Federal Register

4–6–06 Thursday
Vol. 71 No. 66 Apr. 6, 2006

Pages 17335–17690

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# Rules and Regulations

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

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## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

### 14 CFR Part 23

**[Docket No. CE241; Special Conditions No. 23–181–SC]**

## Special Conditions: Cessna Model 510 Series Airplane Special Conditions for Flight Performance, Flight Characteristics, and Operating Limitations

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Final special conditions; request for comments.

**SUMMARY:** These special conditions are issued for the Cessna Model 510 series airplane. This airplane will have a novel or unusual design feature(s) associated with engine location, certain performance, flight characteristics and operating limitations necessary for this type of airplane. The applicable airworthiness regulations do not contain adequate or appropriate safety standards for this design feature. These special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to airworthiness standards applicable to these airplanes.

**DATES:** The effective date of these special conditions is March 28, 2006.

Comments must be received on or before May 8, 2006.

**ADDRESSES:** Comments on these special conditions may be mailed in duplicate to: Federal Aviation Administration, Regional Counsel, ACE–7, Attention: Rules Docket CE241, 901 Locust, Room 506, Kansas City, Missouri 64106; or delivered in duplicate to the Regional Counsel at the above address. Comments must be marked: CE241. Comments may be inspected in the Rules Docket weekdays, except Federal holidays, between 7:30 a.m. and 4 p.m.

**FOR FURTHER INFORMATION CONTACT:** J. Lowell Foster, Federal Aviation Administration, Aircraft Certification Service, Small Airplane Directorate, ACE–111, 901 Locust, Room 301, Kansas City, Missouri, 816–329–4125, fax 816–329–4090.

**SUPPLEMENTARY INFORMATION:** The FAA has determined that notice and opportunity for prior public comment hereon are impracticable because these procedures would significantly delay issuance of the approval design and thus delivery of the affected aircraft. In addition, the substance of these special conditions has been subject to the public comment process in several prior instances with no substantive comments received. The FAA therefore finds that good cause exists for making these special conditions effective on issuance.

### Comments Invited

Interested persons are invited to submit such written data, views, or arguments as they may desire. Communications should identify the regulatory docket or special condition number and be submitted in duplicate to the address specified above. All communications received on or before the closing date for comments will be considered by the Administrator. The special conditions may be changed in light of the comments received. All comments received will be available in the Rules Docket for examination by interested persons, both before and after the closing date for comments. A report summarizing each substantive public contact with FAA personnel concerning this rulemaking will be filed in the docket. Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this notice must include a self-addressed, stamped postcard on which the following statement is made: ''Comments to CE241.'' The postcard will be date stamped and returned to the commenter.

### Background

On August 30, 2003, Cessna applied for a type certificate for their new Model, the 510. The Model 510 is an all-new, high-performance, low wing, twin turbofan powered aircraft. Design features include turbofan engines, engine location, new avionics, and certain performance characteristics inherent in this type of airplane that were not envisioned by the existing regulations.

The Model 510 will be a new aircraft and will have the following significant features incorporated:

- Two Pratt & Whitney PW615F turbofan engines rated at 1,390 pounds of thrust with a Full Authority Digital Engine Control (FADEC) system.
- Garmin will provide a new avionics/instrumentation system, the G1000. This system is a state-of-the-art glass cockpit utilizing redundant Active Matrix Liquid Crystal Displays, featuring three displays.
- The aircraft's general configuration will be similar to other Cessna Citations, including a T-tail, speedbrake-equipped, and a low wing with slight leading edge wing sweep.
- The cabin will have a maximum seating configuration for 4 passengers.
- The preliminary operational design criteria are:

| Parameter | Symbol | Model 510 |
|---|---|---|
| Limit Speeds | $V_{mo}$ | 250 KCAS. |
| | $M_{MO}$ | 0.63 Mach. |
| | $V_D$ | TBD. |
| | $M_D$ | TBD. |
| Max Takeoff Weight | | 8395 lb. |
| Max Landing Weight | | 7850 lb. |
| Max Zero Fuel Weight | | 6500 lb. |
| Flap Speeds | $V_{FE}$ (15° Flaps) | 184 KCAS. |
| | $V_{FE}$ (35° Flaps) | 148 KCAS. |
| Landing Gear Speeds | $V_{LO}$ (Retracting) | 184 KCAS. |

| Parameter | Symbol | Model 510 |
|---|---|---|
| | $V_{LO}$ (Extending) | 233 KCAS. |
| | $V_{LE}$ (Extended) | 250 KCAS. |
| Maximum Altitude | | 41,000 ft. |

**Type Certification Basis**

Under the provisions of 14 CFR part 21, § 21.17, Cessna Aircraft Company must show that the Model 510 meets the applicable provisions of part 23, as amended by Amendment 23–1 through 23–54 thereto. If the Administrator finds that the applicable airworthiness regulations (i.e., 14 CFR, part 23) do not contain adequate or appropriate safety standards for the Cessna Model 510 series because of a novel or unusual design feature, special conditions are prescribed under the provisions of § 21.16.

Special conditions, as appropriate, as defined in § 11.19, are issued in accordance with § 11.38, and become part of the type certification basis in accordance with § 21.17(a)(2).

Special conditions are initially applicable to the model for which they are issued. Should the type certificate for that model be amended later to include any other model that incorporates the same novel or unusual design feature, the special conditions would also apply to the other model under the provisions of § 21.101.

In addition to the applicable airworthiness regulations and special conditions, the Model 510 must comply with the part 23 fuel vent and exhaust emission requirements of 14 CFR part 34 and the part 23 noise certification requirements of 14 CFR part 36. The FAA must also issue a finding of regulatory adequacy pursuant to § 611 of Public Law 92–574, the ''Noise Control Act of 1972.''

**Novel or Unusual Design Features**

The Cessna Model 510 will incorporate the following novel or unusual design features: Aft-mounted engines, certain performance and flight characteristics, and operating limitations necessary for this type of airplane.

**Applicability**

As discussed above, these special conditions are applicable to the Cessna Model 510 series. Should Cessna apply at a later date for a change to the type certificate to include another model incorporating the same novel or unusual design feature, the special conditions would apply to that model as well under the provisions of § 21.101.

**Conclusion**

This action affects only certain novel or unusual design features on Cessna Model 510 series airplanes. It is not a rule of general applicability and affects only the applicant who applied to the FAA for approval of these features on the airplane.

The substance of these special conditions has been subjected to the notice and comment period in several prior instances and has been derived without substantive change from those previously issued. It is unlikely that prior public comment would result in a significant change from the substance contained herein. For this reason, and because a delay would significantly affect the certification of the airplane, which is imminent, the FAA has determined that prior public notice and comment are unnecessary and impracticable, and good cause exists for adopting these special conditions on issuance. The FAA is requesting comments to allow interested persons to submit views that may not have been submitted in response to the prior opportunities for comment described above.

**List of Subjects in 14 CFR Part 23**

Aircraft, Aviation safety, Signs and symbols.

**Citation**

The authority citation for these special conditions is as follows:

**Authority:** 49 U.S.C. 106(g), 40113 and 44701; 14 CFR 21.16 and 14 CFR 11.38 and 11.19.

**The Special Conditions**

Several 14 CFR part 23 paragraphs have been replaced by or supplemented with special conditions. These special conditions have been numbered to match the 14 CFR part 23 paragraphs they replace or supplement. Additionally, many of the other applicable part 23 paragraphs cross-reference paragraphs that are replaced by or supplemented with special conditions. It is implied that the special conditions associated with these paragraphs must be applied. This principal applies to all part 23 paragraphs that cross-reference paragraphs associated with special conditions.

Accordingly, under the authority delegated to me by the Administrator, the following special conditions are issued as part of the type certification basis for the Cessna Model 510 series airplanes.

**1. SC 23.45 General**

Instead of compliance with § 23.45, the following apply:

(a) Unless otherwise prescribed, the performance requirements of this part must be met for—

(1) Still air and standard atmosphere; and

(2) Ambient atmospheric conditions, for commuter category airplanes, for reciprocating engine-powered airplanes of more than 6,000 pounds maximum weight, and for turbine engine-powered airplanes.

(b) Performance data must be determined over not less than the following ranges of conditions—

(1) Airport altitudes from sea level to 10,000 feet; and

(2) For reciprocating engine-powered airplanes of more than 6,000 pounds maximum weight and turbine engine-powered airplanes, temperature from standard to 30 °C above standard, or the maximum ambient atmospheric temperature at which compliance with the cooling provisions of § 23.1041 to § 23.1047 is shown, if lower.

(c) Performance data must be determined with the cowl flaps or other means for controlling the engine cooling air supply in the position used in the cooling tests required by § 23.1041 to § 23.1047.

(d) The available propulsive thrust must correspond to engine power, not exceeding the approved power, less—

(1) Installation losses; and

(2) The power absorbed by the accessories and services appropriate to the particular ambient atmospheric conditions and the particular flight condition.

(e) The performance, as affected by engine power or thrust, must be based on a relative humidity:

(1) Of 80 percent at and below standard temperature; and

(2) From 80 percent, at the standard temperature, varying linearly down to 34 percent at the standard temperature plus 50 °F.

(f) Unless otherwise prescribed, in determining the takeoff and landing distances, changes in the airplane's configuration, speed, and power must be made in accordance with procedures

established by the applicant for operation in service. These procedures must be able to be executed consistently by pilots of average skill in atmospheric conditions reasonably expected to be encountered in service.

(g) The following, as applicable, must be determined on a smooth, dry, hard-surfaced runway—

(1) Not Applicable;

(2) Accelerate-stop distance of SC 23.55;

(3) Takeoff distance and takeoff run of SC 23.59; and

(4) Landing distance of SC 23.75.

**Note:** The effect on these distances of operation on other types of surfaces (for example, grass, gravel) when dry, may be determined or derived and these surfaces listed in the Airplane Flight Manual in accordance with SC 23.1583(p).

(h) The following also apply:

(1) Unless otherwise prescribed, the applicant must select the takeoff, enroute, approach, and landing configurations for the airplane.

(2) The airplane configuration may vary with weight, altitude, and temperature, to the extent that they are compatible with the operating procedures required by paragraph (h)(3) of this section.

(3) Unless otherwise prescribed, in determining the critical-engine-inoperative takeoff performance, takeoff flight path, and accelerate-stop distance, changes in the airplane's configuration, speed, and power must be made in accordance with procedures established by the applicant for operation in service.

(4) Procedures for the execution of discontinued approaches and balked landings associated with the conditions prescribed in SC 23.67(c)(4) and SC 23.77(c) must be established.

(5) The procedures established under paragraphs (h)(3) and (h)(4) of this section must—

(i) Be able to be consistently executed by a crew of average skill in atmospheric conditions reasonably expected to be encountered in service;

(ii) Use methods or devices that are safe and reliable; and

(iii) Include allowance for any reasonably expected time delays in the execution of the procedures.

**2. SC 23.51 Takeoff Speeds.**

Instead of compliance with § 23.51, the following apply:

(a) Not Applicable.

(b) Not Applicable.

(c) The following apply:

(l) $V_1$ must be established in relation to $V_{EF}$ as follows:

(i) $V_{EF}$ is the calibrated airspeed at which the critical engine is assumed to fail. $V_{EF}$ must be selected by the applicant, but it must not be less than 1.05 $V_{MC}$ determined under § 23.149(b) or, at the option of the applicant, not less than $V_{MCG}$ determined under § 23.149(f).

(ii) The takeoff decision speed, $V_1$, is the calibrated airspeed on the ground at which, as a result of engine failure or other reasons, the pilot is assumed to have made a decision to continue or discontinue the takeoff. The takeoff decision speed, $V_1$, must be selected by the applicant but must not be less than $V_{EF}$ plus the speed gained with the critical engine inoperative during the time interval between the instant at which the critical engine is failed and the instant at which the pilot recognizes and reacts to the engine failure, as indicated by the pilot's application of the first retarding means during the accelerate-stop determination of SC 23.55.

(2) The rotation speed, $V_R$, in terms of calibrated airspeed, must be selected by the applicant and must not be less than the greatest of the following:

(i) $V_1$;

(ii) 1.05 $V_{MC}$ determined under § 23.149(b);

(iii) 1.10 $V_{S1}$; or

(iv) The speed that allows attaining the initial climb-out speed, $V_2$, before reaching a height of 35 feet above the takeoff surface in accordance with SC 23.57(c)(2).

(3) For any given set of conditions, such as weight, altitude, temperature, and configuration, a single value of $V_R$ must be used to show compliance with both the one-engine-inoperative takeoff and all-engines-operating takeoff requirements.

(4) The takeoff safety speed, $V_2$, in terms of calibrated airspeed, must be selected by the applicant so as to allow the gradient of climb required in SC 23.67(c)(1) and (c)(2) but must not be less than 1.10 $V_{MC}$ or less than 1.20 $V_{S1}$.

(5) The one-engine-inoperative takeoff distance, using a normal rotation rate at a speed 5 knots less than $V_R$, established in accordance with paragraph (c)(2) of this section, must be shown not to exceed the corresponding one-engine-inoperative takeoff distance, determined in accordance with SC 23.57 and SC 23.59(a)(1), using the established $V_R$. The takeoff, otherwise performed in accordance with SC 23.57, must be continued safely from the point at which the airplane is 35 feet above the takeoff surface and at a speed not less than the established $V_2$ minus 5 knots.

(6) The applicant must show, with all engines operating, that marked increases in the scheduled takeoff distances, determined in accordance with SC 23.59(a)(2), do not result from over-rotation of the airplane or out-of-trim conditions.

**3. SC 23.53 Takeoff Performance**

Instead of compliance with § 23.53, the following apply:

(a) Not Applicable.

(b) Not Applicable.

(c) Takeoff performance, as required by SC 23.55 through SC 23.59, must be determined with the operating engine(s) within approved operating limitations.

**4. SC 23.55 Accelerate-Stop Distance**

Instead of compliance with § 23.55, the following apply:

The accelerate-stop distance must be determined as follows:

(a) The accelerate-stop distance is the sum of the distances necessary to—

(1) Accelerate the airplane from a standing start to $V_{EF}$ with all engines operating;

(2) Accelerate the airplane from $V_{EF}$ to $V_1$, assuming the critical engine fails at $V_{EF}$; and

(3) Come to a full stop from the point at which $V_1$ is reached.

(b) Means other than wheel brakes may be used to determine the accelerate-stop distances if that means—

(1) Is safe and reliable;

(2) Is used so that consistent results can be expected under normal operating conditions; and

(3) Is such that exceptional skill is not required to control the airplane.

**5. SC 23.57 Takeoff Path**

Instead of compliance with § 23.57, the following apply:

The takeoff path is as follows:

(a) The takeoff path extends from a standing start to a point in the takeoff at which the airplane is 1500 feet above the takeoff surface at or below which height the transition from the takeoff to the enroute configuration must be completed; and

(1) The takeoff path must be based on the procedures prescribed in SC 23.45;

(2) The airplane must be accelerated on the ground to $V_{EF}$ at which point the critical engine must be made inoperative and remain inoperative for the rest of the takeoff; and

(3) After reaching $V_{EF}$, the airplane must be accelerated to $V_2$.

(b) During the acceleration to speed $V_2$, the nose gear may be raised off the ground at a speed not less than $V_R$. However, landing gear retraction must not be initiated until the airplane is airborne.

(c) During the takeoff path determination, in accordance with paragraphs (a) and (b) of this section—

(1) The slope of the airborne part of the takeoff path must not be negative at any point;

(2) The airplane must reach $V_2$ before it is 35 feet above the takeoff surface, and must continue at a speed as close as practical to, but not less than $V_2$, until it is 400 feet above the takeoff surface;

(3) At each point along the takeoff path, starting at the point at which the airplane reaches 400 feet above the takeoff surface, the available gradient of climb must not be less than 1.2 percent for two-engine airplanes; and

(4) Except for gear retraction and automatic propeller feathering, the airplane configuration must not be changed, and no change in power that requires action by the pilot may be made, until the airplane is 400 feet above the takeoff surface.

(d) The takeoff path to 35 feet above the takeoff surface must be determined by a continuous demonstrated takeoff.

(e) The takeoff path to 35 feet above the takeoff surface must be determined by synthesis from segments; and

(1) The segments must be clearly defined and must be related to distinct changes in configuration, power, and speed;

(2) The weight of the airplane, the configuration, and the power must be assumed constant throughout each segment and must correspond to the most critical condition prevailing in the segment; and

(3) The takeoff flight path must be based on the airplane's performance without utilizing ground effect.

**6. SC 23.59 Takeoff Distance and Takeoff Run**

Instead of compliance with § 23.59, the following apply:

The takeoff distance and, at the option of the applicant, the takeoff run, must be determined.

(a) Takeoff distance is the greater of—

(1) The horizontal distance along the takeoff path from the start of the takeoff to the point at which the airplane is 35 feet above the takeoff surface as determined under SC 23.57; or

(2) With all engines operating, 115 percent of the horizontal distance from the start of the takeoff to the point at which the airplane is 35 feet above the takeoff surface, determined by a procedure consistent with SC 23.57.

(b) If the takeoff distance includes a clearway, the takeoff run is the greater of—

(1) The horizontal distance along the takeoff path from the start of the takeoff to a point equidistant between the liftoff point and the point at which the airplane is 35 feet above the takeoff surface as determined under SC 23.57; or

(2) With all engines operating, 115 percent of the horizontal distance from the start of the takeoff to a point equidistant between the liftoff point and the point at which the airplane is 35 feet above the takeoff surface, determined by a procedure consistent with SC 23.57.

**7. SC 23.61 Takeoff Flight Path**

Instead of compliance with § 23.61, the following apply:

The takeoff flight path must be determined as follows:

(a) The takeoff flight path begins 35 feet above the takeoff surface at the end of the takeoff distance determined in accordance with SC 23.59.

(b) The net takeoff flight path data must be determined so that they represent the actual takeoff flight paths, as determined in accordance with SC 23.57 and with paragraph (a) of this section, reduced at each point by a gradient of climb equal to 0.8 percent for two-engine airplanes.

(c) The prescribed reduction in climb gradient may be applied as an equivalent reduction in acceleration along that part of the takeoff flight path at which the airplane is accelerated in level flight.

**8. SC 23.63 Climb: General**

Instead of compliance with § 23.63, the following apply:

(a) Compliance with the requirements of §§ 23.65, 23.66, SC 23.67, 23.69, and SC 23.77 must be shown—

(1) Out of ground effect; and

(2) At speeds that are not less than those at which compliance with the powerplant cooling requirements of §§ 23.1041 to 23.1047 has been demonstrated; and

(3) Unless otherwise specified, with one engine inoperative, at a bank angle not exceeding 5 degrees.

(b) Not Applicable.

(c) Not Applicable.

(d) Compliance must be shown at weights as a function of airport altitude and ambient temperature within the operational limits established for takeoff and landing, respectively, with—

(1) SC 23.67(c)(1), SC 23.67(c)(2), and SC 23.67(c)(3) for takeoff; and

(2) SC 23.67(c)(3), SC 23.67(c)(4), and SC 23.77(c) for landing.

**9. SC 23.66 Takeoff Climb: One-Engine Inoperative**

Instead of compliance with § 23.66, see SC 23.67.

**10. SC 23.67 Climb: One Engine Inoperative**

Instead of compliance with § 23.67, the following apply:

(a) Not Applicable.

(b) Not Applicable.

(c) The following apply:

(1) *Takeoff; landing gear extended.* The steady gradient of climb at the altitude of the takeoff surface must be measurably positive for two-engine airplanes with—

(i) The critical engine inoperative and its propeller in the position it rapidly and automatically assumes;

(ii) The remaining engine(s) at takeoff power;

(iii) The landing gear extended, and all landing gear doors open;

(iv) The wing flaps in the takeoff position(s);

(v) The wings level; and

(vi) A climb speed equal to $V_2$.

(2) *Takeoff; landing gear retracted.* The steady gradient of climb at an altitude of 400 feet above the takeoff surface must be not less than 2.0 percent of two-engine airplanes with—

(i) The critical engine inoperative and its propeller in the position it rapidly and automatically assumes;

(ii) The remaining engine(s) at takeoff power;

(iii) The landing gear retracted;

(iv) The wing flaps in the takeoff position(s);

(v) A climb speed equal to $V_2$.

(3) *Enroute.* The steady gradient of climb at an altitude of 1,500 feet above the takeoff or landing surface, as appropriate, must be not less than 1.2 percent for two-engine airplanes with—

(i) The critical engine inoperative and its propeller in the minimum drag position;

(ii) The remaining engine(s) at not more than maximum continuous power;

(iii) The landing gear retracted;

(iv) The wing flaps retracted; and

(v) A climb speed not less than 1.2 $V_{S1}$.

(4) *Discontinued approach.* The steady gradient of climb at an altitude of 400 feet above the landing surface must be not less than 2.1 percent for two-engine airplanes with—

(i) The critical engine inoperative and its propeller in the minimum drag position;

(ii) The remaining engine(s) at takeoff power;

(iii) Landing gear retracted;

(iv) Wing flaps in the approach position(s) in which $V_{S1}$ for these position(s) does not exceed 110 percent of the $V_{S1}$ for the related all-engines-operated landing position(s); and

(v) A climb speed established in connection with normal landing procedures but not exceeding 1.5 $V_{S1}$.

**11. SC 23.73 Reference Landing Approach Speed**

Instead of compliance with § 23.73, the following apply:

(a) Not Applicable.

(b) Not Applicable.

(c) The reference landing approach speed, $V_{REF}$, must not be less than the greater of 1.05 $V_{MC}$, determined in § 23.149(c), and 1.3 $V_{SO}$.

**12. SC 23.75 Landing Distance**

Instead of compliance with § 23.75, the following apply:

The horizontal distance necessary to land and come to a complete stop from a point 50 feet above the landing surface must be determined, for standard temperatures at each weight and altitude within the operational limits established for landing, as follows:

(a) A steady approach at not less than $V_{REF}$, determined in accordance with SC 23.73(c) must be maintained down to the 50 foot height and—

(1) The steady approach must be at a gradient of descent not greater than 5.2 percent (3 degrees) down to the 50-foot height.

(2) In addition, an applicant may demonstrate by tests that a maximum steady approach gradient steeper than 5.2 percent, down to the 50-foot height, is safe. The gradient must be established as an operating limitation and the information necessary to display the gradient must be available to the pilot by an appropriate instrument.

(b) A constant configuration must be maintained throughout the maneuver.

(c) The landing must be made without excessive vertical acceleration or tendency to bounce, nose over, ground loop, porpoise, or water loop.

(d) It must be shown that a safe transition to the balked landing conditions of SC 23.77 can be made from the conditions that exist at the 50 foot height, at maximum landing weight, or at the maximum landing weight for altitude and temperature of SC 23.63(d)(2).

(e) The brakes must be used so as to not cause excessive wear of brakes or tires.

(f) Retardation means other than wheel brakes may be used if that means—

(1) Is safe and reliable; and

(2) Is used so that consistent results can be expected in service.

(g) If any device is used that depends on the operation of any engine, and the landing distance would be increased when a landing is made with that engine inoperative, the landing distance must be determined with that engine inoperative unless the use of other compensating means will result in a landing distance not more than that with each engine operating.

**13. SC 23.77 Balked Landing**

Instead of compliance with § 23.77, the following apply:

(a) Not Applicable.

(b) Not Applicable.

(c) Each airplane must be able to maintain a steady gradient of climb of at least 3.2 percent with—

(1) Not more than the power that is available on each engine eight seconds after initiation of movement of the power controls from the minimum flight idle position;

(2) Landing gear extended;

(3) Wing flaps in the landing position; and

(4) A climb speed equal to $V_{REF}$, as defined in SC 23.73(c).

**14. SC 23.177 Static Directional and Lateral Stability**

Instead of compliance with § 23.177, the following apply:

(a) The static directional stability, as shown by the tendency to recover from a wings level sideslip with the rudder free, must be positive for any landing gear and flap position appropriate to the takeoff, climb, cruise, approach, and landing configurations. This must be shown with symmetrical power up to maximum continuous power, and at speeds from 1.2 $V_{S1}$ up to $V_{FE}$, $V_{LE}$, or $V_{FC}/M_{FC}$ (as appropriate). The angle of sideslip for these tests must be appropriate to the type of airplane. At larger angles of sideslip, up to that at which full rudder is used or a control force limit in § 23.143 is reached, whichever occurs first, and at speeds from 1.2 $V_{S1}$ to $V_O$, the rudder pedal force must not reverse.

(b) The static lateral stability, as shown by the tendency to raise the low wing in a sideslip, must be positive for all landing gear and flap positions. This must be shown with symmetrical power up to 75 percent of maximum continuous power at speeds above 1.2 $V_{S1}$ in the takeoff configuration(s) and at speeds above 1.3 $V_{S1}$ in other configurations, up to $V_{FE}$, $V_{LE}$, or $V_{FC}/M_{FC}$ (as appropriate) for the configuration being investigated, in the takeoff, climb, cruise, and approach configurations. For the landing configuration, the power must be that necessary to maintain a 3-degree angle of descent in coordinated flight. The static lateral stability must not be negative at 1.2 $V_{S1}$ in the takeoff configuration, or at 1.3 $V_{S1}$ in other configurations. The angle of sideslip for these tests must be appropriate to the type of airplane, but in no case may the constant heading sideslip angle be less than that obtainable with a 10 degree bank, or if less, the maximum bank angle obtainable with full rudder deflection or 150 pound rudder force.

(c) Paragraph (b) of this section does not apply to acrobatic category airplanes certificated for inverted flight.

(d) In straight, steady slips at 1.2 $V_{S1}$ for any landing gear and flap positions, and for any symmetrical power conditions up to 50 percent of maximum continuous power, the aileron and rudder control movements and forces must increase steadily, but not necessarily in constant proportion, as the angle of sideslip is increased up to the maximum appropriate to the type of airplane. At larger slip angles, up to the angle at which the full rudder or aileron control is used or a control force limit contained in § 23.143 is reached, the aileron and rudder control movements and forces must not reverse as the angle of sideslip is increased. Rapid entry into, and recovery from, a maximum sideslip considered appropriate for the airplane must not result in uncontrollable flight characteristics.

**15. SC 23.201(e) Wings Level Stall**

Instead of compliance with § 23.201(e), the following apply:

(e) Compliance with the requirements of this section must be shown under the following conditions:

(1) The flaps, landing gear, and speedbrakes in any likely combination of positions and altitudes appropriate for the various positions.

(2) Thrust—

(i) Idle; and

(ii) The thrust necessary to maintain level flight at 1.6$V_{S1}$ (where $V_{S1}$ corresponds to the stalling speed with flaps in the approach position, the landing gear retracted, and maximum landing weight).

(3) Trim at 1.4 $V_{S1}$ or the minimum trim speed, whichever is higher.

**16. SC 23.203(c) Turning Flight and Accelerated Turning Stalls**

Instead of compliance with § 23.203(c), the following apply:

(c) Compliance with the requirements of this section must be shown under the following conditions:

(1) The flaps, landing gear, and speedbrakes in any likely combination of positions and altitudes appropriate for the various positions.

(2) Thrust—

(i) Idle; and

(ii) The thrust necessary to maintain level flight at 1.6 $V_{S1}$ (where $V_{S1}$ corresponds to the stalling speed with flaps in the approach position, the

landing gear retracted, and maximum landing weight).

(3) Trim at 1.4 $V_{S1}$ or the minimum trim speed, whichever is higher.

**17. SC 23.251 Vibration and Buffeting**

Instead of compliance with § 23.251, the following apply:

(a) The airplane must be demonstrated in flight to be free from any vibration and buffeting that would prevent continued safe flight in any likely operating condition.

(b) Each part of the airplane must be shown in flight to be free from excessive vibration under any appropriate speed and thrust conditions up to $V_{DF}/M_{DF}$. The maximum speeds shown must be used in establishing the operating limitations of the airplane in accordance with special condition SC 23.1505.

(c) Except as provided in paragraph (d) of this special condition, there may be no buffeting condition, in normal flight, including configuration changes during cruise, severe enough to interfere with the control of the airplane, to cause excessive fatigue to the crew, or to cause structural damage. Stall warning buffeting within these limits is allowable.

(d) There may be no perceptible buffeting condition in the cruise configuration in straight flight at any speed up to $V_{MO}/M_{MO}$, except that stall warning buffeting is allowable.

(e) With the airplane in the cruise configuration, the positive maneuvering load factors at which the onset of perceptible buffeting occurs must be determined for the ranges of airspeed or Mach number, weight, and altitude for which the airplane is to be certified. The envelopes of load factor, speed, altitude, and weight must provide a sufficient range of speeds and load factors for normal operations. Probable inadvertent excursions beyond the boundaries of the buffet onset envelopes may not result in unsafe conditions.

**18. SC 23.253 High Speed Characteristics**

Instead of compliance with § 23.253, the following apply:

(a) *Speed increase and recovery characteristics.* The following speed increase and recovery characteristics must be met:

(1) Operating conditions and characteristics likely to cause inadvertent speed increases (including upsets in pitch and roll) must be simulated with the airplane trimmed at any likely cruise speed up to $V_{MO}/M_{MO}$. These conditions and characteristics include gust upsets, inadvertent control movements, low stick force gradient in relation to control friction, passenger movement, leveling off from climb, and descent from Mach to airspeed limit altitudes.

(2) Allowing for pilot reaction time after effective inherent or artificial speed warning occurs, it must be shown that the airplane can be recovered to a normal attitude and its speed reduced to $V_{MO}/M_{MO}$, without:

(i) Exceptional piloting strength or skill;

(ii) Exceeding $V_D/M_D$, $V_{DF}/M_{DF}$, or the structural limitations; and

(iii) Buffeting that would impair the pilot's ability to read the instruments or control the airplane for recovery.

(3) There may be no control reversal about any axis at any speed up to $V_{DF}/M_{DF}$. Any reversal of elevator control force or tendency of the airplane to pitch, roll, or yaw must be mild and readily controllable, using normal piloting techniques.

(b) *Maximum speed for stability characteristics,* $V_{FC}/M_{FC}$. $V_{FC}/M_{FC}$ is the maximum speed at which the requirements of § 23.175(b)(1), special condition SC 23.177, and § 23.181 must be met with flaps and landing gear retracted. It may not be less than a speed midway between $V_{MO}/M_{MO}$ and $V_{DF}/M_{DF}$ except that, for altitudes where Mach number is the limiting factor, $M_{FC}$ need not exceed the Mach number at which effective speed warning occurs.

**19. SC 23.735 Brakes**

In addition to paragraphs (a), (b), (c), and (d), the following apply:

(e) The rejected takeoff brake kinetic energy capacity rating of each main wheel brake assembly must not be less than the kinetic energy absorption requirements determined under either of the following methods—

(1) The brake kinetic energy absorption requirements must be based on a conservative rational analysis of the sequence of events expected during a rejected takeoff at the design takeoff weight.

(2) Instead of a rational analysis, the kinetic energy absorption requirements for each main wheel brake assembly may be derived from the following formula—

$$KE=0.0443\ WV^2N$$

Where:

KE=Kinetic energy per wheel (ft.-lbs.);

W=Design takeoff weight (lbs.);

V=Ground speed, in knots, associated with the maximum value of $V_1$ selected in accordance with SC 23.51(c)(1);

N=Number of main wheels with brakes.

**20. SC 23.1323 Airspeed Indicating System**

In addition to paragraphs (a), (b), (c), and (d), the following apply:

(e) In addition, the airspeed indicating system must be calibrated to determine the system error during the accelerate-takeoff ground run. The ground run calibration must be obtained between 0.8 of the minimum value of $V_1$, and 1.2 times the maximum value of $V_1$ considering the approved ranges of altitude and weight. The ground run calibration must be determined assuming an engine failure at the minimum value of $V_1$.

(f) Where duplicate airspeed indicators are required, their respective pitot tubes must be far enough apart to avoid damage to both tubes in a collision with a bird.

**21. SC 23.1505 Airspeed Limitations**

Instead of compliance with § 23.1505, the following apply:

(a) The maximum operating limit speed ($V_{MO}/M_{MO}$-airspeed or Mach number, whichever is critical at a particular altitude) is a speed that may not be deliberately exceeded in any regime of flight (climb, cruise, or descent), unless a higher speed is authorized for flight test or pilot training operations. $V_{MO}/M_{MO}$ must be established so that it is not greater than the design cruising speed $V_C/M_C$ and so that it is sufficiently below $V_D/M_D$ or $V_{DF}/M_{DF}$, to make it highly improbable that the latter speeds will be inadvertently exceeded in operations. The speed margin between $V_{MO}/M_{MO}$ and $V_D/M_D$ or $V_{DF}/M_{DF}$ may not be less than that determined under § 23.335(b) or found necessary in the flight test conducted under special condition SC 23.253.

**22. SC 23.1583 Operating Limitations**

Instead of compliance with § 23.1583, the following apply:

The Airplane Flight Manual must contain operating limitations determined under this part 23, including the following—

(a) *Airspeed limitations.* The following information must be furnished:

(1) Information necessary for the marking of the airspeed limits on the indicator as required in § 23.1545, and the significance of each of those limits and of the color-coding used on the indicator.

(2) The speeds $V_{MC}$, $V_O$, $V_{LE}$, and $V_{LO}$, if established, and their significance.

(3) In addition, for turbine powered airplanes—

(i) The maximum operating limit speed, $V_{MO}/M_{MO}$ and a statement that

this speed must not be deliberately exceeded in any regime of flight (climb, cruise or descent) unless a higher speed is authorized for flight test or pilot training;

(ii) If an airspeed limitation is based upon compressibility effects, a statement to this effect and information as to any symptoms, the probable behavior of the airplane, and the recommended recovery procedures; and

(iii) The airspeed limits must be shown in terms of $V_{MO}/M_{MO}$ instead of $V_{NO}$ and $V_{NE}$.

(b) *Powerplant limitations.* The following information must be furnished:

(1) Limitations required by § 23.1521.

(2) Explanation of the limitations, when appropriate.

(3) Information necessary for marking the instruments required by § 23.1549 through § 23.1553.

(c) *Weight.* The airplane flight manual must include—

(1) Not Applicable;

(1) Not Applicable;

(3) Not Applicable;

(4) The maximum takeoff weight for each airport altitude and ambient temperature within the range selected by the applicant at which—

(i) The airplane complies with the climb requirements of SC 23.63(d)(1); and

(ii) The accelerate-stop distance determined under SC 23.55 is equal to the available runway length plus the length of any stopway, if utilized; and either:

(iii) The takeoff distance determined under SC 23.59(a) is equal to the available runway length; or

(iv) At the option of the applicant, the takeoff distance determined under SC 23.59(a) is equal to the available runway length plus the length of any clearway and the takeoff run determined under SC 23.59(b) is equal to the available runway length.

(5) The maximum landing weight for each airport altitude within the range selected by the applicant at which—

(i) The airplane complies with the climb requirements of SC 23.63(d)(2) for ambient temperatures within the range selected by the applicant; and

(ii) The landing distance determined under SC 23.75 for standard temperatures is equal to the available runway length.

(6) The maximum zero wing fuel weight, where relevant, as established in accordance with § 23.343.

(d) *Center of gravity.* The established center of gravity limits.

(e) *Maneuvers.* The following authorized maneuvers, appropriate airspeed limitations, and unauthorized maneuvers, as prescribed in this section.

(1) Not Applicable.

(2) Not Applicable.

(3) Not Applicable.

(4) Not Applicable.

(5) Maneuvers are limited to any maneuver incident to normal flying, stalls, (except whip stalls) and steep turns in which the angle of bank is not more than 60 degrees.

(f) *Maneuver load factor.* The positive limit load factors in g's, and, in addition, the negative limit load factor for acrobatic category airplanes.

(g) *Minimum flight crew.* The number and functions of the minimum flight crew determined under § 23.1523.

(h) *Kinds of operation.* A list of the kinds of operation to which the airplane is limited or from which it is prohibited under § 23.1525, and also a list of installed equipment that affects any operating limitation and identification as to the equipment's required operational status for the kinds of operation for which approval has been given.

(i) *Maximum operating altitude.* The maximum altitude established under § 23.1527.

(j) *Maximum passenger seating configuration.* The maximum passenger-seating configuration.

(k) *Allowable lateral fuel loading.* The maximum allowable lateral fuel loading differential, if less than the maximum possible.

(l) *Baggage and cargo loading.* The following information for each baggage and cargo compartment or zone—

(1) The maximum allowable load; and

(2) The maximum intensity of loading.

(m) *Systems.* Any limitations on the use of airplane systems and equipment.

(n) *Ambient temperatures.* Where appropriate, maximum and minimum ambient air temperatures for operation.

(o) *Smoking.* Any restrictions on smoking in the airplane.

(p) *Types of surface.* A statement of the types of surface on which operations may be conducted. (See SC 23.45(g) and SC 23.1587(a)(4) and (d)(4).)

**23. SC 23.1585 Operating Procedures**

Instead of compliance with § 23.1585, the following apply:

(a) For all airplanes, information concerning normal, abnormal (if applicable), and emergency procedures and other pertinent information necessary for safe operation and the achievement of the scheduled performance must be furnished, including—

(1) An explanation of significant or unusual flight or ground handling characteristics;

(2) The maximum demonstrated values of crosswind for takeoff and landing, and procedures and information pertinent to operations in crosswinds;

(3) A recommended speed for flight in rough air. This speed must be chosen to protect against the occurrence, as a result of gusts, of structural damage to the airplane and loss of control (for example, stalling);

(4) Procedures for restarting any turbine engine in flight, including the effects of altitude; and

(5) Procedures, speeds, and configuration(s) for making a normal approach and landing, in accordance with SC 23.73 and SC 23.75, and a transition to the balked landing condition.

(6) For seaplanes and amphibians, water handling procedures and the demonstrated wave height.

(b) Not applicable.

(c) In addition to paragraph (a) of this section, for all multiengine airplanes, the following information must be furnished:

(1) Procedures, speeds, and configuration(s) for making an approach and landing with one engine inoperative;

(2) Procedures, speeds, and configuration(s) for making a balked landing with one engine inoperative and the conditions under which a balked landing can be performed safely, or a warning against attempting a balked landing;

(3) The $V_{SSE}$ determined in § 23.149; and

(4) Procedures for restarting any engine in flight including the effects of altitude.

(d) Not applicable.

(e) Not applicable.

(f) In addition to paragraphs (a) and (c) of this section the information must include the following:

(1) Procedures, speeds, and configuration(s) for making a normal takeoff.

(2) Procedures and speeds for carrying out an accelerate-stop in accordance with § 23.55.

(3) Procedures and speeds for continuing a takeoff following engine failure in accordance with § 23.59(a)(1) and for following the flight path determined under § 23.57 and § 23.61(a).

(g) For multiengine airplanes, information identifying each operating condition in which the fuel system independence prescribed in § 23.953 is necessary for safety must be furnished, together with instructions for placing the fuel system in a configuration used to show compliance with that section.

(h) For each airplane showing compliance with § 23.1353(g)(2) or

(g)(3), the operating procedures for disconnecting the battery from its charging source must be furnished.

(i) Information on the total quantity of usable fuel for each fuel tank, and the effect on the usable fuel quantity, as a result of a failure of any pump, must be furnished.

(j) Procedures for the safe operation of the airplane's systems and equipment, both in normal use and in the event of malfunction, must be furnished.

**24. SC 23.1587 Performance Information**

Instead of compliance with § 23.1587, the following apply:

Unless otherwise prescribed, performance information must be provided over the altitude and temperature ranges required by SC 23.45(b).

(a) For all airplanes, the following information must be furnished—

(1) The stalling speeds $V_{SO}$ and $V_{S1}$ with the landing gear and wing flaps retracted, determined at maximum weight under § 23.49, and the effect on these stalling speeds of angles of bank up to 60 degrees;

(2) The steady rate and gradient of climb with all engines operating, determined under § 23.69(a);

(3) The landing distance, determined under SC 23.75 for each airport altitude and standard temperature, and the type of surface for which it is valid;

(4) The effect on landing distances of operation on other than smooth hard surfaces, when dry, determined under SC 23.45(g); and

(5) The effect on landing distances of runway slope and 50 percent of the headwind component and 150 percent of the tailwind component.

(b) Not Applicable.

(c) Not Applicable.

(d) In addition to paragraph (a) of this section the following information must be furnished—

(1) The accelerate-stop distance determined under SC 23.55;

(2) The takeoff distance determined under SC 23.59(a);

(3) At the option of the applicant, the takeoff run determined under SC 23.59(b);

(4) The effect on accelerate-stop distance, takeoff distance and, if determined, takeoff run, of operation on other than smooth hard surfaces, when dry, determined under SC 23.45(g);

(5) The effect on accelerate-stop distance, takeoff distance, and if determined, takeoff run, of runway slope and 50 percent of the headwind component and 150 percent of the tailwind component;

(6) The net takeoff flight path determined under SC 23.61(b);

(7) The enroute gradient of climb/descent with one engine inoperative, determined under § 23.69(b);

(8) The effect, on the net takeoff flight path and on the enroute gradient of climb/descent with one engine inoperative, of 50 percent of the headwind component and 150 percent of the tailwind component;

(9) Overweight landing performance information (determined by extrapolation and computed for the range of weights between the maximum landing and maximum takeoff weights) as follows—

(i) The maximum weight for each airport altitude and ambient temperature at which the airplane complies with the climb requirements of SC 23.63(d)(2); and

(ii) The landing distance determined under SC 23.75 for each airport altitude and standard temperature.

(10) The relationship between IAS and CAS determined in accordance with § 23.1323(b) and (c).

(11) The altimeter system calibration required by § 23.1325(e).

Issued in Kansas City, Missouri on March 28, 2006.

**David R. Showers,**

*Manager, Small Airplane Directorate, Aircraft Certification Service.*

[FR Doc. 06–3294 Filed 4–5–06; 8:45 am]

BILLING CODE 4910–13–P

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## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

### 14 CFR Part 97

**[Docket No. 30487; Amdt. No. 3160]**

## Standard Instrument Approach Procedures, Weather Takeoff Minimums; Miscellaneous Amendments

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Final rule.

**SUMMARY:** This amendment establishes, amends, suspends, or revokes Standard Instrument Approach Procedures (SIAPs) and/or Weather Takeoff Minimums for operations at certain airports. These regulatory actions are needed because of the adoption of new or revised criteria, or because of changes occurring in the National Airspace System, such as the commissioning of new navigational facilities, addition of new obstacles, or changes in air traffic requirements. These changes are designed to provide safe and efficient use of the navigable airspace and to promote safe flight operations under instrument flight rules at the affected airports.

**DATES:** This rule is effective April 6, 2006. The compliance date for each SIAP and/or Weather Takeoff Minimums is specified in the amendatory provisions.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of April 6, 2006.

**ADDRESSES:** Availability of matters incorporated by reference in the amendment is as follows:

*For Examination*—

1. FAA Rules Docket, FAA Headquarters Building, 800 Independence Avenue, SW., Washington, DC 20591;

2. The FAA Regional Office of the region in which the affected airport is located;

3. The National Flight Procedures Office, 6500 South MacArthur Blvd., Oklahoma City, OK 73169 or,

4. The National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

*For Purchase*—Individual SIAP and Weather Takeoff Minimums copies may be obtained from:

1. FAA Public Inquiry Center (APA–200), FAA Headquarters Building, 800 Independence Avenue, SW., Washington, DC 20591; or

2. The FAA Regional Office of the region in which the affected airport is located.

*By Subscription*—Copies of all SIAPs and Weather Takeoff Minimums mailed once every 2 weeks, are for sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402.

**FOR FURTHER INFORMATION CONTACT:** Donald P. Pate, Flight Procedure Standards Branch (AFS–420), Flight Technologies and Programs Division, Flight Standards Service, Federal Aviation Administration, Mike Monroney Aeronautical Center, 6500 South MacArthur Blvd. Oklahoma City, OK 73169 (Mail Address: P.O. Box 25082 Oklahoma City, OK 73125) telephone: (405) 954–4164.

**SUPPLEMENTARY INFORMATION:** This amendment to Title 14 of the Code of Federal Regulations, part 97 (14 CFR part 97), establishes, amends, suspends, or revokes SIAPs and/or Weather Takeoff Minimums. The complete

regulatory description of each SIAP and/or Weather Takeoff Minimums is contained in official FAA form documents which are incorporated by reference in this amendment under 5 U.S.C. 552(a), 1 CFR part 51, and 14 CFR part 97.20. The applicable FAA Forms are identified as FAA Forms 8260–3, 8260–4, 8260–5 and 8260–15A. Materials incorporated by reference are available for examination or purchase as stated above.

The large number of SIAPs and/or Weather Takeoff Minimums, their complex nature, and the need for a special format make their verbatim publication in the **Federal Register** expensive and impractical. Further, airmen do not use the regulatory text of the SIAPs and/or Weather Takeoff Minimums but refer to their depiction on charts printed by publishers of aeronautical materials. Thus, the advantages of incorporation by reference are realized and publication of the complete description of each SIAP and/or Weather Takeoff Minimums contained in FAA form documents is unnecessary. The provisions of this amendment state the affected CFR sections, with the types and effective dates of the SIAPs and/or Weather Takeoff Minimums. This amendment also identifies the airport, its location, the procedure identification and the amendment number.

## The Rule

This amendment to 14 CFR part 97 is effective upon publication of each separate SIAP and/or Weather Takeoff Minimums as contained in the transmittal. Some SIAP and/or Weather Takeoff Minimums amendments may have been previously issued by the FAA in a Flight Data Center (FDC) Notice to Airmen (NOTAM) as an emergency action of immediate flight safety relating directly to published aeronautical charts. The circumstances which created the need for some SIAP, and/or Weather Takeoff Minimums amendments may require making them effective in less than 30 days. For the remaining SIAPs and/or Weather Takeoff Minimums, an effective date at least 30 days after publication is provided.

Further, the SIAPs and/or Weather Takeoff Minimums contained in this amendment are based on the criteria contained in the U.S. Standard for Terminal Instrument Procedures (TERPS). In developing these SIAPs and/or Weather Takeoff Minimums, the TERPS criteria were applied to the conditions existing or anticipated at the affected airports. Because of the close and immediate relationship between these SIAPs and/or Weather Takeoff Minimums and safety in air commerce, I find that notice and public procedure before adopting these SIAPs and/or Weather Takeoff Minimums are impracticable and contrary to the public interest and, where applicable, that good cause exists for making some SIAPs and/or Weather Takeoff Minimums effective in less than 30 days.

## Conclusion

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore: (1) Is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. For the same reason, the FAA certifies that this amendment will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

## List of Subjects in 14 CFR Part 97

Air Traffic Control, Airports, Incorporation by reference, and Navigation (Air).

Issued in Washington, DC on March 24, 2006.

**James J. Ballough,**

*Director, Flight Standards Service.*

## Adoption of the Amendment

■ Accordingly, pursuant to the authority delegated to me, under Title 14, Code of Federal Regulations, part 97 (14 CFR part 97) is amended by establishing, amending, suspending, or revoking Standard Instrument Approach Procedures and Weather Takeoff Minimums effective at 0901 UTC on the dates specified, as follows:

## PART 97—STANDARD INSTRUMENT APPROACH PROCEDURES

■ 1. The authority citation for part 97 continues to read as follows:

**Authority:** 49 U.S.C. 106(g), 40103, 40106, 40113, 40114, 40120, 44502, 44514, 44701, 44719, 44721–44722.

■ 2. Part 97 is amended to read as follows:

** * * Effective 13 April 2006*

Lexington-Parsons, TN, Beech River Regional, VOR–A, Orig
Lexington-Parsons, TN, Beech River Regional, RNAV (GPS) RWY 1, Orig
Lexington-Parsons, TN, Beech River Regional, RNAV (GPS) RWY 19, Orig

** * * Effective 11 May 2006*

Machias, ME, Machias Valley, NDB RWY 36, Amdt 1, CANCELLED
Las Vegas, NV, McCarran Intl, RNAV (GPS) RWY 1R, Amdt 1
Angleton/Lake Jackson, TX, Brazoria County, ILS OR LOC RWY 17, Amdt 4

** * * Effective 8 June 2006*

Concord, CA, Buchanan Field, Takeoff Minimums and Textual DP, Amdt 1
Napa, CA, Napa County, RNAV (GPS) RWY 36L, Orig
Santa Monica, CA, Santa Monica Muni, Takeoff Minimums and Textual DP, Amdt 6
Tallahassee, FL, Tallahassee Regional, ILS OR LOC RWY 27, ILS RWY 27, (CAT II), Amdt 9
Brunswick, GA, Malcolm McKinnon, NDB RWY 22, Amdt 1, CANCELLED
Cornelia, GA, Habersham County, RNAV (GPS) RWY 6, Orig
Cornelia, GA, Habersham County, RNAV (GPS) RWY 24, Orig
Cornelia, GA, Habersham County, VOR/DME RWY 6, Amdt 6
Cornelia, GA, Habersham County, Takeoff Minimums and Textual DP, Amdt 2
Auburn-Lewiston, ME, Auburn-Lewiston Muni, NDB RWY 4, Amdt 11, CANCELLED
Frenchville, ME, Northern Aroostook Regional, NDB RWY 32, Amdt 6, CANCELLED
Omaha, NE, Eppley Airfield, RNAV (GPS) RWY 14L, Orig
Omaha, NE, Eppley Airfield, RNAV (GPS) RWY 32R, Orig
Omaha, NE, Eppley Airfield, ILS OR LOC/DME RWY 14L, Orig
Concord, NC, Concord Regional, RNAV (GPS) RWY 2, Orig
Concord, NC, Concord Regional, RNAV (GPS) RWY 20, Orig
Concord, NC, Concord Regional, GPS RWY 20, Orig, CANCELLED
Statesville, NC, Statesville Regional, RNAV (GPS) RWY 28, Amdt 2
Chamberlain, SD, Chamberlain Muni, RNAV (GPS) RWY 13, Orig
Chamberlain, SD, Chamberlain Muni, RNAV (GPS) RWY 31, Orig
Chamberlain, SD, Chamberlain Muni, GPS RWY 31, Orig, CANCELLED
Mc Kinney, TX, Collin County Regional at Mc Kinney, RNAV (GPS) RWY 17, Orig
Mc Kinney, TX, Collin County Regional at Mc Kinney, RNAV (GPS) RWY 35, Orig
Mc Kinney, TX, Collin County Regional at Mc Kinney, GPS RWY 17, Orig-D, CANCELLED
Mc Kinney, TX, Collin County Regional at Mc Kinney, GPS RWY 35, Orig-C, CANCELLED
Spokane, WA, Spokane Intl, ILS OR LOC RWY 21, ILS RWY 21 (CAT II), ILS RWY 21 (CAT III) Amdt 20
Beckley, WV, Raleigh County Memorial, ILS OR LOC RWY 19, Amdt 5

** * * Effective 3 August 2006*

Huslia, AK, Huslia, RNAV (GPS) RWY 3, Amdt 1

Huslia, AK, Huslia, RNAV (GPS) RWY 21, Amdt 1
Huslia, AK, Huslia, VOR/DME RWY 3, Orig
Barre/Montpelier, VT, Edward F. Knapp State, DF RWY 35, Amdt 3, CANCELLED
Barre/Montpelier, VT, Edward F. Knapp State, DF Vectoring Altitudes, Orig, CANCELLED

The FAA published an Amendment in Docket No. 30484, Amdt No. 3158 to Part 97 of the Federal Aviation Regulations (Vol 71, FR No. 52, Page 13756; dated March 17, 2006) under section 97.27 effective 11 May 2006, cancellation which is hereby rescinded as follows:

Fort Pierce, FL, St. Lucie County Intl, NDB RWY 9, Orig-A, CANCELLED
Tampa, FL, Tampa Intl, NDB OR GPS RWY 36L, Amdt 13B, CANCELLED

[FR Doc. 06–3186 Filed 4–5–06; 8:45 am]

**BILLING CODE 4910–13–P**

## SECURITIES AND EXCHANGE COMMISSION

## 17 CFR Part 279

**[Release No. IA–2504]**

## Technical Amendments to Form ADV, Form ADV–W, Form ADV–H, Form ADV–E

**AGENCY:** Securities and Exchange Commission.

**ACTION:** Final rule; technical amendments.

**SUMMARY:** The Securities and Exchange Commission (''Commission'' or ''SEC'') is making technical amendments to Form ADV under the Investment Advisers Act of 1940 (''Advisers Act''). Form ADV is the form advisers use to register with the Commission and the state securities regulatory authorities. The Commission is also making technical amendments to Form ADV–W, Form ADV–H, and Form ADV–E.

**DATES:** *Effective Date:* April 7, 2006.

**FOR FURTHER INFORMATION CONTACT:** Vivien Liu, Senior Counsel, or Jennifer L. Sawin, Assistant Director, at 202–551–6787 or *IArules@sec.gov*, Office of Investment Adviser Regulation, Division of Investment Management, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–5041.

**SUPPLEMENTARY INFORMATION:** Under section 203A(a) of the Advisers Act, an adviser that is ''regulated or required to be regulated'' as an investment adviser in the state in which it maintains its principal office and place of business is prohibited from registering with the Commission unless the adviser has $25 million of assets under management, or advises an investment company registered under the Investment Company Act of 1940.[1] All investment advisers—regardless of the amount of assets they manage or whether they advise a registered investment company—may register with the Commission if their principal office and place of business is located in a state that has not enacted a statute regulating advisers.[2]

Recently the U.S. Virgin Islands enacted a statute regulating investment advisers.[3] As a consequence, an investment adviser with a principal office and place of business in the Virgin Islands may not register with the Commission unless it has at least $25 million of assets under management, advises a registered investment company or is eligible to rely on one of the exemptions from the prohibition on registration contained in rule 203A–2.[4]

The Commission is making technical amendments to Part 1A, Item 2 of Form ADV, as well as to Form ADV–W and Form ADV–E, to reflect the addition of the U.S. Virgin Islands to the group of states with investment adviser statutes.[5] Form ADV–W is the form advisers use to withdraw from registration, and Form ADV–E is the cover page used to submit independent public accountants' certification of surprise examinations under the adviser custody rule, rule 206(4)–2.[6] In addition, the Commission is making amendments to Form ADV–H, the form advisers use to apply for a hardship exemption from the requirement to register with the Commission electronically, and to Item 16 of the General Instructions to Form ADV, to update the Commission's mailing address.

### I. Certain Findings

Under the Administrative Procedure Act (''APA''), notice of proposed rulemaking is not required when the agency, for good cause, finds ''that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.''[7] The Commission is making technical amendments to Part 1A, Item 2 of Form ADV, Form ADV–W and Form ADV–E in light of new legislation in the U.S. Virgin Islands and to update out-of-date cross-references, and making technical amendments to Form ADV–H and the General Instructions to Form ADV to update the Commission's mailing address. The Commission, therefore, finds that publishing the amendments for comment is unnecessary.[8]

Publication of a substantive rule not less than 30 days before its effective date is required by the APA except as otherwise provided by the agency for good cause.[9] For the same reasons described above with respect to notice and opportunity for comment, the Commission finds that there is good cause for making these technical amendments effective on April 7, 2006.

### II. Consideration of Promotion of Efficiency, Competition, and Capital Formation

Section 202(c) of the Advisers Act requires the Commission, when engaging in rulemaking that requires it to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency,

[1] 15 U.S.C. 80b–3a. The Commission has adopted various additional exemptions from the prohibition on SEC registration. *See* rule 203A–2 (17 CFR 275.203A–2).

[2] *Rules Implementing Amendments to the Investment Advisers Act of 1940*, Investment Advisers Act Release No. 1633 (May 15, 1997) (62 FR 28112 (May 22, 1997)). Section 202(a)(19) (15 U.S.C. 80b–2(a)(19)) of the Advisers Act defines ''state'' to include, in addition to the 50 states, the District of Columbia, Puerto Rico, the Virgin Islands, or any other possession of the United States.

[3] 9 V.I. Code Ann. §§ 601–672 (2004).

[4] Absent eligibility for Commission registration, these advisers are subject to the registration provisions of U.S. Virgin Islands law. In addition, advisers ineligible for Commission registration that have their principal office and place of business in the U.S. Virgin Islands may be required to register in one or more other states, if they have six or more clients that are residents of that state or have a place of business in that state. *See* Advisers Act section 222(d)(15 U.S.C. 80b–18a(d)).

[5] 17 CFR 279.1 (Form ADV); 17 CFR 279.2 (Form ADV–W); 17 CFR 279.8 (Form ADV–E). These changes include not only removing reference to the Virgin Islands from Item 2.A(2) in Part 1A of Form ADV (concerning an adviser's eligibility to register with the Commission), but also adding check-boxes for the Virgin Islands to Item 2.B. in Part 1A of Form ADV (concerning state notice filings for SEC-registered investment advisers), and paragraph (b) of the Status section of Form ADV–W (concerning withdrawals from state investment adviser registration). These check-boxes will appear on the paper version of the Forms, but will not be available for use by electronic filers on IARD until the IARD system is reprogrammed to support the Virgin Islands' participation in the system as a state securities administrator.

[6] 17 CFR 275.206(4)–2. The Commission is also updating Form ADV–E's cross-references to the rule to reflect the recent amendments to the rule.

[7] 5 U.S.C. 553(b).

[8] For similar reasons, the amendments do not require analysis under the Regulatory Flexibility Act or analysis of major rule status under the Small Business Regulatory Enforcement Fairness Act. *See* 5 U.S.C. 601(2) (for purposes of Regulatory Flexibility Act analyses, the term ''rule'' means any rule for which the agency publishes a general notice of proposed rulemaking); 5 U.S.C. 804(3)(C) (for purposes of Congressional review of agency rulemaking, the term ''rule'' does not include any rule of agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties).

[9] 5 U.S.C. 553(d).

competition, and capital formation.[10] Because the amendments are limited to technical amendments, we do not anticipate that any competitive advantages or disadvantages would be created. We do not expect the amendments, as technical amendments, to have an effect on efficiency, or on capital formation or the capital markets.

### III. Statutory Authority

We are adopting technical amendments to Form ADV (17 CFR 279.1) under the authority set forth in section 19(a) of the Securities Act of 1933 (15 U.S.C. 77s(a)), sections 23(a) and 28(e)(2) of the Securities Exchange Act of 1934 (15 U.S.C. 78w(a) and 78bb(e)(2)), section 319(a) of the Trust Indenture Act of 1939 (15 U.S.C. 77sss(a)), section 38(a) of the Investment Company Act of 1940 (15 U.S.C. 78a–37(a)), and sections 203(c)(1), 204, and 211(a) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–3(c)(1), 80b–4, and 80b–11(a)).

We are adopting technical amendments to Form ADV–W (17 CFR 279.2) under the authority set forth in sections 203(h), 204, and 211(a) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–3(h), 80b–4, and 80b–11(a)).

We are adopting technical amendments to Form ADV–H (17 CFR 279.3) under the authority set forth in sections 203(c)(1), 204, and 211(a) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–3(c)(1), 80b–4, and 80b–11(a)).

We are adopting technical amendments to Form ADV–E (17 CFR 279.8) under the authority set forth in sections 204, 206, and 211(a) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–4, 80b–6, and 80b–11(a)).

### Text of Form Amendments

### List of Subjects in 17 CFR Part 279

Reporting and recordkeeping requirements; Securities.

■ Accordingly, 17 CFR part 279 is amended as follows:

## PART 279—FORMS PRESCRIBED UNDER THE INVESTMENT ADVISERS ACT OF 1940

■ 1. The authority citation for part 279 continues to read as follows:

**Authority:** The Investment Advisers Act of 1940, 15 U.S.C. 80b–1, *et seq.*

■ 2. Form ADV (referenced in § 279.1) is amended by:

■ a. Removing ''the U.S. Virgin Islands or'' from Part 1A, Item 2 A.(2); and

■ b. Inserting ''□ VI'' in the table of Part 1A, Item 2 B before ''□ VA''.

■ 3. Form ADV General Instruction 16 (referenced in § 279.1) is amended by revising ''450 5th Street, NW., Mail Stop A–2, Washington, DC 20549'' to read ''100 F Street, NE., Mail Stop 0–25, Washington, DC 20549.''

**Note:** Form ADV does not and this amendment will not appear in the Code of Federal Registrations.

■ 4. Form ADV–W (referenced in § 279.2) is amended by inserting ''□ VI'' before ''□ VA'' in paragraph (b) of the Status section.

**Note:** Form ADV–W does not and this amendment will not appear in the Code of Federal Registrations.

■ 5. Form ADV–H (referenced in § 279.3) is amended in Item 4 by revising ''Office of Registrations and Examinations, Mail Stop 0–25, 450 Fifth Street, NW., Washington, DC 20549'' to read ''Branch of Registrations and Examinations, Mail Stop 0–25, 100 F Street, NE., Washington, DC 20549''.

**Note:** Form ADV–H does not and this amendment will not appear in the Code of Federal Registrations.

■ 6. Form ADV–E (referenced in § 279.8) is amended by:

■ a. In 2, revising the table to read:

| | | | | |
|---|---|---|---|---|
| AL | AK | AZ | AR | CA |
| CO | CT | DE | DC | FL |
| GA | HI | ID | IL | IN |
| IA | KS | KY | LA | ME |
| MO | MT | NE | NV | NH |
| JN | NM | NY | NC | ND |
| OH | OK | OR | PA | RI |
| SC | SD | TN | TX | UT |
| VT | VI | VA | WA | WV |
| WI | WY | Puerto Rico | Other (specify): | |

■ b. In Instructions 2 and 3, and in the paragraph with the heading ''SEC's Collection of Information,'' revising references to ''rule 206(4)–2(a)(5)'' to read ''rule 206(4)–2(a)(3)(ii)(B)''; and

■ c. In the paragraph with the heading ''SEC's Collection of Information,'' revising ''17 CFR 275.206(4)–2(a)(5)'' to read ''17 CFR 275.206(4)–2(a)(3)(ii)(B)''.

**Note:** Form ADV–E does not and this amendment will not appear in the Code of Federal Registrations.

Dated: March 30, 2006.

By the Commission.

**Nancy M. Morris,**

*Secretary.*

[FR Doc. 06–3322 Filed 4–5–06; 8:45 am]

BILLING CODE 8010–01–P

[10] 15 U.S.C. 80b–2(c).

## DEPARTMENT OF THE TREASURY

### Office of Foreign Assets Control

### 31 CFR Part 500

### Foreign Assets Control Regulations

**AGENCY:** Office of Foreign Assets Control, Treasury.

**ACTION:** Final rule; amendment.

**SUMMARY:** The Office of Foreign Assets Control of the U.S. Department of the Treasury is amending the Foreign Assets Control Regulations, 31 CFR part 500, effective May 8, 2006, to add a new provision limiting the authorization of post-June 19, 2000 transactions involving property in which the Democratic People's Republic of Korea (''North Korea'') or a national thereof has an interest. The new provision prohibits United States persons from owning, leasing, operating or insuring any vessel flagged by North Korea.

**DATES:** *Effective date:* May 8, 2006.

**FOR FURTHER INFORMATION CONTACT:** Assistant Director of Compliance Outreach/Implementation, tel.: (202) 622–2490, Assistant Director of Licensing, tel.: (202) 622–2480, Assistant Director of Policy, tel.: (202) 622–4855, or Chief Counsel, tel.: (202) 622–2410, Office of Foreign Assets Control, Department of the Treasury, Washington, DC 20220.

**SUPPLEMENTARY INFORMATION:**

**Electronic and Facsimile Availability**

This document and additional information concerning OFAC are available from OFAC's Web site (*http://www.treas.gov/ofac*) or via facsimile through a 24-hour fax-on-demand service, tel.: (202) 622–0077.

**Background**

The Foreign Assets Control Regulations (the ''FACR''), 31 CFR part 500, which are authorized under the Trading with the Enemy Act, 50 U.S.C. App. 1–44, imposed economic sanctions against the Democratic People's Republic of Korea (''North Korea'') beginning in 1950. Since that time, those sanctions have been modified on a number of occasions, most recently to ease economic sanctions against North Korea in order to improve overall relations and to encourage North Korea to continue to refrain from testing long-range missiles. Consistent with U.S. foreign policy interests, the Office of Foreign Assets Control (''OFAC''), on June 19, 2000, amended the FACR, 31 CFR part 500, to add § 500.586, authorizing transactions concerning certain North Korean property.

Subject to the limitations in paragraph (b) of § 500.586, paragraph (a) authorized new, i.e., post-June 19, 2000, transactions in which North Korea has a property interest. Paragraph (b) set forth four limitations on the new authorization. Today OFAC is amending the FACR by adding a new provision, effective May 8, 2006, to further limit the authorization provided by § 500.586. This new provision, § 500.586(b)(5), prohibits United States persons from owning, leasing, operating or insuring any vessel flagged by North Korea. Because the term *United States person* is a new term not previously used or defined in the FACR, a definition of the term is provided for purposes of paragraph (b)(5). The effective date of this amendment has been delayed to provide time for United States persons to re-flag any vessels currently flagged by North Korea.

Because the Regulations involve a foreign affairs function, the provisions of Executive Order 12866 and the Administrative Procedure Act (5 U.S.C. 553) (the ''APA'') requiring notice of proposed rulemaking, opportunity for public participation, and delay in effective date are inapplicable. Because no notice of proposed rulemaking is required for this rule, the Regulatory Flexibility Act (5 U.S.C. 601–602) does not apply.

**Paperwork Reduction Act**

As authorized in the APA, the Regulations are being issued without prior notice and public comment. The collection of information related to 31 part 500 is contained in 31 CFR part 501 (the ''Reporting, Procedures and Penalties Regulations''). Pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3507), those collections of information have been approved by the Office of Management and Budget under control number 1505–0164. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number.

**List of Subjects in 31 CFR Part 500**

Administrative practice and procedure, Banks, Banking, Brokers, Foreign Trade, Investments, Loans, Securities, North Korea.

■ For the reasons set forth in the preamble, 31 CFR part 500 is amended as follows:

## PART 500—FOREIGN ASSETS CONTROL REGULATIONS

■ 1. The authority citation for part 500 continues to read as follows:

**Authority:** 18 U.S.C. 2332d; 31 U.S.C. 321(b); 50 U.S.C. App. 1–44; Pub. L. 101–410, 104 Stat. 890 (28 U.S.C. 2461 note); E.O. 9193, 7 FR 5205, 3 CFR, 1938–1943 Comp., p. 1174; E.O. 9989, 13 FR 4891, 3 CFR, 1943–1948 Comp., p. 748.

### Subpart E—Licenses, Authorizations and Statements of Licensing Policy

■ 2. A new paragraph (b)(5) is added to § 500.586 to read as follows:

**§ 500.586 Authorization of new transactions concerning certain North Korean property.**

* * * * *

(b) * * *

(5) Effective May 8, 2006, United States persons are prohibited from owning, leasing, operating or insuring any vessel flagged by North Korea. For purposes of this paragraph, the term *United States person* means any United States citizen, permanent resident alien, entity organized under the laws of the United States or any jurisdiction within the United States (including foreign branches), or any person in the United States.

* * * * *

Dated: March 23, 2006.

**Barbara C. Hammerle,**

*Acting Director, Office of Foreign Assets Control.*

Approved: March 24, 2006.

**Stuart A. Levey,**

*Under Secretary, Office of Terrorism and Financial Intelligence, Department of the Treasury.*

[FR Doc. 06–3286 Filed 4–5–06; 8:45 am]

BILLING CODE 4810–25–P

## DEPARTMENT OF DEFENSE

### Department of the Navy

### 32 CFR Part 706

### Certifications and Exemptions Under the International Regulations for Preventing Collisions at Sea, 1972

**AGENCY:** Department of the Navy, DOD.

**ACTION:** Final rule.

**SUMMARY:** The Department of the Navy is amending its certifications and exemptions under the International Regulations for Preventing Collisions at Sea, 1972 (72 COLREGS), to reflect that the Deputy Assistant Judge Advocate General (Admiralty and Maritime Law) has determined that USS TEXAS (SSN 775) is a vessel of the Navy which, due to its special construction and purpose, cannot fully comply with certain provisions of the 72 COLREGS without interfering with its special function as a naval ship. The intended effect of this rule is to warn mariners in waters where 72 COLREGS apply.

**DATES:** *Effective Date:* March 20, 2006.

**FOR FURTHER INFORMATION CONTACT:** Commander Gregg A. Cervi, JAGC, U.S. Navy, Deputy Assistant Judge Advocate General (Admiralty and Maritime Law), Office of the Judge Advocate General, Department of the Navy, 1322 Patterson Ave., SE., Suite 3000, Washington Navy Yard, DC 20374–5066, telephone 202–685–5040.

**SUPPLEMENTARY INFORMATION:** Pursuant to the authority granted in 33 U.S.C. 1605, the Department of the Navy amends 32 CFR part 706. This amendment provides notice that the Deputy Assistant Judge Advocate General (Admiralty and Maritime Law), under authority delegated by the Secretary of the Navy, has certified that USS TEXAS (SSN 775) is a vessel of the Navy which, due to its special construction and purpose, cannot fully comply with the following specific provisions of 72 COLREGS without interfering with its special function as a naval ship: Annex I, paragraph 2(a)(i),

pertaining to the height placement of the masthead light above the hull; Annex I, paragraph 2(k), pertaining to the height and relative positions of the anchor lights; Annex I, paragraph 3(b), pertaining to the location of the sidelights; and Rule 21(c), pertaining to the location and arc of visibility of the sternlight. The Deputy Assistant Judge Advocate General (Admiralty and Maritime Law) has also certified that the lights involved are located in closest possible compliance with the applicable 72 COLREGS requirements.

Moreover, it has been determined, in accordance with 32 CFR parts 296 and 701, that publication of this amendment for public comment prior to adoption is impracticable, unnecessary, and contrary to public interest since it is based on technical findings that the placement of lights on this vessel in a manner differently from that prescribed herein will adversely affect the vessel's ability to perform its military functions.

**List of Subjects in 32 CFR Part 706**

Marine safety, Navigation (water), and Vessels.

■ For the reasons set forth in the preamble, amend part 706 of title 32 of the Code of Federal Regulations as follows:

## PART 706—CERTIFICATIONS AND EXEMPTIONS UNDER THE INTERNATIONAL REGULATIONS FOR PREVENTING COLLISIONS AT SEA, 1972

■ 1. The authority citation for part 706 continues to read:

**Authority:** 33 U.S.C. 1605.

■ 2. Table One of § 706.2 is amended by adding, in numerical order, the following entry for USS TEXAS:

**§ 706.2 Certifications of the Secretary of the Navy under Executive Order 11964 and 33 U.S.C. 1605.**

* * * * *

TABLE ONE

| Vessel | Number | Distance in meters of forward masthead light below minimum required height. § 2(a)(i), Annex I |
|---|---|---|
| * | * | * |
| USS TEXAS | SSN 775 | 2.90 |
| * | * | * |

■ 3. Table Three of § 706.2 is amended by adding, in numerical order, the following entry for USS TEXAS:

**§ 706.2 Certifications of the Secretary of the Navy under Executive Order 11964 and 33 U.S.C. 1605.**

* * * * *

TABLE THREE

| Vessel | No. | Masthead lights arc of visibility; rule 21(a) | Side lights arc of visibility; rule 21(b) | Stern light arc of visibility; rule 21(c) | Side lights distance inboard of ship's sides in meters 3(b) annex 1 | Stern light, distance forward of stern in meters; rule 21(c) | Forward anchor light, height above hull in meters; 2(K) annex 1 | Anchor lights relationship of aft light to forward light in meters 2(K) annex 1 |
|---|---|---|---|---|---|---|---|---|
| * | | * | * | * | * | | * | * |
| USS TEXAS. | SSN 775 | ..... | ..... | 210.2° | 4.37 | 11.05 | 2.8 | .30 below. |
| * | | * | * | * | * | | * | * |

Approved: March 20, 2006.

**Gregg A. Cervi,**

*Commander, JAGC, U.S. Navy, Deputy Assistant Judge Advocate General (Admiralty and Maritime Law).*

[FR Doc. 06–3192 Filed 4–5–06; 8:45 am]

BILLING CODE 3310–FF–P

## DEPARTMENT OF DEFENSE

### Department of the Navy

### 32 CFR Part 706

### Certifications and Exemptions Under the International Regulations for Preventing Collisions at Sea, 1972

**AGENCY:** Department of the Navy, DOD.

**ACTION:** Final rule.

**SUMMARY:** The Department of the Navy is amending its certifications and exemptions under the International Regulations for Preventing Collisions at Sea, 1972 (72 COLREGS), to reflect that the Deputy Assistant Judge Advocate General (Admiralty and Maritime Law) has determined that USS NEWPORT NEWS (SSN 750) is a vessel of the Navy which, due to its special construction and purpose, cannot fully comply with certain provisions of the 72 COLREGS without interfering with its special function as a naval ship. The intended effect of this rule is to warn mariners in waters where 72 COLREGS apply.

**DATES:** *Effective Date:* March 21, 2006.

**FOR FURTHER INFORMATION CONTACT:** Commander Gregg A. Cervi, JAGC, U.S. Navy, Deputy Assistant Judge Advocate General (Admiralty and Maritime Law), Office of the Judge Advocate General, Department of the Navy, 1322 Patterson Ave., SE., Suite 3000, Washington Navy Yard, DC 20374–5066, telephone 202–685–5040.

**SUPPLEMENTARY INFORMATION:** Pursuant to the authority granted in 33 U.S.C. 1605, the Department of the Navy amends 32 CFR part 706. This amendment provides notice that the Deputy Assistant Judge Advocate General (Admiralty and Maritime Law), under authority delegated by the Secretary of the Navy, has certified that USS NEWPORT NEWS (SSN 750) is a

vessel of the Navy which, due to its special construction and purpose, cannot fully comply with the following specific provision of 72 COLREGS without interfering with its special function as a naval ship: Rule 21(a), pertaining to the placement of the masthead light on the ship's fore and aft centerline. The Deputy Assistant Judge Advocate General (Admiralty and Maritime Law) has also certified that the lights involved are located in closest possible compliance with the applicable 72 COLREGS requirements.

Moreover, it has been determined, in accordance with 32 CFR parts 296 and 701, that publication of this amendment for public comment prior to adoption is impracticable, unnecessary, and contrary to public interest since it is based on technical findings that the placement of lights on this vessel in a manner differently from that prescribed herein will adversely affect the vessel's ability to perform its military functions.

**List of Subjects in 32 CFR Part 706**

Marine safety, Navigation (water), and Vessels.

■ For the reasons set forth in the preamble, amend part 706 of title 32 of the Code of Federal Regulations as follows:

## PART 706—CERTIFICATIONS AND EXEMPTIONS UNDER THE INTERNATIONAL REGULATIONS FOR PREVENTING COLLISIONS AT SEA, 1972

■ 1. The authority citation for part 706 continues to read:

**Authority:** 33 U.S.C. 1605.

■ 2. Amend Table Two of § 706.2 by adding, in numerical order, the following entry for USS NEWPORT NEWS:

**§ 706.2 Certifications of the Secretary of the Navy under Executive Order 11964 and 33 U.S.C. 1605.**

* * * * *

TABLE TWO

| Vessel | Number | Masthead lights, distance to stbd of keel in meters; Rule 21(a) | Forward anchor light, distance below flight deck in; § 2(K), Annex I | Forward anchor light, number of; Rule 30(a)(i) | AFT anchor light, distance below flight deck in meters; Rule 21(e), Rule 30(a)(ii) | AFT anchor light, number of; Rule 30(a)(ii) | Side lights, distance below flight deck in meters § 2(g), Annex I | Side lights, distance forward of forward masthead light in meters; § 3(b), Annex I | Side lights, distance inboard of ship's sides in meters; § 3(b), Annex I |
|---|---|---|---|---|---|---|---|---|---|
| * | * | * | | * | * | | * | * | |
| USS Newport News ... | SSN 750 ..... | 0.41 | ..... | ..... | ..... | ..... | ..... | ..... | ..... |
| * | * | * | | * | * | | * | * | |

Approved: March 21, 2006.

**Gregg A. Cervi,**

*Commander, JAGC, U.S. Navy, Deputy Assistant Judge Advocate General (Admiralty and Maritime Law).*

[FR Doc. 06–3193 Filed 4–5–06; 8:45 am]

**BILLING CODE 3810–FF–P**

## DEPARTMENT OF HOMELAND SECURITY

## Coast Guard

## 33 CFR Part 117

**[CGD01–06–004]**

**RIN 1625–AA09**

## Drawbridge Operation Regulations; Connecticut River, East Haddam, CT

**AGENCY:** Coast Guard, DHS.

**ACTION:** Temporary final rule.

**SUMMARY:** The Coast Guard has temporarily changed the drawbridge operating regulations governing the operation of the Route 82 Bridge across the Connecticut River at mile 16.8, at East Haddam, Connecticut. This temporary final rule requires the Route 82 Bridge to operate on a fixed opening schedule from April 1, 2006 through June 30, 2006. The bridge shall open at all times for commercial vessels after at least a 24-hour advance notice and a 2-hour confirmation is given by calling the number posted at the bridge. This temporary final rule is necessary to facilitate electrical and mechanical bridge repairs.

**DATES:** This rule is effective from April 1, 2006 through June 30, 2006.

**ADDRESSES:** Comments and material received from the public, as well as documents indicated in this preamble as being available in the docket, are part of docket (CGD01–06–004) and are available for inspection or copying at the First Coast Guard District, Bridge Branch Office, 408 Atlantic Avenue, Boston, Massachusetts, 02110, between 7 a.m. and 3 p.m., Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Ms. Judy Leung-Yee, Project Officer, First Coast Guard District, (212) 668–7195.

**SUPPLEMENTARY INFORMATION:**

### Regulatory Information

On March 6, 2006, we published a notice of proposed rulemaking (NPRM) entitled ''Drawbridge Operation Regulations''; Connecticut River, East Haddam, Connecticut, in the **Federal Register** (71 FR 11172). We received no comments in response to the notice of proposed rulemaking. No public hearing was requested and none was held.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**.

Making this rule effective in less than 30 days after publication in the **Federal Register** will allow this rule to become effective in time for the April 1, 2006, start date for the electrical and mechanical bridge repairs.

The electrical and mechanical repairs are vital necessary repairs that must be performed without delay in order to assure the continued safe and reliable operation of the Route 82 Bridge.

### Background and Purpose

The Route 82 Bridge has a vertical clearance of 22 feet at mean high water, and 25 feet at mean low water in the closed position. The existing drawbridge operating regulations listed at 33 CFR 117.205(c), require the bridge to open on signal at all times; except that, from May 15 to October 31, 9 a.m. to 9 p.m., the bridge is required to open for recreational vessels on the hour and half hour only. The bridge is required to open on signal at all times for commercial vessels.

The bridge owner, Connecticut Department of Transportation, requested a temporary rule to facilitate electrical

and mechanical rehabilitation at the Route 82 Bridge.

Under this temporary final rule, from April 1, 2006 through June 30, 2006, the Route 82 Bridge shall open on signal at 5:30 a.m., 1:30 p.m., and 8 p.m., daily. The bridge shall open for commercial vessels at any time after a 24-hour notice with a 2-hour confirmation is given by calling the number posted at the bridge.

**Discussion of Comments and Changes**

The Coast Guard received no comments in response to the notice of proposed rulemaking. As a result, no changes have been made to this temporary final rule.

**Regulatory Evaluation**

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

This conclusion is based on the fact that vessel traffic will still be able to transit through the Route 82 Bridge under a fixed opening schedule that is expected to meet the present and anticipated needs of navigation.

**Small Entities**

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

The Coast Guard certifies under 5 U.S.C. 605(b), that this rule will not have a significant economic impact on a substantial number of small entities.

This conclusion is based on the fact that vessel traffic will still be able to transit through the Route 82 Bridge under a fixed opening schedule that is expected to meet the present and anticipated needs of navigation.

**Assistance for Small Entities**

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

No small entities requested Coast Guard assistance and none was given.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247).

**Collection of Information**

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

**Federalism**

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

**Unfunded Mandates Reform Act**

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

**Taking of Private Property**

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

**Civil Justice Reform**

This rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

**Protection of Children**

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

**Indian Tribal Governments**

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

**Energy Effects**

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

**Technical Standards**

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

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

**Environment**

We have analyzed this rule under Commandant Instruction M16475.1D,

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 rule is categorically excluded, under figure 2–1, paragraph (32)(e), of the Instruction, from further environmental documentation considering that it relates to the promulgation of operating regulations or procedures for drawbridges. Under figure 2–1, paragraph (32)(e), of the Instruction, an ''Environmental Analysis Check List'' and a ''Categorical Exclusion Determination'' are not required for this rule.

**List of Subjects in 33 CFR Part 117**

Bridges.

**Regulations**

■ For the reasons discussed in the preamble, the Coast Guard amends 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 April 1, 2006 through June 30, 2006, § 117.205 is amended by suspending paragraph (c) and adding a temporary paragraph (d) to read as follows:

**§ 117.205 Connecticut River.**

* * * * *

(d) The draw of the Route 82 Bridge, mile 16.8, at East Haddam, shall open on signal at 5:30 a.m., 1:30 p.m., and 8 p.m., daily. The draw shall open on signal for commercial vessels at any time after at least a 24-hour advance notice and a 2-hour confirmation is given by calling the number posted at the bridge.

Dated: March 28, 2006.

**David P. Pekoske,**

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

[FR Doc. 06–3287 Filed 4–5–06; 8:45 am]

BILLING CODE 4910–15–P

## DEPARTMENT OF HOMELAND SECURITY

## Coast Guard

## 33 CFR Part 117

**[CGD01–05–096]**

**RIN 1625–AA09**

## Drawbridge Operation Regulations: Cheesequake Creek, NJ

**AGENCY:** Coast Guard, DHS.

**ACTION:** Final rule.

**SUMMARY:** The Coast Guard has changed the regulation that governs the operation of the S35 Bridge across Cheesequake Creek, mile 0.0, at Morgan, South Amboy, New Jersey. This final rule would allow the bridge owner to require mariners to provide a two hour notice for bridge openings between 11 p.m. and 7 a.m. year round and all day from December 1 through March 31. This final rule is expected to better meet the present and the anticipated needs of navigation.

**DATES:** This rule is effective May 8, 2006.

**ADDRESSES:** Comments and material received from the public, as well as documents indicated in this preamble as being available in the docket, are part of docket (CGD01–05–096) and are available for inspection or copying at the First Coast Guard District, Bridge Branch Office, 408 Atlantic Avenue, Boston, Massachusetts 02110, between 7 a.m. and 3 p.m., Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Mr. Gary Kassof, Bridge Administrator, First Coast Guard District, (212) 668–7165.

**SUPPLEMENTARY INFORMATION:**

### Regulatory History

On November 22, 2005, we published a notice of proposed rulemaking (NPRM) entitled Drawbridge Operation Regulations; Cheesequake Creek, New Jersey, in the **Federal Register** (70 FR 70563). We received no comments in response to the notice of proposed rulemaking. No public hearing was requested and none was held.

### Background and Purpose

The S35 Bridge has a vertical clearance of 25 feet at mean high water and 30 feet at mean low water in the closed position. The existing drawbridge operation regulations are listed at 33 CFR § 117.709(a).

The existing regulations, promulgated on April 20, 2005, (70 FR 20464), require the S35 Bridge to operate as follows:

From May 1 through October 31, from 7 a.m. to 8 p.m., the draw need only open on the hour. From 8 p.m. to 11 p.m. the draw shall open on signal. From 11 p.m. to 7 a.m. the draw shall open after at least a four hour advance notice is given. From November 1 through April 30 the draw shall open on signal after at least a four hour advance notice is given.

Subsequent to the publication of that final rule (70 FR 20464), the Coast Guard was contacted by several mariners and a local official advising that the four hour advance notice required by the new rule was problematic and that consideration should be given to changing that rule.

After a meeting with the mariners and local officials the Coast Guard decided to publish a notice of proposed rulemaking (NPRM) to further change the drawbridge operation regulations for the S35 Bridge.

On November 22, 2005, the above NPRM (70 FR 70563) was published. It proposed that a two hour notice for bridge openings be required during the times the bridge is not normally crewed instead of the four hour notice in the existing rule, and also proposed changing the all day advance notice for bridge openings from November 1 through April 30, to December 1 through March 31.

### Discussion of Comments and Changes

The Coast Guard received no comments in response to the notice of proposed rulemaking and as a result, no changes have been made to this final rule.

### Regulatory Evaluation

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

This conclusion is based on the fact that the bridge will open during times the bridge is not normally crewed after a two hour advance notice instead of a four hour advance notice which is required by the existing regulations.

### Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we considered whether this rule would have a significant economic impact on a substantial number of small entities.

The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations less than 50,000.

The Coast Guard certifies under 5 U.S.C. 605(b), that this rule will not have a significant economic impact on a substantial number of small entities.

**Assistance for Small Entities**

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

No small entities requested Coast Guard assistance and none was given.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247).

**Collection of Information**

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

**Federalism**

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

**Unfunded Mandates Reform Act**

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

**Taking of Private Property**

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

**Civil Justice Reform**

This rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

**Protection of Children**

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

**Indian Tribal Governments**

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

**Energy Effects**

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

**Technical Standards**

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

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

**Environment**

We have analyzed this rule under Commandant Instruction M16475.1D, 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 rule is categorically excluded, under figure 2–1, paragraph (32)(e) of the Instruction, from further environmental documentation considering that it relates to the promulgation of operating regulations or procedures for drawbridges. Under figure 2–1, paragraph (32)(e), of the instruction, an ''Environmental Analysis Check List'' and a ''Categorical Exclusion Determination'' are not required for this rule.

**List of Subjects in 33 CFR Part 117**

Bridges.

**Regulations**

■ For the reasons set out in the preamble, the Coast Guard amends 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. Section 117.709 is amended by revising paragraph

(a) to read as follows:

**§ 117.709 Cheesequake Creek.**

(a) The draw of the S35 Bridge, at mile 0.0, at Morgan, South Amboy, New Jersey, shall operate as follows:

(1) From April 1 through November 30 from 7 a.m. to 8 p.m., the draw need only open on the hour. From 8 p.m. to 11 p.m. the draw shall open on signal.

From 11 p.m. to 7 a.m. the draw shall open after at least a two hour advance notice is given by calling the number posted at the bridge.

(2) From December 1 through March 31, the draw shall open on signal after at least a two hour advance notice is given by calling the number posted at the bridge.

* * * * *

Dated: March 21, 2006.

**David P. Pekoske,**

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

[FR Doc. 06–3245 Filed 4–5–06; 8:45 am]

**BILLING CODE 4910–15–P**

## ENVIRONMENTAL PROTECTION AGENCY

## 40 CFR Part 63

**[EPA–HQ–OAR–2004–0019, FRL–8054–5]**

**RIN 2060–AK10**

## National Emission Standards for Gasoline Distribution Facilities (Bulk Gasoline Terminals and Pipeline Breakout Stations)

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final decision; and final rule, amendment.

**SUMMARY:** On December 14, 1994, we promulgated National Emission Standards for Gasoline Distribution Facilities (Bulk Gasoline Terminals and Pipeline Breakout Stations). Section 112(f)(2) of the Clean Air Act directs us to assess the risk remaining (residual risk) after the application of national emission standards controls for hazardous air pollutants. Also, section 112(d)(6) requires us to review and revise the national emission standards as necessary by taking into account developments in practices, processes, and control technologies. On August 10, 2005, we proposed not to revise the national emission standards based on our residual risk assessment and technology review. This action finalizes that decision not to revise the national emission standards and amends a reference error.

**DATES:** This final decision and final rule amendment is effective on April 6, 2006.

**ADDRESSES:** We have established a docket for this action under Docket ID No. EPA–HQ–OAR–2004–0019. All documents in the docket are listed on the *www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, *e.g.*, confidential business information 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 Docket, EPA/DC, EPA West, Room B–102, 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:**

*General and Technical Information.* Mr. Stephen Shedd, Office of Air Quality Planning and Standards, Sector Policies and Programs Division, Coatings and Chemicals Group (E143–01), Environmental Protection Agency, Research Triangle Park, North Carolina 27711, telephone (919) 541–5397, facsimile number (919) 685–3195, electronic mail (e-mail) address: *shedd.steve@epa.gov.*

*Residual Risk Assessment Information.* Mr. Ted Palma, Office of Air Quality Planning and Standards, Health and Environmental Impacts Division, Sector Based Assessment Group (C539–02), Environmental Protection Agency, Research Triangle Park, North Carolina 27711, telephone (919) 541–5470, facsimile number (919) 541–0840, electronic mail (e-mail) address: *palma.ted@epa.gov.*

**SUPPLEMENTARY INFORMATION:**

*Regulated Entities.* The regulated categories and entities affected by the national emission standards include:

| Category | NAICS [a] | (SIC [b]) | Examples of regulated entities |
|---|---|---|---|
| Industry | 324110<br>493190<br>486910<br>424710 | (2911)<br>(4226)<br>(4613)<br>(5171) | Operations at major sources that transfer and store gasoline, including petroleum refineries, pipeline breakout stations, and bulk terminals. |
| Federal/State/local/tribal governments | | | |

[a] North American Industry Classification System.
[b] Standard Industrial Classification.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by the national emission standards. To determine whether your facility would be affected by the national emission standards, you should examine the applicability criteria in 40 CFR 63.420. If you have any questions regarding the applicability of the national emission standards to a particular entity, consult either the air permit authority for the entity or your EPA regional representative as listed in 40 CFR 63.13.

*World Wide Web (WWW).* In addition to being available in the docket, an electronic copy of today's final decision will also be available on the WWW through the Technology Transfer Network (TTN). Following signature, a copy of the final decision will be posted on the TTN's policy and guidance page for newly proposed or promulgated rules at the following address: *http://www.epa.gov/ttn/oarpg/.* The TTN provides information and technology exchange in various areas of air pollution control.

*Judicial Review.* Under section 307(b)(1) of the Clean Air Act (CAA), judicial review of this final decision is available only by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit by June 5, 2006. Under section 307(d)(7)(B) of the CAA, only an objection to a rule or procedure raised with reasonable specificity during the period for public comment can be raised during judicial review. Moreover, under section 307(b)(2) of the CAA, the requirements established by the final decision may not be challenged separately in civil or criminal proceedings brought to enforce these requirements.

Section 307(d)(7)(B) of the CAA further 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 us 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 us 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 Associate General Counsel for the Air and Radiation Law Office, Office of General Counsel (Mail Code 2344A), U.S. EPA, 1200 Pennsylvania Ave., NW., Washington, DC 20004.

*Outline.* The information presented in this preamble is organized as follows:

I. Background
A. What Is the Statutory Authority for These Actions?
B. What Did We Propose?
II. Risk and Technology Review Final Decision
III. Summary of Comments and Responses
IV. Correction to the December 19, 2003 Final Rule
V. Statutory and Executive Order Reviews
A. Executive Order 12866: Regulatory Planning and Review
B. Paperwork Reduction Act
C. Regulatory Flexibility Act
D. Unfunded Mandates Reform Act
E. Executive Order 13132: Federalism
F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments
G. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks
H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use
I. National Technology Transfer and Advancement Act
J. Congressional Review Act

## I. Background

### *A. What Is the Statutory Authority for These Actions?*

Section 112 of the CAA establishes a comprehensive regulatory process to address hazardous air pollutants (HAP) from stationary sources. In implementing this process, we have identified categories of sources emitting one or more of the HAP listed in the CAA, and gasoline distribution facilities are identified as one such source category. Section 112(d) requires us to promulgate national technology-based emission standards for sources within those categories that emit or have the potential to emit any single HAP at a rate of 10 tons or more per year or any combination of HAP at a rate of 25 tons or more per year (known as major sources), as well as for certain area sources emitting less than those amounts. These technology-based national emission standards for hazardous air pollutants (NESHAP) must reflect the maximum reductions of HAP achievable (after considering cost, energy requirements, and nonair health and environmental impacts) and are commonly referred to as maximum achievable control technology (MACT) standards. We promulgated the National Emission Standards for Gasoline Distribution Facilities (Bulk Gasoline Terminals and Pipeline Breakout Stations) at 59 FR 64318 on December 14, 1994 (Gasoline Distribution NESHAP).

In what is referred to as the technology review, we are required under section 112(d)(6) of the CAA to review these technology-based standards no less frequently than every 8 years. Further, if we conclude that a revision is necessary, we have the authority to revise these standards, taking into account ''developments in practices, processes, and control technologies.''

The residual risk review is described in section 112(f) of the CAA. Section 112(f)(2) requires us to determine for each section 112(d) source category, except area source categories for which we issued a generally available control technology standard, whether the NESHAP protects public health with an ample margin of safety. If the NESHAP for HAP ''classified as a known, probable, or possible human carcinogen do not reduce lifetime excess cancer risks to the individual most exposed to emissions from a source in the category or subcategory to less than one in one million,'' we must decide whether additional reductions are necessary to provide an ample margin of safety. As a part of this decision, we may consider costs, technological feasibility, uncertainties, or other relevant factors. We must determine whether more stringent standards are necessary to prevent adverse environmental effect (defined in section 112(a)(7) as ''any significant and widespread adverse effect, which may reasonably be anticipated to wildlife, aquatic life, or other natural resources, including adverse impacts on populations of endangered or threatened species or significant degradation of environmental quality over broad areas''), but in making this decision we must consider cost, energy, safety, and other relevant factors.

### *B. What Did We Propose?*

We promulgated the Gasoline Distribution NESHAP in 1994. On August 10, 2005 (70 FR 46452), we proposed to take no further action to revise the Gasoline Distribution NESHAP and requested public comments on the residual risk and technology review for the Gasoline Distribution NESHAP.

## II. Risk and Technology Review Final Decision

In our proposal, we presented the analysis and conclusions on residual risk and technology review, concluding that the maximum individual cancer risk for this source category already meets the level of 100 in 1 million that we generally consider acceptable, and that further control requirements would achieve minimal additional risk reduction at a very high cost. Further, the analyses showed that both the chronic noncancer and acute risks from this source category are below their respective relevant health thresholds, and that there are no adverse impacts to the environment (*i.e.*, ecological risks). As a result, we concluded that no additional control should be required because an ample margin of safety (considering cost, technical feasibility, and other factors) has been achieved by the 1994 NESHAP for the gasoline distribution source category.

In the technology review, we concluded that additional controls at existing sources would achieve, at best, minimal emission and risk reductions at a very high cost. Additionally, we did not identify any significant developments in practices, processes, or control technologies since promulgation of the original standards in 1994 which represent the best controls. Thus, we proposed no additional controls under the technology review under CAA section 112(d)6).

We conclude in this rulemaking, as proposed, that there is not a need to revise the Gasoline Distribution NESHAP under the provisions of CAA section 112(f) or 112(d)(6).

## III. Summary of Comments and Responses

The proposal provided a 60-day comment period ending October 11, 2005. We received comments from eight commenters. Commenters included one State agency, one State and local agency association, three industry trade associations, one industrial consultant, and two individual commenters. We

have considered the public comments as discussed below and did not find that the comments changed any results of our risk or technology reviews or analyses, or any of our determinations.

*1. General Approach*

*Comment:* We received comments both in favor of and objecting to the consideration of facilitywide emissions in the risk analyses; objecting to what was perceived as an implication within the proposal that we must conduct mandatory facilitywide risk determinations in future CAA section 112(f) rulemakings; and concerns with emissions from other source categories at the facility providing an overly conservative analysis not consistent with the CAA.

*Response:* In our ample margin of safety analysis, we calculated residual risk from facilitywide emissions of the nine HAP found in gasoline. However, we did not have sufficiently detailed information to analyze the emissions from various specific sources within a facility but outside the gasoline distribution source category. Because the facilities in this source category also frequently handle other, non-gasoline, petroleum products, we could not always associate the reported emissions to a particular source category. As a result, we could not evaluate the existing levels of control or the potential for applying additional controls at the facilities where HAP emissions from non-gasoline distribution sources contributed to the risk. Therefore, as stated in the August 2005 proposal, we did not use the residual risk calculated from facilitywide emissions in our decision to require no additional controls because we did not have the control cost and feasibility data necessary to do so.

Our position on the potential consideration of both source category-only emissions and facilitywide emissions is fully discussed in the final Coke Oven Batteries NESHAP (70 FR 19996–19998, April 15, 2005).

*Comment:* Comments were received objecting to the need to perform a separate technology review for the source category.

*Response:* As discussed in the proposal, we performed a separate technology review for the gasoline distribution source category under section 112(d)(6), but recommended no changes to the NESHAP. It is possible that future advances in control technologies for this source category could allow for further emission reductions (possibly reducing risk to below 1 in 1 million) at a reasonable cost. We continue to believe that the technology review required under section 112(d)(6) is applicable to this source category.

*2. Risk Analysis Assumptions*

*Comment:* One commenter stated that the methodology used in the gasoline distribution risk assessment sets a poor precedent for future residual risk determinations that must be carried out for other source categories, recommending that, because there is no mechanism to revisit the section 112(f) assessments, the risk assessment be corrected to account for reasonably foreseeable changes that could result in increased risk.

*Response:* We disagree with the commenter's assertions that there is no mechanism to revisit risks from the source category and that the risk assessment must include consideration of foreseeable changes that may occur in the future. We have the authority to revisit (and revise, if necessary) any rulemaking if there is sufficient evidence that changes within the affected industry or significant improvements to science suggests the public is exposed to significant increases in risk as compared to the risk assessment prepared for the rulemaking (*e.g.*, CAA section 301).

*Comment:* One commenter stated that the use of a number of overly conservative assumptions make the modeling results more conservative than necessary and do not accurately reflect reality. Another commenter also pointed out these same conservative assumptions and stated that ''the conservative level of analysis determined that the risk was acceptable, and thus, there was no need to go further with the analysis.''

*Response:* We agree with the second commenter. Several assumptions mentioned by the commenters as conservative are used in the risk assessment because the specific intent of that risk assessment is to perform an initial screening analysis. If this initial conservative risk assessment predicts negligible levels of risk, then no further analysis or action would be required. However, if it showed unacceptable risk, then additional data would be collected and incorporated into a refined analysis so that the results would more accurately reflect the true risks posed by the source category. Our position is that this type of screening approach is valuable because it allows us to focus resources on source categories that potentially pose unacceptable risks versus those that pose clearly negligible risks.

Other assumptions mentioned by commenters as being overly conservative include the use of the 24 hours a day, 7 days a week, 70-year exposure duration for determining maximum individual risk (MIR) and the use of a Hazard Index threshold of 1.0. In the final Coke Oven Batteries NESHAP, we stated that we are currently working on additional revisions to refine the residual risk analysis. A more realistic assessment of population mobility is part of this effort (70 FR 20004, April 15, 2005). Our rationale for the use of both the exposure duration and the Hazard Index threshold that were used in this assessment is fully addressed in the final Coke Oven Batteries NESHAP (70 FR 19999–20000, April 15, 2005).

*Comment:* Two commenters recommended that the impacts be recalculated based on concentrations at the property line and beyond, rather than at the centroid of the most highly-exposed census block; because census blocks can be large geographically, the maximum point of impact can be far from the centroid and, thus, the use of the census block centroid does not take into account the maximum exposed individual who may live adjacent to the fence-line.

*Response:* In a national-scale assessment of lifetime inhalation exposures and health risks from a category of facilities, it is appropriate to identify exposure locations where an individual may reasonably be expected to spend a majority of his or her lifetime. Further, it is appropriate to use census block information on where people actually reside, rather than points on a fence-line, to locate the estimation of exposures and risks to individuals living near such facilities. This is the approach that we took for this analysis to predict the MIR.

Census blocks are the finest resolution available for the nationwide population data set (as developed by the United States Census Bureau); each is typically comprised of approximately 40 people or about 10 households. In our risk assessments, we use the geographic centroid of each census block containing at least one person to represent the location where all the people in that census block live. The census block centroid with the highest estimated exposure then becomes the location of maximum exposure, and the entire population of that census block experiences the MIR. In some cases, since actual residence locations may be closer to or farther from facility emission points, this may result in an overestimate or underestimate of the actual chronic risks. However, given the relatively small dimensions of census blocks in densely-populated areas and

the relatively large number of sources being assessed for any given source category, these uncertainties are small and do not bias our estimates of MIR for a source category.

*Comment:* Two commenters recommended that the risk assessment be based on potential emissions rather than on only actual reported emissions, stating that facility emissions could increase over time and that determining risk based on actual emissions does not address the potential risk to the public. One commenter stated that major source HAP thresholds are based on maximum potential to emit and that air agencies issue permits based on potential emissions, further stating that limiting the scope of the risk evaluation to actual emissions is inconsistent with the CAA section 112 rules.

*Response:* Our position on the use of both allowable and actual emissions is fully discussed in the final Coke Oven Batteries NESHAP (70 FR 19998–19999, April 15, 2005). We used reported emissions (from the National Emissions Inventory database) for the gasoline distribution risk analysis. The reported emissions are a mix of actual, allowable, and potential emissions, but we do not have the necessary information to distinguish between the types of data reported. While we generally recognize that most facilities overcomply with the MACT requirements (thus, actual emissions are lower than allowable), we do not have data to determine the degree of overcompliance that facilities are achieving or reporting. However, the possible inclusion of actual emissions in our analysis is not significant enough to change the results even if we could more accurately account for it. For example, if the modeled emissions doubled because of our use of some reported actual emissions, the regulatory decision would be the same as proposed.

*Comment:* One commenter recommended that the effects of building downwash be included in the risk assessment. The commenter stated that downwind concentrations from a point source vary and that the concentrations are skewed highest close to a source when it is affected by building downwash.

*Response:* While the effects of building downwash are not specifically accounted for in the model (Human Exposure Model—Screen) used, these effects generally occur only very close to the buildings or structures from which emissions emanate, and in most cases, only occur on the property of the facility. Further, for this source category, emissions are from low-level structures (*i.e.*, storage tanks and tank truck loading racks), and this minimizes the impacts of downwash. In determining the MIR for this source category, we note that the locations of the census block centroids where the risks are maximum are well beyond the zone of influence of any building downwash effects.

*Comment:* One commenter stated that the cost-effectiveness analysis should have been performed in terms of dollars per cancer incidence reduced (rather than dollars per ton of emissions reduced) because it takes into account toxicity and exposure.

*Response:* Our residual risk decisions are based on the approach in the 1989 benzene decision framework.[1] In that decision, we stated that the level of the MIR, distribution of risk in exposed population, incidence, science policy assumptions, and uncertainties associated with risk measures, and weight of evidence that a pollutant is harmful to health are all important factors which may be considered in the acceptability judgment (first step). In the second step, we again consider all of the health risk and other health information considered in the first step. Beyond that information, additional factors relating to the appropriate level of control will also be considered, including costs and economic impacts of controls, technological feasibility, uncertainties, and any other relevant factors.

For the Gasoline Distribution NESHAP ample margin of safety analysis, we developed cost data for a hypothetical model terminal to apply additional controls because we do not have data on the actual control levels being achieved at real terminals. Thus, we do not have data on the actual emission reductions that could be achieved or on the control costs that real terminals would incur. We examined the hypothetical emission reductions (at best, a 30 percent reduction) that could be achieved through the application of additional controls and the estimated costs of these additional controls.

We found the 30 percent reduction would reduce the highest calculated MIR cancer risk from this source category from about 5 in 1 million to about 3 in 1 million. Given these relatively low risk reductions and lack of data concerning actual controls at real terminals, we did not further consider incidence or change in distribution of risks. The costs and emission reductions of these additional controls were compared to the controls required by the MACT standards and we found the additional costs to be very high compared to the emission reduction of the MACT standards and considering the limited risk reduction these controls would achieve. Thus, our model terminal analysis led us to conclude in our ample margin of safety decision that ''additional control requirements would achieve minimal risk reduction at a very high cost'' (70 FR 46456, August 10, 2005). Thus, while we did not calculate cost effectiveness, we did account for toxicity, exposure, and control costs in our decision, as the commenter recommended.

*3. Conclusions*

*Comment:* One commenter does not believe the current standards for gas distribution facilities protect children and recommended that we consult a children's environmental health toxicologist due to recent research on the risks posed by these facilities.

*Response:* The commenter did not provide or reference a particular research study. Our most recent assessment activity on cancer effects due to early-life exposure is reflected in the ''Supplemental Guidance for Assessing Susceptibility from Early-Life Exposure to Carcinogens'' (EPA/630/R–03/003F, March 2005). The Supplemental Guidance addresses a number of issues pertaining to cancer risks associated with early-life exposures generally, but provides specific guidance on potency adjustments only for carcinogens that have been determined to cause cancer through a mutagenic mode of action. While some recent articles have suggested an association between gasoline vapors and childhood leukemia, the carcinogenic HAP commonly found in gasoline (benzene and naphthalene) have not yet been determined by us to act through a mutagenic mode of action. If we determine in the future that these pollutants do cause cancer by a mutagenic mode of action, and assuming early life exposure, the approximately 60 percent increase in estimated lifetime cancer risk would still result in a risk well below the generally considered acceptable level of 100 in 1 million. In addition, regarding effects other than cancer, EPA Reference Concentration values are designed to be protective of sensitive populations, including children.

[1] Our decisions regarding residual risk in the gasoline distribution and other source categories follows the two-step framework established in the Benzene NESHAP (54 FR 38044, September 14, 1989, National Emission Standards for Hazardous Air Pollutants (NESHAP): Benzene Emissions from Maleic Anhydride Plants, Ethylbenzene/Styrene Plants, Benzene Storage Vessels, Benzene Equipment Leaks, and Coke By Product Recovery Plants). In the Benzene NESHAP, we interpreted and applied the two-step test drawn from the D.C. Circuit Court's Vinyl Chloride opinion.

## IV. Correction to the December 19, 2003 Final Rule

On August 18, 1983, we promulgated Standards of Performance for Bulk Gasoline Terminals (48 FR 37590) and on December 14, 1994, we promulgated National Emission Standards for Gasoline Distribution Facilities (Bulk Gasoline Terminals and Pipeline Breakout Stations) (59 FR 64318). On December 19, 2003, we promulgated final rule amendments in the **Federal Register** (68 FR 70960) for the 1983 standards of performance and 1994 national emission standards. An error was subsequently discovered in a cross-reference in the final rule amendments. Under 40 CFR 63.428, Reporting and Recordkeeping, paragraph (b)(1) refers to 40 CFR 63.425(k). The correct reference is to 40 CFR 63.425(i). Today's final amendment corrects the reference error.

This correction does not affect the substance of the above-noted regulatory action, nor does it change the rights or obligations of any party. Thus, it is proper to issue this notice of final rule corrections without notice and comment. Section 553 of the Administrative Procedure Act, 5 U.S.C. 553(b)(B), provides that, when an agency for good cause finds that notice and public procedure are impracticable, unnecessary, or contrary to the public interest, the agency may issue a rule without providing notice and an opportunity for public comment. We have determined that there is good cause for making today's action final without prior proposal and opportunity for comment because the change to the rule is a minor correction, is noncontroversial, and does not substantively change the agency actions taken in the final rule. Thus, notice and public procedure are unnecessary. We find that this constitutes good cause under 5 U.S.C. 553(b)(B).

## V. Statutory and Executive Order Reviews

### *A. Executive Order 12866: Regulatory Planning and Review*

Under Executive Order 12866 (58 FR 51735, October 4, 1993), we must determine whether the regulatory action is ''significant'' and, therefore, subject to Office of Management and Budget (OMB) review and the requirements of the Executive Order. The Executive 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 government 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.

Pursuant to the terms of Executive Order 12866, OMB has notified EPA that it considers this a ''significant regulatory action'' within the meaning of the Executive Order. We have submitted this action to OMB for review. Changes made in response to OMB suggestions or recommendations will be documented in the public record.

### *B. Paperwork Reduction Act*

This action does not impose any new information collection burden. However, OMB has previously approved the information collection requirements for the national emissions standards under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501, *et seq.*, and has assigned OMB control number 2060–0325, EPA ICR number 1659. 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 are listed in 40 CFR part 9 and 48 CFR chapter 15.

We have established a public docket for this action, which includes the ICR, under Docket ID number EPA–HQ–OAR–2004–0019, which can be found in *http://www.regulations.gov*. Today's final decision will not change the burden estimates from those developed and approved in 1994 for the national emission standards.

### *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 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 final decision on small entities, we have concluded that this action will not have a significant economic impact on a substantial number of small entities. We are taking no further action at this time to revise the national emission standards. Thus, the final decision will not impose any requirements on small entities. Today's final decision on the residual risk assessment and technology review for the national emission standards imposes no additional burden on facilities impacted by the national emission standards.

### *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 by the private sector, of $100 million or more in any 1 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 us 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 regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

We have determined that today's final decision does not contain a Federal mandate that may result in expenditures of $100 million or more to State, local, and tribal governments in the aggregate, or to the private sector in any 1 year. Thus, today's final decision is not subject to the requirements of sections 202 and 205 of the UMRA. In addition, today's final decision does not significantly or uniquely affect small governments because it contains no requirements that apply to such governments or impose obligations upon them. Therefore, today's final decision is not subject to section 203 of the UMRA.

*E. Executive Order 13132: Federalism*

Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' 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.''

Today's final decision 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. Thus, the requirements of the Executive Order do not apply to today's final decision.

*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 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.'' ''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.''

Today's final decision 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. Thus, Executive Order 13175 does not apply to today's final decision.

*G. Executive Order 13045: Protection of Children From Environmental Health & Safety Risks*

Executive Order 13045 (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, we 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.

Today's final decision is not subject to the Executive Order because it is not economically significant as defined in Executive Order 12866, and because, as explained earlier, the Agency does not have reason to believe the environmental health or safety risk addressed by this action present a disproportionate risk to children.

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

Today's final decision is not an economically significant energy action as defined in Executive Order 13211 (66 FR 28355, May 22, 2001) because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Further, we have concluded that today's final decision is not likely to have any adverse energy impacts.

*I. National Technology Transfer and Advancement Act*

Under section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, all Federal agencies are required to use voluntary consensus standards (VCS) in their regulatory and procurement activities unless to do so would be inconsistent with applicable law or otherwise impractical. VCS are technical standards (e.g., materials specifications, test methods, sampling procedures, business practices) developed or adopted by one or more voluntary consensus bodies. The NTTAA requires Federal agencies to provide Congress, through annual reports to OMB, with explanations when the agency does not use available and applicable VCS.

Today's final decision does not involve technical standards. Therefore, the requirements of the NTTAA are not applicable.

*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. We will submit a report containing this final decision and other required information to the United States Senate, the United States House of Representatives, and the Comptroller General of the United States prior to publication of the final decision in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This

action is not a ''major rule'' as defined by 5 U.S.C. 804(2). The final decision becomes effective on April 6, 2006.

**List of Subjects in 40 CFR Part 63**

Environmental protection, Administrative practice and procedures, Air pollution control, Intergovernmental relations, Reporting and recordkeeping requirements.

Dated: March 31, 2006.

**Stephen L. Johnson,**

*Administrator.*

■ For the reasons set out in the preamble, title 40, chapter I, part 63 of the Code of Federal Regulations is amended as follows:

## PART 63—[AMENDED]

■ 1. The authority citation for part 63 continues to read as follows:

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

## Subpart R—[Amended]

■ 2. Section 63.428 is amended by revising paragraph (b)(1) to read as follows:

**§ 63.428 Reporting and recordkeeping.**

* * * * *

(b) * * *

(1) Annual certification testing performed under § 63.425(e) and railcar bubble leak testing performed under § 63.425(i); and

* * * * *

[FR Doc. 06–3315 Filed 4–5–06; 8:45 am]

BILLING CODE 6560–50–P

## DEPARTMENT OF COMMERCE

## National Oceanic and Atmospheric Administration

## 50 CFR Part 229

**[Docket No. 030221039–6089–30; I.D. 032906C]**

## Taking of Marine Mammals Incidental to Commercial Fishing Operations; Atlantic Large Whale Take Reduction Plan (ALWTRP)

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

**ACTION:** Temporary rule.

**SUMMARY:** The Assistant Administrator for Fisheries (AA), NOAA, announces temporary restrictions consistent with the requirements of the ALWTRP's implementing regulations. These regulations apply to lobster trap/pot and anchored gillnet fishermen in an area totaling approximately 1,248 nm² (4,281 km²), east of Chatham, MA, for 15 days. The purpose of this action is to provide protection to an aggregation of northern right whales (right whales).

**DATES:** Effective beginning at 0001 hours April 8, 2006, through 2400 hours April 22, 2006.

**ADDRESSES:** Copies of the proposed and final Dynamic Area Management (DAM) rules, Environmental Assessments (EAs), Atlantic Large Whale Take Reduction Team (ALWTRT) meeting summaries, and progress reports on implementation of the ALWTRP may also be obtained by writing Diane Borggaard, NMFS/Northeast Region, One Blackburn Drive, Gloucester, MA 01930.

**FOR FURTHER INFORMATION CONTACT:** Diane Borggaard, NMFS/Northeast Region, 978–281–9300 x6503; or Kristy Long, NMFS, Office of Protected Resources, 301–713–2322.

**SUPPLEMENTARY INFORMATION:**

### Electronic Access

Several of the background documents for the ALWTRP and the take reduction planning process can be downloaded from the ALWTRP web site at *http://www.nero.noaa.gov/whaletrp/*.

### Background

The ALWTRP was developed pursuant to section 118 of the Marine Mammal Protection Act (MMPA) to reduce the incidental mortality and serious injury of three endangered species of whales (right, fin, and humpback) due to incidental interaction with commercial fishing activities. In addition, the measures identified in the ALWTRP would provide conservation benefits to a fourth species (minke), which are neither listed as endangered nor threatened under the Endangered Species Act (ESA). The ALWTRP, implemented through regulations codified at 50 CFR 229.32, relies on a combination of fishing gear modifications and time/area closures to reduce the risk of whales becoming entangled in commercial fishing gear (and potentially suffering serious injury or mortality as a result).

On January 9, 2002, NMFS published the final rule to implement the ALWTRP's DAM program (67 FR 1133). On August 26, 2003, NMFS amended the regulations by publishing a final rule, which specifically identified gear modifications that may be allowed in a DAM zone (68 FR 51195). The DAM program provides specific authority for NMFS to restrict temporarily on an expedited basis the use of lobster trap/pot and anchored gillnet fishing gear in areas north of 40° N. lat. to protect right whales. Under the DAM program, NMFS may: (1) require the removal of all lobster trap/pot and anchored gillnet fishing gear for a 15-day period; (2) allow lobster trap/pot and anchored gillnet fishing within a DAM zone with gear modifications determined by NMFS to sufficiently reduce the risk of entanglement; and/or (3) issue an alert to fishermen requesting the voluntary removal of all lobster trap/pot and anchored gillnet gear for a 15-day period and asking fishermen not to set any additional gear in the DAM zone during the 15-day period.

A DAM zone is triggered when NMFS receives a reliable report from a qualified individual of three or more right whales sighted within an area (75 nm² (139 km²)) such that right whale density is equal to or greater than 0.04 right whales per nm² (1.85 km²). A qualified individual is an individual ascertained by NMFS to be reasonably able, through training or experience, to identify a right whale. Such individuals include, but are not limited to, NMFS staff, U.S. Coast Guard and Navy personnel trained in whale identification, scientific research survey personnel, whale watch operators and naturalists, and mariners trained in whale species identification through disentanglement training or some other training program deemed adequate by NMFS. A reliable report would be a credible right whale sighting.

On March 24, 2006, an aerial survey reported a sighting of fifteen right whales in the proximity 41° 34′N. lat. and 69° 33′W. long. This position lies east of Chatham, MA. After conducting an investigation, NMFS ascertained that the report came from a qualified individual and determined that the report was reliable. Thus, NMFS has received a reliable report from a qualified individual of the requisite right whale density to trigger the DAM provisions of the ALWTRP.

Once a DAM zone is triggered, NMFS determines whether to impose restrictions on fishing and/or fishing gear in the zone. This determination is based on the following factors, including but not limited to: the location of the DAM zone with respect to other fishery closure areas, weather conditions as they relate to the safety of human life at sea, the type and amount of gear already present in the area, and a review of recent right whale entanglement and mortality data.

NMFS has reviewed the factors and management options noted above relative to the DAM under consideration. As a result of this review, NMFS prohibits lobster trap/pot and

anchored gillnet gear in this area during the 15-day restricted period unless it is modified in the manner described in this temporary rule.

The DAM Zone is bound by the following coordinates:

41° 45′N., 69° 55.8′W. (NW Corner)
41° 45′N., 69° 33′W.
41° 44′N., 69° 36′W.
41° 11′N., 69° 09′W.
41° 11′N., 70° 01′W.
41° 14′N., 70° 01′W.
41° 22′N., 70° 01′W.
41° 40′N., 70° 01′W.
41° 45′N., 69° 55.8′W. (NW Corner)

In addition to those gear modifications currently implemented under the ALWTRP at 50 CFR 229.32, the following gear modifications are required in the DAM zone. If the requirements and exceptions for gear modification in the DAM zone, as described below, differ from other ALWTRP requirements for any overlapping areas and times, then the more restrictive requirements will apply in the DAM zone.

**Lobster Trap/Pot Gear**

Fishermen utilizing lobster trap/pot gear within the portion of Northern Inshore State Lobster Waters and Northern Nearshore Lobster Waters Area that overlap with the DAM zone are required to utilize all of the following gear modifications while the DAM zone is in effect:

1. Groundlines must be made of either sinking or neutrally buoyant line. Floating groundlines are prohibited;
2. All buoy lines must be made of either sinking or neutrally buoyant line, except the bottom portion of the line, which may be a section of floating line not to exceed one-third the overall length of the buoy line;
3. Fishermen are allowed to use two buoy lines per trawl; and
4. A weak link with a maximum breaking strength of 600 lb (272.4 kg) must be placed at all buoys.

Fishermen utilizing lobster trap/pot gear within the portion of the Offshore Lobster Waters Area that overlap with the DAM zone are required to utilize all of the following gear modifications while the DAM zone is in effect:

1. Groundlines must be made of either sinking or neutrally buoyant line. Floating groundlines are prohibited;
2. All buoy lines must be made of either sinking or neutrally buoyant line, except the bottom portion of the line, which may be a section of floating line not to exceed one-third the overall length of the buoy line;
3. Fishermen are allowed to use two buoy lines per trawl; and
4. A weak link with a maximum breaking strength of 1,500 lb (680.4 kg) must be placed at all buoys.

**Anchored Gillnet Gear**

Fishermen utilizing anchored gillnet gear within portions of Great South Channel Sliver Area and Other Northeast Gillnet Waters Area that overlap with the DAM zone are required to utilize all the following gear modifications while the DAM zone is in effect:

1. Groundlines must be made of either sinking or neutrally buoyant line. Floating groundlines are prohibited;
2. All buoy lines must be made of either sinking or neutrally buoyant line, except the bottom portion of the line, which may be a section of floating line not to exceed one-third the overall length of the buoy line;
3. Fishermen are allowed to use two buoy lines per string;
4. Each net panel must have a total of five weak links with a maximum breaking strength of 1,100 lb (498.8 kg). Net panels are typically 50 fathoms (91.4 m) in length, but the weak link requirements would apply to all variations in panel size. These weak links must include three floatline weak links. The placement of the weak links on the floatline must be: one at the center of the net panel and one each as close as possible to each of the bridle ends of the net panel. The remaining two weak links must be placed in the center of each of the up and down lines at the panel ends;
5. A weak link with a maximum breaking strength of 1,100 lb (498.8 kg) must be placed at all buoys; and
6. All anchored gillnets, regardless of the number of net panels, must be securely anchored with the holding power of at least a 22 lb (10.0 kg) Danforth-style anchor at each end of the net string.

The restrictions will be in effect beginning at 0001 hours April 8, 2006, through 2400 hours April 22, 2006, unless terminated sooner or extended by NMFS through another notification in the **Federal Register**.

The restrictions will be announced to state officials, fishermen, ALWTRT members, and other interested parties through e-mail, phone contact, NOAA website, and other appropriate media immediately upon issuance of this final rule by the AA.

**Classification**

In accordance with section 118(f)(9) of the MMPA, the Assistant Administrator (AA) for Fisheries has determined that this action is necessary to implement a take reduction plan to protect North Atlantic right whales.

Environmental Assessments for the DAM program were prepared on December 28, 2001, and August 6, 2003. This action falls within the scope of the analyses of these EAs, which are available from the agency upon request.

NMFS provided prior notice and an opportunity for public comment on the regulations establishing the criteria and procedures for implementing a DAM zone. Providing prior notice and opportunity for comment on this action, pursuant to those regulations, would be impracticable because it would prevent NMFS from executing its functions to protect and reduce serious injury and mortality of endangered right whales. The regulations establishing the DAM program are designed to enable the agency to help protect unexpected concentrations of right whales. In order to meet the goals of the DAM program, the agency needs to be able to create a DAM zone and implement restrictions on fishing gear as soon as possible once the criteria are triggered and NMFS determines that a DAM restricted zone is appropriate. If NMFS were to provide prior notice and an opportunity for public comment upon the creation of a DAM restricted zone, the aggregated right whales would be vulnerable to entanglement which could result in serious injury and mortality. Additionally, the right whales would most likely move on to another location before NMFS could implement the restrictions designed to protect them, thereby rendering the action obsolete. Therefore, pursuant to 5 U.S.C. 553(b)(B), the AA finds that good cause exists to waive prior notice and an opportunity to comment on this action to implement a DAM restricted zone to reduce the risk of entanglement of endangered right whales in commercial lobster trap/pot and anchored gillnet gear as such procedures would be impracticable.

For the same reasons, the AA finds that, under 5 U.S.C. 553(d)(3), good cause exists to waive the 30-day delay in effective date. If NMFS were to delay for 30 days the effective date of this action, the aggregated right whales would be vulnerable to entanglement, which could cause serious injury and mortality. Additionally, right whales would likely move to another location between the time NMFS approved the action creating the DAM restricted zone and the time it went into effect, thereby rendering the action obsolete and ineffective. Nevertheless, NMFS recognizes the need for fishermen to have time to either modify or remove (if not in compliance with the required

restrictions) their gear from a DAM zone once one is approved. Thus, NMFS makes this action effective 2 days after the date of publication of this document in the **Federal Register**. NMFS will also endeavor to provide notice of this action to fishermen through other means as soon as this final rule is issued by the AA, thereby providing approximately 3 additional days of notice while the Office of the **Federal Register** processes the document for publication.

NMFS determined that the regulations establishing the DAM program and actions such as this one taken pursuant to those regulations are consistent to the maximum extent practicable with the enforceable policies of the approved coastal management program of the U.S. Atlantic coastal states. This determination was submitted for review by the responsible state agencies under section 307 of the Coastal Zone Management Act. Following state review of the regulations creating the DAM program, no state disagreed with NMFS' conclusion that the DAM program is consistent to the maximum extent practicable with the enforceable policies of the approved coastal management program for that state.

The DAM program under which NMFS is taking this action contains policies with federalism implications warranting preparation of a federalism assessment under Executive Order 13132. Accordingly, in October 2001 and March 2003, the Assistant Secretary for Intergovernmental and Legislative Affairs, Department of Commerce, provided notice of the DAM program and its amendments to the appropriate elected officials in states to be affected by actions taken pursuant to the DAM program. Federalism issues raised by state officials were addressed in the final rules implementing the DAM program. A copy of the federalism Summary Impact Statement for the final rules is available upon request (**ADDRESSES**).

The rule implementing the DAM program has been determined to be not significant under Executive Order 12866.

**Authority:** 16 U.S.C. 1361 *et seq.* and 50 CFR 229.32(g)(3).

Dated: March 31, 2006.

**James W. Balsiger,**

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

[FR Doc. 06–3284 Filed 3–31–06; 4:15 pm]

**BILLING CODE 3510–22–S**

## DEPARTMENT OF COMMERCE

## National Oceanic and Atmospheric Administration

## 50 CFR Part 229

**[Docket No. 030221039–6088–29; I.D. 032906B]**

## Taking of Marine Mammals Incidental to Commercial Fishing Operations; Atlantic Large Whale Take Reduction Plan (ALWTRP)

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

**ACTION:** Temporary rule.

**SUMMARY:** The Assistant Administrator for Fisheries (AA), NOAA, announces temporary restrictions consistent with the requirements of the ALWTRP's implementing regulations. These regulations apply to lobster trap/pot and anchored gillnet fishermen in an area totaling approximately 1,514 nm$^2$ ( 5,193 km$^2$), southeast of the Great South Channel, for 15 days. The purpose of this action is to provide protection to an aggregation of northern right whales (right whales).

**DATES:** Effective beginning at 0001 hours April 8, 2006, through 2400 hours April 22, 2006.

**ADDRESSES:** Copies of the proposed and final Dynamic Area Management (DAM) rules, Environmental Assessments (EAs), Atlantic Large Whale Take Reduction Team (ALWTRT) meeting summaries, and progress reports on implementation of the ALWTRP may also be obtained by writing Diane Borggaard, NMFS/Northeast Region, One Blackburn Drive, Gloucester, MA 01930.

**FOR FURTHER INFORMATION CONTACT:** Diane Borggaard, NMFS/Northeast Region, 978–281–9300 x6503; or Kristy Long, NMFS, Office of Protected Resources, 301–713–2322.

**SUPPLEMENTARY INFORMATION:**

### Electronic Access

Several of the background documents for the ALWTRP and the take reduction planning process can be downloaded from the ALWTRP web site at *http://www.nero.noaa.gov/whaletrp/*.

### Background

The ALWTRP was developed pursuant to section 118 of the Marine Mammal Protection Act (MMPA) to reduce the incidental mortality and serious injury of three endangered species of whales (right, fin, and humpback) due to incidental interaction with commercial fishing activities. In addition, the measures identified in the ALWTRP would provide conservation benefits to a fourth species (minke), which are neither listed as endangered nor threatened under the Endangered Species Act (ESA). The ALWTRP, implemented through regulations codified at 50 CFR 229.32, relies on a combination of fishing gear modifications and time/area closures to reduce the risk of whales becoming entangled in commercial fishing gear (and potentially suffering serious injury or mortality as a result).

On January 9, 2002, NMFS published the final rule to implement the ALWTRP's DAM program (67 FR 1133). On August 26, 2003, NMFS amended the regulations by publishing a final rule, which specifically identified gear modifications that may be allowed in a DAM zone (68 FR 51195). The DAM program provides specific authority for NMFS to restrict temporarily on an expedited basis the use of lobster trap/pot and anchored gillnet fishing gear in areas north of 40° N. lat. to protect right whales. Under the DAM program, NMFS may: (1) require the removal of all lobster trap/pot and anchored gillnet fishing gear for a 15–day period; (2) allow lobster trap/pot and anchored gillnet fishing within a DAM zone with gear modifications determined by NMFS to sufficiently reduce the risk of entanglement; and/or (3) issue an alert to fishermen requesting the voluntary removal of all lobster trap/pot and anchored gillnet gear for a 15–day period and asking fishermen not to set any additional gear in the DAM zone during the 15–day period.

A DAM zone is triggered when NMFS receives a reliable report from a qualified individual of three or more right whales sighted within an area (75 nm$^2$ (139 km$^2$)) such that right whale density is equal to or greater than 0.04 right whales per nm$^2$ (1.85 km$^2$). A qualified individual is an individual ascertained by NMFS to be reasonably able, through training or experience, to identify a right whale. Such individuals include, but are not limited to, NMFS staff, U.S. Coast Guard and Navy personnel trained in whale identification, scientific research survey personnel, whale watch operators and naturalists, and mariners trained in whale species identification through disentanglement training or some other training program deemed adequate by NMFS. A reliable report would be a credible right whale sighting.

On March 24, 2006, an aerial survey reported a sighting of six right whales in the proximity 41° 16′ N. lat. and 67° 34′

W. long. This position lies southeast of the Great South Channel. After conducting an investigation, NMFS ascertained that the report came from a qualified individual and determined that the report was reliable. Thus, NMFS has received a reliable report from a qualified individual of the requisite right whale density to trigger the DAM provisions of the ALWTRP.

Once a DAM zone is triggered, NMFS determines whether to impose restrictions on fishing and/or fishing gear in the zone. This determination is based on the following factors, including but not limited to: the location of the DAM zone with respect to other fishery closure areas, weather conditions as they relate to the safety of human life at sea, the type and amount of gear already present in the area, and a review of recent right whale entanglement and mortality data.

NMFS has reviewed the factors and management options noted above relative to the DAM under consideration. As a result of this review, NMFS prohibits lobster trap/pot and anchored gillnet gear in this area during the 15–day restricted period unless it is modified in the manner described in this temporary rule.

The DAM Zone is bound by the following coordinates:

41° 35′ N., 68° 00′ W. (NW Corner)
41° 35′ N., 67° 07′ W.
40° 57′ N., 67° 07′ W.
40° 57′ N., 68° 00′ W.
41° 35′ N., 68° 00′ W. (NW Corner)

In addition to those gear modifications currently implemented under the ALWTRP at 50 CFR 229.32, the following gear modifications are required in the DAM zone. If the requirements and exceptions for gear modification in the DAM zone, as described below, differ from other ALWTRP requirements for any overlapping areas and times, then the more restrictive requirements will apply in the DAM zone. Special note for gillnet fisherman: A portion of this DAM zone overlaps the year-round Closure Area II for Northeast Multispecies found at 50 CFR 648.81(b). Due to this closure, sink gillnet gear is prohibited from this portion of the DAM zone.

**Lobster Trap/Pot Gear**

Fishermen utilizing lobster trap/pot gear within the portion of the Offshore Lobster Waters Area that overlap with the DAM zone are required to utilize all of the following gear modifications while the DAM zone is in effect:

1. Groundlines must be made of either sinking or neutrally buoyant line. Floating groundlines are prohibited;
2. All buoy lines must be made of either sinking or neutrally buoyant line, except the bottom portion of the line, which may be a section of floating line not to exceed one-third the overall length of the buoy line;
3. Fishermen are allowed to use two buoy lines per trawl; and
4. A weak link with a maximum breaking strength of 1,500 lb (680.4 kg) must be placed at all buoys.

**Anchored Gillnet Gear**

Fishermen utilizing anchored gillnet gear within portions of the Other Northeast Gillnet Waters Area that overlap with the DAM zone are required to utilize all the following gear modifications while the DAM zone is in effect:

1. Groundlines must be made of either sinking or neutrally buoyant line. Floating groundlines are prohibited;
2. All buoy lines must be made of either sinking or neutrally buoyant line, except the bottom portion of the line, which may be a section of floating line not to exceed one-third the overall length of the buoy line;
3. Fishermen are allowed to use two buoy lines per string;
4. Each net panel must have a total of five weak links with a maximum breaking strength of 1,100 lb (498.8 kg). Net panels are typically 50 fathoms (91.4 m) in length, but the weak link requirements would apply to all variations in panel size. These weak links must include three floatline weak links. The placement of the weak links on the floatline must be: one at the center of the net panel and one each as close as possible to each of the bridle ends of the net panel. The remaining two weak links must be placed in the center of each of the up and down lines at the panel ends;
5. A weak link with a maximum breaking strength of 1,100 lb (498.8 kg) must be placed at all buoys; and
6. All anchored gillnets, regardless of the number of net panels, must be securely anchored with the holding power of at least a 22 lb (10.0 kg) Danforth-style anchor at each end of the net string.

The restrictions will be in effect beginning at 0001 hours April 8, 2006, through 2400 hours April 22, 2006, unless terminated sooner or extended by NMFS through another notification in the **Federal Register**.

The restrictions will be announced to state officials, fishermen, ALWTRT members, and other interested parties through e-mail, phone contact, NOAA website, and other appropriate media immediately upon issuance of this final rule by the AA.

**Classification**

In accordance with section 118(f)(9) of the MMPA, the Assistant Administrator (AA) for Fisheries has determined that this action is necessary to implement a take reduction plan to protect North Atlantic right whales.

Environmental Assessments for the DAM program were prepared on December 28, 2001, and August 6, 2003. This action falls within the scope of the analyses of these EAs, which are available from the agency upon request.

NMFS provided prior notice and an opportunity for public comment on the regulations establishing the criteria and procedures for implementing a DAM zone. Providing prior notice and opportunity for comment on this action, pursuant to those regulations, would be impracticable because it would prevent NMFS from executing its functions to protect and reduce serious injury and mortality of endangered right whales. The regulations establishing the DAM program are designed to enable the agency to help protect unexpected concentrations of right whales. In order to meet the goals of the DAM program, the agency needs to be able to create a DAM zone and implement restrictions on fishing gear as soon as possible once the criteria are triggered and NMFS determines that a DAM restricted zone is appropriate. If NMFS were to provide prior notice and an opportunity for public comment upon the creation of a DAM restricted zone, the aggregated right whales would be vulnerable to entanglement which could result in serious injury and mortality. Additionally, the right whales would most likely move on to another location before NMFS could implement the restrictions designed to protect them, thereby rendering the action obsolete. Therefore, pursuant to 5 U.S.C. 553(b)(B), the AA finds that good cause exists to waive prior notice and an opportunity to comment on this action to implement a DAM restricted zone to reduce the risk of entanglement of endangered right whales in commercial lobster trap/pot and anchored gillnet gear as such procedures would be impracticable.

For the same reasons, the AA finds that, under 5 U.S.C. 553(d)(3), good cause exists to waive the 30–day delay in effective date. If NMFS were to delay for 30 days the effective date of this action, the aggregated right whales would be vulnerable to entanglement, which could cause serious injury and mortality. Additionally, right whales would likely move to another location between the time NMFS approved the action creating the DAM restricted zone

and the time it went into effect, thereby rendering the action obsolete and ineffective. Nevertheless, NMFS recognizes the need for fishermen to have time to either modify or remove (if not in compliance with the required restrictions) their gear from a DAM zone once one is approved. Thus, NMFS makes this action effective 2 days after the date of publication of this document in the **Federal Register**. NMFS will also endeavor to provide notice of this action to fishermen through other means as soon as this final rule is issued by the AA, thereby providing approximately 3 additional days of notice while the Office of the **Federal Register** processes the document for publication.

NMFS determined that the regulations establishing the DAM program and actions such as this one taken pursuant to those regulations are consistent to the maximum extent practicable with the enforceable policies of the approved coastal management program of the U.S. Atlantic coastal states. This determination was submitted for review by the responsible state agencies under section 307 of the Coastal Zone Management Act. Following state review of the regulations creating the DAM program, no state disagreed with NMFS' conclusion that the DAM program is consistent to the maximum extent practicable with the enforceable policies of the approved coastal management program for that state.

The DAM program under which NMFS is taking this action contains policies with federalism implications warranting preparation of a federalism assessment under Executive Order 13132. Accordingly, in October 2001 and March 2003, the Assistant Secretary for Intergovernmental and Legislative Affairs, Department of Commerce, provided notice of the DAM program and its amendments to the appropriate elected officials in states to be affected by actions taken pursuant to the DAM program. Federalism issues raised by state officials were addressed in the final rules implementing the DAM program. A copy of the federalism Summary Impact Statement for the final rules is available upon request (**ADDRESSES**).

The rule implementing the DAM program has been determined to be not significant under Executive Order 12866.

**Authority:** 16 U.S.C. 1361 *et seq.* and 50 CFR 229.32(g)(3).

Dated: March 31, 2006.

**James W. Balsiger,**

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

[FR Doc. 06–3285 Filed 3–31–06; 4:15 pm]

**BILLING CODE 3510–22–S**

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## DEPARTMENT OF COMMERCE

## National Oceanic and Atmospheric Administration

## 50 CFR Part 679

**[Docket No. 050607152-6070-02; I.D. 052605B]**

**RIN 0648–AT04**

## Fisheries of the Exclusive Economic Zone Off Alaska; Groundfish Retention Standard

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

**ACTION:** Final rule.

**SUMMARY:** NMFS issues a final rule to implement a groundfish retention standard (GRS) program in the Bering Sea and Aleutian Island management area (BSAI) for trawl catcher/processor vessels (C/Ps) that are 125 ft (38.1 m) length overall (LOA) or greater and that are not listed American Fisheries Act (AFA) catcher/processors referred to throughout this rule as non-AFA trawl C/Ps. This action is necessary to reduce bycatch and improve utilization of groundfish harvested by these non-AFA trawl C/Ps. This action is intended to promote the management objectives of the Improved Retention/Improved Utilization (IRIU) program, the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area (FMP), and the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act).

**DATES:** Effective on January 20, 2008.

**ADDRESSES:** Copies of the Environmental Assessment/Regulatory Impact Review/Final Regulatory Flexibility Analysis (EA/RIR/FRFA) prepared for this action may be obtained from NMFS, Alaska Region, P.O. Box 21668, Juneau, Alaska, 99802–1668, Attn: Records Officer, or from the NMFS Alaska Region website at *www.fakr.noaa.gov*.

Written comments regarding the burden-hour estimates or other aspects of the collection-of-information requirements contained in this final rule may be submitted to NMFS, Alaska Region, and by email to *David_Rostker@omb.eop.gov* or fax to 202–395–7285.

**FOR FURTHER INFORMATION CONTACT:** Jason Anderson at *jason.anderson@noaa.gov* or Jeff Hartman at *jeff.hartman@noaa.gov*. Either person may be contacted at (907) 586–7228.

**SUPPLEMENTARY INFORMATION:**

### Background

NMFS manages the U.S. groundfish fisheries of the BSAI in the Exclusive Economic Zone under the FMP. The North Pacific Fishery Management Council (Council) prepared the FMP pursuant to the Magnuson-Stevens Act. Regulations implementing the FMP appear at 50 CFR part 679. General regulations that pertain to U.S. fisheries appear at subpart H of 50 CFR part 600.

This action was adopted by the Council to decrease regulatory and economic discards and increase catch utilization in the BSAI groundfish fisheries. Amendment 49 to the FMP (62 FR 63880, January 3, 1998), establishes retention and utilization standards for pollock and Pacific cod. In June 2003, the Council adopted Amendment 79 to the FMP, which authorizes groundfish retention standards as a tool for further increasing the retention and utilization of groundfish and responding to bycatch reduction goals described in National Standard 9. A notice of availability for Amendment 79 was published in the **Federal Register** on June 2, 2005 (70 FR 32287), and Amendment 79 was approved by the Secretary of Commerce on August 31, 2005.

Also in June 2003, the Council adopted a GRS program for all non-AFA trawl C/Ps that are used to harvest BSAI groundfish. A proposed rule for the GRS program was published in the **Federal Register** on June 16, 2005 (70 FR 35054). The public comment period for the proposed rule ended on August 1, 2005. NMFS received 19 letters of comment and 38 discrete comments on the proposed rule. These comments are summarized and responded to below under Response to Comments.

The Council's analysis of groundfish retention rates in the BSAI groundfish fishery revealed that vessels in the non-AFA trawl catcher/processor sector (all lengths) had the lowest retained catch rates of any groundfish trawl fishery in the BSAI. The EA/RIR/FRFA for the GRS program reports that non-AFA trawl C/Ps had a retained groundfish catch rate of 75.1 percent in 2001 and accounted for 67 percent of all discards in the BSAI. However, during the same year in the BSAI, AFA trawl catcher/

processors had a retained groundfish catch rate of 99.1 percent, pot catcher/processors had a retained groundfish catch rate of 93.5 percent and longline catcher/processors had a retained groundfish catch rate of 85.4 percent. Since 2001, non-AFA trawl C/P retention rates have declined slightly while retention rates from other sectors have remained relatively stable. For example, in 2004, non-AFA trawl C/Ps had a retained groundfish catch rate of 67.6 percent. For these reasons, the GRS program focuses on non-AFA trawl C/Ps for improved groundfish retention rates and reduced bycatch.

The Council specified that regulations implementing this GRS program would only apply to non-AFA trawl C/Ps that are 125 ft (38.1 m) LOA or greater while fishing in the BSAI because trawl catcher/processor vessels that are less than 125 ft (38.1m) LOA account for a relatively small portion of the sector's total catch and total discard. In 2004, non-AFA trawl C/Ps less than 125 ft (38.1 m) LOA accounted for only 17 percent of the total catch of all non-AFA trawl C/Ps and 24 percent of the discarded catch. Additionally, because non-AFA trawl C/Ps under 125 ft (38.1 m) LOA have relatively smaller factory space, scale and sampling station requirements could reduce processing capacity relative to larger vessels. Displacing a crew member to accommodate an additional observer could also reduce processing capacity for smaller vessels with limited space for crew. Given the relatively small contribution to this sector's overall harvest and recognizing that compliance costs associated with observers and scale monitoring requirements would be relatively higher for vessels less than 125 ft (38.1 m) LOA, non-AFA trawl catcher/processor vessels that are less than 125 ft (38.1 m) LOA were excluded from the GRS program. The existing management background and explanation of the need for this action were described in greater detail in the preamble to the proposed rule (70 FR 35054, June 16, 2005). The following provides a summary of the approved GRS program.

**GRS Program**

This action implements an annual GRS for non-AFA trawl C/Ps. The percent of groundfish retained will be a percent calculated as a specified ratio of the round-weight equivalent of total retained groundfish to total groundfish catch. The owners or operators of these vessels will be required to meet this standard on an annual basis. The use of total groundfish catch in the denominator of the calculation, instead of total catch, is intended to avoid a potential incentive to target groundfish species closed to directed fishing and to recognize that retention of non-groundfish often is either impractical or prohibited by regulation. Further, the catch of groundfish that are required to be treated as prohibited species under 50 CFR 679.20(d)(2) will be removed from the GRS calculation for individual vessels. By removing groundfish that are in prohibited species status, vessel operators will not be held accountable for retaining catch that they are required to discard. Groundfish species that are closed to directed fishing will be included in the calculation for percent of groundfish retained, because species taken incidental to target species may be retained up to the maximum retainable amounts established in regulations at § 679.27(c). Including these species in the GRS calculation will provide an incentive to reduce incidental catch while providing flexibility to catch target species.

This action also requires non-AFA trawl C/Ps to meet a 15 percent utilization standard for all retained groundfish species listed in Table 2a to part 679 that are used in the calculation for percent of retained groundfish. For each groundfish species, the total weight of retained products must equal or exceed 15 percent of the round-weight catch of each species during a fishing trip.

**Monitoring and Enforcement of the GRS**

The GRS will be enforced on an individual vessel basis as opposed to a sector basis, so that those vessels that fail to meet the standard could not affect fishing activity by the rest of the non-AFA trawl C/Ps. All regulated vessels will be required to use NMFS-approved scales to determine the weight of total catch and either obtain sufficient observer coverage to ensure every haul is observed for verification that all fish are weighed, or use an alternative processing plan approved by NMFS. Each vessel will be required to provide a single location for observers to collect samples to reduce the potential of sample bias. Observer sampling of each haul is necessary to determine the percentage of the total catch that is comprised of groundfish. This information will be used to estimate total groundfish weight used in the denominator of the GRS calculation. The round weight of retained groundfish catch will be calculated using NMFS standard product recovery rates (PRRs) set forth in regulations at Table 3 to part 679. For each product/species combination, retained tonnage will be equal to primary product tonnage divided by the applicable PRR. For primary products that do not have a PRR specified in Table 3, NMFS will use best available data until a PRR can be established in regulation. Since retained groundfish must meet minimum utilization requirements at § 679.27(i), any primary product with a PRR less than 15 percent of the total weight of retained or lawfully transferred products produced from catch or receipt of that species will not comply with this action.

Mixing of catch from two or more hauls prior to sampling by an observer will be prohibited. This activity is prohibited because all hauls must be available to be observed and sampled, and it is not possible to obtain a discrete sample if hauls are mixed. Non-AFA trawl C/Ps occasionally mix catch from two or more hauls prior to sampling by an observer. However, the percent of groundfish retained under the GRS will be calculated based on the amount of groundfish in each haul. To determine the amount of groundfish in each haul, each haul will be sampled by an observer for species composition. The proportion of groundfish in each species composition sample will be extrapolated to the total haul weight. NMFS would not be able to determine accurately the total haul weight of groundfish or species composition for a specific haul for purposes of calculating the percent of retained groundfish if two or more hauls are mixed.

Recent enforcement actions concerning intentional presorting of catch to bias observed catch rates of Pacific halibut document the incentive for biasing observer samples to optimize groundfish catch relative to constraining PSC or other groundfish catch. However, NMFS expects that opportunities to bias observer samples will be reduced under the GRS program in comparison with the status quo because of the enhanced monitoring provisions that are established under this rule. These include observer sampling space and catch access provisions that will allow observers to monitor all catch between a holding bin and the scale used to weigh total catch.

Recent enforcement actions also have identified an issue with observers' unwillingness to serve as witnesses in enforcement actions because of inconvenience, cost, and the need for observers to refamiliarize themselves with the data and other records relating to the alleged violation. This could be a particular problem when numerous observers may have information and evidence necessary to prove a violation of the GRS. To address this issue, and

to acknowledge the critical role observers play in effective management and enforcement of Alaska fisheries, NMFS intends to implement a program that provides for payment of a supplementary witness fee to any observer who, at the request of NOAA General Counsel, assists in the prosecution of an enforcement action. This program will mitigate, to some degree, the inconvenience and other costs that may otherwise dissuade an observer from assisting the government in proving its case.

*Authority for Bycatch Reduction, the National Standards and the GRS*

The EA/RIR/FRFA for this action provides information on Magnuson-Stevens Act requirements to reduce bycatch and increase retention of catch. The analysis also highlights the relevance of National Standards 7 and 9 in this action. NMFS has determined that the GRS program balances conservation through reductions in discards (National Standard 9) and minimizes costs where practicable (National Standard 7) by enforcing higher retention rates only on the specific section of the fleet with the largest problem.

Reduction of bycatch for fisheries and other living marine resources has become a national and global concern. For example, on March 6, 2003, NMFS issued a National Bycatch Strategy to address issues related to the management of bycatch within the Nation's fisheries. To provide the authority for programs like the GRS, Congress amended the Magnuson-Stevens Act to require each fishery management plan approved by the Secretary to ''establish a standardized reporting methodology to assess the amount and type of bycatch occurring in the fishery,'' and include conservation and management measures that, to the extent practicable and in the following priority: (A) minimize bycatch; and (B) minimize the mortality of bycatch which cannot be avoided.'' Also, NMFS regulations at 50 CFR 600.350(d)(3) provide guidance on factors that should be considered in determining the practicability of a particular management action to minimize bycatch or the mortality of bycatch. Relevant factors were considered and assessed in the EA/RIR/FRFA prepared for this action and are summarized below.

**Comparing GRS Tradeoffs**

NMFS concluded that progress made in adhering to Magnuson-Stevens Act requirements to reduce bycatch and potential consumer and environmental benefits from improved retention and utilization of groundfish from the GRS program outweighs the costs of enforcement, increased observer coverage, vessel modifications, operational adjustments and recordkeeping and reporting. The EA/RIR/FRFA describes these conclusions relative to conservation goals through reductions in discards (National Standard 9) and minimization of costs where practicable (National Standard 7) by enforcing higher retention rates only on the specific section of the fleet with a recent history of higher discard rates relative to other BSAI trawl groundfish fisheries. The analysis notes that the growing national and regional emphasis on reduction of discards reflects national and regional consumer interest in and potential for non-market, non-consumptive, or environmental benefits of this type of program. The analysis also recognizes the technical difficulty of quantifying those potential benefits. NMFS has determined that implementation of this action imposes reduced compliance costs on industry, as compared to a proposal for full retention of specified flatfish species in the original IRIU program implemented under Amendment 49. Additionally, the EA/RIR/FRFA concludes that a targeted application of the GRS program to the sector of the fleet with the highest discard rates will provide the greatest benefit in bycatch reduction for the costs imposed. At the same time, this action also mitigates the cost of the program on the industry and sector it most directly impacts by excluding non-AFA trawl catcher/processor vessels less than 125 ft (38.1 m) LOA. It also gradually phases in the GRS program over time which allows the affected vessels to schedule and adjust to the retention requirements. This phase-in provides that portion of the industry most impacted by GRS requirements with the opportunity to continue targeting rock sole and yellowfin sole, while working to reduce discards in these fisheries. A recognition of monitoring and enforcement (M&E) costs associated with the GRS program; the time required by the agency to consider public comment and respond in a deliberative manner; the ensuing delay in publication of a final rule; and the time frame within which this sector would incur the M&E costs under a 2007 effective date has led NMFS to implement the GRS in 2008.

Providing additional time for vessel owners to make these changes enhances the flexibility they would have to make arrangements for factory modifications and to plan for associated costs in their business plans. This additional time also would facilitate the design of efficient monitoring space, scale placement, and observer viewing that supports overall catch and bycatch accounting goals.

TABLE 1. GROUNDFISH RETENTION STANDARD

| *GRS Schedule* | *Annual GRS* |
|---|---|
| 2008 | 65% |
| 2009 | 75% |
| 2010 | 80% |
| 2011 and each year after | 85% |

*Description of Regulations Specific to the GRS Program*

Current recordkeeping and reporting regulations at § 679.5(a)(7)(iv)(C)(*3*) require the owners or operators of a catcher/processor using trawl gear to record an estimate of total round weight of groundfish by haul in a NMFS daily cumulative production logbook (DCPL). Other regulations, including those that implement monitoring requirements for the GRS, require all catch on certain catcher/processors to be weighed on NMFS-approved scales. This final rule at § 679.5(a)(7)(iv)(C)(*3*) requires all vessel owners or operators of vessels subject to the GRS to record in the DCPL the total catch scale weight for each haul. This will increase the quality of data available to NMFS managers and provide NMFS enforcement with a tool to verify total catch weight for vessels subject to the GRS program.

Regulations at § 679.7(m) establish prohibitions specific to the GRS program. Regulations at § 679.7(m)(1) prohibit owners or operators from discarding groundfish in an amount greater than allowed under the GRS program.

Regulations at § 679.7(m)(2) prohibit owners or operators from failing to submit required information, submitting inaccurate information, or intentionally submitting false information that relates to the GRS program.

Regulations at § 679.7(m)(3) prohibit an owner or operator from processing or discarding any catch that was not weighed on a NMFS-approved scale that complies with requirements described at § 679.28(b), prohibit the sorting of catch prior to the catch passing over the scale, and require that all catch be available to be sampled by an observer.

Regulations at § 679.7(m)(4) prohibit the processing of any catch by a vessel that does not comply with observer sampling station requirements described at § 679.28(d). Also, as previously

described, regulations at § 679.7(m)(5) prohibit the mixing of catch from two or more hauls.

Regulations at § 679.27(b)(4) describe the specific groundfish species to be used in the GRS calculation. This includes all species listed in Table 2a to 50 CFR part 679, except for listed groundfish species that are in prohibited species status. Groundfish species used in the GRS calculations also are subject to the 15 percent utilization requirements found at § 679.27(i). Regulations at § 679.27(j)(1) specify the vessels that are required to comply with the annual GRS program and the time period for which the GRS will be calculated.

Regulations at § 679.27(j)(2)(i) establish the equation used for the GRS calculation and describe the variables used in each component of the calculation. Also, § 679.27(j)(2)(ii) describes the schedule for increasing GRS percentages from 2007 through 2010 and beyond.

Regulations at § 679.27(j)(3) describe the monitoring requirements for vessels subject to the GRS program. Section 679.27(j)(3)(i) requires vessels subject to the GRS program to comply with minimum observer coverage requirements at § 679.50(c)(6). These requirements are described below. Regulations at § 679.27(j)(3)(ii) require vessels to weigh each haul on a NMFS-approved scale and comply with catch weighing requirements described at § 679.28(b). Also, the vessel owner or operator is required to ensure that the catch from each haul is available to be sampled by an observer from a single location at a single collection point. Regulations at § 679.27(j)(3)(iii) require the owner or operator to provide an observer sampling station that meets requirements described at § 679.28(d).

Vessels required to comply with the GRS program also may operate in areas other than the BSAI. Total retained groundfish is calculated from total fish product divided by the PRR for each species. For purposes of enforcing GRS requirements, it is necessary to separate fish or fish product subject to the GRS program from fish or fish product not subject to the GRS program. Regulations at § 679.27(j)(4) require all vessel owners or operators subject to the GRS program to either (1) offload or transfer all fish or fish product prior to harvesting fish outside of the BSAI; or (2) ensure that the vessel is in compliance with recordkeeping and reporting and monitoring requirements described above and at § 679.5(a)(7)(iv)(C) and § 679.27(j)(3) at all times when fishing outside the BSAI. These requirements will improve the enforceability of this action by ensuring that all hauls used to estimate the GRS are available to be observed, and that a record is created by the vessel operator to compare with the observer record. Regulations at § 679.27(j)(5) require compliance with the monitoring requirements described above and at § 679.27(j)(3) by all vessels required to comply with the GRS program that have BSAI groundfish or groundfish product on board and that receive deliveries of unsorted catch from vessels not required to comply with the GRS program. This requirement is necessary to separate fish or fish product subject to the GRS program from fish or fish product not subject to the GRS program.

Regulations at § 679.50(c)(6)(i) and (c)(6)(ii) describe observer coverage and observer workload requirements for vessels subject to the GRS program. The owner or operator of a vessel subject to the GRS program is required to provide two Level 2 NMFS-certified observers, at least one of which must be certified as a lead Level 2 observer, for each day the vessel is used to harvest or process fish in the BSAI. The owner or operator will be required to provide more than two observers if workload restrictions would otherwise preclude sampling duties. The time required for an observer to complete sampling, data recording, and data communications will not be permitted to exceed 12 hours in a 24 hour period. NMFS may authorize an alternative processing plan that could allow the vessel to carry only one lead Level 2 NMFS-certified observer depending on whether the vessel owner or operator can demonstrate to NMFS that the observer's duties can be completed within these workload restrictions. NMFS will not authorize an alternative processing plan if it would require the observer to divide 12-hour shifts into shifts of less than 6 hours.

**Response to Comments**

NMFS received 19 letters of comment on the proposed rule that contained 38 separate comments. The following summarizes and responds to these comments.

*Comment 1:* Costs associated with the proposed monitoring requirements, combined with other costs of this program, exceed the benefits of the proposed rule. Costly monitoring requirements include: (1) a prohibition on the mixing of hauls; (2) a requirement for observer sampling from a single location; (3) limiting observer sampling to nine hours in a twelve hour shift; and (4) installation and use of a NMFS certified scale, an observer sampling station, and the requirement for observing all hauls. Monitoring measures will have significant, perhaps bankrupting, economic repercussions for affected vessels. In aggregate, the monitoring, installation, and operating costs to the industry, occupational health and safety issues, and timing issues impose greater costs in the context of National Standard 7 than benefits to either the industry or society from this action.

*Response:* NMFS disagrees that this final rule is inconsistent with National Standard 7. National Standard 7 states that conservation and management measures shall, where practicable, minimize costs and avoid unnecessary duplication. Regulatory guidelines for National Standard 7 at 50 CFR 600.340(d) state that the supporting analyses for management measures should demonstrate that the benefits of fishery regulation are real and substantial relative to the added research, administrative, and enforcement costs, as well as costs to the industry of compliance.

NMFS has determined that the benefits from implementation of the GRS program are real and substantial relative to the costs of the program. First, the GRS program will significantly reduce the current level of fishery resource waste that occurs in the non-AFA trawl catcher processor sector through the mandatory increase in retention of groundfish by non-AFA trawl C/Ps and the mandatory production of product from that retained fish. As noted in the EA/RIR/FRFA, there is no conclusive information regarding how many, if any, discarded groundfish survive after being caught in a trawl, and NMFS assumes 100 percent mortality for all groundfish discarded by trawl vessels. Under the GRS program, the amount of groundfish catch that is discarded annually by non-AFA trawl C/Ps will decrease by tens of thousands of metric tons. The EA/AIR/FFA notes that by 2010, retained catch is anticipated to increase by approximately 53,000 metric tons. The GRS will also increase the quantity of groundfish production by non-AFA trawl C/Ps by 20 percent, to approximately 34,300 tons.

Members of the public not directly regulated by this action testified in support of the GRS program at the Council meetings and in public comment on the proposed rule. Federal government resource agencies commenting on the proposed rule (supporting the GRS) expressed interest in reducing waste of living resources, particularly where no products are extracted, used or sold from these groundfish discards. Persons who value

reduction of groundfish discards and waste will perceive that the GRS program has successfully reduced groundfish waste in the BSAI and benefitted society. National Standard 7 explicitly includes consideration of intangible benefits and costs that often are not represented by formal markets. For example, these intangible factors are not typically included in the observed prices of groundfish removed from the BSAI. Moreover, the public interest in reducing the relatively high discard rates within this sector also is reflected in National Standard 9 guidelines which convey specific national values, and benefits for reduction of bycatch and waste in U.S. fisheries. A number of these environmental interest groups and other agencies commented on the proposed rule and the GRS, attesting to the value that exists in reducing bycatch and waste. Bycatch is defined in section 3 of the Magnuson-Stevens Act (16 U.S.C. 1802(2)) and used synonymously with the term ''discards'' in this final rule.

Technical challenges to monetizing societal perceptions of groundfish discards and waste do not mean that society places an insignificant value on wasteful practices in the BSAI. The existence of fisheries and game waste reduction, discard and utilization laws in a number of states is observable evidence that some members of the public perceive that a cost exists to the removal and discard of fish in commercial and recreational fisheries. The States of Washington, New Jersey, Alaska, Oregon, Minnesota, South Dakota and Vermont regulate, to a differing extent, discards of fish and wildlife, roe stripping, or limited utilization of fish. The State of Alaska prohibits the discard of salmon, herring, and groundfish. The State's laws are noted as some of the most restrictive fish and wildlife waste laws in the United States. The State's waste laws impose a cost on fishermen to either avoid catching fish that are not efficient to sell or use, or to catch and deliver the whole fish to a buyer. For example, if market prices for salmon flesh were low, or zero, a fisherman may choose to exit from a fishery in which he or she would otherwise strip roe, dispose of the carcass, and sell the roe because the costs to commercial fishermen to forgo catching fish that they may otherwise roe strip and sell, or to retain and dispose of fish delivered to processing plants are substantial, are potentially on the order of millions of dollars annually. The willingness of the legislature (and populace) to forgo some of the value of the target fisheries and to avoid discards of valuable roe-bearing fish indicates a positive value of this type of waste avoidance policy to people who may not catch, produce or consume the fish.

Second, NMFS believes the GRS program will reduce the catch of incidental species and the waste of unutilized groundfish by providing an incentive to avoid catches with little commercial value. The agency expects owners and operators of non-AFA trawl C/Ps to adjust their fishing practices to avoid undesirable fish. The tangible benefit of such an incentive is that there will be some reduction in the disturbance, injury or mortality of groundfish that currently are incidentally caught, discarded and unutilized by non-AFA trawl C/Ps. The additional groundfish that are retained by implementation of the GRS are processed into head and gut products utilized at a rate that exceeds the minimum groundfish utilization rate of 15 percent as identified in this rule. Under the GRS, not only are more fish expected to be retained, but products made from those groundfish are expected to contribute to additional production of the head and tail cut product known as kirimi. The product recovery rate for kirimi is among the highest product recovery rates for BSAI groundfish at 48 percent.

Third, NMFS anticipates that the increased retention and utilization requirements of the GRS program will result in an increase in the quantity of groundfish sold to consumers from previously discarded species. The benefits that flow from an increase in the amount of groundfish production in the marketplace include the expanded availability of groundfish for consumers.

Finally, an indirect but tangible benefit from the GRS program is that it will enhance the status quo catch monitoring and accounting of groundfish for non-AFA trawl C/Ps. The enhanced data collection will allow NMFS inseason managers to adjust season dates with greater confidence and may reduce the chance of exceeding groundfish total allowable catch. As identified in the preamble to this rule, recent enforcement actions for halibut presorting raise concerns regarding the accuracy of catch accounting data. If the presorting violations of the magnitude documented by some vessels non-AFA trawl C/Ps become widely practiced in this sector, and are extended to species at or near an overfished state, a conservation risk for those species may exist. The monitoring program for the GRS reduces this risk with a combination of improved observer coverage and weighing requirements for groundfish.

NMFS understands that non-AFA trawl C/Ps will incur costs for flowscales and plant changes and these costs are examined in the EA/RIR/FRFA. For example, the rule requires seven vessels in this sector to invest in flow scales at an approximate cost of $75,000 to $300,000 per vessel, and it requires all sixteen vessels greater than 125 ft. LOA to carry an extra observer at a cost of roughly $82,000 per year per vessel. Under this action, these vessels may incur the costs and lost revenues associated with holding/processing, transporting, and transferring fish that are of relative low value. However, the lack of any standardized industry data on variable costs, fixed costs, and earnings to evaluate the effects of the GRS program prevent any reliable estimate of how these vessel owners will adjust to this action, or how it would change their decisions to enter or exit BSAI groundfish fisheries. Based on anecdotal information from the regulated sector, the EA/RIR/FRFA notes that one or more vessels may exit the fishery if the vessel could be used more profitably elsewhere. However, many economic and resource variables enter into groundfish fishing vessel entry or exit decisions. Some economic variables that could impact this sector include: (1) prices of some non-pollock products produced by non-AFA trawl C/Ps have increased in the last decade changing the relative value of retaining or discarding certain species in the mixed fishery catches; (2) a new vessel buyback program passed by Congress (Department of Commerce and Related Agencies Appropriations Act, 2005, Public Law 108–447), could encourage non-AFA trawl C/Ps to remain active in this fleet until the details of the buyback program are known and bids for buyout are approved through a referendum; (3) the Council has been working on a program that could facilitate the industry's formation of one or more non-AFA trawl C/P fishing cooperatives that may increase the expected value of fishing history and returns to capital; and (4) changing prices of operational inputs such as fuel and labor. Each of these factors may alter economic incentives to remain active in or exit a fishery. Also, for some non-AFA trawl C/Ps, compliance with GRS program monitoring requirements will not involve significant changes to a vessel or operation. Seven vessels in this sector currently have flow scales, five of which have certified flow scales. Five vessels also have observer stations, and at least one vessel has two observers on board for much of the year. NMFS anticipates these vessels will experience lower GRS

program costs compared with vessels that have no flow scales, observer stations or less than 2 observers. In consideration of vessels that may incur relatively higher initial M&E costs associated with modifying vessel layout and associated processing operations, the regulated entities are provided additional time to contract for and arrange vessel modifications by implementing the GRS program in 2008 rather than in 2007. NMFS has also addressed comments on monitoring costs of the GRS program in response to Comments 2, 13, 23, and 25.

The costs of the GRS program are justified by the groundfish discard and compliance history of the non-AFA trawl C/P sector. The sector regulated by the GRS has chronically exceeded groundfish discard rates that have been routinely achieved by other BSAI groundfish sectors. These relatively higher discard rates create an inconsistency and imbalance in groundfish fishing privileges to sectors striving to reduce groundfish discards. This regulatory action is necessary to maintain groundfish fishing practices that are equitable and accountable across all BSAI groundfish C/Ps.

This final rule applies a reasoned process for determining that the benefits of the GRS justify the costs for the following additional reasons: (1) A tangible market exists for avoidance of groundfish discards in the United States as demonstrated by Federal and State laws restricting and preventing fish discards to reduce waste as identified in this response and the response to Comment 6. Public comment in support of the proposed rule from the EPA and the State of Alaska (Department of Fish and Game) are representative agencies for those market values. Market prices for discard reduction cannot be directly observed because there is no mechanism for people who value clean fishing to pay those that catch, kill and discard groundfish in this sector; (2) The increment in discard reduction from the action are significant in comparison with total discards in the BSAI and large compared with total groundfish harvests in many other coastal states as identified in the response to Comment 3, and justified as identified in public comments (on the proposed rule) from persons outside the regulated sector, including the EPA and State of Alaska; (3) Costs of the GRS may change fishing decisions and fishing effort for one or more vessels in the non-AFA trawl C/P sector, but they are not likely to force persons to exit Alaska groundfish fisheries altogether considering prices of the products derived from many of the species that will be retained, as noted in the response to Comment 9 and (4) The M&E costs associated with initial factory modifications could be accommodated over more than an 18 month period to provide flexibility in planning and construction time for plant changes.

There is no requirement to limit bycatch reduction tools to only those that increase profits for affected vessels or do not impose costs to a business or aggregation of fishing businesses. National Standard 9 requires that conservation and management measures minimize bycatch to the extent practicable and minimize the mortality of bycatch when it cannot be avoided. Guidelines for practicable bycatch reduction efforts (discard reduction) include consideration of impacts on the environment and value to people who may not directly consume or produce the resource. In this respect, NMFS received public comments from persons and Federal and State agencies that expressed support for implementing the GRS program. These include an environmental interest group, a member of the non-AFA trawl C/P sector, the U.S. Environmental Protection Agency, and the State of Alaska.

A portion of this comment refers to costs associated with safety as a result of a possible industry response to the prohibition on haul mixing. The alternatives for non-AFA trawl C/Ps to respond to or adjust operations and reduce or eliminate circumstances where loading practices may have adverse safety implications are numerous and addressed in the response to Comment 12. Any efforts to avoid unsafe loading practices in this sector could result in a change to vessel costs. NMFS believes that these risk avoidance costs are likely to be subsumed in the fixed costs and driven by external Coast Guard vessel safety regulations and economic incentives for risk avoidance.

The prohibition on mixing of hauls, limitations to one flow scale and conveyor line passing over a scale, and limitation on observer sampling time to 9 hours a day were all included in the proposed rule to provide NMFS with the ability to adequately account for groundfish catch and discards under the GRS program. NMFS agrees that observers may be allowed to sample during an entire 12-hour shift, and the final rule removes the limitation of 9 hours on observer sampling, as explained in the response to Comment 13. Based on the above, NMFS has determined that the benefits from the GRS program identified in this response are real and substantial relative to the added costs to the industry and the agency.

*Comment 2:* NMFS received a number of comments regarding the cost estimates for the monitoring provisions of the GRS program. A range of opinions expressed that some data used to estimate the costs of the monitoring provisions were not accurate, understated or overstated. For example, one commenter asserted that NMFS underestimated the costs of altering vessels to accommodate flow scales, the costs resulting from the prohibition on mixing of hauls, and the costs of other monitoring requirements. Other comments suggested that specific estimates of aggregate costs in the EA/RIR/IRFA were overstated, noting that each year most of the affected vessels make major factory modifications to repair equipment and make processing operations more efficient.

*Response:* The data included in the EA/RIR/FRFA represent the best scientific data available to NMFS on the financial costs associated with the monitoring requirements of the GRS program. Wherever possible, NMFS accessed third party data on costs, such as those associated with purchasing and installing scales, or published rates for observers. No independent data exists to determine the extent of other potential costs. Other effects and available data on the costs of the monitoring program are outlined in the response to Comment 1. The range of comments on vessel upgrade costs suggests the possibility that NMFS' estimates represent reasonable point estimates for this sector, although NMFS acknowledges that considerable variation in monitoring compliance costs may exist among fishing vessels.

*Comment 3:* The proposed action could have a detrimental effect on the community of Greater Seattle due to the concentration of C/Ps in this locality. Further, National Standard 8 is not constrained to the concept of a community as a formal geographic area. A community can be an aggregation of similarly interested individuals engaged in an activity such as fishing. In this context, severe impacts would be imposed on the non-AFA trawl C/P community from this action.

*Response:* NMFS disagrees that the GRS program will have a detrimental effect on the community of Greater Seattle. The EA/RIR/FRFA examines the impacts of the GRS program on fishing communities. As treated in section 4.2 and in the National Standard 8 discussion in section 5.1 of the EA/RIR/FRFA for the GRS program, NMFS does not anticipate that the Seattle area in the State of Washington and communities along the northern Oregon coast will experience any significant impacts or

cumulative effects from the GRS program based upon the sustained participation of these communities in the groundfish fisheries. The size of the regional economy and personal income generated in Seattle and surrounding areas as well as in coastal communities in Oregon dilutes the overall impact of the Alaska groundfish fishery jobs. While nearly all the non-AFA trawl C/Ps affected by the GRS program are home ported in Seattle, NMFS anticipates few impacts on the surrounding area, in terms of average annual employment, personal income or purchase of goods and services.

The comment also suggests that under National Standard 8, a community can be defined as an aggregation of similarly interested individuals. National Standard 8 states that conservation and management measures must, consistent with the conservation requirements of the Magnuson-Stevens Act (including the prevention of overfishing and rebuilding of overfished stocks), take into account the importance of fishery resources to fishing communities in order to (A) provide for the sustained participation of such communities; and (B) to the extent practicable, minimize adverse economic impacts on such communities. Regulatory guidelines for National Standard 8 at 50 CFR 600.345(b)(3) define a fishing community as a community that is ''substantially dependent on or substantially engaged in the harvest or processing of fishery resources to meet social and economic needs and includes fishing vessel owners, operators, and crew, and fish processors that are based in such communities. A fishing community is a social or economic group whose members reside in a specific location and share a common dependency on commercial, recreational, or subsistence fishing, or on directly related fisheries dependent services and industries (for example, boatyards, ice suppliers, tackle shops).'' NMFS developed the guidelines for National Standard 8 in accordance with the Sustainable Fisheries Act (SFA, Pub. L. 104 - 297), which added National Standard 8 to the Magnuson - Stevens Act, and with congressional intent as expressed through the legislative history for the SFA. Given NMFS' regulatory guidelines, a ''fishing community'' is based on a geographic approach, defining a census area or statistical area that is consistent with a known state or federal designation for a community. NMFS disagrees with the comment that a fishing community can be an aggregation of similarly interested individuals, engaged in an activity such as fishing. NMFS has followed its regulatory guidelines with respect to analyzing the impacts of the GRS program on affected entities and has determined that the GRS program is consistent with National Standard 8.

*Comment 4:* The proposed rule does not meet the practicability standards for National Standard 9. The costs to non-AFA trawl C/Ps are high in comparison with the benefits to society. These costs result from the following provisions: no mixing of hauls, limitation to only one flow scale and line, limitation on observer sampling workload time to nine hours out of twelve hours in a day, requirement for installation and use of a NMFS certified scale, requirement for an observer sampling station, and the requirement for monitoring of all hauls.

*Response:* NMFS disagrees that the GRS program fails to meet the practicability standards for National Standard 9. National Standard 9 states that conservation and management measures shall, to the extent practicable, (A) minimize bycatch and (B) to the extent bycatch cannot be avoided, minimize the mortality of such bycatch. Regulations implementing National Standard 9 at 50 CFR 600.350(d)(3) state that NMFS should consider ten factors when determining whether a conservation and management measure minimizes bycatch or bycatch mortality to the extent practicable, consistent with the other national standards and maximizing net benefits to the Nation. The ten factors are: population effects for the bycatch species; ecological effects due to changes in the bycatch of that species (effects on other species in the ecosystem); changes in the bycatch of other species of fish and the resulting population and ecosystem effects; effects on marine mammals and birds; changes in fishing, processing, disposal, and marketing costs; changes in fishing practices and behavior of fishermen; changes in research, administration, and enforcement costs and management effectiveness; changes in the economic, social, or cultural value of fishing activities and nonconsumptive uses of fishery resources; changes in the distribution of benefits and costs; and social effects.

Because the GRS program is a bycatch reduction measure, the costs and benefits associated with the GRS program and considered in light of National Standard 9 are similar to the considerations that NMFS must undertake relative to National Standard 7 and therefore, the response to Comment 1 is relevant to this response. As explained in the response to Comment 1, the EA/RIR/FRFA developed for the GRS program demonstrates that the benefits of the GRS program, while not all of which are easily quantifiable, are real and substantial relative to the costs of compliance, consistent with both National Standards 7 and 9. The EA/RIR/FRFA for the GRS program itemizes and addresses each of these factors in a manner that is responsive to National Standard 9. Several of the key benefits identified in the response to Comment 1 directly address two of the factors that NMFS must consider when evaluating an action's consistency with National Standard 9: changes in the economic, social, or cultural value of fishing activities and nonconsumptive uses of fishery resources; and social effects. Additionally, as noted in the response to Comment 1, a number of states have enacted bycatch (discard) and other fish and wildlife waste reduction measures, including complete or partial banning of such actions as roe stripping and wanton waste. NMFS believes that measures implemented by other jurisdictions to reduce waste and under-utilization of fish reveal preferences and positive values for the GRS program.

The response to Comment 1 lists the benefits and costs of the GRS program. Although the non-AFA trawl C/P sector has attempted to increase retention of groundfish without regulatory intervention, it has been unsuccessful in raising retention rates to match the rates of other catcher processors' operations in the BSAI groundfish fisheries. The groundfish retention rate for non-AFA trawl C/Ps remains significantly lower than other BSAI catcher processor sectors.

*Comment 5:* NMFS has not addressed National Standard 9, which explicitly states the intent of Congress for discard reduction efforts to be ''practicable.'' As clarified in the Congressional Record on National Standard 9: '''Practicable' requires an analysis of the costs of imposing a management action; the Congress does not intend that this provision will be used to allocate among fish gear groups, nor to impose costs on fishermen and processors that cannot be reasonably met.'' Some of the new monitoring and enforcement aspects presented in the proposed rule do not meet this standard.

*Response:* NMFS disagrees that National Standard 9 has not been addressed and that the GRS program is inconsistent with National Standard 9. NMFS has published regulatory guidelines for National Standard 9 at 50 CFR 600.350 that are responsive to and consistent with National Standard 9 and other provisions of the Magnuson Stevens Act. The EA/RIR/FRFA at section 4.5.4 includes a discussion of

the consistency of the GRS program with National Standard 9. NMFS acknowledges that some vessels will incur new costs under the GRS program that could reduce profits for some fishing businesses in this sector. The potential exists that one or more non-AFA trawl C/Ps may choose to exit from this fishery, though no independently verifiable data are available from this sector to confirm if this is likely. National Standard 9 does not require that the benefits to a sector or a fishery offset the costs of complying with discard reduction programs, or that the benefits to each vessel offset the costs to individual vessels. National Standard 9 does, however, require that the agency examine the best available data on bycatch reduction benefits to the nation and bycatch costs. Benefits from a bycatch (discard) reduction action include a broad spectrum of effects as discussed in the responses to Comments 1 and 4. In the case of the GRS program, NMFS has determined that the preponderance of benefits to society by reducing discards by over 50 thousand metric tons per year at a GRS of 85 percent offset costs in a manner consistent with National Standard 9.

Past actions by some non-AFA trawl C/Ps demonstrate that the monitoring requirements necessary to implement the GRS program and described above do not impose costs that cannot be reasonably met. As described in section 4.5.2 of the EA/RIR/FRFA prepared for this action, several non-AFA trawl C/Ps already have met some or all the GRS program monitoring requirements in compliance with other management programs. Finally, the GRS program does not allocate among fish gear groups.

*Comment 6:* The State of Alaska recommends that the proposed GRS be approved because it addresses National Standard 9 as follows:

a. National Standard 9, as approved by Congress is consistent with the State of Alaska wanton waste laws and its application to state resource management. The Alaska legislature received impassioned testimony regarding citizen objections to waste of fishery resources of the type that is occurring in the non-AFA trawl C/P fleet when the bill was originally passed in 1975 and amended in 1984.

b. Bycatch (discard) reduction has international and national support. There is broad-based public consensus that discarded portions of fishery catches represent an unacceptable waste of the public's natural resources.

c. According to NMFS regulations (50 CFR 600.350), the criteria for evaluating discard reduction measures include non-consumptive, existence, ecological values, and impacts of groundfish discards on the environment. The GRS provides potential mitigation for any losses in the value of groundfish to persons who do not produce or consume these resources, and any lost value associated with the environment.

d. The proposed GRS program for the non-AFA trawl C/P sector would provide ecological and social benefits that outweigh the costs of the program.

*Response:* NMFS agrees with the comments made in paragraphs (b) and (c) and notes the comments made in paragraphs (a) and (d).

*Comment 7:* None of the Council's bycatch reduction actions, alone or in combination, are sufficient to comply with the Magnuson-Stevens Act bycatch mandates. The GRS is a single species-based approach to reducing bycatch (discards) in one portion of the fleet. The commenter urges NMFS to address discards on a more fundamental level by establishing a Bycatch Committee with a strong mandate and clear timeline to develop ecosystem-based conservation and management measures that focus on avoiding discard of all marine species.

*Response:* NMFS disagrees with the comment that none of the current bycatch reduction measures in the North Pacific groundfish fisheries is sufficient to comply with the Magnuson-Stevens Act's bycatch mandates. The bycatch monitoring and reduction programs implemented for the North Pacific groundfish fisheries have resulted in significant reductions in the amount of fish discarded in these fisheries over the past decade, as well as bycatch avoidance initiatives for prohibited species and seabirds. These activities and the catch monitoring programs implemented for the Alaska groundfish fisheries are the most extensive in the nation and are fully compliant with the Manguson-Stevens Act. Nonetheless, opportunities for improvement exist, and the Council focused a GRS program on non-AFA trawl C/Ps because those vessels had the highest discard rate compared to other sectors operating in the BSAI. The GRS program is not a single species-based approach to reducing bycatch. Instead, it is a multispecies approach for reducing discards of multiple groundfish species.

Consistent with the U.S. Commission on Ocean Policy report and the President's U.S. Ocean Action Plan, the Council is continuing to pursue ecosystem-based conservation and management measures. It has established an ecosystem committee to explore different ecosystem approaches to management and is exploring the concept of a fishery ecosystem plan for the Aleutian Islands area as a pilot project. The Council recognizes that its decisions regarding fisheries and associated bycatch issues affect and are affected by the actions of other governing bodies. Accordingly, the Council also is exploring the feasibility of an Aleutian Islands Ecosystem Forum or some similar mechanism for collaboration among the governmental bodies involved in ocean related activities in the Aleutian Islands area.

*Comment 8:* The GRS is necessary because the sector has not shown the ability to internally control discard practices. Some species, such as northern rockfish in the Aleutian Islands Atka mackerel fishery, are discarded at rates that are equal to or exceed 80 percent. This activity shows a disregard for a species managed under a federal fishery management plan.

*Response:* The statistic that discards of northern rockfish discards are equal to or exceed 80 percent is consistent with NMFS catch accounting data. In 2003 and 2004, the discard rate of northern rockfish in the non-AFA trawl C/P fleet exceeded 90 percent in the Aleutian Islands area. NMFS agrees that this discard rate is an example of why the GRS program is a necessary conservation and management measure. The GRS program will make it more difficult to discard groundfish species that are currently discarded at rates that are much higher than the GRS percent for a given year. The GRS program is expected to provide incentives to either avoid catching unwanted groundfish or to seek markets to better utilize incidental harvest of groundfish species.

*Comment 9:* This action would not reduce discards and, therefore, is not practicable. Bycatch is defined by the Magnuson-Stevens Act as fish which are not sold or kept for personal use. This action would require vessels to retain fish that are valueless and not likely to be marketable in the near future. This unmarketable fish will have to be thrown away on land, and likely would increase ancillary transportation and disposal costs. These fish do not meet the definition of bycatch and, furthermore, these removals represent a net loss of energy from the ecosystem.

*Response:* Section 3 of the Magnuson-Stevens Act (16 U.S.C. 1802(2)) defines the term ''bycatch'' to mean fish which are harvested in a fishery, but which are not sold or kept for personal use, and ''includes economic discards and regulatory discards'' (emphasis added). Economic discards are defined as fish that are the target of a fishery, but which are not retained because they are of an undesirable size, sex, or quality, or for

other economic reasons. As noted in the response to Comment 1, the GRS will create an incentive to reduce economic discards by establishing a minimum percentage of the total catch of groundfish that must be retained. The costs associated with required retention rates are an incentive to avoid catching groundfish that will not be utilized. Therefore, unless total catch of groundfish declines in this sector, NMFS assumes that both groundfish retention and utilization will increase under the GRS program. The GRS is likely to reduce economic discards that are clearly included in the definition of ''bycatch'' in the Magnuson-Stevens Act.

NMFS does not agree that all utilized product from the GRS program will be unmarketable, although it is possible a vessel regulated by this action could find that the cost of harvesting and marketing a groundfish product may exceed the revenues generated. For some products this condition may occur in any fishery. The marketability of products utilized under the GRS program will depend on a number of regional and international market factors that are unrelated to the GRS program. For example, rising market prices have been observed for a number of flatfish species subject to the GRS program.

The EA/RIR/FRFA for the GRS program projects that increased retention requirements will typically reduce the percent and amount of discards, relative to the no action alternative. Any reduction in discards projected from the GRS will be small compared to natural sources of detritus in the BSAI. There is also an absence of evidence relating changes in scavenger populations to discard trends that would suggest groundfish discards have significant ecosystem impacts through energy removal and redirection.

*Comment 10:* The analysis shows that the GRS alternative only results in a small change in groundfish retention.

*Response:* NMFS disagrees that the anticipated reduction in groundfish discard amounts under the GRS program should be characterized as insignificant or small. The rule requires that the groundfish retention rate for the vessels regulated by this rule to increase to 85 percent from present levels of 65 percent - 75 percent in the absence of a regulation. The EA/RIR/FRFA for the GRS program estimates that when the GRS increases to 85 percent in 2010, more than an additional 50,000 metric tons (110 million pounds) of groundfish will be retained annually.

*Comment 11:* Discarding catch in the course of normal fishing operations is a poor practice, and will decrease the sustainability of fisheries in the long term. We support efforts by NMFS and the Council to reduce regulatory and economic discards.

*Response:* Comment noted. The GRS program will reduce amounts of economic discards by non-AFA trawl C/Ps in the BSAI groundfish fisheries.

*Comment 12:* The U.S. Coast Guard (USCG) Fishing Vessel Safety Division recommends the prohibition on mixing of hauls aboard non-AFA trawl C/P vessels impacted by the GRS be reexamined with respect to safety at sea. The basis for this recommendation is the potential for additional risks to vessel stability if vessel operators choose to comply with the proposed prohibition on mixing of hauls by holding greater amounts of groundfish on deck prior to transporting that fish into bins and weighing areas.

*Response:* As adopted by the Council, the GRS program for non-AFA trawl C/Ps is based solely on groundfish species that are not on prohibited species status. As a result, catch of non-groundfish, groundfish species on prohibited species status, or rocks, boulders, and other non-biological catch must be estimated by NMFS based on haul specific observer data and deducted from the total haul catch weight. The response to Comment 17 describes why this estimation procedure must be done on a haul by haul basis and cannot allow for the mixing of fish from different hauls.

Given the comment from the USCG Fishing Vessel Safety Division, NMFS re-examined the prohibition for mixing hauls. In that re-examination, NMFS demonstrated ample operational choices and flexibility for vessel operators to avoid unsafe loading practices while fishing under the mixing of hauls prohibition. After reviewing NMFS' re-examination, the USCG concluded that NMFS had ''offered numerous viable options to reduce time (of codends and fish) on the deck.''

After consulting with staff of the USCG Fishing Vessel Safety Division, NMFS concludes that this final rule will not result in a decrease in vessel safety compared with the status quo, and that this action is consistent with National Standard 10. NMFS recognizes that fishing is a dangerous activity, particularly in the North Pacific, and believes that persons engaged in this business are aware of these risks. The GRS program does not require persons to undertake dangerous actions beyond those they voluntarily undertake when they choose to fish in the North Pacific. Vessel masters and crew make choices on how best to accommodate safety concerns during fishing activity, including considerations about vessel stability.

The prohibition on mixing of hauls could be accommodated in a number of ways that would not result in new vessel stability risks. For example, vessels could slow fishing effort and the frequency at which gear is deployed to better time haul back activities to minimize the amount of time a codend is on deck. Or, rather than staging a codend on deck where it could be poised for immediate dumping when the previous haul is completely processed, it is a common practice by operators of non-AFA trawl C/Ps to ''shortwire'' a codend, where it is closely towed behind the vessel. Hauling of the codend up onto the deck takes little more than several minutes. As soon as the bin is emptied, the vessel operator could haul the shortwired codend on deck and immediately dump its contents into the bin. Thus, little or no legitimate need exists to stage a codend on deck, and the timing of when to haul the codend on deck and begin dumping the codend into the tank is within the control of the vessel operator. The industry practice of shortwiring a codend at the stern provides an opportunity to ensure a very minimal delay in fish being delivered to the processing deck without having to leave a codend on deck.

Vessel operators also could increase throughput in a factory to complete processing activities of a prior haul before a codend is brought on deck. Vessel specific layout also could be modified to increase the size or number of fish bins to avoid mixing of hauls.

The GRS program does not impede the use of any of these strategies. Although some of them may be costly to some vessels, these changes could be incorporated into other required factory modifications. The analysis prepared for this action describes the costs associated with these changes in section 4.5. The response to Comment 1 includes a more detailed explanation of the costs examined in the EA/RIR/FRFA.

NMFS also encourages vessel owners to adhere to USCG requirements that the master of a vessel is the responsible party to ensure the stability and safety of his or her vessel. In addition, many commercial fishing vessel owners are required by the USCG to retain on board a copy of the vessel's Trim and Stability Booklet (T&S Booklet) prepared by a certified naval architect (46 CFR part 170 subpart D—Stability Instructions for Operating Personnel). Most, if not all, the 16 non-AFA trawl C/Ps that will be regulated under the GRS program have a T&S Booklet. The USCG advises that

the T&S Booklet should be written in clear terms and made available to all members of the crew. Each vessel must restrict the loading of catch according to the tables and analysis in the T&S Booklet, which considers many variables, including fuel, other ballast, and gear. The USCG is authorized to review these booklets when boarding a vessel at sea, but more frequently will review the T&S Booklet in port prior to departing for the fishing grounds. Carrying a load of fish on deck in amounts that exceed the recommendations in a vessel's T&S Booklet may adversely impact vessel stability and create a safety hazard. The implementation date for the GRS program provides ample time for vessel owners and operators to further to integrate vessel safety measures into modified vessels and plants. NMFS encourages vessel operators to consult USCG guidance for reviewing safety equipment and loading practices between the date of this final rule and implementation of the GRS.

The incentive for both crew and observers to work in safe conditions is likely to contribute to a vessel operator's compliance with safe loading procedures and, if available, recommendations of the T&S Booklet. While stability risk assessment involves potentially complex engineering models, the act of loading the contents of multiple codends of fish on the deck of a vessel is highly observable to persons working on a vessel and easier to monitor than many activities that may involve safety risks. Crew members have an interest in safety and an incentive to understand loading procedures that may impact vessel stability. NMFS certified observers are neither trained nor expected to assess or monitor vessel stability. However, at any time, crew or observers may formally record practices, question a skipper, or contact the USCG regarding any safety issue posing a risk to the conduct of their activities on a vessel, including issues associated with the stability of a vessel. Furthermore, any increase in observed illegal or unadvised risk taking behavior on the part of non-AFA trawl C/Ps could be translated into higher insurance premiums, including employee liability and capital loss insurance. Thus, the threat of higher costs imposed by insurance markets for violating loading and stability recommendations may buffer any propensity of an operator of a non-AFA trawl C/P to attempt unsafe, and/or illegal loading practices in these fishing operations.

Given the above considerations, NMFS has determined that the GRS program for non-AFA trawl C/Ps will not result in additional safety concerns resulting from the catch monitoring requirements established for this program and is consistent with National Standard 10.

*Comment 13:* The Small Business Administration Office of Advocacy was unable to locate a discussion of the monitoring and enforcement costs associated with the prohibition on mixing of hauls, limitation on the number of hours per day an observer may sample catch, the installation of a NMFS approved scale, and specified single observer sampling location.

*Response:* The IRFA prepared for the proposed rule includes a summary of the impacts of the proposed rule and alternatives, including the monitoring program and states that the specific economic impacts of the proposed rule and other alternatives on both large and small entities in section 4. Section 5.3.9 of the FRFA includes information and analysis on a number of economic factors, including an examination of changes in revenues and operating costs under the proposed action and alternatives. section 5. This section examines the estimated costs of installing flow scales and observer stations and the costs associated with additional observer coverage. Although not explicitly stated, the estimated costs of installation apply to those vessels that must reconfigure a previously installed flow scale or observer sampling station in order to accommodate the monitoring provisions of the GRS program. While the FRFA does not include a specific discussion of the costs associated with the prohibition on the mixing of hauls, it does provide an estimate of the overall costs of compliance with the monitoring provisions of the proposed rule, which specifically included the prohibition on the mixing of hauls. The estimates provided in the FRFA are based on the best available data.

The EA/RIR/FRFA prepared for the final rule notes in several locations that ''all hauls'' must be available for observer sampling and in Appendix 1 that ''each haul'' must be available for observer sampling. NMFS is aware that some vessels routinely mix hauls and may have costs associated with this prohibition that are different from costs experienced by those vessels that do not mix hauls. No independent data exist to determine the extent of these potential costs, but the primary effect of the haul mixing constraint could be reduced haul frequency. Other effects and available data on the costs of the monitoring program are outlined in the response to Comment 1.

Reference to an observer sampling station is made in numerous locations throughout the EA/RIR/FRFA. The proposed rule clearly states the requirement for a single observer station and NMFS has not suggested that multiple observer stations would be allowed. The effects and costs associated with requiring observer stations on these vessels are discussed in the EA/RIR/FRFA , and NMFS has used the best available data to project potential costs associated with observer requirements and sampling stations. NMFS acknowledges that observer sampling station costs may differ among operations, but that the estimates provided constitute the best data available to the agency at this time to make these estimates. A substantial time period for planning and construction is accommodated by the 2008 implementation date to allow regulated vessels to seek the most efficient means to install and modify equipment to comply with the GRS. The response to Comment 24 also includes information on the need for and impacts of observer stations.

For the reasons explained in response to Comment 21 and in Changes from the proposed rule, NMFS agrees that the proposed limitation of an observer's sampling activities to no more than 9 hours per day is not explicitly discussed in the EA/RIR/IRFA. NMFS received public comment that constraining observers to a nine hour sampling day could constrain fishing operations for vessels subject to the GRS program. Thus, upon reconsideration, this measure has been modified in the final rule such that the time required for observers to complete their sampling, data recording, and data communications duties cannot exceed 12 hours per day. Non-AFA trawl C/Ps continue to be required to carry two observers to fish uninterrupted during each 24 hour period.

The EA/RIR/IRFA provided information on the cost of NMFS approved scales in section 4.5. The response to Comment 1 also notes that flow scale installation costs could range from $75,000 to $300,000 per vessel.

*Comment 14:* NMFS used the wrong criteria for assessing the impacts of the proposed rule on the non-AFA trawl C/Ps under the Regulatory Flexibility Act. The Small Business Administration Office of Advocacy (NAICS) indicates that the correct North American Industry Classification System code for catcher processor vessels is code 311711, which is known as ''Seafood Product Preparation and Packaging.'' This classification specifically includes establishments that are ''floating factory

ships.'' The size standard for businesses in that industry is 500 or fewer employees.

*Response:* The IRFA and FRFA prepared for this action consider the effects to all non-AFA trawl C/Ps as if they are all small entities under the Regulatory Flexibility Act. The effects to all vessels subject to this action were examined in these analyses. However, the Small Business Administration's Size Standards by NAICS code at 13 CFR 121.201 do not include a size standard for vessels that both harvest and process catch. NMFS acknowledged the need for a determination as to whether the catcher processor fleet would be considered fish harvesters, and thereby governed by the annual receipts standard for catcher vessels, or fish processors, and thereby governed by the employee standard for seafood processors, for purposes of preparing analyses under the requirements of the Regulatory Flexibility Act. To date, NMFS has applied the annual receipts standard to catcher/processors because a catcher/processor is first and foremost a fish harvesting operation. Using this rationale, NMFS appropriately considered non-AFA trawl C/Ps as fish harvesters in the IRFA and FRFA prepared for this action and applied the annual receipts standard for purposes of Regulatory Flexibility Act analyses. Although NMFS currently is reviewing its small entity size classification for all catcher/processors in the United States, NMFS will continue to use the annual receipts standard for catcher/processors until new guidance is adopted.

*Comment 15:* The Small Business Administration Office of Advocacy requests that a new IRFA be submitted that includes a discussion of the impacts on small entities.

*Response:* NMFS has determined that a new IRFA is not necessary. As explained in the responses to Comments 13 and 14, NMFS considered the non-AFA trawl C/Ps affected by the GRS program to be small entities and prepared an IRFA that sufficiently discussed the impacts of the proposed rule on small entities, including all the non-AFA trawl C/Ps directly regulated by this action.

*Comment 16:* The agency did not consider the reasonable and prudent alternative of changing the accounting period for maximum retainable amounts (MRA) of other groundfish species to achieve discard reduction. This revision was implemented for pollock in the BSAI and resulted in increased retention with minimal costs. The MRA accounting period for groundfish could be revised to an offload-to-offload period. By providing operators with additional flexibility to manage groundfish retention, this revision would allow vessels to decrease discards.

*Response:* The EA/RIR/FRFA examined a range of reasonable alternatives to achieve the stated purpose and need: to create a fixed standard for the retention of BSAI groundfish. MRAs are management tools intended to slow the harvest rate of a species by prohibiting directed fishing for the species but permitting the limited retention of incidental catch amounts. Requiring vessel operators to adhere to MRAs at any time during a trip limits vessel operators' ability to maximize catch retention of any given species. This restriction also limits opportunities for vessel operators to intentionally target valuable species that are closed to directed fishing. Revising an MRA accounting period to allow additional groundfish retention could provide for increased targeting on a valuable species and increase the risk that catch would approach over-fishing levels. Additionally, this revision would only increase groundfish retention of those species that provide an economic benefit to vessel owners and operators. Vessel owners and operators are unlikely to retain species that decrease their profits.

Conversely, the GRS program is a performance-based management concept that is intended to alter fishing behavior to decrease discard and increase retention within the current management constraints. Vessel operators would increase their overall groundfish retention within current MRA restraints. They would also be less likely to intentionally target high value species that are closed to directed fishing, and more likely to retain groundfish species they would not otherwise retain.

NMFS agrees that modification of the pollock MRA accounting period provides greater opportunity for retention of pollock when a vessel operator determines that it is economically feasible to do so. The adjustment to the accounting period for the pollock MRA may be an effective tool to reduce discards through increased retention because pollock is sometimes a valuable species and it is always on bycatch status for vessels that are not permitted to participate in the directed pollock fishery under the American Fisheries Act. Furthermore, the incidental catch of pollock on a haul-by-haul basis can be relatively high for non-AFA trawl C/Ps. These two facts led the Council to focus on the pollock MRA adjustment as an effective management measure to reduce discards.

Other economically valuable species such as Pacific cod and some rockfish species also are taken incidentally by non-AFA trawl C/Ps. The Council is considering adjusting the MRA accounting periods for these species to address discard issues. NMFS supports this initiative, however, the potential reduction in discards of Pacific cod and rockfish likely would be less than that anticipated for pollock due to the larger volume of pollock catch that currently must be discarded. Conservation and allocation concerns also must be considered for any change in retention standards that might create greater incentives to target a species that may have low acceptable biological catch levels and associated overfishing concerns or be fully utilized by competing user groups. Nonetheless, the Council and NMFS would need to prepare a separate rulemaking to adjust the MRA accounting period for incidental catch of groundfish taken by non-AFA trawl C/Ps. If adopted by the Council and approved by NMFS, such an adjustment may be implemented prior to 2007 when the GRS program becomes effective.

*Comment 17:* The requirement to observe and sample each haul can be satisfied by less onerous and safer means than prohibiting the mixing of hauls. For example, traditional operations could continue and all hauls could be observed by requiring the container that holds unsorted catch from the codend (live tank) to be emptied before the observer goes off-duty.

*Response:* As described above, only groundfish not on prohibited species status are used in the GRS calculation. Observer samples will be used to calculate the proportion of groundfish not on prohibited species status for each discrete haul. Total groundfish catch is determined by pooling together multiple basket samples from a discrete haul, determining species composition of the catch by weight, and expanding the sampled weight of all groundfish not on prohibited species status by the total weight of the haul as measured by a flow scale. To determine whether a vessel has met the specified annual GRS threshold, NMFS divides the round weight equivalent of retained products during a year by the sum of haul specific estimates of total groundfish catch over the same time period.

Because the distribution of organisms by size and species in a haul is often heterogeneous between hauls, an aggregation of hauls (i.e., mixing two or more hauls) could create errors in the

calculation of total groundfish catch. For example, if a vessel mixes hauls from two different areas or depths, catch composition and size could be significantly different between these hauls, and a composite sample may not be representative of each individual haul. Any errors would be exacerbated as the composite sample is expanded to the total weight of the mixed hauls.

Adequate accounting of the GRS will rely heavily on observer species composition samples. To adequately assess groundfish retention rates for consistency with the GRS, NMFS must have confidence that the data collected is representative of actual groundfish catch and that potential sources of bias have been minimized to the greatest extent practicable. Because the mixing of hauls could create unacceptable data errors as described above, NMFS must prohibit the mixing of hauls. Clearing the live tank as suggested in this comment does not resolve these data collection issues.

*Comment 18:* In aggregate, the proposed monitoring requirements exceed the scope of the analysis for the GRS program and the Council's recommendation to the Secretary. For example, the provisions for prohibiting the mixing of hauls, limitation to only one flow scale and line, and limitation on observer workload time to nine hours out of twelve hours in a day exceed the recommendations identified by the Council. No notice of these requirements was ever given to the Council, and no authority was given to NMFS to add these requirements to the proposed rule.

*Response:* With the exception of the 9-hour limitation on observer sampling time and GRS implementation date of 2008, NMFS disagrees that the proposed monitoring requirements exceeded the scope of the analysis. See the response to Comment 19. Most of the key monitoring elements included in the proposed rule and information on the costs associated with those monitoring elements were included in the EA/RIR/IRFA that was available to the Council when it took final action on Amendment 79 and the GRS program. These elements include the requirements for flow scales, two observers, and that each haul be available for observer sampling. The public had numerous opportunities to comment on these monitoring elements before the Council prior to the Council's decision in June 2003.

NMFS agrees that several details of the monitoring program were clarified during development of the proposed rule after new information became available on recent presorting cases, necessitating additional monitoring and enforcement tools for ensuring compliance with the GRS. These clarifications included the prohibition on mixing of hauls and the use of a nine hour day of sampling for each observer. The practice in the Alaska region is to have NMFS, rather than Council staff, prepare the proposed rule for Council action. NMFS provides the Council with the proposed rule and the Council initiates Secretarial review by formally transmitting the proposed rule to NMFS. On May 26, 2005, the Council formally transmitted the GRS program proposed rule to NMFS, which included all the monitoring components of the published proposed rule. Additionally, the Council submitted comments to the Secretary during the public comment period on the proposed rule, but none of the Council's comments objected to the monitoring requirements.

All the monitoring requirements for the GRS program were fully noticed to the public in accordance with the requirements of the Magnuson-Stevens Act and the Administrative Procedure Act. Note that in response to comments received, NOAA Fisheries has modified the final rule to remove the nine hour time constraint on observer sampling.

*Comment 19:*The Council never had an opportunity to comment on the specific monitoring requirements that exceeded those identified in their June 2003 motion.

*Response:* Several of the monitoring requirements included in the proposed rule were not before the Council when it took its final action on the GRS program, as explained in greater detail in the response to Comment 18. However, at the June 2005 meeting, the NMFS described all the monitoring requirements prior to their publication in the proposed rule and the Council heard public testimony on the GRS program, which included all the proposed monitoring components. Subsequently, the Council clarified their intentions for the GRS program, and submitted comments to NMFS during the proposed rule comment period. None of the Council's comments recommended revising any of the monitoring components. Additionally, as noted in Comment 18, all the monitoring components were included in the proposed rule transmitted to NMFS on May 26, 2005.

NMFS agrees that some regulatory provisions for this rule were not explicitly discussed by the Council before they adopted a recommendation to the Secretary. In the course of implementing a Council recommendation, NMFS must consider its ability to monitor programs such as the GRS, and promulgate enforceable regulations. The prohibition on the mixing of hauls, the limitations to one flow scale, the requirement that the conveyor line pass over a scale, and the limitation on observer sampling time to 9 hours a day were all included in the proposed rule to promote compliance with the GRS. While the final rule eliminates the restriction of observer sampling to nine hours, as explained in the response to Comment 13, the public was provided ample opportunity for public notice and comment on these regulatory clarifications in accordance with the APA.

*Comment 20:* The proposed rule would establish several additional monitoring requirements for the non-AFA trawl C/P sector. These new monitoring requirements are excessive. Current monitoring standards are sufficient and adequately meet NMFS data needs.

*Response:* The proposed rule and the supporting EA/RIR/IRFA as well as this final rule and EA/RIR/FRFA discuss the need for enhanced haul-by-haul catch monitoring standards necessary to monitor and support the GRS program. Also, see the response to Comment 17 above. NMFS' ability to adequately account for groundfish catch made under the GRS program would be severely compromised or impossible under current regulations because these regulations do not provide the information needed to determine haul-by-haul accounting of groundfish catch.

All regulated vessels are required to use NMFS-approved scales to determine the weight of total catch. This information is necessary to estimate total groundfish weight used in the denominator of the GRS calculation. All regulated vessels also must obtain sufficient observer coverage to ensure every haul is observed for verification that all fish are weighed or use an alternative processing plan approved by NMFS. Observer sampling of each haul is necessary to determine the percentage of the total catch that is comprised of groundfish. Each vessel will be required to provide a single location for observers to collect samples to reduce the potential of sample bias and enhance an observer's ability to obtain high quality samples. Mixing of catch from two or more hauls prior to sampling by an observer will be prohibited, because it is not possible to obtain a discrete sample if hauls are mixed.

Additionally, recent enforcement actions involving the intentional presorting of catch to bias observed catch rates of Pacific halibut document the incentive for biasing observer samples to optimize groundfish catch

relative to constraining PSC or other groundfish catch. However, the opportunities to bias observer samples should be reduced under the GRS program in comparison with the status quo because of the enhanced monitoring provisions that are established under this rule. These include observer sampling space and catch access provisions that will allow observers to monitor all catch between a holding bin and the scale used to weigh total catch. NMFS has determined that the new monitoring requirements are necessary to adequately account for groundfish catch under the GRS program and are not excessive.

*Comment 21:* The requirement that fishing operations must be conducted in such a manner that observers are available for no more than 9 hours out of a 12 hour shift could force a vessel to acquire three observers. The analysis envisioned two observers to meet this standard for vessels conducting fishing operations for 24 hours each day. The analysis did not analyze the effects of three observers.

*Response:* NMFS agrees. As the commenter notes, the analysis is based on the premise that two observers each working a 12-hour shift would be available to sample all hauls retrieved by a non-AFA trawl C/P that conducted fishing operations for 24 hours each day. The proposed rule included the nine hour sampling limitation to provide observers with sufficient time to complete other assigned duty tasks. NMFS assumed that the nine hour sampling limitation would not disrupt the normal haul retrieval patterns of non-AFA trawl C/Ps and that two observers would continue to be sufficient to sample all hauls retrieved by a non-AFA trawl C/P that conducted fishing operations for 24 hours each day. However, as revealed in the comment, non-AFA trawl C/Ps typically retrieve hauls throughout a 12-hour period. Limiting observers to nine hours of sampling within each 12-hour shift would likely require most non-AFA trawl C/Ps to routinely carry a third observer or to significantly alter their operations. Because the EA/RIR/FRFA did not analyze the effects of the 9-hour sampling limitation, NMFS has removed the 9-hour time limitation on sampling in the final rule, as noted in the response to Comment 13. Observers will continue to be limited to a 12-hour work day, and vessel operators must ensure that all hauls are available to an observer to sample. Routine fishing practices which do not allow for 2 observers working 12-hour shifts to complete all required sampling duties would not meet this standard, and additional observers may be required.

*Comment 22:* The analysis for the proposed GRS program indicates that the additional monitoring requirements provide improvements to management precision and accuracy because NOAA Fisheries will have scale weight data to verify each haul's total weight. Fishery managers currently must rely on secondary sources such as skipper estimates or total weekly production figures to estimate total catch weight. Other potential benefits include: (a) a reduction in error in the timing of fishing closures for some directed groundfish species, (b) improved precision and accuracy associated with prohibited species catch and non-target species removal estimates may lead to more precise estimates of the residual stock, and (c) improved data for estimating sampling variability between observers and for improved information on non-target species which are important components of the ecosystem.

*Response:* Installation of flow scales, sample stations and observation of each haul will enhance status quo catch monitoring and accounting for non-AFA trawl C/Ps. Direct measurement of weight on a flow scale is likely to be more accurate than observer measurements based on volumetric estimates and density. Managers will use catch estimates based on observer species catch composition data for each discrete haul. The greater the number of hauls that are sampled, the more representative are the species specific catch rates that will be applied to the groundfish catch weight from a specific vessel. NMFS agrees that improvements to data quality could enable inseason managers to adjust season dates with greater confidence than without these monitoring tools. If data from the GRS program are more representative of the actual catch, the management response may reduce the chance of exceeding TAC amounts. While NMFS agrees that the monitoring components of the GRS program are likely to increase data quality and potentially decrease the chance of exceeding catch allocation thresholds, sampling methods employed under the GRS program would not allow NMFS to measure bias and precision error in catch data.

*Comment 23:* The requirements that all catch be available for sampling from a single point and that an observer be able to ensure that no catch was removed from the point where fish exit the fish bin to the point where unsorted catch is collected are costly, if not unattainable. In many cases, these requirements would require massive restructuring of the factory area or would be physically impossible. The industry always understood that two flow scales would be allowed. This action will prevent vessels from having multiple lines or multiple scales. This will impose an unnecessary burden on those vessels with multiple processing lines and slow down production by creating a bottleneck upstream from the factory.

*Response:* As described above, NMFS must be confident that a vessel crew's ability to intentionally bias an observer's sample is minimized. Requiring all catch to be available for sampling from a single point reduces the crew's ability to deliberately sort catch prior to observer sampling. For example, if multiple sampling points were allowed, crew could intentionally move catch away from the observer's current sample collection point. Under this scenario, all catch would not be available for sampling by an observer and the sample could be biased. Additionally, a line-of-sight between the observer work station and discharge point of the codend is a required component of this final rule. This requirement further reduces the potential for intentional presorting as observers could detect these violations between the discharge and sample points.

The EA/RIR/FRFA includes an estimate of the costs associated with complying with this requirement as part of the cost of building a NMFS-approved observer sampling station. Factory designers have always sought to minimize the amount of space between the bins and the size sorters because until sorting takes place, fish cannot be further processed and excess space, in effect, would be wasted. Because of this constraint, the natural area for the flow scale in almost all cases is very close to the bins and visibility is not a problem. NMFS' experience with approving sampling stations for vessels has shown that in some cases the observer could not see the entire flow of fish from the sampling location, but that modifications to allow full visibility tended to be inexpensive (such as installing a parabolic mirror). To date, only two vessels have had to make factory modifications specifically to comply with the same monitoring requirements implemented under the CDQ program. Based on agency staff experience with this requirement in other programs and knowledge of all the affected vessels, NMFS has concluded that complying with the line-of-site regulation will likely require minimal factory alteration and should not be physically impossible or require massive restructuring.

This comment also asserts that the rule would prevent the use of multiple scales or multiple lines. NMFS disagrees, as the rule will only require that multiple scales not be used simultaneously and that all unsorted catch pass by a single location where the observer collects his or her samples. The vessel may bifurcate those lines both upstream and downstream in order to increase processing capacity or flexibility. This requirement will only result in a production-reducing constraint in the event that the speed with which fish could pass over the scale was a limiting factor. Given that NMFS-approved flow scales are capable of weighing catch at rates of 60–80 metric tons per hour, NMFS does not believe that such a bottleneck would be created. NMFS also notes that all the C/Ps and motherships participating in the AFA pollock fishery are able to effectively pass fish across a single point in spite of the fact that factory throughput in these vessels is generally considerably greater than the throughput of any non-AFA trawl C/P.

*Comment 24:* Smaller non-AFA trawl C/Ps should not be required to invest significant amounts of money into vessel capacity and factory upgrades when the need to make such investments may disappear when Amendment 80 is implemented. Amendment 80 is expected to include mechanisms that would allow these vessels to either comply with discard retention requirements through contractual means or retire from the fishery in an economically rational manner.

*Response:* NMFS recognizes that the lengths of vessels subject to the GRS program vary greatly, from slightly longer to 125 ft (38.1m) LOA to significantly longer than 125 ft. (38.1m) LOA. However, all non-AFA trawl C/Ps are required to comply with the GRS program regardless of whether they are slightly or significantly longer than 125 ft (38.1m) LOA because the non-AFA trawl C/P sector has consistently had the highest rate of groundfish discards of any groundfish sector in the BSAI and non-AFA trawl C/Ps account for 83 percent of the total catch of all non-AFA trawl catcher/processors.

Amendment 80 currently is under consideration by the Council and has not yet been submitted to NMFS for review and approval. Amendment 80 is an entirely separate action that would allocate specified groundfish species to the non-AFA trawl C/P sector and would provide the option for participants in the sector to form one or more fishing cooperatives.

In the future, vessels may be able to exit the fishery with some form of compensation for relinquishing their history and forego initial or ongoing compliance costs of the GRS program if opportunities arise to do so under a legislated buy out program. Similarly, Amendment 80, if adopted by the Council and approved by NMFS, could allow License Limitation Program permit holders the opportunity to enter cooperative agreements to lease their fishing history and avoid direct compliance costs associated with the monitoring of cooperative allocations and the GRS program. These options apply equally to non-AFA trawl C/Ps that are slightly longer than 125 ft (38.1m) LOA and to those that are much longer than 125 ft (38.1m) LOA. The comment appears to assume that only smaller non-AFA trawl C/Ps will exit the fishery were Amendment 80 if approved, but it is difficult to predict which non-AFA trawl C/Ps would continue to operate under Amendment 80.

*Comment 25:* The draft EA notes that more practicable measures exist for achieving bycatch reduction goals. Specifically, combining a GRS with Amendment 80 would achieve the same goal while offsetting the monitoring and enforcement costs associated with this regulation.

*Response:* NMFS does not agree that the EA/RIR/IRFA for the GRS states that other alternatives are more practicable for achieving bycatch reduction goals than this GRS. On the contrary, the preferred alternative GRS in this final rule is identified as a practicable means for meeting bycatch reduction goals. The purpose of the GRS program is to create a standard for the retention of groundfish in the BSAI groundfish fishery that will reduce current levels of discards in order to address the problem of excessive discards of groundfish in the BSAI. The alternatives examined in the EA/RIR/FRFA for the GRS program represent a reasonable range of alternatives to the identified purpose and need for the action. While NMFS anticipates that the formation of fishery cooperatives in the non-AFA trawl C/P sector under Amendment 80 (if approved) would decrease discard levels, there is no assurance under Amendment 80 that fishery cooperatives will form and, if formed, that discard reduction will reach the standard imposed by the GRS program.

The Council could have combined the GRS program and Amendment 80 into one action. However, for various policy reasons, the Council chose to separate the two actions. When the Council submitted the GRS program to NMFS for review and approval in accordance with section 304(b) of the Magnuson-Stevens Act (16 U.S.C. 1854(b)), NMFS had to determine whether the GRS program, as a stand alone action, was consistent with the Magnuson-Stevens Act and other applicable law. The provisions of Amendment 80 and the likelihood that they would offset costs associated with the GRS program were immaterial to the determination before NMFS, which was whether the proposed rule for the GRS program is consistent with the Magnuson-Stevens Act and other applicable law. NMFS initially determined that the proposed rule for the GRS program was consistent with the Magnuson-Stevens Act and other applicable law. After reviewing public comment received on the proposed rule, NMFS has determined that the GRS program continues to be consistent with the Magnuson-Stevens Act and other applicable law for the reasons provided in the preamble to this final rule.

*Comment 26:* Proposed Amendment 80 could impose different, more stringent, monitoring standards. These could cause vessels to have to modify their factories again in order to fish under Amendment 80. For example, the draft Amendment 80 analysis indicates that NMFS may require more space in the observer sampling station to accommodate larger samples.

*Response:* NMFS agrees that Amendment 80 could impose different, more stringent monitoring standards than those imposed in this final rule for the GRS program. Amendment 80, if approved, would impose monitoring standards on participating vessels that are appropriate for monitoring and accurate species specific catch accounting. Because non-AFA trawl C/Ps that are subject to the GRS program also would be subject to Amendment 80 if it were approved by the Council and NMFS, non-AFA trawl C/Ps may have to reconfigure certain parts of their factories twice - once to accommodate the monitoring requirements of the GRS program and again to accommodate the monitoring requirements of Amendment 80. To the extent possible, NMFS has sought to develop Amendment 80 monitoring standards to avoid additional costs, but in some cases this may not be possible. NMFS cannot state with certainty how the standards will differ until such time as Amendment 80 is approved by the Council and rulemaking implementing Amendment 80 is promulgated. Section 3.3 of the EA/RIR/FRFA prepared for the GRS program examines the cumulative effects that may occur from Amendment 80.

*Comment 27:* NMFS has not adequately discussed how the program will be enforced. Also, an observer misreporting incentive exists in part of the enforcement mechanism, where observers could be paid to return to testify on a case. Financial compensation for an observer to testify at some future date could compel observers to falsify records on the basis of potential future remuneration.

*Response:* The preambles to the proposed and final rules, EA/RIR/FRFA, and additional clarifications in response to public comment provide extensive discussion on how the program will be enforced and why different regulatory provisions, such as the requirement for weighing all catch on a certified scale, are required to support compliance monitoring, enforcement and prosecution.

Supplemental witness fees paid to observers will not bias observer reporting of data. In the event that a person contests a violation of the GRS, NMFS must be able to assemble a sufficient number of observers to provide testimony and review sampling data. When prosecution of a violation requires the testimony of observers, NMFS possesses the authority to provide travel expenses and some remuneration for incidental costs and labor associated with that testimony. It is unlikely that this supplemental witness fee will approach the value of lost time, inconvenience or other forgone opportunities for an observer who has chosen to leave the observer program for some alternative activity or source of employment. Additionally, any observer who biases data is subject to agency action which could include decertification and criminal prosecution.

*Comment 28:* This action will improve estimation of groundfish and prohibited species catch through better sampling and more precise estimation of observer total catch samples.

*Response:* As noted in the response to Comment 22, NMFS agrees that the accuracy of total catch estimates and the distribution of catch by species in hauls could be improved by this action. It is possible that increasing the total number of samples will have some positive catch precision implications, but the current sampling program is insufficient to generate any error statistics or other statistical measures from catch data. Improvements in the precision of catch estimates are not the purpose of this action, and the monitoring measures were not designed to accomplish this goal. However, this action will clearly improve NMFS' ability to measure total catch and to determine the species composition of that catch.

*Comment 29:* The Council's length criterion for exempting vessels from the GRS is arbitrary. Some vessels greater than 125 ft (38.1 m) LOA cannot comply with the proposed GRS while some vessels less than 125 ft (38.1 m) LOA would be able to meet the GRS. Differences in vessel size, processing capability, hold capacity, horsepower, crew capacity, and fish tank capacity are not determined by vessel length. The decision to use greater than or equal to 125 ft (38.1 m) LOA as a measure by which vessels can comply with the GRS is not supported in the analysis and is arbitrary.

*Response:* The length criterion for inclusion in the GRS program is not arbitrary or unsupported in the record. The GRS program applies to non-AFA trawl C/Ps that are 125 ft (38.1 m) LOA or greater. The EA/RIR/FRFA includes data showing that in 2001, non-AFA trawl catcher/processors less than 125 ft (38.1 m) LOA accounted for only 8 percent of the total catch of all non-AFA trawl catcher/processors and only 7 percent of the retained catch. Data presented in the EA/RIR/FRFA demonstrate for these two vessel length categories that catch and retained catch percentages are relatively stable between 1999 and 2002. Additionally, the EA/RIR/FRFA includes information on the costs associated with observers and scale monitoring requirements for non-AFA trawl catcher/processors over and under 125 ft (38.1 m) LOA. Because vessels under 125 ft (38.1m) LOA have relatively smaller factory space, scale and sampling station requirements could reduce processing capacity to a greater extent relative to that of larger vessels. Displacing a crew member to accommodate an additional observer also could reduce processing capacity for smaller vessels with limited space for crew. Given the relatively small contribution to this sector's overall harvest and recognizing that compliance costs associated with observers and scale monitoring requirements would be relatively higher for vessels less than 125 ft (38.1 m) LOA, these vessels are excluded from the GRS program.

Vessel length is a well established criterion for determining application of fishery regulations. In particular, 125 ft (38.1 m) LOA is a common dividing line for other regulations implemented for the North Pacific groundfish fisheries. For example, regulations at § 679.50(c) describe vessel observer coverage requirements. Groundfish vessels 125 ft (38.1 m) LOA or longer are required to carry an observer 100 percent of the time. In general, groundfish vessels less than 125 ft (38.1 m), but greater than 60 ft (18.3 m) LOA are required to carry an observer 30 percent of their fishing days. Groundfish vessels less than 60 ft (18.3 m) LOA are exempt from observer coverage. These regulations have been in place since implementation of the Observer Program in 1990, and are based on an analysis similar to that prepared for the GRS program. The proposed rule for the Observer Program (54 FR 51042, 51044; December 12, 1989) states, ''Because these large vessels harvest more than 50 percent of all the groundfish, requiring them to have higher observer coverage relative to smaller vessels and shoreside processing facilities is appropriate.''

Vessel length is the most practical criterion to determine applicability of fisheries regulations. Determination of vessel length is subject to little uncertainty or measurement bias as compared with some of the alternative operational measures suggested in this comment. Vessel length is tracked and monitored by the USCG and NMFS. While other capacity and power measures are not without merit as criteria for some regulations, NMFS has determined that they do not provide the necessary level of precision or accuracy for applying the GRS program. By applying the equal to or greater than 125 ft (38.1 m) vessel length criterion, those vessels accounting for a significant majority of the total catch and discards by non-AFA trawl C/Ps will be subject to the GRS program. This is consistent with the Council and NMFS's intent for the GRS program to reduce to the maximum extent practicable the amount of discards by non-AFA trawl C/P vessels. Therefore, NMFS has determined that the record for the GRS program supports the use of the 125 ft (38.1 m) LOA criterion.

*Comment 30:* The proposed rule imposes a burden on vessels within the non-AFA trawl C/P sector over 125 ft (38.1 m) LOA in a manner that is unequal between vessels. For example, vessels that operate in mixed species flatfish and cod fisheries may find it necessary to operate in other fisheries that are further from traditional fishing areas to achieve the required retention rates. The relative costs of making changes to physical plants and ongoing operations in this sector are unequal (and have different effects on the efficiency of a vessel) between the vessels in the sector. It is more costly for some vessels to operate in these remote fisheries than others.

*Response:* NMFS is aware that the GRS program may pose more operational costs on some non-AFA trawl C/Ps greater than or equal to 125

ft (38.1 m) LOA than other non-AFA trawl C/Ps greater than or equal to 125 ft (38.1 m) LOA. The analysis for this action is based on aggregate catch data for the entire sector as well as other data such as gross revenue and discards. As noted in the response to Comment 29, NMFS has determined that the vessel size threshold of greater than or equal to 125 ft (38.1 m) LOA is an appropriate criterion for inclusion in the GRS program between non-AFA trawl C/Ps. Also, the Magnuson-Stevens Act does not require the imposition of uniform costs or uniform benefits on each vessel in a fleet.

*Comment 31:* Amendment 79 is not approved at this time. It is not appropriate for NMFS to publish a proposed rule without FMP authority through an approved FMP amendment.

*Response:* Amendment 79, which authorizes the establishment of GRS programs, was approved by NMFS on August 31, 2005. NMFS disagrees that it was inappropriate to publish the proposed rule for the GRS program prior to approving Amendment 79. Amendment 79 and the proposed rule for the GRS program were submitted by the Council to NMFS on May 26, 2005. The Magnuson-Stevens Act at section 304(b) (16 U.S.C. 1854(b)) requires NMFS to publish a proposed rule within 15 days of receipt if NMFS determines that the proposed rule is consistent with the proposed FMP amendment, the Magnuson-Stevens Act and other applicable law. Because NMFS determined that the proposed rule for the GRS program was consistent with proposed Amendment 79, the Magnuson-Stevens Act, and other applicable law, NMFS appropriately published the proposed rule 15 days after its receipt and prior to NMFS' approval of Amendment 79, consistent with the requirements of the Magnuson-Stevens Act.

*Comment 32:* The decision to approve, disapprove or partially approve Amendment 79 must be made considering the legal approvability of the regulations implementing it.

*Response:* NMFS agrees that a decision to approve, disapprove or partially approve an FMP amendment must be made considering the legal consistency of the regulations necessary to implement the FMP amendment. Amendment 79 included the following statement in the management objectives section of the FMP: ''Continue to improve the retention of groundfish where practicable, through establishment of minimum groundfish retention standards.'' As worded, Amendment 79 refines the existing bycatch reduction objectives of the FMP by explicitly recognizing GRS programs as tools to reduce bycatch. At the time NMFS approved Amendment 79, the agency considered the consistency of the amendment as well as any regulations necessary for its implementation. Because regulations were not immediately necessary in order to implement Amendment 79 given its general, discretionary nature, NMFS was able to approve Amendment 79 without having to also make a decision on the proposed GRS program for non-AFA trawl C/Ps. NMFS recognized that any specific GRS program developed by the Council and NMFS under the authority of Amendment 79 must be consistent with the FMP, the Magnuson-Stevens Act, and other applicable law.

*Comment 33:* Amendment 79 should be approved to provide authority for the GRS program, but the regulations for the proposed GRS program should not be approved.

*Response:* As explained in greater detail in the response to Comment 32, NMFS approved Amendment 79 on August 31, 2005. After approving Amendment 79, NMFS considered whether the GRS program for non-AFA trawl C/Ps was consistent with the FMP, Magnuson-Stevens Act, and other applicable law. For the reasons provided throughout this final rule, NMFS determined that the GRS program for non-AFA trawl C/Ps was consistent with the FMP, the Magnuson-Stevens Act, and other applicable law, and has approved it.

*Comment 34:* The Council clarified its intent for the GRS by recommending that NMFS implement the GRS program in 2007 emphasizing that it intended to start the GRS at a rate of 65 percent in the first year of the program. The Council concluded that starting the GRS in 2007 would provide the affected fleet with a sufficient amount of time to make the necessary adjustments, including factory restructuring, to comply with the rule. The Council was concerned that inadequate time would be available to purchase and install the required monitoring equipment before the 2006 fishing season. The Council also concluded that the GRS should start at 65 percent because it was necessary to allow vessel owners to adjust fishing and business operations to accommodate gradually increased groundfish retention over time.

*Response:* NMFS determines that implementation of the GRS program in 2008 will provide the owners of affected non-AFA trawl C/Ps with a sufficient amount of time to modify their vessels as necessary to comply with the monitoring requirements of this rule. While the Council listed year 2007 as an anticipated starting date for the GRS, the time required to develop this final rule, and provide a sufficient opportunity for persons subject to the final rule to conform to its requirements lead NMFS to implement the GRS in 2008. Therefore, the proposed rule has been modified and this final rule implements the GRS program in 2008. NMFS also agrees with the Council's intent that the GRS program start at 65 percent regardless of the year in which the program is implemented. NMFS has determined that the owners and operators of some of the non-AFA trawl C/Ps regulated by this action will find it easier to adjust to the GRS in the first year if it is implemented at 65 percent as opposed to 75 percent as specified in the proposed rule because some of the non-AFA trawl C/P vessels continue to have a retained groundfish catch of less than 75 percent. Under the final rule, the GRS program will start at a GRS of 65 percent in 2008 and incrementally increase each year thereafter, culminating in an 85 percent GRS in 2011. Although the monitoring requirements must be met for the first year of the GRS program, the incremental increase in the GRS will provide owners and operators of regulated vessels with additional time to make operational adjustments in response to the required retention of additional groundfish. Because of the changes made to the final rule, non-AFA trawl C/Ps will have until 2011, instead of 2008, to respond to an 85 percent retention level.

*Comment 35:* In June 2005, the Council forwarded a comment on the proposed rule that if adopted by NMFS, would start the GRS program in 2007. In addition to the reasons provided by the Council for starting the GRS program at 65 percent in the first year of the program as summarized in Comment 34, the Council also commented that starting the GRS program later than 2006 is intended to allow the GRS to come on line simultaneously with or at most one year earlier than Amendment 80.

*Response:* While NMFS notes that Comment 35 is part of the Council's rationale for proposing to start the GRS program in 2007, NMFS does not find Comment 35 to be an appropriate reason to start the GRS program in 2007. NMFS has determined to start the GRS program in 2008 for the reasons provided in the response to Comment 34 and in the Changes to the final rule section of the preamble. Amendment 80 is currently under development by the Council. If the Council submits Amendment 80 to NMFS for approval, its approval is not

guaranteed, and if approved, its implementation date is not certain. Therefore, it is not possible to know at this time whether starting the GRS program in 2007 or even in 2008 will result in a simultaneous implementation with or a one year difference in implementation with Amendment 80.

The GRS program is an action that is independent of and separate from Amendment 80. As such, the GRS program must have a reasonable basis for its approval that is not dependent on the approval of and a specific implementation date for Amendment 80. For the reasons set forth in this rulemaking, NMFS has determined that the GRS program has sufficient analysis and justification for its approval regardless of Amendment 80's approval or implementation date.

*Comment 36:* The Council understood that industry would incur costs to implement and comply with the GRS and balanced them with the benefits it believes will arise from a reduction of discards and improved utilization of catch.

*Response:* NMFS agrees. The record developed during Council consideration of the GRS program and its adoption by the Council in June 2003 demonstrates that the Council was fully aware that the GRS program would result in vessel modifications and additional operational costs for non-AFA trawl C/Ps. The Council was again made aware of and received additional public testimony on the operational effects and costs of the GRS, and amended the GRS at its June 2005 meeting. At that time, the Council recommended modification of the GRS implementation date and percentage, but did not act to remove or withdraw support for the GRS program in any manner.

*Comment 37:* NMFS should adhere to the guidelines for overfishing established by the Pew Report and the United Nations.

*Response:* The GRS program has no explicit connection with the process that NMFS uses for designating the status of a species or species complex relative to overfishing guidelines.

*Comment 38:* All quotas should be reduced by 50 percent this year, 10 percent each subsequent year, and marine sanctuaries should be established.

*Response:* The GRS program implemented by this final rule does not have any relationship to the establishment of harvest specifications or the assignment of quotas or allocations in the North Pacific groundfish fisheries. Furthermore, the GRS program does not have any tangible connection with the establishment of marine sanctuaries.

**Changes From the Proposed Rule**

In June 2003, the Council assumed that approval and implementation of the GRS program would occur in time for the 2005 fishing year with a GRS of 65 percent. However, Secretarial review of Amendment 79 and associated rulemaking was not initiated prior to the start of the 2005 fishing year. Therefore, the proposed rule prepared for this action (70 FR 35054, June 16, 2005) proposed implementing the GRS in 2006 at the 75 percent level, which was consistent with the schedule in the Council's motion, but NMFS specifically asked for public comment on this aspect of the proposed rule. In June 2005, the Council asked NMFS to start implementation of the GRS at the 65 percent level and assumed the start date for implementation would be in 2007. The Council clarified that it did not intend implementation of the GRS on a date certain basis. Rather, it intended a gradual increase of the GRS level, regardless of the year the program was implemented. The Council clarified that this was necessary to allow vessel owners to adjust fishing and business operations to accommodate gradually increased groundfish retention over time. The Council also was concerned that inadequate time would be available to purchase and install the required monitoring equipment before the 2006 fishing season.

Because the Council clarified its intent to implement the GRS at the 65 percent level regardless of the calendar year, and public comment documented the extent to which some vessels may incur an additional burden to meet a GRS of 75 percent for the first year of the program, the final rule is adjusted to implement the first year of the GRS program at 65 percent. The EA/RIR/FRFA prepared for this action analyzed the effects of implementing the GRS at the 65 percent level, and this change is consistent with the analysis.

Because of the timing concerns highlighted by the industry and Council during public comment associated with making factory modifications to comply with the GRS program in 2006 and because the GRS program must start at the beginning of a fishing year for reasons summarized above, the final rule is adjusted to allow time for vessels to make these modifications and will be effective in 2008. Public comment was also helpful in determining the implementation date for the GRS. Some fishing companies noted that factory modifications would be more significant for some vessels than others. The time required to develop architectural and engineering contracts, scope and budget for capital modifications and schedule one or more shipyard visits for significant modifications could take several months. NMFS has responded to these concerns by implementing the GRS in 2008. Shifting the imposition of monitoring costs by one additional year from 2007 to 2008 will result in clear cost savings to the sector, by deferring present accounting costs by one full year. In addition to extending the time vessel owners and operators would have to plan and make these modifications, NMFS anticipates that the goals of the monitoring program are more likely to be achieved with this additional time by improving the quality of monitoring spaces, ease of observer access and viewing, and accuracy of catch accounting.

Some members of industry affected by this action also expressed concern with observer workload restrictions. As revealed by public comments, non-AFA trawl C/Ps typically retrieve hauls throughout a 12-hour period. Limiting observer to nine hours of sampling within each 12-hour shift could require vessels to alter their operations to allow observers to remain within this limit. To provide non-AFA C/Ps with increased flexibility to maximize their operational efficiencies, the final rule eliminates the 9-hour sampling restriction, as noted in the response to Comment 13. Observers will continue to be limited to a 12-hour work day, and vessel operators must ensure that all hauls are available to an observer to sample. Routine fishing practices that do not allow for 2 observers working 12-hour shifts to complete all required sampling duties would not meet this standard, and additional observers may be required.

A cross reference is added to the final rule at § 679.27(b)(3)(i) to clarify that all hauls must be available to be observed. This is a non-substantive change intended to provide consistency with observer coverage requirements.

At § 679.27(j)(5), the proposed rule is clarified so that the owner or operator of a non-AFA trawl C/P that is subject to the GRS program at § 679.27(j)(1) at any time during a fishing year also is required to comply with the GRS and all associated monitoring requirements if that vessel receives unsorted codends from another vessel at any time during a fishing year. For example, if a non-AFA trawl C/P vessel were to begin the fishing year by acting as a mothership and receive unsorted codends and then act as a catcher/processor later in the year, that vessel would be required to comply with the monitoring requirements at § 679.27(j)(3) for all

catch that was brought on board, even when the vessel was acting as a mothership. If the vessel failed to meet those monitoring requirements during the period that it acted as a mothership, the vessel would be in violation of the GRS program if at anytime during the fishing year it also acted as a catcher/processor. This revision is necessary to clarify which vessels are required to comply with the GRS, and the circumstances under which the GRS may apply to a mothership. Without these monitoring requirements, it would be impossible to accurately account for GRS fish and enforce the GRS program for any catcher/processor that also receives unsorted codends. Total catch would not be required to be measured by a flow scale, but could be estimated by the vessel operator. Furthermore, it would be impossible to verify the amount of product reported on WPRs.

For the reasons described above, regulations at § 679.7(m)(6) were added to prohibit non-AFA trawl C/Ps from receiving deliveries of unsorted catch at any time during a fishing year without complying with the monitoring requirements at § 679.27(j)(3) if the vessel is required to comply with § 679.27(j)(1) at any time during the same fishing year.

## Classification

The Administrator, Alaska Region, determined that Amendment 79 to the FMP is necessary for the conservation and management of the BSAI groundish fishery and that it is consistent with the Magnuson-Stevens Act and other applicable law.

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

The NMFS prepared a final regulatory flexibility analysis (FRFA). The FRFA incorporates the IRFA, a summary of the significant issues raised by the public comments in response to the IRFA, NMFS responses to those comments, and a summary of the analyses completed to support the action. A summary of the FRFA and how it addresses each of the requirements in 5 U.S.C. 604(a)(1)-(5) follows. A copy of this FRFA is available from NMFS (see **ADDRESSES**).

This action is intended to decrease regulatory and economic discards and increase catch utilization in the BSAI groundfish fisheries by implementing an annual GRS for non-AFA trawl C/Ps equal to or greater than 125 ft (38.1 m) LOA. The percent of groundfish retained will be a percent calculated as a specified ratio of the round-weight equivalent of total retained groundfish to total groundfish catch. The GRS will gradually increase from 65 percent in 2007 to 85 percent in 2010.

The GRS program applies only to non-AFA C/Ps using trawl gear that are 125 ft (38.1m) LOA or greater. Sixteen head-and-gut trawl C/Ps meet these criteria. Based on the best available data, it is improbable that any of these vessels are small entities. However, NMFS does not have the level of data and information to make a statistically confident estimation of the number of small entities affected by this action. Therefore, NMFS considered these vessels to be small entities and prepared an IRFA/FRFA that examines the impacts of the GRS program.

Alternative 1 described in the EA/RIR/FRFA is the status quo alternative. Current regulations regarding retention and discards would remain in effect.

Alternative 2 would establish a GRS of 70 percent. The standard would apply to non-AFA trawl C/Ps 125 ft (38.1m) LOA or greater and would be enforced at the sector level. Compliance with the GRS would be determined at the end of a fishing year. The MRA for pollock would be increased to 35 percent for all non-AFA trawl C/Ps, including vessels less than 125 ft (38.1m) LOA, and compliance with the pollock MRA would be monitored and enforced on each vessel at the end of each offload. NMFS-approved scales, a certified observer sampling station, and observer coverage of every haul would be used to measure and verify total catch. Alternative processing plans, approved by NMFS, could be substituted for observer coverage of every haul. Retained catch would be calculated using NMFS standard PRRs.

Alternative 3 would establish a GRS of 85 percent for January through May of each calendar year. The GRS would increase to 90 percent for the remainder of the year. The GRS would apply to individual non-AFA C/Ps 125 ft (38.1m) LOA or greater. Non-AFA C/Ps less than 125 ft (38.1m) LOA would be exempt from the GRS program if their weekly production were less than 600 mt. The MRA for pollock would be revised so that it is enforced at any time. Compliance with the GRS would be monitored and enforced at the end of each week for each area and gear type. NMFS-approved scales, a certified observer sampling station, and observation of every haul would be used to measure and verify total catch. Retained catch would be calculated using standard PRRs.

Alternative 4 is the preferred alternative, and is described above in the preamble to this action.

Not withstanding the possibility that markets could develop, retaining additional groundfish is not expected to generate additional revenues immediately, and could result in lower revenues if these fish displace higher value fish. Vessels subject to the GRS program could incur operating costs associated with holding, processing, transporting, and transferring fish that are of relatively low value. However, changes in technology, fishing techniques, and markets could reduce these potential costs.

Vessels subject to this action will be required to comply with the monitoring components described in the preamble above. NMFS estimates 7 of the 16 vessels subject to the GRS program will be required to install NMFS-approved flow scales, which are estimated to cost approximately $50,000 each. Equipment necessary to comply with observer sampling station requirements is estimated to cost between $6,000 and $12,000. Installation of this equipment is estimated to cost between $20,000 and $100,000. Under the GRS program, every haul will be required to be available for sampling by a NMFS-certified observer. This requirement will likely necessitate an additional observer on each vessel, which is estimated to cost $82,000 per vessel per year.

This action revises recordkeeping and reporting requirements for vessels subject to the GRS program. Proposed revisions to regulations will require all vessel owners or operators of vessels subject to the GRS program to record in the DCPL the total catch scale weight for each haul. This will increase the quality of data available to NMFS managers and provide NMFS enforcement with a tool to verify total catch weight for vessels subject to the GRS program.

### *Need for and Objectives of the Rule*

A description of the need for and objectives of this action is contained in the preamble to the proposed rule published in the **Federal Register** on July 16, 2005 (69 FR 35054), and in the preamble to this final rule and is not repeated here.

### *Summary of Significant Issues Raised in Public Comment*

The public comment period for the proposed rule ended on August 1, 2005. NMFS received 19 letters of comment on the proposed rule including 38 discrete comments. Four of the comments received specifically addressed the IRFA. These comments are summarized above in Comments 2, 13, 14, and 15. Seventeen of the comments focused on economic concerns of the proposed rule, but did not specifically address the IRFA. These comments are summarized above in

Comments 1, 3, 4, 5, 6, 9, 10, 17, 20, 21, 23, 24, 25, 26, 27, 30, and 36. Eleven letters of comment were received from persons working for or associated with one or more vessels subject to these regulations. Ten of those letters opposed the rule, and one was in favor of the rule. Associated entities opposing the rule cited the lack of discussion on some of the proposed monitoring components, the burden to catcher processing operations from monitoring and operational adjustments required for fishing under the rule, the costs associated with compliance to the rule, inconsistency of criteria for a small business entity as applied to catcher processors in the fishery, comparatively small benefits to the sector, fishing industry and nation, and a request to complete a new IRFA as the reasons for opposing the action. The regulated entity supporting the rule cited the need for bycatch reduction in the fleet due to wasted catch of groundfish and minimal costs associated with the benefits of the regulation. Of the total number of 19 letters, 5 respondents were in favor of the action, and 13 were not in favor of the action and one expressed no approval/disapproval opinion. Some of the agencies in favor of the action included the Environmental Protection Agency and the State of Alaska.

*Description and Estimate of Number of Small Entities to Which the Rule Will Apply*

The GRS program will apply only to non-AFA C/Ps using trawl gear that are 125 ft (38.1m) LOA or greater. Sixteen vessels meet these criteria. Based on the best available data, it is improbable that any of these vessels are small entities. NMFS defines a catcher/processor as a small entity if it has gross earnings of less than $3.5 million in a year. However, NMFS does not have the level of data and sufficient information on the corporate organization of these companies or data on the gross earnings from fishing operations of these companies to make a statistically confident estimation of the number of small entities affected by this action. Therefore, an IRFA was prepared for the proposed rule, and a FRFA was prepared for the final rule. A detailed description of the entities affected by the alternatives considered is provided in the EA/RIR/FRFA for the final rule in Sections 3.0, 4.0 and 5.0.

*Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements*

This action will not change the overall reporting structure and recordkeeping requirements of the participants in the BSAI groundfish fisheries. Modifications to plants for accommodating and certifying scales required of non-AFA trawl C/Ps regulated by this action will result in reporting costs. Many of these costs are detailed in the EA/RIR/FRFA submitted with this final rule in section 5.3.9, regarding impacts on regulated small entities. A detailed description of recordkeeping and reporting requirements are included in the draft support statement for the GRS proposed rule: Supporting Statement for Scale and Catch Weighing Requirements : June 2005 OMB Control No. 0648–0330.

All GRS regulated vessels are required to use NMFS-approved scales to determine the weight of total catch. In addition all vessels must obtain sufficient observer coverage to ensure each haul is observed for verification that all fish are weighed. Capital costs for scales on vessels that do not currently have them are estimated to total approximately $1.0 million. Approximately $0.5 million in annual observer costs are anticipated to support the monitoring program. Observer sampling stations are also required and capital costs for including these stations are anticipated to total approximately $70,000. Other reporting costs include scale tests and inspections, labor associated with producing scale outputs and recordkeeping for logging scale weights for total catch of each haul.

*Steps Taken to Minimize Economic Impacts on Small Entities*

The FRFA and other sections of the EA/RIR submitted with this rule, considered and rejected a number of options and alternatives that were each likely to have a greater negative impact on regulated entities than the preferred alternative. Alternative 3 would have imposed a GRS of 85 percent for January through May and 90 percent during the remainder of the year. That GRS percent would have applied to all vessel sizes in the non-AFA trawl C/P sector, and for those equal to or greater than 125 ft (38.1 m) length overall (LOA). Alternative 3 would be applied and enforced on an individual vessel basis. A greater number of the non-AFA trawl C/P vessels would be required to increase retention of groundfish under this alternative. The preferred Alternative 4 also considered an option to apply the GRS to non-AFA trawl catcher/processor vessels under 125 ft (38.1 m) LOA. This option was determined to be costly for these operations under 125 ft (38.1 m) LOA, and was rejected because of the lack of cost data associated with adapting these vessels for monitoring the GRS due to limited deck space and processing area. Additionally, non-AFA trawl catcher/processor vessels under 125 ft (38.1 m) LOA accounted for only 17 percent of the total groundfish catch by all non-AFA catcher/processors. Also, as a result of public comment on a potential approach to minimizing the impacts of the GRS, the regulations for this rule (Alternative 4) provide additional relief to these entities, by both reducing and staggering the GRS from the proposed rule level of 75 to 65 percent and by starting the GRS program in 2007 rather than 2006 as proposed. The GRS program is staggered to further provide a gradual increase of the GRS up to 85 percent in 2010 as opposed to imposing it at 85 percent in Alternative 3. Based on public comment, the regulations regarding observer sampling times also were relaxed to provide the affected entities with additional periods in a 12 hour work day to fish. The proposed rule restrained each observer to a sampling work schedule of nine hours in a 12 hour work day. The final rule allows observers to sample over the full 12 hour period, reducing the need for additional observers, or staging trawl operations only during the 9 hour observer sampling period.

*Small Entity Compliance Guide*

Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996 states that, for each rule or group of related rules for which an agency is required to prepare a FRFA, the agency shall publish one or more guides to assist small entities in complying with the rule, and shall designate such publications as ''small entity compliance guides.'' The agency shall explain the actions a small entity is required to take to comply with a rule or group of rules.

The preamble to this rule serves as the small entity compliance guide. It applies to the 16 vessels in the non-AFA trawl C/P sector that are equal or greater than 125 ft (38.1 m) LOA. Parent companies for these operations are well informed of compliance measures for the GRS, due to their long term participation in the non-AFA trawl C/P sector and involvement in the Council process leading to the GRS recommendation. These entities have assessed their ability to comply with the GRS and provided comments to NMFS on the proposed rule, and NMFS has incorporated many of these comments in the final rule. Implementing regulations at §§ 679.2, 679.5, 679.7, 679.27 and 679.50 detail all revisions and additions to recordkeeping, prohibitions, retention and utilization and observer requirements. This action

does not require additional compliance from small entities that is not described in the preamble. Copies of this final rule are available from NMFS (see **ADDRESSES**) and at the following website: *http://www.fakr.noaa.gov*.

NMFS has determined that this alternative meets the objective of the recordkeeping and reporting requirements of the GRS program by appropriately balancing the requirements for conservation and management of the groundfish fisheries under the Magnuson-Stevens Act with the requirements to minimize bycatch under National Standard 9 and minimize economic burdens under both National Standard 7 (minimize costs and avoid unnecessary duplication) and the Paperwork Reduction Act (minimize the economic burden of recordkeeping and reporting requirements).

This final rule includes a collection-of-information requirement subject to the Paperwork Reduction Act (PRA) that has been approved by OMB under control number 0648–0330. Public reporting burden for a catcher/processor trawl gear daily cumulative production logbook is estimated to average 30 minutes per response. Public reporting burden per response for: at-sea scale inspection report/sticker is estimated to average 6 minutes; record of daily scale tests is estimated to average 45 minutes; printed output of at-sea scale weight is estimated to average 45 minutes; observer sampling station inspection request is estimated to average 2 hours; and prior notice to observer of scale test is estimated to average 2 minutes.

Estimated response times include the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding these burden estimates or any other aspect of this data collection, including suggestions for reducing the burden, to NMFS Alaska Region at the **ADDRESSES** above, and e-mail to *David_Rostker@omb.eop.gov*, or fax to (202) 395–7285.

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

**List of Subjects in 50 CFR Part 679**

Alaska, Fisheries, Reporting and recordkeeping requirements.

Dated: March 31, 2006.

**James W. Balsiger,**

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

■ For the reasons set out in the preamble, 50 CFR part 679 is amended to read as follows:

## PART 679—FISHERIES OF THE EXCLUSIVE ECONOMIC ZONE OFF ALASKA

■ 1. The authority citation for 50 CFR part 679 continues to read as follows:

**Authority:** 16 U.S.C. 773 *et seq.*; 1540(f); 1801 *et seq.*; 1851 note; 3631 *et seq.*

■ 2. In § 679.2, a definition of ''Groundfish Retention Standard (GRS)'' is added in alphabetical order to read as follows:

**§ 679.2 Definitions.**

* * * * *

*Groundfish Retention Standard (GRS)* means the retention and utilization standard for groundfish described at § 679.27(j).

* * * * *

■ 3. In § 679.5, paragraph (a)(7)(iv)(C)(*3*) is revised to read as follows:

**§ 679.5 Recordkeeping and reporting (R&R).**

* * * * *

(a) * * *

(7) * * *

(iv) * * *

(C) * * *

| Enter ... | In a ... | If a ... |
|---|---|---|
| * * * * *<br>(*3*) Estimated total round weight of groundfish by haul. If the owner or operator of the vessel is required to comply with the GRS program described at § 679.27(j), the operator or manager must enter the round weight total of all catch by haul as measured by the NMFS-approved scale.<br>* * * * * | Trawl DCPL | C/P |

* * * * *

■ 4. In § 679.7, paragraph (m) is added to read as follows:

**§ 679.7 Prohibitions.**

* * * * *

(m) *Prohibitions specific to GRS.* It is unlawful for the owner or operator of a catcher/processor that is 125 ft (38.1 m) LOA or longer and not listed in § 679.4(l)(2)(i) and using trawl gear in the BSAI to:

(1) Retain an amount of groundfish during a fishing year that is less than the amount of groundfish required to be retained under the GRS program described at § 679.27(j).

(2) Fail to submit, submit inaccurate information, or intentionally submit false information on any report, application or statement required under this part.

(3) Process or discard any catch not weighed on a NMFS-approved scale that complies with the requirements of § 679.28(b). Catch must not be sorted before it is weighed and each haul must be available to be sampled by an observer for species composition.

(4) Process any groundfish without an observer sampling station that complies with § 679.28(d).

(5) Combine catch from two or more hauls.

(6) Receive deliveries of unsorted catch at any time during a fishing year without complying with § 679.27(j)(3) if the vessel is required to comply with § 679.27(j)(1) at any time during the same fishing year.

* * * * *

■ 5. In § 679.27, paragraphs (b)(4) and (j) are added to read as follows:

**§ 679.27 Improved Retention/Improved Utilization Program.**

* * * * *

(b) * * *

(4) All species listed in Table 2a to this part for purposes of the GRS program described in paragraph (j) of this section, except for groundfish in prohibited species status at the end of each reporting week.

* * * * *

(j) *Groundfish retention standard*—(1) *Applicability.* The operator of a catcher/processor that is 125 ft (38.1 m) LOA or

longer, not listed in § 679.4(l)(2)(i), and using trawl gear must comply with the GRS set forth under paragraph (j)(2)(ii) of this section while fishing for or processing groundfish caught from the BSAI from January 1 through December 31 of each year. The owner of a catcher/processor 125 ft (38.1 m) LOA or longer is required to ensure that the operator complies with the GRS program set forth under paragraph (j)(2)(ii) of this section. No part of the GRS program supersedes minimum retention or utilization requirements for IR/IU species found in this section.

(2) *Percent of groundfish retained calculation.* (i) For any fishing year, the percent of groundfish retained by each vessel identified under paragraph (j)(1) of this section would be calculated using the following equations:

$$\text{GFroundweight} = \sum_{i=1}^{n} \left( \text{PWspecies}_n \ / \ \text{PRRspecies}_n \right)$$

Substituting the value for GFroundweight into the following equation,

GRF% = (GFroundweight/TotalGF)*100

Where:

GFroundweight = the total annual round weight equivalent of all retained product weights for each IR/IU groundfish species.

$PWspecies_n$ = the total annual product weight for each groundfish species listed in Table 2a to this part by product type as reported in the vessel's weekly production report required at § 679.5(i).

$PRRspecies_n$ = the standard product recovery rate for each groundfish species and product combination listed in Table 3 to this part.

GFR% = the groundfish retention percentage for a vessel calculated as GFroundweight divided by the total weight of groundfish catch.

TotalGF = the total groundfish catch weight as measured by the flow scale measurement, less any non-groundfish, PSC species or groundfish species on prohibited species status under § 679.20.

(ii) The following table displays annual minimum groundfish retention requirements for each vessel required to comply with the GRS program under paragraph (j)(1) of this section:

| GROUNDFISH RETENTION STANDARD | |
|---|---|
| *GRS Schedule* | *Annual GRS* |
| 2008 | 65% |
| 2009 | 75% |
| 2010 | 80% |
| 2011 and each year after | 85% |

(3) *Monitoring requirements*—(i) *Observer coverage requirements.* In addition to complying with minimum observer coverage requirements at § 679.50(c), the owner or operator of a vessel required to comply with the GRS program must comply with observer coverage requirements as described at §§ 679.50(c)(6) and 679.7(m)(3) at all times the vessel is used to harvest groundfish in the BSAI with trawl gear.

(ii) *Catch weighing.* For each haul, all catch caught by a vessel required to comply with the GRS program must be weighed on a NMFS-approved scale and made available for sampling by a NMFS certified observer at a single location. The owner or operator of a vessel required to comply with the GRS program must ensure that the vessel is in compliance with the scale requirements described at § 679.28(b), that each haul is weighed separately, and that no sorting of catch takes place prior to weighing. All weighed catch must be recorded as required at § 679.5(a)(7)(iv)(C).

(iii) *Observer sampling station.* The owner or operator of a vessel required to comply with the GRS program must provide an observer sampling station as described at § 679.28(d) and the owner of a vessel required to comply with the GRS program must ensure that the vessel operator complies with the observer sampling station requirements described at § 679.28(d) at all times the vessel is used to harvest groundfish in the BSAI. In addition to the requirements at § 679.28(d)(7)(ii), observers must be able to sample all catch from a single point along the conveyer belt conveying unsorted catch, and when standing where unsorted catch is collected, the observer must be able to see that no catch has been removed between the bin and where unsorted catch is collected.

(4) *Requirements for vessels that also harvest groundfish outside of the BSAI.* The operator of a vessel required to comply with the GRS program must offload or transfer all fish or fish product prior to harvesting fish outside the BSAI, unless the operator of the vessel is in compliance with the recordkeeping and reporting and monitoring requirements described at § 679.5(a)(7)(iv)(C) and paragraph (j)(3) of this section at all times the vessel harvests or processes groundfish outside the BSAI.

(5) *Requirements for vessels receiving deliveries of unsorted catch.* The owner or operator of a vessel required to comply with paragraph (j) of this section at any time during a fishing year and also receives deliveries of unsorted catch at any time during a fishing year must comply with paragraph (j)(3) of this section while processing deliveries of unsorted catch.

■ 6. In § 679.50, paragraph (c)(6) is added to read as follows:

**§ 679.50 Groundfish Observer Program (applicable through December 31, 2007).**

* * * * *

(c) * * *

(6) *Catcher/processors 125 ft (38.1m) LOA or longer and not listed in § 679.4(l)(2)(i) using trawl gear in the BSAI*—(i) *Coverage requirement.* The owner or operator of a catcher/processor 125 ft (38.1 m) LOA or longer using trawl gear and not listed in § 679.4(l)(2)(i) must provide at least two level 2 NMFS-certified observers, at least one of which must be certified as a lead level 2 observer, for each day that the vessel is used to harvest or process groundfish in the BSAI. More than two observers are required if the observer workload restriction at paragraph (c)(6)(ii) of this section would otherwise preclude sampling as required under § 679.27(j)(3) and § 679.7(m)(3). NMFS may authorize the vessel to carry only one lead level 2 observer if the vessel owner or operator supplies vessel logbook or observer data that demonstrate that one level 2 observer can complete sampling, data recording, and data communication duties within the workload requirements described in § 679.50(c)(6)(ii) under an alternative processing plan. NMFS will not authorize an alternative processing plan with only one lead level 2 observer if it would require the observer to divide a 12-hour shift into shifts of less than 6 hours.

(ii) *Observer work load.* The time required for the observer to complete sampling, data recording, and data communication duties must not exceed 12 consecutive hours in each 24-hour period.

* * * * *

[FR Doc. 06–3265 Filed 4–5–06; 8:45 am]

BILLING CODE 3510–22–S

# Proposed Rules

Federal Register
Vol. 71, No. 66
Thursday, April 6, 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

### Food Safety and Inspection Service

### 9 CFR Part 390

**[Docket No. FSIS–2006–0009]**

## Public Meeting To Discuss the Proposed Rule on the Availability of Lists of Retail Consignees During Meat or Poultry Product Recalls

**AGENCY:** Food Safety and Inspection Service, USDA.

**ACTION:** Notice of public meeting; request for comments.

**SUMMARY:** The Food Safety and Inspection Service (FSIS) will hold a public meeting to solicit comments on its proposal to make available to the public lists of the retail consignees of meat and poultry products that have voluntarily been recalled by a federally inspected meat or poultry establishment if product has been distributed to the retail level. FSIS has proposed to routinely post these retail consignee lists on its Web site as they are developed by the Agency during its recall verification activities.

There will be a five-minute time limit for each commenter who presents at the meeting.

**DATES:** The public meeting will be held on April 24, 2006, from 9:30 a.m. to 12 p.m. Registration for the meeting will begin at 9 a.m.

**ADDRESSES:** The public meeting will take place in the conference room at the south end of the U.S. Department of Agriculture cafeteria located in the South Building, 1400 Independence Avenue, SW., Washington, DC, 20250. Meeting attendees must enter the South Building at Wing 2, C Street, SW.

FSIS will finalize an agenda on or before the meeting date and will post it on the FSIS Internet Web page *http://www.fsis.usda.gov/News/Meetings_&_Events/.* Interested persons may submit comments on this notice. Comments may be submitted by any of the following methods:

- Federal eRulemaking Portal: This Web site provides the ability to type short comments directly into the comment field on this Web page or attach a file for lengthier comments. Go to *http://www.regulations.gov* and, in the ''Search for Open Regulations'' box, select ''Food Safety and Inspection Service'' from the agency drop-down menu, and then click on ''Submit.'' In the Docket ID column, select FDMS Docket Number FSIS–2006–0009 to submit or view public comments and to view supporting and related materials available electronically. This docket can be viewed using the ''Advanced Search'' function in Regulations.gov.
- Mail, including floppy disks or CD–ROM's, and hand- or courier-delivered items: Send to Docket Clerk, U.S. Department of Agriculture, Food Safety and Inspection Service, 300 12th Street, SW., Room 102 Cotton Annex, Washington, DC 20250.
- Electronic mail: *fsis.regulationscomments@fsis.usda.gov.*

All submissions received by mail and electronic mail must include the Agency name and docket number FSIS–2006–0009. All comments submitted in response to this notice will be available for public inspection in the FSIS Docket Room at the address listed above between 8:30 a.m. and 4:30 p.m., Monday through Friday. The comments also will be posted to the regulations.gov Web site and on the Agency's Web site at *http://www.fsis.usda.gov/regulations_&_policies/2006_Notices_Index/index.asp.*

**FOR FURTHER INFORMATION CONTACT:** Victoria A. Levine, Program Analyst, Regulations and Petitions Policy Staff, Office of Policy, Program, and Employee Development, Room 112, Cotton Annex, 300 12th Street, SW., Washington, DC 20250–3700; Telephone (202) 720–5627, e-mail *victoria.levine@fsis.usda.gov.* Pre-registration for this meeting is required. To pre-register, please contact Diane Jones at (202) 720–9692 or by e-mail at *Diane.Jones@fsis.usda.gov.* Persons requiring a sign language interpreter or special accommodations should contact Ms. Jones as soon as possible.

**SUPPLEMENTARY INFORMATION:** On March 7, 2006, FSIS published in the **Federal Register** a proposed rule titled *Availability of Lists of Retail Consignees During Meat or Poultry Product Recalls* (71 FR 11326). In the preamble to the proposed rule, FSIS indicated that it would hold a public meeting to solicit comments on the issue raised in the proposal. Therefore, FSIS is holding this public meeting to solicit comment on FSIS' proposal to amend the federal meat and poultry products inspection regulations to provide that the Agency will make available to the public lists of the retail consignees of meat and poultry products that have been voluntarily recalled by a federally inspected meat or poultry products establishment if product has been distributed to the retail level. FSIS has proposed to routinely post these retail consignee lists on its website as they are developed by the Agency during its recall verification activities.

FSIS proposed this action because it believes that the efficiency of recalls will be improved if there is more information available as to where products that have been recalled were sold. By providing consumers this information, FSIS believes that consumers will be more likely to identify and return such products to those locations or to dispose of them. This action will apply only to meat and poultry products.

### Additional Public Notification

Public awareness of all segments of rulemaking and policy development is important. Consequently, in an effort to ensure that the public and in particular minorities, women, and persons with disabilities, are aware of this notice, FSIS will announce it on-line through the FSIS Web page located at *http://www.fsis.usda.gov/regulations_&_policies/2006_Notices_Index/index.asp.*

The Regulations.gov website is the central online rulemaking portal of the United States government. It is being offered as a public service to increase participation in the Federal government's regulatory activities. FSIS participates in Regulations.gov and will accept comments on documents published on the site. The site allows visitors to search by keyword or Department or Agency for rulemakings that allow for public comment. Each entry provides a quick link to a comment form so that visitors can type in their comments and submit them to FSIS. The website is located at *http://www.regulations.gov.*

FSIS also will make copies of this **Federal Register** publication available through the FSIS Constituent Update, which is used to provide information regarding FSIS policies, procedures, regulations, **Federal Register** notices, FSIS public meetings, recalls, and other types of information that could affect or would be of interest to our constituents and stakeholders. The update is communicated via Listserv, a free e-mail subscription service consisting of industry, trade, and farm groups, consumer interest groups, allied health professionals, scientific professionals, and other individuals who have requested to be included. The update also is available on the FSIS web page. Through Listserv and the web page, FSIS is able to provide information to a much broader, more diverse audience.

In addition, FSIS offers an email subscription service which provides an automatic and customized notification when popular pages are updated, including **Federal Register** publications and related documents. This service is available at *http://www.fsis.usda.gov/news_and_events/email_subscription/* and allows FSIS customers to sign up for subscription options across eight categories. Options range from recalls to export information to regulations, directives and notices. Customers can add or delete subscriptions themselves and have the option to password protect their account.

Done in Washington, DC: April 3, 2006.

**Barbara J. Masters,**

*Administrator.*

[FR Doc. E6–5013 Filed 4–5–06; 8:45 am]

**BILLING CODE 3410–DM–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

### 14 CFR Part 71

**[Docket No. FAA–2006–23907; Airspace Docket No. 06–AEA–003**

### Establishment of Class E Airspace; Ridgeway, PA

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** This notice proposes to establish Class E airspace at Ridgeway Landing Zone, Ridgeway, Pennsylvania. The development of an Area Navigation (RNAV) Standard Instrument Approach Procedure (SIAP) and Helicopter RNAV (GPS) 100 approach for the Ridgeway Landing Zone to serve flights operating into the airport during Instrument Flight Rules (IFR) conditions makes this action necessary. Controlled airspace extending upward from 700 feet Above Ground Level (AGL) is needed to contain aircraft executing an approach. The area would be depicted on aeronautical charts for pilot reference.

**DATES:** Comments must be received on or before May 8, 2006.

**ADDRESSES:** Send comments on the proposal in triplicate to: Manager, Airspace Branch, AEA–520, Docket No. FAA–2006–23907; Airspace Docket No. 06–AEA–003, FAA Eastern Region, 1 Aviation Plaza, Jamaica, NY, 11434–4809

The official docket may be examined in the Office of the Regional Counsel, AEA–7, FAA. Eastern Region, 1 Aviation Plaza, Jamaica, NY, 11434–4809. An informal docket may also be examined during normal business hours in the Airspace Branch, AEA–520, FAA Eastern Region, 1 Aviation Plaza, Jamaica, NY, 11434–4809.

**FOR FURTHER INFORMATION CONTACT:** Mr. Francis T. Jordan, Jr., Airspace Specialist, Airspace Branch, AEA–520 F.A.A. Eastern Region, 1 Aviation Plaza, Jamaica, NY, 11434–4809; telephone: (718) 553–4521.

**SUPPLEMENTARY INFORMATION:**

#### Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, economic, environmental, and energy-related aspects of the proposal. Communications should identify the airspace docket number and be submitted in triplicate to the address listed above. Commenters wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket No. FAA–2006–23907; Airspace Docket No. 06–AEA–003''. The postcard will be date/time stamped and returned to the commenter. All communications received on or before the closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this notice may be changed in light of comments received. All comments submitted will be available for examination in the Rules Docket closing both before and after the closing date for comments. A report summarizing each substantive public contact with the FAA personnel concerned with this rulemaking will be filed in the docket.

#### Availability of NPRMs

Any person may obtain a copy of this Notice of Proposed Rulemaking (NPRM) by submitting a request to the Office of the Regional Counsel, AEA–7, FAA Eastern Region, 1 Aviation Plaza, Jamaica, NY 11434–4809. Communications must identify the notice number of this NPRM. Persons interested in being placed on a mailing list for future NPRMs should also request a copy of Advisory Circular No. 11–2A, which describes the application procedure.

#### The Proposal

The FAA is considering an amendment to part 71 of the Federal Aviation Regulations (14 CFR part 71) to establish Class E airspace at Ridgeway, PA. The development of SIAPs to serve flights operating into the airport during IFR conditions makes this action necessary. Controlled airspace extending upward from 700 feet AGL is needed to accommodate the SIAPs. Class E airspace designations for airspace areas extending upward from 700 feet or more above the surface are published in Paragraph 6005 of FAA Order 7400.9N, dated September 1, 2005, and effective September 16, 2005, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designation listed in this document would be published subsequently in the Order.

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

#### List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

**The Proposed Amendment**

In consideration of the foregoing, the Federal Aviation Administration proposes to amend 14 CFR part 71 as follows:

## PART 71—[AMENDED]

1. The authority citation for 14 CFR part 71 continues to read as follows:

**Authority:** 49 U.S.C. 106(g), 40103, 40113, 40120; EO 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 16, 2005, is proposed to be amended as follows:

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

**AEA PA E5 Ridgeway Landing Zone [New]**

Ridgeway, PA

(Lat. 41°25′25″ N., long. 78°43′54″ W.)

That airspace extending upward from 700 feet above the surface within a 6.0 mile radius of the Ridgeway Landing Zone, Ridgeway, PA.

Issued in Jamaica, New York, on March 13, 2006.

**John G. McCartney,**

*Acting Area Director, Eastern Terminal Operations.*

[FR Doc. 06–3293 Filed 4–5–06; 8:45 am]

**BILLING CODE 4910–13–M**

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## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

### 14 CFR Part 71

**[Docket No. FAA–2006–23904; Airspace Docket No. 06–AEA–002]**

### Establishment of Class E Airspace; Jersey Shores Airport, PA

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** This notice proposes to establish Class E airspace at Jersey Shores Airport (P96), Jersey Shores, Pennsylvania. The development of an Area Navigation (RNAV) Standard Instrument Approach Procedure (SIAP) and Helicopter RNAV (GPS) 074 approach for the Jersey Shores Airport to serve flights operating into the airport during Instrument Flight Rules (IFR) conditions makes this action necessary. Controlled airspace extending upward from 700 feet Above Ground Level (AGL) is needed to contain aircraft executing an approach. The area would be depicted on aeronautical charts for pilot reference.

**DATES:** Comments must be received on or before May 8, 2006.

**ADDRESSES:** Send comments on the proposal in triplicate to: Manager, Airspace Branch, AEA–520, Docket No. FAA–2006–23904; Airspace Docket No. 06–AEA–002, FAA Eastern Region, 1 Aviation Plaza, Jamaica, NY 11434–4809.

The official docket may be examined in the Office of the Regional Counsel, AEA–7, FAA Eastern Region, 1 Aviation Plaza, Jamaica, NY 11434–4809.

An informal docket may also be examined during normal business hours in the Airspace Branch, AEA–520, FAA Eastern Region, 1 Aviation Plaza, Jamaica, NY 11434–4809.

**FOR FURTHER INFORMATION CONTACT:** Mr. Francis T. Jordan, Jr., Airspace Specialist, Airspace Branch, AEA–520 FAA Eastern Region, 1 Aviation Plaza, Jamaica, NY 11434–4809; telephone: (718) 553–4521.

**SUPPLEMENTARY INFORMATION:**

**Comments Invited**

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, economic, environmental, and energy-related aspects of the proposal. Communications should identify the airspace docket number and be submitted in triplicate to the address listed above. Commenters wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket No. FAA–2006–23904; Airspace Docket No. 06–AEA–002''. The postcard will be date/time stamped and returned to the commenter. All communications received on or before the closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this notice may be changed in light of comments received. All comments submitted will be available for examination in the Rules Docket closing both before and after the closing date for comments. A report summarizing each substantive public contact with the FAA personnel concerned with this rulemaking will be filed in the docket.

**Availability of NPRMs**

Any person may obtain a copy of this Notice of Proposed Rulemaking (NPRM) by submitting a request to the Office of the Regional Counsel, AEA–7, FAA Eastern Region 1, Aviation Plaza, Jamaica, NY, 11434–4809. Communications must identify the notice number of this NPRM. Persons interested in being placed on a mailing list for future NPRMs should also request a copy of Advisory Circular No. 11–2A, which describes the application procedure.

**The Proposal**

The FAA is considering an amendment of part 71 of the Federal Aviation Regulations (14 CFR part 71) to establish Class E airspace at Jersey Shores, PA. The development of SIAPs to serve flights operating into the airport during IFR conditions makes this action necessary. Controlled airspace extending upward from 700 feet AGL is needed to accommodate the SIAPs. Class E airspace designations for airspace areas extending upward from 700 feet or more above the surface are published in Paragraph 6005 of FAA Order 7400.9N, dated September 1, 2005, and effective September 16, 2005, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designation listed in this document would be published subsequently in the Order.

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

**List of Subjects in 14 CFR Part 71**

Airspace, Incorporation by reference, Navigation (air).

**The Proposed Amendment**

In consideration of the foregoing, the Federal Aviation Administration proposes to amend 14 CFR part 71 as follows:

## PART 71—[AMENDED]

1. The authority citation for 14 CFR part 71 continues to read as follows:

**Authority:** 49 U.S.C. 106(g), 40103, 40113, 40120; EO 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 16, 2005, is proposed to be amended as follows:

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

**AEA PA E5 Jersey Shores Airport [New]**

Jersey Shores, PA

(Lat. 41°12′22″ N., long. 77°13′46″ W.)

That airspace extending upward from 700 feet above the surface within a 6.0 mile radius of the Jersey Shores Airport, Jersey Shores, PA.

Issued in Jamaica, New York on March 13, 2006.

**John G. McCartney,**

*Acting Area Director, Eastern Terminal Operations.*

[FR Doc. 06–3292 Filed 4–5–06; 8:45 am]

BILLING CODE 4910–13–M

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## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 71

**[Docket No. FAA–2006–23909; Airspace Docket No. 06–AEA–005]**

## Establishment of Class E Airspace; Nessmuk Helipad, PA

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** This notice proposes to establish Class E airspace at Nessmuk Helipad, Wellsboro, Pennsylvania. The development of an Area Navigation (RNAV) Standard Instrument Approach Procedure (SIAP) and Helicopter RNAV (GPS) 080 approach for the Nessmuk Helipad to serve flights operating into the airport during Instrument Flight Rules (IFR) conditions makes this action necessary. Controlled airspace extending upward from 700 feet Above Ground Level (AGL) is needed to contain aircraft executing an approach. The area would be depicted on aeronautical charts for pilot reference.

**DATES:** Comments must be received on or before May 8, 2006.

**ADDRESSES:** Send comments on the proposal in triplicate to: Manager, Airspace Branch, AEA–520, Docket No. FAA–2006–23909; Airspace Docket No. 06–AEA–005, FAA Eastern Region, 1 Aviation Plaza, Jamaica, NY 11434–4809.

The official docket may be examined in the Office of the Regional Counsel, AEA–7, FAA Eastern Region, 1 Aviation Plaza, Jamaica, NY 11434–4809.

An informal docket may also be examined during normal business hours in the Airspace Branch, AEA–520, FAA Eastern Region, 1 Aviation Plaza, Jamaica, NY 11434–4809.

**FOR FURTHER INFORMATION CONTACT:** Mr. Francis T. Jordan, Jr., Airspace Specialist, Airspace Branch, AEA–520 FAA Eastern Region, 1 Aviation Plaza, Jamaica, NY 11434–4809; telephone: (718) 553–4521.

**SUPPLEMENTARY INFORMATION:**

**Comments Invited**

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, economic, environmental, and energy-related aspects of the proposal. Communications should identify the airspace docket number and be submitted in triplicate to the address listed above. Commenters wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket No. FAA–2006–23909; Airspace Docket No. 06–AEA–005''. The postcard will be date/time stamped and returned to the commenter. All communications received on or before the closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this notice may be changed in light of comments received. All comments submitted will be available for examination in the Rules Docket closing both before and after the closing date for comments. A report summarizing each substantive public contact with the FAA personnel concerned with this rulemaking will be filed in the docket.

**Availability of NPRMs**

Any person may obtain a copy of this Notice of Proposed Rulemaking (NPRM) by submitting a request to the Office of the Regional Counsel, AEA–7, FAA Eastern Region, 1 Aviation Plaza, Jamaica, NY, 11434–4809. Communications must identify the notice number of this NPRM. Persons interested in being placed on a mailing list for future NPRMs should also request a copy of Advisory Circular No. 11–2A, which describes the application procedure.

**The Proposal**

The FAA is considering an amendment to part 71 of the Federal Aviation Regulations (14 CFR part 71) to establish Class E airspace of Nessmuk Helipad, PA. The development of SIAPs to serve flights operating into the airport during IFR conditions makes this action necessary. Controlled airspace extending upward from 700 feet AGL is needed to accommodate the SIAPs. Class E airspace designations from airspace areas extending upward from 700 feet or more above the surface are published in Paragraph 6005 of FAA Order 7400.9N, dated September 1, 2005, and effective September 16, 2005, which is incorporated by reference in 14 CFR Part 71.1. The Class E airspace designated listed in this document would be published subsequently in the Order.

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

**List of Subjects in 14 CFR Part 71**

Airspace, Incorporation by reference, Navigation (air).

**The Proposed Amendment**

In consideration of the foregoing the Federal Aviation Administration proposed to amend 14 CFR part 71 as follows:

## PART 71—[AMENDED]

1. The authority citation for 14 CFR part 71 continues to read as follows:

**Authority:** 49 U.S.C. 106(g), 40103, 40113, 40120; EO 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

### § 71.1 [Amended]

2. The incorporation by reference in 14 CFR Part 71.1 of Federal Aviation Administration Order 740.9N dated September 1, 2005, and effective September 16, 2005, is proposed to be amended as follows:

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

**AEA PA E5 Nessmuk Helipad [New]**

Wellsboro, PA
(Lat. 41°43′30″ N., long. 77°17′15″ W.)

That airspace extending upward from 700 feet above the surface within a 6.0 mile radius of the Nessmuk Helipad, Wellsboro, PA.

Issued in Jamaica, New York, on March 13, 2006.

**John G. McCartney,**

*Acting Area Director, Eastern Terminal Operations.*

[FR Doc. 06–3291 Filed 4–5–06; 8:45 am]

**BILLING CODE 4910–13–M**

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## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 71

**[Docket No. FAA–2006–23908; Airspace Docket No. 06–AEA–004]**

## Establishment of Class E Airspace; Wyoming Valley Medical Center, Wilkes Barre, PA

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** This notice proposes to establish Class E airspace at Wyoming Valley Medical Center, Wilkes Barre, Pennsylvania. The development of an Area Navigation (RNAV) Standard Instrument Approach Procedure (SIAP) and Helicopter RNAV (GPS) 188 approach for the Wyoming Valley Medical Center to serve flights operating into the airport during Instrument Flight Rules (IFR) conditions makes this action necessary. Controlled airspace extending upward from 700 feet Above Ground Level (AGL) is needed to contain aircraft executing an approach. The area would be depicted on aeronautical charts for pilot reference.

**DATES:** Comments must be received on or before May 8, 2006.

**ADDRESSES:** Send comments on the proposal in triplicate to: Manager, Airspace Branch, AEA–520, Docket No. FAA–2006–23908; Airspace Docket No. 06–AEA–004, FAA Eastern Region, 1 Aviation Plaza, Jamaica, NY 11434–4809.

The official docket may be examined in the Office of the Regional Counsel, AEA–7, FAA Eastern Region, 1 Aviation Plaza, Jamaica, NY 11434–4809. An informal docket may also be examined during normal business hours in the Airspace Branch, AEA–520, FAA Eastern Region, 1 Aviation Plaza, Jamaica, NY 11434–4809.

**FOR FURTHER INFORMATION CONTACT:** Mr. Francis T. Jordan, Jr., Airspace Specialist, Airspace Branch, AEA–520 FAA Eastern Region, 1 Aviation Plaza, Jamaica, NY 11434–4809, telephone: (718) 553–4521.

**SUPPLEMENTARY INFORMATION:**

### Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, economic, environmental, and energy-related aspects of the proposal. Communications should identify the airspace docket number and be submitted in triplicate to the address listed above. Commenters wishing the FAA to acknowledge receipt of their contents on this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket No. FAA–2006–23908; Airspace Docket No. 06–AEA–004''. The postcard will be date/time stamped and returned to the commenter. All communications received on or before the closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this notice may be changed in light of comments received. All comments submitted will be available for examination in the Rules Docket closing both before and after the closing date for comments. A report summarizing each substantive public contact with the FAA personnel concerned with this rulemaking will be filed in the docket.

### Availability of NPRMs

Any person may obtain a copy of this Notice of Proposed Rulemaking (NPRM) by submitting a request to the Office of the Regional Counsel, AEA–7, FAA Eastern Region, 1 Aviation Plaza, Jamaica, NY 11434–4809. Communications must identify the notice number of this NPRM. Persons interested in being placed on a mailing list for future NPRMs should also request a copy of Advisory Circular No. 11–2A, which describes the application procedure.

### The Proposal

The FAA is considering an amendment to part 71 of the Federal Aviation Regulations (14 CFR part 71) to establish Class E airspace at Wyoming Valley Medical Center, PA. The development of SIAPs to serve flights operating into the airport during IFR conditions makes this action necessary. Controlled airspace extending upward from 700 feet AGL is needed to accommodate the SIAPs. Class E airspace designations for airspace areas extending upward from 700 feet or above the surface are published in Paragraph 6005 of FAA Order 7400.9N, dated September 1, 2005, and effective September 16, 2005, which is incorporated by reference in 14 CFR 71.1 The Class E airspace designation listed in this document would be published subsequently in the Order.

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

### List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

### The Proposed Amendment

In consideration of the foregoing, the Federal Aviation Administration proposes to amend 14 CFR part 71 as follows:

## PART 71—[AMENDED]

1. The authority citation for 14 CFR part 71 continues to read as follows:

**Authority:** 49 U.S.C. 106(g), 40103, 40113, 40120; EO 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 16, 2005, is proposed to be amended as follows:

*Paragraph 6006 Class E airspace areas extending upward from 700 feet or more above the surface of the earth.*

**AEA PA E5 Wyoming Valley Medical Center [New]**

Wilkes Barre, PA
(Lat. 41°15′29″ N., long. 75°48′32″ W.)

That airspace extending upward from 700 feet above the surface within a 6.0 mile radius of the Wyoming Valley Medical Center, Wilkes Barre, PA.

Issued in Jamaica, New York on March 13, 2006.

**John G. McCartney,**

*Acting Area Director, Eastern Terminal Operations.*

[FR Doc. 06–3290 Filed 4–5–06; 8:45 am]

**BILLING CODE 4910–13–M**

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## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 71

**[Docket No. FAA–2006–23715; Airspace Docket No. 06–AAL–08]**

## Proposed Modification of Offshore Airspace Area: Control 1487L; AK

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** This action proposes to modify the Control 1487L offshore airspace area in the vicinity of the Sitka Rocky Gutierrez Airport, Sitka, AK; Merle K. Mudhole Smith Airport, Cordova, AK; and Middleton Island Airport, Middleton Island, AK, by lowering the affected airspace floors associated within Control 1487L. The FAA is proposing these actions to provide additional controlled airspace for the safety of aircraft executing instrument flight rules (IFR) operations at the Sitka Rocky Gutierrez, Merle K. Mudhole, and Middleton Island Airports.

**DATES:** Comments must be received on or before May 22, 2006.

**ADDRESSES:** Send comments on this proposal to the Docket Management System, U.S. Department of Transportation, Room Plaza 401, 400 Seventh Street, SW., Washington, DC 20590–0001. You must identify FAA Docket No. FAA–2005–23715 and Airspace Docket No. 06–AAL–08, at the beginning of your comments. You may also submit comments through the Internet at *http://dms.dot.gov.*

**FOR FURTHER INFORMATION CONTACT:** Ken McElroy, Airspace and Rules, Office of System Operations Airspace and AIM, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone: (202) 267–8783.

**SUPPLEMENTARY INFORMATION:**

### Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments, as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal.

Communications should identify both docket numbers (FAA Docket No. FAA–2006–23715 and Airspace Docket No. 06–AAL–08) and be submitted in triplicate to the Docket Management System (see **ADDRESSES** section for address and phone number). You may also submit comments through the Internet at *http://dms.dot.gov.*

Commenters wishing the FAA to acknowledge receipt of their comments on this action must submit with those comments a self-addressed, stamped postcard on which the following statement is made: ''Comments to FAA Docket No. FAA–2006–23715 and Airspace Docket No. 06–AAL–08.'' The postcard will be date/time stamped and returned to the commenter.

All communications received on or before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this action may be changed in light of comments received. All comments submitted will be available for examination in the public docket both before and after the closing date for comments. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

### Availability of NPRM's

An electronic copy of this document may be downloaded through the Internet at *http://dms.dot.gov.* Recently published rulemaking documents can also be accessed through the FAA's Web page at *http://www.faa.gov.*, or the **Federal Register**'s Web page at *http://www.gpoaccess.gov/fr/index.html.*

You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office (see **ADDRESSES** section for address and phone number) between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. An informal docket may also be examined during normal business hours at the office of the Regional Air Traffic Division, Federal Aviation Administration, 222 West 7th Avenue 14, Anchorage, AK 99513.

Persons interested in being placed on a mailing list for future NPRM's should contact the FAA's Office of Rulemaking, (202) 267–9677, for a copy of Advisory Circular No. 11–2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedure.

### The Proposal

The FAA is proposing an amendment to Title 14 Code of Federal Regulations (14 CFR) part 71 to modify the Control 1487L airspace area, AK, by lowering the floor from 5,500 feet mean sea level (MSL) to as low as 700 feet MSL in the vicinity of the Sitka Rocky Gutierrez Airport, Merle K. Mudhole Smith Airport and Middleton Island Airport. This action also proposes to provide offshore airspace in the vicinity of Merle K. Mudhole Smith Airport, AK, by lowering the offshore airspace floor from 5,500 feet MSL to 1,200 feet MSL. Additionally, this action would re-designate the existing class E airspace at Anchorage, AK, by extending Control 1487L airspace area westward to the 12-mile shoreline limit within the 149.5-mile radius associated with Anchorage, AK Class E airspace, and clarify offshore airspace descriptions within already established domestic Class E airspace at Anchorage and Cordova. The FAA is proposing these actions to provide additional controlled airspace for the safety of aircraft executing IFR operations at the Sitka Rocky Gutierrez, Merle K. Mudhole Smith, and Middleton Island Airports, and to correctly designate the existing Class E airspace for Anchorage and Cordova, AK.

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and

routine amendments are necessary to keep them operationally current. Therefore, this proposed regulation: (1) Is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under Department of Transportation (DOT) Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this proposed rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

**ICAO Considerations**

As part of this proposal relates to navigable airspace outside the United States, this notice is submitted in accordance with the International Civil Aviation Organization (ICAO) International Standards and Recommended Practices.

The application of International Standards and Recommended Practices by the FAA, Office of System Operations Airspace and AIM, Airspace & Rules, in areas outside the United States domestic airspace, is governed by the Convention on International Civil Aviation. Specifically, the FAA is governed by Article 12 and Annex 11, which pertain to the establishment of necessary air navigational facilities and services to promote the safe, orderly, and expeditious flow of civil air traffic. The purpose of Article 12 and Annex 11 is to ensure that civil aircraft operations on international air routes are performed under uniform conditions.

The International Standards and Recommended Practices in Annex 11 apply to airspace under the jurisdiction of a contracting state, derived from ICAO. Annex 11 provisions apply when air traffic services are provided and a contracting state accepts the responsibility of providing air traffic services over high seas or in airspace of undetermined sovereignty. A contracting state accepting this responsibility may apply the International Standards and Recommended Practices that are consistent with standards and practices utilized in its domestic jurisdiction.

In accordance with Article 3 of the Convention, state-owned aircraft are exempt from the Standards and Recommended Practices of Annex 11. The United States is a contracting state to the Convention. Article 3(d) of the Convention provides that participating state aircraft will be operated in international airspace with due regard for the safety of civil aircraft. Since this action involves, in part, the designation of navigable airspace outside the United States, the Administrator is consulting with the Secretary of State and the Secretary of Defense in accordance with the provisions of Executive Order 10854.

**List of Subjects in 14 CFR Part 71**

Airspace, Incorporation by reference, Navigation (air).

**The Proposed Amendment**

In consideration of the foregoing, the Federal Aviation Administration proposes to amend 14 CFR part 71 as follows:

## PART 71—DESIGNATION OF CLASS A, B, C, D AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

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

**Authority:** 49 U.S.C. 106(g), 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

**§ 71.1 [Amended]**

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

*Paragraph 6007 Offshore Airspace Areas.*

* * * * *

**Control 1487L [Amended]**

That airspace extending upward from 8,000 feet MSL within 149.5 miles of the Anchorage VOR/DME clockwise from the 090°((T)/065°(M) radial to the 185°(T)/160°(M) radial of the Anchorage VOR/DME; and that airspace extending upward from 5,500 feet MSL within the area bounded by a line beginning at lat. 58°19′58″ N., long. 148°55′07″ W.; to lat. 59°08′34″ N., long. 147°16′06″ W.; thence counterclockwise via the arc of a 149.5-mile radius centered on the Anchorage VOR/DME to the intersection of the 149.5-mile radius arc and a point 12 miles from and parallel to the U.S. coastline; thence southeast 12 miles from and parallel to the U.S. coastline to a point 12 miles offshore on the Vancouver FIR boundary; to lat. 54°32′57″ N., long. 133°11′29″ W.; to lat. 54°00′00″ N., long. 136°00′00″ W.; to lat. 52°43′00″ N., long. 135°00′00″ W.; to lat. 56°45′42″ N., long. 151°45′00″ W.; to the point of beginning; and that airspace extending upward from 1,200 feet MSL within the area bounded by a line beginning at lat. 59°33′25″ N., long. 141°03′22″ W.; thence southeast 12 miles from and parallel to the U.S. coastline to lat. 58°56′18″ N., long. 138°45′19″ W.; to lat. 58°40′00″ N., long. 139°30′00″ W.; to lat. 59°00′00″ N., long.141°10′00″ W.; to the point of beginning, and that airspace within 85 miles of the Biorka Island VORTAC, and that airspace within 42 miles of the Middleton Island VOR/DME, and that airspace within 30 miles of the Glacier River NDB; and that airspace extending upward from 700 feet MSL within 14 miles of the Biorka Island VORTAC and within 4 miles west and 8 miles east of the Biorka Island VORTAC 209°(T)/181°(M) radial extending to 16 miles southwest of the VORTAC. The portion within Canada is excluded.

* * * * *

Issued in Washington, DC, on March 30, 2006.

**Edith V. Parish,**

*Manager, Airspace and Rules.*

[FR Doc. E6–4973 Filed 4–5–06; 8:45 am]

BILLING CODE 4910–13–P

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## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

### 21 CFR Part 878

**[Docket No. 2006N–0109]**

### General and Plastic Surgery Devices; Reclassification of the Topical Oxygen Chamber for Extremities

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Proposed rule.

**SUMMARY:** The Food and Drug Administration (FDA) is proposing to reclassify the topical oxygen chamber for extremities (TOCE) from class III (premarket approval) into class II (special controls). The device is intended to surround a patient's limb and apply humidified oxygen to aid healing of chronic skin ulcers such as bedsores. Elsewhere in this issue of the **Federal Register**, FDA is publishing a notice of availability of the draft guidance document that the agency proposes to use as a special control for the device.

**DATES:** Submit written or electronic comments by July 5, 2006. See section VIII of this document for the proposed effective date of a final rule based on this proposed rule.

**ADDRESSES:** You may submit comments, identified by Docket No. 2006N–0109, by any of the following methods:

*Electronic Submissions*

Submit electronic comments in the following ways:

- Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the instructions for submitting comments.
- Agency Web site: *http://www.fda.gov/dockets/ecomments*.

Follow the instructions for submitting comments on the agency Web site.

*Written Submissions*

Submit written submissions in the following ways:

- FAX: 301–827–6870.
- Mail/Hand delivery/Courier [For paper, disk, or CD–ROM submissions]: Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

To ensure more timely processing of comments, FDA is no longer accepting comments submitted to the agency by e-mail. FDA encourages you to continue to submit electronic comments by using the Federal eRulemaking Portal or the agency Web site, as described in the *Electronic Submissions* portion of this paragraph.

*Instructions*: All submissions received must include the agency name and Docket No(s). and Regulatory Information Number (RIN) (if a RIN number has been assigned) for this rulemaking. All comments received may be posted without change to *http://www.fda.gov/ohrms/dockets/default.htm*, including any personal information provided. For detailed instructions on submitting comments and additional information on the rulemaking process, see the ''Comments'' heading of the **SUPPLEMENTARY INFORMATION** section of this document.

*Docket*: For access to the docket to read background documents or comments received, go to *http://www.fda.gov/ohrms/dockets/default.htm* and insert the docket number(s), found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Division of Dockets Management, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

**FOR FURTHER INFORMATION CONTACT:** Charles N. Durfor, Center for Devices and Radiological Health (HFZ–410), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 301–594–3090, ext. 134.

**SUPPLEMENTARY INFORMATION:**

## I. Background

### *A. Regulatory Authorities*

The Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 301 *et seq.*), as amended by (among other amendments) the Medical Device Amendments of 1976 (the 1976 amendments) (Public Law 94–295) and the Safe Medical Devices Act (SMDA) (Public Law 101–629) established a comprehensive system for the regulation of medical devices intended for human use. Section 513 of the act (21 U.S.C. 360c) established three categories (classes) of devices, depending on the regulatory controls needed to provide reasonable assurance of their safety and effectiveness. The three categories of devices are class I (general controls), class II (special controls), and class III (premarket approval).

Under section 513 of the act, devices that were in commercial distribution before May 28, 1976 (the date of enactment of the 1976 amendments), generally referred to as preamendments devices, are classified after FDA has taken the following steps: (1) Received a recommendation from a device classification panel (an FDA advisory committee); (2) published the panel's recommendation for comment, along with a proposed regulation classifying the device; and (3) published a final regulation classifying the device. FDA has classified most preamendments devices under these procedures.

Devices that were not in commercial distribution prior to May 28, 1976, generally referred to as postamendments devices, are classified automatically by statute (section 513(f) of the act) into class III without any FDA rulemaking process. Postamendments devices require premarket approval, unless FDA issues an order finding the device to be substantially equivalent, in accordance with section 513(i) of the act, to a predicate device that does not require premarket approval. The agency determines whether new devices are substantially equivalent to predicate devices by means of premarket notification procedures in section 510(k) of the act (21 U.S.C. 360(k)) and 21 CFR part 807) of the regulations.

A preamendments device that has been classified into class III may be marketed, by means of premarket notification procedures, without submission of a premarket approval application (PMA) until FDA issues a final regulation under section 515(b) of the act (21 U.S.C. 360e(b)) requiring premarket approval.

In 1990, the SMDA added section 515(i) to the act. This section requires FDA to issue an order to manufacturers of preamendments class III devices for which no final regulation requiring the submission of PMAs has been issued to submit to the agency a summary of, and a citation to, any information known or otherwise available to them respecting such devices, including adverse safety and effectiveness information that has not been submitted under section 519 of the act (21 U.S.C. 360i). Section 519 of the act requires manufacturers, importers, and device user facilities to submit adverse event reports of certain device-related events and reports of certain corrective actions taken. Section 515(i) of the act also directs FDA to either revise the classification of the device into class I or class II or require the device to remain in class III and establish a schedule for the issuance of a rule requiring the submission of PMAs for those devices.

In the **Federal Register** of May 6, 1994 (59 FR 23731), FDA announced the availability of a document setting forth its strategy for implementing the provisions of the SMDA that require FDA to review the classification of preamendments class III devices. Under this plan, the agency divided preamendments class III devices into the following three groups: Group 1 devices are devices that FDA believes raise significant questions of safety and/or effectiveness, but are no longer used or are in very limited use; group 2 devices are devices that FDA believes have a high potential for being reclassified into class II; and group 3 devices are devices that FDA believes are not likely candidates for reclassification.

In the **Federal Register** of August 14, 1995 (60 FR 41986), FDA published an order for Group 2 preamendment class III devices, including the TOCE, requiring the submission of safety and effectiveness information in accordance with the preamendments class III strategy to implement section 515(i) of the act (515(i) summary). The order describes in detail the format for submitting the type of information required by section 515(i) of the act so that the information submitted would clearly support reclassification or indicate that the device should be retained in class III. This order was updated in the **Federal Register** of June 13, 1997 (62 FR 32355).

Reclassification of classified preamendments devices is governed by section 513(e) of the act. This section provides that FDA may, by rulemaking, reclassify a device based upon ''new information.'' The reclassification can be initiated by FDA or by the petition of an interested person. The term ''new information,'' as used in section 513(e) of the act, includes information developed as a result of a re-evaluation of the data before the agency when the device was originally classified, as well as information not presented, not available, or not developed at that time. (See, e.g., *Holland Rantos* v. *United States Department of Health, Education, and Welfare*, 587 F.2d 1173, 1174 n.1 (D.C. Cir. 1978); *Upjohn* v. *Finch*, 422 F.2d 944 (6th Cir. 1970); *Bell* v. *Goddard*, 366 F.2d 177 (7th Cir. 1966).)

Re-evaluation of the data previously before the agency is an appropriate basis for subsequent regulatory action where the reevaluation is made in light of changes in ''medical science.'' (See *Upjohn* v. *Finch*, supra, 422 F.2d at 951.) However, regardless of whether data before the agency are past or new data, the ''new information'' upon which reclassification under section 513(e) of the act is based must consist of ''valid scientific evidence,'' as defined in section 513(a)(3) of the act and 21 CFR 860.7(c)(2). FDA relies upon ''valid scientific evidence'' in the classification process to determine the level of regulation for devices. For the purpose of reclassification, the valid scientific evidence upon which the agency relies must be publicly available. Publicly available information excludes trade secret and/or confidential commercial information, e.g., the contents of a pending PMA. (See section 520(c) of the act (21 U.S.C. 360j(c)).)

*B. Device Description*

The TOCE is currently identified as a device intended to surround hermetically a patient's limb and apply humidified oxygen topically at a pressure slightly greater than atmospheric pressure to aid healing of chronic skin ulcers or bed sores.

*C. Regulatory History of the Device*

In 1988, the agency issued a final rule classifying this device into class III (53 FR 23856, June 24, 1988). In the preamble to the classification final rule, FDA cited two documents that found little scientific evidence to support the safety and effectiveness of the device. FDA stated that there was a potential for widespread use of the device in the treatment of skin sores in the elderly and infirm. FDA concluded that the device presented a potential unreasonable risk of illness or injury to these patients if there were not adequate data to assure its safety and effectiveness. In addition, FDA found that the device was purported or represented to be for a use, the treatment of decubitus ulcers, that was of substantial importance in preventing impairment of human health. Accordingly, the agency classified the device into class III.

In August 1997, in response to FDA's order for the submission of information on the TOCE, two manufacturers submitted 515(i) summaries of safety and effectiveness information to the agency for the TOCE (Refs. 1 and 2). These 515(i) summaries recommended that the device be reclassified into class II and provided information to assist FDA in reclassifying the device. FDA referred the 515(i) submissions to the General and Plastic Surgery Devices Panel (GPS Panel) for their recommendation on the requested reclassification.

At a public meeting on November 17, 1998, the GPS Panel recommended that the device be retained in class III (Ref. 3). The GPS Panel based their recommendation on the information in the 515(i) submissions of safety and effectiveness information; the information provided by FDA; testimony presented at the meeting by manufacturers of the device, a physician user of the device, and FDA; and the Panel's deliberations at the meeting.

The GPS Panel believed that the effectiveness of the TOCE remained unestablished. The Panel also concluded that special controls, in addition to general controls, were insufficient to provide a reasonable assurance of the safety and effectiveness of the device and that there was insufficient information, primarily a lack of effectiveness information, to establish special controls. Accordingly, the GPS panel recommended premarket approval to provide reasonable assurance of the device's effectiveness. The Panel recommended that the call for premarket approval be of low priority to allow manufacturers of the device sufficient time to conduct studies that would establish the effectiveness of the device.

## II. Proposed Rule

As discussed in more detail in the following paragraph, FDA is proposing to reclassify the TOCE from class III to class II (special controls). FDA believes that new information now exists to establish special controls, that, in addition to the general controls, will provide a reasonable assurance of the safety and effectiveness of this device.

In addition, FDA is proposing minor revisions to the device description (see 21 CFR 878.5650) intended to more accurately describe this device type. FDA is proposing to remove the term hermetically and to clarify that bedsores are chronic skin ulcers. FDA proposes to identify the TOCE as follows: A topical oxygen chamber for extremities is a device that is intended to surround a patient's limb and apply humidified oxygen topically at a pressure slightly greater than atmospheric pressure to aid healing of chronic skin ulcers such as bedsores.

## III. Risks to Health

After considering the information in the 515(i) submissions for the two devices, the GPS Panel's recommendation, the published literature, and Medical Device Reports, FDA has evaluated the risks to health associated with use of the TOCE and determined that the following risks to health are associated with its use.

*A. Infection*

If the device cannot be sterilized, an infection can occur. FDA also notes that some TOCEs are for single patient use and some are for multiple patient use. If a TOCE for multiple patient use cannot be adequately sterilized between use in multiple patients, there is a high potential for transmission of infection between patients because these patients are already immunologically compromised.

*B. Fire and Explosion*

The risk of fire and explosion is common to all devices that are used in an atmosphere of pure oxygen.

*C. Local Tissue Damage*

The therapeutic topical oxygen pressure range, which is only slightly above atmospheric pressure, is very narrow and is critical to maintain. Excessive topical oxygen pressure (higher than 22 millimeters of mercury) can occlude local arterial circulation, decreasing local tissue circulation, which could cause local tissue damage.

*D. Adverse Tissue Reaction*

Adverse tissue reaction is a risk common to all devices that contact compromised skin. Incompatible materials or impurities in the materials may increase the severity of a local tissue reaction or cause a system tissue reaction.

*E. Electrical Shock*

Electrical shock is also a risk common to electrical devices that contact compromised skin.

## IV. Summary of the Reasons for the Reclassification

FDA believes that the TOCE should be reclassified into class II because special controls, in addition to general controls, can be established to provide reasonable assurance of the safety and effectiveness of the device. In addition, there is now experience in the clinical community and adequate effectiveness information sufficient to establish special controls to provide such assurance.

## V. Summary of the Data Upon Which the Reclassification is Based

New information has become available since the 1998 GPS Panel meeting on the clinical effectiveness of the device. Specifically, three recent studies (two prospective and one

retrospective) report safe use and adequate healing of wounds using the TOCE. Two studies compared standard wound care with TOCE treatment for gangrenous or necrotic wounds (Refs. 4 and 5), and the third study evaluated the clinical effectiveness of TOCE treatment of chronic ulcers, post-surgical wounds, and acute trauma-induced wounds (Ref. 6). These three studies demonstrated adequate healing for an acceptable number of wounds. Investigators reported no complications related to TOCE use in these three studies.

## VI. Special Controls

FDA believes that the draft guidance document entitled ''Class II Special Controls Guidance: Topical Oxygen Chamber for Extremities'' (draft special controls guidance document), in addition to general controls, can be an adequate special control to address the risks to health associated with the use of the TOCE device described in section III of this document. FDA agrees with the GPS Panel that in 1998 the effectiveness of the TOCE was not established. FDA now believes that the new information cited previously (Refs. 4 to 6) provides sufficient supporting evidence regarding effectiveness. Thus, the agency now believes that the draft special controls guidance document, which incorporates voluntary consensus standards, device performance testing, and labeling, addresses the GPS Panel's concerns. Elsewhere in this issue of the **Federal Register**, FDA is publishing a notice of availability of the draft guidance document that the agency intends to use as the special control for this device.

The draft special controls guidance document contains specific recommendations for device performance testing and other information that should be included in a premarket notification (510(k)) submission. For example, the draft special controls guidance document addresses the following issues: sterility, fire and explosion control, oxygen pressure control, biocompatibility, electrical safety testing, and labeling. In the following table 1, FDA has identified the risks to health associated with the use of the device in the first column and the recommended mitigation measures identified in the draft special controls guidance document in the second column. These recommendations will also help ensure that the device has appropriate performance characteristics and labeling for its use. Following the effective date of any final reclassification rule based on this proposal, any firm submitting a 510(k) submission for this device will need to address the issues covered in the draft special controls guidance document. However, the firm need only show that its device meets the recommendations of the draft special controls guidance document or in some other way provides equivalent assurances of safety and effectiveness.

TABLE 1

| Identified Risk | Recommended Mitigation Measures |
|---|---|
| Infection | Section 7: Sterility<br>Section 12: Clinical Studies<br>Section 13: Labeling |
| Fire and Explosion | Section 8: Fire and Explosion Control<br>Section 13: Labeling |
| Local Tissue Damage | Section 9: Oxygen Pressure Control<br>Section 13: Labeling |
| Adverse Tissue Reaction | Section 10: Biocompatibility |
| Electrical Shock | Section 11: Electrical Safety Testing<br>Section 13: Labeling |

## VII. FDA's Findings

As discussed previously, FDA believes the TOCE should be reclassified into II because special controls, in addition to general controls, provide reasonable assurance of the safety and effectiveness of the devices, and there is sufficient information to establish special controls to provide such assurance. FDA, therefore, is proposing to reclassify the device into class II and establish the draft class II special controls guidance document as a special control for the device.

Section 510(m) of the act provides that a class II device may be exempted from the premarket notification requirements under section 510(k) of the act, if the agency determines that premarket notification is not necessary to provide reasonable assurance of the safety and effectiveness of the device. For this type of device, FDA has determined that premarket notification is necessary to provide reasonable assurance of safety and effectiveness and, therefore, the device is not exempt from the premarket notification requirements. FDA review of performance characteristics will provide reasonable assurance that acceptable levels of performance for both safety and effectiveness are addressed before marketing clearance. Thus, persons who intend to market this device must submit to FDA a 510(k) submission containing information on the TOCE and receive a substantial equivalence determination from the agency before marketing the device.

## VIII. Proposed Effective Date

FDA proposes that any final regulation based on this proposal become effective 30 days after its date of publication in the **Federal Register**.

## IX. Environmental Impact

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

## X. Analysis of Impacts

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

The Regulatory Flexibility Act requires agencies to analyze regulatory options that would minimize any significant impact of a rule on small entities. Reclassification of this device from class III to class II will relieve all manufacturers of the device of the cost of complying with the premarket approval requirements of section 515 of the act. Because reclassification will reduce the regulatory costs with respect to this device, the agency certifies that the proposed rule will not have a significant economic impact on a substantial number of small entities.

Section 202(a) of the Unfunded Mandates Reform Act of 1995 requires that agencies prepare a written statement, which includes an assessment of anticipated costs and benefits, before proposing ''any rule that includes any Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more (adjusted annually for inflation) in any one year.'' The current threshold after adjustment for inflation is $115

million, using the most current (2003) Implicit Price Deflator for the Gross Domestic Product. FDA does not expect this proposed rule to result in any 1-year expenditure that would meet or exceed this amount.

### XI. Federalism

FDA has analyzed this proposed rule in accordance with the principles set forth in Executive Order 13132. FDA has determined that the proposed rule, if finalized, would not contain policies that would 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. Accordingly, the agency tentatively concludes that the proposed rule does not contain policies that have federalism implications as defined in the Executive order and, consequently, a federalism summary impact statement has not been prepared.

### XII. Paperwork Reduction Act of 1995

FDA tentatively concludes that this proposed rule contains no collections of information. Therefore, clearance by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (the PRA) (44 U.S.C. 3501–3520) is not required.

FDA also tentatively concludes that the draft special controls guidance document does not contain new information collection provisions that are subject to review and clearance by OMB under the PRA. Elsewhere in this issue of the **Federal Register**, FDA is publishing a notice announcing the availability of the draft guidance document entitled ''Class II Special Controls Guidance: Topical Oxygen Chamber for Extremities''; the notice contains an analysis of the paperwork burden for the draft guidance.

### XIII. Comments

Interested persons may submit to the Division of Dockets Management Branch (see **ADDRESSES**) written or electronic comments regarding this document. Submit a single copy of electronic comments or two paper copies of any mailed comments, except that individuals may submit one paper copy. Comments are to be identified with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

### XIV. References

The following references have been placed on display in the Division of dockets management (see **ADDRESSES**) and may be seen by interested persons between 9 a.m. and 4 p.m. Monday through Friday.

1. 515(i) Submission submitted by Gaymar Industries, Inc., Orchard Park, NY, dated August 4, 1997, received August 11, 1997.

2. 515(i) Submission submitted by Stephen's Medical Inc./Wound Cure, Inc., Northbrook, IL, dated August 11, 1997, received August 12, 1997.

3. General and Plastic Surgery Devices Panel, Transcript, November 17, 1998, pages 120–201.

4. Heng, M.C.Y., J. Harker, V.B. Bardakjian, and H. Ayvazian, ''Enhanced Healing and Cost-Effectiveness of Low Pressure Oxygen Therapy in Healing Necrotic Wounds: A feasibility study of technology transfer,'' Ostomy Wound Management, 46: 52–60, 2000.

5. Heng, M.C.Y., J. Harker, G. Csathy, C. Marshall, J. Brazier, S. Socorro, and E.P. Gomez, ''Angiogenesis in Necrotic Ulcers Treated with Hyperbaric Oxygen,'' Ostomy Wound Management, 46: 18–32, 2000.

6. Kalliainen, L.K., G.M. Gordillo, R. Schlanger, and C.K. Sen, ''Topical oxygen as an adjunct to wound healing: a clinical case series,'' Pathophysiology 9: 81–87, 2003.

### List of Subjects in 21 CFR Part 878

Medical devices.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, it is proposed that 21 CFR part 878 be amended as follows:

## PART 878—GENERAL AND PLASTIC SURGERY DEVICES

1. The authority citation for 21 CFR part 878 continues to read as follows:

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

2. Section 878.5650 is revised in Subpart F to read as follows:

**§ 878.5650 Topical oxygen chamber for extremities.**

(a) *Identification*. A topical oxygen chamber for extremities is a device that is intended to surround a patient's limb and apply humidified oxygen topically at a pressure slightly greater than atmospheric pressure to aid healing of chronic skin ulcers such as bedsores.

(b) *Classification*. Class II (special controls). The special control for the device is FDA's ''Class II Special Controls Guidance: Topical Oxygen Chamber for Extremities.'' See § 878.1(e) for the availability of this guidance document.

Dated: March 27, 2006.

**Linda S. Kahan,**

*Deputy Director, Center for Devices and Radiological Health.*

[FR Doc. E6–4962 Filed 4–5–06; 8:45 am]

BILLING CODE 4160–01–S

## DEPARTMENT OF HOMELAND SECURITY

## Coast Guard

## 33 CFR Part 117

**[CGD05–06–017]**

**RIN 1625–AA09**

## Drawbridge Operation Regulations; Atlantic Intracoastal Waterway (Alternate Route), Dismal Swamp Canal, NC

**AGENCY:** Coast Guard, DHS.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Coast Guard proposes to establish regulations that govern the operation of the new Dismal Swamp Canal Bridge, at the Alternate Route of the Atlantic Intracoastal Waterway (AICW) mile 28.0, in South Mills, NC. The proposed regulations will maintain a level of operational capabilities that will continue to provide for the reasonable needs of the North Carolina Department of Parks and Recreation Visitor Center, at Dismal Swamp, and vessel navigation.

**DATES:** Comments and related material must reach the Coast Guard on or before June 5, 2006.

**ADDRESSES:** You may mail comments and related material to Commander (obr), Fifth Coast Guard District, Federal Building, 4th Floor, 431 Crawford Street, Portsmouth, VA 23704–5004. The Fifth Coast Guard District maintains the public docket for this rulemaking. 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 Commander (obr), Fifth Coast Guard District between 8 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Bill H. Brazier, Bridge Management Specialist, Fifth Coast Guard District, at (757) 398–6422.

**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 CGD05–06–017, 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 a return receipt, please enclose a stamped, self-addressed postcard or envelope. We will consider all submittals 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 Commander (obr), Fifth Coast Guard District 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 North Carolina Department of Parks and Recreation (NC Parks and Recreation) will own and operate this proposed new swing-type bridge at the Alternate Route of the AICW mile 28.0 across Dismal Swamp Canal. This proposed rule will allow the Dismal Swamp Canal Bridge to remain open to vessel traffic, closing only for pedestrian crossings and periodic maintenance. This proposed rule will also allow the Dismal Swamp Canal Bridge to be operated from a remote location at the Dismal Swamp Visitors Center.

NC Parks and Recreation has installed closed circuit cameras in the area of the bridge mounted on the fender systems on both sides. Infrared sensors have also been installed to cover the swing radius of the bridge. This equipment enhances the controller's ability to monitor vessel traffic from the remote location. The controller will also monitor marine channel 13.

The proposed rule will require the draw to remain in the open-to-navigation position and only close to allow pedestrians (visitors to the park) to cross the bridge, and for periodic maintenance, and then the bridge will immediately reopen to navigation once the pedestrians have crossed the bridge. This will provide for an even flow of vessel traffic along the Dismal Swamp.

**Discussion of Proposed Rule**

The Coast Guard proposes to adopt new regulations to govern the operation of the Dismal Swamp Canal Bridge, at mile 28.0, in South Mills, NC. The Coast Guard proposes to insert this new specific regulation at 33 CFR § 117.820. The rule will allow the draw of the bridge to be remotely-operated by Park Service Rangers at the Dismal Swamp Visitors Center.

The draw will remain in the open position for navigation and shall only be closed for the crossing of pedestrians and periodic maintenance authorized in accordance with 33 CFR Subpart A.

Before the Dismal Swamp Visitor Center Bridge closes for any reason, the remote operator will monitor waterway traffic in the area. The bridge will only be closed if the operator's visual inspection shows that the channel is clear and there are no vessels transiting in the area.

While the Dismal Swamp Visitor Center Bridge is moving from the full open to the full closed position, the operator will maintain constant surveillance of the navigation channel to ensure that no conflict with maritime traffic exists.

In the event of failure or obstruction of monitoring equipment, the operator will stop and return the bridge to the full open position to vessels.

Before closing the draw, the channel traffic lights will change from flashing green to flashing red and the horn will sound five short blasts. Five short blasts of the horn will continue until the bridge is seated and locked down to vessels, the channel traffic lights will continue to flash red.

When pedestrian traffic has cleared, the horn will automatically sound one prolonged blast followed by one short blast to indicate that the draw of the Dismal Swamp Canal Bridge is about to return to its full open position to vessels. During the open swing movement, the channel traffic lights will flash red until the bridge is in the full open position. In the full open position to vessels, the bridge channel lights will flash green.

**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 (DHS).

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. We reached this conclusion based on the fact that the proposed changes have only a minimal impact on maritime traffic transiting the bridge. Although the Dismal Swamp Canal Bridge will be untended and operated from a remote location, mariners can continue their transits because the bridge will remain open to mariners, only to be closed for pedestrian crossings or periodic maintenance.

**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.

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.

This proposed rule would not have a significant economic impact on a substantial number of small entities for the following reason. The rule allows the Dismal Swamp Canal Bridge to operate remotely and requires the bridge to remain in the open position to vessels the majority of the time, only closing for pedestrian crossings or periodic maintenance.

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. 04–121), 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 Waverly W. Gregory, Jr., Bridge Administrator, Fifth Coast Guard District, (757) 398–6222. 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 the Office of Information and Regulatory Affairs has not designated it as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

**Technical Standards**

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

This proposed 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 because it has been determined that the promulgation of operating regulations for drawbridges are categorically excluded.

**List of Subjects in 33 CFR Part 117**

Bridges.

**Regulations**

For the reasons discussed in the preamble, the Coast Guard proposes to 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; Department of Homeland Security Delegation No. 0170.1; 33 CFR 1.05–1(g); § 117.255 also issued under the authority of Pub. L. 102–587, 106 Stat. 5039.

2. Add new § 117.820 immediately following the undesignated center heading North Carolina to read as follows:

### § 117.820 Atlantic Intracoastal Waterway (Alternate Route), Dismal Swamp Canal.

The draw of the Dismal Swamp Canal Bridge, mile 28.0 at South Mills, NC, shall operate as follows:

(a) The draw shall remain in the open position for navigation. The draw shall only be closed for pedestrian crossings or periodic maintenance authorized in accordance with Subpart A of this part.

(b) The bridge shall be remotely operated by the Park Service Rangers at the Dismal Swamp Visitors Center.

The remote operator shall monitor vessel traffic with closed circuit cameras and infrared sensors covering the swing radius. Operational information will be provided 24 hours a day on marine channel 13.

(c) The bridge shall not be operated from the remote location in the following events: Failure or obstruction of the infrared sensors, closed-circuit cameras or marine-radio communications, or when remote operator's visibility is impaired.

(d) Before the bridge closes for any reason, the remote operator will monitor waterway traffic in the area. The bridge shall only be closed if the off-site remote operator's visual inspection shows that the channel is clear and there are no vessels transiting in the area. While the bridge is moving, the operator shall maintain constant surveillance of the navigation channel.

(e) Before closing the draw, the channel traffic lights will change from flashing green to flashing red, the horn will sound five short blasts. Five short blasts of the horn will continue until the bridge is seated and locked down to vessels, the channel traffic lights will continue to flash red.

(f) When pedestrian traffic has cleared, the horn will automatically sound one prolonged blast followed by one short blast to indicate the draw is opening to vessel traffic. During the

opening swing movement, the channel traffic lights will flash red until the bridge returns to the fully open position. In the full open position to vessels, the bridge channel lights will flash green.

Dated: March 23, 2006.

**L.L. Hereth,**

*Rear Admiral, United States Coast Guard, Commander, Fifth Coast Guard District.*

[FR Doc. E6–4899 Filed 4–5–06; 8:45 am]

**BILLING CODE 4910–15–P**

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## DEPARTMENT OF HOMELAND SECURITY

## Coast Guard

## 33 CFR Part 117

**[CGD01–06–024]**

**RIN 1625–AA09**

## Drawbridge Operation Regulations; Chelsea River, Chelsea, MA

**AGENCY:** Coast Guard, DHS.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Coast Guard proposes to temporarily change the drawbridge operation regulations governing the operation of the P.J. McArdle Bridge, across the Chelsea River at mile 0.3, between East Boston and Chelsea, Massachusetts. This proposed rule would allow the bridge to remain closed from 9 a.m. to 5 p.m. on June 17, 2006, to facilitate the Third Annual Chelsea River Revel Festival and the running of the Chelsea River Revel 5K Road Race. Vessels that can pass under the bridge without a bridge opening may do so at all times.

**DATES:** Comments and related material must reach the Coast Guard on or before May 8, 2006.

**ADDRESSES:** You may mail comments and related material to Commander (dpb), First Coast Guard District Bridge Branch, 408 Atlantic Avenue, Boston, Massachusetts, 02110, or deliver them to the same address between 7 a.m. and 3 p.m., Monday through Friday, except, Federal holidays. The telephone number is (617) 223–8364. The First Coast Guard District, Bridge Branch, maintains the public docket for this rulemaking. 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 First Coast Guard District, Bridge Branch, 7 a.m. to 3 p.m., Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Mr. John McDonald, Project Officer, First Coast Guard District, (617) 223–8364.

**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 (CGD01–06–024), 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 if 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; however, you may submit a request for a meeting by writing to the First Coast Guard District, Bridge 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 P.J. McArdle Bridge across the Chelsea River at mile 0.3, has a vertical clearance of 21 feet at mean high water and 30 feet at mean low water in the closed position. The existing drawbridge operation regulations listed at 33 CFR 117.593 require the bridge to open on signal at all times.

On March 6, 2006, the Chelsea Creek Action Group (CCAG) requested a temporary change to the regulation that governs the operation of the P.J. McArdle Bridge. The temporary regulation would allow the bridge to remain closed to vessel traffic from 9 a.m. to 5 p.m. on Saturday, June 17, 2006, in the interest of public safety during the Third Annual Chelsea River Revel Festival and 5K Road Race.

Vessels that can pass under the bridge without a bridge opening may do so at all times.

### Discussion of Proposed Rule

This proposed change would suspend § 117.593 and temporarily add a new § 117.T594.

The P.J. McArdle Bridge would remain in the closed position from 9 a.m. to 5 p.m. in the interest of public safety during the Third Annual Chelsea River Revel Festival and the running of the Chelsea River Revel 5K Road Race.

The 5K Road Race does not actually cross over the bridge; however, the Chelsea River passes through the middle of the festival which takes place on both sides of the Chelsea River in East Boston and Chelsea.

A large volume of pedestrian traffic is anticipated to cross over the bridge during the festival.

It would not be in the best interest of public safety and the coordination of this public event to have the bridge open during the time period this event is in progress.

The Chelsea River is predominantly transited by commercial tugs, barges, oil tankers. The Coast Guard coordinates this closure annually with the oil facilities and the one recreational marina which are upstream from the bridge.

This temporary rule is expected to meet the present and anticipated needs of navigation.

Under this proposed temporary rule, all drawbridges across the Chelsea River would open on signal; except that the P.J. McArdle Bridge, at mile 0.3, would need not open for the passage of vessel traffic from 9 a.m. to 5 p.m. on June 17, 2006.

The opening signal for each drawbridge would remain two prolonged blasts followed by two short blasts and one prolonged blast. The acknowledging signal would remain three prolonged blasts when the draw can be opened immediately and two prolonged blasts when the draw cannot be opened or is open and must be closed.

### 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 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 (DHS).

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.

This conclusion is based on the fact that the bridge will only be closed for 8 hours in the interest of public safety during the running of the 5K Road Race

on June 17, 2006. Vessels that can pass under the draw without a bridge opening may do so at all times during the time the bridge is closed.

**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.

The Coast Guard certifies under section 5 U.S.C. 605(b) that this proposed rule would not have a significant economic impact on a substantial number of small entities.

This conclusion is based on the fact that the bridge will only be closed for 8 hours in the interest of public safety during the running of the 5K Road Race on June 17, 2006. Vessels that can pass under the draw without a bridge opening may do so at all times during the time the bridge is closed.

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 us in writing at, Commander (dpb), First Coast Guard District, Bridge Branch, One South Street, New York, NY 10004. The telephone number is (212) 668–7165. 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 would 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 the Office of Information and Regulatory Affairs has not designated it as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

**Technical Standards**

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

This proposed 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 M16475.1D, which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have made a preliminary determination 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 environment documentation. Under figure 2–1, paragraph (32)(e) of the instruction, an ''Environmental Analysis Checklist'' is not required for this rule. Comments on this section will be considered before we make the final decision on whether to categorically exclude this rule from further environmental review.

**List of Subjects in 33 CFR Part 117**

Bridges.

**Regulations**

For the reasons discussed in the preamble, the Coast Guard proposes to 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; Department of Homeland Security Delegation No. 0170.1; 33 CFR 1.05–1(g); § 117.255 also issued under the authority of Pub. L. 102–587, 106 Stat. 5039.

2. On June 17, 2006, from 9 a.m. to 5 p.m., § 117.593 is suspended and a new § 117.T594 is added to read as follows:

**§ 117.T594 Chelsea River.**

(a) All drawbridges across the Chelsea River shall open on signal; except that the P.J. McArdle Bridge, mile 0.3, need not open for the passage of vessel traffic from 9 a.m. to 5 p.m. on June 17, 2006.

(b) The opening signal for each drawbridge is two prolonged blasts followed by two short blasts and one prolonged blast. The acknowledging signal is three prolonged blasts when the draw can be opened immediately and two prolonged blasts when the draw cannot be opened or is open and must be closed.

Dated: March 21, 2006.

**David P. Pekoske,**

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

[FR Doc. E6–4900 Filed 4–5–06; 8:45 am]

**BILLING CODE 4910–15–P**

## DEPARTMENT OF COMMERCE

## United States Patent and Trademark Office

## 37 CFR Part 1

**[Docket No.: PTO–P–2006–0005]**

**RIN 0651–AC01**

## Changes to Eliminate the Disclosure Document Program

**AGENCY:** United States Patent and Trademark Office, Commerce.

**ACTION:** Notice of proposed rule making.

**SUMMARY:** The United States Patent and Trademark Office (Office) implemented the Disclosure Document Program in 1969 in order to provide an alternative form of evidence of conception of an invention to, for example, a ''self-addressed envelope'' containing a disclosure of an invention. It appears, however, that few, if any, inventors obtain any actual benefit from a disclosure document, and some inventors who use the Disclosure Document Program believe that they are actually filing an application for a patent. In addition, a provisional application for patent affords better benefits and protection to inventors than a disclosure document. Therefore, the Office is proposing to eliminate the Disclosure Document Program.

*Comment Deadline Date:* To be ensured of consideration, written comments must be received on or before May 8, 2006. No public hearing will be held.

**ADDRESSES:** Comments should be sent by electronic mail message over the Internet addressed to *ddp.comments@uspto.gov.* Comments may also be submitted by mail addressed to: Mail Stop Comments—Patents, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313–1450, or by facsimile to (571) 273–7735, marked to the attention of Catherine M. Kirik. Although comments may be submitted by mail or facsimile, the Office prefers to receive comments via the Internet. If comments are submitted by mail, the Office prefers that the comments be submitted on a DOS formatted 3½ inch disk accompanied by a paper copy.

Comments may also be sent by electronic mail message over the Internet via the Federal eRulemaking Portal. See the Federal eRulemaking Portal Web site (*http://www.regulations.gov*) for additional instructions on providing comments via the Federal eRulemaking Portal.

The comments will be available for public inspection at the Office of the Commissioner for Patents, located in Madison East, Tenth Floor, 600 Dulany Street, Alexandria, Virginia, and will be available via the Office Internet Web site (address: *http://www.uspto.gov*). Because comments will be made available for public inspection, information that is not desired to be made public, such as an address or phone number, should not be included in the comments.

**FOR FURTHER INFORMATION CONTACT:** Catherine M. Kirik, Office of the Commissioner for Patents, by telephone at (571) 272–8040, by mail addressed to: Mail Stop Comments—Patents, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313–1450, or by facsimile to (571) 273–0170, marked to the attention of Catherine M. Kirik.

**SUPPLEMENTARY INFORMATION:** An inventor may file a disclosure document with the Office which includes a written description and drawings of his or her invention in sufficient detail to enable a person of ordinary skill in the art to make and use the invention to establish a date of conception of an invention in the United States under 35 U.S.C. 104 prior to the application filing date. The inventor must sign the disclosure document and include a separate signed cover letter identifying the papers as a disclosure document. A disclosure document does not require either a claim in compliance with 35 U.S.C. 112, ¶2, or an inventor's oath (or declaration) under 35 U.S.C. 115, and is not accorded a patent application filing date. A disclosure document is to be destroyed by the Office after two years unless it is referred to in a separate letter in a related provisional or nonprovisional application filed within those two years. The filing fee for a disclosure document is $10. *See* 37 CFR 1.21(c).

The Office published a notice in September of 1998 seeking input from the general public on whether the Office should eliminate the Disclosure Document Program. *See Changes to Implement the Patent Business Goals,* 63 FR 53498, 53527–28 (Oct. 5, 1998), 1215 *Off. Gaz. Pat. Office* 87 (Oct. 27, 1998) (advance proposed rule). The Office received a number of comments supporting the elimination of the Disclosure Document Program, but did not receive any input from the independent inventor community and, therefore, decided to delay eliminating the Disclosure Document Program. *See Changes to Implement the Patent Business Goals,* 64 FR 53772, 53776–77 (Oct. 4, 1998), 1215 *Off. Gaz. Pat. Office* 87 (Oct. 27, 1998) (proposed rule). The Office has determined that it is now appropriate to propose elimination of the Disclosure Document Program because, *inter alia*, independent inventors have become more familiar with and are using provisional applications more often than they were in 1998, and provisional applications provide more protections for independent inventors than disclosure documents.

The Office implemented the Disclosure Document Program in 1969 in order to provide an alternative form of evidence of conception of an invention to forms such as a ''self-addressed envelope'' form of evidence. *See Disclosure Document Program,* 34 FR 6003 (Apr. 2, 1969), 861 *Off. Gaz. Pat. Office* 1 (May 6, 1969). Since June of 1995, however, applicants have been able to file a provisional application for patent, which provides better benefits and protection to inventors than a disclosure document. A provisional application must contain a specification

in compliance with 35 U.S.C. 112, ¶1, and drawings, if drawings are necessary to understand the invention described in the specification. A provisional application must name the inventors and be accompanied by a separate cover sheet identifying the papers as a provisional application. The basic filing fee for a provisional application by a small entity is $100.00. *See* 37 CFR 1.16(d). A provisional application does not require a claim under 35 U.S.C. 112, ¶2, or an inventor's oath (or declaration) under 35 U.S.C. 115. While a nonprovisional application must be filed within twelve months of the filing date of a provisional application in order for the inventor to claim the benefit of the provisional application under 35 U.S.C. 119(e), the file of a provisional application is retained by the Office for at least twenty years, or longer if it is referenced in a patent or patent application publication. With respect to an invention claimed in a nonprovisional application that is entitled under 35 U.S.C. 119(e) to the benefit of a provisional application, the provisional application is considered a constructive reduction to practice of an invention as of the filing date accorded the application, if it describes the invention in sufficient detail to enable a person of ordinary skill in the art to make and use the invention and discloses the best mode known by the inventor for carrying out the invention. Thus, the disclosure requirements for a provisional application are similar to the disclosure requirements for a disclosure document, and a provisional application provides users with a filing date without starting the patent term period. Therefore, almost any papers filed as a proper disclosure document may also be filed as a provisional application.

A provisional application is, however, more valuable to an inventor than a disclosure document. A provisional application, just like a nonprovisional application, establishes a constructive reduction to practice date with respect to an invention claimed in a nonprovisional application that is entitled under 35 U.S.C. 119(e) to the benefit of the provisional application and disclosed in the provisional application in the manner required by 35 U.S.C. 112, ¶1, and can be used under the Paris Convention to establish a priority date for foreign filing. A disclosure document, however, may only be used as evidence of a date of conception of an invention under 35 U.S.C. 104. A disclosure document is not a patent application and the filing of a disclosure document does not establish a constructive reduction to practice date for an invention described therein. Thus, to use a disclosure document to establish prior invention under 35 U.S.C. 102(g) or under 37 CFR 1.131, an inventor may rely on the disclosure document to demonstrate that he or she conceived of the invention first, but the inventor may also be required to demonstrate that he or she was reasonably diligent from a date just prior to: (1) The date of conception by the other party in an interference proceeding; or (2) effective date of a reference being used by the Office to reject one or more claims of an application until the inventor's actual or constructive reduction to practice. With respect to an invention claimed in a nonprovisional application that is entitled under 35 U.S.C. 119(e) to the benefit of a provisional application and disclosed in the provisional application in the manner required by 35 U.S.C. 112, ¶1, however, the provisional application may be used to establish a constructive reduction to practice date as of the filing date of the provisional application.

Under 35 U.S.C. 102(b), any public use or sale of an invention in the U.S. or description of an invention in a patent or a printed publication anywhere in the world more than one year prior to the filing of a patent application on that invention will bar the grant of a patent. In addition, many foreign countries currently have what is known as an ''absolute novelty'' requirement which means that a public disclosure of an invention anywhere in the world prior to the filing date of an application for patent will act as a bar to the granting of any patent directed to the invention disclosed. Since a disclosure document is not a patent application, it does not help an inventor avoid the forfeiture of U.S. or foreign patent rights.

## Discussion of Specific Rules

Title 37 of the Code of Federal Regulations, Part 1, is proposed to be amended as follows:

*Section 1.21:* Section 1.21(c) currently sets forth a fee ($10.00) for filing a disclosure document. Section 1.21 is proposed to be amended to remove and reserve paragraph (c) in view of the proposed elimination of the Disclosure Document Program.

## Rule Making Considerations

### *Regulatory Flexibility Act*

For the reasons set forth herein, the Deputy General Counsel for General Law of the United States Patent and Trademark Office has certified to the Chief Counsel for Advocacy of the Small Business Administration that the changes proposed in this notice will not have a significant economic impact on a substantial number of small entities. *See* 5 U.S.C. 605(b). There is no statutory provision relating to the disclosure document program. The program dates back to 1969, when commercial services were not as abundantly available. Now, there are numerous commercially available ''electronic notebooks'' that may be used to document evidence of conception of an invention. In addition, inventors may still use a ''self-addressed envelope'' to mail documents to themselves or they may maintain a logbook containing fixed pages that may be witnessed to document evidence of conception of an invention. Thus, the program is no longer necessary.

### *Executive Order 13132*

This rule making does not contain policies with federalism implications sufficient to warrant preparation of a Federalism Assessment under Executive Order 13132 (Aug. 4, 1999).

### *Executive Order 12866*

This rule making has been determined to be not significant for purposes of Executive Order 12866 (Sept. 30, 1993).

### *Paperwork Reduction Act*

The information collection requirements being suspended by this rule were approved in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) by the Office of Management and Budget (OMB) under 0651–0030 disclosure documents. Suspension of the reporting requirements under 0651–0030 is expected to reduce the public reporting burden by 4,445 hours and $236,000. This proposed rule would thus not impose any additional reporting or record keeping requirements on the public.

Interested persons are requested to send comments to the Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 10202, 725 17th Street, NW., Washington, DC 20503, Attention: Desk Officer for the Patent and Trademark Office; and (2) Robert J. Spar, Director, Office of Patent Legal Administration, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313–1450.

Notwithstanding any other provision of law, no person is required to respond to nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork

Reduction Act unless that collection of information displays a currently valid OMB control number.

**List of Subjects in 37 CFR Part 1**

Administrative practice and procedure, Courts, Freedom of Information, Inventions and patents, Reporting and recordkeeping requirements, Small businesses.

For the reasons set forth in the preamble, 37 CFR part 1 is proposed to be amended as follows:

## PART 1—RULES OF PRACTICE IN PATENT CASES

1. The authority citation for 37 CFR part 1 continues to read as follows:

**Authority:** 35 U.S.C. 2(b)(2).

2. Section 1.21 is amended by removing and reserving paragraph (c).

**§ 1.21 Miscellaneous fees and charges.**

* * * * *

(c) [Reserved]

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Dated: March 29, 2006.

**Jon W. Dudas,**

*Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office.*

[FR Doc. E6–4833 Filed 4–5–06; 8:45 am]

BILLING CODE 3510–16–P

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## ENVIRONMENTAL PROTECTION AGENCY

## 40 CFR Part 60

**[EPA–HQ–OAR–2003–0199; FRL–8055–2]**

**RIN 2060–AL98**

## Alternative Work Practice To Detect Leaks From Equipment

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule amendment.

**SUMMARY:** Numerous EPA air pollution standards require specific work practices for equipment leak detection and repair (LDAR). The current work practice requires the use of a monitor which meets required performance specifications. This work practice is based on 25-year-old technology. New technology has been developed which we believe provides equal, or better, environmental protection than that provided by the current work practice. This action proposes a voluntary alternative work practice (AWP) for finding leaking equipment using optical gas imaging.

**DATES:** *Comments.* Submit comments on or before June 5, 2006, or 30 days after the date of any public hearing, if later.

*Public Hearing.* If anyone contacts the EPA requesting to speak at a public hearing by April 26, 2006, a public hearing will be held on May 4, 2006.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2003–0199, by one of the following methods:

- *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.
- E-mail: *a-and-r-docket@epa.gov.*
- Fax: (202) 566–1741.
- Mail: Air Docket, EPA, Mailcode: 6102T, 1200 Pennsylvania Avenue, NW., Washington, DC 20460. Please include a total of two copies.
- Hand Delivery: EPA, 1301 Constitution Avenue, NW., Room B102, 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–2003–0199. 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 law. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or e-mail. The Web site *http://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 *http://www.regulations.gov,* your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.*

*Docket.* All documents in the docket are listed in *http://www.regulations.gov.* Although listed in the index, some information is not publicly available, *i.e.*, CBI or other information whose disclosure is restricted by law. 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 at the Air and Radiation Docket, EPA/DC, EPA West, Room B102, 1301 Constitution Avenue, 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.

*Public Hearing.* If a public hearing is held, it will begin at 10 a.m. and will be held at the EPA facility complex in Research Triangle Park, North Carolina, or at an alternate facility nearby. Persons interested in presenting oral testimony or inquiring as to whether a public hearing is to be held must contact Mr. David Markwordt; Coatings and Chemicals Group; Sector Policies and Programs Division; EPA; Research Triangle Park, NC 27711; telephone (919) 541–0837.

**FOR FURTHER INFORMATION CONTACT:** For additional information on the proposed rule amendment, review the reports listed in the **SUPPLEMENTARY INFORMATION** section.

*General and technical information.* Mr. David Markwordt, Office of Air Quality Planning and Standards, Sector Policies and Programs Division, Coatings and Chemicals Group (C439–03), Environmental Protection Agency, Research Triangle Park, North Carolina 27711, telephone (919) 541–0837, facsimile number (919) 541–0942, electronic mail (e-mail) address: ''*markwordt.david@epa.gov.*''

**SUPPLEMENTARY INFORMATION:**

*Regulated Entities.* The regulated categories and entities affected by the proposed rule amendment include, but are not limited to:

| Category | NAICS * | Examples of regulated entities |
|---|---|---|
| Industry | 325<br>324 | Chemical manufacturers.<br>Petroleum refineries, and manufacturers of coal products. |

* North American Information Classification System.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by the national emission standards. To determine whether your facility would be affected by the national emission standards, you should examine the applicability criteria in 40 CFR parts 60, 61, 63 and 65, including, but not limited to: Part 60, subparts A, Kb, VV, XX, DDD, GGG, KKK, QQQ, and WWW; part 61, subparts F, L, V, BB, and FF; part 63, subparts G, H, I, R, S, U, Y, CC, DD, EE, GG, HH, OO, PP, QQ, SS, TT, UU, VV, YY, GGG, HHH, III, JJJ, MMM, OOO, VVV, FFFF, and GGGGG; and part 65, subparts A, F, and G. If you have any questions regarding the applicability of the national emission standards to a particular entity, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

*Worldwide Web (WWW).* In addition to being available in the docket, an electronic copy of today's proposed rule amendment will also be available on the WWW through the Technology Transfer Network (TTN). Following signature, a copy of the proposed rule amendment will be posted on the TTN's policy and guidance page for newly proposed or promulgated rules at the following address: *http://www.epa.gov/ttn/oarpg/*. The TTN provides information and technology exchange in various areas of air pollution control.

*Reports for Public Comment.* We have prepared a summary memorandum covering the rationale for the proposed rule amendment. The memorandum is entitled: ''Basis and Purpose for the Alternative Leak Detection and Repair (LDAR) Work Practice,'' and is in Docket ID No. EPA–HQ–OAR–2003–0199. See the preceding *Docket* section for docket information and availability.

*Outline.* The information presented in this preamble is organized as follows:

I. Background Information
A. What is the current LDAR work practice?
B. What are the current LDAR requirements?
C. What is the statutory basis for these requirements?
D. How can the existing requirements be changed?
E. Why is EPA proposing consideration of an alternative LDAR work practice?
F. How does the new optical gas imaging technology work?
G. How were emission reductions estimated for LDAR programs originally?
H. What did the Agency do to compare existing and proposed work practice effectiveness?
I. How well does the new technology work?
J. How does this proposed voluntary work practice promote development of innovative technology?
K. Request for comments
II. Summary of the Regulatory Action
III. Statutory and Executive Order Reviews
A. Executive Order 12866: Regulatory Planning and Review
B. Paperwork Reduction Act
C. Regulatory Flexibility Act
D. Unfunded Mandates Reform Act
E. Executive Order 13132: Federalism
F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments
G. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks
H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use
I. National Technology Transfer Advancement Act

## I. Background Information

### *A. What is the current LDAR work practice?*

Numerous EPA air pollution control standards require specific work practices for LDAR. These practices require plant operators to periodically inspect designated equipment for leaks. The work practice currently employed requires the use of a monitor which meets the performance specifications of EPA Reference Method 21.

The monitor is a portable instrument that is used to detect leaks of volatile organic compounds (VOC) and/or hazardous air pollutants (HAP) at the leak interface of the equipment component. The work practice requires periodic monitoring of the equipment, usually on a quarterly basis. A ''leak'' is generally defined under the current rules as 10,000 parts per million by volume (ppmv) of VOC and 500 ppmv of HAP, as measured by the monitor (i.e., the EPA Reference Method 21 instrument).

### *B. What are the current LDAR requirements?*

U.S. refineries, chemical manufacturers, and other industries are required to identify leaks using EPA Reference Method 21 for processes and streams described in various subparts of 40 CFR parts 60, 61, 63 and 65, including, but not limited to: Part 60, subparts A, Kb, VV, XX, DDD, GGG, KKK, QQQ, and WWW; part 61, subparts F, L, V, BB, and FF; part 63, subparts G, H, I, R, S, U, Y, CC, DD, EE, GG, HH, OO, PP, QQ, SS, TT, UU, VV, YY, GGG, HHH, III, JJJ, MMM, OOO, VVV, FFFF, and GGGGG; and part 65, subparts A, F, and G. Currently, covered facilities must periodically monitor each regulated component (e.g., pump, valve, connector, closed vent system, etc.) with an EPA Reference Method 21 instrument. The frequency of such monitoring may vary from each month to every 4 years depending on the subpart and the piece of equipment being monitored. If equipment is found to be leaking, the equipment is tagged and required to be repaired within a specified time.

The current LDAR work practice involves placing an EPA Reference Method 21 instrument probe at the leak interface (seal) of a component and registering a VOC and/or HAP concentration. We developed a correlation which relates the mass rate of VOC or HAP leaking from the component to the concentration registered by the instrument. EPA and some State agencies have established different concentration thresholds which define a leak. If the concentration exceeds the leak definition, then the component must be repaired. EPA's leak definition varies from 500 ppmv to 10,000 ppmv depending on the type of component and the specific subpart.

After the LDAR program has been used for a few periods, the number of leaks detected decreases because pre-existing leaks have been repaired and may not leak for extended periods of time. Although repair costs decrease as the number of leaks are reduced, the costs of conducting EPA Reference Method 21 monitoring remains constant, resulting in a decrease in cost-effectiveness.

### *C. What is the statutory basis for these requirements?*

Current LDAR requirements are primarily applicable to sources through EPA work practice standards promulgated under Clean Air Act (CAA) section 111 (New Source Performance Standards (NSPS)) and section 112 (National Emission Standards for Hazardous Air Pollutants (NESHAP)). These sections authorize EPA to

promulgate work practice standards in lieu of numerical emission standards where ''it is not feasible in the judgment of the Administrator to prescribe or enforce an emission standard'' because the regulated pollutants ''cannot be emitted through a conveyance designed and constructed to emit or capture such pollutant * * * or [because] the application of measurement methodology to a particular class of sources is not practicable due to technological and economic limitations.'' 42 U.S.C. 7412(h)(1), (2); see also 42 U.S.C. 7411(h)(1), (2).

In promulgating such standards, we are not required to mandate a single work practice applicable to all sources in a source category but may instead provide several AWP options. Indeed, the United States Court of Appeals for the District of Columbia Circuit has indicated that EPA may provide sources with multiple work practice compliance options if EPA demonstrates that at least one of these options is cost effective and ''expressly provides for the alternative in the standard.'' *Arteva Specialties S.R.R.L., d/b/a KoSa* v. *EPA*, 323 F.3d 1088, 1092 (DC Cir. 2003).

*D. How can the existing requirements be changed?*

Once promulgated, EPA retains the authority to provide additional work practice alternatives. Such authority exists under EPA's general authority to review and amend its regulations as appropriate, e.g., 42 U.S.C. 7411(b)(1)(B), 42 U.S.C. 7412(d)(6).

*E. Why is EPA proposing to consider an alternative LDAR work practice?*

On November 17, 2000, the American Petroleum Institute (API) requested a meeting with EPA to initiate discussion regarding approval of an alternative LDAR work practice based on the proposed work practice's ''equivalency'' with the current EPA Reference Method 21 based LDAR work practice. While the request did not indicate if it was invoking EPA(s general rulemaking authority or the AWP provisions of CAA sections 111 and 112, EPA has treated the request as being for a general rulemaking because API's request was not specific to any single source category.

API(s request was based upon ongoing studies involving API, EPA, and the Department of Energy designed to provide guidance for conducting LDAR programs in a more cost-effective manner. These studies began with a 1997 study conducted by API. It evaluated data collected under the LDAR program by seven Los Angeles, California, refineries in the South Coast Air Quality Management District (SCAQMD). The data was examined to help determine: (1) The design and operational characteristics that influence leaks from equipment; and (2) whether a sub-population of chronic leakers existed which could be the primary focus of a more cost-effective LDAR program. SCAQMD requires refineries to screen all accessible components quarterly (valves, connectors etc.) and defines a leak as equal to, or greater than, 1,000 ppmv as registered with an EPA Reference Method 21 instrument.

The API study analyzed 11.5 million LDAR program monitoring values collected over 5½ years, 1991 to mid-1996. The data were analyzed to determine if certain component designs or component applications (e.g., gate valves vs. globe valves, different process units, or different frequencies of actuation) are more susceptible to leaks. The refinery screening study showed that about 0.13 percent of components contribute greater than 90 percent of controllable fugitive emissions. This small population of large leakers is random over time, type of component, and process unit. Thus, no clear criteria exist for predicting which components are likely to leak.

Consequently, the refining industry began to analyze alternative work practices/technologies to find leaking equipment more efficiently. The outgrowth of this analysis was the development of a work practice based on optical gas imaging.

*F. How does the new optical gas imaging technology work?*

Currently available optical gas imaging technologies fall into two general classes, active and passive. The active type uses a laser beam that is reflected by the background. The attenuation of the beam passing through a hydrocarbon cloud provides the optical image. The passive type uses ambient illumination to detect the difference in heat radiance of the hydrocarbon cloud.

The principle of operation of the active system is the production of an optical image by reflected (backscattered) laser light, where the laser wavelength is such that it is strongly absorbed by the gas of interest. The system illuminates the scene with infrared light and a video camera-type scanner picks up the backscattered infrared light. The camera converts this backscattered infrared light to an electronic signal, which is displayed in real-time as an image. Since the scanner is only sensitive to illumination from the infrared light source and not the sun, the camera is capable of displaying an image in either day or night conditions.

The passive instrument has a tuned optical lens, which is in some respects like ''night-vision'' glasses. It selects and displays a video image of light of a particular frequency range and filters out the light outside of that frequency range. In one design, by superimposing the filtered light (at a frequency that displays VOC gas) on a normal video screen, the instrument (or camera) displays the VOC cloud in real time in relationship to the surrounding process equipment. The operator can see a plume of VOC gas emanating from a leak.

*G. How were emission reductions estimated for LDAR programs originally?*

The most accurate technique for measuring mass emissions from leaking equipment requires the ''bagging,'' or physical isolation, of each component leak and subsequent measurement. This technique is estimated to cost approximately $500 per component. Facilities may have as many as a million components, making bagging each component impractical and prohibitively expensive.

The original EPA studies correlated EPA Reference Method 21 measurement values (i.e., screening values) with a mass emissions rate from limited bagging results as a way to estimate emissions from the total population of components. The resulting correlation equations enable the calculation of emissions from the total population of equipment by plugging all measured EPA Reference Method 21 screening values into those equations. EPA used the original screening values from uncontrolled plants to determine both the amount of uncontrolled emissions and which leaks require repair. The original studies showed that mass emissions associated with EPA Reference Method 21 screening values equal to, or greater than, 10,000 ppmv represented 95 percent of the total emissions, but involved only 5 percent of all the equipment. Based on the correlation approach, the 10,000 ppmv leak definition, in conjunction with the quarterly periodic detection requirement, reduces emissions by approximately 70 to 80 percent.

Because the cost of direct emission measurement, i.e., bagging each component, is so expensive, the correlation approach is the only cost-effective way to estimate emissions. However, there is some uncertainty associated with any emission estimates based on using the correlation

equations. These uncertainties arise because the correlation equations do not take into account the inherent variability of equipment leak emissions recorded through direct periodic measurements. We are unable to determine whether leak rates are constant or intermittent, how effective repair is, and whether leaks are chronic or random.

Also, the calculation of emission estimates from leaking equipment using correlation equations cannot be used with instruments other than the EPA Reference Method 21 instruments, i.e., organic vapor analyzers. In other words, the correlation equations and emission factors are directly linked to EPA Reference Method 21. Therefore, it was necessary to develop a methodology specifically for the purpose of comparing existing and alternative work practices.

*H. What did the Agency do to compare existing and proposed work practice effectiveness?*

Any new work practice must be as equally protective of the environment as the current work practice. Because it is too costly to measure mass emissions directly, EPA developed a computer model that allows the simulation of leaks as well as the effect of various leak definitions and monitoring frequencies. This model performs a side by side comparison of alternative work practices to the current EPA Reference Method 21 based work practice.

1. How does the model work? The model's four basic steps can be summarized as follows:

—Select an uncontrolled population of process equipment components with known EPA Reference Method 21 field data which has been used to estimate mass emission rates,

—Simulate each work practice for each equipment component to determine the work practice's response to mass emission leak rates,

—Identify leakers by comparing each work practice's response to the various leak definitions. Reduce emissions from detected leakers to simulate the effect of being repaired, and

—Calculate total emissions for both the current work practice and alternative work practices.

2. What are the issues in developing the comparative work practices model?

—To make an equivalency determination of any AWP requires modeling of an uncontrolled facility. The control effectiveness of the current EPA Reference Method 21 based work practice was based on facility leak rates dating from the 1970s. EPA Reference Method 21 plant emissions data from the 1970s provided the basis for the regulatory requirements for refinery and chemical plants at that time. These facilities were uncontrolled; that is, these facilities did not have LDAR programs in place at the time. The original uncontrolled baseline EPA Reference Method 21 data used to develop the existing work practice would have been appropriate to make the comparison. Unfortunately, this 25-year-old database is no longer available. The only uncontrolled data available were from natural gas processing plants which were used in the modeled comparison. These plants were screened with EPA Reference Method 21 instruments in the early 1990s as part of an EPA/industry effort to develop emission factors for the refinery and gas processing industries.

—There is a large variance in EPA Reference Method 21 screening values for a given mass emission rate. That is, the empirical data show that the EPA Reference Method 21 instrument will register different ppmv concentrations for the same mass emission leak.

Based on a 1993 petroleum industry study, EPA developed a statistical relationship between measured (bagged) mass emissions and the associated measured EPA Reference Method 21 screening values. The study contained a database of 337 paired values (i.e., mass emissions rate (kg/hr) and screening value (ppmv) for each valve). This statistical relationship established the probability of registering an EPA Reference Method 21 screening value for a given range of mass emissions. The statistical relationship was then used to simulate detection of leaks by the EPA Reference Method 21 work practice in the computer model. The model selects a screening value for the current EPA Reference Method 21 work practice for each mass emission rate associated with the population of uncontrolled equipment. The modeling program compares the screening value of EPA Reference Method 21 to various leak definitions to determine if a leak would be detected. Similarly, the model assigns a mass rate detection limit to the AWP. For each component with a leak at or above the assigned mass detection limit, the program specifies detection by the AWP.

—The model must also consider the frequency of applying the work practice. The emission control effectiveness of any work practice is a function of both its ability to detect leakage and the frequency of monitoring. An equivalent work practice may require more frequent monitoring, depending on its mass rate threshold for detecting leaks. A work practice which detects leaks at a higher mass rate than the current work practice would need to be practiced more frequently than the current periodic requirement of once a quarter. A more frequent monitoring requirement becomes necessary because higher mass emissions reductions from large leaks, found earlier, are offset to some degree by smaller leaks which go undetected.

—The AWP mass detection limit and monitoring frequency were varied and modeled to determine the equivalent mass emission reduction to the existing work practice. For both the existing work practice and the AWP, the model then reduces emissions from components found leaking to simulate emissions from repaired components. Finally, total emissions from the AWP are compared to emissions from the current work practice. Modeling results showed a work practice repeated bimonthly with a detection limit of 60 grams per hour (g/hr) range was equivalent to the existing work practice. The model also showed a work practice repeated semi-quarterly with a detection limit of 85 g/hr range was equivalent to the existing work practice.

The model generated different detection limits for the 500 and 10,000 ppmv thresholds in existing rules. The proposed rule reflects the mass detection limit for 500 ppmv, i.e., the more stringent limit which provides equivalency for both leak definitions.

*I. How well does the new technology work?*

Lab and field data demonstrate that the optical gas imaging technology can routinely detect leaks at a mass rate of approximately 60 g/hr. The imaging technology has negligible variance associated with its ability to detect leaks of 60 g/hr.

Five laboratory and field tests have been conducted using optical gas imaging for fugitive emissions monitoring at both refineries and petrochemical plants. Each test used at least one of the imager types: $CO_2$ laser imager, ''fiber'' laser imager, and passive IR imager. In each case, the imager was successfully tested at chemical plants or refineries.

Based on the model used to compare existing and proposed work practice effectiveness, a leak mass rate of 60 g/hr was determined as the equivalent for

an AWP. The tests conducted on the optical gas imaging technology showed that the imagers could detect a leak with a mass rate of as low as 1 g/hr.

Several evaluations have been conducted to demonstrate the ability of the optical gas imaging technology to detect a range of VOC under typical plant operating conditions. The technology currently available has been shown to detect propylene, ethylene, formaldehyde, acetaldehyde, isoprene, all butanes, 1,3 butadiene, toluene, all pentenes, all pentanes, all trimethybenzenes, all xylenes, all ethyletoluenes, and all hexenes.

In one test, a side-by-side comparison of EPA Reference Method 21 and the optical gas imaging device was conducted. This study took place at two different plants and tested four different imagers: Two passive IR imagers, long-wave BAGI imager, and mid-wave BAGI imager. A total of 66 leaks were discovered at the two sites. The imagers detected 31 leaks and the EPA Reference Method 21 instrument detected 49 leaks. The imagers and the EPA Reference Method 21 instrument found 14 of the same leaks. Neither method for detecting leaks discovered all leaking equipment at the test sites. Of the leaks discovered by the imagers, leak mass rates ranged between 1 g/hr and over 100 g/hr. The imagers did detect all leaks with leak mass rates greater than 60 g/hr, thus supporting the conclusion that the optical gas imaging device will detect leaks above the 60 g/hr threshold.

*J. How does the proposed voluntary work practice promote development of innovative technology?*

Several field and laboratory studies have been conducted to demonstrate the use of optical gas imaging for fugitive emissions monitoring. In both the laboratory and field tests, the technology has been shown to find leaks. However, some of these laboratory and field tested units are prototypes which are not yet commercially available. Vendors will only manufacture the technology if there is a demand for the equipment. Our current regulations do not allow companies to use the new technology. Thus, we propose to add amendatory language to allow companies to elect an AWP based on the new technology. Allowing this AWP will, therefore, encourage development of this technology because it should open the market driven by regulatory requirements to optical gas imaging equipment.

*K. Request for Comments*

We are requesting comment on the need for clarifying language in individual subparts, the use of optical gas imaging technology for monitoring closed vent systems, and opportunities for reduced recordkeeping and reporting burden.

We are contemplating incorporating the appropriate rule language for the AWP into the General Provisions of 40 CFR parts 60, 61, 63, and 65. The new work practice requirements are nearly identical to the existing work practice requirements with the exception of the instrument used to detect the leaks. Therefore, rather than amending all of the applicable subparts, we are considering amending only the General Provision language of each part. These amendments would be intended to allow for the use of the optical gas imaging technology. Facilities choosing to demonstrate compliance with LDAR requirements by using the AWP would continue to comply with all the non-instrumentation requirements of the existing subparts. We are requesting public comment regarding whether the proposed amendatory language provides sufficient legal authority for a source to utilize the AWP for complying with the LDAR requirements.

Additionally, we are requesting public comment on whether the amendatory language clearly explains what requirements a source must satisfy if using the AWP. Current subparts language includes many requirements specific to the EPA Reference Method 21 based work practice, specifically to the Method 21 instrument itself. Although the specific EPA Reference Method 21 requirements would not be applicable to a source using the AWP, that language may confuse a source regarding what requirements would apply. We are, therefore, seeking comment on whether the amendatory language provided in today's notice sufficiently enables a source to identify the applicable requirements for using the AWP, or whether it is necessary to amend all of the existing subparts to clarify which of the existing requirements apply only to the EPA Reference Method 21 based work practice.

Current requirements specify annual monitoring of closed vent systems with an EPA Reference Method 21 instrument. Vent systems used to route emissions to control devices are required to be closed. The original ppmv threshold was set at 5 percent of the leak definition (10,000 ppmv) or 500 ppmv. This threshold has never been changed even though the leak definition for many standards was lowered to 500 ppmv.

The modeled results show a similar mass limit threshold for both 500 and 10,000 ppmv. This suggests the optical gas imaging technology as specified for LDAR could be used to satisfy the closed vent system monitoring requirements. We could use the same approach we used originally, that is, use 5 percent of the new threshold, i.e., 3 g/hr as the basis for monitoring closed vent systems. We are soliciting comment on the appropriateness of also using the optical gas imaging technology for closed vent systems.

Facilities subject to current rules will, for the purpose of the alternative LDAR work practice, still rely on the current rule language for all recordkeeping and reporting requirements which are not specific to the use of the EPA Reference Method 21 instrument. We are soliciting comment on alternative recordkeeping and reporting requirements which may be feasible with the optical gas imaging technology.

## II. Summary of the Regulatory Action

The proposed AWP allows owners or operators to identify leaking equipment using an optical gas imaging instrument instead of a leak monitor prescribed in 40 CFR part 60, Appendix A–7. The new work practice requirements are identical to the existing work practice requirements except for those requirements which are directly or indirectly associated with the instrument used to detect the leaks. For example, owners or operators are still subject to the existing difficult to and unsafe to monitor, repair, recordkeeping, and reporting requirements. If a leak is identified using the optical gas imaging instrument, then the leak must be re-screened after repair using the imaging instrument.

Owners or operators must use an optical gas imaging instrument capable of imaging compounds in the streams that are regulated by the applicable rule. The imaging instrument must provide the operator with an image of the leak and the leak source.

Prior to using the optical gas imaging instrument, owners and operators must determine the mass flow rate that the imaging instrument will be required to image. The optical gas imaging instrument may either meet a minimum detection sensitivity mass flow rate (provided in the proposed AWP), or owners or operators may calculate the mass flow rate for their process by prorating a standard detection sensitivity emission rate (provided in the proposed AWP) using equations

provided in the amendatory language. If the owner or operator chooses to prorate the standard detection sensitivity, they must conduct an engineering analysis to identify the stream containing the lowest mass fraction of chemicals that have to be identified as detectable.

Owners or operators must conduct a daily instrument check to confirm that the optical gas imaging equipment is able to detect leaks at the emission rate specified in the amendatory language (or calculated by the owner or operator). The instrument check consists of using the optical gas imaging instrument to view the mass flow rate required to be met exiting a gas cylinder.

Owners or operators using the AWP must keep records of the detection sensitivity level used for the optical gas imaging instrument; the analysis to determine the stream containing the lowest mass fraction of detectable chemicals; the basis of the mass fraction emission rate calculation; documentation of the daily instrument check (either with the video recording device, electronically, or written in a log book); and the video record of the leak survey.

## III. Statutory and Executive Order Reviews

### *A. Executive Order 12866: Regulatory Planning and Review*

Under Executive Order 12866 (58 FR 51735, October 4, 1993), EPA must determine whether a regulation is ''significant'' and, therefore, subject to Office of Management and Budget (OMB) review and the requirements of the Executive Order. The Executive 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 government 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 or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Because the proposed amendments are voluntary and expected to reduce burden, it has been determined that the proposed amendment is not a ''significant regulatory action'' under the terms of Executive Order 12866 and is, therefore, not subject to OMB review.

### *B. Paperwork Reduction Act*

This action does not impose any new information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. *et seq.* Today's proposed decision provides plant operators with an alternative method for identifying equipment leaks but does not change the recordkeeping and reporting requirements in the various subparts of CFR parts 60, 61, 63 and 65. However, EPA anticipates that this proposed action will change the burden estimates developed and approved for the existing national emission standards by reducing the labor hours necessary to identify equipment leaks.

An ICR document (EPA ICR No. 2210.01) was prepared for this action to estimate the costs associated with reading and understanding the proposed alternatives, purchasing an optical imaging instrument, and initial training of plant personnel. The ICR has 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 annual public burden for this collection of information (averaged over the first 3 years after the effective date of the final rule) is estimated to total 3,027 labor hours per year and a total annual cost of $2,260,048. EPA has established a public docket for this action (Docket ID number EPA–HQ–OAR–2003–0199) which can be found at *http://www.regulations.gov.* The ICR for this proposal is included in the public docket.

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 ICR for this proposal will be submitted for approval to OMB under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* The OMB control numbers for the ICRs developed for the existing national emission regulations under CFR parts 60, 61, 63 and 65 are listed in 40 CFR part 9 and 48 CFR chapter 15.

### *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 amendment on small entities, small entity is defined as: (1) A small business whose parent company has fewer than 100 to 1,500 employees, or a maximum of $5 million to $18.5 million in revenues, depending on the size definition for the affected North American Industry Classification System (NAICS) code; (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. It should be noted that the small business definition applied to each industry by NAICS code is that listed in the Small Business Administration (SBA) size standards (13 CFR part 121).

After considering the economic impact of today's proposed amendment on small entities, I certify that this action will not have a significant impact on a substantial number of small entities. Today's proposed amendment imposes no additional burden on facilities impacted by existing EPA regulations because this action allows for an AWP to existing requirements and is voluntary. 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 (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 by State, local, and tribal governments, in aggregate, or by the private sector, of $100 million or more in any 1 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 of 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.

EPA has determined that today's proposed amendment does not contain a Federal mandate that may result in expenditures of $100 million or more to State, local, and tribal governments in the aggregate, or to the private sector in any 1 year. Therefore, today's proposed amendment is not subject to the requirements of sections 202 and 205 of the UMRA. In addition, today's proposed amendment does not significantly or uniquely affect small governments because it contains no requirements that apply to such governments or impose obligations upon them. Therefore, today's proposed decision is not subject to section 203 of the UMRA.

*E. Executive Order 13132: Federalism*

Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' The phrase ''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.''

Today's proposed amendment 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. Thus, the requirements of the Executive Order do not apply to today's proposed amendment.

*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.'' The phrase ''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.''

Today's proposed amendment 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. Thus, Executive Order 13175 does not apply to today's proposed amendment.

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

Executive Order 13045 (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, EPA 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.

Today's proposed amendment is not subject to the Executive Order because it is not economically significant as defined in Executive Order 12866, and because the Agency does not have reason to believe the environmental health or safety risk addressed by this action presents a disproportionate risk to children.

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

Today's proposed amendment is not a ''significant energy action'' as defined in Executive Order 13211 (66 FR 28355, May 22, 2001), because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Further, we have concluded that today's proposed amendment is not likely to have any adverse energy impacts.

*I. National Technology Transfer and Advancement Act*

Under section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law No. 104–113, all Federal agencies are required to use voluntary consensus standards (VCS) in their regulatory and procurement 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, business practices) developed or adopted by one or more voluntary consensus bodies. The NTTAA requires Federal agencies to provide Congress, through annual reports to OMB, with explanations when the agency does not use available and applicable VCS.

Today's proposed amendment does not involve technical standards. Therefore, the requirements of the NTTAA are not applicable.

**List of Subjects in 40 CFR Part 60**

Environmental protection, Administrative practice and procedures, Air pollution control, Intergovernmental relations, Reporting and recordkeeping requirements, Equipment leaks, and Alternative monitoring.

Dated: March 31, 2006.

**Stephen L. Johnson,**

*Administrator.*

For reasons set out in the preamble, title 40, chapter I, part 60 of the Code of Federal Regulations is proposed to be amended as follows:

## PART 60—[AMENDED]

1. The authority citation for part 60 continues to read as follows:

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

2. Section 60.2 is amended by adding the definitions for ''Engineering analysis,'' ''Gas imaging instrument,'' ''Imaging,'' and ''Stream'' in alphabetical order to read as follows:

* * * * *

*Engineering analysis* means the assessment of the imaging technology's capability to detect leaks at the specified sensitivity level for each component.

* * * * *

*Imaging* means making visible on a screen an emission plume which is otherwise invisible to the naked eye.

* * * * *

Optical *gas imaging instrument* means an instrument which makes visible on a screen an emission plume which is otherwise invisible to the naked eye.

* * * * *

*Stream* means gasoline or any other stream for which no constituent exceeds one percent of the stream by weight.

* * * * *

3. Section 60.18 is amended by:

a. The section heading is revised;

b. Revising paragraph (a) introductory text; and

c. Adding paragraphs (g), (h), and (i) to read as follows:

### § 60.18 General Control Device and Work Practice Requirements.

(a) *Introduction.* This section contains requirements for control devices used to comply with applicable subparts of parts 60 and 61. The requirements are here for administrative convenience and only apply to facilities covered by subparts referring to this section. This section also contains requirements for an alternative work practice used to identify leaking equipment. This alternative is placed here for administrative convenience and is available to all subparts in 40 CFR parts 60, 61, 63, and 65 that require monitoring of leaking equipment with a 40 CFR part 60, Appendix A–7, Method 21 monitor.

* * * * *

(g) Alternative Work Practice for Monitoring Equipment for Leaks. Paragraphs (h) and (i) of this section apply to all leaking equipment.

(h) This section contains an alternative work practice used to identify leaking equipment. Specifically, this section allows a source to use an optical gas imaging instrument as described in paragraph (i)(1) of this section instead of a 40 CFR part 60, Appendix A–7, Method 21 monitor. This alternative is available to all subparts in 40 CFR parts 60, 61, 63, and 65 that require monitoring of leaking equipment with a 40 CFR part 60, Appendix A–7, Method 21 monitor.

(1) An owner or operator of an affected source subject to CFR parts 60, 61, 63, or 65 can choose to comply with the requirements in paragraph (i) of this section instead of using the 40 CFR part 60, Appendix A–7, Method 21 monitor to identify leaking components.

(2) Any leak identified in paragraph (i)(3) of this section must be tagged for repair.

(3) Re-screening after repairing a leaking component must be conducted using the same method used to identify the leaking component.

(i) Owners or operators of an affected source who choose to use the alternative work practice shall comply with the requirements of paragraphs (i)(1) through (i)(4) of this section.

(1) Instrument Specifications. The optical gas imaging instrument must meet the following requirements:

(i) Image the compounds in the streams for which it will be used to monitor leaks, and

(ii) Provide the operator with an image of the potential leak points for a component and the regulated species at the standard detection sensitivity level selected from Table A, within the distance to be used in the daily instrument check of paragraph (i)(2) of this section, provided the instrument has been properly adjusted to the manufacturer's prescribed settings.

(2) Daily Instrument Check. Daily prior to beginning any leak monitoring work you must test the optical gas imaging instrument at the mass flow rate determined in paragraph (i)(2)(i) of this section in accordance with the procedure specified in paragraphs (i)(2)(ii) through (i)(2)(iv) of this section, unless an alternative method to demonstrate daily instrument checks has been approved in accordance with paragraph (i)(2)(v) of this section.

(i) The mass flow rate to be used in the daily instrument check shall be determined in accordance with either paragraphs (i)(2)(i)(A) or (i)(2)(i)(B) of this section.

(A) Calculate a mass flow rate using paragraphs (i)(2)(i)(A)(*1*) and (i)(2)(i)(A)(*2*) of this section.

(*1*) For a specified population of components to be imaged by the instrument, perform an engineering analysis to identify the stream containing the lowest mass fraction of chemicals that have to be identified as detectable, within the distance to be used in paragraph (i)(2)(iv) of this section, at or below the standard detection sensitivity level.

(*2*) Multiply the standard detection sensitivity level in Table A by the mass fraction of detectable chemicals from the stream identified in paragraph (i)(2)(i)(A)(*1*) of this section to determine the mass flow rate to be used in the daily instrument check, using the following equation.

$$E_{dic} = (E_{sds}) \sum_{i=1}^{k} x_i$$

Where:

$E_{dic}$ = Mass flow rate for the daily instrument check, grams per hour.

$X_i$ = Mass fraction of detectable chemical(s) i seen by the optical gas imaging instrument, within the distance to be used in paragraph (i)(2)(iv) of this section, at or below the standard detection sensitivity level, Esds.

$E_{sds}$ = Standard detection sensitivity from Table A, grams per hour.

k = Total number of detectable chemicals emitted from the leaking equipment and seen by the optical gas imaging instrument.

(B) Use the minimum detection sensitivity level specified in Table A as the mass flow rate for the daily instrument check. The calculations specified in paragraph (i)(2)(i)(A) of this section are not required if the daily instrument check is performed at the minimum detection sensitivity level.

(ii) Start the optical gas imaging instrument according to the manufacturer's instructions, ensuring that all appropriate settings conform to the manufacturer's instructions.

(iii) Use any gas chosen by the user that can be viewed by the optical gas imaging instrument and that has a purity of no less than 98 percent.

(iv) Establish a mass flow rate by using the following procedures:

(A) Position a cylinder of the gas in a secured upright position.

(B) Set up the optical gas imaging instrument at a recorded distance from the outlet or leak orifice of the flow meter that will not be exceeded in the actual performance of the leak survey. Do not exceed the operating parameters of the flow meter.

(C) Open the valve on the flow meter to set a flow rate that will create a mass emission rate equal to the mass rate specified in paragraph (i)(1) of this section while observing the gas flow through the optical gas imaging instrument viewfinder. When an image of the gas emission is seen through the viewfinder at the required emission rate, make a record of the reading on the flow meter.

(v) If you wish to use an alternative method to demonstrate daily instrument checks, then you must apply to the Administrator for approval of the alternative under § 60.13(i).

(3) Leak Survey Procedure. Operate the optical gas imaging equipment to image every regulated component in accordance with the instrument manufacturer's operating parameters.

(4) Recordkeeping. You must keep the following records:

(i) The detection sensitivity level used for the optical gas imaging instrument.

(ii) The analysis of the component population to determine the stream containing the lowest mass fraction of detectable chemicals in paragraph (i)(2)(i)(A)(*1*) of this section.

(iii) The technical basis for the mass fraction used in the equation in paragraph (i)(2)(i)(A)(*2*) of this section.

(iv) The daily instrument check. You may document the daily instrument check using either a video recording device, electronic recordkeeping, or written entry into a log book.

(v) Recordkeeping requirements in the applicable subpart. A video record must be used to document the leak survey results.

TABLE A.—DETECTION SENSITIVITY LEVELS

| Monitoring frequency | Monitoring frequency (days) | Detection sensitivity level (grams per hour) | |
|---|---|---|---|
| | | Standard | Minimum |
| Bi-Monthly | 60 | 60 | 6.0 |
| Semi-Quarterly | 45 | 85 | 8.5 |
| Monthly | 30 | 100 | 10.0 |

[FR Doc. E6–5005 Filed 4–5–06; 8:45 am]

BILLING CODE 6560–50–P

## ENVIRONMENTAL PROTECTION AGENCY

## 40 CFR Part 745

**[EPA–HQ–OPPT–2005–0049; FRL–7775–1]**

**RIN 2070–AC83**

## Lead; Renovation, Repair, and Painting Program; Extension of Comment Period

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule; extension of comment period.

**SUMMARY:** On January 10, 2006, EPA proposed new requirements to reduce exposure to lead hazards created by renovation, repair, and painting activities that disturb lead-based paint in the **Federal Register**. The proposal supports the attainment of the Federal government's goal of eliminating childhood lead poisoning by 2010. The proposal discussed requirements for training renovators and dust sampling technicians; certifying renovators, dust sampling technicians, and renovation firms; accrediting providers of renovation and dust sampling technician training; and for renovation work practices. This notice announces a 45-day extension of the comment period for the Renovation, Repair, and Painting Program proposed rule. This extension is necessary to provide the public with an opportunity to review and comment on materials recently added to the docket.

**DATES:** The comment period previously expiring on April 10, 2006, is extended to May 25, 2006.

**ADDRESSES:** For detailed instructions on the submission of comments, follow the instructions provided under **ADDRESSES** in the **Federal Register** document of January 10, 2006.

**FOR FURTHER INFORMATION CONTACT:** *For general information contact:* Colby Lintner, Regulatory Coordinator, Environmental Assistance Division (7408M), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (202) 554–1404; e-mail address: *TSCA-Hotline@epa.gov*.

*For technical information contact:* Mike Wilson, National Program Chemicals Division (7404T), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (202) 566–0521; e-mail address: *wilson.mike@epa.gov*.

**SUPPLEMENTARY INFORMATION:**

### I. Does this Action Apply to Me?

The Agency included in the proposed rule a list of those who may be potentially affected by this action. If you have questions regarding the applicability of this action to a particular entity, consult the technical person listed under **FOR FURTHER INFORMATION CONTACT**.

### II. What Action is the Agency Taking?

In the **Federal Register** of January 10, 2006 (71 FR 1588) (FRL–7755–5), EPA proposed new requirements to reduce exposure to lead hazards created by renovation, repair, and painting activities that disturb lead-based paint. In addition, EPA announced in the **Federal Register** of March 2, 2006 (71 FR 10628) (FR 7762–7), the availability of supplemental materials added to the docket. EPA has received requests for extension of the comment period from Owens Corning, National Multi Housing Council, National Association of Home Builders, Painting and Decorating Contractors of America, National Association of Realtors, National Paint and Coatings Association, and Atrium Environmental Health and Safety Services.

To allow additional time for comment EPA is extending the comment period established in the **Federal Register** issued on January 10, 2006 (71 FR 1588), for an additional 45 days. As extended, the comment period for this proposal expires May 25, 2006. Prior to this extension, the comment period was scheduled to expire on April 10, 2006.

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

The training, certification and accreditation requirements and work practice standards were proposed pursuant to the authority of TSCA section 402(c)(3), 15 U.S.C. 2682(c)(3), as amended by Title X of the Housing and Community Development Act of 1992, Public Law 102–550 (also known as the Residential Lead-Based Paint Hazard Reduction Act of 1992). The Model State Program and amendments to the regulations on the authorization of State and Tribal programs with respect to renovators and dust sampling technicians were proposed pursuant to section 404 of TSCA, 15 U.S.C. 2684.

## IV. Do Any Statutory and Executive Order Reviews Apply to this Action?

No. This action is not a rulemaking, it merely extends the date by which public comments must be submitted on a proposed rule that EPA published in the **Federal Register** of January 10, 2006 (71 FR 1588). For information about the applicability of the regulatory assessment requirements to the proposed rule, please refer to the discussion in Unit VIII. of that document (at 71 FR 1620).

## List of Subjects in Part 745

Environmental protection, Housing renovation, Lead, Lead-based paint, Reporting and recordkeeping requirements.

Dated: March 31, 2006.

**Margaret Schneider,**

*Acting Assistant Administrator, Office of Prevention, Pesticides and Toxic Substances.*

[FR Doc. E6–4998 Filed 4–5–06; 8:45 am]

**BILLING CODE 6560–50–S**

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## FEDERAL COMMUNICATIONS COMMISSION

## 47 CFR Part 1

**[MD Docket No. 06–68; FCC 06–38]**

## Assessment and Collection of Regulatory Fees For Fiscal Year 2006

**AGENCY:** Federal Communications Commission.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Commission will revise its Schedule of Regulatory Fees in order to recover the amount of regulatory fees that Congress has required it to collect for fiscal year 2006. Section 9 of the Communications Act of 1934, as amended, provides for the annual assessment and collection of regulatory fees under sections 9(b)(2) and 9(b)(3), respectively, for annual ''Mandatory Adjustments'' and ''Permitted Amendments'' to the Schedule of Regulatory Fees.

**DATES:** Comments are due April 14, 2006, and reply comments are due April 21, 2006.

**ADDRESSES:** You may submit comments, identified by MD Docket No. 06–68, by any of the following methods:

- Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the instructions for submitting comments.
- Federal Communications Commission's Web site: *http://www.fcc.gov/cgb/ecfs.* Follow the instructions for submitting comments.
- E-mail: *ecfs@fcc.gov.* Include MD Docket No. 06–68 in the subject line of the message.
- Mail: Commercial overnight mail (other than U.S. Postal Service Express Mail, and Priority Mail, must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first-class, Express, and Priority mail should be addressed to 445 12th Street, SW., Washington DC 20554.

**FOR FURTHER INFORMATION CONTACT:** Roland Helvajian, Office of Managing Director at (202) 418–0444 or Rob Fream, Office of Managing Director at (202) 418–0408.

**SUPPLEMENTARY INFORMATION:**

*Adopted:* March 22, 2006.

*Released:* March 27, 2006.

By the Commission.

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## I. Introduction

1. In this *Notice of Proposed Rulemaking (NPRM)*, we propose to collect $288,771,000 in regulatory fees for Fiscal Year (FY) 2006, pursuant to section 9 of the Communications Act of 1934, as amended (the Act). These fees are mandated by Congress and are collected to recover the regulatory costs associated with the Commission's enforcement, policy and rulemaking, user information, and international activities.[1]

## II. Discussion

2. In this *NPRM*, we seek comment on the development of FY 2006 regulatory fees collected pursuant to section 9 of the Act. For FY 2006, we tentatively propose to retain the established method, policies, and priorities. In addition to the assessment methodology, the Commission typically seeks comment on various administrative and operational issues affecting the collection of regulatory fees. For the FY 2006 regulatory fee cycle, we propose to retain the same administrative measures used for notification and assessment of regulatory fees in previous years, such as generating pre-completed regulatory fee assessment forms for certain regulatees. Consistent with past practice, we invite comments and suggestions on ways to improve the Commission's administrative processes for notifying entities of their regulatory fee obligations and collecting their payments.

3. The Commission is obligated to collect $288,771,000 in regulatory fees during FY 2006 to fund the Commission's operations. Consistent with our established practice, we plan to collect these regulatory fees in the August-September 2006 time frame in order to collect the required amount by the end of the fiscal year. In addition to the $288,771,000 amount above, pursuant to section 3013 of the Deficit Reduction Act (Public Law 109–171), the Commission is required to assess and collect an additional $10,000,000 in fiscal year 2006 as offsetting receipts.[2]

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[1] 47 U.S.C. 159(a).

[2] Section 3013 of Public Law 109–171 reads as follows, ''In addition to any fees assessed under the

We seek comment on how the Commission should implement this provision. Specifically, we seek comment on whether the Commission should assess the additional $10,000,000 on application fees, on regulatory fees, or from some other form of assessment.

*A. FY 2006 Regulatory Fee Assessment Methodology*

1. Development of FY 2006 Regulatory Fees

a. Calculation of Revenue and Fee Requirements

4. We propose to use, for the purpose of our FY 2006 regulatory fee assessment, the same section 9 regulatory fee assessment methodology adopted for FY 2005. Each fiscal year, the Commission proportionally allocates the total amount that must be collected via section 9 regulatory fees. The results of our proposed FY 2006 regulatory fee assessment methodology (including a comparison to the prior year's results) are contained in Appendix C. For FY 2006, we propose to use the receipts collected through the FY 2005 regulatory fees as a base for calculating the amount the Commission must collect in FY 2006. To collect the $288,771,000 required by law, we propose to adjust the FY 2005 amount upward by 3.1 percent.[3] Consistent with past practice, we propose to divide the FY 2006 amount by the number of payment units in each fee category to determine the unit fee.[4] As in prior years, for cases involving small fees (*e.g.*, licenses that are renewed over a multiyear term), we propose to divide the resulting unit fee by the term of the license. We propose to round these unit fees consistent with the requirements of section 9(b)(2).

b. Additional Adjustments to Payment Units

5. In calculating the FY 2006 regulatory fees proposed in Attachment D, we further adjusted the FY 2005 list of payment units (Attachment B) based upon licensee databases and industry and trade group projections. Whenever possible, we verified these estimates from multiple sources to ensure the accuracy of these estimates. In some instances, Commission licensee databases were used, while in other instances, actual prior year payment records and/or industry and trade association projections were used in determining the payment unit counts.[5] Where appropriate, we adjusted and/or rounded our final estimates to take into consideration variables that may impact the number of payment units, such as waivers and/or exemptions that may be filed in FY 2005, and fluctuations in the number of licensees or station operators due to economic, technical, or other reasons. Therefore, when we state that our estimated FY 2006 payment units are based on FY 2005 actual payment units, the number may have been rounded or adjusted slightly to account for these variables.

6. Additional factors are considered in determining regulatory fees for AM and FM radio stations. These factors are facility attributes and the population served by the radio station. The calculation of the population served is determined by coupling current U.S. Census Bureau data with technical and engineering data, as detailed in Attachment E. Consequently, the population served, as well as the class and type of service (AM or FM), determines the regulatory fee amount to be paid.[6]

2. Commercial Mobile Radio Service (CMRS) Messaging Service

7. Since FY 2003, the Commission has maintained the CMRS Messaging regulatory fee at the rate that was established in FY 2002 (*i.e.*, $0.08 per subscriber). We have maintained, rather than increased, this rate to account for the messaging industry's declining subscriber base.[7] We note that between FY 1997 and FY 2005, for example, the CMRS Messaging subscriber base declined 75.3 percent from 40.8 million to 10.1 million, respectively.[8] We seek comment on whether we should continue the same approach for regulatory fees applicable to the messaging industry. Specifically, should we maintain the industry's regulatory fee at $0.08 per subscriber in FY 2006?

3. Regulatory Fees for Direct Broadcast Service (DBS) Providers and Cable Television Operators

8. We seek comment on the appropriate regulatory fee structure for both cable operators and DBS providers. Since the inception of the Commission regulatory fee program, we have assessed section 9 regulatory fees on cable operators using a per-subscriber approach, which is consistent with the statute. By contrast, section 9 regulatory fee assessments for DBS providers are based on a per-license approach. In the FY 2005 regulatory fee proceeding, the cable industry generally argued that the Commission should modify the regulatory fee assessment for DBS providers to a per-subscriber approach.[9] In the FY 2005 proceeding, we concluded that no changes were warranted at that time and therefore retained the regulatory fee assessment methodology used for DBS providers since FY 1995. We seek comment on whether we should retain the existing regulatory fee assessment methodology for cable operators and DBS providers for the purposes of our FY 2006 regulatory fee assessment. Commenters proposing a fee change should identify the Commission rulemaking proceeding(s) or change(s) in law that they believe warrant a modification of our fee assessment methodology for DBS operators. To the extent parties argue

Communications Act of 1934 (47 U.S.C. 151 *et seq.*), the Federal Communications Commission shall assess extraordinary fees for licenses in the aggregate amount of $10,000,000, which shall be deposited in the Treasury during fiscal year 2006 as offsetting receipts.''

[3] Note that the required increase in regulatory fee payments of approximately 3.1 percent in FY 2006 is reflected in the revenue that is expected to be collected from each service category. Because this expected revenue is adjusted each year by the number of estimated payment units in a service category, the actual fee itself is sometimes increased by a number other than 3.1 percent. For example, in industries where the number of units is declining and the expected revenue is increasing, the impact of the fee increase may be greater.

[4] In many instances, the regulatory fee amount is a flat fee per licensee or regulatee. However, in some instances the fee amount represents a unit subscriber fee (such as for Cable, Commercial Mobile Radio Service (CMRS) Cellular/Mobile and CMRS Messaging), a per unit fee (such as for International Bearer Circuits), or a fee factor per revenue dollar (Interstate Telecommunications Service Provider fee). The payment unit is the measure upon which the fee is based, such as a licensee, regulatee, subscriber fee, etc.

[5] The databases we consulted include, but are not limited to, the Commission's Universal Licensing System (ULS), International Bureau Filing System (IBFS), and Consolidated Database System (CDBS). We also consulted industry sources including, but not limited to, *Television & Cable Factbook* by Warren Publishing, Inc. and the *Broadcasting and Cable Yearbook* by Reed Elsevier, Inc., as well as reports generated within the Commission such as the Wireline Competition Bureau's *Trends in Telephone Service* and the Wireless Telecommunications Bureau's *Numbering Resource Utilization Forecast and Annual CMRS Competition Report.* For additional information on source material, see Attachment B.

[6] In addition, beginning in FY 2005, we established a procedure by which we set regulatory fees for AM and FM radio and VHF and UHF television Construction Permits each year at an amount no higher than the lowest regulatory fee in that respective service category. For example, the regulatory fee for a Construction Permit for an AM radio station will never be more than the regulatory fee for an AM Class C radio station serving a population of less than 25,000.

[7] *See*, e.g., Assessment and Collection of Regulatory Fees for Fiscal Year 2003; Report and Order, 18 FCC Rcd 15985, 15992, at paragraph (2003).

[8] The 40.8 million number represents a unit estimate from the FY 1997 regulatory fee order, and the 10.1 million figure represents the number of paid units as of fiscal year end 2005.

[9] Assessment and Collection of Regulatory Fees for Fiscal Year 2005, *Report and Order and Order on Reconsideration*, 20 FCC Rcd 12259, 12264, at paragraph 10 (2005) (*FY 2005 R&O and Order on Recon*).

the regulatory fee assessment process should be changed, they should identify the legal basis that would justify a change and explain how the benefits of the proposed change outweigh the costs of the established assessment methodology.

4. Broadband Radio Service (BRS)/ Educational Broadband Service (EBS)

9. We are exploring regulatory fee issues for BRS/EBS in a separately pending BRS/EBS proceeding.[10] To the extent that any changes to our regulatory fee rules are adopted in this separate BRS/EBS proceeding, we propose not to implement such regulatory fee changes in the FY 2006 schedule of section 9 Regulatory Fees.

*B. Administrative and Operational Issues*

10. We invite comment on the administrative and operational processes used to collect the annual section 9 regulatory fees. Although these issues do not affect the amount of regulatory fees parties are obligated to submit, the administrative and operational issues affect the process of submitting payment. We generally invite comment on ways to improve these processes.

1. Mandatory Use of Fee Filer

11. We continue to encourage regulatees to use the Commission's online electronic Fee Filer application. Since this application was introduced in 2000, entities who will be submitting more than twenty-five (25) Form 159–Cs have been strongly encouraged to use Fee Filer when sending their regulatory fee payment. We seek comment on the impact to the public if the Commission was to institute the mandatory use of Fee Filer for large-volume section 9 regulatory fee payers. Mandatory use of Fee Filer by large-volume payers could ease both the Commission's administrative burden and those of high-volume payers, as well. We seek comment on whether any such mandatory usage requirement should be based on a pre-determined dollar amount, or on the number of transactions necessary to make payment. If mandatory usage were to be based on a dollar amount, what amount should be pre-determined? If based on the number of transactions conducted by a single entity, at what threshold should mandatory usage be established? Commenters should be aware that, for FY 2006, the Commission seeks solely to establish a record on this topic. In the event that, after receiving comments, the Commission deems this proposal to be an improvement, the use of Fee Filer would only become mandatory in FY 2007 or later.

2. Proposals for Notification and Collection of Regulatory Fees

12. In this section, we seek comment on the administrative processes that the Commission uses to notify regulatees and collect regulatory fees. Each year, we generate public notices and fact sheets that notify regulatees of the fee payment due date and provide additional information regarding regulatory fee payment procedures. Consistent with our established practice, we propose to provide public notices, fact sheets and all other relevant material on our Web site at *http://www.fcc.gov/fees/regfees.html* for the FY 2006 regulatory fee cycle. As a general practice, we will not send such material via surface mail. However, in the event that regulatees do not have access to the Internet, we will mail public notices and other relevant material upon request. Regulatees and the general public may request such information by contacting the FCC Financial Operations HelpDesk at (877) 480–3201, Option 4.

13. Although we will not send public notices and fact sheets to regulatees en masse, we will send specific regulatory fee bills or assessments via surface mail or e-mail to the select fee categories discussed below.[11] We are pursuing our billing initiatives as part of our effort to modernize our financial practices. These initiatives also serve the purpose of providing licensees with notification of upcoming regulatory fees. Eventually, we intend to expand our billing initiatives to include all regulatory fee service categories.

a. Interstate Telecommunications Service Providers (ITSPs)—Billed

14. In FY 2001, we began sending pre-completed FCC Form 159–W assessments to carriers in an effort to assist them in paying the Interstate Telecommunications Service Provider (ITSP) regulatory fee. The fee amount on FCC Form 159–W was calculated from the FCC Form 499–A report, which carriers are required to submit by April 1st of each year. Throughout FY 2002 and FY 2003, we refined the FCC Form 159–W to simplify the regulatory fee payment process.[12] Beginning in FY 2004, the pre-completed FCC Form 159–W was sent to carriers as a bill, rather than as an assessment of amount due. Other than the manner in which Form 159–W payments were entered into our financial system, carriers experienced no procedural changes regarding the use of the FCC Form 159–W when submitting payment of their ITSP regulatory fees. For FY 2006, we propose to continue our Form 159–W billing initiative for ITSPs. We seek comment on this proposal and on ways that we could improve our billing initiative for ITSPs.

b. Satellite Space Station Licensees—Billed

15. Beginning in FY 2004, we mailed regulatory fee bills via surface mail to licensees in our two satellite space station service categories. Specifically, geostationary orbit space station (GSO) licensees receive bills requesting regulatory fee payment for satellites that (1) were licensed by the Commission and operational on or before October 1 of the respective fiscal year; and (2) were not co-located with and technically identical to another operational satellite on that date (*i.e.*, were not functioning as a spare satellite). Non-geostationary orbit space station (NGSO) licensees received bills requesting regulatory fee payment for systems that were licensed by the Commission and operational on or before October 1 of the respective fiscal year.

16. For FY 2006, we propose to continue our billing initiative for our GSO and NGSO satellite space station categories. We emphasize that the bills that we propose to generate for our GSO and NGSO licensees will only be for the satellite or system aspects of their respective operations. GSO and NGSO licensees typically have regulatory fee obligations in other service categories (such as earth stations, broadcast facilities, etc.), and we expect satellite operators to meet their full fee payment obligations for their entire portfolio of

[10] *See* Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150–2162 and 2500–2690 MHz Bands *et al., Report & Order and Further Notice of Proposed Rulemaking*, 19 FCC Rcd 14165, 14293–97, at paragraphs 351–359 (2004) (*R&O and FNPRM*).

[11] An assessment is a proposed statement of the amount of regulatory fees owed by an entity to the Commission (or proposed subscriber count to be ascribed for purposes of setting the entity's regulatory fee) but it is not entered into the Commission's accounts receivable system as a current debt. By contrast, a bill is automatically recognized as a debt owed to the Commission. Bills reflect the amount owed and have a Fee Due Date of the last day of the regulatory fee payment window. Consequently, if a bill is not paid by the Fee Due Date, it becomes delinquent and is subject to our debt collection procedures. *See also* 47 CFR 1.1161(c), 1.1164(f)(5), and 1.1910.

[12] Beginning in FY 2002, Form 159–W included a payment section at the bottom of the form that allowed carriers the opportunity to send in Form 159–W in lieu of completing Form 159 Remittance Advice Form.

FCC licenses. We seek comment on our proposal to generate regulatory fee bills for our two satellite space station service categories.

c. Additional Service Categories for Billing or Assessing

17. We are currently exploring the feasibility of expanding our section 9 regulatory fee billing or assessing initiatives to three additional service categories in FY 2006. The service categories are Earth Stations, Cable Television Relay Service Stations (CARS) and the Local Multipoint Distribution Service (LMDS). We believe that billing or assessing can be accomplished for these categories because they are comprised of relatively few payment units (in comparison to many other categories in our Schedule of Regulatory Fees), and because the Commission maintains licensing databases for each of the three categories. Depending on progress made throughout this year, we may be in a position to generate bills or assessments for Earth Station, CARS and LMDS licensees in FY 2006. Any assessment initiative may occur solely online, whereby licensees would be instructed to visit a Commission-authorized Web site to view their regulatory fee obligations. Licensees would then be able to update or correct any information concerning their license, or to certify their fee-exempt status, if appropriate. The web site would be available to licensees throughout this summer. We seek comment on our intent to expand our billing/assessment initiatives to these service categories.

d. Media Services Licensees—Assessed

18. Beginning in FY 2003, we sent fee assessment postcards via surface mail to media services entities on a per-facility basis. The postcards notified licensees of the date when fee payments were due; provided the assessed fee amount for the facility, as well as other data attributes that we used to determine the fee amount; and, beginning in FY 2004, provided licensees with a telephone number to call (Financial Operations Help Desk) in the event that they needed customer assistance. We propose to continue our assessment initiative for media services licensees this year in a similar fashion.[13]

19. Consistent with procedures used last year, we propose to mail a single round of postcards to licensees and their other known points of contact listed in CDBS (Consolidated Database System) and in CORES (Commission Registration System), the Commission's two official databases for media services. By doing so, licensees and their other points of contact will all be furnished with the same information for each facility in question so that they can designate among themselves the payer of this year's fee. Mailing postcards to all interested parties at different addresses on file for each facility also encourages all parties to visit a Commission-authorized Web site to update or correct any information concerning the facility, or to certify their fee-exempt status, if appropriate. The Web site will be available to licensees throughout this summer.[14] We seek comment on our proposal to generate fee assessment postcards for media services entities.

20. In the past, some media services licensees have mistakenly mailed their postcards back to the Commission stapled to payment checks. We emphasize that under our proposal, licensees must still submit a completed FCC Form 159 Remittance Advice with their fee payments, despite having received an assessment postcard. The postcards may not be used as a substitute for a completed Form 159. We cannot guarantee that a licensee's regulatory fee payment will be posted accurately against the licensee's account if the licensee does not submit a completed Form 159 along with its fee payment.

21. We also emphasize that the most important data element that media services licensees need to include on their Form 159 is their *facility ID number*. The facility ID number is a unique identifier that remains constant over the course of a facility's existence. Despite the fact that we prominently display a facility ID number on the facility's postcard, and our Form 159 filing instructions require payers to provide their facility ID number (and associated call sign) for the facility in question, we continue to receive many incomplete Form 159s that do not provide the facility ID number for the facility for which the fee is being paid.

e. Commercial Mobile Radio Service (CMRS) Cellular and Mobile Services—Assessed

22. As in FY 2005,[15] we propose to send an assessment letter to Commercial Mobile Radio Service (CMRS) providers using data that is based on the Numbering Resource Utilization Forecast (NRUF) form, which includes a list of the carrier's Operating Company Numbers (OCNs) upon which the assessment is based. Consistent with existing practice, the letters will not include OCNs with their respective assigned number counts, but rather, an aggregate total of assigned numbers for each carrier. We also propose to continue our procedure of giving entities an opportunity to amend their subscriber counts by sending two rounds of assessment letters—an initial assessment and a final assessment letter.

23. If the number of subscribers on the initial assessment letter differs from the subscriber count the service provider provided on its NRUF form, the carrier can correct its subscriber count by returning the assessment letter or by contacting (a telephone number will be provided) the Commission and stating a reason for the change, such as the purchase or the sale of a subsidiary, including the date of the transaction, and any other information that will help to justify a reason for the change.

24. If we receive no response to our initial assessment letter, we will assume that the initial assessment is correct and will expect the fee payment to be based on the number of subscribers listed on the initial assessment. We will review all responses to initial assessment letters and determine whether a change in the number of subscribers is warranted. We will then generate a final assessment letter that informs carriers as to whether or not we accept the changed number of subscribers.

25. As in previous years, operators will certify their subscriber counts in Block 30 of the FCC Form 159 Remittance Advice when making their regulatory fee payments. As an additional enhancement this year to this assessment process, we propose to include porting information (*e.g.*, information on the number of ''ports in'' and ''ports out'') in our assessment letters so that licensees can account for any differences between the data submitted in their NRUF report and the Commission's assessment count.

26. Although an initial and a final assessment letter will be mailed to carriers that have filed an NRUF form, it is conceivable that some carriers will

[13] Fee assessments are proposed to be issued for AM and FM Radio Stations, AM and FM Construction Permits, FM Translators/Boosters, VHF and UHF Television Stations, VHF and UHF Television Construction Permits, Satellite Television Stations, Low Power Television (LPTV) Stations and LPTV Translators/Boosters, to the extent that applicants, permittees and licensees of such facilities do not qualify as government entities or non-profit entities. Fee assessments have not been issued for broadcast auxiliary stations in prior years, nor will they be issued in FY 2006.

[14] The Commission-authorized Web site for media services licensees is *http://www.fccfees.com.*

[15] *See FY 2005 R&O and Order on Recon.*, 20 FCC Rcd 12259, 12264, at paragraphs 38–44.

not be sent any letters of assessment because they did not file the NRUF form. We propose that these carriers compute their fee payment using the standard methodology [16] that is currently in place for CMRS Wireless services (*e.g.*, compute their subscriber counts as of December 31, 2005), and submit their payment accordingly on FCC Form 159. However, regardless of whether a carrier receives an assessment letter or computes the subscriber count itself, the Commission reserves the right, under the Communications Act, to audit the number of subscribers for which regulatory fees are paid. In the event that the Commission determines that the number of subscribers is inaccurate or that an insufficient reason is given for making a correction on the initial assessment letter, we note that the Commission reserves the right to assess the carrier for the difference between what was paid and what should have been paid.

27. In summary, we propose to (1) Derive the subscriber count from NRUF data based on ''assigned'' number counts that have been adjusted for porting to net Type 0 ports (''in'' and ''out''), which should reflect a more accurate subscriber count; (2) provide carriers with the opportunity to revise their subscriber count in an initial assessment letter, and (3) require carriers to confirm their subscriber counts on an aggregate basis using data in the NRUF report.

f. Cable Television Subscribers—Assessed

28. We propose to conduct a regulatory fee assessment initiative for the cable television industry consistent with the process the Commission used in FY 2005. Specifically, we propose to generate fee assessment letters for the cable operators who are on file as having paid regulatory fees the previous fiscal year for their basic cable subscribers. Also, as an additional means of notifying cable television regulatees of their section 9 regulatory fee payment obligations for FY 2006, we propose to send an e-mail reminder to all of the operators' e-mail addresses that are populated in the Media Bureau's Cable Operations and Licensing System (COALS). We seek comment on our proposed assessment initiative and on our intention to use company e-mail addresses in COALS.

29. Our assessment letter to each operator will (1) Announce the due date for payment of regulatory fees; (2) reflect the subscriber count for which the operator paid regulatory fees in FY 2005—and thus certified as having served as of December 31, 2004; and (3) request that the operator access a Commission-authorized Web site to provide its aggregate subscriber count as of December 31, 2005. If the number of subscribers as of December 31, 2005 differs from that as reported for last year, operators will be required to provide a brief explanation for the differing subscriber counts and indicate when the difference occurred. Cable operators who do not have access to the Internet will be able to contact the FCC Financial Operations Help Desk to provide their subscriber count as of December 31, 2005. We seek comment on this proposed assessment initiative.

30. Some cable operators may not have made regulatory fee payments in FY 2005 and, as a result, will not receive an assessment letter for FY 2006 regulatory fees. For example, a new company may have become operational after the first day of the fiscal year and therefore did not have a regulatory fee obligation in FY 2005; or an existing company did not make a payment because it filed a petition for waiver of regulatory fees for FY 2005 based on financial hardship. Regardless of the circumstance, we emphasize that not receiving a regulatory fee assessment letter in FY 2006 does not excuse an operator from its obligation to pay FY 2006 regulatory fees. All non-exempt cable operators, not only those that made payments in FY 2005 and/or receive assessment letters for FY 2006 fees, are required to make payments.

31. We also propose to retain the payment procedures for cable television operators that we have had in place for the past two fiscal years. That is, we will continue to permit cable television operators to base their payment on their company's aggregate subscriber count as of December 31, 2005, rather than requiring them to sub-report subscriber counts on a per community unit identifier (CUID) basis on the FCC Form 159 Remittance Advice. After providing their company's aggregate subscriber count in Block 25A of the FCC Form 159, operators will still be required to certify the accuracy of the subscriber count in Block 30.

32. Finally, regarding the cable television industry's annual payment obligation for section 9 regulatory fees, we seek comment on ways in which we could reduce the gap between the number of estimated payment units that we establish for each fiscal year and the number of actual payment units that we receive for that fiscal year. The Commission does not have a universal reporting requirement by which all cable television operators would report the number of basic cable television subscribers that they serve throughout all of their cable television systems.[17] Our estimates of the number of basic television subscribers are based on reviews of prior year regulatory fee payments made by cable operators and subscriber data published in publicly available data sources. As a result, the aggregate number of actual payment units made by the cable television industry may differ from the estimated number of units. We seek comments and/or proposals that address this situation.

3. Streamlined Regulatory Fee Payment Process for CMRS Providers

33. We propose to allow those CMRS Cellular, Mobile, and Messaging service providers that pay using an FCC Form 159 or the automated Fee Filer system to pay their subscriber totals at the aggregate level without having to identify and associate their subscriber counts with calls signs. We are requiring CMRS Cellular/Mobile providers to use the aggregate subscriber totals from their Numbering Resource Utilization Forecast report (NRUF),[18] netted for porting; therefore, it is consistent for CMRS providers (Cellular, Mobile, and Messaging) to pay their subscriber totals at the aggregate level without having to associate these subscriber counts with their respective call signs. We believe that eliminating the requirement to identify subscribers at the call sign level will improve the Commission's efficiency in processing regulatory fee payments, as well as reduce the administrative burden on licensees during the payment process. We seek comment on whether eliminating the requirement for CMRS providers to identify their call signs when making their regulatory fee payment will in any manner disrupt the processes by which providers determine and calculate their subscriber totals.

4. Future Streamlining of the Regulatory Fee Assessment and Collection Process

34. We continue to welcome comments concerning our commitment to reviewing, streamlining and modernizing our statutorily required fee assessment and collection procedures.

[16] Federal Communications Commission, *Regulatory Fees Fact Sheet: What You Owe—Commercial Wireless Services for FY 2005* at 1 (rel. July 2005).

[17] The number of basic cable television subscribers served is the basis from which cable television operators are required to calculate their annual section 9 regulatory fee payment obligations.

[18] For more information on our proposed regulatory fee assessment initiative for CMRS providers this fiscal year, *see also* Section II.B.2.E. of this *NPRM.*

Our areas of particular interest include: (1) The process for notifying licensees about changes in the annual Schedule of Regulatory Fees and how it can be improved; (2) the most effective way to disseminate regulatory fee assessments and bills, *e.g.*, through surface mail, e-mail, online Web site, or some other mechanism; (3) the fee payment process, including how the agency's online regulatory fee filing system (Fee Filer) can be enhanced; (4) the timing of fee payments, including whether we should alter the existing section 9 regulatory fee payment ''window'' in any way; and (5) the timing of fee assessments and bills.

## III. Procedural Matters

### *A. Payment of Regulatory Fees*

1. De Minimis Fee Payment Liability

35. Consistent with past practice, regulatees whose *total* FY 2006 regulatory fee liability, including all categories of fees for which payment is due, amounts to less than $10 will be exempted from payment of FY 2006 regulatory fees.

2. Standard Fee Calculations and Payment Dates

36. The Commission will, for the convenience of payers, accept fee payments made in advance of the normal formal window for the payment of regulatory fees. Licensees are reminded that, under our current rules, the responsibility for payment of fees by service category is as follows:

(a) *Media Services:* Regulatory fees must be paid for AM/FM radio station and VHF/UHF television station initial construction permits that were issued on or before October 1, 2005, and for all broadcast facility licenses granted on or before October 1, 2005. However, in instances where a permit or license is transferred or assigned after October 1, 2005, responsibility for payment rests with the holder of the permit or license as of the Fee Due Date.

(b) *Wireline (Common Carrier) Services:* Fees must be paid for any authorization that was granted on or before October 1, 2005. However, in instances where a permit or license is transferred or assigned after October 1, 2005, responsibility for payment rests with the holder of the permit or license as of the Fee Due Date.

(c) *Wireless Services:* Commercial Mobile Radio Service (CMRS) cellular, mobile, and messaging services (fees based upon a subscriber, unit or circuit count): Fees must be paid for any authorization that was issued on or before October 1, 2005. The number of subscribers, units or circuits on December 31, 2005 will be used as the basis from which to calculate the fee payment.

The first eleven fee categories in our Attachment D, Schedule of Regulatory Fees, pay what the Commission refers to as ''small multi-year wireless regulatory fees.'' Entities pay these regulatory fees in advance for the entire amount of the 5-year or 10-year term of initial license, and only pay fees again at the time of license renewal. As a result, the Commission does not collect regulatory fees for these eleven fee categories on an annual basis.

(d) *Multichannel Video Programming Distributor Services (cable television operators and CARS licensees):* The number of basic cable television subscribers on December 31, 2005 will be used as the basis from which to calculate the fee payment.[19] For CARS licensees, fees must be paid for any license that was granted on or before October 1, 2005. In instances where a CARS license is transferred or assigned after October 1, 2005, responsibility for payment rests with the holder of the license as of the Fee Due Date.

(e) *International Services:* For earth stations and geostationary orbit space stations, regulatory fees must be paid for stations that were licensed and operational on or before October 1, 2005. In instances where a license is transferred or assigned after October 1, 2005, responsibility for payment rests with the holder of the license as of the Fee Due Date. For non-geostationary orbit satellite systems, fees must be paid for systems that were licensed and operational on or before October 1, 2005. In instances where a license is transferred or assigned after October 1, 2005, responsibility for payment rests with the holder of the license as of the Fee Due Date. For international bearer circuits, payment is calculated on a per-active circuit basis as of December 31, 2005.[20]

### *B. Enforcement*

37. As a reminder to all licensees, section 159(c) of the Communications Act requires us to impose an additional charge as a penalty for late payment of any regulatory fee. As in years past, a late payment penalty of 25 percent of the amount of the required regulatory fee will be assessed on the first day following the deadline date for filing of these fees. Regulatory fee payment must be received and stamped at the lockbox bank by the last day of the regulatory fee filing window, and not merely postmarked by the last day of the window. Failure to pay regulatory fees and/or any late penalty will subject regulatees to sanctions, including the Commission's Red Light Rule (*see* 47 CFR 1.1910) and the provisions set forth in the Debt Collection Improvement Act of 1996 (DCIA). We also assess administrative processing charges on delinquent debts to recover additional costs incurred in processing and handling the related debt pursuant to the DCIA and § 1.1940(d) of the Commission's Rules. These administrative processing charges will be assessed on any delinquent regulatory fee, in addition to the 25 percent late charge penalty. Partial underpayments of regulatory fees are treated in the following manner. The licensee will be given credit for the amount paid, but if it is later determined that the fee paid is incorrect or not timely paid, the 25 percent late charge penalty will be assessed on the

[19] Cable television system operators should compute their basic subscribers as follows: Number of single family dwellings + number of individual households in multiple dwelling unit (apartments, condominiums, mobile home parks, etc.) paying at the basic subscriber rate + bulk rate customers + courtesy and free service. Note: Bulk-Rate Customers = Total annual bulk-rate charge divided by basic annual subscription rate for individual households. Operators may base their count on ''a typical day in the last full week'' of December 2005, rather than on a count as of December 31, 2005.

[20] Regulatory fees for International Bearer Circuits are to be paid by facilities-based common carriers that have active international bearer circuits in any transmission facility for the provision of service to an end user or resale carrier, which includes active circuits to themselves or to their affiliates. In addition, non-common carrier satellite operators must pay a fee for each circuit sold or leased to any customer, including themselves or their affiliates, other than an international common carrier authorized by the Commission to provide U.S. international common carrier services. Non-common carrier submarine cable operators are also to pay fees for any and all international bearer circuits sold on an indefeasible right of use (IRU) basis or leased to any customer, including themselves or their affiliates, other than an international common carrier authorized by the Commission to provide U.S. international common carrier services. *See Assessment and Collection of Regulatory Fees for Fiscal Year 2001*, MD Docket No. 01–76, Report and Order, 16 FCC Rcd 13525, 13593 (2001); *Regulatory Fees Fact Sheet: What You Owe—International and Satellite Services Licensees for FY 2004* at 3 (rel. July 2004) (the fact sheet is available on the FCC Web site at: *http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC–249904A4.pdf).* On February 6, 2006, VSNL Telecommunications (US) Inc. filed a Petition for Rulemaking urging the Commission to reform the current International Bearer Circuit Fee rules and policies as applied to non-common carrier submarine cable operators. *See* Petition for Rulemaking of VSNL Telecommunications (US) Inc., RM–11312 (filed February 6, 2006). This Petition remains pending before the Commission, which has issued a Public Notice requesting comment on the petition. *See* Consumer and Governmental Affairs Bureau, Reference Information Center, *Public Notice*, Report No. 2759 (released February 15, 2006). The Commission intends to resolve the complex issues presented by this Petition separately, and any comments on these issues filed in the instant proceeding will be incorporated into, and addressed, with those filed on the Petition for Rulemaking.

portion that is not paid in a timely manner.

38. Furthermore, our regulatory fee rules provide that we will withhold action on any applications or other requests for benefits filed by anyone who is delinquent in any non-tax debts owed to the Commission (including regulatory fees) and will ultimately dismiss those applications or other requests if payment of the delinquent debt or other satisfactory arrangement for payment is not made. See 47 CFR 1.1161(c), 1.1164(f)(5), and 1.1910. Failure to pay regulatory fees can also result in the initiation of a proceeding to revoke any and all authorizations held by the entity responsible for paying the delinquent fee(s).

*C. Initial Regulatory Flexibility Analysis*

39. With respect to this *NPRM*, an Initial Regulatory Flexibility Analysis (IRFA), is contained in Attachment A of the Appendix.[21] Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the *NPRM* specified *infra*. The Commission will send a copy of the *NPRM*, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.

*D. Initial Paperwork Reduction Act of 1995 Analysis*

40. This document does not contain proposed or modified information collection(s) 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). Completion of the 159 family of forms required by the Commission's regulatory fee payment process is already approved by the Office of Management and Budget under information collections 3060–0589 and 3060–0949.

*E. Ex Parte Rules*

41. *Permit-But-Disclose.* This proceeding will be treated as a ''permit-but-disclose'' proceeding subject to the ''permit-but-disclose'' requirements under section 1.1206(b) of the Commission's rules.[22] *Ex parte* presentations are permissible if disclosed in accordance with Commission rules, except during the Sunshine Agenda period when presentations, *ex parte* or otherwise, are generally prohibited. Persons making oral *ex parte* presentations are reminded that a memorandum summarizing a presentation must contain a summary of the substance of the presentation and not merely a listing of the subjects discussed. More than a one- or two-sentence description of the views and arguments presented is generally required.[23] Additional rules pertaining to oral and written presentations are set forth in section 1.1206(b).

*F. Filing Requirements*

42. *Comments and Replies.* Pursuant to sections 1.415 and 1.419 of the Commission's rules,[24] interested parties may file comments on or before the dates indicated on the first page of this document. Comments may be filed using: (1) The Commission's Electronic Comment Filing System (''ECFS''), (2) the Federal Government's eRulemaking Portal, or (3) by filing paper copies.[25]

43. *Electronic Filers:* Comments may be filed electronically using the Internet by accessing the ECFS: *http://www.fcc.gov/cgb/ecfs* or the Federal eRulemaking Portal: *http://www.regulations.gov.* Filers should follow the instructions provided on the website for submitting comments. For ECFS filers, if multiple docket or rulemaking numbers appear in the caption of this proceeding, filers must transmit one electronic copy of the comments for each docket or rulemaking number referenced in the caption. In completing the transmittal screen, filers should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions, filers should send an e-mail to *ecfs@fcc.gov,* and include the following words in the body of the message, ''get form.'' A sample form and directions will be sent in response.

44. *Paper Filers:* Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- The Commission's contractor will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, NE., Suite 110, Washington, DC 20002. The filing hours at this location are 8 a.m. to 7 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail should be addressed to 445 12th Street, SW., Washington DC 20554.

45. *Availability of Documents.* Comments, reply comments, and *ex parte* submissions will be available for public inspection during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street, SW., CY–A257, Washington, DC 20554. These documents will also be available via ECFS. Documents will be available electronically in ASCII, Word 97, and/or Adobe Acrobat.

46. *Accessibility Information.* To request information in accessible formats (computer diskettes, large print, audio recording, and Braille), send an e-mail to *fcc504@fcc.gov* or call the FCC's Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY). This document can also be downloaded in Word and Portable Document Format (PDF) at: *http://www.fcc.gov.*

## IV. Ordering Clauses

47. Accordingly, *it is ordered* that, pursuant to sections 4(i) and (j), 9, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 154(j), 159, and 303(r), this Notice of Proposed Rulemaking is hereby *adopted.*

*It is further ordered* that the Commission's Consumer Information Bureau, Reference Information Center, *shall send* a copy of this *NPRM,* including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

[21] *See* 5 U.S.C. 603. In addition, the *NPRM* and the IRFA (or summaries thereof) will be published in the **Federal Register**.

[22] *See* 47 CFR 1.1206(b); *see also* 47 CFR 1.1202 and 1.1203.

[23] *See* 47 CFR 1.1206(b)(2).

[24] *See id.* §§ 1.415, 1.419.

[25] *See Electronic Filing of Documents in Rulemaking Proceedings,* 13 FCC Rcd 11322 (1998).

Federal Communications Commission.

**Marlene H. Dortch,**

*Secretary.*

## Attachment A: Initial Regulatory Flexibility Analysis

48. As required by the Regulatory Flexibility Act (RFA),[26] the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities by the policies and rules in the present *NPRM.* Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed on or before the dates indicated on the first page of this document. The Commission will send a copy of the *NPRM,* including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.[27] In addition, the *NPRM* and IRFA (or summaries thereof) will be published in the **Federal Register**.[28]

### I. Need for, and Objectives of, the Proposed Rules

49. This rulemaking proceeding is initiated to obtain comments concerning the Commission's proposed amendment of its Schedule of Regulatory Fees in the amount of $288,771,000, the amount that Congress has required the Commission to recover. The Commission seeks to collect the necessary amount through its proposed Schedule of Regulatory Fees in the most efficient manner possible and without undue public burden.

### II. Legal Basis

50. This action, including publication of proposed rules, is authorized under sections (4)(i) and (j), 9, and 303(r) of the Communications Act of 1934, as amended.[29]

### III. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

51. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rules and policies, if adopted.[30] The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.'' [31] In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act.[32] A ''small business concern'' is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.[33]

52. *Small Businesses.* Nationwide, there are a total of 22.4 million small businesses, according to SBA data.[34]

53. *Small Organizations.* Nationwide, there are approximately 1.6 million small organizations.[35]

54. *Small Governmental Jurisdictions.* The term ''small governmental jurisdiction'' is defined as ''governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.'' [36] As of 1997, there were approximately 87,453 governmental jurisdictions in the United States.[37] This number includes 39,044 county governments, municipalities, and townships, of which 37,546 (approximately 96.2%) have populations of fewer than 50,000, and of which 1,498 have populations of 50,000 or more. Thus, we estimate the number of small governmental jurisdictions overall to be 84,098 or fewer.

55. We have included small incumbent local exchange carriers in this present RFA analysis. As noted above, a ''small business'' under the RFA is one that, inter alia, meets the pertinent small business size standard (*e.g.*, a telephone communications business having 1,500 or fewer employees), and ''is not dominant in its field of operation.'' [38] The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent local exchange carriers are not dominant in their field of operation because any such dominance is not ''national'' in scope.[39] We have therefore included small incumbent local exchange carriers in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

56. *Incumbent Local Exchange Carriers (ILECs).* Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[40] According to Commission data,[41] 1,303 carriers have reported that they are engaged in the provision of incumbent local exchange services. Of these 1,303 carriers, an estimated 1,020 have 1,500 or fewer employees and 283 have more than 1,500 employees. Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses that may be affected by our proposed action.

57. *Competitive Local Exchange Carriers (CLECs), Competitive Access Providers (CAPs), ''Shared-Tenant Service Providers,'' and ''Other Local Service Providers.''* Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[42] According to Commission data,[43] 820 carriers have reported that they are engaged in the provision of either competitive access provider services or competitive local exchange carrier services. Of these 820 carriers, an estimated 726 have 1,500 or fewer

[26] 5 U.S.C. 603. The RFA, 5 U.S.C. 601–612 has been amended by the Contract With America Advancement Act of 1996, Public Law 104–121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

[27] 5 U.S.C. 603(a).

[28] *Id.*

[29] 47 U.S.C. 154(i) and (j), 159, and 303(r).

[30] 5 U.S.C. 603(b)(3).

[31] 5 U.S.C. 601(6).

[32] 5 U.S.C. 601(3) (incorporating by reference the definition of ''small-business concern'' in the Small Business Act, 15 U.S.C. 632). Pursuant to 5 U.S.C. 601(3), the statutory definition of a small business applies ''unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the **Federal Register**.''

[33] 15 U.S.C. 632.

[34] *See* SBA, Programs and Services, SBA Pamphlet No. CO–0028, at page 40 (July 2002).

[35] Independent Sector, The New Nonprofit Almanac & Desk Reference (2002).

[36] 5 U.S.C. 601(5).

[37] U.S. Census Bureau, *Statistical Abstract of the United States*: 2000, Section 9, pages 299–300, Tables 490 and 492.

[38] 15 U.S.C. 632.

[39] Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to William E. Kennard, Chairman, FCC (May 27, 1999). The Small Business Act contains a definition of ''small-business concern,'' which the RFA incorporates into its own definition of ''small business.'' *See* 15 U.S.C. 632(a) (Small Business Act); 5 U.S.C. 601(3) (RFA). SBA regulations interpret ''small business concern'' to include the concept of dominance on a national basis. *See* 13 CFR 121.102(b).

[40] 13 CFR 121.201, North American Industry Classification System (NAICS) code 517110 (changed from 513310 in October 2002).

[41] FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, ''*Trends in Telephone Service*'' at Table 5.3, Page 5–5 (June 2005) (hereinafter ''*Trends in Telephone Service*''). This source uses data that are current as of October 1, 2004.

[42] 13 CFR 121.201, NAICS code 517110 (changed from 513310 in October 2002).

[43] ''Trends in Telephone Service'' at Table 5.3.

employees and 94 have more than 1,500 employees. In addition, 12 carriers have reported that they are ''Shared-Tenant Service Providers,'' and all 12 are estimated to have 1.500 or fewer employees. In addition, 39 carriers have reported that they are ''Other Local Service Providers.'' Of the 39, an estimated 38 have 1,500 or fewer employees and one has more than 1,500 employees. Consequently, the Commission estimates that most providers of competitive local exchange service, competitive access providers, ''Shared-Tenant Service Providers,'' and ''Other Local Service Providers'' are small entities that may be affected by our proposed action.

58. *Local Resellers.* The SBA has developed a small business size standard for the category of Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[44] According to Commission data,[45] 143 carriers have reported that they are engaged in the provision of local resale services. Of these, an estimated 141 have 1,500 or fewer employees and two have more than 1,500 employees. Consequently, the Commission estimates that the majority of local resellers are small entities that may be affected by our proposed action.

59. *Toll Resellers.* The SBA has developed a small business size standard for the category of Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[46] According to Commission data,[47] 770 carriers have reported that they are engaged in the provision of toll resale services. Of these, an estimated 747 have 1,500 or fewer employees and 23 have more than 1,500 employees. Consequently, the Commission estimates that the majority of toll resellers are small entities that may be affected by our proposed action.

60. *Payphone Service Providers (PSPs).* Neither the Commission nor the SBA has developed a small business size standard specifically for payphone services providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[48] According to Commission data,[49] 654 carriers have reported that they are engaged in the provision of payphone services. Of these, an estimated 652 have 1,500 or fewer employees and two have more than 1,500 employees. Consequently, the Commission estimates that the majority of payphone service providers are small entities that may be affected by our proposed action.

61. *Interexchange Carriers (IXCs).* Neither the Commission nor the SBA has developed a small business size standard specifically for providers of interexchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[50] According to Commission data,[51] 316 carriers have reported that they are engaged in the provision of interexchange service. Of these, an estimated 292 have 1,500 or fewer employees and 24 have more than 1,500 employees. Consequently, the Commission estimates that the majority of IXCs are small entities that may be affected by our proposed action.

62. *Operator Service Providers (OSPs).* Neither the Commission nor the SBA has developed a small business size standard specifically for operator service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[52] According to Commission data,[53] 23 carriers have reported that they are engaged in the provision of operator services. Of these, an estimated 20 have 1,500 or fewer employees and three have more than 1,500 employees. Consequently, the Commission estimates that the majority of OSPs are small entities that may be affected by our proposed action.

63. *Prepaid Calling Card Providers.* Neither the Commission nor the SBA has developed a small business size standard specifically for prepaid calling card providers. The appropriate size standard under SBA rules is for the category Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[54] According to Commission data,[55] 89 carriers have reported that they are engaged in the provision of prepaid calling cards. Of these, an estimated 88 have 1,500 or fewer employees and one has more than 1,500 employees. Consequently, the Commission estimates that the majority of prepaid calling card providers are small entities that may be affected by our proposed action.

64. *800 and 800-Like Service Subscribers.*[56] Neither the Commission nor the SBA has developed a small business size standard specifically for 800 and 800-like service (''toll free'') subscribers. The appropriate size standard under SBA rules is for the category Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[57] The most reliable source of information regarding the number of these service subscribers appears to be data the Commission receives from Database Service Management on the 800, 866, 877, and 888 numbers in use.[58] According to our data, at the end of December 2004, the number of 800 numbers assigned was 7,540,453; the number of 888 numbers assigned was 5,947,789; the number of 877 numbers assigned was 4,805,568; and the number of 866 numbers assigned was 5,011,291. We do not have data specifying the number of these subscribers that are not independently owned and operated or have more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of toll free subscribers that would qualify as small businesses under the SBA size standard. Consequently, we estimate that there are 7,540,453 or fewer small entity 800 subscribers; 5,947,789 or fewer small entity 888 subscribers; 4,805,568 or fewer small entity 877 subscribers, and 5,011,291 or fewer entity 866 subscribers.

65. *International Service Providers.* The Commission has not developed a small business size standard specifically for providers of international service. The appropriate size standards under SBA rules are for the two broad categories of Satellite Telecommunications and Other Telecommunications. Under both categories, such a business is small if it has $12.5 million or less in average

[44] 13 CFR 121.201, NAICS code 517310 (changed from 513330 in October 2002).

[45] ''*Trends in Telephone Service*'' at Table 5.3.

[46] 13 CFR 121.201, NAICS code 517310 (changed to 513330 in October 2002).

[47] ''*Trends in Telephone Service*'' at Table 5.3.

[48] 3 CFR 121.201, NAICS code 517110 (changed from 513310 in October 2002).

[49] ''*Trends in Telephone Service*'' at Table 5.3.

[50] 13 CFR 121.201, NAICS code 517110 (changed from 513310 in October 2002).

[51] ''*Trends in Telephone Service*'' at Table 5.3.

[52] 13 CFR 121.201, NAICS code 517110 (changed from 513310 in October 2002).

[53] ''*Trends in Telephone Service*'' at Table 5.3.

[54] 13 CFR 121.201, NAICS code 517310 (changed from 513330 in October 2002).

[55] ''*Trends in Telephone Service*'' at Table 5.3.

[56] We include all toll-free number subscribers in this category, including those for 888 numbers.

[57] 13 CFR 121.201, NAICS code 517310 (changed from 513330 in October 2002).

[58] FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, ''*Trends in Telephone Service,*'' Tables 18.4, 18.5, 18.6, and 18.7, (June 2005).

annual receipts.[59] For the first category of Satellite Telecommunications, Census Bureau data for 1997 show that there were a total of 324 firms that operated for the entire year.[60] Of this total, 273 firms had annual receipts of under $10 million, and an additional 24 firms had receipts of $10 million to $24,999,999. Thus, the majority of Satellite Telecommunications firms can be considered small.

66. The second category—Other Telecommunications—includes ''establishments primarily engaged in * * * providing satellite terminal stations and associated facilities operationally connected with one or more terrestrial communications systems and capable of transmitting telecommunications to or receiving telecommunications from satellite systems.''[61] According to Census Bureau data for 1997, there were 439 firms in this category that operated for the entire year.[62] Of this total, 424 firms had annual receipts of $5 million to $9,999,999 and an additional six firms had annual receipts of $10 million to $24,999,990. Thus, under this second size standard, the majority of firms can be considered small.

67. *Wireless Service Providers.* The SBA has developed a small business size standard for wireless firms within the two broad economic census categories of ''Paging''[63] and ''Cellular and Other Wireless Telecommunications.''[64] Under both SBA categories, a wireless business is small if it has 1,500 or fewer employees. For the census category of Paging, Census Bureau data for 1997 show that there were 1,320 firms in this category, total, that operated for the entire year.[65] Of this total, 1,303 firms had employment of 999 or fewer employees, and an additional 17 firms had employment of 1,000 employees or more.[66] Thus, under this category and associated small business size standard, the great majority of firms can be considered small. For the census category Cellular and Other Wireless Telecommunications, U.S. Census Bureau data for 1997 show that there were 977 firms in this category, total, that operated for the entire year.[67] Of this total, 965 firms had employment of 999 or fewer employees, and an additional 12 firms had employment of 1,000 employees or more.[68] Thus, under this second category and size standard, the great majority of firms can, again, be considered small.

68. *Internet Service Providers.* The SBA has developed a small business size standard for Internet Service Providers. This category comprises establishments ''primarily engaged in providing direct access through telecommunications networks to computer-held information compiled or published by others.''[69] Under the SBA size standard, such a business is small if it has average annual receipts of $21 million or less.[70] According to Census Bureau data for 1997, there were 2,751 firms in this category that operated for the entire year.[71] Of these, 2,659 firms had annual receipts of under $10 million, and an additional 67 firms had receipts of between $10 million and $24,999,999.[72] Thus, under this size standard, the great majority of firms can be considered small entities.

69. *Cellular Licensees.* The SBA has developed a small business size standard for wireless firms within the broad economic census category ''Cellular and Other Wireless Telecommunications.''[73] Under this SBA category, a wireless business is small if it has 1,500 or fewer employees. For the census category Cellular and Other Wireless Telecommunications firms, U.S. Census Bureau data for 1997 show that there were 977 firms in this category, total, that operated for the entire year.[74] Of this total, 965 firms had employment of 999 or fewer employees, and an additional 12 firms had employment of 1,000 employees or more.[75] Thus, under this category and size standard, the great majority of firms can be considered small. According to the most recent *Trends in Telephone Service* data, 604 carriers reported that they were engaged in the provision of cellular service, personal communications service, or specialized mobile radio telephony services, which are placed together in the data.[76] We have estimated that 427 of these are small, under the SBA small business size standard.[77]

70. *Common Carrier Paging.* The SBA has developed a small business size standard for wireless firms within the broad economic census categories of ''Cellular and Other Wireless Telecommunications.''[78] Under this SBA category, a wireless business is small if it has 1,500 or fewer employees. For the census category of Paging, U.S. Census Bureau data for 1997 show that there were 1,320 firms in this category, total, that operated for the entire year.[79] Of this total, 1,303 firms had employment of 999 or fewer employees, and an additional 17 firms had employment of 1,000 employees or

[59] 13 CFR 121.201, NAICS codes 517410 and 517910 (changed from 513340 and 513390 in October 2002).

[60] U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, ''Establishment and Firm Size (Including Legal Form of Organization),'' Table 4, NAICS code 513340 (issued October 2000).

[61] Office of Management and Budget, North American Industry Classification System, page 513 (1997) (NAICS code 513390, changed to 517910 in October 2002).

[62] U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, ''Establishment and Firm Size (Including Legal Form of Organization),'' Table 4, NAICS code 513390 (issued October 2000).

[63] 13 CFR 121.201, NAICS code 513321 (changed to 517211 in October 2002).

[64] 13 CFR 121.201, NAICS code 513322 (changed to 517212 in October 2002).

[65] U.S. Census Bureau, 1997 Economic Census, Subject Series: ''Information,'' Table 5, Employment Size of Firms Subject to Federal Income Tax: 1997, NAICS code 513321 (issued October 2000).

[66] U.S. Census Bureau, 1997 Economic Census, Subject Series: ''Information,'' Table 5, Employment Size of Firms Subject to Federal Income Tax: 1997, NAICS code 513321 (issued October 2000). The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is ''Firms with 1000 employees or more.''

[67] U.S. Census Bureau, 1997 Economic Census, Subject Series: ''Information,'' Table 5, Employment Size of Firms Subject to Federal Income Tax: 1997, NAICS code 513322 (issued October 2000).

[68] U.S. Census Bureau, 1997 Economic Census, Subject Series: ''Information,'' Table 5, Employment Size of Firms Subject to Federal Income Tax: 1997, NAICS code 513322 (issued October 2000). The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is ''Firms with 1000 employees or more.''

[69] Office of Management and Budget, North American Industry Classification System, page 515 (1997). NAICS code 514191, ''On-Line Information Services'' (changed to current name and to code 518111 in October 2002).

[70] 13 CFR 121.201, NAICS code 518111.

[71] U.S. Census Bureau, 1997 Economic Census, Subject Series: ''Information,'' Table 4, Receipts Size of Firms Subject to Federal Income Tax: 1997, NAICS code 514191 (issued October 2000).

[72] U.S. Census Bureau, 1997 Economic Census, Subject Series: ''Information,'' Table 4, Receipts Size of Firms Subject to Federal Income Tax: 1997, NAICS code 514191 (issued October 2000).

[73] 13 CFR 121.201, NAICS code 513322 (changed to 517212 in October 2002).

[74] U.S. Census Bureau, 1997 Economic Census, Subject Series: ''Information,'' Table 5, Employment Size of Firms Subject to Federal Income Tax: 1997, NAICS code 513322 (issued October 2000).

[75] U.S. Census Bureau, 1997 Economic Census, Subject Series: ''Information,'' Table 5, Employment Size of Firms Subject to Federal Income Tax: 1997, NAICS code 513322 (issued October 2000). The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is ''Firms with 1000 employees or more.''

[76] FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, ''*Trends in Telephone Service*'' at Table 5.3, page 5–5 (June 2005). This source uses data that are current as of October 1, 2004.

[77] FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, ''*Trends in Telephone Service*'' at Table 5.3, page 5–5 (June 2005). This source uses data that are current as of October 1, 2004.

[78] 13 CFR 121.201, NAICS code 513322 (changed to 517212 in October 2002).

[79] U.S. Census Bureau, 1997 Economic Census, Subject Series: ''Information,'' Table 5, Employment Size of Firms Subject to Federal Income Tax: 1997, NAICS code 513321 (issued October 2000).

more.[80] Thus, under this category and associated small business size standard, the great majority of firms can be considered small.

71. In the Paging Second Report and Order, the Commission adopted a size standard for ''small businesses'' for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.[81] A small business is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $15 million for the preceding three years.[82] The SBA has approved this definition.[83] An auction of Metropolitan Economic Area (MEA) licenses commenced on February 24, 2000, and closed on March 2, 2000. Of the 2,499 licenses auctioned, 985 were sold.[84] Fifty-seven companies claiming small business status won 440 licenses.[85] An auction of MEA and Economic Area (EA) licenses commenced on October 30, 2001, and closed on December 5, 2001. Of the 15,514 licenses auctioned, 5,323 were sold.[86] One hundred thirty-two companies claiming small business status purchased 3,724 licenses. A third auction, consisting of 8,874 licenses in each of 175 EAs and 1,328 licenses in all but three of the 51 MEAs commenced on May 13, 2003, and closed on May 28, 2003. Seventy-seven bidders claiming small or very small business status won 2,093 licenses.[87] Currently, there are approximately 74,000 Common Carrier Paging licenses. According to the most recent *Trends in Telephone Service,* 408 private and common carriers reported that they were engaged in the provision of either paging or ''other mobile'' services.[88] Of these, we estimate that 589 are small, under the SBA-approved small business size standard.[89] We estimate that the majority of common carrier paging providers would qualify as small entities under the SBA definition.

72. Wireless Communications Services. This service can be used for fixed, mobile, radiolocation, and digital audio broadcasting satellite uses. The Commission defined ''small business'' for the wireless communications services (WCS) auction as an entity with average gross revenues of $40 million for each of the three preceding years, and a ''very small business'' as an entity with average gross revenues of $15 million for each of the three preceding years.[90] The SBA has approved these definitions.[91] The Commission auctioned geographic area licenses in the WCS service. In the auction, which commenced on April 15, 1997 and closed on April 25, 1997, there were seven bidders that won 31 licenses that qualified as very small business entities, and one bidder that won one license that qualified as a small business entity. An auction for one license in the 1670–1674 MHz band commenced on April 30, 2003 and closed the same day. One license was awarded. The winning bidder was not a small entity.

73. *Wireless Telephony.* Wireless telephony includes cellular, personal communications services, and specialized mobile radio telephony carriers. The SBA has developed a small business size standard for ''Cellular and Other Wireless Telecommunications'' services.[92] Under the SBA small business size standard, a business is small if it has 1,500 or fewer employees.[93] According to the most recent *Trends in Telephone Service* data, 719 carriers reported that they were engaged in wireless telephony.[94] We have estimated that 427 of these are small under the SBA small business size standard.

74. *Broadband Personal Communications Service.* The broadband personal communications services (PCS) spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission has created a small business size standard for Blocks C and F as an entity that has average gross revenues of less than $40 million in the three previous calendar years.[95] For Block F, an additional small business size standard for ''very small business'' was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years.[96] These small business size standards, in the context of broadband PCS auctions, have been approved by the SBA.[97] No small businesses within the SBA-approved small business size standards bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the Block C auctions. A total of 93 ''small'' and ''very small'' business bidders won approximately 40 percent of the 1,479 licenses for Blocks D, E, and F.[98] On March 23, 1999, the Commission reauctioned 155 C, D, E, and F Block licenses; there were 113 small business winning bidders.[99]

75. On January 26, 2001, the Commission completed the auction of 422 C and F Broadband PCS licenses in Auction No. 35. Of the 35 winning bidders in this auction, 29 qualified as

[80] U.S. Census Bureau, 1997 Economic Census, Subject Series: ''Information,'' Table 5, Employment Size of Firms Subject to Federal Income Tax: 1997, NAICS code 513321 (issued October 2000). The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is ''Firms with 1000 employees or more.''

[81] Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, *Second Report and Order,* 12 FCC Rcd 2732, 2811–2812, at paragraphs 178–181 (*Paging Second Report and Order*); *see also* Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, *Memorandum Opinion and Order on Reconsideration,* 14 FCC Rcd 10030, 10085–10088, at paragraphs 98–107 (1999).

[82] *Paging Second Report and Order,* 12 FCC Rcd at 2811, at paragraph 179.

[83] *See* Letter to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, from Aida Alvarez, Administrator, Small Business Administration, dated December 2, 1998.

[84] *See* ''929 and 931 MHz Paging Auction Closes,'' *Public Notice,* 15 FCC Rcd 4858 (WTB 2000).

[85] *See* ''929 and 931 MHz Paging Auction Closes,'' *Public Notice,* 15 FCC Rcd 4858 (WTB 2000).

[86] *See* ''Lower and Upper Paging Band Auction Closes,'' *Public Notice,* 16 FCC Rcd 21821 (WTB 2002).

[87] *See* ''Lower and Upper Paging Bands Auction Closes,'' *Public Notice,* 18 FCC Rcd 11154 (WTB 2003).

[88] *See Trends in Telephone Service,* Industry Analysis Division, Wireline Competition Bureau, Table 5.3 (Number of Telecommunications Service Providers by Size of Business) (June 2005).

[89] 13 CFR 121.201, NAICS code 517211.

[90] Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service (WCS), *Report and Order,* 12 FCC Rcd 10785, 10879, at paragraph 194 (1997).

[91] *See* Letter to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated December 2, 1998.

[92] 13 CFR 121.201, NAICS code 513322 (changed to 517212 in October 2002).

[93] 13 CFR 121.201, NAICS code 513322 (changed to 517212 in October 2002).

[94] FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, ''*Trends in Telephone Service*'' at Table 5.3, page 5–5 (June 2005). This source uses data that are current as of October 1, 2004.

[95] *See* Amendment of Parts 20 and 24 of the Commission's Rules—Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, *Report and Order*, 11 FCC Rcd 7824, 7850–7852, at paragraphs 57–60 (1996); *see also* 47 CFR 24.720(b).

[96] *See* Amendment of Parts 20 and 24 of the Commission's Rules—Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, *Report and Order*, 11 FCC Rcd 7824, 7852, at paragraph 60.

[97] *See* Letter to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated December 2, 1998.

[98] FCC News, ''Broadband PCS, D, E and F Block Auction Closes,'' No. 71744 (released January 14, 1997).

[99] *See* ''C, D, E, and F Block Broadband PCS Auction Closes,'' *Public Notice*, 14 FCC Rcd 6688 (WTB 1999).

''small'' or ''very small'' businesses.[100] Subsequent events, concerning Auction 35, including judicial and agency determinations, resulted in a total of 163 C and F Block licenses being available for grant.

76. *Narrowband Personal Communications Services.* The Commission held an auction for Narrowband PCS licenses that commenced on July 25, 1994, and closed on July 29, 1994. A second auction commenced on October 26, 1994 and closed on November 8, 1994. For purposes of the first two Narrowband PCS auctions, ''small businesses'' were entities with average gross revenues for the prior three calendar years of $40 million or less.[101] Through these auctions, the Commission awarded a total of 41 licenses, 11 of which were obtained by four small businesses.[102] To ensure meaningful participation by small business entities in future auctions, the Commission adopted a two-tiered small business size standard in the Narrowband PCS Second Report and Order.[103] A ''small business'' is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than $40 million.[104] A ''very small business'' is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than $15 million.[105] The SBA has approved these small business size standards.[106] A third auction commenced on October 3, 2001 and closed on October 16, 2001. Here, five bidders won 317 (Metropolitan Trading Areas and nationwide) licenses.[107] Three of these claimed status as a small or very small entity and won 311 licenses.

77. *Lower 700 MHz Band Licenses.* We adopted criteria for defining three groups of small businesses for purposes of determining their eligibility for special provisions such as bidding credits.[108] We have defined a ''small business'' as an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $40 million for the preceding three years.[109] A ''very small business'' is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $15 million for the preceding three years.[110] Additionally, the lower 700 MHz Service has a third category of small business status that may be claimed for Metropolitan/Rural Service Area (MSA/RSA) licenses. The third category is ''entrepreneur,'' which is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $3 million for the preceding three years.[111] The SBA has approved these small size standards.[112] An auction of 740 licenses (one license in each of the 734 MSAs/RSAs and one license in each of the six Economic Area Groupings (EAGs)) commenced on August 27, 2002, and closed on September 18, 2002. Of the 740 licenses available for auction, 484 licenses were sold to 102 winning bidders. Seventy-two of the winning bidders claimed small business, very small business or entrepreneur status and won a total of 329 licenses.[113] A second auction commenced on May 28, 2003, and closed on June 13, 2003, and included 256 licenses: 5 EAG licenses and 476 Cellular Market Area licenses.[114] Seventeen winning bidders claimed small or very small business status and won 60 licenses, and nine winning bidders claimed entrepreneur status and won 154 licenses.[115]

78. *Upper 700 MHz Band Licenses.* The Commission released a Report and Order, authorizing service in the upper 700 MHz band.[116] This auction, previously scheduled for January 13, 2003, has been postponed.[117]

79. *700 MHz Guard Band Licenses.* In the 700 MHz Guard Band Order, we adopted size standards for ''small businesses'' and ''very small businesses'' for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.[118] A small business in this service is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $40 million for the preceding three years.[119] Additionally, a very small business is an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $15 million for the preceding three years.[120] SBA approval of these definitions is not required.[121] An auction of 52 Major Economic Area (MEA) licenses commenced on September 6, 2000, and

[100] *See* ''C and F Block Broadband PCS Auction Closes; Winning Bidders Announced,'' *Public Notice*, 16 FCC Rcd 2339 (2001).

[101] Implementation of Section 309(j) of the Communications Act—Competitive Bidding Narrowband PCS, *Third Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, 10 FCC Rcd 175, 196, at paragraph 46 (1994).

[102] *See* ''Announcing the High Bidders in the Auction of ten Nationwide Narrowband PCS Licenses, Winning Bids Total $617,006,674,'' *Public Notice*, PNWL 94–004 (released Aug. 2, 1994); ''Announcing the High Bidders in the Auction of 30 Regional Narrowband PCS Licenses; Winning Bids Total $490,901,787,'' *Public Notice*, PNWL 94–27 (released Nov. 9, 1994).

[103] Amendment of the Commission's Rules to Establish New Personal Communications Services, Narrowband PCS, *Second Report and Order and Second Further Notice of Proposed Rule Making*, 15 FCC Rcd 10456, 10476, at paragraph 40 (2000).

[104] Amendment of the Commission's Rules to Establish New Personal Communications Services, Narrowband PCS, *Second Report and Order and Second Further Notice of Proposed Rule Making*, 15 FCC Rcd 10456, 10476, at paragraph 40 (2000).

[105] Amendment of the Commission's Rules to Establish New Personal Communications Services, Narrowband PCS, *Second Report and Order and Second Further Notice of Proposed Rule Making*, 15 FCC Rcd 10456, 10476, at paragraph 40 (2000).

[106] *See* Letter to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated December 2, 1998.

[107] *See* ''Narrowband PCS Auction Closes,'' Public Notice, 16 FCC Rcd 18663 (WTB 2001).

[108] See Reallocation and Service Rules for the 698–746 MHz Spectrum Band (Television Channels 52–59), *Report and Order*, 17 FCC Rcd 1022 (2002).

[109] *See* Reallocation and Service Rules for the 698–746 MHz Spectrum Band (Television Channels 52–59), *Report and Order*, 17 FCC Rcd 1022, 1087–88, at paragraph 172 (2002).

[110] *See* Reallocation and Service Rules for the 698–746 MHz Spectrum Band (Television Channels 52–59), *Report and Order*, 17 FCC Rcd 1022, 1087–88, at paragraph 172 (2002).

[111] *See* Reallocation and Service Rules for the 698–746 MHz Spectrum Band (Television Channels 52–59), *Report and Order*, 17 FCC Rcd 1022, 1088, at paragraph 173 (2002).

[112] *See* Letter to Thomas Sugrue, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated August 10, 1999.

[113] *See* ''Lower 700 MHz Band Auction Closes,'' *Public Notice*, 17 FCC Rcd 17272 (WTB 2002).

[114] *See* ''Lower 700 MHz Band Auction Closes,'' *Public Notice*, 18 FCC Rcd 11873 (WTB 2003).

[115] *See* ''Lower 700 MHz Band Auction Closes,'' *Public Notice*, 18 FCC Rcd 11873 (WTB 2003).

[116] Service Rules for the 746–764 and 776–794 MHz Bands, and Revisions to Part 27 of the Commission's Rules, *Second Memorandum Opnion and Order*, 16 FCC Rcd 1239 (2001).

[117] *See* ''Auction of Licenses for 747–762 and 777–792 MHz Bands (Auction No. 31) Is Rescheduled,'' *Public Notice*, 16 FCC Rcd 13079 (WTB 2003).

[118] *See* Service Rules for the 746–764 MHz Bands, and Revisions to Part 27 of the Commission's Rules, *Second Report and Order*, 15 FCC Rcd 5299 (2000).

[119] *See* Service Rules for the 746–764 MHz Bands, and Revisions to Part 27 of the Commission's Rules, *Second Report and Order*, 15 FCC Rcd 5299, 5343, at paragraph 108 (2000).

[120] *See* Service Rules for the 746–764 MHz Bands, and Revisions to Part 27 of the Commission's Rules, *Second Report and Order*, 15 FCC Rcd 5299, 5343, at paragraph 108 (2000).

[121] *See* Service Rules for the 746–764 MHz Bands, and Revisions to Part 27 of the Commission's Rules, *Second Report and Order*, 15 FCC Rcd 5299, 5343, at paragraph 108, note 246 (for the 746–764 MHz and 776–794 MHz bands, the Commission is exempt from 15 U.S.C. 632, which requires Federal agencies to obtain SBA approval before adopting small business size standards).

closed on September 21, 2000.[122] Of the 104 licenses auctioned, 96 licenses were sold to nine bidders. Five of these bidders were small businesses that won a total of 26 licenses. A second auction of 700 MHz Guard Band licenses commenced on February 13, 2001, and closed on February 21, 2001. All eight of the licenses auctioned were sold to three bidders. One of these bidders was a small business that won a total of two licenses.[123]

80. *Specialized Mobile Radio.* The Commission awards ''small entity'' bidding credits in auctions for Specialized Mobile Radio (SMR) geographic area licenses in the 800 MHz and 900 MHz bands to firms that had revenues of no more than $15 million in each of the three previous calendar years.[124] The Commission awards ''very small entity'' bidding credits to firms that had revenues of no more than $3 million in each of the three previous calendar years.[125] The SBA has approved these small business size standards for the 900 MHz Service.[126] The Commission has held auctions for geographic area licenses in the 800 MHz and 900 MHz bands. The 900 MHz SMR auction began on December 5, 1995, and closed on April 15, 1996. Sixty bidders claiming that they qualified as small businesses under the $15 million size standard won 263 geographic area licenses in the 900 MHz SMR band. The 800 MHz SMR auction for the upper 200 channels began on October 28, 1997, and was completed on December 8, 1997. Ten bidders claiming that they qualified as small businesses under the $15 million size standard won 38 geographic area licenses for the upper 200 channels in the 800 MHz SMR band.[127] A second auction for the 800 MHz band was held on January 10, 2002 and closed on January 17, 2002 and included 23 BEA licenses. One bidder claiming small business status won five licenses.[128]

81. The auction of the 1,053 800 MHz SMR geographic area licenses for the General Category channels began on August 16, 2000, and was completed on September 1, 2000. Eleven bidders won 108 geographic area licenses for the General Category channels in the 800 MHz SMR band qualified as small businesses under the $15 million size standard.[129] In an auction completed on December 5, 2000, a total of 2,800 Economic Area licenses in the lower 80 channels of the 800 MHz SMR service were sold.[130] Of the 22 winning bidders, 19 claimed small business status and won 129 licenses. Thus, combining all three auctions, 40 winning bidders for geographic licenses in the 800 MHz SMR band claimed status as small business.

82. In addition, there are numerous incumbent site-by-site SMR licensees and licensees with extended implementation authorizations in the 800 and 900 MHz bands. We do not know how many firms provide 800 MHz or 900 MHz geographic area SMR pursuant to extended implementation authorizations, nor how many of these providers have annual revenues of no more than $15 million. One firm has over $15 million in revenues. We assume, for purposes of this analysis, that all of the remaining existing extended implementation authorizations are held by small entities, as that small business size standard is approved by the SBA.

83. *220 MHz Radio Service—Phase I Licensees.* The 220 MHz service has both Phase I and Phase II licenses. Phase I licensing was conducted by lotteries in 1992 and 1993. There are approximately 1,515 such non-nationwide licensees and four nationwide licensees currently authorized to operate in the 220 MHz band. The Commission has not developed a definition of small entities specifically applicable to such incumbent 220 MHz Phase I licensees. To estimate the number of such licensees that are small businesses, we apply the small business size standard under the SBA rules applicable to ''Cellular and Other Wireless Telecommunications'' companies. This category provides that a small business is a wireless company employing no more than 1,500 persons.[131] According to the Census Bureau data for 1997, only twelve firms out of a total of 1,238 such firms that operated for the entire year in 1997, had 1,000 or more employees.[132] If this general ratio continues in the context of Phase I 220 MHz licensees, the Commission estimates that nearly all such licensees are small businesses under the SBA's small business standard.

84. *220 MHz Radio Service—Phase II Licensees.* The 220 MHz service has both Phase I and Phase II licenses. The Phase II 220 MHz service is a new service, and is subject to spectrum auctions. In the 220 MHz Third Report and Order, we adopted a small business size standard for defining ''small'' and ''very small'' businesses for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.[133] This small business standard indicates that a ''small business'' is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $15 million for the preceding three years.[134] A ''very small business'' is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that do not exceed $3 million for the preceding three years.[135] The SBA has approved these small size standards.[136] Auctions of Phase II licenses commenced on September 15, 1998, and closed on October 22, 1998.[137] In the first auction, 908 licenses were auctioned in three different-sized geographic areas: Three nationwide licenses, 30 Regional Economic Area Group (EAG) Licenses, and 875 Economic Area (EA) Licenses. Of the 908 licenses auctioned, 693 were sold.[138] Thirty-nine small businesses

[122] *See* ''700 MHz Guard Bands Auction Closes: Winning Bidders Announced,'' *Public Notice*, 15 FCC Rcd 18026 (2000).

[123] *See* ''700 MHz Guard Bands Auction Closes: Winning Bidders Announced,'' *Public Notice*, 16 FCC Rcd 4590 (WTB 2001).

[124] 47 CFR 90.814(b)(1).

[125] 47 CFR 90.814(b)(1).

[126] *See* Letter to Thomas Sugrue, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated August 10, 1999. We note that, although a request was also sent to the SBA requesting approval for the small business size standard for 800 MHz, approval is still pending.

[127] *See* ''Correction to Public Notice DA 96–586 'FCC Announces Winning Bidders in the Auction of 1020 Licenses to Provide 900 MHz SMR in Major Trading Areas,' '' *Public Notice*, 18 FCC Rcd 18367 (WTB 1996).

[128] *See* ''Multi-Radio Service Auction Closes,'' *Public Notice*, 17 FCC Rcd 1446 (WTB 2002).

[129] *See*, ''800 MHz Specialized Mobile Radio (SMR) Service General Category (851–854 MHz) and Upper Band (861–865 MHz) Auction Closes; Winning Bidders Announced,'' *Public Notice*, 15 FCC Rcd 17162 (2000).

[130] *See*, ''800 MHz SMR Service Lower 80 Channels Auction Closes; Winning Bidders Announced,'' *Public Notice*, 16 FCC Rcd 1736 (2000).

[131] 13 CFR 121.201, NAICS code 513322 (changed to 517212 in October 2002).

[132] U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, ''Establishment and Firm Size (Including Legal Form of Organization),'' Table 5, NAICS code 513322 (October 2000).

[133] Amendment of Part 90 of the Commission's Rules to Provide For the Use of the 220–222 MHz Band by the Private Land Mobile Radio Service, *Third Report and Order*, 12 FCC Rcd 10943, 11068–70, at paragraphs 291–295 (1997).

[134] *Id.* at 11068, at paragraphs 291.

[135] *Id.*

[136] *See* Letter to Daniel Phythyon, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated January 6, 1998.

[137] *See generally* ''220 MHz Service Auction Closes,'' *Public Notice*, 14 FCC Rcd 605 (WTB 1998).

[138] *See* ''FCC Announces It is Prepared to Grant 654 Phase II 220 MHz Licenses After Final Payment is Made,'' *Public Notice*, 14 FCC Rcd 1085 (WTB 1999).

won 373 licenses in the first 220 MHz auction. A second auction included 225 licenses: 216 EA licenses and 9 EAG licenses. Fourteen companies claiming small business status won 158 licenses.[139] A third auction included four licenses: 2 BEA licenses and 2 EAG licenses in the 220 MHz Service. No small or very small business won any of these licenses.[140]

85. *Private Land Mobile Radio (PLMR).* PLMR systems serve an essential role in a range of industrial, business, land transportation, and public safety activities. These radios are used by companies of all sizes operating in all U.S. business categories, and are often used in support of the licensee's primary (non-telecommunications) business operations. For the purpose of determining whether a licensee of a PLMR system is a small business as defined by the SBA, we could use the definition for ''Cellular and Other Wireless Telecommunications.'' This definition provides that a small entity is any such entity employing no more than 1,500 persons.[141] The Commission does not require PLMR licensees to disclose information about number of employees, so the Commission does not have information that could be used to determine how many PLMR licensees constitute small entities under this definition. Moreover, because PMLR licensees generally are not in the business of providing cellular or other wireless telecommunications services but instead use the licensed facilities in support of other business activities, we are not certain that the Cellular and Other Wireless Telecommunications category is appropriate for determining how many PLMR licensees are small entities for this analysis. Rather, it may be more appropriate to assess PLMR licensees under the standards applied to the particular industry subsector to which the licensee belongs.[142]

86. The Commission's 1994 Annual Report on PLMRs [143] indicates that at the end of fiscal year 1994, there were 1,087,267 licensees operating 12,481,989 transmitters in the PLMR bands below 512 MHz. Because any entity engaged in a commercial activity is eligible to hold a PLMR license, the revised rules in this context could potentially impact every small business in the United States.

87. *Fixed Microwave Services.* Fixed microwave services include common carrier,[144] private operational-fixed,[145] and broadcast auxiliary radio services.[146] At present, there are approximately 22,015 common carrier fixed licensees and 61,670 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services. The Commission has not created a size standard for a small business specifically with respect to fixed microwave services. For purposes of this analysis, the Commission uses the SBA small business size standard for the category ''Cellular and Other Telecommunications,'' which is 1,500 or fewer employees.[147] The Commission does not have data specifying the number of these licensees that have more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of fixed microwave service licensees that would qualify as small business concerns under the SBA's small business size standard. Consequently, the Commission estimates that there are up to 22,015 common carrier fixed licensees and up to 61,670 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services that may be small and may be affected by the rules and policies proposed herein. We noted, however, that the common carrier microwave fixed licensee category includes some large entities.

88. *39 GHz Service.* The Commission created a special small business size standard for 39 GHz licenses—an entity that has average gross revenues of $40 million or less in the three previous calendar years.[148] An additional size standard for ''very small business'' is: An entity that, together with affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years.[149] The SBA has approved these small business size standards.[150] The auction of the 2,173 39 GHz licenses began on April 12, 2000 and closed on May 8, 2000. The 18 bidders who claimed small business status won 849 licenses. Consequently, the Commission estimates that 18 or fewer 39 GHz licensees are small entities that may be affected by the rules and polices proposed herein.

89. *Local Multipoint Distribution Service.* Local Multipoint Distribution Service (LMDS) is a fixed broadband point-to-multipoint microwave service that provides for two-way video telecommunications.[151] The auction of the 986 Local Multipoint Distribution Service (LMDS) licenses began on February 18, 1998 and closed on March 25, 1998. The Commission established a small business size standard for LMDS licenses as an entity that has average gross revenues of less than $40 million in the three previous calendar years.[152] An additional small business size standard for ''very small business'' was added as an entity that, together with its affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years.[153] The

[139] *See* ''Phase II 220 MHz Service Spectrum Auction Closes,'' *Public Notice*, 14 FCC Rcd 11218 (WTB 1999).

[140] *See* ''Multi-Radio Service Auction Closes,'' *Public Notice*, 17 FCC Rcd 1446 (WTB 2002).

[141] *See* 13 CFR 121.201, NAICS code 517212.

[142] *See generally* 13 CFR 121.201.

[143] Federal Communications Commission, 60th Annual Report, Fiscal Year 1994, at paragraph 116.

[144] *See* 47 CFR 101 et seq. (formerly, Part 21 of the Commission's Rules) for common carrier fixed microwave services (except Multipoint Distribution Service).

[145] Persons eligible under parts 80 and 90 of the Commission's Rules can use Private Operational-Fixed Microwave services. *See* 47 CFR Parts 80 and 90. Stations in this service are called operational-fixed to distinguish them from common carrier and public fixed stations. Only the licensee may use the operational-fixed station, and only for communications related to the licensee's commercial, industrial, or safety operations.

[146] Auxiliary Microwave Service is governed by Part 74 of Title 47 of the Commission's Rules. *See* 47 CFR Part 74. This service is available to licensees of broadcast stations and to broadcast and cable network entities. Broadcast auxiliary microwave stations are used for relaying broadcast television signals from the studio to the transmitter, or between two points such as a main studio and an auxiliary studio. The service also includes mobile television pickups, which relay signals from a remote location back to the studio.

[147] 13 CFR 121.201, NAICS code 513322 (changed to 517212 in October 2002).

[148] *See* Amendment of the Commission's Rules Regarding the 37.0–38.6 GHz and 38.6–40.0 GHz Bands, ET Docket No. 95–183, *Report and Order*, 12 FCC Rcd 18600 (1997).

[149] *Id.*

[150] *See* Letter to Kathleen O'Brien Ham, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, FCC, from Aida Alvarez, Administrator, SBA (Feb. 4, 1998) (VoIP); *See* Letter to Margaret Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, from Hector Barreto, Administrator, Small Business Administration, dated January 18, 2002 (WTB).

[151] *See* Rulemaking to Amend Parts 1, 2, 21, 25, of the Commission's Rules to Redesignate the 27.5–29.5 GHz Frequency Band, Reallocate the 29.5–30.5 Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, *Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rule Making*, 12 FCC Rcd 12545, 12689–90, at paragraph 348 (1997).

[152] *See* Rulemaking to Amend Parts 1, 2, 21, 25, of the Commission's Rules to Redesignate the 27.5–29.5 GHz Frequency Band, Reallocate the 29.5–30.5 Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, *Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rule Making*, 12 FCC Rcd 12545, 12689–90, at paragraph 348 (1997).

[153] *See* Rulemaking to Amend Parts 1, 2, 21, 25, of the Commission's Rules to Redesignate the 27.5–29.5 GHz Frequency Band, Reallocate the 29.5–30.5 Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed

Continued

SBA has approved these small business size standards in the context of LMDS auctions.[154] There were 93 winning bidders that qualified as small entities in the LMDS auctions. A total of 93 small and very small business bidders won approximately 277 A Block licenses and 387 B Block licenses. On March 27, 1999, the Commission re-auctioned 161 licenses; there were 32 small and very small business bidders winning that won 119 licenses.

90. *218–219 MHz Service.* The first auction of 218–219 MHz (previously referred to as the Interactive and Video Data Service or IVDS) spectrum resulted in 178 entities winning licenses for 594 Metropolitan Statistical Areas (MSAs).[155] Of the 594 licenses, 567 were won by 167 entities qualifying as a small business. For that auction, we defined a small business as an entity that, together with its affiliates, has no more than a $6 million net worth and, after federal income taxes (excluding any carry over losses), has no more than $2 million in annual profits each year for the previous two years.[156] In the 218–219 MHz Report and Order and Memorandum Opinion and Order, we defined a small business as an entity that, together with its affiliates and persons or entities that hold interests in such an entity and their affiliates, has average annual gross revenues not exceeding $15 million for the preceding three years.[157] A very small business is defined as an entity that, together with its affiliates and persons or entities that hold interests in such an entity and its affiliates, has average annual gross revenues not exceeding $3 million for the preceding three years.[158] The SBA has approved of these definitions.[159] At this time, we cannot estimate the number of licenses that will be won by entities qualifying as small or very small businesses under our rules in future auctions of 218–219 MHz spectrum. Given the success of small businesses in the previous auction, and the prevalence of small businesses in the subscription television services and message communications industries, we assume for purposes of this analysis that in future auctions, many, and perhaps all, of the licenses may be awarded to small businesses.

91. Location and Monitoring Service (LMS). Multilateration LMS systems use non-voice radio techniques to determine the location and status of mobile radio units. For purposes of auctioning LMS licenses, the Commission has defined ''small business'' as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the preceding three years not exceeding $15 million.[160] A ''very small business'' is defined as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the preceding three years not exceeding $3 million.[161] These definitions have been approved by the SBA.[162] An auction for LMS licenses commenced on February 23, 1999, and closed on March 5, 1999. Of the 528 licenses auctioned, 289 licenses were sold to four small businesses. We cannot accurately predict the number of remaining licenses that could be awarded to small entities in future LMS auctions.

92. Rural Radiotelephone Service. The Commission has not adopted a size standard for small businesses specific to the Rural Radiotelephone Service.[163] A significant subset of the Rural Radiotelephone Service is the Basic Exchange Telephone Radio System (BETRS).[164] The Commission uses the SBA's small business size standard applicable to ''Cellular and Other Wireless Telecommunications,'' *i.e.*, an entity employing no more than 1,500 persons.[165] There are approximately 1,000 licensees in the Rural Radiotelephone Service, and the Commission estimates that there are 1,000 or fewer small entity licensees in the Rural Radiotelephone Service that may be affected by the rules and policies proposed herein.

93. *Air-Ground Radiotelephone Service.* The Commission has not adopted a small business size standard specific to the Air-Ground Radiotelephone Service.[166] We will use SBA's small business size standard applicable to ''Cellular and Other Wireless Telecommunications,'' *i.e.*, an entity employing no more than 1,500 persons.[167] There are approximately 100 licensees in the Air-Ground Radiotelephone Service, and we estimate that almost all of them qualify as small under the SBA small business size standard.

94. *Aviation and Marine Radio Services.* Small businesses in the aviation and marine radio services use a very high frequency (VHF) marine or aircraft radio and, as appropriate, an emergency position-indicating radio beacon (and/or radar) or an emergency locator transmitter. The Commission has not developed a small business size standard specifically applicable to these small businesses. For purposes of this analysis, the Commission uses the SBA small business size standard for the category ''Cellular and Other Telecommunications,'' which is 1,500 or fewer employees.[168] Most applicants for recreational licenses are individuals. Approximately 581,000 ship station licensees and 131,000 aircraft station licensees operate domestically and are not subject to the radio carriage requirements of any statute or treaty. For purposes of our evaluations in this analysis, we estimate that there are up to approximately 712,000 licensees that are small businesses (or individuals) under the SBA standard. In addition, between December 3, 1998 and December 14, 1998, the Commission held an auction of 42 VHF Public Coast licenses in the 157.1875–157.4500 MHz (ship transmit) and 161.775–162.0125 MHz (coast transmit) bands. For purposes of the auction, the Commission defined a ''small'' business as an entity that, together with controlling interests and affiliates, has average gross revenues for the preceding three years not to exceed $15 million dollars. In addition, a ''very small'' business is one that, together with controlling interests and affiliates, has

Satellite Services, *Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rule Making,* 12 FCC Rcd 12545, 12689–90, at paragraph 348 (1997).

[154] *See* Letter to Dan Phythyon, Chief, Wireless Telecommunications Bureau, FCC, from Aida Alvarez, Administrator, SBA (Jan. 6, 1998).

[155] *See* ''Interactive Video and Data Service (IVDS) Applications Accepted for Filing,'' *Public Notice,* 9 FCC Rcd 6227 (1994).

[156] Implementation of Section 309(j) of the Communications Act—Competitive Bidding, *Fourth Report and Order, 9* FCC Rcd 2330 (1994).

[157] Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218–219 MHz Service, *Report and Order and Memorandum Opinion and Order,* 15 FCC Rcd 1497 (1999).

[158] *Id.*

[159] *See* Letter to Daniel Phythyon, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated January 6, 1998.

[160] Amendment of Part 90 of the Commission's Rules to Adopt Regulations for Automatic Vehicle Monitoring Systems, *Second Report and Order,* 13 FCC Rcd 15182, 15192, at paragraph 20 (1998); *see also* 47 CFR 90.1103.

[161] Amendment of Part 90 of the Commission's Rules to Adopt Regulations for Automatic Vehicle Monitoring Systems, *Second Report and Order,* 13 FCC Rcd at 15192, at paragraph 20; *see also* 47 CFR 90.1103.

[162] *See* Letter to Thomas Sugrue, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated February 22, 1999.

[163] The service is defined in § 22.99 of the Commission's Rules, 47 CFR 22.99.

[164] BETRS is defined in §§ 22.757 and 22.759 of the Commission's Rules, 47 CFR 22.757 and 22.759.

[165] 13 CFR 121.201, NAICS code 513322 (changed to 517212 in October 2002).

[166] The service is defined in § 22.99 of the Commission's Rules, 47 CFR 22.99.

[167] 13 CFR 121.201, NAICS codes 513322 (changed to 517212 in October 2002).

[168] 13 CFR 121.201, NAICS code 513322 (changed to 517212 in October 2002).

average gross revenues for the preceding three years not to exceed $3 million dollars.[169] There are approximately 10,672 licensees in the Marine Coast Service, and the Commission estimates that almost all of them qualify as ''small'' businesses under the above special small business size standards.

95. *Offshore Radiotelephone Service.* This service operates on several ultra high frequencies (UHF) television broadcast channels that are not used for television broadcasting in the coastal areas of states bordering the Gulf of Mexico.[170] There are presently approximately 55 licensees in this service. We are unable to estimate at this time the number of licensees that would qualify as small under the SBA's small business size standard for ''Cellular and Other Wireless Telecommunications'' services.[171] Under that SBA small business size standard, a business is small if it has 1,500 or fewer employees.[172]

96. *Multiple Address Systems (MAS).* Entities using MAS spectrum, in general, fall into two categories: (1) Those using the spectrum for profit-based uses, and (2) those using the spectrum for private internal uses. With respect to the first category, the Commission defines ''small entity'' for MAS licenses as an entity that has average gross revenues of less than $15 million in the three previous calendar years.[173] ''Very small business'' is defined as an entity that, together with its affiliates, has average gross revenues of not more than $3 million for the preceding three calendar years.[174] The SBA has approved of these definitions.[175] The majority of these entities will most likely be licensed in bands where the Commission has implemented a geographic area licensing approach that would require the use of competitive bidding procedures to resolve mutually exclusive applications. The Commission's licensing database indicates that, as of January 20, 1999, there were a total of 8,670 MAS station authorizations. Of these, 260 authorizations were associated with common carrier service. In addition, an auction for 5,104 MAS licenses in 176 EAs began November 14, 2001, and closed on November 27, 2001.[176] Seven winning bidders claimed status as small or very small businesses and won 611 licenses.

97. With respect to the second category, which consists of entities that use, or seek to use, MAS spectrum to accommodate internal communications needs, we note that MAS serves an essential role in a range of industrial, safety, business, and land transportation activities. MAS radios are used by companies of all sizes, operating in virtually all U.S. business categories, and by all types of public safety entities. For the majority of private internal users, the definitions developed by the SBA would be more appropriate. The applicable definition of small entity in this instance appears to be the ''Cellular and Other Wireless Telecommunications'' definition under the SBA rules. This definition provides that a small entity is any entity employing no more than 1,500 persons.[177] The Commission's licensing database indicates that, as of January 20, 1999, of the 8,670 total MAS station authorizations, 8,410 authorizations were for private radio service, and of these, 1,433 were for private land mobile radio service.

98. *Incumbent 24 GHz Licensees.* This analysis may affect incumbent licensees who were relocated to the 24 GHz band from the 18 GHz band, and applicants who wish to provide services in the 24 GHz band. The applicable SBA small business size standard is that of ''Cellular and Other Wireless Telecommunications'' companies. This category provides that such a company is small if it employs no more than 1,500 persons.[178] According to U.S. Census Bureau data for 1997, there were 977 firms in this category, total, that operated for the entire year.[179] Of this total, 965 firms had employment of 999 or fewer employees, and an additional 12 firms had employment of 1,000 employees or more.[180] Thus, under this size standard, the great majority of firms can be considered small. These broader census data notwithstanding, we believe that there are only two licensees in the 24 GHz band that were relocated from the 18 GHz band, Teligent[181] and TRW, Inc. It is our understanding that Teligent and its related companies have less than 1,500 employees, though this may change in the future. TRW is not a small entity. Thus, only one incumbent licensee in the 24 GHz band is a small business entity.

99. *Future 24 GHz Licensees.* With respect to new applicants in the 24 GHz band, we have defined ''small business'' as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the three preceding years not exceeding $15 million.[182] ''Very small business'' in the 24 GHz band is defined as an entity that, together with controlling interests and affiliates, has average gross revenues not exceeding $3 million for the preceding three years.[183] The SBA has approved these definitions.[184] The Commission will not know how many licensees will be small or very small businesses until the auction, if required, is held.

100. *Multipoint Distribution Service, Multichannel Multipoint Distribution Service, and Instructional Television Fixed Service.* Multichannel Multipoint Distribution Service (MMDS) systems, often referred to as ''wireless cable,'' transmit video programming to subscribers using the microwave frequencies of the Multipoint Distribution Service (MDS) and Instructional Television Fixed Service (ITFS).[185] In connection with the 1996

[169] Amendment of the Commission's Rules Concerning Maritime Communications, PR Docket No. 92–257, *Third Report and Order and Memorandum Opinion and Order,* 13 FCC Rcd 19853 (1998).

[170] This service is governed by Subpart I of Part 22 of the Commission's Rules. See 47 CFR 22.1001–22.1037.

[171] 13 CFR 121.201, NAICS code 513322 (changed to 517212 in October 2002).

[172] *Id.*

[173] *See* Amendment of the Commission's Rules Regarding Multiple Address Systems, *Report and Order,* 15 FCC Rcd 11956, 12008, at paragraph 123 (2000).

[174] *Id.*

[175] *See* Letter to Thomas Sugrue, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated June 4, 1999.

[176] *See* ''Multiple Address Systems Spectrum Auction Closes,'' *Public Notice,* 16 FCC Rcd 21011 (2001).

[177] *See* 13 CFR 121.201, NAICS code 517212.

[178] 13 CFR 121.201, NAICS code 513322 (changed to 517212 in October 2002).

[179] U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, ''Employment Size of Firms Subject to Federal Income Tax: 1997,'' Table 5, NAICS code 513322 (issued October 2000).

[180] *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is ''Firms with 1,000 employees or more.''

[181] Teligent acquired the DEMS licenses of FirstMark, the only licensee other than TRW in the 24 GHz band whose license has been modified to require relocation to the 24 GHz band.

[182] Amendments to Parts 1, 2, 87 and 101 of the Commission's Rules To License Fixed Services at 24 GHz, *Report and Order,* 15 FCC Rcd 16934, 16967, at paragraph 77 (2000) (24 GHz Report and Order); *see also* 47 CFR 101.538(a)(2).

[183] 24 GHz Report and Order, 15 FCC Rcd at 16967, at paragraph 77; *see also* 47 CFR 101.538(a)(1).

[184] *See* Letter to Margaret W. Wiener, Deputy Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, from Gary M. Jackson, Assistant Administrator, Small Business Administration, dated July 28, 2000.

[185] Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act—Competitive Bidding, *Report*

Continued

MDS auction, the Commission defined ''small business'' as an entity that, together with its affiliates, has average gross annual revenues that are not more than $40 million for the preceding three calendar years.[186] The SBA has approved of this standard.[187] The MDS auction resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas (BTAs).[188] Of the 67 auction winners, 61 claimed status as a small business. At this time, we estimate that of the 61 small business MDS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent MDS licensees that have gross revenues that are not more than $40 million and are thus considered small entities.[189]

101. In addition, the SBA has developed a small business size standard for Cable and Other Program Distribution,[190] which includes all such companies generating $12.5 million or less in annual receipts.[191] According to Census Bureau data for 1997, there were a total of 1,311 firms in this category, total, that had operated for the entire year.[192] Of this total, 1,180 firms had annual receipts of under $10 million, and an additional 52 firms had receipts of $10 million or more but less than $25 million.[193] Consequently, we estimate that the majority of providers in this service category are small businesses that may be affected by the proposed rules and policies.

102. Finally, while SBA approval for a Commission-defined small business size standard applicable to ITFS is pending, educational institutions are included in this analysis as small entities.[194] There are currently 2,032 ITFS licensees, and all but 100 of these licenses are held by educational institutions. Thus, we tentatively conclude that at least 1,932 ITFS licensees are small businesses.

103. *Television Broadcasting.* The Small Business Administration defines a television broadcasting station that has no more than $12 million in annual receipts as a small business.[195] Business concerns included in this industry are those ''primarily engaged in broadcasting images together with sound.''[196] According to Commission staff review of the BIA Publications, Inc. Master Access Television Analyzer Database as of May 16, 2003, about 814 of the 1,220 commercial television stations in the United States have revenues of $12 million or less. We note, however, that, in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations[197] must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by our action, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. There are also 2,117 low power television stations (LPTV).[198] Given the nature of this service, we will presume that all LPTV licensees qualify as small entities under the SBA definition.

104. In addition, an element of the definition of ''small business'' is that the entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific television station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply do not exclude any television station from the definition of a small business on this basis and are therefore over-inclusive to that extent. Also as noted, an additional element of the definition of ''small business'' is that the entity must be independently owned and operated. We note that it is difficult at times to assess these criteria in the context of media entities and our estimates of small businesses to which they apply may be over-inclusive to this extent.

105. *Radio Broadcasting.* The SBA defines a radio broadcast entity that has $6 million or less in annual receipts as a small business.[199] Business concerns included in this industry are those ''primarily engaged in broadcasting aural programs by radio to the public.[200] According to Commission staff review of the BIA Publications, Inc., Master Access Radio Analyzer Database, as of May 16, 2003, about 10,427 of the 10,945 commercial radio stations in the United States have revenue of $6 million or less. We note, however, that many radio stations are affiliated with much larger corporations with much higher revenue, and that in assessing whether a business concern qualifies as small under the above definition, such business (control) affiliations[201] are included.[202] Our estimate, therefore likely overstates the number of small businesses that might be affected by our action.

106. *Auxiliary, Special Broadcast and Other Program Distribution Services.* This service involves a variety of

*and Order,* 10 FCC Rcd 9589, 9593, at paragraph 7 (1995) (MDS Auction R&O).

[186] 47 CFR 21.961(b)(1).

[187] *See* Letter to Margaret Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Bureau, from Gary Jackson, Assistant Administrator for Size Standards, Small Business Administration, dated March 20, 2003 (noting approval of $40 million size standard for MDS auction).

[188] Basic Trading Areas (BTAs) were designed by Rand McNally and are the geographic areas by which MDS was auctioned and authorized. *See* MDS Auction R&O, 10 FCC Rcd 9608, at paragraph 34.

[189] 47 U.S.C. 309(j). Hundreds of stations were licensed to incumbent MDS licensees prior to implementation of Section 309(j) of the Communications Act of 1934, 47 U.S.C. 309(j). For these pre-auction licenses, the applicable standard is SBA's small business size standard for ''other telecommunications'' (annual receipts of $12.5 million or less). *See* 13 CFR 121.201, NAICS code 517910.

[190] 13 CFR 121.201, NAICS code 517510.

[191] *Id.*

[192] U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, ''Establishment and Firm Size (Including Legal Form of Organization),'' Table 4 (issued October 2000).

[193] *Id.*

[194] In addition, the term ''small entity'' under SBREFA applies to small organizations (nonprofits) and to small governmental jurisdictions (cities, counties, towns, townships, villages, school districts, and special districts with populations of less than 50,000). 5 U.S.C. 601(4)–(6). We do not collect annual revenue data on ITFS licensees.

[195] *See* OMB, North American Industry Classification System: United States, 1997 at 509 (1997) (NAICS code 513120, which was changed to code 515120 in October 2002).

[196] OMB, North American Industry Classification System: United States, 1997, at 509 (1997) (NAICS code 513120, which was changed to code 51520 in October 2002). This category description continues, ''These establishments operate television broadcasting studios and facilities for the programming and transmission of programs to the public. These establishments also produce or transmit visual programming to affiliated broadcast television stations, which in turn broadcast the programs to the public on a predetermined schedule. Programming may originate in their own studios, from an affiliated network, or from external sources.'' Separate census categories pertain to businesses primarily engaged in producing programming. *See id.*, at 502–05, NAICS code 51210. Motion Picture and Video Production: code 512120, Motion Picture and Video Distribution, code 512191, Teleproduction and Other Post-Production Services, and code 512199, Other Motion Picture and Video Industries.

[197] ''Concerns are affiliates of each other when one concern controls or has the power to control the other or a third party or parties controls or has to power to control both.'' 13 CFR 121.103(a)(1).

[198] FCC News Release, ''Broadcast Station Totals as of September 30, 2005.''

[199] *See* OMB, North American Industry Classification System: United States, 1997, at 509 (1997) (Radio Stations) (NAICS code 513111, which was changed to code 515112 in October 2002).

[200] *Id.*

[201] ''Concerns are affiliates of each other when one concern controls or has the power to control the other, or a third party or parties controls or has the power to control both.'' 13 CFR 121.103(a)(1).

[202] ''SBA counts the receipts or employees of the concern whose size is at issue and those of all its domestic and foreign affiliates, regardless of whether the affiliates are organized for profit, in determining the concern's size.'' 13 CFR 121(a)(4).

transmitters, generally used to relay broadcast programming to the public (through translator and booster stations) or within the program distribution chain (from a remote news gathering unit back to the station). The Commission has not developed a definition of small entities applicable to broadcast auxiliary licensees. The applicable definitions of small entities are those, noted previously, under the SBA rules applicable to radio broadcasting stations and television broadcasting stations.[203]

107. The Commission estimates that there are approximately 3,868 FM translators and boosters.[204] The Commission does not collect financial information on any broadcast facility, and the Department of Commerce does not collect financial information on these auxiliary broadcast facilities. We believe that most, if not all, of these auxiliary facilities could be classified as small businesses by themselves. We also recognize that most commercial translators and boosters are owned by a parent station which, in some cases, would be covered by the revenue definition of small business entity discussed above. These stations would likely have annual revenues that exceed the SBA maximum to be designated as a small business ($5 million for a radio station or $10.5 million for a TV station). Furthermore, they do not meet the Small Business Act's definition of a ''small business concern'' because they are not independently owned and operated.[205]

108. *Cable and Other Program Distribution.* This category includes cable systems operators, closed circuit television services, direct broadcast satellite services, multipoint distribution systems, satellite master antenna systems, and subscription television services. The SBA has developed small business size standard for this census category, which includes all such companies generating $12.5 million or less in revenue annually.[206] According to Census Bureau data for 1997, there were a total of 1,311 firms in this category, total, that had operated for the entire year.[207] Of this total, 1,180 firms had annual receipts of under $10 million and an additional 52 firms had receipts of $10 million or more but less than $25 million. Consequently, the Commission estimates that the majority of providers in this service category are small businesses that may be affected by the rules and policies proposed herein.

109. *Cable System Operators (Rate Regulation Standard).* The Commission has developed its own small business size standard for cable system operators, for purposes of rate regulation. Under the Commission's rules, a ''small cable company'' is one serving fewer than 400,000 subscribers nationwide.[208] The most recent estimates indicate that there were 1,439 cable operators who qualified as small cable system operators at the end of 1995.[209] Since then, some of those companies may have grown to serve over 400,000 subscribers, and others may have been involved in transactions that caused them to be combined with other cable operators. Consequently, the Commission estimates that there are now fewer than 1,439 small entity cable system operators that may be affected by the rules and policies proposed herein.

110. *Cable System Operators (Telecom Act Standard).* The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is ''a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000.''[210] The Commission has determined that there are 63,000,000 subscribers in the United States.[211] Therefore, an operator serving fewer than 630,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed $250 million in the aggregate.[212] Based on available data, the Commission estimates that the number of cable operators serving 630,000 subscribers or fewer, totals 1,450.[213] The Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed $250 million,[214] and therefore are unable, at this time, to estimate more accurately the number of cable system operators that would qualify as small cable operators under the size standard contained in the Communications Act of 1934.

111. *Open Video Services.* Open Video Service (OVS) systems provide subscription services.[215] The SBA has created a small business size standard for Cable and Other Program Distribution.[216] This standard provides that a small entity is one with $12.5 million or less in annual receipts. The Commission has certified approximately 25 OVS operators to serve 75 areas, and some of these are currently providing service.[217] Affiliates of Residential Communications Network, Inc. (RCN) received approval to operate OVS systems in New York City, Boston, Washington, DC, and other areas. RCN has sufficient revenues to assure that they do not qualify as a small business entity. Little financial information is available for the other entities that are authorized to provide OVS and are not yet operational. Given that some entities authorized to provide OVS service have not yet begun to generate revenues, the Commission concludes that up to 24 OVS operators (those remaining) might qualify as small businesses that may be affected by the rules and policies proposed herein.

112. *Cable Television Relay Service.* This service includes transmitters generally used to relay cable programming within cable television system distribution systems. The SBA has defined a small business size standard for Cable and other Program Distribution, consisting of all such companies having annual receipts of no more than $12.5 million.[218] According to Census Bureau data for 1997, there were 1,311 firms in the industry category Cable and Other Program Distribution, total, that operated for the entire year.[219] Of this total, 1,180 firms

[203] 13 CFR 121.201, NAICS codes 513111 and 513112.

[204] FCC News Release, ''Broadcast Station Totals as of September 30, 2004.''

[205] 15 U.S.C. 632.

[206] 13 CFR 121.201, NAICS code 513220 (changed to 517510 in October 2002).

[207] U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, ''Establishment and Firm Size (Including Legal Form of Organization)'', Table 4, NAICS code 513220 (issued October 2000).

[208] 47 CFR 76.901(e). The Commission developed this definition based on its determination that a small cable system operator is one with annual revenues of $100 million or less. Implementation of Sections of the 1992 Cable Act: Rate Regulation, *Sixth Report and Order and Eleventh Order on Reconsideration,* 10 FCC Rcd 7393 (1995).

[209] Paul Kagan Associates, Inc., Cable TV Investor, February 29, 1996 (based on figures for December 30, 1995).

[210] 47 U.S.C. 543(m)(2).

[211] *See* FCC Announces New Subscriber Count for the Definition of Small Cable Operator, *Public Notice*, DA 01–158 (January 24, 2001).

[212] 47 CFR 76.901(f).

[213] *See* FCC Announces New Subscriber Count for the Definition of Small Cable Operators, *Public Notice*, DA–01–0158 (released January 24, 2001).

[214] The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority's finding that the operator does not qualify as a small cable operator pursuant to § 76.901(f) of the Commission's rules. *See* 47 CFR 76.909(b).

[215] *See* 47 U.S.C. 573.

[216] 13 CFR 121.201, NAICS code 513220 (changed to 517510 in October 2002).

[217] *See* http://www.fcc.gov/csb/ovs/csovscer.html (current as of March 2002).

[218] 13 CFR 121.201, NAICS code 517510.

[219] U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, ''Establishment and Firm Size (Including Legal Form of Organization),'' Table 4 (issued October 2000).

had annual receipts of $10 million or less, and an additional 52 firms had receipts of $10 million or more but less than $25 million.[220] Thus, under this standard, we estimate that the majority of providers in this service category are small businesses that may be affected by the proposed rules and policies.

113. *Multichannel Video Distribution and Data Service.* MVDDS is a terrestrial fixed microwave service operating in the 12.2–12.7 GHz band. No auction has yet been held in this service, although an action has been scheduled for January 14, 2004.[221] Accordingly, there are no licensees in this service.

114. *Amateur Radio Service.* These licensees are believed to be individuals, and therefore are not small entities.

115. *Aviation and Marine Services.* Small businesses in the aviation and marine radio services use a very high frequency (VHF) marine or aircraft radio and, as appropriate, an emergency position-indicating radio beacon (and/or radar) or an emergency locator transmitter. The Commission has not developed a small business size standard specifically applicable to these small businesses. For purposes of this analysis, the Commission uses the SBA small business size standard for the category ''Cellular and Other Telecommunications,'' which is 1,500 or fewer employees.[222] Most applicants for recreational licenses are individuals. Approximately 581,000 ship station licensees and 131,000 aircraft station licensees operate domestically and are not subject to the radio carriage requirements of any statute or treaty. For purposes of our evaluations in this analysis, we estimate that there are up to approximately 712,000 licensees that are small businesses (or individuals) under the SBA standard. In addition, between December 3, 1998 and December 14, 1998, the Commission held an auction of 42 VHF Public Coast licenses in the 157.1875–157.4500 MHz (ship transmit) and 161.775–162.0125 MHz (coast transmit) bands. For purposes of the auction, the Commission defined a ''small'' business as an entity that, together with controlling interests and affiliates, has average gross revenues for the preceding three years not to exceed $15 million dollars. In addition, a ''very small'' business is one that, together with controlling interests and affiliates, has average gross revenues for the preceding three years not to exceed $3 million dollars.[223] There are approximately 10,672 licensees in the Marine Coast Service, and the Commission estimates that almost all of them qualify as ''small'' businesses under the above special small business size standards.

116. *Personal Radio Services.* Personal radio services provide short-range, low power radio for personal communications, radio signaling, and business communications not provided for in other services. The Personal Radio Services include spectrum licensed under Part 95 of our rules.[224] These services include Citizen Band Radio Service (CB), General Mobile Radio Service (GMRS), Radio Control Radio Service (R/C), Family Radio Service (FRS), Wireless Medical Telemetry Service (WMTS), Medical Implant Communications Service (MICS), Low Power Radio Service (LPRS), and Multi-Use Radio Service (MURS).[225] There are a variety of methods used to license the spectrum in these rule parts, from licensing by rule, to conditioning operation on successful completion of a required test, to site-based licensing, to geographic area licensing. Under the RFA, the Commission is required to make a determination of which small entities are directly affected by the rules being proposed. Since all such entities are wireless, we apply the definition of cellular and other wireless telecommunications, pursuant to which a small entity is defined as employing 1,500 or fewer persons.[226] Many of the licensees in these services are individuals, and thus are not small entities. In addition, due to the mostly unlicensed and shared nature of the spectrum utilized in many of these services, the Commission lacks direct information upon which to base an estimation of the number of small entities under an SBA definition that might be directly affected by the proposed rules.

117. *Public Safety Radio Services.* Public Safety radio services include police, fire, local government, forestry conservation, highway maintenance, and emergency medical services.[227] There are a total of approximately 127,540 licensees in these services. Governmental entities [228] as well as private businesses comprise the licensees for these services. All governmental entities with populations of less than 50,000 fall within the definition of a small entity.[229]

## IV. Description of Projected Reporting, Recordkeeping and Other Compliance Requirements

118. With certain exceptions, the Commission's Schedule of Regulatory Fees applies to all Commission licensees and regulatees. Most licensees will be required to count the number of licenses or call signs authorized, complete and submit an FCC Form 159 (''FCC Remittance Advice''), and pay a regulatory fee based on the number of licenses or call signs.[230] Interstate

[220] *Id.*

[221] ''Auctions of Licenses in the Multichannel Video Distribution and Data Service Rescheduled for January 14, 2004,'' *Public Notice,* DA 03–2354 (August 28, 2003).

[222] 13 CFR 121.201, NAICS code 513322 (changed to 517212 in October 2002).

[223] Amendment of the Commission's Rules Concerning Maritime Communications, *Third Report and Order and Memorandum Opinion and Order,* 13 FCC Rcd 19853 (1998).

[224] 47 CFR Part 90.

[225] The Citizens Band Radio Service, General Mobile Radio Service, Radio Control Radio Service, Family Radio Service, Wireless Medical Telemetry Service, Medical Implant Communications Service, Low Power Radio Service, and Multi-Use Radio Service are governed by Subpart D, Subpart A, Subpart C, Subpart B, Subpart H, Subpart I, Subpart G, and Subpart J, respectively, of Part 95 of the Commission's rules. *See generally* 47 CFR Part 95.

[226] 13 CFR 121.201, NAICS Code 517212.

[227] With the exception of the special emergency service, these services are governed by Subpart B of part 90 of the Commission's Rules, 47 CFR 90.15–90.27. The police service includes approximately 27,000 licensees that serve state, county, and municipal enforcement through telephony (voice), telegraphy (code) and teletype and facsimile (printed material). The fire radio service includes approximately 23,000 licensees comprised of private volunteer or professional fire companies as well as units under governmental control. The local government service that is presently comprised of approximately 41,000 licensees that are state, county, or municipal entities that use the radio for official purposes not covered by other public safety services. There are approximately 7,000 licensees within the forestry service which is comprised of licensees from state departments of conservation and private forest organizations who set up communications networks among fire lookout towers and ground crews. The approximately 9,000 state and local governments are licensed to highway maintenance service provide emergency and routine communications to aid other public safety services to keep main roads safe for vehicular traffic. The approximately 1,000 licensees in the Emergency Medical Radio Service (EMRS) use the 39 channels allocated to this service for emergency medical service communications related to the delivery of emergency medical treatment. 47 CFR 90.15–90.27. The approximately 20,000 licensees in the special emergency service include medical services, rescue organizations, veterinarians, handicapped persons, disaster relief organizations, school buses, beach patrols, establishments in isolated areas, communications standby facilities, and emergency repair of public communications facilities. 47 CFR 90.33–90.55.

[228] 47 CFR 1.1162.

[229] 5 U.S.C. 601(5).

[230] The following categories are exempt from the Commission's Schedule of Regulatory Fees: Amateur radio licensees (except applicants for vanity call signs) and operators in other non-licensed services (e.g., Personal Radio, part 15, ship and aircraft). Governments and non-profit (exempt under section 501(c) of the Internal Revenue Code) entities are exempt from payment of regulatory fees and need not submit payment. Non-commercial educational broadcast licensees are exempt from regulatory fees as are licensees of auxiliary broadcast services such as low power auxiliary stations, television auxiliary service stations, remote pickup stations and aural broadcast auxiliary stations where such licenses are used in

telephone service providers must compute their annual regulatory fee based on their interstate and international end-user revenue using information they already supply to the Commission in compliance with the Form 499–A, Telecommunications Reporting Worksheet, and they must complete and submit the FCC Form 159. Compliance with the fee schedule will require some licensees to tabulate the number of units (*e.g.*, cellular telephones, pagers, cable TV subscribers) they have in service, and complete and submit an FCC Form 159. Licensees ordinarily will keep a list of the number of units they have in service as part of their normal business practices. No additional outside professional skills are required to complete the FCC Form 159, and it can be completed by the employees responsible for an entity's business records.

119. Each licensee must submit the FCC Form 159 to the Commission's lockbox bank after computing the number of units subject to the fee. Licensees may also file electronically to minimize the burden of submitting multiple copies of the FCC Form 159. Applicants who pay small fees in advance and provide fee information as part of their application must use FCC Form 159.

120. Licensees and regulatees are advised that failure to submit the required regulatory fee in a timely manner will subject the licensee or regulatee to a late payment penalty of 25 percent in addition to the required fee.[231] If payment is not received, new or pending applications may be dismissed, and existing authorizations may be subject to rescission.[232] Further, in accordance with the Debt Collection Improvement Act of 1996, federal agencies may bar a person or entity from obtaining a federal loan or loan insurance guarantee if that person or entity fails to pay a delinquent debt owed to any federal agency.[233] Nonpayment of regulatory fees is a debt owed the United States pursuant to 31 U.S.C. 3711 *et seq.*, and the *Debt Collection Improvement Act of 1996*, Public Law 194–134. Appropriate enforcement measures as well as administrative and judicial remedies, may be exercised by the Commission. Debts owed to the Commission may result in a person or entity being denied a federal loan or loan guarantee pending before another federal agency until such obligations are paid.[234]

121. The Commission's rules currently provide for relief in exceptional circumstances. Persons or entities may request a waiver, reduction or deferment of payment of the regulatory fee.[235] However, timely submission of the required regulatory fee must accompany requests for waivers or reductions. This will avoid any late payment penalty if the request is denied. The fee will be refunded if the request is granted. In exceptional and compelling instances (where payment of the regulatory fee along with the waiver or reduction request could result in reduction of service to a community or other financial hardship to the licensee), the Commission will defer payment in response to a request filed with the appropriate supporting documentation.

## V. Steps Taken To Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

122. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives: (1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities. As described in Section III of this IRFA, *supra*, we have created procedures in which all fee-filing licensees and regulatees use a single form, FCC Form 159, and have described in plain language the general filing requirements. We have sought comment on other alternatives that might simplify our fee procedures or otherwise benefit small entities, while remaining consistent with our statutory responsibilities in this proceeding.

123. *The Omnibus Appropriations Act for FY 2006*, Public Law 109–108, requires the Commission to revise its Schedule of Regulatory Fees in order to recover the amount of regulatory fees that Congress, pursuant to Section 9(a) of the Communications Act, as amended, has required the Commission to collect for Fiscal Year (FY) 2006.[236] As noted, we seek comment on the proposed methodology for implementing these statutory requirements and any other potential impact of these proposals on small entities.

124. We have previously used cost accounting data for computation of regulatory fees, but found that some fees which were very small in previous years would have increased dramatically and would have a disproportionate impact on smaller entities. The methodology we are proposing in this *Notice of Proposed Rulemaking* minimizes this impact by limiting the amount of increase and shifting costs to other services which, for the most part, are larger entities.

125. Several categories of licensees and regulatees are exempt from payment of regulatory fees. *See, e.g.*, footnote 230, *supra*.

## VI. Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rules

126. None.

## Attachment B: Sources of Payment Unit Estimates for FY 2006

In order to calculate individual service fees for FY 2006, we adjusted FY 2005 payment units for each service to more accurately reflect expected FY 2006 payment liabilities. We obtained our updated estimates through a variety of means. For example, we used Commission licensee data bases, actual prior year payment records and industry and trade association projections when available. The databases we consulted include the Commission's Universal Licensing System (ULS), International Bureau Filing System (IBFS) and Consolidated Database System (CDBS), as well as reports generated within the Commission such as the Wireline Competition Bureau's *Trends in Telephone Service* and the Wireless Telecommunications Bureau's *Numbering Resource Utilization Forecast*.

We tried to obtain verification for these estimates from multiple sources and, in all cases; we compared FY 2006

conjunction with commonly owned non-commercial educational stations. Emergency Alert System licenses for auxiliary service facilities are also exempt as are instructional television fixed service licensees. Regulatory fees are automatically waived for the licensee of any translator station that: (1) Is not licensed to, in whole or in part, and does not have common ownership with, the licensee of a commercial broadcast station; (2) does not derive income from advertising; and (3) is dependent on subscriptions or contributions from members of the community served for support. Receive only earth station permittees are exempt from payment of regulatory fees. A regulatee will be relieved of its fee payment requirement if its total fee due, including all categories of fees for which payment is due by the entity, amounts to less than $10.

[231] 47 CFR 1.1164.

[232] 47 CFR 1.1164(c).

[233] Public Law 104–134, 110 Stat. 1321 (1996).

[234] 31 U.S.C. 7701(c)(2)(B).

[235] 47 CFR 1.1166.

[236] 47 U.S.C. 159(a).

estimates with actual FY 2005 payment units to ensure that our revised estimates were reasonable. Where appropriate, we adjusted and/or rounded our final estimates to take into consideration the fact that certain variables that impact on the number of payment units cannot yet be estimated exactly. These include an unknown number of waivers and/or exemptions that may occur in FY 2006 and the fact that, in many services, the number of actual licensees or station operators fluctuates from time to time due to economic, technical or other reasons. Therefore, when we note, for example, that our estimated FY 2006 payment units are based on FY 2005 actual payment units, it does not necessarily mean that our FY 2006 projection is *exactly* the same number as FY 2005. It means that we have either rounded the FY 2006 number or adjusted it slightly to account for these variables.

| Fee category | Sources of payment unit estimates |
|---|---|
| Land Mobile (All), Microwave, 218–219 MHz, Marine (Ship & Coast), Aviation (Aircraft & Ground), GMRS, Amateur Vanity Call Signs, Domestic Public Fixed. | Based on Wireless Telecommunications Bureau (WTB) projections of new applications and renewals taking into consideration existing Commission licensee data bases. Aviation (Aircraft) and Marine (Ship) estimates have been adjusted to take into consideration the licensing of portions of these services on a voluntary basis. |
| CMRS Mobile Services | Based on Wireless Telecommunications Bureau estimates. |
| CMRS Messaging Services | Based on Wireless Telecommunications Bureau Competition Report estimates. |
| AM/FM Radio Stations | Based on estimates from Media Bureau estimates, adjusted for exemptions, and actual FY 2005 payment units. |
| UHF/VHF Television Stations | Based on Media Bureau estimates as well as actual FY 2005 payment units. |
| AM/FM/TV Construction Permits | Based on Media Bureau estimates as well as actual FY 2005 payment units. |
| LPTV, Translators and Boosters | Based on actual FY 2005 payment units. |
| Broadcast Auxiliaries | Based on actual FY 2005 payment units. |
| BRS (formerly MDS/MMDS) | Based on Wireless Telecommunications Bureau estimates and actual FY 2005 payment units. |
| Cable Television Relay Service (CARS) Stations | Based on actual FY 2005 payment units. |
| Cable Television System Subscribers | Based on Media Bureau industry estimates of subscriber counts, and actual FY 2005 payment units. |
| Interstate Telecommunication Service Providers | Based on actual FY 2005 interstate revenues reported on Telecommunications Reporting Worksheet, adjusted for FY 2006 revenue growth/decline for industry, and projections by the Wireline Competition Bureau. |
| Earth Stations | Based on actual FY 2005 payment estimates and projected FY 2006 units. |
| Space Stations (GSOs & NGSOs) | Based on International Bureau licensee data base estimates. |
| International Bearer Circuits | Based on FY 2005 actual units. |
| International HF Broadcast Stations, International Public Fixed Radio Service. | Based on International Bureau estimates. |

## Attachment C: Calculation of FY 2006 Revenue Requirements and Pro-Rata Fees

Regulatory fees for the first ten categories are collected by the Commission in advance to cover the term of the license and are submitted along with the application at the time the application is filed.

| Fee category | FY 2006 payment units | Years | FY 2005 revenue estimate | Pro-rated FY 2006 revenue requirement* | Computed new FY 2006 regulatory fee | Rounded new FY 2006 regulatory fee | Expected FY 2006 revenue |
|---|---|---|---|---|---|---|---|
| PLMRS (Exclusive Use) | 2,200 | 10 | 370,000 | 380,547 | 17 | 15 | 330,000 |
| PLMRS (Shared use) | 25,000 | 10 | 2,300,000 | 2,365,564 | 9 | 10 | 2,500,000 |
| Microwave | 2,000 | 10 | 1,560,000 | 1,604,469 | 80 | 80 | 1,600,000 |
| 218–219 MHz (Formerly IVDS) | 3 | 10 | 1,500 | 1,543 | 51 | 50 | 1,500 |
| Marine (Ship) | 8,000 | 10 | 700,000 | 719,954 | 9 | 10 | 800,000 |
| GMRS | 17,000 | 5 | 525,000 | 539,966 | 6 | 5 | 425,000 |
| Aviation (Aircraft) | 6,000 | 10 | 370,000 | 380,547 | 6 | 5 | 300,000 |
| Marine (Coast) | 600 | 10 | 100,000 | 102,851 | 17 | 15 | 90,000 |
| Aviation (Ground) | 1,500 | 10 | 120,000 | 123,421 | 8 | 10 | 150,000 |
| Amateur Vanity Call Signs | 8,500 | 10 | 166,443 | 171,188 | 2.01 | 2.01 | 171,188 |
| AM Class A | 69 | 1 | 202,950 | 213,431 | 3,093 | 3,100 | 213,900 |
| AM Class B | 1,612 | 1 | 2,467,600 | 2,556,655 | 1,586 | 1,575 | 2,538,900 |
| AM Class C | 950 | 1 | 860,400 | 893,691 | 941 | 940 | 893,000 |
| AM Class D | 1,769 | 1 | 2,874,625 | 2,977,802 | 1,683 | 1,675 | 2,963,075 |
| FM Classes A, B1 & C3 | 3,068 | 1 | 6,013,875 | 6,234,202 | 2,032 | 2,025 | 6,212,700 |
| FM Classes B, C, C0, C1 & C2 | 2,908 | 1 | 7,333,425 | 7,599,534 | 2,613 | 2,625 | 7,633,500 |
| AM Construction Permits | 60 | 1 | 35,030 | 36,245 | 604 | 375 | 22,500 |
| FM Construction Permits [1] | 59 | 1 | 53,900 | 55,770 | 945 | 550 | 32,450 |
| Satellite TV | 123 | 1 | 132,225 | 136,813 | 1,112 | 1,100 | 135,300 |
| Satellite TV Construction Permit | 3 | 1 | 1,605 | 1,661 | 554 | 555 | 1,665 |
| VHF Markets 1–10 | 44 | 1 | 2,664,925 | 2,757,388 | 62,668 | 62,675 | 2,757,700 |
| VHF Markets 11–25 | 61 | 1 | 2,725,175 | 2,819,728 | 46,225 | 46,225 | 2,819,725 |
| VHF Markets 26–50 | 72 | 1 | 2,305,800 | 2,385,803 | 33,136 | 33,125 | 2,385,000 |
| VHF Markets 51–100 | 118 | 1 | 2,218,400 | 2,295,370 | 19,452 | 19,450 | 2,295,100 |
| VHF Remaining Markets | 211 | 1 | 975,875 | 1,009,734 | 4,785 | 4,775 | 1,007,525 |
| VHF Construction Permits | 9 | 1 | 28,575 | 29,566 | 3,285 | 3,275 | 29,475 |

| Fee category | FY 2006 payment units | Years | FY 2005 revenue estimate | Pro-rated FY 2006 revenue requirement* | Computed new FY 2006 regulatory fee | Rounded new FY 2006 regulatory fee | Expected FY 2006 revenue |
|---|---|---|---|---|---|---|---|
| UHF Markets 1–10 | 84 | 1 | 1,682,100 | 1,742,992 | 20,750 | 20,750 | 1,743,000 |
| UHF Markets 11–25 | 79 | 1 | 1,384,475 | 1,435,040 | 18,165 | 18,175 | 1,435,825 |
| UHF Markets 26–50 | 115 | 1 | 1,155,750 | 1,198,378 | 10,421 | 10,425 | 1,198,875 |
| UHF Markets 51–100 | 162 | 1 | 992,250 | 1,028,286 | 6,347 | 6,350 | 1,028,700 |
| UHF Remaining Markets | 181 | 1 | 312,225 | 323,058 | 1,785 | 1,775 | 321,275 |
| UHF Construction Permits [1] | 26 | 1 | 53,475 | 55,330 | 2,128 | 1,775 | 46,150 |
| Broadcast Auxiliaries | 24,000 | 1 | 250,000 | 258,674 | 11 | 10 | 240,000 |
| LPTV/Translators/Boosters | 2,900 | 1 | 1,145,500 | 1,185,245 | 409 | 410 | 1,189,000 |
| CARS Stations | 850 | 1 | 139,500 | 144,340 | 170 | 170 | 144,500 |
| Cable TV Systems | 63,000,000 | 1 | 46,800,000 | 48,423,784 | 0.769 | 0.77 | 48,510,000 |
| Interstate Telecommunication Service Providers | 53,100,000,000 | 1 | 131,220,000 | 135,772,841 | 0.00255693 | 0.00256 | 135,936,000 |
| CMRS Mobile Services (Cellular/Public Mobile) | 203,000,000 | 1 | 39,380,000 | 41,153,670 | 0.203 | 0.20 | 40,600,000 |
| CMRS Messaging Services | 6,500,000 | 1 | 896,000 | 519,756 | 0.08 | 0.08 | 520,000 |
| BRS [2] | 1,767 | 1 | 459,000 | 473,579 | 268 | 270 | 477,090 |
| LMDS | 330 | 1 | 84,150 | 88,417 | 268 | 270 | 89,100 |
| International Bearer Circuits | 5,300,000 | 1 | 7,261,000 | 7,512,929 | 1.42 | 1.42 | 7,526,000 |
| International Public Fixed | 1 | 1 | 1,800 | 1,862 | 1,862 | 1,850 | 1,850 |
| Earth Stations | 3,500 | 1 | 697,000 | 721,183 | 206 | 205 | 717,500 |
| International HF Broadcast | 5 | 1 | 3,825 | 3,958 | 792 | 790 | 3,950 |
| Space Stations (Geostationary) | 87 | 1 | 9,065,925 | 9,380,479 | 107,822 | 107,825 | 9,380,775 |
| Space Stations (Non-Geostationary | 6 | 1 | 674,550 | 697,954 | 116,326 | 116,325 | 697,950 |
| ****** Total Estimated Revenue to be Collected | | | 280,765,853 | 290,515,198 | | | 290,116,743 |
| ****** Total Revenue Requirement | | | 280,098,000 | 288,771,000 | | | 288,771,000 |
| Difference | | | 667,853 | 1,744,198 | | | 1,345,743 |

* 1.030964163 factor applied based on the amount Congress designated for recovery through regulatory fees (Public Law 109–108 and 47 U.S.C. 159(a)(2)).

[1] The AM and FM Construction Permits and the UHF Construction Permit revenues were adjusted to set the regulatory fee to an amount no higher than the lowest licensed fee for that class of service.

[2] MDS/MMDS category was renamed Broadband Radio Service (BRS). *See* Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150–2162 and 2500–2690 MHz Bands et al, *Report & Order and Further Notice of Proposed Rulemaking*, 19 FCC Rcd 14165, 14169, at paragraph 6 (2004) (*R&O and FNPRM*).

**Attachment D: FY 2006 Schedule of Regulatory Fees**

Regulatory fees for the first eleven categories are collected by the Commission in advance to cover the term of the license and are submitted along with the application at the time the application is filed.

| Fee category | Annual regulatory fee (U.S. $'s) |
|---|---|
| PLMRS (per license) (Exclusive Use) (47 CFR part 90) | 15 |
| Microwave (per license) (47 CFR part 101) | 80 |
| 218–219 MHz (Formerly Interactive Video Data Service) (per license) (47 CFR part 95) | 50 |
| Marine (Ship) (per station) (47 CFR part 80) | 10 |
| Marine (Coast) (per license) (47 CFR part 80) | 15 |
| General Mobile Radio Service (per license) (47 CFR part 95) | 5 |
| Rural Radio (47 CFR part 22) (previously listed under the Land Mobile category) | 10 |
| PLMRS (Shared Use) (per license) (47 CFR part 90) | 10 |
| Aviation (Aircraft) (per station) (47 CFR part 87) | 5 |
| Aviation (Ground) (per license) (47 CFR part 87) | 10 |
| Amateur Vanity Call Signs (per call sign) (47 CFR part 97) | 2.01 |
| CMRS Mobile/Cellular Services (per unit) (47 CFR parts 20, 22, 24, 27, 80 and 90) | .20 |
| CMRS Messaging Services (per unit) (47 CFR parts 20, 22, 24 and 90) | .08 |
| Broadband Radio Service (formerly MMDS/MDS) (per license) (47 CFR part 21) | 270 |
| Local Multipoint Distribution Service (per call sign) (47 CFR, part 101) | 270 |
| AM Radio Construction Permits | 375 |
| FM Radio Construction Permits | 550 |
| TV (47 CFR part 73) VHF Commercial: | |
| Markets 1–10 | 62,675 |
| Markets 11–25 | 46,225 |
| Markets 26–50 | 33,125 |
| Markets 51–100 | 19,450 |
| Remaining Markets | 4,775 |
| Construction Permits | 3,275 |
| TV (47 CFR part 73) UHF Commercial: | |

| Fee category | Annual regulatory fee (U.S. $'s) |
|---|---|
| Markets 1–10 | 20,750 |
| Markets 11–25 | 18,175 |
| Markets 26–50 | 10,425 |
| Markets 51–100 | 6,350 |
| Remaining Markets | 1,775 |
| Construction Permits | 1,775 |
| Satellite Television Stations (All Markets) | 1,100 |
| Construction Permits—Satellite Television Stations | 555 |
| Low Power TV, TV/FM Translators & Boosters (47 CFR part 74) | 410 |
| Broadcast Auxiliaries (47 CFR part 74) | 10 |
| CARS (47 CFR part 78) | 170 |
| Cable Television Systems (per subscriber) (47 CFR part 76) | .77 |
| Interstate Telecommunication Service Providers (per revenue dollar) | .00256 |
| Earth Stations (47 CFR part 25) | 205 |
| Space Stations (per operational station in geostationary orbit) (47 CFR part 25) also includes DBS Service (per operational station) (47 CFR part 100) | 107,825 |
| Space Stations (per operational system in non-geostationary orbit) (47 CFR part 25) | 116,325 |
| International Bearer Circuits (per active 64KB circuit) | 1.42 |
| International Public Fixed (per call sign) (47 CFR part 23) | 1,850 |
| International (HF) Broadcast (47 CFR part 73) | 790 |

FY 2006 RADIO STATION REGULATORY FEES

| Population served | AM Class A | AM Class B | AM Class C | AM Class D | FM Classes A, B1 & C3 | FM Classes B, C, C0, C1 & C2 |
|---|---|---|---|---|---|---|
| <=25,000 | 625 | 475 | 375 | 450 | 550 | 725 |
| 25,001–75,000 | 1,225 | 925 | 575 | 700 | 1,125 | 1,250 |
| 75,001–150,000 | 1,825 | 1,150 | 775 | 1,150 | 1,550 | 2,300 |
| 150,001–500,000 | 2,750 | 1,950 | 1,150 | 1,375 | 2,375 | 3,000 |
| 500,001–1,200,000 | 3,950 | 2,975 | 1,925 | 2,300 | 3,775 | 4,400 |
| 1,200,001–3,000,00 | 6,075 | 4,575 | 2,875 | 3,675 | 6,150 | 7,025 |
| >3,000,000 | 7,275 | 5,475 | 3,650 | 4,600 | 7,850 | 9,125 |

**Attachment E: Factors, Measurements and Calculations That Determine Station Contours and Population Coverages**

**AM Stations**

For stations with nondirectional daytime antennas, the theoretical radiation was used at all azimuths. For stations with directional daytime antennas, specific information on each day tower, including field ratio, phasing, spacing and orientation was retrieved, as well as the theoretical pattern root-mean-square of the radiation in all directions in the horizontal plane (RMS) figure milliVolt per meter (mV/m) @ 1 km) for the antenna system. The standard, or modified standard if pertinent, horizontal plane radiation pattern was calculated using techniques and methods specified in §§ 73.150 and 73.152 of the Commission's rules.[237] Radiation values were calculated for each of 360 radials around the transmitter site. Next, estimated soil conductivity data was retrieved from a database representing the information in FCC Figure R3 [238]. Using the calculated horizontal radiation values, and the retrieved soil conductivity data, the distance to the principal community (5 mV/m) contour was predicted for each of the 360 radials. The resulting distance to principal community contours was used to form a geographical polygon. Population counting was accomplished by determining which 2000 block centroids were contained in the polygon. (A block centroid is the center point of a small area containing population as computed by the U.S. Census Bureau.) The sum of the population figures for all enclosed blocks represents the total population for the predicted principal community coverage area.

**FM Stations**

The greater of the horizontal or vertical effective radiated power (ERP) (kW) and respective height above average terrain (HAAT) (m) combination was used. Where the antenna height above mean sea level (HAMSL) was available, it was used in lieu of the average HAAT figure to calculate specific HAAT figures for each of 360 radials under study. Any available directional pattern information was applied as well, to produce a radial-specific ERP figure. The HAAT and ERP figures were used in conjunction with the Field Strength (50–50) propagation curves specified in 47 CFR 73.313 of the Commission's rules to predict the distance to the principal community (70 dBu (decibel above 1 microVolt per meter) or 3.17 mV/m) contour for each of the 360 radials.[239] The resulting distance to principal community contours were used to form a geographical polygon. Population counting was accomplished by determining which 2000 block centroids were contained in the polygon. The sum of the population figures for all enclosed blocks represents the total population for the predicted principal community coverage area.

**Attachment F: FY 2005 Schedule of Regulatory Fees**

[237] 47 CFR 73.150 and 73.152.

[238] *See Map of Estimated Effective Ground Conductivity in the United States,* 47 CFR 73.190 Figure R3.

[239] 47 CFR 73.313.

| Fee category | Annual regulatory fee (U.S. $'s) |
|---|---|
| PLMRS (per license) (Exclusive Use) (47 CFR part 90) | 10 |
| Microwave (per license) (47 CFR part 101) | 60 |
| 218–219 MHz (Formerly Interactive Video Data Service) (per license) (47 CFR part 95) | 50 |
| Marine (Ship) (per station) (47 CFR part 80) | 10 |
| Marine (Coast) (per license) (47 CFR part 80) | 10 |
| General Mobile Radio Service (per license) (47 CFR part 95) | 5 |
| Rural Radio (47 CFR part 22) (previously listed under the Land Mobile category) | 5 |
| PLMRS (Shared Use) (per license) (47 CFR part 90) | 5 |
| Aviation (Aircraft) (per station) (47 CFR part 87) | 5 |
| Aviation (Ground) (per license) (47 CFR part 87) | 15 |
| Amateur Vanity Call Signs (per call sign) (47 CFR part 97) | 2.19 |
| CMRS Mobile/Cellular Services (per unit) (47 CFR parts 20, 22, 24, 27, 80 and 90) | .22 |
| CMRS Messaging Services (per unit) (47 CFR parts 20, 22, 24 and 90) | .08 |
| Multipoint Distribution Services (MMDS/MDS) (per license sign) (47 CFR part 21) | 255 |
| Local Multipoint Distribution Service (per call sign) (47 CFR, part 101) | 255 |
| AM Radio Construction Permits | 310 |
| FM Radio Construction Permits | 550 |
| TV (47 CFR part 73) VHF Commercial: | |
| Markets 1–10 | 61,975 |
| Markets 11–25 | 44,675 |
| Markets 26–50 | 32,025 |
| Markets 51–100 | 18,800 |
| Remaining Markets | 4,625 |
| Construction Permits | 3,175 |
| TV (47 CFR part 73) UHF Commercial: | |
| Markets 1–10 | 20,025 |
| Markets 11–25 | 17,525 |
| Markets 26–50 | 10,050 |
| Markets 51–100 | 6,125 |
| Remaining Markets | 1,725 |
| Construction Permits | 1,725 |
| Satellite Television Stations (All Markets) | 1,075 |
| Construction Permits—Satellite Television Stations | 535 |
| Low Power TV, TV/FM Translators & Boosters (47 CFR part 74) | 395 |
| Broadcast Auxiliary (47 CFR part 74) | 10 |
| CARS (47 CFR part 78) | 155 |
| Cable Television Systems (per subscriber) (47 CFR part 76) | .72 |
| Interstate Telecommunication Service Providers (per revenue dollar) | .00243 |
| Earth Stations (47 CFR part 25) | 205 |
| Space Stations (per operational station in geostationary orbit) (47 CFR part 25) also includes Direct Broadcast Satellite Service (per operational station) (47 CFR part 100) | 111,925 |
| Space Stations (per operational system in non-geostationary orbit) (47 CFR part 25) | 112,425 |
| International Bearer Circuits (per active 64KB circuit) | 1.37 |
| International Public Fixed (per call sign) (47 CFR part 23) | 1,800 |
| International (HF) Broadcast (47 CFR part 73) | 765 |

FY 2005 RADIO STATION REGULATORY FEES

| Population served | AM Class A | AM Class B | AM Class C | AM Class D | FM Classes A, B1 & C3 | FM Classes B, C, C0, C1 & C2 |
|---|---|---|---|---|---|---|
| <=25,000 | 625 | 475 | 375 | 450 | 550 | 725 |
| 25,001–75,000 | 1,225 | 925 | 550 | 675 | 1,125 | 1,250 |
| 75,001–150,000 | 1,825 | 1,150 | 750 | 1,125 | 1,550 | 2,300 |
| 150,001–500,000 | 2,750 | 1,950 | 1,125 | 1,350 | 2,375 | 3,000 |
| 500,001–1,200,000 | 3,950 | 2,975 | 1,875 | 2,250 | 3,750 | 4,400 |
| 1,200,001–3,000,00 | 6,075 | 4,575 | 2,825 | 3,600 | 6,100 | 7,025 |
| >3,000,000 | 7,275 | 5,475 | 3,575 | 4,500 | 7,750 | 9,125 |

[FR Doc. 06–3201 Filed 4–5–06; 8:45 am]

BILLING CODE 6712–01–P

# Notices

Federal Register

Vol. 71, No. 66

Thursday, April 6, 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

### Motor Vehicles: FY 2005, Prior, and Future Annual Alternative Fuel Vehicle (AFV) Reports

**AGENCY:** Departmental Administration, Agriculture.

**ACTION:** Notice of Availability of USDA FY 2005, prior, and future annual AFV Reports.

**SUMMARY:** In accordance with the Energy Policy Act of 1992 (EPAct) (42 U.S.C. 13211–13219) as amended by the Energy Conservation Reauthorization Act of 1998 (Pub. L. 105–388), and Executive Order (EO) 1349, ''Greening the Government Through Federal Fleet and Transportation Efficiency,'' the Department of Agriculture's FY 2005, prior, and future year annual AFV reports are available on the following Department of Agriculture Web site: *http://www.usda.gov/energyandenvironment/altFuel/index.htm.*

**FOR FURTHER INFORMATION CONTACT:** James Michael, Jr., (202) 720–8616.

Dated: March 29, 2006.

**W.R. Ashworth,**

*Director, Office of Procurement and Property Management.*

[FR Doc. 06–3274 Filed 4–5–06; 8:45 am]

**BILLING CODE 3410–98–M**

## DEPARTMENT OF AGRICULTURE

### Animal and Plant Health Inspection Service

**[Docket No. APHIS–2006–0045]**

### Availability of an Evaluation of Asymptomatic Citrus Fruit as a Pathway for the Introduction of Citrus Canker Disease

**AGENCY:** Animal and Plant Health Inspection Service, USDA.

**ACTION:** Notice of availability and request for comments.

**SUMMARY:** We are advising the public that the Animal and Plant Health Inspection Service has prepared a document titled, ''Evaluation of asymptomatic citrus fruit (*Citrus* spp.) as a pathway for the introduction of citrus canker disease (*Xanthomonas axonopodis* pv. *citri*).'' The evaluation concludes that it is highly unlikely that citrus canker could be introduced on asymptomatic, commercially produced citrus fruit that has been treated with disinfectant dips and subject to other mitigations. We are making the evaluation available to the public for review and comment.

**DATES:** We will consider all comments that we receive on or before June 5, 2006.

**ADDRESSES:** You may submit comments by either of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov* and, in the lower ''Search Regulations and Federal Actions'' box, select ''Animal and Plant Health Inspection Service'' from the agency drop-down menu, then click on ''Submit.'' In the Docket ID column, select APHIS–2006–0045 to submit or view public comments and to view supporting and related materials available electronically. After the close of the comment period, the docket can be viewed using the ''Advanced Search'' function in Regulations.gov.
- *Postal Mail/Commercial Delivery:* Please send four copies of your comment (an original and three copies) to Docket No. APHIS–2006–0045, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road Unit 118, Riverdale, MD 20737–1238. Please state that your comment refers to Docket No. APHIS–2006–0045.

*Reading Room:* You may read any comments that we receive on the evaluation in our reading room. The reading room is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue, SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 690–2817 before coming.

*Other Information:* Additional information about APHIS and its programs is available on the Internet at *http://www.aphis.usda.gov.*

**FOR FURTHER INFORMATION CONTACT:** Mr. Robert L. Griffin, Director, Plant Epidemiology and Risk Analysis Laboratory, Center for Plant Health Science and Technology, PPQ, APHIS, 1730 Varsity Drive, Raleigh, NC 27606–5202; (919) 855–7512.

**SUPPLEMENTARY INFORMATION:**

#### Background

We are advising the public that the Animal Plant Health Inspection Service, Plant Protection and Quarantine, Center for Plant Health Science and Technology has produced an evaluation titled, ''Evaluation of asymptomatic citrus fruit, (*Citrus* spp.) as a pathway for the introduction of citrus canker disease (*Xanthomonas axonopodis* pv. *citri*),'' which we are making available to the public for review and comment.

This evaluation concludes it is highly unlikely that citrus canker could be introduced on asymptomatic, commercially produced citrus fruit that has been treated with disinfectant dips and subject to other mitigations. Even if infected fruit were to enter a canker-free area with susceptible hosts, the establishment of citrus canker via this pathway appears to be unlikely. The evaluation further indicates that it appears there is no evidence that asymptomatic fruit can be a source of infective bacteria. According to the evaluation, in the unlikely event that viable propagules were present, the environmental and physiological conditions necessary for disease development at the precise time that an infected citrus fruit was placed in close proximity to a susceptible host is highly unlikely. Empirical data from experience and interceptions further reinforce the conclusion that the likelihood of introducing citrus canker on asymptomatic fruit is extremely low.

We are making this evaluation available for comment for 60 days. During that period, we also plan to have the evaluation peer reviewed, consistent with the Office of Management and Budget's guidelines on peer review. A copy of the peer review plan is posted on the Internet at *http://www.aphis.usda.gov/about_aphis/peer_review.shtml.*

The evaluation may be viewed on the Internet on the Regulations.gov Web site (see **ADDRESSES** above for instructions

for accessing Regulations.gov). You may also request paper copies of the evaluation by calling or writing to the person listed under **FOR FURTHER INFORMATION CONTACT.** Please refer to the title of the evaluation when requesting copies.

The evaluation is also available for review in our reading room (information on the location and hours of the reading room is provided under the heading **ADDRESSES** at the beginning of this notice).

**Authority:** 7 U.S.C. 7701–7772 and 7781–7786; 7 CFR 2.22, 2.80, and 371.3.

Done in Washington, DC, this 3rd day of April 2006.

**W. Ron DeHaven,**

*Administrator, Animal and Plant Health Inspection Service.*

[FR Doc. E6–5015 Filed 4–5–06; 8:45 am]

**BILLING CODE 3410–34–P**

## DEPARTMENT OF AGRICULTURE

### Food Safety and Inspection Service

**[Docket No. FSIS–2006–0006]**

### Exemption for Retail Store Operations

**AGENCY:** Food Safety and Inspection Service, USDA.

**ACTION:** Notice of adjusted dollar limitations.

**SUMMARY:** The Food Safety and Inspection Service (FSIS) is announcing new dollar limitations on the amount of meat and meat food products and poultry products that a retail store can sell to hotels, restaurants, and similar institutions without disqualifying itself for exemption from Federal inspection requirements. By reason of FSIS' regulations, for calendar year 2006 the dollar limitation for meat and meat food products has been increased from $54,500 to $55,100 and for poultry products has been reduced from $45,800 to $45,200. FSIS is changing the dollar limitations from calendar year 2005 based on price changes for these products evidenced by the Consumer Price Index.

**DATES:** *Effective Date:* This notice is effective April 6, 2006.

**FOR FURTHER INFORMATION CONTACT:** John O'Connell, Regulations and Petitions Policy Staff, Office of Policy, Program, and Employee Development, FSIS, U.S. Department of Agriculture, Room 112, Cotton Annex Building, 300 12th Street, SW., Washington, DC 20250–3700; telephone (202) 720–0345, fax (202) 690–0486.

**SUPPLEMENTARY INFORMATION:**

**Background**

The Federal Meat Inspection Act (21 U.S.C. 601 *et seq.*) and the Poultry Products Inspection Act (21 U.S.C. 451 *et seq.*) provide that the statutory provisions requiring inspection of the slaughter of livestock or poultry, and the preparation or processing of meat and meat food and poultry products, do not apply to the types of operations traditionally and usually conducted at retail stores and restaurants, when those operations are conducted at any retail store or restaurant or similar retail-type establishment for sale in normal retail quantities (21 U.S.C. 454(c)(2)and 661 (c)(2)). In Title 9 of the Code of Federal Regulations §§ 303.1(d) and 381.10(d), FSIS regulations address the conditions under which requirements for inspection do not apply to retail operations involving the preparation or processing of meat or poultry products.

Under these regulations, sales to hotels, restaurants, and similar institutions disqualify a store for exemption if they exceed either of two maximum limits: 25 percent of the dollar value of total product sales or the calendar year dollar limitation set by the Administrator. The dollar limitation is adjusted automatically during the first quarter of the year if the Consumer Price Index (CPI), published by the Bureau of Labor Statistics, indicates an increase or decrease of more than $500 in the price of the same volume of product for the previous year. FSIS publishes a notice of the adjusted dollar limitations in the **Federal Register**. (See paragraphs (d)(2)(iii)(*b*) of both §§ 303.1 and 381.10.)

The CPI for 2005 reveals an average annual price increase for meat and meat food products of 1.1 percent and an annual average price decrease for poultry products of 1.3 percent. When rounded off to the nearest $100.00, the price increase for meat and meat food products is $600 and the price decrease for poultry products is $600. Because the price of meat and meat food products and the price of poultry products have changed by more than $500, in accordance with §§ 303.1 (d)(2)(iii)(*b*) and 381.10 (d)(2)(iii)(*b*) of the regulations, FSIS is increasing the dollar limitation on sales to hotels, restaurants, and similar institutions to $55,100 for meat and meat food products and decreasing the dollar limitation to $45,200 for poultry products for calendar year 2006.

**Additional Public Notification**

Public awareness of all segments of rulemaking and policy development is important. Consequently, in an effort to ensure that the public and in particular minorities, women, and persons with disabilities, are aware of this notice, FSIS will announce it on-line through the FSIS Web page located at *http://www.fsis.usda.gov/regulations/2006_Notices_Index/.*

FSIS also will make copies of this **Federal Register** publication available through the FSIS Constituent Update, which is used to provide information regarding FSIS policies, procedures, regulations, **Federal Register** notices, FSIS public meetings, recalls, and other types of information that could affect or would be of interest to our constituents and stakeholders. The update is communicated via Listserv, a free e-mail subscription service consisting of industry, trade, and farm groups, consumer interest groups, allied health professionals, scientific professionals, and other individuals who have requested to be included. The update also is available on the FSIS Web page. Through Listserv and the web page, FSIS is able to provide information to a much broader and more diverse audience.

In addition, FSIS offers an email subscription service which provides an automatic and customized notification when popular pages are updated, including **Federal Register** publications and related documents. This service is available at *http://www.fsis.usda.gov/news_and_events/email_subscription/* and allows FSIS customers to sign up for subscription options across eight categories. Options range from recalls to export information to regulations, directives and notices. Customers can add or delete subscriptions themselves and have the option to password protect their account.

Done at Washington, DC, on: April 3, 2006.

**Barbara J. Masters,**

*Administrator.*

[FR Doc. E6–5011 Filed 4–5–06; 8:45 am]

**BILLING CODE 3410–DM–P**

## DEPARTMENT OF AGRICULTURE

### Forest Service

### Umatilla National Forest Invasive Plants Treatment, Umatilla National Forest, Oregon and Washington

**AGENCY:** Forest Service, USDA.

**ACTION:** Notice of intent to prepare an environmental impact statement.

**SUMMARY:** The Umatilla National Forest proposes to treat approximately 25,000 acres of invasive plants located across the 1.4 million acre National Forest. It is anticipated that approximately 4,000

acres of both existing and newly discovered sites would be treated in any year. The proposed treatment methods includes: Manual pulling or use of hand tools, use of mechanical hand tools, herbicide, cultural methods such as grazing or mulching, and biological controls. The method used would depend on resource protection concerns for a given site.

**DATES:** Comments concerning the scope of the analysis must be received by May 17, 2006. The draft environmental impact statement is expected in March 2007 and the final environmental impact statement is expected in September 2007.

**ADDRESSES:** Send written comments about this project to Kevin D. Martin, Forest Supervisor, Umatilla National Forest, 2517 SW. Hailey Avenue, Pendleton, OR 97801. Electronic comments can be mailed to: *comments-pacificnorthwest-umatilla@fs.fed.us.*

**FOR FURTHER INFORMATION CONTACT:** Glen Westlund, Project Leader, Walla Walla Ranger District, 1415 West Rose Street, Walla Walla, WA 99362. Phone: 509–522–6009 or e-mail: *gwestlund@fs.fed.us.*

**SUPPLEMENTARY INFORMATION:**

*Purpose and Need for Action*

The purpose of this action is to provide a rapid and more comprehensive, up to date approach for the control and eradication of invasive plants that occur on the National Forest. The purpose of controlling or eradicating weed infestations is to maintain or improve the diversity, function, and sustainability of desired native plant communities and other natural resources that can be adversely impacted by invasive plant species. Specifically, there is an underlying need on the Forest to: (1) Implement treatment actions to contain and reduce the extent of invasive plants at existing inventoried sites, and (2) rapidly respond to new or expanded invasive plant sites as they may occur in the future.

*Proposed Action*

A detailed project description can be found on the Umatilla National Forest Web page in the NEPA reading room; *http://www.fs.fed.us/r6/uma/projects/readroom.* Various types of treatments would be used to contain, control, or eradicate invasive plants including the use of herbicides, physical, and biological methods. Treatments are proposed for existing or new infestations including new plant species that currently are not found on the Forest. Potential treatments based on existing mapped sites include: Biological or physical methods used on approximately 3,920 acres; approximately 17,300 acres of uplands would utilize chemical, physical, or biological methods; approximately 3,400 acres of riparian areas would be treated with chemical, physical, or biological methods, and physical methods on 50 acres. Any use of chemicals would be done in accordance with USDA Forest Service policies, regulations and Forest Plan Standards as well as product label requirements. Chemicals approved for use, within or outside riparian areas, are listed in the Pacific Northwest Region Invasive Plant Program Preventing and Managing Invasive Plants FEIS (Regional Invasive Plant EIS), April 2005 and ROD. Monitoring of treated sites would determine what follow-up treatments would be needed. Ground based or aerial application methods would be used based on accessibility, topography, and the size of treatment area and may include spot spraying, wicking, stem injection, hand broadcast and boom broadcast. Aerial application is proposed on approximately 1,420 acres covering 20 sites ranging in size from 1 to 418 acres. When needed to facilitate recovery, native seed would be used to recover the site and increase competition. Physical methods include manual control, hand mechanical and cultural methods. Biological weed control activities typically include the release of parasitic and ''host specific'' insects. Presently, insects are the primary biological control agent in use.

*Responsible Official*

The Forest Supervisor, Kevin Martin, will be the responsible official for making the decision and providing direction for the analysis. He can be contacted at the address listed above.

*Nature of Decision To Be Made*

The responsible official will decide what type of methods and how they will be used to control invasive plants on the Umatilla National Forest.

*Scoping Process*

The public is asked to provide the responsible official with written comments describing their concerns about this project. At this time, no public meetings are being planned.

*Comment Requested*

This notice of intent initiates the scoping process which guides the development of the environmental impact statement. When reviewing the proposed action, bear in mind that the Forest has been operating under the 1995 Umatilla National Forest Environmental Assessment for the Management of Noxious Weeds and herbicides were used only on a limited basis. Monitoring has indicated that this approach is not successful. In 2005 the Forest Service's Pacific Northwest Region completed and implemented the Pacific Northwest Region Invasive plant Program FEIS providing new direction and updating the hercides that would be permitted for use in the Region. The new hercides offer many advantages over the more limited set allowed previously, including greater selectivity, less harm to desired vegetation, reduced application rates, and lower toxicity to animals and people. The proposed treatments will be guided by this FEIS. The most useful comments to developing or refining the proposed action would be site specific concerns and those that can help us develop treatments that would be responsive to our goal to control, contain, or eradicate invasive plants as well as being cost effective. Prevention measures have already been built into the Regional Invasive Plant FEIS and will be implemented with all actions occurring on the Forest. The purpose of this proposed action is to begin treatments on known invasive plant sites and provide a mechanism to respond rapidly when new infestations are discovered.

*Early Notice of Importance of Public Participation in Subsequent Environmental Review*

A draft environmental impact statement will be prepared for comment. The comment period on the draft environmental impact statement will be 45 days from the date of 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 review 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 comment period so that substantive comments and objections are made available to the Forest Service at a time when it can meaningful consider them and respond to them in the final environmental impact statement.

To assist the Forest Service in identifying an 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.

Comments received, including the names and addresses of those who comment, will be considered part of the public record on this proposal and will be available for public inspection.

(Authority: 40 CFR 1501.7 and 1508.22; Forest Service Handbook 1909.15, Section 21)

Dated: March 30, 2006.

**Kevin D. Martin,**

*Forest Supervisor.*

[FR Doc. 06–3281 Filed 4–5–06; 8:45 am]

BILLING CODE 3410–11–M

## DEPARTMENT OF AGRICULTURE

### Forest Service

### Eastern Washington Cascades Provincial Advisory Committee and the Yakima Provincial Advisory Committee

**AGENCY:** Forest Service, USDA.

**ACTION:** Notice of meeting.

**SUMMARY:** The Eastern Washington Cascades Provincial Advisory Committee and the Yakima Provincial Advisory Committee will meet on Wednesday, May 3, 2006 and Tuesday, May 23, 2006 at the Okanogan and Wenatchee National Forests Headquarters office, 215 Melody Lane, Wenatchee, WA. These meetings will begin at 9 a.m. and continue until 3 p.m. During these meting Provincial Advisory Committee members will continue the collaboration process on forest plan issues relating to the preparation of a revised forest plan for the Okanogan and Wenatchee National Forests. All Eastern Washington Cascades and Yakima Province Advisory Committee meetings are open to the public.

**FOR FURTHER INFORMATION CONTACT:** Direct questions regarding this meeting to Paul Hart, Designated Federal Official, USDA, Wenatchee National Forest, 215 Melody Lane, Wenatchee, Washington 98801, 509–664–9200.

Dated: March 6, 2006.

**Paul Hart,**

*Designated Federal Official, Okanogan and Wenatchee National Forests.*

[FR Doc. 06–3302 Filed 4–5–06; 8:45 am]

BILLING CODE 3410–11–M

## DEPARTMENT OF AGRICULTURE

### Forest Service

### Eastern Washington Cascades Provincial Advisory Committee and the Yakima Provincial Advisory Committee

**AGENCY:** Forest Service, USDA.

**ACTION:** Notice of meeting.

**SUMMARY:** The Eastern Washington Cascades Provincial Advisory Committee and the Yakima Provincial Advisory Committee will meet on Thursday, April 20, 2006 at the Sunnyslope Fire Station Rural County Fire District #1 office, 206 Easy Street, Wenatchee, WA. The meeting will begin at 9 a.m. and continue until 3 p.m. During this meeting we will continue the collaboration process on forest plan issues relating to the preparation of a revised forest plan for the Okanogan and Wenatchee National Forests. All Eastern Washington Cascades and Yakima Province Advisory Committee meetings are open to the public.

**FOR FURTHER INFORMATION CONTACT:** Direct questions regarding this meeting to Paul Hart, Designated Federal Official, USDA, Wenatchee National Forest, 215 Melody Lane, Wenatchee, Washington 98801, 509–664–9200.

Dated: March 6, 2006.

**Paul Hart,**

*Designated Federal Official, Okanogan and Wenatchee National Forests.*

[FR Doc. 06–3303 Filed 4–5–06; 8:45 am]

BILLING CODE 3410–11–M

## DEPARTMENT OF AGRICULTURE

### Forest Service

### Okanogan and Wenatchee National Forests Resource Advisory Committee

**AGENCY:** Forest Service, USDA.

**ACTION:** Notice of meeting.

**SUMMARY:** The Wenatchee-Okanogan Resource Advisory Committee will meet on Tuesday, May 2, 2006, Tuesday, May 9, 2006, and Wednesday, May 17, 2006 at the Okanogan and Wenatchee National Forest Headquarters Office, 215 Melody Lane, Wenatchee, WA. These meetings will begin at 9 a.m. and continue until 3 p.m. On May 2, 2006, committee members will review Okanogan County projects, on May 9, 2006 committee members will review Chelan County projects, and on May 17, 2006 committee members will review Kittitas and Yakima Counties projects proposed for Resource Advisory Committee consideration under Title II of the Secure Rural Schools and Community Self-Determination Act of 2000. All Wenatchee-Okanogan Resource Advisory Committee meetings are open to the public. Interested citizens are welcome to attend.

**FOR FURTHER INFORMATION CONTACT:** Direct questions regarding this meeting to Paul Hart, Designated Federal Official, USDA, Wenatchee National Forest, 215 Melody Lane, Wenatchee, Washington 98801, (509) 664–9200.

Dated: March 31, 2006.

**Paul Hart,**

*Designated Federal Official, Okanogan and Wenatchee National Forests.*

[FR Doc. 06–3304 Filed 4–5–06; 8:45 am]

BILLING CODE 3410–11–M

## DEPARTMENT OF AGRICULTURE

### Natural Resources Conservation Service

### Notice of Request for Nominations for the Agricultural Air Quality Task Force

**AGENCY:** Natural Resources Conservation Service, Agriculture.

**ACTION:** Notice of Request for Nominations.

**SUMMARY:** The Secretary of Agriculture intends to renew the Agricultural Air Quality Task Force and requests nominations for qualified persons to serve as members.

**DATES:** Nominations must be received in writing (see **SUPPLEMENTARY INFORMATION** section) by May 19, 2006.

**ADDRESSES:** Send written nominations to: Chief, USDA/Natural Resources Conservation Service, Post Office Box 2890, Washington DC 20013–2890.

**FOR FURTHER INFORMATION CONTACT:** Dr. Diane Gelburd, Designated Federal Official, USDA/Natural Resources Conservation Service, telephone: (202) 720–2587, fax: (202) 720–2646, e-mail: *Diane.Gelburd@wdc.usda.gov.*

**SUPPLEMENTARY INFORMATION:**

## AAQTF Purpose

As required by section 391 of the Federal Agriculture Improvement and Reform Act of 1996, the Chief of the Natural Resources Conservation Service (NRCS) shall establish a committee to address agricultural air quality issues. The Agricultural Air Quality Task Force (AAQTF) shall advise the Secretary of Agriculture, with respect to the role of the Secretary, for providing oversight and coordination related to agricultural air quality. The requirements of the Federal Advisory Committee Act (FACA) apply to AAQTF.

AAQTF will advise the Secretary of Agriculture on:

1. Research efforts related to agricultural air quality;
2. The extent to which agricultural activities contribute to air pollution;
3. Cost-effective ways in which the agricultural industry can improve air quality;
4. Coordination of research on agricultural air quality issues to avoid duplication and to ensure data quality and sound interpretation of data; and
5. The respect to the role of the Secretary for providing oversight and coordination related to agricultural air quality.

## AAQTF Membership

AAQTF will be made up of United States citizens and be composed of:

1. Individuals with scientific knowledge of agricultural air quality issues. Candidates in this category will be considered based upon their published research and editorial record, having provided testimony to congressional bodies, directing research efforts, receipt of national professional awards, and other applicable special experience or abilities. At least one atmospheric scientist will specifically be selected from this category of applicant.
2. Experts in the production of food and fiber. Candidates in this category will be considered based upon their practical experience in farming/ranching, participation in professional associations, service as an elected official, service on other agricultural action committees, having provided expert testimony to congressional bodies, and other applicable special experience or abilities.
3. Representatives from agricultural interest groups and industry. Candidates in this category will be considered based upon their professional industry standing, academic training, owning a producing farm/ranch, service on industry-wide committees, relevant publications/speeches, and other applicable special experience or abilities.
4. Representatives of other interests, including human health, environmental advocacy, and air quality regulators. Candidates in this category will be considered based upon their academic training, air-quality or agriculturally-related professional service, knowledge of farm/ranch operations, professional memberships, air-quality or agriculturally-related publications/speeches, and other applicable special experience or abilities.

AAQTF nominations must be in writing and must provide the appropriate background documents required by the Department of Agriculture (USDA) policy, including Form AD–755 (which is available online at the URL listed below). Previous nominees and current AAQTF members who wish to be reappointed must completely update their nominations, including all supporting materials, and provide a new background disclosure form (AD–755) to reaffirm their candidacy. Service as an AAQTF member shall not constitute employment by, or the holding of an office of, the United States for the purpose of any Federal law.

An AAQTF member shall serve for a term of 2 years. AAQTF members shall receive no compensation from NRCS for their service as AAQTF members, except as described below.

While away from home or regular place of business as a member of the AAQTF, the member will be eligible for travel expenses paid by NRCS, including per diem in lieu of subsistence, at the same rate as a person employed intermittently in the government service under section 5703 of Title 5, United States Code.

Additional information about the AAQTF, as well as Form AD–755, may be found online at *http://www.airquality.nrcs.usda.gov/AAQTF/*.

## Submitting Nominations

Nominations should be typed and should include the following:

1. A brief summary of no more than two pages explaining the nominee's qualifications to serve on the AAQTF.
2. Resume, including publication list. Please do not send actual publications.
3. A completed copy of Form AD–755.
4. Letters of support.

Nominations should be sent to the Chief of NRCS at the address listed above and postmarked no later than May 19, 2006.

## Equal Opportunity Statement

To ensure that recommendations of AAQTF take unto account the needs of underserved and diverse communities served by USDA, membership shall include to the extent practicable, individuals representing minorities, women, and persons with disabilities.

Signed in Washington, DC on March 28, 2006.

**Bruce I. Knight,**

*Chief, Natural Resources Conservation Service.*

[FR Doc. E6–4895 Filed 4–5–06; 8:45 am]

**BILLING CODE 3410–16–P**

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# DEPARTMENT OF COMMERCE

## International Trade Administration

**[A–428–816]**

## Certain Cut-to-Length Steel Plate From Germany: Extension of Time Limits for the Preliminary Results of Antidumping Duty Administrative Review

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**DATES:** *Effective Date:* April 6, 2006.

**FOR FURTHER INFORMATION CONTACT:** Dennis McClure or Stephanie Moore (202) 482–5973 or (202) 482–3692, respectively, AD/CVD Operations, Office 3, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Ave., NW., Washington, DC 20230.

## Background

On September 28, 2005, the U.S. Department of Commerce (''the Department'') published a notice of initiation of the administrative review of the antidumping duty order on certain cut-to-length carbon steel plate from Germany, covering the period August 1, 2004, to July 31, 2005. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part*, 70 FR 56631 (September 28, 2005). The preliminary results of this review are currently due no later than May 3, 2006.

## Extension of Time Limit of Preliminary Results

Section 751(a)(3)(A) of the Tariff Act of 1930, as amended (''the Act''), requires the Department to make a preliminary determination in an administrative review within 245 days after the last day of the anniversary month of an order or finding for which a review is requested. Consistent with

section 751(a)(3)(A) of the Act, the Department may extend the 245-day period to 365 days if it is not practicable to complete the review within a 245-day period.

We determine that completion of the preliminary results of this review within the 245-day period is not practicable. A number of complex issues concerning the respondent company's intercorporate relationships have arisen in the case. As a result, the Department needs additional time to gather supplemental responses from the company and its affiliate participating in the review. In order to obtain and analyze the necessary additional information, we are extending the time period for issuing the preliminary results of review by 120 days to August 31, 2006, in accordance with section 751(a)(3)(A) of the Act and 19 CFR 351.213(h)(2) of the Department's regulations. Therefore, the preliminary results are now due no later than August 31, 2006. The final results continue to be due 120 days after publication of the preliminary results.

This notice is published in accordance with sections 751(a)(3)(A) and 777(i) of the Act.

Dated: March 30, 2006.

**Stephen J. Claeys,**

*Deputy Assistant Secretary for Import Administration.*

[FR Doc. E6–5029 Filed 4–5–06; 8:45 am]

BILLING CODE 3510–DS–P

## DEPARTMENT OF COMMERCE

### International Trade Administration

**[A–570–831]**

### Notice of Extension of Time Limit for Final Results of Antidumping Duty Administrative Review: Certain Malleable Iron Pipe Fittings from the People's Republic of China

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**EFFECTIVE DATE:** April 6, 2006.

**FOR FURTHER INFORMATION CONTACT:** Sochieta Moth, AD/CVD Operations, Office 8, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone; (202) 482–0168.

**SUPPLEMENTARY INFORMATION:**

#### Background

On December 23, 2005, the Department of Commerce (''The Department'') published the preliminary results of the administrative review of the antidumping duty order on malleable iron pipe fittings from the People's Republic of China covering the period December 2, 2003, through November 30, 2004. *See Certain Malleable Iron Pipe Fittings From the People's Republic of China: Notice of Preliminary Results of Antidumping Duty Administrative Review*, 70 FR 76234 (December 23, 2005) (''*Preliminary Results*''). The final results of review are currently due no later than April 22, 2006.

#### Extension of Time Limits for Final Results

Pursuant to section 751(a)(3)(A) of the Tariff Act of 1930, as amended (''the Act''), and section 351.213(h)(1) of the Department's regulations, the Department shall issue the preliminary results of an administrative review within 245 days after the last day of the anniversary month of the date of publication of the antidumping duty order. The Act further provides that the Department shall issue the final results of review within 120 days after the date on which the notice of the preliminary results was published in the **Federal Register**. However, if the Department determines that it is not practicable to complete the review within this time period, section 751(a)(3)(A) of the Act and section 351.213(h)(2) of the Department's regulations allow the Department to extend the 245-day period to 365 days and the 120-day period to 180 days. We find that it is not practicable to complete the final results in this administrative review by April 22, 2006, because additional time is needed to analyze a significant amount of information submitted in response to supplemental questionnaires that were issued subsequent to the *Preliminary Results*. Therefore, the Department is extending the time limit for the completion of these final results by 60 days until no later than Wednesday, June 21, 2006, which is 180 days from the date on which the notice of the *Preliminary Results* was published.

#### Briefing and Hearing Request Schedule

In the *Preliminary Results*, the Department stated that it would notify all parties of the briefing and hearing request schedule at a later date. Any interested party may submit case briefs and/or written comments, and request a hearing, within 20 days of the date of publication of this notice. The deadline for interested parties to submit rebuttal briefs and rebuttals to written comments, limited to issues raised in such briefs or comments, is 27 days after the publication of this notice of extension. A hearing, if requested, will be held at the main Commerce Department building at a time and location to be determined.

Issues raised in hearings will be limited to those raised in the respective case and rebuttal briefs. Parties who submit case or rebuttal briefs in these proceedings are requested to submit with each argument (1) a statement of the issue, and (2) a brief summary of the argument with an electronic version included.

This notice is issued and published in accordance with section 751(a)(3)(A) and 777(i) of the Act.

Dated: March 30, 2006.

**Stephen J. Claeys,**

*Deputy Assistant Secretaryfor Import Administration.*

[FR Doc. E6–5030 Filed 4–5–06; 8:45 am]

BILLING CODE 3510–DS–S

## DEPARTMENT OF COMMERCE

### International Trade Administration

**[A–533–809]**

### Stainless Steel Flanges from India: Notice of Initiation of Antidumping Duty New Shipper Reviews

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**SUMMARY:** The Department of Commerce (the Department) has received requests for new shipper reviews of the antidumping duty order on certain forged stainless steel flanges (flanges) from India issued on February 9, 1994. *See Amended Final Determination and Antidumping Duty Order; Certain Forged Stainless Steel Flanges from India*, 59 FR 5994 (February 9, 1994). In accordance with section 751(a)(2)(B) of the Tariff Act of 1930, as amended (the Act), and 19 CFR 351.214(d) (2005), we are initiating antidumping new shipper reviews of Kunj Forgings Pvt. Ltd. (Kunj), Micro Forge (India), Ltd. (Micro), Pradeep Metals Limited (Pradeep), and Rollwell Forge, Ltd. (Rollwell), exporters and producers that requested new shipper reviews.

**EFFECTIVE DATE:** April 6, 2006.

**FOR FURTHER INFORMATION CONTACT:** Fred Baker, Michael Heaney, or Robert James, AD/CVD Operations, Office 7, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230, telephone: (202) 482–2924, (202) 482–4475, or (202) 482–0649, respectively.

**SUPPLEMENTARY INFORMATION:**

## Background

In accordance with section 751(a)(2)(B) of the Act and 19 CFR 351.214(d), the Department received timely requests submitted by Kunj, Micro, Pradeep, and Rollwell (all producers and exporters of flanges) for new shipper reviews of the antidumping duty order on flanges from India. See February 28, 2006, letters from Kunj, Micro, Pradeep, and Rollwell to the Secretary of Commerce requesting new shipper reviews.

Pursuant to 19 CFR 351.214(b), Kunj, Micro, Pradeep, and Rollwell certified that they are both exporters and producers of the subject merchandise, that they did not export subject merchandise to the United States during the period of the investigation (POI) (July 1, 1992 through December 31, 1992), and that since the investigation was initiated, they have not been affiliated with any producer or exporter who exported the subject merchandise to the United States during the POI. They also submitted documentation establishing the date on which they first shipped the subject merchandise to the United States, the volume of those shipments, and the date of their first sales to unaffiliated customers in the United States. They also certified they had no shipments to the United States during the period subsequent to their first shipments.

## Initiation of Review

In accordance with section 751(a)(2)(B) of the Act and section 351.214(d) of the Department's regulations, we find that the requests submitted by Kunj, Micro, Pradeep, Rollwell meet the threshold requirements for initiation of a new shipper review. Accordingly, we are initiating new shipper reviews of the antidumping duty order on flanges from India manufactured and exported by Kunj, Micro, Pradeep, and Rollwell. These reviews cover the period February 1, 2005, through January 31, 2006. We intend to issue the preliminary results of these reviews no later than 180 days after the date on which these reviews are initiated, and the final results within 90 days after the date on which we issue the preliminary results. See section 751(a)(2)(B)(iv) of the Act.

We will instruct U.S. Customs and Border Protection to suspend liquidation of any unliquidated entries of the subject merchandise from Kunj, Micro, Pradeep, and Rollwell, and allow, at the option of the importer, the posting, until completion of the reviews, of a bond or security in lieu of a cash deposit for each entry of the merchandise produced and exported by Kunj, Micro, Pradeep, and Rollwell in accordance with section 751(a)(2)(B)(iii) of the Act and 19 CFR 351.214(e). Because each of the four companies certified that it both produces and exports the subject merchandise, the sales of which are the basis for these new shipper review requests, we will permit the bonding privilege only for those entries of subject merchandise for which the company is both the manufacturer and the exporter.

Interested parties may submit applications for disclosure under administrative protective order in accordance with 19 CFR 351.305 and 351.306.

This initiation and this notice are issued and published in accordance with section 751(a)(2)(B) of the Act and sections 351.214(d) and 351.221(c)(1)(i) of the Department's regulations.

Dated: March 31, 2006.

**Stephen Claeys,**

*Deputy Assistant Secretaryfor Import Administration.*

[FR Doc. E6–5027 Filed 4–5–06; 8:45 am]

**BILLING CODE 3510–DS–S**

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## DEPARTMENT OF COMMERCE

### International Trade Administration

**[C–475–819]**

### Certain Pasta From Italy: Preliminary Results of the Ninth Countervailing Duty Administrative Review and Notice of Intent To Revoke Order, in Part

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**SUMMARY:** The Department of Commerce is conducting an administrative review of the countervailing duty order on certain pasta from Italy for the period January 1, 2004, through December 31, 2004. We preliminarily find that the countervailing duty rates during the period of review for all of the producers/exporters under review are either zero or *de minimis*. *See* the ''Preliminary Results of Review'' section, below. We are also preliminarily revoking the order with respect to Pasta Lensi S.r.l., in accordance with section 751(d)(1) of the Tariff Act of 1930, as amended (''the Act''), and 19 CFR 351.222(c)(3). *See* the ''Partial Revocation'' section, below. Interested parties are invited to comment on these preliminary results (*see* the ''Public Comment'' section of this notice).

**DATES:** *Effective Date:* April 6, 2006.

**FOR FURTHER INFORMATION CONTACT:** Audrey Twyman or Brandon Farlander, AD/CVD Operations, Office 1, Import Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–3534 and (202) 482–0182, respectively.

**SUPPLEMENTARY INFORMATION:**

## Background

On July 24, 1996, the Department of Commerce (''the Department'') published a countervailing duty order on certain pasta (''pasta'' or ''subject merchandise'') from Italy. *See Notice of Countervailing Duty Order and Amended Final Affirmative Countervailing Duty Determination: Certain Pasta From Italy*, 61 FR 38544 (July 24, 1996). On July 1, 2005, the Department published a notice of ''Opportunity to Request Administrative Review'' of this countervailing duty order for calendar year 2004, the period of review (''POR''). *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review*, 70 FR 38099 (July 1, 2005). On July 28, 2005, we received a request for review from Pastificio Laporta S.a.s (''Laporta''). On July 29, 2005, we received requests for reviews from the following four producers/exporters of subject merchandise: Pastificio Antonio Pallante S.r.l. (''Pallante''), Corticella Molini e Pastifici S.p.a. (''Corticella'')/ Pasta Combattenti S.p.a. (''Combattenti'') (collectively, ''Corticella/Combattenti''), Atar S.r.l. (''Atar''), and Moline e Pastificio Tomasello S.r.l. (''Tomasello''). On August 1, 2005, we received a request for review and a request for revocation from Pasta Lensi S.r.l. (''Pasta Lensi'').[1] (*See* the ''Partial Revocation'' section, below.) In accordance with 19 CFR 351.221(c)(1)(i), we published a notice of initiation of the review on August 29, 2005. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part*, 70 FR 51009 (August 29, 2005).

On August 31, 2005, we issued countervailing duty questionnaires to the Commission of the European Union, the Government of Italy (''GOI''), Pallante, Corticella/Combattenti, Pasta Lensi, Tomasello, Laporta, and Atar. We received all responses to our questionnaire in October 2005. We issued supplemental questionnaires to

[1] Pasta Lensi is the successor-in-interest to IAPC Italia S.r.1. *See Notice of Final Results of Antidumping and Countervailing Duty Changed Circumstances Reviews: Certain Pasta from Italy*, 68 FR 41553 (July 14, 2003).

the respondents in November 2005, and we received responses to our supplemental questionnaires in November and December 2005.

On September 15, 2005, Laporta withdrew its request for review. On September 29, 2005, Tomasello withdrew its request for review. On October 25, 2005, Pallante withdrew its request for review. As discussed in the ''Partial Rescission'' section, below, we have rescinded this administrative review for Laporta, Tomasello, and Pallante.

**Period of Review**

The period for which we are measuring subsidies, or POR, is January 1, 2004, through December 31, 2004.

**Scope of the Order**

Imports covered by the order are shipments of certain non-egg dry pasta in packages of five pounds four ounces or less, whether or not enriched or fortified or containing milk or other optional ingredients such as chopped vegetables, vegetable purees, milk, gluten, diastasis, vitamins, coloring and flavorings, and up to two percent egg white. The pasta covered by this scope is typically sold in the retail market, in fiberboard or cardboard cartons, or polyethylene or polypropylene bags of varying dimensions.

Excluded from the scope of the order are refrigerated, frozen, or canned pastas, as well as all forms of egg pasta, with the exception of non-egg dry pasta containing up to two percent egg white. Also excluded are imports of organic pasta from Italy that are accompanied by the appropriate certificate issued by the Instituto Mediterraneo Di Certificazione, Bioagricoop S.r.l., QC&I International Services, Ecocert Italia, Consorzio per il Controllo dei Prodotti Biologici, Associazione Italiana per l'Agricoltura Biologica, or Codex S.r.l. In addition, based on publicly available information, the Department has determined that, as of August 4, 2004, imports of organic pasta from Italy that are accompanied by the appropriate certificate issued by Bioagricert S.r.l. are also excluded from this order. *See* memorandum from Eric B. Greynolds to Melissa G. Skinner, dated August 4, 2004, which is on file in the Department's Central Records Unit (''CRU'') in Room B–099 of the main Department building. In addition, based on publicly available information, the Department has determined that, as of March 13, 2003, imports of organic pasta from Italy that are accompanied by the appropriate certificate issued by Instituto per la Certificazione Etica e Ambientale (ICEA) are also excluded from this order. *See* memorandum from Audrey Twyman to Susan Kuhbach, dated February 28, 2006, entitled ''Recognition of Instituto per la Certificazione Etica e Ambientale (ICEA) as a Public Authority for Certifying Organic Pasta from Italy'' which is on file in the Department's Central Records Unit (''CRU'') in Room B–099 of the main Department building.

The merchandise subject to review is currently classifiable under items 1901.90.9095 and 1902.19.20 of the *Harmonized Tariff Schedule of the United States* (''*HTSUS*''). Although the *HTSUS* subheadings are provided for convenience and customs purposes, the written description of the merchandise subject to the order is dispositive.

**Scope Rulings**

The Department has issued the following scope rulings to date:

(1) On August 25, 1997, the Department issued a scope ruling that multicolored pasta, imported in kitchen display bottles of decorative glass that are sealed with cork or paraffin and bound with raffia, is excluded from the scope of the antidumping and countervailing duty orders. *See* Memorandum from Edward Easton to Richard Moreland, dated August 25, 1997, which is on file in the CRU.

(2) On July 30, 1998, the Department issued a scope ruling finding that multipacks consisting of six one-pound packages of pasta that are shrink-wrapped into a single package are within the scope of the antidumping and countervailing duty orders. *See* Letter from Susan H. Kuhbach to Barbara P. Sidari, dated July 30, 1998, which is available in the CRU.

(3) On October 23, 1997, the petitioners filed an application requesting that the Department initiate an anti-circumvention investigation of Barilla S.r.l. (''Barilla''), an Italian producer and exporter of pasta. The Department initiated the investigation on December 8, 1997. *See Initiation of Anti-Circumvention Inquiry on Antidumping Duty Order on Certain Pasta From Italy*, 62 FR 65673 (December 15, 1997). On October 5, 1998, the Department issued its final determination that, pursuant to section 781(a) of the Tariff Act of 1930, as amended by the Uruguay Round Agreements Act (''URAA'') effective January 1, 1995 (''the Act''), circumvention of the antidumping order on pasta from Italy was occurring by reason of exports of bulk pasta from Italy produced by Barilla which subsequently were repackaged in the United States into packages of five pounds or less for sale in the United States. *See Anti-Circumvention Inquiry of the Antidumping Duty Order on Certain Pasta from Italy: Affirmative Final Determination of Circumvention of the Antidumping Duty Order*, 63 FR 54672 (October 13, 1998).

(4) On October 26, 1998, the Department self-initiated a scope inquiry to determine whether a package weighing over five pounds as a result of allowable industry tolerances is within the scope of the antidumping and countervailing duty orders. On May 24, 1999, we issued a final scope ruling finding that, effective October 26, 1998, pasta in packages weighing or labeled up to (and including) five pounds four ounces is within the scope of the antidumping and countervailing duty orders. *See* Memorandum from John Brinkmann to Richard Moreland, dated May 24, 1999, which is available in the CRU.

(5) On April 27, 2000, the Department self-initiated an anti-circumvention inquiry to determine whether Pastificio Fratelli Pagani S.p.A.'s importation of pasta in bulk and subsequent repackaging in the United States into packages of five pounds or less constitutes circumvention with respect to the antidumping and countervailing duty orders on pasta from Italy pursuant to section 781(a) of the Act and 19 CFR 351.225(b). *See Certain Pasta from Italy: Notice of Initiation of Anti-Circumvention Inquiry of the Antidumping and Countervailing Duty Orders*, 65 FR 26179 (May 5, 2000). On September 19, 2003, we published an affirmative finding of the anti-circumvention inquiry. *See Anti-Circumvention Inquiry of the Antidumping and Countervailing Duty Orders on Certain Pasta from Italy: Affirmative Final Determinations of Circumvention of Antidumping and Countervailing Duty Orders*, 68 FR 54888 (September 19, 2003).

**Partial Revocation**

On August 1, 2005, Pasta Lensi requested revocation of the countervailing duty order as it pertains to its sales. Under section 751(d)(1) of the Act, the Department ''may revoke, in whole or in part'' a countervailing duty order upon completion of a review. Although Congress has not specified the procedures that the Department must follow in revoking an order, the Department has developed a procedure for revocation that is set forth under 19 CFR 351.222. Under 19 CFR 351.222(c)(3)(i), in determining whether to revoke a countervailing duty order in part, the Secretary will consider: (1) Whether one or more exporters or producers covered by the order have not applied for or received any net

countervailable subsidy on the subject merchandise for a period of at least five consecutive years; (2) whether, for any exporter or producer that the Secretary previously has determined to have received any net countervailable subsidy on the subject merchandise, the exporter or producer agrees in writing to their immediate reinstatement in the order, if the Secretary concludes that the exporter or producer, subsequent to the revocation, has received any net countervailable subsidy on the subject merchandise; and (3) whether the continued application of the countervailing duty order is otherwise necessary to offset subsidization.

A request for revocation of an order in part must address these four elements, per 19 CFR 351.222(e)(2)(iii). The company requesting the revocation must do so in writing and submit the following statements with the request: (1) The company's certification that it has not applied for or received any net countervailable subsidy on the subject merchandise for a period of at least five consecutive years; (2) the company's certification that it will not apply for or receive any net countervailable subsidy on the subject merchandise from any program the Secretary has found countervailable; (3) the company's certification that during each of the consecutive years, the company sold the subject merchandise to the United States in commercial quantities; and (4) the company's agreement in writing to their immediate reinstatement in the order, if the Secretary concludes that the exporter or producer, subsequent to the revocation, has received any net countervailable subsidy on the subject merchandise.

We preliminarily find that the request from Pasta Lensi meets all of the criteria under 19 CFR 351.222. Pasta Lensi's revocation request includes the necessary certifications in accordance with 19 CFR 351.222(e)(2)(iii). With regard to the criteria of 19 CFR 351.222(e)(2)(iii)(A), our preliminary results show that Pasta Lensi did not receive countervailable subsidies during the POR and, therefore, the net subsidy rate for Pasta Lensi is zero. *See* ''Preliminary Results of Review'' section, below. In addition, Pasta Lensi had zero net subsidy rates in the four previous administrative reviews in which it was involved. *See Certain Pasta from Italy: Final Results of the Eighth Countervailing Duty Administrative Review*, 70 FR 37084 (June 28, 2005), covering the period January 1, 2003, through December 31, 2003; *Certain Pasta from Italy: Final Results of the Seventh Countervailing Duty Administrative Review*, 69 FR 70657 (December 7, 2004), covering the period January 1, 2002, through December 31, 2002; *Certain Pasta from Italy: Final Results of the Sixth Countervailing Duty Administrative Review*, 68 FR 48599 (August 14, 2003), covering the period January 1, 2001, through December 31, 2001; and *Certain Pasta from Italy: Final Results of the Fifth Countervailing Duty Administrative Review*, 67 FR 52452 (August 12, 2002), covering the period January 1, 2000, through December 31, 2000.

Based on our examination of the data submitted by Pasta Lensi, we preliminarily find that Pasta Lensi qualifies for revocation of the order pursuant to 19 CFR 351.222(c)(3) and 351.222(e)(2)(iii). We also preliminarily find that the order with respect to merchandise produced and exported by Pasta Lensi should be revoked. If these preliminary findings are affirmed in our final results, we will revoke the order, in part, with respect to pasta from Italy produced and exported by Pasta Lensi. In accordance with 19 CFR 351.222(f)(3), we will terminate the suspension of liquidation for pasta produced and exported by Pasta Lensi that was entered, or withdrawn from warehouse, for consumption on or after January 1, 2005, and will instruct U.S. Customs and Border Protection (''CBP'') to refund any cash deposits for such entries.

**Partial Rescission**

The Department's regulations at 19 CFR 351.213(d)(1) provide that the Department will rescind an administrative review, in whole or in part, if a party that requested a review withdraws the request within 90 days of the date of publication of the notice of initiation of the requested review. On September 15, 2005, Laporta withdrew its request for review. On September 29, 2005, Tomasello withdrew its request for review. On October 25, 2005, Pallante withdrew its request for review. All parties submitted their withdrawal requests within the 90-day deadline. No other party requested a review of Pallante's, Laporta's, or Tomasello's sales.

Therefore, because these withdrawal requests were timely filed, and because no other interested party requested that they be reviewed, we rescinded this review with respect to Pallante, Tomasello, and Laporta in accordance with 19 CFR 351.213(d)(1). *See Certain Pasta from Italy: Notice of Partial Rescission of Countervailing Duty Administrative Review*, 70 FR 59723 (October 13, 2005); *Certain Pasta from Italy: Notice of Partial Rescission of Countervailing Duty Administrative Review*, 70 FR 61788 (October 26, 2005); and *Certain Pasta from Italy: Notice of Partial Rescission of Countervailing Duty Administrative Review*, 70 FR 69515 (November 16, 2005).

We have instructed CBP to liquidate any entries from Pallante, Laporta, and Tomasello during the POR and to assess countervailing duties at the rate that was applied at the time of entry.

**Subsidies Valuation Information**

*Allocation Period*

Pursuant to 19 CFR 351.524(b), non-recurring subsidies are allocated over a period corresponding to the AUL of the renewable physical assets used to produce the subject merchandise. The Department's regulations create a rebuttable presumption that the AUL will be taken from the U.S. Internal Revenue Service's 1977 Class Life Asset Depreciation Range System (''IRS Tables''). *See* 19 CFR 351.524(d)(2). For pasta, the IRS Tables prescribe an AUL of 12 years. None of the responding companies or interested parties objected to this allocation period. Therefore, we have used the 12-year allocation period for all respondents.

*Attribution of Subsidies*

Pursuant to 19 CFR 351.525(b)(6), the Department will attribute subsidies received by certain companies to the combined sales of those companies. Based on our review of the responses, we preliminarily find that ''cross-ownership'' exists with respect to certain companies, as described below, and we have attributed subsidies accordingly:

*Pasta Lensi:* Pasta Lensi is an Italian producer and exporter of pasta. As further discussed in the April 3, 2006, proprietary memorandum entitled ''Pasta Lensi S.r.l.—Attribution Issues,'' which is on file in the Department's CRU, Pasta Lensi has reported that IAPC Leasing S.r.l., another company owned by the parent company of Pasta Lensi, did not receive any benefits under the programs being examined. Therefore, there are no benefits to this company that require attribution. Moreover, IAPC Leasing S.r.l. does not produce subject merchandise. Thus, we are attributing any subsidies received to Pasta Lensi's sales only.

*Corticella/Combattenti:* Corticella/Combattenti is an Italian producer and exporter of pasta. As further discussed in the April 3, 2006, memorandum entitled ''Attribution Issues: Corticella Molini e Pastifici S.p.a. and Pasta Combattenti S.p.a.,'' which is on file in the Department's CRU, Corticella/

Combattent has reported that affiliates Certosa, CLC, and the parent company Euricom, did not receive any benefits under the programs being examined. Therefore, there are no benefits to these companies that require attribution. Thus, we are attributing any subsidies received to the combined sales of Corticella and Combattenti.

*Atar:* Atar has reported that it has no affiliates or cross-ownership. Thus, we are attributing any subsidies received to Atar's sales only.

*Discount Rates*

Pursuant to 19 CFR 351.524(d)(3)(i)(B), we used the national average cost of long-term, fixed-rate loans as a discount rate for allocating non-recurring benefits over time because no company for which we need such discount rates took out any loans in the years in which the government agreed to provide the subsidies in question. Consistent with past practice in this proceeding, for years prior to 1995, we used the Bank of Italy reference rate adjusted upward to reflect the mark-up an Italian commercial bank would charge a corporate customer. *See, e.g., Certain Pasta from Italy: Preliminary Results and Partial Recision of the Eighth Countervailing Duty Administrative Review*, 70 FR 17971 (April 8, 2005) (decision unchanged in the final results, *Certain Pasta from Italy: Final Results of the Eighth Countervailing Duty Administrative Review*, 70 FR 37084 (June 28, 2005)). For benefits received in 1995 and later, we used the Italian Bankers' Association interest rate, increased by the average spread charged by banks on loans to commercial customers plus an amount for bank charges. *See* Memorandum the File, ''Calculations for the Preliminary Results for Corticella Molini e Pastifici S.p.a. and Pasta Combattenti S.p.a.'' (April 3, 2006) (''*Corticella/Combattenti Calculation Memorandum*'')

**Analysis of Programs**

*I. Program Preliminarily Determined to be Countervailable*

A. Export Marketing Grants Under Law 304/90

Under Law 304/90, the GOI provided grants to promote the sale of Italian food and agricultural products in foreign markets. The grants were given for pilot projects aimed at developing links and integrating marketing efforts between Italian food producers and foreign distributors. The emphasis was on assisting small and medium-sized enterprises.

Corticella received a grant under this program in 1993 to assist it in establishing a sales office and network in the United States. No other respondent covered by this review received benefits under this program during the POR.

In the *Final Affirmative Countervailing Duty Determination: Certain Pasta from Italy*, 61 FR 30288 (June 14, 1996) (''*Pasta Investigation*''), the Department determined that these export marketing grants confer a countervailable subsidy within the meaning of section 771(5) of the Act. They are a direct transfer of funds from the GOI bestowing a benefit in the amount of the grant. *See* Sections 771(5)(D)(i) and (E) of the Act. Also, these grants were found to be specific within the meaning of section 771(5A)(B) of the Act because their receipt was contingent upon export performance. In this review, neither the GOI nor the responding companies have provided new information that would warrant reconsideration of our determination that these grants confer a countervailable subsidy.

Also in the *Pasta Investigation*, the Department treated these export marketing grants as non-recurring. No new information has been placed on the record of this review that would cause us to depart from this treatment.

Because the amount of the grant that was approved by the GOI exceeded 0.5 percent of Corticella's exports to the United States in the year of approval, we used the grant methodology described in 19 CFR 351.524(d) to allocate the benefit over the AUL. We divided the benefit attributable to the POR by the value of the companies' total exports to the United States in the POR.

On this basis, we preliminarily determine the countervailable subsidy from these Law 304/90 export marketing grants to be 0.12 percent ad valorem for Corticella/Combattenti. *See* the *Corticella/Combattenti Calculation Memorandum.*

B. Social Security Reductions and Exemptions—Sgravi (Article 44 of Law 448/01)

Italian law allows companies, particularly those located in the *Mezzogiorno* region (southern Italy), to use a variety of exemptions from and reductions (sgravi) of payroll contributions that employers make to the Italian social security system for health care benefits, pensions, etc. The sgravi benefits are regulated by a complex set of laws and regulations, and are sometimes linked to conditions such as creating more jobs. We have found in past segments of this proceeding that the benefits under some of these laws (*e.g.*, Laws 183/76 and 449/97) are available only to companies located in the *Mezzogiorno* and other disadvantaged regions. Other laws (*e.g.*, Laws 407/90 and 863/84) provide benefits to companies all over Italy, but the level of benefits is higher for companies in the south than for companies in other parts of the country.

The law identified as having provided countervailable sgravi benefits during the POR is the following: Article 44 of Law 448/01.

In the instant review, no party in this proceeding challenged our past determinations in the *Pasta Investigation* and subsequent reviews that sgravi benefits were countervailable for companies located within the *Mezzogiorno* region. Additionally, no new information or evidence of changed circumstances was received that would warrant reconsideration of these past determinations.

Article 44 of Law 448/01 is provided to encourage employment in the *Mezzogiorno* region by reducing the amount of the portion of social security contributions paid by the employer on behalf of the employee. Effectively, the government undertakes to pay a portion of the social security amount on behalf of the employer. This benefit is provided for three years after the hire of a new employee in the *Mezzogiorno* region. To receive the benefit, companies must increase their number of employees from that in existence as of December 31, 2001. This program was terminated on January 1, 2003. Atar is located in the *Mezzogiorno* region and made use of this program.

We find that this program confers a countervailable subsidy because the GOI has foregone tax revenues that are otherwise due pursuant to section 771(5)(D)(ii) of the Act, which provided a benefit to Atar in the amount of the revenue forgone, pursuant to section 771(5)(E) of the Act. This program is specific within the meaning of section 771(5A)(D)(iv) of the Act because the program is limited to the *Mezzogiorno* region of Italy. On this basis, we preliminarily determine the countervailable subsidy from Article 44 of Law 448/01 to be 0.20 percent ad valorem for Atar. *See* Memorandum the File, ''Calculations for the Preliminary Results for Atar S.r.l.'' (April 3, 2006).

*II. Programs Preliminarily Determined To Be Not Countervailable*

A. Social Security Reductions and Exemptions—Sgravi (Law 407/90, Law 223/91, Law 337/90, and Article 120 of Law 388/00)

Other various laws identified as having also provided sgravi benefits

during the POR are the following: Law 407/90 (Pasta Lensi), Law 223/91 (Pasta Lensi and Combattenti), Law 337/90 (Corticella), and Article 120 of Law 388/00 (Pasta Lensi, Corticella, Combattenti, and Atar).

In the instant review, no party in this proceeding challenged our past determinations in the *Pasta Investigation* and subsequent reviews that sgravi benefits were not countervailable for companies located outside of the *Mezzogiorno* region because the program was generally available throughout Italy at a lower rate and therefore, not specific within the meaning of section 771(5A) of the Act. Moreover, under such circumstances, there is no benefit under 19 CFR 351.503(d)(1). Additionally, no new information or evidence of changed circumstances was received that would warrant reconsideration of our past determinations. Therefore, because Pasta Lensi and Corticella/Combattenti are not located in the *Mezzogiorno* region, we preliminarily find that these companies did not receive countervailable subsidies under Law 407/90, Law 223/91, and Law 337/90 during the POR.

Unlike these other sgravi programs, Article 120 of Law 388/00 (fiscalizzazione program) is a nationwide sgravi program that provides an equivalent level of deductions throughout Italy and is not specific to the *Mezzogiorno* region or to the pasta industry pursuant to section 771(5A) of the Act. Article 120 of Law 388/00 provides a deduction of certain social security payments related to health care or insurance. The government takes over a minimal amount of the payments for social contributions which are owed to the Instituto Nazionale Previdenza Sociale (''INPS''). Therefore, we preliminarily find that Article 120 of Law 388/00 is not a countervailable subsidy because the subsidy is not specific. Accordingly, we determine that Atar, Pasta Lensi, and Corticella/Combattenti did not receive countervailable subsidies under this program during the POR.

B. Brescia Chamber of Commerce Fairs and Exhibition Grants

The Brescia Chamber of Commerce provided grants to small and medium-sized enterprises, artisan and agricultural enterprises, and pools and cooperatives in the province of Brescia for their direct participation in fairs and exhibitions abroad during calendar year 2004.

Pasta Lensi was the only respondent in this proceeding that reported receiving grants from the Brescia Chamber of Commerce. Specifically, Pasta Lensi reported receiving a grant in 2004 for a fair in Germany. However, because there is no indication that the Brescia Chamber of Commerce constitutes a ''public entity'' under section 771(5)(B)(iii) of the Act, or that the Brescia Chamber of Commerce was entrusted or directed by the GOI to provide the grant, we preliminarily determine that this grant does not confer a countervailable subsidy.

C. Tremonti Law 383/01 (Formerly Law 357/94 and 489/94)

Tremonti Law 383/01 allowed for a deduction from taxable income of 50 percent of the difference between investments in new plant and equipment and the average investment rate for the preceding five years. Pasta Lensi has stated that one of its affiliates, IAPC Leasing, claimed a deduction for tax benefits under this law on its 2003 tax return but that no benefits were received in the POR because IAPC Leasing was in a tax loss position. Regardless of whether there was a benefit during the POR, we find that there is no evidence on the record that indicates that any subsidies under this program are specific pursuant to section 771(5A) of the Act. Therefore, we preliminarily determine that this program did not confer a countervailable subsidy.

*III. Programs Preliminarily Determined To Not Be Used*

We examined the following programs and preliminarily determine that the producers and/or exporters of the subject merchandise under review did not apply for or receive benefits under these programs during the POR:

A. *Industrial Development Grants Under Law 488/92*
B. *Industrial Development Loans Under Law 64/86*
C. *European Regional Development Fund Grants*
D. *Law 236/93 Training Grants*
E. *Law 1329/65 Interest Contributions (Sabatini Law) (Formerly Lump-Sum Interest Payment Under the Sabatini Law for Companies in Southern Italy)*
F. *Development Grants Under Law 30 of 1984*
G. *Law 908/55 Fondo di Rotazione Iniziative Economiche (Revolving Fund for Economic Initiatives) Loans*
H. *Industrial Development Grants Under Law 64/86*
I. *Law 317/91 Benefits for Innovative Investments*
J. *Brescia Chamber of Commerce Training Grants*
K. *Ministerial Decree 87/02*
L. *Law 10/91 Grants to Fund Energy Conservation*
M. *Export Restitution Payments*
N. *Export Credits Under Law 227/77*
O. *Capital Grants Under Law 675/77*
P. *Retraining Grants Under Law 675/77*
Q. *Interest Contributions on Bank Loans Under Law 675/77*
R. *Preferential Financing for Export Promotion Under Law 394/81*
S. *Urban Redevelopment Under Law 181*
T. *Industrial Development Grants under Law 183/76*
U. *Interest Subsidies Under Law 598/94*
V. *Duty-Free Import Rights*
W. *European Social Fund Grants*
X. *Law 113/86 Training Grants*
Y. *European Agricultural Guidance and Guarantee Fund*
Z. *Law 341/95 Interest Contributions on Debt Consolidation Loans (Formerly Debt Consolidation Law 341/95)*
AA. *Interest Grants Financed by IRI Bonds*
BB. *Grant Received Pursuant to the Community Initiative Concerning the Preparation of Enterprises for the Single Market (PRISMA)*

*IV. Programs Preliminarily Determined To Have Been Terminated*

We examined the following programs at verification and preliminarily determine they have been terminated prior to the POR and that there will be no remaining subsidy benefits from these programs after this POR.

A. *Regional Tax Exemptions Under IRAP*
B. *VAT Reductions Under Laws 64/86 and 675/55*
C. *Corporate Income Tax (IRPEG) Exemptions*
D. *Remission of Taxes on Export Credit Insurance Under Article 33 of Law 227/77*
E. *Export Marketing Grants Under Law 304/90*
F. *Tremonti Law 383/01*

**Verification**

In accordance with 19 CFR 351.222(f)(2)(ii) and 351.307(b)(1)(iii), we verified information submitted by the GOI for Pasta Lensi, Atar, Corticella, and Combattenti in Rome, Italy on February 13–15, 2006. *See* ''Verification of the Questionnaire Responses of the Government of Italy in the 9th Administrative Review,'' dated March 31, 2006. We verified information submitted by Pasta Lensi in Verolanuova, Italy on February 17 and 20, 2006. *See* ''Verification of the Questionnaire Responses of Pasta Lensi S.r.l. in the 9th Administrative Review,'' dated March 31, 2006.

**Preliminary Results of Review**

In accordance with 19 CFR 351.221(b)(4)(i), we calculated an individual subsidy rate for Atar and Corticella/Combattenti. Pasta Lensi had no countervailable subsidies. For the period January 1, 2004, through December 31, 2004, we preliminarily find the net subsidy rates for the producers/exporters under review to be those specified in the chart shown below:

| Producer/exporter | Net subsidy rate |
|---|---|
| Pasta Lensi S.r.l ..... | 0.00 percent. |
| Corticella Molini e Pastifici S.p.a./ Pasta Combattenti S.p.a. | 0.12 percent (*de minimis*). |
| Atar S.r.l ..... | 0.20 percent (*de minimis*). |

If the final results of this review remain the same as these preliminary results, because the countervailing duty rates for all of the above-noted companies are less than 0.5 percent and, consequently are either zero or *de minimis*, we will instruct CBP to liquidate entries during the period January 1, 2004, through December 31, 2004, without regard to countervailing duties in accordance with 19 CFR 351.106(c)(1). The Department will issue appropriate instructions directly to CBP within 15 days of publication of these final results of this review.

For all other companies that were not reviewed (except Barilla G. e R. F.lli S.p.A. and Gruppo Agricoltura Sana S.r.l., which are excluded from the order), the Department has directed CBP to assess countervailing duties on all entries between January 1, 2004, and December 31, 2004, at the rates in effect at the time of entry.

The Department also intends to instruct CBP to collect cash deposits of estimated countervailing duties. For the companies noted above (except Pasta Lensi) the cash deposit rate is zero because each company's rate is *de minimis*. If the revocation in part becomes final for Pasta Lensi, suspension of liquidation will cease and, consequently, no duties will be collected.

For all non-reviewed firms (except Barilla G. e R. F.lli S.p.A. and Gruppo Agricoltura Sana S.r.l., which are excluded from the order), we will instruct CBP to collect cash deposits of estimated countervailing duties at the most recent company-specific or ''all others'' rate applicable to the company. These 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(c)(ii), interested parties may submit written arguments in case briefs within 30 days of the date of publication of this notice. Rebuttal briefs, limited to issues raised in case briefs, may be filed no later than five days after the date of filing the case briefs, in accordance with 19 CFR 351.309(d). Parties who submit briefs in this proceeding should provide a summary of the arguments not to exceed five pages and a table of statutes, regulations, and cases cited. Copies of case briefs and rebuttal briefs must be served on interested parties in accordance with 19 CFR 351.303(f).

Interested parties may request a hearing within 30 days after the date of publication of this notice, pursuant to 19 CFR 351.310(c). Any hearing, if requested, will be held two days after the scheduled date for submission of rebuttal briefs.

The Department will publish a notice of the final results of this administrative review within 120 days from the publication of these preliminary results, in accordance with section 751(a)(3) of the Act.

We are issuing and publishing these results in accordance with sections 751(a)(1) and 777(i)(1) of the Act and 19 CFR 351.221(b)(4).

Dated: March 31, 2006.

**David M. Spooner,**

*Assistant Secretary for Import Administration.*

[FR Doc. E6–5031 Filed 4–5–06; 8:45 am]

BILLING CODE 3510–DS–P

## DEPARTMENT OF COMMERCE

### International Trade Administration

**[C–489–502]**

### Notice of Preliminary Results of Countervailing Duty Administrative Review: Certain Welded Carbon Steel Standard Pipe from Turkey

**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 welded carbon steel standard pipe from Turkey for the period January 1, 2004, through December 31, 2004. For information on the net subsidy rate for the reviewed company, see the ''Preliminary Results of Review'' section, infra. If the final results remain the same as the preliminary results of this review, we will instruct U.S. Customs and Border Protection (''CBP'') to assess countervailing duties as detailed in the ''Preliminary Results of Review'' section, *infra*. Interested parties are invited to comment on these preliminary results. (*See* the ''Public Comment'' section, *infra*).

**EFFECTIVE DATE:** April 6, 2006.

**FOR FURTHER INFORMATION CONTACT:** Kristen Johnson, AD/CVD Operations, Office 3, Import Administration, International Trade Administration, U.S. Department of Commerce, Room 4014, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–4793.

**SUPPLEMENTARY INFORMATION:**

**Background**

On March 7, 1986, the Department published in the **Federal Register** the CVD order on certain welded carbon steel pipe and tube products from Turkey. *See Countervailing Duty Order: Certain Welded Carbon Steel Pipe and Tube Products from Turkey*, 51 FR 7984 (March 7, 1986) (''*Turkey Pipe Order*''). 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 a timely request for review from the Borusan Group (''Borusan''), a Turkish producer and exporter of subject merchandise. On April 22, 2005, the Department initiated an administrative review of the CVD order on certain welded carbon steel standard pipe from Turkey, covering the period January 1, 2004, through December 31, 2004. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 70 FR 20862 (April 22, 2005).

On June 13, 2005, the Department issued a questionnaire to Borusan and the Government of the Republic of Turkey (''GOT''); we received their questionnaire responses on August 22, 2005. On October 26, 2005, we issued supplemental questionnaires to Borusan and the GOT. We received the supplemental questionnaire response from Borusan on November 25, 2005,

and from the GOT on November 28, 2005.

On November 7, 2005, the Department published in the **Federal Register** an extension of the deadline for the preliminary results. *See Certain Welded Carbon Steel Standard Pipe from Turkey: Extension of Time Limit for Preliminary Results of Countervailing Duty Administrative Review*, 70 FR 67455 (November 7, 2005).

On February 15 through February 23, 2006, we conducted verification in Ankara, Turkey, of the questionnaire responses submitted by the GOT, and in Istanbul, Turkey, of the questionnaire responses submitted by Borusan.

In accordance with 19 CFR 351.213(b), this review covers only those producers or exporters of the subject merchandise for which a review was specifically requested. The only company subject to this review is Borusan. During the period of review (''the POR''), Borusan was comprised of Borusan Birlesik Boru Fabrikalari A.S. (''BBBF''), Mannesmann Boru Endustrisi T.A.S. (''MB''), Borusan Mannesmann Boru Sanayi ve Ticaret A.S. (''BMB''), and Istikbal Ticaret T.A.S. (''Istikbal''). This review covers fourteen programs.

## Scope of the Order

The products covered by this order are certain welded carbon steel pipe and tube with an outside diameter of 0.375 inch or more, but not over 16 inches, of any wall thickness (pipe and tube) from Turkey. These products are currently provided for under the Harmonized Tariff Schedule of the United States (''HTSUS'') as item numbers 7306.30.10, 7306.30.50, and 7306.90.10. Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the merchandise is dispositive.

## Period of Review

The period for which we are measuring subsidies is January 1, 2004, through December 31, 2004.

## Company History

As noted above, Borusan is composed of BBBF, MB, BMB, and Istikbal. During the POR, BBBF produced the subject merchandise, which was first sold to Istikbal, an export sales company, and then resold to an unaffiliated customer in the United States. MB ceased production of the subject merchandise in November 2003, and a year later, was merged into BBBF on November 30, 2004. BBBF was subsequently renamed Borusan Mannesmann Boru Sanayi ve Ticaret A.S. (*i.e.*, BMB) on December 13, 2004, and continued to produce the subject merchandise and export the merchandise through Istikbal.

Prior to the November 2004 merger, BBBF and MB were affiliated through their parent company, Borusan Mannesmann Boru Yatirim Holding A.S. (''BMBYH''). BMBYH, a holding company, is majority–owned by Borusan Holding A.S.[1] Post merger and company name change, BMB continued to be owned by BMBYH. During the POR, Istikbal was majority–owned by Borusan Holding A.S.[2]

## Subsidies Valuation Information

### Benchmark Interest Rates

To determine whether government–provided loans under review conferred a benefit, the Department uses, where possible, company–specific interest rates for comparable commercial loans. See 19 CFR 351.505(a). Borusan provided the interest rates it paid on short–term Turkish Lira (''TL'')-denominated and foreign currency (''FX'')-denominated commercial loans. We preliminarily find that the company–specific FX–denominated short–term loans are comparable to the export credit FX–denominated loans against which Borusan paid interest during the POR. However, Borusan's short–term TL–denominated commercial loans, outstanding during the POR, were revolving, open account loans and not comparable to the maturity of the export financing loans that Borusan received from the Export Credit Bank of Turkey (''Export Bank'').

Where no company–specific benchmark interest rates are available, the Department's regulations direct us to use a national average interest rate as the benchmark. *See* 19 CFR 351.505(a)(3)(ii). According to the GOT, however, there is no official national average short–term interest rate available. *See* the March 31, 2006, Memorandum to the File concerning the Verification of the Questionnaire Responses Submitted by the Government of the Republic of Turkey (''GOT Verification Report'') at 3.[3] Therefore, we have calculated the benchmark interest rate for short–term TL–denominated loans based on short–term interest rate data for 2004, as reported by *The Economist*. Specifically, from issues of *The Economist*, we sourced a short–term interest rate for each quarter of 2004.[4] We then simple averaged those quarterly rates to calculate an annual short–term interest rate for Turkey. *See* the March 31, 2006, Memorandum to the File concerning the Calculations for the Preliminary Results of the Review of the Countervailing Duty Order on Certain Welded Carbon Steel Standard Pipe from Turkey (''Preliminary Calculations''). This methodology is consistent with the Department's practice. *See e.g.*, *Certain Welded Carbon Steel Pipes and Tubes from Turkey; Final Results of Countervailing Duty Administrative Review*, 65 FR 49230 (August 11, 2000) (''*1998 Pipe Final*''); and *Carbon and Certain Alloy Steel Wire Rod from Turkey; Final Negative Countervailing Duty Determination*, 67 FR 55815 (August 30, 2002) (''*Wire Rod*''), and accompanying Issues and Decision Memorandum, at 3–4 (''*Wire Rod Memorandum*'').

Further, it is the Department's practice to normally compare effective interest rates rather than nominal rates in making the loan comparison. See Countervailing Duties; Final Rule, 63 FR 65348, 65362 (November 25, 1998) (''*Preamble*''). ''Effective'' interest rates are intended to take account of the actual cost of the loan, including the amount of any fees, commissions, compensating balances, government charges, or penalties paid in addition to the ''nominal'' interest rate.

The short–term TL interest rates sourced from *The Economist* do not include commissions or fees paid to commercial banks, *i.e.*, they are nominal rates. *See Wire Rod Memorandum* at 4. For Pre–Shipment Export Credits, discussed *infra*, commercial banks, through which the loans are extended, can add a maximum 2.0 percent to the interest rate for TL–denominated loan as their commission. *See* GOT Verification Report at 4. Therefore, for these preliminary results, we compared the benchmark TL interest rate, inclusive of the 2.0 percent commission, to the interest rate that Borusan was charged on the Pre–Shipment Export Credit TL–denominated loans to make the comparison on an effective interest rate basis.[5] Where a company–specific benchmark interest rate was used[6] to

[1] Mannesmannrohren-Werke A.G., a publicly traded company in Germany, also has ownership in BMBYH.

[2] Borusan Holding A.S. is owned by the family of Asim Kocabiyik, the company's founder.

[3] A public version of the verification report is available on the public file in the Department's Central Records Unit (room B-099).

[4] In each issue, *The Economist* reports short-term interest date on a percentage per annum basis for select countries.

[5] Borusan also received TL-denominated export credit loans under the Foreign Trade Companies Short-Term Export Credit program and the Pre-Export Credit program (*see infra*). However, those loans are extended directly by Turkey's Export Bank and, therefore, not subject to a intermediary bank commission charge.

[6] For these preliminary results, we used a company-specific benchmark interest rate to

determine whether government–provided export loans under review conferred a benefit, that comparison of interest rates was also made on an effective basis.

**Analysis of Programs**

I. Programs Preliminarily Determined To Be Countervailable

A. *Deduction from Taxable Income for Export Revenue*

Addendum 4108 of Article 40 of the Income Tax Law allows companies that operate internationally to claim, directly on their corporate income tax returns, a tax deduction equal to 0.5 percent of the foreign exchange revenue earned from exports and other international activities.[7] The income tax deduction for export earnings may either be taken as a lump sum or be used to cover certain undocumented expenses, which were incurred through international activities, that would otherwise be non–deductible for tax purposes (*e.g.*, expenses paid in cash, such as for lodging, gasoline, and food).

Consistent with *Wire Rod*, we preliminarily find that this tax deduction is a countervailable subsidy. See *Wire Rod Memorandum* at 4; *see also Certain Welded Carbon Steel Pipe and Tube and Welded Carbon Steel Line Pipe from Turkey; Final Results and Partial Rescission of Countervailing Duty Administrative Review*, 63 FR 18885, 18886–87 (April 16, 1998) (''*1996 Pipe Final*''). The deduction provides a financial contribution within the meaning of section 771(5)(D)(ii) of the Tariff Act of 1930, as amended (''the Act'') because it represents revenue forgone by the GOT. The deduction provides a benefit in the amount of the tax savings to the company pursuant to section 771(5)(E) of the Act. It is specific under section 771(5A)(B) of the Act because its receipt is contingent upon export performance. In this review, no new information or evidence of changed circumstances has been submitted to warrant reconsideration of the Department's prior findings.

During the POR, BBBF, MB, and Istikbal filed separate corporate income tax returns for tax year 2003. However, only Istikbal utilized the deduction for export earnings on its 2003 tax return. BBBF and MB did not have direct exports of merchandise during 2003 and, therefore, could not claim the deduction for export earnings on their respective 2003 tax returns.

The Department typically treats a tax deduction as a recurring benefit in accordance with 19 CFR 351.524(c)(1). To calculate the countervailable subsidy rate for this program, we calculated the tax savings realized by Istikbal in 2004, as a result of the deduction for export earnings. We then divided that benefit by Borusan's total export sales for 2004. On this basis, we preliminarily determine the net countervailable subsidy for this program to be 0.09 percent *ad valorem*.

B. *Pre–Shipment Export Credits*

Turkey's Export Bank provides short–term pre–shipment export loans to exporters through intermediary commercial banks.[8] This loan program is designed to support export–related firms. Loans are made to exporters who commit to export within a specified period of time. Generally, loans are extended for a period of up to 180 days, and cover up to 100 percent of the FOB export value. These loans are denominated in either TL or FX. The interest rates charged on these pre–shipment loans are set by the Export Bank. In several previous determinations, the Department found this program to be countervailable because receipt of the loans is contingent upon export performance and the interest rates paid on these loans are less than the amount the recipient would pay on comparable commercial loans. *See 1998 Pipe Final*, 65 FR 49231; and *Certain Pasta from Turkey: Final Results of Countervailing Duty Administrative Review*, 66 FR 64398 (December 13, 2001) (''*1999 Pasta from Turkey*''), and accompanying Issues and Decision Memorandum, at 3–4 (''*1999 Pasta Memorandum*'').

We also found that the pre–shipment loan program is an untied export loan program because the loans are not specifically tied to a particular destination at the time of approval and the borrower only has to show that the export commitment was satisfied (*i.e.*, exports amounting to the FOB value of the credit) during the credit period to close out the loan with the bank. *See e.g.*, *Wire Rod Memorandum* at 5. In this review, no new information or evidence of changed circumstances has been submitted to warrant reconsideration of the Department's prior findings. *See* GOT Verification Report at 3.

During the POR, BBBF paid interest against pre–shipment export loans denominated in both TL and FX. MB paid interest against pre–shipment TL–denominated loans.

Pursuant to section 771(5)(E)(ii) of the Act, a benefit shall be treated as conferred ''in the case of a loan, if there is a difference between the amount the recipient of the loan pays on the loan and the amount the recipient would pay on a comparable commercial loan that the recipient could actually obtain on the market.'' To calculate the amount of interest the recipient would pay on a comparable TL–denominated commercial loan, in absence of a company–specific interest rate on comparable TL–denominated commercial loans, we have used, as the benchmark rate, a simple average of the 2004 quarterly short–term interest rates for Turkey as reported by *The Economist*. *See* ''Benchmark Interest Rates'' section, *supra*, for more information. To calculate the amount of interest the recipient would pay on a comparable FX–denominated commercial loan, we have used a company–specific interest rate as the benchmark rate. *See Id*.

Using these benchmark rates, we continue to find the pre–shipment export loans countervailable because the interest rate charged is less than the rate for comparable commercial loans that the company could actually obtain on the market. Therefore, the loans constitute a financial contribution in the form of a direct transfer of funds from the GOT, under section 771(5)(D)(i) of the Act. A benefit exists under section 771(5)(E)(ii) of the Act in the amount of the difference between the payments of interest that BBBF and MB made on their loans during the POR and the payments the each company would have made on comparable commercial loans. The program is also specific in accordance with section 771(5A)(B) of the Act because receipt of the loans is contingent upon export performance.

To determine the benefit, we calculated the countervailable subsidy as the difference between the actual interest paid on the pre–shipment loans during the POR and the interest that would have been paid using the benchmark interest rates. We then added the benefits and divided the sum by Borusan's total export sales for 2004. On this basis, we preliminarily determine the countervailable subsidy under this program to be 0.07 percent ad valorem.

C. *Foreign Trade Companies Short–Term Export Credits*[9]

conduct the loan comparison for loans denominated in a foreign currency.

[7] These actions include construction, repair, installation, and transportation activities that occur abroad.

[8] As discussed in the ''Benchmark Interest Rates'' section, *supra*, the intermediary bank can add a commission fee rate to the loan program's interest rate, which is set by the Export Bank.

[9] This program was previously known as ''Export Credit Through the Foreign Trade Corporate Companies Rediscount Credit Facility'' or ''Foreign Trade Corporate Companies Credit Facility.''

The Foreign Trade Company (''FTC'') loan program was implemented to assist large export trading companies with their export financing needs. This program is specifically designed to benefit Foreign Trade Corporate Companies (''FTCC'') and Sectoral Foreign Trade Companies (''SFTC'').[10] An FTCC is a company whose export performance was at least U.S. $75 million in the previous year. For eligible companies, the Export Bank will provide short–term export credits based on their past export performance. Under this credit program, the Export Bank extends short–term export credits directly to exporters in TL and FX, up to 100 percent of FOB export commitment. The program's interest rates are set by the Export Bank and the maturity of the loans is usually 180 days. To qualify for a FTC loan, in addition to submitting the necessary application documents, a company must provide a bank letter of guarantee, equivalent to the loan's principal and interest amount.

Istikbal acquired FTCC status in April 2003 and was the only Borusan company to receive FTC credits. During the POR, Istikbal paid interest against FTC loans denominated in both TL and FX.

Consistent with previous determinations, we preliminarily find that these loans confer a countervailable subsidy within the meaning of section 771(5) of the Act. *See e.g.*, *Wire Rod Memorandum* at 6–7. The loans constitute a financial contribution in the form of a direct transfer of funds from the GOT, under section 771(5)(D)(i) of the Act. A benefit exists under section 771(5)(E)(ii) of the Act in the amount of the difference between the payments of interest that Istikbal made on its loans during the POR and the payments the company would have made on comparable commercial loans. The program is also specific in accordance with section 771(5A)(B) of the Act because receipt of the loans is contingent upon export performance.

Further, like the pre–shipment loans, the FTC loans are not tied to a particular export destination. *See* GOT Verification Report at 3. Therefore, we have treated this program as an untied export loan program which renders it countervailable regardless of whether the loans were used for exports to the United States. *See Wire Rod Memorandum* at 6–7.

Pursuant to 19 CFR 351.505(a)(1), we have calculated the benefit as the difference between the payments of interest that Istikbal made on its FTC loans during the POR and the payments the company would have made on comparable commercial loans. In accordance with section 771(6)(A) of the Act, we subtracted from the benefit amount the fees which Istikbal paid to commercial banks for the required letters of guarantee. We then divided the resulting benefit by Borusan's total export value for 2004. On this basis, we preliminarily find that the countervailable subsidy for this program is 0.09 percent *ad valorem*.[11]

D. *Pre–Export Credits*[12]

This program is similar to the FTC credit program described above; however, companies classified as either FTC or SFTC are not eligible for pre–export loans. Under the pre–export credit program, a company's past export performance is considered in evaluating a company's eligibility and establishing the company's credit limit. Like FTC loans, the Export Bank directly extends to companies pre–export loans, which are denominated in either TL or FX and have a maturity of 180 days.[13] To quality for a pre–export loan, in addition to submitting the necessary application documents, a company must provide a bank letter of guarantee, equivalent to the loan's principal and interest amount. During the POR, BBBF paid interest against pre–export loans that were denominated in both TL and FX.

Consistent with previous determinations, we preliminarily find that these loans confer a countervailable subsidy within the meaning of section 771(5) of the Act. *See e.g.*, *Wire Rod Memorandum* at 7–8. The loans constitute a financial contribution in the form of a direct transfer of funds from the GOT, under section 771(5)(D)(i) of the Act. A benefit exists under section 771(5)(E)(ii) of the Act in the amount of the difference between the payments of interest that BBBF made on its loans during the POR and the payments the company would have made on comparable commercial loans. The program is also specific in accordance with section 771(5A)(B) of the Act because receipt of the loans is contingent upon export performance.

Further, these loans are not tied to a particular export destination. *See* GOT Verification Report at 3. Therefore, we have treated this program as an untied export loan program which renders it countervailable regardless of whether the loans were used for exports to the United States.

Pursuant to 19 CFR 351.505(a)(1), we have calculated the benefit as the difference between the payments of interest that BBBF made on its pre–export loans during the POR and the payments the company would have made on comparable commercial loans.[14] In accordance with section 771(6)(A) of the Act, we subtracted from the benefit amount the fees which BBBF paid to commercial banks for the required letters of guarantee. We then divided the resulting benefit by Borusan's total export value for 2004. On this basis, we preliminarily find that the countervailable subsidy for this program is 0.02 percent *ad valorem*.

II. Program Preliminarily Determined To Be Not Countervailable

A. *Investment Allowance Under Article 19 of Law 4842*

In *Wire Rod*, the Department investigated investment allowances provided for under Investment Incentive Certificates, which were granted under the General Incentives Encouragement Program (''GIEP''), and found certain investment allowances to be countervailable and others to be non–countervailable.[15]

During the POR of the instant review, investment allowances were no longer provided for under the GIEP via an Investment Incentive Certificate. With Article 19 of Law 4842, published on April 24, 2003, the obligation to have an Investment Incentive Certificate to benefit from an investment allowance was abolished and the ability to claim an investment allowance on a corporate income tax return was made available to all taxpayers at a uniform rate.[16] Specifically, by the provisions of Article 19, taxpayers without regard to region or sector, and without any requirement of an Investment Incentive Certificate, are eligible to claim an investment

[10] A grouping of small- and medium-sized companies that operate together in a similar sector.

[11] *See* ''Benchmark Interest Rates,'' *supra*, (discussing the benchmark rates used in these preliminary results).

[12] This loan program was formerly known as ''Past Performance Related Export Credits.''

[13] The Export Bank also sets the interest rates for this export loan program.

[14] *See* ''Benchmark Interest Rates,'' *supra* (discussing the benchmark rates used in these preliminary results).

[15] Specifically, in *Wire Rod*, we determined that because the criteria governing the minimum investment allowance (*i.e.*, 40 percent) were identical to those of the GIEP itself, our analysis of the minimum investment allowance was identical to that for the GIEP, which we found to be non-countervailable. Therefore, because we found that the GIEP is not countervailable, we also found that the minimum investment allowance is not countervailable. *See Wire Rod Memorandum* at 14-16. Investment allowances greater than 40 percent were found to be countervailable. *See Id.* at 8-11.

[16] Expenses for investments covered by an Investment Incentive Certificate continued to be subject to the previous investment allowance rules if the application for the certificate was made before the effective date of Law 4842.

allowance at the rate of 40 percent. There is no special application or approval process to claim and receive the investment allowance. The amount of the investment allowance is indicated on a company's tax return. The amount of the deduction is 40 percent of the costs of depreciable economic assets that are purchased or produced for use in the company's operations. *See* GOT Verification Report at 8.

BBBF and MB both took an Article 19 investment allowance deduction on their respective 2003 tax returns that were filed during the POR. We analyzed whether this investment allowance is *de jure* specific, within the meaning of section 771(5A)(D) of the Act. As discussed above, Article 19 of Law 4842 does not limit access to the investment allowance deduction to an enterprise, industry, group of industries, or region. Eligibility for the investment allowance is automatic as a company calculates the 40 percent deduction of its depreciable economic assets and reports that amount on its income tax return. A company's annual income tax return is subject to a statutory tax audit. The conditions under which a company can enjoy the investment allowance are delineated in the law and use of the investment allowance is clearly indicated in the income tax return and tax audit report.

At verification, we confirmed BBBF's and MB's usage of the investment allowance provided for under Article 19, through an examination of each company's 2003 annual income tax return and accompanied 2003 tax audit report. *See* the March 31, 2006, Memorandum to the File concerning the Verification of the Questionnaire Responses Submitted by the Borusan Group (''Borusan Verification Report'') at 11–12.[17]

Based on our analysis of Article 19 of Law 4842 and the process by which companies realize the investment allowance, we preliminarily determine that the investment allowance under Article 19 of Law 4842 is not specific under section 771(5A)(D) of the Act and, therefore, is not countervailable.

B. *Investment Allowance Under Investment Incentive Certificate*

In *Wire Rod*, the Department determined that the threshold requirement for eligibility of any GIEP benefit is the receipt of an Investment Incentive Certificate, which specifies the benefit programs (*e.g.*, investment allowance and customs duty exemption) a certificate holder can receive. The Department further determined that particular investment allowances extended under the GIEP are countervailable and others are non–countervailable. *See Wire Rod Memorandum* at 8–11 and 14–16. During the POR, MB had an Investment Incentive Certificate, received prior to the effective date of Article 19 of Law 4842, that provided for a 40 percent investment allowance, which the company claimed on its 2003 income tax return filed during the POR. MB was eligible for a 40 percent investment allowance because of its location in a developed region.[18]

In *Wire Rod*, we determined that because the criteria governing the minimum investment allowance (*i.e.*, 40 percent for a developed region) were identical to those of the GIEP itself, our analysis of the minimum investment allowance was identical to that for the GIEP, which we found to be non–countervailable. Therefore, because we found that the GIEP was not countervailable, we also found the minimum investment allowance to be not countervailable. *See Id.* at 14–16. In this review, no new information or evidence of changed circumstances has been submitted to warrant reconsideration of the Department's prior findings.

III. Programs Preliminary Determined To Not Confer Countervailable Benefits

A. *Export Credit Insurance*

Through this program, exporters can obtain export credit insurance from Turkey's Export Bank. These are one-year blanket insurance policies that cover up to 90 percent of losses incurred due to political risk (*e.g.*, loss resulting from a war) and commercial risk (*e.g.*, the insolvency of the buyer). The insurance provided under this program is post–shipment insurance because the Export Bank becomes liable only if the loss occurs on or after the date of shipment. Beginning in February 1997, use of the export credit insurance program became voluntary for borrowers under the pre–shipment export financing programs.

During the POR, Istikbal had in place an export credit insurance program. We verified that the company did not submit an insurance claim or receive a reimbursement under the program in 2004. We also verified with the Export Bank that for 2002, 2003, and 2004, the premiums paid for the export credit insurance and other income generated by the program exceeded the insurance claims paid to participating companies and operating costs of the program. *See* GOT Verification Report at 5. On this basis, consistent with *Wire Rod* and *1999 Pasta Final*, and in accordance with 19 CFR 351.520(a)(1), we preliminarily find that the export credit insurance program did not confer countervailable benefits during the POR. *See Wire Rod Memorandum* at 18; and *1999 Pasta Memorandum* at 7.

B. *Inward Processing Certificate Exemption*

Under the Inward Processing Certificate (''IPC'')[19] program, companies are exempt from paying customs duties and value added taxes (''VAT'') on raw material imports to be used in the production of exported goods. Companies may choose whether to be exempted from the applicable duties and taxes or have them refunded upon export. Under the exemption system, companies provide a letter of guarantee that is returned to the companies upon fulfillment of the committed export.

To participate in this program, a company must hold an IPC, which lists the amount of raw materials to be imported and the amount of product to be exported. The input/output usage rates listed on the IPC are set by the GOT working in conjunction with Turkey's Exporter Associations, which are quasi–governmental organizations whose leadership are subject to GOT approval. The input/output usage rates vary by product and industry and are determined using data from capacity reports submitted by companies that apply for IPCs. The input/output usage rates are subject to periodic review and verification by the GOT. In the case of the pipe and tube industry, the input/output usage rates were last modified in June 2001. *See* Borusan Verification Report at 12–13. The GOT uses the input/output usage rates to ensure that a company's expected export quantities are sufficient to cover the quantity of inputs imported duty–free under the program. An IPC specifies the maximum quantity of inputs that can be imported under the program. Further, under the IPC program, the value of imported inputs may not exceed the value of the exported products.

Pursuant to 19 CFR 351.519(a)(1)(ii), a benefit exists to the extent that the exemption extends to inputs that are not consumed in the production of the exported product, making normal

[17] A public version of the verification report is available on the public file in the Department's Central Records Unit (room B-099).

[18] Companies located in a normal region received a 60 percent allowance and those in a priority region received a 100 percent allowance. The different regions were determined by the GOT.

[19] The IPC program is governed by the following GOT provisions: Customs Code No. 4458 (Articles 80, 108, 111, 115, and 121), IPC Council of Ministers' Decree No. 2005/8391, and Communique of IPR No. Export 2005/1.

allowances for waste, or if the exemption covers charges other than imported charges that are imposed on the input. In regard to the VAT exemption granted under this program, pursuant to 19 CFR 351.517(a), in the case of the exemption upon export of indirect taxes, a benefit exists to the extent that the Department determines that the amount exempted exceeds the amount levied with respect to the production and distribution of like products when sold for domestic consumption.

During the POR, Borusan used IPCs to receive duty and VAT exemptions on certain imported inputs used in the production of steel pipes and tubes. Borusan did not receive any duty or VAT refunds under the program during the POR. There is no indication that Borusan used the imported inputs for any other product besides those exported or that the amount of exempted inputs imported under the program were excessive.

At verification, we learned that the GOT sets the waste/usage rate for each imported raw material.[20] The usage ratios are developed on an industry and product basis. These rates are used to determine the amount of each raw material input required to produce a given unit of exported product. In setting the rates, the GOT relies on company capacity reports and conducts on–site inspections of production facilities. The GOT periodically reviews the waste/usage rates. A company may request that a raw material ratio be modified if there have been improvements in productivity and efficiency of the company's facilities. At verification, we confirmed, through examination of the company's production records, that the waste rate established by the GOT, in June 2001, reflects Borusan's actual production experience. *See* Borusan Verification Report at 12–14 and GOT Verification Report at 10–11.

On this basis, we preliminarily determine that the tax and duty exemptions that Borusan received on imported inputs under the IPC program did not confer countervailable benefits as Borusan consumed the imported inputs in the production of the exported product, making normal allowance for waste. We further preliminarily find that the VAT exemption did not confer countervailable benefits on Borusan because the exemption does not exceed the amount levied with respect to the production and distribution of like products when sold for domestic consumption.

During our verification meeting with the GOT, we learned of a previously unreported form of IPC, *i.e.*, a D3 license, in which the GOT provides exemptions and refunds on quantities of imported inputs that are incorporated into products sold on the domestic market. Using records available at the GOT's UFT, we identified Borusan's D3 licenses that were open during the POR. *See* GOT Verification Report at 12. During Borusan's verification, we examined each of the D3 licenses. We confirmed that Borusan did not use the licenses to import any raw materials during the POR. We also confirmed that, under the D3 certificates, Borusan was exempt from paying import duties and VAT by providing a bank letter of guarantee. *See* Borusan Verification Report at 13–14.

As the issuance of a D3 license is not based on exportation, we preliminarily find that this aspect of the IPC program is not an export program but rather falls under 19 CFR 351.510. Pursuant to 19 CFR 351.510(a)(1), in the case of a program, other than an export program, that provides for the full or partial exemption or remission of an indirect tax or an import charge, a benefit exists to the extent that the taxes or import charges paid by a firm are less than the taxes the firm would have paid in the absence of the program. Further, under 19 CFR 351.510(b)(1), the Department normally will consider the benefit as having been received at the time the recipient firm otherwise would be required to pay the indirect tax or import charge. Because Borusan did not import any goods under a D3 certificate during the POR, we preliminarily determine that this aspect of the IPC program was not used. We will, however, continue to examine the use of D3 licenses under the IPC program in future CVD proceedings involving Turkish producers/exporters.

## IV. Programs Preliminarily Determined To Not Be Used

We examined the following programs and preliminarily determine that Borusan did not apply for or receive benefits under these programs during the POR:

A. VAT Support Program (Incentive Premium on Domestically Obtained Goods)[21]
B. Post–Shipment Export Loans
C. Pre–Shipment Rediscount Loans
D. Subsidized Turkish Lira Credit Facilities
E. Subsidized Credit for Proportion of Fixed Expenditures
F. Regional Subsidies.

**Preliminary Results of Review**

In accordance with 19 CFR 351.221(b)(4)(i), we have calculated a subsidy rate for Borusan for calendar year 2004. We preliminarily determine that the total estimated net countervailable subsidy rate is 0.27 percent *ad valorem*, which is *de minimis*, pursuant to 19 CFR 351.106(c).

If the final results of this review remain the same as these preliminary results, the Department intends to instruct CBP within 15 days of publication of the final results of this review, to liquidate without regard to countervailing duties all shipments of subject merchandise produced by Borusan entered, or withdrawn from warehouse, for consumption from January 1, 2004, through December 31, 2004. The Department will also instruct CBP not to collect cash deposits of estimated countervailing duties on all shipments of the subject merchandise produced by Borusan, entered, or withdrawn from warehouse, for consumption on or after the date of publication of the final results of this review.

We will also 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 are those established in the most recently completed administrative proceeding conducted under the URAA. If such a review has not been conducted, the rate established in the most recently completed administrative proceeding conducted pursuant to the statutory provisions that were in effect prior to the URAA amendments is applicable. *See Certain Welded Carbon Steel Pipe and Tube Products from Turkey; Final Results of Countervailing Duty Administrative Review*, 53 FR 9791

[20] Specifically, the Undersecretariat for Foreign Trade (''UFT'') works in conjunction with various exporter associations (quasi-governmental organizations comprised of industry officials) and the Chamber of Industries (independent non-governmental organization) to set the waste/loss ratios. For example, the Chamber of Industries issues the company-specific capacity reports, which a company must submit to the UFT for consideration of a certificate. To obtain a capacity report, a company first establishes a production plan and then requests an inspection of its production facilities to confirm production capability, efficiency, annual consumption and production capacity, etc. Each capacity report has an expiration date and an updated capacity report is generated every three or four years.

[21] Although we found this program to be terminated in *Wire Rod*, residual payments for purchases made prior to the program's termination were permitted. *See Wire Rod Memorandum* at 11.

(March 25, 1988). These 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 date of publication of this notice. Rebuttal briefs, 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 issues, 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, that is, 37 days after the date of publication of these preliminary results.

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. *See* 19 CFR 351.305(b)(3). The Department will publish the final results of this administrative review, including the results of its analysis of arguments made in any case or rebuttal briefs.

This administrative review is issued and published in accordance with section 751(a)(1), 777(i)(1) of the Act, and 19 CFR 351.221(b)(4).

Dated: March 31, 2006.

**David M. Spooner,**

*Assistant Secretaryfor Import Administration.*

[FR Doc. E6–5028 Filed 4–5–06; 8:45 am]

BILLING CODE 3510–DS–S

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**[I.D. 031406G]**

### Endangered Species; File No. 1527

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

**ACTION:** Notice; issuance of permit.

**SUMMARY:** Notice is hereby given that John A. Musick, Ph.D., Virginia Institute of Marine Science (VIMS), Gloucester Point, VA 23062, has been issued a permit to take loggerhead (*Caretta caretta*), Kemp's ridley (*Lepidochelys kempii*), leatherback (*Dermochelys coriacea*), green (*Chelonia mydas*), and hawksbill (*Eretmochelys imbricata*) sea turtles for purposes of scientific research.

**ADDRESSES:** The permit and related documents are available for review upon written request or by appointment in the following office(s):

Permits, Conservation and Education Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Silver Spring, MD 20910; phone (301)713–2289; fax (301)427–2521; and

Northeast Regional Office, NMFS, One Blackburn Drive, Gloucester, MA 01930-2298; phone (978)281-9328; fax (978)281-9394.

**FOR FURTHER INFORMATION CONTACT:** Patrick Opay or Kate Swails, (301)713–2289.

**SUPPLEMENTARY INFORMATION:** On August 24, 2005, notice was published in the **Federal Register** (70 FR 49577) that a request for a scientific research permit to take loggerhead, Kemp's ridley, green, leatherback, and hawksbill sea turtles had been submitted by the applicant. The requested permit has been issued under the authority of the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*) and the regulations governing the taking, importing, and exporting of endangered and threatened species (50 CFR parts 222–226).

The research will take place in the waters of the Chesapeake Bay, and the local Virginia and Maryland tributaries to the Bay. Researchers will capture up to 100 loggerhead, 30 Kemp's ridley, 10 leatherback, 10 green, and 5 hawksbill sea turtles each year over the course of the permit. The turtles will be captured by relocation trawlers as part of dredging activities authorized under separate permits, or incidentally captured in pound net fisheries and then turned over to the applicant. Turtles will be measured, weighed, blood sampled, flipper tagged, and PIT tagged. A subset of these animals will have satellite and/or radio/sonic transmitters attached to their carapace. Twenty loggerhead sea turtles will be used in a whelk gear bycatch reduction study. The research will identify sea turtle's relative abundance over time; detect changes in size and age composition; monitor and document movement and migration patterns; and study sea turtle interactions with whelk pot gear. The permit is issued for 5 years.Issuance of this permit, as required by the ESA, was based on a finding that such permit (1) was applied for in good faith, (2) will not operate to the disadvantage of any endangered or threatened species, and (3) is consistent with the purposes and policies set forth in section 2 of the ESA.

Dated: March 31, 2006.

**Stephen L. Leathery,**

*Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service.*

[FR Doc. E6–5025 Filed 4–5–06; 8:45 am]

BILLING CODE 3510–22–S

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**[I.D. 011306B]**

### Endangered Species; File No. 1552

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

**ACTION:** Notice; issuance of permit.

**SUMMARY:** Notice is hereby given that NMFS, Southeast Fisheries Science Center (SEFSC), 75 Virginia Beach Drive, Miami, Florida 33149 has been issued a permit to take green (*Chelonia mydas*), loggerhead (*Caretta caretta*), Kemp's ridley (*Lepidochelys kempii*), hawksbill (*Eretmochelys imbricata*), leatherback (*Dermochelys coriacea*), olive ridley (*Lepidochelys olivacea*), and unidentified hardshell sea turtles for purposes of scientific research.

**ADDRESSES:** The permit and related documents are available for review upon written request or by appointment in the following offices:

Permits, Conservation and Education Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301)713–2289; fax (301)427–2521;

Southeast Region, NMFS, 263 13th Ave South, St. Petersburg, FL 33701; phone (727)824–5312; fax (727)824–5309.

**FOR FURTHER INFORMATION CONTACT:** Patrick Opay or Amy Hapeman, (301)713–2289.

**SUPPLEMENTARY INFORMATION:** On October 19, 2005 notice was published in the **Federal Register** (70 FR 60796) that a request for a scientific research permit to take green, loggerhead, Kemp's ridley, hawksbill, leatherback, olive ridley, and unidentified hardshell sea turtles had been submitted by the above-named organization. The requested permit has been issued under the authority of the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*) and the regulations governing the taking, importing, and exporting of endangered and threatened species (50 CFR parts 222–226).

The SEFSC will handle, measure, weigh, photograph, flipper tag, passive integrated transponder tag, skin biopsy, and release green, loggerhead, Kemp's ridley, hawksbill, leatherback, olive ridley, and unidentified hardshell (combination of green, loggerhead, Kemp's ridley, hawksbill, olive ridley, or hybrids that would not be able to be identified at the time of capture) sea turtles. In addition, a limited number of turtle carcasses (including tissues or parts from them) will be collected annually from the fisheries or activities for which incidental lethal take has been previously authorized. The applicant will sample turtles captured incidentally during other activities including the shark gillnet fishery, longline fisheries, the shrimp trawl fishery, and surveys during oil/gas platform removal. The capture will be authorized by the incidental take statements of the biological opinions or section 10(a)(1)(B) permits that cover these activities. The research will provide data on the turtles that interact with these activities and provide data useful to better understanding turtle migration, habitat use, genetics, and population dynamics. The information will be used to develop, implement, and evaluate conservation recovery efforts for sea turtles. The research will take place in the Atlantic Ocean, Gulf of Mexico, Caribbean Sea, and their tributaries. The permit is issued for 5 years.

Issuance of this permit, as required by the ESA, was based on a finding that such permit (1) Was applied for in good faith, (2) will not operate to the disadvantage of any endangered or threatened species, and (3) is consistent with the purposes and policies set forth in section 2 of the ESA.

Dated: March 31, 2006.

**Stephen L. Leathery,**

*Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service.*

[FR Doc. E6–5026 Filed 4–5–06; 8:45 am]

**BILLING CODE 3510–22–S**

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**[I.D. 032106D]**

### Caribbean Fishery Management Council; Public Meetings

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

**ACTION:** Notice of public meetings.

**SUMMARY:** The Caribbean Fishery Management Council (Council) its Enforcement Committee and its Administrative Committee will hold meetings.

**DATES:** The meetings will be held on April 26–27, 2006. See **SUPPLEMENTARY INFORMATION** for specific dates and times.

**ADDRESSES:** The meetings will be held at Ponce Hilton Hotel, 1150 Caribe Avenue, Ponce, Puerto Rico 00716.

**FOR FURTHER INFORMATION CONTACT:** Caribbean Fishery Management Council, 268 Munoz Rivera Avenue, Suite 1108, San Juan, Puerto Rico 00918–1920, telephone: (787) 766–5926.

**SUPPLEMENTARY INFORMATION:** The Council will convene on Wednesday, April 26, 2006, from 9 a.m. to 5 p.m., and the Administrative Committee will meet from 5:15 p.m. to 6 p.m., on that same day. The Enforcement Committee will meet on April 27, 2006, from 9 a.m. to 12 noon. The Council will reconvene on Thursday, April 27, 2006, from 1:30 p.m. to 5 p.m., approximately.

The Council will hold its 120th regular public meeting to discuss the items contained in the following agenda:

**April 26, 2006**

*9 a.m. - 5 p.m.*

•Call to Order
•Adoption of Agenda
•Consideration of 120th Council Meeting Verbatim Transcription
•Executive Director's Report
•ICAAT Presentation
•Models for Ecosystem Based Management Approach - Monica Valle
•Revised Regulations SFA, PR, USVI

*5:15 p.m. - 6 p.m.*

Administrative Committee Meeting

-AP/SSC/HAP Membership
-Budget 2006, 2007
-Other Business

**April 27, 2006**

*9 a.m. - 12 noon*

Enforcement Committee Meeting

*1:30 p.m. - 5 p.m.*

•Enforcement Reports
-Puerto Rico
-U.S. Virgin Islands
-NOAA
-U.S. Coast Guard
•Administrative Committee Recommendations - April 26. 2006
•Meetings attended by Council members and staff
•Other Business
•Next Council Meeting

The meetings are open to the public, and will be conducted in English. However, simultaneous translation (English-Spanish) will be provided. Fishers and other interested persons are invited to attend and participate with oral or written statements regarding agenda issues.

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 identified in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

**Special Accommodations**

These meetings are physically accessible to people with disabilities. For more information or request for sign language interpretation and/or other auxiliary aids, please contact Mr. Miguel A. Rolon, Executive Director, Caribbean Fishery Management Council, 268 Munoz Rivera Avenue, Suite 1108, San Juan, Puerto Rico, 00918–2577; telephone: (787) 766–5926, at least 5 days prior to the meeting date.

Dated: April 3, 2006.

**Tracey L. Thompson,**

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

[FR Doc. E6–4978 Filed 4–6–06; 8:45 am]

BILLING CODE 3510–22–S

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**[I.D. 032106E]**

### Caribbean Fishery Management Council; Public Meetings

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

**ACTION:** Notice of public meetings.

**SUMMARY:** The Caribbean Fishery Management Council's Advisory Panel (AP), Scientific and Statistical Committee (SSC) and Habitat Advisory Panel (HAP), will hold meetings.

**DATES:** The SSC, HAP and AP meetings will be held on April 25, 2006, from 10 a.m. to 4 p.m.

**ADDRESSES:** All meetings will be held at the Ponce Hilton Hotel, 1150 Caribe Avenue, Ponce, Puerto Rico.

**FOR FURTHER INFORMATION CONTACT:** Caribbean Fishery Management Council, 268 Munoz Rivera Avenue, Suite 1108, San Juan, Puerto Rico 00918–2577; telephone: (787) 766–5926.

**SUPPLEMENTARY INFORMATION:** The AP, SSC and HAP will meet to discuss the items contained in the following agendas:

*SSC/HAP Meeting*

-Call to order
-Models for Ecosystem Based Management Approach - Monica Valle
-Jurisdiction Separation for Assessment Purposes in the Caribbean
-Limited Entry - Scientific Issues in the U.S. Caribbean
-Other Business

*AP Meeting*

-Call to Order
-Revised SFA, PR, USVI Regulations
-Issues with closed areas/season
-Limited Entry Update
-Other Business

The meetings are open to the public, and will be conducted in English. However, simultaneous interpretation (Spanish-English) will be available during the AP meeting. Fishers and other interested persons are invited to attend and participate with oral or written statements regarding agenda issues.

Although non-emergency issues not contained in this agenda may come before these groups for discussion, those issues may not be the subject of formal action during these meetings. Action will be restricted to those issues specifically identified in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

**Special Accommodations**

These meetings are physically accessible to people with disabilities. For more information or request for sign language interpretation and/other auxiliary aids, please contact Mr. Miguel A. Rolon, Executive Director, Caribbean Fishery Management Council, 268 Munoz Rivera Avenue, Suite 1108, San Juan, Puerto Rico 00918–2577; telephone: (787) 766–5926, at least 5 days prior to the meeting date.

Dated: April 3, 2006.

**Tracey L. Thompson,**

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

[FR Doc. E6–4979 Filed 4–5–06; 8:45 am]

BILLING CODE 3510–22–S

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**[I.D. 033006F]**

### Mid-Atlantic Fishery Management Council; Public Meeting

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

**ACTION:** Notice of public meetings.

**SUMMARY:** The Mid-Atlantic Fishery Management Council's (Council) Tilefish Monitoring Committee will hold a public meeting.

**DATES:** The meeting will be held on April 24, 2006, beginning at noon.

**ADDRESSES:** The meeting will be held at the Sheraton Providence Airport Hotel, 1850 Post Road, Warwick, RI 02886; telephone: (401) 738–4000.

*Council address*: Mid-Atlantic Fishery Management Council, Room 2115, 300 S. New Street, Dover, DE 19904.

**FOR FURTHER INFORMATION CONTACT:** Daniel T. Furlong, Executive Director, Mid-Atlantic Fishery Management Council; telephone: (302) 674–2331, ext. 19.

**SUPPLEMENTARY INFORMATION:** The purpose of the meeting is to recommend the 2006/07 tilefish quota.

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 identified in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management 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 Jan Saunders at (302) 674–2331 ext. 18, at the Council office at least 5 days prior to the meeting date.

Dated: April 3, 2006.

**Tracey L. Thompson,**

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

[FR Doc. E6–4980 Filed 4–5–06; 8:45 am]

BILLING CODE 3510–22–S

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**[I.D. 033106B]**

### Mid-Atlantic Fishery Management Council; Public Meeting

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

**ACTION:** Notice of public meeting.

**SUMMARY:** The Trawl Survey Advisory Panel, composed of representatives from the National Marine Fisheries Service's Northeast Fisheries Science Center (NEFSC), the Mid-Atlantic Fishery Management Council (MAFMC), the New England Fishery Management Council (NEFMC), and several independent scientific researchers, will hold a public meeting.

**DATES:** The meeting will be held on April 27, 2006, from 12 p.m. to 6 p.m. and April 28, 2006, from 8 a.m. to 4 p.m.

**ADDRESSES:** The meeting will be held at the Sheraton Providence Airport Hotel,

1850 Post Road, Warwick, RI 02886 telephone: (401) 738–4000.

*Council address*: Mid-Atlantic Fishery Management Council; 300 S. New Street, Room 2115, Dover, DE 19904.

**FOR FURTHER INFORMATION CONTACT:** Daniel T. Furlong, Executive Director, Mid-Atlantic Fishery Management Council; 300 S. New Street, Room 2115, Dover, DE 19904; telephone: (302) 674–2331, ext. 19.

**SUPPLEMENTARY INFORMATION:** The purpose of this meeting is to review the results of the March Northeast Fisheries Science Center's experimental trawl survey cruise and continue to develop and evaluate survey protocols for the new survey.

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 identified in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management 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 Jan Saunders at the Mid-Atlantic Council office (see **ADDRESSES**) at least 5 days prior to the meeting date.

Dated: April 3, 2006.

**Tracey L. Thompson,**

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

[FR Doc. E6–4981 Filed 4–5–06; 8:45 am]

**BILLING CODE 3510–22–S**

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**[I.D. 033106E]**

### Pacific Fishery Management Council; Public Meeting

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

**ACTION:** Notice of public meeting.

**SUMMARY:** The Pacific Fishery Management Council (Council) will convene a meeting of the Legislative Committee (Committee), which is open to the public. The primary purpose of the meeting is to review proposed federal legislation regarding the reauthorization of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). The Committee may also review Federal and state legislative matters relative to the Capital Construction Fund, aquaculture, the American Fisheries Act, and other Council interests.

**DATES:** The Committee will meet on Friday, April 28 2006, from 8:30 a.m. until business for the day is completed.

**ADDRESSES:** The meeting will be held in the West Conference Room at the Pacific Fishery Management Council, 7700 NE Ambassador Place, Suite 200, Portland, OR 97220–1384; telephone: (503) 820–2280.

*Council address*: Pacific Fishery Management Council, 7700 NE Ambassador Place, Suite 200, Portland, OR 97220–1384.

**FOR FURTHER INFORMATION CONTACT:** Mr. Mike Burner, Pacific Fishery Management Council Staff Officer; telephone: (503) 820–2280.

**SUPPLEMENTARY INFORMATION:** The Legislative Committee often meets concurrently with the Council but will next meet away from a Council meeting to allow additional time to deliberate several significant federal legislative matters. Although not limited to the following topics, the Committee will focus on recently introduced legislation pertaining to the reauthorization of the Magnuson-Stevens Act. Additionally, the Committee may discuss Senate Bill 1195, the National Offshore Aquaculture Act of 2005; legislation regarding the Capital Construction Fund, and solicited Council input on potential amendment of the American Fisheries Act. Committee recommendations will be provided in a report to the Council which may form the basis for Council input on these important legislative matters.

Although non-emergency issues not contained in the meeting agenda may be discussed, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically listed in this document and any issues arising after publication of this document that require emergency action under Section 305(c) of the Magnuson-Stevens Act, provided the public has been notified of the intent to take final action to address the emergency.

### Special Accommodations

The meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Ms. Carolyn Porter at (503) 820–2280 at least 5 days prior to the meeting date.

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

Dated: April 3, 2006.

**Tracey L. Thompson,**

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

[FR Doc. E6–4995 Filed 4–5–06; 8:45 am]

**BILLING CODE 3510–22–S**

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**[I.D. 033106C]**

### Western Pacific Fishery Management Council; Public Meeting

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

**ACTION:** Notice of public meetings

**SUMMARY:** The Western Pacific Fishery Management Council (Council) will hold meetings of its Pelagics Plan Team (PPT) in Honolulu, HI, to discuss fishery issues and develop recommendations for future management.

**DATES:** The meeting of the PPT will be held on May 2–4, 2006, from 8:30 a.m. to 5 p.m., each day.

**ADDRESSES:** The meeting will be held at the Council Office Conference Room, Western Pacific Fishery Management Council, 1164 Bishop St., Suite 1400, Honolulu, HI 96813; telephone: (808) 522–8220.

**FOR FURTHER INFORMATION CONTACT:** Kitty M. Simonds, Executive Director; telephone: (808) 522–8220.

**SUPPLEMENTARY INFORMATION:** The PPT will meet on May 2–4, 2006, at the Council Conference Room to discuss the following agenda items:

*Tuesday May 2, 2006, 8:30 a.m.*

1. Introduction
2. Annual Report review
   a. Review 2005 Annual Report modules and recommendations
   b. 2005 Annual Report region-wide recommendations

*Wednesday & Thursday, May 4–5, 2005, 8:30 a.m.*

3. Modifications to the pelagic annual report

4. Recreational fisheries
5. International fisheries issues
   a. Report on the second meeting of the Western & central Pacific Fishery Commission

b. Report on the International Scientific Committee for tuna and tuna like species in the North Pacific, including stock assessments for North Pacific albacore tuna, northern bluefin tuna and striped marlin
6. Management options for bigeye tuna catches by the Hawaii tuna longline fishery

7. Management options for the Hawaii swordfish longline fishery
8. Fishing effort increase in the Hawaii longline fishery
9. Hawaii offshore mixed line fisheries for tunas
10. South Pacific albacore fisheries
11. Other business

The order in which the agenda items are addressed may change. The PPT will meet as late as necessary to complete scheduled business.

Although non-emergency issues not contained in this agenda may come before the PPT for discussion, those issues may not be the subject of formal action during these meetings. Plan Team action will be restricted to those issues specifically listed in this document and any issue arising after publication of this document that requires emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

## Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Kitty M. Simonds, (808) 522–8220 (voice) or (808) 522–8226 (fax), at least 5 days prior to the meeting date.

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

Dated: April 3, 2006.

**Tracey L. Thompson,**

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

[FR Doc. E6–4982 Filed 4–5–06; 8:45 am]

BILLING CODE 3510–22–S

## DEPARTMENT OF COMMERCE

## National Oceanic and Atmospheric Administration

**[I.D. 033106D]**

## Western Pacific Fishery Management Council; Public Meetings

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

**ACTION:** Notice of public meeting and public hearing.

**SUMMARY:** The Western Pacific Fishery Management Council (Council) will hold its 132nd meeting to consider and take final action on recommendations to limit fishing in the Northwestern Hawaiian Islands (NWHI). The Council will also hold a public hearing during this 132nd Council meeting.

**DATES:** The 132nd Council meeting and public hearing will be held on Thursday, April 20, 2006. For specific dates, times and locations of the public hearing, and the agenda for the 132nd Council meeting, see **SUPPLEMENTARY INFORMATION**.

**ADDRESSES:** The 132nd Council meeting and public hearing will be held at the Council's office, 1164 Bishop Street, Suite 1400, Honolulu, HI 96813. The 132nd Council meeting telephone conference call-in-number is: (866) 867–8289, passcode 1683776. For Guam and International Participants, the call-in-number is: (813) 276–1442, passcode 1683776.

**FOR FURTHER INFORMATION CONTACT:** Kitty M. Simonds, Executive Director; telephone: (808) 522–8220; fax: (808) 522–8226.

**SUPPLEMENTARY INFORMATION:**

## Background Information

On January 18, 2006, the Council was informed by the Under Secretary of Commerce for Oceans and Atmosphere, that NOAA is developing alternatives in the Draft Environmental Impact Statement for the proposed NWHI National Marine Sanctuary that would enable the Council to continue to recommend management measures to limit bottomfish and pelagic fisheries through regulations under the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), consistent with the goals and objectives of the proposed sanctuary. While the preferred alternative has not been selected, the range of alternatives under consideration includes a regulatory regime allowing commercial bottomfishing and non-longline pelagic fishing to continue either: (1) indefinitely, (2) until 2025, or (3) for 5 years with a ban on fishing thereafter.

The Council was also informed that if, by May 1, 2006, it transmits for Secretarial review, an amendment to the Bottomfish and Pelagics Fishery Management Plans (FMPs) and corresponding proposed regulations implementing limits to bottomfish and pelagic fishing, NOAA may review those Magnuson-Stevens Act regulations as potential mechanisms to implement NOAA's preferred alternative for the proposed sanctuary, rather than implementing the alternative via the National Marine Sanctuaries Act.

At its 131st Council meeting held March 13–16, 2006, the Council took initial action and recommended that limited fishing be allowed in federal waters of the proposed NWHI National Marine Sanctuary and managed under the Magnuson-Stevens Act (except for recreational fishing at Midway Atoll), consistent with all codified federal regulations and subject to the following restrictions:

a. A closure be established indefinitely for all harvests of crustacean, precious coral and coral reef ecosystem species;

b. All commercial and recreational fishing be subject to Magnuson-Stevens Act permit and logbook reporting requirements

c. Recreational fishing permits be issued on a case-by case basis, and that the Council will evaluate the need for further management;

d. Limited-entry NWHI bottomfish permits be capped at 14, with 7 permits for the Ho'omalu Zone and 7 permits for the Mau Zone (the two Community Development Program permits for indigenous use to be included in the latter and issued as previously recommended by the Council);

e. The annual bottomfish catch be limited to 381,500 lbs (85% of Maximum Sustainable Yield);

f. Non-longline commercial pelagic fishing permits be capped at three (3);

g. The annual commercial pelagic catch by the non-longline pelagic fishery and the limited-entry bottomfish fishery be limited to 180,000 lbs.;

h. No-take Marine Protected Areas be established around French Frigate Shoals and West of 174 W longitude;

i. The use-or-lose requirements for renewal of commercial bottomfish permits be removed;

j. Relinquished or revoked commercial bottomfish permits be reissued by NMFS in accordance with the existing procedures for Ho'omalu Zone permits and as described in the Council's previous recommendation for Mau Zone permits; and

k. Federally permitted research regarding fishery and ecosystem conservation and management would be allowed in Federal waters.

The Council will consider final action on these proposed limits to fishing in the NWHI at this 132nd meeting.

**132nd Council Meeting Agenda**

*Thursday, April 20, 2006, 1 p.m. Hawaii Standard Time*

1. Introductions
2. Approval of Agenda
3. Limits to Fishing in the NWHI
4. Public Hearing
5. Council Discussion and Action
6. Other Business

Although non-emergency issues not contained in this agenda may come before the Council for discussion, those issues may not be the subject of formal Council action during its 132nd meeting. Council action will be restricted to those issues specifically listed in this document and any issue arising after publication of this document that requires 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**

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Kitty M. Simonds, (808) 522–8220 (voice) or (808) 522–8226 (fax), at least 5 days prior to the meeting date.

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

Dated: April 3, 2006.

**Tracey L. Thompson,**

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

[FR Doc. E6–4983 Filed 4–5–06; 8:45 am]

**BILLING CODE 3510–22–S**

## 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 2006 Summer Study will meet in closed session on August 7–18, 2006; at the Beckman Center, Irvine, CA. At this meeting, the Defense Science Board will discuss interim findings and recommendations resulting from two ongoing Task Force activities: 21st Century Strategic Technology Vectors and Information Management for Net-Centric Operations.

The mission of the Defense Science Board is to advise the Secretary of Defense and the Under Secretary of Defense for Acquisition, Technology and Logistics on scientific and technical matters as they affect the perceived needs of the Department of Defense. At this meeting, the Board will develop recommendations regarding: the operational value enabled by networks and networking and their impact on innovations across the Enterprise; the underlying framework, architecture, processes and organizational structures that are in place or being pursued to deliver the power of information to the DoD enterprise as well as potential external partners; and the state of the art in knowledge utilization.

The Board will also review and develop recommendations regarding: previous attempts by DoD to identify critical technologies in order to derive lessons that would help illuminate the current challenge; identify the National Security objectives for the 21st century and the operational missions that U.S. military will be called upon to support these objectives; identify new operational capabilities needed for the proposed missions; identify the critical science technology, and other related enablers of the desired capabilities; assess current S&T investment plans' relevance to the needed operational capabilities and enablers and recommend needed changes to the plans; identify mechanisms to accelerate and assure the transition of technology into U.S. military capabilities; and review and recommend changes as needed, the current processes by which national security objectives and needed operational capabilities are used to develop and prioritize science, technology, and other related enablers, and how those enablers are then developed.

In accordance with Section 10(d) of the Federal Advisory Committee Act, Pub. L. No. 92–463, as amended (5 U.S.C. App. 2), it has been determined that this meeting concerns matters listed in 5 U.S.C. 552b(c)(1) and that, accordingly, this meeting will be closed to the public.

**FOR FURTHER INFORMATION CONTACT:** Ms. Debra Rose, Executive Officer, Defense Science Board, 3140 Defense Pentagon, Room 3C553, Washington, DC 20301–3140, via e-mail at *debra.rose@osd.mil*, or via phone at (703) 571–0084.

Dated: March 31, 2006.

**L.M. Bynum,**

*OSD Federal Register Liaison Officer, Department of Defense.*

[FR Doc. 06–3300 Filed 4–5–06; 8:45 am]

**BILLING CODE 5001–06–M**

## DEPARTMENT OF DEFENSE

### Corps of Engineers, Department of the Army

### Supplemental Notice of Intent To Prepare a Draft Environmental Impact Statement/Environmental Impact Report (EIS/EIR) for a Permit Application for the Berths 136–147 Terminal Improvement Project, Also Known as the TraPac Container Terminal in the Port of Los Angeles, Los Angeles County, CA

**AGENCY:** U.S. Army Corps of Engineers, DOD.

**ACTION:** Notice of Intent (NOI).

**SUMMARY:** The U.S. Army Corps of Engineers (Corps) Los Angeles District in conjunction with the Los Angeles Harbor Department (Port) is examining the feasibility of waterside, terminal and transportation improvements at Berths 136–147 in the Port of Los Angeles. The Corps is considering the Port's application for a Department of the Army permit under Clean Water Act section 404 and River and Harbor Act section 10 to conduct dredge and fill activities and construct one new wharf approximately 705 feet and seismically upgrade two wharves approximately 3,022 feet in length associated with the proposed project.

Major project elements to be covered in the Draft EIS/EIR include: wharf construction and landside improvements. The landside developments will include expansion, redevelopment and construction of marine terminal facilities, and transportation infrastructure improvements including construction of grade separations, and potential realignment of road and railways.

The primary Federal involvement is the discharge of dredge and/or fill materials within waters of the United States, work (e.g. dredging) and structures in or affecting navigable waters of the United States, and potential impacts on the human environment from such activities. Therefore, in accordance with the National Environmental Policy Act (NEPA), the Corps is requiring the preparation of an Environmental Impact Statement (EIS) prior to rendering a final decision on the Port's permit application. The Corps may ultimately make a determination to permit or deny the above project or permit or deny modified versions of the above project.

Pursuant to the California Environmental Quality Act (CEQA), the Port will serve as Lead Agency for the Preparation of an Environmental Impact

Report (EIR). The Corps and the Port have agreed to jointly prepare a Draft EIS/EIR for the improvements at Berth 136–147 in order to optimize efficiency and avoid duplication. The Draft EIS/EIR is intended to be sufficient in scope to address both the Federal and the state and local requirements and environmental issues concerning the proposed activities and permit approvals.

**FOR FURTHER INFORMATION CONTACT:** Questions about the proposed action and Draft EIS/EIR can be answered by Dr. Joshua Burnam, Corps Project Manager, at (213) 452–3294. Comments shall be addressed to: U.S. Army Corps of Engineers, Los Angeles District, Regulatory Branch. Attn: File Number 2003–0–1142–JLB, P.O. Box 532711, Los Angeles, CA 90053–2325, and Dr. Ralph Appy, Director of Environmental Management, Port of Los Angeles, 425 S. Palos Verdes St., San Pedro, CA 90731.

**SUPPLEMENTARY INFORMATION:**

1. *Project Site and Background Information.* The proposed project is located in the northwestern portion of the Port of Los Angeles, adjacent to the San Pedro District of the City of Los Angeles, CA. The proposed project involves dredge and fill operations, new wharf construction, coupled with terminal expansion on adjacent areas of existing land, and improvement of transportation infrastructure at and adjacent to Berths 136–147.

The project's overall goals are to upgrade the container cargo handling efficiency at the Berths 136–147 Terminal, increase its cargo handling capacity, and to improve transportation infrastructure in order to accommodate forecasted and planned increases in the volume of containerized goods shipped through the Port. In order to meet these goals, the following objectives must be met:

- Establish needed container facilities that would maximize the use of existing waterways and integrate into the Port's overall utilization of available shoreline, while maintaining opportunities for the future integration with adjacent terminals;
- Construct sufficient container berthing and infrastructure capacity to accommodate foreseeable increases in containerized cargo volumes entering the Port;
- Create sufficient backland area for optimal container terminal operations including, storage, transport, and on/offloading of container ships in a safe and efficient manner;
- Provide access to rail and truck infrastructure locations in order to minimize surface transportation congestion or delays and promote transport to both local and distant cargo destinations; and
- Provide needed container terminal accessory buildings and structures to support containerized cargo handling requirements.

2. *Changes Since the October 19th, 2003 NOI/NOP.* Since the NOI/NOP process was completed, there have been some project changes for the EIS/EIR. These changes are as follows:

- The project was previously called Berths 136–147. It is now identified as Berths 136–149 (Figure 1).
- The size of the Terminal would increase from 176 acres to 251 acres by the year 2030 (previously, it was to increase to 244 acres). With the additional 7 acres of terminal area, there would be some additional traffic and air quality impacts.
- Projects associated with Phase I were previously to be completed by the year 2010 and Phase II by 2025. Now Phase I projects would be completed by 2015 and Phase II by 2030.
- Harry Bridges Boulevard will only be moved 50 feet to the north instead of 580 feet to the north. Because of this change, there is no need to construct a noise buffer (berm) between Harry Bridges Boulevard and ''C'' Street residents. There would now be an approximately 25-acre landscaped area between Harry Bridges Boulevard and ''C'' Street residents between Figueroa Street and Lagoon Avenue. This new project component would reduce air quality, health risk, noise, and aesthetic impacts on the adjoining Wilmington residents.
- There are presently 13 cranes along Berths 136–149. Some cranes will be replaced and there will be a net reduction of one crane (12 total) after the proposed projects are completed. This would reduce aesthetic impacts.
- 10 acres of additional backland would be created for container terminal use by filling in the 10-acre Northwest Slip. This project would require 1,200,000 cubic yards (cy) of fill. A new 400-foot wharf (44,332 square feet) would be built at an adjoining new berth created by filling the Northwest Slip. The fill slope would be covered with 50,000 cy of rocky dike, 12,000 cy of fill would be placed behind the dike, and 397 concrete piles would be installed. Approximately 3,000 cy would be dredged as part of this project. This project component is part of the total 251-acre Terminal project that would be completed by the year 2030. This project component would have some water quality and marine biology impacts.
- Instead of constructing two grade separations at Neptune Avenue and Avalon Boulevard as originally envisioned there would be two other transportation projects completed. A Fries Avenue Grade Separation (overpass over the rail tracks) would be built (not part of the TraPac Terminal project). Most of the TraPac cargo would be moved over this new grade separation. Also as part of the proposed project, the ''C'' Street/Figueroa Street interchange would be redesigned to include an elevated ramp from Harry Bridges Boulevard to the I–110 Freeway, over John S. Gibson Boulevard. An additional extension would connect from Figueroa Street to the new elevated ramp over Harry Bridges Boulevard. These transportation projects would reduce traffic and air quality impacts.

Project changes are being analyzed through the Draft EIR/EIS process and no new potentially significant impacts not previously identified in the initial scoping notice are anticipated as a result of the changes. For example, changes include adding 7 acres of terminal area, which would result in some additional traffic and air quality impacts. However, air quality and traffic were identified as potentially significant impacts in the 2003 NOP/NOI. Therefore, air quality and traffic impacts are being analyzed as part of the Draft EIR/EIS. Some changes may also result in fewer impacts than anticipated as part of the 2003 NOP/NOI. For example, eliminating the noise buffer between Harry Bridges Boulevard and ''C'' Street and building instead a 25-acre landscaped area is anticipated to result in fewer impacts than discussed in the NOP/NOI. All project changes will be discussed and analyzed in the EIR/EIS.

3. *Issues.* There are several potential environmental issues that will be addressed in the EIS/EIR. Additional issues may be identified during the scoping process. Issues initially identified as potentially significant include:

(a) Geological issues, including dredging and stabilization of fill areas in an area of known seismic activity;
(b) Impacts to hydrology;
(c) Impacts to air quality;
(d) Impacts to traffic, including marine navigation and ground transportation;
(e) Potential for noise impacts;
(f) Impacts to public utilities and services;
(g) Potential impacts to aesthetic resources, including light and glare;
(h) Potential impacts on public health and safety;
(i) Cumulative impacts; and
(j) Disposal of dredged materials.

4. *Alternatives.* Alternatives initially being considered for the proposed improvement project include the following:

(a) Alternate location(s) for the Terminal Improvements (within the State or within the Ports of Los Angeles/Long Beach).

(b) Development of new landfills for a container terminal.

(c) Non-containerized use of terminal (i.e., lumber, autos).

(d) Non-shipping use i.e., park, cruise terminal, commercial development, empty container storage, etc.

(e) No Federal action (No wharf construction or dredging—construction of only backlands developments for Phases I and II) with and without Harry Bridges being relocated.

(f) Larger facility (14-acre fill for more storage area).

(g) Reduce Wharf (reduced fill—reduction in rip-rap, pilings, and dredging).

(h) Proposed project without Harry Bridges Boulevard being relocated.

(i) No Project (no physical changes).

5. *Comment Process.* All comments received as part of the 2003 scoping period will remain part of the administrative record and be addressed in the Draft EIR/EIS. A new public scoping meeting will not be held. Written comments to the Corps and Port regarding the Project changes will be received until April 28, 2006. Written comments should be addressed to the address below:

U.S. Army Corps of Engineers, Los Angeles District, Regulatory Branch and the Los Angeles Harbor Department, c/o Dr. Joshua Burnam and Dr. Ralph G. Appy, Attn: 2003–0–1142–JLB, P.O. Box 532711, Los Angeles, California 90053–2325.

Parties interested in being added to the Corps' electronic mail notification list for the Port of Los Angeles can register at: *http://www.spl.usace.army.mil/regulatory/register.html.* This list will be used in the future to notify the public about scheduled hearings and availability of future public notices.

6. *Availability of the Draft EIS/EIR.* The joint lead agencies expect the Draft EIS/EIR to be made available to the public in Summer 2006. A public hearing will be held during the public comment period for the Draft EIS/EIR.

**Alex C. Dornstauder,**

*Colonel, U.S. Army, District Engineer.*

[FR Doc. E6–4904 Filed 4–5–06; 8:45 am]

**BILLING CODE 3710–92–P**

## DEPARTMENT OF DEFENSE

### Department of the Navy

### Notice of Availability of Government-Owned Inventions; Available for Licensing

**AGENCY:** Department of the Navy, DoD.

**ACTION:** Notice.

**SUMMARY:** The inventions listed below are assigned to the United States Government as represented by the Secretary of the Navy and are made available for licensing by the Department of the Navy. U.S. Patent Number 6,904,861, entitled ''Boat Capture System'', issue date June 14, 2005.//U.S. Patent Pending, entitled ''Role Based Access Control'', Navy Case Number 96217.//U.S. Patent Pending, entitled System of Access Control Based on Hierarchical Characteristics'', Navy Case Number 97189.//U.S. Patent Pending, entitled ''Software Architecture for Access Control Based Hierarchical Characteristics'', Navy Case Number 97188.

**ADDRESSES:** Requests for copies of patents cited should be directed to the Space and Naval Warfare Systems Center, Office of Research and Technology Applications, Code 2112, 83570 Silvergate Ave., Room 2306, San Diego, CA 92152–5048.

**FOR FURTHER INFORMATION CONTACT:** Dr. Stephen H. Lieberman, Office of Research and Technology Applications, Space and Naval Warfare Systems Center, Code 2112, 83570 Silvergate Ave., Room 2306, San Diego, CA 92152–5048, telephone 619–553–2778, e-mail: *stephen.lieberman@navy.mil.*

(Authority: 35 U.S.C. 207, 37 CFR part 404)

Dated: March 28, 2006.

**Eric McDonald,**

*Lieutenant Commander, Judge Advocate General's Corps, U.S. Navy, Federal Register Liaison Officer.*

[FR Doc. E6–4994 Filed 4–5–06; 8:45 am]

**BILLING CODE 3810–FF–P**

## DEPARTMENT OF DEFENSE

### Department of the Navy

### Notice of Availability of Government-Owned Inventions; Available for Licensing

**AGENCY:** Department of the Navy, DoD.

**ACTION:** Notice.

**SUMMARY:** The inventions listed below are assigned to the United States Government as represented by the Secretary of the Navy and are made available for licensing by the Department of the Navy.

U.S. Patent Number 6,958,466, entitled ''Method and System For Detecting Targets Known Up to a Simplex from Multi-Spectral and Hyper-Spectral Imagery Employing the Normal Compositional Model'', issue date October 25, 2005.//U.S. Patent Number 6,948,388, entitled ''Wireless Remote Sensor'', issue date September 27, 2005.//U.S. Patent Number 6,947,504, entitled ''Frequency Synchronizer'', issue date September 20, 2005.//U.S. Patent Number 6,925,136, entitled ''Simultaneous Frequency and Phase Synchronizer'', issue date August 2, 2005.//U.S. Patent Number 6,943,358, entitled ''Method for Developing a Calibration Algorithm for Quantifying the Hydrocarbon Content of Aqueous Media'', issue date September 13, 2005.//U.S. Patent Number 6,842,013, entitled ''Method for Making Transmission Measurements in a Dual-Chambered Anechoic Chamber Using Spatial Averaging'', issue date January 11, 2005.//U.S. Patent Number 6,822,522, entitled ''Method and Apparatus for an Improved Nonlinear Oscillator'', issue date November 23, 2004.//U.S. Patent Number 6,802,132, entitled ''Electrolytic Tilt Sensor and Method for Manufacturing Same'', issue date October 12, 2004.//U.S. Patent Number 6,784,670, entitled ''Dual Chambered Anechoic Chamber'', issue date August 31, 2004.//U.S. Patent Number 6,782,063, entitled ''Automatic Gain Control'', issue date August 24, 2004.//U.S. Patent Number 6,753,994, entitled ''Spatially Conformable Tunable Filter'', issue date June 22, 2004.//U.S. Patent Number 6,727,941, entitled ''Universal Digital Camera Controller with Automatic Iris Tuning'', issue date April 27, 2004.//U.S. Patent Number 6,710,737, entitled ''Calibrator for Radar Target Simulator'', issue date March 23, 2004.//U.S. Patent Number 6,671,304, entitled ''Amplitude-Modulated Laser for High-Bandwidth Communications Systems'', issue date December 30, 2003.//U.S. Patent Number 6,661,566, entitled ''Method and Optical Switch for Altering an Electromagnetic Energy Wave in Response to Acceleration Forces'', issue date December 9, 2003.//U.S. Patent Number 6,631,156, entitled ''Digital Data Communications System'', issue date October 7, 2003.//U.S. Patent Number 6,625,896, entitled ''Electrolytic Tilt Sensor and Method for Manufacturing Same'', issue date September 30, 2003.//U.S. Patent Number 6,622,092, entitled ''Predictor for Optimal Broadband Impedance

Matching'', issue date September 16, 2003.//U.S. Patent Number 6,619,866, entitled ''Dynamic Range Extended For Optical Transmitters'', issue date September 16, 2003.//U.S. Patent Number 6,584,300, entitled ''Object-Oriented System for Simulating Sonar Target Acoustic Scattering'', issue date June 24, 2003.//U.S. Patent Number 6,549,560, entitled ''Comb Limiter Combiner for Frequency-Hopped Communications'', issue date April 15, 2003.//U.S. Patent Number 6,525,325, entitled ''System for Quantifying the Hydrocarbon Content of Aqueous Media'', issue date February 25, 2003.// U.S. Patent Number 6,507,252, entitled ''High Rejection Evanescent Mic Multiplexers for Multifunctional Systems'', issue date January 14, 2003.// U.S. Patent Number 6,466,515, entitled ''Power-Efficient Sonar System Employing a Waveform and Processing Method for Improved Range Resolution at High Doppler Sensitivity'', issue date October 15, 2002.//U.S. Patent Number 6,466,184, entitled ''Three Dimensional Volumetric Display'', issue date October 15, 2002.//U.S. Patent Number 6,459,745, entitled ''Frequency/Timing Recovery Circuit for Orthogonal Frequency Division Multiplexed Signals'', issue date October 1, 2002.// U.S. Patent Number 6,448,941, entitled ''Method for Secure Communications Using Spiral Antennas'', issue date September 10, 2002.//U.S. Patent Number 6,437,890, entitled ''Laser Communications Link'', issue date August 20, 2002.//U.S. Patent Number 6,414,305, entitled ''Automated System for Determining Minimum Resolvable Temperature Differences'', issue date July 2, 2002.//U.S. Patent Number 6,395,435, entitled ''Photo-Lithographic Mask Having Total Internal Reflective Surfaces'', May 28, 2002.//U.S. Patent Number 6,232,931, entitled ''Opto-Electronically Controlled Frequency Selective Surface'', issue date May 15, 2001.//U.S. Patent Number 6,229,847, entitled ''Signal Quality Measurement Device'', issue date May 8, 2001.//U.S. Patent Number 6,198,425, entitled ''Pulse Doppler Target Detecting Device'', issue date March 6, 2001.//U.S. Patent Number 6,166,680, entitled ''Range Dependent time Delay Target Detecting Device'', issue date December 26, 2000.//U.S. Patent Number 6,138,572, entitled ''Three-Beam Passive Infrared Guided Missile Fuze (U)'', issue date October 31, 2000.//U.S. Patent Number 6,137,609, entitled ''Over-the-Horizon Optical Communications Transceiver'', issue date October 24, 2000.//U.S. Patent Number 6,133,865, entitled ''Cw Converter Circuit'', issue date October 17, 2000.//U.S. Patent Number 6,067,448, entitled ''System and Method for Isolating Radio Frequency Signals'', issue date May 23, 2000.//U.S. Patent Number 6,061,821, entitled ''Context Based Error Detection and Correction for Binary Encoded Text Messages'', issue date May 9, 2000.// U.S. Patent Number 6,052,100, entitled ''Computer Controlled Three-Dimensional Volumetric Display'', issue date April 18, 2000.//U.S. Patent Number 6,040,801, entitled ''Low Duty Cycle Navigation System'', issue date March 21, 2000.//U.S. Patent Number 6,008,642, entitled ''Stochastic Resonance Detector for Weak Signals'', issue date December 28, 1999.//U.S. Patent Number 5,892,765, entitled ''System and Method for Effectuating Communications between Networks Operating Asynchronously with Respect to One Another'', issue date April 6, 1999.//U.S. Patent Number 5,805,635, entitled ''Secure Communication System'', issue date September 8, 1998.//U.S. Patent Number 5,789,961, entitled ''Noise- and Coupling-Tuned Signal Processor with Arrays of Nonlinear Dynamic Elements'', issue date August 4, 1998.//U.S. Patent Number 5,754,496, entitled ''Detector Employing Logic Circuitry for the Selective Screening of Signals (U)'', issue date May 19, 1998.//U.S. Patent Number 5,648,940 entitled ''Pulse Coded Sonar Having Improved Doppler Determination Feature'', issue date July 15, 1997.//U.S. Patent Number 5,493,612, entitled ''Secure Communication Keying System'', issue date February 20, 1996.//U.S. Patent Number 5,475,802, entitled ''Selective Polygon Map Display Method'', issue date December 12, 1995.//U.S. Patent Number 5,341,463, entitled ''Selective Polygon Map Display Method'', issue date August 23, 1994.//U.S. Patent Number 5,325,395, entitled ''5-Volt Low Level Serial Transceiver'', issue date June 28, 1994.//U.S. Patent Number 5,081,900, entitled ''Resonance Damage Process'', issue date January 21, 1992.// U.S. Patent Number 5,073,784, entitled ''Transmitter Location System for Frequencies Below Hf'', issue date December 17, 1991.//U.S. Patent Number 5,062,083, entitled ''Ping Elongator-Modulator for Realistic Echo Synthesis'', issue date October 29, 1991.

**ADDRESSES:** Requests for copies of patents cited should be directed to the Space and Naval Warfare Systems Center, Office of Research and Technology Applications, Code 2112, 83570 Silvergate Ave., Room 2306, San Diego, CA 92152–5048.

**FOR FURTHER INFORMATION CONTACT:** Dr. Stephen H. Lieberman, Office of Research and Technology Applications, Space and Naval Warfare Systems Center, Code 2112, 83570 Silvergate Ave., Room 2306, San Diego, CA 92152–5048, telephone 619–553–2778, E-Mail: *stephen.lieberman@navy.mil*.

(Authority: U.S.C. 207, 37 CFR part 404)

Dated: March 30, 2006.

**Eric McDonald,**

*Lieutenant Commander, Judge Advocate General's Corps, U.S. Navy, Federal Register Liaison Officer.*

[FR Doc. E6–4997 Filed 4–5–06; 8:45 am]

**BILLING CODE 3810–FF–P**

## DEPARTMENT OF DEFENSE

### Department of the Navy

### Notice of Intent To Grant Exclusive Patent License; Omega Sensors, Inc.

**AGENCY:** Department of the Navy, DoD.

**ACTION:** Notice.

**SUMMARY:** The Department of the Navy herby gives notice of its intent to grant to Omega Sensors, Inc., a revocable, nonassignable, exclusive license in the United States to practice the Government-Owned invention(s) described in U.S. Patent Number 6,546,798, entitled ''Micro-Electro-Mechanical Systems Resonant Optical Gyroscope'', issue date April 4, 2003.// U.S. Patent Number 6,550,330, entitled ''Differential Amplification for Micro-Electro-Mechanical Ultra-Sensitive Accelerometer'', issue date April 22, 2003.//U.S. Patent Number 6,581,465, entitled ''Micro-electro-mechanical systems ultra sensitive accelerometer'', issue date June 24, 2003.//U.S. Patent Number 6,763,718, entitled ''Micro-Electro-Mechanical Ultra-Sensitive Accelerometer with Independent Sensitivity Adjustment'', issue date July 20, 2004.//U.S. Patent Pending, entitled ''Integrated Circuit Porphyrin-Based Optical Chemical Sensor'', Navy Case Number 84715.//U.S. Patent Pending, entitled ''Wireless Remote Sensor and Method for Making Same'', Navy Case Number 84769.//U.S. Patent Pending, entitled ''Micro-Electro-Mechanical Systems Magnetic Vibration Power Generator'', Navy Case Number 84774.

**DATES:** Anyone wishing to object to the grant of this license must file written objections along with supporting evidence, if any, not later than April 21, 2006.

**ADDRESSES:** Written objections are to be filed with the Office of Research and Technology Applications, Space and Naval Warfare Systems Center, Code

2112, 83570 Silvergate Ave., Room 2306, San Diego, CA 92152–5048.

**FOR FURTHER INFORMATION CONTACT:** Dr. Stephen H. Lieberman, Office of Research and Technology Applications, Space and Naval Warfare Systems Center, Code 2112, 83570 Silvergate Ave., Room 2306, San Diego, CA 92152–5048, telephone 619–553–2778, e-mail: *stephen.lieberman@navy.mil*.

(Authority: 35 U.S.C. 207, 37 CFR part 404)

Dated: March 28, 2006.

**Eric McDonald,**

*Lieutenant Commander, Judge Advocate General's Corps, U.S. Navy, Federal Liaison Officer.*

[FR Doc. E6–4996 Filed 4–5–06; 8:45 am]

**BILLING CODE 3810–FF–P**

## DEPARTMENT OF EDUCATION

### Notice of Proposed Waivers for the Native American Vocational Technical Education Program (NAVTEP) and the Tribally Controlled Postsecondary Vocational and Technical Institutions Program (TCPVTIP) and Funding of Continuation Grants

**AGENCY:** Office of Vocational and Adult Education, Department of Education.

**SUMMARY:** The Secretary proposes to waive the requirements in 34 CFR 75.250 of the Education Department General Administrative Regulations (EDGAR) that generally prohibit project periods exceeding five years and announces the proposed funding of continuation grants for current NAVTEP and TCPVTIP grantees. These waivers would enable the 30 current eligible grantees under NAVTEP and the two current eligible grantees under TCPVTIP to apply for and continue to receive Federal funding beyond the five-year limitation contained in 34 CFR 75.250.

**DATES:** We must receive your comments on or before May 8, 2006.

**ADDRESSES:** Address all comments about these proposed waivers to Sharon A. Jones, U.S. Department of Education, 400 Maryland Avenue, SW., room 11108, Potomac Center Plaza, Washington, DC 20202–7242. If you prefer to send your comments through the Internet, use the following address: *sharon.jones@ed.gov.*

**FOR FURTHER INFORMATION CONTACT:** Sharon A. Jones; Telephone: (202) 245–7803.

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 under **FOR FURTHER INFORMATION CONTACT**.

**SUPPLEMENTARY INFORMATION:**

#### Invitation To Comment

We invite you to submit comments regarding these proposed waivers. We are particularly interested in receiving comments on the potential impact that these proposed waivers may have on NAVTEP and TCPVTIP, and on potential applicants who would be eligible to apply for awards under a NAVTEP or TCPVTIP competition.

During and after the comment period, you may inspect all public comments about these proposed waivers in room 11108, Potomac Center Plaza, 550 12th Street, SW., Washington, DC, between the hours of 8 a.m. and 4 p.m., Eastern time, Monday through Friday of each week, except Federal holidays.

#### Assistance to Individuals With Disabilities in Reviewing the Rulemaking Record

On request, we will supply an appropriate aid, such as a reader or print magnifier, to an individual with a disability who needs assistance to review the comments or other documents in the public rulemaking record for these proposed waivers. If you want to schedule an appointment for this type of aid, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

#### Background

NAVTEP and TCPVTIP support grants to operate vocational and technical education programs, as authorized by sections 116(a) through (g) and 117, respectively, of the Carl D. Perkins Vocational and Technical Education Act of 1998 (Perkins Act) (20 U.S.C. 2326(a)–(g) and 2327). The Congress is now in the process of reauthorizing the Perkins Act and we do not believe it would be in the public interest to hold new competitions under either NAVTEP or TCPVTIP until after Congress has concluded that process.

Eligible applicants for fiscal year (FY) 2005 NAVTEP funds (the appropriation currently available for expenditure for NAVTEP) are:

(a) Federally recognized Indian tribes.

(b) Tribal organizations.

(c) Alaska Native entities.

(d) Bureau-funded schools (as defined in the notice inviting applications published in the **Federal Register** on January 3, 2001 (66 FR 560)), except for Bureau-funded schools proposing to use their award to support secondary school vocational and technical education programs.

(e) Consortia of one or more eligible tribes, tribal organizations, Alaska Native entities, or eligible Bureau-funded schools.

Eligible applicants for FY 2006 TCPVTIP funds (the appropriation currently available for expenditure for TCPVTIP) are tribally controlled postsecondary vocational and technical institutions that do not receive Federal support under the Tribally Controlled College or University Assistance Act of 1978 (25 U.S.C. 1801 *et seq.*) or the Navajo Community College Act (25 U.S.C. 640a *et seq.*)

To avoid a lapse in the availability of vocational and technical education and training provided by current NAVTEP and TCPVTIP grantees, the Secretary proposes to waive the requirements in 34 CFR 75.250, which prohibit project periods exceeding five years. With these waivers we would continue to fund current, eligible NAVTEP and TCPVTIP grantees, for as long as Congress continues to appropriate funds for the existing program authorities and possibly during a transition to any new program authorities. We have concluded that it would be contrary to the public interest to have a lapse in NAVTEP and TCPVTIP projects pending reauthorization of the Perkins Act. With these waivers of 34 CFR 75.250: (1) Current NAVTEP and TCPVTIP grants would be continued at least through FY 2006 and possibly beyond, if Congress continues to appropriate funds for NAVTEP or TCPVTIP under their current statutory authorities, and (2) we would not announce new competitions or make new awards under NAVTEP or TCPVTIP in FY 2006.

In a July 16, 2004 **Federal Register** notice for NAVTEP (69 FR 42701), and in a July 29, 2002 **Federal Register** notice for TCPVTIP (67 FR 49015), we waived the requirements of 34 CFR 75.261(c)(2), which prohibit project period extensions involving the obligation of additional Federal funds. The waivers of 34 CFR 75.261(c)(2) announced in those notices remain in effect for current NAVTEP and TCPVTIP grantees. If the waivers of 34 CFR 75.250 proposed in this notice are announced by us in a final notice, the requirements applicable to continuation awards for current NAVTEP and TCPVTIP grantees that were established in our July 16, 2004 and July 29, 2002 **Federal Register** notices, and the requirements in 34 CFR 75.253 would apply to any continuation awards sought by eligible current grantees under these programs.

The waivers of 34 CFR 75.250 and 75.261(c)(2) do not exempt current

NAVTEP and TCPVTIP grantees from the account closing provisions of 31 U.S.C. 1552(a), nor do they extend the availability of funds previously awarded to current NAVTEP and TCPVTIP grantees. As a result of 31 U.S.C. 1552(a), appropriations available for a limited period may be used for payment of valid obligations for only five years after the expiration of their period of availability for Federal obligation. After that time, the unexpended balance of those funds is canceled and returned to the U.S. Treasury Department and is unavailable for restoration for any purpose.

**Regulatory Flexibility Act Certification**

The Secretary certifies that the proposed waivers would not have a significant economic impact on a substantial number of small entities.

The small entities that would be affected by these proposed waivers are:

(a) The FY 2000 grantees currently receiving Federal funds and the following entities that are eligible for an award under NAVTEP:

(1) Federally recognized Indian tribes.

(2) Tribal organizations.

(3) Alaska Native entities.

(4) Bureau-funded schools (as defined in the notice inviting applications published in the **Federal Register** on January 3, 2001 (66 FR 560)), except for Bureau-funded schools proposing to use their award to support secondary school vocational and technical education programs.

(b) The FY 2001 grantees currently receiving Federal funds and other tribally controlled postsecondary vocational and technical institutions that do not receive Federal support under the Tribally Controlled College or University Assistance Act of 1978 (25 U.S.C. 1801 *et seq.*) or the Navajo Community College Act (25 U.S.C. 640a *et seq.*) that are eligible for an award under the TCPVTIP.

The Secretary certifies that the proposed waivers would not have a significant economic impact on these entities because the proposed waivers and the activities required to support the additional years of funding would not impose excessive regulatory burdens or require unnecessary Federal supervision. The proposed waivers would impose minimal requirements to ensure the proper expenditure of program funds, including requirements that are standard for continuation awards.

**Paperwork Reduction Act of 1995**

This notice of proposed waivers does not contain any information collection requirements.

**Intergovernmental Review**

The NAVTEP and TCPVTIP are not subject to Executive Order 12372 and the regulations in 34 CFR part 79.

**Electronic Access to This Document**

You may view this document, as well as all other Department of Education documents published in the **Federal Register**, in text or Adobe Portable Document Format (PDF) on the Internet at the following site: *http://www.ed.gov/new/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.*

(Catalog of Federal Domestic Assistance Number 84.101 Native American Vocational and Technical Education Program and 84.245 Tribally Controlled Postsecondary Vocational and Technical Institutions Program.)

**Program Authority:** 20 U.S.C. 2326(a) through (g) and 20 U.S.C. 2327.

Dated: March 31, 2006.

**Beto D. Gonzalez,**

*Acting Assistant Secretary for Vocational and Adult Education.*

[FR Doc. E6–4903 Filed 4–5–06; 8:45 am]

BILLING CODE 4000–01–P

## ELECTION ASSISTANCE COMMISSION

### Sunshine Act Notice

**AGENCY:** United States Election Assistance Commission.

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**ACTION:** Notice of Public Meeting Agenda.

**DATE & TIME:** Thursday, April 20, 2006, 10 a.m.–12 noon.

**PLACE:** Seattle Hilton, 1301 6th Avenue and University Street, Seattle, WA 98101–2304. (206) 624–0500.

**AGENDA:** The Commission will receive presentations on the following topic: ''Vote Counting and Recounting''. The Commission will hear from election officials and election researchers on experiences with recounting and procedures for counting votes. The Commission will receive updates on other administrative matters.

**This Meeting Will be Open to the Public**

* * * * *

**PERSON TO CONTACT FOR INFORMATION:** Bryan Whitener, Telephone: (202) 566–3100.

* * * * *

**Thomas R. Wilkey,**

*Executive Director, U.S. Election Assistance Commission.*

[FR Doc. 06–3362 Filed 4–4–06; 2:02 pm]

BILLING CODE 6820–KF–M

## DEPARTMENT OF ENERGY

### Office of Science; Fusion Energy Sciences Advisory Committee

**AGENCY:** Department of Energy.

**ACTION:** Notice of open meeting.

**SUMMARY:** This notice announces a meeting of the Fusion Energy Sciences Advisory Committee. The Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770) requires that public notice of these meetings be announced in the **Federal Register**.

**DATES:** Thursday, June 1, 2006, 8:30 a.m. to 6 p.m.

**ADDRESSES:** The Gaithersburg Hilton Hotel, 620 Perry Parkway, Gaithersburg, Maryland, 20887, USA.

**FOR FURTHER INFORMATION CONTACT:** Albert L. Opdenaker, Office of Fusion Energy Sciences, U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585–1290; Telephone: 301–903–4927.

**SUPPLEMENTARY INFORMATION:**

*Purpose of the Meeting:* The major purposes of the meeting are for the Fusion Energy Sciences Advisory Committee (FESAC) to (1) complete the *charge* to rate the program's progress toward meeting long-range PART measures; (2) review the EPAct-required plan for the participation of U.S. scientists in ITER; and, (3) hear from a small group of FESAC members that was appointed after the last meeting to consider how to address the charge on how the program should evolve over the coming decade taking into account new and upgraded international experiments, and how the U.S. program should prepare to make the transition to ITER.

**Tentative Agenda**

Thursday, June 1, 2006:

- Complete the charge on assessing the program's progress toward achieving long-range PART measures.
- Review the EPAct-required plan for the participation of U.S. Scientists in ITER.

• Discuss the approach to addressing the new charge to recommend how the program should evolve over the next ten years.

• Hear Public Comments.

*Public Participation:* The meeting is open to the public. If you would like to file a written statement with the Committee, you may do so either before or after the meeting. If you would like to make oral statements regarding any of the items on the agenda, you should contact Albert L. Opdenaker at 301–903–8584 (fax) or *albert.opdenaker@science.doe.gov* (e-mail). You must make your request for an oral statement at least 5 business days before the meeting. Reasonable provision will be made to include the scheduled oral statements on the agenda. The Chairperson of the Committee will conduct the meeting to facilitate the orderly conduct of business. Public comment will follow the 10-minute rule.

*Minutes:* We will make the minutes of this meeting available for public review and copying within 30 days at the Freedom of Information Public Reading Room, 1E–190, Forrestal Building, 1000 Independence Avenue, SW., Washington, DC, between 9 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

Issued at Washington, DC, on March 30, 2006.

**Rachel M. Samuel,**

*Deputy Advisory Committee Management Officer.*

[FR Doc. E6–4999 Filed 4–5–06; 8:45 am]

**BILLING CODE 6450–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. RP06–171–003]**

### Central New York Oil and Gas Company, LLC; Notice of Compliance Filing

March 7, 2006.

Take notice that, on February 23, 2006, Central New York Oil And Gas Company, LLC (CNYOG), tendered for filing as part of its FERC Gas Tariff, Original Volume No. 1, Substitute Original Sheet No. 75A and Substitute Third Revised Sheet No. 98, to become effective February 6, 2006.

CNYOG states that the filing is being made to comply with the Commission's order dated February 3, 2006 in this proceeding.

CNYOG states that copies of the filing were served on the company's jurisdictional customers and interested state commissions.

Any person desiring to protest this filing must file in accordance with Rule 211 of the Commission's Rules of Practice and Procedure (18 CFR 385.211). Protests to this filing will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Such protests must be filed in accordance with the provisions of section 154.210 of the Commission's regulations (18 CFR 154.210). Anyone filing a protest must serve a copy of that document on all the parties to the proceeding.

The Commission encourages electronic submission of protests in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible online at *http://www.ferc.gov*, using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

**Magalie R. Salas,**

*Secretary.*

[FR Doc. E6–4975 Filed 4–5–06; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. CP04–365–003]**

### Dominion Transmission, Inc.; Notice of Application

March 30, 2006.

On March 21, 2006, Dominion Transmission, Inc. (Dominion), 120 Tredegar Street, Richmond, Virginia 23219, filed an application in the above referenced docket, pursuant to section 7(c) of the Natural Gas Act (NGA), and Part 157 of the Federal Energy Regulatory Commission's (Commission) Rules and Regulations seeking to amend its certificate of public convenience and necessity issued June 16, 2005, for the Northeast Storage Project. Dominion is specifically requesting clarification of the number of lateral wellbores in well QW–6A, the location of well QW–6A, and an extension of time for the construction of well QW–5. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''e-Library'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC at *FERCOnlineSupport@ferc.gov* or call toll-free, (866) 208–3676, or for TTY, (202) 502–8659.

Any questions regarding this application should be directed to Matthew R. Bley, Manager, Gas Transmission Certificates, Dominion Transmission, Inc., 120 Tredegar Street, Richmond, Virginia 23219, (804) 819–2877.

There are two ways to become involved in the Commission's review of this project. First, any person wishing to obtain legal status by becoming a party to the proceedings for this project should, on or before the comment date stated below file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, a motion to intervene in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the NGA (18 CFR 157.10). A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies of all documents filed by the applicant and by all other parties. A party must submit 14 copies of filings made in the proceeding with the Commission and must mail a copy to the applicant and to every other party. Only parties to the proceeding can ask for court review of Commission orders in the proceeding.

However, a person does not have to intervene in order to have comments considered. The second way to participate is by filing with the Secretary of the Commission, as soon as possible, an original and two copies of comments in support of or in opposition to this project. The Commission will consider these comments in determining the appropriate action to be taken, but the filing of a comment alone will not serve to make the filer a party to the proceeding. The Commission's rules require that persons filing comments in opposition to the project provide copies of their protests only to the party or parties directly involved in the protest.

Persons who wish to comment only on the environmental review of this project should submit an original and two copies of their comments to the Secretary of the Commission. Environmental commenters will be placed on the Commission's environmental mailing list, will receive copies of the environmental documents, and will be notified of meetings associated with the Commission's environmental review process. Environmental commenters will not be required to serve copies of filed documents on all other parties. However, the non-party commenters will not receive copies of all documents filed by other parties or issued by the Commission (except for the mailing of environmental documents issued by the Commission) and will not have the right to seek court review of the Commission's final order.

Protests and interventions may be filed electronically via the Internet in lieu of paper; see, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link. The Commission strongly encourages electronic filings.

*Comment Date:* April 10, 2006.

**Magalie R. Salas,**

*Secretary.*

[FR Doc. E6–4970 Filed 4–5–06; 8:45 am]

BILLING CODE 6717–01–P

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. RP97–13–023]**

### East Tennessee Natural Gas, LLC; Notice of Compliance Filing

March 7, 2006.

Take notice that on February 22, 2006, East Tennessee Natural Gas, LLC (East Tennessee) submitted a compliance filing pursuant to the Commission's August 16, 2005 order in the above-captioned docket.

East Tennessee states that copies of the filing were served on parties on the official service list in the above-captioned proceeding, as well as all customers and interested state commissions.

Any person desiring to protest this filing must file in accordance with Rule 211 of the Commission's Rules of Practice and Procedure (18 CFR 385.211). Protests to this filing will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Such protests must be filed in accordance with the provisions of section 154.210 of the Commission's regulations (18 CFR 154.210). Anyone filing a protest must serve a copy of that document on all the parties to the proceeding.

The Commission encourages electronic submission of protests in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible online at *http://www.ferc.gov*, using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

**Magalie R. Salas,**

*Secretary.*

[FR Doc. E6–4977 Filed 4–5–06; 8:45 am]

BILLING CODE 6717–01–P

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. RP06–279–000]**

### Eastern Shore Natural Gas Company; Notice of Proposed Changes in FERC Gas Tariff

March 30, 2006.

Take notice that on March 27, 2006 Eastern Shore Natural Gas Company (Eastern Shore) tendered for filing revised tariff sheets, proposed to be effective April 1, 2006.

Sixtieth Revised Sheet No. 7
Sixtieth Revised Sheet No. 8

Eastern Shore states that copies of its filing are available for public inspection at 417 Bank Lane, Dover, Delaware and a copy has been mailed to its customers and interested state commissions.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed in accordance with the provisions of Section 154.210 of the Commission's regulations (18 CFR 154.210). Anyone filing an intervention or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible online at *http://www.ferc.gov*, using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

**Magalie R. Salas,**

*Secretary.*

[FR Doc. E6–4964 Filed 4–5–06; 8:45 am]

BILLING CODE 6717–01–P

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. RP06–226–000]**

### El Paso Natural Gas Company; Notice of Request of Waiver

March 30, 2006.

Take notice that on February 16, 2006, El Paso Natural Gas Company (El Paso) filed proposals for the month of January 2006 to discount its new Order No. 637 daily overrun charges, as well as to waive any monthly cash-out charges resulting from the tiers in El Paso's cash-out mechanism. El Paso states that the filing is being made as an accommodation to shippers to give them more time to adjust to these new tariff provisions.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed in accordance with the provisions of Section 154.210 of the Commission's regulations (18 CFR 154.210). Anyone filing an intervention or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible online at *http://www.ferc.gov*, using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

**Magalie R. Salas,**

*Secretary.*

[FR Doc. E6–4968 Filed 4–5–06; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. PR06–13–000]**

### Enbridge Pipelines (Louisiana Intrastate), L.L.C.; Notice of Petition for Rate Approval

March 30, 2006.

Take notice that on March 20, 2006, Enbridge Pipelines (Louisiana Intrastate), L.L.C. filed a petition for rate approval for NGPA section 311 maximum transportation rates for interruptible transportation service, pursuant to section 284.123(b)(2) of the Commission's regulations.

Any person desiring to participate in this rate proceeding must file a motion to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the date as indicated below. Anyone filing an intervention or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible online at *http://www.ferc.gov*, using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

*Comment Date:* 5 p.m. Eastern Time April 7, 2006.

**Magalie R. Salas,**

*Secretary.*

[FR Doc. E6–4967 Filed 4–5–06; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. RP06–278–000]**

### Gas Transmission Northwest Corporation; Notice of Proposed Changes in FERC Gas Tariff

March 30, 2006.

Take notice that on March 24, 2006, Gas Transmission Northwest Corporation (GTN) tendered for filing as part of its FERC Gas Tariff, Third Revised Volume No. 1–A, the following tariff sheets, to become effective April 24, 2006:

Fifth Revised Sheet No. 100
First Revised Sheet No. 141
Original Sheet No. 141A
Second Revised Sheet No. 160
Second Revised Sheet No. 161
Second Revised Sheet No. 162
First Revised Sheet No. 164
Original Sheet No. 204
Original Sheet No. 205
Original Sheet No. 206
Sheet No. 207

GTN states that a copy of this filing has been served on GTN's jurisdictional customers and interested state regulatory agencies.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed in accordance with the provisions of Section 154.210 of the Commission's regulations (18 CFR 154.210). Anyone filing an intervention or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible online at *http://www.ferc.gov*, using the

''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

**Magalie R. Salas,**

*Secretary.*

[FR Doc. E6–4969 Filed 4–5–06; 8:45 am]

BILLING CODE 6717–01–P

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. PR06–10–000]**

### Ohio Valley Hub, LLC; Notice of Petition for Approval of Rates

March 7, 2006.

Take notice that on January 31, 2006, Ohio Valley Hub, LLC (Ohio Valley) filed a cost and throughput study pursuant to a Commission order issued in Docket Nos. PR02–15–000 and CP02–161–000 (Ohio Valley Hub, LLC, 100 FERC ¶ 61,238 (2002)).

Ohio Valley states that it requests no change to its existing rates and charges or to the previously approved terms and conditions of service.

Any person desiring to participate in this rate proceeding must file a motion to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the date as indicated below. Anyone filing an intervention or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

*Comment Date:* 5 p.m. Eastern Time on March 17, 2006.

**Magalie R. Salas,**

*Secretary.*

[FR Doc. E6–4974 Filed 4–5–06; 8:45 am]

BILLING CODE 6717–01–P

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. RP06–222–001]**

### Viking Gas Transmission Company; Notice of Compliance Filing

March 7, 2006.

Take notice that on February 20, 2006, Viking Gas Transmission Company (Viking) tendered for filing to be part of its FERC Gas Tariff, First Revised Volume No. 1, substitute Sixteenth Revised Sheet No. 5B, to become effective April 1, 2006.

Any person desiring to protest this filing must file in accordance with Rule 211 of the Commission's Rules of Practice and Procedure (18 CFR 385.211). Protests to this filing will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Such protests must be filed in accordance with the provisions of section 154.210 of the Commission's regulations (18 CFR 154.210). Anyone filing a protest must serve a copy of that document on all the parties to the proceeding.

The Commission encourages electronic submission of protests in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible online at *http://www.ferc.gov*, using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

**Magalie R. Salas,**

*Secretary.*

[FR Doc. E6–4976 Filed 4–5–06; 8:45 am]

BILLING CODE 6717–01–P

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

### Notice of Application for Transfer of License, and Soliciting Comments, Motions To Intervene, and Protests

March 30, 2006.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Application Type:* Transfer of License.

b. *Project No.:* 12379–018.

c. *Date Filed:* March 23, 2006.

d. *Applicants:* Lake Dorothy Hydro, Inc. (Transferor); Alaska Electric Light and Power Company (Transferee).

e. *Name and Location of Project:* The Lake Dorothy Hydroelectric Project is located at Lake Dorothy on Dorothy Creek, near Juneau Alaska and occupies lands of the Tongass National Forest.

f. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791a–825r.

g. *Applicant Contacts:* For the Transferor: Corry V. Hildenbrand, President, Lake Dorothy Hydro, Inc., 5601 Tonsgard Court, Juneau, AK, (907) 463–6320.

*Transferee:* Tim McLeod, President, Alaska Electric Light & Power Company, 5601 Tonsgard Court, Juneau, AK, 99801, (907) 463–6317.

h. *FERC Contact:* Patricia W. Gillis, (202) 502–8735.

i. Deadline for filing comments, protests, and motions to intervene: April 17, 2006.

All documents (original and eight copies) should be filed with: Magalie R. Salas, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

Comments, protests, and interventions may be filed electronically via the Internet in lieu of paper. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's web site under the ''e-Filing'' link. The Commission strongly encourages electronic filings. Please include the Project Number on any comments or motions filed.

The Commission's Rules of Practice and Procedure require all intervenors filing a document with the Commission to serve a copy of that document on each person on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the documents on that resource agency.

j. *Description of Application:* The Applicants seek Commission approval to transfer the license for the Lake Dorothy Hydroelectric Project from Lake Dorothy Hydro, Inc. to Alaska Electric Light & Power Company.

k. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number (P–12379) in the docket number field to access the document. For assistance, call toll-free 1–866–208–3676 or e-mail *FERCOnlineSupport@ferc.gov.* For TTY, call (202) 502–8659. A copy is also available for inspection and reproduction at the addresses in item g above.

l. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

m. Comments, Protests, or Motions to Intervene: Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

n. Filing and Service of Responsive Documents: Any filings must bear in all capital letters the title ''COMMENTS'', ''PROTEST'', or ''MOTION TO INTERVENE'', as applicable, and the Project Number of the particular application to which the filing refers. Any of the above-named documents must be filed by providing the original and eight copies to: The Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. A copy of any motion to intervene must also be served upon each representative of the Applicants specified in the particular application.

o. *Agency Comments:* Federal, State, and local agencies are invited to file comments on the described application. A copy of the application may be obtained by agencies directly from the Applicants. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the Applicants' representatives.

**Magalie R. Salas,**

*Secretary.*

[FR Doc. E6–4965 Filed 4–5–06; 8:45 am]

**BILLING CODE 6717–01–P**

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## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

### Notice of Application for Amendment of License and Soliciting Comments, Motions To Intervene, and Protests

March 30, 2006.

Take notice that the following application has been filed with the Commission and is available for public inspection:

a. *Application Type:* Non-Capacity Amendment of License.

b. *Project No.:* 1904–042.

c. *Date Filed:* March 1, 2006.

d. *Applicant:* TransCanada Hydro Northeast, Inc.

e. *Name of Project:* Vernon Hydroelectric Project.

f. *Location:* The project is located on the Connecticut River, in Cheshire County, New Hampshire and Windham County, Vermont.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791a–825r.

h. *Applicant Contact:* John Ragonese, FERC License Manager, TransCanada Hydro Northeast, Inc., 4 Park Street, Suite 402, Concord, New Hampshire 03301–6313, telephone: (603) 224–5528, fax: (603) 225–3260.

i. *FERC Contact:* Any questions on this notice should be addressed to Mrs. Anumzziatta Purchiaroni at (202) 502–6191, or e-mail address: *anumzziatta.purchiaroni@ferc.gov*.

j. Deadline for filing comments and/or motions: May 1, 2006.

k. *Description of Request:* The licensee filed an amendment application to replace the existing four 2.0-MW turbine generator units with four new 4.0-MW units, instead of two 14.0-MW units, as approved by a 1992 amendment order. The licensee indicates in the filing, that the two 14-MW units were never installed at the project due to economic factors. The proposed amendment would decrease the authorized installed capacity of the project from 44.4 MW to 32.4 MW. The total hydraulic capacity would decrease from 20,930 cfs to 17,130 cfs.

l. *Locations of the Application:* A copy of the application is available for inspection and reproduction at the Commission's Public Reference Room, located at 888 First Street, NE., Room 2A, Washington, DC 20426, or by calling (202) 502–8371. Information about this filing may also be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via e-mail of new filings and issuances related to this or other pending projects. For assistance, call 1–866–208–3676 or e-mail *FERCOnlineSupport@ferc.gov*, for TTY, call (202) 502–8659. A copy is also available for inspection and reproduction at the address in item (h) above.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. Comments, Protests, or Motions to Intervene—Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

o. Filing and Service of Responsive Documents: Any filings must bear in all capital letters the title ''COMMENTS'', ''RECOMMENDATIONS FOR TERMS AND CONDITIONS'', ''PROTEST'', or ''MOTION TO INTERVENE'', as applicable, and the Project Number of the particular application to which the filing refers. All documents (original and eight copies) should be filed with: Magalie R. Salas, Secretary, Federal

Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. A copy of any motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

p. Agency Comments: Federal, State, and local agencies are invited to file comments on the described application. A copy of the application may be obtained by agencies directly from the Applicant. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the Applicant's representatives.

q. Comments, protests and interventions may be filed electronically via the Internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site at *http://www.ferc.gov* under the ''e-Filing'' link.

**Magalie R. Salas,**

*Secretary.*

[FR Doc. E6–4966 Filed 4–5–06; 8:45 am]

BILLING CODE 6717–01–P

## ENVIRONMENTAL PROTECTION AGENCY

**[EPA–HQ–OAR–2003–0162; FRL–8054–4]**

### Agency Information Collection Activities: Submissions for OMB Review; Comment Request; EPA Information Collection Request for the Regional Haze Rule; EPA ICR No. 1813.06; OMB Control No. 2060–0421; Correction

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice correction.

**SUMMARY:** The EPA published a document in the **Federal Register** of March 13, 2006, concerning request for comments on a renewal of EPA's Information Collection Request for the Regional Haze Rule. The document contained incorrect dates.

**FOR FURTHER INFORMATION CONTACT:** General questions concerning today's action should be addressed to Kathy Kaufman, U.S. EPA, Office of Air Quality Policy Division, Mail Code C504–02, Research Triangle Park, NC, 27711, telephone (919) 541–0102, e-mail *kaufman.kathy@epa.gov.*

**Correction**

In the **Federal Register** of March 13, 2006, in FR Document E6–3517, on page 12696, in the second column, correct the ''Dates'' caption to read:

**DATES:** Comments must be submitted on or before May 12, 2006.

Dated: March 28, 2006.

**Scott Mathias,**

*Acting Director, Air Quality Policy Division, Office of Air Quality Planning and Standards.*

[FR Doc. E6–5020 Filed 4–5–06; 8:45 am]

BILLING CODE 6560–50–P

## FEDERAL RESERVE SYSTEM

### Change in Bank Control Notices; Acquisition of Shares of Bank or Bank Holding Companies

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the office of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than April 21, 2006.

**A. Federal Reserve Bank of Dallas** (W. Arthur Tribble, Vice President) 2200 North Pearl Street, Dallas, Texas 75201-2272:

*1. Henry Cook Taylor*, Natchitoches, Louisiana; to retain voting shares of City Bancshares, Inc., Natchitoches, Louisiana, and thereby indirectly retain voting shares of City Bank & Trust Company, Natchitoches, Louisiana.

Board of Governors of the Federal Reserve System, April 3, 2006.

**Robert deV. Frierson,**

*Deputy Secretary of the Board.*

[FR Doc. E6–4992 Filed 4–5–06; 8:45 am]

BILLING CODE 6210–01–S

## 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 website at *http://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 May 1, 2006.

**A. Federal Reserve Bank of Chicago** (Patrick M. Wilder, Assistant Vice President) 230 South LaSalle Street, Chicago, Illinois 60690-1414:

*1. Signature Bancorporation, Inc.*, Chicago, Illinois; to become a bank holding company by acquiring 100 percent of the voting shares of Signature Bank, Chicago, Illinois (in organization).

**B. Federal Reserve Bank of Kansas City** (Donna J. Ward, Assistant Vice President) 925 Grand Avenue, Kansas City, Missouri 64198-0001:

*1. First Pryor Bancorp, Inc.*, Pryor, Oklahoma; to acquire 10 percent of the voting shares of Carson River Community Bank, Carson City, Nevada (in organization).

Board of Governors of the Federal Reserve System, April 3, 2006.

**Robert deV. Frierson,**

*Deputy Secretary of the Board.*

[FR Doc. E6–4991 Filed 4–5–06; 8:45 am]

BILLING CODE 6210–01–S

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Office of Public Health and Science; Opportunity for Cosponsorship of the 3rd Annual HealthierUS Fitness Festival

**AGENCY:** Department of Health and Human Services, Office of the Secretary, Office of Public Health and Science,

Office of the President's Council on Physical Fitness and Sports.

**ACTION:** Notice.

**SUMMARY:** The Office of the President's Council on Physical Fitness and Sports (PCPFS) announces the opportunity for both Federal and non-Federal public and private sector entities to cosponsor a fitness festival depicting activities to help all Americans get moving for health and fitness in celebration of May, National Physical Fitness and Sports Month. Potential cosponsors must have a demonstrated interest in physical activity/fitness and/or sports and be willing to participate substantively in the cosponsored activity.

**DATES:** To receive consideration, a request to participate as a cosponsor must be received by the close of business on April 21, 2006. Requests will meet the deadline if they are either (1) received on or before the deadline date; or (2) postmarked on or before the deadline date.

**ADDRESSES:** Notifications of interest in a cosponsorship should be sent to Christine Spain, Director of Research, Planning and Special Projects, Office of the President's Council on Physical Fitness and Sports, Hubert H. Humphrey Building, Room 738–H, 200 Independence Avenue, SW., Washington, DC 20201; Ph: (202) 690–5148, Fax: (202) 690–5211. Notifications may also be submitted by electronic mail to *cspain@osophs.dhhs.gov.*

**FOR FURTHER INFORMATION CONTACT:** Christine Spain, Director of Research, Planning and Special Projects, Office of the President's Council on Physical Fitness and Sports, Hubert H. Humphrey Building, Room 738–H, 200 Independence Avenue, SW., Washington, DC 20201; Ph: (202) 690–5148, Fax: (202) 690–5211, E-mail: *cspain@osophs.dhhs.gov.*

**SUPPLEMENTARY INFORMATION:**

## Background

The PCPFS was established by the President of the United States and operates under Executive Order No. 13265, continued by Executive Order 13385, in accordance with the Federal Advisory Committee Act. Its purpose is to provide advice and recommendations to the President through the Secretary of HHS regarding actions to develop and coordinate a national program for physical activity/fitness and sports and, in part, inform the general public of the importance of exercise and the link between regular physical activity and good health.

The Office of the PCPFS serves as a catalyst to promote the development and implementation of physical activity/fitness and sports programs for all Americans. The Office of the PCPFS has a long and productive history of working with public and private sponsors to bring opportunities to participate in activities at the grassroots level. Cosponsorship of this activity will help to further the promotion of physical activity/fitness and sports by the Office of the PCPFS. This activity will be carried out by the Office of the PCPFS under its authority contained in Title XVII of the Public Health Service Act.

The purpose of the 3rd annual HealthierUS Fitness Festival is to motivate individuals, of all ages and abilities, to begin and continue an active lifestyle leading to enhanced physical fitness by providing access to actual demonstrations and sound information on diverse organizations and activities. Over one thousand individuals participated in this event on June 16, 2004; and 2,000 on May 2, 2005. The program will take place in Washington, DC on Saturday, May 6, 2006 from 8 a.m. to 12:30 p.m. and will include ongoing interactive sports and fitness demonstrations. Health and fitness experts from a myriad of organizations will be on hand to share tips as well as health and fitness information. No registration fees will be charged for any participants. All cosponsors agree not to sell any educational materials/equipment pertaining to the event. There are no federal funds available for this event. Participation may be limited depending on the number of proposals received and the space available.

## Requirements of Cosponsorship

The Office of the PCPFS is seeking a cosponsor(s) to partner in ways that accord with its particular circumstances. For example, an entity might offer to cosponsor the following proposed program activities with the Office of PCPFS:

(1) Participate in the development of the concept, planning of physical activity/fitness/sports demonstrations, and designation of professional organizations and experts in those specific activities;

(2) Participate in the review and approval of all materials produced to educate the public and promote the event;

(3) Participate in the review, development, and approval of all materials, signage, press releases, etc. that mention the cosponsorship;

(4) Participate in the coordination of logistical concerns; e.g., U.S. Park Police, bonds, insurance, etc.

No discrete portion of the event may be sponsored independently.

## Availability of Funds

There are no Federal funds available for this cosponsorship. All cosponsors agree to not use the event as a vehicle to sell or promote products or services. Any incidental promotional materials cannot imply that the PCPFS, Office of the PCPFS, or HHS endorses any products or services.

## Eligibility for Cosponsorship

To be eligible, a requester must: (1) Have a demonstrated interest and understanding of physical activity/fitness and/or sports; (2) participate substantively in the cosponsored activity (not just provide funding or logistical support); (3) have an organizational or corporate mission that is not inconsistent with the public health and safety mission of the Department; and (4) agree to sign a cosponsorship agreement with the Office of the PCPFS which will set forth the details of the cosponsored activity.

## Evaluation Criteria

After engaging in exploratory discussions with potential cosponsors that respond to this notice, the cosponsor(s) will be selected by the Office of the PCPFS using the following evaluation criteria:

(1) Requester's qualifications and capability to fulfill cosponsorship responsibilities;

(2) Requester's creativity for enhancing the medium for program messages; and

(3) Requester's potential for reaching underserved/special populations.

Dated: March 31, 2006.

**Melissa Johnson,**

*Executive Director, President's Council on Physical Fitness and Sports, Department of Health and Human Services.*

[FR Doc. E6–4963 Filed 4–5–06; 8:45 am]

BILLING CODE 4150–35–P

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# DEPARTMENT OF HEALTH AND HUMAN SERVICES

## Centers for Disease Control and Prevention

**[60 Day–06–06BD]**

## Proposed Data Collections Submitted for Public Comment and Recommendations

In compliance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 for opportunity for public comment on proposed data collection projects, the

Centers for Disease Control and Prevention (CDC) will publish periodic summaries of proposed projects. To request more information on the proposed projects or to obtain a copy of the data collection plans and instruments, call 404–639–5960 and send comments to Seleda Perryman, CDC Assistant Reports Clearance Officer, 1600 Clifton Road, MS–D74, Atlanta, GA 30333 or send an e-mail to *omb@cdc.gov.*

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Written comments should be received within 60 days of this notice.

**Proposed Project**

Economic Analysis of the National Breast and Cervical Cancer Early Detection Program—New—National Center for Chronic Disease Prevention and Health Promotion (NCCDPHP), Centers for Disease Control and Prevention (CDC).

*Background and Brief Description*

CDC administers the National Breast and Cervical Cancer Early Detection Program (NBCCEDP) which provides critical breast and cervical cancer screening services to underserved women in the United States, the District of Columbia, 4 U.S. territories, and 13 American Indian/Alaska Native organizations. The program provides breast and cervical cancer screening for eligible women who participate in the program as well as diagnostic procedures for women who have abnormal findings. For the past decade, the NBCCEDP has provided over 5 million breast and cervical cancer screening and diagnostic exams to almost 2.1 million low-income women. Women diagnosed with cancer through the program are eligible for Medicaid coverage through the Breast and Cervical Cancer Prevention and Treatment Act passed by Congress in 2000.

The NBCCEDP is the largest organized cancer screening program in the United States but to date there has been no systematic analysis of the economic costs incurred by the program. CDC is proposing to collect one year of cost data, (period covering 07/01/2005—06/30/2006), from all the 68 NBCCEDP grantees to assess the cost and cost-effectiveness of the program. The information required to perform an activity-based cost analysis includes: staff and consultant salaries, screening costs, contracts and material costs, provider payments, in-kind contributions, administrative costs, allocation of funds and staff time devoted to specific program activities. CDC has developed and tested a draft questionnaire with 9 NBCCEDP grantees to assess the ability of the grantees to provide the cost data elements requested, identify the cost information required, and to complete the questionnaire within the allocated timeframe.

The cost data provided by the 68 grantees will be used to evaluate the programs to ensure the most appropriate use of limited program resources. Performing an assessment of the resources expended on NBCCEDP will provide valuable information to the CDC and its' partners for improving program efficiency within the various components of the NBCCEDP including screening, case management, outreach, and overall management. The cost data will allow CDC to assess the costs of the various program components, identify factors that impact average cost, perform cost-effectiveness analysis and develop a resource allocation tool. The collection and analysis of the cost data will allow CDC to utilize a more systematic process to allocate program resources based on grantees' past performance, level of efficiency, and future needs.

Since information on screening and diagnosis volumes (the effectiveness measures) are already collected as part of the Minimum Data Elements (MDEs), OMB# 0920–0571 Exp. Date 05/31/2006, the additional burden on grantees to provide the requested cost data will be modest. If future cost data collection efforts are undertaken, the response burden would be further reduced because the infrastructure established to capture the data is already in place.

There are no costs to respondents except their time to participate in the survey. All respondents will be using the same cost assessment tool.

ESTIMATED ANNUALIZED BURDEN TABLE

| Respondent | Number of respondents | Number responses per respondent | Average burden per response (in hours) | Total burden hours |
|---|---|---|---|---|
| Program Director | 68 | 1 | 4 | 272 |
| Business Manager | 68 | 1 | 4 | 272 |
| Data Manager | 68 | 1 | 14 | 952 |
| Total | | | | 1,496 |

Dated: March 31, 2006.

**Joan F. Karr,**

*Acting Reports Clearance Officer, Centers for Disease Control and Prevention.*

[FR Doc. E6–5038 Filed 4–5–06; 8:45 am]

**BILLING CODE 4163–18–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Disease Control and Prevention

### National Institute for Occupational Safety and Health (NIOSH); Advisory Board on Radiation and Worker Health (ABRWH); Meetings

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), the Centers for Disease Control and Prevention announces the following committee meeting:

*Name:* Advisory Board on Radiation and Worker Health, National Institute for Occupational Safety and Health and Subcommittee for Dose Reconstruction and Site Profile Reviews (SDRSPR).

*Subcommittee Meeting Time and Date:*

9 a.m.–2 p.m., April 25, 2006.

*Committee Meeting Times and Dates:*

2:30 p.m.–5 p.m., April 25, 2006.

8:30 a.m.–5 p.m., April 26, 2006.

8:30 a.m.–4:30 p.m., April 27, 2006.

*Public Comment Time and Date:*

7 p.m.–8:30 p.m., April 26, 2006.

*Place:* Four Points by Sheraton Denver Cherry Creek Hotel, 600 South Colorado Boulevard, Denver, Colorado 80246. Phone 303.757.3341, Fax 303.756.6670.

*Status:* Open to the public, limited only by the space available. The meeting space accommodates approximately 75 people.

*Background:* The ABRWH was established under the Energy Employees Occupational Illness Compensation Program Act of 2000 to advise the President on a variety of policy and technical functions required to implement and effectively manage the new compensation program. Key functions of the Board include providing advice on the development of probability of causation guidelines which have been promulgated by the Department of Health and Human Services (HHS) as a final rule, advice on methods of dose reconstruction which have also been promulgated by HHS as a final rule, advice on the scientific validity and quality of dose estimation and reconstruction efforts being performed for purposes of the compensation program, and advice on petitions to add classes of workers to the Special Exposure Cohort (SEC).

In December 2000, the President delegated responsibility for funding, staffing, and operating the Board to HHS, which subsequently delegated this authority to the CDC. NIOSH implements this responsibility for CDC. The charter was issued on August 3, 2001, renewed at appropriate intervals, and will expire on August 3, 2007.

*Purpose:* This board is charged with (a) providing advice to the Secretary, HHS, on the development of guidelines under Executive Order 13179; (b) providing advice to the Secretary, HHS, on the scientific validity and quality of dose reconstruction efforts performed for this program; and (c) upon request by the Secretary, HHS, advise the Secretary on whether there is a class of employees at any Department of Energy facility who were exposed to radiation but for whom it is not feasible to estimate their radiation dose, and on whether there is reasonable likelihood that such radiation doses may have endangered the health of members of this class.

*Matters to be Discussed:* The agenda for the Subcommittee meeting includes Y–12 and Rocky Flats Site Profiles; Procedures Review Update; Selection of 5th and 6th Round of Individual Dose Reconstructions; and Individual Dose Reconstruction Reviews. The agenda for the Board meeting includes the Subcommittee Report on the following topics: Y–12 Site and Rocky Flats Site Profiles, Procedures Review Update, Selection of 5th and 6th Round of Individual Dose Reconstructions, and Individual Dose Reconstruction Reviews. There will be a report on the S. Cohen & Associates (SC&A) SEC Activities, specifically Ames, Procedures, Rocky Flats and Y–12; Board SEC Procedures; Conflict of Interest; Y–12 and Rocky Flats SEC Petitions; Program Updates from the Office of Compensation Analysis and Support on General Items, Bethlehem Steel Site Profile, and Science Issues; Program Updates from the Department of Labor; General SC&A Contract Issues; Board Correspondence; Future Schedules and Agendas; Nevada Test Site SEC Petition; and Pacific Proving Ground SEC Petition.

The agenda is subject to change as priorities dictate. In the event an individual cannot attend, written comments may be submitted. Any written comments received will be provided at the meeting and should be submitted to the contact person below well in advance of the meeting.

**FOR FURTHER INFORMATION CONTACT:** Dr. Lewis V. Wade, Executive Secretary, NIOSH, CDC, 4676 Columbia Parkway, Cincinnati, Ohio 45226, telephone 513.533.6825, fax 513.533.6826.

The Director, Management Analysis and Services Office, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both CDC and the Agency for Toxic Substances and Disease Registry.

Dated: March 30, 2006.

**Alvin Hall,**

*Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.*

[FR Doc. 06–3305 Filed 4–5–06; 8:45 am]

**BILLING CODE 4163–18–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Medicare & Medicaid Services; Privacy Act of 1974; Report of a Modified or Altered System

**AGENCY:** Department of Health and Human Services (HHS), Centers for Medicare & Medicaid Services (CMS).

**ACTION:** Notice of a Modified or Altered System of Records (SOR).

**SUMMARY:** In accordance with the requirements of the Privacy Act of 1974, we are proposing to modify or alter an existing SOR, ''Medicare Provider Analysis and Review (MEDPAR), System No. 09–70–0009.'' Notice for this system was published at 65 **Federal Register** (FR) 50548 (August 18, 2000). CMS is reorganizing its databases because of the impact of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA) (Public Law (Pub. L.) 108–173) provisions and the large volume of information the Agency collects to administer the Medicare program. We propose to assign a new CMS identification number to this system to simplify the obsolete and confusing numbering system originally designed to identify the Bureau, Office, or Center that maintained the system. The new assigned identifying number for this system should read: System No. 09–70–0514.

We propose to establish a new routine use to provide disclosure of data to hospitals that may be entitled to disproportionate share hospital payments. This new routine use will implement the disclosure provisions of Section 951 of the MMA. Section 951 will provide hospitals with a data set that will span the 2 Federal Fiscal Years that encompass the hospital's cost reporting period. This modification will carry out the purposes of the MEDPAR

and enable hospitals to calculate and verify their Supplemental Security Income (SSI) ratio without the need for additional processing on the part of CMS. This new routine use will be published at routine use number 3.

We are modifying the language in some of the remaining routine uses to provide clarity to CMS' intention to disclose individual-specific information contained in this system. The routine uses will then be prioritized and reordered according to their usage. We will also take the opportunity to update any sections of the system that were affected by recent reorganizations and to update language in the administrative sections to correspond with language used in other CMS SORs.

The primary purpose of the system is to collect and maintain information for all services rendered during Medicare beneficiary stays in an inpatient hospital and/or Skilled Nursing Facilities (SNF), so as to enable CMS and its contractors to facilitate research on the quality and effectiveness of care provided, update annual hospital Inpatient Prospective Payment System (IPPS) rates, and to calculate Supplemental Security Income (SSI) ratios for hospitals that are paid under the hospital IPPS and serve a disproportionate share of low-income patients (hospitals that serve a disproportionate share of low-income patients are entitled to increased reimbursement under the IPPS). Information retrieved from this system will also be disclosed to: (1) Support regulatory, reimbursement, and policy functions performed within the agency or by a contractor or consultant; (2) provide system data to a hospital that has an appeal properly pending before the Provider Reimbursement Review Board (PRRB) or before an intermediary; (3) provide system data when all requirements have been met to a hospital that may be entitled to disproportioned share hospital payments and makes a request in accordance with section 951 of the MMA; (4) assist another Federal or state agency with information to enable such agency to administer a Federal health benefits program, or to enable such agency to fulfill a requirement of a Federal statute or regulation that implements a health benefits program funded in whole or in part with Federal funds; (5) support constituent requests made to a Congressional representative; (6) support litigation involving the agency; (7) facilitate research on the quality and effectiveness of care provided; and (8) combat fraud and abuse in certain Federally-funded health benefits programs. We have provided background information about the modified system in the ''Supplementary Information'' section below. Although the Privacy Act requires only that CMS provide an opportunity for interested persons to comment on the proposed routine uses, CMS invites comments on all portions of this notice. See ''Effective Dates'' section for comment period.

**DATES:** *Effective Dates:* CMS filed a modified or altered system report with the Chair of the House Committee on Government Reform and Oversight, the Chair of the Senate Committee on Homeland Security & Governmental Affairs, and the Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB) on *3/30/2006*. To ensure that all parties have adequate time in which to comment, the modified system, including routine uses, will become effective 30 days from the publication of the notice, or 40 days from the date it was submitted to OMB and Congress, whichever is later, unless CMS receives comments that require alterations to this notice.

**ADDRESSES:** The public should address comments to: CMS Privacy Officer, Division of Privacy Compliance Data Development, CMS, Room N2–04–27, 7500 Security Boulevard, Baltimore, Maryland 21244–1850. Comments received will be available for review at this location, by appointment, during regular business hours, Monday through Friday from 9 a.m.–3 p.m., eastern time zone.

**FOR FURTHER INFORMATION CONTACT:** Molly Smith, Division of Acute Care, Hospital and Ambulatory Provider Group, Center for Medicare Management, CMS, Room C4–08–06, 7500 Security Boulevard, Baltimore, Maryland 21244–1850. The telephone number is (410) 786–8354; she can also be reached via e-mail at *Molly.Smith@cms.hhs.gov*.

**SUPPLEMENTARY INFORMATION:** Notice of this system was last published at 65 FR 50548 (August 18, 2000). The MEDPAR contains a summary of all services rendered to a Medicare beneficiary, from the time of admission through discharge, for a stay in an inpatient hospital and/or SNF, SSI eligibility information that CMS receives from the Social Security Administration (SSA) on Medicare beneficiaries who have had stays in inpatient hospitals and SNF, and enrollment data on Medicare beneficiaries.

Under section 1886 (d)(5)(F)(vi)(I) of the Social Security Act, 42 U.S.C. 1395ww(d)(5)(F)(vi)(I), hospitals that are paid under the IPPS and serve a disproportionate share of low-income patients may be entitled to increased reimbursement under Part A of the Medicare program. Such disproportionate share hospital payments, which became effective for discharges occurring on or after May 1, 1986, depend in part on a hospital's ''SSI ratio.'' CMS determines a hospital's SSI ratio by comparing, for the same period, (1) the hospital's total number of its Medicare inpatient days to (2) the hospital's ''Medicare/SSI days,'' *i.e.*, inpatient days attributable to Medicare patients who for such days were eligible for SSI payments under Title XVI of the Act. In determining a hospital's SSI ratio, CMS uses information from the National Claims History (CMS System No. 09–70–0005), in conjunction with SSI eligibility information that CMS receives from SSA. CMS notifies each hospital of the total number of its Medicare/SSI days for a given Federal fiscal year, or cost reporting period, but does not identify which of the hospital's Medicare patients had Medicare/SSI days.

Section 951 of the MMA requires the Secretary of HHS to arrange to furnish the data necessary for hospitals to compute the number of patient days used in calculating their disproportionate patient percentage. Beginning with cost reporting periods that include December 8, 2004, CMS will arrange to furnish, consistent with the Privacy Act, the MEDPAR limited data set data for a hospital's Medicare patients at the hospital's request, regardless of whether there is a properly pending appeal relating to disproportionate share hospital payments. We will make the information available for either the Federal fiscal year or, if the hospital's fiscal year differs from the Federal fiscal year, for the months included in the 2 Federal fiscal years that encompass the hospital's cost reporting period. Under this provision, the hospital will be able to use these data to calculate and verify its SSI ratio, and to decide whether it prefers to have the fraction determined on the basis of its fiscal year rather than a Federal fiscal year.

## I. Description of the Modified or Altered System of Records

### *A. Statutory and Regulatory Basis for System of Records*

Authority for maintenance of this system is given under sections 1102(a), 1871, and 1886(d)(5)(F) of the Social Security Act, (Title 42 United States Code (U.S.C.) §§ 1302(a), 1395hh, and 1395ww(d)(5)(F)). Authority is also given under section 951 of the Medicare Prescription Drug, Improvement, and

Modernization Act of 2003 (Pub. L. 108–173).

*B. Scope of the Data Collected*

The MEDPAR contains a summary of all services rendered to a Medicare beneficiary, from the time of admission through discharge, for a stay in an inpatient hospital and/or SNF, SSI entitlement information that CMS receives from SSA on Medicare beneficiaries who have had stays at inpatient hospitals and SNF, and enrollment data on Medicare beneficiaries. The MEDPAR contains information necessary for appropriate Medicare claim processing. It also contains, but is not limited to, the Medicare health insurance claim number, gender, race, age (no date of birth), zip code, state and county for Medicare beneficiaries who have received inpatient hospital and SNF services.

**II. Collection and Maintenance of Data in the System**

*A. Agency Policies, Procedures, and Restrictions on the Routine Use*

The Privacy Act permits us to disclose information without an individual's consent if the information is to be used for a purpose that is compatible with the purpose(s) for which the information was collected. Any such disclosure of data is known as a ''routine use.'' The government will only release MEDPAR information that can be associated with an individual as provided for under ''Section III. Proposed Routine Use Disclosures of Data in the System.'' Both identifiable and non-identifiable data may be disclosed under a routine use.

We will only collect the minimum personal data necessary to achieve the purpose of MEDPAR. CMS has the following policies and procedures concerning disclosures of information that will be maintained in the system. Disclosure of information from this system will be approved only to the extent necessary to accomplish the purpose of the disclosure and only after CMS:

1. Determines that the use or disclosure is consistent with the reason that the data is being collected, *e.g.*, to collect and maintain information for all services rendered during Medicare beneficiary stays in an inpatient hospital and/or SNF, so as to enable CMS and its contractors to facilitate research on the quality and effectiveness of care provided, update annual hospital IPPS rates, and to calculate SSI ratios for hospitals that are paid under the hospital IPPS and serve a disproportionate share of low-income patients.

2. Determines:

a. That the purpose for which the disclosure is to be made can only be accomplished if the record is provided in individually identifiable form;

b. That the purpose for which the disclosure is to be made is of sufficient importance to warrant the potential effect and/or risk on the privacy of the individual that additional exposure of the record might bring; and

c. That there is a strong probability that the proposed use of the data would in fact accomplish the stated purpose(s).

3. Requires the information recipient to:

a. Establish administrative, technical, and physical safeguards to prevent unauthorized use of disclosure of the record; and

b. Remove or destroy at the earliest time all patient-identifiable information.

4. Determines that the data are valid and reliable.

**III. Proposed Routine Use Disclosures of Data in the System**

A. The Privacy Act allows us to disclose information without an individual's consent if the information is to be used for a purpose that is compatible with the purpose(s) for which the information was collected. Any such compatible use of data is known as a ''routine use.'' The proposed routine uses in this system meet the compatibility requirement of the Privacy Act. We are proposing to establish the following routine use disclosures of information maintained in the system:

1. To agency contractors, or consultants who have been engaged by the agency to assist in the performance of a service related to this system of records and who need to have access to the records in order to perform the activity.

We contemplate disclosing information under this routine use only in situations in which CMS may enter into a contractual or similar agreement with a third party to assist in accomplishing CMS function relating to purposes for this system.

CMS occasionally contracts out some of its functions when doing so would contribute to more effective and efficient operations. CMS must be able to give a contractor or consultant whatever information is necessary for the contractor or consultant to fulfill its duties. In these situations, safeguards are provided in the contract prohibiting the contractor or consultant from using or disclosing the information for any purpose other than that described in the contract and requires the contractor or consultant to return or destroy all information at the completion of the contract.

2. To a hospital that has an appeal properly pending before the Provider Reimbursement Review Board, or before an intermediary, on the issue of whether it is entitled to disproportionate share hospital payments, or the amount of such payments. As a condition of disclosure under this routine use, CMS will require the recipient of the information to:

a. Establish reasonable administrative, technical, and physical safeguards to prevent unauthorized access, use, or disclosure of the record or any part thereof;

b. Remove or destroy the information that allows the subject individual(s) to be identified at the earliest time at which removal or destruction can be accomplished consistent with the purpose of the request;

c. Refrain from using or disclosing the information for any purpose other than the stated purpose under which the information was disclosed; and

d. Attest in writing that it understands the foregoing provisions, and is willing to abide by the foregoing provisions and any additional provisions that CMS deems appropriate in the particular circumstances.

Disclosure under this routine use shall be for the purpose of assisting the hospital to verify or challenge CMS' determination of the hospital's SSI ratio (*i.e.,* the total number of Medicare days compared to the number of Medicare/SSI days). Disclosure shall be limited to data concerning the total number of patient days, the number of SSI/Medicare days, if any, and the number of Medicare covered days, if any, associated with each stay at the hospital's facility during the cost reporting period under appeal or, where the hospital does not report on a Federal Fiscal Years basis, during the 2 Federal Fiscal Years in which the hospital's cost reporting period falls. The data disclosed will relate to stays at the hospital's IPPS units as well as any IPPS-excluded units in order to assist the hospital in verifying that all qualifying stays (*i.e.,* those in the IPPS units) were included in CMS' determination of the hospital's SSI ratio. The routine use would permit disclosure only to a hospital that has a proper appeal pending before the PRRB or before an intermediary. This routine use is applicable to appeals of determinations of a hospital's SSI ratio for cost reporting periods ending prior to December 8, 2004.

3. To a hospital that may be entitled to disproportionate share hospital

payments, or the amount of such payments, for cost reporting periods that span December 8, 2004, and beyond. As a condition of disclosure under this routine use, CMS will require the recipient of the information to:

a. Establish reasonable administrative, technical, and physical safeguards to prevent unauthorized access, use or disclosure of the record or any part thereof;

b. Remove or destroy the information that allows the subject individual(s) to be identified at the earliest time at which removal or destruction can be accomplished consistent with the purpose of the request;

c. Refrain from using or disclosing the information for any purpose other than the stated purpose under which the information was disclosed; and

d. Attest in writing that it understands the foregoing provisions, and is willing to abide by the foregoing provisions and any additional provisions that CMS deems appropriate in the particular circumstances.

Disclosure under this routine use shall be for the purpose of assisting the hospital to verify or challenge CMS' determination of the hospital's SSI ratio (*i.e.,* the total number of Medicare days compared to the number of Medicare/SSI days). Disclosure shall be limited to data concerning the total number of patient days, the number of SSI/Medicare days, if any, and the number of Medicare covered days, if any, associated with each stay at the hospital's facility during the cost reporting period for which the hospital has requested the data, or, where the hospital does not report on a Federal Fiscal Years basis, during the 2 Federal Fiscal Years in which the hospital's cost reporting period falls. The data disclosed will relate to stays at the hospital's IPPS units as well as any IPPS-excluded units in order to assist the hospital in verifying that all qualifying stays (*i.e.*, those in the IPPS units) were included in CMS' determination of the hospital's SSI ratio. This routine use is applicable for cost reporting periods ending on or after December 8, 2004.

4. To another Federal or state agency to:

a. Contribute to the accuracy of CMS' proper payment of Medicare benefits, and/or

b. Enable such agency to administer a Federal health benefits program, or as necessary to enable such agency to fulfill a requirement of a Federal statute or regulation that implements a health benefits program funded in whole or in part with Federal funds.

Other Federal or state agencies in their administration of a Federal health program may require MEDPAR information in order to support evaluations and monitoring of Medicare claims information of beneficiaries who have had stays at inpatient hospitals and SNF, including proper reimbursement for services provided. In addition, other state agencies in their administration of a Federal health program may require MEDPAR information for the purpose of determining, evaluating and/or assessing cost effectiveness, and/or the quality of health care services provided in the state.

5. To an individual or organization for research, evaluation, or epidemiological projects related to the prevention of disease or disability, or the restoration or maintenance of health, and for payment related projects.

The MEDPAR data will provide the research, evaluation and epidemiological projects a broader, longitudinal, national perspective of the MEDPAR and inpatient data. CMS anticipates that many researchers will have legitimate requests to use these data in projects that could ultimately improve the care provided to Medicare patients and the policy that governs the care.

6. To a member of Congress or to a Congressional staff member in response to an inquiry of the Congressional office made at the written request of the constituent about whom the record is maintained.

Beneficiaries sometimes request the help of a member of Congress in resolving an issue relating to a matter before CMS. The member of Congress then writes CMS, and CMS must be able to give sufficient information to be responsive to the inquiry.

7. To the Department of Justice (DOJ), court or adjudicatory body when:

a. The agency or any component thereof, or

b. Any employee of the agency in his or her official capacity, or

c. Any employee of the agency in his or her individual capacity where the DOJ has agreed to represent the employee, or

d. The United States Government is a party to litigation or has an interest in such litigation, and by careful review, CMS determines that the records are both relevant and necessary to the litigation and that the use of such records by the DOJ, court or adjudicatory body is compatible with the purpose for which the agency collected the records.

Whenever CMS is involved in litigation, and occasionally when another party is involved in litigation and CMS' policies or operations could be affected by the outcome of the litigation, CMS would be able to disclose information to the DOJ, court or adjudicatory body involved.

8. To a CMS contractor (including, but not necessarily limited to fiscal intermediaries and carriers) that assists in the administration of a CMS-administered health benefits program, or to a grantee of a CMS-administered grant program, when disclosure is deemed reasonably necessary by CMS to prevent, deter, discover, detect, investigate, examine, prosecute, sue with respect to, defend against, correct, remedy, or otherwise combat fraud or abuse in such program.

We contemplate disclosing information under this routine use only in situations in which CMS may enter into a contractual relationship or grant with a third party to assist in accomplishing CMS functions relating to the purpose of combating fraud and abuse.

CMS occasionally contracts out certain of its functions and makes grants when doing so would contribute to effective and efficient operations. CMS must be able to give a contractor or grantee whatever information is necessary for the contractor or grantee to fulfill its duties. In these situations, safeguards are provided in the contract prohibiting the contractor or grantee from using or disclosing the information for any purpose other than that described in the contract and requiring the contractor or grantee to return or destroy all information.

9. To another Federal agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States (including any State or local governmental agency), that administers, or that has the authority to investigate potential fraud or abuse in, a health benefits program funded in whole or in part by Federal funds, when disclosure is deemed reasonably necessary by CMS to prevent, deter, discover, detect, investigate, examine, prosecute, sue with respect to, defend against, correct, remedy, or otherwise combat fraud or abuse in such programs.

Other agencies may require MEDPAR information for the purpose of combating fraud and abuse in such Federally-funded programs.

*B. Additional Provisions Affecting Routine Use Disclosures*

To the extent this system contains Protected Health Information (PHI) as defined by HHS regulation ''Standards for Privacy of Individually Identifiable Health Information'' (45 CFR Parts 160

and 164, Subparts A and E) 65 FR 82462 (12–28–00). Disclosures of such PHI that are otherwise authorized by these routine uses may only be made if, and as, permitted or required by the ''Standards for Privacy of Individually Identifiable Health Information.'' (See 45 CFR 164–512 (a)(1)).

In addition, our policy will be to prohibit release even of data not directly identifiable, except pursuant to one of the routine uses or if required by law, if we determine there is a possibility that an individual can be identified through implicit deduction based on small cell sizes (instances where the patient population is so small that individuals who are familiar with the enrollees could, because of the small size, use this information to deduce the identity of the beneficiary).

## IV. Safeguards

CMS has safeguards in place for authorized users and monitors such users to ensure against excessive or unauthorized use. Personnel having access to the system have been trained in the Privacy Act and information security requirements. Employees who maintain records in this system are instructed not to release data until the intended recipient agrees to implement appropriate management, operational and technical safeguards sufficient to protect the confidentiality, integrity and availability of the information and information systems and to prevent unauthorized access.

This system will conform to all applicable Federal laws and regulations and Federal, HHS, and CMS policies and standards as they relate to information security and data privacy. These laws and regulations may apply but are not limited to: The Privacy Act of 1974; the Federal Information Security Management Act of 2002; the Computer Fraud and Abuse Act of 1986; the Health Insurance Portability and Accountability Act of 1996; the E-Government Act of 2002, the Clinger-Cohen Act of 1996; the Medicare Modernization Act of 2003, and the corresponding implementing regulations. OMB Circular A–130, Management of Federal Resources, Appendix III, Security of Federal Automated Information Resources also applies. Federal, HHS, and CMS policies and standards include but are not limited to: All pertinent National Institute of Standards and Technology publications; the HHS Information Systems Program Handbook and the CMS Information Security Handbook.

## V. Effects of the Modified or Altered System of Records on Individual Rights.

CMS proposes to establish this system in accordance with the principles and requirements of the Privacy Act and will collect, use, and disseminate information only as prescribed therein. Data in this system will be subject to the authorized releases in accordance with the routine uses identified in this system of records.

CMS will take precautionary measures to minimize the risks of unauthorized access to the records and the potential harm to individual privacy or other personal or property rights of patients whose data are maintained in the system. CMS will collect only that information necessary to perform the system's functions. In addition, CMS will make disclosure from the proposed system only with consent of the subject individual, or his/her legal representative, or in accordance with an applicable exception provision of the Privacy Act. CMS, therefore, does not anticipate an unfavorable effect on individual privacy as a result of the disclosure of information relating to individuals.

Dated: March 29, 2006.

**Charlene Fizzera,**

*Acting Chief Operating Officer, Centers for Medicare & Medicaid Services.*

## SYSTEM NO. 09–70–0514

### SYSTEM NAME:

''Medicare Provider Analysis and Review (MEDPAR) HHS/CMS/OIS.''

### SECURITY CLASSIFICATION:

Level Three Privacy Act Sensitive Data.

### SYSTEM LOCATION:

Centers for Medicare & Medicaid Services (CMS) Data Center, 7500 Security Boulevard, North Building, First Floor, Baltimore, Maryland 21244–1850.

### CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

The MEDPAR contains a summary of all services rendered to a Medicare beneficiary, from the time of admission through discharge, for a stay in an inpatient hospital and/or Skilled Nursing Facilities (SNF), Supplemental Security Income (SSI) entitlement information that CMS receives from the Social Security Administration on Medicare beneficiaries who have had stays at inpatient hospitals and SNF, and enrollment data on Medicare beneficiaries.

### CATEGORIES OF RECORDS IN THE SYSTEM:

The MEDPAR contains information necessary for appropriate Medicare claim processing. It also contains, but is not limited to, the Medicare health insurance claim number (HICN), gender, race, age (no date of birth), zip code, state and county for Medicare beneficiaries who have received inpatient hospital and SNF services.

### AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Authority for maintenance of this system is given under sections 1102(a), 1871, and 1886(d)(5)(F) of the Social Security Act, (Title 42 United States Code (U.S.C.) §§ 1302(a), 1395hh, and 1395ww(d)(5)(F)). Authority is also given under section 951 of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (Pub. L. 108–173).

### PURPOSE(S) OF THE SYSTEM:

The primary purpose of the system is to collect and maintain information for all services rendered during Medicare beneficiary stays in an inpatient hospital and/or Skilled Nursing Facilities, so as to enable CMS and its contractors to facilitate research on the quality and effectiveness of care provided, update annual hospital Inpatient Prospective Payment System (IPPS) rates, and to calculate Supplemental Security Income ratios for hospitals that are paid under the hospital IPPS and serve a disproportionate share of low-income patients, (hospitals that serve a disproportionate share of low-income patients are entitled to increased reimbursement under the IPPS). Information retrieved from this system will also be disclosed to: (1) Support regulatory, reimbursement, and policy functions performed within the agency or by a contractor or consultant; (2) provide system data to a hospital that has an appeal properly pending before the Provider Reimbursement Review Board (PRRB) or before an intermediary; (3) provide system data when all requirements have been met to a hospital that may be entitled to disproportioned share hospital payments and makes a requests in accordance with section 951 of the MMA; (4) assist another Federal or state agency with information to enable such agency to administer a Federal health benefits program, or to enable such agency to fulfill a requirement of a Federal statute or regulation that implements a health benefits program funded in whole or in part with Federal funds; (5) support constituent requests made to a Congressional representative; (6) support litigation involving the

agency; (7) facilitate research on the quality and effectiveness of care provided; and, (8) combat fraud and abuse in certain Federally-funded health benefits programs.

**ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OR USERS AND THE PURPOSES OF SUCH USES:**

A. The Privacy Act allows us to disclose information without an individual's consent if the information is to be used for a purpose that is compatible with the purpose(s) for which the information was collected. Any such compatible use of data is known as a ''routine use.'' The proposed routine uses in this system meet the compatibility requirement of the Privacy Act. We are proposing to establish the following routine use disclosures of information maintained in the system:

1. To agency contractors, or consultants who have been engaged by the agency to assist in the performance of a service related to this system of records and who need to have access to the records in order to perform the activity.

2. To a hospital that has an appeal properly pending before the Provider Reimbursement Review Board, or before an intermediary, on the issue of whether it is entitled to disproportionate share hospital payments, or the amount of such payments. As a condition of disclosure under this routine use, CMS will require the recipient of the information to:

a. Establish reasonable administrative, technical, and physical safeguards to prevent unauthorized access, use, or disclosure of the record or any part thereof;

b. Remove or destroy the information that allows the subject individual(s) to be identified at the earliest time at which removal or destruction can be accomplished consistent with the purpose of the request;

c. Refrain from using or disclosing the information for any purpose other than the stated purpose under which the information was disclosed; and

d. Attest in writing that it understands the foregoing provisions, and is willing to abide by the foregoing provisions and any additional provisions that CMS deems appropriate in the particular circumstances.

3. To a hospital that may be entitled to disproportionate share hospital payments, or the amount of such payments, for cost reporting periods that span December 8, 2004, and beyond. As a condition of disclosure under this routine use, CMS will require the recipient of the information to:

a. Establish reasonable administrative, technical, and physical safeguards to prevent unauthorized access, use or disclosure of the record or any part thereof;

b. Remove or destroy the information that allows the subject individual(s) to be identified at the earliest time at which removal or destruction can be accomplished consistent with the purpose of the request;

c. Refrain from using or disclosing the information for any purpose other than the stated purpose under which the information was disclosed; and

d. Attest in writing that it understands the foregoing provisions, and is willing to abide by the foregoing provisions and any additional provisions that CMS deems appropriate in the particular circumstances.

4. To another Federal or state agency to:

a. Contribute to the accuracy of CMS' proper payment of Medicare benefits, and/or

b. Enable such agency to administer a Federal health benefits program, or as necessary to enable such agency to fulfill a requirement of a Federal statute or regulation that implements a health benefits program funded in whole or in part with Federal funds.

5. To an individual or organization for research, evaluation, or epidemiological projects related to the prevention of disease or disability, or the restoration or maintenance of health, and for payment related projects.

6. To a member of Congress or to a Congressional staff member in response to an inquiry of the Congressional office made at the written request of the constituent about whom the record is maintained.

7. To the Department of Justice (DOJ), court or adjudicatory body when:

a. The agency or any component thereof, or

b. Any employee of the agency in his or her official capacity, or

c. Any employee of the agency in his or her individual capacity where the DOJ has agreed to represent the employee, or

d. The United States Government is a party to litigation or has an interest in such litigation, and by careful review, CMS determines that the records are both relevant and necessary to the litigation and that the use of such records by the DOJ, court or adjudicatory body is compatible with the purpose for which the agency collected the records.

8. To a CMS contractor (including, but not necessarily limited to fiscal intermediaries and carriers) that assists in the administration of a CMS-administered health benefits program, or to a grantee of a CMS-administered grant program, when disclosure is deemed reasonably necessary by CMS to prevent, deter, discover, detect, investigate, examine, prosecute, sue with respect to, defend against, correct, remedy, or otherwise combat fraud or abuse in such program.

9. To another Federal agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States (including any State or local governmental agency), that administers, or that has the authority to investigate potential fraud or abuse in, a health benefits program funded in whole or in part by Federal funds, when disclosure is deemed reasonably necessary by CMS to prevent, deter, discover, detect, investigate, examine, prosecute, sue with respect to, defend against, correct, remedy, or otherwise combat fraud or abuse in such programs.

B. Additional Provisions Affecting Routine Use Disclosures

To the extent this system contains Protected Health Information (PHI) as defined by HHS regulation ''Standards for Privacy of Individually Identifiable Health Information'' (45 CFR Parts 160 and 164, Subparts A and E) 65 FR 82462 (12–28–00). Disclosures of such PHI that are otherwise authorized by these routine uses may only be made if, and as, permitted or required by the ''Standards for Privacy of Individually Identifiable Health Information.'' (See 45 CFR 164–512 (a) (1)).

In addition, our policy will be to prohibit release even of data not directly identifiable, except pursuant to one of the routine uses or if required by law, if we determine there is a possibility that an individual can be identified through implicit deduction based on small cell sizes (instances where the patient population is so small that individuals who are familiar with the enrollees could, because of the small size, use this information to deduce the identity of the beneficiary).

**POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:**

**STORAGE:**

All records are stored on magnetic media.

**RETRIEVABILITY:**

The Medicare records are retrieved by HICN of the beneficiary.

**SAFEGUARDS:**

CMS has safeguards in place for authorized users and monitors such users to ensure against excessive or unauthorized use. Personnel having access to the system have been trained in the Privacy Act and information

security requirements. Employees who maintain records in this system are instructed not to release data until the intended recipient agrees to implement appropriate management, operational and technical safeguards sufficient to protect the confidentiality, integrity and availability of the information and information systems and to prevent unauthorized access.

This system will conform to all applicable Federal laws and regulations and Federal, HHS, and CMS policies and standards as they relate to information security and data privacy. These laws and regulations may apply but are not limited to: the Privacy Act of 1974; the Federal Information Security Management Act of 2002; the Computer Fraud and Abuse Act of 1986; the Health Insurance Portability and Accountability Act of 1996; the E-Government Act of 2002, the Clinger-Cohen Act of 1996; the Medicare Modernization Act of 2003, and the corresponding implementing regulations. OMB Circular A–130, Management of Federal Resources, Appendix III, Security of Federal Automated Information Resources also applies. Federal, HHS, and CMS policies and standards include but are not limited to: all pertinent National Institute of Standards and Technology publications; the HHS Information Systems Program Handbook and the CMS Information Security Handbook.

**RETENTION AND DISPOSAL:**

CMS will retain identifiable MEDPAR data for a total period not to exceed 25 years. All claims-related records are encompassed by the document preservation order and will be retained until notification is received from DOJ.

**SYSTEM MANAGER AND ADDRESS:**

Director, Division of Acute Care, Hospital and Ambulatory Provider Group, Center for Medicare Management, CMS, Room C4–08–06, 7500 Security Boulevard, Baltimore, Maryland 21244–1850.

**NOTIFICATION PROCEDURE:**

For purpose of access, the subject individual should write to the system manager who will require the system name, HICN, address, age, gender, and for verification purposes, the subject individual's name (woman's maiden name, if applicable) and social security number (SSN). Furnishing the SSN is voluntary, but it may make searching for a record easier and prevent delay.

**RECORD ACCESS PROCEDURE:**

For purpose of access, use the same procedures outlined in Notification Procedures above. Requestors should also reasonably specify the record contents being sought. (These procedures are in accordance with Department regulation 45 CFR 5b.5(a)(2)).

**CONTESTING RECORD PROCEDURES:**

The subject individual should contact the system manager named above, and reasonably identify the record and specify the information to be contested. State the corrective action sought and the reasons for the correction with supporting justification. (These procedures are in accordance with Department regulation 45 CFR 5b.7).

**RECORD SOURCE CATEGORIES:**

CMS's National Claims History system of records, enrollment data on Medicare beneficiaries, and SSI eligibility information from the Social Security Administration.

**SYSTEMS EXEMPTED FROM CERTAIN PROVISIONS OF THE ACT:**

None.

[FR Doc. E6–4953 Filed 4–5–06; 8:45 am]

**BILLING CODE 4120–01–P**

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## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket No. 2006D–0112]**

### Draft Guidance for Industry and Food and Drug Administration Staff; Class II Special Controls Guidance Document: Topical Oxygen Chamber for Extremities; Availability

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA) is announcing the availability of the draft guidance for industry and FDA entitled ''Class II Special Controls Guidance Document: Topical Oxygen Chamber for Extremities.'' It was developed as a special control to support the reclassification of the topical oxygen chamber for extremities (TOCE) from class III (premarket approval) into class II (special controls). Elsewhere in this issue of the **Federal Register**, FDA is publishing a proposed rule to reclassify the TOCE device from class III into class II (special controls). This draft guidance is neither final nor is it in effect at this time.

**DATES:** Submit written or electronic comments on this draft guidance by July 5, 2006.

**ADDRESSES:** Submit written requests for single copies of the draft guidance document entitled ''Class II Special Controls Guidance Document: Topical Oxygen Chamber for Extremities to the Division of Small Manufacturers, International, and Consumer Assistance (HFZ–220), Center for Devices and Radiological Health, Food and Drug Administration, 1350 Piccard Dr., Rockville, MD 20850. Send one self-addressed adhesive label to assist that office in processing your request, or fax your request to 301–443–8818. See the **SUPPLEMENTARY INFORMATION** section for information on electronic access to the guidance.

Submit written comments concerning this draft guidance to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Submit electronic comments to *http://www.fda.gov/dockets/ecomments*. Identify comments with the docket number found in brackets in the heading of this document.

**FOR FURTHER INFORMATION CONTACT:** Charles N. Durfor, Center for Devices and Radiological Health (HFZ–410), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 301– 594–3090.

**SUPPLEMENTARY INFORMATION:**

#### I. Background

FDA is announcing the availability of a draft guidance for industry and FDA staff entitled ''Class II Special Controls Guidance Document: Topical Oxygen Chamber for Extremities.''

Following the effective date of any final reclassification rule based on this proposal, any firm submitting a premarket notification (510(k)) for the TOCE will need to address the issues covered in the special controls guidance document. However, the firm need only show that its device meets the recommendations of the guidance document or in some other way provides equivalent assurances of safety and effectiveness.

#### II. Significance of Guidance

This draft guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The draft guidance, when finalized, will represent the agency's current thinking on the TOCE. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the requirements of the applicable statute and regulations.

### III. Electronic Access

To receive ''Class II Special Controls Guidance Document: Topical Oxygen Chamber for Extremities'' by fax, call the CDRH Facts-On-Demand system at 800–899–0381 or 301–827–0111 from a touch-tone telephone. Press 1 to enter the system. At the second voice prompt, press 1 to order a document. Enter the document number (1582) followed by the pound sign (#). Follow the remaining voice prompts to complete your request.

Persons interested in obtaining a copy of the draft guidance may also do so by using the Internet. CDRH maintains an entry on the Internet for easy access to information including text, graphics, and files that may be downloaded to a personal computer with Internet access. Updated on a regular basis, the CDRH home page includes device safety alerts, **Federal Register** notices, information on premarket submissions (including lists of approved applications and manufacturers' addresses), small manufacturers' assistance, information on video conferencing and electronic submissions, Mammography Matters, and other device-oriented information. The CDRH web site may be accessed at *http://www.fda.gov/cdrh*. A search capability for all CDRH guidance documents is available at *http://www.fda.gov/cdrh/guidance.html*. Guidance documents are also available on the Division of Dockets Management Internet site at *http://www.fda.gov/ohrms/dockets*.

### IV. Paperwork Reduction Act of 1995

This draft guidance refers to previously approved collections of information found in FDA regulations. These collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520) (the PRA). The collections of information in 21 CFR part 807, subpart E, have been approved under OMB control number 0910–0120. The collections of information in 21 CFR part 801 have been approved under OMB control number 0910–0485.

### V. Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**), written or electronic comments regarding this document. Submit a single copy of electronic comments or two paper copies of any mailed comments, except that individuals may submit one paper copy. Comments are to be identified with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

Dated: March 27, 2006.

**Linda S. Kahan,**

*Deputy Director, Center for Devices and Radiological Health.*

[FR Doc. E6–4961 Filed 4–5–06; 8:45 am]

**BILLING CODE 4160–01–S**

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## DEPARTMENT OF HOMELAND SECURITY

### Transportation Security Administration

### Aviation Security Advisory Committee Meeting

**AGENCY:** Transportation Security Administration (TSA), DHS.

**ACTION:** Notice of meeting.

**SUMMARY:** This notice announces a public meeting of the Aviation Security Advisory Committee (ASAC).

**DATES:** The meeting will take place on May 3, 2006, from 9 a.m. to 12:30 p.m., or until the conclusion of the committee's business.

**ADDRESSES:** The meeting will be held at the Residence Inn by Marriott Pentagon City, 550 Army Navy Drive, Arlington VA 22202.

**FOR FURTHER INFORMATION CONTACT:** Joseph Corrao, Office of Transportation Sector Network Integration, Transportation Security Administration, 601 South 12th Street, Arlington, VA 22202–4220; telephone 571–227–2980, e-mail *joseph.corrao@dhs.gov.*

**SUPPLEMENTARY INFORMATION:** This meeting is announced pursuant to section 10(a)(2) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.). The agenda for the meeting will include—

- Final report on the actions of the Airport Security Design Guidelines Working Group;
- Status reports on the actions of the Air Cargo Security Working Group, the Aviation Security Impact Assessment Working Group, and the Baggage Security Investment Study Working Group; and
- Other aviation security topics.

This meeting is open to the public but attendance is limited to space available. Doors open at 8:30 a.m.

Members of the public must make advance arrangements to present oral statements at the meeting. Written statements may be presented to the committee by providing copies of them to the person listed under the heading **FOR FURTHER INFORMATION CONTACT** prior to or at the meeting. Anyone in need of assistance or a reasonable accommodation for the meeting should contact the person listed under the heading **FOR FURTHER INFORMATION CONTACT**. In addition, sign and oral interpretation, as well as a listening device, can be made available at the meeting if requested 10 calendar days before the meeting. Arrangements may be made by contacting the person listed under the heading **FOR FURTHER INFORMATION CONTACT**.

Issued in Arlington, Virginia, on March 31, 2006.

**Charlotte Bryan,**

*Acting Assistant Administrator, Transportation Sector Network Management.*

[FR Doc. E6–5032 Filed 4–5–06; 8:45 am]

**BILLING CODE 4910–62–P**

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## DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

**[Docket No. FR–5042–N–02]**

### Notice of Proposed Information Collection: Healthy Homes and Lead Hazard Control Programs Data Collection—Progress Reporting

**AGENCY:** Office of Healthy Homes and Lead Hazard Control, HUD.

**ACTION:** Notice.

**SUMMARY:** The revised information collection requirement described below will be submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

**DATES:** *Comments Due Date:* June 5, 2006.

**ADDRESSES:** Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Katina Flythe, Reports Liaison Officer, Department of Housing and Urban Development, 451 7th Street, SW., Room P–3206, Washington, DC 20410.

**FOR FURTHER INFORMATION CONTACT:** Lillian Deitzer, Reports Management Officer, Q, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; (202) 708–2374. (This is not a toll-free number. Hearing- or speech-impaired persons may access the number above via TTY by calling the toll-free Federal Information Relay Service at 1–800–877–8339).

**SUPPLEMENTARY INFORMATION:** The Department will submit the proposed information collection to OMB for

review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended).

This Notice is soliciting comments from members of the public and affecting agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

This Notice also lists the following information:

*Title of Proposal:* Healthy Homes and Lead Hazard Control Programs Data Collection—Progress Reporting.

*OMB Control Number:* 2539–0008.

*Need for the Information and Proposed Use:* This data collection is designed to provide timely information to HUD regarding the implementation progress of the grantees on carrying out Healthy Homes and Lead Hazard Control Grant Programs. The information collection will also be used to provide Congress with status reports as required by the Residential Lead-Based Paint Hazard Reduction Act (Title X of the Housing and Community Development Act of 1992).

*Agency Form Numbers:* HUD–96006.

*Members of Affected Public:* State, tribal, local governments, not-for-profit institutions and for-profit firms located in the U.S.

*Total Burden Estimate (First Year):* Number of respondents: 250; Frequency of response: 4; Hours per response: 8; Total Burden Hours: 8,000.

*Status of the Proposed Information Collection:* Revision.

*Additional Information:* The obligation to respond to this information collection is mandatory.

**Authority:** Section 3506 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35, as amended.

Dated: March 31, 2006.

**Warren Friedman,**

*Deputy Director, Office of Healthy Homes and Lead Hazard Control.*

[FR Doc. E6–4955 Filed 4–5–06; 8:45 am]

BILLING CODE 4210–67–P

## DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

**[Docket No. FR–5041–N–10]**

### Notice of Proposed Information Collection: Comment Request; Title I Property Improvement and Manufactured Home Loan Programs

**AGENCY:** Office of the Assistant Secretary for Housing-Federal Housing Commissioner, HUD.

**ACTION:** Notice.

**SUMMARY:** The proposed information collection requirement described below will be submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

**DATES:** *Comments Due Date:* June 5, 2006.

**ADDRESSES:** Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Lillian Deitzer, Reports Management Officer, Department of Housing and Urban Development, 451 7th Street, SW., L'Enfant Plaza Building, Room 8001, Washington, DC 20410 or *Lillian_Deitzer@hud.gov*.

**FOR FURTHER INFORMATION CONTACT:** Margaret Burns, Director, Office of Single Family Program Development, Department of Housing and Urban Development, 451 7th Street SW., Washington, DC 20410, telephone (202) 708–2121 (this is not a toll free number) for copies of the proposed forms and other available information.

**SUPPLEMENTARY INFORMATION:** The Department is submitting the proposed information collection to OMB for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended).

This Notice is soliciting comments from members of the public and affected agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

This Notice also lists the following information:

*Title of Proposal:* Title I Property Improvement and Manufactured Home Loan Programs.

*OMB Control Number, if applicable:* 2502–0328.

*Description of the need for the information and proposed use:* Title I loans are made by private sector lenders and insured by HUD against loss from defaults. HUD uses this information to evaluate individual lenders on their overall program performance. The information collected is also used to determine claim eligibility.

*Agency form numbers, if applicable:* HUD–637, 646, 27029, 27030, 55013, 55014, 56001, 56001–MH, 56002, 56002–MH, 56004, 92802.

*Estimation of the total numbers of hours needed to prepare the information collection including number of respondents, frequency of response, and hours of response:* The estimated number of hours needed to prepare the information collection is 27,401; the number of respondents is 14,300 generating approximately 129,040 annual responses; the frequency of response is on occasion; and the estimated time needed to prepare the responses varies from three minutes to two hours.

*Status of the proposed information collection:* This is an extension of a currently approved collection.

**Authority:** The Paperwork Reduction Act of 1995, 44 U.S.C., Chapter 35, as amended.

Dated: March 31, 2006.

**Frank L. Davis,**

*General Deputy Assistant Secretary for Housing-Deputy Federal Housing Commissioner.*

[FR Doc. E6–4956 Filed 4–5–06; 8:45 am]

BILLING CODE 4210–67–P

## DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

**[Docket No. FR–5033–FA–03]**

### Announcement of Funding Awards for Fiscal Year 2004 for the Housing Choice Voucher Program

**AGENCY:** Office of the Assistant Secretary for Public and Indian Housing, HUD.

**ACTION:** Announcement of Fiscal Year 2004 awards.

**SUMMARY:** In accordance with Section 102(a)(4)(C) of the Department of Housing and Urban Development

Reform Act of 1989, this document notifies the public of funding awards for Fiscal Year (FY) 2004 to housing agencies (HAs) under the Section 8 housing choice voucher program. The purpose of this notice is to publish the names, addresses, and the amount of the awards to HAs for non-competitive funding awards for housing conversion actions, public housing relocations and replacements, and HOPE VI voucher awards. Due to Congressional mandates and limited staff, these awards were not published in the **Federal Register**.

**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:** The regulations governing the housing choice voucher program are published at 24 CFR 982. The regulations for allocating housing assistance budget authority under Section 213(d) of the Housing and Community Development Act of 1974 are published at 24 CFR Part 791, Subpart D.

The purpose of this rental assistance program is to assist eligible families to pay the rent for decent, safe, and sanitary housing. The FY2004 awardees announced in this notice were provided Section 8 funds on an as-needed, non-competitive basis, i.e., not consistent with the provisions of a Notice of Funding Availability (NOFAs).

Awards published under this notice were provided: (1) To assist families living in HUD-owned properties that are being sold; (2) to assist families affected by the expiration or termination of their project-based Section 8 contracts; (3) to assist families in properties where the owner has prepaid the HUD mortgage; (4) to provide relocation and replacement housing in connection with the demolition of public housing; (5) to provide replacement housing assistance for single room occupancy (SRO) units that fail housing quality standards (HQS); and (6) to assist families in public housing developments that are scheduled for demolition in connection with a HUD-approved HOPE VI Revitalization or Demolition Grant. Administrative fees were added to each assignment for the administration of housing choice vouchers awarded under this notice. In addition, special housing fees were included for applicable Housing tenant protection awards.

A total of $229,205,510 in budget authority for 29,296 housing choice vouchers was awarded to recipients under all of the above-mentioned categories.

In accordance with Section 102(a)(4)(C) of 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 as shown in Appendix A.

Dated: March 29, 2006.

**Orlando J. Cabrera,**

*Assistant Secretary for Public and Indian Housing.*

APPENDIX A—SECTION 8 RENTAL ASSISTANCE PROGRAMS ANNOUNCEMENT OF AWARDS FOR FISCAL YEAR 2004

| Housing agency | Address | Units | Award |
|---|---|---|---|
| Hope VI Vouchers: | | | |
| HA of Birmingham Dist | 1826 3rd Ave. South, Birmingham, AL 35233 | 353 | 2,096,820 |
| Mobile Housing Board | PO Box 1345, Mobile, AL 36633 | 481 | 2,447,328 |
| HA Decatur | PO Box 878, Decatur, AL 35602 | 100 | 402,000 |
| Wilmington HA | 400 Walnut St, Wilmington, DE 19801 | 180 | 1,274,400 |
| Miami Dade HA | 1401 NW 7th St, Miami, FL 33125 | 450 | 3,733,800 |
| HA Daytona Beach | 118 Cedar St, Daytona Beach, FL 32114 | 277 | 1,579,908 |
| HA Lake Wales | 10 W. Sessoms Ave, Lake Wales, FL 33859 | 100 | 630,000 |
| HA Tallahassee | 2940 Grady Rd, Tallahassee, FL 32312 | 47 | 302,868 |
| HA Tampa | 1514 Union St., Tampa, FL 33607 | 155 | 1,222,020 |
| Clearwater HA | 210 South Ewing, Clearwater, FL 33757 | 284 | 1,755,120 |
| HA Atlanta GA | 230 John Wesley Dobbs Ave., NE, Atlanta, GA 30303 | 434 | 3,853,920 |
| HA Marietta | PO Drawer K, Marietta, GA 30061 | 124 | 1,199,328 |
| HA Americus | 825 N Mayo St, Americus, GA 31709 | 62 | 273,792 |
| Menard County HA | PO Box 168, Petersburg, IL 62675 | 13 | 55,692 |
| Louisville HA | 420 South Eighth St, Louisville, KY 40203 | 75 | 488,550 |
| New Orleans HA | PO Box 6409, New Orleans, LA 70174 | 50 | 346,200 |
| Shreveport HA | 2500 Line Ave, Shreveport, LA 71104 | 100 | 492,000 |
| Boston HA | 52 Chauncy St, Boston, MA 02111 | 196 | 2,648,352 |
| HA of the City of Frederick | 209 Madison St, Frederick, MD 21701 | 40 | 381,120 |
| Benton Harbor HSG Comm | 721 Natewells Sr. Dr, Benton Harbor, MI 49022 | 20 | 82,560 |
| Raleigh HA | PO Box 28007, Raleigh, NC 27611 | 141 | 1,067,652 |
| HA Charlotte | 1301 South Blvd, Charlotte, NC 28236 | 309 | 2,476,188 |
| Jersey City HA | 400 U.S. Highway #1, Jersey City, NJ 07306 | 96 | 791,424 |
| Camden HA | 1300 Admiral Wilson Blvd, Camden, NJ 08101 | 188 | 1,743,888 |
| Atlantic City HA | 227 Vermont Ave, Atlantic City, NJ 08404 | 30 | 232,560 |
| County of Clark HA | 5390 East Flamingo Rd, Las Vegas, NV 89122 | 66 | 498,960 |
| The Muni HA City of Yonkers | 1511 Central Park Ave, Yonkers, NY 10710 | 200 | 2,121,600 |
| Chester HA | 1010 Madison St, Chester, PA 19016 | 184 | 1,552,224 |
| Fayette County HA | 624 Pittsburgh Rd, Uniontown, PA 15401 | 40 | 159,360 |
| HA Columbia | 1917 Harden St, Columbia, SC 29204 | 214 | 1,250,616 |
| City of Spartanburg HA | PO Box 2828, Spartanburg, SC 29304 | 156 | 835,536 |
| Metropolitan Dev & HSG | 701 South Sixth St, Nashville, TN 37202 | 200 | 1,214,400 |
| Galveston HA | 4700 Broadway, Galveston, TX 77551 | 20 | 122,160 |
| HA City of Seattle | 120 Sixth Ave North, Seattle, WA 98109 | 267 | 2,499,120 |
| HA County of King | 600 Andover Park West, Seattle, WA 98188 | 300 | 2,530,800 |
| HA of the City of Milwaukee | 809 North Broadway, Milwaukee, WI 53201 | 151 | 784,596 |

APPENDIX A—SECTION 8 RENTAL ASSISTANCE PROGRAMS ANNOUNCEMENT OF AWARDS FOR FISCAL YEAR 2004—Continued

| Housing agency | Address | Units | Award |
|---|---|---|---|
| Total for Hope VI Vouchers | | 6,103 | $45,146,862 |
| Housing Tenant Protection: | | | |
| HA Phenix City | PO Box 338, Phenix City, AL 36867 | 64 | 286,702 |
| HA City of Montgomery | 1020 Bell St, Montgomery, AL 36104 | 64 | 339,364 |
| HA Guntersville | PO Box 4, Guntersville, AL 35976 | 46 | 187,022 |
| HA Albertville | PO Box 1126, Albertville, AL 35950 | 50 | 178,076 |
| Benton Public HA | 1200 West Pine St, Benton, AR 72015 | 93 | 368,890 |
| Oakland HA | 1619 Harrison St, Oakland, CA 94612 | 120 | 1,667,490 |
| City of Los Angeles HA | 2600 Wilshire Blvd, 3rd Fl, Los Angeles, CA 90057 | 48 | 417,504 |
| Sacramento HSG & Redev | PO Box 1834, Sacramento, CA 95812 | 156 | 924,755 |
| City of Fresno HA | 1331 Fulton Mall, Fresno, CA 93776 | 39 | 216,606 |
| Sacramento HSG & Redev | PO Box 1834, Sacramento, CA 95812 | 0 | 1,045,431 |
| Kern County HA | 601 24th St, Bakersfield, CA 93301 | 24 | 113,232 |
| San Bernardino County HA | 715 E. Brier Dr, San Bernardino, CA 92408 | 40 | 441,616 |
| County of San Joaquin HSG | 448 South Center St, Stockton, CA 95203 | 54 | 357,588 |
| Riverside County HA | 5555 Arlington Ave, Riverside, CA 92504 | 64 | 451,456 |
| County of Fresno HA | 1331 Fulton Mall, Fresno, CA 93776 | 31 | 174,778 |
| County of Monterey HA | 123 Rico St, Salinas, CA 93907 | 48 | 380,640 |
| County of Butte HA | 2039 Forest Ave, Ste 10, Chico, CA 95928 | 18 | 92,760 |
| City of Alameda HA | 701 Atlantic Ave, Alameda, CA 94501 | 0 | 171,864 |
| Long Beach HA | 521 E 4th St, Long Beach, CA 90802 | 72 | 675,284 |
| Glendale HA | 141 North Glendale Ave #202, Glendale, CA 91206 | 8 | 62,096 |
| Denver | 777 Grant St, Denver, CO 80203 | 5 | 50,680 |
| Colorado Springs HAO | PO Box 1575, MC 1490, Colorado Springs, CO 80901 | 24 | 186,000 |
| Lakewood | 445 S. Allison Pkwy, Lakewood, CO 80226 | 18 | 174,624 |
| Garfield County | 2128 Railrd Ave, Rifle, CO 81650 | 42 | 237,384 |
| CO Div of HSG | 1313 Sherman St, Room 518, Denver, CO 80203 | 7 | 52,030 |
| Waterbury HA | 2 Lakewood Rd, Waterbury, CT 06704 | 65 | 484,250 |
| Conn Dept of Social Services | 25 Sigourney St 9th Fl, Hartford, CT 06105 | 248 | 2,391,194 |
| DC HA | 1133 North Capitol St NE, Washington, DC 20002 | 302 | 3,093,476 |
| HA of Jacksonville | 1300 Broad St, Jacksonville, FL 32202 | 24 | 156,354 |
| HA Tampa | 1514 Union St, Tampa, FL 33607 | 116 | 1,000,150 |
| NW Florida Regional HA | PO Box 218, Graceville, FL 32440 | 5 | 27,800 |
| Bradenton HA | 1307 5th St West, Bradenton, FL 34205 | 100 | 815,050 |
| Gainesville HA | PO Box 1468, Gainesville, FL 32602 | 172 | 950,992 |
| Broward County HAI | 1773 North State Rd 7, Lauderhill, FL 33313 | 113 | 861,490 |
| City of Fort Myers | 1700 Medical Lane, Fort Myers, FL | 30 | 179,580 |
| HA Savannah | 200 East Brd St, Savannah, GA 31402 | 13 | 140,942 |
| HA Atlanta GA | 230 John Wesley Dobbs Ave. NE, Atlanta, GA 30303 | 531 | 5,412,468 |
| HA Macon | PO Box 4928, Macon, GA 31208 | 46 | 255,622 |
| HA Jonesboro | PO Box 458, Jonesboro, GA 30237 | 68 | 570,248 |
| City and County of Honolulu | 715 South King St, Ste 311, Honolulu, HI 96813 | 126 | 1,005,938 |
| City of Mason City | 10 1st St NW, Mason City, IA 50401 | 0 | 39,876 |
| Area XV Multi-County HA | 417 North College, Agency, IA 52530 | 20 | 77,000 |
| Chicago HA | 626 West Jackson Blvd, Chicago, IL 60661 | 132 | 1,116,380 |
| Champaign County HA | 205 West Park Ave, Champaign, IL 61820 | 92 | 648,096 |
| Quincy HA | 540 Harrison St, Quincy, IL 62301 | 130 | 309,782 |
| HA of Cook County | 310 South Michigan Ave, 15th Fl, Chicago, IL 60604 | 96 | 1,125,804 |
| HA of the County of Lake | 33928 N Route 45, Grayslake, IL 60030 | 151 | 1,329,580 |
| Dupage HA | 128A South County Farm Rd, Wheaton, IL 60187 | 34 | 329,496 |
| McHenry County HA | 1108 North Seminary Ave, Woodstock, IL 60098 | 80 | 629,810 |
| McLean County HA | 104 East Wood, Bloomington, IL 61701 | 198 | 1,004,406 |
| Gary HA | 578 Broadway, Gary, IN 46402 | 86 | 613,900 |
| Bloomington HA | 1007 N Summit, Bloomington, IN 47402 | 27 | 178,748 |
| Indiana Dept of Human Services. | PO Box 6116, Indianapolis, IN 46206 | 5 | 26,400 |
| Kansas City HA | 1124 North Ninth St, Kansas City, KS 66101 | 136 | 842,084 |
| Nek-Cap, Inc | PO Box 380, Hiawatha, KS 66434 | 12 | 38,102 |
| Ellis County PHA | c/o DSNWK, PO Box 1016, Hays, KS 67601 | 12 | 35,856 |
| Covington HA | 638 Madison Ave, First Fl, Covington, KY 41011 | 16 | 88,038 |
| Kentucky Housing Corp | 1231 Louisville Rd, Frankfort, KY 40601 | 53 | 236,872 |
| St Landry Parish HA | PO Box 276, Washington, LA 70589 | 100 | 305,972 |
| Holyoke HA | 475 Maple St, Holyoke, MA 01040 | 44 | 293,079 |
| Comm Dev Prog Comm of MAE.O. | 100 Cambridge St, Boston, MA 02114 | 0 | 35,582 |
| HA of Baltimore City | 417 East Fayette St, Baltimore, MD 21201 | 207 | 1,439,516 |
| HA of Prince George's County | 9400 Peppercorn Pl, Ste 200, Largo, MD 20774 | 114 | 1,183,702 |
| Howard County HSG Comm | 6751 Columbia Gtwy Dr, 3rd Fl, Columbia, MD | 162 | 1,537,085 |
| Co. Commissioners Charles Co.. | 8190 Port Tobacco Rd, Port Tobacco, MD 20677 | 60 | 576,024 |

APPENDIX A—SECTION 8 RENTAL ASSISTANCE PROGRAMS ANNOUNCEMENT OF AWARDS FOR FISCAL YEAR 2004—Continued

| Housing agency | Address | Units | Award |
|---|---|---|---|
| Harford County HSG Agency | 15 South Main St, Ste 106, Bel Air, MD 21014 | 12 | 75,432 |
| Washington County HA | PO Box 2944, Hagerstown, MD 21741 | 24 | 118,898 |
| Baltimore Co. Housing Office | 6401 York Rd, 1st Fl, Baltimore, MD 21201 | 82 | 520,256 |
| Sanford HA | PO Box 1008, Sanford, ME 04073 | 104 | 606,281 |
| Augusta HA | 33 Union St, Ste 3, Augusta, ME 04330 | 86 | 342,578 |
| Maine State HA | 353 Water St, Augusta, ME 04330 | 54 | 304,152 |
| Pontiac HSG Comm | 132 Franklin Blvd, Pontiac, MI 48341 | 50 | 429,140 |
| Saginaw HSG Comm | PO Box 3225, Saginaw, MI 48605 | 56 | 267,344 |
| River Rouge HSG Comm | PO Box 18174, River Rouge, MI 48218 | 135 | 975,080 |
| Ypsilanti HSG Comm | 601 Armstrong Dr, Ypsilanti, MI 48197 | 0 | 679,602 |
| Inkster HSG Comm | 4500 Inkster Rd, Inkster, MI 48141 | 196 | 1,230,061 |
| Port Huron HSG Comm | 905 Seventh St, Port Huron, MI 48060 | 64 | 398,464 |
| Lansing HSG Comm | 310 North Seymour St, Lansing, MI 48933 | 310 | 1,431,563 |
| Grand Rapids HSG Comm | 1420 Fuller Ave SE, Grand Rapids, MI 49507 | 166 | 1,053,532 |
| Taylor HSG Comm | 15270 Plaza South Dr, Taylor, MI 48180 | 46 | 357,184 |
| Ferndale HSG Comm | 415 Withington, Ferndale, MI 48220 | 87 | 894,783 |
| Lapeer HSG Comm | 544 North Saginaw, Ste 109, Lapeer, MI 48446 | 102 | 623,208 |
| Wyoming HSG Comm | 2450 36th St, SW, Wyoming, MI 49509 | 127 | 804,418 |
| Michigan State HSG Dev Auth | PO Box 30044, Lansing, MI 48909 | 1,201 | 8,277,220 |
| St. Cloud HRA | 1225 West St. Germain, St. Cloud, MN 56301 | 12 | 61,752 |
| St Louis Park HRA | 5005 Minnetonka Blvd, St. Louis Park, MN 55416 | 0 | 8,000 |
| NW MN Multi-County HRA | PO Box 128, Mentor, MN 56736 | 24 | 81,240 |
| Southeast MN Multi-County HRA. | 134 East Second St, Wabasha, MN 55981 | 0 | 2,750 |
| Washington County HRA | 321 Broadway Ave, St. Paul Park, MN 55071 | 60 | 476,654 |
| South Central Multi County HRA. | 410 Jackson St, Ste 300, Mankato, MN 56002 | 64 | 255,264 |
| St. Louis HA | 4100 Lindell Blvd, St. Louis, MO 63108 | 68 | 390,606 |
| St. Louis County HAO | 8865 Natural Bridge, St. Louis, MO 63121 | 53 | 321,110 |
| Lees Summit HA | 111 South Grand, Lees Summit, MO 64063 | 36 | 283,048 |
| Pulaski County PHA | PO Box 69, Richland, MO 65556 | 48 | 207,985 |
| HA Mississippi Regional No. 5 | PO Box 419, Newton, MS 39345 | 56 | 226,698 |
| Miss Regional HA VIII | PO Box 2347, Gulfport, MS 39505 | 10 | 51,580 |
| Jackson Hous Auth | 2747 Livingston Rd, Jackson, MS 39283 | 69 | 380,187 |
| Whitefish | 100 East Fourth St, Whitefish, MT 59937 | 16 | 86,852 |
| MDOC | 836 Front St, Helena, MT 59620 | 50 | 241,100 |
| HA Winston-Salem | 901 Cleveland Ave, Winston-Salem, NC 27101 | 150 | 922,450 |
| HA Wadesboro | 200 W Short Plaza, Wadesboro, NC 28170 | 7 | 25,946 |
| Isothermal Planning & Dev Comm. | PO Box 841, Rutherfordton, NC 28139 | 34 | 167,702 |
| Grand Forks | 1405 1st Ave North, Grand Forks, ND 58203 | 198 | 950,004 |
| Omaha HA | 540 South 27th St, Omaha, NE 68105 | 259 | 1,678,716 |
| Jersey City HA | 400 U.S. Highway #1, Jersey City, NJ 07306 | 20 | 113,240 |
| Edison HA | Willard Dunham Dr, Edison, NJ 08837 | 233 | 1,668,424 |
| East Orange HA | 160 Halsted St, East Orange, NJ 07018 | 0 | 398,452 |
| Fort Lee HA | 1403 Teresa Dr, Fort Lee, NJ 07024 | 85 | 847,636 |
| Bernalillo County HSG Dept | 1900 Bridge Blvd, SW, Albuquerque, NM 87105 | 152 | 974,018 |
| North Las Vegas HA | 1632 Yale St, North Las Vegas, NV 89030 | 44 | 407,016 |
| County of Clark HA | 5390 East Flamingo Rd, Las Vegas, NV 89122 | 138 | 1,066,956 |
| HA of Rochester | 675 West Main St, Rochester, NY 14611 | 365 | 1,869,328 |
| HA of Ithaca | 800 S Plain St, Ithaca, NY 14850 | 99 | 556,474 |
| Town of Amherst | 1195 Main St, Buffalo, NY 14209 | 37 | 175,888 |
| The City of New York DHPD | 100 Gold St Room 5N, New York, NY 10007 | 1,816 | 26,707,500 |
| Town of Babylon HAA | 281 Phelps Lane, Rm 9, North Babylon, NY 11703 | 120 | 1,517,520 |
| City of Buffalo | 470 Franklin St, Buffalo, NY 14202 | 194 | 1,165,538 |
| Town of Glenville | 242 Union St, Schenectady, NY 12305 | 7 | 32,914 |
| New York State HSG Fin Agency. | 25 Beaver St, Rm 674, New York, NY 10004 | 515 | 5,967,602 |
| Columbus Metro. HA | 880 East 11th Ave, Columbus, OH 43211 | 309 | 1,955,106 |
| Cuyahoga MHA | 1441 West 25th St, Cleveland, OH 44113 | 18 | 130,610 |
| Cincinnati Metropolitan HA | 16 West Central Pkwy, Cincinnati, OH 45210 | 30 | 152,661 |
| Akron MHA | 100 W. Cedar St, Akron, OH 44307 | 6 | 39,720 |
| Mansfield MHA | 150 Park Ave West, Mansfield, OH 44901 | 32 | 139,712 |
| Greene Metro HA | 538 North Detroit St, Xenia, OH 45385 | 46 | 265,682 |
| Chillicothe Met HA | 178 West Fourth St, Chillicothe, OH 45601 | 80 | 397,198 |
| Medina MHA | 850 Walter Rd, Medina, OH 44256 | 24 | 140,578 |
| Wayne MHA | 200 South Market St, Wooster, OH 44691 | 81 | 365,649 |
| Hamilton County PHA | 630 Main St, 1st Fl, Cincinnati, OH 45202 | 17 | 133,592 |
| Parma PHA | 5983 W. 54th St #124, Cleveland, OH 44129 | 0 | 320,340 |
| Seneca MHA | 150 Park Ave West, Mansfield, OH 44901 | 10 | 36,030 |
| Marion Metro HA | 150 Park Ave West, Mansfield, OH 44901 | 40 | 190,722 |

APPENDIX A—SECTION 8 RENTAL ASSISTANCE PROGRAMS ANNOUNCEMENT OF AWARDS FOR FISCAL YEAR 2004—Continued

| Housing agency | Address | Units | Award |
|---|---|---|---|
| Tulsa | PO Box 6369, Tulsa, OK 74148 | 60 | 380,420 |
| Clackamas County HA | PO Box 1510, Oregon City, OR 97045 | 18 | 128,918 |
| HA of Douglas County | 902 West Stanton St, Roseburg, OR 97470 | 1 | 4,037 |
| HA of Lincoln County | PO Box 1470, Newport, OR 97365 | 5 | 24,214 |
| Linn-Benton HA | 1250 SE Queen Ave, Albany, OR 97322 | 10 | 58,340 |
| HA of Malheur County | 959 Fortner St, Ontario, OR 97914 | 10 | 48,718 |
| HA City of Pittsburgh | 200 Ross St, Pittsburgh, PA 15219 | 87 | 523,946 |
| McKeesport HA | 2901 Brownlee Ave, McKeesport, PA 15132 | 7 | 32,436 |
| Allegheny County HA | 625 Stanwix St, 12th Fl, Pittsburgh, PA 15222 | 18 | 103,452 |
| Reading HA | 400 Hancock Blvd, Reading, PA 19611 | 1 | 5,578 |
| HA of the County of Butler | 114 Woody Dr, Butler, PA 16001 | 52 | 250,744 |
| Erie City HA | 606 Holland St, Erie, PA 16501 | 106 | 425,110 |
| Westmoreland County HAOR | 223 South Greengate Rd, Greensburg, PA 15601 | 8 | 39,708 |
| Wilkes Barre HA | 50 Lincoln Plz S. Wilkes-Barre, Wilkes Barre, PA | 0 | 346,846 |
| Municipality of Trujillo Alto | PO Box 1869, Trujillo Alto, PR 00977 | 80 | 528,800 |
| Puerto Rico HSG Finance Co | Call Box 71361–GPO, San Juan, PR 00936 | 69 | 441,018 |
| HA Columbia | 1917 Harden St, Columbia, SC 29204 | 228 | 1,193,954 |
| City of Rock Hill | PO Box 11579, Rock Hill, SC 29731 | 70 | 396,294 |
| Pennington County | 1805 West Fulton St, Rapid City, SD 57702 | 19 | 109,696 |
| Mobridge HA | PO Box 370, Mobridge, SD 57601 | 24 | 94,332 |
| Yankton HSG & Redev Comm | PO Box 176, Yankton, SD 57078 | 24 | 81,890 |
| HA Memphis | 700 Adams Ave, Memphis, TN 38105 | 104 | 546,965 |
| Metropolitan Dev & HSG | 701 South Sixth St, Nashville, TN 37202 | 1 | 6,346 |
| Kingsport HSG and Redev | PO Box 44, Kingsport, TN 37662 | 26 | 121,316 |
| EL Paso HA | 5300 Paisano, El Paso, TX 79905 | 150 | 878,564 |
| Corpus Christi HA | 3701 Ayers St, Corpus Christi, TX 78415 | 101 | 639,734 |
| Dallas HA | 3939 N. Hampton Rd, Dallas, TX 75212 | 44 | 408,992 |
| Waco HA | 1001 Washington, Waco, TX 76703 | 50 | 268,468 |
| Brownwood HA | 1500 Terrace Dr., Brownwood, TX 76804 | 20 | 73,380 |
| Beaumont HA | 4925 Concord Rd, Beaumont, TX 77708 | 39 | 215,286 |
| Georgetown HA | PO Box 60, Georgetown, TX 78627 | 3 | 16,133 |
| Abilene HA | 555 Walnut, Abilene, TX 79604 | 0 | 660,680 |
| Tarrant County HA | 2100 Cir Dr, Ste 200, Fort Worth, TX 76119 | 0 | 529,914 |
| Harris County HA | 8410 Lantern Point, Houston, TX 77054 | 214 | 1,786,962 |
| Tyler | 213 N. Bonner, Tyler, TX 75710 | 56 | 366,391 |
| Dallas County | 2377 N. Stemmons Frwy, Ste 200–LB 16, Dallas, TX | 171 | 1,323,640 |
| Norfolk Redevelopment & HA | 201 Granby St, Norfolk, VA 23501 | 49 | 294,240 |
| Richmond Redevelopment & HA. | PO Box 26887, Richmond, VA 23261 | 378 | 2,888,910 |
| Roanoke Redev & HA | 2624 Salem Trnpk, NW, Roanoke, VA 24017 | 153 | 714,574 |
| Lynchburg Redev & HA | 918 Commerce St, Lynchburg, VA 24505 | 149 | 621,926 |
| Harrisonburg Redev & HA | 286 Kelley St, Harrisonburg, VA 22801 | 143 | 734,350 |
| Fairfax Co. Redev and HA | 3700 Pender Dr, Ste 300, Fairfax, VA 22030 | 22 | 235,180 |
| Waynesboro Redev & HA | 1700 New Hope Rd, Waynesboro, VA 22980 | 100 | 390,472 |
| City of Virginia Beach | 2424 Courthouse Dr, Virginia Beach, VA 23456 | 131 | 871,544 |
| Prince William County | 15941 Donald Curtis Dr Ste 112, Woodbridge, VA 22191 | | 14 |
| Virginia HSG Dev Auth | 601 South Belvidere St, Richmond, VA 23220 | 323 | 1,598,939 |
| HA County of King | 600 Andover Park West, Seattle, WA 98188 | 16 | 150,701 |
| HA City of Yakima | 810 N 6th Ave, Yakima, WA 98902 | 30 | 151,820 |
| HA City of Spokane | West 55 Mission St, Ste 104, Spokane, WA 99201 | 109 | 448,723 |
| HA City of Walla Walla | 501 Cayuse St, Walla Walla, WA 99362 | 50 | 231,319 |
| Mason County HA | PO Box 4460, Bremerton, WA 98312 | 5 | 25,826 |
| HA of the City of Milwaukee | 809 North Brdway, Milwaukee, WI 53201 | 23 | 122,758 |
| Milwaukee Co. HA | 2711 W Wells St, Room 102, Milwaukee, WI 53208 | 72 | 439,382 |
| Janesville CDA | 18 North Jackson St, Janesville, WI 53547 | 93 | 496,434 |
| Marinette Co. HA | 926 Main St, Wausaukee, WI 54177 | 20 | 62,700 |
| Wisconsin HSG & Econ Dev Auth. | PO Box 1728, Madison, WI 53701 | 12 | 51,770 |
| Total for Housing Tenant Protection. | | 17,463 | $138,330,028 |
| Public Housing Tenant Protection: | | | |
| County of Contra Costa HA | 3133 Estudillo St, Martinez, CA 94553 | 94 | 1,134,768 |
| HA Sarasota | 1300 Blvd of the Arts, Sarasota, FL 34236 | 36 | 261,360 |
| HA Punta Gorda | 420 Myrtle St, Punta Gorda, FL 33950 | 200 | 1,113,600 |
| HA Savannah | PO Box 1179 200 East Brd St, Savannah, GA 31402 | 210 | 1,385,268 |
| HA Atlanta GA | 230 John Wesley Dobbs Ave. NE, Atlanta, GA 30303 | 712 | 6,599,232 |
| Des Moines Municipal HA | 100 East Euclid, Ste 101, Des Moines, IA 50313 | 100 | 563,170 |
| HA of the City of East STL | 700 North 20th St, East St Louis, IL 62205 | 28 | 178,080 |
| Chicago HA | 626 West Jackson Blvd, Chicago, IL 60661 | 2,794 | 23,795,492 |

APPENDIX A—SECTION 8 RENTAL ASSISTANCE PROGRAMS ANNOUNCEMENT OF AWARDS FOR FISCAL YEAR 2004—Continued

| Housing agency | Address | Units | Award |
|---|---|---|---|
| Peoria HA | 100 South Sheridan Rd, Peoria, IL 61605 | 214 | 1,123,448 |
| Menard County HA | PO Box 168, Petersburg, IL 62675 | 16 | 64,926 |
| Appalachian Foothills HA | 1214 Riverside Blvd, Wurtland, KY 41144 | 50 | 218,400 |
| Boston HA | 52 Chauncy St, Boston, MA 02111 | 295 | 3,378,426 |
| Moorhead Pub HSG Agency | 800 Second Ave North, Moorhead, MN 56560 | 46 | 192,096 |
| Miss Regional HA VIII | PO Box 2347, Gulfport, MS 39505 | 100 | 506,856 |
| HA High Point | 500 E Russell Ave, High Point, NC 27261 | 47 | 677,040 |
| North Las Vegas HA | 1632 Yale St, North Las Vegas, NV 89030 | 44 | 389,568 |
| Cuyahoga MHA | 1441 West 25th St, Cleveland, OH 44113 | 125 | 888,960 |
| Trumbull MHA | 4076 Youngstown Rd SE, Warrne, OH 44484 | 84 | 400,836 |
| Clinton Metropolitan HA | 478 Thorne Ave, Wilmington, OH 45177 | 30 | 141,120 |
| Washington County HA | 100 Crumrine Tower Franklin St, Washington, PA 15301 | | 56 |
| Metropolitan Dev & HSG | 701 South Sixth St, Nashville, TN 37202 | 100 | 617,940 |
| HA Jackson | PO Box 3188, Jackson, TN 38301 | 270 | 1,273,320 |
| Midland County | 1710 Edwards, Midland, TX 79701 | 35 | 161,490 |
| HA City of Seattle | 120 Sixth Ave North, Seattle, WA 98109 | 44 | 444,840 |
| Total for Public Housing Tenant Protections. | | 5,730 | $45,728,620 |
| Grand Total | | 29,296 | $229,205,510 |

[FR Doc. E6–4957 Filed 4–5–06; 8:45 am]

BILLING CODE 4210–67–P

## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

### Issuance of Permits

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice of issuance of permit for endangered species.

**SUMMARY:** The following permit was issued.

**ADDRESSES:** Documents and other information submitted with this application is available for review, subject to the requirements of the Privacy Act and Freedom of Information Act, by any party who submits a written request for a copy of such documents to: U.S. Fish and Wildlife Service, Division of Management Authority, 4401 North Fairfax Drive, Room 700, Arlington, Virginia 22203; fax 703/358–2281.

**FOR FURTHER INFORMATION CONTACT:** Division of Management Authority, telephone (703) 358–2104.

**SUPPLEMENTARY INFORMATION:** Notice is hereby given that on the dates below, as authorized by the provisions of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*), the Fish and Wildlife Service issued the requested permit(s) subject to certain conditions set forth therein. For each permit for an endangered species, the Service found that (1) the application was filed in good faith, (2) the granted permit would not operate to the disadvantage of the endangered species, and (3) the granted permit would be consistent with the purposes and policy set forth in Section 2 of the Endangered Species Act of 1973, as amended.

**Endangered Species**

| Permit No. | Applicant | Receipt of application **Federal Register** notice | Permit issuance date |
|---|---|---|---|
| 113778 | William G. Hatcher | 70 FR 2562; January 17, 2006 | March 1, 2006. |

Dated: March 17, 2006.

**Michael L. Carpenter,**

*Senior Permit Biologist, Branch of Permits, Division of Management Authority.*

[FR Doc. E6–5018 Filed 4–5–06; 8:45 am]

BILLING CODE 4310–55–P

## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

### Receipt of Applications for Permit

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice of receipt of applications for permit.

**SUMMARY:** The public is invited to comment on the following applications to conduct certain activities with endangered species.

**DATES:** Written data, comments or requests must be received by May 8, 2006.

**ADDRESSES:** Documents and other information submitted with these applications are available for review, subject to the requirements of the Privacy Act and Freedom of Information Act, by any party who submits a written request for a copy of such documents within 30 days of the date of publication of this notice to: U.S. Fish and Wildlife Service, Division of Management Authority, 4401 North Fairfax Drive, Room 700, Arlington, Virginia 22203; fax 703/358–2281.

**FOR FURTHER INFORMATION CONTACT:** Division of Management Authority, telephone 703/358–2104.

**SUPPLEMENTARY INFORMATION:**

**Endangered Species**

The public is invited to comment on the following applications for a permit to conduct certain activities with endangered species. This notice is provided pursuant to Section 10(c) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*). Written data, comments, or requests for copies of these complete applications should be submitted to the Director (address above).

**PRT–119840**

*Applicant:* William G. Leffler, Jr., Palm Beach Gardens, FL

The applicant requests a permit to import the sport-hunted trophy of one male bontebok (*Damaliscus pygargus pygargus*) culled from a captive herd maintained under the management program of the Republic of South Africa, for the purpose of enhancement of the survival of the species.

**PRT–119843**

*Applicant:* Daniel S. Mac Curdy, Jupiter, FL

The applicant requests a permit to import the sport-hunted trophy of one male bontebok (*Damaliscus pygargus pygargus*) culled from a captive herd maintained under the management program of the Republic of South Africa, for the purpose of enhancement of the survival of the species.

Dated: March 17, 2006.

**Michael L. Carpenter,**

*Senior Permit Biologist, Branch of Permits, Division of Management Authority.*

[FR Doc. E6–5024 Filed 4–5–06; 8:45 am]

**BILLING CODE 4310–55–P**

## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

### Receipt of an Application for an Incidental Take Permit for Proposed Construction of a Single-Family Home in Charlotte County, FL

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice.

**SUMMARY:** Robert Aulbach and Elizabeth Aulbach (Applicants) request an incidental take permit (ITP) for a one-year term pursuant to section 10(a)(1)(B) of the Endangered Species Act of 1973, as amended (Act). The Applicants anticipate taking about 0.46 acre of Florida scrub-jay (*Aphelocoma coerulescens*) (scrub-jay) foraging, sheltering, and possibly nesting habitat, incidental to lot preparation for the construction of a single-family home and supporting infrastructure in Charlotte County, Florida (Project). The Applicants' Habitat Conservation Plan (HCP) describes the mitigation and minimization measures proposed to address the effects of the Project to the Florida scrub-jay. These measures are outlined in the **SUPPLEMENTARY INFORMATION** section below.

**DATES:** Written comments on the ITP application and HCP should be sent to the Service's Regional Office (see **ADDRESSES**) and should be received on or before May 8, 2006.

**ADDRESSES:** Persons wishing to review the application and HCP may obtain a copy by writing the Service's Southeast Regional Office at the address below. Please reference permit number TE113867–0 in such requests. Documents will also be available for public inspection by appointment during normal business hours at the Southeast Regional Office, U.S. Fish and Wildlife Service, 1875 Century Boulevard, Suite 200, Atlanta, Georgia 30345 (Attn: Endangered Species Permits), or Field Supervisor, South Florida Ecological Services Field Office, U.S. Fish and Wildlife Service, 1339 20th Street, Vero Beach, Florida 32960–3559.

**FOR FURTHER INFORMATION CONTACT:** Mr. David Dell, Regional HCP Coordinator, Southeast Regional Office (see **ADDRESSES** above), telephone: 404/679–7313, facsimile: 404/679–7081; or Mr. Mark Salvato, Fish and Wildlife Biologist, South Florida Ecological Services Field Office, Vero Beach, Florida (see **ADDRESSES** above), telephone: 772/562–3909, extension 340.

**SUPPLEMENTARY INFORMATION:** If you wish to comment, you may submit written comments by any one of several methods. Please reference permit number TE113867–0 in such comments. You may mail comments to the Service's Southeast Regional Office (see **ADDRESSES**). You may also comment via the Internet to *david_dell@fws.gov.* Please include your name and return address in your internet message. If you do not receive a confirmation from us that we have received your internet message, contact us directly at either telephone number listed below (see **FOR FURTHER INFORMATION CONTACT**). Finally, you may hand-deliver comments to either Service office listed above (see **ADDRESSES**). Our practice is to make comments, including names and home addresses of respondents, available for public review during regular business hours. Individual respondents may request that we withhold their home addresses from the administrative record. We will honor such requests to the extent allowable by law. There may also be other circumstances in which we would withhold from the administrative record a respondent's identity, as allowable by law. If you wish us to withhold your name and address, you must state this prominently at the beginning of your comments. We will not, however, 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.

The Florida scrub-jay (scrub-jay) is geographically isolated from other species of scrub-jays found in Mexico and the western United States. The scrub-jay is found exclusively in peninsular Florida and is restricted to xeric uplands (mostly consisting of oak-dominated scrub). Increasing urban and agricultural development has resulted in habitat loss and fragmentation, which has adversely affected the distribution and numbers of scrub-jays. The total estimated population is between 7,000 and 11,000 individuals (U.S. Fish and Wildlife Service 1990. Recovery plan for the Florida scrub-jay, U.S. Fish and Wildlife Service, Atlanta, Georgia).

The scrub-jays using the Applicants' residential lot and adjacent properties are part of a larger complex of scrub-jays located in a matrix of urban and natural settings in Charlotte County. Construction of the Project's infrastructure and facilities will result in the destruction of 0.46 acre of foraging, sheltering, and possibly nesting habitat and is expected to result in the take, in the form of harm, of one family of scrub-jays, incidental to the carrying out of these otherwise lawful activities. The Applicants propose to minimize and avoid incidental take by conducting clearing activities outside of the nesting season, removal of exotic vegetation from the lot, and maintenance of the remaining area in native vegetation for use by the resident scrub-jays. The Applicants propose to replace any scrub oaks and wax myrtles that might be removed during land clearing. The Applicants propose to avoid landscaping with trees that will grow greater than 30 feet tall and potentially provide perch trees for predators that may prey on scrub-jays on this lot and surrounding unimproved lots. The Applicants propose to implement measures to remove and to discourage the presence of free-roaming cats on the lot as they can be a potential predator on young scrub-jays.

The Applicants propose to mitigate the take of scrub-jays through contribution of $25,822 to the Charlotte County Florida Scrub-Jay Conservation Fund or other appropriate conservation fund approved by the Service. Funds in this account are earmarked for use in the conservation and recovery of scrub-jays and may include habitat acquisition, restoration, and management. A similar account is also in development between the Service and The Nature Conservancy.

The Service has determined that the Applicants' proposal, including the proposed mitigation and minimization measures, will individually and cumulatively have a minor or negligible effect on the species covered in the HCP. Therefore, the ITP is a ''low-effect'' project and qualifies as a categorical exclusion under the National Environmental Policy Act (NEPA), as provided by the Department of Interior Manual (516 DM 2, Appendix 1 and 516 DM 6, Appendix 1). This preliminary information may be revised based on our review of public comments that we receive in response to this notice. Low-effect HCPs are those involving: (1) Minor or negligible effects on federally listed or candidate species and their habitats, and (2) minor or negligible effects on other environmental values or resources. The Applicants' HCP qualifies for the following reasons:

1. Approval of the HCP would result in minor or negligible effects on the Florida scrub-jay population as a whole. The Service does not anticipate significant direct or cumulative effects to the Florida scrub-jay population as a result of the project.

2. Approval of the HCP would not have adverse effects on known unique geographic, historic, or cultural sites, or involve unique or unknown environmental risks.

3. Approval of the HCP would not result in any significant adverse effects on public health or safety.

4. The project does not require compliance with Executive Order 11988 (Floodplain Management), Executive Order 11990 (Protection of Wetlands), or the Fish and Wildlife Coordination Act, nor does it threaten to violate a Federal, State, local, or tribal law or requirement imposed for the protection of the environment.

5. Approval of the Plan would not establish a precedent for future action or represent a decision in principle about future actions with potentially significant environmental effects.

The Service will evaluate the HCP and comments submitted thereon to determine whether the application meets the requirements of section 10(a) of the Act (16 U.S.C. 1531 *et seq.*). If it is determined that those requirements are met, the ITP will be issued for incidental take of the Florida scrub-jay. The Service will also evaluate whether issuance of the section 10(a)(1)(B) ITP complies with section 7 of the Act by conducting an intra-Service section 7 consultation. The results of this consultation, in combination with the above findings, will be used in the final analysis to determine whether or not to issue the ITP. This notice is provided pursuant to section 10 of the Endangered Species Act and NEPA regulations (40 CFR 1506.6).

Dated: March 24, 2006.

**Cynthia K. Dohner,**

*Acting Regional Director, Southeast Region.*

[FR Doc. E6–4988 Filed 4–5–06; 8:45 am]

**BILLING CODE 4310–55–P**

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## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

### Receipt of an Application and Availability of an Environmental Assessment for an Incidental Take Permit for Florida Scrub-Jays During Construction for the Expansion of the Deltona Regional Library, Deltona, Volusia County, FL

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice.

**SUMMARY:** The County of Volusia, Environmental Management Division (Applicant) requests an incidental take permit (ITP) pursuant to section 10(a)(1)(B) of the Endangered Species Act of 1973, as amended (Act). The Applicant anticipates taking two families of Florida scrub-jays (*Aphelocoma coerulescens*) (scrub-jay) over the requested 30-year permit term as a result of the destruction of 1.9 acres of foraging, sheltering, and possible nesting habitat, incidental to land clearing for the expansion of the Deltona Regional Library and supporting infrastructure in Volusia County, Florida (Project).

The Applicant's Habitat Conservation Plan (HCP) describes the mitigation and minimization measures proposed to address the effects of the Project to the Florida scrub-jay. These measures are outlined in the **SUPPLEMENTARY INFORMATION** section below. We announce the availability of the ITP application and HCP and an environmental assessment.

**DATES:** Written comments on the ITP application and HCP should be sent to the Service's Regional Office (see **ADDRESSES**) and should be received on or before June 5, 2006.

**ADDRESSES:** Persons wishing to review the application, environmental assessment, and HCP may obtain a copy by writing the Service's Southeast Regional Office, Atlanta, Georgia. Please reference permit number TE103648–0 in such requests. Documents will also be available for public inspection by appointment during normal business hours at the Regional Office, 1875 Century Boulevard, Suite 200, Atlanta, Georgia 30345 (Attn: Endangered Species Permits), or Field Supervisor, U.S. Fish and Wildlife Service, 6620 Southpoint Drive South, Suite 310, Jacksonville, Florida 32216–0912.

**FOR FURTHER INFORMATION CONTACT:** Mr. David Dell, Regional HCP Coordinator, (see **ADDRESSES** above), telephone: 404/679–7313, facsimile: 404/679–7081; or Mr. Michael Jennings, Fish and Wildlife Biologist, Jacksonville Field Office, Jacksonville, Florida (see **ADDRESSES** above), telephone: 904/232–2580, ext. 113.

**SUPPLEMENTARY INFORMATION:** If you wish to comment, you may submit comments by any one of several methods. Please reference permit number TE103648–0 in such comments. You may mail comments to the Service's Regional Office (see **ADDRESSES**). You may also comment via the Internet to ''*david_dell@fws.gov*''. Please submit comments over the Internet as an ASCII file avoiding the use of special characters and any form of encryption. Please also include your name and return address in your Internet message. If you do not receive a confirmation from us that we have received your Internet message, contact us directly at either telephone number listed below (see *Further Information*). Finally, you may hand deliver comments to either Service office listed below (see **ADDRESSES**). Our practice is to make comments, including names and home addresses of respondents, available for public review during regular business hours. Individual respondents may request that we withhold their home address from the administrative record. We will honor such requests to the extent allowable by law. There may also be other circumstances in which we would withhold from the administrative record a respondent's identity, as allowable by law. If you wish us to withhold your name and address, you must state this prominently at the beginning of your comments. We will not, however, 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.

The Florida scrub-jay (scrub-jay) is geographically isolated from other species of scrub-jays found in Mexico and the western United States. The scrub-jay is found exclusively in peninsular Florida and is restricted to xeric uplands (predominately in oak-dominated scrub). Increasing urban and agricultural development has resulted in

habitat loss and fragmentation that has adversely affected the distribution and numbers of scrub-jays. The total estimated population is between 7,000 and 11,000 individuals.

The decline in the number and distribution of scrub-jays in east-central Florida has been exacerbated by tremendous urban growth in the past 50 years. Much of the historic commercial and residential development has occurred on the dry soils that previously supported scrub-jay habitat. Based on existing soils data, much of the historic and current scrub-jay habitat of coastal east-central Florida occurs proximal to the current shoreline and larger river basins. Much of this area of Florida was settled early because few wetlands restricted urban and agricultural development. Due to the effects of urban and agricultural development over the past 100 years, much of the remaining scrub-jay habitat is now relatively small and isolated. What remains is largely degraded due to the exclusion of fire that is needed to maintain xeric uplands in conditions suitable for scrub-jays.

Surveys conducted during the summer of 2004 found two scrub-jay family groups using a total of about 2.5 acres that will be impacted by the Project. The remaining habitat for these two families of scrub-jays is protected within the Lyonia Preserve, a county-owned and managed parcel dedicated to scrub and scrub-jay conservation. Lyonia Preserve is contiguous with the Project site and contains another 18 families of scrub-jays.

Scrub-jays using the Project site are part of a larger complex of scrub-jays located in a matrix of urban and natural settings in areas of western Volusia County. Scrub-jays in urban areas are particularly vulnerable and typically do not successfully produce young that survive to adulthood. Persistent urban growth in this area will likely result in further reductions in the amount of suitable habitat for scrub-jays. Increasing urban pressures are also likely to result in the continued degradation of scrub-jay habitat as fire exclusion slowly results in vegetative overgrowth. Thus, over the long-term, scrub-jays are unlikely to persist in urban settings, and conservation efforts for this species should target acquisition and management of large parcels of land outside the direct influence of urbanization. The retention of small patches of habitat similar to the onsite mitigation proposed by the Applicant can provide benefits to scrub-jays by creating ''stepping stones'' used by scrub-jays dispersing between larger parcels of conservation lands in Volusia County.

Construction of the Project's infrastructure and facilities will result in harm to scrub-jays, incidental to the carrying out of these otherwise lawful activities. Habitat alteration associated with the proposed expansion of the regional library and associated infrastructure will reduce the availability of foraging, sheltering, and possible nesting habitat for two families of scrub-jays.

The Applicant proposes to minimize impacts to scrub-jays by reducing the Project's footprint and avoiding active nest sites during the breeding season. The Applicant proposes to mitigate the take of scrub-jays by protecting and managing scrub-jay habitat within Lyonia Preserve pursuant to an agreement between the Service and County of Volusia. In that agreement, Volusia County agreed to provide long-term protection of scrub-jay habitat and to implement land management activities that will enhance habitat for this species. Until the Service and County of Volusia entered into this agreement, no such protection was afforded to scrub-jays in Lyonia Preserve. In return for their commitment to protect and manage scrub-jay habitat within Lyonia Preserve, the agreement stipulates that the County of Volusia's Public Works Department and Volusia County School District may use the Lyonia Preserve as a scrub-jay mitigation site for locally sponsored projects, such as the expansion of the regional library. The Applicant proposes to use a portion of their scrub-jay enhancement credits as mitigation for the Project.

The Service has made a preliminary determination that issuance of the requested ITP is not a major Federal action significantly affecting the quality of the human environment within the meaning of section 102(2)(C) of National Environmental Policy Act (NEPA). This preliminary information may be revised due to public comment received in response to this notice and is based on information contained in the EA and HCP. This notice is provided pursuant to section 10 of the Endangered Species Act (16 U.S.C. 1531 *et seq.*) and NEPA regulations (40 CFR 1506.6).

We will evaluate the HCP and comments submitted thereon to determine whether the application meets the requirements of section 10(a) of the Act. If it is determined that those requirements are met, the ITP will be issued for the incidental take of the Florida scrub-jay. We will also evaluate whether issuance of the section 10(a)(1)(B) ITP complies with section 7 of the Act by conducting an intra-Service section 7 consultation. The results of this consultation, in combination with the above findings, will be used in the final analysis to determine whether or not to issue the ITP.

Dated: January 27, 2006.

**Cynthia K. Dohner,**

*Acting Regional Director, Southeast Region.*

[FR Doc. E6–4985 Filed 4–5–06; 8:45 am]

**BILLING CODE 4310–55–P**

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## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

### Availability of an Environmental Assessment and Umbrella Incidental Take Permit Coverage for Small Lot Developments Throughout 34 Florida Counties

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice.

**SUMMARY:** The U.S. Fish and Wildlife Service has prepared, and proposes to make available for use by the public for a term of seven years, a combined Habitat Conservation Plan and Environmental Assessment (HCP/EA) that addresses incidental take of the threatened Florida scrub-jay (*Aphelocoma coerulescens*) (scrub-jay) that would result from residential, commercial, industrial, and similar development activities on properties one acre or smaller in size located in urban areas. The Service anticipates that the HCP/EA will act as an ''umbrella'' document for qualifying landowners who might need an incidental take permit (ITP) pursuant to section 10(a)(1)(B) of the Endangered Species Act (Act) on an estimated total of 14,928 acres of scrub-jay foraging, sheltering, and nesting habitat throughout 34 counties. The HCP portion of this document identifies minimization and mitigation measures that will be required of individual landowners wishing to participate under the umbrella HCP/EA. A more detailed description of the mitigation and minimization measures required pursuant to section 10 of the Act is provided in the HCP/EA and in the **SUPPLEMENTARY INFORMATION** section below.

**DATES:** Written comments on the HCP/EA should be sent to the Service's Regional Office (see **ADDRESSES**) and received on or before June 5, 2006.

**ADDRESSES:** Persons wishing to review the HCP/EA may obtain a copy by writing the Service's Southeast Regional Office, Atlanta, Georgia. Requests must

be in writing to be processed. Please reference permit number TE109021–0 in such requests. The document will also be available for public inspection by appointment during normal business hours at the Regional Office, 1875 Century Boulevard, Suite 200, Atlanta, Georgia 30345 (Attn: Endangered Species Permits); Field Supervisor, U.S. Fish and Wildlife Service, 6620 Southpoint Drive South, Suite 310, Jacksonville, Florida 32216; or Field Supervisor, U.S. Fish and Wildlife Service, 1339 20th Street, Vero Beach, Florida, 32960.

**FOR FURTHER INFORMATION CONTACT:** Mr. David Dell, Regional HCP Coordinator, (see **ADDRESSES** above), telephone: 404/679–7313, facsimile: 404/679–7081; Mr. Michael Jennings, Fish and Wildlife Biologist, Jacksonville Field Office, Jacksonville, Florida (see **ADDRESSES** above), telephone: 904/232–2580, ext. 113.; or Ms. Trish Adams, Fish and Wildlife Biologist, South Florida Ecological Services Office, Vero Beach, Florida (see **ADDRESSES** above).

**SUPPLEMENTARY INFORMATION:** If you wish to comment, you may submit written comments by any one of several methods. Please reference permit number TE109021–0 in such comments. You may mail comments to the Service's Regional Office (see **ADDRESSES**). You may also request documents or comment via the Internet to ''*david_dell@fws.gov*''. Please include your name and return address in your Internet message. If you do not receive a confirmation from us that we have received your Internet message, contact us directly at either telephone number listed below (see **FOR FURTHER INFORMATION CONTACT**). Finally, you may hand deliver comments to any Service office listed above (see **ADDRESSES**).

Our practice is to make comments, including names and home addresses of respondents, available for public review during regular business hours. Individual respondents may request that we withhold their home address from the administrative record. We will honor such requests to the extent allowable by law. There may also be other circumstances in which we would withhold from the administrative record a respondent's identity, as allowable by law. If you wish us to withhold your name and address, you must state this prominently at the beginning of your comments. We will not, however, 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.

The Florida scrub-jay (scrub-jay) is geographically isolated from other species of scrub-jays found in Mexico and the western United States. The scrub-jay is found exclusively in peninsular Florida and is restricted to xeric uplands (predominately in oak-dominated scrub). Increasing urban and agricultural development, and subsequent fire suppression, has resulted in habitat degradation, loss and fragmentation which have adversely affected the distribution and numbers of scrub-jays. The total estimated population is between 7,000 and 11,000 individuals (U.S. Fish and Wildlife Service 1990. Recovery plan for the Florida scrub-jay, U.S. Fish and Wildlife Service, Atlanta, Georgia).

Since the listing of the scrub-jay in 1987 (52 FR 42661), owners of property in urban areas that are occupied by scrub-jays have been challenged with the difficulty of complying with section 9 of the Endangered Species of 1973, as amended (Act), which prohibits the take of scrub-jays. The majority of land owners with property in urban areas that is occupied by scrub-jays have been faced with the choice of complying with the Act by not clearing or constructing in occupied scrub-jay habitat, complying with the Act by obtaining a section 10(a)(1)(B) incidental take permit (ITP) prior to land clearing, or potentially violating the take prohibitions under section 9 of the Act by clearing lots without coverage from an ITP. Each of these alternatives has limitations; land owners may incur costs associated with ongoing property tax burdens and local government assessments for infrastructure improvements while not developing property they own, or they may incur costs and time constraints associated with obtaining an ITP. Lot owners who choose not to pursue an ITP for land clearing, may be faced with violating section 9 of the Act, which can result in fines and/or imprisonment.

The cost and complexity of complying with the Act is thought to have precluded many individual lot owners from seeking ITPs for otherwise lawful activities, such as land clearing and construction. Additionally, most local governments have not embraced large-scale scrub-jay conservation planning efforts and have not encouraged their residents to comply with the Act because of perceived legal and fiscal constraints the Act may impose on them. The failure of individual lot owners to seek regulatory relief from the prohibitions of take has also resulted in the continued degradation of scrub-jay habitat because their properties remain unmanaged and impacts are not mitigated.

Indian River County and the City of Sebastian successfully completed an ITP application and received authorization, TE026007–0, to take scrub-jays resulting from residential and commercial development. This planning effort resulted in the only area-wide HCP that is currently available to land owners whose property is occupied by scrub-jays. However, the plan area for this HCP and area covered by the incidental take authorization is restricted to the city limits of the City of Sebastian and, therefore, offers no regulatory or financial relief to landowners in other areas of the state.

Recognizing the limitations that the above-mentioned alternatives place on owners of property in urban areas, the Service considered methods to streamline the section 10(a)(1)(B) permitting process, while still providing conservation benefits to the Florida scrub-jay. This umbrella HCP/EA is the culmination of our review of streamlining options. Although the focus of this HCP/EA is on modifications to existing permitting processes, the premise for these modifications is based on available biological information indicating that Florida scrub-jays in some urban areas will not persist long-term and are unlikely to substantially contribute to the recovery of the species.

The umbrella HCP/EA is intended to result in conservation benefits to the scrub-jay through minimization and mitigation of impacts. To minimize take of the scrub-jay, land clearing activities would not take place during the scrub-jay nesting season (March 1 through June 30). To mitigate for the loss of up to 14,928 acres of scrub-jay habitat, participating landowners would have the option of providing funding to acquire and perpetually manage two acres of habitat for every one acre of habitat that will be impacted, or of acquiring scrub-jay habitat in a Service-approved conservation bank. Funds provided by participating landowners would be used to purchase or otherwise encumber scrub-jay habitat, manage and restore scrub-jay habitat, monitor scrub-jays or their habitat, or conduct applied research for the benefit of scrub-jays. Landowners would provide funding to a dedicated account managed by The Nature Conservancy (TNC). The TNC would subsequently use these mitigation funds to purchase scrub-jay habitat based on priority areas identified by the Service, fund habitat management or restoration projects.

At this time, no scrub-jay conservation banks have been approved by the Service. We include conservation banks as a mitigation option in the umbrella HCP/EA in order to maintain incentives for private interests that may want to develop a scrub-jay conservation bank in the future. Conservation banks have been established for a few other listed species throughout the Southeast, as well as in other regions of the country. A conservation bank typically comprises a tract of land managed to restore, enhance, and protect a listed species' habitat with the purpose of making units of habitat value available for sale to third-party project applicants who need to compensate for impacts to listed species that would result from their projects. Ideally, a conservation bank would make listed species mitigation practicable for project proponents who otherwise would find it difficult to develop their own mitigation plan.

The Service has made a preliminary determination that issuance of incidental take permits in accordance with the proposed HCP/EA is not a major Federal action significantly affecting the quality of the human environment within the meaning of section 102(2)(C) of the National Environmental Policy Act (NEPA). This preliminary determination is based on information contained in the HCP/EA and may be revised, however, due to public comment received in response to this notice.

The Service will also evaluate whether issuance of section 10(a)(1)(B) ITPs in accordance with the proposed HCP/EA complies with section 7 of the Act (16 U.S.C. 1531 *et seq.*) by conducting an intra-Service section 7 consultation. The results of the biological opinion, in combination with the above findings, will be used in our final analysis to determine whether or not to make the HCP/EA available for use by qualifying landowners and to issue ITPs. This notice is provided pursuant to section 10 of the Endangered Species Act and NEPA regulations (40 CFR 1506.6).

Dated: March 21, 2006.

**Cynthia K. Dohner,**

*Acting Regional Director.*

[FR Doc. E6–5036 Filed 4–5–06; 8:45 am]

**BILLING CODE 4310–55–P**

## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

### Draft Safe Harbor Agreement With Assurances and Application for an Enhancement of Survival Permit for the Houston Toad in Bastrop County, TX

**AGENCY:** U.S. Fish and Wildlife Service, Interior.

**ACTION:** Notice of availability; receipt of application.

**SUMMARY:** Small Family Investments, Ltd. (Applicant) has applied to the U.S. Fish and Wildlife Service (Service) for an enhancement of survival permit pursuant to section 10(a)(1)(A) of the Endangered Species Act (Act) of 1973, as amended (16 U.S.C. 1531 et seq.). The requested permit, which is for a period of 12 years, includes a draft Safe Harbor Agreement (SHA) for the endangered Houston toad (*Bufo houstonensis*) in Bastrop County, Texas. We invite the public to review and comment on the permit application and the associated SHA.

**DATES:** To ensure consideration, written comments must be received on or before May 8, 2006.

**ADDRESSES:** Persons wishing to review the application may obtain a copy by writing to the Regional Director, P.O. Box 1306, Room 4102, Albuquerque, New Mexico, 87103. Persons wishing to review the draft SHA or other related documents may obtain a copy by written or telephone request to Paige Najvar, U.S. Fish and Wildlife Service, 10711 Burnet Road, Suite 200, Austin, Texas 78758 (512–490–0057; Fax 512–490–0974). The documents will also be available for public inspection, by appointment only, during normal business hours (8 a.m. to 4:30 p.m.) at the Service's Austin office. The Draft Agreement may also be obtained from the Internet at *http://www.fws.gov/ifw2es/Documents/R2ES/Small_SHA_for_notice.pdf.* Comments concerning the draft SHA or other related documents should be submitted in writing to the Field Supervisor at the U.S. Fish and Wildlife Service, 10711 Burnet Road, Suite 200, Austin, Texas 78758. Please refer to permit number TE–120475–0 when submitting comments. All comments received will become a part of the official administrative record and may be made available to the public.

**FOR FURTHER INFORMATION CONTACT:** Paige Najvar at the U.S. Fish and Wildlife Service, 10711 Burnet Road, Suite 200, Austin, Texas 78758 (512–490–0057; Fax 512–490–0974), or *Paige_Najvar@fws.gov.*

**SUPPLEMENTARY INFORMATION:** The Applicant has applied to the Service for a section 10(a)(1)(A) enhancement of survival permit for the endangered Houston toad in Bastrop County, Texas for a period of 12 years.

The Applicant intends to work collaboratively with Environmental Defense and the Service to implement conservation measures that are expected to provide a net conservation benefit to the Houston toad and will improve the quality of Houston toad habitat on the 836-acre property in Bastrop County, Texas. The Applicant has agreed to undertake conservation measures such as prescribed burning and brush thinning activities in order to control invasive woody understory species and decrease existing fuel load. These conservation measures are expected to facilitate the establishment of native, herbaceous vegetation while expanding and enhancing potential breeding, foraging, and hibernating habitats for the Houston toad currently occupying the property and the adjacent Bastrop State Park.

Incidental take of toads may occur on the property due to habitat management actions conducted in accordance with the conservation measures in the SHA, on-going ranch activities, and the possible cessation of management activities by the Applicant.

We provide this notice pursuant to section 10(c) of the Act, the National Environmental Policy Act (42 U.S.C 4371 et seq.), and its implementing regulations (40 CFR 1506.6).

**Geoffrey L. Haskett,**

*Acting Regional Director, Region 2, Albuquerque, New Mexico.*

[FR Doc. E6–4993 Filed 4–5–06; 8:45 am]

**BILLING CODE 4310–55–P**

## DEPARTMENT OF THE INTERIOR

### Bureau of Indian Affairs

### Proposed Finding for Federal Acknowledgment of the Mashpee Wampanoag Indian Tribal Council, Incorporated of Massachusetts

**AGENCY:** Bureau of Indian Affairs, Interior.

**ACTION:** Notice of Proposed Finding.

**SUMMARY:** Pursuant to 25 CFR 83.10(h), notice is hereby given that the Associate Deputy Secretary (ADS) proposes to determine that the Mashpee Wampanoag Indian Tribal Council, Inc., P.O. Box 1048, Mashpee, Massachusetts 02649, c/o Mr. Glenn Marshall, is an

Indian tribe within the meaning of Federal law. This notice is based on a determination that the petitioner satisfies all seven mandatory criteria, and thus, meets the requirements for a government-to-government relationship with the United States.

**DATES:** Comments are due on or before October 3, 2006. Publication of this notice of the proposed finding in the **Federal Register** initiates a 180-day comment period during which the petitioner, interested and informed parties, and the public may submit arguments and evidence to support or rebut the evidence relied upon in the proposed finding. Interested or informed parties must provide a copy of their comments to the petitioner.

**ADDRESSES:** Comments on the proposed finding or requests for a copy of the summary evaluation of the evidence should be addressed to the Office of the Assistant Secretary—Indian Affairs, Attention: Office of Federal Acknowledgment, 1951 Constitution Avenue, NW., Mail Stop 34B–SIB, Washington, DC 20240.

**FOR FURTHER INFORMATION CONTACT:** R. Lee Fleming, Director, Office of Federal Acknowledgment, (202) 513–7650.

**SUPPLEMENTARY INFORMATION:** This notice is published in the exercise of authority delegated by the Secretary of the Interior to the ADS by Secretarial Order 3259, of February 8, 2005, as amended on August 11, 2005.

The acknowledgment process is based on the regulations at 25 CFR Part 83. Under these regulations, the petitioner has the burden to present evidence that it meets the seven mandatory criteria in section 83.7.

The Mashpee petition is being considered under time-frame set by a July 22, 2005, Joint Settlement Agreement and Stipulated Dismissal (Agreement) entered into by the petitioner and the Department in the United States District Court for the District of Columbia.

The Mashpee Wampanoag Indian Tribal Council, Inc. of Massachusetts (MWT, petitioner #15) submitted a letter of intent to petition for Federal acknowledgment on July 7, 1975. As per the Agreement, the ADS placed the petitioner on active consideration on October 1, 2005.

The Mashpee petitioner is located in the town of Mashpee, Barnstable County, Massachusetts, on the southeastern portion of Cape Cod along Nantucket Sound.

Criterion 83.7(a) requires that the petitioner be identified as an American Indian entity on a substantially continuous basis since 1900. The available evidence demonstrates that since 1900 external observers identified the petitioning group now known as the Mashpee Wampanoag Indian Tribal Council, Incorporated, or a group of the petitioner's ancestors as an American Indian entity on a substantially continuous basis since 1900.

Criterion 83.7(b) requires that a predominant portion of the petitioning group comprises a distinct community and has existed as a community from historical times until the present. The Mashpee petitioner is located in an area that was traditionally Wampanoag. Based on the evaluation of its 1,462 members, the petitioner represents a group of lineal descendants of the Wampanoag Indians who have inhabited this area since first sustained contact with non-Indians in the early colonial period. From 1665 to 1720, the Mashpee inhabited a praying town that provided considerable political autonomy. In 1720, the colony established a proprietary system for the Mashpee, a system of government that also afforded them significant political authority. In 1746, the colonial legislature limited this self-rule by assigning three guardians to the Mashpee proprietors. For the next 16 years, the Mashpee frequently petitioned the legislature with complaints about the overseers, and were able to govern their affairs despite the presence of the overseers. In 1763, the colony, in response to the Mashpee complaints made the settlement a self-governing ''Indian'' district. This political structure remained until after the American Revolution.

The evidence shows that almost all of the Mashpee maintained a distinct community during the colonial and revolutionary eras. Colonial officials regularly described the Mashpee as being a distinct Indian entity. Other available evidence of shared religious activities by the Mashpee also demonstrates the existence of a social community distinct from that of surrounding populations. There is also good evidence from the colonial and revolutionary periods to demonstrate that much more than 50 percent, in fact almost all, of the Mashpee resided in a defined geographical area, the town of Mashpee, exclusively, or almost exclusively, composed of its members. This residential patterns provides evidence which, under 83.7(b)(2)(i), is sufficient by itself to demonstrate community during the colonial and revolutionary eras.

From 1788 to 1834, when State overseers were again assigned to the group, the Mashpee remained set apart from surrounding populations. A large portion, as many as two-thirds, of the members demonstrated shared religious practices through the Mashpee Baptist church from 1788 to 1834, which is also good evidence of community. State officials in reports consistently described the distinct Indian character of the Mashpee at this time, thereby providing good evidence of community from 1788 to 1834. This evidence is sufficient under criterion 83.7(b)(i). The available evidence further shows that virtually all the Mashpee from 1802 to 1834 lived in a defined geographical area composed almost exclusively of its members. Evidence shows that the Mashpee who lived outside the town usually did so only on a temporary basis, thereby retaining contact with the majority. This evidence is sufficient in itself to show community during this period under criterion 83.7(b)(2) for the period from 1802 to 1834. The petitioner also provided significant evidence under 83.7(c) of political influence or authority for this period that demonstrates interaction and social ties and thus provides additional evidence of community.

During the period, 1834 to 1870, when the State of Massachusetts designated the town of Mashpee an Indian district, the State generated records, particularly the 1849 Briggs Report and the 1861 Earle Report, which showed the Mashpee settlement was a distinct Indian community with significant social relationships and interactions. Through the district government, the Mashpee controlled most of the social and economic behavior of the Indian community. The Baptist church also maintained its position as an important social institution for a large portion of the Mashpee. The available evidence also shows that a large majority of the Mashpee during this time, as high as 82 percent in the late 1860's, lived in a defined geographical area composed almost exclusively of its members. There is also evidence that those few who lived outside of the town either lived very close by or were doing so only temporarily and were likely to return, thereby maintaining social ties to the majority in the town. This evidence is sufficient in itself to show community during these years under criterion 83.7(b)(2)(i).

Moreover, the petitioner provided sufficient evidence to demonstrate the exercise of political authority from 1834 to 1870, using evidence described in 83.7(c)(2). This evidence shows Mashpee leaders using the district government to allocate group resources on common lands and fisheries and to exert influence on the behavior of the

Mashpee, including through law enforcement by the district constables. Under 83.7(b)(2)(v), this political evidence is also sufficient evidence of community during this period.

In 1870, the Mashpee Indian District became an incorporated town, which the Mashpee controlled politically for the next 100 years. From 1870 to 1930, the town records showed that almost all the political offices were held by the Mashpee and contemporary records described a distinct Mashpee Indian community in and around the town of Mashpee. Early in this period, evidence of conflict among the Mashpee over the sale of collective land demonstrated both social interactions among the Mashpee and their distinct character from that of other populations in the area. The Baptist church and Parish Committee remained important social institutions for a majority of the Mashpee from 1870 to 1930. The available evidence further shows a large majority of the Mashpee during this time, as many as 87 percent by the early 1930's, lived in a defined geographical area composed almost exclusively of its members. There is also evidence during this period that those few Mashpee who lived outside of the town, often in adjacent towns or other areas on the Cape, maintained contact with those in the town through a high rate of return migration. This evidence is sufficient in itself to show community during these years, under criterion 83.7(b)(2)(i). There is also good evidence for this period of significantly high patterns of intra-group marriages, as described in 83.7(b)(1), from 1860 to 1930. These high rates of intra-group marriage resulted in extensive kinship ties among the Mashpee that have fostered social interaction and relationships within the Mashpee to this day.

During the remainder of the town period, 1930 to 1974, contemporary records described the Mashpee in a way that demonstrated the group constituted a distinct entity with significant social relationships and interactions among a predominant portion of the membership. It was a community bounded by a common ancestry, politics, geography, culture, and extensive kinship ties. The available evidence shows that the Parish Committee and Baptist church functioned as important social organizations for a significant portion of the group into the early 1970's, although the significance of the latter declined after the 1960's. There is also good evidence of socials and other activities that involved Mashpee from many family lines and multiple generations throughout the period. Significant kinship ties provided by still high intra-group marriage rates also facilitated social relationships and interactions within the group during this time. In addition, the petition record contains evidence of concentrated residential patterns that show a significant part of the group still lived in an exclusive settlement in the town of Mashpee from 1930 to 1974. These residency patterns are good evidence of community.

Moreover, the petitioner provided sufficient evidence to demonstrate the exercise of political influence or authority from 1870 to 1965, using evidence described in 83.7(c)(2). This evidence shows Mashpee selectmen and public officials using the town government to regulate fisheries, including the catching of herring, shellfish, and trout obtained from streams and waterways and exerting influence on the behavior of the Mashpee on a consistent basis through their control of the police department. The Mashpee provided this leadership for a town in which they continued to make up the large majority of the year-round population up to 1965. Under 83.7(b)(2)(v), this political evidence is also sufficient evidence of community during that period.

In 1974, the Mashpee lost control of the town government to non-Indians. For the period since 1974, when the group has been governed by an incorporated council, the petitioner presented good evidence of social interactions and relationships connected to the Mashpee's land claim suit (1976–1983) that mobilized the support of a significant portion of the group. The petition record also contains evidence of social distinction by non-members towards the Mashpee because of the land-claim suit and other controversial events that show distinct community.

For this period, the majority of group members have continued to reside in or near their historical territory of the town of Mashpee. In addition to geographic proximity around an area of exclusive settlement within the town of Mashpee, social relationships and informal social interactions within the community are facilitated by kinship patterns that include substantial rates of intra-group marriage among Mashpee members and a persistent and extensive network of extended family connections. Different family lines are well represented in various Mashpee events and activities, some of which are sponsored by the incorporated council. Group involvement is additionally expressed through a historically recognized political division within its membership of ''traditionals'' and ''non-traditionals.'' The petitioner also provided significant evidence under 83.7(c) of political influence or authority since the middle 1970's that demonstrates interaction and social ties and thus provides additional evidence of community.

The petitioner presented sufficient evidence to demonstrate that it has comprised a distinct community since first sustained contact with non-Indians. Therefore, the petitioner meets the requirements of criterion 83.7(b).

Criterion 83.7(c) requires that the petitioner has maintained political influence or authority over its members as an autonomous entity from historical times until the present. Wampanoag leadership at the time of first sustained contact in the 1620's was provided by a hereditary chief or sachem. The area around what is now the town of Mashpee, Massachusetts, had a number of these sachems controlling several villages joined in a loose confederacy. For the period between 1665 and 1746, after the formation of the praying town, there is evidence that the Mashpee exerted political authority over its members, first through a six-member council and then later through a proprietorship. Native religious leaders also exercised important political influence during this period. After the Massachusetts colony appointed guardians in 1746, the Mashpee proprietors regularly petitioned the colonial authorities of Massachusetts for the next 16 years, demanding a change in government. In 1763, shortly after sending one of their members to petition the King of England and his ministers with a list of their grievances, they persuaded the colonial legislature to give them full self-rule once again, a form of government that lasted until 1788. Therefore, the petitioner provided sufficient evidence to demonstrate that it meets 83.7(c) for the colonial and revolutionary periods. In addition, the group supplied evidence of community through the Mashpee's residential patterns during the colonial and revolutionary periods to meet the requirements of paragraph 83.7(b)(2)(i), which is also sufficient to demonstrate political influence, under 83.7(c)(3) during that period.

Following the American Revolution a number of Mashpee women provided notable leadership in defending standards of behavior and opposing outside control of land and resources in the town of Mashpee. Between 1788 and 1834, when Massachusetts again appointed overseers to supervise the group, the Mashpee frequently petitioned State authorities complaining about the activities of these overseers. State records acknowledged that despite

the presence of overseers between 1788 and 1834, the Mashpee remained essentially autonomous and self-governing. Indeed, one State investigation report from 1827 stated that the Mashpee had been running their ''municipal affairs'' for the past hundred years. In 1834, the State, in response to their entreaties, gave the Mashpee greater self-government by establishing an ''Indian District'' in Mashpee, Massachusetts. Therefore, the petitioner provided good evidence to demonstrate that it meets 83.7(c) for 1788 to 1834. In addition, the group supplied evidence of community through the Mashpee's residential patterns during the overseer period to meet the requirements of paragraph 83.7(b)(2)(i) that is also sufficient to demonstrate political influence, under 83.7(c)(3), during that period.

As an Indian District, between 1834 and 1870, the Mashpee gained complete control of political, legal, and economic affairs in the town once again. District status gave the Mashpee control over government, local justice, schools, roads, parish, and welfare. The Mashpee allocated group resources by regulating common lands and waterways. This regulation included laws regarding grazing of livestock, cutting of timber, and the catching of herring, trout, eels, and shellfish. They also controlled group behavior through law enforcement by the local constables. The consistent allocation of group resources and control of individual behavior are sufficient evidence in themselves, under 83.7(c)(2)(i) and (iii), of political influence, and therefore, under 83.7(b)(2)(v), are also sufficient to demonstrate community during this time as well. In addition, the group supplied evidence of community through the Mashpee's residential patterns during the district period to meet the requirements of paragraph 83.7(b)(2)(i) that is also sufficient to demonstrate political influence, under 83.7(c)(3), during that period.

In 1870, the State of Massachusetts incorporated the Indian district of Mashpee as a town. The evidence shows that from 1870 to 1974, the Mashpee adapted the principal elements of the town governmental system for their own political needs. The Mashpee employed the town government as the primary structure by which they maintained political influence and/or authority over members. The Department's Final Determination for Federal Acknowledgment of the Wampanoag Tribal Council of Gay Head, Inc. provides precedent for evaluating such a governmental form as meeting 83.7(c). This type of government also provided the Mashpee with the means to continue the allocation of group resources through the regulation of fisheries and the ability to control individual behavior of members through the local police department from 1870 to 1965, when they represented much more than a majority of the year-round population in the town. The consistent allocation of group resources and control of individual behavior are sufficient evidence in themselves, under 83.7(c)(2)(i) and (iii), of political influence for those years and, therefore, under 83.7(b)(2)(v), is also sufficient to demonstrate community during this time as well. In addition, the group supplied evidence of community through the Mashpee's residential patterns from 1870 to 1930 to meet the requirements of paragraph 83.7(b)(2)(i) that is also sufficient to demonstrate political influence during that period under 83.7(c)(3).

Since 1974, the petitioner maintained political influence and authority over its members in the following ways. First, the incorporated council, formed in 1974, mobilized significant numbers of members and resources to meet group purposes through ongoing programs, events, and associations. Extended family networks play an important role in facilitating communication and political involvement among members. Second, while there are notable political divisions within the group, most members consider the actions taken by the incorporated council's leaders to be important. Within the incorporated council, leadership is multifaceted including both traditional and business positions. During this period, informal leadership within the group also existed along with the authority of the incorporated council. Third, there is widespread knowledge and communication regarding political processes, which disseminates mostly through family networks. And fourth, there are intense intra-group conflicts that demonstrate controversy over valued group goals, policies, and decisions. Since the late 1990's, internal disputes have intensified because the incorporated council changed its administrative processes and style of leadership, which culminated with the adoption of a new constitution in 2004. The petitioner meets the requirements of 83.7(c) from historical times to the present.

Criterion 83.7(d) requires that the petitioner provide a copy of the group's present governing document including its membership criteria. The petitioner submitted a certified copy of its constitution, and bylaws, which were adopted on June 26, 2004. The constitutional requirements for membership include tracing descent from a Mashpee Indian on the 1861 Earle Report, or from Charles or Leander Peters, who were Christiantown Indians identified on the Earle Report, and maintaining ''affiliation with the tribe.'' The constitution also describes the duties of the governing body, which is composed of elected officers and council members, and a ''chief'' and ''medicine man'' who are ''selected by the general Tribal membership according to Tribal custom.'' The 2004 constitution also describes the composition and duties of a newly instituted ''Tribal Judiciary'' branch. The petitioner also sent copies of its previous governing documents and a description of the enrollment practices in place before the adoption of the 2004 constitution.

The petitioner submitted a copy of its current governing document, which includes its membership criteria and the processes by which it governs itself. Therefore, the petitioner meets criterion 83.7(d).

Criterion 83.7(e) requires that the petitioner's membership consist of individuals who descend from a historical Indian tribe or from historical Indian tribes which combined and functioned as a single autonomous political entity. The historical tribe is determined to be Wampanoag Indians or ''South Sea Indians'' generally residing in and around the area of the Indian villages of Massipee (later Mashpee), Santuit, and Cotuit, Barnstable County, Massachusetts, at the time of first sustained historical contact in the 1620's. The membership of the historical tribe, for purposes of calculating descent from that tribe, consists of the ''Marshpee'' Indians identified in the 1861 Earle Report on the Indians in Massachusetts. The analysis for this proposed finding shows that the Mashpee Indians identified by Earle were the same individuals, or descendants of individuals, who had been identified previously in 1833, 1842, and 1849 as members of the Mashpee tribe living in the Mashpee Indian District. Thus, the evidence supports Earle's identification of the Mashpee Indian entity as it continued to exist in 1861. The petitioner's documented ancestors were among the 391 ''Marshpee Indians'' who were named in the 1861 Earle Report as members of the tribe and residents of the ''Marshpee Indian District.''

The petitioner claims that about 98 percent of the members (1,427 of 1,462) descend from Mashpee Indians identified on the 1861 Earle Report and that about 2 percent of the group

descend from two Christiantown Indians, Charles H. and Leander Peters, who according to the petitioner's governing document, are eligible ancestors.

The petitioner submitted evidence which shows that about 90 percent of the current members (1,323 of 1,462) have documented their claimed ancestry and meet the group's own membership requirements in its 2004 governing document: 88 percent from the historical Mashpee tribe as defined by the 1861 Earle Report, and 2 percent solely from two Christiantown Indians. Based on precedents in previous findings, this 88 percent is sufficient to meet the requirements of 83.7(e)(1) for descent from the historical tribe. However, the petitioner is urged to submit the necessary evidence to document the ancestry for the remaining 139 individuals (10 percent of 1,462).

The petitioner submitted a membership list dated November 15, 2002, with the full names, birth dates, and addresses of 1,462 members, which was separately certified by the current governing body on February 23, 2006.

The MWT submitted a separately certified membership list, and documented that 88 percent of its members descend from the historical Mashpee tribe. Based on precedents, the MWT meets the requirements of criterion 83.7(e).

Criterion 83.7(f) requires that the membership of the petitioning group be composed principally of persons who are not members of any acknowledged North American Indian tribe. A review of the available documentation revealed that the membership is composed principally of persons who are not members of any acknowledged North American Indian tribe. The petitioner meets criterion 83.7(f).

Criterion 83.7(g) requires that neither the petitioner nor its members be the subject of congressional legislation that has expressly terminated or forbidden the Federal relationship. A review of the available documentation showed no evidence that the petitioning group was the subject of congressional legislation to terminate or prohibit a Federal relationship as an Indian tribe. The petitioner meets the requirements of criterion 83.7(g).

Based on this preliminary finding, the Department proposes to acknowledge as an Indian Tribe under 25 CFR Part 83 the petitioner known as the Mashpee Wampanoag Indian Tribal Council, Incorporated.

As provided by 25 CFR 83.1(h), a report summarizing the evidence, reasoning, and analyses that are the basis for the proposed decision will be provided to the petitioner and interested parties, and is available to other parties upon written request.

Publishing notice of the proposed finding in the **Federal Register** initiates a 180-day comment period during which the petitioner, interested and informed parties, and the public may submit arguments and evidence to support or rebut the evidence used in the proposed finding. Interested or informed parties must provide copies of their submissions to the petitioner. The regulations, 25 CFR 83.10(k), provide the petitioner a minimum of 60 days to respond to any submissions by interested and informed parties on the proposed finding during the comment period. The Agreement modifies this time-frame, providing the MWT a 30-day response period. If the MWT wants the 60-day response period, it must notify the Department in writing prior to the expiration of the 30-day response period. If the interested or informed parties do not provide submissions during the 180-day comment period, the MWT may submit a written waiver of its response period to the Department.

As provided in the Agreement, the Department will issue a final determination on the MWT petition on or before March 30, 2007. If the Mashpee petitioner does not request the full 60-day response period, the Department will work to issue the final determination before March 30, 2007. The Department, as per the Agreement, will exercise due diligence to publish notice of the proposed finding in the **Federal Register** within 5 business days of being issued.

After the publication of notice of the final determination, the petitioner or any interested party may file a request for reconsideration with the Interior Board of Indian Appeals (IBIA) under the procedures set forth in section 83.11 of the regulations. This request must be received by the IBIA no later than 90 days after the publication of the final determination in the **Federal Register**. The final determination will become effective as provided in the regulations 90 days from the **Federal Register** publication unless a request for reconsideration is filed within that time period.

Dated: March 31, 2006.

**James E. Cason,**

*Associate Deputy Secretary.*

[FR Doc. E6–5017 Filed 4–5–06; 8:45 am]

BILLING CODE 4310–G1–P

## DEPARTMENT OF THE INTERIOR

### Bureau of Indian Affairs

### Confederated Tribes of the Umatilla Reservation Liquor Code

**AGENCY:** Bureau of Indian Affairs, Interior.

**ACTION:** Notice.

**SUMMARY:** This notice publishes the Confederated Tribes of the Umatilla Indian Reservation Tribal Liquor Code (Code). The Code regulates and controls the possession, sale and consumption of liquor within the Confederated Tribes of the Umatilla Indian Reservation. The Reservation is located on trust land and this Code allows for the possession and sale of alcoholic beverages within the exterior boundaries of the Confederated Tribes of the Umatilla Indian Reservation. This Code will increase the ability of the tribal government to control the community's liquor distribution and possession, and at the same time will provide an important source of revenue for the continued operation and strengthening of the tribal government and the delivery of tribal services.

**DATES:** *Effective Date:* This Code is effective on April 6, 2006.

**FOR FURTHER INFORMATION CONTACT:** Betty Scissons, Division of Tribal Government Services, Bureau of Indian Affairs, Northwest Regional Office, 911 NE 11th Avenue, Portland, OR 97232–4169, Telephone (503) 231–6723, Fax 503–231–2201; or Ralph Gonzales, Office of Tribal Services, 1951 Constitution Avenue, NW., Mail Stop 320–SIB, Washington, DC 20240, Telephone (202) 513–7629.

**SUPPLEMENTARY INFORMATION:** Pursuant to the Act of August 15, 1953, Public Law 83–277, 67 Stat. 586, 18 U.S.C. 1161, as interpreted by the Supreme Court in *Rice* v. *Rehner*, 463 U.S. 713 (1983), the Secretary of the Interior shall certify and publish in the **Federal Register** notice of adopted liquor codes for the purpose of regulating liquor transactions in Indian country. The Confederated Tribes of the Umatilla Indian Reservation Board of Trustees adopted its Liquor Code by Resolution No. 05–127 on December 19, 2005. The purpose of this Code is to govern the sale, possession and distribution of alcohol within the Confederated Tribes of the Umatilla Indian Reservation. This notice is published in accordance with the authority delegated by the Secretary of the Interior to the Principal Deputy Assistant Secretary—Indian Affairs. I certify that this Liquor Code of the Confederated Tribes of Coos was duly

adopted by the Board of Trustees on December 19, 2005.

Dated: March 31, 2006.

**Michael D. Olsen,**

*Acting Principal Deputy Assistant Secretary—Indian Affairs.*

The Confederated Tribes of the Umatilla Indian Reservation Tribal Liquor Code reads as follows:

**Liquor Code Confederated Tribes of the Umatilla Indian Reservation**

*Liquor Code*

**Chapter 1. Liquor Code**

*Section 1.01. Title*

This Code shall be the Liquor Code of the Confederated Tribes of the Umatilla Indian Reservation (Confederated Tribes) and shall be referenced as the Liquor Code.

*Section 1.02. Findings and Purpose*

A. The introduction, possession, and sale of liquor on Indian reservations have historically been recognized as a matter of special concern to Indian tribes and to the United States. The control of liquor on the Umatilla Indian Reservation remains exclusively subject to the legislative enactments of the Confederated Tribes in its exercise of its governmental powers over the Reservation, and the United States.

B. Federal law currently prohibits the introduction of liquor into Indian Country (18 U.S.C. 1154), leaving tribes the decision regarding when and to what extent liquor transactions, sales, possession and service shall be permitted on their reservation (18 U.S.C. 1161).

C. The Board of Trustees, as the governing body of the Confederated Tribes pursuant to Article VI, § 1 of the Constitution and Bylaws of the Confederated Tribes, discussed and approved a Resolution to permit the sale and service of liquor at the Wildhorse Resort & Casino, but at no other location, at the Board of Trustee meeting held on October 3, 2005.

D. Pursuant to the authority in Article VI, § 1(a) of the Confederated Tribes' Constitution, the Board of Trustees has the authority ''to represent the [Confederated] Tribes and to negotiate with the Federal, State and local governments * * * on * * * projects and legislation that affect the [Confederated] Tribes''.

E. Pursuant to the authority in Article VI, § 1(d) of the Confederated Tribes' Constitution, the Board of Trustees has the authority ''to promulgate and enforce ordinances governing the conduct of all persons and activities within the boundaries of the Umatilla Indian Reservation, providing for the procedure of the Board of Trustees, and carrying out any powers herein conferred upon the Board of Trustees''.

F. The enactment of this Liquor Code to govern liquor sales and service on the Umatilla Indian Reservation, and the limitation of such liquor sales and service at the Wildhorse Resort & Casino, will increase the ability of the Confederated Tribes to control Reservation liquor distribution and possession, and at the same time will provide an important source of revenue for the continued operation of tribal government and the delivery of governmental services, as well as provide an amenity to customers at the Wildhorse Resort & Casino.

G. The Confederated Tribes will enter into a Memorandum of Understanding (MOU) with the Oregon Liquor Control Commission to deal with governmental issues associated with the licensing and regulation of liquor sales on the Umatilla Indian Reservation.

*Section 1.03. Definitions*

A. Unless otherwise required by the context, the following words and phrases shall have the designated meanings.

1. *''Alcohol''.* That substance known as ethyl alcohol, hydrated oxide or ethyl, spirits or wine as defined herein, which is commonly produced by the fermentation or distillation of grain, starch, molasses, or sugar, or other substances including all dilutions and mixtures of those substances.

2. *''Wildhorse Chief Operating Officer''.* That person appointed by the Confederated Tribes to manage the Wildhorse Resort & Casino.

3. *''Liquor'' or ''Liquor Products''.* Includes the four varieties of liquor herein defined (alcohol, spirits, wine, and beer) and all fermented, spirituous, vinous, or malt liquor, or a combination thereof, and mixed liquor, a part of which is fermented, spirituous, vinous, or malt liquor or otherwise intoxicating in every liquid or solid or semi-solid or other substance patented or not containing alcohol, spirits, wine, or beer, and all drinks of potable liquids and all preparations or mixtures capable of human consumption, and any liquid, semi-solid, solid, or other substance, which contains more than one percent (1%) of alcohol by weight shall be conclusively deemed to be intoxicating.

4. *''Wildhorse Resort & Casino''.* Shall be the casino, hotel, golf course, and RV park located on the 640 acre Wildhorse site located on the Umatilla Indian Reservation which is more specifically described in Exhibit 1 to the Tribal-State Compact between the Confederated Tribes and the State of Oregon.

5. *''Sale'' and ''Sell''.* Includes exchange, barter, and traffic; and also the supplying or distribution by any means whatsoever, of liquor or any liquid known or described as beer or by any name whatever commonly used to describe malt or brewed liquor or wine, by any person to any other person; and also includes the supply and distribution to any other person.

6. *''Spirits''.* Any beverage which contains alcohol obtained by distillation, including wines exceeding seventeen percent (17%) of alcohol by weight.

7. *''Wine''.* Any alcoholic beverage obtained by fermentation of fruits, grapes, berries, or any other agricultural product containing sugar, to which any saccharin substances may have been added before, during or after fermentation, and containing not more than seventeen percent (17%) of alcohol by weight, including sweet wines fortified with wine spirits, such as port, sherry, muscatel, and anglican, not exceeding seventeen percent (17%) of alcohol by weight.

*Section 1.04. Jurisdiction*

To the extent permitted by applicable law, the Confederated Tribes asserts jurisdiction to determine whether liquor sales and service are permitted within the boundaries of the Umatilla Indian Reservation. As provided in section 1.06 of this Code, liquor sales and service is only permitted at the Wildhorse Resort & Casino facilities under this Code. Nothing in this Code is intended nor shall be construed to limit the jurisdiction of the Confederated Tribes to all lands within the boundaries of the Umatilla Indian Reservation.

*Section 1.05. Relation to Other Laws*

All prior codes, ordinances, resolutions and motions of the Confederated Tribes regulating, authorizing, prohibiting, or in any way dealing with the sale or service of liquor are hereby repealed and are of no further force or effect to the extent they are inconsistent or conflict with the provisions of this Code. Specifically, amendments to the Criminal Code to make it consistent with this Liquor Code have been approved by Resolution 05–095 (October 3, 2005). No Tribal business licensing law or other Tribal law shall be applied in a manner inconsistent with the provisions of this Code.

*Section 1.06. Authorized Sale and Service of Liquor*

A. Liquor may be offered for sale and may be served on the Umatilla Indian Reservation only at the following Wildhorse Resort & Casino facilities: Casino, hotel, golf course, and RV park. The sales and service of liquor at Wildhorse Resort & Casino facilities may only be permitted in the following areas.

1. *Casino.* Lounge(s), restaurant(s), bingo/multipurpose hall when used for entertainment, food service, or convention/meeting purposes, conference/meeting room facility, entertainment facilities constructed within or adjacent to the Casino building and on casino premises in connection with special events (i.e., concert, rodeo event, car shows, etc.). All such sales and service of liquor shall be consistent with the Tribal-State Compact.

2. *Golf course.* Clubhouse and on the golf course.

3. *Hotel.* Hotel meeting room and in hotel rooms by guest use of room service, etc.

4. *RV park.* In common area at special events and in individual RVs.

B. The Board of Trustees hereby authorizes the Wildhorse Chief Operating Officer to apply for and maintain the appropriate license(s) from the Oregon Liquor Control Commission (OLCC) for the sales and service of liquor at the Wildhorse Resort & Casino as provided in this Code. The Wildhorse Chief Operating Officer is further authorized to treat as a casino expense any license fees associated with the OLCC liquor license.

*Section 1.07. Prohibitions*

A. *General Prohibitions.* The commercial introduction of liquor for sales and service, other than by the Confederated Tribes through its Wildhorse Resort & Casino as permitted by this Code, is prohibited within the Umatilla Indian Reservation, and is hereby declared an offense under Tribal law.

Federal liquor laws applicable to Indian Country shall remain applicable to any person, act, or transaction which is not authorized by this Code and violators of this Code shall be subject to federal prosecution as well as to legal action in accordance with the law of the Confederated Tribes.

B. *Age Restrictions.* No person shall be authorized to serve liquor to casino patrons unless they are at least 21 years of age. No person may be served liquor unless they are 21 years of age.

C. *No Consumption of Liquor Outside of Wildhorse Resort & Casino Premises.* All liquor sales and service authorized by this Code shall be fully consumed within the areas of the Wildhorse Resort & Casino as set forth in § 1.06 of this Code. No open containers of liquor, or unopened containers of liquor in bottles, cans, or otherwise may be permitted outside of the above-described premises.

D. *No Credit Liquor Sales.* The sales and service of liquor authorized by this Code shall be upon a cash basis only. Payment for liquor shall be by cash, credit card, or check.

*Section 1.08. Conformity With State Law*

Authorized liquor sales and service on the Umatilla Indian Reservation shall comply with Oregon State liquor law standards to the extent required by 18 U.S.C. 1161. The Wildhorse Chief Operating Officer shall be responsible for ensuring that all OLCC license requirements are satisfied, that the license(s) is renewed on an annual basis, and that all reasonable and necessary actions are taken to sell and serve liquor to Wildhorse patrons in a manner consistent with this Code, applicable State law, and the Tribal-State Compact. The Wildhorse Chief Operating Officer shall also be authorized to purchase liquor from the State or other source for sale and service within the Wildhorse Resort & Casino.

*Section 1.09. Penalty*

Any person or entity possessing, selling, serving, bartering, or manufacturing liquor products in violation of any part of this Code shall be subject to a civil fine of not more than $500 for each violation involving possession, but up to $5,000 for each violation involving selling, bartering, or manufacturing liquor products in violation of this Code, and violators may be subject to exclusion from the Umatilla Indian Reservation. In addition, persons or entities subject to the criminal jurisdiction of the Confederated Tribes who violate this Code shall be subject to criminal punishment as provided in the Criminal Code. All contraband liquor shall be confiscated by the Umatilla Tribal Police Department (UTPD). The Umatilla Tribal Court shall have exclusive jurisdiction to enforce this Code and the civil fines, criminal punishment and exclusion authorized by this section.

*Section 1.10. Sovereign Immunity Preserved*

Nothing in this Code is intended or shall be construed as a waiver of the sovereign immunity of the Confederated Tribes. No manager or employee of the Wildhorse Resort & Casino shall be authorized, nor shall they attempt, to waive the sovereign immunity of the Confederated Tribes pursuant to this Code.

*Section 1.11. Severability*

If any provision or provisions in this Code are held invalid by a court of competent jurisdiction, this Code shall continue in effect as if the invalid provision(s) were not a part hereof.

*Section 1.12. Effective Date*

This Code shall be effective following approval by the Board of Trustees and approval by the Secretary of the Interior or his/her designee and publication in the **Federal Register** as provided by Federal law.

**Appendix A Legislative History**

*Liquor Code*

Legislative History

The Board of Trustees enacted the Liquor Code in Resolution No. 05–094 (October 3, 2005). In Resolution No. 05–127 (December 19, 2005), the Board amended section 1.12 of the Code. No further amendments or revisions have been enacted.

[FR Doc. 06–3336 Filed 4–5–06; 8:45 am]

BILLING CODE 4310–4J–P

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

**[WY–100–06–1610–DJ]**

### Call for Nominations for the Pinedale Anticline Working Group

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Call for nominations for membership to the Pinedale Anticline Working Group as part of the Adaptive Environmental Management program for the Pinedale Anticline Project Area in Southwestern Wyoming

**DATES:** All nominations should be postmarked by 45 days from date of publication in the **Federal Register**. Final appointments will be made by the Secretary of the Interior.

**ADDRESSES:** Nominations should be sent to Matt Anderson, Pinedale Anticline Working Group and Task Groups Coordinator, Bureau of Land Management, Pinedale Field Office, 432 East Mill Street, P.O. Box 768, Pinedale, Wyoming 82941.

**SUMMARY:** On August 13, 2004, the Secretary of the Interior renewed the Charter for the Pinedale Anticline Working Group and Task Groups (PAWG). Current members of the PAWG are coming up on the end of their 2-year appointment and we are now initiating the process to select seven of the nine memberships of the PAWG. Several interest groups, governmental agencies, and local interests will be given the opportunity to be represented on the PAWG, including previous PAWG members. Individuals or groups interested in becoming a member of the PAWG should submit the specified information within 45 days of this Notice.

**FOR FURTHER INFORMATION CONTACT:** Matt Anderson, PAWG Coordinator, BLM, Pinedale Field Office, P.O. Box 768, Pinedale, Wyoming, 82941, telephone (307) 367–5328.

**SUPPLEMENTARY INFORMATION:** The Federal Advisory Committee Act (5 U.S.C. Appendix 1) requires establishment of a system governing advisory committees in the Executive Branch of the Federal Government and specific policies, procedures, and responsibilities for committee creation, management and termination.

The Federal Land Policy, and Management Act of 1976 (43 U.S.C. 1701 *et seq.*) as amended by the Public Rangelands Improvement Act of 1978 (43 U.S.C. 1901 *et seq.*) requires establishment of advisory councils representative of major citizen interests concerned with resource management planning or the management of public lands.

Section 2 of the Reorganization Plan No. 3 of 1950 (5 U.S.C. Appendix, as amended; 64 Stat. 1262), authorizes the Secretary of the Interior to make provisions deemed appropriate authorizing the performance by any other officer, or by any agency or employee or Department of the Interior of a Departmental function. The establishment of advisory committees is deemed an appropriate action.

On August 13, 2004, the Secretary of the Interior renewed the Charter for the Pinedale Anticline Working Group and Task Groups (PAWG). In May 2004, nine members representing interest groups, governmental agencies, and local interests were appointed to the PAWG to serve a 2-year term. One member representing the public-at-large and one member representing Sublette County resigned. Recommendations for those two positions have been made and forwarded to the Secretary of the Interior's office for selection. Nominations are being taken for the other seven positions. Members will be selected to represent the following: Public-at-large, State of Wyoming, ranching community, land owners, environmental community, Town of Pinedale, and oil and gas operators. The Charter established several membership selection criteria and operational procedures that were developed once the Working Group became active. These are listed as follows:

(1) The PAWG is composed of 9 members who reside in the State of Wyoming. The PAWG members will be appointed by and serve at the pleasure of the Secretary of the Interior.

(2) Members to be selected to serve on the PAWG are as follows:

—A representative from the State of Wyoming, Office of the Governor
—A representative from the Town of Pinedale
—A representative from the oil/gas operators active in the Pinedale Anticline area
—A representative from statewide or local environmental groups
—A representative from the landowners within or bordering the Pinedale Anticline area
—A representative of livestock operators operating within or bordering the Pinedale Anticline area
—One of two members from the public-at-large

(A representative from the Sublette County government and one member from the public-at-large have been nominated, but not yet appointed)

(3) All members should have demonstrated an ability to analyze and interpret data and information, evaluate proposals, identify problems, and promote the use of collaborative management techniques (such as, long-term planning, management across jurisdictional boundaries, data sharing, information exchange, and partnerships).

(4) The service of the PAWG members shall be as follows:

(a) PAWG members will be appointed to 2-year terms, subject to removal by the Secretary of the Interior. At the discretion of the Secretary of the Interior, members may be reappointed to additional terms.

(b) The Chairperson of the PAWG will be selected by the PAWG at its first meeting.

(c) The term of the Chairperson will not exceed 2 years.

Individuals, or representatives of groups, who wish to become members of the Pinedale Anticline Working Group should complete and submit the following information to this office by May 22, 2006:

A. Representative Group to be considered for:
B. Nominee's Full Name:
C. Business Address:
D. Business Phone:
E. Home Address:
F. Home Phone:
G. Occupation/Title:
H. Qualifications (education including colleges, degrees, major field of study and/or training):
I. Career Highlights (significant related experience, civic and professional activities, elected offices, prior advisory committee experience, or career achievements related to the interest to be represented):
J. Experience in collaborative management techniques, such as long term planning, management across jurisdictional boundaries, data sharing, information exchange and partnerships:
K. Experience in data analysis and interpretation, problem identification and evaluation of proposals:
L. Knowledge of issues involving oil and gas development:
M. Indicate Specific Area of Interest to be Represented from the following:
1. A representative from the State of Wyoming, Office of the Governor,
2. A representative from the Town of Pinedale,
3. A representative from the oil/gas operators active in the Pinedale, Anticline area,
4. A representative from statewide or local environmental groups,
5. A representative from the landowners within or bordering the Pinedale Anticline area,
6. A representative of livestock operators operating within or bordering the Pinedale Anticline area, or
7. A representative from the public-at-large.
N. List any leases, licenses, permits, contracts or claims that you hold which involve lands or resources administered by the BLM:
O. Attach two or three Letters of Reference from interests or organization to be represented:
P. Nominated by: Include Nominator's name, address and telephone number(s):
Q. Date of nomination:

Groups should nominate more than one person and indicate their preferred order of appointment selection.

**Donald A. Simpson,**
*Acting State Director.*

[FR Doc. E6–5043 Filed 4–5–06; 8:45 am]

BILLING CODE 4310–22–P

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

**[CO–922–06–1310–FI; COC59954]**

### 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 of oil and gas lease COC59954 from CDX Rockies LLC for lands in Garfield County, Colorado. 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, Milada Krasilinec, Land Law Examiner, Branch of Fluid Minerals Adjudication, at 303–239–3767.

**SUPPLEMENTARY INFORMATION:** The lessee has agreed to the amended lease terms for rentals and royalties at rates of $5.00 per acre or fraction thereof, per year and 16⅔ percent, respectively. The lessee has paid the required $500 administrative fee and $155 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 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 COC59954 effective October 1, 2005, under the original terms and conditions of the lease and the increased rental and royalty rates cited above.

Dated: March 30, 2006.

**Milada Krasilinec,**
*Land Law Examiner.*

[FR Doc. E6–5041 Filed 4–5–06; 8:45 am]

BILLING CODE 4310–JB–P

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

**[NMNM 52377, NMNM 52388, NMNM 52393, and NMNM 52401]**

### Public Land Order No. 7661; Revocation of Four Withdrawal Orders for Carlsbad and Rio Grande Reclamation Projects; New Mexico

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Public Land Order.

**SUMMARY:** This order revokes a Bureau of Reclamation Order and 3 Secretarial Orders in their entireties, as they affect approximately 7,955 acres of lands withdrawn for the Bureau of Reclamation's Carlsbad and Rio Grande Projects. The lands have either been conveyed out of Federal ownership or are no longer needed for project purposes. This order also opens 0.106 acre to sale or exchange.

**DATES:** *Effective Date:* April 6, 2006.

**FOR FURTHER INFORMATION CONTACT:** Gilda Fitzpatrick, BLM New Mexico State Office, 1474 Rodeo Road, Santa Fe, New Mexico 87502, 505–438–7597.

**SUPPLEMENTARY INFORMATION:** The lands withdrawn for the Carlsbad Reclamation Project by the Secretarial Orders dated April 12, 1916, and May 25, 1928, are no longer needed for the Project so those two withdrawals are no longer necessary. Those lands will not be opened to surface entry or mining until completion of an analysis to determine if any of the lands need special designation. The lands withdrawn for the Rio Grande Reclamation Project by the Secretarial Order dated December 16, 1903, have been conveyed out of Federal ownership. This is a record-clearing action only for those lands. The land withdrawn for the Rio Grande Reclamation Project by the Bureau of Reclamation Order dated August 27, 1953, is no longer needed for the Project, so the withdrawal is no longer necessary and that land will be opened to sale or exchange. Copies of the original withdrawal orders containing a legal description of the lands involved are available from the BLM New Mexico State Office at the address above.

**Order**

By virtue of the authority vested in the Secretary of the Interior by Section 204 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1714 (2000), it is ordered as follows:

1. The Bureau of Reclamation Order dated August 27, 1953 (21 FR 1076), and the Secretarial Orders dated December 16, 1903, April 12, 1916, and May 25, 1928, which withdrew approximately 7,955 acres for the Bureau of Reclamation's Carlsbad and Rio Grande Projects, are hereby revoked in their entireties.

2. The following described land, which was withdrawn for the Bureau of Reclamation's Rio Grande Project by the Bureau of Reclamation Order dated August 27, 1953 (21 FR 1076), is hereby opened and made available for sale or exchange under Sections 203 and 206 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1713 and 1716 (2000):

**New Mexico Principal Meridian**

T. 29 S., R. 4 E.,
Sec. 5, Tract 64.

The area described contains 0.106 acre in Dona Ana County.

Dated: March 20, 2006.

**Mark Limbaugh,**

*Assistant Secretary of the Interior.*

[FR Doc. E6–5042 Filed 4–5–06; 8:45 am]

**BILLING CODE 4310–MN–P**

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

**[WY–957–05–1910–BJ–5GKM]**

### Notice of Filing of Plats of Survey, Nebraska

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Notice of filing of plats of survey, Nebraska.

**SUMMARY:** The Bureau of Land Management (BLM) is scheduled to file the plats of surveys of the lands described below thirty (30) calendar days from the date of this publication in the BLM Wyoming State Office, Cheyenne, Wyoming.

**FOR FURTHER INFORMATION CONTACT:** Bureau of Land Management, 5353 Yellowstone Road, Cheyenne, Wyoming 82009.

**SUPPLEMENTARY INFORMATION:** These surveys were executed at the request of the Bureau of Indian Affairs and are necessary for the management of these lands. The lands surveyed are:

The plat and field notes representing the dependent resurvey of portions of the east, west and north boundaries, and portions of the subdivisional lines, and the survey of the subdivision of certain sections, Township 31 North, Range 4 West, Sixth Principal Meridian, Nebraska, was accepted March 24, 2006.

The plat and field notes representing the dependent resurvey of portions of the west and north boundaries, and portions of the subdivisional lines, and the survey of the subdivision of certain sections, Township 31 North, Range 5 West, Sixth Principal Meridian, Nebraska, was accepted March 24, 2006.

The plat and field notes representing the dependent resurvey of the Eighth Standard Parrallel North, through Range 4 West, portions of the east and west boundaries, portions of the subdivisional lines, the subdivision of certain sections, and the metes and bounds survey of Parcel A, section 3, Township 32 North, Range 4 West, Sixth Principal Meridian, Nebraska, was accepted March 24, 2006.

Copies of the preceding described plats are available to the public.

Dated: March 27, 2006.

**Charles I. Doman,**

*Acting Chief Cadastral Surveyor, Division of Support Services.*

[FR Doc. E6–4952 Filed 4–5–06; 8:45 am]

**BILLING CODE 4467–22–P**

## INTERNATIONAL TRADE COMMISSION

**[Investigation No. 332–474]**

### Medical Devices and Equipment: Competitive Conditions Affecting U.S. Trade in Japan and Other Principal Foreign Markets

**AGENCY:** United States International Trade Commission.

**ACTION:** Institution of investigation and scheduling of hearing.

**EFFECTIVE DATE:** April 3, 2006.

**SUMMARY:** Following receipt on March 9, 2006, of a request from the Committee on Ways and Means of the U.S. House of Representatives (Committee) under section 332(g) of the Tariff Act of 1930 (19 U.S.C. (332(g)), the Commission instituted investigation No. 332–474, Medical Devices and Equipment: Competitive Conditions Affecting U.S. Trade in Japan and Other Principal Foreign Markets.

*Background:* As requested by the Committee, the Commission will conduct an investigation under section 332(g) and prepare a report assessing competitive conditions affecting U.S. trade of medical devices and equipment in principal foreign markets.

In preparing its report, the Commission will, as requested, closely examine the regulatory conditions of competition affecting U.S. sales and trade of medical devices and equipment in Japan, and other principal foreign markets, for the most recent 5-year period. The Commission will focus on the main U.S. exports of medical devices and equipment to these markets during this period, and compare Japan's regulatory conditions to those of the other major foreign markets for U.S.-made medical devices and equipment.

This report will also include, to the extent possible, for the most recent 5-year period: (1) An overview of the global market for medical devices and equipment, including production, consumption, and trade; (2) profiles of the medical device and equipment industries in the United States and principal foreign producer countries; (3) an analysis of U.S. trade in medical devices and equipment with major competitor countries including a description of trade practices, regulatory measures such as product approvals, and government and private expenditures on medical research; and (4) an examination of bilateral and multilateral trade agreements that have addressed regulatory issues in major foreign markets, including Japan's, and the implications for the U.S. medical device and equipment industry.

The Commission will provide its report to the Committee by March 9, 2007.

**FOR FURTHER INFORMATION CONTACT:** Co-Project Leader, Christopher Johnson (202–205–3488 or *christopher.johnson@usitc.gov*).

Co-Project Leader, Heather Sykes (202–205–3436 or *heather.sykes@usitc.gov*). Industry-specific information may be obtained from the above persons. For more information on legal aspects of the investigation, contact William Gearhart of the Commission's Office of the General Counsel at 202–205–3091 or *william.gearhart@usitc.gov*. The media should contact Margaret O'Laughlin, Office of External Relations at 202–205–1819 or *margaret.olaughlin@usitc.gov*. Hearing impaired individuals are advised that information on this matter can be obtained by contacting the TDD terminal on 202–205–1810. General information concerning the Commission may also be obtained by accessing its Internet server (*http://www.usitc.gov*). The public record for these investigations may be viewed on the Commission's electronic docket (EDIS–ONLINE) at *http://edis.usitc.gov/hvwebex*.

*Public Hearing:* A public hearing in connection with this investigation will be held beginning at 9:30 a.m. on July 11, 2006, at the United States International Trade Commission Building, 500 E Street, SW., Washington, DC. All persons have the right to appear by counsel or in person, to present information, and to be heard. Persons wishing to appear at the public hearing should file a letter with the Secretary, United States International Trade Commission, 500 E St., SW., Washington, DC 20436, not later than the close of business (5:15 p.m. e.s.t.) on June 27, 2006, in accordance with the requirements in the ''Submissions'' section below.

*Written Submissions:* In lieu of or in addition to participating in the hearing, interested parties are invited to submit written statements or briefs concerning this investigation. All written submissions, including requests to appear at the hearing, statements, and briefs, should be addressed to the Secretary, United States International Trade Commission, 500 E Street, SW., Washington, DC 20436. Any prehearing statements or briefs should be filed not later than close of business, June 29, 2006; the deadline for filing posthearing statements or briefs is close of business, July 25, 2006. All written submissions must conform with the provisions of section 201.8 of the Commission's Rules of Practice and Procedure (19 C.F.R. 201.8). Section 201.8 of the rules requires that a signed original (or a copy designated as an original) and fourteen (14) copies of each document be filed. In the event that confidential treatment of the document is requested, at least four (4) additional copies must be filed, in which the confidential information must be deleted (see the following paragraph for further information regarding confidential business information). The Commission's rules do not authorize filing submissions with the Secretary by facsimile or electronic means, except to the extent permitted by section 201.8 of the rules (see Handbook for Electronic Filing Procedures, *ftp://ftp.usitc.gov/pub/reports/electronic_filing_handbook.*

Any submissions that contain confidential business information must also conform with the requirements of section 201.6 of the Commission's Rules of Practice and Procedure (19 C.F.R. 201.6). Section 201.6 of the rules requires that the cover of the document and the individual pages be clearly marked as to whether they are the ''confidential'' or ''nonconfidential'' version, and that the confidential business information be clearly identified by means of brackets. All written submissions, except for confidential business information, will be made available in the Office of the Secretary to the Commission for inspection by interested parties.

In its request letter, the Committee stated that it intends to make the Commission's report available to the public in its entirety, and asked that the Commission not include any confidential business or national security confidential information in the report it sends to the Committee. The report that the Commission sends to the Committee will not contain any such information. Any confidential business information received by the Commission in this investigation and used in preparing the report will not be published in a manner that would reveal the operations of the firm supplying the information.

Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Secretary at 202–205–2000.

By order of the Commission.

Issued: April 3, 2006.

**Marilyn R. Abbott,**

*Secretary to the Commission.*

[FR Doc. E6–5021 Filed 4–5–06; 8:45 am]

**BILLING CODE 7020–02–P**

## DEPARTMENT OF JUSTICE

### Notice of Lodging of Consent Decree Under the Clean Water Act, the Clean Air Act, and the Resource Conservation and Recovery Act

Notice is hereby given that on April 3, 2006, a proposed Consent Decree in Partial Resolution of Pending Claims (''Consent Decree'') in *United States, et al.* v. *AK Steel Corporation,* Civil Action No. C–1–00530, was lodged with the United States District Court for the Southern District of Ohio. The Consent Decree partially resolves pending claims of the United States, the State of Ohio, and the Sierra Club/Natural Resources Defense Council against AK Steel Corporation (''Settling Defendant'') in this action under the Clean Air Act, as amended, 42 U.S.C. 7401 *et seq.,* the Clean Water Act, as amended, 33 U.S.C. 1251 *et seq.,* and the Resource Conservation and Recovery Act, as amended, 42 U.S.C. 6901 *et seq.* (''RCRA''), relating to Settling Defendant's integrated steelmaking facility in Middletown, Ohio (the ''Facility'').

Under the Consent Decree, Settling Defendant will implement a series of RCRA corrective action ''interim measures,'' including removal of PCB-contaminated sediments and soils from specified surface waters, adjacent floodplain areas, and previously identified PCB ''hot spots.'' In addition, the Consent Decree requires Settling Defendant to undertake a comprehensive RCRA Facility Investigation, including human health and ecological risk assessments, to evaluate the nature, extent and potential impact of releases of hazardous wastes, hazardous constituents and other contaminants at or from the Facility and, as appropriate, complete a Corrective Measures Study to evaluate potential corrective measure alternatives. The Consent Decree also requires Settling Defendant to comply with specified requirements of the Clean Air Act and Clean Water Act. Finally, the Consent Decree requires Settling Defendant to pay a civil penalty of $460,000, and to perform an environmentally beneficial project that will remove ozone-depleting refrigerants from specified equipment at the Facility at a cost of not less than $750,000.

The Department of Justice will receive from a period of thirty (30) days from the date of this publication comments relating to the Consent Decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, PO Box 7611, U.S. Department

of Justice, Washington, DC 20044–7611, and should refer to *United States, et al.* v. *AK Steel Corporation,* D.J. Ref. 90–5–2–1–2189.

The Consent Decree may be examined at the Office of the United States Attorney, 221 East Fourth Street, Suite 400, Cincinnati, OH, 45202, and at U.S. EPA Region V, 77 West Jackson Blvd., Chicago, IL 60604. During the public comment period, the Consent Decree may also be examined on the following Department of Justice Web site. *http://www.usdoj.gov/enrd/open.html.* A copy of the Consent Decree may also be obtained by mail from the Consent Decree Library, PO Box 7611, U.S. Department of Justice, Washington, DC 20044–7611 or by faxing or e-mailing a request to Tonia Fleetwood (*tonia.fleetwood@usdoj.gov)*, fax No. (202 514–0097, phone confirmation number (202) 514–1547. In requesting a copy from the Consent Decree Library, please enclose a check in the amount of $25.75 (25 cents per page reproduction cost) payable to the U.S. Treasury.

**William D. Brighton,**

*Assistant Chief, Environmental Enforcement Section, Environment and Natural Resources Division.*

[FR Doc. 06–3323 Filed 4–5–06; 8:45am]

**BILLING CODE 4410–15–M**

## DEPARTMENT OF JUSTICE

### Notice of Lodging of Stipulation and Order in *In Re Saltire Industrial, Inc.* Under the Comprehensive Environmental Response Compensation and Liability Act (CERCLA)

Notice is hereby given that on March 22, 2006, a Stipulation and Order was filed with the United States Bankruptcy Court for the Southern District of New York in *In Re Saltire Industrial, Inc.,* Case No. 04–15389 (BRL) (SDNY), concerning the liabilities of the Debtor for nine hazardous waste sites. Under this Stipulation and Order, EPA has allowed general unsecured claims for the following nine sites in the amounts of: $170,000 for the Solvents Recovery Service of New England Superfund Site in Southington, Connecticut; $717,636 for the Arrowhead Plating Superfund Site in Montross, Virginia; $2,500 for the Sand, Gravel, and Stone Superfund Site in Elkton, Maryland; $78,000 for the Dickson County Landfill Superfund Site in Dickson, Tennessee; $150,000 for the Fultz Landfill Superfund Site in Byesville, Ohio; $1.5 million for the Puente Valley Operable Unit of the San Gabriel Superfund Site, Area 4, in Los Angeles County, California; and $5.3 million for the Scovill Industrial Landfill Superfund Site in Waterbury, Connecticut. Under this Stipulation and Order, EPA has an allowed general unsecured claim in the amount of $3.11 million at the Scovill-Shrader facility in Dickson, Tennessee, as well as an allowed administrative expense claim of $307,000 at this Facility. The Stipulation and Order further provides for the release of $500,000 in an escrow account established pre-bankruptcy pertaining to the Puente Valley Operable Unit of the San Gabriel Superfund Site, Area 4, in Los Angeles County, California. Additionally, the Stipulation and Order notes the Debtor has entered into a separate agreement pertaining to the Caldwell Trucking Superfund Site in Fairfield, New Jersey.

The Department of Justice will receive comments relating to the Stipulation and Order for a period of thirty (30) days from the date of this publication. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, and should refer to *In Re Saltire Industrial, Inc.,* No. 05–15389 (BRL) (SDNY), D.J. Ref. 90–11–3–856/2.

The Stipulation and Order may be examined at the Office of the United States Attorney for the Southern District of New York, Civil Division, 86 Chambers Street, 3d Floor, New York, NY 10007, by request to Assistant U.S. Attorney David J. Kennedy, and at the United States Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460. During the public comment period, the Stipulation and Order also may be examined on the Department of Justice Web site, *http://www.usdoj.gov/enrd/open.html.* A copy of the Stipulation and Order may also be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, or by faxing or e-mailing a request to Tonia Fleetwood (*tonia.fleetwood@usdoj.gov*), fax no. (202) 514–0097, phone confirmation number (202) 514–1547. In requesting a copy from the Consent Decree Library, please enclose a check in the amount of $3.00 (25 cents per page reproduction cost) payable to the U.S. Treasury.

**Bruce S. Gelber,**

*Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.*

[FR Doc. 06–3324 Filed 4–5–06; 8:45am]

**BILLING CODE 4410–15–M**

## DEPARTMENT OF JUSTICE

### Bureau of Alcohol, Tobacco, Firearms and Explosives

### Agency Information Collection Activities: Proposed Collection; Comments Requested

**ACTION:** 30-Day Notice of Information Collection Under Review: Notification to Fire Marshall and Chief, Law Enforcement Officer of Storage of Explosive Materials.

The Department of Justice (DOJ), Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) has submitted the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. This proposed information collection was previously published in the **Federal Register** Volume nn, Number nnn, page nnnnn on month, day, 2002, allowing for a 60 day comment period.

The purpose of this notice is to allow for an additional 30 days for public comment until May 8, 2006. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding the items contained in this notice, especially the estimated public burden and associated response time, should be directed to The Office of Management and Budget, Office of Information and Regulatory Affairs, Attention Department of Justice Desk Officer, Washington, DC 20503. Additionally, comments may be submitted to OMB via facsimile to (202) 395–5806.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—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 agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

—Enhance the quality, utility, and clarity of the information to be collected; and

—Minimize the burden of the collection of information on those who are to

respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

**Overview of This Information Collection**

(1) *Type of Information Collection:* Extension of a currently approved collection.

(2) *Title of the Form/Collection:* Notification to Fire Marshall and Chief, Law Enforcement Officer of Storage of Explosive Materials.

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection:* Form Number: None. Bureau of Alcohol, Tobacco, Firearms and Explosives.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Business or other for-profit. *Other:* Farms, State, Local, or Tribal Government, Individuals or households. *Abstract:* The information is provided both orally and in writing to the chief, law enforcement officer and the fire marshal of the jurisdiction in which explosives are stored. The information is necessary for the safety of emergency response personnel responding to fires at sites where explosives are stored.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* There will be an estimated 5,000 respondents, who will complete the notification within approximately 30 minutes.

(6) *An estimate of the total burden (in hours) associated with the collection:* There are an estimated 2,500 total burden hours associated with this collection.

*If additional information is required contact:* Brenda E. Dyer, Clearance Officer, United States Department of Justice, Policy and Planning Staff, Justice Management Division, Suite 1600, Patrick Henry Building, 601 D Street NW., Washington, DC 20530.

Dated: March 31, 2006.

**Brenda E. Dyer,**

*Department Clearance Officer, United States Department of Justice.*

[FR Doc. E6–4984 Filed 4–5–06; 8:45 am]

BILLING CODE 4810–FY–P

## DEPARTMENT OF JUSTICE

### Parole Commission

### Record of Vote of Meeting Closure; (Public Law 94–409) (5 U.S.C. Sec. 552b)

I, Edward F. Reilly, Jr., Chairman of the United States Parole Commission, was present at a meeting of said Commission, which started at approximately 12:30 p.m., on Thursday, March 30, 2006, at the U.S. Parole Commission, 5550 Friendship Boulevard, 4th Floor, Chevy Chase, Maryland 20815. The purpose of the meeting was to decide two petitions for reconsideration pursuant to 28 CFR 2.27. Five Commissioners were present, constituting a quorum when the vote to close the meeting was submitted.

Public announcement further describing the subject matter of the meeting and certifications of General Counsel that this meeting may be closed by vote of the Commissioners present were submitted to the Commissioners prior to the conduct of any other business. Upon motion duly made, seconded, and carried, the following Commissioners voted that the meeting be closed: Edward F. Reilly, Jr., Cranston J. Mitchell, Deborah A. Spagnoli, Isaac Fulwood, Jr., and Patricia Cushwa.

*In Witness Whereof*, I make this official record of the vote taken to close this meeting and authorize this record to be made available to the public.

Dated: March 30, 2006.

**Edward F. Reilly, Jr.,**

*Chairman, U.S. Parole Commission.*

[FR Doc. 06–3350 Filed 4–04–06; 10:55 am]

BILLING CODE 4410–01–M

## NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

### Agency Information Collection Activities: Proposed Collection; Comment Request

**AGENCY:** National Archives and Records Administration (NARA).

**ACTION:** Notice.

**SUMMARY:** NARA is giving public notice that the agency proposes to request extension of three currently approved information collections. The first information collection is used for requesting permission to use privately owned equipment to microfilm archival holdings in the National Archives of the United States and Presidential libraries. The second information collection is used by participants in training courses and workshops that NARA conducts. NARA needs the information to assess customer satisfaction with course content and delivery and to ensure that the training meets the customer's needs. The third information collection is used for requesting permission to film, photograph, or videotape at a NARA facility for news purposes. The fourth information collection is a form, Independent Researcher Listing Application, NA 14115, used by independent researchers to provide their contact information. The public is invited to comment on the proposed information collection pursuant to the Paperwork Reduction Act of 1995.

**DATES:** Written comments must be received on or before June 5, 2006 to be assured of consideration.

**ADDRESSES:** Comments should be sent to: Paperwork Reduction Act Comments (NHP), Room 4400, National Archives and Records Administration, 8601 Adelphi Rd, College Park, MD 20740–6001; or faxed to 301–837–3213; or electronically mailed to *tamee.fechhelm@nara.gov*.

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information or copies of the proposed information collections and supporting statements should be directed to Tamee Fechhelm at telephone number 301–837–1694 or fax number 301–837–3213.

**SUPPLEMENTARY INFORMATION:** Pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104–13), NARA invites the general public and other Federal agencies to comment on proposed information collections. The comments and suggestions should address one or more of the following points: (a) Whether the proposed information collections are necessary for the proper performance of the functions of NARA; (b) the accuracy of NARA's estimate of the burden of the proposed information collections; (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 the use of information technology; and (e) whether small businesses are affected by this collection. The comments that are submitted will be summarized and included in the NARA request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this notice, NARA is soliciting comments concerning the following information collections:

1. *Title:* Request to Microfilm Records.
*OMB number:* 3095–0017.
*Agency form number:* None.

*Type of review:* Regular.

*Affected public:* Companies and organizations that wish to microfilm archival holdings in the National Archives of the United States or a Presidential library for micropublication.

*Estimated number of respondents:* 2.

*Estimated time per response:* 10 hours.

*Frequency of response:* On occasion (when respondent wishes to request permission to microfilm records).

*Estimated total annual burden hours:* 20.

*Abstract:* The information collection is prescribed by 36 CFR 1254.92. The collection is prepared by companies and organizations that wish to microfilm archival holdings with privately-owned equipment. NARA uses the information to determine whether the request meets the criteria in 36 CFR 1254.94, to evaluate the records for filming, and to schedule use of the limited space available for filming.

2. *Title:* National Archives and Records Administration Class Evaluation.

*OMB number:* 3095–0023.

*Agency form number:* NA 2019.

*Type of review:* Regular.

*Affected public:* Individuals or households, Business or other for-profit, Nonprofit organizations and institutions, Federal, state, local, or tribal government agencies.

*Estimated number of respondents:* 6,830.

*Estimated time per response:* 5 minutes.

*Frequency of response:* On occasion (when respondent takes NARA sponsored training classes).

*Estimated total annual burden hours:* 543 hours.

*Abstract:* The information collection allows uniform measurement of customer satisfaction with NARA training courses and workshops. NARA distributes the approved form to the course coordinators on diskette for customization of selected elements, shown as shaded areas on the form submitted for clearance.

3. *Title:* Request to film, photograph, or videotape at a NARA facility for news purposes.

*OMB number:* 3095–0040.

*Agency form number:* None.

*Type of review:* Regular.

*Affected public:* Business or other for-profit, not-for-profit institutions.

*Estimated number of respondents:* 660.

*Estimated time per response:* 10 minutes.

*Frequency of response:* On occasion.

*Estimated total annual burden hours:* 110.

*Abstract:* The information collection is prescribed by 36 CFR 1280.48. The collection is prepared by organizations that wish to film, photograph, or videotape on NARA property for news purposes. NARA needs the information to determine if the request complies with NARA's regulation, to ensure protections of archival holdings, and to schedule the filming appointment.

4. *Title:* Independent Researcher Listing Application.

*OMB number:* 3095–0054.

*Agency form number:* NA 14115.

*Type of review:* Regular.

*Affected public:* Individuals or households.

*Estimated number of respondents:* 269.

*Estimated time per response:* 10 minutes.

*Frequency of response:* On occasion.

*Estimated total annual burden hours:* 40.

*Abstract:* To assist researchers who can not travel to the metropolitan area to conduct their own research, NARA's Customer Services Division of the National Archives maintains a listing of independent researchers who perform freelance research for hire in the Washington, DC area. All interested independent researchers provide their contact information via this form. Collecting contact and other key information from each independent researcher and providing such information to the public when deemed appropriate will only increase business. This form is not a burden in any way to any independent researcher who voluntarily submits a completed form. Inclusion on the list will not be viewed or advertised as an endorsement by the National Archives and Records Administration (NARA). The listing is compiled and disseminated as a service to the public.

Dated: March 30, 2006.

**Martha Morphy,**

*Acting Assistant Archivist for Information Services.*

[FR Doc. E6–4902 Filed 4–5–06; 8:45 am]

BILLING CODE 7515–01–P

## NUCLEAR REGULATORY COMMISSION

### Agency Information Collection Activities: Proposed Collection; Comment Request

**AGENCY:** U.S. Nuclear Regulatory Commission (NRC).

**ACTION:** Notice of pending NRC action to submit an information collection request to OMB and solicitation of public comment.

**SUMMARY:** The NRC is preparing a submittal to OMB for review of continued approval of information collections under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35).

Information pertaining to the requirement to be submitted:

1. *The title of the information collection:* ''Reports Concerning Possible Non-Routine Emergency Generic Problems.''

2. *Current OMB approval number:* 3150–0012.

3. *How often the collection is required:* On occasion.

4. *Who is required or asked to report:* Nuclear power reactor licensees, research and test reactors, and materials applicants and licensees.

5. *The number of annual respondents:* 204 (104 nuclear power reactor licensees; 100 materials applicants and licensees).

6, *The number of hours needed annually to complete the requirement or request:* 369,440 (349,440 for nuclear power reactor licensees [8 responses × 420 hrs/response × 104 licensees] and 20,000 for materials applicants and licensees [2 responses × 100 hrs/response × 100 licensees]).

*Abstract.* NRC is requesting approval authority to collect information concerning possible non-routine generic problems which would require prompt action from NRC to preclude potential threats to public health and safety.

Submit, by June 5, 2006, comments that address the following questions:

1. Is the proposed collection of information necessary for the NRC to properly perform its functions? Does the information have practical utility?

2. Is the burden estimate accurate?

3. Is there a way to enhance the quality, utility, and clarity of the information to be collected?

4. How can the burden of the information collection be minimized, including the use of automated collection techniques or other forms of information technology?

A copy of the draft supporting statement may be viewed free of charge at the NRC Public Document Room, One White Flint North, 11555 Rockville Pike, Room O–1 F21, Rockville, MD 20852. OMB clearance requests are available at the NR worldwide Web site: *http://www.nrc.gov/public-involve/doc-comment/omb/index.html.* The document will be available on the NRC home page site for 60 days after the signature date of this notice.

Comments and questions about the information collection requirements

may be directed to the NRC Clearance Officer, Brenda Jo. Shelton (T–5 F52), U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, by telephone at 301–415–7233, or by Internet electronic mail to *INFOCOLLECTS&NRC.GOV.*

Dated at Rockville, Maryland, this 30th day of March 2006.

For the Nuclear Regulatory Commission.

**Brenda Jo. Shelton,**

*NRC Clearance Officer, Office of Information Services.*

[FR Doc. 06–3335 Filed 4–5–06; 8:45am]

BILLING CODE 7590–01–M

## NUCLEAR REGULATORY COMMISSION

**[Docket No. 50–244]**

### R.E. Ginna Nuclear Power Plant, LLC; Notice of Withdrawal of Request for Release of Part of Site for Unrestricted Use

The U.S. Nuclear Regulatory Commission (the Commission) has granted the request of R.E. Ginna Nuclear Power Plant, LLC (the licensee) to withdraw its application dated May 20, 2005, for the release of part of the site for unrestricted use at the R.E. Ginna Nuclear Power Plant (Ginna), located in Wayne County, New York.

The proposed request would have involved the release of a tract of land consisting of two adjacent parcels, comprising a total of about 15 acres along the western edge of the Ginna site boundary.

The Commission had previously issued a Notice of Receipt and Availability for Comment of Request Regarding Release of Part of Site for Unrestricted Use published in the **Federal Register** on July 11, 2005 (70 FR 39802). However, by letter dated March 3, 2006, the licensee withdrew the proposed request.

For further details with respect to this action, see the application dated May 20, 2005 (Agencywide Documents Access and Management System (ADAMS Accession No. ML051530448), and the licensee's letter dated March 3, 2006 (ADAMS No. ML060790446), which withdrew the application. Documents may be examined, and/or copied for a fee, at the NRC's Public Document Room (PDR), located at One White Flint North, Public File Area O1 F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible electronically from the Agencywide Documents Access and Management Systems (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm.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, or 301–415–4737 or by e-mail to *pdr@nrc.gov*.

Dated at Rockville, Maryland, this 31st day of March 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. E6–5023 Filed 4–5–06; 8:45 am]

BILLING CODE 7590–01–P

## RAILROAD RETIREMENT BOARD

### Agency Forms Submitted for OMB Review

*Summary:* In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the Railroad Retirement Board (RRB) has submitted the following proposal(s) for the collection of information to the Office of Management and Budget for review and approval.

**Summary of Proposal(s)**

(1) *Collection title:* Gross Earnings Record.

(2) *Form(s) submitted:* BA–11.

(3) *OMB Number:* 3220–0132.

(4) *Expiration date of current OMB clearance:* 4/30/2006.

(5) *Type of request:* Revision of a currently approved collection.

(6) *Respondents:* Business or other for-profit.

(7) *Estimated annual number of respondents:* 444.

(8) *Total annual responses:* 499.

(9) *Total annual reporting hours:* 202.

(10) *Collection description:* Section 7(c)(2) of the Railroad Retirement Act requires a financial interchange between the OASDHI trust funds and the railroad retirement account. The collection obtains gross earnings of railway employees on a 1% basis. The information is used in determining the amount which would place the OASDHI funds trust in the position they would have been if railroad service had been covered by the Social Security and FIC Acts.

*Additional Information or Comments:* Copies of the forms and supporting documents can be obtained from Charles Mierzwa, the agency clearance officer (312–751–3363) or *Charles.Mierzwa@rrb.gov.*

Comments regarding the information collection should be addressed to Ronald J. Hodapp, Railroad Retirement Board, 844 North Rush Street, Chicago, Illinois, 60611–2092 or *Ronald.Hodapp@rrb.gov* and to the OMB Desk Officer for the RRB, at the Office of Management and Budget, Room 10230, New Executive Office Building, Washington, DC 20503.

**Charles Mierzwa,**

*Clearance Officer.*

[FR Doc. 06–3306 Filed 4–5–06; 8:45 am]

BILLING CODE 7905–01–M

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–53581; File No. 81–935]**

### Order Granting an Application of Peoples Financial Corporation Under Section 12(h) of the Securities Exchange Act of 1934

March 31, 2006.

Peoples Financial Corporation has filed an application under Section 12(h) of the Securities Exchange Act of 1934, as amended, for certain relief. Peoples states that its principal executive offices are located in Biloxi, Mississippi, which is within one of the Presidentially Declared Disaster Areas where Individual Assistance has been authorized by the Federal Emergency Management Agency as a result of Hurricane Katrina, and that its sixteen branch facilities are also located in the Disaster Areas. In its application, Peoples asserts that the relief is necessary due to, among other things, the extraordinary impact of Hurricane Katrina on Peoples's facilities, personnel, customers, and independent public accountants. For example, the application indicates that: (1) Peoples, which is a bank holding company, lost six of the sixteen branch locations of its bank subsidiary, The Peoples Bank; (2) more than twenty percent of its employees lost their homes, another twenty-five percent had serious damages to their homes and several of Peoples's branches served as temporary housing for employees; and (3) company personnel have had to focus on on-going post-Katrina recovery issues such as evaluation of the loan portfolio and recovery and decontamination of items from vaults and safe deposit boxes. Further, the application states that: (1) The Biloxi, Mississippi office of Peoples's independent public accountants, which housed all of their hard copy records and computer files, was destroyed and more than twenty-five percent of their professional and

support staff have relocated out of the area; and (2) Peoples was the only client of its independent public accountants that is subject to the reporting requirements of Section 13 or 15(d) of the Exchange Act. Accordingly, Peoples has asked the Commission that Peoples be required to first include the disclosures specified in paragraphs (a) and (b) of Item 308 of Regulation S–K and first comply with Exchange Act Rule 13a–15(c) for the fiscal year ended December 31, 2006.

On March 10, 2006, the Commission issued a notice of the filing of the application and provided, until March 30, 2006, an opportunity for interested persons to request a hearing. In its March 10, 2006 notice, the Commission stated that an order disposing of the application might be issued upon the basis of the information stated therein unless a hearing should be ordered. No request for a hearing has been filed and the Commission has not ordered a hearing.

The matter having been considered, it is found that the requested relief is appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Exchange Act.

*It is ordered*, pursuant to Section 12(h) of the Exchange Act, that the application requesting that Peoples be required to first include the disclosures specified in paragraphs (a) and (b) of Item 308 of Regulation S–K and first comply with Exchange Act Rule 13a–15(c) for the fiscal year ended December 31, 2006, be, and hereby is, granted, effective immediately.

For the Commission, by the Division of Corporation Finance, pursuant to delegated authority.

**Nancy M. Morris,**

*Secretary.*

[FR Doc. E6–5014 Filed 4–5–06; 8:45 am]

**BILLING CODE 8010–01–P**

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## SECURITIES AND EXCHANGE COMMISSION

**[Release No. IC–27277]**

## Notice of Applications for Deregistration Under Section 8(f) of the Investment Company Act of 1940

March 31, 2006.

The following is a notice of applications for deregistration under section 8(f) of the Investment Company Act of 1940 for the month of March 2006. A copy of each application may be obtained for a fee at the SEC's Public Reference Branch (tel. 202–551–5850). An order granting each application will be issued unless the SEC orders a hearing. Interested persons may request a hearing on any application by writing to the SEC's Secretary at the address below and serving the relevant applicant with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on April 25, 2006, and should be accompanied by proof of service on the applicant, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Secretary, U.S. Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

**FOR FURTHER INFORMATION CONTACT:** Diane L. Titus at (202) 551–6810, SEC, Division of Investment Management, Office of Investment Company Regulation, 100 F Street, NE., Washington, DC 20549–4041.

**Noah Investment Group, Inc. [File No. 811–8058]**

*Summary:* Applicant seeks an order declaring that it has ceased to be an investment company. On June 10, 2005, applicant transferred its assets to Timothy Plan Large/Mid-Cap Growth Fund, a series of the Timothy Plan, based on net asset value. Expenses of $15,525 incurred in connection with the reorganization were paid by Polestar Management Company, Inc., applicant's investment adviser.

*Filing Date:* The application was filed on March 13, 2006.

*Applicant's Address:* 975 Delchester Rd., Newton Square, PA 19073.

**Opus Investment Trust [File No. 811–21214]**

*Summary:* Applicant seeks an order declaring that it has ceased to be an investment company. On January 26, 2006, applicant made a liquidating distribution to its shareholders, based on net asset value. Expenses of approximately $1,840 incurred in connection with the liquidation were paid by applicant.

*Filing Dates:* The application was filed on February 13, 2006, and amended on March 16, 2006.

*Applicant's Address:* 440 Lincoln St., Worcester, MA 01653.

**Progressive Capital Accumulation Trust [File No. 811–972]**

*Summary:* Applicant seeks an order declaring that it has ceased to be an investment company. Applicant has never made a public offering of its securities and does not propose to make a public offering. Applicant will continue to operate as a private investment company in reliance on section 3(c)(1) of the Act.

*Filing Dates:* The application was filed on February 10, 2006, and amended on March 14, 2006.

*Applicant's Address:* 579 Pleasant St., Suite 4, Paxton, MA 01612.

**Franklin Floating Rate Trust [File No. 811–8271]**

*Summary:* Applicant, a closed-end investment company, seeks an order declaring that it has ceased to be an investment company. On June 2, 2005, applicant transferred its assets to Franklin Floating Rate Daily Access Fund, a series of Franklin Investors Securities Trust, based on net asset value. Expenses of $356,674 incurred in connection with the reorganization were paid by applicant, the acquiring fund and Franklin Advisers, Inc., investment adviser for applicant and the acquiring fund.

*Filing Date:* The application was filed on February 22, 2006.

*Applicant's Address:* One Franklin Parkway, San Mateo, CA 94403–1906.

**Franklin Multi-Income Trust [File No. 811–5873]**

*Summary:* Applicant, a closed-end investment company, seeks an order declaring that it has ceased to be an investment company. On July 21, 2005, applicant's outstanding senior notes were prepaid in full in accordance with the terms of its senior note agreement. On August 4, 2005, applicant transferred its assets to Franklin Income Fund, a series of Franklin Custodian Funds, Inc., based on net asset value. Expenses of $104,915 incurred in connection with the reorganization were paid by applicant, the acquiring fund and Franklin Advisers, Inc., investment adviser for applicant and the acquiring fund.

*Filing Date:* The application was filed on February 22, 2006.

*Applicant's Address:* One Franklin Parkway, San Mateo, CA 94403–1906.

**First Trust Advantage Series 1 and Subsequent Series [File No. 811–2749]**

*Summary:* Applicant, a unit investment trust, seeks an order declaring that it has ceased to be an investment company. On July 21, 2004, applicant made a final liquidating distribution to its unitholders, based on net asset value. Applicant incurred no expenses in connection with the liquidation.

*Filing Date:* The application was filed on March 1, 2006.

*Applicant's Address:* First Trust Portfolios, L.P., 1001 Warrenville Rd., Suite 300, Lisle, IL 60532.

**Muni California Intermediate Duration Fund, Inc. [File No. 811–21347]**

*Summary:* Applicant, a closed-end investment company, seeks an order declaring that it has ceased to be an investment company. Applicant has never made a public offering of its securities and does not propose to make a public offering or engage in business of any kind.

*Filing Dates:* The application was filed on January 3, 2006, and amended on March 8, 2006.

*Applicant's Address:* 800 Scudders Mill Rd., Plainsboro, NJ 08543–9011.

**Global Capital and Income Strategies Fund, Inc. [File No. 811–21578]**

*Summary:* Applicant, a closed-end investment company, seeks an order declaring that it has ceased to be an investment company. Applicant has never made a public offering of its securities and does not propose to make a public offering or engage in business of any kind.

*Filing Dates:* The application was filed on January 3, 2006, and amended on March 8, 2006.

*Applicant's Address:* 800 Scudders Mill Rd., Plainsboro, NJ 08543–9011.

**Fidelity Government Securities Fund [File No. 811–2869]**

*Summary:* Applicant seeks an order declaring that it has ceased to be an investment company. On November 28, 1997, applicant transferred its assets to a corresponding series of the Fidelity Income Fund, based on net asset value. Expenses of approximately $12,000 incurred in connection with the reorganization were paid by applicant.

*Filing Dates:* The application was filed on November 30, 2005, and amended on February 22, 2006.

*Applicant's Address:* 82 Devonshire St., Boston, MA 02109.

**Hillview Investment Trust II [File No. 811–9901]**

*Summary:* Applicant seeks an order declaring that it has ceased to be an investment company. On November 25, 2005, applicant made a liquidating distribution to its shareholders, based on net asset value. Expenses of $3,000 incurred in connection with the liquidation were paid by applicant and Hillview Capital Advisors, LLC, applicant's investment adviser.

*Filing Dates:* The application was filed on January 25, 2006, and amended on March 3, 2006.

*Applicant's Address:* c/o PFPC Inc., 400 Bellevue Parkway, Wilmington, DE 19809.

**TD Waterhouse Trust [File No. 811–9519]**

*Summary:* Applicant seeks an order declaring that it has ceased to be an investment company. On July 8, 2005, applicant's six series transferred their assets to corresponding series of T. Rowe Price Index Trust, Inc., T. Rowe Price International Index Fund, Inc., or T. Rowe Price U.S. Bond Index Fund, Inc., based on net asset value. Expenses of $534,576 incurred in connection with the reorganization were paid by TD Waterhouse Investor Services, Inc., an affiliate of applicant's investment adviser.

*Filing Dates:* The application was filed on November 29, 2005, and amended on March 6, 2006.

*Applicant's Address:* 100 Wall St., New York, NY 10005.

**Variable Life Account C of ING Life Insurance and Annuity Company [File No. 811–9665]**

*Summary:* Applicant seeks an order declaring that it has ceased to be an investment company. Prior to April 30, 2003, each existing group life certificate was surrendered and the amount of insurance in effect was converted to a substantially comparable flexible premium general account life insurance policy. Expenses of $4,000 incurred in connection with the liquidation were paid by ING Life Insurance and Annuity Company.

*Filing Dates:* The application was filed on February 6, 2006 and amended on March 13, 2006.

*Applicant's Address:* 151 Farmington Avenue, Hartford, CT 06156.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

**Nancy M. Morris,**

*Secretary.*

[FR Doc. E6–5006 Filed 4–5–06; 8:45 am]

BILLING CODE 8010–01–P

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. IC–27276; File No. 812–13187]**

## Pacific Life Insurance Company, et al.

March 30, 2006.

**AGENCY:** Securities and Exchange Commission (''Commission'').

**ACTION:** Notice of an application for an order pursuant to Section 26(c) of the Investment Company Act of 1940 (''1940 Act'') approving a substitution of securities.

**APPLICANTS:** Pacific Life Insurance Company (''Pacific Life''); Separate Account A of Pacific Life (''Pacific Separate Account A''); Separate Account B of Pacific Life (''Pacific Separate Account B''); Pacific Select Variable Annuity Separate Account of Pacific Life (''PSVA Separate Account''); Pacific Select Exec Separate Account of Pacific Life (''Pacific PSE Separate Account''); Pacific Life & Annuity Company (''PL&A''); Separate Account A of PL&A (''PL&A Separate Account A''); Pacific Select Exec Separate Account of PL&A (''PL&A PSE Separate Account'') (Pacific Separate Account A, Pacific Separate Account B, PSVA Separate Account, Pacific PSE Separate Account, PL&A Separate Account A and PL&A PSE Separate Account, are collectively referred to herein as the ''Separate Accounts''); and Pacific Select Fund (''Select Fund'') (Pacific Life, PL&A, the Separate Accounts and Select Fund are collectively referred to herein as the ''Applicants'')

**SUMMARY OF APPLICATION:** Applicants request an order pursuant to section 26(c) of the 1940 Act to permit the substitution of shares of the American Funds Growth-Income Portfolio of Select Fund (''Growth-Income Portfolio'' or ''Substitute Portfolio'') for shares of the Equity Income Portfolio of Select Fund (''Equity Income Portfolio'' or ''Replaced Portfolio'') held by each Separate Account (''Substitution'').

**FILING DATES:** The application was filed with the Commission on April 29, 2005. Applicants have agreed to file a final amendment during the notice period, the substance of which is reflected in this notice.

**HEARING OR NOTIFICATION:** An order granting the Application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's secretary and serving Applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m., on April 24, 2006, and should be accompanied by proof of service on Applicants, in the form of an affidavit, or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Secretary of the Commission.

**ADDRESSES:** Secretary, Securities and Exchange Commission, 100 F Street,

NE., Washington, DC 20549–1090. Applicants, 700 Newport Center Drive, Newport Beach, CA 92660.

**FOR FURTHER INFORMATION CONTACT:** Michael Kosoff, Staff Attorney, at (202) 551–6754 or Harry Eisenstein, Branch Chief, Office of Insurance Products, Division of Investment Management, at (202) 551–6795.

**SUPPLEMENTARY INFORMATION:** The following is a summary of the application. The complete application may be obtained for a fee at the Commission's Public Reference Room, 100 F Street, NE., Room 1580, Washington, DC 20549 (202–551–8090).

## Applicants' Representations

1. Pacific Life is a life insurance company that is domiciled in Nebraska. Along with subsidiaries and affiliates, Pacific Life's operations include life insurance, annuities, pension and institutional products, mutual funds, group employee benefits, broker/dealer operations and investment advisory services. Pacific Life and PL&A issue variable annuity contracts and variable life insurance policies, including those currently funded by a Separate Account (each, a ''Variable Contract'' and collectively, the ''Variable Contracts'').

2. Pacific Separate Account A was established on September 7, 1994, as a segregated asset account of Pacific Life and is registered with the Commission as a unit investment trust. Pacific Separate Account A currently funds the variable benefits available under various variable annuity contracts issued by Pacific Life. Interests in Pacific Separate Account A under each Variable Contract funded by Pacific Separate Account A are registered under the Securities Act of 1933, as amended (the ''1933 Act'').[1] Pacific Life is the legal owner of the assets in Pacific Separate Account A. Assets of Pacific Separate Account A attributable to the reserves and other liabilities under the outstanding Variable Contracts funded by Pacific Separate Account A may not be charged with liabilities arising from other Pacific Life business.

3. Pacific Separate Account B was established on September 25, 1996, as a segregated asset account of Pacific Life and is registered with the Commission as a unit investment trust. Pacific Separate Account B currently funds the variable benefits available under various variable annuity contracts issued by Pacific Life. Interests in Pacific Separate Account B under each Variable Contract funded by Pacific Separate Account B are registered under the 1933 Act.[2] Pacific Life is the legal owner of the assets in Pacific Separate Account B. Assets of Pacific Separate Account B attributable to the reserves and other liabilities under the outstanding Variable Contracts funded by Pacific Separate Account B may not be charged with liabilities arising from other Pacific Life business.

4. PSVA Separate Account was established on November 30, 1989, as a segregated asset account of Pacific Life and is registered with the Commission as a unit investment trust. PSVA Separate Account currently funds the variable benefits available under a variable annuity contract designated as Pacific Select Variable Annuity (''PSVA''). PSVA Separate Account interests in PSVA are registered under the 1933 Act.[3] Pacific Life is the legal owner of the assets in PSVA Separate Account. Assets of PSVA Separate Account attributable to the reserves and other liabilities under the Variable Contracts funded by PSVA Separate Account may not be charged with liabilities arising from any other Pacific Life business.

5. Pacific PSE Separate Account was established on May 12, 1988, as a segregated asset account of Pacific Life and is registered with the Commission as a unit investment trust. Pacific PSE Separate Account currently funds the variable benefits available under various flexible premium variable life insurance policies. Interests in Pacific PSE Separate Account under each Variable Contract funded by Pacific PSE Separate Account are registered under the 1933 Act.[4] Pacific Life is the legal owner of the assets in Pacific PSE Separate Account. Assets of Pacific PSE Separate Account attributable to the reserves and other liabilities under the outstanding Variable Contracts funded by Pacific PSE Separate Account may not be charged with liabilities arising from other Pacific Life business.

6. PL&A is a life insurance company domiciled in Arizona. It is a wholly-owned subsidiary of Pacific Life. PL&A's operations include life insurance, annuity and institutional products, group life and health insurance and various other insurance products and services. PL&A also issues Variable Contracts. PL&A is authorized to conduct life insurance and annuity business in Arizona, New York and certain other states.

7. PL&A Separate Account A was established on January 25, 1999, as a segregated asset account of PL&A and is registered with the Commission as a unit investment trust. PL&A Separate Account A currently funds the variable benefits available under various variable annuity contracts issued by PL&A. Interests in PL&A Separate Account A under each Variable Contract funded by PL&A Separate Account A are registered under the 1933 Act.[5] PL&A is the legal owner of the assets in PL&A Separate Account A. Assets of PL&A Separate Account A attributable to the reserves and other liabilities under the outstanding Variable Contracts funded by PL&A Separate Account A may not be charged with liabilities arising from other PL&A business.

8. PL&A PSE Separate Account was established on September 24, 1998, as a segregated asset account of PL&A and is registered with the Commission as a unit investment trust. PL&A PSE Separate Account currently funds the variable benefits available under various flexible premium variable life insurance policies. Interests in PL&A PSE Separate Account under each Variable Contract funded by PL&A PSE Separate Account are registered under the 1933 Act.[6] PL&A is the legal owner of the assets in PL&A PSE Separate Account. Assets of PL&A PSE Separate Account attributable to the reserves and other liabilities under the outstanding Variable Contracts funded by PL&A PSE Separate Account may not be charged with liabilities arising from other PL&A business.

9. Select Fund is a registered open-end management investment company that currently offers 34 separate

[1] Pacific Life and Pacific Separate Account A have filed Form N–4 Registration Statements under the 1933 Act registering the various Variable Contracts funded by Pacific Separate Account A (File Nos. 333–60833, 33–88460, 33–88458, 33–88458, 333–93059, 333–93059, 333–53040 and 811–08946).

[2] Pacific Life and Pacific Separate Account B have filed a Form N–4 Registration Statement under the 1933 Act relating to the Variable Contracts funded by Pacific Separate Account B (File Nos. 333–14131 and 811–07859).

[3] Pacific Life and PSVA Separate Account have filed a Form N–4 Registration Statement under the 1933 Act relating to the Variable Contracts funded by PSVA Separate Account (File Nos. 33–32704 and 811–05980).

[4] Pacific Life and Pacific PSE Separate Account have filed Form N–6 Registration Statements under the 1933 Act relating to the various Variable Contracts funded by Pacific PSE Separate Account (File Nos. 33–21754, 33–57908, 333–01713, 333–20355, 333–60461, 333–61135, 333–102902, 333–106969, 333–118913 and 811–05563).

[5] PL&A and PL&A Separate Account A have filed Form N–4 Registration Statements under the 1933 Act relating to the various Variable Contracts funded by PL&A Separate Account A (File Nos. 333–71081, 333–100907, 333–107571 and 811–09203).

[6] PL&A and PL&A PSE Separate Account have filed Form N–6 Registration Statements under the 1933 Act relating to the various Variable Contracts funded by PL&A PSE Separate Account (File Nos. 333–62446, 333–80825, 333–106653, 333–106721 and 811–09389).

portfolios. Shares of Select Fund currently are offered only to the Separate Accounts for the purpose of serving as an investment vehicle for variable annuity contracts and variable life insurance policies offered or administered by Pacific Life and PL&A (collectively, the ''PL Insurers''). Pursuant to an Advisory Agreement, Pacific Life serves as the investment adviser of Select Fund.

10. Select Fund began offering shares of the Equity-Income Portfolio (''Replaced Portfolio'') on January 2, 2002. Putnam Investment Management, LLC serves as the Portfolio Manager to the Replaced Portfolio. As of December 31, 2005, the Replaced Portfolio had approximately $160.9 million in assets.

11. Since May 1, 2005, Select Fund has offered shares of the Growth-Income Portfolio (''Substitute Portfolio''). The Substitute Portfolio does not invest directly in securities but instead invests all of its assets in Class 2 shares of the American Funds Growth-Income Fund (the ''Master Fund''). The Master Fund is a series of American Funds Insurance Series® and invests directly in securities. Capital Research and Management Company serves as investment adviser to the Master Fund. As of December 31, 2005, the Substitute Portfolio had $783.9 million in assets.

12. The PL Insurers and the Board of Trustees of Select Fund made a strategic determination to replace the sub-adviser of the Replaced Portfolio, which sub-advised two other portfolios in addition to the Replaced Portfolio. This decision was based primarily on the concerns of potential effects of recent regulatory events respecting such sub-adviser. With respect to the Replaced Portfolio, the PL Insurers and the Board of Trustees have determined that this Substitution is an appropriate means to effectively replace the sub-adviser.

13. The following chart sets out the investment objectives and certain policies of each Portfolio as stated in the Fund's most recent post-effective amendment to its registration statement.

| Replaced Portfolio (Equity Income Portfolio) | Substitute Portfolio (Growth-Income Portfolio) |
|---|---|
| Investment Goal: Seeks current income; capital growth is of secondary importance. | Investment Goal: Seeks long-term growth of capital and income. |
| Main Investments: The Replaced Portfolio invests primarily in common stocks of large U.S. companies, with a focus on value stocks that offer the potential for current income and may also offer the potential for capital growth. Value stocks are those that the manager believes are currently undervalued by the market. To determine whether to buy or sell investments, Putnam Investment Management, LLC, the portfolio manager, will consider, among other factors, a company's financial strength, competitive position in its industry, projected future earnings, cash flows and dividends. The Replaced Portfolio will normally invest at least 80% of its assets in common stocks and other equity investments. The manager may invest up to 20% of its assets in foreign securities that are principally traded outside the U.S. including emerging market securities (American Depositary Receipts (ADRs) are excluded from this limit), preferred stocks, convertible securities, and fixed income securities, including high yield (junk) bonds. The Replaced Portfolio may invest up to 20% of its net assets in lower-rated high-yield (junk) bonds. The manager may use derivatives (such as options, futures contracts, swaps and warrants) to try to increase returns, for hedging purposes, as a substitute for securities, or to otherwise help achieve the Replaced Portfolio's investment goal. The manager may use foreign currency contracts or derivatives to hedge against changes in currency exchange rates. | Main Investments: The Substitute Portfolio invests all of its assets in Class 2 shares of the Master Fund. In turn, the Master Fund seeks to make shareholders' investments grow and to provide income over time by investing primarily in common stocks or other securities which demonstrate the potential for appreciation and/or dividends. The Master Fund is designed for investors seeking both long-term growth of capital and income.<br>The Master Fund may invest up to 15% of its assets in equity securities of issuers domiciled outside the U.S. and Canada and not included in S&P 500 Index.<br>The Master Fund may invest up to 5% of its assets in nonconvertible debt securities rated Ba or below by Moody's and BB or below by S&P or in unrated securities that are determined to be of equivalent quality (junk bonds).<br>The Master Fund currently does not intend to purchase and sell currencies to facilitate securities transactions and enter into forward currency contracts to protect against changes in currency exchange rates other than to facilitate the settlement of trades. |
| Principal risks:<br>• price volatility risk—the Replaced Portfolio principally invests in equity securities, which tend to go up or down in value, sometimes rapidly and unpredictably. The prices of equity securities change in response to many factors, including a company's historical and prospective earnings, the value of its assets, general economic conditions, interest rates, investor perceptions and market liquidity. The Replaced Portfolio may invest in small and medium-sized companies, which may be riskier and more susceptible to greater price swings than large companies because they may have fewer financial resources, limited product and market diversification, greater potential volatility in earnings and business prospects, and many are dependent on a few key managers.<br>• foreign investment risk—foreign investments may be riskier than U.S. investments for many reasons, including changes in currency exchange rates, unstable political and economic conditions, lack of adequate and timely company information, differences in the way securities markets operate, relatively lower market liquidity, less stringent financial reporting and accounting standards and controls, less secure foreign banks or securities depositories than those in the U.S., foreign taxation issues and foreign controls on investment.<br>• interest rate risk—the value of bonds and short-term money market instruments may fall when interest rates rise. Bonds with longer durations tend to be more sensitive to changes in interest rates, making them more volatile than bonds with shorter durations or money market instruments. | Principal risks:<br>• price volatility risk—the Master Fund principally invests in equity securities, which may go up or down in value, sometimes rapidly and unpredictably. The Master Fund invests in companies that the portfolio counselors think have the potential for above average growth, which may give the Master Fund a higher risk of price volatility than a portfolio that invests principally in equities that are ''undervalued.''<br>The Master Fund may also invest in small and medium-sized companies, which may be more susceptible to greater price swings than larger companies because they may have fewer financial resources, limited product and market diversification, greater potential volatility in earnings and business prospects and many are dependent on a few key managers.<br>• foreign investment risk—foreign investments may be riskier than U.S. investments for many reasons, including changes in currency exchange rates, unstable political and economic conditions, lack of adequate and timely company information, differences in the way securities markets operate, relatively lower market liquidity, less stringent financial reporting and accounting standards and controls, less secure foreign banks or securities depositories than those in the U.S., foreign taxation issues and foreign controls on investment.<br>• interest rate risk—the value of bonds and short-term money market instruments may fall when interest rates rise. Bonds with longer durations tend to be more sensitive to changes in interest rates, making them more volatile than bonds with shorter durations or money market instruments. |

| Replaced Portfolio (Equity Income Portfolio) | Substitute Portfolio (Growth-Income Portfolio) |
|---|---|
| • credit risk—a fixed income security's issuer may not be able to meet its financial obligations and go bankrupt. High-yield/high-risk bonds, i.e., low credit ratings by Moody's (Ba and lower) or Standard & Poor's (BB and lower), or no rating, but are of comparable quality, are especially subject to credit risk during periods of economic uncertainty or during economic downturns and are considered to be mostly speculative in nature. Not all U.S. government securities are backed or guaranteed by the U.S. Some are supported only by the credit of the issuing agency, which depend entirely on their own resources to repay their debt, and are subject to the risk of default.<br>• emerging countries—investments in emerging market countries (such as many in Latin America, Asia, the Middle East, Eastern Europe and Africa) may be riskier than in developed markets, for many reasons, including smaller market capitalizations, greater price volatility, less liquidity, higher degree of political and economic instability, less governmental regulation of the financial industry and markets, and less stringent financial reporting and accounting standards and controls. Such investments may also involve risk of loss resulting from problems in share registration and custody, especially in Eastern European countries such as Russia. | • credit risk—a fixed income security's issuer may not be able to meet its financial obligations and go bankrupt. High-yield/high-risk bonds, i.e., low credit ratings by Moody's (Ba and lower) or Standard & Poor's (BB and lower), or no rating, but are of comparable quality, are especially subject to credit risk during periods of economic uncertainty or during economic downturns and are considered to be mostly speculative in nature. Not all U.S. government securities are backed or guaranteed by the U.S. Some are supported only by the credit of the issuing agency, which depend entirely on their own resources to repay their debt, and are subject to the risk of default.<br>• master/feeder mutual fund structure—the Substitute Portfolio operates as a ''feeder portfolio'' which means it invests all of its assets in the Master Fund. The Substitute Portfolio has a similar investment objective and the same limitations as the master fund in which it invests. The Substitute Portfolio does not buy investment securities directly. The Master Fund, on the other hand, invests directly in portfolio securities.<br>Under the master/feeder structure, the Substitute Portfolio may withdraw its investment in the Master Fund if approved by the Board of Trustees. Prior to any such withdrawal, the Board would consider what action might be taken, including the investment of all the assets of the Substitute Portfolio in another pooled investment entity having the same or similar investment objective as the Substitute Portfolio, request Pacific Life to manage the Substitute Portfolio directly or hire another portfolio manager to manage the Substitute Portfolio, or take other action.<br>Because the Substitute Portfolio invests all of its assets in the Master Fund, the Substitute Portfolio will bear the fees and expenses of the Substitute Portfolio and the Master Fund in which it invests. The Substitute Portfolio's expenses may be higher than those of other mutual funds which invest directly in securities. The master/feeder structure is different from that of most of the other portfolios of Select Fund and many other investment companies. The Master Fund may have other shareholders, each of whom will pay their proportionate share of the Master Fund's expenses. The Master Fund may change its investment objectives, policies, managers, expense limitation agreements and other matters relating to the Master Fund without approval of the Substitute Portfolio or the Substitute Portfolio's Board.<br>• derivatives and forward contracts—derivatives (such as futures and options contracts) derive their value from the value of an underlying security, a group of securities or an index. Synthetics are artificially created by using a collection of other assets whose combined features replicate the economic characteristics of a direct investment. The Replaced Portfolio's use of derivatives, synthetics, forward commitments and currency transactions could reduce returns, increase portfolio volatility, may not be liquid, and may not correlate precisely to the underlying securities or index. All of these investments, including repurchase agreements, are particularly sensitive to counterparty risk. |

Although both the Master Fund and the Replaced Portfolio are permitted to invest in high yield bonds, derivative instruments and emerging markets securities, neither the Master Fund nor the Replaced Portfolio held significant investments in these categories as of December 31, 2005. Both the Master Fund and the Replaced Portfolio are considered to be ''Large Value'' funds by Morningstar, Inc., a leading provider of independent investment research.

14. Pacific Life, as investment adviser to the Substitute Portfolio, is responsible for monitoring the performance and continued appropriateness of the Master Fund for the Substitute Portfolio. Pacific Life may recommend to the Substitute Portfolio's Board (or the Board may, on its own determine) that the Substitute Portfolio should withdraw its assets from the Master Fund, upon appropriate notice to the Master Fund. Investment in the Master Fund is not a fundamental policy of the Substitute Portfolio, consequently, the Board may authorize the Substitute Portfolio's withdrawal from the Master Fund without a shareholder vote.

15. The following chart compares the advisory fees, 12b–1 fees (if any), operating expenses and total expenses expressed as an annual percentage of average daily net assets, both before and after giving effect to fee waivers and expense reimbursements. The figures for the Substitute Portfolio set forth the fees and expenses at both the master and feeder levels. The fees and expenses quoted for the Replaced Portfolio, Master Fund and Substitute Portfolio are for the year ended December 31, 2005. As the chart demonstrates, while the Replaced Portfolio has the same total expenses as the Substitute Portfolio has before giving effect to fee waivers, the Substitute Portfolio is expected to have lower total net expenses than the Replaced Portfolio after giving effect to fee waivers.

| Replaced Portfolio | Substitute Portfolio |
|---|---|
| Advisory Fees 0.95% | Feeder Fund Level |
| Other Expenses 0.06% | Advisory Fees [7] 0.42% |
| Total Expenses of Replaced Portfolio 1.01% | Other Expenses 0.03% |
| | Total Expenses of Feeder Fund 0.45% |
| | Advisory Fee Waiver [8] (0.06%) |
| | Total Net Expenses of Feeder Fund 0.39% |
| | Master Fund Level |
| | Advisory Fees [9] 0.28% |
| | 12b–1 Fees 0.25% |
| | Other Expenses 0.01% |
| | Total Expenses of Master Fund [10] 0.54% |
| | Total Expenses of Master and Feeder |
| | Total Expenses 0.99% |
| | Less Advisory Fee Waiver (0.06%) |
| | Total Net Expenses 0.93% |

Pursuant to the Investment Advisory Agreement between Pacific Life and Select Fund with respect to the Substitute Portfolio, Pacific Life's advisory fee will be 0.95% minus the annual rates of any advisory and 12b–1 fees paid by a master fund in which the Substitute Portfolio invests in a master/feeder arrangement. In the event that the Master Fund level advisory fees and 12b–1 fees exceed 95 basis points, Pacific Life will subsidize any fees in excess of this amount for the life of the Substitute Portfolio or until the fee is changed pursuant to a shareholder vote.

The Advisory Fee Waiver, with respect to the Feeder Fund Level expenses, shown in the chart above is put into place through an Advisory Fee Waiver Agreement between Select Fund and Pacific Life (''Waiver Agreement''). Under the terms of the Waiver Agreement, Pacific Life agrees to limit its total advisory fee to 0.36% annually during the term of the agreement. The Waiver Agreement has an initial term ending on the earlier of May 1, 2007, or such time as the Substitute Portfolio no longer invests substantially all of its assets in the Master Fund.

In addition to the Waiver Agreement, Pacific Life has contractually committed to waive that portion of its advisory fee and/or reimburse expenses with respect to the Substitute Portfolio such that the net fees and expenses, considering both the master and feeder levels, paid by shareholders invested in the Substitute Portfolio will not exceed an annual rate of 1.01% of the Substitute Portfolio's average daily net assets. In order to effectuate this commitment, Pacific Life and Select Fund have entered into an Expense Limitation Agreement. Under the terms of the Expense Limitation Agreement, Pacific Life will reimburse the Substitute Portfolio an amount necessary to ensure that portfolio net operating expenses do not exceed an annual rate of 1.01% during the term of the Expense Limitation Agreement. The Expense Limitation Agreement has an initial term of two years from the date the Substitution requested by the Application occurs (the ''Effective Date''). Separate Account expenses also will not be increased during this two-year period for Contractholders that invest in the Replaced Portfolio on the Effective Date of the substitution (the ''Affected Contractholders'').

16. The following chart compares the historical performance of the Replaced Portfolio to the historical performance of the Master Fund for the periods shown. The Master Fund's historical performance has been adjusted to reflect the estimated expenses of the Substitute Portfolio at the feeder fund level, as if the Substitute Portfolio had invested in the Master Fund for the periods presented.

| Replaced Portfolio | | Substitute Portfolio | |
|---|---|---|---|
| *Calendar Year Ended:* | | *Calendar Year Ended:* | |
| 2005 | 5.63% | 2005 | 5.43% |
| 2004 | 12.19% | 2004 | 9.98% |
| 2003 | 26.24% | 2003 | 32.04% |
| 2002* | (13.54)% | 2002 | (18.73)% |
| *Average Annual Total Return as of December 31, 2005:* | | *Average Annual Total Return as of December 31, 2004:* | |
| 1 year | 5.63% | 1 year | 5.44% |
| 3 years | 14.37% | 3 years | 15.26% |
| 5 years | N/A | 5 years | 4.92% |
| 10 years | N/A | 10 years | 10.17% |

*Inception date 1/2/02.

17. Applicants will effect the Substitution as soon as practicable following the issuance of the requested order. As of the Effective Date, shares of the Replaced Portfolio will be redeemed for cash. The PL Insurers, on behalf of the subaccount of each relevant Separate Account investing in the Replaced Portfolio, will simultaneously place a redemption request with the Replaced Portfolio and a purchase order with the Substitute Portfolio so that the

[7] Under an addendum to the amended and restated advisory agreement between the Substitute Portfolio and Pacific Life, advisory fees are payable to Pacific Life, as investment adviser to the Substitute Portfolio, at an annual rate of 0.95% reduced by the sum of the annual rates of any investment advisory fees and 12b–1 fees paid by the Master Fund.

[8] This waiver reflects the terms of an advisory fee waiver agreement described below.

[9] CRMC, the Adviser to the Master Fund, began waiving 5% of its advisory fees on September 1, 2004. Beginning April 1, 2005, this waiver increased to 10% and will continue at this level until further review by CRMC. Total Expenses of the Master Fund do not reflect this waiver.

[10] The Total Expenses of the Master Fund do not include a non-contractual advisory fee waiver of 0.02%.

purchase of the Substitute Portfolio shares will be for the exact amount of the redemption proceeds, and thus Variable Contract values will remain fully invested at all times. The proceeds of such redemptions will then be used to purchase the appropriate number of shares of the Substitute Portfolio. Following the Substitution, the Replaced Portfolio will no longer be offered through the Variable Contracts.

18. The Substitution will take place at relative net asset value (in accordance with Rule 22c–1 under the 1940 Act) with no change in the amount of any Affected Contractholder's accumulation value or death benefit or in dollar value of his or her investment in the applicable Separate Account. No brokerage commissions, fees or other remuneration will be paid by either the Replaced Portfolio or the Substitute Portfolio or by Affected Contractholders in connection with the Substitution. The transactions comprising the Substitution will be consistent with the policies of each investment company involved and with the general purposes of the 1940 Act.

19. Affected Contractholders will not incur any fees or charges as a result of the Substitution nor will their rights or the relevant PL Insurer's obligations under the Variable Contracts be altered in any way. The PL Insurers or their affiliates will pay all expenses and transaction costs of the Substitution, including legal and accounting expenses, any applicable brokerage expenses, and other fees and expenses. In addition, the Substitution will not impose any tax liability on Affected Contractholders. The Substitution will not cause the Variable Contract fees and charges currently being paid by Affected Contractholders to be greater after the Substitution than before the Substitution.

20. Currently, each Affected Contractholder is subject to transfer limitations which are stated in the applicable prospectus. Generally, an Affected Contractholder may not make more than twenty-five (25) transfers per calendar year and may only make one ''safe harbor'' transfer into the Money Market Portfolio once the 25 transfer limit is reached. Additionally, an Affected Contractholder may not make more than two transfers per calendar month involving international portfolios. Multiple transfers among the portfolios on the same day count as one transfer. Transfers to or from a portfolio cannot be made before the seventh calendar day following the last transfer to or from the same portfolio. If the seventh calendar day is not a business day, then a transfer may not occur until the next business day. The day of the last transfer is not considered a calendar day for purposes of meeting this requirement. Currently, there are no fees imposed for transfers among the investment options, but a transfer fee of up to $15 per transfer may be imposed in the future for transfers in excess of fifteen (15) in any contract year. The above transfer restrictions are referred to as ''Frequent Trading Policies.''

However, as described more fully below, for a 60 day period commencing 30 days prior to the Effective Date and ending 30 days after the Effective Date (''Free Transfer Period''), Affected Contractholders may reallocate to any other investment options available under their Variable Contract their accumulation value allocated to each subaccount invested in the Replaced Portfolio (''Replaced Subaccount'') and each subaccount invested in the Substitute Portfolio (together with the Replaced Subaccounts, the ''Affected Subaccounts'') without incurring any administrative costs or allocation (transfer) charges and such reallocation will not count toward the Frequent Trading Policies. In effect, each transfer by Affected Contractholders from the Affected Subaccounts during the Free Transfer Period will be a ''free transfer;'' if Affected Contractholders reallocate accumulation value in the Affected Subaccounts only during the Free Transfer Period, there will be no charge for the entire reallocation of accumulated value from that Affected Subaccount and the entire reallocation will not be counted toward the total number of reallocations made within the calendar year or Variable Contract year for purposes of determining the number of reallocations that may be made pursuant to the Frequent Trading Policies with respect to the Affected Subaccounts, or that may be made without incurring any potential future administrative or transfer fees, if any, under the relevant Variable Contract. The PL Insurers will not exercise any right they may have under the Variable Contracts to impose additional restrictions or fees on the free transfer from the Affected Subaccounts under the Variable Contracts during the Free Transfer Period.

21. All Affected Contractholders have been or will be sent notification of this Application by means of supplements to the prospectuses for the Variable Contracts on or shortly before or after the date that this Application is filed. Among other information regarding the proposed Substitution, the supplements will inform Affected Contractholders that the PL Insurers will not exercise any rights reserved by them under the Variable Contracts to impose additional restrictions or fees on transfers from the Affected Subaccounts during the Free Transfer Period. Following the date the order requested by this Application is issued, but before the Effective Date, PL Insurers will send Affected Contractholders a notice (the ''Substitution Notice'') setting forth the scheduled Effective Date as well as the commencement date and precise duration of the Free Transfer Period. The Substitution Notice will advise Affected Contractholders of their right, if they choose, at any time during the Free Transfer Period, to reallocate to any other investment options available under their Variable Contract their accumulation value allocated to each Affected Subaccount 30 days prior to and after the Effective Date without incurring any administrative costs or allocation (transfer) charges and such reallocation will not count toward determining the number of reallocations that may be made pursuant to the Frequent Trading Policies (a ''free transfer''). Any additional transfers beyond the ''free transfer'' must be made in accordance with the terms and conditions of the Variable Contracts.

22. Within five (5) business days after the Effective Date, Affected Contractholders will be sent a notice (''Post-Substitution Confirmation'') showing that each Affected Contractholder's interest in the Affected Subaccount invested the Replaced Portfolio has been transferred in exchange for units of the Subaccounts that invest in the Substitute Portfolio, and confirming the transactions effected on behalf of the respective Affected Contractholder with regard to the Substitution. All current Contractholders will have been sent a Select Fund prospectus containing a description of the Substitute Portfolio before the Effective Date.

**Applicants' Legal Analysis**

1. Section 26(c) of the 1940 Act prohibits any depositor or trustee of a unit investment trust that invests exclusively in the securities of a single issuer from substituting the securities of another issuer without the approval of the Commission. Section 26(c) provides that such approval shall be granted by order of the Commission, if the evidence establishes that the substitution is consistent with the protections of investors and the purposes fairly intended by the policy and the provisions of the 1940 Act.

2. Section 26(c) of the 1940 Act was enacted as part of the Investment Company Act Amendments of 1970. Prior to the enactment of these

amendments, a depositor or a unit investment trust could substitute new securities for those held by the trust by notifying the trust's security holders of the substitution within five days of the substitution. In 1966, the Commission, concerned with the high sales charges then common to most unit investment trusts and the disadvantageous position in which such charges placed investors who did not want to remain invested in the substituted fund, recommended that Section 26 be amended to require that a proposed substitution of the underlying investments of a trust receive prior Commission approval.

3. Applicants assert that the proposed Substitution appears to involve a substitution of securities within the meaning of section 26(c) of the 1940 Act. The Applicants therefore request an order from the Commission pursuant to Section 26(c) approving the proposed Substitution.

4. Applicants contend that although not identical, the investment objective of the Substitute Portfolio is compatible with that of the Replaced Portfolio. In addition, Applicants believe that the investment policies of the Substitute Portfolio are substantially similar to those of the Replaced Portfolio and assure that the investment objectives of Affected Contractholders can continue to be met.

5. Applicants note that the Commission has previously granted Section 26(c) orders to permit the substitution of one fund for another where the investment policies or restrictions or both were not exactly the same. In addition to the foregoing, Applicants generally submit that the Substitution meets the standards that the Commission and its staff have applied to similar substitutions that have been approved in the past.

6. Applicants state that the expenses of the Substitute Portfolio will be slightly lower than those experienced by the Replaced Portfolio, after giving effect to applicable fee waivers. The total net annualized expenses of the Replaced Portfolio, expressed as a percentage of net assets, is 1.01%. The total net annualized expenses of the Substitute Portfolio (including the net fees and expenses incurred by the Master Fund), expressed as a percentage of net assets, is expected to be 0.93%. Pursuant to the Expense Limitation Agreement with respect to the Substitute Portfolio, the total net annualized expenses are limited to 1.01% of the Substitute Portfolios average daily net assets for a period not less than two years from the Effective Date.

7. Applicants state that the Substitution will take place at relative net asset value (in accordance with Rule 22c–1 under the 1940 Act) with no change in the amount of any Affected Contractholder's accumulation value or death benefit or in dollar value of his or her investment in the Separate Accounts. Affected Contractholders will not incur any fees or charges as a result of the Substitution, nor will their rights or the PL Insurer' obligations under the affected Variable Contracts be altered in any way. In addition, the Substitution will not impose any tax liability on Affected Contractholders. The PL Insurers or their affiliates will pay all expenses incurred with the Substitution, including legal, accounting, and other fees and expenses.

8. Applicants also note that the Substitution will not cause the affected Variable Contract fees and charges currently being paid by Affected Contractholders to be greater after the Substitution than before the Substitution. In addition, while the PL Insurers do not anticipate increasing Variable Contract fees and/or charges paid by any current Contractholders, the PL Insurers have agreed not to increase the Variable Contract fees and charges specified in the Variable Contracts for a period of at least two years following the Substitution.

9. Applicants note that each Affected Contractholder will be sent a copy of: (1) A supplement informing shareholders of the proposed substitution; (2) a Substitution Notice setting forth the Effective Date and advising Affected Contractholders of their right to reconsider the Substitution and, if they so choose, any time during the Free Transfer Period, to withdraw or reallocate accumulation value under the affected Variable Contract; and (3) within five business days of the Effective Date, a Post-Substitution Confirmation.

10. Applicants note that each of the Variable Contracts reserves to the PL Insurers the right, subject to compliance with applicable law, to substitute shares of another open end management investment company for shares of an open end management investment company held by a subaccount of a Separate Account. The prospectuses for the Variable Contracts and the Separate Accounts contain appropriate disclosure of this right. The PL Insurers reserve this right of substitution to address situations where continued investment in an underlying investment option becomes unsuitable or unavailable.

11. Applicants assert that unlike traditional unit investment trusts where a depositor could only substitute an investment security in a manner which permanently affected all the investors in the trust, the Variable Contracts provide each Contractholder with the right to exercise his or her own judgment and transfer accumulation values into other subaccounts. Moreover, the Variable Contracts will offer Contractholders the opportunity to transfer amounts out of the affected subaccounts into any of the remaining subaccounts without cost or other disadvantage. The Substitution, therefore, will not result in the type of costly forced redemption which Section 26(c) was designed to prevent.

12. Applicants also contend that the Substitution also is unlike the type of substitution which Section 26(c) was designed to prevent in that by purchasing a Variable Contract, Contractholders select much more than a particular investment company in which to invest their account values. They also select the specific type of death benefit and other optional benefits offered by the PL Insurers in their Variable Contracts as well as numerous other rights and privileges set forth in the Variable Contracts. Contractholders may also have considered the PL Insurers' size, financial condition, and reputation for service in selecting their Variable Contract. The Applicant states that these factors will not change as a result of the Substitution.

13. Applicants contend that the Substitution will not result in the type of costly forced redemption that Section 26(c) was intended to guard against and is consistent with the protection of investors and the purposes fairly intended by the 1940 Act, because of what the Applicants consider to be the significant terms of the Substitution. These terms include:

(a) The Replaced Portfolio has investment objectives that Applicants believe are compatible with and policies and risks substantially similar to those of the Substitute Portfolio so that the objective of the Affected Contractholders can continue to be met.

(b) For two years following the implementation of the Substitution described herein, the net operating expenses of the Substitute Portfolio (including the net fees and expenses incurred by the Master Fund) will not exceed an annual rate of 1.01% of its average daily net assets.

(c) Affected Contractholders may reallocate accumulation value in the Affected Subaccounts during the sixty-day Free Transfer Period, with no charge for the reallocations of accumulated value from each Affected Subaccount. The reallocations will not be counted toward the total number of

reallocations made within the calendar year or Variable Contract year for purposes of determining whether the number of reallocations that may be made pursuant to the Frequent Trading Policies has been exceeded, or that may be made without incurring administrative or transfer fees, if any, under the relevant Variable Contract. Alternately, Affected Contractholders may withdraw amounts held in any Affected Subaccount at any time during the Free Transfer Period in accordance with the terms and conditions of the relevant Variable Contract. The Free Transfer Period commences upon a date declared in the Substitution Notice (which will be thirty days prior to the Effective Date) and will last for 30 days after the Effective Date.

(d) The Substitution will be effected at the net asset value of the shares in conformity with Section 22(c) of the 1940 Act and Rule 22c–1 thereunder, without the imposition of any transfer or similar charge by Applicants.

(e) The Substitution will take place at relative net asset value without change in the amount or value of any Variable Contract held by Affected Contractholders. Affected Contractholders will not incur any fees or charges as a result of the Substitution, nor will their rights or the obligations of the PL Insurers under such Variable Contracts be altered in any way. In addition, the PL Insurers will not increase the Variable Contract fees and charges specified in the Variable Contracts for a period of at least two years following the Substitution.

(f) The Substitution will be effected in such a manner that Applicants believe will continue to fulfill Affected Contractholders' objectives and risk expectations, because, according to Applicants, the investment objectives of the Substitute Portfolio are substantially similar to those of the Replaced Portfolio.

(g) No brokerage commissions, fees or other remuneration will be paid by the Replaced Portfolio or the Substitute Portfolio or Affected Contractholders in connection with the Substitution.

(h) The Substitution will not alter in any way the annuity, life or tax benefits afforded under the Variable Contracts held by any Affected Contractholder.

(i) The PL Insurers will send to their Affected Contractholders within five (5) business days of the Effective Date a copy of the Post-Substitution Confirmation confirming the transactions effected on behalf of the respective Affected Contractholder with regard to the Substitution.

*Conditions:*

Applicants agree that the proposed Substitution and related transaction will not be completed unless all of the following conditions are met:

1. The Commission shall have issued an order approving the Substitution under Section 26(c) of the 1940 Act.

2. Each Affected Contractholder will have been sent a copy of (i) a supplement informing shareholders of this Application; (ii) a prospectus for the Substitute Portfolio, (iii) a Substitution Notice setting forth the scheduled Effective Date and advising Affected Contractholders of their right, if they so choose, to reallocate or withdraw amounts allocated to the Affected Subaccount under their Variable Contract at any time during the sixty-day Free Transfer Period, in accordance with the terms and conditions of their Variable Contract; and (iv) within five business days of the Effective Date, a Post-Substitution Confirmation confirming the transactions effected on behalf of the respective Affected Contractholder with regard to the Substitution.

3. The PL Insurers shall have satisfied themselves that (i) the Variable Contracts allow the substitution of investment company shares in the manner contemplated by the Substitution and related transactions described herein; (ii) the transactions can be consummated as described in this Application under applicable insurance laws; and (iii) any regulatory requirements in each jurisdiction where the Variable Contracts are qualified for sale, have been complied with to the extent necessary to complete the transactions.

4. Pacific Life and Select Fund have entered into an Expense Limitation Agreement, with respect to the Substitute Portfolio, whereby Pacific Life will reimburse the Substitute Portfolio an amount necessary to ensure that net operating expenses do not exceed an annual rate of 1.01% during a two-year period from the date the Substitution occurs. Separate Account expenses will not be increased during this two-year period for Affected Contractholders.

5. Pacific Life will amend its advisory agreement with the Substitute Portfolio to reflect that in the event that the Master Fund level advisory fees and 12b–1 fees exceed 95 basis points, Pacific Life will subsidize any fees in excess of this amount for the life of the Substitute Portfolio or until the fee is changed pursuant to a shareholder vote.

*Conclusion:*

Applicants submit that, for all reasons stated above, the proposed Substitution is consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the 1940 Act, and that the requested order should be granted.

For the Commission, by the Division of Investment Management, under delegated authority.

**Nancy M. Morris,**

*Secretary.*

[FR Doc. E6–5016 Filed 4–5–06; 8:45 am]

**BILLING CODE 8010–01–P**

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## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–53582; File No. SR–Amex–2005–127]**

## Self-Regulatory Organizations; American Stock Exchange LLC; Order Approving Proposed Rule Change and Amendment Nos. 1 and 2 Thereto Relating to the Listing and Trading of Units of the United States Oil Fund, LP

March 31, 2006.

### I. Introduction

On December 6, 2005, the American Stock Exchange LLC (''Amex'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder.[2] On January 20, 2006, the Exchange filed Amendment No. 1 to the proposed rule change.[3] On February 15, 2006, the Exchange filed Amendment No. 2 to the proposed rule change.[4] The proposed rule change, as amended by Amendment Nos. 1 and 2, was published for comment in the **Federal Register** on February 24, 2006.[5] The Commission received no comments on the proposal. This order approves the proposed rule change, as amended by Amendment Nos. 1 and 2.

### II. Description of the Proposal

The Exchange proposes to add new Rules 1500 *et seq.* to permit the listing and trading of units in a partnership that is a commodity pool under the

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[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Partial Amendment dated, January 20, 2006 (''Amendment No. 1''). In Amendment No. 1, the Amex made clarifying changes to the ''purpose'' section of the proposed rule change.

[4] *See* Partial Amendment dated, February 15, 2006 (''Amendment No. 2''), which made technical and clarifying changes to the ''purpose'' section of the proposed rule change.

[5] *See* Securities Exchange Act Release No. 53324 (February 16, 2006), 71 FR 9614 (February 24, 2006)(''USOF Notice'').

Commodity Exchange Act (''CEA'')[6] that are designed to track a specified commodity or index of commodities by holding any combination of investments (i) comprised of or based on futures contracts, options on futures contracts, forward contracts, swaps, and over-the-counter (''OTC'') contracts for commodities or based on price changes in commodities, and (ii) in securities that may be required to satisfy margin or collateral requirements associated with investments in the financial instruments listed in item (i) above. Pursuant to these proposed rules, the Amex proposes to list and trade units (the ''Units'') of the United States Oil Fund, LP (''USOF'' or the ''Partnership''). The Units represent ownership of a fractional undivided beneficial interest in the net assets of USOF.

USOF, a Delaware limited partnership, is a commodity pool.[7] It is operated by Victoria Bay Asset Management, LLC, a single member Delaware limited liability company (the ''General Partner'' or ''Victoria Bay''), which is wholly owned by Wainwright Holdings, Inc. The General Partner was formed for the specific purpose of managing and controlling USOF and has registered as a Commodity Pool Operator (''CPO'') with the Commodity Futures Trading Commission (''CFTC'') and become a member of the National Futures Association (''NFA'').[8]

The investment objective of the USOF is for its net asset value (''NAV'')[9] to reflect the performance of the spot price of West Texas Intermediate light, sweet crude oil delivered to Cushing, Oklahoma (the ''WTI light, sweet crude oil''),[10] as represented by the performance of the price of the ''Benchmark Oil Futures Contract,''[11] less the expense of operation of USOF. The ''Benchmark Oil Futures Contract'' is the near-month (*i.e.*, spot month) future contract for delivery of WTI light, sweet crude oil traded on the New York Mercantile Exchange (''NYMEX'').[12] The Exchange states that an investment in the Units will allow both retail and institutional investors to easily gain exposure to the crude oil market in a cost-effective manner.

The assets of USOF will consist of futures contracts for light, sweet crude oil and other petroleum based fuels that are traded on the NYMEX or other U.S. and foreign exchanges[13] (collectively, ''Oil Futures Contracts''). USOF will also purchase other oil interests, such as cash-settled options on Oil Futures Contracts, forward contracts for oil, and OTC transactions that are based on the price of oil, other petroleum-based fuels, and indices based on the foregoing (collectively, ''Other Oil Interests'') (Oil Futures Contracts and Other Oil Interests are collectively referred to as ''Oil Interests.'') The Oil Interests for light, sweet crude oil and other petroleum based fuels in which USOF will invest are based on domestic oil, (WTI light, sweet crude), international oil (Brent Crude Oil), heating oil, natural gas, and gasoline. A description of these commodities and the primary trading market for futures contracts based on such commodities is set out in the USOF Notice.[14]

USOF will also invest in short term obligations of the United States Government (''Treasuries'') to be used to satisfy its current or future margin and collateral requirements and to otherwise satisfy its obligations with respect to its investments in Oil Interests.

Commodity-Based Trust Shares are trust issued receipts (''TIRs'') based on the value of an underlying commodity or index of commodities held by a trust.[15] Because of USOF's structure as a partnership and the nature of its investments, the current Commodity-Based Trust Shares rules (Amex Rules 1200A *et seq.*) do not specifically permit the Exchange to list this product. This proposal seeks to expand the ability of the Exchange to list and/or trade securities based on a portfolio of underlying investments that may not be ''securities'' in circumstances where the issuer is a partnership, organized as a commodities pool under the CEA.

Under proposed Amex Rule 1501, the Exchange would be able to list and trade the Units issued by USOF. For units issued by other commodity-based partnerships or other types of units issued by USOF, if any, the Exchange will submit a filing pursuant to Section 19(b) of the Act, subject to the review and approval of the Commission. The Exchange submits that the Units will conform to the initial and continued listing criteria under proposed Amex Rule 1502.[16]

Information about the liquidity, depth, and pricing mechanisms of the international oil market, operation of the USOF, and descriptions of the Units of USOF follows below.[17]

*Description of the Oil Market*

The Exchange states that crude oil is the world's most actively traded commodity. The investment objective of USOF is to track the spot month futures contracts for WTI light, sweet crude traded on the NYMEX, and thus USOF will primarily purchase WTI light, sweet crude Oil Futures Contracts traded on the NYMEX. The Oil Futures Contracts for light, sweet crude oil that

[6] The offering of the Units of the Partnership is registered with the Commission under the Securities Act of 1933.

[7] The Exchange states that USOF is not an investment company as defined in Section 3(a) of the Investment Company Act of 1940.

[8] Telephone conversation between Jeffrey Burns, Senior Associate General Counsel, Amex, Florence Harmon, Senior Special Counsel, Division of Market Regulation (''Division''), Commission, and Johnna B. Dumler, Attorney, Division, Commission, on February 15, 2006. Additional information about the management and structure of USOF is found in the USOF Notice, *supra* note 5.

[9] NAV is the total assets, less total liabilities of USOF, determined on the basis of generally accepted accounting principles. NAV per Unit is the NAV of USOF divided by the number of outstanding Units.

[10] The types of crude oil are typically described by a combination of their physical attributes and their place of origin. A few of these types of crude oil are widely traded and their prices serve as benchmarks in determining the spot and forward prices of the other types of crude oil. The three most important types of crude oil that are used as benchmarks are the light, sweet crude from the United States known as ''West Texas Intermediate,'' a light, sweet crude from Europe's North Sea known as ''Brent Crude,'' and a medium crude oil from the Middle East known as ''Dubai Crude.'' These three types of crude oil are the ones used most frequently in the trading of listed futures contracts, listed options, and non-exchange listed derivative contracts based on crude oil.

[11] Telephone conversation between Florence E. Harmon, Senior Special Counsel, Division, Commission, and Cliff Weber, Senior Vice President, Amex, on March 24, 2006.

[12] The Exchange will file a Form 19b–4 to obtain Commission approval for the continued listing and trading of the Units should the General Partner change the Benchmark Oil Futures Contract from this NYMEX WTI light, sweet crude oil futures contract. Telephone conversation between Jeffrey Burns, Senior Associate General Counsel, Amex, Florence Harmon, Senior Special Counsel, Division, Commission, and Johnna B. Dumler, Attorney, Division, Commission, on February 13, 2006.

[13] USOF will primarily purchase WTI light, sweet crude Oil Futures Contracts traded on the NYMEX, but may also purchase Oil Futures Contracts on other exchanges, including the Intercontinental Exchange, formerly known as the International Petroleum Exchange, which operates its futures business through ICE Futures (''ICE Futures''), and the Singapore Oil Exchange.

[14] *See* USOF Notice, *supra* note 5.

[15] *See* Securities Exchange Act Release No. 51446 (March 29, 2005), 70 FR 17272 (April 5, 2005). The Exchange listed and traded the iShares® COMEX Gold Trust under Amex Rule 1200A as the first Commodity Based Trust Share. Recently, the Exchange commenced the trading of shares of the streetTRACKS® Gold Trust (GLD) pursuant to Amex Rule 1000B on an unlisted trading privileges (''UTP'') basis. *See also* Securities Exchange Act Release No. 53105 (January 11, 2006), 71 FR 3129 (January 19, 2006) (order approving listing and trading of DB Commodity Index Tracking Fund).

[16] Proposed Amex Rule 1502 for listing the Units is substantially similar to current Amex Rule 1202A relating to Commodity-Based Trust Shares. As set forth in the section ''Initial and Continued Listing'' of proposed Amex Rule 1502, the minimum number of Units required to be outstanding at the time of trading will be 100,000. This section of the proposed rule specifically details the initial and continued listing standards for the Units.

[17] Further information about the USOF is provided in the USOF Notice, *supra* note 5.

are traded on the NYMEX are the world's most liquid forum for crude oil trading, as well as the most liquid futures contracts on a physical commodity. Due to the liquidity and price transparency of Oil Futures Contracts, they are used as a principal international pricing benchmark. Oil Futures Contracts for WTI light, sweet crude oil trade on the NYMEX in units of 1,000 U.S. barrels (42,000 gallons) and, if not closed out before maturity, will result in delivery of the oil to Cushing, Oklahoma, which is also accessible to the world market by two major interstate petroleum pipeline systems.[18]

*Futures Regulation*

The CEA [19] governs the regulation of commodity interest transactions, markets, and intermediaries. The CFTC administers the CEA. Among other things, the CEA provides that the trading of commodity interest contracts generally must be upon exchanges designated as contract markets or derivatives transaction execution facilities and that all trading on those exchanges must be done by or through exchange members. Commodity interest trading between sophisticated persons may be traded on a trading facility not regulated by the CFTC. As a general matter, the Exchange states that trading in spot contracts, forward contracts, options on forward contracts or options on commodities, or swap contracts between eligible contract participants is not within the jurisdiction of the CFTC and may therefore be effectively unregulated.

The Exchange states that non-U.S. futures exchanges differ in certain respects from their U.S. counterparts. Importantly, non-U.S. futures exchanges are not subject to regulation by the CFTC, but rather are regulated by their home country regulator. In contrast to U.S. designated contract markets, some non-U.S. exchanges are principals' markets, where trades remain the liability of the traders involved, and the exchange or an affiliated clearing organization, if any, does not become substituted for any party. Due to the absence of a clearing system, the Exchange states that such exchanges are significantly more susceptible to disruptions. Further, participants in such markets must often satisfy themselves as to the individual creditworthiness of each entity with which they enter into a trade. Trading on non-U.S. exchanges is often in the currency of the exchange's home jurisdiction. Consequently, USOF may be subject to the additional risk of fluctuations in the exchange rate between such currencies and U.S. dollars and the possibility that exchange controls could be imposed in the future.

*Investment Strategy*

In connection with tracking the price of the Benchmark Oil Futures Contract, the General Partner will endeavor to place USOF's trades in Oil Futures Contracts and Other Oil Interests and otherwise manage USOF's investments so that ''A'' will be within ±10 percent of ''B'', where:

- A is the average daily change in USOF's NAV for any period of 30 successive valuation days, *i.e.*, any day as of which USOF calculates its NAV; and
- B is the average daily change in the price of the Benchmark Oil Futures Contract over the same period.

Therefore, USOF's investment objective is to manage its assets so that the average daily change in the NAV for any period of 30 successive valuation days will be within 10% of the average daily change in the price of the Benchmark Oil Futures Contract over the same period.[20]

The Exchange believes that market arbitrage opportunities should cause USOF's Unit price to closely track USOF's per Unit NAV, which is targeted at the current Benchmark Oil Futures Contract. The price of the Benchmark Oil Futures Contract has closely tracked the spot price of WTI light, sweet crude oil over time.[21] Accordingly, the General Partner expects that the price of USOF's Units on the Exchange will closely track the spot price of a barrel of WTI light, sweet crude oil, less USOF's expenses.

*Investments*

USOF believes that it will be able to use a combination of Oil Futures Contracts and Other Oil Interests to manage the portfolio to achieve its investment objective of tracking the price of the Benchmark Oil Futures Contract. USOF further anticipates that the exact mix of Oil Futures Contracts and Other Oil Interests held by the portfolio will vary over time depending on, among over things, the amount of invested assets in the portfolio, price movements of oil, the rules and regulations of the various futures and commodities exchanges and trading platforms that deal in Oil Interests, and innovations in the Oil Interests marketplace including both the creation of new Oil Interest investment vehicles and the creation of new trading venues that trade in Oil Interests.

USOF's total portfolio composition will be disclosed each business day that the Amex is open for trading on its Web site at *http://www.unitedstatesoilfund.com* and/or the Exchange's Web site at *http://www.amex.com.* USOF states that Web site disclosure of portfolio holdings will be made daily and will include, as applicable, the name and value of each Oil Interest, the specific types of Other Oil Interests and characteristics of such Other Oil Interests, Treasuries and amount of cash held in the portfolio of USOF.[22]

Oil Futures Contracts

The principal Oil Interests to be invested in by USOF are Oil Futures Contracts. In particular, USOF expects to purchase futures on the WTI light, sweet crude oil traded on the NYMEX. USOF may also purchase futures on Brent crude oil traded on NYMEX.[23] Brent crude oil futures contracts are also listed on the ICE Futures. In addition to the commodities and futures exchanges in New York and London, several other established futures exchanges currently offer, or have announced plans to offer, trading in futures contracts on light, medium, or heavy crude oils, including exchanges in Singapore, Tokyo, Shanghai and Dubai.[24]

As noted above, the NYMEX futures contracts on WTI light, sweet crude oil have historically closely tracked the investment objective of USOF over both

[18] In practice, few Oil Futures Contracts result in delivery of the underlying oil.

[19] 7 U.S.C. 1 *et seq.*

[20] Telephone conversation between Jeffrey Burns, Senior Associate General Counsel, Amex, Florence Harmon, Senior Special Counsel, Division, Commission, and Johnna B. Dumler, Attorney, Division, Commission, on February 13, 2006.

[21] *See* Exhibit A attached to the Form 19b–4 filed by the Exchange, showing the tracking of the Benchmark Oil Futures Contract and the WTI spot price.

[22] *See* Amendment No. 1. The public Web site disclosure of the portfolio composition of USOF will coincide with the disclosure by the Administrator on each business day of the NAV for the Units and the Basket Amount (for orders placed during the day). Therefore, the same portfolio information will be provided on the public Web site, as well as in the facsimile or electronic mail message to Authorized Purchasers containing the NAV and Basket Amount (''Daily Dissemination''). The format of the public Web site disclosure and the Daily Dissemination will differ because the public Web site will list all portfolio holdings, while the Daily Dissemination will provide the portfolio holdings in a format appropriate for Authorized Purchasers, *i.e.*, the exact components of a Creation Unit.

[23] Brent crude oil is the price reference for two-thirds of the world's traded oil.

[24] The Exchange has represented that the USOF will only purchase Oil Futures Contracts on markets where the Exchange has entered into the appropriate comprehensive surveillance sharing arrangements. *See infra,* note 53.

the short-term, medium-term, and the long-term.[25] For that reason, USOF anticipates making significant investments in the current Benchmark Oil Futures Contract. The General Partner submits that Other Oil Futures Contracts, such as the Brent crude oil futures contract traded on the NYMEX and ICE Futures, the Dubai crude oil futures contract traded in Singapore and elsewhere, and other NYMEX petroleum-based futures contracts such as heating oil and gasoline, have also tended to track the investment objective of USOF, though not as closely as the NYMEX light, sweet crude (WTI) oil futures contract.[26]

Other Oil Interests

In addition to Oil Futures Contracts, there are also a number of listed options on Oil Futures Contracts on the principal commodities and futures exchanges. These option contracts offer investors and hedgers another vehicle for managing exposure to the crude oil market. USOF may purchase oil-related listed options on these exchanges in pursuing its investment objective.

In addition to the Oil Futures Contracts and related listed options, there also exists an active OTC market in derivatives linked to crude oil. These OTC derivative transactions are privately-negotiated agreements between two parties. Unlike most of the exchange-traded Oil Futures Contracts or related options, each party to an OTC contract bears the credit risk that the counterparty may not be able to perform its obligations.

Some oil-based derivatives transactions contain fairly generic terms and conditions and are available from a wide range of participants. Other oil-based derivatives have highly customized terms and conditions and are not as widely available. Many of these OTC contracts are cash-settled forwards for the future delivery of oil- or petroleum-based fuels that have terms similar to the Oil Futures Contracts. Others take the form of ''swaps'' in which the two parties exchange cash flows based on pre-determined formulas tied to the price of oil as determined by the spot, forward, or futures markets. USOF may enter into OTC derivative contracts whose value will be tied to changes in the difference between the WTI spot price, the price of Oil Futures Contracts traded on NYMEX, and the prices of non-NYMEX Oil Futures Contracts that may be invested in by USOF.

To protect itself from the credit risk that arises in connection with such contracts, USOF will enter into agreements with each counterparty that provide for the netting of its overall exposure to its counterparty and/or provide collateral or other credit support to address USOF's exposure.[27] The counterparties to an OTC contract will generally be major broker-dealers and banks or their affiliates, though certain institutions, such as large energy companies or other institutions active in oil commodities markets, may also be counterparties. The creditworthiness of each potential counterparty will be assessed by the General Partner. The General Partner will assess or review, as appropriate, the creditworthiness of each potential or existing counterparty to an OTC contract pursuant to guidelines approved by the General Partner's Board of Directors. Furthermore, the General Partner on behalf of USOF will only enter into OTC contracts with (a) members of the Federal Reserve System or foreign banks with branches regulated by the Federal Reserve Board; (b) primary dealers in U.S. government securities; (c) broker-dealers; (d) commodities futures merchants; or (e) affiliates of the foregoing. Existing counterparties will also be reviewed periodically by the General Partner.

USOF anticipates that the use of Other Oil Interests, together with its investments in Oil Futures Contracts, will produce price and total return results that closely track the investment objective of USOF.

Treasuries and Cash

USOF will invest virtually all of its assets not invested in Oil Interests in Treasuries, currently anticipated to be those securities with a remaining maturity of two years or less. The Treasuries and any cash will be available to be used to meet USOF's current or potential margin and collateral requirements with respect to its investments in Oil Interests. USOF will not use Treasuries as margin for new investments unless it has a sufficient amount of Treasuries and cash to meet the margin or collateral requirements that may arise due to changes in the value of its currently held Oil Interests. Other than in connection with a redemption of Units, USOF does not intend to distribute cash or property to its Unit holders. Interest earned on Treasuries and cash held by USOF will be retained by it to pay its expenses, to make investments to satisfy its investment objectives, or to satisfy its margin or collateral requirements.

Impact of Speculative Position Limits

The CFTC and U.S. designated contract markets, such as the NYMEX, have speculative position limits or position limits on the maximum net long or net short speculative position that any person or group of persons under common trading control (other than a hedger) may hold, own, or control in commodity interests. Among the purposes of speculative position limits is to prevent a corner or squeeze on a market or undue influence on prices by any single trader or group of traders.[28]

The foregoing speculative position limits will impact the mix of investments in Oil Interests by USOF, with such mix varying depending on the level of assets held by USOF. The following example illustrates how the mix will vary as assets increase, assuming the spot price of WTI light, sweet crude oil remains the same: Assuming the spot price for WTI light, sweet crude oil and the Unit price were each $60, USOF anticipates that it would invest the first $300 million of its daily net assets only in Oil Futures Contracts. The majority of those contracts will consist of the current Benchmark Oil Futures Contract. At this level, USOF could purchase 5,000 of such contacts or 25% of the NYMEX's speculative position limit for such contracts. When daily net assets exceed $300 million, USOF anticipates that it will invest the majority of its assets above that amount in the current Benchmark Oil Futures Contract with the balance of its net assets being invested in a mix of other Oil Futures Contracts, such as the Brent crude oil futures contract traded on NYMEX or the ICE Futures, and Other Oil Interests. At this level, USOF anticipates that it

[25] *See supra* note 21 and text accompanying note 12.

[26] *See* Exhibit B attached to the Form 19b–4 filed by the Exchange, tracking the NYMEX futures contracts on light, sweet crude oil, heating oil, natural gas and gasoline from November 17, 1995 to November 11, 2005.

[27] The agreements published by the International Swap and Derivatives Association (''ISDA'') and used extensively in the OTC derivatives market provides ''netting'' provisions. As discussed above, USOF's total portfolio composition will be disclosed, each business day that the Amex is open for trading, on its Web site at *http://www.unitedstatesoilfund.com* and/or the Exchange's Web site at *http://www.amex.com*, with a valuation assigned to these instruments.

[28] Most U.S. futures exchanges limit the amount of fluctuation in some futures contracts or options on futures contract prices during a single trading session. These regulations specify what are referred to as daily price fluctuation limits (*i.e.*, daily limits). The daily limits establish the maximum amount that the price of a futures contract or options on a futures contract may vary either up or down from the previous day's settlement price. Once the daily limit has been reached in a particular futures contract or options on a futures contract, no trades may be made at a price beyond the limit.

would also invest in various OTC derivative contracts to hedge the short-term price movements of Oil Futures Contracts against the current Benchmark Oil Futures Contract.

Once the daily net assets of the portfolio exceed approximately $1.2 billion, USOF anticipates that a majority of all further investments will be made in Oil Futures Contracts, other than the current Benchmark Oil Futures Contract, and in Other Oil Interests.

USOF anticipates that once the daily net assets of the portfolio exceed approximately $2.4 billion, the ability of the portfolio to invest in additional current Benchmark Oil Futures Contracts may be sharply limited due to speculative position limit rules in effect on the NYMEX. Assuming the current Benchmark Oil Futures Contract is at the same price level and half of the USOF's assets were then fully invested in such contracts ($1.2 billion), the current NYMEX position limits for such contracts (20,000 contracts) would be met. Under that scenario, all additional investments above the $2.4 billion level would be required to be invested in other Oil Future Contracts and Other Oil Interests. USOF anticipates that at or above the $2.4 billion daily net asset level, the majority of the total portfolio holdings would be in other Oil Futures Contracts or Other Oil Interests.

*Issuance and Redemption of USOF Units*

There will be two markets for investors to purchase and sell Units. New issuances of the Units will be made only in baskets of 100,000 Units or multiples thereof (a ''Basket''). USOF will issue and redeem Baskets of the Units on a continuous basis by or through participants who have entered into authorized purchaser agreements (''Authorized Purchaser Agreement'' and each such participant, an ''Authorized Purchaser'') [29] with the General Partner, at the NAV per Unit next determined after an order to purchase the Units in a Basket is received in proper form. Baskets may be issued and redeemed on any Business day (defined as any day other than a day on which the Amex, the NYMEX or the New York Stock Exchange is closed for regular trading) through the Marketing Agent in exchange for cash and/or Treasuries, which the Custodian receives from Authorized Purchasers or transfers to Authorized Purchasers, in each case on behalf of USOF. Baskets are then separable upon issuance into identical Units that will be listed and traded on the Exchange as equity securities.[30]

Baskets will be issued in exchange for Treasuries and/or cash in an amount equal to the NAV per Unit times 100,000 Units (the ''Basket Amount''). Authorized Purchasers that wish to purchase a Basket must transfer the Basket Amount to the Administrator (the ''Deposit Amount''). Authorized Purchasers that wish to redeem a Basket will receive an amount of Treasuries and cash in exchange for each Basket surrendered in an amount equal to the NAV per Basket (the ''Redemption Amount'').

On each business day, the Administrator will make available prior to the opening of trading on the Exchange, the estimated Basket Amount for the creation of a Basket based on the prior day's NAV.[31] The Exchange will disseminate at least every 15 seconds throughout the trading day, via the facilities of the Consolidated Tape Association (''CTA''), an amount representing, on a per Unit basis, the current indicative value of the Basket Amount (*See* ''Indicative Partnership Value'' below). Shortly after 4 p.m. Eastern Time (''ET''), the Administrator will determine the NAV for USOF as described below. At or about 4 p.m. ET on each business day, the Administrator will determine the Actual Basket Amount (''Actual Basket Amount'') for orders placed by Authorized Purchasers received before 12 p.m. ET that day.[32] Thus, although Authorized Purchasers place orders to purchase Units during the trading day until 12 p.m. ET, the Actual Basket Amount is determined as of 4 p.m. ET.

Shortly after 4 p.m. ET on each business day, the Administrator, Amex, and the General Partner will disseminate the NAV for the Units and the Actual Basket Amount (for orders placed during the day). The Basket Amount and the NAV are communicated by the Administrator to all Authorized Purchasers via facsimile or electronic mail message. The Amex will also disclose the NAV and the Actual Basket Amount on its Web site at *http://www.amex.com.*[33] On each day that the Amex is open for regular trading, the Administrator will adjust the Deposit Amount as appropriate to reflect the prior day's Partnership NAV and accrued expenses. The Administrator will then determine the Deposit Amount for a given business day.

Calculation of USOF's NAV

The Administrator will calculate NAV as follows: (1) Determine the current value of USOF assets and (2) subtract the liabilities of USOF. The NAV will be calculated at 4 p.m. ET using the settlement value [34] of Oil Futures Contracts traded on the NYMEX as of the close of open-outcry trading on the NYMEX at 2:30 p.m. ET,[35] and for the value of other Oil Futures Interests and Treasuries, the value of such investments as of the earlier of 4 p.m. ET or the close of trading on the New York Stock Exchange. The NAV is calculated by including any unrealized profit or loss on Oil Futures Contracts and other Oil Interests and any other credit or debit accruing to USOF but unpaid or not received by USOF. The NAV is then used to compute all fees (including the management and administrative fees) that are calculated from the value of Partnership assets. The Administrator will calculate the NAV per unit by dividing the NAV by the number of Units outstanding.

When calculating NAV for USOF, the Administrator will value Oil Futures Contracts based on the closing settlement prices quoted on the relevant commodities and futures exchange and obtained from various market data

[29] An ''Authorized Purchaser'' is a person, who at the time of submitting to the General Partner an order to create or redeem one or more Baskets: (i) Is a registered broker-dealer or other market participants, such as banks and other financial institutions, that are exempt from broker-dealer registration; (ii) is a DTC Participant; and (iii) has in effect a valid Authorized Participant Agreement. Telephone conversation between Jeffrey Burns, Senior Associate General Counsel, Amex, Florence Harmon, Senior Special Counsel, Division, Commission, and Johnna B. Dumler, Attorney, Division, Commission, on February 13, 2006 (clarifying that the reference to ''trustee'' in this sentence should be changed to ''General Partner'').

[30] The Exchange expects that the number of outstanding Units will increase and decrease as a result of creations and redemptions of Baskets.

[31] Amex clarified that it intended for this sentence to indicate that the Administrator will make available an ''estimated'' Basket Amount prior to the opening of trading on the Exchange, rather than the Actual Basket Amount (as described below), which will not be available until shortly after the close of trading on each business day. Additionally, such information (NAV, Actual Basket Amount, Estimated Basket Amount, daily disclosure of portfolio holdings) will be available to all market participants at the same time to avoid any informational advantage. Telephone conversation between Jeffrey Burns, Senior Associate General Counsel, Amex, Florence Harmon, Senior Special Counsel, Division, Commission, and Johnna B. Dumler, Attorney, Division, Commission, on February 8, 2006.

[32] *See* Amendment No. 2, *supra* note 4. *See also* ''Calculation and Payment of Deposit Amount'' and ''Calculation and Payment of Redemption Amount,'' *infra*.

[33] *See supra*, note 32.

[34] *See* Rule 6.52 of the NYMEX Rulebook.

[35] Telephone conversation between Jeffrey Burns, Senior Associate General Counsel, Amex, Florence Harmon, Senior Special Counsel, Division, Commission, and Johnna B. Dumler, Attorney, Division, Commission, on February 8, 2006.

vendors such as Bloomberg or Reuters.[36] The value of the Other Oil Interests for purposes of determining the NAV will be valued based upon the determination of the Administrator as to their fair market value. Certain types of Other Oil Interests, such as listed options on futures contracts, have closing prices that are available from the exchange upon which they are traded or from various market data vendors. If available from an exchange, Other Oil Interests will be valued based on the last sale price on the exchange or market where traded. If a contract fails to trade, the value shall be the most recent bid quotation from the third-party source.

Other types of Other Oil Interests, such as crude oil forward contracts do not trade on established exchanges, but typically have prices that are widely available from third-party sources. The Administrator may make use of such third-party sources in calculating a fair market value of these Other Oil Interests.

Certain types of Other Oil Interests, such as ''swaps,'' also do not have established exchanges upon which they trade and may not have readily available price quotes from third parties. Swaps and other similar derivative or contractual-type instruments will be first valued at a price provided by a single broker or dealer, typically the counterparty. If no such price is available, the contract will be valued at the price at which the counterparty to such contract would repurchase the instrument or terminate the contract. In determining the fair market value of such derivative contracts, the Administrator may make use of quotes from other providers of similar derivatives. If these are not available, the Administrator may calculate a fair market value of the derivative contract based on the terms of the contract and the movement of the underlying price factors of the contract.

Calculation and Payment of the Deposit Amount

The Deposit Amount of Treasuries and cash will be in the same proportion to the total net assets of USOF as the number of Units to be created is in proportion to the total number of Units outstanding. The General Partner will determine the requirements for the Treasuries that may be included in the Deposit Amount and will disseminate these requirements prior to the start of each business day. The amount of cash that is required is the difference between the aggregate market value of the Treasuries required to be included in the Deposit Amount as of 4 p.m. ET on the date of purchase and the total required deposit.

All purchase orders must be received by the Marketing Agent by 12 p.m. ET. Delivery of the Deposit Amount, *i.e.*, Treasuries and cash, to the Administrator must occur by the third Business day following the purchase order date.[37] Thus, the General Partner will disseminate shortly after 4 p.m. ET the amount of Treasuries and cash to be deposited with the Custodian for each Basket (100,000 Units) order properly submitted by Authorized Purchasers by 12 p.m. ET that business day, (*e.g.*, the Actual Basket Amount).

Calculation and Payment of the Redemption Amount

The Units will not be individually redeemable but will only be redeemable in Baskets. To redeem, an Authorized Purchaser will be required to accumulate enough Units to constitute a Basket (*i.e.*, 100,000 Units). An Authorized Purchaser redeeming a Basket will receive the Redemption Amount.

Upon the surrender of the Units and payment of applicable redemption transaction fee,[38] taxes or charges, the Custodian will deliver to the redeeming Authorized Purchaser the Redemption Amount. The Redemption Amount of Treasuries and cash will be in the same proportion to the total net assets of USOF as the number of Units to be redeemed is in proportion to the total number of Units outstanding. The General Partner will determine the Treasuries to be included in the Redemption Amount. The amount of cash that is required is the difference between the aggregate market value of the Treasuries required to be included in the Redemption Amount calculated as of 4:00 p.m. ET on the date of redemption and the total Redemption Amount. All redemption orders must be received by the Marketing Agent by 12:00 p.m. ET on the date redemption is requested. Delivery of the Basket to be redeemed to the Custodian and payment of Redemption Amount will occur by the third business day (T+3) following the redemption order date.

The Exchange believes that the Units will not trade at a material discount or premium to a Unit's NAV based on potential arbitrage opportunities. Due to the fact that the Units can be created and redeemed only in Baskets at the NAV, the Exchange submits that arbitrage opportunities should provide a mechanism to mitigate the effect of any premiums or discounts that may exist from time to time.

*Dissemination and Availability of Information*

Oil Futures Contracts

The daily settlement prices for the NYMEX traded Oil Futures Contracts held by USOF are publicly available on the NYMEX Web site at *http://www.nymex.com*. The Exchange's Web site at *http://www.amex.com* will also include a hyperlink to the NYMEX Web site for the purpose of disclosing futures contract pricing. In addition, various market data vendors and news publications publish futures prices and related data. The Exchange represents that quote and last sale information for the Oil Futures Contracts are widely disseminated through a variety of market data vendors worldwide, including Bloomberg and Reuters. Thus, last sale information for the Benchmark Oil Futures Contract will be updated and disseminated at least every 15 seconds in accordance with the continued listing standards by one or more major market data vendors during the time the Units trade on Amex.[39] From 2:30 p.m. ET to the opening of NYMEX ACCESS at 3:15 p.m. ET, the pricing for the Benchmark Oil Futures Contract will not be updated. The Exchange further represents that real-time futures data is available by subscription from Reuters and Bloomberg. The NYMEX also provides delayed futures information on current and past trading sessions and market news free of charge on its Web site. The specific contract specifications for the Oil Futures Contracts are also available on the NYMEX Web site and the ICE Futures Web site at *https://www.theice.com.*

USOF Units

The Web site for USOF, which will be publicly accessible at no charge, will include the following information: (1) The prior business day's NAV and the reported closing price; (2) the mid-point of the bid-ask price[40] in relation to the NAV as of the time the NAV is calculated (the ''Bid-Ask Price''); (3)

[36] The Amex confirmed that the pricing for the NAV also will be derived from the NYMEX futures contract nearest to settlement (spot month) for WTI light, sweet crude.

[37] Authorized Purchasers are required to pay a transaction fee of $1,000 for each order to create one or more Baskets.

[38] Authorized Purchasers are required to pay a transaction fee of $1,000 for each order to redeem one or more Baskets.

[39] Telephone conversation between Florence E. Harmon, Senior Special Counsel, Division, Commission, and Cliff Weber, Senior Vice President, Amex, on March 24, 2006.

[40] The Bid-Ask Price of Units is determined using the highest bid and lowest offer as of the time of calculation of the NAV.

calculation of the premium or discount of such price against such NAV; (4) data in chart form displaying the frequency distribution of discounts and premiums of the Bid-Ask Price against the NAV, within appropriate ranges for each of the four (4) previous calendar quarters; (5) the prospectus and the most recent periodic reports filed with the Commission or required by the CFTC; and (6) other applicable quantitative information. In addition, information on USOF's daily portfolio holdings will be available on its Web site at *http://www.unitedstatesoilfund.com* and will be equally accessible to investors and Authorized Purchasers.[41]

As described above, the NAV for USOF will be calculated and disseminated daily. The Amex also intends to disseminate for USOF on a daily basis by means of CTA/CQ High Speed Lines information with respect to the Indicative Partnership Value (as discussed below), recent NAV, Units outstanding, the estimated Basket Amount and the Deposit Amount (*e.g.*, the Actual Basket Amount). The Exchange will also make available on its Web site daily trading volume, closing prices and the NAV. The closing price and settlement prices of the Oil Futures Contracts held by USOF are also readily available from the NYMEX, automated quotation systems, published or other public sources, or on-line information services such as Bloomberg or Reuters. In addition, the Exchange will provide a hyperlink on its Web site at *http://www.amex.com* to USOF's Web site.

Indicative Partnership Value

The Exchange will disseminate through the facilities of the CTA an updated Indicative Partnership Value (the ''Indicative Partnership Value'') per Unit basis at least every 15 seconds during the regular Amex trading hours of 9:30 a.m. to 4:15 p.m. ET. The Indicative Partnership Value will be calculated based on the Treasuries and cash required for creations and redemptions (*i.e.*, NAV per limit x 100,000) adjusted to reflect the price changes of the current Benchmark Oil Futures Contract.

The Indicative Partnership Value will not reflect price changes to the price of the current Benchmark Oil Futures Contract between the close of open-outcry trading of these oil futures contract on the NYMEX at 2:30 p.m. ET and the open of trading on the NYMEX ACCESS market at 3:15 p.m. ET.[42] The Indicative Partnership Value after 3:15 p.m. ET will reflect changes to the current Benchmark Oil Futures Contract as provided for through NYMEX ACCESS. The value of a Unit may accordingly be influenced by the non-concurrent trading hours of the Amex and NYMEX. While the Units will trade on the Amex from 9:30 a.m. to 4:15 p.m. ET, the current Benchmark Oil Futures Contract will trade, in open-outcry, on the NYMEX from 10:00 a.m. ET to 2:30 p.m. ET and NYMEX ACCESS from 3:15 p.m. ET through the following morning 9:30 a.m. ET.

The Exchange represents that while the NYMEX (open outcry) is open for trading, the Indicative Partnership Value can be expected to closely approximate the value per unit of the Basket Amount. However, during Amex trading hours when the Oil Futures Contracts have ceased trading, spreads and resulting premiums or discounts may widen, and therefore, increase the difference between the price of the Units and the NAV of the Units. The Exchange believes that dissemination of the Indicative Partnership Value based on the cash amount required for a Basket provides additional information that is not otherwise available to the public and is useful to professionals and investors in connection with the Units trading on the Exchange or the creation or redemption of the Units.

*Criteria for Initial and Continued Exchange Listing*

USOF will be subject to the criteria in proposed Amex Rule 1502 for initial and continued listing of the Units. These continued listing criteria provide for the delisting or removal from listing of the Units under any of the following circumstances:

- Following the initial twelve month period from the date of commencement of trading of the Units: (i) If USOF has more than 60 days remaining until termination and there are fewer than 50 record and/or beneficial holders of the Units for 30 or more consecutive trading days; (ii) if USOF has fewer than 50,000 Units issued and outstanding; or (iii) if the market value of all Units issued and outstanding is less than $1,000,000.
- If the value of the underlying spot commodity or Oil Futures Contract is no longer calculated or available on at least a 15-second delayed basis or the Exchange stops providing a hyperlink on its Web site to any such investment commodity or asset value.
- The Indicative Partnership Value is no longer made available on at least a 15-second delayed basis.
- If such other event shall occur or condition exists which in the opinion of the Exchange makes further dealings on the Exchange inadvisable.

A minimum of 100,000 Units will be required to be outstanding at the start of trading.[43] It is anticipated that the initial price of a Unit will be approximately $67.00 based upon the WTI light, sweet crude oil spot price on March 30, 2006.[44] USOF expects that the initial Authorized Purchaser will purchase the initial Basket of 100,000 Units at the initial offering price per Unit equal to the closing price of the expiration month light, sweet crude (WTI) oil futures contract listed on the NYMEX on the first Business day prior to the launch date. On the date of the public offering and thereafter, USOF will continuously issue Units in Baskets of 100,000 Units to Authorized Purchasers at NAV. The Exchange believes that the anticipated minimum number of Units outstanding at the start of trading is sufficient to provide adequate market liquidity and to further USOF's objective to seek to provide a simple and cost effective means of accessing the commodity futures markets.

The Exchange represents that it prohibits the initial and/or continued listing of any security that is not in compliance with Rule 10A–3 under the Act.[45]

*Original and Annual Listing Fees*

The Amex original listing fee applicable to the listing of USOF is $5,000. In addition, the annual listing fee applicable under Section 141 of the Amex *Company Guide* will be based on the year-end aggregate number of Units in all series of USOF outstanding at the end of each calendar year.

*Trading Rules*

The Units are equity securities subject to Amex Rules governing the trading of equity securities, including, among others, rules governing priority, parity and precedence of orders, specialist responsibilities and account opening

[41] *See* Amendment No. 1, *supra* note 3.

[42] NYMEX ACCESS(r), an electronic trading system, is open for price discovery on the NYMEX light, sweet crude oil futures contract each Monday through Thursday at 3:15 p.m. ET through the following morning at 9:30 a.m. ET, and from 7:00 p.m. Sunday night until Monday morning 9:30 a.m. ET.

[43] Telephone conversation between Florence E. Harmon, Senior Special Counsel, Division, Commission, and Cliff Weber, Senior Vice President, Amex, on March 29, 2006.

[44] Telephone conversation between Jeffrey Burns, Associate General Counsel, Amex, and Florence E. Harmon, Senior Special Counsel, Division, Commission, on March 31, 2006. As of March 30, 2006, the settlement spot price was $67.15 for a barrel of oil. The exact price of a Unit will be determined on the date of launch. *Id.*

[45] The Exchange represents that the listed issuer of the USOF Units qualifies for the exemption in Rule 10A–3(c)(7) of the Act.

and customer suitability (Amex Rule 411). Initial equity margin requirements of 50% will apply to transactions in the Units. Units will trade on the Amex until 4:15 p.m. ET each business day and will trade in a minimum price variation of $0.01 pursuant to Amex Rule 127. Trading rules pertaining to odd-lot trading in Amex equities (Amex Rule 205) will also apply.

Amex Rule 154, Commentary .04(c) provides that stop and stop limit orders to buy or sell a security (other than an option, which is covered by Amex Rule 950(f) and Commentary thereto) the price of which is derivatively priced based upon another security or index of securities, may with the prior approval of a Floor Official, be elected by a quotation, as set forth in Commentary .04(c)(i–v). The Exchange has designated the Units as eligible for this treatment.[46]

The Units will be deemed ''Eligible Securities'', as defined in Amex Rule 230, for purposes of the Intermarket Trading System Plan and therefore will be subject to the trade-through provisions of Amex Rule 236 which require that Amex members avoid initiating trade-throughs for ITS securities.

Specialist transactions of the Units made in connection with the creation and redemption of Units will not be subject to the prohibitions of Amex Rule 190, which generally prohibits business transactions between a specialist (or its member organization) and a company (or its officers, directors, or 10% stockholder) in which the specialist is registered.[47] Unless exemptive or no-action relief is available, the Units will be subject to the short sale rule, Rule 10a–1 under the Act and Regulation SHO.[48] If exemptive or no-action relief is provided, the Exchange will issue a notice detailing the terms of the exemption or relief. The Units will generally be subject to the Exchange's stabilization rule, Amex Rule 170, except that specialists may buy on ''plus ticks'' and sell on ''minus ticks,'' in order to bring the Units into parity with the underlying commodity or commodities and/or futures contract price. Commentary .01 to Amex Rule 1503 sets forth this limited exception to Amex Rule 170.

The Amex proposes Rule 1503 to address potential conflicts of interest in connection with acting as a specialist in the Units. Specifically, Amex Rule 1503 provides that the prohibitions in Amex Rule 175(c) apply to a specialist in the Units so that the specialist or affiliated person may not act or function as a market-maker in an underlying asset, related futures contract or option or any other related derivative. An affiliated person of the specialist, consistent with Amex Rule 193, may be afforded an exemption to act in a market making capacity, other than as a specialist in the Units on another market center, in the underlying asset, related futures or options or any other related derivative.

Amex Rule 1504(a) provides that the member organization acting as specialist in the Units is obligated to conduct all trading in the Units in its specialist account, subject to only the ability to have one or more investment accounts, all of which must be reported to the Exchange (*See* Rule 170).

Moreover, Amex Rule 1504(b) requires that the specialist in the Units make available to the Exchange information relating to its transactions or the transactions of any member, member organization, limited partner, officer or approved person thereof, registered or non-registered employee affiliated with such entity for its or their own accounts in the underlying physical asset or commodity, related futures or options on futures, or any other related derivatives.[49] Finally, Amex Rule 1504(c) prohibits the specialist registered as such in the Units from using any material nonpublic information received from any person associated with a member, member organization or employee of such person regarding trading by such person or employee in the physical asset or commodity, futures or options on futures, or any other related derivatives.

*Trading Halts*

Prior to the commencement of trading, the Exchange will issue an Information Circular (described below) to members informing them of, among other things, Exchange policies regarding trading halts in the Units. First, the Information Circular will advise that trading will be halted in the event the market volatility trading halt parameters set forth in Amex Rule 117 have been reached. Second, the Information Circular will advise that, in addition to the parameters set forth in Amex Rule 117, the Exchange will halt trading in the Units if trading in the current Benchmark Oil Futures Contract is halted or suspended. Third, with respect to a halt in trading that is not specified above, the Exchange may also consider other relevant factors and the existence of unusual conditions or circumstances that may be detrimental to the maintenance of a fair and orderly market. Additionally, the Exchange represents that it will cease trading the Units if the conditions in Amex Rule 1202(d)(2)(ii) or (iii) exist (*i.e.*, if there is a halt or disruption in the dissemination of the Indicative Partnership Value and/or underlying Benchmark Futures Contract (spot commodity) value).[50]

*Information Circular*

The Amex will distribute an Information Circular to its members in connection with the trading of the Units. The Information Circular, will discuss the special characteristics of and risks of trading in the Units. Specifically, the Information Circular, among other things, will discuss what the Units are, how a basket is created and redeemed, the requirement that members and member firms deliver a prospectus to investors purchasing newly issued Units prior to or concurrently with the confirmation of a transaction, applicable Amex rules, dissemination information regarding the per unit Indicative Partnership Value, trading information and applicable suitability rules. The Information Circular will also explain that USOF is subject to various fees and expenses described in the Registration Statement. The Information Circular will also reference the fact that there is no regulated source of last sale information regarding physical commodities, that the Commission has no jurisdiction over the trading of WTI light, sweet crude oil, Brent crude oil, heating oil, gasoline,

[46] *See* Securities Exchange Act Release No. 29063 (April 10, 1991), 56 FR 15652 (April 17, 1991) at note 8, regarding the Exchange's designation of equity derivative securities as eligible for such treatment under Amex Rule 154, Commentary .04(c).

[47] *See* Commentary .05 to Amex Rule 190.

[48] USOF expects to seek relief, in the near future, from the Commission in connection with the trading of the Units from the operation of the short sale rule, Rule 10a–1 under the Act, no-action relief from Regulation SHO, and other no-action or exemptive relief from the Act.

[49] As a general matter, the Exchange has regulatory jurisdiction over its members, member organizations and approved persons of a member organization. The Exchange also has regulatory jurisdiction over any person or entity controlling a member organization, as well as a subsidiary or affiliate of a member organization that is in the securities business. A subsidiary or affiliate of a member organization that does business only in commodities or futures contracts would not be subject to Exchange jurisdiction, but the Exchange could obtain information regarding the activities of such subsidiary or affiliate through surveillance sharing agreements with regulatory organizations of which such subsidiary or affiliate is a member.

[50] In the event the Benchmark Oil Futures Contract value or Indicative Partnership Value is no longer calculated or disseminated, the Exchange would immediately contact the Commission to discuss measures that may be appropriate under the circumstances. Telephone conversation between Jeffrey Burns, Associate General Counsel, Amex, Florence Harmon, Senior Special Counsel, Division, Commission and Johnna B. Dumler, Attorney, Division, Commission on February 8, 2006.

natural gas or other petroleum-based fuels, that the CFTC has regulatory jurisdiction over the trading of oil-based futures contracts and related options, and that trading in certain OTC commodity based derivatives is not within the jurisdiction of the CFTC and may therefore be effectively unregulated.[51]

The Information Circular will inform members and member organizations, prior to commencement of trading, of the prospectus delivery requirements applicable to USOF. The Exchange notes that investors purchasing Units directly from USOF (by delivery of the Deposit Amount) will receive a prospectus. Amex members purchasing Units from USOF for resale to investors will deliver a prospectus to such investors.

The Information Circular will also notify members and member organizations about the procedures for purchases and redemptions of Units in Baskets, and that Units are not individually redeemable but are redeemable only in Baskets or multiples thereof.

The Information Circular will advise members of their suitability obligations with respect to recommended transactions to customers in the Units pursuant to Amex Rule 411. The Information Circular will also discuss any exemptive or no-action relief, if granted, by the Commission or the staff from any rules under the Act. The Information Circular will disclose that the NAV for Units will be calculated shortly after 4:00 p.m. ET each trading day.

*Surveillance*

The Exchange submits that its surveillance procedures are adequate to deter and detect violations of Exchange rules relating to the trading of the units. The surveillance procedures for the Units will be similar to those used for the iShares(®) COMEX Gold Trust and the streetTRACKS(®) Gold Trust Shares, as well as other TIRs and exchange-traded funds. In addition, the surveillance procedures will incorporate and rely on existing Amex surveillance procedures governing options and equities.[52]

The Exchange currently has in place a comprehensive surveillance sharing agreement with the NYMEX for the purpose of providing information in connection with trading in or related to futures contracts traded on the NYMEX. In addition, the Exchange has entered into a comprehensive surveillance sharing arrangement with ICE Futures for the purpose of providing information in connection with the trading in or related to futures contracts traded on the ICE Futures. To the extent that USOF invests in Oil Interests traded on other exchanges, the Amex will enter into comprehensive surveillance sharing arrangements, acceptable to the Commission staff, with those particular exchanges.[53]

## III. Discussion and Commission's Findings

After careful consideration, the Commission finds that the proposed rule change, as amended, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[54] In particular, the Commission finds that the proposed rule change, as amended, is consistent with the requirements of Section 6(b)(5) of the Act,[55] which requires, among other things, that the Exchange's rules be designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest.

*A. Surveillance*

Information sharing agreements with primary markets are an important part of a self-regulatory organization's ability to monitor for trading abuses in derivative products. The Commission believes that the Exchange's comprehensive surveillance sharing agreements with the NYMEX and ICE Futures for the purpose of providing information in connection with trading in or related to futures contracts traded on the NYMEX and the ICE Futures create the basis for the Amex to monitor for fraudulent and manipulative practices in the trading of the Units. Should the USOF invest in oil derivatives traded on markets such as the Singapore Oil Market, the Exchange represents that it will file a proposed rule change pursuant to Section 19(b) of the Act, seeking Commission approval of the Exchange's surveillance arrangement with such market.

Moreover, Amex Rule 1504(b) requires that specialists handling the Units provide the Exchange with necessary information relating to its transactions and the trading activities of any member, member organization, limited partner, officer or approved person thereof, registered or non-registered employee affiliated with such entity in the underlying physical assets or commodities, related futures contracts and options thereon or any other derivative. Furthermore, Amex Rule 1504(c) prohibits the specialist registered as such in the Units from using any material nonpublic information received from any person associated with a member, member organization or employee of such person regarding trading by such person or employee in the physical asset or commodity, futures or options on futures, or any other related derivatives. The Commission believes that these rules provide the Amex with the tools necessary to adequately surveil trading in the Units.

*B. Dissemination of Information*

The Commission believes that sufficient venues exist for obtaining reliable information so that investors in the Units can monitor the underlying Benchmark Oil Futures Contract market relative to the NAV of their Units. There is a considerable amount of oil futures contract price and information available through public Web sites and professional subscription services, including Bloomberg and Reuters. Other than from 2:30 p.m. to 3:15 p.m. ET, quote and last sale information for the Benchmark Oil Futures Contract will be updated and disseminated at least every 15 seconds, in accordance with the continued listing standards, by one or more major market data vendors during the time the Units trade on Amex. In addition, the daily settlement prices for the NYMEX traded Oil Futures Contracts held by USOF are publicly available on the NYMEX Web site at (*http://www.nymex.com*) and various market data vendors, and news publications publish futures prices and related data. The NYMEX also provides delayed futures information on current and past trading sessions and market news free of charge on its Web site.

The Commission further notes that the Web site for USOF, which will publicly accessible at no charge, will contain the following information: (1) The prior business day's NAV and the reported closing price; (2) the mid-point

[51] Telephone conversation between Jeffrey Burns, Senior Associate General Counsel, Amex, and Florence Harmon, Senior Special Counsel, Division, Commission, on March 31, 2006.

[52] Proposed Rule 1504 will aid the Exchange in conducting appropriate surveillance.

[53] In such event, the Exchange will file a proposed rule change pursuant to Rule 19b–4 of the Act, indicating such surveillance arrangements. Telephone conversation between Jeffrey Burns, Senior Associate General Counsel, Amex, and Florence Harmon, Senior Special Counsel, Division, Commission, on March 29, 2006. *See also* USOF Notice, *supra* note 5, at n.14.

[54] In approving this proposed rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[55] 15 U.S.C. 78f(b)(5).

of the bid-ask price[56] in relation to the NAV as of the time the NAV is calculated (the ''Bid-Ask Price''); (3) calculation of the premium or discount of such price against such NAV; (4) data in chart form displaying the frequency distribution of discounts and premiums of the Bid-Ask Price against the NAV, within appropriate ranges for each of the four (4) previous calendar quarters; (5) the prospectus and the most recent periodic reports filed with the Commission or required by the CFTC; and (6) other applicable quantitative information. In addition, information on USOF's daily portfolio holdings will be available on its Web site at (*http://www.unitedstatesoilfund.com*) and will be equally accessible to investors and Authorized Purchasers.

In addition, the NAV for the USOF will be calculated and disseminated on a daily basis. The Exchange represents that it intends to disseminate for USOF on a daily basis by means of CTA/CQ High Speed Lines information with respect to the Indicative Partnership Value, recent NAV, Units outstanding, the estimated Basket Amount and the Actual Basket Amount. The Exchange will also make available on its Web site (*http://www.amex.com*) daily trading volume, closing prices and the NAV. The Commission believes that the wide availability of information about the Units the Oil Futures Contracts held by the USOF and NAV will facilitate transparency with respect to the proposed Units and diminish the risk of manipulation or unfair informational advantage.

*C. Listing and Trading*

The Commission finds that the Exchange's proposed rules and procedures for the listing and trading of the proposed Units are consistent with the Act. The Units will trade as equity securities subject to Amex rules including, among others, rules governing priority, parity and precedence of orders, specialist responsibilities, account opening and customer suitability requirements. The Commission believes that the listing and delisting criteria for the Units should help to maintain a minimum level of liquidity and therefore minimize the potential for manipulation of the Units. Finally, the Commission notes that the Information Circular the Exchange will distribute will inform members and member organizations about the terms, characteristics and risks in trading the Units, including their prospectus delivery obligations.

**IV. Conclusion**

*It is therefore ordered,* pursuant to Section 19(b)(2) of the Act, that the proposed rule change (SR–Amex–2005–127), as amended, be, and it hereby is, approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[57]

**Nancy M. Morris,**

*Secretary.*

[FR Doc. E6–4971 Filed 4–5–06; 8:45 am]

BILLING CODE 8010–01–P

[56] The Bid-Ask Price of Units is determined using the highest bid and lowest offer as of the time of calculation of the NAV.

[57] 17 CFR 200.30–3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–53576; File No. SR–CBOE–2006–14]**

## Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing of Proposed Rule Change Relating to Customer Portfolio Margining Requirements

March 30, 2006.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Exchange Act'' or ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on February 2, 2006, the Chicago Board Options Exchange, Incorporated (''CBOE'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

**I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change**

CBOE is proposing to broaden its Rule 12.4—*Portfolio Margin and Cross-Margin for Index Options*—to allow portfolio margining of listed equity options, narrow-based index options, and security futures, as well as certain OTC instruments. The text of the proposed rule change is below. Additions are in italics. Deletions are in brackets.

* * * * *

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

Chicago Board Options Exchange, Inc.

Chapter XII

Margins

Rule 12.4. Portfolio Margin for Index and Equity Options, and Cross-Margin for Index Options

As an alternative to the transaction / position specific margin requirements set forth in Rule 12.3 of this Chapter 12, members may require margin for listed[, broad-based U.S.] index *and equity* options *(defined below as a ''listed option''), options on exchange traded funds, security futures products,* index warrants, [and] underlying instruments *and unlisted derivatives* (as defined below) in accordance with the portfolio margin requirements contained in this Rule 12.4.

In addition, members, provided they are a Futures Commission Merchant (''FCM'') and are either a clearing member of a futures clearing organization or have an affiliate that is a clearing member of a futures clearing organization, are permitted under this Rule 12.4 to combine a customer's related instruments (as defined below), *listed index options, options on exchange traded funds* [and listed, broad-based U.S. index options], index warrants, [and ]underlying instruments *and unlisted derivatives* and compute a margin requirement (''cross-margin'') on a portfolio margin basis. Members must confine cross-margin positions to a portfolio margin account dedicated exclusively to cross-margining.

Application of the portfolio margin and cross-margining provisions of this Rule 12.4 to IRA accounts is prohibited.

(a) Definitions.

(1) The term ''listed option'' shall mean any option traded on a registered national securities exchange or automated facility of a registered national securities association.

*(2) The term ''security future'' means a contract of sale for future delivery of a single security or of a narrow-based security index, including any interest therein or based on the value thereof, to the extent that that term is defined in Section 3(a)(55) of the Securities Exchange Act of 1934.*

*(3) The term ''security futures product'' means a security future, or an option on any security future.*

([2]*4*) The term ''unlisted *derivative*[option]'' means any *equity-based (or equity index-based) unlisted* option, *forward contract or swap that can be priced by a model approved by a ''DEA'' covering the same underlying instrument*[ not included in the definition of listed option].

(5) The term ''option series'' means all option contracts of the same type (either a call or a put) and exercise style, covering the same underlying instrument with the same exercise price, expiration date, and number of underlying units.

([3]*6*) *The term ''options class'' refers to all options contracts covering the same underlying instrument.*

([4]*7*) The term ''portfolio'' means options of the same options class *grouped with their corresponding security futures products,* underlying instruments and related instruments.

([6]*8*) The term ''related instrument'' within an option class or product group means futures contracts and options on futures contracts covering the same underlying instrument *, but does not include security futures products.*

([7]*9*) The term ''underlying instrument'' means long and short positions, *as appropriate, covering the same security, group or index of securities, or a security which is exchangeable for or convertible into the underlying security or group of securities within a period of 90 days, or* [in ]an exchange traded fund or other fund product registered under the Investment Company Act of 1940 that holds the same securities, and in the same proportion, as contained in *an* [broad-based ]index on which options are listed. The term underlying instrument shall not be deemed to include futures contracts, options on futures contracts[,] *or* underlying stock baskets[, or unlisted instruments]. *Securities that are included in the FT Actuaries World index can qualify as an underlying instrument. Restricted and control stock qualify as an underlying instrument provided that the offsetting option or other eligible derivative has been established in a manner consistent with SEC Rule 144 or SEC ''no-action'' positions to permit the sale of the stock without restriction upon exercise of the option or other eligible derivative.*

([8]*10*) The term ''product group'' means two or more portfolios of the same type [(see subparagraph (a)(9) below) ]for which it has been determined by Rule 15c3–1*a(b)(ii)* under the Securities Exchange Act of 1934 that a percentage of offsetting profits may be applied to losses at the same valuation point.

([9]*11*) The terms ''theoretical gains and losses'' means the gain and loss in the value of *each eligible position*[individual option series and related instruments] at 10 equidistant intervals (valuation points) ranging from an assumed movement (both up and down) in the current market value of the underlying instrument.

The magnitude of the valuation point range shall be as follows:

| Portfolio type | Up/down market move (high & low valuation points) |
|---|---|
| [Non-]High Capitalization, Broad-based U.S. Market Index [Option] [1]. | [+/− 10%]*+6%/− 8%* |
| *Non*-High Capitalization, Broad-based U.S. Market Index [Option] [1]. | [+6%/− 8%]*+/− 10%* |
| *Narrow-based Index* [1] .. | *+/− 15%* |
| *Individual Equity* [1] ..... | *+/− 15%* |

[1] In accordance with sub-paragraph (b)(1)(i)(B) of Rule 15c3–1a under the Securities Exchange Act of 1934.

(b) Eligible Participants.

*Any member organization intending to apply the portfolio margin provisions of this Rule 12.4 to its accounts must receive prior approval from its Designated Examining Authority (''DEA''). The member organization will be required to, among other things, demonstrate compliance with Rule 15.8A—Risk Analysis of Portfolio Margin Accounts, and with the net capital requirements of Rule 13.5—Customer Portfolio Margin Accounts.*

The application of the portfolio margin provisions of this Rule 12.4, including cross-margining, is limited to the following:

(1) Any broker or dealer registered pursuant to section 15 of the Securities Exchange Act of 1934 *subject to minimum margin requirements under paragraph (e)(2)(A) below;*

(2) Any member of a national futures exchange to the extent that listed index options hedge the member's index futures *subject to minimum margin requirements under paragraph (e)(2)A) below,* and

(3)*(i)* Any [other ]person or entity not included in (b)(1) or (b)(2) above that has or establishes, and maintains, equity of at least 5 million dollars subject to minimum margin requirements under paragraph (e)(2)(A) below. For purposes of this equity requirement, all securities and futures accounts carried by the member for the same customer may be combined provided ownership across the accounts is identical. A guarantee by any other account for purposes of the minimum equity requirement is not to be permitted.

*(ii) Any other person or entity not included in (b)(1), (b)(2) or (b)(3)(i) above that is approved under paragraph (c) below, provided that no unlisted derivative as defined in paragraph (a)(4) above is carried, and the minimum margin requirements under paragraph (e)(2)(B) below are applied.*

(c) Opening of Accounts.

(1) Only customers that, pursuant to Rule 9.7, have been approved [for options transactions, and specifically approved] to engage in uncovered short option contracts, are permitted to utilize a portfolio margin account.

(2) On or before the date of the initial transaction in a portfolio margin account, a member shall:

A. Furnish the customer with a special written disclosure statement describing the nature and risks of portfolio margining and cross-margining which includes an acknowledgement for all portfolio margin account owners to sign, and an additional acknowledgement for owners that also engage in cross-margining to sign, attesting that they have read and understood the disclosure statement, and agree to the terms under which a portfolio margin account and the cross-margin account, respectively, are provided, and

B. Obtain a signed acknowledgement(s) from the customer, both of which are required for cross-margining customers, and record the date of receipt.

(d) Establishing Account and Eligible Positions.

(1) Portfolio Margin Account. For purposes of applying the portfolio margin requirements provided in this Rule 12.4, members are to establish and utilize a dedicated securities margin account, or sub-account of a margin account, clearly identified as a portfolio margin account that is separate from any other securities account carried for a customer.

(2) Cross-Margin Account. For purposes of combining related instruments *and unlisted derivatives,* and listed [broad-based U.S.] index options, index warrants and underlying instruments and applying the portfolio margin requirements provided in this Rule 12.4, members are to establish and utilize a portfolio margin account, clearly identified as a cross-margin account, that is separate from any other securities account or portfolio margin account carried for a customer.

A margin deficit in either the portfolio margin account or the cross-margin account of a customer may not be considered as satisfied by excess equity in the other account. Funds and/or securities must be transferred to the deficient account and a written record created and maintained.

(3) Portfolio Margin Account—Eligible Positions

(i) A transaction in, or transfer of, a listed[, broad-based U.S.] index *or equity* option, *security futures product,*[or] index warrant*, or unlisted derivative (except for an account approved under paragraph (b)(3)(ii))* may be effected in the portfolio margin account.

(ii) *With the exception of eligible participants operating pursuant to paragraphs (b)(1), (b)(2) or (b)(3)(i) above, a*[A] transaction in, or transfer of, an underlying instrument may *not* be effected in the portfolio margin account *unless*[provided] a position in an offsetting listed[, broad-based U.S.] index *or equity* option*, security futures product,*[ or] index warrant *or unlisted derivative* is in the account or is established in the account on the same day.

(iii) *With the exception of eligible participants operating pursuant to paragraphs (b)(1), (b)(2) or (b)(3)(i) above,* [If, in the portfolio margin account,]*if* the listed[, broad-based U.S.] index *or equity* option*, security futures product,*[or] index warrant*, or unlisted derivative* position offsetting an underlying instrument position ceases to exist and is not replaced within 10 business days, the underlying instrument position must be transferred to a regular margin account, subject to [Regulation T initial margin and] the margin required pursuant to the other provisions of this chapter. Members will be expected to monitor portfolio margin accounts for possible abuse of this provision.

(iv) In the event that fully paid for long options and/or index warrants are the only positions contained within a portfolio margin account, such long positions must be transferred to a securities account other than a portfolio margin account or cross-margin account within 10 business days, subject to the margin required pursuant to the other provisions of this chapter, unless the status of the account changes such that it is no longer composed solely of fully paid for long options and/or index warrants.

(4) Cross-Margin Account—Eligible Positions

(i) A transaction in, or transfer of, a related instrument may be effected in the cross margin account provided a position in an offsetting listed[, U.S. broad-based] index option, index warrant, [or ]underlying instrument *or unlisted derivative* is in the account or is established in the account on the same day.

(ii) If the listed[, U.S. broad-based] index option, index warrant,[ or] underlying instrument or *unlisted derivative* position offsetting a related instrument ceases to exist and is not replaced within 10 business days, the related instrument position must be transferred to a futures account. Members will be expected to monitor cross-margin accounts for possible abuse of this provision.

*(iii) With the exception of eligible participants operating pursuant to paragraphs (b)(1), (b)(2) or (b)(3)(i) above, if the related instrument position offsetting an underlying instrument position ceases to exist and is not replaced within 10 business days, the underlying instrument position must be transferred to a regular margin account, subject to the margin required pursuant to the other provisions of this chapter. Members will be expected to monitor portfolio margin accounts for possible abuse of this provision.*

(iii*i*) In the event that fully paid for long *index* options and/or index warrants (securities) are the only positions contained within a cross-margin account, such long positions must be transferred to a securities account other than a portfolio margin account or cross-margin account within 10 business days, subject to the margin required pursuant to the other provisions of this chapter, unless the status of the account changes such that it is no longer composed solely of fully paid for long options and/or index warrants.

(e) Initial and Maintenance Margin Required. The amount of margin required under this Rule 12.4 for each portfolio shall be the greater of:

(1) The amount for any of the 10 equidistant valuation points representing the largest theoretical loss as calculated pursuant to paragraph (f) below or

(2)*(A) In the case of an account operating under paragraph (b)(1), (b)(2) or (b)(3) of this Rule 12.4,* $.375 for each listed [index ]option*, security futures product,*[and] related instrument *and unlisted derivative,* multiplied by the contract or instrument's multiplier, not to exceed the market value in the case of long positions in listed options*, including options on security futures,* and options on futures contracts.

*(B) In the case of an account operating under paragraph (b)(3)(ii) of this Rule 12.4, for any portfolio that holds a position in the underlying instrument, $.75 for each listed option (excluding broad-based index options and options on broad-based exchange traded funds), security futures product and related instrument multiplied by the contract or instrument's multiplier, not to exceed the market value in the case of long options, including options on security futures, and options on futures contracts. In the case of a portfolio not holding a position in the underlying instrument, or a broad-based index portfolio, $.375 shall be applied instead of $.75.*

(f) Method of Calculation.

(1) Long and short positions in listed options, *security futures products,* underlying instruments,[ and] related instruments *and unlisted derivatives* are to be grouped by option class; each option class group being a ''portfolio''. Each portfolio is categorized as one of the portfolio types specified in paragraph (a)([9]*11*) above.

(2) For each portfolio, theoretical gains and losses are calculated for each position as specified in paragraph (a)([9]*11*) above. For purposes of determining the theoretical gains and losses at each valuation point, members shall obtain and utilize the theoretical value of a listed [index]option, *security futures product,* underlying instrument, [or]related instrument *and unlisted derivative,* rendered by a theoretical pricing model that, in accordance with paragraph (b)(1)(i)(B) of Rule 15c3–1a under the Securities Exchange Act of 1934, qualifies for purposes of determining the amount to be deducted in computing net capital under a portfolio based methodology.

(3) Offsets. Within each portfolio, theoretical gains and losses may be netted fully at each valuation point.

Offsets between portfolios within the High Capitalization, Broad-Based Index Option, [product group and the]Non-High Capitalization, Broad-Based Index Option [product group]*and Narrow-Based Index Option product groups* may then be applied as permitted by Rule 15c3–1a under the Securities Exchange Act of 1934.

(4) After applying paragraph (3) above, the sum of the greatest loss from each portfolio is computed to arrive at the total margin required for the account (subject to the per contract minimum).

*If a security that is exchangeable or convertible into the underlying security requires the payment of money or results in a loss upon conversion at the time when the security is deemed an underlying instrument, the full amount of the conversion loss will be required.*

(g) Equity Deficiency. If, at any time, equity declines below the[ 5 million dollar] minimum required under Paragraph (b)[(4)] of this Rule 12.4 and is not brought back up to *the required level*[at least 5 million dollars] within three (3) business days (T+3) by a deposit of funds or securities, or

through favorable market action; members are prohibited from accepting opening orders starting on T+4, except that opening orders entered for the purpose of hedging existing positions may be accepted if the result would be to lower margin requirements. This prohibition shall remain in effect until such time as *the*[an] *required minimum account* equity [of 5 million dollars] is *re*-established.

*A deduction in computing net capital in the amount of a customer's equity deficiency may not serve in lieu of complying with the above requirements.*

(h) Determination of Value for Margin Purposes. For the purposes of this Rule 12.4, all [listed index options and related instruments] *eligible* positions shall be valued at current market prices. Account equity for the purposes of this Rule 12.4 shall be calculated separately for each portfolio margin account by adding the current market value of all long positions, subtracting the current market value of all short positions, and adding the credit (or subtracting the debit) balance in the account.

(i) Additional Margin.

(1) If at any time, the equity in any portfolio margin account, including a cross-margin account, is less than the margin required, additional margin must be obtained within [one]*three* business day*s* (T+[1]*3*). *During the three business day period, member organizations are prohibited from accepting opening or closing orders that would increase the margin requirement until the additional margin is obtained.* In the event a customer fails to deposit additional margin within [one]*three* business days, the member must liquidate positions in an amount sufficient to, at a minimum, lower the total margin required to an amount less than or equal to account equity. Exchange Rule 12.9—Meeting Margin Calls by Liquidation shall not apply to portfolio margin accounts. However, members will be expected to monitor the risk of portfolio margin accounts pursuant to the risk monitoring procedures required by Rule 15.8A. Guarantees by any other account for purposes of margin requirements is not to be permitted.

*(2) Pursuant to Chapter XIII—Net Capital and Rule 13.5—Customer Portfolio Margin Accounts—thereunder, if additional margin required is not obtained by the close of business on T+1, member organizations must deduct in computing net capital any amount of the additional margin that is still outstanding until such time as the additional margin is obtained or positions are liquidated pursuant to (i)(1) above.*

*(3) A deduction in computing net capital in the amount of a customer's margin deficiency may not serve in lieu of complying with the requirements of (i)(1) above.*

*(4) A member organization may request from its Designated Examining Authority an extension of time for a customer to deposit additional margin. Such request must be in writing and will be granted only in extraordinary circumstances.*

(*5*[2]) The day trading requirements of Exchange Rule 12.3(j) shall not apply to portfolio margin accounts, including cross-margin accounts.

(j) Cross-Margin Accounts—Requirement to Liquidate.

(1) A member is required immediately either to liquidate, or transfer to another broker-dealer eligible to carry cross-margin accounts, all customer cross-margin accounts that contain positions in futures and/or options on futures if the member is:

(i) Insolvent as defined in section 101 of title 11 of the United States Code, or is unable to meet its obligations as they mature;

(ii) The subject of a proceeding pending in any court or before any agency of the United States or any State in which a receiver, trustee, or liquidator for such debtor has been appointed;

(iii) Not in compliance with applicable requirements under the Securities Exchange Act of 1934 or rules of the Securities and Exchange Commission or any self-regulatory organization with respect to financial responsibility or hypothecation of customers' securities; or

(iv) Unable to make such computations as may be necessary to establish compliance with such financial responsibility or hypothecation rules.

(2) Nothing in this paragraph (j) shall be construed as limiting or restricting in any way the exercise of any right of a registered clearing agency to liquidate or cause the liquidation of positions in accordance with its by-laws and rules.

* * * * *

Chapter 9

Doing Business with the Public

Rule 9.15. Delivery of Current Options Disclosure Documents and Prospectus

(a) no change.

(b) no change.

(c) The special written disclosure statement describing the nature and risks of portfolio margining and cross-margining, and acknowledgement for customer signature, required by Rule 12.4(c)(2) shall be in a format prescribed by the Exchange or in a format developed by the member organization, provided it contains substantially similar information as the prescribed Exchange format and has received prior written approval of the Exchange.

Sample Risk Description for Use by Firms To Satisfy Requirements of Exchange Rule 9.15(d)

Portfolio Margining and Cross-Margining

Disclosure Statement and Acknowledgement

For a Description of the Special Risks Applicable to a Portfolio Margin Account and its Cross-Margining Features, See the Material Under Those Headings Below.

Overview of Portfolio Margining

1. Portfolio margining is a margin methodology that sets margin requirements for an account based on the greatest projected net loss of all positions in a ''*portfolio*[product class]'' or ''product group'' as determined by an options pricing model using multiple pricing scenarios. These pricing scenarios are designed to measure the theoretical loss of the positions given changes in both the underlying price and implied volatility inputs to the model. Portfolio margining is currently limited to *equity and equity index products*[product classes and groups of index products relating to broad-based market indexes].

2. The goal of portfolio margining is to set levels of margin that more precisely reflect actual net risk. The customer benefits from portfolio margining in that margin requirements calculated on net risk are generally lower than alternative ''position'' or ''strategy'' based methodologies for determining margin requirements. Lower margin requirements allow the customer more leverage in an account.

Customers Eligible for Portfolio Margining

3. To be eligible for portfolio margining, customers [(other than broker-dealers)] must meet the basic standards for having an options account that is approved for uncovered writing. *If a customer wishes to utilize unlisted derivatives,* [and]*the customer* must have and maintain at all times account net equity of not less than $5 million, aggregated across all accounts under identical ownership at the clearing broker. The identical ownership requirement excludes accounts held by the same customer in different capacities (e.g., as a trustee and as an individual) and accounts where

ownership is overlapping but not identical (e.g., individual accounts and joint accounts).

*Carrying broker-dealers will have their own minimum account equity requirement, and possibly other eligibility requirements. Also, pursuant to exchange rules, a higher per contract minimum margin requirement will apply to portfolios holding the underlying instrument whenever account net equity is less than $5 million and no position in an unlisted derivative is held.*

*Neither the $5 million minimum account equity requirement nor the higher per contract minimum is applicable to portfolio margining of customers that are broker-dealers or futures locals.*

Positions Eligible for a Portfolio Margin Account

4. All positions in [broad-based U.S. market]index *and equity* options, *security futures products,* and index warrants listed on a national securities exchange, *underlying instruments (including*[and] exchange traded funds and other fund products registered under the Investment Company Act of 1940 that are managed to track the same index that underlies permitted index options), are eligible for a portfolio margin account. *Additionally, an account that elects to operate with account net equity of not less than $5 million may carry positions in unlisted derivatives (e.g., OTC swaps, options) that have the same underlying instrument as an index or equity option and can be priced by an approved vendor of theoretical values.*

Special Rules for Portfolio Margin Accounts

5. A portfolio margin account may be either a separate account or a subaccount of a customer's regular margin account. In the case of a subaccount, equity in the regular account will be available to satisfy any margin requirement in the portfolio margin subaccount without transfer to the subaccount.

6. A portfolio margin account or subaccount *that elects to operate with account equity of not less than $5 million* will be subject to a minimum margin requirement of $.375 multiplied by the index multiplier for every options contract, *security futures product,* [or ]index warrant, *unlisted derivative and related instrument* carried long or short in the account. No minimum margin is required in the case of *underlying instruments,* eligible exchange traded funds or other eligible fund products. *A portfolio margin account that elects to operate with account equity of less than $5 million will be subject to a minimum margin requirement of $.75 multiplied by the index multiplier for every options contract, security futures product, index warrant, unlisted derivative and related instrument carried long or short in any portfolio that contains a position in the underlying instrument. For portfolios that do not contain a position in the underlying security, a $.375 minimum will apply.*

7. Margin calls in the portfolio margin account or subaccount, regardless of whether due to new commitments or the effect of adverse market moves on existing positions, must be met within [one]three business days. Any shortfall in aggregate net equity across accounts must be met within three business days. *Once a margin call is incurred, the entry of an opening or closing order that would increase the margin requirement is prohibited until the margin call is met.* Failure to meet a margin call when due will result in immediate liquidation of positions to the extent necessary to reduce the margin requirement. Failure to meet an equity call prior to the end of the third business day will result in a prohibition on entering any *new orders that would increase the margin requirement*[opening orders, with the exception of opening orders that hedge existing positions], beginning on the fourth business day and continuing until such time as the minimum equity requirement is satisfied.

8. *Except for accounts that maintain account net equity of $5 million, a*[A] position in an underlying instrument[exchange traded fund or other eligible fund product] may not be established in a portfolio margin account unless there exists, or there is established on the same day, an offsetting position in securities options or other eligible securities.

*Underlying instruments*[Exchange traded index funds and/or other eligible funds] will be transferred out of the portfolio margin account and into a regular securities account subject to strategy based margin if, for more than 10 business days and for any reason, the offsetting securities options or other eligible securities no longer remain in the account.

9. When a broker-dealer carries a regular cash account or margin account for a customer, the broker-dealer is limited by rules of the Securities and Exchange Commission and of The Options Clearing Corporation (''OCC'') in the extent to which the broker-dealer may permit OCC to have a lien against long option positions in those accounts. In contrast, OCC will have a lien against all long option positions that are carried by a broker-dealer in a portfolio margin account, and this could, under certain circumstances, result in greater losses to a customer having long option positions in such an account in the event of the insolvency of the customer's broker. *Furthermore, the carrying broker-dealer has a lien on all long securities in a portfolio margin account, including underlying instruments, even if fully paid.* Accordingly, to the extent that a customer does not borrow against long option *and underlying instrument* positions in a portfolio margin account or have margin requirements in the account against which the long option *or underlying instruments* can be credited, there is no advantage to carrying the long options *and underlying instruments* in a portfolio margin account and the customer should consider carrying them in an account other than a portfolio margin account.

Special Risks of Portfolio Margin Accounts

10. Portfolio margining generally permits greater leverage in an account, and greater leverage creates greater losses in the event of adverse market movements.

11. Because the time limit for meeting margin calls is shorter than in a regular margin account, there is increased risk that a customer's portfolio margin account will be liquidated involuntarily, possibly causing losses to the customer.

12. Because portfolio margin requirements are determined using sophisticated mathematical calculations and theoretical values that must be calculated from market data, it may be more difficult for customers to predict the size of future margin calls in a portfolio margin account. This is particularly true in the case of customers who do not have access to specialized software necessary to make such calculations or who do not receive theoretical values calculated and distributed periodically by OCC.

13. For the reasons noted above, a customer that carries long options *and underlying instrument* positions in a portfolio margin account could, under certain circumstances, be less likely to recover the full value of those positions in the event of the insolvency of the carrying broker.

14. Trading of securities index *and equity* products in a portfolio margin account is generally subject to all the risks of trading those same products in a regular securities margin account. Customers should be thoroughly familiar with the risk disclosure materials applicable to those products,

including the booklet entitled Characteristics and Risks of Standardized Options.

15. Customers should consult with their tax advisers to be certain that they are familiar with the tax treatment of transactions in securities index *and equity* products.

16. The descriptions in this disclosure statement relating to eligibility requirements for portfolio margin accounts, and minimum equity and margin requirements for those accounts, are minimums imposed under exchange rules. Time frames within which margin and equity calls must be met are maximums imposed under exchange rules. Broker-dealers may impose their own more stringent requirements.

Overview of Cross-Margining

17. With cross-margining, index futures and options on index futures are combined with offsetting positions in securities index options and underlying instruments, for the purpose of computing a margin requirement based on the net risk. This generally produces lower margin requirements than if the futures products and securities products are viewed separately, thus providing more leverage in the account.

18. Cross-margining must be done in a portfolio margin account type. A separate portfolio margin account must be established exclusively for cross-margining.

19. When index futures and options *on index* futures are combined with offsetting positions in index options and underlying instruments in a dedicated account, and a portfolio margining methodology is applied to them, cross-margining is achieved.

Customers Eligible for Cross-Margining

20. The eligibility requirements for cross-margining are generally the same as for portfolio margining, and any customer eligible for portfolio margining is eligible for cross-margining.

21. Members of futures exchanges on which cross-margining eligible index contracts are traded are also permitted to carry positions in cross-margin accounts without regard to the minimum aggregate account equity.

Positions Eligible for Cross-Margining

22. All securities *index option* products eligible for portfolio margining are also eligible for cross-margining. *Additionally, accounts that elect to maintain equity of not less than $5 million may carry positions in unlisted derivatives (e.g., OTC index swaps, options).*

23. All [broad-based U.S. market ]index futures and options on index futures [traded on a designated contract market ]*that have the same underlying index as a securities index option permitted in paragraph 22 above and that are traded on a designated contract market* subject to the jurisdiction of the Commodity Futures Trading Commission are eligible for cross-margining.

Special Rules for Cross-Margining

24. Cross-margining must be conducted in a portfolio margin account type. A separate portfolio margin account must be established exclusively for cross-margining. A cross-margin account is a securities account, and must be maintained separate from all other securities accounts.

25. Cross-margining is automatically accomplished with the portfolio margining methodology. Cross-margin positions are subject to the same minimum margin requirement for every contract, including futures contracts.

26. Margin calls arising in the cross-margin account, and any shortfall in aggregate net equity across accounts, must be satisfied within the same time frames [(10 business days),] and subject to the same consequences, as in a portfolio margin account (*see paragraph 7 above*).

27. A position in a futures product may not be established in a cross-margin account unless there exists, or there is established on the same day, an offsetting position in securities options and/or other eligible securities. Futures products will be transferred out of the cross-margin account and into a futures account if, for more than 10 business days and for any reason, the offsetting securities options and/or other eligible securities no longer remain in the account. If the transfer of futures products to a futures account causes the futures account to be undermargined, a margin call will be issued or positions will be liquidated to the extent necessary to eliminate the deficit.

*28. Except for accounts maintain account net equity of $5 million, a[A] position in an underlying instrument may not be established in a cross-margin account unless there exists, or there is established on the same day, an offsetting position in a related instrument. Underlying instrument positions will be transferred out of the cross-margin account and into a regular securities account if, for more than 10 business days and for any reason, the offsetting related instrument or other eligible instrument no longer remains in the account.*

[28]*29.* According to the rules of the exchanges, a broker-dealer is required to immediately liquidate, or, if feasible, transfer to another broker-dealer eligible to carry cross-margin accounts, all customer cross-margin accounts that contain positions in futures and/or options on futures in the event that the carrying broker-dealer becomes insolvent.

[29]*30.* Customers participating in cross-margining will be required to sign an agreement acknowledging that their positions and property in the cross-margin account will be subject to the customer protection provisions of Rule 15c3–3 under the Securities Exchange Act of 1934 and the Securities Investor Protection Act, and will not be subject to the provisions of the Commodity Exchange Act, including segregation of funds.

[30]*31.* In signing the agreement referred to in paragraph 29 above, a customer also acknowledges that a cross-margin account that contains positions in futures and/or options on futures will be immediately liquidated, or, if feasible, transferred to another broker-dealer eligible to carry cross-margin accounts, in the event that the carrying broker-dealer becomes insolvent.

Special Risks of Cross-Margining

[31]*32.* Cross-margining must be conducted in a portfolio margin account type. Generally, cross-margining and the portfolio margining methodology both contribute to provide greater leverage than a regular margin account, and greater leverage creates greater losses in the event of adverse market movements.

[32]*33.* As cross-margining must be conducted in a portfolio margin account type, the time required for meeting margin calls is shorter than in a regular securities margin account and may be shorter than the time ordinarily required by a futures commission merchant for meeting margin calls in a futures account. As a result, there is increased risk that a customer's cross-margin positions will be liquidated involuntarily, causing possible loss to the customer.

[33]*34.* As noted above, cross-margin accounts are securities accounts and are subject to the customer protections set-forth in Rule 15c3–3 under the Securities Exchange Act of 1934 and the Securities Investor Protection Act. Cross-margin positions are not subject to the customer protection rules under the segregation provisions of the Commodity Exchange Act and the rules of the Commodity Futures Trading Commission (''CFTC'') adopted pursuant to the Commodity Exchange Act.

[34]*35.* Trading of index options and futures contracts in a cross-margin

account is generally subject to all the risks of trading those same products in a futures account or a regular securities margin account, as the case may be. Customers should be thoroughly familiar with the risk disclosure materials applicable to those products, including the booklet entitled Characteristics and Risks of Standardized Options and the risk disclosure document required by the CFTC to be delivered to futures customers. Because this disclosure statement does not disclose the risks and other significant aspects of trading in futures and options, customers should review those materials carefully before trading in a cross-margin account.

[35]*36.* Customers should bear in mind that the discrepancies in the cash flow characteristics of futures and certain options are still present even when those products are carried together in a cross-margin account. Both futures and options contracts are generally marked to the market at least once each business day, but the marks may take place with different frequency and at different times within the day. When a futures contract is marked to the market, the gain or loss is immediately credited to or debited from, respectively, the customer's account in cash. While *a change*[an increase] in *the* value of [a long]*an* option contract may increase *or decrease* the equity in the account, the gain *or loss* is not realized until the option is *liquidated,* [sold or ]exercised *or assigned.* Accordingly, a customer may be required to deposit cash in the account in order to meet a variation payment on a futures contract even though the customer is in a hedged position and has experienced a corresponding (but as yet unrealized) gain on an [long ]option. On the other hand, a customer who is in a hedged position and would otherwise be entitled to receive a variation payment on a futures contract may find that the cash is required to be held in the account as margin collateral on an offsetting option position.

[36]*37.* Customers should consult with their tax advisers to be certain that they are familiar with the tax treatment of transactions in index products, including tax consequences of trading strategies involving both futures and option contracts.

[37]*38.* The descriptions in this disclosure statement relating to eligibility requirements for cross-margining, [and] minimum equity and margin requirements for cross-margin accounts, are minimums imposed under exchange rules. Time frames within which margin and equity calls must be met are maximums imposed under exchange rules. The broker-dealer carrying a customer's portfolio margin account, including any cross-margin account, may impose its own more stringent requirements.

Acknowledgement for Customers Utilizing a Portfolio Margin Account Cross-Margining and Non Cross-Margining

Rule 15c3–3 under the Securities Exchange Act of 1934 requires that a broker or dealer promptly obtain and maintain physical possession or control of all fully-paid securities and excess margin securities of a customer. Fully-paid securities are securities carried in a cash account and margin equity securities carried in a margin or special account (other than a cash account) that have been fully paid for. Excess margin securities are a customer's margin securities having a market value in excess of 140% of the total of the debit balances in the customer's non-cash accounts. For the purposes of Rule 15c3–3, securities held subject to a lien to secure obligations of the broker-dealer are not within the broker-dealer's physical possession or control. The Securities and Exchange Commission has taken the position that all long option positions in a customer's portfolio-margining account (including any cross-margining account) may be subject to such a lien by OCC and will not be deemed fully-paid or excess margin securities under Rule 15c3–3. *Furthermore, long positions, including underlying instruments, in a portfolio margin account (including any cross-margin account) are held subject to a lien by the carrying broker-dealer, even if fully paid.*

The hypothecation rules under the Securities Exchange Act of 1934 (Rules 8c–1 and 15c2–1), prohibit broker-dealers from permitting the hypothecation of customer securities in a manner that allows those securities to be subject to any lien or liens in an amount that exceeds the customer's aggregate indebtedness. However, all long option positions in a portfolio-margining account (including any cross-margining account) will be subject to OCC's lien, including any positions that exceed the customer's aggregate indebtedness. *Furthermore, long positions, including underlying instruments, in a portfolio margin account (including any cross-margin account) are held subject to a lien by the carrying broker-dealer, even if fully paid.* The Securities and Exchange Commission has granted an exemption from the hypothecation rules to allow customers to carry positions in portfolio-margining accounts (including any cross-margining account), even when those positions exceed the customer's aggregate indebtedness. Accordingly, within a portfolio margin account or cross-margin account, to the extent that you have long option or *underlying instrument* positions that do not operate to offset your aggregate indebtedness and thereby reduce your margin requirement, you receive no benefit from carrying those positions in your portfolio margin account or cross-margin account and incur the additional risk of OCC's lien on your long option position(s) *and the carrying broker-dealer's lien on your long underlying instrument position(s).*

By signing below, the customer affirms that the customer has read and understood the foregoing disclosure statement and acknowledges and agrees that long option positions in portfolio-margining accounts, and cross-margining accounts will be exempted from certain customer protection rules of the Securities and Exchange Commission as described above and will be subject to a lien by the Options Clearing Corporation without regard to such rules.

Customer Name: _____

By: _____

Date: _____

(signature/title)

Acknowledgement for Customers Engaged in Cross-Margining

As disclosed above, futures contracts and other property carried in customer accounts with Futures Commission Merchants (''FCM'') are normally subject to special protection afforded under the customer segregation provisions of the Commodity Exchange Act (''CEA'') and the rules of the CFTC adopted pursuant to the CEA. These rules require that customer funds be segregated from the accounts of financial intermediaries and be separately accounted for, however, they do not provide for, and regular futures accounts do not enjoy the benefit of, insurance protecting customer accounts against loss in the event of the insolvency of the intermediary carrying the accounts.

As also has been discussed above, cross-margining must be conducted in a portfolio margin account dedicated exclusively to cross-margining, and cross-margin accounts are not treated as a futures account with an FCM. Instead, cross-margin accounts are treated as securities accounts carried with broker-dealers. As such, cross-margin accounts are covered by Rule 15c3–3 under the Securities Exchange Act of 1934, which

protects customer accounts. Rule 15c3–3, among other things, requires a broker-dealer to maintain physical possession or control of all fully-paid and excess margin securities and maintain a special reserve account for the benefit of their customers. However, in respect of cross-margin accounts, there is an exception to the possession or control requirement of Rule 15c3–3 that permits The Options Clearing Corporation to have a lien on long *option* positions*, and the carrying broker-dealer to have a lien on any long securities. These*[This] aspects *are*[is] outlined in a separate acknowledgement form that must be signed prior to or concurrent with this form. Additionally, the Securities Investor Protection Corporation (''SIPC'') insures customer accounts against the financial insolvency of a broker-dealer in the amount of up to $500,000 to protect against the loss of registered securities and cash maintained in the account for purchasing securities or as proceeds from selling securities (although the limit on cash claims is $100,000). According to the rules of the exchanges, a broker-dealer is required to immediately liquidate, or, if feasible, transfer to another broker-dealer eligible to carry cross-margin accounts, all customer cross-margin accounts that contain positions in futures and/or options on futures in the event that the carrying broker-dealer becomes insolvent.

By signing below, the customer affirms that the customer has read and understood the foregoing disclosure statement and acknowledges and agrees that: 1) positions and property in cross-margining accounts, will not be subject to the customer protection rules under the customer segregation provisions of the Commodity Exchange Act (''CEA'') and the rules of the Commodity Futures Trading Commission adopted pursuant to the CEA, and 2) cross-margining accounts that contain positions in futures and/or options on futures will be immediately liquidated, or, if feasible, transferred to another broker-dealer eligible to carry cross-margin accounts in the event that the carrying broker-dealer becomes insolvent.

Customer Name: _____

By: _____

Date: _____

(signature/title)

* * * * *

Chapter XIII

Net Capital

Rule 13.5. Customer Portfolio Margin Accounts

(a) No member organization that requires margin in any customer accounts pursuant to Rule 12.4—Portfolio *Margin for Index and Equity Options*, and Cross-Margin for Index Options, shall permit gross customer portfolio margin requirements to exceed 1,000 percent of its net capital for any period exceeding three business days. The member organization shall, beginning on the fourth business day of any non-compliance, cease opening new portfolio margin accounts, *including cross-margin accounts* until compliance is achieved.

(b) If, at any time, a member organization's gross customer portfolio margin requirements exceed 1,000 percent of its net capital, the member organization shall immediately transmit telegraphic or facsimile notice of such deficiency to the Office of Market Supervision, Division of Market Regulation, Securities and Exchange Commission, *100 F Street, NE*[450 Fifth Street NW], Washington, DC, 20549; to the district or regional office of the Securities and Exchange Commission for the district or region in which the member organization maintains its principal place of business; and to its Designated Examining Authority.

(c) *If any customer portfolio margin account becomes subject to a call for additional margin, and all of the additional margin is not obtained by the close of business on T+1, member organizations must deduct in computing net capital any amount of the additional margin that is still outstanding until such time as it is obtained or positions are liquidated pursuant to Rule 12.4(i)(1).*

* * * * *

Chapter XV

Records, Reports and Audits

Rule 15.8A. Risk Analysis of Portfolio Margin Accounts

(a) Each member organization that maintains any portfolio margin accounts for customers shall establish and maintain *a sophisticated* written risk analysis methodology[procedures] for assessing and monitoring the potential risk to the member organization's capital over a specified range of possible market movements of positions maintained in such accounts. [Current procedures shall be filed and maintained with the Department of Financial and Sales Practice Compliance.] The *risk analysis methodology*[procedures] shall specify the computations to be made, the frequency of computations, the records to be reviewed and maintained, and the *person(s)*[position(s)] within the organization responsible for the risk function. *This risk analysis methodology must be approved by the member organization's Designated Examining Authority and then submitted to the SEC prior to the implementation of portfolio margining and cross-margining.*

(b) Upon direction by the Department of *Member Firm Regulation*[Financial and Sales Practice Compliance], each affected member organization shall provide to the Department such information as the Department may reasonably require with respect to the member organization's risk analysis for any or all of the portfolio margin accounts it maintains for customers.

(c) In conducting the risk analysis of portfolio margin accounts required by this Rule 15.8A, each affected member organization is required to follow the Interpretations and Policies set forth under Rule 15.8—Risk Analysis of Market-Maker Accounts. In addition, each affected member organization shall include in *the* written *risk analysis methodology*[procedures] required pursuant to paragraph (a) above *procedures and guidelines for*[the following:

*(1) Obtaining and reviewing the appropriate customer account documentation and financial information necessary for assessing the amount of credit extended to customers,*

(*2*[1]) [Procedures and guidelines for ]the determination, review and approval of credit limits to each customer, and across all customers, utilizing a portfolio margin account[.],

(*3*[2]) [Procedures and guidelines ]for monitoring credit risk exposure to the member organization, including intra-day credit risk, related to portfolio margin accounts[.],

(*4*[3]) [Procedures and guidelines for ]the use of stress testing of portfolio margin accounts in order to monitor market risk exposure from individual accounts and in the aggregate[.],

(*5*[4]) [Procedures providing for ]the regular review and testing of these risk analysis procedures by an independent unit such as internal audit or other comparable group[.],

*(6) The type, scope and frequency of reporting by management on credit extension exposure,*

*(7) Managing the impact of credit extension on the member organization's overall risk exposure,*

*(8) The appropriate response by management when limits on credit extensions have been exceeded, and*

*(9) Determining the need to collect margin from a particular eligible participant, including whether that determination was based upon the creditworthiness of the participant and/or the risk of the eligible position(s).*

*Moreover, management must periodically review, in accordance with written procedures, the member organization's credit extension activities for consistency with these guidelines. Management must determine if the data necessary to apply this Rule 15.8A is accessible on a timely basis and information systems are available to capture, monitor, analyze and report relevant data.*

**II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change**

In its filing with the Commission, 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. 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 Rule 12.4—*Portfolio Margin and Cross-Margin for Index Options*—permits member organizations to compute a margin requirement for broad-based index option positions carried for customers using a portfolio (or risk-based) margin approach. The CBOE is proposing to broaden this rule by enabling portfolio margining of listed equity options, narrow-based index options, and security futures. The inclusion of offsetting (underlying) equity securities and related instruments (i.e., futures, options on futures) in a portfolio margin account is also proposed. The CBOE is also proposing to allow portfolio margining of certain unlisted options, forward contracts and swaps (or unlisted derivatives). Under the proposed amendments, a $5 million minimum account equity requirement would apply only to portfolio margin accounts that contain unlisted derivatives.

The Exchange is proposing amendments to current Rule 12.4, as necessary, to accommodate portfolio margining of listed equity options,[3] narrow-based index options, and security futures, as well as underlying securities, related instruments and unlisted derivatives that offset risk.[4] In proposing these changes, the Exchange, in large part, is adopting the recommendations of a portfolio margining working group of the Securities Industry Association (''SIA'').[5] The New York Stock Exchange's (''NYSE'') Rule 431 Committee endorsed the SIA working group's proposal, and the CBOE understands that the NYSE has, or will be, filing a substantively similar rule change proposal.

For portfolios of equity options, narrow-based index options, and/or security futures, the Exchange is proposing that the risk array for computing the portfolio margin requirement be set at up/down market moves of +15%/−15%. A portfolio of only broad-based index options and futures would continue to be stress tested as specified under the current rule: +6%/-8% for highly capitalized broad-based indices and +/−10% for non-highly capitalized broad-based indices. Computation of the portfolio margin requirement would otherwise follow the same process prescribed by Rule 12.4. All equity options having the same underlying security, the underlying security itself, and any related futures, options on futures or security futures could be combined as a portfolio for purposes of computing a portfolio margin requirement. The +/−15% price range for computing a portfolio margin requirement is the same parameter required under Appendix A of the Commission's net capital rule (Exchange Act Rule 15c3–1) for computing deductions to a firm's net capital for proprietary positions.

Rule 12.4 currently requires a person or entity that wishes to open a portfolio margin account to have and maintain $5 million dollars in account equity. All of a customer's accounts in the same name, at the same broker-dealer, including any futures accounts, may be combined for purposes of meeting this equity requirement. CBOE proposes to eliminate the requirement of a $5 million account equity requirement except for accounts that carry unlisted derivatives.

The Exchange believes that there are a large number of market participants for which portfolio margining would be an appropriate and more practical methodology, but that do not qualify for portfolio margining only because they are unable to meet the $5 million minimum account equity requirement. The Exchange believes that portfolio margining provides an efficient and prudent margin methodology and that it should be available to as broad a population of market participants as possible. Portfolio margining as designed in this proposal would provide for an adequate level of margin for portfolios of options and any related, offsetting instruments (futures, options on futures). By testing the portfolio against assumed up and down market moves that reflect historical moves in the underlying security with a high level of confidence, and thereby assessing potential loss in a portfolio taken as a whole, portfolio margining provides an accurate and efficient means for deriving a reasonable margin requirement. A minimum account equity requirement is unnecessary to provide adequate margin coverage, particularly with the higher minimum contract charges contained in this proposal for accounts with less than $5 million equity that hold stock positions.[6] The Exchange is proposing an amendment of Rule 12.4 that would permit customers that do not have $5 million in account equity to open a portfolio margin account, but under more stringent controls. Under the proposed amendments, a portfolio margin account could be opened for a customer that does not meet the $5 million minimum account equity, but such account would be subject to the following requirements:

1. Only *listed* derivatives and underlying securities are permitted (no OTC instruments),

2. A $75.00 per contract minimum charge for portfolios that contain underlying stock positions ($37.50 per contract minimum charge for portfolios that do not contain underlying stock positions).

Additionally, Rule 12.4 is being amended to require that margin calls in a portfolio margin account be met by T+

[3] Including options on exchange traded funds.

[4] It should be noted that the Chairman of the Commission, Christopher Cox, in a letter, dated September 27, 2005, to William J. Brodsky and John A. Thain, the Chief Executive Officers of CBOE and NYSE, respectively, encouraged each exchange to file a rule proposal to make portfolio margining available to equity options and security futures with the Commission by year-end 2005.

[5] Goldman, Sachs & Co., Morgan Stanley & Co., Inc., Merrill Lynch, Pierce, Fenner and Smith, Inc., Bear Stearns Securities Corp. and Credit Suisse First Boston Corp comprise the working group.

[6] CBOE notes that the proposal would continue to equire that an account must be approved for uncovered options writing to be eligible for portfolio margining. As the equity requirement for uncovered accounts imposed by firms is generally at least $100,000, this will result in a minimum account equity requirement of at least $100,000.

3, instead of on T+1 (the current requirement). This is being done based on the SIA Working Group's proposal. Based on its input, the T+1 requirement is onerous in that, from an operational and customer service standpoint, it is not practical, and risk is not viewed as significantly increased by going from a T+1 to a T+3 requirement.

For added safety and soundness, the Exchange is also proposing a change to Rule 12.4 that would require carrying firms to deduct the amount of any outstanding customer margin call in a portfolio margining customer's account from net capital on T+1. Additionally, an amendment is proposed that would prohibit entry of new orders that would increase the margin requirement once a margin call is made, and continuing until the margin call is met. Additionally, amendments to Rule 15.8A—Risk Analysis of Portfolio Margin Accounts—are proposed under which the currently required risk analysis procedures for assessing and monitoring the risk of portfolio margin accounts to the carrying firm's capital would have to be sophisticated and be approved in advance by the firm's Designated Examining Authority. Also, several procedures/guidelines have also been added to Rule 15.8A. Lastly, Rule 13.5—Customer Portfolio Margin Accounts—will continue to require that a carrying firm limit its aggregate customer portfolio margin requirements (including cross-margin requirements) to not more than 1,000% of its net capital.

As with the current rule for broad-based index options, only the theoretical option values provided by The Options Clearing Corporation (the ''OCC'') may be used for computing gain or loss on portfolio positions.

Additionally, it is being proposed that an unlisted derivative be allowed in a portfolio margin account only if the OCC can provide theoretical values.

The Exchange proposes to amend Rule 12.4 to add a requirement that a firm be approved in advance by its Designated Examining Authority (''DEA'') to offer portfolio margining to customers. Exchange Rule 15.8A—*Risk Analysis of Portfolio Margin Accounts*—currently requires firms to file and maintain procedures with the Exchange for assessing and monitoring the potential risk to the firm's capital of carrying customer portfolio margin accounts. The Exchange is proposing to delete this requirement given the proposed amendment of Rule 15.8A that would require prior DEA approval of written risk monitoring procedures.

A further revision of Rule 12.4 is proposed that would allow control and restricted stock to be held in a portfolio margin account, provided the option (or other derivative) to which the stock relates is established in a manner that is consistent with SEC Rule 144, or any applicable Commission guidelines or no-action letters. Additionally, it is proposed that foreign equity securities be permitted in a portfolio margin account provided that they have a ready market. The term ready market in respect of a foreign equity security would be defined the same as in the Commission's net capital rule—i.e., a security included in the FT Actuaries World Index.

The requirement under current Rule 12.4 that an account must be approved for writing uncovered option contracts in order to receive portfolio margin treatment will continue to apply. The current rules of the exchanges and NASD pertaining to approval of accounts for writing uncovered option contracts require the account to have a minimum level of account equity, which is set by the firm.

Finally, the requirement to furnish a special disclosure document concerning portfolio margining to each customer on or before the date of an initial transaction in a portfolio margin account will continue to apply. The disclosure document is being amended as necessary to incorporate references to equity options, narrow-based index options and security futures, and hedging positions in underlying equity securities.

2. Statutory Basis

The proposed portfolio margin rules are intended to promote greater reasonableness, accuracy and efficiency in respect of Exchange margin requirements for complex, multiple position listed option strategies, and offer a cross-margin capability with related index futures positions, in eligible accounts. As such, the proposed rule change is consistent with and furthers the objectives of section 6(b)(5)[7] of the Act, in that it is designed to perfect the mechanisms of a free and open market and to protect investors and the public interest.

*B. Self-Regulatory Organization's Statement on Burden on Competition*

CBOE does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of purposes of the Act.

[7] 15 U.S.C. 78f(b)(5).

*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 Exchange 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 Exchange Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send e-mail to rule-comments@sec.gov. Please include File Number SR–CBOE–2006–14 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–2006–14. 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 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 submission should refer to File Number SR–CBOE–2006–14 and should be submitted on or before April 27, 2006.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[8]

**Nancy M. Morris,**

*Secretary.*

[FR Doc. E6–4989 Filed 4–5–06; 8:45 am]

BILLING CODE 8010–01–P

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–53567; File No. SR–CBOE–2006–09]**

## Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Order Approving Proposed Rule Change Relating to the Exposure Period for Crossing Orders in the Hybrid Trading System

March 29, 2006.

On January 30, 2006, the Chicago Board Options Exchange, Incorporated (''CBOE'' or ''Exchange''), filed with the Securities and Exchange Commission (''Commission'') a proposed rule change pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] to decrease the exposure period for crossing orders in its Hybrid Trading System (''Hybrid'') from 10 seconds to 3 seconds. The proposed rule change was published for comment in the **Federal Register** on February 22, 2006.[3] The Commission received no comments on the proposal.

After careful consideration, the Commission finds that the proposed rule change is consistent with the requirements of Section 6(b) of the Act[4] and the rules and regulations thereunder applicable to a national securities exchange,[5] and in particular with Section 6(b)(5) of the Act.[6] The Commission believes that, in the electronic environment of Hybrid, reducing the exposure period to 3 seconds could facilitate the prompt execution of orders, while providing participants in Hybrid with an adequate opportunity to compete for exposed bids and offers.

*It is therefore ordered,* pursuant to Section 19(b)(2) of the Act,[7] that the proposed rule change (SR–CBOE–2006–09) is hereby approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[8]

**Nancy M. Morris,**

*Secretary.*

[FR Doc. E6–5034 Filed 4–5–06; 8:45 am]

BILLING CODE 8010–01–P

[8] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 53278 (February 13, 2006), 71 FR 9184.

[4] 15 U.S.C. 78f(b).

[5] In approving this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[6] 15 U.S.C. 78f(b)(5).

[7] 15 U.S.C. 78s(b)(2).

[8] 17 CFR 200.30–3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–53580; File No. SR–NASD–2006–040]**

## Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change To Expand NASD's Order Audit Trail System Exemptive Authority To Include Recording Requirements

March 30, 2006.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4[2] thereunder, notice is hereby given that on March 28, 2006, the National Association of Securities Dealers, Inc. (''NASD'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by NASD. The Commission is publishing this notice and order 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

NASD is proposing to expand NASD's current Order Audit Trail System (OATS) exemptive authority to include recording requirements. Below is the text of the proposed rule change. Proposed new language is in *italics*; proposed deletions are in [brackets].[3]

* * * * *

**6950. Order Audit Trail System**

* * * * *

**6955. Order Data Transmission Requirements**

(a) through (c) No Change.

[(d) Exemptions]

[(1) Pursuant to the Rule 9600 Series, the staff, for good cause shown after taking into consideration all relevant factors, may exempt, subject to specified terms and conditions, a member from the order data transmission requirements of this Rule for manual orders, if such exemption is consistent with the protection of investors and the public interest, and the member meets the following criteria:]

[(A) the member and current control affiliates and associated persons of the member have not been subject within the last five years to any final disciplinary action, and within the last ten years to any disciplinary action involving fraud;]

[(B) The member has annual revenues of less than $2 million;]

[(C) The member does not conduct any market making activities in Nasdaq Stock Market equity securities;]

[(D) The member does not execute principal transactions with its customers (with limited exception for principal transactions executed pursuant to error corrections); and]

[(E) The member does not conduct clearing or carrying activities for other firms.]

[(2) An exemption provided pursuant to this paragraph (d) shall not exceed a period of two years. At or prior to the expiration of a grant of exemptive relief under this paragraph (d), a member meeting the criteria set forth in paragraph (d)(1) may request, pursuant to the Rule 9600 Series, a subsequent exemption, which will be considered at the time of the request, consistent with the protection of investors and the public interest.]

[(3) This paragraph shall be in effect until May 8, 2011.]

* * * * *

*6958. Exemption to the Order Recording and Data Transmission Requirements*

*(a) Pursuant to the Rule 9600 Series, the staff, for good cause shown after*

[3] The proposed changes indicated herein are based on rule text approved by the SEC on September 28, 2005, which become effective on May 8, 2006. *See* Securities Exchange Act Release No. 52521 (September 28, 2005), 70 FR 57909 (October 4, 2005) (File No. SR–NASD–00–23).

*taking into consideration all relevant factors, may exempt, subject to specified terms and conditions, a member from the recording and order data transmission requirements of Rules 6954 and 6955, respectively, for manual orders, if such exemption is consistent with the protection of investors and the public interest, and the member meets the following criteria:*

*(1) The member and current control affiliates and associated persons of the member have not been subject within the last five years to any final disciplinary action, and within the last ten years to any disciplinary action involving fraud;*

*(2) The member has annual revenues of less than $2 million;*

*(3) The member does not conduct any market making activities in Nasdaq Stock Market equity securities;*

*(4) The member does not execute principal transactions with its customers (with limited exception for principal transactions executed pursuant to error corrections); and*

*(5) The member does not conduct clearing or carrying activities for other firms.*

*(b) An exemption provided pursuant to this Rule shall not exceed a period of two years. At or prior to the expiration of a grant of exemptive relief under this Rule, a member meeting the criteria set forth in paragraph (a) above may request, pursuant to the Rule 9600 Series, a subsequent exemption, which will be considered at the time of the request, consistent with the protection of investors and the public interest.*

*(c) This Rule shall be in effect until May 8, 2011.*

* * * * *

**9600. Procedures for Exemptions**

**9610. Application**

(a) Where to File

A member seeking exemptive relief as permitted under Rules 1021, 1050, 1070, 2210, 2315, 2320, 2340, 2520, 2710, 2720, 2790, 2810, 2850, 2851, 2860, Interpretive Material 2860–1, 3010(b)(2), 3020, 3150, 3210, 3230, 3350, 695[5]*8*, 8211, 8212, 8213, 11870, or 11900, or Municipal Securities Rulemaking Board Rule G–37 shall file a written application with the appropriate department or staff of NASD and provide a copy of the application to the Office of General Counsel of NASD.

(b) and (c) No Change.

* * * * *

**II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change**

In its filing with the Commission, NASD 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. NASD 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

On September 28, 2005, the SEC approved amendments to the OATS Rules (NASD Rules 6950 through 6957) which, among other things, implement the final phase of OATS (OATS Phase III) relating to manual orders and permit NASD to grant exemptive relief from the OATS reporting requirements for manual orders.[4] The amendments become effective on May 8, 2006. The new exemptive authority permits NASD to grant exemptive relief only to those members that meet specified criteria.[5] The narrow scope is generally intended to permit NASD to grant relief only to smaller member firms where the reporting of such information would be unduly burdensome or where temporary relief from the rules (in the form of additional time to achieve compliance) would permit the member to avoid unnecessary expense or hardship.

NASD's exemptive authority is further limited in that it only permits NASD to relieve members of their obligations to report OATS information to NASD on a daily basis. Thus, while members that are granted an exemption are exempt from reporting or submitting information required under the OATS Rules to NASD, such members must still record and electronically maintain all information required under the OATS Rules. Certain smaller member firms that meet the criteria to request an exemption from the reporting requirements have raised concerns about having to comply with the OATS recording requirements. Specifically, such firms have indicated that even if they ultimately are granted an exemption from the reporting requirements, complying with the OATS recording requirements will impose significant burdens and costs on their firms.

NASD understands the concerns raised by these firms and believes that expanding its current exemptive authority to include recording requirements will greatly assist these smaller member firms by providing such firms more time to determine the best mechanism for complying with the OATS requirements. At the same time, NASD does not believe that such an exemption will have a material impact on NASD's regulatory program because members currently are required to capture and maintain much of the data via other NASD and SEC rules (*e.g.*, NASD Rule 3110 and Rule 17a–3 under the Act[6]), and any exemption granted will be for a limited time period.

NASD intends to grant exemptions from the OATS recording and reporting requirements for manual orders for a period of six months to those members that meet the minimum required criteria. This exemptive relief is intended to provide such members additional time to determine and implement an effective mechanism for recording and reporting OATS information to NASD.

In this regard, NASD has developed several new enhancements to NASD's OATS Web interface, which are designed to significantly reduce the OATS recording and reporting burdens for manual firms with limited order volume.[7] Specifically, the upgrades to the OATS Web interface, which is available at no cost to members, will greatly improve usability and reduce the number of fields users are required to enter when recording an OATS event. The enhanced Web interface will enable a user to submit the data to OATS, as well as download the data to its own system prior to submission, to allow the

[4] *Id.*

[5] At a minimum, members must meet the following criteria to be eligible to request an exemption to the OATS reporting requirements for manual orders: (1) The member and current control affiliates and associated persons of the member have not been subject within the last five years to any final disciplinary action, and within the last ten years to any disciplinary action involving fraud; (2) the member has annual revenues of less than $2 million; (3) the member does not conduct any market making activities in Nasdaq Stock Market equity securities; (4) the member does not execute principal transactions with its customers (with limited exceptions for error corrections); and (5) the member does not conduct clearing or carrying activities for other firms.

[6] 17 CFR 240.17a–3.

[7] While the enhanced OATS Web interface is designed to reduce significantly the OATS recording and reporting burdens for manual firms with limited order volume, the enhanced Web interface is available as a mechanism for recording and reporting OATS information to all eligible member firms, including member firms already required to report to NASD during OATS Phase I and Phase II.

user to maintain on its own system a record of events submitted to OATS.[8]

During the six-month exemption period, NASD will be evaluating the enhanced Web interface functionality to determine whether it reduces significantly the reporting burdens for smaller member firms. The availability of an effective OATS Web interface will be a major factor in NASD's decision to grant further exemptions after the initial six-month exemptive period expires. For this reason, NASD strongly recommends that members granted an exemption contact NASD immediately to begin testing usage of the Web interface enhancements. As NASD and member firms gain experience with the Web interface, NASD will be in a better position to evaluate and consider the effectiveness of Web interface for OATS requirements and whether any future exemptive relief beyond the initial six-month time frame is appropriate. Notwithstanding the effectiveness of Web interface, NASD may decide to grant further exemptions to certain smaller member firms where complying with the OATS recording and reporting requirements for manual orders would impose significant burdens and costs on their firms.

The effective date of the proposed rule change would be May 8, 2006, if approved prior to that date; otherwise, the effective date would be the date of SEC approval.

2. Statutory Basis

NASD believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,[9] which requires, among other things, that NASD rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. NASD believes expanding NASD's OATS exemptive authority would provide smaller member firms additional time to determine an appropriate mechanism for complying with the OATS requirements, while not materially impacting NASD's regulatory oversight.

*B. Self-Regulatory Organization's Statement on Burden on Competition*

NASD does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants or Others*

While NASD did not specifically solicit comment on the proposed rule change, NASD received one written comment letter regarding the scope of the exemptive authority set forth in Rule 6955(d).[10] The commenter requests that NASD broaden its current exemptive authority to include recording requirements. Specifically, the commenter argues that NASD's exemptive authority was intended to include the requirement to record information required under the OATS Rules and maintain such information in an electronic format. The commenter contends that its firm, as well as other firms, were confused that the current exemption from the OATS reporting requirements included only the narrow exemption from the requirement to transmit OATS data to NASD. The commenter further contends that the distinction between the transmission requirement and the electronic retention and collection of information was not highlighted nor discussed. As noted above, NASD proposes to expand its OATS exemptive authority to include recording requirements.

## III. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the 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–NASD–2006–040 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–NASD–2006–040. 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 the filing also will be available for inspection and copying at the principal office of NASD. 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–NASD–2006–040 and should be submitted on or before April 27, 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 self-regulatory organization.[11] In particular, the Commission believes that the proposal is consistent with Section 15A(b)(6) of the Act,[12] which requires that the rules of an association be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest.

The NASD's view that the benefits afforded to smaller member firms by the proposed rule change seem to be significant, without materially impacting the regulatory oversight, seems reasonable. Importantly, the Commission notes that smaller firms may be exempt under NASD's current exemptive authority from daily reporting requirements with respect to OATS information under current rules, so the proposed change would not affect the information received by the NASD on a daily basis. Additionally, the NASD notes that member firms that may be eligible for the proposed expanded

[8] The testing environment for the Web interface enhancements will be available on April 24, 2006, and the production environment will be available on May 8, 2006.

[9] 15 U.S.C. 78*o*–3(b)(6).

[10] *See* Letter to Paul J. McKenney, Assistant Director—OATS, NASD, from Bonnie K. Wachtel, CEO, and Wendie L. Wachtel, COO, Wachtel & Co., Inc. dated February 1, 2006.

[11] In approving this proposal, the Commission has considered its impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[12] 15 U.S.C. 78*o*–3(b)(6).

exemption are required to capture and maintain certain information required by the OATS Rules pursuant to other NASD and Commission rules.[13]

The Commission also notes that the NASD initially plans to limit an exemption available under this proposal to six months and re-evaluate whether to grant further exemptions after the expiration of the six-month period. The Commission believes that by initially limiting the exemption to qualifying member firms to six months, firms may have sufficient time to become familiar with NASD's enhanced Web interface and to discuss with NASD any problems encountered.

Finally, the Commission believes that the NASD's proposed requirement that a firm receiving an exemption under the proposed rule change re-apply after six months and at least every two years should help to ensure that firms applying for the exemption are continuing to meet the exemption requirements.

The Commission understands that the NASD wants to provide members eligible for an exemption adequate notice as to whether they will be required to comply with the OATS recording requirement on May 8, 2006. The Commission believes that allowing accelerated approval of this proposed rule change would give members eligible for the exemption more time to evaluate their options with respect to the OATS Rules and hopefully prevent unnecessary hardships or expense that may otherwise occur without accelerated approval. The Commission, therefore, finds good cause for approving this proposal before the thirtieth day after the publication of notice thereof in the **Federal Register**.

## V. Conclusion

*It is therefore ordered,* pursuant to Section 19(b)(2) of the Act,[14] that the proposed rule change, as amended (SR–NASD–2006–040), is hereby approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[15]

**Nancy M. Morris,**

*Secretary.*

[FR Doc. E6–4986 Filed 4–5–06; 8:45 am]

**BILLING CODE 8010–01–P**

[13] *See e.g.*, NASD Rule 3110 and 17 CFR 240.17a–3 and page 6, *supra*.

[14] 15 U.S.C. 78s(b)(2).

[15] 17 CFR 200.30–3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–53578; File No. SR–NASD–2005–073]**

## Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Order Granting Approval of a Proposed Rule Change and Amendment Nos. 1 and 2 Thereto and Notice of Filing and Order Granting Accelerated Approval of Amendment No. 3 Thereto Relating to Rule 4350(e) To Amend the Annual Shareholder Meeting Requirement

March 30, 2006.

On June 6, 2005, the National Association of Securities Dealers, Inc. (''NASD''), through its subsidiary, The Nasdaq Stock Market, Inc. (''Nasdaq''), filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend NASD Rule 4350 in order to change its annual shareholder meeting requirement. On December 5, 2005, Nasdaq filed Amendment No. 1 to the proposed rule change.[3] On December 9, 2005, Nasdaq filed Amendment No. 2 to the proposed rule change.[4] The proposed rule change, as amended, was published for comment in the **Federal Register** on December 28, 2005.[5] No comments were received regarding the proposal. On March 16, 2006, Nasdaq filed Amendment No. 3 to the proposed rule change.[6] This order approves the proposed rule change, as amended, publishes notice of Amendment No. 3 to the proposed rule change, and grants accelerated approval to Amendment No. 3.

## I. Description of the Proposed Rule Change

NASD Rule 4350(e) currently requires all Nasdaq issuers to hold an annual meeting of shareholders and to provide notice of such meeting to Nasdaq. Nasdaq recognizes the significance of annual shareholder meetings because they allow the equity owners of a company—typically its common stockholders—the opportunity to elect directors and meet with management to discuss company affairs.

Nasdaq, however, believes that the annual shareholder meeting requirement is not necessary for, or applicable to, an issuer with respect to certain types of its listed securities because the holders of those securities do not directly participate as equity holders and do not vote in the election of directors. Specifically, Nasdaq makes reference to securities listed pursuant to NASD Rule 4420(f) (Quantitative Designation Criteria, Other Securities), which allows for the listing of securities that possess attributes or features of more than one category of security.[7] Nasdaq believes that these securities typically are not an issuer's primary equity security, and their holders have only limited economic interests and other rights.

Nasdaq also believes that Portfolio Depository Receipts (listed pursuant to NASD Rule 4420(i)) and Index Fund Shares (listed pursuant to NASD Rule 4420(j)), which are securities issued by unit investment trusts and open-end management investment companies, respectively, that are organized as exchange-traded funds, should not be required to hold an annual shareholder meeting. According to Nasdaq, these exchange-traded funds are generally passive investment vehicles that seek to match the performance of an index and must obtain an exemptive order from the Commission before they offer securities. As a result, Nasdaq notes that the operations of the issuers of these securities are circumscribed by numerous representations and conditions of the applicable orders, and that the issuers of these securities do not typically experience the need for operational or other changes requiring a shareholder vote, and, by extension, a shareholder meeting.

Finally, Nasdaq would exclude from its annual shareholder meeting requirement those issuers listing Trust Issued Receipts (listed pursuant to NASD Rule 4420(l)), which are securities issued by a trust that holds,

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 3 In Amendment No. 1, Nasdaq revised the proposed rule text and corresponding description of the proposal in its Form 19b–4. Amendment No. 1 replaced Nasdaq's original filing in its entirety.

[4] In Amendment No. 2, Nasdaq made clarifying changes to the proposed rule text of IM–4350–8 with respect to certain issuers still subject to the annual shareholder meeting requirement under NASD Rule 4350(e).

[5] *See* Securities Exchange Act Release No. 52985 (December 20, 2005), 70 FR 76895.

[6] In Amendment No. 3, Nasdaq made further clarifying changes to the proposed rule text of IM–4350–8 to state that at the annual shareholder meeting, shareholders must be afforded the opportunity to discuss company affairs with management and, if required by the issuer's governing documents, to elect directors.

[7] Securities currently listed under Rule 4420(f) include: (i) Trust Preferred Securities, the payments on which are linked to the performance of another security; (ii) Index Linked Notes, the payments on which are linked to the performance of an underlying index; and (iii) Contingent Value Rights, the performance of which are tied to the performance of another security, a particular division of the company, or the occurrence of a certain event.

but does not manage, specific securities on behalf of the investors in the trust. Nasdaq notes that these trusts do not hold shareholder (or unitholder) meetings because the trusts have no boards of directors and essentially serve only as conduits for the investors' indirect investments in the underlying securities of the trusts.

For the foregoing reasons, Nasdaq proposes to amend NASD Rule 4350(e) such that the requirement to hold an annual shareholder meeting would be applicable only to those Nasdaq issuers as a result of listing voting and non-voting common stock and voting preferred stock, and their respective equivalents. Under the proposal, issuers of securities listed under NASD Rules 4420(f), 4420(i), 4420(j), and 4420(l) would specifically be excluded from the annual meeting requirement in proposed IM–4350–8. The proposal makes clear, however, that issuers of such securities are still required to hold an annual shareholder meeting with respect to the listing of common stock or voting preferred stock, or their equivalents.[8] By clearly identifying those issuers that will be subject to the annual shareholder meeting requirement, Nasdaq believes that NASD Rule 4350(e) will be more transparent.

In addition, NASD Rule 4350(e) currently requires all Nasdaq issuers to provide notice of their annual shareholder meetings to Nasdaq. In practice, however, Nasdaq states that it does not rely on this notification to monitor compliance with the annual shareholder meeting requirement. Instead, Nasdaq represents that its staff reviews proxy statements (and, in the case of issuers that do not file proxy statements, other Commission filings) to determine compliance. For these reasons, Nasdaq proposes to further amend NASD Rule 4350(e) to eliminate the notification requirement.

Finally, while NASD Rule 4350(e) currently does not provide a deadline for holding the annual shareholder meeting, Nasdaq proposes that the annual shareholder meeting must be held within one year of the end of the issuer's fiscal year.[9] At each such meeting, shareholders must be afforded the opportunity to discuss company affairs with management and, if required by the issuer's governing documents, to elect directors. Nasdaq believes that codifying this time frame would provide additional transparency to the annual shareholder meeting requirement.

## II. Discussion and Commission Findings

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 association[10] and, in particular, the requirements of Section 15A(b)(6) of the Act[11] and the rules and regulations thereunder. Specifically, the Commission finds that the proposal to amend the annual shareholder meeting requirement is consistent with Section 15A(b)(6) of the Act because it is designed to promote just and equitable principles of trade, to remove impediments to a free and open market and a national market system, and, in general, to protect investors and the public interest, and is not designed to permit unfair discrimination between issuers.

### *A. Applicability of the Annual Shareholder Meeting Requirement*

The proposal sets forth which Nasdaq issuers are required to hold annual shareholder meetings and excludes from the annual shareholder meeting requirement issuers listing certain types of securities with respect to which the shareholders typically have a limited interest.[12] The Commission notes that Nasdaq's proposed annual shareholder meeting requirement remains subject to any applicable state and federal securities laws that relate to such annual meetings; as a result, an issuer that lists one or more of the types of securities set forth in proposed IM–4350–8 may still be required to hold annual shareholder meetings in accordance with such state and federal securities laws. In addition, the Commission notes that issuers of Nasdaq-listed securities, including the types of securities set forth in proposed IM–4350–8, remain subject to state and federal securities laws that may require other types of shareholder meetings, such as special meetings of shareholders. For example, exchange-traded funds are registered under, and remain subject to, the Investment Company Act of 1940 (''Investment Company Act''), which imposes various shareholder-voting requirements that may be applicable to such funds.[13]

The proposal also clarifies that, under the NASD rules, the right not to hold an annual shareholder meeting, as set forth in proposed IM–4350–8, applies only with respect to the particular securities specified in proposed IM–4350–8. Thus, although the proposed rule change excludes a particular Nasdaq issuer from holding an annual shareholder meeting with respect to, and as a result of listing, the specific type of security specified in proposed IM–4350–8, if such issuer also lists other common stock or voting preferred-stock, or their equivalent, such issuer must nevertheless hold an annual meeting for the holders of that common stock or voting preferred-stock, or their equivalent, under the proposal. In addition, proposed IM–4350–8 makes clear that issuers listing securities under NASD Rule 4420(f) (Other Securities), which allows for the listing of Trust Preferred Securities, Index Linked Notes, and Contingent Value Rights, among others, will still be subject to the annual shareholder meeting requirement, irrespective of whether such securities are listed under NASD Rule 4420(f), if such securities have the attributes of common stock or voting preferred stock, or their equivalents.

Given the limited rights and other interests of the holders of those securities specified in proposed IM–4350–8 and the applicability of federal and state securities laws that govern shareholder meetings, the Commission believes that the proposed rule change reasonably sets forth the scope of the annual shareholder meeting requirement and will ensure that the appropriate Nasdaq-listed companies are required to hold annual shareholder meetings under NASD rules, for the benefit of investors and the public interest.

[8] Proposed IM–4350–8 provides that the requirement to hold an annual shareholder meeting would not be applicable as a result of an issuer listing the following types of securities: ''securities listed pursuant to Rule 4420(f) (such as Trust Preferred Securities and Contingent Value Rights), unless the listed security is a common stock or voting preferred stock equivalent (e.g., a callable common stock); Portfolio Depository Receipts listed pursuant to Rule 4420(i); Index Fund Shares listed pursuant to Rule 4420(j); and Trust Issued Receipts listed pursuant to Rule 4420(l). Notwithstanding, if the issuer also lists common stock or voting preferred stock, or their equivalent, the issuer must still hold an annual meeting for the holders of that common stock or voting preferred stock, or their equivalent.'' *See* Securities Exchange Act Release No. 52985 (December 20, 2005), 70 FR 76895, 76896.

[9] *See infra* note 14.

[10] In approving this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[11] 15 U.S.C. 78*o*–3(b)(6).

[12] For example, as noted above, shareholders of some of these securities have a limited economic interest in the issuer and do not even vote for a board of directors.

[13] *See e.g.*, Section 16 of the Investment Company Act, which requires, among others, an investment company's initial board of directors to be elected by the shareholders at an annual or special meeting. 15 U.S.C. 80a–16(a).

*B. Notification of the Annual Shareholder Meeting*

With respect to Nasdaq's proposal to eliminate the notice requirement in NASD Rule 4350(e), the Commission believes that, because Nasdaq's practice to monitor the annual shareholder meeting requirement involves the review of proxy statements and other Commission filings, the current notification requirement is redundant and its elimination from NASD Rule 4350(e) would be reasonable. Of course, Nasdaq will still be required to ensure compliance with the annual shareholder meeting requirement and is simply eliminating a notification requirement which Nasdaq claims is not necessary. The proposed change would be consistent with Section 15A(b)(6) of the Act because the elimination of a redundancy and an unnecessary obligation of Nasdaq issuers removes impediments to the mechanism of a free and open market and a national market system, while continuing to ensure the protection of investors and the public interest.

*C. Timing of the Annual Shareholder Meeting*

Finally, the provision concerning the holding of an annual meeting is being amended to require that the annual meeting must be held within one year after the end of the fiscal year. The Commission believes that such proposed change reasonably establishes a time frame to the annual shareholder meeting requirement that is consistent with the Act, and in particular, Section 15A(b)(6) thereof. The Commission notes that this change makes explicit that the annual meeting must be held within a year of the fiscal year-end of the company.[14] In addition, the Commission notes that the date a company holds its annual meeting must be consistent with state law. The Commission also notes that the provision requires those issuers that must hold an annual shareholder meeting under NASD Rule 4350(e) to hold such meetings within a certain time frame, for the benefit of the security holders, the investors, and the public interest, consistent with Section 15A(b)(6) of the Act.[15]

## III. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning Amendment No. 3, including whether Amendment No. 3 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 No. SR–NASD–2005–073 on the subject line.

*Paper Comments*

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, Station Place, 100 F Street, NE., Washington, DC 20549–1090. All submissions should refer to File Number SR–NASD–2005–073. 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 NASD. 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–NASD–2005–073 and should be submitted on or before April 27, 2006.

## IV. Accelerated Approval of Amendment No. 3

Pursuant to Section 19(b)(2) of the Act,[16] the Commission may not approve any proposed rule change, or amendment thereto, prior to the 30th day after the date of publication of notice of the filing thereof, unless the Commission finds good cause for so doing and publishes its reasons for so finding. The Commission hereby finds good cause for approving Amendment No. 3 to the proposal, prior to the 30th day after publishing notice of Amendment No. 3 in the **Federal Register**. The revisions made to the proposal in Amendment No. 3 are typographical changes intended to clarify that at the annual shareholder meeting shareholders must be afforded the opportunity to discuss company affairs with management. In addition, if required by the issuer's governing documents, shareholders must be afforded the opportunity to elect directors. This was the intent of the provision as originally proposed. The Commission believes that accelerating Amendment No. 3 is appropriate because these revisions are clarifying and do not raise new regulatory issues. Accordingly, pursuant to Section 19(b)(2) of the Act,[17] the Commission finds good cause to approve Amendment No. 3 prior to the thirtieth day after notice of the Amendment is published in the **Federal Register**.

## V. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,[18] that the proposed rule change (File No. SR–NASD–2005–073), as amended, is approved, and Amendment No. 3 to the proposed rule change is hereby granted accelerated approval.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[19]

**Nancy M. Morris,**

*Secretary.*

[FR Doc. E6–5033 Filed 4–5–06; 8:45 am]

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## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–53579; File No. SR–NYSE–2006–12]**

## Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change and Amendment No. 1 Thereto Relating to NYSE Rule 103.12 Regarding Time Tracking Requirements of Specialists and Clerks

March 30, 2006.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934

[14] The proposed rule text of IM–4350–8 also states that for a new listing that was not previously subject to a requirement to hold an annual meeting, the company is required to hold its first meeting within one year after its first fiscal year-end following such listing.

[15] 15 U.S.C. 78*o*–3(b)(6).

[16] 15 U.S.C. 78s(b)(2).

[17] *Id.*

[18] *Id.*

[19] 17 CFR 200.30–3(a)(12).

(''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on February 28, 2006, the New York Stock Exchange LLC (''NYSE'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange has designated the proposed rule change as constituting a ''non-controversial'' rule change under Section 19(b)(3)(A)(iii) of the Act,[3] and paragraph (f)(6) of Rule 19b–4 under the Act,[4] which renders the proposal effective upon receipt of this filing by the Commission.[5] On March 30, 2006, NYSE filed Amendment No. 1 to the proposed rule change.[6] The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

## I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is proposing to amend NYSE Rule 103.12 (Registration of Specialists) by requiring specialists and specialist clerks to electronically sign and certify as accurate the end-of-day IDTrack℠ reports identifying: (1) The time they spent on the Floor of the Exchange working in those capacities; and (2) the identity of the specialty stocks in which they worked during the trading day. IDTrack is an electronic touch screen application that electronically records the login and logout time of specialists and specialist clerks during the trading day and the names of the specialty stock in which they work during a particular trading day. The text of the proposed rule change is available on the NYSE's Web site (*http://www.nyse.com*), at the NYSE's Office of the Secretary, and at the Commission's Public Reference Room.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(iii).

[4] 17 CFR 240.19b–4(f)(6).

[5] NYSE has requested that the Commission waive both the five-day pre-filing notification requirement and the 30-day operative delay, as specified in Rule 19b–4(f)(6)(iii). 17 CFR 240.19b–4(f)(6)(iii).

[6] Amendment No. 1 replaces and supersedes the original filing in its entirety. In Amendment No. 1, the Exchange: (i) Revised the purpose section of the filing to provide additional details regarding how the IDTrack reports and electronic signature component will work; (ii) removed unnecessary language from the rule text; and (iii) withdrew the proposed addition of subparagraph (C) of NYSE Rule 103.12 to the ''List of Exchange Rule Violations and Fines Applicable Thereto Pursuant to Rule 476A,'' which the Exchange represents it will file separately at a later date.

## 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. 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

As part of the settlement with the Commission,[7] the Exchange agreed to undertake certain initiatives concerning the oversight of the Floor. In one of these undertakings, the Exchange is required to develop systems to track the identity of specialists and their clerks and the times when each specialist and clerk act as such while on the Floor.

NYSE Rule 103.12, adopted in 2005,[8] requires specialist firms to track the identity of specialists and their clerks, the times when each specialist and clerk acts as such while on the Floor, and the identity of the specialty stocks in which the specialist and the clerk worked on any given trading day. The rule also requires that specialist firms independently make and keep, in the regular course of business, records of the times that each of the firm's specialists and clerks work in these capacities on the Floor. The specialist firms must be able to provide these records to the Exchange within the time frame and in a format determined by the Exchange.

To facilitate the Exchange's ability to monitor specialist and clerk activity, in November 2005 the Exchange installed a system to capture this information electronically. This system, known as IDTrack, requires specialists and clerks to log in to the IDTrack system and register their presence with respect to specialty stocks in which they worked. IDTrack is an electronic touch screen application that electronically records the login and logout times of specialists and specialist clerks during the trading day, and the names of the specialty stocks in which they are working. The IDTrack system also provides electronic reports and information to the Exchange's Division of Market Surveillance and to specialist firms with respect to this information. The IDTrack reports do not replace the specialist firms' obligations under NYSE Rule 103.12 to make and keep their own records regarding specialist and specialist clerk activity during the trading day.

The Exchange is proposing to enhance the IDTrack application and improve accountability by developing supplemental components to the end-of-day report. The end-of-day report will continue to detail the login and logout times and the specialty stocks of specialists and clerks throughout the trading day. However, the Exchange will further require that each specialist and clerk provide their electronically written signature to certify as accurate the daily IDTrack report at the end of the trading day, thereby improving the reliability of the information in the reports.

The electronic signature will be written using an optical pen attached to the touch screen terminal. In the event a specialist or clerk disagrees with the information in the end-of-day report, a ''comment'' section is available on the electronic screen to enter a comment regarding a disputed fact, *i.e.*, a disputed login/logout time or stock name. Comments added by the specialists and specialist clerks on the actual trading day of the report in question will become part of the end-of-day report. If the specialists and clerks do not make entries in the comment section on that day, then they forfeit their ability to directly enter such comments in their IDTrack end-of-day report.[9]

The proposed rule requires each specialist and specialist clerk to electronically sign and certify as accurate each end-of-day report, even if they disagree or have comments regarding information in the report. In the event that a specialist or clerk has a question or concern about the information in the end-of-day report, the IDTrack system directs them to contact Exchange personnel as soon as the issue arises. Specialists and clerks are also directed to inform their firms' compliance officers with concerns or questions about their end-of-day report. Despite any questions, concerns or

[7] *See* Securities Exchange Act Release No. 51524 (April 12, 2005) announcing Administrative Proceeding File No. 3–11892 (the ''Administrative Proceeding'').

[8] *See* Securities Exchange Act Release No. 52251 (August 12, 2005), 70 FR 48790 (August 19, 2005) (SR–NYSE–2005–47).

[9] Comments may be entered in a separate electronic screen by a firm's ''administrative user'' when the administrative user reviews the ''pending report'' list, but the original end-of-day report cannot be altered by any user after the trade date in question.

comments about the information in the end-of-day report, the specialists and clerks are required to electronically sign the report at the end of each trading day.

IDTrack includes an ''administrative user'' screen to administer certain aspects of the system. The administrative user may be the firm's compliance office or a designee of the compliance officer. The administrative user may view a list of unsigned ''pending'' reports of their firm's specialists and clerks. Through the use of this screen, administrative users may file an end-of-day report for their firm's specialists or clerks without the required signatures, but the administrative user must enter a comment into their electronic screen explaining this action. To ensure the integrity of IDTrack electronic reports, IDTrack users, including specialists, clerks and administrative personnel, will not be able to override the information in IDTrack reports.

Thus, under the proposed rule change, the Exchange will have an electronically signed record of the times that specialists and their clerks spend on the Floor of the Exchange working in those capacities, and the identity of specialty stocks in which the specialists and clerks worked on any given trading day. As with other Exchange rules, failure by a specialist or specialist clerk to sign the end-of-day report at the end of the trading day or comply with IDTrack obligations may result in disciplinary action.[10]

2. Statutory Basis

The Exchange believes that the basis under the Act for this proposed rule change is the requirement under Section 6(b)(5)[11] that an Exchange have rules that are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to, and perfect the mechanism of, a free and open market and a national market system and, in general, to protect investors and the public interest.

*B. Self-Regulatory Organization's Statement on Burden on Competition*

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

The Exchange has neither solicited nor received written comments on the proposed rule change.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

Because the proposed rule change: (i) Does not significantly affect the protection of investors or the public interest; (ii) does not impose any significant burden on competition; and (iii) does not become operative for 30 days after the date of the filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act[12] and Rule 19b–4(f)(6) thereunder.[13]

A proposed rule change filed under Rule 19b–4(f)(6) normally does not become operative for 30 days after the date of filing. However, Rule 19b–4(f)(6)(iii) permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to provide the Commission with written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission.

The Exchange has asked the Commission to waive the five-day pre-filing requirement and the 30-day operative delay to allow NYSE to immediately enhance its IDTrack system, so that the tracking of the time specialists and clerks spend on the Floor, and the signing and certification of the daily IDTrack reports comply with the requirements of the Administrative Proceeding. The Commission has decided, consistent with the protection of investors and the public interest, to waive the five-day pre-filing notice and 30-day operative delay so that the NYSE may meet the requirement in the Administrative Proceeding.[14]

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.[15]

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change, as amended, 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–NYSE–2006–12 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 No. SR–NYSE–2006–12. 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 the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does

[10] *See* Securities Exchange Act Release No. 52768 (November 10, 2005), 70 FR 70014 (November 18, 2005) (SR–NYSE–2005–64) (adding NYSE Rule 103.12 to the NYSE List of Exchange Rule Violations and Fines under Rule 476A). The Exchange intends to propose, in a separate rule filing, an amendment to Rule 476A that will apply to all requirements under Rule 103.12, including this proposed rule change, Rule 103.12(C).

[11] 15 U.S.C. 78f(b)(5).

[12] 15 U.S.C. 78s(b)(3)(A).

[13] 17 CFR 240.19b–4(f)(6).

[14] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[15] For purposes of calculating the 60-day abrogation period, the Commission considers the proposed rule change to have been filed on March 30, 2006, the date the NYSE filed Amendment No. 1.

not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR–NYSE–2006–12 and should be submitted on or before April 27, 2006.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[16]

**Nancy M. Morris,**

*Secretary.*

[FR Doc. E6–4987 Filed 4–5–06; 8:45 am]

**BILLING CODE 8010–01–P**

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–53575; File No. SR–NYSE–2006–23]**

## Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Amendments to Exchange Rules 475 and 476

March 30, 2006.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on March 27, 2006, the New York Stock Exchange LLC (''NYSE'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange filed the proposed rule change pursuant to Section 19(b)(3)(A) of the Act[3] and Rule 19b–4(f)(6) thereunder,[4] which renders the proposed rule change effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Exchange Rules 475 and 476 in order to reconcile amendments to the text of Exchange Rules 475 and 476 as previously approved by the Commission.[5] The proposed amendments further seek to remove inadvertently inserted text from the approved changes in Exchange Rule 476(l)[6] and incorporate the corrected text of Rule 476(l) into Rule 476(k). In addition, the proposed amendments make technical changes and render the rules gender neutral.

The text of the proposed rule change is available on the Exchange's Web site (*http://www.nyse.com*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

### II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

*A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*

1. Purpose

On May 23, 2005, the New York Stock Exchange, Inc. (''NYSE Inc.'') filed SR–NYSE–2005–37 (''Filing 2005–37'') with the Commission to amend Article IX of its Constitution and Rules 475 and 476 to modify certain aspects of its disciplinary procedures and to provide a structure for a summary suspension hearing and a ''call-up'' procedure for review by members of the board of directors, certain members of the Board of Executives listed in Rule 476(f), any member of the Regulation, Enforcement and Listing Standards Committee and either the division of the Exchange that initiated the proceedings or the respondent. On January 13, 2006, the Commission approved Filing 2005–37 and its subsequent amendments, to be operative on April 1, 2006.[7]

On November 3, 2005, NYSE Inc. filed SR–NYSE–2005–77 (''Filing 2005–77'') with the Commission concerning a proposed rule change relating to its business combination with Archipelago Holdings, Inc. (''Merger''). Contained in Filing 2005–77, among other proposed amendments, were modifications to Rules 475 and 476. On February 27, 2006, the Commission approved Filing 2005–77 and its subsequent amendments to be operative upon the date of the closing of the Merger, which occurred on March 7, 2006.[8] Pursuant to the terms of the Merger, the Exchange became the successor entity to NYSE Inc.

Filing 2005–37 references certain committees and boards that are no longer part of the corporate structure of the Exchange as approved in Filing 2005–77. The Exchange seeks to amend Exchange Rules 475 and 476 to remove these references to conform the rules to the current corporate structure of the Exchange. The proposed rule change seeks to revise paragraph lettering to reconcile rule text; to use consistent references to current Exchange entities; and to correct minor typographical errors.

In addition, Filing 2005–37 modified sections of the NYSE Inc. Constitution as it related to its disciplinary process. However, Filing 2005–77, among other things, rescinded the NYSE Inc. Constitution and incorporated certain of its provisions into Rule 476. The provisions incorporated into Rule 476 by Filing 2005–77 are reconciled in this filing with the modifications made in Filing 2005–37. Additionally, certain corrections are made to the text of Rule 476(l) as approved in Filing 2005–77. The Exchange further seeks to incorporate the amended text of Rule 476(l) into Rule 476(k) as the second paragraph of Rule 476(k).

Specifically, Filing 2005–77 incorporated the provisions from Article X, Section 6 of the NYSE Inc. Constitution into Rule 476 as section (l). Those provisions govern penalties imposed upon members, allied members and member organizations for failure to pay fines or other sums due the exchange. Rule 476(l) as approved in Filing 2005–77 reads as follows:

(l) Any member, member organization, allied member, approved person or registered or non-registered employee of a member organization who shall not pay a fine, or any other sums due to the Exchange, within forty-five days after the same shall become payable, shall be reported by the Exchange Treasurer to the Chairman of the Exchange Board and, after written notice mailed to such member, member organization, allied member, approved person or registered or non-registered employee of a member organization of such arrearages, may be suspended by

[16] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 240.19b–4(f)(6).

[5] *See* Securities Exchange Act Release Nos. 53124 (January 13, 2006), 71 FR 3595 (January 23, 2006) (SR–NYSE–2005–37) (which will become operative on April 1, 2006), and 53382 (February 27, 2006), 71 FR 11251 (March 6, 2006) (SR–NYSE–2005–77).

[6] *See* Securities Exchange Act Release No. 53382, *supra* note 5.

[7] *See* Securities Exchange Act Release No. 53124, *supra* note 5.

[8] *See* Securities Exchange Act Release No. 53382, *supra* note 5.

the Exchange Board until payment is made.

In Filing 2005–77, NYSE Inc. proposed to amend Rule 476(l) above and inadvertently included references to approved persons, registered and non-registered employees. However, penalties for approved persons, registered and non-registered employees that fail to pay fines were already covered in the first paragraph of Rule 476(k) and continued to be covered in that rule. Thus, the Exchange seeks to remove the phrase ''approved person or registered and non-registered employee'' from Rule 476(l) as approved in Filing 2005–77 and then incorporate the amended text of Rule 476(l) into Rule 476(k) as the second paragraph of Rule 476(k).

In this filing, the Exchange further seeks to remove references to ''he'' and ''his'' in order to render the rules gender neutral.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the requirement under section 6(b)(5) of the Act [9] that an exchange have rules that are designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest.

*B. Self-Regulatory Organization's Statement on Burden on Competition*

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others*

Written comments were neither solicited nor received.

## III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (1) Significantly affect the protection of investors or the public interest; (2) impose any significant burden on competition; and (3) by its terms, become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to section 19(b)(3)(A) [10] of the Act and Rule 19b–4(f)(6) thereunder.[11]

A proposed rule change filed under Rule 19b–4(f)(6) [12] normally may not become operative prior to 30 days after the date of filing. However, Rule 19b–4(f)(6)(iii) [13] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has requested that the Commission waive the 30-day operative delay and designate the proposed rule change to become operative on April 1, 2006. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest.[14] The Commission notes that such waiver would allow the Exchange to reconcile rule changes previously approved by the Commission that are due to become operative on April 1, 2006. Accordingly, the Commission designates that the proposed rule change become operative on April 1, 2006.

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 No. SR–NYSE–2006–23 on the subject line.

*Paper Comments*

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, Station Place, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSE–2006–23. 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 Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSE–2006–23 and should be submitted on or before April 27, 2006.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[15]

**Nancy M. Morris,**

*Secretary.*

[FR Doc. E6–4990 Filed 4–5–06; 8:45 am]

**BILLING CODE 8010–01–P**

[9] 15 U.S.C. 78f(b)(5).

[10] 15 U.S.C. 78s(b)(3)(A).

[11] 17 CFR 240.19–4(f)(6). Rule 19b–4(f)(6) also requires that the Exchange give the Commission written notice of the Exchange's intention to file the proposed rule change along with a brief description and text of the proposed rule change at least five business days prior to the date of the filing of the proposed rule change. The Commission notes that the Exchange has satisfied the pre-filing five-day notice requirement.

[12] 17 CFR 240.19b–4(f)(6).

[13] 17 CFR 240.19b–4(f)(6)(iii).

[14] 14 For purposes only of waiving the operative delay for this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[15] 17 CFR 200.30–3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–53577; File No. SR–NYSE–2006–13]**

## Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Proposed Rule Change to Rule 431 (''Margin Requirements'') and Rule 726 (''Delivery of Options Disclosure Document and Prospectus'') To Expand the Products Eligible for Customer Portfolio Margining and Cross-Margining and Eliminate Separate Cross-Margin Accounts

March 30, 2006.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Exchange Act''), [1] and Rule 19b–4 thereunder,[2] notice is hereby given that on March 2, 2006, the New York Stock Exchange LLC (''NYSE'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The NYSE is filing with the Commission proposed amendments to NYSE Rule 431 (''Margin Requirements'') that would further expand the scope of products that are eligible for treatment as part of the Commission approved Portfolio Margin Pilot Program [3] (''Pilot'') and eliminate the requirement for a separate cross-margin account for margining eligible security products with eligible commodity products. Amendments to Rule 726 (''Delivery of Options Disclosure Document and Prospectus'') also are proposed to include the Commission approved products on the disclosure document required to be furnished to customers pursuant to this rule. The text of the proposed rule change is below. Additions are in italics. Deletions are in brackets.

* * * * *

Margin Requirements

Rule 431. (a) through (f) unchanged.

*Portfolio Margin [and Cross-Margin]*

(g) As an alternative to the ''strategy'' based margin requirements set forth in sections (a) through (f) of this Rule, member organizations may elect to apply the portfolio margin requirements set forth in this section (g) to [1) listed, broad-based U.S. index options, index warrants and underlying instruments and 2) listed security futures contracts and listed single stock options] *all margin eligible securities* [4]*, listed options, OTC derivatives, and U.S. security futures* [5]*, provided certain requirements are met. (See section (g)(6)(C)(1))*

In addition, member organizations, provided they are a Futures Commission Merchant (''FCM'') and are either a clearing member of a futures clearing organization or have an affiliate that is a clearing member of a futures clearing organization, are permitted under this section (g) to combine an eligible participant's related instruments as defined in section (g)(2)*(D)* [(C)], with listed, [broad-based] U.S. index options, *options on exchange traded funds (''ETF''),* index warrants and underlying instruments and compute a margin requirement for such combined products on a portfolio margin basis. [(''cross-margin''). Member organizations must confine cross-margin positions to a portfolio margin account dedicated exclusively to cross-margining.]

The portfolio margin [and cross-margining] provisions of this Rule shall not apply to Individual Retirement Accounts (''IRAs'').

(1) Member organizations must monitor the risk of portfolio margin accounts and maintain a *comprehensive* written risk analysis methodology for assessing the potential risk to the member organization's capital over a specified range of possible market movements of positions maintained in such accounts. The risk analysis methodology shall specify the computations to be made, the frequency of computations, the records to be reviewed and maintained, and the person(s) within the organization responsible for the risk function. This risk analysis methodology [shall be made available to] *must be approved by* the *New York Stock* Exchange *(''Exchange'')* [upon request.] *and submitted to the Securities and Exchange Commission (''SEC'') prior to the implementation of portfolio margining.* In performing the risk analysis of portfolio margin accounts required by this Rule, each member organization shall include [the following] in the written risk analysis methodology *procedures and guidelines for*:

(A) *obtaining and reviewing the appropriate account documentation and financial information necessary for assessing the amount of credit to be extended to eligible participants.*

*(B)* [(A) Procedures and guidelines for] the determination, review and approval of credit limits to each eligible participant, and across all eligible participants, utilizing a portfolio margin account[.],

*(C)* [(B) Procedures and guidelines for] monitoring credit risk exposure to the member organization *from portfolio margin accounts, on both an* [including] intra-day and *end of day basis* [credit risk], *including the type, scope and frequency of reporting to senior management* [related to portfolio margin accounts.],

*(D)* [(C) Procedures and guidelines for] the use of stress testing of portfolio margin accounts in order to monitor market risk exposure from individual accounts and in the aggregate[.],

*(E)* [(D) Procedures providing for] the regular review and testing of these risk analysis procedures by an independent unit such as internal audit or other comparable group[.],

*(F) Managing the impact of credit extension related to portfolio margin accounts on the member organization's overall risk exposure,*

*(G) The appropriate response by management when limits on credit extensions related to portfolio margin accounts have been exceeded, and*

*(H) Determining the need to collect additional margin from a particular eligible participant, including whether that determination was based upon the*

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[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Exchange Act Release No. 52031 (July 14, 2005), 70 FR 42130 (July 21, 2005) (SR–NYSE–2002–19). On July 14, 2005, the Commission approved on a pilot basis expiring July 31, 2007, amendments to Exchange Rule 431 to permit the use of a prescribed risk-based margin requirement (''portfolio margin''), for certain specified products (*e.g.*, listed, broad-based U.S. index options and warrants, along with any underlying instruments), as an alternative to the strategy based margin requirements currently required by Rule 431. Amendments to Rule 726 were also approved to require disclosure to, and written acknowledgment from, customers in connection with the use of portfolio margin. *See* NYSE Information Memo 05–56 for additional information; *see also* SR–NYSE–2005–93 in which the Exchange filed with the Commission amendments to Rule 431 which would expand the approved products for certain customers that are eligible for treatment under portfolio margin requirements to include U.S. security futures and single stock options. *See* Exchange Act Release No. 53126 (Jan.13, 2006), 71 FR 3586 (Jan. 23, 2006) (SR–NYSE–2005–93).

[4] *For purposes of this section (g) of the Rule, the term ''margin eligible security'' utilizes the definition at section 220.2 of Regulation T of the Board of Governors of the Federal Reserve System, excluding a nonequity security.*

[5] For purposes of this section *(g)* of the Rule, the term ''security future'' utilizes the definition at section 3(a)(55) of the Exchange Act. [, excluding narrow-based indices.]

*creditworthiness of the participant and/or the risk of the eligible product.*

*Moreover, management must periodically review, in accordance with written procedures, the member organization's credit extension activities for consistency with these guidelines. Management must periodically determine if the data necessary to apply this section (g) is accessible on a timely basis and information systems are available to adequately capture, monitor, analyze and report relevant data.*

(2) Definitions.—For purposes of this section (g), the following terms shall have the meanings specified below:

(A) The term ''listed option'' means any option traded on a registered national securities exchange or automated facility of a registered national securities association.

*(B) The term ''OTC derivative'' means any equity-based or equity index-based unlisted option, forward contract, or security-based swap that can be valued by a theoretical pricing model approved by the Exchange and submitted to the SEC.*

*(C)* [(B)] The term ''underlying instrument'' means *a security or security index upon which any listed option, OTC derivative, U.S. security future, or broad-based U.S index future is based.* [long and short positions in an exchange traded fund or other fund product registered under the Investment Company Act of 1940, that holds the same securities, and in the same proportion, as contained in a broad-based index on which options are listed. In the case of a listed security futures contract, ''underlying instrument'' means listed single stock option on the same security and in the same proportion. The term ''underlying instrument'' shall not be deemed to include options on futures contracts, or unlisted instruments.]

*(D)* [(C)] The term ''related instrument'' within *a security* [an option] class or product group means *broad-based U.S. index* futures [contracts] and options on *broad-based U.S index* futures [contracts] covering the same underlying instrument. *The term ''related instrument'' does not include security futures or options on security futures.*

*(E)* [(D)] The term ''*security* [options] class'' refers to all *securities* [options] covering the same underlying instrument.

*(F)* [(E)] The term ''portfolio'' means any eligible product, as defined in section (g)(6)(C)(1), grouped with their underlying instruments and related instruments.

[(F) The term ''option series'' relates to listed options and means all option contracts of the same type (either a call or a put) and exercise style, covering the same underlying instrument with the same exercise price, expiration date, and number of underlying units.]

(G) The term ''product group'' means two or more portfolios of the same type (see table in section (g)(2)(I) below) for which it has been determined by Rule 15c3–1a under the Securities Exchange Act of 1934 *(''Exchange Act'')* that a percentage of offsetting profits may be applied to losses at the same valuation point.

(H) For purposes of portfolio margin [and cross-margin] *requirements* the term ''equity'', as defined in section (a)(4) of this Rule, includes the market value of any long or short [option] positions held in *an eligible participant's* [a customer's] account.

(I) The term ''theoretical gains and losses'' means the gain and loss in the value of individual eligible products and related instruments at *ten* [10] equidistant intervals (valuation points) ranging from an assumed movement (both up and down) in the current market value of the underlying instrument. The magnitude of the valuation point range shall be as follows:

| Portfolio type | Up/down market move (high & low valuation points) |
|---|---|
| *High Capitalization Broad-based U.S. Market Index [Option]*[6] | *+6%– 8%* |
| *Non-High Capitalization, Broad-based U.S. Market Index [Option]*[7] | *+/– 10%* |
| *Margin Eligible Security,Listed Equity Option, Listed Narrow-based Index Option, [Listed] U.S. Security Future, and OTC Derivative [Instrument] (Including forward contracts and swaps)* [Listed Security Futures Contract and Listed Single Stock Option]. | *+/– 15%* |

(3) Approved Theoretical Pricing Models.—Theoretical pricing models must be approved by *the Exchange* [a Designated Examining Authority] and *submitted to* [reviewed by] the *SEC* [Securities and Exchange Commission (''The Commission'')] in order to qualify.[8] [Currently, the theoretical model utilized by the Options Clearing Corporation (''The OCC'') is the only model qualified pursuant to the Commission's Net Capital Rule. All member organizations shall obtain their theoretical values from the OCC.]

(4) Eligible Participants.—The application of the portfolio margin provisions of this section (g)[, including cross-margining, is limited to] *include* the following:

(A) Any broker or dealer registered pursuant to Section 15 of the [Securities] Exchange Act; [of 1934;]

(B) Any member of a national futures exchange to the extent that listed index options hedge the member's index futures; and

*(C) Any person or entity not included in sections (g)(4)(A) and (g)(4)(B) above approved for options or U.S. security futures transactions. However, an eligible participant under this section (g)(4)(C) may not establish or maintain positions in OTC derivatives unless minimum equity of at least five million dollars is established and maintained with the member organization.* [any other person or entity not included in sections (g)(4)(A) and (g)(4)(B) above that has or establishes, and maintains, equity of at least five million dollars.] For purposes of this *minimum* equity requirement, all securities and futures accounts carried by the member organization for the same eligible participant may be combined provided ownership across the accounts is identical. A guarantee pursuant to section (f)(4) of this Rule is not permitted for purposes of the minimum equity requirement. [For those accounts that are solely limited to listed security futures contracts and listed single stock options, the five million dollar equity requirement shall be waived.]

(5) Opening of Accounts.

(A) Member organizations must notify and receive approval from the Exchange prior to establishing a portfolio margin

[6] In accordance with section (b)(1)(i)(B) of Rule 15c3–1a (Appendix A to Rule 15c3–1) under the Securities Exchange Act of 1934, 17 CFR 240.15c3–1a(b)(1)(i)(B).

[7] See footnote above.

[8] Currently, the theoretical model utilized by the Options Clearing Corporation (''OCC'') is the only model qualified.

[or cross-margin] methodology for eligible participants.

(B) Only eligible participants that have been [approved for options transactions and] approved to engage in uncovered short option contracts pursuant to Exchange Rule 721, are permitted to utilize a portfolio margin account.

(C) On or before the date of the initial transaction in a portfolio margin account, a member organization shall:

(1) Furnish the eligible participant with a special written disclosure statement describing the nature and risks of portfolio margining [and cross-margining] which includes an acknowledgement for all portfolio margin account owners to sign, [and an additional acknowledgement for owners that also engage in cross-margining to sign,] attesting that they have read and understood the disclosure statement, and agree to the terms under which a portfolio margin account [and the cross-margin account respectively, are] *is* provided (see Exchange Rule 726 (d)), and

(2) Obtain the signed acknowledgement[(s)] noted above from the eligible participant [(both of which are required for cross-margining eligible participants)] and record the date of receipt.

(6) Establishing Account and Eligible Positions

(A) [Portfolio Margin Account.] For purposes of applying the portfolio margin requirements prescribed in this section (g), *and combining related instruments with listed, U.S. index options, options on exchange traded funds (''ETF''), index warrants, and underlying instruments,* member organizations are to establish and utilize a specific securities margin account, or sub-account of a margin account, clearly identified as a portfolio margin account that is separate from any other securities account carried for an eligible participant.

[(B) Cross-Margin Account. For purposes of combining related instruments with listed, broad-based U.S. index options, index warrants, and underlying instruments, and applying the portfolio margin requirements, member organizations are to establish a cross-margin account that is separate from any other securities account or portfolio margin account carried for an eligible participant.]

A margin deficit in [either] the portfolio margin account [or the cross-margin account] of an eligible participant may not be considered as satisfied by excess equity in [the other] *another* account. Funds and/or securities must be transferred to the deficient account and a written record created and maintained.

(*B*) [(C)] [Portfolio Margin Account—] Eligible Products

(1) For eligible participants as described in sections (g)(4)(A) through (g)(4)(C), a transaction in, or transfer of, an eligible product may be effected in the portfolio margin account. Eligible products under this section *(g)* consist of:

[(i) A listed, broad-based U.S. index option or index warrant and underlying instrument.

(ii) A listed security futures contract or listed single stock option.]

*(i) A margin eligible security, a listed option, a security future, an option on a security future, or OTC derivative.*

*(ii) A foreign equity security and option on a foreign equity security, provided the foreign equity security is deemed to have a ''ready market'' under SEC Rule 15c3–1 or a ''no-action'' position issued thereunder.*

*(iii) A margin eligible control or restricted security, provided the security has met the requirements in a manner consistent with SEC Rule 144 or an SEC ''no-action'' position issued thereunder, sufficient enough to permit the sale of the security, upon exercise of any listed option or OTC derivative written against it, without restriction.*

*(iv) related instruments as defined in section (2)(D)*

[(2) A transaction in, or transfer of, an underlying instrument may be effected in the portfolio margin account provided a position in an offsetting eligible product is in the account or is established in the account on the same day.

(3) A transaction in, or transfer of, a listed security futures contract or listed single stock option may also be effected in the portfolio margin account.]

*(2)* [(4)] *For eligible participants as described in section (g)(4)(C) that do not maintain five million dollars in equity, any* [Any] long position or any short position in any *OTC derivative* [eligible product] that is no longer part of a hedge strategy must be transferred from the portfolio margin account to the appropriate securities account within ten business days, subject to any applicable margin requirement, unless the position becomes part of a hedge strategy again. Member organizations will be expected to monitor portfolio margin accounts for possible abuse of this provision.

[(D) Cross-Margin Account—Eligible Products

(1) For eligible participants as described in sections (g)(4)(A) through (g)(4)(C), a transaction in, or transfer of, an eligible product may be effected in the cross-margin account.

(2) A transaction in, or transfer of, a related instrument may be effected in the cross-margin account provided a position in an offsetting eligible product is in the account or is established in the account on the same day.

(3) Any long position or any short position in any eligible product that is no longer part of a hedge strategy must be transferred from the cross-margin account to the appropriate securities account or futures account within ten business days, subject to any applicable margin requirement, unless the position becomes part of a hedge strategy again. Member organizations will be expected to monitor cross-margin accounts for possible abuse of this provision.]

(7) [Initial and Maintenance] Margin Required.—The amount of margin required under this section (g) for each portfolio shall be the greater of:

(A) the amount for any of the *ten* [10] equidistant valuation points representing the largest theoretical loss as calculated pursuant to section (g)(8) below, or

(B) *for eligible participants as described in section (g)(4)(A) through (g)(4)(C)*, $.375 for each *listed option, OTC derivative, U.S. security future*, [contract] and related instrument, multiplied by the contract's or instrument's multiplier, not to exceed the market value in the case of long *contracts* [positions] in eligible products.

(C) Account guarantees pursuant to section (f)(4) of this Rule are not permitted for purposes of meeting [initial and maintenance] margin requirements.

(8) Method of Calculation

(A) Long and short contracts, including underlying instruments and related instruments, are to be grouped *by security class; each security class group being* [as] a ''portfolio''. Each portfolio is categorized as one of the portfolio types specified in section (g)(2)(I) above.

(B) For each portfolio, theoretical gains and losses are calculated for each position as specified in section (g)(2)(I) above. For purposes of determining the theoretical gains and losses at each valuation point, member organizations shall obtain and utilize the theoretical values of eligible products as described in this section *(g)* rendered by an approved theoretical pricing model.

(C) Offsets. Within each portfolio, theoretical gains and losses may be netted fully at each valuation point. Offsets between portfolios within the

eligible product groups, as described in section (g)(2)(I), may then be applied as permitted by Rule 15c3–1a under the [Securities] Exchange Act [of 1934].

(D) After applying the offsets above, the sum of the greatest loss from each portfolio is computed to arrive at the total margin required for the account (subject to the per contract minimum).

(9) Portfolio Margin Minimum Equity *Deficiency* [Call]

(A) If, *as of the close of business*, [at any time,] the equity in the portfolio margin [or cross-margin] account of an eligible participant as described in section (g)(4)(C), declines below the five million dollar minimum equity required, and is not restored to at least five million dollars within three business days [(T+3)] by a deposit of funds and/or securities, member organizations are prohibited from accepting [opening] *new* orders *beginning on the fourth business day,* [starting on T+4,] except that [opening] *new* orders entered for the purpose of hedging existing positions may be accepted if the result would be to lower margin requirements. This prohibition shall remain in effect until,

(1) Equity of five million dollars is established[.] *or,*

*(2) any OTC derivative is liquidated or transferred from the portfolio margin account to the appropriate securities account.* [For those accounts that are solely limited to security futures contracts and single stock options, the five million dollar equity requirement shall be waived.]

(B) Member organizations will not be permitted to deduct any portfolio margin minimum equity *deficiency* [call] amount from Net Capital in lieu of collecting the minimum equity required.

(10) Portfolio Margin [Maintenance] *Deficiency* [Call]

(A) If, *as of the close of business,* [at any time,] the equity in the portfolio margin [or cross-margin] account of an eligible participant, as described in section (g)(4)(A) through (g)(4)(C), is less than the margin required, the eligible participant may deposit additional margin or establish a hedge to meet the margin requirement within three business days [(T+3)]. *After* [During] the three business day period, member organizations are prohibited from accepting [opening] *new* orders, except that [opening] *new* orders entered for the purpose of hedging existing positions may be accepted if the result would be to lower margin requirements. In the event an eligible participant fails to hedge existing positions or deposit additional margin *in an amount sufficient to eliminate any margin deficiency after* [within] three business days, the member organization must liquidate positions in an amount sufficient to, at a minimum, lower the total margin required to an amount less than or equal to the account equity.

(B) If the portfolio margin [maintenance] *deficiency* [call] is not met by the close of business *on the next business* day after the business day on which such deficiency arises, [T+1,] member organizations will be required to deduct *the amount of the deficiency* from Net Capital [the amount of the call] until such time the *deficiency* [call] is satisfied.

(C) Member organizations will not be permitted to deduct any portfolio margin [maintenance] *deficiency* [call] amount from Net Capital in lieu of collecting the margin required.

*(D) The Exchange may grant additional time for an eligible participant to meet a portfolio margin deficiency upon written request, which is expected to be granted in unique circumstances only.*

*(E) Member organizations should not permit an eligible participant to make a practice of meeting a portfolio margin deficiency by liquidation.*

(11) Determination of Value for Margin Purposes.—For the purposes of this section (g), all eligible products and related instrument positions shall be valued at current market prices. Account equity for the purposes of [this] sections *(g)(9)(A) and (g)(10)(A)* shall be calculated separately for each portfolio margin [or cross-margin] account.

(12) Net Capital Treatment of Portfolio Margin [and Cross-Margin] Accounts.

(A) No member organization that requires margin in any *portfolio margin* [eligible participant] account pursuant to section (g) of this Rule shall permit the aggregate [eligible participant] portfolio margin [and cross-margin initial and maintenance] requirements to exceed ten times its *Net Capital* [net capital] for any period exceeding three business days. The member organization shall, beginning on the fourth business day, cease opening new portfolio margin [and cross-margin] accounts until compliance is achieved.

(B) If, at any time, a member organization's aggregate [eligible participant] portfolio margin [and cross-margin] requirements exceed ten times its net capital, the member organization shall immediately transmit telegraphic or facsimile notice of such deficiency to the principal office of the Securities and Exchange Commission in Washington, DC, the district or regional office of the Securities and Exchange Commission for the district or region in which the member organization maintains its principal place of business; and to the [New York Stock] Exchange.

(13) Day Trading Requirements.—[The requirements of sub-paragraph (f)(8)(B) of this Rule—Day-Trading shall not apply to portfolio margin accounts including cross-margin accounts.] Day trading is not permitted in portfolio margin accounts. Member organizations are expected to monitor portfolio margin accounts to detect and prevent circumvention of the day trading requirements.

(14) [Cross-Margin Accounts—] Requirements to Liquidate

(A) A member *organization* is required immediately either to liquidate, or transfer to another broker-dealer eligible to carry *portfolio* [cross-] margin accounts, all [eligible participant] *portfolio* [cross-] margin accounts that contain positions eligible for *portfolio* [cross-] margining if the member *organization* is:

(1) Insolvent as defined in section 101 of title 11 of the United States Code, or is unable to meet its obligations as they mature;

(2) The subject of a proceeding pending in any court or before any agency of the United States or any State in which a receiver, trustee, or liquidator for such debtor has been appointed;

(3) Not in compliance with applicable requirements under the [Securities] Exchange Act [of 1934] or rules of the Securities and Exchange Commission or any self-regulatory organization with respect to financial responsibility or hypothecation of eligible participant's securities; or

(4) Unable to make such computations as may be necessary to establish compliance with such financial responsibility or hypothecation rules.

(B) Nothing in this section (14) shall be construed as limiting or restricting in any way the exercise of any right of a registered clearing agency to liquidate or cause the liquidation of positions in accordance with its by-laws and rules.

*(15) Member organizations must ensure that portfolio margin accounts are in compliance with all other applicable Exchange rules promulgated in Rules 700 through 795.*

* * * * *

Delivery of Options Disclosure Document and Prospectus

Rule 726 (a) through (c) unchanged.

Portfolio Margining [and Cross-Margining] Disclosure Statement and Acknowledgement

(d) The special written disclosure statement describing the nature and

risks of portfolio margining [and cross-margining], and acknowledgement for an eligible participant signature, required by Rule 431(g)(5)(B) shall be in a format prescribed by the Exchange or in a format developed by the member organization, provided it contains substantially similar information as in the prescribed Exchange format and has received the prior written approval of the Exchange.

Sample Portfolio Margining [and Cross-Margining] Risk Disclosure Statement To Satisfy Requirements of Exchange Rule 431(g)

Overview of Portfolio Margining

1. Portfolio margining is a margin methodology that sets margin requirements for an account based on the greatest projected net loss of all positions in a ''*security* [product] class'' or ''product group'' as determined by [an options] *a theoretical* pricing model using multiple pricing scenarios. These pricing scenarios are designed to measure the theoretical loss of the positions given changes in both the underlying price and implied volatility inputs to the model. [Portfolio margining is currently limited to product classes and groups of index products relating to listed, broad-based market indexes, listed security futures contracts and listed single stock options.]

2. The goal of portfolio margining is to set levels of margin that more precisely reflect[s] actual net risk. The eligible participant benefits from portfolio margining in that margin requirements calculated on net risk are generally lower than alternative ''position'' or ''strategy'' based methodologies for determining margin requirements. Lower margin requirements allow the customer more leverage in an account.

Customers Eligible for Portfolio Margining

3. To be eligible for portfolio margining, eligible participants (other than broker-dealers) must meet the basic standards for having an options account that is approved for uncovered writing. *In addition, eligible participants holding positions in over-the-counter (''OTC'') derivatives* [and] must have and maintain at all times account net equity of not less than five million dollars, aggregated across all accounts under identical ownership at the clearing broker. The identical ownership requirement excludes accounts held by the same customer in different capacities (*e.g.*, as a trustee and as an individual) and accounts where ownership is overlapping but not identical (*e.g.*, individual accounts and joint accounts). [For those accounts that are solely limited to security futures contracts and single stock options, the five million dollar equity requirement shall be waived.]

4. Members of futures exchanges on which portfolio margining eligible index contracts are traded are also permitted to carry positions in portfolio margin accounts without regard to the minimum aggregate account equity.

Positions Eligible for a Portfolio Margin Account

5. [4.] All positions in [listed] margin eligible securities, listed options, OTC *derivatives, and U.S. security futures [contracts, listed single stock options, listed, broad-based U.S. index options or index warrants, exchange traded funds and other products registered under the Investment Company Act of 1940 that are managed to track the same index that underlies permitted index options], are eligible for a portfolio margin account. In addition, listed, U.S index options, options on exchange traded funds (''ETF''), index warrants and underlying instruments can be combined with offsetting positions in related instruments, for the purpose of computing a margin requirement based on the net risk. This generally produces lower margin requirements than if the related instruments*[9] *and securities products are viewed separately, thus providing more leverage in the account.*

*6. All broad-based U.S. listed market index futures and options on index futures traded on a designated contract market subject to the jurisdiction of the Commodity Futures Trading Commission (''CFTC'') are eligible for portfolio margining.*

Special Rules for Portfolio Margin Accounts

*7.* [5.] A portfolio margin account may be either a separate account or a sub-account of a customer's standard margin account. In the case of a sub-account, equity in the standard account will be available to satisfy any margin requirement in the portfolio margin sub-account without transfer to the sub-account.

*8.* [6.] A portfolio margin account or sub-account will be subject to a minimum margin requirement of $.375, multiplied by the contract's multiplier, for [every] *each listed option, OTC derivative, U.S. security future, and related instrument* [contract] carried long or short in the account. [No minimum margin is required in the case of eligible exchange traded funds or other eligible fund products.]

*9.* [7.] *A margin* [Margin] *deficiency* [calls] in the portfolio margin account or sub-account, regardless of whether due to new commitments or the effect of adverse market movements on existing positions, must be met within three business days. Any shortfall in aggregate net equity across accounts must be met within three business days. Failure to meet a portfolio margin [maintenance] *deficiency* [call] when due will result in immediate liquidation of positions to the extent necessary to reduce the margin requirement. Failure to meet a minimum equity *deficiency* [call] prior to the end of the third business day will result in a prohibition on entering any [opening] *new* orders, with the exception of [opening] *new* orders that hedge existing positions, beginning on the fourth business day and continuing until such time as the minimum equity requirement is satisfied[.] *or until any OTC derivative is liquidated or transferred from the portfolio margin account to the appropriate securities account.*

[8. A position in an exchange traded index fund or other eligible fund product may not be established in a portfolio margin account unless there exists, or there is established on the same day, an offsetting position in a related or underlying security, or other eligible securities. The position(s) will be transferred out of the portfolio margin account and into a standard securities account subject to any applicable margin requirement if the offsetting securities options, other eligible securities and/or related instruments no longer remain in the account for ten business days.]

*10.* [9.] When a broker-dealer carries a standard cash account or margin account for a customer, the broker-dealer is limited by rules of the Securities and Exchange Commission and of *the* [The] Options Clearing Corporation (''OCC'') to the extent to which the broker-dealer may permit *the* OCC to have a lien against long option positions in those accounts. In contrast, *the* OCC will have a lien against all long option positions that are carried by a broker-dealer in a portfolio margin account, and this could, under certain circumstances, result in greater losses to a customer having long option positions in such an account in the event of the insolvency of the customer's broker. Accordingly, to the extent that a customer does not borrow against long

[9] *For purposes of this Rule, the term ''related instruments,'' within a security class or product group means broad-based U.S. index futures and options on broad-based U.S. index futures covering the same underlying instrument.*

option positions in a portfolio margin account or have margin requirements in the account against which the long option can be credited, there is no advantage to carrying the long options in a portfolio margin account and the customer should consider carrying them in an account other than a portfolio margin account.

*11. Customers participating in portfolio margining will be required to sign an agreement acknowledging that their positions and property in the portfolio margin account will be subject to the customer protection provisions of Rule 15c3–3 under the Securities Exchange Act of 1934 and the Securities Investor Protection Act.*

Special Risks of Portfolio Margin Accounts

*12.* [10.] Portfolio margining generally permits greater leverage in an account, and greater leverage creates greater losses in the event of adverse market movements.

*13.* [11.] Because the time limit for meeting *a* margin *deficiency* [calls]is shorter than in a standard margin account, *and may be shorter than the time ordinarily required by a Futures Commission Merchant for meeting a margin deficiency in a futures account,* there is increased risk that a customer's portfolio margin account will be liquidated involuntarily, possibly causing losses to the customer.

*14.* [12.] Because portfolio margin requirements are determined using sophisticated mathematical calculations and theoretical values that must be calculated from market data, it may be more difficult for customers to predict the size of *any* future margin *deficiency* [calls] in a portfolio margin account. This is particularly true in the case of customers who do not have access to specialized software necessary to make such calculations or who do not receive theoretical values calculated and distributed periodically by [The] *the* Options Clearing Corporation.

*15.* [13.] For the reasons noted above, a customer that carries long options positions in a portfolio margin account could, under certain circumstances, be less likely to recover the full value of those positions in the event of the insolvency of the carrying broker.

*16.* [14.] Trading of [securities index] *eligible* products in a portfolio margin account is generally subject to all the risks of trading those same products in a standard securities margin account. Customers should be thoroughly familiar with the risk disclosure materials applicable to those products, including the booklet entitled ''Characteristics and Risks of Standardized Options''[.] *and the risk disclosure document required by the CFTC to be delivered to futures customers. Customers should review these materials carefully before trading in a portfolio margin account.*

*17.* [15.] Customers should consult with their tax advisers to be certain that they are familiar with the tax treatment of transactions in *these products,* [securities options and futures products] *including tax consequences of trading strategies involving these eligible products.*

*18.* [16.] The descriptions in this disclosure statement relating to eligibility requirements for portfolio margin accounts, and minimum equity and margin requirements for those accounts, are minimums imposed under Exchange rules. Time frames within which *a* margin *or* [and] equity *deficiency* [calls] must be met are maximums imposed under Exchange rules. Broker-dealers may impose [their own] more stringent requirements.

*19. According to the rules of the exchanges, a broker dealer is required to immediately liquidate, or, if feasible, transfer to another broker-dealer eligible to carry portfolio margin accounts, all customer portfolio margin accounts that contain positions in futures in the event that the carrying broker-dealer becomes insolvent.*

*20. In signing the agreement referred to above, a customer also acknowledges that a portfolio margin account that contains positions in futures will be immediately liquidated, or, if feasible, transferred to another broker-dealer eligible to carry portfolio margin accounts, in the event that the carrying broker-dealer becomes insolvent.*

*21. As noted above, portfolio margin accounts are securities accounts and are subject to the customer protections set-forth in Rule 15c3–3 under the Securities Exchange Act of 1934 and the Securities Investor Protection Act.*

*22. Customers should bear in mind that the discrepancies in the cash flow characteristics of futures and certain options are still present even when those products are carried together in a portfolio margin account. Both futures and options contracts are generally marked to the market at least once each business day, but the marks may take place with different frequency and at different times within the day. When a futures contract is marked to the market, the gain or loss is immediately credited to or debited from the customer's account in cash. While an increase in the value of a long option contract may increase the equity in the account, the gain is not realized until the option is sold or exercised. Accordingly, a customer may be required to deposit cash in the account in order to meet a variation payment on a futures contract even though the customer is in a hedged position and has experienced a corresponding (but yet unrealized) gain on a long option. Alternatively, a customer who is in a hedged position and would otherwise be entitled to receive a variation payment on a futures contract may find that the cash is required to be held in the account as margin collateral on an offsetting option position.*

[Overview of Cross-Margining

17. In a cross-margin account, index futures, security futures and options on index and security futures are combined with offsetting positions in listed securities and underlying instruments, for the purpose of computing a margin requirement based on the net risk. This generally produces lower margin requirements than if the related instruments [10] and securities products are viewed separately, thus providing more leverage in the account.

18. Cross-margining must be effected in a portfolio margin account type. A separate portfolio margin account must be established exclusively for cross-margining.

19. Cross-margining is achieved when index futures are combined with offsetting positions in index options and underlying instruments in a dedicated account, and a portfolio margining methodology is applied to them.

Customers Eligible for Cross-Margining

20. The eligibility requirements for cross-margining are generally the same as for portfolio margining. Accordingly, any customer eligible for portfolio margining is eligible for cross-margining.

21. Members of futures exchanges on which cross-margining eligible index contracts are traded are also permitted to carry positions in cross-margin accounts without regard to the minimum aggregate account equity.

Positions Eligible for Cross-Margining

22. All securities products eligible for portfolio margining are also eligible for cross-margining.

23. All broad-based U.S. listed market index futures and options on index futures traded on a designated contract market subject to the jurisdiction of the Commodity Futures Trading

[10] [For purposes of this Rule, the term ''related instruments,'' within an option class or product group means futures contracts and options on futures contracts covering the same underlying instrument.]

Commission (''CFTC'') are eligible for cross-margining.

Special Rules for Cross-Margining

24. Cross-margining must be conducted in a portfolio margin account type. A separate portfolio margin account must be established exclusively for cross-margining. A cross margin account is a securities account, and must be maintained separately from all other securities account.

25. Cross-margining is automatically accomplished with the portfolio margining methodology. Cross-margin positions are subject to the same minimum margin requirement for every contract, including futures contracts.

26. Margin calls arising in a cross-margin account, and any shortfall in aggregate net equity across accounts, must be satisfied within the same timeframe, and subject to the same consequences, as in a portfolio margin account.

27. A position in a futures product may not be established in a cross-margin account unless there exists, or there is established on the same day, an offsetting position in securities options and/or other eligible securities. Related instruments will be transferred out of the cross-margin account and into a futures account if, for more than ten business days and for any reason, the offsetting securities options and/or other eligible securities no longer remain in the account. If the transfer of related instruments to a futures account causes the futures account to be undermargined, a margin call will be issued or positions will be liquidated to the extent necessary to eliminate the deficit.

28. Customers participating in cross-margining will be required to sign an agreement acknowledging that their positions and property in the cross-margin account will be subject to the customer protection provisions of Rule 15c3–3 under the Securities Exchange Act of 1934 and the Securities Investor Protection Act, and will not be subject to the provisions of the Commodity Exchange Act, including segregation of funds.

29. According to the rules of the exchanges, a broker dealer is required to immediately liquidate, or, if feasible, transfer to another broker-dealer eligible to carry cross-margin accounts, all customer cross-margin accounts that contain positions in futures in the event that the carrying broker-dealer becomes insolvent.

30. In signing the agreement referred to in paragraph 28 above, a customer also acknowledges that a cross-margin account that contains positions in futures will be immediately liquidated, or, if feasible, transferred to another broker-dealer eligible to carry cross-margin accounts, in the event that the carrying broker-dealer becomes insolvent.

Special Risks of Cross-Margining

31. Cross-margining must be conducted in a portfolio margin account type. Generally, cross-margining and the portfolio margining methodology both contribute to provide greater leverage than a standard margin account, and greater leverage creates greater losses in the event of adverse market movements.

32. Since cross-margining must be conducted in a portfolio margin account type, the time required for meeting *a* margin *deficiency* [calls] is shorter than in a standard securities margin account and may be shorter than the time ordinarily required by a futures commission merchant for meeting *a* margin *deficiency* [calls] in a futures account. Consequently, there is increased risk that a customer's cross-margin positions will be liquidated involuntarily, causing possible loss to the customer.

33. As noted above, cross-margin accounts are securities accounts and are subject to the customer protections set-forth in Rule 15c3–3 under the Securities Exchange Act of 1934 and the Securities Investor Protection Act. Cross-margin positions are not subject to the customer protection rules under the segregation provisions of the Commodity Exchange Act and the rules of the CFTC adopted pursuant to the Commodity Exchange Act.

34. Trading of index options and futures contracts in a cross-margin account is generally subject to all the risks of trading those same products in a futures account or a standard securities margin account. Customers should be thoroughly familiar with the risk disclosure materials applicable to those products, including the booklet entitled Characteristics and Risks of Standardized Options and the risk disclosure document required by the CFTC to be delivered to futures customers. Because this disclosure statement does not disclose the risks and other significant aspects of trading in futures and options, customers should review those materials carefully before trading in a cross-margin account.

35. Customers should bear in mind that the discrepancies in the cash flow characteristics of futures and certain options are still present even when those products are carried together in a cross margin account. Both futures and options contracts are generally marked to the market at least once each business day, but the marks may take place with different frequency and at different times within the day. When a futures contract is marked to the market, the gain or loss is immediately credited to or debited from the customer's account in cash. While an increase in the value of a long option contract may increase the equity in the account, the gain is not realized until the option is sold or exercised. Accordingly, a customer may be required to deposit cash in the account in order to meet a variation payment on a futures contract even though the customer is in a hedged position and has experienced a corresponding (but yet unrealized) gain on a long option. Alternatively, a customer who is in a hedged position and would otherwise be entitled to receive a variation payment on a futures contract may find that the cash is required to be held in the account as margin collateral on an offsetting option position.

36. Customers should consult with their tax advisers to be certain that they are familiar with the tax treatment of transactions in these products, including tax consequences of trading strategies involving both futures and option contracts]

37. The descriptions in this disclosure statement relating to eligibility requirements for cross-margining, and minimum equity and margin requirements for cross margin accounts, are minimums imposed under Exchange rules. Time frames within which margin and equity calls must be met are maximums imposed under Exchange rules. The broker-dealer carrying a customer's portfolio margin account, including any cross-margin account, may impose more stringent requirements.]

* * * * *

Sample Portfolio Margining [and Cross-Margining] Acknowledgement[s]

Acknowledgement for Customers Utilizing a Portfolio Margin Account

[—Cross-Margining and Non-Cross-Margining—]

Rule 15c3–3 under the Securities Exchange Act of 1934 requires that a broker or dealer promptly obtain and maintain physical possession or control of all fully-paid securities and excess margin securities of a customer. Fully-paid securities are securities carried in a cash account and margin equity securities carried in a margin or special account (other than a cash account) that have been fully paid for. Excess margin securities are a customer's margin securities having a market value in

excess of 140% of the total of the debit balances in the customer's non-cash accounts. For the purposes of Rule 15c3–3, securities held subject to a lien to secure obligations of the broker-dealer are not within the broker-dealer's physical possession or control. The Commission staff has taken the position that all long option positions in a customer's portfolio margining account [(including any cross-margin account)] may be subject to such a lien by *the* OCC and will not be deemed fully-paid or excess margin securities under Rule 15c3–3.

The hypothecation rules under the Securities Exchange Act of 1934 (Rules 8c–1 and 15c2–1), prohibit broker-dealers from permitting the hypothecation of customer securities in a manner that allows those securities to be subject to any lien or liens in an amount that exceeds the customer's aggregate indebtedness. However, all long option positions in a portfolio margining account [(including any cross-margining account)] will be subject to *the* OCC's lien, including any positions that exceed the customer's aggregate indebtedness. The Commission staff has taken a position that would allow customers to carry positions in portfolio margining accounts, [(including any cross-margining account)] even when those positions exceed the customer's aggregate indebtedness. Accordingly, within a portfolio margin account [or cross-margin account], to the extent that you have long option positions that do not operate to offset your aggregate indebtedness and thereby reduce your margin requirement you receive no benefit from carrying those positions in your portfolio margin account [or cross-margin account] and incur the additional risk of *the* OCC's lien on your long option position(s). [By signing below the customer affirms that the customer has read and understood the foregoing disclosure statement and acknowledges and agrees that long option positions in portfolio margining accounts, and cross-margining accounts, will be exempted from certain customer protection rules of the Securities and Exchange Commission as described above and will be subject to a lien by the Options Clearing Corporation without regard to such rules.

Customer name: ____

By: ____

(Signature/title)

Date ____

Acknowledgement for Customers Engaged in Cross-Margining

As disclosed above, futures contracts and other property carried in customer accounts with Futures Commission Merchants (''FCM'') are normally subject to special protection afforded under the customer segregation provisions of the Commodity Exchange Act (''CEA'') and the rules of the Commodity Futures Trading Commission *(''CFTC'')* adopted pursuant to the CEA. These rules require that customer funds be segregated from the accounts of financial intermediaries and be accounted for separately. However, they do not provide for, and standard futures accounts do not enjoy the benefit of, insurance protecting customer accounts against loss in the event of the insolvency of the intermediary carrying the accounts.]

As discussed above, *portfolio* [cross-] margining must be conducted in [a portfolio margin] *an* account[,] dedicated exclusively to *portfolio* [cross-] margining and *portfolio* [cross-] margin accounts are not treated as a futures account with an FCM. Instead, *portfolio* [cross-] margin accounts are treated as securities accounts carried with broker-dealers. As such, *portfolio* [cross-] margin accounts are covered by Rule 15c3–3 under the Securities Exchange Act of 1934, which protects customer accounts. Rule 15c3–3, among other things, requires a broker-dealer to maintain physical possession or control of all fully-paid and excess margin securities and maintain a special reserve account for the benefit of their customers. However, with regard to portfolio [cross] margin accounts, there is an exception to the possession or control requirement of Rule 15c3–3 that permits [The] *the* Options Clearing Corporation to have a lien on long positions. This exception is outlined in a separate acknowledgement form that must be signed prior to or concurrent with this form. Additionally, the Securities Investor Protection Corporation (''SIPC'') insures customer accounts against the financial insolvency of a broker-dealer in the amount of up to $500,000 to protect against the loss of registered securities and cash maintained in the account for purchasing securities or as proceeds from selling securities (although the limit on cash claims is $100,000). According to the rules of the exchanges, a broker-dealer is required to immediately liquidate, or, if feasible, transfer to another broker-dealer eligible to carry *portfolio* [cross-] margin accounts, all customer portfolio [cross] margin accounts that contain positions in futures and/or options on futures in the event that the carrying broker-dealer becomes insolvent.

By signing below the customer affirms that the customer has read and understood the foregoing disclosure statement and acknowledges and agrees that: (1) *long option positions in portfolio margining accounts will be exempted from certain customer protection rules of the Securities and Exchange Commission as described above and will be subject to a lien by the Options Clearing Corporation without regard to such rules, and* [positions and property in cross-margining accounts, will not be subject to the customer protection rules under the customer segregation provisions of the Commodity Exchange Act and the rules of the Commodity Futures Trading Commission adopted pursuant to the CEA and] (2) *portfolio* [cross-] margining accounts that contain positions in futures and/or options on futures will be immediately liquidated, or if feasible, transferred to another broker-dealer eligible to carry *portfolio* [cross-] margin accounts in the event that the carrying broker-dealer becomes insolvent.

Customer name: ____

By:____

(Signature/title)

Date: ____

## 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. 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.[11]

### *A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*

1. Purpose

Proposed amendments to NYSE Rule 431 would further expand the recently Commission approved and NYSE proposed products that are eligible for

[11] The Commission has modified the text of the summaries prepared by the NYSE. Telephone conversation between William Jannace, Director—Rule & Interpretive Standards, Member Firm Regulation, NYSE and Randall Roy, Branch Chief, and Sheila Swartz, Special Counsel, Division of Market Regulations, Commission, on March 29, 2006.

treatment under portfolio margin requirements to include: All margin eligible securities,[12] listed options, OTC derivatives, and U.S. security futures provided certain requirements are met. Amendments to Rule 726 are also proposed to include the Commission approved products on the disclosure document required to be furnished to options customers pursuant to this rule.

a. Background

Section 7(a)[13] of the Exchange Act[14] empowers the Board of Governors of the Federal Reserve System to prescribe the rules and regulations regarding credit that may be extended by broker-dealers on securities (Regulation T) to their customers. NYSE Rule 431 prescribes specific margin requirements that must be maintained in all customers accounts, based on the type of securities products held in such accounts. In April 1996, the Exchange established a Rule 431 Committee (the ''Committee'') to assess the adequacy of Rule 431 on an ongoing basis, review margin requirements, and make recommendations for change. The Committee has endorsed the proposed amendments discussed below.[15]

b. The Pilot

The Board of Governors of the Federal Reserve System in its amendments to Regulation T in 1998 permitted SROs to implement portfolio margin rules, subject to Commission approval.[16]

As noted above, on July 14, 2005 the Commission approved amendments to Exchange Rules 431 and 726 to permit, on a two-year pilot basis, the use of a prescribed risk-based methodology (''portfolio margin'')[17] for certain products, as an alternative to the strategy or position based margin requirements[18] currently required in Rule 431(a) through (f). Exchange member organizations may utilize portfolio margin for listed, broad-based U.S. index options and index warrants, along with any underlying instruments.[19] These positions are to be margined (either for initial or maintenance) in a separate portfolio margin account dedicated exclusively for such margin computation.

In addition, as noted above, the Exchange on December 29, 2005, filed with the Commission amendments to Rule 431 which would expand the approved products for certain customers that are eligible for treatment under portfolio margin requirements to include security futures and single stock options.[20] The filing was noticed for comment in the **Federal Register** on January 23, 2006[21] and resulted in the Commission receiving three comment letters.[22]

c. Portfolio Margin Requirements

Portfolio margining is a margin methodology that sets margin requirements for an account based on the greatest projected net loss of all positions in a product class or group. The Pilot utilizes a Commission approved theoretical options pricing model using multiple pricing scenarios to set or determine the risk level.[23] These scenarios are designed to measure the theoretical loss of the positions given changes in both the underlying price and implied volatility inputs to the model. Accordingly, the margin required is based on the greatest loss that would be incurred in a portfolio if the value of its components move up or down by a predetermined amount. In permitting a margin computation based on actual net risk, member organizations are no longer required to compute a margin requirement for each individual position or strategy in a customer's account.[24]

As discussed in more detail below, utilizing portfolio margin for the above noted products and any underlying instruments enables the portfolio to be subjected to certain preset market volatility parameters that reflect historical moves in the underlying security thereby assessing potential loss in the portfolio in the aggregate. Accordingly, such a methodology provides an accurate and realistic assessment of reasonable margin requirements.

d. Proposed Amendments

Eligible Products

The proposed amendments to Rule 431 seek to expand the scope of eligible products[25] previously approved, provided all such products can be priced within a prescribed risk-based theoretical pricing methodology that has been approved by the Exchange and submitted to the Commission. Specifically, the proposed amendments noted above will expand the eligible products to further include all margin eligible securities, listed options, OTC

[12] The term all ''margin eligible security'' utilizes the definition at Section 220.2 of Regulation T of the Board of Governors of the Federal Reserve System.

[13] 15 U.S.C. 78g.

[14] 15 U.S.C. 78a *et seq.*

[15] The Committee is currently composed of several member organizations, including Goldman, Sachs & Co., Morgan Stanley & Co., Inc., Merrill Lynch, Pierce, Fenner and Smith, Inc., Bear Stearns Corp, Credit Suisse First Boston Corp, and several self-regulatory organizations (''SROs'') including: the NYSE, the Chicago Board Options Exchange (''CBOE''), NASD as well as representatives from the Securities Industry Association's Ad Hoc Committee on Portfolio Margining.

[16] *See* Federal Reserve System, ''Securities Credit Transactions; Borrowing by Broker and Dealers''; Regulations G, T, U and X; Docket Nos. R–0905, R–0923 and R–0944, 63 FR 2806 (January 16, 1998).

[17] As a pre-condition to permitting portfolio margining, member organization are required to establish procedures and guidelines to monitor credit risk to the member organization's capital, including intra-day credit risk and stress testing of portfolio margin accounts. Further, member organizations must establish procedures for regular review and testing of these required risk analysis procedures (see Rule 431(g)(1)).

[18] Prior to the Pilot, member organizations were solely subject, pursuant to NYSE Rule 431, to strategy or positioned-based margin requirements. This methodology applied specific margin percentage requirements as prescribed in Rule 431 to each security position and/or strategy, either long or short, held in customer's account, irrespective of the fact that all security (*e.g.,* options) prices do not change equally (in percentage terms) with a change in the price of the underlying security. When utilizing a portfolio margin methodology, offsets are fully realized, whereas under strategy or position-based methodology, positions and or groups of positions comprising a single strategy are margined independently of each other and offsets between them do not efficiently impact the total margin requirement.

[19] For purposes of the Pilot and SR–NYSE–2005–93, the term ''underlying instrument,'' means long and short positions in an exchange traded fund or other fund product registered under the Investment Company Act of 1940, that holds the same securities, and in the same proportion, as contained in a broad-based index on which options are listed. The term ''underlying instrument'' shall not be deemed to include futures contracts, options on futures contracts, underlying stock baskets, or unlisted instruments.

[20] Commission Chairman Christopher Cox, in a letter dated September 27, 2005 to William J. Brodsky and John A. Thain, the Chief Executive Officers of CBOE and NYSE, respectively, encouraged each SRO to file a rule proposal to expand portfolio margining to a broader universe of products.

[21] *See supra* note 3.

[22] Comment letters were received from: (1) The Futures Industry Associations; (2) the Securities Industry Association; and (3) Citigroup Global Markets Inc. The Exchange will be filing a separate response to comments with the Commission. Some of the major comments, however, have been addressed by the amendments the Exchange is proposing herein.

[23] The theoretical options pricing model is used to derive position values at each valuation point for the purpose of determining the gain or loss. For purposes of the Pilot and SR–NYSE–2005–93 the amount of initial and maintenance margin required with respect to a portfolio was the larger of: (1) The greatest loss amount among the valuation calculations; or (2) the sum of $.375 for each option and security future in the portfolio multiplied by the contract's (*e.g.,* 100 shares per contract) or instrument's multiplier.

[24] *See* NYSE Rule 431.

[25] Under the current Pilot, eligible products consist of listed broad-based U.S. index options, index warrants along with any underlying instruments. On December 29, 2005, the Exchange filed with the Commission amendments to Rule 431, which would expand the approved products that are eligible for treatment under portfolio margin requirements to include security futures and single stock options. *See* SR–NYSE–2005–93.

derivatives and U.S. security futures, provided certain requirements are met.

Risk Analysis Methodology

Rule 431(g)(1) requires member organizations to monitor the risk of portfolio margin accounts and maintain a written risk analysis methodology for assessing potential risk to the firm's capital. Such methodology must specify the computations to be made, the frequency of the computations, the records to be reviewed and maintained and the person responsible for such risk function. Under the approved pilot, this risk analysis methodology shall be made available to the Exchange upon request. As proposed, the risk analysis methodology must now be comprehensive, approved by the Exchange and submitted to the Commission prior to implementation.

Minimum Equity Requirements

The proposed amendments also will permit eligible participants (as defined in proposed Rule 431(g)(4)) effecting transactions in eligible products to do so without maintaining $5.0 million in equity, which is currently required for eligible products under the Pilot.[26] As proposed, however, eligible participants may not establish or maintain positions in OTC derivatives unless equity of at least $5.0 million is established and maintained in a portfolio margin account.

Portfolio Margin Minimum Equity Deficiency

Proposed Rule 431(g)(9)(A) provides that in the event the equity of an eligible participant, subject to the $5.0 million equity requirement, declines below such minimum requirement, it must be restored within three business days and prohibits member organizations from accepting new orders beginning on the fourth business day, except for new orders effected solely for the purpose of hedging existing positions and lowering margin requirements.

Valuation Points

The Pilot established ten equidistant valuation points for the following eligible products: Non-High Capitalization/Broad-based U.S. Market Index Options (+/−10%) and High Capitalization/Broad-based U.S. Market Index Option (+6%/−8%). In SR–NYSE–2005–93, the Exchange proposed amendments that would establish theoretical valuation points within a range consisting of an increase or a decrease of +/−15% (*i.e.,* +/−3%, 6%, 9%, 12%, and 15%) for security futures and single stock options. Similarly, the proposed amendments also would establish theoretical valuation points of +/−15% for margin eligible securities, listed equity options, listed narrow-based index options, and OTC derivatives (including forward contracts and swaps).

Cross-Margin Account

The proposed amendments will remove the provisions approved in the Pilot pertaining to the use of a cross-margin account for margining eligible securities products with eligible commodity products. Under the proposed rule change, a single portfolio margin account would be used for margining all eligible products. Maintaining and monitoring two separate accounts for a customer's trading activities would be operationally difficult for both broker-dealers and customers. In this regard, the SIA and FIA comment letters received to the Exchange's recent portfolio margin filing,[27] stated that the industry has legal, regulatory and operational concerns regarding the maintenance of a separate cross margin account for customers who maintain both securities and commodity positions.[28] Both the SIA and the FIA urged the Commission to work with the CFTC, the exchanges and the clearing corporations to resolve the legal and regulatory issues that may create a barrier to comprehensive cross-margining at both the broker-dealer and clearing organization level.[29]

Definitions

The proposed amendments change the definition of ''underlying instrument'' to mean a security or security index upon which any listed option, OTC derivative, U.S. security future, or broad-based U.S. Index future is based. In addition the term ''related instrument'' (as approved in the Pilot) is being changed to mean broad-based U.S. index futures, and options on broad-based index futures covering the same underlying instrument.

In addition, a new definition of ''OTC derivative'' was added to the proposed rule change to include any equity-based or equity index-based unlisted option, forward contract or swap that can be valued by a theoretical pricing model approved by the Exchange and submitted to the Commission.

Disclosure Document and Customer Attestation

Exchange Rule 726 prescribes requirements for the delivery of options disclosure documents concerning the opening of customer accounts. As part of the Pilot, members and member organizations are required to provide every portfolio margin customer with a written risk disclosure statement[30] at or prior to the initial opening of a portfolio margin account.

In addition, at or prior to the time a portfolio margin account is initially opened, members and member organizations are required to obtain a signed acknowledgement regarding certain implications of portfolio margining (*e.g.* treatment under Exchange Act Rules 15c2–1 and 15c3–3) from the customer. As proposed, the disclosure document required by Rule 726 is being amended to incorporate the expanded list of eligible products.

Finally, the filing includes several minor technical amendments to the rules for purposes of clarity and consistency.

2. Statutory Basis

The statutory basis for this proposed rule change is Section 6(b)(5)[31] of the Exchange Act which requires, among other things, that the rules of the Exchange are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation

[26] Under the approved pilot, eligible participants are any broker-dealer registered pursuant to Section 15 of the Exchange Act, any member of a national futures exchange to the extent that listed index options hedge the member's index futures, and any other person or entity not included above that has or establishes, and maintains, equity of at least $5.0 million dollars. In SY–NYSE–2005–93, the Exchange proposed amendments that would permit customers effecting transactions in listed security futures and listed single stock options to do so without maintaining the $5.0 million equity requirement, which is currently required under the Pilot for all other eligible products. However, as proposed herein, only customer transactions in OTC derivatives (including forwards and swaps) with require an minimum equity $5 million dollars. For transactions in all other eligible products (including all listed products), this minimum requirements would not apply.

[27] *See supra* note 3.

[28] *See* letter from Gerard J. Quinn, Vice President and Associate General Counsel, Securities Industry Association, to Nancy M. Morris, Secretary, Commission, dated February 13, 2006 (''SIA Letter''); letter from Barbara Wierzynski, Executive Vice President and General Counsel, Futures Industry Association, to Nancy M. Morris, Secretary, Commission, dated February 13, 2006 (''FIA Letter''); and letter from Severino Renna, Director, Citigroup Global Markets, Inc., to Nancy M. Morris, Secretary, dated February 13, 2006 (''Citigroup Letter'').

[29] *Id.*

[30] The disclosure statement discloses the special risk and operation of portfolio margin accounts, and the differences between portfolio margin and strategy-based margin requirements. The disclosure statement also addresses who is eligible to open a portfolio margin account, the instruments that are allowed, and when deposits to meet margin and minimum equity are required.

[31] 15 U.S.C. 78f(b)(5).

and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to perfect the mechanism of a free and open market and national market system, and in general to protect investors and the public interest. The proposed amendments are consistent with this section in that they will better align margin requirements with the actual risk of hedged products, will also potentially alleviate excess margin calls and potentially reduce the risk of forced liquidations of positions in customer accounts.

*B. Self-Regulatory Organization's Statement on Burden on Competition*

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others*

The Exchange has neither solicited nor received written comments on 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 Exchange 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 Exchange Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send e-mail to *rule-comments@sec.gov*. Please include File Number SR–NYSE–2006–13 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–NYSE–2006–13. 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 NYSE. 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 submission should refer to File Number SR–NYSE–2006–13 and should be submitted on or before April 27, 2006.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[32]

**Nancy M. Morris,**

*Secretary.*

[FR Doc. E6–5019 Filed 4–5–06; 8:45 am]

BILLING CODE 8010–01–P

[32] 17 CFR 200.30–3(a)(12).

## SMALL BUSINESS ADMINISTRATION

### Interest Rates

The Small Business Administration publishes an interest rate called the optional ''peg'' rate (13 CFR 120.214) on a quarterly basis. This rate is a weighted average cost of money to the government for maturities similar to the average SBA direct loan. This rate may be used as a base rate for guaranteed fluctuating interest rate SBA loans. This rate will be 4.500 (4½) percent for the April–June quarter of FY 2006.

**James E. Rivera,**

*Associate Administrator for Financial Assistance.*

[FR Doc. E6–5022 Filed 4–5–06; 8:45 am]

BILLING CODE 8025–01–P

## SOCIAL SECURITY ADMINISTRATION

### Agency Information Collection Activities: Proposed Request and Comment Request

The Social Security Administration (SSA) publishes a list of information collection packages that will require clearance by the Office of Management and Budget (OMB) in compliance with Public Law 104–13, the Paperwork Reduction Act of 1995, effective October 1, 1995. The information collection packages that may be included in this notice are for new information collections, approval of existing information collections, revisions to OMB-approved information collections, and extensions (no change) of OMB-approved information collections.

SSA is soliciting comments on the accuracy of the agency's burden estimate; the need for the information; its practical utility; ways to enhance its quality, utility, and clarity; and on ways to minimize burden on respondents, including the use of automated collection techniques or other forms of information technology. Written comments and recommendations regarding the information collection(s) should be submitted to the OMB Desk Officer and the SSA Reports Clearance Officer. The information can be mailed and/or faxed to the individuals at the addresses and fax numbers listed below: (OMB), Office of Management and Budget, Attn: Desk Officer for SSA, Fax: 202–395–6974.(SSA), Social Security Administration, DCFAM, Attn: Reports Clearance Officer, 1333 Annex Building, 6401 Security Blvd., Baltimore, MD 21235, Fax: 410–965–6400.

I. The information collections listed below are pending at SSA and will be submitted to OMB within 60 days from the date of this notice. Therefore, your comments should be submitted to SSA within 60 days from the date of this publication. You can obtain copies of the collection instruments by calling the SSA Reports Clearance Officer at 410–965–0454 or by writing to the address listed above.

1. *Application for Special Age 72-or-Over Monthly Payments—20 CFR 404.380–404.384—0960–0096.* Form SSA–19–F6 collects the information

needed to determine whether a claimant can qualify for Special Age 72 payments. Eligibility requirements will be evaluated based on the data collected on this form. The respondents are individuals who reached age 72 before 1972.

*Type of Request:* Extension of an OMB-approved information collection.

*Number of Respondents:* 10.

*Frequency of Response:* 1.

*Average Burden per Response:* 10 minutes.

*Estimated Annual Burden:* 2 hours.

2. *Medical or Psychological Review of Childhood Disability Evaluation Form (SSA–538)—20 CFR 416.1040, 416.1043, 416.1045, 416.924(g)—0960–0675.* Form SSA–536 is used by SSA medical or psychological consultants to document their review and assessment of the Childhood Disability Evaluation Form, SSA–538, prepared by State DDS employees. A childhood disability evaluation is required in each SSI childhood disability case that is reviewed. The respondents are 256 SSA medical and psychological consultants.

*Type of Request:* Extension of an OMB-approved information collection.

*Number of Responses:* 17,000.

*Frequency of Response:* 1.

*Average Burden Per Response:* 12 minutes.

*Estimated Annual Burden:* 3,400 hours.

3. *Claimant's Medication—20 CFR 404.1512, 416.912—0960–0289.* The HA–4632, completed by applicants for disability benefits, provides an updated list of medications used by the claimant. This enables the Administrative Law Judge hearing the case to fully inquire into the medical treatment the claimant is receiving and the effect of medications on the claimant's impairments and functional capacity. The respondents are applicants for Old Age, Survivors and Disability Insurance (OASDI) benefits, and/or Supplemental Security income (SSI) payments.

*Type of Request:* Extension of an OMB-approved information collection.

*Number of Respondents:* 171,939.

*Frequency of Response:* 1.

*Average Burden Per Response:* 15 minutes.

*Estimated Annual Burden:* 42,985 hours.

4. *Authorization for the Social Security Administration to Obtain Account Records from a Financial Institution and Request for Records (Medicare Low-Income Subsidy)—0960–NEW.* Under the aegis of the Medicare Modernization Act of 2003, Medicare beneficiaries can apply for a subsidy for the Medicare Prescription Drug Plan (Part D) program. In some cases, SSA will need to verify the details of applicants' accounts at financial institutions to determine if they are eligible for the subsidy. Form SSA–4640 will give SSA the authority to contact financial institutions about beneficiaries' accounts. It will also be used by financial institutions to verify the information requested by SSA. The respondents are applicants for the Medicare Part D program subsidy and financial institutions where applicants have accounts.

*Type of Request:* New information request.

| | Medicare Part D subsidy applicants | Financial institutions | Totals |
|---|---|---|---|
| Number of Respondents | 10,000 | 10,000 | 20,000. |
| Frequency of Response | 1 | 1 | 1. |
| Average Burden Per Response (minutes) | 1 | 4 | 5. |
| Estimated Annual Burden (hours) | 167 | 667 | 834. |

*Total Estimated Annual Burden:* 834 hours.

II. The information collections listed below have been submitted to OMB for clearance. Your comments on the information collections would be most useful if received by OMB and SSA within 30 days from the date of this publication. You can obtain a copy of the OMB clearance packages by calling the SSA Reports Clearance Officer at 410–965–0454, or by writing to the address listed above.

1. *Claimant's Recent Medical Treatment—20 CFR 404.1512 & 416.912—0960–0292.* The information collected on Form HA–4631 is used to facilitate processing an applicant's OASDI (Title II) and/or SSI (Title XVI) claim. The form elicits from the claimant an updated list of medical treatment. This enables the Administrative Law Judge hearing the case to fully inquire into past and current medical treatment the claimant received/receives and the effect on the claimant's physical and mental status. The respondents are applicants for OASDI benefits and/or SSI payments.

*Type of Request:* Extension of an OMB-approved information collection.

*Number of Respondents:* 320,000.

*Frequency of Response:* 1.

*Average Burden per Response:* 10 minutes.

*Estimated Annual Burden:* 53,333 hours.

2. *Statement of Funds You Provided to Another and Statement of Funds You Received—20 CFR 416.1103(f)—0960–0481.* Forms SSA–2854 and SSA–2855 collect information in situations where the SSI recipient alleges that he or she borrowed funds informally from a non-commercial lender, e.g., a relative or a friend. The statements are required to determine whether the proceeds from the transaction are income to the borrower. If the transaction constitutes a bona fide loan, then the proceeds are not income to the borrower. The respondents are the borrower/recipient and the lender of the funds.

*Type of Request:* Extension of an OMB-approved information collection.

*Number of Respondents:* 40,000.

*Frequency of Response:* 1.

*Average Burden Per Response:* 10 minutes.

*Estimated Annual Burden:* 6,667 hours.

3. *Quickstart Enrollment—31 CFR 209 and 210—0960–0564.* Social Security beneficiaries and SSI recipients can enroll for direct deposit/electronic funds transfer through their financial institutions (FIs) using an automated enrollment process. SSA uses the information to facilitate electronic transmission of data for direct deposit of funds to a payee's account. The respondents are Social Security beneficiaries and SSI recipients requesting direct deposit to their financial institutions.

*Type of Request:* Extension of an OMB-approved information collection.

*Number of Respondents:* 3,950,000.

*Frequency of Response:* 1.

*Average Burden Per Response:* 3 minutes.

*Estimated Annual Burden:* 197,500 hours.

4. *Certificate of Election for Reduced Spouse's Benefits—20 CFR 404.421—0960–0398.* SSA uses the information collected on Form SSA–25 to pay a qualified spouse who elects to receive a reduced Social Security benefit.

Reduced benefits are not payable to an already entitled spouse, at least age 62 but under full retirement age, who no longer has a child in care, unless the spouse elects to receive reduced benefits. The respondents are entitled spouses seeking reduced Social Security benefits.

*Type of Request:* Revision of an OMB-approved information collection.

*Number of Respondents:* 30,000.

*Frequency of Response:* 1.

*Average Burden Per Response:* 2 minutes.

*Estimated Annual Burden:* 1,000 hours.

5. *Voluntary Customer Satisfaction Surveys in Accordance with E.O. 12862 for the Social Security Administration—0960–0526.* Under the auspices of E.O. 12862, Setting Customer Service Standards, SSA conducts multiple customer satisfaction surveys each year. These voluntary customer satisfaction assessments include paper, Internet, and telephone surveys; mailed questionnaires; focus groups; and customer comment cards. The purpose of these surveys is to assess customer satisfaction with the timeliness, appropriateness, access, and overall quality of the services SSA provides. The respondents are direct recipients of SSA services and professionals and other individuals who work on behalf of SSA beneficiaries.

*Type of Request:* Revision of an OMB-approved information collection.

| | Fiscal year 2006 | Fiscal year 2007 | Fiscal year 2008 |
|---|---|---|---|
| Number of Respondents | 1,352,181 | 1,356,001 | 1,357,851. |
| Frequency of Response | 1 | 1 | 1. |
| Range of Response Times | Varies (5 minutes to 1½ hours) | Varies (5 minutes to 1½ hours) | Varies (5 minutes to 1½ hours). |
| Estimated Annual Burden | 119,646 | 120,993 | 121,191. |

**Note:** Please note that the figures above differ slightly from those published in the 60-day advance Notice. The reason for this difference is that SSA obtained updated burden data since publishing the 60-day **Federal Register** Notice.

Dated: March 30, 2006.

**Elizabeth A. Davidson,**

*Reports Clearance Officer, Social Security Administration.*

[FR Doc. E6–4913 Filed 4–5–06; 8:45 am]

**BILLING CODE 4191–02–P**

## SOCIAL SECURITY ADMINISTRATION

## Social Security Acquiescence Ruling 06–1(2); Fowlkes v. Adamec, 432 F.3d 90 (2d Cir. 2005): Determining Whether an Individual Is a Fugitive Felon Under the Social Security Act (Act)—Titles II and XVI of the Act

**AGENCY:** Social Security Administration.

**ACTION:** Notice of Social Security Acquiescence Ruling.

**SUMMARY:** In accordance with 20 CFR 402.35(b)(2), the Commission of Social Security gives notice of Social Security Acquiescence Ruling 06–1(2).

**DATES:** *Effective Date:* April 6, 2006.

**FOR FURTHER INFORMATION CONTACT:** Stephanie Fishkin Kiley, Office of the General Counsel, Social Security Administration, 6401 Security Boulevard, Baltimore, MD 21235–6401, (410) 965–3483, or TTY (800) 966–5609.

**SUPPLEMENTARY INFORMATION:** We are publishing this acquiescence ruling in accordance with 20 CFR 402.35(b)(2).

An acquiescence ruling explain how we will apply a holding in a decision of a United States Court of Appeals that we determine conflicts with our interpretation of a provision of the Social Security Act (Act) or regulations when the Government has decided not to seek further review of that decision or is unsuccessful on further review.

We will apply the holding of the court of appeals decision as explained in this acquiescence ruling to all determinations or decisions at all levels of the administrative review process that an individual is a fugitive felon pursuant to sections 202(x)(1)(A), 205(j)(2)(C), 1611(e)(4)(A), and 1631(a)(2)(B) of the Act. The ruling applies to all title II and title XVI applicants, title II beneficiaries, and title XVI recipients who live in Connecticut, New York, or Vermont. If we made a determination or decision that an individual was a fugitive felon under the relevant provisions of the Act, which affected an individual's application for title II benefits or title XVI payments, or resulted in nonpayment of title II benefits or suspension of title XVI payments, between December 6, 2005, the date of the court of appeals decision, and April 6, 2006, the effective date of this acquiescence ruling, the individual may request application of the acquiescence ruling to the prior determination or decision. The individual must demonstrate, pursuant to 20 CFR 404.985(b)(2), 416.1485(b)(2), that application of this acquiescence ruling could change our prior determination or decision.

Additionally, when we received this precedential court of appeals decision and determined that an acquiescence ruling might be required, we began to identify those cases within the circuit that might be subject to readjudication if an acquiescence ruling was subsequently issued. Because we have determined that an acquiescence ruling is required, we will send a notice to individuals we have identified whose title II or title XVI application, title II benefits, or title XVI payments may be affected by the acquiescence ruling. The notice will provide information about this ruling and the right to request readjudication under it. It is not necessary for an individual to receive a notice in order to request relief based on this acquiescence ruling.

If this acquiescence ruling is later rescinded as obsolete, we will publish a notice in the **Federal Register** to that effect as provided for in 20 CFR 404.985(e), 416.148(e). If we decide to relitigate the issue covered by this acquiescence ruling as provided for by 20 CFR 404.985(c), 416.1485(c), we will publish a notice in the **Federal Register** stating that we will apply our interpretation of the Act or regulations involved and explaining why we have decided to relitigate the issue.

(Catalog of Federal Domestic Assistance, Program Nos. 96.001 Social Security—Disability Insurance; 96.002 Social Security—Retirement Insurance; 96.004 Social Security—Survivors Insurance; 96.006—Supplemental Security Insurance)

Dated: March 29, 2006.

**Jo Anne B. Barnhart,**

*Commissioner of Social Security.*

*Acquiescence Ruling 06–1(2)*

*Fowlkes* v. *Adamec*, 432 F.3d 90 (2d Cir. 2005): Determining Whether an Individual is a Fugitive Felon Under the Social Security Act (Act)—Titles II and XVI of the Act.[1]

*Issue:* Whether an outstanding warrant or similar order for the arrest of an individual on a felony charge is, on its own, sufficient evidence for the Agency to determine that an individual is a fugitive felon under the Act and, therefore, not entitled to receive title II

[1] Although *Fowlkes* was a title XVI case, the Act provides the same standard under title II for determining whether an individual is a fugitive felon.

benefits or ineligible to receive title XVI payments.

*Statute/Regulation/Ruling Citation:* Sections 202(x)(1)(A) and 1611(e)(4) of the Social Security Act (42 U.S.C. 402(x)(1)(A) and 1382(e)(4)); 20 CFR 416.202(f) and 416.1339.

*Circuit:* Second (Connecticut, New York, Vermont). *Fowlkes* v. *Adamec*, 432 F.3d 90 (2nd Cir. 2005).

*Applicability of Ruling:* This ruling applies to all determinations or decisions at all levels of the administrative review process that an individual is a fugitive felon within the meaning of sections 202(x)(1)(A) and 1611(e)(4) of the Act. This ruling applies to all title II and title XVI applicants, title II beneficiaries, and title XVI recipients who live in Connecticut, New York, or Vermont.

*Description of Case:* In 1997, Felipe Fowlkes applied for and was found eligible to receive supplemental security income (SSI) disability payments under title XVI of the Act. In September 1999, he was indicted in Virginia on two felony charges. On March 16, 2000, the Agency notified Mr. Fowlkes, who at that time resided in New York, that his eligibility for SSI payments would be suspended retroactively to September 1999 because of two outstanding felony warrants from Virginia. Mr. Fowlkes requested administrative review and, after a hearing, an ALJ issued a decision finding that because he had not satisfied the outstanding felony arrest warrants, Mr. Fowlkes was fleeing to avoid prosecution as described in section 1611(e)(4) of the Act, 42 U.S.C. 1382(e)(4). Accordingly, the ALJ found that suspension of Mr. Fowlkes' SSI payments was proper because he was a fugitive felon under the Act.

Mr. Fowlkes sought judicial review, not under the Act, but based on a claim that the Agency violated his civil rights. The district court dismissed Mr. Fowlkes' civil rights claim, without reaching the issue of whether or not Mr. Fowlkes was a fugitive felon under the Act. On appeal, the Second Circuit converted the action into one seeking review, under section 1631(c)(3) of the Act, of the Agency's fleeing felon determination and remanded the case to the district court for further proceedings consistent with its opinion.

*Holding:* The Second Circuit held that the Agency could not conclude that an individual is fleeing to avoid prosecution, custody, or confinement from the mere fact that an outstanding felony arrest warrant or similar order exists. Specifically, the court stated that ''fleeing'' is understood to mean the conscious evasion of arrest or prosecution. The court determined that for ''flight'' to result in a suspension of benefits, it must be undertaken with the specific intent to avoid prosecution. Accordingly, the court concluded that for the Agency to suspend benefits on the basis that an individual was ''fleeing,'' the Agency must have some evidence that the individual knows that his apprehension is sought. The court found the implementing regulation consistent with this construction of the Act. In addition, the court interpreted the implementing regulation to permit the Agency to suspend benefits only as of the date of a warrant or order issued by a court or other appropriate tribunal on the basis of a finding that an individual has fled or was fleeing from justice.

*Statement as to How Fowlkes Differs from the Agency's Policy:* We interpret section 1611(e)(4) of the Act to mean that a person is ''fleeing to avoid prosecution, custody, or confinement'' when a person has an outstanding warrant for his or her arrest, even if that person is unaware of that warrant.

The Second Circuit Court of Appeals rejected this interpretation. The Second Circuit held the term ''fleeing'' to mean ''the conscious evasion of arrest or prosecution.'' The court determined that for ''flight'' to result in a suspension of benefits, it must be undertaken with the specific intent to avoid prosecution. Thus, for the Agency to take adverse action against an individual described in the Act as ''fleeing to avoid prosecution, custody, or confinement,'' the Agency must have some evidence that the individual knew his apprehension was sought.

*Explanation of How SSA Will Apply the Fowlkes Decision Within the Circuit:* This ruling applies to all determinations or decisions at all levels of the administrative review process that an individual is a fugitive felon within the meaning of sections 202(x)(1)(A) and 1611(e)(4) of the Act. This ruling applies to all title II and title XVI applicants, title II beneficiaries and title XVI recipients who live in Connecticut, New York, or Vermont.

We will not use the existence of an outstanding felony arrest warrant or similar order as the sole basis for finding that an individual is fleeing to avoid prosecution, custody, or confinement and is, therefore, a fugitive felon subject to withholding of title II benefits or ineligibility to receive title XVI payments. Before we determine that a title II or title XVI applicant, title II beneficiary, or title XVI recipient is a fugitive felon, we must have evidence that the individual knows that there is an outstanding felony arrest warrant, and the outstanding arrest warrant must have been issued on the basis that the individual has fled or is fleeing from justice.

*Cross References:* Program Operations Manual System, sections SI 00530.010 and GN 02613.010.

[FR Doc. 06–3259 Filed 4–5–06; 8:45 am]

BILLING CODE 4191–02–M

## DEPARTMENT OF STATE

**[Public Notice 5368]**

## Bureau of Political—Military Affairs: Directorate of Defense Trade Controls; Notifications to the Congress of Proposed Commercial Export Licenses

**SUMMARY:** Notice is hereby given that the Department of State has forwarded the attached Notifications of Proposed Export Licenses to the Congress on the dates indicated pursuant to sections 36(c) and 36(d) and in compliance with section 36(f) of the Arms Export Control Act (22 U.S.C. 2776).

**DATES:** *Effective Date:* As shown on each of the 30 letters.

**FOR FURTHER INFORMATION CONTACT:** Mr. Peter J. Berry, Director, Office of Defense Trade Controls Licensing, Directorate of Defense Trade Controls, Bureau of Political-Military Affairs, Department of State (202) 663–2806.

**SUPPLEMENTARY INFORMATION:** Section 36(f) of the Arms Export Control Act mandates that notifications to the Congress pursuant to sections 36(c) and 36(d) must be published in the **Federal Register** when they are transmitted to Congress or as soon thereafter as practicable.

September 27, 2005.

Hon. J. Dennis Hastert, Speaker of the House of Representatives.

Dear Mr. Speaker: Pursuant to Section 36(c) of the Arms Export Control Act, I am transmitting, herewith, certification of a proposed license for the export of defense articles or defense services sold commercially under a contract in the amount of $100,000,000 or more.

The transaction contained in the attached certification involves the export of technical data, defense services and hardware to related to the sale and inspection of U–125A aircraft to Japan.

The United States Government is prepared to license the export of this item having taken into account political, military, economic, human rights and arms control considerations.

More detailed information is contained in the formal certification which, though unclassified, contains business information submitted to the Department of State by the applicant, publication of which could cause competitive harm to the United States firm concerned.

Sincerely,

Matthew A. Reynolds,

*Acting Assistant Secretary Legislative Affairs.*

Enclosure: Transmittal No. DDTC 038–05.

November 14, 2005.

Hon. J. Dennis Hastert, Speaker of the House of Representatives.

Dear Mr. Speaker: Pursuant to Section 36(c) of the Arms Export Control Act, I am transmitting, herewith, certification of a proposed license for the export of defense articles or defense services sold commercially under a contract in the amount of $100,000,000 or more.

The transaction contained in the attached certification involves the export to the United Kingdom of technical data, defense services and hardware for the manufacture of the AN/VIC–3 Vehicle Intercommunications System.

The United States Government is prepared to license the export of these items having taken into account political, military, economic, human rights and arms control considerations.

More detailed information is contained in the formal certification, which, though unclassified, contains business information submitted to the Department of State by the applicant, publication of which could cause competitive harm to the United States firm concerned.

Sincerely,
Jeffrey T. Bergner,
*Assistant Secretary Legislative Affairs.*
Enclosure: Transmittal No. DTC 032–05.

November 14, 2005.
Hon. J. Dennis Hastert, Speaker of the House of Representatives.
Dear Mr. Speaker: Pursuant to Section 36(c) of the Arms Export Control Act, I am transmitting, herewith, certification of a proposed license for the export of major defense equipment and defense articles in the amount of $50,000,000 or more.
The transaction contained in the attached certification involves export of technical data, defense services and hardware to the Republic of Korea to support the aircraft refurbishment, and mission systems modernization for the Republic of Korea, Navy Maritime Patrol Aircraft Lot II Program.
The United States Government is prepared to license the export of these items having taken into account political, military, economic, human rights and arms control considerations.
More detailed information is contained in the formal certification which, though unclassified, contains business information submitted to the Department of State by the applicant, publication of which could cause competitive harm to the United States firm concerned.

Sincerely,
Jeffrey T. Bergner,
*Assistant Secretary Legislative Affairs.*
Enclosure: Transmittal No. DTC 044–05.

November 14, 2005.
Hon. J. Dennis Hastert, Speaker of the House of Representatives.
Dear Mr. Speaker: Pursuant to Section 36(c) of the Arms Export Control Act, I am transmitting, herewith, certification of a proposed manufacturing license agreement for the export of defense articles or defense services in the amount of $100,000,000 or more.
The transaction contained in the attached certification involves the export of technical data, defense services and hardware to Japan for the manufacture of F100 engines, associated spare parts and equipment for the F–15 aircraft operated by the Japanese Air Self Defense Force (JASDF).
The United States Government is prepared to license the export of these items having taken into account political, military, economic, human rights and arms control considerations.
More detailed information is contained in the formal certification which, though unclassified, contains business information submitted to the Department of State by the applicant, publication of which could cause competitive harm to the United States firm concerned.

Sincerely,
Jeffrey T. Bergner,
*Assistant Secretary Legislative Affairs.*
Enclosure: Transmittal No. DDTC 049–05.

November 14, 2005.
Hon. J. Dennis Hastert, Speaker of the House of Representatives.
Dear Mr. Speaker: Pursuant to Section 36(c) of the Arms Export Control Act, I am transmitting, herewith, certification of a proposed license for the export of major defense equipment and defense articles in the amount of $14,000,000 or more.
The transaction contained in the attached certification involves the export of technical data, hardware, and assistance for Sentinel radars and Sentry command and control software for the Mexican Navy.
The United States Government is prepared to license the export of these items having taken into account political, military, economic, human rights and arms control considerations.
More detailed information is contained in the formal certification which, though unclassified, contains business information submitted to the Department of State by the applicant, publication of which could cause competitive harm to the United States firm concerned.

Sincerely,
Jeffrey T. Bergner,
*Assistant Secretary Legislative Affairs.*
Enclosure: Transmittal No. DDTC 050–05.

November 15, 2005.
Hon. J. Dennis Hastert, Speaker of the House of Representatives.
Dear Mr. Speaker: Pursuant to Section 36(c) of the Arms Export Control Act, I am transmitting, herewith, certification of a proposed license for the export of defense articles or defense services sold commercially under a contract in the amount of $100,000,000 or more.
The transaction contained in the attached certification involves the export of technical data, hardware, and assistance for six Model S–70B helicopters to the government of Singapore.
The United States Government is prepared to license the export of this item having taken into account political, military, economic, human rights and arms control considerations.
More detailed information is contained in the formal certification which, though unclassified, contains business information submitted to the Department of State by the applicant, publication of which could cause competitive harm to the United States firm concerned.

Sincerely,
Jeffrey T. Bergner,
*Assistant Secretary Legislative Affairs.*
Enclosure: Transmittal No. DDTC 051–05.

November 17, 2005.
Hon. J. Dennis Hastert, Speaker of the House of Representatives.
Dear Mr. Speaker: Pursuant to Section 36(c) of the Arms Export Control Act, I am transmitting, herewith, certification of a proposed license for the export of defense articles or defense services sold commercially under a contract in the amount of $50,000,000 or more.
The transaction contained in the attached certification involves the export of (1) one AMC–14 A2100 Ku-band commercial communications satellite to Kazakhstan.
The United States Government is prepared to license the export of these items having taken into account political, military, economic, human rights and arms control considerations.
More detailed information is contained in the formal certification which, though unclassified, contains business information submitted to the Department of State by the applicant, publication of which could cause competitive harm to the United States firm concerned.

Sincerely,
Jeffrey T. Bergner,
*Acting Assistant Secretary Legislative Affairs.*
Enclosure: Transmittal No. DDTC 033–05.

November 17, 2005.
Hon. J. Dennis Hastert, Speaker of the House of Representatives.
Dear Mr. Speaker: Pursuant to Section 36(d) of the Arms Export Control Act, I am transmitting, herewith, certification of a proposed manufacturing license agreement for the manufacture of significant military equipment abroad.
The transaction contained in the attached certification involves the export to the United Kingdom of technical data, defense services, and hardware for the manufacture of the High Capacity Data Radio for end-use by the Ministry of Defense of Belgium.
The United States Government is prepared to license the export of these items having taken into account political, military, economic, human rights and arms control considerations.
More detailed information is contained in the formal certification which, though unclassified, contains business information submitted to the Department of State by the applicant, publication of which could cause competitive harm to the United States firm concerned.

Sincerely,
Jeffrey T. Bergner,
*Assistant Secretary Legislative Affairs.*
Enclosure: Transmittal No. DDTC 036–05.

November 18, 2005.
Hon. J. Dennis Hastert, Speaker of the House of Representatives.
Dear Mr. Speaker: Pursuant to Section 36(d) of the Arms Export Control Act, I am transmitting, herewith, certification of a proposed manufacturing license agreement for the manufacture of significant military equipment abroad.
The transaction contained in the attached certification involves the transfer of technical data, assistance and manufacturing know-how to Sweden and the United Kingdom for the manufacture of the Bushmaster IV 40mm Chain Gun.
The United States Government is prepared to license the export of these items having taken into account political, military, economic, human rights and arms control considerations.
More detailed information is contained in the formal certification which, though unclassified, contains business information submitted to the Department of State by the applicant, publication of which could cause competitive harm to the United States firm concerned.

Sincerely,
Jeffrey T. Bergner,
*Assistant Secretary Legislative Affairs.*
Enclosure: Transmittal No. DDTC 006–05.

November 18, 2005.
Hon. J. Dennis Hastert, Speaker of the House of Representatives.
Dear Mr. Speaker: Pursuant to Section 36(c) of the Arms Export Control Act, I am

transmitting, herewith, certification of a proposed license for the export of defense articles or defense services sold commercially under a contract in the amount of $50,000,000 or more.

The transaction contained in the attached certification involves the export to the Republic of Korea of technical data, hardware, and assistance to support the manufacture, assembly and repair of fuselages and fuselage components for the AH–64D Apache helicopter.

The United States Government is prepared to license the export of these items having taken into account political, military, economic, human rights and arms control considerations.

More detailed information is contained in the formal certification which, though unclassified, contains business information submitted to the Department of State by the applicant, publication of which could cause competitive harm to the United States firm concerned.

Sincerely,
Jeffrey T. Bergner,
*Assistant Secretary Legislative Affairs.*

Enclosure: Transmittal No. DDTC 042–05.

November 28, 2005.
Hon. J. Dennis Hastert, Speaker of the House of Representatives.

Dear Mr. Speaker: Pursuant to Section 36(c) of the Arms Export Control Act, I am transmitting, herewith, certification of a proposed license for the export of defense articles or defense services sold commercially under a contract in the amount of $50,000,000 or more.

The transaction contained in the attached certification involves the export to Taiwan of technical data, hardware and assistance in support of the An-Yu 4 Program Automated Air Defense System (AADS) for the Taiwan Ministry of National Defense.

The United States Government is prepared to license the export of these items having taken into account political, military, economic, human rights and arms control considerations.

More detailed information is contained in the formal certification which, though unclassified, contains business information submitted to the Department of State by the applicant, publication of which could cause competitive harm to the United States firm concerned.

Sincerely,
Jeffrey T. Bergner,
*Assistant Secretary Legislative Affairs.*

Enclosure: Transmittal No. DDTC 040–05.

November 28, 2005.
Hon. J. Dennis Hastert, Speaker of the House of Representatives.

Dear Mr. Speaker: Pursuant to Section 36(c) of the Arms Export Control Act, I am transmitting, herewith, certification of a proposed license for the export of defense articles or defense services sold commercially under a contract in the amount of $100,000,000 or more.

The transaction contained in the attached certification adds France and Austria to the countries previously approved (i.e., Germany, Italy, Spain, and the United Kingdom) to receive exports consisting of electronic power generating systems in support of the Eurofighter program.

The United States Government is prepared to license the export of these items having taken into account political, military, economic, human rights and arms control considerations.

More detailed information is contained in the formal certification which, though unclassified, contains business information submitted to the Department of State by the applicant, publication of which could cause competitive harm to the United States firm concerned.

Sincerely,
Jeffrey T. Bergner,
*Assistant Secretary Legislative Affairs.*

Enclosure: Transmittal No. DDTC 046–05.

November 29, 2005.
Hon. J. Dennis Hastert, Speaker of the House of Representatives.

Dear Mr. Speaker: Pursuant to Section 36(c) of the Arms Export Control Act, I am transmitting, herewith, certification of a proposed license for the export of defense articles or defense services sold commercially under a contract in the amount of $100,000,000 or more.

The transaction contained in the attached certification involves the export to Austria, Canada, France, Switzerland and the United Kingdom of technical data, hardware, and assistance for the integration of Link-16 Ground-to-air Data Link (GADL) into the FLORAKO Swiss Air Defense Ground Environment System.

The United States Government is prepared to license the export of these items having taken into account political, military, economic, human rights and arms control considerations.

More detailed information is contained in the formal certification which, though unclassified, contains business information submitted to the Department of State by the applicant, publication of which could cause competitive harm to the United States firm concerned.

Sincerely,
Jeffrey T. Bergner,
*Assistant Secretary Legislative Affairs.*

Enclosure: Transmittal No. DDTC 037–05.

December 5, 2005.
Hon. J. Dennis Hastert, Speaker of the House of Representatives.

Dear Mr. Speaker: Pursuant to Section 36(c) and (d) of the Arms Export Control Act, I am transmitting, herewith, certification of a proposed manufacturing license agreement for the manufacture of significant military equipment abroad and the export of defense articles and defense services in the amount of $100,000,000 or more.

The transaction described in the attached certification involves the export to the United Kingdom of technical data, defense services and hardware for the manufacture of the MPR–9600 and RF–5800H-MP HF tactical radio systems for resale to Albania, Bolivia, Brazil, Brunei, Bulgaria, Chile, Colombia, Ecuador, Egypt, Ghana, Guatemala, Hungary, Iraq, Jamaica, Kenya, Kyrgyzstan, Malawi, Malaysia, Morocco, Mozambique, Netherlands, Nigeria, Oman, Pakistan, Peru, Philippines, Poland, Romania, Saudi Arabia, Singapore, Spain, Sri Lanka, Tajikistan, Tanzania, Trinidad and Tobago, Tunisia, United Arab Emirates, Uganda, and U.S.

The United States Government is prepared to license the export of this item having taken into account political, military, economic, human rights and arms control considerations.

More detailed information is contained in the formal certification which, though unclassified, contains business information submitted to the Department of State by the applicant, publication of which could cause competitive harm to the United States firm concerned.

Sincerely,
Jeffrey T. Bergner,
*Assistant Secretary Legislative Affairs.*

Enclosure: Transmittal No. DDTC 028–05.

December 5, 2005.
Hon. J. Dennis Hastert, Speaker of the House of Representatives.

Dear Mr. Speaker: Pursuant to Section 36(c) of the Arms Export Control Act, I am transmitting, herewith, certification of a proposed license for the export of defense articles or defense services sold commercially under a contract in the amount of $50,000,000 or more.

The transaction contained in the attached certification involves the export and launch of a commercial communications satellite, and related support equipment, from French Guiana.

The United States Government is prepared to license the export of these items having taken into account political, military, economic, human rights and arms control considerations.

More detailed information is contained in the formal certification which, though unclassified, contains business information submitted to the Department of State by the applicant, publication of which could cause competitive harm to the United States firm concerned.

Sincerely,
Jeffrey T. Bergner,
*Assistant Secretary Legislative Affairs.*

Enclosure: Transmittal No. DDTC 056–05.

December 8, 2005.
Hon. J. Dennis Hastert, Speaker of the House of Representatives.

Dear Mr. Speaker: Pursuant to Section 36(c) and (d) of the Arms Export Control Act, I am transmitting, herewith, certification of a proposed manufacturing license agreement for the manufacture of significant military equipment abroad and the export of defense articles and defense services in the amount of $50,000,000.

The transaction described in the attached certification involves an extension of duration of the manufacture in Russia and the United States of RD–180 two-chamber rocket motors for use on Atlas launch vehicles, including the USAF Evolved Expandable Launch Vehicle.

The United States Government is prepared to license the export of this item having taken into account political, military, economic, human rights and arms control considerations.

More detailed information is contained in the formal certification which, though

unclassified, contains business information submitted to the Department of State by the applicant, publication of which could cause competitive harm to the United States firm concerned.

Sincerely,
Jeffrey T. Bergner,
*Assistant Secretary Legislative Affairs.*

Enclosure: Transmittal No. DDTC 070–05.

December 12, 2005.
Hon. J. Dennis Hastert, Speaker of the House of Representatives.

Dear Mr. Speaker: Pursuant to Section 36(c) of the Arms Export Control Act, I am transmitting, herewith, certification of a proposed license for the export of defense articles or defense services sold commercially under a contract in the amount of $100,000,000 or more.

The transaction contained in the attached certification involves the export of defense services, technical data and defense articles related to the sale of 212 AIM–120C–5 Advanced Medium Range Air-to-Air missiles (AMRAAM) for end-use by the United Kingdom Ministry of Defence.

The United States Government is prepared to license the export of these items having taken into account political, military, economic, human rights and arms control considerations.

More detailed information is contained in the formal certification which, though unclassified, contains business information submitted to the Department of State by the applicant, publication of which could cause competitive harm to the United States firm concerned.

Sincerely,
Jeffrey T. Bergner,
*Assistant Secretary Legislative Affairs.*

Enclosure: Transmittal No. DDTC 052–05.

December 15, 2005.
Hon. J. Dennis Hastert, Speaker of the House of Representatives.

Dear Mr. Speaker: Pursuant to Section 36(c) and (d) of the Arms Export Control Act, I am transmitting, herewith, certification of a proposed license for the export of major defense equipment and defense articles in the amount of $100,000,000 or more.

The transaction described in the attached certification involves the export to Italy of technical data, defense services, and defense articles necessary for the development and production of C–27J Spartan Transport aircraft for follow-on sale to the Ministries of Defense of Bulgaria, Canada, Finland, Greece, Italy, and Portugal.

The United States Government is prepared to license the export of this item having taken into account political, military, economic, human rights and arms control considerations.

More detailed information is contained in the formal certification which, though unclassified, contains business information submitted to the Department of State by the applicant, publication of which could cause competitive harm to the United States firm concerned.

Sincerelyc,
Jeffrey T. Bergner,
*Assistant Secretary Legislative Affairs.*

Enclosure: Transmittal No. DDTC 048–05.

December 20, 2005.
Hon. J. Dennis Hastert, Speaker of the House of Representatives.

Dear Mr. Speaker: Pursuant to Section 36(c) of the Arms Export Control Act, I am transmitting, herewith, certification of a proposed license for the export of defense articles or defense services sold commercially under a contract in the amount of $50,000,000 or more.

The transaction contained in the attached certification involves the export to the Republic of Korea of technical data, hardware, and assistance to implement the Night Owl/Hyangbaek signals intelligence systems for the Ministry of National Defense.

The United States Government is prepared to license the export of these items having taken into account political, military, economic, human rights and arms control considerations.

More detailed information is contained in the formal certification which, though unclassified, contains business information submitted to the Department of State by the applicant, publication of which could cause competitive harm to the United States firm concerned.

Sincerely,
Jeffrey T. Bergner,
*Assistant Secretary Legislative Affairs.*

Enclosure: Transmittal No. DDTC 043–05.

December 20, 2005.
Hon. J. Dennis Hastert, Speaker of the House of Representatives.

Dear Mr. Speaker: Pursuant to Section 36(c) of the Arms Export Control Act, I am transmitting, herewith, certification of a proposed license for the export of major defense equipment and defense articles in the amount of $50,000,000 or more.

The transaction contained in the attached certification involves the export to Switzerland of technical data, defense services, and defense articles necessary to support the manufacture of aircraft metallic machined detail parts and minor structural assemblies for the F/A–18, F–15, T–45, C–17, and AH–64 aircraft.

The United States Government is prepared to license the export of these items having taken into account political, military, economic, human rights and arms control considerations.

More detailed information is contained in the formal certification which, though unclassified, contains business information submitted to the Department of State by the applicant, publication of which could cause competitive harm to the United States firm concerned.

Sincerely,
Jeffrey T. Bergner,
*Assistant Secretary Legislative Affairs.*

Enclosure: Transmittal No. DDTC 047–05.

December 20, 2005.
Hon. J. Dennis Hastert, Speaker of the House of Representatives.

Dear Mr. Speaker: Pursuant to Section 36(c) and (d) of the Arms Export Control Act, I am transmitting, herewith, certification of a proposed license for the export of defense articles or defense services sold commercially under contract in the amount of $100,000,000 or more.

The transaction described in the attached certification involves the export of defense services, technical data and defense articles related to HAWK Air Defense System Phase III Product Improvement Program for end-use by the Japanese Defense Agency.

The United States Government is prepared to license the export of this item having taken into account political, military, economic, human rights and arms control considerations.

More detailed information is contained in the formal certification which, though unclassified, contains business information submitted to the Department of State by the applicant, publication of which could cause competitive harm to the United States firm concerned.

Sincerely,
Jeffrey T. Bergner,
*Assistant Secretary Legislative Affairs.*

Enclosure: Transmittal No. DDTC 060–05.

December 20, 2005.
Hon. J. Dennis Hastert, Speaker of the House of Representatives.

Dear Mr. Speaker: Pursuant to Section 36(c) of the Arms Export Control Act, I am transmitting, herewith, certification of a proposed license for the export of defense articles or defense services sold commercially under a contract in the amount of $100,000,000 or more.

The transaction contained in the attached certification involves the export of technical data, defense services, and hardware to Japan for design, production and launch of the JCSAT–11 commercial communications satellite and associated ground system for Japan.

The United States Government is prepared to license the export of these items having taken into account political, military, economic, human rights and arms control considerations.

More detailed information is contained in the formal certification which, though unclassified, contains business information submitted to the Department of State by the applicant, publication of which could cause competitive harm to the United States firm concerned.

Sincerely,
Jeffrey T. Bergner,
*Assistant Secretary Legislative Affairs.*

Enclosure: Transmittal No. DDTC 061–05.

December 20, 2005.
Hon. J. Dennis Hastert, Speaker of the House of Representatives.

Dear Mr. Speaker: Pursuant to Section 36(c) of the Arms Export Control Act, I am transmitting, herewith, certification of a proposed license for the export of defense articles or defense services sold commercially under a contract in the amount of $100,000,000 or more.

The transaction contained in the attached certification involves the export to the Netherlands of technical data, defense services and hardware for the manufacture of the Improved Extended Forward Avionics Bays (IEFABS) for installation on the AH–64 Series Apache helicopter for sales in the U.S.

The United States Government is prepared to license the export of these items having taken into account political, military,

economic, human rights and arms control considerations.

More detailed information is contained in the formal certification which, though unclassified, contains business information submitted to the Department of State by the applicant, publication of which could cause competitive harm to the United States firm concerned.

Sincerely,
Jeffrey T. Bergner,
*Assistant Secretary Legislative Affairs.*

Enclosure: Transmittal No. DDTC 063–05.

December 20, 2005.

Hon. J. Dennis Hastert, Speaker of the House of Representatives.

Dear Mr. Speaker: Pursuant to Section 36(c) & (d) of the Arms Export Control Act, I am transmitting, herewith, certification of a proposed license for the export of defense articles or defense services sold commercially under contract in the amount of $100,000,000 or more.

The transaction contained in the attached certification involves the export of defense services, technical data and defense articles for the manufacture in Japan of the Vertol 107 Helicopter, components and parts for end-use by Japan, Saudi Arabia, Sweden, and the United States.

The United States Government is prepared to license the export of this item having taken into account political, military, economic, human rights and arms control considerations.

More detailed information is contained in the formal certification which, though unclassified, contains business information submitted to the Department of State by the applicant, publication of which could cause competitive harm to the United States firm concerned.

Sincerely,
Jeffrey T. Bergner,
*Assistant Secretary Legislative Affairs.*

Enclosure: Transmittal No. DDTC 065–05.

December 20, 2005.

Hon. J. Dennis Hastert, Speaker of the House of Representatives.

Dear Mr. Speaker: Pursuant to Section 36(c) & (d) of the Arms Export Control Act, I am transmitting, herewith, certification of a proposed license for the export of defense articles or defense services sold commercially under contract in the amount of $100,000,000 or more.

The transaction contained in the attached certification involves the export of defense services, technical data and defense articles for the manufacture in the Japan of the CH–47J Chinook Helicopter for end-use by the Japan Defense Agency.

The United States Government is prepared to license the export of this item having taken into account political, military, economic, human rights and arms control considerations.

More detailed information is contained in the formal certification which, though unclassified, contains business information submitted to the Department of State by the applicant, publication of which could cause competitive harm to the United States firm concerned.

Sincerely,
Jeffrey T. Bergner,
*Assistant Secretary Legislative Affairs.*

Enclosure: Transmittal No. DDTC 066–05.

December 20, 2005.

Hon. J. Dennis Hastert, Speaker of the House of Representatives.

Dear Mr. Speaker: Pursuant to Section 36(c) of the Arms Export Control Act, I am transmitting, herewith, certification of a proposed license for the export of defense articles or defense services sold commercially under a contract in the amount of $50,000,000 or more.

The transaction contained in the attached certification involves the export of technical data, defense services and hardware to Taiwan for the manufacture, installation and upgrade of the GD–53 Airborne Multimode Radar installed on the Indigenous Defensive Fighter (IDF)/Ching Kuo Aircraft.

The United States Government is prepared to license the export of these items having taken into account political, military, economic, human rights and arms control considerations.

More detailed information is contained in the formal certification which, though unclassified, contains business information submitted to the Department of State by the applicant, publication of which could cause competitive harm to the United States firm concerned.

Sincerely,
Jeffrey T. Bergner,
*Assistant Secretary Legislative Affairs.*

Enclosure: Transmittal No. DDTC 067–05.

December 20, 2005.

Hon. J. Dennis Hastert, Speaker of the House of Representatives.

Dear Mr. Speaker: Pursuant to Section 36(d) of the Arms Export Control Act, I am transmitting, herewith, certification of a proposed manufacturing license agreement for the manufacture of significant military equipment abroad.

The transaction contained in the attached certification involves the export to the United Kingdom of technical data, defense services and hardware for the manufacture of the Bowman Communication System for end-use by the Royal Netherlands Navy (Marine Corps).

The United States Government is prepared to license the export of these items having taken into account political, military, economic, human rights and arms control considerations.

More detailed information is contained in the formal certification which, though unclassified, contains business information submitted to the Department of State by the applicant, publication of which could cause competitive harm to the United States firm concerned.

Sincerely,
Jeffrey T. Bergner,
*Assistant Secretary Legislative Affairs.*

Enclosure: Transmittal No. DDTC 068–05.

December 20, 2005.

Hon. J. Dennis Hastert, Speaker of the House of Representatives.

Dear Mr. Speaker: Pursuant to Section 36(c) of the Arms Export Control Act, I am transmitting, herewith, certification of a proposed license for the export of defense articles or defense services sold commercially under a contract in the amount of $100,000,000 or more.

The transaction contained in the attached certification involves the export of defense services, technical data and defense articles to the United Kingdom for the manufacture of the wing trailing edge panels and flap hinge fairings for installation on the C–17 aircraft in the United States.

The United States Government is prepared to license the export of these items having taken into account political, military, economic, human rights and arms control considerations.

More detailed information is contained in the formal certification which, though unclassified, contains business information submitted to the Department of State by the applicant, publication of which could cause competitive harm to the United States firm concerned.

Sincerely,
Jeffrey T. Bergner,
*Assistant Secretary Legislative Affairs.*

Enclosure: Transmittal No. DDTC 069–05.

February 7, 2006.

Hon. J. Dennis Hastert, Speaker of the House of Representatives.

Dear Mr. Speaker: Pursuant to Section 36(c) and 36(d) of the Arms Export Control Act, I am transmitting, herewith, certification of a proposed manufacturing license agreement for the manufacture of significant military equipment abroad and the export of defense articles or defense services in the amount of $50,000,000.

The transaction contained in the attached certification involves the manufacture in Russia and the United States of RD–180 two-chamber rocket motors for use on Atlas launch vehicles, including the USAF Evolved Expandable Launch Vehicle.

The United States Government is prepared to license the export of these items having taken into account political, military, economic, human rights and arms control considerations.

More detailed information is contained in the formal certification which, though unclassified, contains business information submitted to the Department of State by the applicant, publication of which could cause competitive harm to the United States firm concerned.

Sincerely,
Jeffrey T. Bergner,
*Assistant Secretary Legislative Affairs.*

Enclosure: Transmittal No. DDTC 003–06.

March 23, 2006.

Hon. J. Dennis Hastert, Speaker of the House of Representatives.

Dear Mr. Speaker: Pursuant to Section 36(c) of the Arms Export Control Act, I am transmitting, herewith, certification of a proposed license for the export of defense articles or defense services sold commercially under contract in the amount of $100,000,000 or more.

The transaction contained in the attached certification involves the export of defense services, technical data and defense articles to the United Kingdom for the UK Chinook Through Life Customer Support Program (TLCS) for the United Kingdom Ministry of Defence.

The United States Government is prepared to license the export of these items having taken into account political, military, economic, human rights and arms control considerations.

More detailed information is contained in the formal certification which, though unclassified, contains business information submitted to the Department of State by the applicant, publication of which could cause competitive harm to the United States firm concerned.

Sincerely,
Jeffrey T. Bergner,
*Assistant Secretary Legislative Affairs.*
Enclosure: Transmittal No. DDTC 055–05.

Dated: March 30, 2006.

**Peter J. Berry,**

*Director, Office of Defense Trade Controls Licensing, Department of State*

[FR Doc. E6–5004 Filed 4–5–06; 8:45 am]

BILLING CODE 4710–25–P

## DEPARTMENT OF STATE

**[Public Notice: 5367]**

### Secretary of State's Advisory Committee of Private International Law: Study Group on International Child Support

*Subject:* There will be a public meeting of the Study Group on International Child Support of the Secretary's of State's Advisory Committee on Private International Law on Thursday, April 20, 2006, to consider the draft Convention on the International recovery of Child Support and other Forms of Family Maintenance. The draft is available at *http://www.hcch.net* (click Works in Progress, Maintenance, Preliminary Document 16). The meeting will be held at the Holiday Inn Tyson's Corner Hotel, 1960 Chain Bridge Road, McLean, Virginia, 22102, from 8 a.m. until 5 p.m. The purpose is to assist the United States in preparing for the next negotiating session which will take place at the Hague Conference on Private International Law in June 2006.

The Study Group meeting is open to the public up to the capacity of the meeting room. Persons wishing to attend and have their views considered are encouraged to submit in writing comments in advance of the meeting. Comments should be sent electronically to *carlsonmh@state.gov.* Anyone planning to attend this meeting should provide their name, affiliation and contact information in advance to Mary Helen Carlson at 202–776–8420 or by e-mail to *carlsonmh@state.gov*

Dated: March 31, 2006.

**Mary Helen Carlson,**

*Office of the Legal Adviser for Private International Law, Department of State.*

[FR Doc. 06–3357 Filed 4–5–06; 8:45 am]

BILLING CODE 4710–08–P

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

### Notice of Opportunity for Public Comment on Surplus Property Release at Augusta Regional Airport, Augusta, GA

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice.

**SUMMARY:** Under the provisions of Title 49, U.S.C. 47153(c), notice is being given that the FAA is considering a request from the Augusta Aviation Commission and the Augusta Regional Airport to waive the requirement that a 4.31-acre parcel of surplus property, located at the Augusta Regional Airport, be used for aeronautical purposes.

**DATES:** Comments must be received on or before May 8, 2006.

**ADDRESSES:** Comments on this notice may be mailed or delivered in triplicate to the FAA at the following address: Atlanta Airports District Office, Attn: Aimee A. McCormick, Program Manager, 1701 Columbia Ave., Campus Bldg., Suite 2–260, Atlanta, GA 30337–2747.

In addition, one copy of any comments submitted to the FAA must be mailed or delivered to Mr. Buster Boshears, Executive Director, Augusta Regional Airport at the following address: 1501 Aviation Way, Augusta, GA 30906.

**FOR FURTHER INFORMATION CONTACT:** Aimee McCormick, Program Manager, Atlanta Airports District Office, 1701 Columbia Ave., Campus Bldg., Suite 2–260, Atlanta, GA 30337–2747, (404) 305–7143. The application may be reviewed in person at this same location.

**SUPPLEMENTARY INFORMATION:** The FAA is reviewing a request by the Augusta Aviation Commission and the Augusta Regional Airport to release 4.31 acres of surplus property at the Augusta Regional Airport. The property will be purchased as a permanent easement to construct a force gravity sewer main and additional future utility lines. The net proceeds from the sale of this property will be used for airport purposes. The proposed use of this property is compatible with airport operations.

Any person may inspect the request in person at the FAA office listed above under **FOR FURTHER INFORMATION CONTACT**. In addition, any person may, upon request, inspect the request, notice and other documents germane to the request in person at the Augusta Aviation Commission and the August Regional Airport.

Issued in Atlanta, Georgia, on March 20, 2006.

**Scott L. Seritt,**

*Manager, Atlanta Airports District Office, Southern Region.*

[FR Doc. 06–3288 Filed 4–5–06; 8:45 am]

BILLING CODE 4910–13–M

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

### Receipt of Noise Compatibility Program and Request for Review; Columbia Metropolitan Airport, Columbia, SC

**AGENCY:** Federal Aviation Administration, DOT.

**ACTION:** Notice.

**SUMMARY:** The Federal Aviation Administration (FAA) announces that it is reviewing a proposed noise compatibility program that was submitted for Columbia Metropolitan Airport under the provisions of 49 U.S.C. 47501 et seq. (the Aviation Safety and Noise Abatement Act hereinafter referred to as ''the Act'') and 14 CFR part 150 by the Richland-Lexington Airport District. This program was submitted subsequent to a determination by FAA that the associated noise exposure maps submitted under 14 CFR part 150 for Columbia Metropolitan Airport were in compliance with applicable requirements effective July 29, 2005. The proposed noise compatibility program will be approved or disapproved on or before September 18, 2006.

**DATES:** *Effective Date:* The effective date of the start of FAA's review of the associated noise compatibility program is March 22, 2006. The public comment period ends May 22, 2006.

**FOR FURTHER INFORMATION CONTACT:** Ms. Bonnie Baskin, Federal Aviation Administration, Atlanta Airports District Office, 1702 Columbia Avenue, Campus Building, Suite 2–260, College Park, Georgia, (404) 305–7152. Comments on the proposed noise compatibility program should also be submitted to the above office.

**SUPPLEMENTARY INFORMATION:** This notice announces that the FAA is

reviewing a proposed noise compatibility program for Columbia Metropolitan Airport that will be approved or disapproved on or before September 18, 2006. This notice also announces the availability of this program for public review and comment.

An airport operator who has submitted noise exposure maps that are found by FAA to be in compliance with the requirements of Federal Aviation Regulations (FAR) part 150, promulgated pursuant to the Act, may submit a noise compatibility program for FAA approval which sets forth the measure the operator has taken or proposes to reduce existing non-compatible uses and prevent the introduction of additional non-compatible uses.

The FAA has formally received the noise compatibility program for Columbia Metropolitan Airport, effective on March 22, 2006. The airport operator has requested that the FAA review this material and that the noise mitigation measures, to be implemented jointly by the airport and surrounding communities, be approved as a noise compatibility program under section 47504 of the Act. Preliminary review of the submitted material indicates that it conforms to the requirements for the submittal of noise compatibility programs, but that further review will be necessary prior to approval or disapproval of the program. The formal review period, limited by law to a maximum of 180 days, will be completed on or before September 18, 2006.

The FAA's detailed evaluation will be conducted under the provisions of 14 CFR part 150, section 150.33. The primary considerations in the evaluation process are whether the proposed measures may reduce the level of aviation safety or create an undue burden on interstate or foreign commerce, and whether they are reasonably consistent with obtaining the goal of reducing existing non-compatible land uses and preventing the introduction of additional non-compatible land uses.

Interested persons are invited to comment on the proposed program with specific reference to these factors. All comments relating to these factors, other than those properly addressed to local land use authorities, will be considered by the FAA to the extent practicable. Copies of the noise exposure maps, the FAA's evaluation of the maps, and the proposed noise compatibility program are available for examination at the following location: Federal Aviation Administration, Atlanta Airports District Office, 1701 Columbia Avenue, Campus Building 2–260, College Park, Georgia 30337. Questions may be directed to the individual named above under the heading, **FOR FURTHER INFORMATION CONTACT.**

Issued in Atlanta, Georgia, March 22, 2006.

**Scott L. Seritt,**

*Manager, Atlanta Airports District Office.*

[FR Doc. 06–3289 Filed 4–5–06; 8:45 am]

**BILLING CODE 4910–13–M**

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## DEPARTMENT OF TRANSPORTATION

### Federal Motor Carrier Safety Administration

**[Docket No. FMCSA–2006–24016]**

### Qualification of Drivers; Exemption Application From Thomas Deke; Diabetes

**AGENCY:** Federal Motor Carrier Safety Administration (FMCSA), DOT.

**ACTION:** Notice of application for exemption; request for comments.

**SUMMARY:** FMCSA announces receipt of application from Mr. Thomas Deke for an exemption from the prohibition against persons with insulin-treated diabetes mellitus (ITDM) operating commercial motor vehicles (CMVs) in interstate commerce. If granted, the exemption would enable Mr. Deke to operate commercial motor vehicles in interstate commerce.

**DATES:** Comments must be received on or before May 8, 2006.

**ADDRESSES:** You may submit comments identified by DOT Docket Management System (DMS) Docket Number FMCSA–2006–24016 using any of the following methods:

- *Web site: http://dmses.dot.gov.* Follow the instructions for submitting comments on the DOT electronic docket site.
- *Fax:* 1–202–493–2251.
- *Mail:* Docket Management Facility; U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, Room PL–401, Washington, DC 20590–0001.
- *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.
- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the online instructions for submitting comments.

All submissions must include the agency name and docket number for this notice. Note that all comments received will be posted without change to *http://dms.dot.gov*, including any personal information provided. Please see the Privacy Act heading below.

*Docket:* For access to the docket to read background documents or comments received, go to *http://dms.dot.gov* at any time or 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. The DMS is available 24 hours each day, 365 days each year. If you want acknowledgment that we received your comments, please include a self-addressed, stamped envelope or postcard or print the acknowledgement page that appears after submitting comments online.

*Privacy Act:* Anyone may search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or of the person signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review the Department of Transportation's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477; Apr. 11, 2000). This information is also available at *http://dms.dot.gov*.

**FOR FURTHER INFORMATION CONTACT:** Dr. Mary D. Gunnels, Chief, Physical Qualifications Division, (202) 366–4001, *maggi.gunnels@dot.gov*, FMCSA, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590–0001. Office hours are from 8 a.m. to 5 p.m., e.t., Monday through Friday, except Federal holidays.

**SUPPLEMENTARY INFORMATION:**

### Background

Under 49 U.S.C. 31315 and 31136(e), FMCSA may grant an exemption for a 2-year period if it finds ''such exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption.'' The statute also allows the agency to renew exemptions at the end of the 2-year period. The individual listed in this notice has recently requested an exemption from the diabetes prohibition in 49 CFR 391.41(b)(3), which applies to drivers of CMVs in interstate commerce. Accordingly, the agency will evaluate the qualifications of this applicant to determine whether granting the exemption will achieve the required level of safety mandated by the statute.

**Qualifications of Applicant**

*Thomas G. Deke*

Mr. Deke, age 51, has had ITDM since 2002. He has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years. His endocrinologist examined him in 2005 and stated, ''Mr. Deke has demonstrated excellent willingness to monitor and manage his diabetes since starting on insulin in October, 2005''. Mr. Deke meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2005 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Montana.

**Request for Comments**

In accordance with 49 U.S.C. 31315 and 31136(e), FMCSA requests public comment from all interested persons on Mr. Deke's exemption application. We will consider all comments received before the close of business on the closing date indicated earlier in the notice.

FMCSA notes that Section 4129 of the Safe, Accountable, Flexible and Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) requires the Secretary to revise its diabetes exemption program established on September 3, 2003 (68 FR 52441).[1] The revision must provide for individual assessment of drivers with diabetes mellitus, and be consistent with the criteria described in section 4018 of the Transportation Equity Act for the 21st Century (49 U.S.C. 31305).

Section 4129 requires: (1) the elimination of the requirement for three years of experience operating CMVs while being treated with insulin; and (2) the establishment of a specified minimum period of insulin use to demonstrate stable control of diabetes before being allowed to operate a CMV.

In response to section 4129, FMCSA made immediate revisions to the diabetes exemption program established by the September 3, 2003 Notice. FMCSA discontinued use of the 3-year driving experience criterion and fulfilled the requirements of section 4129 while continuing to ensure that operation of CMVs by drivers with ITDM will achieve the requisite level of safety required of all exemptions granted under 49USC 31136 (e).

Section 4129(d) also directed FMCSA to ensure that drivers of CMVs with ITDM are not held to a higher standard than other drivers, with the exception of limited operating, monitoring and medical requirements that are deemed medically necessary. FMCSA concluded that all of the operating, monitoring and medical requirements set out in the September 3, 2003 Notice, except as modified, were in compliance with section 4129(d). Therefore, all of the requirements set out in the September 3, 2003 Notice, except as modified in the notice in the **Federal Register** on November 8, 2005 (70 FR 67777), remain in effect.

Issued on: March 31, 2006.

**Rose A. McMurray,**

*Associate Administrator, Policy and Program Development.*

[FR Doc. E6–4972 Filed 4–5–06; 8:45 am]

BILLING CODE 4910–EX–P

[1] Section 4129(a) refers to the 2003 Notice as a ''final rule.'' However, the 2003 Notice did not issue a ''final rule,'' but did establish the procedures and standards for issuing exemptions for drivers with ITDM.

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

### Proposed Collection; Comment Request for Form 1066 and Schedule Q (Form 1066)

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Notice and request for comments.

**SUMMARY:** The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form 1066, U.S. Real Estate Mortgage Investment Conduit (REMIC) Income Tax Return and Schedule Q (Form 1066), Quarterly Notice to Residual Interest Holder of REMIC Taxable Income or Net Loss Allocation.

**DATES:** Written comments should be received on or before June 5, 2006 to be assured of consideration.

**ADDRESSES:** Direct all written comments to Glenn P. Kirkland, Internal Revenue Service, room 6516, 1111 Constitution Avenue, NW., Washington, DC 20224.

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information or copies of the form and instructions should be directed to R. Joseph Durbala, (202) 622–3634, Internal Revenue Service, room 6516, 1111 Constitution Avenue, NW., Washington, DC 20224, or through the Internet at *RJoseph.Durbala@irs.gov.*

**SUPPLEMENTARY INFORMATION:**

*Title:* Form 1066, U.S. Real Estate Mortgage Investment Conduit (REMIC) Income Tax Return and Schedule Q (Form 1066), Quarterly Notice to Residual Interest Holder of REMIC Taxable Income or Net Loss Allocation.

*OMB Number:* 1545–1014.

*Form Number:* Form 1066 and Schedule Q (Form 1066).

*Abstract:* Form 1066 and Schedule Q (Form 1066) are used by a real estate mortgage investment conduit (REMIC) to figure its tax liability and income and other tax-related information to pass through to its residual holders. IRS uses the information to determine the correct tax liability of the REMIC and its residual holders.

*Current Actions:* There are no changes being made to the forms at this time.

*Type of Review:* Extension of a currently approved collection.

*Affected Public:* Business or other for-profit organizations.

*Estimated Number of Respondents:* 4,917.

*Estimated Time per Respondent:* 64 hours, 16 minutes.

*Estimated Total Annual Burden Hours:* 758,989.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

**Request for Comments**

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of

information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: March 28, 2006.

**Glenn P. Kirkland,**

*IRS Reports Clearance Officer.*

[FR Doc. E6–5007 Filed 4–5–06; 8:45 am]

**BILLING CODE 4830–01–P**

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

### Proposed Collection; Comment Request for Notice 2006–24

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Notice and request for comments.

**SUMMARY:** The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Notice 2006–24, Qualifying Advanced Coal Project Program.

**DATES:** Written comments should be received on or before June 5, 2006 to be assured of consideration.

**ADDRESSES:** Direct all written comments to Glenn P. Kirkland, Internal Revenue Service, room 6516, 1111 Constitution Avenue NW., Washington, DC 20224.

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information or copies of the form and instructions should be directed to R. Joseph Durbala, (202) 622–3634, at Internal Revenue Service, room 6516, 1111 Constitution Avenue NW., Washington, DC 20224, or through the Internet at *RJoseph.Durbala@irs.gov.*

**SUPPLEMENTARY INFORMATION:**

*Title:* Qualifying Advanced Coal Project Program.

*OMB Number:* 1545–2003.

*Form Number:* Notice 2006–24.

*Abstract:* This notice establishes the qualifying advanced coal project program under § 48A of the Internal Revenue Code. The notice provides the time and manner for a taxpayer to apply for an allocation of qualifying advanced coal project credits and, once the taxpayer has received this allocation, the time and manner for the taxpayer to file for a certification of its qualifying advanced coal project.

*Current Actions:* There is no change in the paperwork burden previously approved by OMB. This form is being submitted for renewal purposes only.

*Type of Review:* Extension of a currently approved collection.

*Affected Public:* Businesses and other for-profit organizations.

*Estimated Number of Respondents:* 45.

*Estimated Time Per Respondent:* 45 minutes.

*Estimated Total Annual Burden Hours:* 4,950.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

**Request for Comments**

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: March 28, 2006.

**Glenn P. Kirkland,**

*IRS Reports Clearance Officer.*

[FR Doc. E6–5008 Filed 4–5–06; 8:45 am]

**BILLING CODE 4830–01–P**

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

### Proposed Collection; Comment Request for Form 944

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Notice and request for comments.

**SUMMARY:** The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form 944, Employer's Annual Employment Tax Return.

**DATES:** Written comments should be received on or before June 5, 2006 to be assured of consideration.

**ADDRESSES:** Direct all written comments to Glenn P. Kirkland, Internal Revenue Service, room 6516, 1111 Constitution Avenue NW., Washington, DC 20224.

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information or copies of the form and instructions should be directed to R. Joseph Durbala, (202) 622–3634, at Internal Revenue Service, room 6516, 1111 Constitution Avenue NW., Washington, DC 20224, or through the Internet at *RJoseph.Durbala@irs.gov.*

**SUPPLEMENTARY INFORMATION:**

*Title:* Employer's Annual Employment Tax Return.

*OMB Number:* 1545–2007.

*Form Number:* Form 944.

*Abstract:* The information on Form 944 will be collected to ensure the smallest nonagricultural and nonhousehold employers are paying the correct amount of social security tax, Medicare tax, and withheld Federal income tax. Information on line 13 will be used to determine if employers made any required deposits of these taxes.

*Current Actions:* There is no change in the paperwork burden previously approved by OMB. This form is being submitted for renewal purposes only.

*Type of Review:* Extension of a currently approved collection.

*Affected Public:* Individual or households, Businesses and other for-profit organizations, Not-for-profit institutions, and State, local, and tribal Governments.

*Estimated Number of Respondents:* 950,000.

*Estimated Time Per Respondent:* 14 hours 58 minutes.

*Estimated Total Annual Burden Hours:* 14,212,000.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

**Request for Comments**

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: March 27, 2006.

**Glenn P. Kirkland,**

*IRS Reports Clearance Officer.*

[FR Doc. E6–5009 Filed 4–5–06; 8:45 am]

**BILLING CODE 4830–01–P**

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## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

### Proposed Collection; Comment Request for Form 5304–SIMPLE, Form 5305–SIMPLE, and Notice 98–4

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Notice and request for comments.

**SUMMARY:** The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form 5304–SIMPLE, Savings Incentive Match Plan for Employees of Small Employers (SIMPLE)—Not for Use With a Designated Financial Institution; Form 5305–SIMPLE, Savings Incentive Match Plan for Employees of Small Employers (SIMPLE)—for Use With a Designated Financial Institution; Notice 98–4, Simple IRA Plan Guidance.

**DATES:** Written comments should be received on or before June 5, 2006 to be assured of consideration.

**ADDRESSES:** Direct all written comments to Glenn P. Kirkland, Internal Revenue Service, room 6516, 1111 Constitution Avenue NW., Washington, DC 20224.

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information or copies of the forms, instructions, and notice should be directed to R. Joseph Durbala, (202) 622–3634, Internal Revenue Service, room 6516, 1111 Constitution Avenue NW., Washington, DC 20224, or through the Internet at *RJoseph.Durbala@irs.gov.*

**SUPPLEMENTARY INFORMATION:**

*Title:* Form 5304–SIMPLE, Savings Incentive Match Plan for Employees of Small Employers (SIMPLE)—Not for Use With a Designated Financial Institution, Form 5304–SIMPLE; Savings Incentive Match Plan for Employees of Small Employers (SIMPLE)—for Use With a Designated Financial Institution, Form 5305–SIMPLE; SIMPLE IRA Plan Guidance (Notice 98–4).

*OMB Number:* 1545–1502.

*Form Number:* Form 5304–SIMPLE, Form 5305–SIMPLE, and Notice 98–4.

*Abstract:* Form 5304–SIMPLE is a model SIMPLE IRA agreement that was created to be used by an employer to permit employees who are not using a designated financial institution to make salary reduction contributions to a SIMPLE IRA described in Internal Revenue Code section 408(p). Form 5305–SIMPLE is also a model SIMPLE IRA agreement, but it is for use with a designated financial institution. Notice 98–4 provides guidance for employers and trustees regarding how they can comply with the requirements of Code section 408(p) in establishing and maintaining a SIMPLE IRA, including information regarding the notification and reporting requirements under Code section 408.

*Current Actions:* The total burden was decreased by 14,000 hours as a result of corrections to prior computations. We are making this submission for renewal purposes.

*Type of Review:* Extension of a currently approved collection.

*Affected Public:* Business or other for-profit organizations not-for-profit institutions, and individuals.

*Estimated Number of Respondents:* 600,000.

*Estimated Time Per Respondent:* 3 hours, 32 minutes.

*Estimated Total Annual Burden Hours:* 2,113,000.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

**Request for Comments**

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: March 27, 2006.

**Glenn P. Kirkland,**

*IRS Reports Clearance Officer.*

[FR Doc. E6–5010 Filed 4–5–06; 8:45 am]

**BILLING CODE 4830–01–P**

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

### Proposed Collection; Comment Request for Form 851

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Notice and request for comments.

**SUMMARY:** The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form 851, Affiliations Schedule.

**DATES:** Written comments should be received on or before June 5, 2006 to be assured of consideration.

**ADDRESSES:** Direct all written comments to Glenn P. Kirkland, Internal Revenue Service, room 6516, 1111 Constitution Avenue, NW., Washington, DC 20224.

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information or copies of the form and instructions should be directed to R. Joseph Durbala, (202) 622–3634, Internal Revenue Service, room 6516, 1111 Constitution Avenue, NW., Washington, DC 20224, or through the Internet at *RJoseph.Durbala@irs.gov.*

**SUPPLEMENTARY INFORMATION:**

*Title:* Affiliations Schedule.

*OMB Number:* 1545–0025.

*Form Number:* 851.

*Abstract:* Form 851 is filed by the parent corporation for an affiliated group of corporations that files a consolidated return (Form 1120). Form 851 provides IRS with information on the names and identification numbers of the members of the affiliated group, the taxes paid by each member of the group, and stock ownership, changes in stock ownership and other information to determine that each corporation is a qualified member of the affiliated group as defined in Internal revenue Code section 1504.

*Current Actions:* There are no changes being made to Form 851 at this time.

*Type of Review:* Extension of a currently approved collection.

*Affected Public:* Businesses or other for-profit organizations and farms.

*Estimated Number of Responses:* 4,000.

*Estimated Time Per Response:* 12 hrs., 46 min.

*Estimated Total Annual Burden Hours:* 51,040.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

**Request for Comments**

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: March 28, 2006.

**Glenn P. Kirkland,**

*IRS Reports Clearance Officer.*

[FR Doc. E6–5012 Filed 4–5–06; 8:45 am]

BILLING CODE 4830–01–P

## DEPARTMENT OF VETERANS AFFAIRS

**[OMB Control No. 2900–0090]**

### Proposed Information Collection Activity: Proposed Collection; Comment Request

**AGENCY:** Veterans Health Administration, Department of Veterans Affairs.

**ACTION:** Notice.

**SUMMARY:** The Veterans Health Administration (VHA) is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of a currently approved collection, and allow 60 days for public comment in response to the notice. This notice solicits comments on information needed to determine an applicant's suitability and placement as a potential volunteer at VA.

**DATES:** Written comments and recommendations on the proposed collection of information should be received on or before June 5, 2006.

**ADDRESSES:** Submit written comments on the collection of information to Ann Bickoff, Veterans Health Administration (193E1), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420 or e-mail *ann.bickoff@mail.va.gov*. Please refer to ''OMB Control No. 2900–0090'' in any correspondence.

**FOR FURTHER INFORMATION CONTACT:** Ann Bickoff at (202) 273–8310.

**SUPPLEMENTARY INFORMATION:** Under the PRA of 1995 (Pub. L. 104–13; 44 U.S.C. 3501–3521), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VHA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VHA's functions, including whether the information will have practical utility; (2) the accuracy of VHA's estimate of the burden of the proposed collection of information; (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 respondents, including through the use of automated collection techniques or the use of other forms of information technology.

*Title:* Application for Voluntary Service, VA Form 10–7055.

*OMB Control Number:* 2900–0090.

*Type of Review:* Extension of a currently approved collection.

*Abstract:* Individuals expressing interest in volunteering at a VA medical center complete VA Form 10–7055 to request placement in the nationwide VA Voluntary Service Program. VA will use the data collected to place applicants in assignments most suitable to their special skills and abilities.

*Affected Public:* Individuals or Households, Not-for-Profit Institutions.

*Estimated Total Annual Burden:* 8,000 hours.

*Estimated Average Burden Per Respondent:* 15 minutes.

*Frequency of Response:* One time.

*Estimated Number of Respondents:* 32,000.

Dated: March 28, 2006.

By direction of the Secretary.

**Denise McLamb,**

*Program Analyst, Records Management Service.*

[FR Doc. E6–4958 Filed 4–5–06; 8:45 am]

**BILLING CODE 8320–01–P**

## DEPARTMENT OF VETERANS AFFAIRS

**[OMB Control No. 2900–0319]**

### Proposed Information Collection Activity: Proposed Collection; Comment Request

**AGENCY:** Veterans Benefits Administration, Department of Veterans Affairs.

**ACTION:** Notice.

**SUMMARY:** The Veterans Benefits Administration (VBA), Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed revision of a currently approved collection, and allow 60 days for public comment in response to the notice. This notice solicits comments for information needed to establish a legal contract between VA and a Federal-appointed fiduciary.

**DATES:** Written comments and recommendations on the proposed collection of information should be received on or before June 5, 2006.

**ADDRESSES:** Submit written comments on the collection of information to Nancy J. Kessinger, Veterans Benefits Administration (20M35), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420 or e-mail: *irmnkess@vba.va.gov.* Please refer to ''OMB Control No. 2900–0319'' in any correspondence.

**FOR FURTHER INFORMATION CONTACT:** Nancy J. Kessinger at (202) 273–7079 or fax (202) 275–5947.

**SUPPLEMENTARY INFORMATION:** Under the PRA of 1995 (Pub. L. 104–13; 44 U.S.C. 3501–3521), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed collection of information; (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 respondents, including through the use of automated collection techniques or the use of other forms of information technology.

*Title:* Fiduciary Agreement, VA Form 21–4703.

*OMB Control Number:* 2900–0319.

*Type of Review:* Revision of a currently approved collection.

*Abstract:* VA Form 21–4703 is a legal binding contract between VA and Federally appointed fiduciaries receiving VA funds on behalf beneficiaries who were determined to be incompetent or under legal disability by reason of minority or court action. The form outlines the fiduciary's responsibility regarding the use of VA funds.

*Affected Public:* Individuals or households, Business or other for-profit, Not for profit institutions, and State, local or tribal government.

*Estimated Annual Burden:* 1,467 hours.

*Estimated Average Burden Per Respondent:* 5 minutes.

*Frequency of Response:* One time.

*Estimated Number of Respondents:* 17,600.

Dated: March 22, 2006.

By direction of the Secretary.

**Denise McLamb,**

*Program Analyst, Records Management Service.*

[FR Doc. E6–4959 Filed 4–5–06; 8:45 am]

**BILLING CODE 8320–01–P**

## DEPARTMENT OF VETERANS AFFAIRS

**[OMB Control No. 2900–0042]**

### Proposed Information Collection Activity: Proposed Collection; Comment Request

**AGENCY:** Board of Veterans' Appeals, Department of Veterans Affairs.

**ACTION:** Notice.

**SUMMARY:** The Board of Veterans' Appeals (BVA), Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of a currently approved collection, and allow 60 days for public comment in response to the notice. This notice solicits comments for information needed to summarize a claimant's disagreement of denied VA benefits before the Board of Veterans' Appeals.

**DATES:** Written comments and recommendations on the proposed collection of information should be received on or before June 5, 2006.

**ADDRESSES:** Submit written comments on the collection of information to Sue Hamlin, Board of Veterans' Appeals (01C), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420 or e-mail *sue.Hamlin@mail.va.gov.* Please refer to ''OMB Control No. 2900–0042'' in any correspondence.

**FOR FURTHER INFORMATION CONTACT:** Sue Hamlin at (202) 565–5686 or FAX (202) 565–4064.

**SUPPLEMENTARY INFORMATION:** Under the PRA of 1995 (Pub. L. 104–13; 44 U.S.C. 3501–3521), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, BVA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of BVA's functions, including whether the information will have practical utility; (2) the accuracy of BVA's estimate of the burden of the proposed collection of information; (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 respondents, including through the use of automated collection techniques or the use of other forms of information technology.

*Title:* Statement of Accredited Representative in Appealed Case, VA Form 646.

*OMB Control Number:* 2900–0042.

*Type of Review:* Extension of a currently approved collection.

*Abstract:* A recognized organization, attorney, agent, or other authorized person representing VA claimants before the Board of Veterans' Appeals complete VA Form 646 to provide identifying data describing the basis for their claimant's disagreement with the denial of VA benefits. VA uses the data collected to identify the issues in dispute and to prepare a decision responsive to the claimant's disagreement.

*Affected Public:* Not-for-profit institutions.

*Estimated Annual Burden:* 30,462.

*Estimated Average Burden Per Respondent:* 60 minutes.

*Frequency of Response:* On occasion.

*Estimated Number of Respondents:* 30,462.

Dated: March 23, 2006.

By direction of the Secretary.

**Denise McLamb,**

*Program Analyst, Records Management Service.*

[FR Doc. E6–4960 Filed 4–5–06; 8:45 am]

BILLING CODE 8320–01–P

## DEPARTMENT OF VETERANS AFFAIRS

### Clinical Science Research and Development Service Cooperative Studies Scientific Merit Review Board; Notice of Meeting

The Department of Veterans Affairs (VA) gives notice under Public Law 92–463 (Federal Advisory Committee Act) that a meeting of the Clinical Science Research and Development Service Cooperative Studies Scientific Merit Review Board will be held on May 2, 2006, at the Doubletree Rockville Hotel, 1750 Rockville Pike, Rockville, Maryland. The meeting is scheduled to begin at 8:30 a.m. and end at 3 p.m.

The Board advises the Chief Research and Development Officer through the Director of the Clinical Science Research and Development Service on the relevance and feasibility of proposed studies, the adequacy of the protocols, and the scientific validity and propriety of technical details, including protection of human subjects.

The session will be open to the public from 8:30 a.m. to 9 a.m. for the discussion of administrative matters and the general status of the program. The sessions will be closed from 9 a.m. to 3 p.m. for the Board's review of research and development applications.

During the closed sessions of the meeting, discussions and recommendations will deal with qualifications of personnel conducting the studies, staff and consultant critiques of research proposals and similar documents, and the medical records of patients who are study subjects, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. As provided by section 10(d) of Public Law 92–463, as amended, closing portions of this meeting is in accordance with 5 U.S.C. 552b(c)(6) and (c)(9)(B).

Those who plan to attend should contact Dr. Grant Huang, Deputy Director, Cooperative Studies Program (125), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, at (202) 254–0183.

Dated: March 30, 2006.

By Direction of the Secretary.

**E. Philip Riggin,**

*Committee Management Officer.*

[FR Doc. 06–3279 Filed 4–5–06; 8:45 am]

BILLING CODE 8320–01–M

## DEPARTMENT OF VETERANS AFFAIRS

### Advisory Committee on Former Prisoners of War; Notice of Meeting

The Department of Veterans Affairs (VA) gives notice under Public Law 92–463 (Federal Advisory Committee Act) that the Advisory Committee on Former Prisoners of War (FPOW) has scheduled a meeting for April 10–12, 2006, Room 430, VA Central Office, 810 Vermont Avenue NW., Washington, DC. The meeting will be held each day from 9 a.m. to 4 p.m. The meeting is open to the public.

The purpose of the Committee is to advise the Secretary of Veterans Affairs on the administration of benefits under title 38, United States Code, for veterans who are former prisoners of war, and to make recommendations on the needs of such veterans for compensation, health care, and rehabilitation.

On April 10, the meeting will include an introduction of Committee members, remarks from dignitaries, a review of Committee reports, an update of Committee activities, and time for FPOW veterans and/or the public to address the Committee. On April 11, the Committee will receive reports from the Veterans Health Administration and the Veterans Benefits Administration. The Committee will also get an update from the Robert E. Mitchell Center for Prisoner of War Studies. On April 12, the Committee's medical and administrative work groups will meet to discuss their activities and report back to the Committee. Additionally, the Committee will review issues discussed throughout the meeting to compile a report to be sent to the Secretary.

Members of the public may ask questions or submit written statements for review by the Committee in advance of the meeting to Ms. Renée L. Szybala, Director, Compensation and Pension Service (21), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420.

Dated: March 17, 2006.

By Direction of the Secretary.

**E. Philip Riggin,**

*Committee Management Officer.*

[FR Doc. 06–3278 Filed 4–5–06; 8:45 am]

BILLING CODE 8320–01–M

Federal Register

Thursday,
April 6, 2006

# Part II

# Department of Transportation

## National Highway Traffic Safety Administration

## 49 CFR Parts 523, 533 and 537

## Average Fuel Economy Standards for Light Trucks Model Years 2008–2011; Final Rule

**DEPARTMENT OF TRANSPORTATION**

**National Highway Traffic Safety Administration**

**49 CFR Parts 523, 533 and 537**

**[Docket No. NHTSA 2006–24306]**

**RIN 2127–AJ61**

# Average Fuel Economy Standards for Light Trucks Model Years 2008–2011

**AGENCY:** National Highway Traffic Safety Administration (NHTSA), Department of Transportation.

**ACTION:** Final rule.

**SUMMARY:** This final rule reforms the structure of the corporate average fuel economy (CAFE) program for light trucks and establishes higher CAFE standards for model year (MY) 2008–2011 light trucks. Reforming the CAFE program will enable it to achieve larger fuel savings, while enhancing safety and preventing adverse economic consequences.

During a transition period of MYs 2008–2010, manufacturers may comply with CAFE standards established under the reformed structure (Reformed CAFE) or with standards established in the traditional way (Unreformed CAFE). This will permit manufacturers and the agency to gain experience with implementing the Reformed CAFE standards. In MY 2011, all manufacturers will be required to comply with a Reformed CAFE standard.

Under Reformed CAFE, fuel economy standards are restructured so that they are based on a measure of vehicle size called ''footprint,'' the product of multiplying a vehicle's wheelbase by its track width. A target level of fuel economy is established for each increment in footprint. Smaller footprint light trucks have higher targets and larger ones, lower targets. A particular manufacturer's compliance obligation for a model year will be calculated as the harmonic average of the fuel economy targets for the manufacturer's vehicles, weighted by the distribution of manufacturer's production volumes among the footprint increments. Thus, each manufacturer will be required to comply with a single overall average fuel economy level for each model year of production.

The Unreformed CAFE standards are: 22.5 miles per gallon (mpg) for MY 2008, 23.1 mpg for MY 2009, and 23.5 mpg for MY 2010. To aid the transition to Reformed CAFE, the Reformed CAFE standards for those years are set at levels intended to ensure that the industry-wide costs of the Reformed standards are roughly equivalent to the industry-wide costs of the Unreformed CAFE standards in those model years. For MY 2011, the Reformed CAFE standard is set at the level that maximizes net benefits. Net benefits includes the increase in light truck prices due to technology improvements, the decrease in fuel consumption, and a number of other factors viewed from a societal perspective. All of the standards have been set at the maximum feasible level, while accounting for technological feasibility, economic practicability and other relevant factors.

Since a manufacturer's compliance obligation for a model year under Reformed CAFE depends in part on its actual production in that model year, its obligation cannot be calculated with absolute precision until the final production figures for that model year become known. However, a manufacturer can calculate its obligation with a reasonably high degree of accuracy in advance of that model year, based on its product plans for the year. Prior to and during the model year, the manufacturer will be able to track all of the key variables in the formula used for calculating its obligation (*e.g.*, distribution of production and the fuel economy of each of its models). This final rule announces estimates of the compliance obligations, by manufacturer, for MYs 2008–2011 under Reformed CAFE, using the fuel economy targets established by NHTSA and the product plans submitted to NHTSA by the manufacturers in response to an August 2005 request for updated product plans.

This rulemaking is mandated by the Energy Policy and Conservation Act (EPCA), which was enacted in the aftermath of the energy crisis created by the oil embargo of 1973–74. The concerns about reliance on petroleum imports, energy security, and the effects of energy prices and supply on national economic well-being that led to the enactment of EPCA remain very much alive today. America is still overly dependent on petroleum. Sustained growth in the demand for oil worldwide, coupled with tight crude oil supplies, are the driving forces behind the sharp price increases seen over the past several years and are expected to remain significant factors in the years ahead. Increasingly, the oil consumed in the U.S. originates in countries with political and economic situations that raise concerns about future oil supply and prices. In the long run, technological innovation will play an increasingly larger role in reducing our dependence on petroleum.

We recognize that financial difficulties currently exist in the motor vehicle industry and that a substantial number of job reductions have been announced recently by large full-line manufacturers. Accordingly, we have carefully balanced the costs of the rule with the benefits of conservation. Compared to Unreformed CAFE, Reformed CAFE enhances overall fuel savings while providing vehicle manufacturers with the flexibility they need to respond to changing market conditions. Reformed CAFE will also provide a more equitable regulatory framework by creating a level-playing field for manufacturers, regardless of whether they are full-line or limited-line manufacturers. We are particularly encouraged that Reformed CAFE will reduce the adverse safety risks generated by the Unreformed CAFE program. The transition from the Unreformed CAFE to the Reformed CAFE system will begin soon, but ample lead time is provided before Reformed CAFE takes full effect in MY 2011.

**DATES:** Today's final rule is effective August 4, 2006. Petitions for reconsideration must be received by May 22, 2006.

**ADDRESSES:** Petitions for reconsideration must be submitted to: Administrator, National Highway Traffic Safety Administration, 400 Seventh Street, SW., Nassif Building, Washington, DC 20590–001.

**FOR FURTHER INFORMATION CONTACT:** For technical issues, call Ken Katz, Lead Engineer, Fuel Economy Division, Office of International Vehicle, Fuel Economy, and Consumer Standards, at (202) 366–0846, facsimile (202) 493–2290, electronic mail *kkatz@nhtsa.dot.gov.* For legal issues, call Stephen Wood or Christopher Calamita of the Office of the Chief Counsel, at (202) 366–2992, or e-mail them at *swood@nhtsa.dot.gov* or *ccalamita@nhtsa.dot.gov.*

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## I. Executive Summary

### *A. Events Leading to Today's Final Rule*

In the notice of proposed rulemaking (NPRM) that the agency published on August 30, 2005, the agency proposed to reform the light truck CAFE program. The Reformed CAFE standard was to be based on a step function.[1] To aid the transition to the Reformed CAFE system, we proposed to provide manufacturers with two alternative compliance options (Unreformed and Reformed) for manufacturers in MYs 2008–2010. The agency proposed requiring compliance with the Reformed CAFE system, beginning in MY 2011. The agency noted in the NPRM that it was publishing a separate notice inviting the manufacturers to submit more updated product plans and stated that it recognized that the new plans might differ enough from the previously submitted plans to necessitate changes in the shape of the step function as well as in the levels of stringency of the standards.

In addition, the agency invited public comment on a number of additional changes to the CAFE program. One was whether to base the Reformed CAFE on a continuous function instead of a step function. A second was whether to include large sport utility vehicles (SUVs) in the CAFE standards. A third was whether to revise the ''flat floor'' criterion for classifying vehicles as light trucks so that minivans and passenger vans would be treated as light trucks.

In response to the NPRM and request for new product plans, the agency

[1] As proposed, the structure of Reformed CAFE for each model year would have three basic elements—

(1)—six footprint categories of vehicles.

(2)—a target level of average fuel economy for each footprint category, as expressed by a step function (see figure 1 below).

(3)—a Reformed CAFE standard based on the harmonic production-weighted average of the fuel economy targets for each category.

obtained a great deal of new information. Compared to the plans that the manufacturers submitted to the agency in early 2004, the new plans submitted in November 2005 contained a significant increase in the variety and amount of efforts to improve fuel economy. The agency also received critiques of the analyses it performed to determine the fuel economy capabilities of the manufacturers in MYs 2008–2011.

In response to the public comments, the agency revised its analyses and assumptions including those related to the rate at which increased amounts of fuel saving technologies can be added to a manufacturer's fleet. The new assumptions are closer to the assumptions made by the National Academies of Science in a 2002 study of the CAFE program, and provide increased assurance that the standards adopted today will be economically practicable.

NHTSA also made other changes. It decided to base Reformed CAFE on a continuous function instead of a step function in order to reduce the incentive under Reformed CAFE for manufacturers to downsize (thus reducing safety) or upsize (thus reducing fuel economy) vehicles. It also decided to add the larger SUVs and passenger vans to the mandatory Reformed CAFE program in MY 2011 and beyond to increase long-term energy savings.

*B. Today's Final Rule*

The final rule adopted today reforms the structure of the CAFE regulatory program so that it achieves higher fuel savings while enhancing safety and preventing adverse economic consequences. We have previously set forth our concerns about the way in which the current CAFE program operates and sought comment on approaches to reforming the CAFE program. We have also previously increased light truck CAFE standards, from the ''frozen'' level of 20.7 mpg applicable from MY 1996 through MY 2004, to a level of 22.2 mpg applicable to MY 2007. In adopting those increased standards, we noted that we were limited in our ability to make further increases without reforming the program.

The Reformed CAFE structure established and institutionalized in this document minimizes those limitations by establishing a system based on light truck size, which allows us to establish higher CAFE standards for MY 2008–2011 light trucks and achieve greater fuel savings across the industry. In addition to the improved energy savings, this CAFE program enhances safety by eliminating the previous regulatory incentive to downsize vehicles and by raising the light truck standards so that there is no regulatory incentive from the CAFE program to design small vehicles as light trucks instead of passenger cars. It prevents adverse economic consequences by incorporating greater consideration of economic practicability issues into the projections of the timing and rate at which manufacturers can introduce fuel economy improving technologies into their fleets, and by setting the Reformed CAFE standards, beginning in MY 2011, at the level at which marginal benefits equal marginal costs.

During a transition period of MYs 2008–2010, manufacturers may comply with CAFE standards established under the reformed structure (Reformed CAFE) or with standards established in the traditional way (Unreformed CAFE). This will permit manufacturers to gain experience with the Reformed CAFE standards. The Reformed CAFE standards for those model years are set at levels intended to ensure that the industry-wide costs of those standards are roughly equivalent to the industry-wide costs of the Unreformed CAFE standards for those model years. The additional lead time provided by the transition period will aid, for example, those manufacturers that, for the first time, face a binding CAFE standard (*i.e.*, one set above their planned level of CAFE) and will be required to make fuel economy improvements to achieve compliance. In MY 2011, all manufacturers are required to comply with a Reformed CAFE standard. The Reformed CAFE standard for that model year is set at the level that maximizes net benefits by setting the fuel economy targets at the point at which marginal benefits of the last added increment of fuel savings equal the marginal costs of the added technology that produced those savings.

As in prior CAFE rulemakings establishing Unreformed standards, this final rule sets the Unreformed standards for MYs 2008–2010 with particular regard to the capabilities of and impacts on the ''least capable'' full line manufacturer (*i.e.*, a full line manufacturer is one that produces a wide variety of types and sizes of vehicles) with a significant share of the market. A single CAFE level, applicable to each manufacturer, is established for each model year.

The Unreformed CAFE standards for MYs 2008–2010 are:

MY 2008: 22.5 mpg
MY 2009: 23.1 mpg
MY 2010: 23.5 mpg

We estimate that compliance with these standards will save 4.4 billion gallons of fuel over the lifetime of the vehicles sold during those model years, compared to the savings that would occur if the standards remained at the MY 2007 level of 22.2 mpg.

Under Reformed CAFE, each manufacturer's required level of CAFE is based on target levels set according to vehicle size. The targets are assigned according to a vehicle's ''footprint''—the product of the average track width (the distance between the centerline of the tires) and wheelbase (basically, the distance between the centers of the axles). Each vehicle footprint value is assigned a target specific to that footprint value. This differs from what we proposed. The proposed reform was based on a discontinuous (or ''step'') function. The proposal segmented the light truck fleet into six discrete categories based on ranges of footprint and assigned a target fuel economy value for each category. The reform adopted in today's final rule is based on a continuous function. Under it, targets are assigned along the continuum of footprint values in the light truck fleet. Each footprint value has a different target. The target values reflect the technological and economic capabilities of the industry. The target for a given footprint value is the same for all manufacturers, regardless of differences in their overall fleet mixes. Compliance is determined by comparing a manufacturer's harmonically averaged fleet fuel economy in a model year with a required fuel economy level calculated using the manufacturer's actual production levels and the category targets.

The Reformed CAFE standards adopted today are more stringent than those proposed in the NPRM. Under the Reformed CAFE system in the NPRM, we estimated that the average CAFE level required of light truck manufacturers would be 23.9 mpg. It is important to note that the MY 2011 standard as adopted in this rule applies to a larger population of vehicles than that in the NPRM. Today's final rule includes medium duty passenger vehicles (MDPVs) (*i.e.*, larger passenger vans and SUVs) as part of the MY 2011 regulated fleet. We estimate that the average CAFE level required of manufacturers under this rule in MY 2011 will be 24.0 mpg. Thus, the MY 2011 standard is more stringent than that proposed while regulating more vehicles, *i.e.*, larger vehicles with typically low fuel economy performance.

As stated above, manufacturers provided updated product plans that

reflect changes made to the evaluated light truck fleet used in the NPRM, partly in response to changes in fuel prices. Changing market conditions, a regulatory landscape revised by our proposal, and the more stringent fuel efficiency levels required under Reform CAFE will result in the production of MY 2008–2011 light truck fleets that will consume approximately 11 billion fewer gallons of fuel over their lifetimes than the fleets that were originally planned in 2004.

Apart from the updated product plans, the agency has revised some of the assumptions inputted into the Reformed CAFE analysis. In response to comments and consistent with the findings of the National Academy of Sciences, we revised the phase-in rates to provide for additional lead-time when projecting technology applications. The agency also revised fuel prices and the vehicle miles traveled schedule, which is used to calculate fuel savings, in response to higher fuel price forecasts.

Given the revised product plans, the revisions to the model assumptions, and the more stringent standards adopted in this rule, the Reformed standards will save approximately 7.8 billion additional gallons of fuel over the lifetime of the vehicles sold during those four model years. The Reformed standards for MYs 2008–2010 will save approximately 500 million more gallons of fuel than the Unreformed standards for those model years. As noted above, the Reformed standard for MY 2011 is the first Reformed standard set through a process the explicitly maximizes net benefits. It will save more than 2.8 billion gallons of fuel over the lifetime of vehicle sold in that model year.

In order to provide a comparison of the fuel savings of the final rule versus the proposed rule, we recalculated the fuel savings from the proposed Reformed CAFE standards using the updated product plans and the final rule assumptions. Under this analysis, we calculated that the proposed Reformed standards would save 5.4 billion gallons under these more current assumptions. This compares to the 7.8 billion gallons of fuel saved under the more stringent Reformed CAFE standards adopted today.

If all manufacturers comply with the Reformed CAFE standards, the total costs would be approximately $6.7 billion for MYs 2008–2011, compared to the costs they would incur if the standards remained at the MY 2007 level of 22.2 mpg. The resulting vehicle price increases to buyers of MY 2008 light trucks would be paid back [2] in additional fuel savings in an average of 2.9 years and to buyers of MY 2011 light trucks in an average of 4,4 years, assuming fuel prices ranging from $1.96 to $2.39 per gallon (in 2003 dollars).[3] We estimate that the total benefits under the Unreformed CAFE standards for MYs 2008–2010 plus the Reformed CAFE standard for MY 2011 are approximately $7.6 billion (2003 dollars, discounted at 7%), and under the Reformed CAFE standards for MYs 2008–2011 are approximately $8.1 billion (2003 dollars, discounted at 7%).

We have determined that the standards under both Unreformed CAFE and Reformed CAFE represent the maximum feasible fuel economy level for each system. In reaching this conclusion, we have balanced the express statutory factors and other relevant considerations, such as safety concerns, effects on employment and the need for flexibility to transition to a Reformed CAFE program that can achieve greater fuel savings in a more economically efficient way.

The Reformed CAFE approach incorporates several important elements of reform suggested by the National Academy of Sciences in its 2002 report (Effectiveness and Impact of Corporate Average Fuel Economy (CAFE) Standards). The agency believes that these reforms give the Reformed CAFE approach four basic advantages over the Unreformed CAFE approach.

First, Reformed CAFE increases energy savings. The energy-saving potential of Unreformed CAFE is limited because only a few full-line manufacturers are required to make improvements. In effect, the capabilities of these full-line manufacturers, whose offerings include larger and heavier light trucks, constrain the stringency of the uniform, industry-wide standard. As a result, the Unreformed CAFE standard is generally set below the capabilities of limited-line manufacturers, who sell predominantly lighter and smaller light trucks. Under Reformed CAFE, which accounts for size differences in product mix, virtually all light-truck manufacturers will be required to use advanced fuel-saving technologies to achieve the requisite fuel economy for their vehicles. Thus, Reformed CAFE will continue to require full-line manufacturers to improve the overall fuel economy of their fleets, while also requiring limited-line manufacturers to enhance the fuel economy of the vehicles they sell.

Second, Reformed CAFE offers enhanced safety. Due to the structure of Unreformed CAFE standards, vehicle manufacturers that need to supplement their product plans in order to comply with the standards can increase their likelihood of compliance by pursuing a variety of compliance strategies that entail safety risks: Downsizing of vehicles, design of some vehicles to permit classification as ''light trucks'' for CAFE purposes, and offering smaller and lighter vehicles to offset sales of larger and heavier vehicles. The adverse safety effects of downsizing and downweighting have already been documented for passenger cars in the CAFE program. For example, when a manufacturer designs a vehicle to permit its classification as a light truck, it may increase the vehicle's propensity to roll over.

Reformed CAFE is designed to lessen each of these safety risks. Downsizing of vehicles is discouraged under Reformed CAFE since as vehicles become smaller, the applicable fuel economy target becomes more stringent. Moreover, Reformed CAFE lessens the incentive to design smaller vehicles to achieve a ''light truck'' classification, since many small light trucks are subject to targets that have at least the same degree of stringency as passenger car standards, if not higher stringency.

Third, Reformed CAFE provides a more equitable regulatory framework for

[2] The payback period represents the length of time required for a vehicle buyer to recoup the higher cost of purchasing a more fuel-efficient vehicle through savings in fuel use. When a more stringent CAFE standard requires a manufacturer to improve the fuel economy of some of its vehicle models, the manufacturer's added costs for doing so are reflected in higher prices for these models. While buyers of these models pay higher prices to purchase these vehicles, their improved fuel economy lowers their owners' costs for purchasing fuel to operate them. Over time, buyers thus recoup the higher purchase prices they pay for these vehicles in the form of savings in outlays for fuel. The length of time required to repay the higher cost of buying a more fuel-efficient vehicle is referred to as the buyer's ''payback period.''

The length of this payback period depends on the initial increase in a vehicle's purchase price, the improvement in its fuel economy, the number of miles it is driven each year, and the retail price of fuel. We calculated payback periods using the fuel economy improvement and average price increase for each manufacturer's vehicles estimated to result from the proposed standard, the U.S. Energy Information Administration's forecast of future retail gasoline prices, and estimates of the number of miles light trucks are driven each year as they age developed from U.S. Department of Transportation data. Energy Information Administration, Annual Energy Outlook 2005 (AEO 2005), Table 100, *http://www.eia.doe.gov/oiaf/aeo/supplement/index.html;* and U.S. Department of Transportation, 2001 National Household Travel Survey, *http://nhts.ornl.gov/2001/index.shtml.* Under these assumptions, payback periods for the final rule alternatives (*i.e.*, Unreformed and Reformed CAFE) range from 2.9 to 4.9 years. .

[3] The fuel prices used to calculate the length of the payback periods are those expected over the life of the MY 2008–2011 light trucks, not the current fuel prices. Those future fuel prices were obtained from the AEO 2006 (Early Report).

different vehicle manufacturers. Under Unreformed CAFE, the cost burdens and compliance difficulties have been imposed nearly exclusively on the full-line manufacturers. Reformed CAFE spreads the regulatory cost burden for fuel economy more broadly across the industry.

Fourth, Reformed CAFE is more market-oriented because it more fully respects economic conditions and consumer choice. Reformed CAFE does not force vehicle manufacturers to adjust fleet mix toward smaller vehicles unless that is what consumers are demanding. Instead, it allows the manufacturers to adjust the mix of their product offerings in response to the market place. As a result, as the industry's sales volume and mix changes in response to economic conditions (e.g., gasoline prices and household income) and consumer preferences (e.g., desire for seating capacity or hauling capability), the level of CAFE required of manufacturers under Reformed CAFE will, at least partially, adjust automatically to these changes. Accordingly, Reformed CAFE reduces the need that the agency might otherwise have to revisit previously established standards in light of changed market conditions, a difficult process that undermines regulatory certainty for the industry. In the mid-1980's, for example, the agency relaxed several Unreformed CAFE standards because fuel prices fell more than had been expected when those standards were established and, as a result, consumer demand for small vehicles with high fuel economy did not materialize as expected.

In addition to reforming the structure of the light truck CAFE program, we are also expanding its applicability. Starting in MY 2011, the CAFE program will include MPDVs, light trucks that have a gross vehicle weight rating (GVWR) less than 10,000 lbs., a GVWR greater than 8,500 lbs. or a curb weight greater than 6,000 lbs., and that primarily transport passengers. We estimate this will bring an additional 240,000 vehicles into the CAFE program in that model year.

### *C. Energy Demand and Supply and the Value of Conservation*

As we noted in the notice of proposed rulemaking (NPRM),[4] many of the concerns about energy security and the effects of energy prices and supply on national economic well-being that led to the enactment of EPCA in 1975 persist today.[5] The demand for oil is steadily growing in the U.S. and around the world. By 2030, U.S. demand for petroleum products is expected to increase 33 percent compared to 2004.[6] World oil demand is expected to increase by nearly 44 percent between 2004 and 2025.[7] Most of these increases would occur in the transportation sector. To meet this projected increase in world demand, worldwide productive capacity would have to increase by more than 36 million barrels per day over current levels. OPEC producers are expected to supply nearly 40 percent of the increased production. By 2025, 60 percent of the oil consumed in the U.S. would be imported oil. Strong growth in the demand for oil worldwide, coupled with tight crude oil supplies, is the driving force behind the sharp price increases seen over the past four years. Increasingly, the oil consumed in the U.S. originates in countries with political and economic situations that raise concerns about future oil supply and prices.

Energy is an essential input to the U.S. economy and having a strong economy is essential to maintaining and strengthening our national security. Conserving energy, especially reducing the nation's dependence on petroleum, benefits the U.S. in several ways. Reducing total petroleum use decreases our economy's vulnerability to oil price shocks. Reducing dependence on oil imports from regions with uncertain conditions enhances our energy security. Reducing the growth rate of oil use will help relieve pressures on already strained domestic refinery capacity, decreasing the likelihood of future product price volatility.

Today's final rule is one piece of President Bush's strategy to move the nation beyond a petroleum-based economy. Aside from the fuel savings that will be realized by today's final rule, the Administration is focusing research on bio-based transportation fuels, improved batteries for hybrid vehicles, and the on-going hydrogen fuel initiative. The President's Advanced Energy Initiative and today's final rule will build on the progress made by the Administration's 2001 National Energy Policy and the increased CAFE standards for MY 2005–2007 light trucks.

## II. Background

In proposing the CAFE standards for MYs 2008–2011, the agency provided a detailed summary of the history of fuel economy standards, and in particular, fuel economy standards for light trucks. Below we have provided a summary of that discussion. For more background on the light truck CAFE program, refer to the NPRM.

### *A. 1974 DOT/EPA Report to Congress on Potential for Motor Vehicle Fuel Economy Improvements*

In 1974, the Department of Transportation (DOT) and Environmental Protection Agency (EPA) submitted to Congress a report entitled ''Potential for Motor Vehicle Fuel Economy Improvement (1974 Report).[8] This report was prepared in compliance with Section 10 of the Energy Supply and Environmental Coordination Act of 1974, Public Law 93–319 (the Act). In the 1974 Report, DOT/EPA said that performance standards regulating fuel economy could take either of two modes: a production-weighted average standard for each manufacturer's entire fleet of vehicles or a fuel economy standard tailored to individual classes of vehicles. Included as a possible form for a production-weighted standard was a variable standard based on the costs or potential to improve for each manufacturer (1974 Report, p. 77).

DOT/EPA concluded in the 1974 Report that a production-weighted standard establishing one uniform specific fuel economy average for all manufacturers would, if sufficiently stringent to have the needed effect, impact most heavily on manufacturers who have lower fuel economy, while not requiring manufacturers of current vehicles with better fuel economy to maintain or improve their performance. (1974 Report, p. 12) Production-weighted standards specifically tailored to each manufacturer would eliminate some inequities, but were considered to be difficult to administer fairly. (Ibid.)

### *B. Energy Policy and Conservation Act of 1975*

Congress enacted the Energy Policy and Conservation Act (EPCA Pub. L. 94–163) during the aftermath of the energy crisis created by the oil embargo of 1973–74. The Act established an automobile fuel economy regulatory program by adding Title V, ''Improving Automotive Efficiency,'' to the Motor Vehicle Information and Cost Savings Act. Title V has been amended from time to time and codified without

[4] 70 FR 51414, August 30, 2005.

[5] The sources of the figures in this section can be found below in section VIII, ''Need for Nation to conserve energy.''

[6] Annual Energy Outlook 2006 with projections to 2030 (Early Release), *http://www.eia.doe.gov/oiaf/aeo/index.html*.

[7] Id.

[8] The 1974 report is available in the docket for this rulemaking.

substantive change as Chapter 329 of title 49, United States Code. Chapter 329 provides for the issuance of average fuel economy standards for passenger automobiles and separate standards for automobiles that are not passenger automobiles (light trucks).

For the purposes of the CAFE statute, ''automobiles'' include any ''4-wheeled vehicle that is propelled by fuel (or by alternative fuel) manufactured primarily for use on public streets, roads, and highways (except a vehicle operated only on a rail line), and rated at not more than 6,000 pounds gross vehicle weight.'' They also include any such vehicle rated at between 6,000 and 10,000 pounds gross vehicle weight (GVWR) if the Secretary decides by regulation that an average fuel economy standard for the vehicle is feasible, and that either such a standard will result in significant energy conservation or the vehicle is substantially used for the same purposes as a vehicle rated at not more than 6,000 pounds GVWR.[9]

The CAFE standards set a minimum performance requirement in terms of an average number of miles a vehicle travels per gallon of gasoline or diesel fuel. Individual vehicles and models are not required to meet the mileage standard. Instead, each manufacturer must achieve a harmonically averaged level of fuel economy for all specified vehicles manufactured by a manufacturer in a given MY. The statute distinguishes between ''passenger automobiles'' and ''non-passenger automobiles.'' We generally refer to non-passenger automobiles as light trucks.

In enacting EPCA and after considering the variety of approaches presented in the 1974 Report, Congress made a clear and specific choice about the structure of the average fuel economy standard for passenger cars. Congress established a common statutory CAFE standard applicable to each manufacturer's fleet of passenger automobiles.

Congress was considerably less decided and prescriptive with respect to what sort of standards and procedures should be established for light trucks. It neither made a clear choice among the approaches (or among the forms of those approaches) identified in the 1974 Report nor precluded the selection of any of those approaches or forms. Further, it did not establish by statute a CAFE standard for light trucks. Instead, Congress provided the Secretary with a choice of establishing a form of a production-weighted average standard for each manufacturer's entire fleet of light trucks, as suggested in the 1974 Report, or a form of production-weighted standards for classes of light trucks. Congress directed the Secretary to establish maximum feasible CAFE standards applicable to each manufacturer's light truck fleet, or alternatively, to classes of light trucks, and to establish them at least 18 months prior to the start of each model year. When determining a ''maximum feasible level of fuel economy,'' the Secretary is directed to balance factors including the nation's need to conserve energy, technological feasibility, economic practicability and the impact of other motor vehicle standards on fuel economy.

*C. 1979–2002 Light Truck Standards*

NHTSA established the first light truck CAFE standards for MY 1979 and applied them to light trucks with a GVWR up to 6,000 pounds (March 14, 1977; 42 FR 13807). Beginning with MY 1980, NHTSA raised this GVWR ceiling to 8,500 pounds. For MYs 1979–1981, the agency established separate standards for two-wheel drive (2WD) and four-wheel drive (4WD) light trucks without a ''combined'' standard reflecting the combined capabilities of 2WD and 4WD light trucks. Manufacturers that produced both 2WD vehicles and 4WD vehicles could, however, decide to treat them as a single fleet and comply with the 2WD standard.

Beginning with MY 1982, NHTSA established a combined standard reflecting the combined capabilities of 2WD and 4WD light trucks, plus optional 2WD and 4WD standards. Manufacturers had the option of complying under the combined fleet standard, or under the separate 2WD and 4WD standards. Although the combined standard reflected the combined capabilities of 2WD and 4WD light trucks, it did not necessarily reflect the combined capabilities of the 2WD and 4WD fleets of an individual manufacturer (e.g., a manufacturer may have found it easier to comply with the combined standard than the 2WD and 4WD standards separately, or vice versa). After MY 1991, NHTSA dropped the optional 2WD and 4WD standards.

As explained in the NPRM, NHTSA twice found it necessary to reduce a light truck standard when it received new information relating to the agency's past projections. In 1979, the agency reduced the MY 1981 2WD standard after Chrysler demonstrated that there were smaller than expected fuel economy benefits from various technological improvements and larger than expected adverse impacts from other federal vehicle standards and test procedures (December 31, 1979; 44 FR 77199).

In 1984, the agency reduced the MY 1985 light truck standards after we concluded that market demand for light truck performance, as reflected in engine mix and axle ratio usage, had not materialized as anticipated when the agency initially established the MY 1985 standards. The agency said that this resulted from lower than anticipated fuel prices. The agency concluded that the only actions then available to manufacturers to improve their fuel economy levels for MY 1986 would have involved product restrictions likely resulting in significant adverse economic impacts. The reduction of the MY 1985 standard was upheld by the U.S. Circuit Court of Appeals for the District of Columbia. *Center for Auto Safety* v. *NHTSA*, 793 F.2d 1322 (D.C. Cir. 1986) (rejecting the contention that the agency gave impermissible weight to the effects of shifts in consumer demand toward larger, less fuel-efficient trucks on the fuel economy levels manufacturers could achieve).[10]

On November 15, 1995, the Department of Transportation and Related Agencies Appropriations Act for FY 1996 was enacted, which limited the ability of the agency to establish CAFE standards for light trucks (Section 330, Pub. L. 104–50). Pursuant to that Act, we then issued a final rule limited to MY 1998, setting the light truck CAFE standard for that year at 20.7 mpg, the same level as the standard we had set for MY 1997 (61 FR 14680; April 3, 1996). The same limitation on the setting of CAFE standards was included in the Appropriations Acts for each of FYs 1997–2001. The agency followed the same process as for MY 1998, established the light truck CAFE standard at 20.7 mpg, for MYs 1999–2002.

[9] In 1978, we extended the CAFE program to include vehicles rated between 6,000 and 8,500 pounds GVWR (March 23, 1978; 43 FR 11995, at 11997). Vehicles rated at between 6,000 and 8,500 pounds GVWR first became subject to the CAFE standards in MY 1980.

[10] NHTSA similarly found it necessary on occasion to reduce the passenger car CAFE standards in response to new information. The agency reduced the MY 1986 passenger car standard because a continuing decline in gasoline prices prevented a projected shift in consumer demand toward smaller cars and smaller engines and because the only actions available to manufacturers to improve their fuel economy levels for MY 1986 would have involved product restrictions likely resulting in significant adverse economic impacts. (October 4, 1985; 40 FR 40528) This action was upheld in *Public Citizen* v. *NHTSA*, 848 F.2d 256 (D.C. Cir. 1988). NHTSA also reduced the MY 1987–88 passenger car standards (October 6, 1986; 51 FR 35594) and MY 1989 passenger car standard (October 6, 1988; 53 FR 39275) for similar reasons.

While the Department of Transportation and Related Agencies Appropriations Act for FY 2001 (Pub. L. 106–346) contained a restriction on CAFE rulemaking identical to that contained in prior appropriation acts, the conference committee report for that Act directed NHTSA to fund a study by the NAS to evaluate the effectiveness and impacts of CAFE standards (H. Rep. No. 106–940, at p. 117–118).

In a letter dated July 10, 2001, following the release of the President's National Energy Policy, Secretary of Transportation Mineta asked the House and Senate Appropriations Committees to lift the restriction on the agency spending funds for the purposes of improving CAFE standards. The Department of Transportation and Related Agencies Appropriations Act for FY 2002 (Pub. L. 107–87), which was enacted on December 18, 2001, did not contain a provision restricting the Secretary's authority to prescribe fuel economy standards.

*D. 2001 National Energy Policy*

The National Energy Policy,[11] released in May 2001, stated that ''(a) fundamental imbalance between supply and demand defines our nation's energy crisis'' and that ''(t)his imbalance, if allowed to continue, will inevitably undermine our economy, our standard of living, and our national security.'' The National Energy Policy was designed to promote dependable, affordable and environmentally sound energy for the future. The Policy envisions a comprehensive long-term strategy that uses leading edge technology to produce an integrated energy, environmental and economic policy. It set forth five specific national goals: ''modernize conservation, modernize our energy infrastructure, increase energy supplies, accelerate the protection and improvement of the environment, and increase our nation's energy security.''

The National Energy Policy included recommendations regarding the path that the Administration's energy policy should take and included specific recommendations regarding vehicle fuel economy and CAFE. It recommended that the President direct the Secretary of Transportation to—

—Review and provide recommendations on establishing CAFE standards with due consideration of the National Academy of Sciences study released (in prepublication form) in July 2001. Responsibly crafted CAFE standards should increase efficiency without negatively impacting the U.S. automotive industry. The determination of future fuel economy standards must therefore be addressed analytically and based on sound science.

—Consider passenger safety, economic concerns, and disparate impact on the U.S. versus foreign fleet of automobiles.

—Look at other market-based approaches to increasing the national average fuel economy of new motor vehicles.

*E. 2002 NAS Study of CAFE Reform*

In response to direction from Congress, NAS published a lengthy report in 2002 entitled ''Effectiveness and Impact of Corporate Average Fuel Economy (CAFE) Standards.''[12]

The report concludes that the CAFE program has clearly contributed to increased fuel economy and that it was appropriate to consider further increases in CAFE standards. (NAS, p. 3 (Finding 1)) It cited not only the value of fuel savings, but also adverse consequences (i.e., externalities) associated with high levels of petroleum importation and use that are not reflected in the price of petroleum (e.g., the adverse impact on energy security). The report further concluded that technologies exist that could significantly reduce fuel consumption by passenger cars and light trucks within 15 years, while maintaining vehicle size, weight, utility and performance. (NAS, p. 3 (Finding 5)) Light duty trucks were said to offer the greatest potential for reducing fuel consumption. (NAS, p. 4 (Finding 5)) The report also noted that vehicle development cycles—as well as future economic, regulatory, safety and consumer preferences—would influence the extent to which these technologies could lead to increased fuel economy in the U.S. market. The report noted that the widespread penetration of even existing technologies will probably require 4–8 years. To assess the economic trade-offs associated with the introduction of existing and emerging technologies to improve fuel economy, the NAS conducted what it called a ''cost-efficient analysis''—''that is, the committee [that authored the report] identified packages of existing and emerging technologies that could be introduced over the next 10 to 15 years that would improve fuel economy up to the point where further increases in fuel economy would not be reimbursed by fuel savings.'' (NAS, p. 4 (Finding 6))

Recognizing the many trade-offs that must be considered in setting fuel economy standards, the report took no position on what CAFE standards would be appropriate for future years. It noted, ''(s)election of fuel economy targets will require uncertain and difficult trade-offs among environmental benefits, vehicle safety, cost, oil import dependence, and consumer preferences.''

The report found that, to minimize financial impacts on manufacturers, and on their suppliers, employees, and consumers, sufficient lead-time (consistent with normal product life cycles) should be given when considering increases in CAFE standards. The report stated that there are advanced technologies that could be employed, without negatively affecting the automobile industry, if sufficient lead-time were provided to the manufacturers.

The report expressed concerns about increasing the standards under the CAFE program as currently structured. While raising CAFE standards under the existing structure would reduce fuel consumption, doing so under alternative structures ''could accomplish the same end at lower cost, provide more flexibility to manufacturers, or address inequities arising from the present'' structure. (NAS, pp. 4–5 (Finding 10))[13] Further, the committee said, ''to the extent that the size and weight of the fleet have been constrained by CAFE requirements * * * those requirements have caused more injuries and fatalities on the road than would otherwise have occurred.'' (NAS, p. 29) Specifically, they noted: ''the downweighting and downsizing that occurred in the late 1970s and early 1980s, some of which was due to CAFE standards, probably resulted in an additional 1300 to 2600 traffic fatalities in 1993.'' (NAS, p. 3 (Finding 2)).

To address those structural problems, the report suggested various possible

[11] *http://www.whitehouse.gov/energy/National-Energy-Policy.pdf.*

[12] The NAS submitted its preliminary report to the Department of Transportation in July 2001 and released its final report in January 2002.

[13] The report noted the following about the concept of equity:

Potential Inequities

The issue of equity or inequity is subjective. However, one concept of equity among manufacturers requires equal treatment of equivalent vehicles made by different manufacturers. The current CAFE standards fail this test. If one manufacturer was positioned in the market selling many large passenger cars and thereby was just meeting the CAFE standard, adding a 22-mpg car (below the 27.5-mpg standard) would result in a financial penalty or would require significant improvements in fuel economy for the remainder of the passenger cars. But, if another manufacturer was selling many small cars and was significantly exceeding the CAFE standard, adding a 22-mpg vehicle would have no negative consequences.

(NAS, p. 102).

reforms.[14] The report found that the ''CAFE program might be improved significantly by converting it to a system in which fuel targets depend on vehicle attributes.'' (NAS, p. 5 (Finding 12)). The report noted that a system in which fuel economy targets were dependent on vehicle weight, with lower fuel consumption targets set for lighter vehicles and higher targets for heavier vehicles, up to some maximum weight, would create incentives to reduce the variance in vehicle weights between large and small vehicles, thus providing for overall vehicle safety. (NAS, p. 5 (Finding 12)). The report stated that such a system has the potential to increase fuel economy with fewer negative effects on both safety and consumer choice.

The report noted further that under an attribute-based approach, the required CAFE levels could vary among the manufacturers based on the distribution of their product mix. NAS stated that targets could vary among passenger cars and among trucks, based on some attribute of these vehicles such as weight, size, or load-carrying capacity. The report explained that a particular manufacturer's average target for passenger cars or for trucks would depend upon the fractions of vehicles it sold with particular levels of these attributes (NAS, p. 87). For example, if weight were the criterion, a manufacturer that sells mostly light vehicles would have to achieve higher average fuel economy than would a manufacturer that sells mostly heavy vehicles.

The report illustrated an example of an attribute-based system using a continuous function (NAS, p. 109). Essentially, as illustrated, the continuous function was represented as a line, which graphed ''gallons per mile'' versus ''curb weight.'' Under the continuous function example, a vehicle's target fuel economy would be determined by locating the vehicle's curb weight along the line and identifying the corresponding gallons per mile value.

[14] In assessing and comparing possible reforms, the report urged consideration of the following factors:

Fuel use responses encouraged by the policy,
Effectiveness in reducing fuel use,
Minimizing costs of fuel use reduction,
Other potential consequences
—Distributional impacts
—Safety
—Consumer satisfaction
—Mobility
—Environment
—Potential inequities, and Administrative feasibility.
(NAS, p. 94).

In February 2002, Secretary Mineta asked Congress ''to provide the Department of Transportation with the necessary authority to reform the CAFE program, guided by the NAS report's suggestions.''

*F. 2003 Final Rule Establishing MY 2005–2007 Light Truck Standards*

On April 7, 2003, the agency published a final rule establishing light truck CAFE standards for MYs 2005–2007: 21.0 mpg for MY 2005, 21.6 mpg for MY 2006, and 22.2 mpg for MY 2007 (68 FR 16868; Docket No. 2002–11419; Notice 3). The agency determined that these levels are the maximum feasible CAFE levels for light trucks for those model years, balancing the express statutory factors and other included or relevant considerations such as the impact of the standard on motor vehicle safety and employment. NHTSA estimated that the fuel economy increases required by the standards for MYs 2005–2007 would generate approximately 3.6 billion gallons of gasoline savings over the 25-year lifetime of the affected vehicles.

We recognized in the final rule that the standard established for MY 2007 could be a challenge for General Motors. We recognized further that, between the issuance of the final rule and the last (MY 2007) of the model years for which standards were being established, there was more time than in previous light truck CAFE rulemakings for significant changes to occur in external factors capable of affecting the achievable levels of CAFE. These external factors include fuel prices and the demand for vehicles with advanced fuel saving technologies, such as hybrid electric and advanced diesel vehicles. We said that changes in these factors could lead to higher or lower levels of CAFE, particularly in MY 2007. Recognizing that it may be appropriate to re-examine the MY 2007 standard in light of any significant changes in those factors, the agency reaffirms its plans to monitor the compliance efforts of the manufacturers.

*G. 2003 Comprehensive Plans for Addressing Vehicle Rollover and Compatibility*

In September 2002, NHTSA completed a thorough examination of the opportunities for significantly improving vehicle and highway safety and announced the establishment of interdisciplinary teams to formulate comprehensive plans for addressing the four most promising problem areas.[15] Based on the work of the teams, the agency issued detailed reports analyzing each of the problem areas and recommending coordinated strategies that, if implemented effectively, will lead to significant improvements in safety.

[15] A fifth problem area was announced in 2004, improving traffic safety data.

Two of the problems areas are vehicle rollover and vehicle compatibility. The reports on those areas identify a series of vehicle, roadway and behavioral strategies for addressing the problems.[16] Among the vehicle strategies, both reports identified reform of the CAFE program as one of the steps that needed to be taken to reduce those problems:

> The current structure of the CAFE system can provide an incentive to manufacturers to downweight vehicles, increase production of vehicle classes that are more susceptible to rollover crashes, and produce a less homogenous fleet mix. As a result, CAFE is critical to the vehicle compatibility and rollover problems.

Recognizing the role of CAFE, we stated:

> It is NHTSA's goal to identify and implement reforms to the CAFE system that will facilitate improvements in fuel economy without compromising motor vehicle safety or American jobs. * * * * * * NHTSA intends to examine the safety impacts, both positive and negative, that may result from any modifications to CAFE as it now exists. Regardless of the root causes, it is clear that the downsizing of vehicles that occurred during the first decade of the CAFE program had serious safety consequences. Changes to the existing system are likely to have equally significant impacts. NHTSA is determined to ensure that these impacts are positive.

*H. 2003 ANPRM*

On December 29, 2003, the agency published an ANPRM seeking comment on various issues relating to reforming the CAFE program (68 FR 74908; Docket No. 2003–16128).[17] The agency sought comment on possible enhancements to the program that would assist in further fuel conservation, while protecting motor vehicle safety and the economic vitality of the automobile industry. The agency indicated that it was particularly interested in structural reform. That document, while not espousing any particular form of reform, sought specific input on various options aimed

[16] See *http://www-nrd.nhtsa.dot.gov/vrtc/ca/capubs/IPTRolloverMitigationReport/; http://www-nrd.nhtsa.dot.gov/departments/nrd-11/aggressivity/IPTVehicleCompatibilityReport/.*

[17] On the same date, we also published a request for comments seeking manufacturer product plan information for MYs 2008–2012 to assist the agency in analyzing possible reforms to the CAFE program which are discussed in a companion notice published today. (68 FR 74931) The agency sought information that would help it assess the effect of these possible reforms on fuel economy, manufacturers, consumers, the economy, motor vehicle safety and American jobs.

at adapting the CAFE program to today's vehicle fleet and needs.

1. Need for Reform

The 2003 ANPRM discussed the principal criticisms of the current CAFE program that led the agency to explore light truck CAFE reform (68 FR 74908, at 74910–13). First, the energy-saving potential of the CAFE program is hampered by the current regulatory structure. The Unreformed approach to CAFE does not distinguish between the various market segments of light trucks, and therefore does not recognize that some vehicles designed for classification purposes as light trucks may achieve fuel economy similar to that of passenger cars. The Unreformed CAFE approach instead applies a single standard to the light truck fleet as a whole, encouraging manufacturers to offer small light trucks that will offset the larger vehicles that get lower fuel economy. A CAFE system that more closely links fuel economy standards to the various market segments reduces the incentive to design vehicles that are functionally similar to passenger cars but classified as light trucks.

Second, because weight strongly affects fuel economy, the current light truck CAFE program encourages vehicle manufacturers to reduce weight in their light truck offerings to achieve greater fuel economy.[18] As the NAS report and a more recent NHTSA study have found, downweighting of the light truck fleet, especially those trucks in the low and medium weight ranges, creates more safety risk for occupants of light trucks and all motorists combined.[19]

Third, the agency noted the adverse economic impacts that might result from steady future increases in the stringency of CAFE standards under the current regulatory structure. Rapid increases in the light truck CAFE standard could have serious adverse economic consequences. The vulnerability of full-line manufacturers to tighter CAFE standards does not arise primarily from poor fuel economy ratings within weight classes, *i.e.*, from less extensive use of fuel economy improving technologies. As explained in the 2003 ANPRM, their overall CAFE averages are low compared to manufacturers that produce more relatively light vehicles because their sales mixes service a market demand for bigger and heavier vehicles capable of more demanding utilitarian functions. An attribute-based (weight and/or size) system could avoid disparate impacts on full-line manufacturers that could result from a sustained increase in CAFE standards.

2. Reform Options

In discussing potential changes, the agency focused primarily on structural improvements to the current CAFE program authorized under the current statutory authority, and secondarily on definitional changes to the current vehicle classification system and whether to include vehicles between 8,500 to 10,000 lbs. GVWR. The NPRM explored the various reform options raised in the ANPRM. It is worth noting again several of those options.

Included in the reform discussion was an attribute-based ''continuous-function'' system, such as that discussed in the NAS report. We chose various measures of vehicle weight and/or size to illustrate the possible design of an attribute-based system. However, we also sought comment as to the merits of using other vehicle attributes as the basis of an attribute-based system.

The 2003 ANPRM also presented potential reform options under which vehicles with a GVWR of up to 10,000 lbs. could be included under the CAFE program. One presented option would be to include vehicles defined by EPA as medium duty passenger vehicles[20] for use in the CAFE program. This definition would essentially make SUVs and passenger vans between 8,500 and 10,000 lbs. GVWR subject to CAFE, while continuing to exclude most medium- and heavy-duty pickups and most medium- and heavy-duty cargo vans that are primarily used for agricultural and commercial purposes.

Through the 2003 ANPRM, the agency intended to begin a public discussion on potential ways, within current statutory authority, to improve the CAFE program to better achieve our public policy objectives. The agency set forth a number of possible concepts and measures, and invited the public to present additional concepts. The agency expressed interest in any suggestions toward revamping the CAFE program in such a way as to enhance overall fuel economy while protecting occupant safety and the economic vitality of the auto market.

*I. Recent developments*

1. Factors underscoring need for reform

In the NPRM, we recognized two important complicating factors that underscore the need for CAFE reform. One factor is the fiscal problems reported by General Motors and Ford, while the other is the recent surge in gasoline prices, a development that may be exacerbating the financial challenges faced by both companies.

Two of the larger, full-line light-truck manufacturers, General Motors and Ford, have reported serious financial difficulties. The investment community has downgraded the bonds of both companies. Further, both companies have announced significant layoffs and other actions to improve their financial condition. While these financial problems did not give rise to the Administration's CAFE reform initiative, the financial risks now faced by these companies, including their workers and suppliers, underscore the importance to full-line vehicle manufacturers of establishing an equitable CAFE regulatory framework.

There has also been a sharp and sustained surge in gasoline prices since our last light truck final rule in April 2003 and the December 2003 ANPRM on CAFE reform. According to the Energy Information Administration (EIA), the retail price for gasoline in April 2003 was $1.59 per gallon and in December 2003 was $1.48 per gallon.[21] When the NPRM was published the weekly U.S. retail price was $2.55 per gallon.[22] While the retail price of gasoline has declined since publication of the NPRM it is still $2.34, which is $.75 per gallon higher than when the 2003 final rule was published.[23]

We noted in the NPRM that it is important to recognize that CAFE standards for MYs 2008–2011 should not be based on current gasoline prices. They should be based on our best forecast of what average real gasoline prices will be in the U.S. during the years that these vehicles will be used by consumers: The 36-year period beginning in 2008 and extending to 2034.[24] Since miles of travel tend to be

[18] Manufacturers can reduce weight without changing the fundamental structure of the vehicle by using lighter materials or eliminating available equipment or options. In contrast, reducing vehicle size, and particularly footprint, generally entails an alteration of the basic architecture of the vehicle.

[19] However, both studies also suggest that if downweighting is concentrated on the heaviest light trucks in the fleet there would be no net safety impact, and there might even be a small fleet-wide safety benefit. There is substantial uncertainty about the curb weight cut-off above which this would occur.

[20] The EPA's discussion of the MDPV definition is at 65 FR 6698, 6749–50, 6851–6852.

[21] See *http://tonto.eia.doe.gov/oog/info/gdu/gaspump.html.*

[22] See *http://www.eia.doe.gov/oil_gas/petroleum/data_publications/wrgp/mogas_home_page.html* and *http://tonto.eia.doe.gov/oog/info/gdu/gasdiesel.asp.*

[23] See id.

[24] To calculate the fuel savings for the light trucks manufactured in a model year, we consider the savings over a 26-year period. The number of light trucks manufactured during each model year that remains in service during each subsequent calendar year is estimated by applying estimates of the proportion of light trucks surviving to each age up

concentrated in the early years of a vehicle's lifetime, the projected gasoline price in the 2008–2020 period is particularly relevant for this rulemaking.

The Preliminary Regulatory Impact Analysis (PRIA) for the NPRM was based on projected gasoline prices from the then most recent Annual Energy Outlook 2005 (AEO2005) (published in 2004 before the recent price rises), which projected gasoline prices ranging from $1.51 to $1.58 per gallon.[25] The Final Regulatory Impact Analysis (FRIA) for today's rule is based on the revised forecast EIA published in the AEO2006 (Early outlook) (see FRIA p. XIII–26). The current forecasted price for gasoline ranges from $1.96 to $2.39 per gallon.[26]

2. Revised product plans

In response to a request for comment (RFC)[27] published in conjunction with the NRPM, the agency has received updated product plans from the vehicle manufacturers. While the NPRM was based on product plans received in response to the 2003 ANPRM, the final rule relied on product plans received in response to the August 2005 RFC.

## III. Summary of the NPRM

On August 30, 2005, the agency published a notice of proposed rulemaking (NPRM) to establish CAFE standards for model years (MYs) 2008 through 2011, and more importantly to reform the CAFE program (70 FR 51414). The NPRM was one piece of the Department of Transportation's continuing effort to achieve higher fuel savings while enhancing safety and preventing adverse economic consequences. We noted that the previous rulemaking efforts increased the light truck CAFE standards, from the ''frozen'' level of 20.7 mpg applicable from MY 1996 through MY 2004, to a level of 22.2 mpg applicable to MY 2007. However, in order to continue moving forward with improved fuel savings while enhancing safety and preventing adverse economic consequences the agency proposed to reform the light truck CAFE system.

In the NPRM, we proposed fuel economy standards for light trucks in MYs 2008–2010, established under the traditional CAFE system (Unreformed CAFE system). We also proposed standards for MYs 2008–2010 established under a proposed reformed CAFE system (Reformed CAFE). During MYs 2008–2010, manufacturers would have an option of complying with standards established under the Unreformed or the Reformed CAFE system. We proposed that this period would serve as a transition period to provide manufacturers an opportunity to adjust to changes in the CAFE system and to provide this agency and the manufacturers' opportunity to gain experience with the new system. For MY 2011, we proposed standards established under Reformed CAFE only.

The Unreformed standards for MYs 2008–2010 were proposed with particular regard to the capabilities of and impacts on the ''least capable'' full-line manufacturer (a full-line manufacturer is one that produces a wide variety of types and sizes of vehicles) with a significant share of the market. A single CAFE level, applicable to each manufacturer, was proposed each model year as follows:

MY 2008: 22.5 mpg
MY 2009: 23.1 mpg
MY 2010: 23.5 mpg

We estimated that these standards could save 4.4 billion gallons of fuel over the lifetime of the vehicles sold during those model years, compared to the savings that would occur if the standards remained at the MY 2007 level of 22.2 mpg.

The proposed Reformed CAFE system relied on a category and target system in which the light truck fleet was segmented according to size and a manufacturer's required fuel economy level would be based on its actual fleet distribution across the categories as compared to applicable fuel economy targets. As proposed, the structure of Reformed CAFE for each model year would have three basic elements—

(1)—six footprint[28] categories of vehicles.

(2)—a target level of average fuel economy for each footprint category, as expressed by a step function (The step or ''staircase'' nature of the function can be seen in Figure 1 below.).

(3)—a Reformed CAFE standard based on the harmonic production-weighted average of the fuel economy targets for each category.

to 26 years (see Table VIII–2 in the PRIA). At the end of 26 years, the proportion of light trucks remaining in service falls below 10 percent.

[25] *http://www.eia.doe.gov/oiaf/aeo/index.html.*

[26] The EIA gasoline prices are provided in 2003 dollars. In terms of 2006 dollars (based on the 2003 GDP deflator; see, *http://www.gpoaccess.gov/usbudget/fy05/sheets/hist10z1.xls*) the forecasted range of fuel prices would be $2.04 to 2.49.

[27] 70 FR 51466; August 30, 2005; Docket No. NHTSA–2005–22144–03.

[28] Footprint is an aspect of vehicle size—the product of multiplying a vehicle's wheelbase by its average track width.

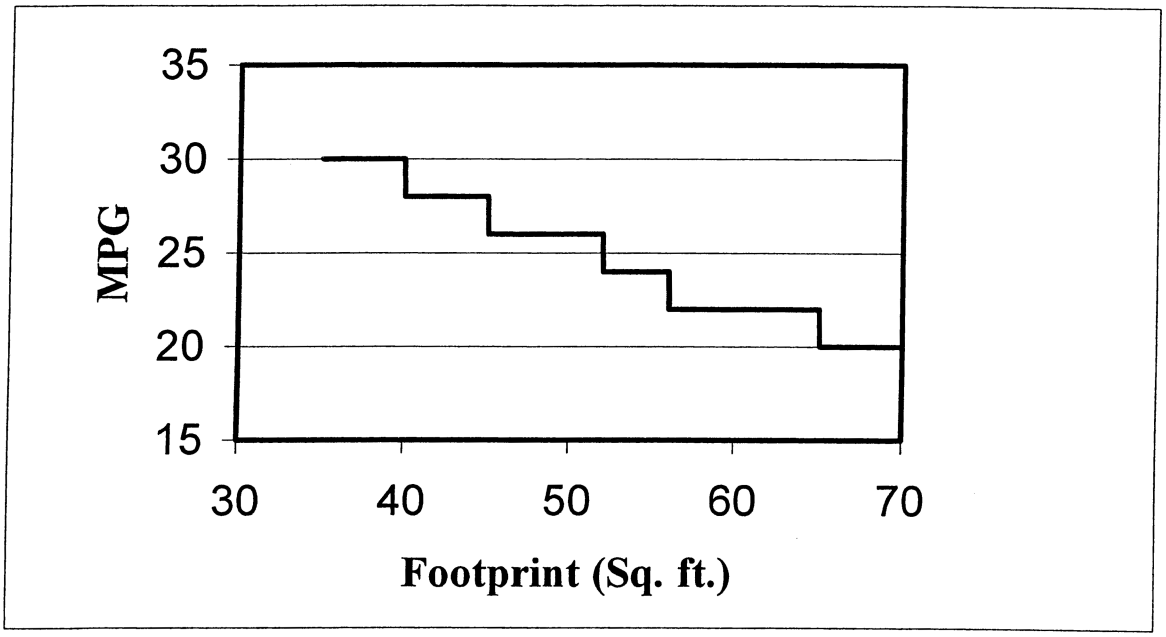


**Figure 1—Illustration of the "shape" of the step function**

To define the proposed category boundaries (step boundaries), we first plotted the light truck production volumes by footprint. We then sought to designate the category boundaries at points where there was low volume footprint immediately adjacent to and to left of a high volume footprint. Our intent in doing this was to reduce any incentive for manufacturers to increase footprint in order to move a model into a category with a lower fuel economy target. We sought to create a reasonable number of categories that would also combine, to the extent practicable, similar vehicle types into the same category. Each category was then assigned a fuel economy target.

The proposed fuel economy targets were determined by a three-step process. First, the agency applied feasible technology to each of the seven largest light truck manufacturers' fleets [29] individually until the marginal cost of the added technology equaled the marginal benefit of the additional technology. Next, initial targets were determined by placing all of the improved vehicles into the six categories and calculating a production-weighted fuel economy average within each category. Finally, the initial targets were adjusted by equal increments of fuel savings to a level at which marginal cost equaled marginal benefit for industry as a whole. This final level provided the targets as proposed, which would be used to determine a manufacturer's required fuel economy level.

Under the proposed reform, the required level of CAFE for a particular manufacturer for a model year would be calculated after inserting the following data into the standard for that model year: that manufacturer's actual total production and its production in each footprint category for that model year.[30] The calculation of the required level would be made by dividing the manufacturer's total production for the model year by the sum of the six fractions (one for each category) obtained by dividing the manufacturer's production in a category by the category's target.

As proposed, a manufacturer's required fuel economy was represented as the following formula:

$$\frac{\text{Manufacturer X's Total Production of Light Trucks}}{\dfrac{\text{X's production in category 1}}{\text{Target for category 1}} + \dfrac{\text{X's production in category 2}}{\text{Target for category 2}} + \text{etc}} = \text{X's required level of CAFE}$$

During the MY 2008–2010 transition period, we proposed that manufacturers may comply with CAFE standards established under Reformed CAFE or with standards established under Unreformed CAFE. To further ease the transition, and to ensure that the Reformed standards were economically practical, the proposed Reformed CAFE standards were set at levels at which the industry-wide cost of those standards were roughly equivalent to the industry-wide cost of the Unreformed CAFE standards for those model years.

[29] The seven largest light truck manufacturers are General Motors, Ford, DaimlerChrysler, Toyota, Honda, Hyundai, and Nissan.

[30] Since the calculation of a manufacturer's required level of average fuel economy for a particular model year would require knowing the final production figures for that model year, the final formal claculation of that level would not occur until after those figures are submitted by the manufacturer to EPA. That submission would not, of course, be made until after the end of that model year.

As proposed, all manufacturers would be required to comply with a Reformed CAFE standard in MY 2011. The proposed Reformed CAFE standard for that model year was set at the level that maximized net benefits.

Under the NPRM, the range of targets for each model year was as follows:

MY 2008: From 26.8 mpg for the smallest vehicles to 20.4 mpg for the largest;

MY 2009: From 27.4 mpg for the smallest vehicles to 21.0 mpg for the largest;

MY 2010: From 27.8 mpg for the smallest vehicles to 20.8 mpg for the largest;

MY 2011: From 28.4 mpg for the smallest vehicles to 21.3 mpg for the largest

We estimated that the standards based on these targets would save approximately 10.0 billion gallons of fuel over the lifetime of the vehicles sold during those four model years, compared to the savings that would occur if the standards remained at the MY 2007 level of 22.2 mpg. The Reformed standards for MYs 2008–2010 were estimated to save 525 million more gallons of fuel than the Unreformed standards for those years. We estimated the proposed MY 2011 standard to save an additional 2.8 billion gallons of fuel.

We tentatively determined that the proposed standards under both Unreformed CAFE and Reformed CAFE represent the maximum feasible fuel economy level for each system. In reaching this conclusion, we balanced the express statutory factors and other relevant considerations, such as safety concerns, effects on employment and the need for flexibility to transition to a Reformed CAFE program that can achieve greater fuel savings in a more economically efficient way.

The proposed Reformed CAFE approach incorporated several important elements of reform suggested by the National Academy of Sciences in its 2002 report (Effectiveness and Impact of Corporate Average Fuel Economy (CAFE) Standards; NAS report). The agency outlined four basic advantages that the proposed Reformed CAFE approach has over the Unreformed CAFE approach: enlarged energy savings, enhanced safety, a more equitable regulatory framework for different vehicle manufacturers, and a more market oriented approach that more fully respects economic conditions and consumer choice. Reformed CAFE forces vehicle manufacturers to ensure that they are incorporating available technologies to enhance fuel efficiency in all the vehicles they produce.

In addition to the proposed step function approach, the agency also discussed a continuous function approach. We explained that under a continuous function approach there would be no categories, but instead each footprint value would be assigned a fuel economy target. We provided an example of a continuous function standard and requested comment on such an approach.

Aside from proposing structural changes to the CAFE program, the agency also discussed the potential of expanding the applicability of the program to include heavier and heavier rated light trucks in MY 2011. The agency requested comment on the inclusion of vehicles classified by the Environmental Protection Agency (EPA) as medium duty passenger vehicles (MDPVs) [31] in the light truck CAFE program.

Along with soliciting comment on the CAFE proposal, the agency also requested updated product plan information and other data to assist in developing a final rule. We noted that based on public comments and other information, new data and analysis, and updated product plans, the standards adopted in the final rule could well be different then those proposed.

## IV. Summary of Public Comments

NHTSA received over 45,000 individual submissions to the rulemaking docket prior to the close of the comment period, including ones from vehicle manufacturers and associations, environmental and consumer advocacy groups, members of Congress, and private individuals. The vast majority of the submissions were letters or e-mails prepared by various organizations and submitted by private individuals to the docket.

Light truck manufacturers and their trade associations that commented on the proposal included General Motors Corporation (Docket No. 2005–22223–1493), Ford Motor Company (Docket No. NHTSA–2005–22223–1570), DaimlerChrysler (Docket No. 20005–22223–1573), Toyota (Docket No. NHTSA–2005–22223–1724), Honda (Docket No. NHTSA–2005–22223–1649), Nissan (Docket No. NHTSA–2005–22223–2058), Mitsubishi Motor Company (Docket No. NHTSA–2005–22223–1819), Hyundai (Docket No. NHTSA–2005–22223–2035), Porsche (Docket No. NHTSA–2005–22223–1688), BMW of North America (Docket No. NHTSA–2005–22223–1616), Volkswagen of North America (Docket No. NHTSA–2005–22223–1674), the Alliance of Automobile Manufacturers (Alliance; Docket No. NHTSA–2005–22223–1642), and the Association of International Automobile Manufacturers (Docket No. NHTSA–2005–22223–1645).

Manufacturers generally agreed that distinguishing vehicles within the light truck fleet according to a size metric, i.e., footprint, adequately recognized differences in manufacturers' compliance efforts due to differences in fleet mix. They stated that step-function standard based on footprint would provide manufacturers greater flexibility in complying with the CAFE requirements while at the same time, address safety concerns associated with the program. Contrary to their general support for the proposed step function standard, manufacturers expressed reservations with a continuous function standard as discussed in the NPRM. Manufacturers stated that a continuous function standard would be overly complex to administer and with which to comply.

While manufacturers expressed general support for the structure of the proposed Reformed CAFE, manufacturers generally expressed concern with the process, as well as the assumptions relied upon in that process, used to define the Reformed CAFE standards. Manufacturers argued that the agency's reliance on a cost-benefit analysis to determine the stringency of the light truck CAFE standards did not adequately account for the capabilities of the industry, and in some instances would not satisfy the ''economic practicability'' consideration required under EPCA. Additionally, manufacturers took issue with the economic and technological assumptions employed in the Reformed CAFE analysis, as well as in the Unreformed CAFE analysis. Manufacturers asserted that the agency did not properly account for technological and market risks that have the potential to render the standards infeasible.

With regard to the applicability of the light truck CAFE program, the vehicle

[31] In 40 CFR 86–1803–01, EPA defines ''MPDV'' as a light truck rated at more than 8,500 lbs GVWR, or that has a vehicle curb weight of more than 6,000 pounds, or that has a basic vehicle frontal area in excess of 45 square feet. ''MDPV'' does not include a vehicle that:

Is an ''incomplete truck'' as defined in this subpart; or

Has a seating capacity of more than 12 persons; or

Is designed for more than 9 persons in seating rearward of the driver's seat; or

Is equipped with an open cargo area (for example, a pick-up truck box or bed) of 72.0 inches in interior length or more. A covered box not readily accessible from the passenger compartment will be considered an open cargo area for purposes of this definition.

manufacturers generally opposed including vehicles with a GVWR greater than 8,500 lbs in the light truck program. Manufacturers asserted that standards were not practical for these vehicles; these vehicles are used in a substantially different manner than lighter vehicles, making the CAFE standards inappropriate; and that regulation of these vehicles would not result in significant fuel savings.

Environmental, consumer and safety advocacy groups commenting on the proposal included Environmental Defense (Docket No. NHTSA–2005–22223–1491, 1698–1703, 1805), Natural Resource Defense Council (NRDC; Docket No. NHTSA–2005–22223–1705 through 1710), the Union of Concerned Scientists (Docket No. NHTSA–2005–22223–1977, 1978), the Insurance Institute for Highway Safety (IIHS; Docket No. NHTSA–2005–22223–2082), Center for Biological Diversity (Docket No. NHTSA–2005–22223–1638 through 1641), National Environmental Trust (Docket No. NHTSA–2005–22223–1483, 1484), Sierra Club (Docket No. NHTSA–2005–22223–1623), U.S. PIRG (Docket No. NHTSA–2005–22223-1623), Alliance to Save Energy—American Council for an Energy-Efficient Economy (ACEEE; (Docket No. NHTSA–2005–22223–1711), the American Jewish Committee (Docket No. NHTSA–2005–22223–1420), Alliance for Affordable Energy *et al.* (Docket No. NHTSA–2005–22223–1726),[32] AAA (Docket No. NHTSA–2005–22223–1804), and Public Citizen (Docket No. NHTSA–2005–22223–2188, 2189).

In general, the environmental and consumer groups stated that the increased fuel prices, the need of the nation to conserve energy and the availability of ''effective technologies'' necessitate more stringent standards. Several of these commenters stated that the light truck standard should approach that for passenger cars or higher. These groups generally asserted that any reform proposal must include a mechanism to guarantee the fuel savings projected by the agency under the new standards. Many of these groups expressed concern that the proposed structure and reliance on vehicle footprint in the Reformed CAFE system would permit manufacturers to ''upsize'' their fleets, which would result in reduced fuel savings. Several commenters stated that the statutory requirement to set ''maximum feasible'' standards makes it impermissible for the agency to limit the level of the new standards based on the concepts of ''optimal economic efficiency'' or ''least capable manufacturer.'' They argued that setting the Reformed CAFE standards during the transition period at levels that impose the same costs as the Unreformed standards was inconsistent with the ''maximum feasible'' requirement. Additionally, some of these groups disagreed with the agency's statement regarding the preemption of State regulation of greenhouse gas emissions from motor vehicles. The Center for Biological Diversity asserted that the accompanying draft Environmental Assessment was inadequate.

IIHS expressed concern that the category system as proposed would provide an incentive for unsafe compliance strategies. IIHS stated that the category system still provided an incentive to downsize a vehicle within a category in order to improve its fuel economy. IIHS stated that downsizing, particularly among the smaller vehicles, can have a negative impact on safety. To address this issue, IIHS recommended that the agency adopt a continuous function approach as discussed in the NPRM.

A number of comments representing the interests of States were received. These comments generally voiced opposition to various parts of the NPRM. The New York State Department of Environmental Conservation (NY DEC; Docket No. NHTSA–22223–1646), the State of New Jersey Department of Environmental Protection (Docket No. NHTSA–22223–1651), NESCAUM[33] (Docket No. NHTSA–22223–1625), the Pennsylvania Department of Environmental Protection (PA DEP; Docket No. NHTSA–22223–1807), the California Air Resources Board (Docket No. NHTSA–22144–31), STAPPA/ALAPCO[34] (Docket No. NHTSA–22223–1494), and the Connecticut Department of Environmental Protection (Docket No. NHTSA–22223–1624) disagreed with the statement in the NPRM preamble about preemption of State greenhouse gas regulations for motor vehicles and requested that not include any such statement in the final rule. These commenters generally also requested that the agency increase the stringency of the final fuel economy requirements as well as regulate the fuel economy of light trucks with a GVWR up to 10,000 lbs. The Attorneys General for California, Massachusetts, New York, Connecticut, New Jersey, Maine, Oregon, Vermont, and the New York City Corporation Counsel (Attorneys General; Docket No. NHTSA–22223–2223) also objected to the preemption language, and further stated that the agency is obligated to perform an environmental impact statement under the National Environmental Policy Act. The California Energy Commission expressed support for the Reformed CAFE structure, but stated that, because of uncertainty in the economic assumptions relied upon by the agency, standards should be established at this time for model year 2008 only (Docket No. NHTSA–22144–19).

Members of Congress also submitted comment, expressing concern over the proposal. A letter signed by Representatives Tammy Baldwin, Jim McDermott, Susan Davis, Raul Grijalva, Barbara Lee, Michael Michaud, Ed Case, Robert Wexler, Pete Stark, Dennis Cardoza, Allyson Y. Schwartz, and Jim Moran stated that the proposal contains a number of positive aspects, particularly the use of footprint instead of weight as the basis for Reformed CAFE (Docket No. NHTSA–22223–1334). However, Representative Baldwin et. al asked that the agency establish more stringent standards and establish standards for vehicles with a GVWR between 8,500 and 10,000 lbs, stating that such revisions are necessary to reduce the nation's demand for foreign oil and to lower gasoline costs for consumers.

Comments were also received from a variety of additional organizations and interests. The Competitive Enterprise Institute (Docket No. NHTSA–22223–1682) commented that the proposal would provide more flexibility to manufacturers and be more accommodating to consumer preference, but argued that increased CAFE standards have the potential to affect motor vehicle safety adversely. The Mercatus Center (Docket No. NHTSA–22223–1632) and Criterion Economics (Docket No. NHTSA–22223–1976) raised concerns relating to many of the analytic assumptions used in the preliminary regulatory impact analysis. The Sport Utility Vehicle Owners of America (Docket No. NHTSA–22223–1599) and Marine Retailers Association of America (Docket No. NHTSA–22223–84) argued that there was a need to

[32] Signatories to the Alliance for Affordable Energy *et al.*, included representatives from Environmental and Energy Study Group, Environmental Energy Solutions, Global Possibilities, Institute for Environmental Research Education, Mainstay Energy, National Environmental Trust, North Carolina Solar Center, Oregon Environmental Council, Redwood Alliance, The Stella Group, Ltd., SUN DAY Campaign, SustainableBusiness.com, Triangle Clean Cities Coalition, and Vermont Energy Investment Corp.

[33] NESCAUM (Northeast States for Coordinated Air Use Management) is an interstate association of air quality control divisions representing the six New England States, as well as New York and New Jersey.

[34] State and Territorial Air Pollution Program Administrators and the Association of Local Air Pollution Control Officials.

consider the utility of light trucks, particularly towing capacity.

As stated above, the vast majority of comments received were submitted by individual citizens. Private individuals expressed concern that the proposed standards would not be sufficient to meet the nation's need to conserve energy, would not protect the nation from future spikes in fuel prices, would negatively impact the environment, and would encourage manufacturers to build larger vehicles with lower fuel economy.

NRDC provided citizens with a letter requesting that the agency increase the light truck standard by 1 mpg a year over five years. These letters raised concern that the fuel economy standards as proposed would not adequately address the nation's need to conserve fuel.

The Union of Concerned Scientists also provided citizens with form letters that requested the agency to regulate vehicles with a GVWR greater than 8,500 lbs, to consider ''cost-efficient technologies'' for ''mid-size SUVs,'' and to provide a mechanism to ensure that manufacturers do not ''up-size'' vehicles. Other similar documents were also submitted to the docket.

Some expressed belief that sufficient technology is available that would enable the manufacturers to exceed the proposed CAFE standards.

While the above discussion very briefly describes the comments submitted by the various interested parties, more detailed discussions of the comments and the agency's responses are embedded in the analysis and discussion which follow.

## V. The Unreformed CAFE Standards for MYs 2008–2010

The agency is establishing Unreformed CAFE standards of 22.5 miles per gallon (mpg) for model year (MY) 2008, 23.1 mpg for MY 2009, and 23.5 mpg for MY 2010. We estimate that these standards will save 4.4 billion gallons of fuel over the lifetime of vehicles sold during those model years, compared to the savings that would occur if the standards remained at the MY 2007 level of 22.2 mpg. We have determined that these requirements represent the maximum feasible fuel economy levels achievable by industry in those model years.

Consistent with the NPRM, the Unreformed CAFE standards in MYs 2008–2010 are one option for compliance during a transition period in which manufacturers may comply with either the Reformed or Unreformed CAFE systems. During the transition period, the requirements under the Reformed CAFE systems are linked to those of the Unreformed system, in the sense that the Reformed CAFE standards for MYs 2008–2010 are set at levels intended to ensure that the industry-wide cost of the Reformed standards are roughly equivalent to the industry-wide cost of the Unreformed CAFE standards in those model years.

As stated in the NPRM, this transition approach has several important advantages. We have determined the Unreformed standards to be economically practicable. The Reformed standards spread the cost burden across the industry to a greater extent. As such, equalizing the cost between the Unreformed and the Reformed CAFE systems ensures that the costs associated with the transition period do not result in economically severe compliance requirements. Further, this approach promotes an orderly and effective transition to the Reformed CAFE system since experience will be gained prior to MY 2011. In this section, we describe how we developed the Unreformed CAFE standards.

In arriving at the Unreformed CAFE standards, we used the same type of analyses as in the NPRM and as we employed in establishing light truck CAFE standards for MYs 2005–2007. First, we analyzed the confidential product planning data submitted by the manufacturers to ascertain the ''baseline'' capabilities and fuel economy of each manufacturer that has a significant share of the light truck market. Second, we conducted a three-stage manual engineering analysis (the Stage Analysis), in conjunction with a computer-based engineering analysis (the Volpe Analysis), to determine what technologies each company with a significant share of the market could use to enhance its overall fleet fuel economy average. In order to perform the two analyses, the agency relied on the National Academy of Sciences (NAS) report entitled, ''Effectiveness and Impact of Corporate Average Fuel Economy (CAFE) Standards,'' which contains costs and effectiveness estimates for various technologies that could be used to enhance vehicle fuel economy.

As explained in the August 2005 NPRM,[35] the Stage Analysis involves application of the agency's engineering expertise and judgment about possible adjustments to the detailed product plans submitted by individual manufacturers. More specifically, Stage I analysis involves the application of technologies which are deemed to be available for use by MY 2008 and which would not require significant changes to the vehicle's driveline components (*i.e.*, the engine and transmission). Stage II analysis involves the application of more advanced transmission upgrades and engine improvements that are readily available in the marketplace. Stage III analysis involves the application of diesel and hybrid powertrains to select products.

The Volpe Analysis was described in detail in the NPRM and Final Rule establishing light truck CAFE standards for MYs 2005–2007.[36] The Volpe analysis uses a technology application algorithm to systematically apply consistent cost and performance assumptions to the entire industry, as well as consistent assumptions regarding economic decision-making by manufacturers. The resultant computer model (the CAFE Compliance and Effects Model), developed by technical staff of the DOT Volpe National Transportation Systems Center in consultation with NHTSA staff, is used to help estimate the overall economic impact of the Unreformed CAFE standards. The Volpe analysis shows the economic impact of the standards in terms of increases in new vehicle prices on a manufacturer-wide, industry-wide, and average per-vehicle basis. Based on these estimates and corresponding estimates of net economic and other benefits, the agency is able to set the standards that are economically practicable and technologically feasible. The Stage Analysis and the Volpe Analysis rely on the same product plan information from manufacturers, consider many of the same technologies (the Stage Analysis considers some manufacturer-specific technologies not represented in the Volpe Analysis), and apply similar conditions regarding the applicability of those technologies.

We note that the Volpe model has been updated and refined with respect to its representation of some fuel-saving technologies, but remains fundamentally the same. The updated model has also been peer reviewed.[37] The model documentation, including a description of the input assumptions and process, as well as peer review reports and the agency's response to reviewers, were made available in the rulemaking docket for the August 2005 NPRM.[38]

We received a significant number of comments in response to the proposed

[35] 70 FR 51414 (August 30, 2005).

[36] See 67 FR 77015 (December 16, 2002) and 68 FR 16868 at 16871 (April 7, 2003). Docket Nos. NHTSA–2002–11419–55 and NHTSA–2002–11419–18361.

[37] The agency's response to the peer review is provided in the docket at NHTSA–2005–22223–52.

[38] See Docket Nos. NHTSA–20005–22223–3, 4, 5.

Unreformed CAFE standards, expressing a wide range of views. While some of those commenting argued that technology is available to set the standards higher, others argued that insufficient lead time, as well as technological and monetary constraints, make it unlikely that the proposed standards would be attainable. We have reviewed these comments and adjusted many aspects of the analyses used to determine the Unreformed CAFE standards in order to account for issues brought to our attention. Responses to comments that raised specific technology and economic assumptions issues are discussed in detail below in sections VIII. Technology issues, and IX.

**Economic Assumptions**

In the balance of this section, we describe in further detail how we developed the Unreformed CAFE standards. After considering the foregoing and taking into consideration the statutory criteria specified in 49 U.S.C. 32092(f) [39], we are adopting the Unreformed CAFE standards specified above, having concluded that they constitute the maximum feasible standards for MYs 2008–2010.

*A. Legal Authority and Requirements Under EPCA*

As previously stated, EPCA requires that the CAFE standards set a minimum performance standard at a level determined by the Secretary of Transportation to be the ''maximum feasible'' average fuel economy achievable by manufacturers in a given model year (49 U.S.C. 32902). To guide determinations of the maximum feasible fuel economy level, Congress specified four statutory criteria that must be considered: technological feasibility, economic practicability, the effect of other Federal motor vehicle standards on fuel economy, and the need of the United States to conserve energy. The agency is permitted to consider additional societal considerations and historically has considered the potential for adverse safety consequences when deciding upon a maximum feasible level.[40] The overarching principle that emerges from the enumerated factors and the court-sanctioned practice of considering safety and links them together is that CAFE standards should be set at a level that will achieve the greatest amount of fuel savings without leading to significant adverse societal consequences.

We have set the Unreformed standards with particular regard to the ''least capable manufacturer with a significant share of the market,'' in response to the direction in the conference report on the CAFE statute language to consider industry-wide considerations, but not necessarily base the standards on the manufacturer with the greatest compliance difficulties.[41] This approach is consistent with the Conference Report on the legislation enacting the CAFE statute:

> Such determination [of maximum feasible average fuel economy level] should take industry-wide considerations into account. For example, a determination of maximum feasible average fuel economy should not be keyed to the single manufacturer that might have the most difficulty achieving a given level of average fuel economy. Rather, the Secretary must weigh the benefits to the nation of a higher average fuel economy standard against the difficulties of individual manufacturers. Such difficulties, however, should be given appropriate weight in setting the standard in light of the small number of domestic manufacturers that currently exist and the possible implications for the national economy and for reduced competition association [sic] with a severe strain on any manufacturer.

S. Rep. No. 94–516, 94th Congress, 1st Sess. 154–155 (1975). The agency must consider the industry's ability to improve fuel economy, but with appropriate consideration given to the difficulties of individual manufacturers.

In response to this congressional direction, we have traditionally given particular regard to the ''least capable manufacturer with a substantial share of the market.'' The agency must take particular care in considering the statutory factors with regard to these manufacturers— weighing their asserted capabilities, product plans and economic conditions against agency projections of their capabilities, the need for the nation to conserve energy and the effect of other regulations (including motor vehicle safety and emissions regulations) and other public policy objectives.

The agency has historically assessed whether a potential CAFE standard is economically practicable in terms of whether the standard is one ''within the financial capability of the industry, but not so stringent as to threaten substantial economic hardship for the industry.'' [42] See, e.g., *Public Citizen*, 848 F.2d at 264. In essence, in determining the maximum feasible level of CAFE, the agency assesses what is technologically feasible for manufacturers to achieve without leading to significant adverse economic consequences, such as a significant loss of jobs or the unreasonable elimination of consumer choice.

At the same time, the law does not preclude a CAFE standard that poses considerable challenges to any individual manufacturer. The Conference Report makes clear, and the case law affirms: ''(A) determination of maximum feasible average fuel economy should not be keyed to the single manufacturer which might have the most difficulty achieving a given level of average fuel economy.'' *CAS*, 793 F.2d at 1338–39. Instead, the agency is compelled ''to weigh the benefits to the nation of a higher fuel economy standard against the difficulties of individual automobile manufacturers.'' Id. The statute permits the imposition of reasonable, ''technology forcing'' challenges on any individual manufacturer, but does not contemplate standards that will result in ''severe'' economic hardship by forcing reductions in employment affecting the overall motor vehicle industry.[43]

[39] The statutory criteria, which are addressed elsewhere in this document, are: (1) The nation's need to conserve energy; (2) technological feasibility; (3) economic practicability (including employment consequences); and the impact of other regulations on fuel economy.

[40] See, e.g., *Center for Auto Safety* v. *NHTSA (CAS)*, 793 F. 2d 1322 (D.C. Cir. 1986) (Administrator's consideration of market demand as component of economic practicability found to be reasonable); *Public Citizen* 848 F.2d 256 (Congress established broad guidelines in the fuel economy statute; agency's decision to set lower standard was a reasonable accommodation of conflicting policies). As the United States Court of Appeals pointed out in upholding NHTSA's exercise of judgment in setting the 1987–1989 passenger car standards, ''NHTSA has always examined the safety consequences of the CAFE standards in its overall consideration of relevant factors since its earliest rulemaking under the CAFE program.'' *Competitive Enterprise Institute* v. *NHTSA (CEI I)*, 901 F.2d 107, 120 at n.11 (D.C. Cir. 1990).

[41] ''Least capable manufacturer'' is something of a misnomer as a major manufacturer could install substantial amounts of fuel saving technologies and still be the major manufacturer with lowest projected CAFE due to its mix of vehicles.

[42] In adopting this interpretation in the final rule establishing the MY 1981–1984 fuel economy standards for passenger cars (June 30, 1977; 42 FR 33534, at 33536–7), the Department rejected several more restrictive interpretations. One was that the phrase means that the standards are statutorily required to be set at levels solely on a cost-benefit basis. The Department pointed out that Congress had rejected a manufacturer-sponsored amendment to the Act that would have required standards to be set at a level at which benefits were commensurate with costs. It also dismissed the idea that economic practicability should limit standards to free market levels that would be achieved with no regulation.

[43] In the past, the agency has set CAFE standards above its estimate of the capabilities of a manufacturer with less than a substantial, but more than a de minimis, share of the market. See, e.g., *CAS*, 793 F.2d at 1326 (noting that the agency set the MY 1982 light truck standard at a level that might be above the capabilities of Chrysler, based on the conclusion that the energy benefits associated with the higher standard would outweigh the harm to Chrysler, and further noting that Chrysler had 10–15 percent market share while Ford had 35 percent market share). On other occasions, the agency reduced an established CAFE

By focusing primarily on the least capable manufacturer with a significant share of the market, this approach has ensured that the standards are technologically feasible and economically practicable for manufacturers with a significant share of the market. If a standard is technologically feasible and economically practicable for the ''least capable'' manufacturer, it can be presumed to be so for the ''more capable'' manufacturers. Together, the manufacturers with a significant share of the market represented a very substantial majority of the light trucks manufactured and thus were deemed to represent ''industry-wide considerations.''

*B. Establishing Unreformed Standards According to EPCA—Process for Determining Maximum Feasible Levels*

In establishing the Unreformed standards for MYs 2008–2010, the agency relied upon its historical standard setting process, which includes consideration of the ''least capable manufacturer with a significant share of the market.''

NRDC, Environmental Defense and the Union of Concerned Scientists stated that the ''least capable manufacturer'' approach applied by the agency in setting standards under the Unreformed CAFE standards violates EPCA and Congress' expressed intent. NRDC argued that ''while the agency is permitted to consider the single, least capable manufacturer in assessing economic practicability, it simply may not allow that manufacturer's capabilities to drive the standard setting process,'' and referred to *CAS.*

In *CAS*, the petitioners alleged that the agency had given ''impermissible weight to shifts in consumer demand toward larger, less fuel-efficient trucks''[44] in reducing the MY 1985 standard for light trucks and in establishing the MY 1986 standard for light trucks. In reducing the MY 1985 standard as well as in establishing the MY 1986 one, NHTSA considered the impacts of different levels of standards on the least capable manufacturer. The Court noted the conference report for EPCA ''states that the fuel economy standards delegated to NHTSA are to be the product of balancing the benefits of higher fuel economy levels against the difficulties individual manufacturers would face in achieving those levels,''[45] Then it quoted language to that effect from the conference report. In the end, the Court upheld the standards established through consideration of the least capable manufacturer with a significant share of the market, stating that ''a standard with harsh economic consequences for the auto[mobile] industry * * * would represent an unreasonable balancing of EPCA's policies.''[46]

As a first step toward ensuring that the CAFE levels selected as the maximum feasible levels under Unreformed CAFE will not lead to significant adverse consequences, we reviewed in detail the confidential product plans provided by the manufacturers with a substantial share of the light truck market (General Motors, Ford and DaimlerChrysler) and all other manufacturers that submitted confidential product plan data and assessed their technological capabilities to go beyond those plans. By doing so, we are able to determine the extent to which each can enhance their fuel economy performance using technology.

*C. Baseline for Determining Manufacturer Capabilities in MYs 2008–2010*

In order to determine the maximum feasible fuel economy levels for MYs 2008–2010 under the Unreformed CAFE system, we first determined each manufacturer's fuel economy baselines for MYs 2008–2010. That is, we determined the fuel economy levels that manufacturers were planning to achieve in those years.

The manufacturer baselines relied upon for the proposed Unreformed CAFE standards were based upon information submitted by manufacturers in response to the December 29, 2003 request for product plans[47], and any additional manufacturer updates. In conjunction with the August 2005 NPRM, we issued a RFC seeking updated product plans to enable NHTSA to use the most accurate and up-to-date product plan information in establishing the Reformed and Unreformed CAFE standards.[48]

In response to the RFC, we received product plans from DaimlerChrysler, Ford, General Motors, Honda, Hyundai, Mitsubishi, Nissan, Subaru and Toyota. To supplement the data provided in response to the RFC, we also relied on product data available from public sources. Taken together, it was this updated information that the agency used in development of the standards for today's final rule.

We note that BMW, Porsche, and Volkswagen previously paid fines in lieu of complying with the MY 2002 and 2003 light truck CAFE standards. The agency assumes that because of that past history and their low light truck production volumes Porsche and Volkswagen will continue to pay fines instead of bringing their fleets into compliance. For purpose of the NPRM, we also assumed that BMW would continue to pay fines. However, BMW has indicated that it does not intend to pay fines in the model years subject to this rulemaking. We have adjusted our analysis accordingly.

Finally, in response to a comment from DaimlerChrysler, we removed Mitsubishi's information from DaimlerChrysler's product plans due to DaimlerChrysler's recent sale of its entire share of Mitsubishi stock and adjusted DaimlerChrysler's baseline capabilities accordingly.

Based on the updated manufacturer's responses and the available public data, we determined the baseline capabilities as follows:

TABLE 1.—ESTIMATED MARKET SHARES AND PLANNED CAFE LEVELS (WITHOUT CREDITS)

| Manufacturer | Market share* | MY 2008 (mpg) | MY 2009 (mpg) | MY 2010 (mpg) |
|---|---|---|---|---|
| General Motors | 25.8 | 21.36 | 21.43 | 21.59 |
| Ford | 19.4 | 21.53 | 21.79 | 22.65 |
| DaimlerChrysler | 23.0 | 21.96 | 22.01 | 22.42 |
| Toyota | 11.6 | 22.51 | 22.44 | 22.65 |
| Honda | 6.5 | 24.56 | 24.56 | 24.56 |
| Nissan | 5.7 | 21.01 | 20.70 | 21.13 |

standard to address unanticipated market conditions that rendered the standard unreasonable and likely to lead to severe economic consequences.

49 FR 41250, 50 FR 40528, 53 FR 39275; see *Public Citizen*, 848 F.2d at 264.

[44] Id. at 1323–4.

[45] Id. at 1338.

[46] Id. at 1340.

[47] *See* 68 FR 74931; see also Docket No. NHTSA–2003–16709–1.

[48] *See* Docket No. NHTSA–2005–22144.

TABLE 1.—ESTIMATED MARKET SHARES AND PLANNED CAFE LEVELS (WITHOUT CREDITS)—Continued

| Manufacturer | Market share* | MY 2008 (mpg) | MY 2009 (mpg) | MY 2010 (mpg) |
|---|---|---|---|---|
| Hyundai | 3.6 | 23.22 | 23.49 | 23.36 |
| Subaru | 1.1 | 25.87 | 27.15 | 27.05 |
| BMW | 0.8 | 21.29 | 21.29 | 21.29 |
| Porsche | 0.2 | 16.80 | 16.80 | 16.80 |
| Isuzu | 0.4 | 20.38 | 20.24 | 20.14 |
| Suzuki | 0.3 | 21.93 | 21.93 | 21.93 |
| Volkswagen | 0.3 | 18.78 | 18.78 | 18.78 |
| Mitsubishi | 1.3 | 24.33 | 24.41 | 24.70 |

*Based on 2005 production data.

After ascertaining the baseline capabilities of individual manufacturers, the agency applied the Stage analysis to analyze the potential technological improvements to the product offerings for each manufacturer with a substantial share of the light truck market, as well as for the remaining light truck manufacturers.[49]

The Alliance and Ford argued that in establishing manufacturer baselines for our analysis, the agency erroneously assumed that each manufacturer's fleet average would be at 22.2 mpg for Model Year 2007. These commenters stated that this assumption is incorrect, because some manufacturers did not submit product plan information to support this assumption and other manufacturers achieve compliance with the CAFE requirements through the use of credits and payment of fines. The Alliance and Ford also stated that some manufacturers (in anticipation of future CAFE increases) might have taken steps in support of higher fleet averages and might have already incorporated fuel saving technologies.

In response, we note that the agency did not assume that each manufacturer's fleet average would be 22.2 mpg for MY 2007. We used the manufacturer's plans to determine the fleet average. When a manufacturer's plans were below 22.2 mpg, we estimated the technologies and costs necessary to bring their fleet average up to a 22.2 mpg baseline. These costs were assigned to the MY 2007 standards, and such costs were not included in the costs for MY 2008.

With respect to alternative fuel vehicles, we note that manufacturers may improve their calculated fuel economy performance by placing these vehicles into the market through MY 2012.[50] However, 49 U.S.C. 32902(h) prohibits us from taking such benefits into consideration in determining the maximum feasible fuel economy standard. Accordingly, the baseline projections cannot reflect those credits.[51]

*D. Technologically Feasible Additions to Product Plans*

As explained in the August 2005 NPRM, we performed a Stage analysis to determine what fuel-saving technologies could be applied to a manufacturer's baseline. At each of the three stages, we add technologies based on our engineering judgment and expertise about possible adjustments to the detailed product plans submitted by the manufacturers. Our decision on whether and when to add a technology reflects our consideration of the practicability of applying a specific technology and the necessity for sufficient lead-time in its application. In addition to considering lead time and practicability, the agency adds technologies in a cost-minimizing fashion. That is, we add technologies in order of lower to higher costs as explained in the FRIA (see FRIA p. VI–13).

While technologies are applied in order of ''effective cost,'' the level of technology added to a manufacturer's fleet is based on the agency's engineering expertise. Technologies are not added until net benefits are maximized as under the Reformed CAFE system. Instead, the agency uses engineering expertise to apply technology. We impose phase-in caps for applications of technology over time and do not make significant changes until a vehicle is refreshed or redesigned to account for product cycles. As such, the price of fuel does not directly factor into the application of technology under the Unreformed CAFE system to the degree that it does under the Reformed CAFE system.

New product plan data in response to the NPRM indicated that manufacturers had shifted the fleet mix and improved the fuel economy of some vehicles. These changes reduced the amount of technology available to be applied. For this reason, more costly technologies (diesel and hybrids) were projected onto the fleet. The agency feels justified in doing so because higher gasoline prices will increase the demand for these types of technologies.

In evaluating which technologies to apply, and the sequence in which to apply them, we follow closely the NAS report. The NAS report estimated the incremental benefits and the incremental costs of technologies that may be applicable to actual vehicles of different classes and intended uses.[52] The NAS report also identified what it called ''cost-efficient technology packages'' (i.e., combinations of technologies that would result in fuel economy improvements sufficient to cover the purchase price increases that such technologies would require).[53]

The Stage I analysis includes technologies that are available for use by MY 2008, but that some manufacturers are not currently choosing to use in their product plans or are using in a limited manner. However, many of these technologies are currently being used in today's light truck fleet. They include non-powertrain applications such as low-rolling-resistance tires, low-friction lubricants, aerodynamic drag reduction, and electric-power steering pumps.

[49] A more detailed discussion of these issues is contained in the Chapter VI of the FRIA, which has been placed in the docket for this notice. Some of the information included in the FRIA, including the details of manufacturers' future product plans, has been determined by the Agency to be confidential business information, the release of which could cause competitive harm. The public version of the FRIA omits the confidential information. The FRIA also discusses in detail the fuel-economy-enhancing technologies expected to be available during the MY 2008–2011 time period.

[50] The applicability of the alternative fuel provision in § 32905 was extended in the Energy Policy Act of 2005 (Pub. L. 109–58).

[51] Sec. 32902(h) states that when establishing fuel economy standards, the agency:

(1) May not consider the fuel economy of dedicated automobiles; and

(2) Shall consider dual fueled automobiles to be operated only on gasoline or diesel fuel.

[52] See NAS Report at p. 40. See also Docket No. 2005–22223–10, ''Fuel Economy Potential of 2010 Light Duty Trucks.'' This document was prepared under the auspices of the U.S. Department of Energy for NHTSA, in order to update the estimates provided by the 2001 NAS Report.

[53] See NAS Report at p. 64.

The Stage II analysis includes two major categories of technological improvements to the manufacturers' fleets. The first category is transmission improvements, which includes the introduction and expanded use of 5-speed and 6-speed transmissions and continuously variable transmissions (CVTs). The second category is engine improvements, which includes gradually upgrading light truck engines to include multi-valve overhead camshafts; introducing engines with more than 2 valves per cylinder; applying variable valve timing or variable valve lift and timing to multi-valve overhead camshaft engines; and applying cylinder deactivation to 6- and 8-cylinder engines.

The Stage III analysis includes projections of the potential CAFE increase that could result from the application of diesel engines and hybrid powertrains to select products. Both diesel engines and hybrid powertrains appear in several manufacturers plans within the MY 2008–2010 timeframe, and other manufacturers have publicly indicated that they are looking seriously into both technologies.

The Stage analysis also includes the possibility that manufacturers could utilize some vehicle weight reduction as a fuel economy improvement technology on light trucks with curb weights over 5,000 pounds.[54] However, the weight reduction was only applied in conjunction with a planned vehicle redesign, and sometimes in concert with a reduction in aerodynamic drag.

The agency again relied on the NAS report, which contains costs and effectiveness estimates for various technologies that could be used to enhance a vehicle's fuel economy. In most instances, NHTSA used the NAS report's mid-range estimate of the potential fuel economy benefits of specific technologies. However, if NHTSA projected the use of a technology specific to a manufacturer, NHTSA relied on effectiveness estimates provided by that manufacturer when applying that technology to that manufacturer and if appropriate, to other manufacturers.

In arriving at the Unreformed CAFE standard, the agency took into account the concerns raised by the manufacturers in response to the August 2005 NPRM. Specifically, the agency is aware that vehicle manufacturers require sufficient lead time to incorporate changes and new features into their vehicles. The agency is also aware that the vehicle manufacturers are unable to deploy new technologies throughout their entire light truck fleet in one model year. Similarly, NHTSA also recognizes that vehicle manufacturers follow design cycles when introducing or significantly modifying a product. In revising and applying the Stage Analysis, NHTSA took these concerns into consideration.

For each of the largest manufacturers that provided product plans with baselines below our proposed levels for at least one model year, the agency projected the use of several Stage I technologies, beginning with MY 2008, and several more technologies, beginning with MY 2009. We note that in performing the Stage Analysis, the agency relied on product plans submitted by the manufacturers as well as comments received in response to the August 2005 NPRM. The agency removed incompatible technologies and technologies already incorporated into manufacturers' product plans from the Stage Analysis. More importantly, the agency delayed and ''staggered'' applications of technologies such that they are not implemented across the entire fleet in one model year. Most new technologies were added in conjunction with model changes or vehicle introductions. That is, instead of adding technologies to existing vehicles in the middle of their product cycle, we added technologies to vehicles at the time the vehicles were undergoing major engineering changes or when they were introduced.

Aside from reliance on the NAS report, we also relied to a limited extent on technologies present in the manufacturers' confidential product plans. If a technology was present in a manufacturer's product plans, we evaluated the opportunity for additional application of the technology within that manufacturer's fleet, and if appropriate, other manufacturers' fleets. The following are examples of non-confidential technologies used in the Stage Analysis.

*Stage 1*

Electrical power steering—We first applied this technology to lighter vehicles that do not require a conversion to a 42-volt electrical system. The agency avoided using this technology for heavier vehicles in the near term. The power demands for lighter vehicles do not require a 42-volt system for operation of electric power steering. However, for larger vehicles it appears that a 42-volt system is required to accommodate electric power steering, and adding a 42-volt system was deemed a technology that can be only introduced in conjunction with model changes or product introductions.

In all cases, electric power steering was added to the Stage Analysis to coincide with model changes. By MY 2008, electrical power steering was included on some of the lighter vehicles undergoing model changes. By MYs 2009 and 2010, this technology was gradually added to heavier vehicles at the beginning of their respective product cycles. That way, installation of electrical power steering can coincide with the necessary conversion of these heavier vehicles to a 42-volt electrical system.

Low-friction lubricants—This technology does not require engineering changes to vehicle engines. Therefore, it was implemented in MYs 2008 and 2009 on a large percentage of the eligible fleet without ''staggering'' the implementation. That is, the agency believes that this technology can be implemented within a relatively short lead time. The agency did not apply low-friction lubricants to vehicles with engines that require higher-friction lubricants.

Aerodynamic drag reduction—This technology was applied to certain vehicles to coincide with a major vehicle redesign or a vehicle introduction. Because aerodynamic drag reduction typically involves actual vehicle body changes, we were especially careful not to attribute any aerodynamic drag reduction, except at the beginning of a new product cycle.

Low-rolling-resistance tires—This technology was added to lighter, passenger-car-based (unibody construction) light trucks that were deemed compatible with passenger-car-like tires. Due to compatibility concerns expressed by several manufacturers, these tires were not applied to light trucks intended for significant off-road duty or pickup trucks with substantial cargo carrying capabilities. Because this technology does not require vehicle engineering resources, we implemented this technology such that it does not necessarily coincide with a planned vehicle introduction or redesign. We believe that in this case, the lead time is sufficient for the manufacturers to make arrangements to purchase sufficient quantities.

Engine accessory improvement—The agency projected the use of this technology for several manufacturers. This technology category encompasses a variety of engine accessory

[54] Based on the results of Dr. Kahane's revised weight and safety analysis, the net weight-safety effect of removing 100 lbs. from a light truck—if footprint is held constant—is zero for all light trucks with curb weights above 3,900 lbs. However, the Stage analysis only considered weight reduction for vehicles with a curb weight in excess of 5,000 lbs. given the statistical uncertainty with the 3,900 lbs. figure. Further discussion of the application of weight reduction is provided below.

improvement technologies that several manufacturers are currently incorporating, such as improved fuel and oil pumps. If a manufacturer provided NHTSA with descriptions for these specific technologies, they were applied to that manufacturer's vehicles where appropriate. If manufacturers provided no information regarding their incorporation of engine accessory improvement technologies, NHTSA applied a potential engine accessory improvement to vehicles that had an engine and engine technologies that would benefit from and be compatible with specific engine accessory improvements. The agency believes that this technology is cost-effective. This technology generally affects the operation of the engine, thus this technology was added in conjunction with a planned introduction of new models.

Stoichiometric Spark Ignition Direct Injection—This technology was added to select vehicles, i.e., those vehicles produced by manufacturers that have product plans which reflect a familiarity with the technology. This technology was applied in conjunction with a planned vehicle redesign. Implementation of this technology was delayed in response to comments and in recognition of cost issues associated with insufficient lead time.

Weight reduction—As explained below, this fuel economy improvement method was used sparingly on vehicles with a curb weights in excess of 5,000 pounds and was applied in conjunction with a planned vehicle redesign.

*Stage 2*

5-speed and 6-speed automatic transmissions—These technologies were added to some vehicles that, based on the manufacturers' product plans, were projected to continue using 4-speed automatic transmissions. As with Stage I technologies, when a transmission upgrade is used in the Stage Analysis, it is timed to coincide with model changes. Further, we first implemented this technology in vehicles that share major mechanical components with vehicles already equipped with 5- or 6-speed transmissions. For example, we project this technology on certain pickup trucks that share their platforms and engines with multipurpose passenger motor vehicles already equipped with 6-speed transmissions, knowing that these transmissions were readily available to the manufacturer and were compatible with the basic vehicle architecture.

Cylinder deactivation—In response to comments, the agency did not apply this technology to vehicles with incompatible existing engine architecture. The agency applied this technology to select vehicles. In doing so, the agency took into account whether this technology was already available to the manufacturers. In some instances, this technology was already utilized by vehicle manufacturers on some of their light trucks, and the agency believes that adopting this technology to other light trucks would save costs, especially if the technology is implemented at the time of vehicle redesign.

Dual overhead cam (DOHC)—The agency did not use, or delayed the implementation of this technology in vehicles where the comments indicated that the change from single overhead cam (SOHC) would be too complicated and would not produce significant fuel economy improvements because of incompatibility with the existing engine architecture. In other vehicles, implementation of DOHC was timed to coincide with a planned vehicle or engine redesign. In applying this technology, the agency examined the manufacturers' current vehicles. In some instances the manufacturers carry both DOHC engines and SOHC engines of the same displacement and basic architecture. In these instances, the agency projected a gradual switch to only the DOHC engines.

Continuous Variable Transmission (CVT)—CVT technology was relied upon in the analysis for the NPRM. The agency did not apply CVTs in the final rule. The updated product plans reflected that manufacturers had applied CVTs or 6-speeds instead to all of those vehicles to which the agency's analysis applied CVTs in the NPRM.

Front Axle Disconnect—Where this technology was implemented, it was timed to coincide with planned vehicle redesign. In addition, in response to comments regarding the general effectiveness of this technology vis-á-vis its effectiveness in specific vehicle applications, we revised downward the projected fuel economy benefits attributed to this technology.

Variable Valve Lift and Timing—Based on comments, this technology was not used on certain vehicles because the basic engine architecture was incompatible. According to commenters, this technology is incompatible with overhead valve engines. Instead, this technology was applied to certain vehicles already equipped with overhead cam engines featuring variable valve timing.

*Stage III*

Stage III technologies were not included in the Stage Analysis for all manufacturers because some manufacturers can meet the Unreformed CAFE standards without the need to use any diesel or hybrid technology. For some vehicle manufacturers, we estimated higher sales of light trucks equipped with hybrid engines compared to the manufacturer's product plans. This revised estimate is based on continuing strong demand and increased popularity of hybrid vehicles. For other manufacturers, we projected the use of direct-injection diesel engines in place of large displacement gasoline V8 engines.

*E. Improved Product Plans*

The agency's revised Stage Analysis produced the following individual projections:

TABLE 2.—MANUFACTURERS' FUEL ECONOMY CAPABILITIES AS PROJECTED UNDER THE STAGE ANALYSIS

| Manufacturer | Model year 2008 | Model year 2009 | Model year 2010 |
|---|---|---|---|
| DaimlerChrysler | *22.475 | 23.059 | 23.599 |
| Ford | 22.455 | 23.060 | 23.935 |
| General Motors | 22.506 | 23.060 | 23.450 |
| Nissan | 22.452 | 23.091 | 23.470 |
| Toyota | 22.506 | 23.054 | 24.044 |

*While compliance is calculated with the standard is in tenths of a mile per gallon, our initial analysis projects fuel economy capabilities to thousandths of mpg.

The technologically-feasible fuel economy levels determined under the Stage Analysis provide the basis for the Unreformed CAFE standards. The Volpe model is then used to estimate benefits and costs of these standards. The Volpe model analyzes what technologies can be added to meet the standard determined by the Stage Analysis. More specifically, the Volpe model uses a technology application algorithm developed by Volpe Center staff in consultation with NHTSA staff to apply technologies to manufacturers' baselines in order to achieve the fuel economy levels produced under the Stage Analysis. This algorithm systematically applies consistent cost and performance assumptions to the entire industry, as well as consistent assumptions regarding economic decision-making by manufacturers. Technologies are selected and applied in order of ''effective cost,'' (total cost − fine reduction − fuel savings value) ÷ (number of affected vehicles).[55] This formula is a private cost concept (i.e., it looks at costs to the manufacturer). It is used to predict how a manufacturer would sequence the addition of technologies to meet a given standard.

Although similar, the two analyses do not apply exactly the same technologies. Both are merely technologically feasible ways of achieving the given standard, not predictions of how manufacturers will actually meet it. As discussed below, additional analysis was performed to ensure that the Unreformed CAFE standards are economically practicable for the industry.

We note that the standards adopted today are the same as those proposed in the NPRM, even though the agency performed the Stage analysis on updated product plans as provided by the manufacturers. This result is largely due to the fact that there is a limited pool of technology that can be applied to the manufacturers' fleets in the time period subject to this rulemaking.

The updated product plans reflected that some technologies previously applied by the agency in the Stage analysis were now applied by the manufacturers in their product plans, which meant that these technologies were no longer available for the Stage analysis. Because the pool of feasible technologies that can be applied in the lead time provided is limited, the agency projected fewer additional technologies for the updated product plans beyond the improvements made by the manufacturers.

As a result of having limited technologies and practical constraints on how and when those technologies can be applied, the difference between the NPRM improved fleet and the final rule improved fleet is largely a matter of the level of technology voluntarily added by manufacturers in their revised product plans submitted in response to the NPRM. Consequently, the two improved fleets provide similar fuel economies.

*F. Economic Practicability and Other Economic Issues*

As explained above, the agency has historically viewed the question of whether a CAFE standard is economically practicable in terms of whether the standard is ''within the financial capability of the industry, but not so stringent as to threaten substantial economic hardship for the industry.'' See, e.g., *Public Citizen*, 848 F.2d at 264. In the Stage analysis, technologies are applied to project fuel economy levels that would be technologically feasible for a manufacturer. When considering economic practicability, the agency assesses whether technologically-feasible levels may lead to adverse economic consequences, such as a significant loss of sales or the unreasonable elimination of consumer choice. The agency must ''weigh the benefits to the nation of a higher fuel economy standard against the difficulties of individual automobile manufacturers.'' *CAS*, 793 F.2d at 1332.

The agency has estimated not only the anticipated costs that would be borne by General Motors, Ford, DaimlerChrysler, Nissan and Toyota to comply with the standards under the Unreformed CAFE system, but also the significance of the societal benefits anticipated to be achieved through fuel savings and other economic benefits from reduced petroleum use. The baselines provided by Honda and Hyundai for MYs 2008–2010 exceeded the standards in each of those model years. In regard to economic impacts on manufacturers and societal benefits, we have relied on the Volpe model to determine a probable range of costs and benefits.

The Volpe model is used to evaluate the standards initially produced under the Stage Analysis in order to estimate their overall economic impact as measured in terms of increases in new vehicle prices on a manufacturer-wide, industry-wide, and average per-vehicle basis. Like the Stage Analysis, the Volpe model relies on the detailed product plans submitted by manufacturers, as well as available data relating to manufacturers that had not submitted detailed information. The Volpe model is used to trace the incremental steps (and their associated costs) that a manufacturer would take toward achieving the standards initially suggested by the Stage Analysis. In applying technologies, the Volpe model is programmed to be as consistent as practical with the technology application method and constraints of the Stage analysis.

Based on the Stage and Volpe analyses, we have concluded that these standards would not significantly affect employment or competition, and that—while challenging—they are achievable and that they will benefit society considerably. For this analysis, we have, where possible, translated the benefits into dollar values and compared those values to our estimated costs for this proposed rule.

In estimating the costs and benefits of this rulemaking, the agency employed a variety of cost estimates (*e.g.*, the cost of technology, lead-time) and economic assumptions (*e.g.*, price of fuel, rebound effect). As the cost estimates and economic assumptions apply, in many cases, equally to the Unreformed and Reformed CAFE system analyses, we have addressed these comments below in Section VIII. Technology issues, and Section IX. Economic assumptions. The discussion that follows provides our estimates for the costs and benefits of the Unreformed CAFE standards adopted today.

1. Costs

In terms of vehicle costs for complying with the Unreformed CAFE standards, we estimate the average incremental cost per vehicle to be $64 for MY 2008, $185 for MY 2009, and $195 for MY 2010. The total incremental costs (the cost necessary to bring the corporate average fuel economy for light

[55] In the current model year, the system begins by carrying over any technologies applied in the preceding model year, based on commonality of engines and transmissions, as well as any identified predecessor/successor relationships among vehicle models. At each subsequent step toward compliance by a given manufacturer in the current model year, the system considers all engines, transmissions, and vehicles produced by the manufacturer and all technologies that may be applied to those engines, transmissions, and vehicles, where the applicability of technologies is governed by a number of constraints related to engineering and product planning. The system selects the specific application of a technology (i.e., the application of a given technology to a given engine, transmission, vehicle model, or group of vehicle models) that yields the lowest ''effective cost'', which the system calculates by taking (1) the cost (retail price equivalent) to apply the technology times the number of affected vehicles, and subtracting (2) the reduction of civil penalties achieved by applying the technology, and subtracting (3) the estimated value to vehicle buyers of the reduction in fuel outlays achieved by applying the technology, and dividing the sum of these components by the number of affected vehicles.

trucks from 22.2 mpg (the standard for MY 2007) to the final rule levels are estimated to be $536 million for MY 2008, $1,621 million for MY 2009, and $1,752 million for MY 2010.

Our cost estimates for the Unreformed CAFE system are based on the application of technologies and the resulting costs to individual manufacturers. We assumed that manufacturers would apply technologies on a cost-effectiveness basis (as described above). More specifically, within the range of values anticipated for each technology, as estimated by the NAS study, we selected the mid-point for cost and fuel consumption impacts during the model years under consideration.

Using the estimated costs and fuel savings for the different technologies, the agency then examined the projections provided by different manufacturers for their light truck fleet fuel economy for MYs 2008–2010. Although the details of the projections by individual manufacturers are confidential, we generally observed that present fuel economy performance indicates that some manufacturers will, if their planned fleets remain unchanged, be able to meet the proposed standards without significant expenditures. In contrast, other manufacturers will need to expend significantly more effort than they were planning to meet the final Unreformed CAFE standards.

Some manufacturers might achieve more fuel savings than others using similar technologies on a vehicle-by-vehicle basis due to differences in vehicle weight and other technologies present. However, this analysis assumes an equal impact from specific technologies for all manufacturers and vehicles. The technologies were ranked based on the cost per percentage point improvement in fuel consumption and applied where available and appropriate to each manufacturer's fleet in their order of rank. The complete list of the technologies and the agency's estimates of cost and associated fuel savings can be found in Table VI–4 of the FRIA.

2. Benefits

In Chapter VIII of the FRIA, the agency analyzes the economic and environmental benefits of the Unreformed CAFE standards by estimating fuel savings over the lifetime of each model year (approximately 36 years). Benefit estimates include both the benefits to consumers in terms of reduced fuel usage and other savings, such as the reduced externalities generated by the importing, refining, and consuming of petroleum products.

The total benefits of the increases in the levels of the Unreformed CAFE standards are estimated to be $577 million for MY 2008, $1,876 million for MY 2009 and $2,109 million for MY 2010, based on fuel prices ranging from $1.96 to $2.39 in 2003 dollars per gallon and a discount rate of seven percent.

3. Comparison of Estimated Costs to Estimated Benefits

Table 3 compares the incremental costs and benefits for the Unreformed CAFE standards.

TABLE 3.—COMPARISON OF INCREMENTAL COSTS AND BENEFITS FOR THE UNREFORMED CAFE STANDARDS

[In millions]

| | MY 2008 | MY 2009 | MY 2010 |
|---|---|---|---|
| Total Incremental Costs* | $536 | $1,621 | $1,752 |
| Total Incremental Benefits* | 577 | 1,876 | 2,109 |

* Relative to the 22.2 mpg standard for MY 2007.

These estimates are provided as present values determined by applying a 7 percent discount rate to the future impacts.[56] The discount rate is intended to measure the reduction in the value to society of benefits when they are deferred until some future date rather than received immediately. The benefits are discounted to provide an appropriate comparison of costs to the value of future benefits. To the extent possible, we translated impacts other than direct fuel savings into dollar values and then factored them into our cumulative estimates. We obtained forecasts of light truck sales for future years from AEO 2005.[57] Based on these forecasts, NHTSA estimated that approximately 8.6 million light trucks affected by this final rule would be sold in MY 2008. For MYs 2009 and 2010, we estimated 8.9 million and 9.0 million light truck sales, respectively.

We calculated the reduced fuel consumption of MY 2008–2010 light trucks by comparing their consumption under the final rule for those years to either the manufacturers' plans if they were above 22.2 mpg, or the consumption they would have if the MY 2007 CAFE standard of 22.2 mpg remained in effect during those years. First, the estimated fuel consumption of MY 2008–2010 light trucks was determined by dividing the total number of miles driven during the vehicles' remaining lifetime by the fuel economy level they were projected to achieve under the 22.2 mpg standard.

Then, we assumed that if these same light trucks were produced to comply with higher CAFE standards for those years, their total fuel consumption during each future calendar year would equal the total number of miles driven (including the increased number of miles driven because of the ''rebound effect,'' the tendency of drivers to respond to increases in fuel economy in the same manner as they respond to decreases in fuel prices, *i.e.*, by driving more),[58] divided by the higher fuel economy they would achieve as a result of that standard. The fuel savings during each future year that will result from the higher CAFE standard is the difference between each model year's fuel use and the fuel use that would occur under either the manufacturer's plans or if the MY 2007 standard remained in effect. This analysis results in estimated lifetime fuel savings of 555 million, 1,813 million, and 2,023 million gallons for MYs 2008, 2009, and 2010, respectively.

A more detailed explanation of our analysis is provided in Chapter VIII of the FRIA and the final EA (see EA p. 26).

[56] In the FRIA, we also evaluated the final rule using a 3 percent discount rate for discounting benefits.

[57] The agency relied on AEO 2005 projections for the total sales figures. The manufacturers provided us with projected sales for passenger cars and light trucks. However, taken together, the sales projections provided by the individual companies to NHTSA yielded unrealistically high industry-wide sales volumes. Percentage of total sales per manufacturer was based on past sales data. A complete discussion of light truck sales projections is provided in the FRIA (FRIA p. VIII–8).

[58] As described in detail in the FRIA, we use a 20 percent rebound effect based on a thorough review of the literature (FRIA p. VIII–45). We are nonetheless aware that there is ongoing research in this area, and will continue to assess this assumption in future rulemakings in light of new evidence.

4. Uncertainty

The agency recognizes that the data and assumptions relied upon in our analysis have inherent limitations that do not permit precise estimates of benefits and costs. NHTSA performed a probabilistic uncertainty analysis to examine the degree of uncertainty in its costs and benefits estimates. Factors examined included technology costs, technology effectiveness in improving fuel economy, fuel prices, the value of oil import externalities, and the rebound effect. This analysis employed Monte Carlo simulation techniques to examine the range of possible variation in these factors. As a result of this analysis, the agency thinks it very likely that the benefits of the Unreformed CAFE standards will exceed their costs for all three model years. A detailed discussion of the uncertainty analysis is provided in Chapter X of the FRIA.

*G. Unreformed Standards for MYs 2008–2010*

We believe the standards established today are challenging enough to encourage the further development and implementation of fuel-efficient technologies and are achievable within the applicable timeframe. Accordingly, we have concluded that the standards for the Unreformed CAFE system are technologically feasible and economically practicable for those manufacturers with a substantial share of the light truck market (General Motors, Ford, and DaimlerChrysler), and are capable of being met without substantial product restrictions, and will enhance the ability of the nation to conserve fuel and reduce its dependence on foreign oil. As noted above, we have concluded that the standards set through this final rule represent the best overall balance of the statutory factors, and in addition, are consistent with the protection of motor vehicle safety and American jobs.

The Unreformed CAFE light truck standards for MYs 2008–2010 are as follows:

MY 2008: 22.5 mpg

MY 2009: 23.1 mpg

MY 2010: 23.5 mpg

## VI. The Reformed CAFE Standards for MYs 2008–2011

*A. Overview of Reformed CAFE*

The structure of Reformed CAFE for each model year, as adopted in today's final rule, has two basic elements—

(1) a function that sets the target fuel economy levels for each value of vehicle footprint; [59] and

(2) a Reformed CAFE standard based on each manufacturer's production-weighted harmonic average of the fuel economy targets for footprint value. Unlike the proposed Reformed CAFE system, which relied on a step function and associated categories, the final Reformed CAFE system relies on a continuous mathematical function relating fuel economy targets to vehicle footprint.

The required level of CAFE for a particular manufacturer for a given model year is calculated using the target-setting function for that model year in conjunction with that manufacturer's actual total production and its production at each footprint value for that model year.[60] The manufacturer's required CAFE level is calculated by dividing its total production for the model year by the sum of the values obtained by dividing the manufacturer's production of each vehicle model included in its fleet by the fuel economy target for that model.

*B. Authority for Reformed CAFE*

In the same manner as we explained the step function proposal to be consistent with EPCA,[61] the continuous function Reformed CAFE standard similarly conforms to the mandate to establish maximum feasible fuel economy standards. The continuous function standard is applicable on a fleet average basis and reflects the agency's balancing of the nation's need to conserve energy, the effect of other standards on fuel economy, technological feasibility, economic practicability and other public policy considerations. Further, like the proposed step function standard, the continuous function achieves the congressional policy objectives embedded in EPCA.

The continuous function standard retains the fleetwide compliance aspect mandated by the CAFE statute. By maintaining reliance on harmonic averaging, the continuous function standard promotes the CAFE statute's overriding goal of conserving energy in a manner that preserves manufacturer flexibility and consumer choice. (H. Rpt. 94–340, p. 87; S. Rpt. 94–179, p. 6.)

The discretion provided to the agency by Congress to determine whether to establish a single fuel economy level applicable to all manufacturers or to set a series of fuel economy levels applicable to individual manufacturers equally supports using a step function or a continuous function to establish fuel economy targets for vehicles of different sizes.[62] Under either type of function, a manufacturer's required fuel economy level is dependent on the manufacturer's fleet mix. Moreover, just as the category targets described in the NPRM are equally applicable to all manufacturers, the fuel economy targets defined by a continuous function are equally applicable to all manufacturers for a given model year.

A continuous function standard is based on similar technological and economic considerations employed in establishing the proposed step function standard, and which we believe ensure the technological feasibility and economic practicability of the proposed MY 2011 standard. Moreover, a continuous function is defined based on the modeled capabilities of the same percentage of the fleet as in the step function proposal (*i.e.*, 97 percent of the light truck fleet). Reliance on 97 percent of the fleet better reflects industry-wide considerations than the primary focus on the ''least capable manufacturer with a substantial share of the market'' in the Unreformed CAFE structure.

In the NPRM we recognized the financial challenges facing the motor vehicle industry and that a substantial number of job losses had been announced by large full-line manufacturers. Since publication of the NPRM, two manufacturers of light trucks, each with a significant share of the market, have continued to report financial difficulties. The financial risks faced by these companies, including their workers and suppliers, underscored the importance to full-line vehicle manufacturers of establishing an equitable CAFE regulatory framework. Compared to Unreformed CAFE, the Reformed CAFE will enhance overall fuel savings while providing manufacturers the flexibility they need to respond to changing market conditions. The reforms adopted today will provide a more equitable regulatory framework by creating a level playing field for manufacturers, regardless of

[59] Footprint is an aspect of vehicle size—the product of multiplying a vehicle's wheelbase by its average track width

[60] Since the calculation of a manufacturer's required level of average fuel economy for a particular model year would require knowing the final production figures for that model year, the final formal calculation of that level would not occur until after those figures are submitted by the manufacturer to EPA. That submission would not, of course, be made until after the end of that model year.

[61] See 70 FR 51415, 51445.

[63] For a discussion of the technology costs and determination of the social benefits of improved fuel economy, refer to the FRIA.

whether they are full-line or limited-line manufacturers.

*C. Legal Issues Related to Reformed CAFE*

1. Maximum feasible

EPCA requires that the light truck CAFE levels be established at the ''maximum feasible average fuel economy level'' achievable by the manufacturers in that model year (49 U.S.C. 32902(a)). When deciding on the maximum feasible level, the agency must consider technological feasibility, economic practicability, the effect of other motor vehicle standards of the Federal government on fuel economy, and the need of the nation to conserve energy (49 U.S.C. 32902(f)). The agency must balance these considerations, along with other factors such as safety, when determining the level of CAFE standards.

As indicated above, and described in greater detail below, the Reformed CAFE system uses incremental cost-benefit analysis (as implemented within the Volpe model) to establish standards. The technology cost and benefit assumptions employed by the model are based on those presented in the NAS report. However, consideration is given to manufacturers' critiques of the technology assumptions employed by NAS. The agency also relies on the product plans provided by manufacturers when projecting potential technology applications. The standard arrived at through this process is then evaluated to determine potential sales and employment impacts. As explained in the following discussion, the totality of this analysis results in a standard that is both technologically feasible and economically practicable. As discussed elsewhere in this notice, the standard reflects consideration of the impact of other Federal motor vehicle standards on fuel economy, and as evidenced by our estimates that the resulting standard for MY 2011 will save approximately 2.8 billion gallons of fuel, also addresses the nation's need to conserve energy.

Vehicle manufacturers and the Alliance expressed concern that the agency's new methodology for setting CAFE standards (*i.e.*, using cost-benefit analysis to identify the pattern and stringency of fuel economy targets) risked losing the key economic practicability check that was previously provided by assessing a proposed standard's effect on the least capable manufacturer, an approach that had proven reasonable and workable in many prior CAFE rulemakings. In general, these commenters argued that the agency must continue to consider the ''least capable manufacturer'' to ensure that standards set under the Reformed CAFE system do not result in adverse economic impacts on any individual manufacturer. General Motors and Ford argued that NHTSA's proposed methodology does not sufficiently consider the capabilities of the ''least capable manufacturer,'' and thus violates its statutory duty to set standards that are ''economically practicable.''

We noted in the NPRM that the term ''least capable'' manufacturer is something of a misnomer under the Reformed system, since each manufacturer's projected level of CAFE is determined by two factors: (1) The extent to which small or large vehicles predominate in its planned production mix, and (2) the type and amount of fuel-saving technologies the manufacturer is deemed capable of applying. Two manufacturers may apply the same type and amount of fuel-saving technologies to their fleets, yet have differing CAFE levels, if their fleet mixes are not identical. Thus, a full-line manufacturer could have a lower overall CAFE than a manufacturer concentrating its production in the smaller footprint range, even though the former manufacturer has applied as much (or more) technology to the models it produces as has the latter manufacturer. The manufacturer concentrating its production in smaller vehicles would have a higher CAFE level due to the higher fuel economies of smaller vehicles. Thus, ''large manufacturer with the lowest fuel economy average'' might better describe the former than ''least capable manufacturer.''

The Reformed CAFE system establishes standards with regard to the capabilities of a wider range of manufacturers than just the ''least capable manufacturer.'' The fuel economy capabilities of an individual manufacturer are projected based on each of the seven largest manufacturers' specific product plans. Consideration of what specific technologies each manufacturer can apply and at what rate each technology can be applied is also made at the individual manufacturer level. Further, a manufacturer's required fuel economy level reflects that manufacturer's actual fleet mix.

Instead of requiring a uniform level of CAFE—which is inherently more challenging for manufacturers whose fleets have high percentages of larger vehicles to meet than for those whose product lines emphasize smaller models—the Reformed system specifies fuel economy targets that vary according to vehicle footprint; these targets are higher for smaller light trucks and lower for large ones. It uses these targets to determine a required CAFE level for each manufacturer that reflects the size distribution and production volumes of its light truck models. By setting each manufacturer's required fleet-wide CAFE level to reflect its size mix, the Reformed system requires some effort by each manufacturer to improve the fuel efficiency of its individual models, regardless of their size distribution.

As stated above, the Volpe model applies technologies to a manufacturer's fleet until the cost of an additional technology application equals the benefits of the resulting improvement in fuel economy. Because these benefits include the value of reducing economic and environmental externalities from producing fuel, this process results in a ''socially optimal'' level of fuel economy. Before we arrive at the level of optimal economic efficiency, it is important to understand the assumptions relied on by the model when applying technology.

As with the Stage analysis, the Volpe model's assumptions about technology cost and effectiveness are based on estimates provided in the NAS report, and incorporate information provided by manufacturers. The agency continues to rely on the NAS report to determine technology costs and effectiveness because the estimates developed in the NAS study were developed by recognized experts in vehicle technology, and were widely peer reviewed. This study is the most up to date peer reviewed study available. While the agency is working to update the NAS data, in a study conducted through an interagency agreement with the Department of Energy, this update requires additional work. To that end, the agency continues to rely on the NAS report.

Because the alternative estimates submitted by vehicle manufacturers and others as part of their comments on the NPRM have not been subjected to the same review process, the agency continues to view those reported in the NAS study as the most reliable estimates available. Further, because the Volpe model applies these technologies to individual vehicle models described in the product plans provided by manufacturers, this ensures that technologies are not added to vehicles already employing them, and that the model reliably projects potential fuel economy improvements for actual vehicle models that manufacturers plan to produce during each future model year. As such, the standard is based on actual characteristics of specific vehicle

models and fleet mixes from manufacturers' product plans.

The agency has also responded to information provided by manufacturers concerning the practicability of applying various technologies. As explained in greater detail below in Section XIII. Comparison of the final and proposed standards, the revised assumptions and constraints include: extending lead times provided for implementing certain technologies, reducing annual phase-in percentages for certain technologies, and reducing instances of mid-product cycle technology applications. The model then relies on these revised assumptions in conjunction with the NAS study's original estimates of technology costs and effectiveness, to determine the ''socially optimal'' fuel economy level.

Ford stated that by focusing on ''optimal economic efficiency,'' NHTSA has adopted a surrogate measure of economic practicability that (as contrasted with its traditional assessment whose starting point is the ''least capable manufacturer'') does not consider many of the effects that the higher standards would have on individual manufacturers. DaimlerChrysler noted that Congress specifically directed NHTSA to consider industry-wide capabilities in setting CAFE standards, not just cost-effectiveness for consumers. As such, DaimlerChrysler argued that retaining a ''least capable manufacturer'' analysis would help ensure that the standard continues to be within the industry's ability to afford in terms of capital costs and annual expenditures.

In response to these comments, the agency notes that determining the socially optimal level of fuel economy targets under the assumptions inputted into the Volpe model provides a benchmark for assessing the economic practicability of the resulting standard. Because these socially optimal targets are determined by equalizing the monetized social benefits of improved fuel economy further to the costs of the technologies that would produce such benefits,[63] this process avoids the application of technologies whose benefits are insufficient to justify their costs when the agency determines a manufacturer's capability. In other words, this approach ensures that each identified private technology investment projected by the model produces marginal benefits at least equal to marginal cost.

The agency did identify and consider a variety of benefits and costs that either could not be monetized or could not be quantified. On the benefit side, for example, there is a significant reduction in carbon dioxide emissions, which can not be monetized. There is no agreement in the literature on values or range of values for monetizing such a benefit to the United States. On the cost side, for example, there is a risk of adverse safety impacts from downweighting, which cannot be quantified. This is because the agency is unable to predict to what extent manufacturers may rely on downweighting, and therefore cannot quantify the number of additional deaths and injuries that may occur as a result. Overall, the agency determined that there is no compelling evidence that these unmonetized benefits and costs would, taken together, alter its assessment of the level of the standard for MY 2011 that would maximize net benefits. Thus, the agency determined the stringency of that standard on the basis of monetized net benefits.

Standards set at a level more stringent than those set at the socially optimal level would not be economically efficient for society. Standards more stringent than those established under the Reformed CAFE system adopted in this document would require the industry to continue applying technology past the point at which doing so increases net social benefits.

Standards set at a level less stringent than those set at the socially optimal level would result in a lost opportunity for applying cost-beneficial technologies. Under less stringent standards, technologies that provide benefits at least equal to their costs would not be projected onto manufacturers' product plans. As such, the standards would not capture fuel savings that are cost-effective to achieve.

In considering manufacturers' costs for applying technology, the agency's analysis accounts for the opportunity costs associated with investing in that technology. When a manufacturer invests its capital in additional technology, those resources are unavailable for other investment opportunities, and the returns the manufacturer could have earned on alternative investments or other uses of its capital resources (such as application to safety or performance attributes of a vehicle, or retiring existing debt) represent an additional cost of improving fuel economy. To ensure that this additional cost of using capital resources is reflected in its assessment of the economic practicability of improving fuel economy, the agency discounts the future fuel savings and other benefits that result from higher fuel economy using a 7 percent discount rate.

The agency is relying on a 7 percent discount rate partly because this rate reflects the economy-wide opportunity cost of capital. The agency believes that a substantial portion of the cost of this regulation may come at the expense of other investments the auto manufacturers might otherwise make. Several large manufacturers are resource-constrained with respect to their engineering and product-development capabilities. As a result, other uses of these resources will be foregone while they are required to be applied to technologies that improve fuel economy.

If a manufacturer were able to capture all of the benefits to both vehicle buyers and society as a whole that result from improved fuel savings, it would apply technology to the level where the present value of increased future benefits when discounted at 7 percent just equaled the costs of applying additional technology.[64] Applying technology to improve fuel economy beyond this level would entail costs—including the opportunity cost of the additional capital resources devoted to improving fuel economy—that would exceed the resulting benefits. Failing to improve fuel economy to this level would leave opportunities to obtain fuel savings and related benefits that exceeded the associated costs of the technologies necessary to obtain them.

In commenting on the Reformed CAFE system, the Alliance stated that standards should not be set so high as the cost of the added technology outweighs the societal benefits of the improved fuel economy. Because the social optimal level of fuel economy ensures that the marginal benefit (either to the consumer or to society) of an increase in fuel economy is equal to cost of the technology producing the additional benefit, the social optimum level is economically practicable for society.

Ford suggested NHTSA's cost-benefit analysis has not properly considered costs to manufacturers for making

[63] For a discussion of the technology costs and determination of the social benefits of improved fuel economy, refer to the FRIA.

[64] The main benefit of improving fuel economy is the savings in fuel costs experienced by vehicle buyers, since as a light truck's fuel economy increases, the amount and cost of the fuel required to operate it decreases. At the same time, reducing the amount of fuel light trucks consume also generates benefits to society and the economy as a whole, including reduced emissions of some criteria pollutants that occur during fuel refining and reduced economic costs from importing and consuming petroleum. Because these benefits accrue to individuals and firms other than those who purchase new vehicles, they are referred to as external benefits.

necessary investments and for increasing employment levels, or competitive forces that may cause domestic manufacturers to absorb CAFE-related costs rather than passing them on to buyers. Ford argued that the potential inability of producers to recoup such costs from buyers (in the form of higher prices) must be taken into account explicitly, not solely through its effect on sales. DaimlerChrysler also argued that not all of the costs associated with improved fuel economy can be passed on to consumers in the form of higher vehicle prices.

As stated above, a cost-benefit analysis is not the sole factor in the agency's consideration of economic practicability. The agency also performs a sales impact analysis. In determining the sales impact of higher prices from improved fuel economy, the agency assumes that consumers will value improved fuel economy. However, the analysis does not rely on the value of fuel savings realized over the life of the vehicle. Our analysis considers the value of fuel savings realized in the first 4.5 years of the vehicle's life. The 4.5 year period is the average ownership period for new cars. We determined that the fuel savings during this period will be recognized and valued by light truck purchasers. Based on our analysis, which assumes that consumers value fuel savings over 4.5 years, there are net benefits for the average light truck purchasers. Thus, the average consumer will be willing to pay higher prices for improved fuel economy, and manufacturers will be able to raise prices to recoup their investments.

DaimlerChrysler further argued that the agency must explain how it will decide whether a standard set at a ''maximum net benefits'' level would exceed the level that is economically practicable if it does not take into account the capabilities of the ''least capable manufacturer'' with a substantial market share. DaimlerChrysler argued that the agency has not provided sufficient detail as to its methodology, as would permit informed public comment. This commenter stated that in certain situations, economic practicability might require the agency to set a lower standard than the maximum net benefits methodology might otherwise dictate. For example, DaimlerChrysler, along with the Alliance and Ford, stated that if gas prices were to rise high enough, every technology would theoretically be ''cost-beneficial.''

Gas prices are but one factor relied on in the agency's analysis for setting fuel economy targets. As stated, the Volpe model also takes into account other factors closely associated with economic practicability, such as lead time and phase-in rates. While higher fuel prices increase the benefits associated with improved fuel economy, the marginal cost-benefit analysis is still bounded by the technological and economic assumptions employed by the model. The agency has relied on technologies determined by the NAS report to be ''currently in the production, product planning, or continued development stage, or are planned for introduction. * * * The feasibility of production is therefore well known, as are the estimated production costs'' (NAS p. 40).[65]

Additionally, the model relies on assumptions that reflect manufacturers' comments regarding the applicability of technology. Manufacturers provided detailed critiques of the agency's application of technology in the NPRM, most of which were provided confidentially. Manufacturers provided alternative assumptions that they deemed more reasonable. Presumably, in providing comment on what were reasonable assumptions for the agency to apply, the manufacturers' recommendations inherently accounted for their capabilities, both technological and economic.

Many of these assumptions are closely tied to the economic capabilities of the manufacturers. For example, in response to commenters, the agency employed longer lead time and longer phase-ins for various technologies. These adjustments reduce the economic impact of applying technology by providing greater flexibility as to when fuel economy improvements are expected. Additionally, we limited the number of mid-product cycle applications. Mid-product cycle changes typically are more costly than changes at the beginning of a product cycle, as mid-product cycle changes may necessitate changes to an established manufacturing line. By limiting the availability of technologies using these assumptions, the cost-benefit does not assume that manufacturers will make improvements that would be unjustifiably costly.

The socially optimum level of fuel economy, as determined under the Volpe analysis, is thus indicative of the fuel economy level that is economically practical for both individual manufacturers and the light truck industry as a whole, and provides a process for careful balancing of the ''competing factors of EPCA'' (*CEI* v. *NHTSA*, 901 F.2d 107, 121 (DC Cir. 1990)). Further, the agency conducts an analysis of the estimated sales and employment impacts on individual manufacturers from a standard set at the level derived from the analysis applied through the Volpe model to ensure the economic practicability of that standard.

We recognize the financial difficulties facing several light truck manufacturers. It has been widely reported that General Motors and Ford are facing financial difficulties. In 2005, gasoline prices rapidly increased, causing a shift in consumer demand away from larger, more profitable SUVs and toward smaller, more fuel-efficient cars and light trucks, a segment of the market long dominated by Asian automobile manufacturers. Sales of sport utility vehicles have fallen slightly in each of the last few years, with the trend accelerated by a jump in gas prices late in 2005. The increase in gasoline prices particularly curbed sales of the biggest SUVs. In response, U.S. automakers increased sales during the 2005 summer with discounts that let consumers pay what was called the ''employee'' price. While this marketing led to near-record sales, sales again dropped off in October when the incentives ended. By December of 2005, General Motors and Ford sales were down 10.2 percent and 8.7 percent respectively.

Aside from the recent sales losses, General Motors and Ford have experienced erosion in their respective market shares. General Motors, and to a lesser extent Ford, have seen their market share fall drastically over the last several years in the last year, which has resulted in operating losses. General Motors' market share dropped from 28.1 percent in 2003 to 26.9 in 2004, and to 24.7 percent in 2005. This is compared to General Motors' market share of 35 percent in the early 1990's. Ford has experienced a drop from 19.3 percent in 2003 to 17.8 in 2005.[66]

These losses in market share have coupled with operating losses. General Motors had an operating loss of $11.5 billion for its North American operations in calendar year 2005, with automotive cash flows related to operations at a negative $7.9 billion.[67] During that same year, Ford Motor Company experienced an operating loss of $1.5 billion, with negative cash flows

[65] Complete documentation of the Volpe fuel economy model is available in the CAFE docket.

[66] The market share values are from wardssuto.com. The 2005 values are estimates.

[67] Source: SEC FORM 8–K submitted to the SEC on January 26, 2006, and General Motors' March 16, 2006 press release as reported by Automotive Business Review (*http://www.automotive-business-review.com/article_news.asp?guid=FE50808D–4915-4A6F-949F-7532C6F5CE75*).

from operations at $4.1 billion.[68] In November 2005, General Motors announced that it would cut 30,000 jobs and close 12 manufacturing facilities by 2008. In January 2006, Ford announced that it would cut up to 30,000 jobs by closing 14 manufacturing facilities over the next six years. The financial difficulties facing these manufacturers was given due consideration.

In their comments to the NPRM, several commenters, including General Motors and Ford, expressed concern that the marginal cost-benefit analysis would not appropriately consider the capabilities of individual manufacturers and may result in standards that impose harsh economic impacts on an individual manufacturer. Ford specifically noted that if standards increased further then the costs may be too high and unrecoverable, further compounding the current economic hardship facing the industry. According to Ford, when determining the economic practicability of its CAFE standards, the agency must determine whether technologically-feasible levels would lead to adverse economic consequences, such as a significant loss of sales or the unreasonable elimination of consumer choice, a determination that Ford claimed the agency has not made in selecting its proposed Reformed CAFE targets.

The agency recognizes that we must consider the potential economic and financial impacts of the CAFE standards on individual manufacturers. Aside from incorporating manufacturers' comments regarding the feasibility of technology applications, the agency has also performed a sales and employment impact analysis. The sales analysis looks at a purchasing decision from the eyes of a knowledgeable and rational consumer, comparing the estimated cost increases versus the payback in fuel savings over 4.5 years (the average new vehicle loan) for each manufacturer. This relationship depends on the cost effectiveness of technologies available to each manufacturer. Some manufacturers are estimated to increase sales and others to lose sales. Overall, based on a 7 percent discount rate for future fuel savings, the maximum sales loss is less than 11,000 vehicles per year for the industry. We believe this will have a minor impact on employment.

Further, we note that the regulatory philosophy set forth in Executive Order 12866, ''Regulatory Planning and Review,'' is that a rulemaking agency should set its regulatory requirements at the level that maximizes net benefits unless its statute prohibits doing so. EPCA neither requires nor prohibits the consideration of the fuel economy level at which net benefits are maximized. Additionally, EPCA does not require the agency to rely on the ''least capable manufacturer'' analysis as we have traditionally used. Reliance on the ''least capable'' manufacturer analysis was in response to the direction in the conference report on the CAFE statute language to consider industry-wide considerations, but not necessarily base the standards on the manufacturer with the greatest compliance difficulties.

Moreover, the very structure of Reformed CAFE standards makes it unnecessary to continue to use the ''least capable manufacturer'' approach in order to be responsive to guidance contained in the EPCA conference report. Instead of specifying a common level of CAFE, a Reformed CAFE standard specifies a variable level of CAFE that varies based on the production mix of each manufacturer. By basing the level required for an individual manufacturer on that manufacturer's own mix, a Reformed CAFE standard in effect recognizes and accommodates differences in production mix between full- and part-line manufacturers, and between manufacturers that concentrate on small vehicles and those that concentrate on large ones. A Reformed standard is also responsive to changes in fleet-mix that result from changes in the market.

In contrast to comments from the manufacturers, environmental commenters argued that the marginal cost-benefit analysis is contrary to EPCA because it results in a standard that is lower than what they deemed to be ''maximum feasible.'' The Union of Concerned Scientists stated that the social optimum level is below ''maximum feasible'' because of the uncertainty surrounding many of the assumptions relied on in the model. The Union of Concerned Scientists stated that the model undervalues the benefits because not all externalities are monetized (*e.g.*, reduction in $CO_2$ emissions). The Union of Concerned Scientists recommends the agency rely on a break-even approach, *i.e.*, set fuel economy levels at the point at which total costs equal total benefits. This commenter stated that the break-even approach would result in targets an average of 6 mpg higher than those in the proposed rule.

The agency considered an approach under which technology was applied to the point of total cost equaling total benefit, but determined that such a standard would violate the maximum feasible requirement. The Volpe model was unable to achieve a level of total cost equaling total benefit before running out of technologies to apply. While the Union of Concerned Scientists stated that it performed a ''break-even'' analysis, it did not explain the technologies it relied upon in its analysis. In any event, the ''break even'' approach necessitates adding technologies that cost more than the benefit they provide.

ACEEE commented that NHTSA's approach of setting CAFE standards that maximize net benefits is flawed because it is inconsistent with the requirements of EPCA. ACEEE stated that under the statute, NHTSA must set ''maximum feasible'' fuel economy standards after considering the ''technological feasibility, economic practicability, the effect of other motor vehicle standards of the Government on fuel economy, and the need of the United States to conserve energy.'' [69] According to ACEEE, there is a range of fuel economy values that are technologically feasible and another range of values that are economically practicable, and the statute requires NHTSA to set the CAFE standard at the highest value within the intersection of those ranges. ACEEE stated that NHTSA's proposed maximum benefits approach would not yield the same level of fuel economy, so the agency's current methodology is therefore impermissible. Accordingly, ACEEE urged NHTSA to adopt an approach whereby CAFE standards would be set at the maximum technically-feasible level that has positive net total economic benefits, rather than a level at which the added benefits from improving fuel economy further are offset by the costs for doing so.

NRDC similarly stated that the agency's methodology ''falls short of statutory compliance'' and argued that a cost-benefit analysis is inappropriate because key benefits of the fuel economy standards are ''impossible to reduce to monetized quantities,'' such as ''the national security benefits of reduced oil dependence and environmental and societal benefits of reducing the severity of global warming.'' NRDC stated that the agency's rationale for relying on a cost-benefit methodology was ''arbitrary and insupportable,'' in part because EPCA provides for NHTSA to engage in ''technology-forcing.'' The Union of Concerned Scientists argued that to account for undervaluing of societal benefits, fuel economy targets should be established at the level where total benefits exceed total costs.

[68] Source: Ford's SEC Form 8–K submitted to the SEC January 23, 2006.

[69] 49 U.S.C. 32902.

As suggested by ACEEE, the agency establishes the standard at the maximum feasible fuel economy level that is economically practicable. The agency is not permitted to establish higher standards simply because they might be technologically feasible. When such standards would impose cost burdens on certain manufacturers that are not economically practicable, such standards would violate EPCA. Conversely, our statutory responsibility does not allow us to set lower standards than those it has established using this process, because the standards adopted today are demonstrably technologically feasible, and more lenient standards would not represent the maximum feasible levels that could be attained while remaining economically practicable.

NRDC commented that the marginal cost-benefit analysis is inconsistent with a ''technology forcing standard'' [70] and, further that it is inappropriate for the purposes of CAFE because the benefits are ''impossible to reduce to monetized quantities.'' NRDC stated that the enhancement of national security and the reduction of potential effects from reduced $CO_2$ emissions may not fully be quantifiable and monetizable.

We disagree with NRDC with regard to the degree of technology forcing permitted under EPCA. The statute permits the imposition of reasonable, ''technology forcing'' challenges on any individual manufacturer, but does not contemplate standards that will result in severe economic hardship by forcing reductions in employment affecting the overall motor vehicle industry.[71] A fuel economy standard ''with harsh economic consequences for the auto industry * * * would represent an unreasonable balancing of EPCA's policies'' (CAS, 793 F.2d at 1340).

In response to arguments by the Union of Concerned Scientists and ACEEE, NHTSA does not agree that the EPCA requires it to set CAFE standards at the highest technically feasible level that would result in positive net economic benefits. Although EPCA does not specify a method for identifying standards that are economically practicable, Executive Order No. 12866 establishes an overall goal of achieving the highest net benefits, which occurs at the point where the additional benefits from further increasing the standards (marginal benefits) just equal the increase in costs for complying with a stricter standard (marginal costs).[72]

NRDC also stated that the agency should use its authority to set standards to be ''technology forcing.'' While NRDC did not define ''technology forcing'' we took their comment to mean that the agency should establish standards that require investment in developing new technologies. However, the agency would not be able to ensure that standards set at such a level would be technologically feasible, as these levels would require the use of technologies not yet proven.

The standards that result from the continuous function CAFE system are technology-forcing in that the standards require manufacturers to employ technologies beyond those in their product plans, to the extent practicable within the lead time available. This is evidenced by the fact that both the Stage and benefit-cost analyses for determining the level of standards envision extensive application of fuel economy technologies that are currently in their early stages of deployment, but are not already included in manufacturers' product plans for the model years to which the adopted standards apply.

Moreover, our cost-benefit analysis carefully considers and weighs all of the benefits of improved fuel savings. The main source of benefits from the standards is the fuel savings experienced by consumers. With regard to the value of increased energy security, the agency has estimated a monetized value of this security associated with improved fuel savings. We have also determined that there is no compelling evidence that the unmonetized benefits would alter our assessment of the level of the standard for MY 2011. A discussion of the benefit assumptions is provided in Chapter VIII of the FRIA. Further, the marginal cost-benefit analysis ensures that we do not set standards beyond what is economically optimal for society.

2. Backstop

Consistent with our proposal, the Reformed CAFE system adopted today does not include a backstop or similar such mechanism. Several commenters, ACEE, NRDC, the Union of Concerned Scientists, and Environmental Defense, argued that EPCA requires the agency to incorporate such measures under the Reformed CAFE system. However, a backstop or similar mechanism as recommended by commenters would not be consistent with the objectives of EPCA, and in some instances could violate the statute.

''Backstop'' refers to a required fuel economy level that would be applicable to an individual manufacturer (or to the industry) if the required fuel economy level calculated under the Reformed CAFE system for a manufacturer (or industry) was below a predetermined minimum. The concept of a backstop is to prevent or minimize the loss of fuel savings from one model year to the next. Such a requirement would essentially be the same as an Unreformed CAFE standard. Stated another way, the Reformed CAFE standard with a backstop would require compliance with the greater of the following fleet-wide requirements: (1) An average fuel economy level calculated under the Reformed CAFE standard, or (2) an equal-cost fuel economy level calculated under the Unreformed CAFE standard.

Under the Reformed CAFE system a manufacturer's required fuel economy is reflective of that manufacturer's product mix. Fuel economy targets are based on vehicle footprint; vehicles with a larger footprint are compared to less stringent targets than vehicles with a smaller footprint. As such, commenters stated that upsizing [73] of manufacturers' fleets through increased sales of larger vehicles would reduce required fuel levels and fuel savings would decrease. It is this potential for reduced fuel savings that these commenters assert necessitates a backstop or fuel economy ratcheting mechanism.[74]

As previously explained, EPCA requires the agency to establish fuel economy standards with consideration given to four statutory criteria, one of which is the Nation's need to conserve

[70] We assume NRDC is using the phrase ''technology forcing'' to indicate a level of a standard that would require manufacturers to apply technologies beyond that assumed technologically feasible under the Volpe model.

[71] In the past, the agency has set CAFE standards above its estimate of the capabilities of a manufacturer with less than a substantial, but more than a de minimus, share of the market. See, e.g., *CAS*, 793 F.2d at 1326 (noting that the agency set the MY 1982 light truck standard at a level that might be above the capabilities of Chrysler, based on the conclusion that the energy benefits associated with the higher standard would outweigh the harm to Chrysler, and further noting that Chrysler had 10–15 percent market share while Ford had 35 percent market share). On other occasions, the agency reduced an established CAFE standard to address unanticipated market conditions that rendered the standard unreasonable and likely to lead to severe economic consequences. 49 FR 41250, 50 FR 40528, 53 FR 39275; see *Public Citizen*, 848 F.2d at 264.

[72] White House Office of Management and Budget, Circular A–4, September 17, 2003, p. 10.

[73] ''Upsizing'' of a fleet refers to the increase in average footprint that occurs through either an increase to the footprint value of individual vehicles, an increase in the production of vehicles with larger footprint values, or a combination of both.

[74] As described by commenters, a ''ratcheting mechanism'' is a regulatory mechanism that would automatically increase the stringency of the required fuel economy level for a manufacturer or the industry if fuel savings dropped below a predetermined level.

energy. However, the agency has in the past reduced established fuel economy standards because the previous balance of the four criteria no longer gave sufficient consideration to the criteria of economic practicability. This course of action was upheld by the U.S. Circuit Court of Appeals for the District of Columbia, once with respect to light trucks, and the other time with respect to passenger cars. See, *CAS*, 793 F.2d 1322; *Public Citizen*, 848 F.2d 256. With regard to the reduction of the light truck standard, the agency determined that manufacturers had made reasonable efforts to comply with the standard, but it was a shift in market demand that was hindering compliance. Consumers were demanding larger vehicles with lower fuel economy performance than manufacturers or the agency had projected. The Court in *CAS* specifically held that EPCA permits the agency to consider consumer demand and the resulting market shifts in setting fuel economy standards. See, CAS at 1323. This precedent is contrary to the commenters' assertion that a backstop or ratcheting mechanism is statutorily required. The Courts have said that none of the four criteria are preeminent. Instead the agency must balance the four criteria in establishing fuel economy standards.

NRDC and the Union of Concerned Scientists stated that historic rates of vehicle upsizing and the potential for fleet upsizing through shifts in production towards vehicles with larger footprints necessitate a backstop or ratcheting mechanism. These commenters stated that historic increases in light truck foot print and a shift in production of nameplates offered with longer wheelbases could result in a 30 percent and one percent reduction in the projected fuel savings, respectively. As such, commenters suggested that the agency adopt a backstop or ratcheting mechanism that would apply if the light truck fleet increased in size beyond some threshold, but did not identify what such a threshold should be.

The regulatory mechanisms suggested by commenters would essentially limit the ability of manufacturers to respond to market shifts arising from changes in consumer demand. If consumer demand shifted towards larger vehicles, a manufacturer potentially could be faced with a situation in which it must choose between limiting its production of the demanded vehicles, and failing to comply with the CAFE light truck standard. Forcing such a choice would be contrary to the congressional intent for establishing EPCA.

Congress directed that:

> [A]ny regulatory program must be carefully drafted so as to require of the industry what is attainable without either imposing impossible burdens on it or unduly limiting consumer choice as to the capacity and performance of motor vehicles.

H. Rep. 94–340 (p. 87). The Court's determination in *CAS* reflects this congressional directive. These comments, on the other hand, seem unaware of it. Consideration of consumer demand is a permissible one under EPCA.

A backstop could also have the unintended consequence of resulting in downsizing by manufacturers, which could have negative safety implications. A manufacturer facing the potential of failing to comply with a backstop might shift its production to smaller, lighter vehicles.

Furthermore, a ratcheting mechanism could result in a manufacturer required to comply with a fuel economy level that violates EPCA. Under the Reformed CAFE system, a manufacturer's required fuel economy level is based on targets that represent the fuel savings capabilities of vehicles with a given footprint value. Targets are set with consideration of the technological feasibility of improving the fuel economy of vehicles given their footprint. As such, the Reformed CAFE system encourages manufacturers to undertake reasonable efforts to improve the fuel economy of all its light trucks. If the stringency of targets were automatically increased due to a predetermined trigger, the resulting changes to required fuel economy levels would be beyond what was established after careful consideration of the statutory criteria, including the technological and economic capabilities of the industry. This result would violate EPCA.

Commenters also presented additional scenarios (i.e., upsizing at category boundaries and upweighting to remove vehicles from the light truck CAFE program) that they argued would likely result in some loss of fuel savings. These additional scenarios are addressed below. As discussed further below, concerns raised by these additional scenarios are addressed through the Reformed CAFE system adopted today.

3. Transition Period

The agency is providing a transition period during MYs 2008–2010, during which manufacturers may choose to comply with the Unreformed CAFE standard or the Reformed CAFE standard. This transition period will minimize the potential for unintended compliance burdens that may be experienced by a manufacturer as the result of shifting to a new regulatory structure. The transition period is critical given that this is the first comprehensive reform of the light truck CAFE program since its inception.

The transition period is consistent with the recommendation of the NAS report. The NAS report stated that a restructuring of the CAFE system should include a phase-in period in order to provide manufacturers an opportunity to analyze the implications of the new standards and to redo their product plans (see NAS Report at 108). The Reformed CAFE standard will require certain manufacturers to improve their fleets, when in the past these manufacturers did not need to be concerned with the light truck CAFE program. These manufacturers are those that produce fleets predominately comprised of small light trucks, which by virtue of their small size have high fuel economies. These manufacturers traditionally had high fleet wide fuel economies that were above the standard. However, the Reformed CAFE system, by comparing vehicles to footprint specific targets will require more manufacturers to improve their fleets' fuel economy performance beyond the baseline of the manufacturers' product plans.

Furthermore, the structure of the Reformed CAFE might require some manufacturers to revise their compliance strategies. For example and as explained below, the Reformed CAFE system minimizes the ability of manufacturers to offset the low fuel economy performance of larger vehicles by increasing the production of smaller vehicles with higher fuel economies. Manufacturers that relied on such a compliance strategy in the past might need to revise their product plans in order to comply with the Reformed CAFE standard. The transition period is an opportunity for manufacturers to gain experience with how the Reformed CAFE system impact their fleets and compliance strategies, while still providing manufacturers the option to comply under the more familiar Unreformed CAFE system.

Several commenters questioned whether the agency had authority to establish a transition period during which manufacturers could choose to comply with one of two standards. The Union of Concerned Scientists stated that the transition period would lead to a ''worst of both worlds'' scenario; each manufacturer would comply with the CAFE system that provided the lower of the two required fuel economy levels. The Union of Concerned Scientists estimated that under this scenario, the

actual light truck fuel economy in the transition years would be as much as 0.4 mpg lower than it would be under either the Reformed CAFE system or the Unreformed CAFE system.

First, we are unable to predict how manufacturers will choose to comply during the transition period. Some manufacturers might choose to continue to comply under the Unreformed CAFE system, given that it is a regulatory structure with which they are familiar. Some manufacturers might plan to comply with the Unreformed CAFE program, but determine that they comply with the Reformed CAFE, and therefore to gain experience with the new system switch to the Reformed system. Other manufacturers may choose to gain early experience with the Reformed CAFE system and choose to comply with the Reformed CAFE system for all 3 years of the transition. We have concluded that it is prudent to provide manufacturers this flexibility in order to provide for a more orderly transition to Reformed CAFE.

Second, this is not the first time that the CAFE program provided manufacturers a choice of standards under which to comply. In 1979, manufacturers were given the option of complying with the 4x4 and 4x2 standards separately or combining all their trucks into one fleet and complying with the 4x2 numerical level. In 1983–1991, manufacturers were provided the option of complying with standards applicable to their 4x4 light truck fleet and 4x2 light truck fleet separately, or complying with a single combined standard applicable to their entire fleet. In establishing the later option, we stated that it provides manufacturers additional flexibility in complying (45 FR 81593, 81594 (December 11, 1980)). We also noted that such a compliance mechanism provides a degree of stability in the standard setting structure of CAFE (*see,* id.). Although the substance of the compliance options adopted in this document differs from those that gave rise to compliance options in previous model years, the rationale is the same.

Manufacturers commented that the flexibility of a transition period is necessary for manufacturers to understand the new system and avoid unintended consequences when revising compliance strategies and product plans. Toyota noted that the current system has been in place for over 25 years, and therefore, a 3-year transition is appropriate for manufacturers to better understand how to plan for and implement the Reformed CAFE system. The Alliance, General Motors, and Mitsubishi stated that 3 years of lead-time is the minimum necessary to comply with the required fuel economy levels under the Reformed CAFE structure. Nissan stated that the stringency of the required fuel economy levels that results from the Reformed CAFE system will be extremely challenging, given the significant changes to the CAFE system that must be incorporated into a manufacturer's product planning process. Nissan suggested that because the proposed regulatory changes are so much more extensive than merely setting new CAFE levels, which Nissan claims the agency has stated requires at least 30–36 months lead time, an even longer phase-in may be appropriate.

General Motors stated that the availability of the traditional standards during MY 2008–2010 would provide a safety net against unintended consequences from the reform process. However, General Motors stated that the agency need not establish the MY 2011 Reformed CAFE standards in the current rulemaking. Instead, General Motors urged, NHTSA should await the experience and data that the transition period will produce. General Motors expressed concern that if the Reformed CAFE targets begin to increase significantly because of new analytical methodologies, time to fully address all of the relevant issues may not be available due to statutory deadlines. In such an instance, General Motors commented that a standard grounded in the ''least capable manufacturer'' might be preferable.

Manufacturers develop product plans for their fleets at least 5 years in advance, plans which incorporate consideration of CAFE compliance. As such, manufacturers have already begun investing in their fleets for some of the model years that are subject to today's final rule. Some manufacturers may determine that it will be necessary to adjust their product plans based on the new CAFE structure. Given the uncertainty associated with how a manufacturer will perform under Reformed CAFE, we are providing a transition period.

In addition to providing manufacturers the option of complying under either CAFE system during the transition period, we adjusted the Reformed CAFE standard such that the industry wide compliance costs are approximately equal between the two systems. Cost equalization has an important advantage. Since the Unreformed CAFE standards were judged to be economically practicable and since the Reformed CAFE standards spread the cost burden across the industry to a greater extent, equalizing the costs between the two systems provides the agency with confidence that the Reformed CAFE standards are also economically practicable.[75] Further, this approach promotes an orderly and effective transition to the Reformed CAFE system since experience with the new system will be gained prior to full implementation in MY 2011.

Several commenters questioned whether the agency had the authority to equalize compliance costs during the transition period. The Union of Concerned Scientists and ACEEE stated that equalizing costs during the transition years and not setting them at a level at which marginal costs equaled marginal benefits, resulted in Reformed CAFE standards are not set at the ''maximum feasible'' level. Therefore, these commenters concluded that the Reformed CAFE standards during the transition period would not comply with EPCA.[76]

With regard to the agency's authority for establishing standards under EPCA, the agency is not limited to the considerations provided for in the statute when determining what fuel economy levels will be maximum feasible. For example, the agency also considers the effect that the CAFE standards will have on safety.[77] Just as safety is an appropriate consideration in determining maximum feasible fuel economy levels, so is the need for an orderly transition to a CAFE system that provides greater fuel savings than the current system.

Because we equalized aggregate industry costs between Reformed and Unreformed CAFE, the costs are not borne by manufacturers in the same way and costs for individual manufacturers may differ between the two systems. Therefore, some manufacturers may have a cost incentive to comply under the Reformed CAFE system beginning in MY 2008. This will provide both the industry and the agency with

[75] We equalized aggregate industry costs between Reformed and Unreformed CAFE. The costs are not borne by manufacturers in the same way and costs for individual manufacturers may differ between the two systems.

[76] Additionally, the ACEEE recommended that the transition period be structured so that all manufacturers pay compliance costs equal to the least capable manufacturer, but did not provide details as to how the standards would be set, or whether such standards would be technologically feasible.

[77] The United States Court of Appeals pointed out in upholding NHTSA's exercise of judgment in setting the 1987–1989 passenger car standards, ''NHTSA has always examined the safety consequences of the CAFE standards in its overall consideration of relevant factors since its earliest rulemaking under the CAFE program.'' *Competitive Enterprise Institute* v. *NHTSA (CEI I)*, 901 F.2d 107, 120 at n.11 (D.C. Cir. 1990).

experience in compliance with and the administration of the new system. Further, some manufacturers may chose to comply under the Reformed CAFE in order to gain a familiarity with the new system. As such, the cost equalization will promote an orderly and effective transition to the Reformed system.

The equalization of costs provides the industry greater flexibility in adjusting to the Reformed CAFE system. The three-year transition period as adopted encourages experimentation by manufacturers, which we conclude will effect a quicker transition than would result by either implementing an abrupt change after providing appropriate lead time or maintaining the status quo. The Reformed CAFE program provides for greater fuel savings. By effecting a quicker transition period, greater fuel savings will be realized over time, thereby furthering EPCA's goal of improving fuel savings.

*D. Structure of Reformed CAFE*

1. Footprint Based Function

The proposed Reformed CAFE system was premised on using vehicle footprint to establish fuel economy targets for light trucks of different sizes. We noted that vehicle weight and shadow [78] were discussed in the ANPRM, but along with commenters to the ANPRM, we had concerns that weight and shadow could more easily be tailored for the sole purpose of subjecting a vehicle to a less stringent target (70 FR 51440). As a result, both of those attributes, if used as the foundation of our program, could fail to achieve our goal of enhancing fuel economy with a Reformed CAFE program, and use of weight could fail to achieve our goal of improving the safety of the program.

Vehicle footprint is more integral to a vehicle's design than either vehicle weight or shadow and cannot easily be altered between model years in order to move a vehicle into a different category with a lower fuel economy target. Footprint is dictated by the vehicle platform, which is typically used for a multi-year model lifecycle. Short-term changes to a vehicle's platform would be expensive and difficult to accomplish without disrupting multi-year product planning. In some cases, several models share a common platform, thus adding to the cost, difficulty, and, therefore, unlikelihood of short-term changes.

Vehicle footprint is the area defined by vehicle wheelbase multiplied by vehicle track width. The proposal defined wheelbase as the longitudinal distance between front- and rear-wheel centerlines. The proposed track width definition was based on the Society of Automotive Engineers (SAE) definition in W101 of SAE J1100, Surface Vehicle Recommended Practice, revised July 2002, which reads as follows:

The lateral distance between the centerlines of the base tires at ground, including the camber angle.[79] However, the agency was concerned that a vehicle's track width could be increased by off-setting its wheels,[80] at minimal expense, and thus subjecting the vehicle to a less stringent target. Therefore, the agency modified the W101 definition for the proposal to read as follows:

> [T]rack width is the lateral distance between the centerlines of the tires at ground when the tires are mounted on rims with zero offset.

Commenters generally supported the use of footprint as a metric to categorize light trucks. However, manufacturers raised a variety of concerns with the proposed definition of track width. The Alliance disagreed with the agency's concern regarding the potential for changes made to wheel offset. The Alliance stated that manufacturers determine wheel offsets based on suspension geometry, ride, and handling characteristics, weight and vehicle drivability. As such, the Alliance asserted that it would be unlikely for a manufacturer would alter a vehicle's wheel offset in response to the light truck CAFE program.

The Alliance, Ford, General Motors, and BMW suggested that the agency should define track width in accordance with W113 in SAE J1100, which defines track width as:

> [T]he lateral distance between the wheel mounting faces,[81] measured along the spindle axis.[82]

Conversely, Honda opposed use of W113, stating that W113 and wheel offset are related to packaging issues inside the wheel area, but not relevant to issues such as wear and dynamic performance. Honda stated that the W113 measurement could be increased without any change to vehicle size or dynamic performance by using wheels with a larger positive offset.

Nissan recommended using SAE J1100 W101, which is based on the centerline of a vehicle's tires at the ground. Nissan stated that it relies on the W101 measurement for handling performance design considerations as well as safety performance design. Nissan stated that there is little incentive to manipulate the W101 measurement because even minor adjustments affect handling. Honda added that use of the tire centerline has more relevance to rollover risk.

The definition of footprint adopted in today's final rule incorporates the definition of track width as defined in W101. The agency has reviewed the three different definitions of track width and has determined that there is the potential to affect the measurements under each definition. The definition proposed by the agency can be affected through changes to a wheel's camber angle and the thickness of the wheel mounting face (*e.g.*, through the addition of washers). The measurement under W113 could be affected by the thickness of the wheel mounting face. The measurement under W101 can be affected by changes to wheel offset (positive or negative offset), camber angle, and the thickness of the wheel mounting face.

However, W101 is most directly linked to safety in terms of rollover risk, as stated by Honda. The W101 measurement is taken where a vehicle's tires touch the ground and is used by NHTSA in calculating a vehicle's Static Stability Factor. If a manufacturer were to increase a vehicle's footprint through increasing its track width, there likely would be a positive safety effect.

We also believe that use of the vehicle footprint attribute helps us achieve greater fuel economy without having a potential negative impact on safety. While past analytic work [83] focused on the relationship between vehicle weight and safety, weight was understood to encompass a constellation of size-related factors, not just weight. More recent studies [84] have begun to consider

[78] "Shadow" is the area defined as the vehicle's length multiplied by the vehicle's width.

[79] Camber angle is the angle between the vertical axis of the wheel of an automobile and the vertical axis of the vehicle when viewed from the front or rear. It is used in the design of steering and suspension.

[80] Wheel offset is the distance from where a wheel is mounted to an axis to the centerline of the wheel. The offset can be one of three types.

*Zero Offset*—The hub mounting surface is even with the centerline of the wheel.

*Positive*—The hub mounting surface is toward the front or wheel side of the wheel. Positive offset wheels are generally found on front wheel drive cars and newer rear drive cars.

*Negative*—The hub mounting surface is toward the back or brake side of the wheels centerline. "Deep dish" wheels are typically a negative offset.

[81] A spindle axis is the rotating arm, or axis, unto which the wheels are attached.

[82] W113 was added to SAE J1100 in September of 2005, after the agency published the NPRM. (A spindle axis is the rotating arm, or axis, unto which the wheels are attached.)

[83] See, Kahane (2003) and Van Auken, R.M. and J.W. Zellner, An Assessment of the Effects of Vehicle Weight on Fatality Risk in Model Year 1985–98 Passenger Cars and 1985–97 Light Trucks, Dynamic Research, Inc. February 2002. Docket No. NHTSA 2003–16318–2.

[84] See, Van Auken, R.M. and J.W. Zellner, *Supplemental Results on the Independent Effects of*

Continued

whether the relationship between vehicle size and safety differs. To the extent that mass reduction has historically been associated with reductions in many other size attributes and given the construct of the current fleet, we believe that the relationship between size or weight (on the one hand) and safety (on the other) has been similar, except for rollover risks.

Developing CAFE standards based on vehicle footprint encourages compliance strategies that decrease rollover risk. Manufacturers are encouraged to maintain track width because reducing it would subject the vehicle to a more stringent fuel economy target. Maintaining track width potentially would allow some degree of weight reduction without a decrease in overall safety. Moreover, by setting fuel economy targets for light trucks with the smallest footprints that approach (or exceed) 27.5 mpg, the agency is providing little incentive, or even a disincentive, to design vehicles to be classified as light trucks in order to comply or offset the fuel economy of larger light trucks.

The influence of Reformed CAFE on track width is reinforced by our New Car Assessment Program (NCAP) rollover ratings. As stated above, track width as defined by SAE J100 W101 is one of the elements of our Static Stability Factor, which constitutes a significant part of our NCAP rollover ratings and which correlates closely with real world rollover risk. The rollover NCAP program (as well as real world rollover risk) reinforces Reformed CAFE by a separate disincentive to decrease track width.

Overall, use of vehicle footprint is ''weight-neutral'' and thus does not exacerbate the vehicle compatibility problem. A footprint-based system does not encourage manufacturers to add weight to move vehicles to a higher footprint category. Nor would the system penalize manufacturers for making limited weight reductions. By using vehicle footprint in lieu of a weight-based metric, we are facilitating the use of promising lightweight materials that, although perhaps not cost-effective in mass production today, may ultimately achieve wider use in the fleet, become less expensive, and enhance both vehicle safety and fuel economy.[85] In Reformed CAFE, lightweight materials can be incorporated into vehicle design without moving a vehicle into a footprint category with a more stringent average fuel economy target.

2. Continuous Function

In the NPRM, we proposed a Reformed CAFE structure utilizing a step function that established fuel economy targets for vehicles within specified ranges of footprint values. We also discussed and sought comments on an alternative structure that would use a continuous function to establish a different fuel economy target for each discrete footprint value. In today's final rule, we are adopting a Reformed CAFE structure that employs such a continuous function.

The process for establishing a continuous function is similar to that for establishing a step function, which was described in detail in the NPRM. Moreover, a CAFE system based on a continuous function will provide fuel-saving benefits equivalent to those of the proposed step function. By varying a vehicle's fuel economy target continuously but gradually as its footprint changes, a continuous function will reduce the incentive created by a step function to upsize a vehicle whose footprint is near a category boundary. By comparison, the proposed step function would have relaxed fuel economy targets significantly for any vehicle that could be upsized so that it moves from one category up to the next. At the same time, the continuous function will also minimize the incentive to downsize a vehicle to improve its fuel economy since, unlike under the proposed category system, any reduction of footprint will raise a vehicle's fuel economy target. A continuous function also provides manufacturers with greater regulatory certainty because there are no category boundaries that could be redefined in future rulemaking. These points are discussed in greater detail below.

a. Overview of Establishing the Continuous Function Standard

The continuous function standard is developed using a three-phrase process substantially similar to that used to develop the step function standard described in the NPRM. In ''phase one,'' the agency adds fuel saving technologies to each manufacturer's fleet until the incremental cost of improving its fuel economy further just equals the incremental value of fuel savings and other benefits from doing so. This is done for each of the seven largest manufacturers. Data points representing each vehicle's size and ''optimized'' fuel economy from the light truck fleets of those manufacturers are then plotted on a graph.

In ''phase two,'' a preliminary continuous function is statistically fitted through these data points, subject to constraints at the upper and lower ends of the footprint range. This contrasts with the proposed step function standard, in which the vehicle models of the improved fleets were placed in the pre-defined footprint categories and the harmonic average fuel economy of the models assigned to each category was used to determine the preliminary target for that category. With a continuous function, the agency sets different fuel economy targets for each increment or value of vehicle footprint, rather than setting targets, that would each apply to a range of footprint values.

However, establishing fuel economy targets that vary gradually by vehicle footprint does not differ fundamentally from the proposal to set different targets for specific footprint ranges. If the number of footprint categories in a step function were steadily increased, the relationship of fuel economy targets to vehicle footprint would increasingly resemble that under a continuous function. In fact, as the number of footprint categories in a step function increased, the fuel economy targets it established would apply to progressively smaller footprint ranges, until each category consisted of a single value of footprint just as under the continuous function.

Once a preliminary continuous function has been statistically fitted to the data for a model year, the level of the function is then adjusted just as the step function is adjusted in ''phase three'' of the proposed rule. That is, the preliminary continuous function is then raised or lowered until industry-wide net benefits are maximized. Maximization occurs when the incremental change in industry-wide compliance costs from adjusting it further would be exactly offset by the resulting incremental change in benefits.

Under a continuous function, the level of CAFE required for each manufacturer (and its compliance with that level) is determined in exactly the same fashion as under the proposed step function. Each manufacturer's required CAFE level is the sales-weighted harmonic average of the fuel economy

*Curb Weight, Wheelbase, and Track on Fatality Risk in 1985–1997 Model Year LTVs,* Dynamic Research, Inc. May 2005. Docket No. NHTSA 2003–16318–17.

[85] The Aluminum Association commented that using aluminum to decrease a vehicle's weight by 10 percent could improve its fuel economy by 5–8 percent. The commenter noted that the Honda Insight, an all aluminum vehicle, is 40 percent lighter than a comparable steel vehicle. It also provided data to demonstrate that all aluminum vehicles have comparable performance in frontal barrier crash tests as comparable steel vehicles. See comments provided by the Aluminum Association, Inc. (Docket No. 2003–16128–1120, pp. 5 and 12).

targets corresponding to the footprint of each of its light truck models. Its compliance with that CAFE level is assessed by comparing the sales-weighted harmonic average of each of its model's actual fuel economy to this required level. The key difference is that under the continuous function, any change in a vehicle's footprint subjects it to a slightly different fuel economy target, thus changing a manufacturer's required CAFE level slightly. Conversely, under the step function, changing a vehicle's footprint would subject it to a new target—and thus change a manufacturer's required CAFE level—only if that change moved it to a smaller or larger footprint category.

B. Industry-Wide Considerations in Defining the Stringency of the Standard

In setting standards under the proposed Reformed CAFE system, we focused on the seven largest manufacturers of light trucks in selecting the targets. This differs from the traditional focus on the manufacturer with the lowest projected level of CAFE that also has a significant share of the market (*i.e.*, the ''least capable'' manufacturer). We have traditionally set the Unreformed CAFE standards with particular regard to the ''least capable'' manufacturer with a significant market share in response to language in the conference report on the CAFE statute directing the agency to consider industry-wide factors, but not necessarily to base the standards on the manufacturer with the greatest compliance difficulties. As the NPRM indicated, this ''least capable'' manufacturer approach was simply a way of implementing the guidance in the conference report in the specific context of Unreformed CAFE. While this approach has ensured that the standards are technologically feasible and economically practicable for all manufacturers with significant market shares, it limits the amount of fuel saving possible under Unreformed CAFE.

As previously explained, by basing a manufacturer's required fuel economy level on that manufacturer's individual product mix, the Reformed CAFE system provides for a more individualized assessment of the capabilities of each of the manufacturers. Thus, Reformed CAFE permits the agency to carefully assess the capabilities of the ''least capable manufacturer,'' as well as the capabilities of the other manufacturers that comprise nearly all of the light truck market. Instead of requiring a uniform level of CAFE—which is inherently more challenging for manufacturers whose fleets have relatively high percentages of larger vehicles to meet than for those whose product lines emphasize smaller models—the Reformed system specifies fuel economy targets that vary according to vehicle footprint. These targets are higher for smaller light trucks and lower for large ones. By setting each manufacturer's required fleet-wide CAFE level to reflect its size mix, the Reformed system requires each manufacturer to ensure the fuel efficiency of its individual models, regardless of their size distribution.

Porsche expressed disagreement with NHTSA's decision to consider only the performance and capabilities of the seven largest manufacturers, while not considering the other four manufacturers of light trucks (Volkswagen, BMW, Porsche, and Subaru). Porsche stated that the Reformed CAFE standards do not truly represent industry-wide considerations if they do not consider this remaining several percent of the light truck market, particularly where many of these manufacturers serve niche markets not served by the seven largest manufacturers.

With regard to Porsche's suggestion that the agency consider all manufacturers in setting the targets, we previously have addressed the degree to which we consider manufacturers with small shares of the light truck market. In our 1996 rulemaking setting light truck CAFE standard for MY 1998, NHTSA faced a substantially similar argument from Mercedes-Benz asserting that there is a need to set the CAFE standards at a level achievable by all light truck manufacturers (*i.e.*, even those manufacturers with a very small market share). In rejecting that suggestion, we cited the language from the Conference Report accompanying EPCA that directs us to consider industry-wide considerations and to not base the standards on the manufacturer with the greatest difficulties. Even under Reformed CAFE, this aspect of CAFE standard-setting has not changed since that time.

The target setting process in this rulemaking focuses on roughly 97 percent of the light truck market, a figure that reflects industry-wide considerations. Inclusion of all manufacturers, even those with a very small market share, has the potential to skew the resulting CAFE targets so as to decrease the overall stringency of the standards. Such an approach would depress the CAFE levels below the maximum feasible capability of the rest of the industry and reduce overall fuel savings. We recognize that under the Reformed CAFE system, the degree to which the standard would be depressed by including the remaining very small manufacturers likely would not be more than 0.1 mpg on any given target. However, this reduction would result in a reduction in fuel savings. Balancing the need of the Nation to conserve energy, we have concluded to rely on the largest seven manufacturers as discussed.

c. Improving the Light Truck Fleet

The first phase in determining the footprint targets was to determine separately for *each* of the seven largest manufacturers the overall level of CAFE that would maximize the net benefits for that manufacturer's vehicles.

To find the socially optimal point for each of these seven manufacturers (*i.e.*, the point at which the incremental or marginal change in costs equals the incremental or marginal change in benefits for that manufacturer), we used the Volpe model to compute the total costs and total benefits of exceeding the baseline [86] CAFE by progressively larger increments. We began by exceeding the baseline by 0.1 mpg. We then used the model to calculate the total costs and total benefits of exceeding the baseline by 0.2 mpg. The marginal costs and benefits were then computed as the difference between the total costs and total benefits resulting from exceeding the baseline by 0.1 mpg and the total costs and benefits resulting from exceeding the baseline by 0.2 mpg. We then used the Volpe model to calculate the total costs and total benefits of exceeding the baseline by 0.3 mpg and computed the difference between the total costs and benefits between 0.2 mpg and 0.3 mpg to determine the marginal costs and benefits.

We continued making similar iterations until marginal costs equaled marginal benefits for that manufacturer. Performing this iterative process individually for each manufacturer pushed each of the seven largest

[86] An important distinction needs to be made between the baseline and the manufacturer's product plan mpg. As discussed earlier, ''baseline'' is defined as the fuel economy that would exist absent of the rulemaking (*i.e.*, the model year 2007 standard of 22.2 mpg). The 22.2 mpg baseline differs from the mpg level reported in a manufacturer's product plan. Some manufacturers report fuel economy levels that are below 22.2 mpg. In that case, the cost and benefits of going from the product plan mpg to the baseline (22.2) mpg are not counted as costs and benefits of the rulemaking, as they were already counted in the MY 2005–2007 final rule. Only costs and benefits associated with going from baseline mpg to a higher standard are counted. It is important to note that since technology is applied on a cost effective basis, the most cost effective technologies will be used to get a manufacturer from the product plan mpg to the baseline mpg.

manufacturers to a point at which net benefits are maximized for each manufacturer's vehicles.

As a general concept, Toyota expressed support for the agency's use of cost-benefit analysis in establishing proposed CAFE standards, although it asserted that NHTSA may have underestimated costs and overestimated potential benefits in developing its proposal. Toyota also suggested that the agency had relied too heavily on its approach of using cost-benefit analysis to determine a maximum feasible standard, and in doing so had not considered other relevant factors. Thus, Toyota recommended that NHTSA carefully review the assumptions in its model in order to ensure that the economically efficient fuel economy targets it identifies nevertheless fall within the practical constraints and limitations of technology deployment. Finally, Toyota also urged caution in assessing any potential changes to the CAFE targets resulting from increased fuel prices.

As discussed previously, DaimlerChrysler argued that in order to ensure the economic practicability of CAFE standards, NHTSA's procedure of establishing standards that maximize net benefits must always be tempered by considering the industry's ability to afford the required technologies. DaimlerChrysler also argued that the agency's methodology for determining ''maximum feasible'' fuel economy levels overestimates the potential of technology to improve fuel economy, while underestimating its costs. The commenter suggested that setting standards based upon ''maximum feasible'' and ''maximum net benefits'' approaches will not necessarily yield identical results in all cases.

As discussed above, the marginal cost-benefit analysis is part of the agency's consideration of economic practicability. Our analysis also considered the financial condition of the industry in determining technology applications. The marginal cost-benefit analysis, taken in conjunction with these technology considerations, provided fuel economy requirements that were then subject to a sales and job impact analysis. The totality of this process, in conjunction with consideration of the nation's need to conserve energy, the impacts of other Federal standards, and societal impacts such as safety, provides us with a determination of ''maximum feasible.''

The Alliance cautioned that while it is probably permissible for NHTSA to use cost-benefit analysis in setting CAFE standards, the agency should not rely solely on this tool in determining their economic practicability. However, the Alliance provided no ''tool'' to determine economic practicability or an individual manufacturer's capability. The Alliance argued that the proposed CAFE standards pose significant technical challenges and may be beyond manufacturers' capabilities, and thus that NHTSA should not finalize standards any higher than those proposed in the NPRM, because higher targets would be unlikely to comply with the statutory criteria of technological feasibility and economic practicability.[87] The Alliance also noted that the fuel economy improvements required by the proposed standard would come at a time when vehicles are already significantly more fuel-efficient than in recent years, thereby making such fuel economy improvement much more difficult and costly to achieve. Finally, the Alliance also commented that use of cost-benefit analysis makes the agency's estimates of the costs, benefits, and applicability of certain technologies more important than in setting previous rules, and these assumptions should therefore be fully explained and documented.

Similarly, NADA commented that the success of NHTSA's CAFE reform hinges upon the application of appropriate information and assumptions. For example, NADA stated that because the cost-benefit analysis is so critical to the establishment of CAFE targets under the agency's proposal, there must be an accurate assessment of real costs and real benefits. NADA argued that applying cost-benefit analysis to determine the level of CAFE standards should be only one step in a rigorous examination of their economic practicability.

Honda requested confirmation that once CAFE standards are set using NHTSA's proposed benefit-cost approach, they will not be revised simply because updated information affecting the benefit or cost estimates becomes available (*e.g.*, new fuel prices estimates), unless overwhelming need can be demonstrated. According to Honda, such changes would be extremely disruptive to manufacturers' product planning. Thus, Honda argued that updated data should be considered only for setting CAFE requirements that would apply to model years beyond those covered by the current rule.

Environmental Defense raised specific objections to some of the assumptions relied upon in the agency's analysis, but stated that the Reformed CAFE standard-setting methodology itself is reasonable. Environmental Defense stated that the Reformed CAFE approach provides greater transparency than the Stage analysis relied upon in the Unreformed CAFE system.

In response to the manufacturers' reservations about equating ''maximum feasible'' fuel economy standards with those that produce maximum net benefits, the agency is aware of its continuing statutory responsibility to establish maximum feasible fuel economy standards at levels that simultaneously reflect consideration of technological feasibility, economic practicability, the effects of other Federal vehicle standards, and the need of the nation to conserve energy. The approach for determining the continuous function sets the fuel economy targets just below the level where the increased cost of technologies that could be adopted by manufacturers to improve fuel economy would first outweigh the added benefits that would result from such technology.

These targets translate into required levels of average fuel economy that are technologically feasible because manufacturers can achieve them using available technologies. Those levels also reflect the need of the nation to conserve energy because they reflect the economic value of the savings in resources, as well as of the reductions in economic and environmental externalities that result from producing and using less fuel. We note that our assumptions for each technology, its cost, and its effectiveness are in the FRIA (see FRIA Table VI–4). (However, the application to each manufacturer is confidential and therefore not included in the docketed FRIA.)

In answer to comments from various commenters that NHTSA's process for establishing fuel economy targets overstates the fuel economy improvements likely to result from specific technologies and underestimates manufacturers' costs for adopting those fuel economy technologies, the agency again notes that we have relied on the technology cost and effectiveness estimates from the NAS report. The estimates of fuel economy technology effectiveness and costs developed by NAS represent the most reliable estimates that are available. The alternative estimates of technology costs and effectiveness recommended by some commenters

[87] According to the Alliance, once finalized, the CAFE rule would mark seven consecutive years of light truck fuel economy increases. The Alliance argued that combined with previous increases for MY 2005–2007, the current proposal would match the highest seven-year rate of increase (2.2 percent per year, the average from 1982–1989) in the history of the light truck CAFE program, and it would be more than 1.5 times the historical trend of fuel efficiency improvements.

have not been subjected to the same level of expert review and public scrutiny as those developed by NAS, and are thus not suitable for use by NHTSA in establishing fuel economy standards.

In response to Honda's request for clarification regarding our position on updating the standards when new data become available, new data will be relied upon for consideration of standards beyond MY 2011. If the agency were to consider increasing the established standards for MY 2008-2011, we would need to be mindful of lead time constraints and the need for regulatory certainty (i.e., the need for manufacturers to be able to rely on today's final rule to adjust their product plans).

d. Defining the Function and the Preliminary Shape of the Curve

In the second phase, we plotted the results of phase one (i.e., the light truck fleets of the seven largest manufacturers, each separately ''socially optimized''). Then, we calculated a statistical relationship through the plotted data points (using production-weighted nonlinear least squares regression). This relationship defines a preliminary continuous function (a ''curve'') that, upon being adjusted, determines the fuel economy targets for light trucks based on vehicle footprint. Although adjusted, the shape of the curve remains unchanged throughout the equal-increment adjustments in phase three below, because the absolute differences (on a gallon-per-mile basis) between the targets are unaffected by those adjustments.

In its report, NAS illustrated a function that set fuel economy targets for vehicle based on weight. See Figure 2 below. Under the NAS function, fuel consumption increased in a linear manner as vehicle weight increased up to 4,000 lbs. At 4,000 lbs, the function leveled-off. The leveling of the function at 4,000 lbs represented a ''safety threshold,'' i.e., the NAS report determined that there was a safety benefit in minimizing the incentive to up-weight vehicles beyond 4,000 lbs. Under the NAS function, increasing a vehicles weight beyond 4,000 lbs did not subject a vehicle to a less stringent fuel consumption value.

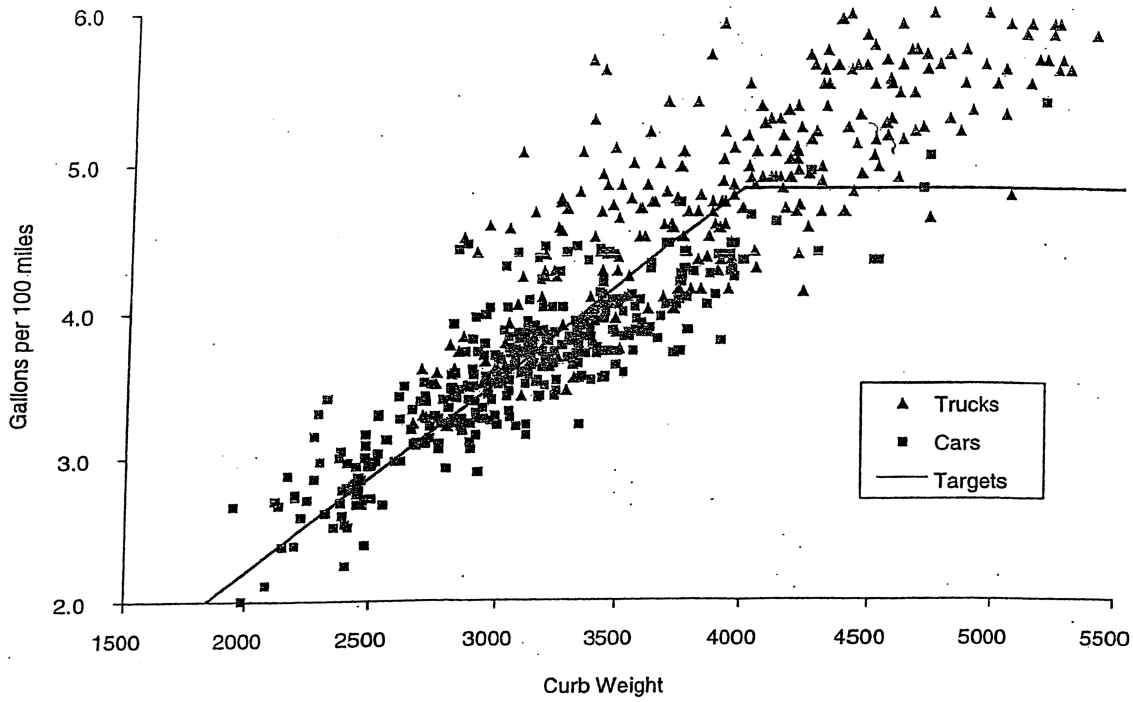


**Figure 2: Illustration of the fuel economy function under the NAS alternative attribute system example (NAS report, p. 109).**

The agency considered relying on a function as illustrated by NAS, but determined that the NAS function presented several problems. First, the flattening of the function would be expected to produce a milder form of the ''edge effects'' that are of concern under the step function. At the ''safety threshold'' there would be an abrupt change in the rate at which size increases are rewarded. This abrupt change could distort the production of vehicles located near the threshold and encourage manufacturers to potentially downsize some vehicles to the threshold point. Second, it is not clear whether and, if so, where, in terms of footprint, a true ''safety threshold'' occurs. Without a ''safety threshold'' the NAS function would be a simple linear function, which as discussed below introduces several potential problems. Finally, there is a possibility that a function based on the NAS illustration could extrapolate to unreasonably high levels for small vehicles.

As discussed below, the agency has decided to use a constrained logistic function to set the targets. We have determined that a constrained logistic function provides a good fit to the optimized light truck fleet data, while not resulting in potentially impracticable high targets for very small vehicles, or unreasonably low targets for very large vehicles.

The agency evaluated a variety of mathematical forms to estimate the relationship between vehicle footprint and fuel economy. The agency considered a simple linear function, a quadratic function, an exponential function, and an unconstrained logistic function. Each of these relationships was estimated in gallons per mile (gpm) rather than miles per gallon (mpg). As explained in the NPRM, the relationship between fuel economy measured in mpg and fuel savings is not linear. An increase in one mpg in a vehicle with low fuel economy (e.g., 20 mpg to 21 mpg) results in higher fuel savings than if the change occurs in a vehicle with high fuel economy (e.g., 30 mpg to 31 mpg). Increasing fuel economy by equal increments of gallons per mile provides equal fuel savings regardless of the fuel economy of a vehicle. Increasing the fuel economy of a vehicle from 0.06 gpm to 0.05 gpm saves exactly the same amount of fuel as increasing the fuel economy of a vehicle from 0.03 gpm to 0.02 gpm.[88]

Given that the agency is concerned with fuel savings, gpm is a more appropriate metric for evaluating the functions. Therefore, we plotted the ''socially optimized'' fleets in terms of footprint versus gpm. Once a shape of a function was determined in terms of ''gallons per mile,'' the agency then converted the function to mpg for the purpose of evaluating the potential target values. Figures 3A through 6B below illustrate each of the functions as sales weighted estimates of the relationship between fuel economy of the ''socially optimized'' fleets and foot print, which were considered by the agency.

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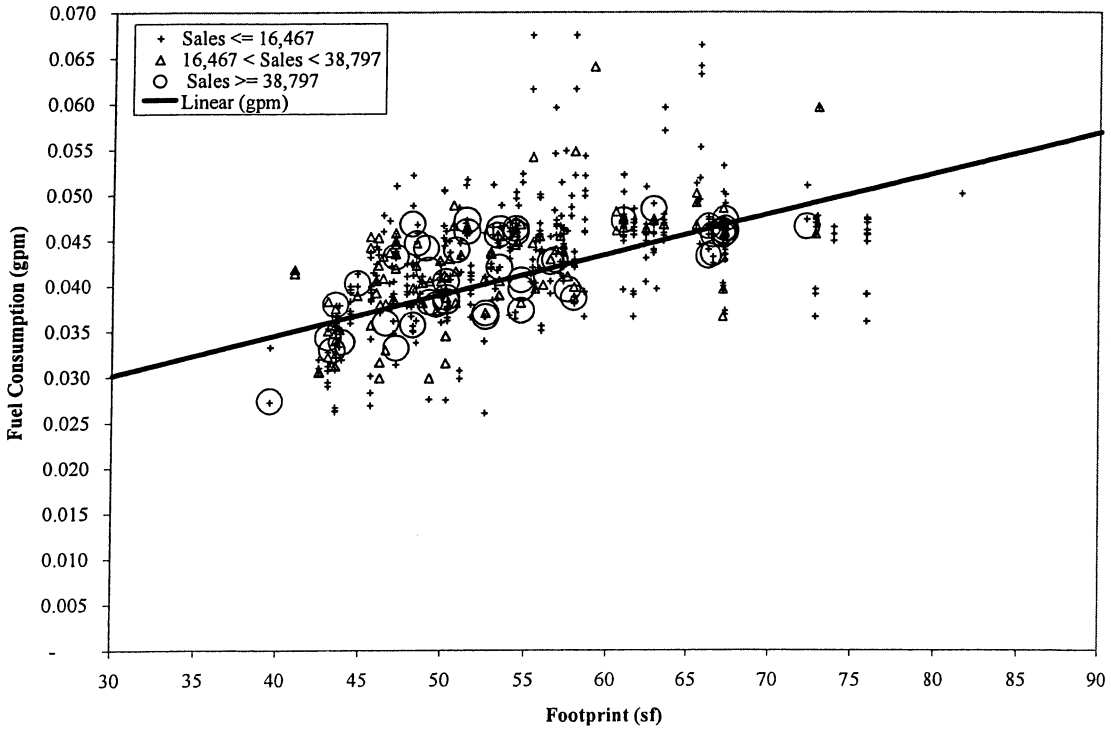


**Figure 3A: Linear function fit through sales weighted "socially optimized" light truck fleet (gpm as a function of footprint)**

[88] Lower fuel consumption represents a more stringent value (i.e., a low gpm value equates to a high mpg value)

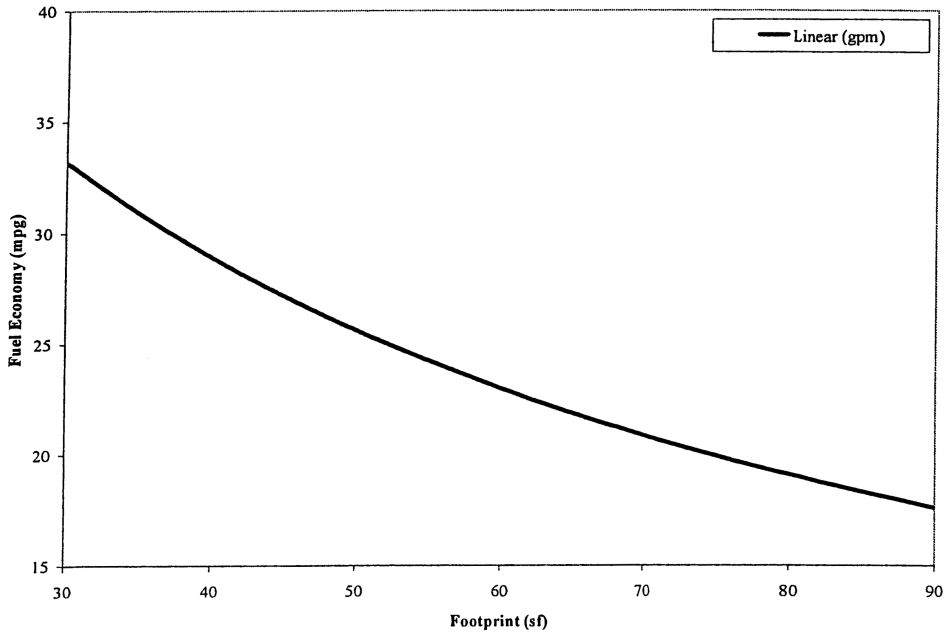


**Figure 3B: Linear function fit through sales weighted "socially optimized" light truck fleet (mpg as a function of footprint)**

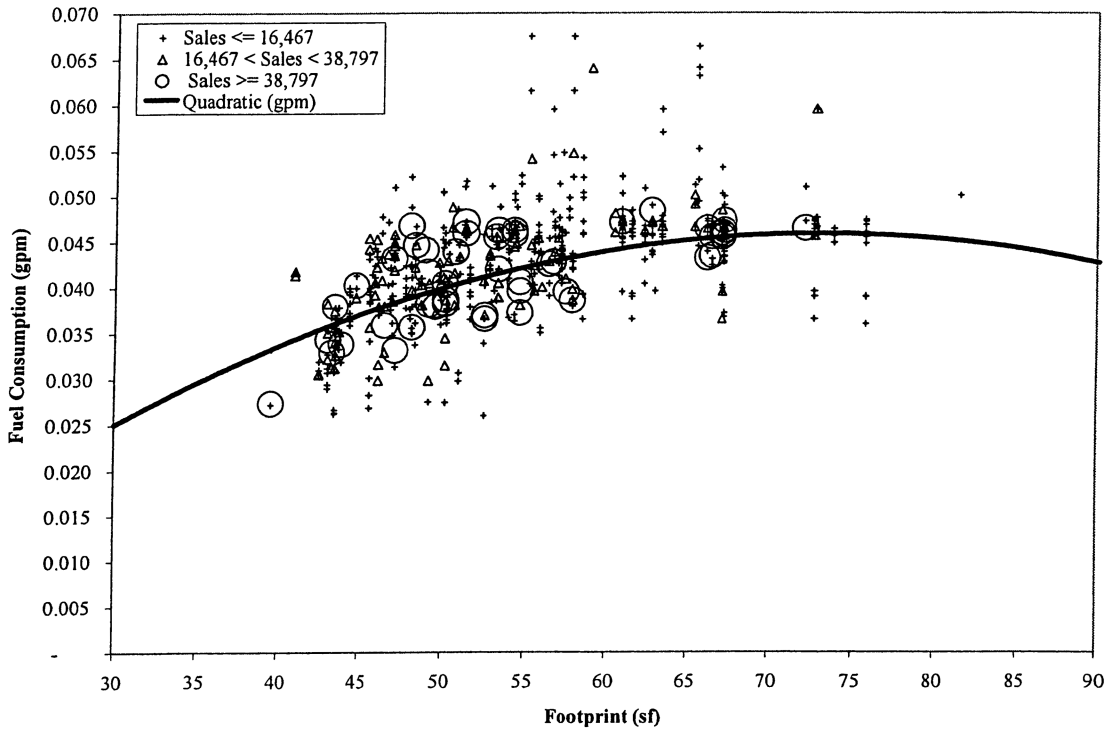


**Figure 4A: Quadratic function fit through sales weighted "socially optimized" light truck fleet (gpm as a function of footprint)**

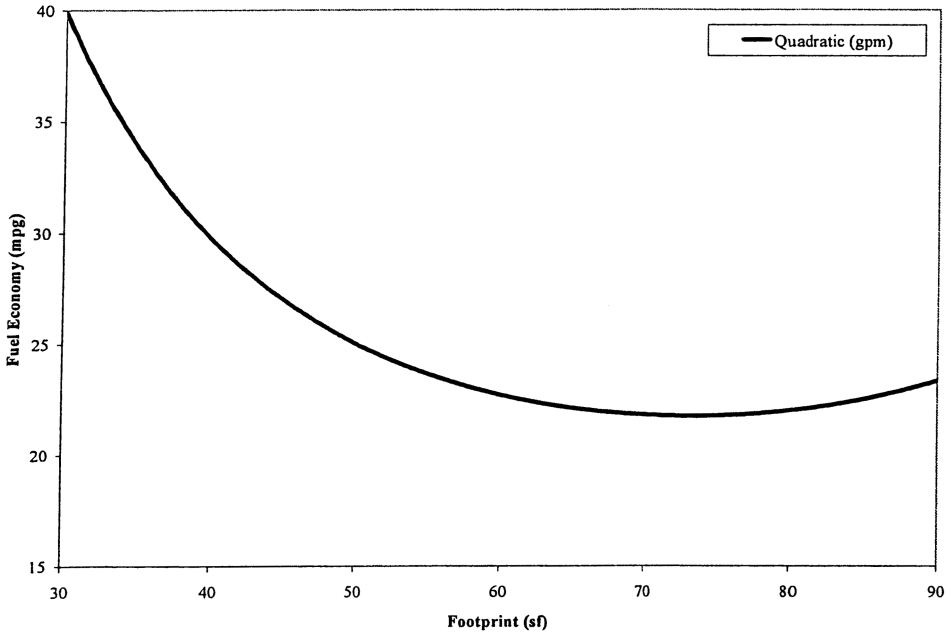


**Figure 4B: Quadratic function fit through sales weighted "socially optimized" light truck fleet (mpg as a function of footprint)**

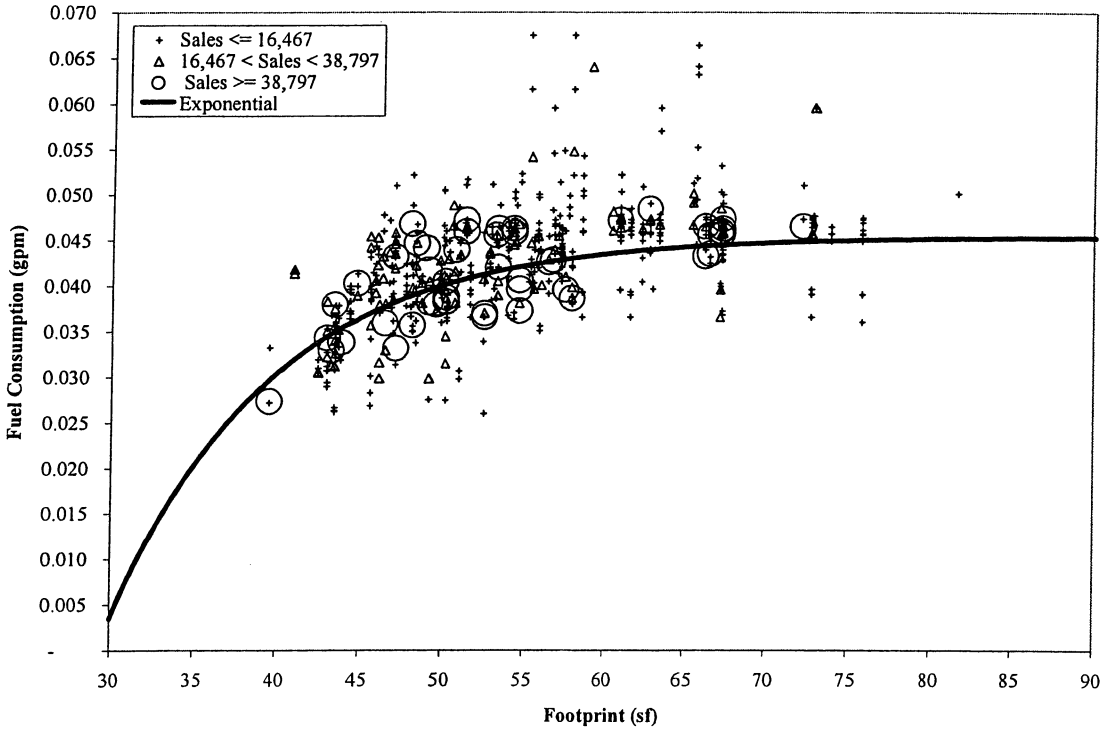


**Figure 5A: Exponential function fit through sales weighted "socially optimized" light truck fleet (gpm as a function of footprint)**

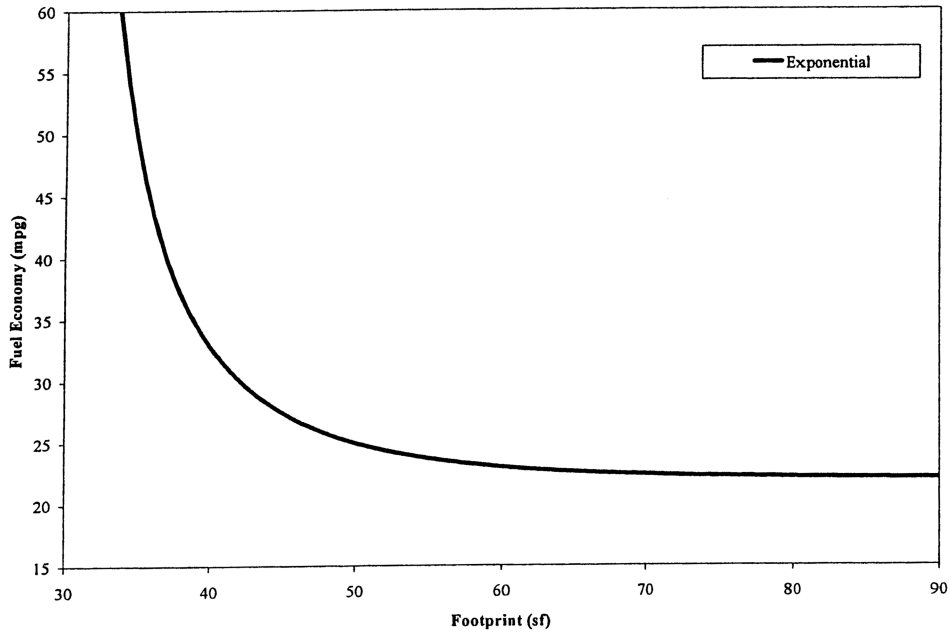


**Figure 5B: Exponential function fit through sales weighted "socially optimized" light truck fleet (mpg as a function of footprint)**

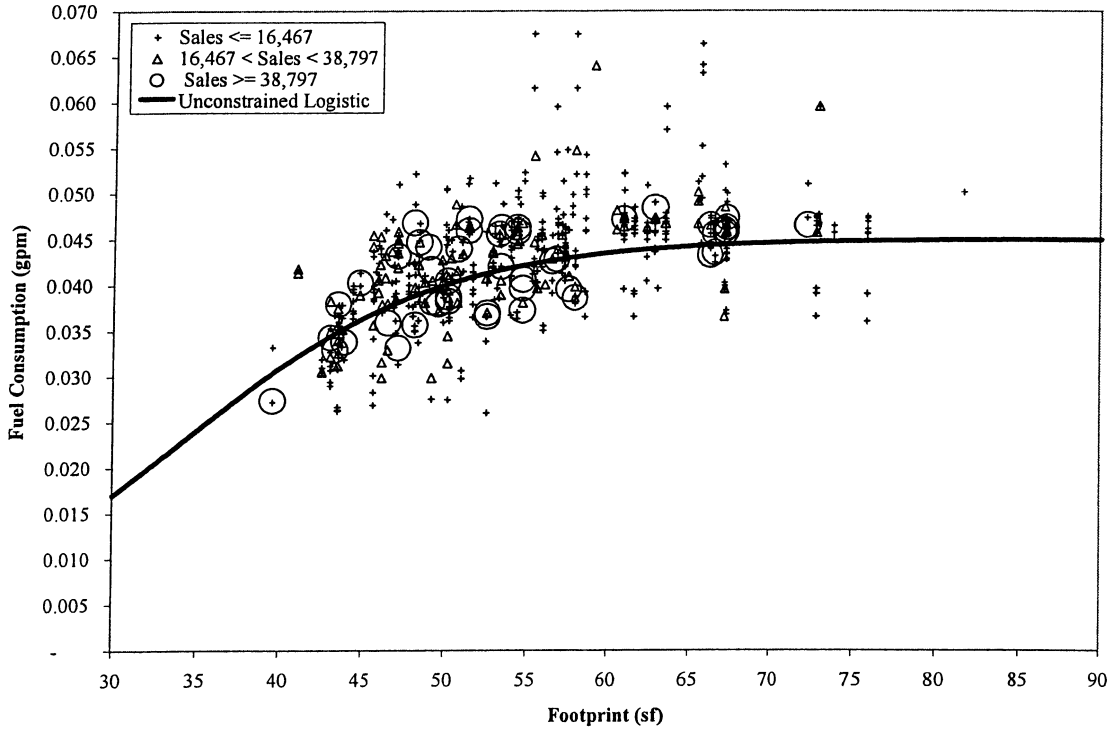


**Figure 6A: Logistic function fit through sales weighted "socially optimized" light truck fleet (gpm as a function of footprint)**

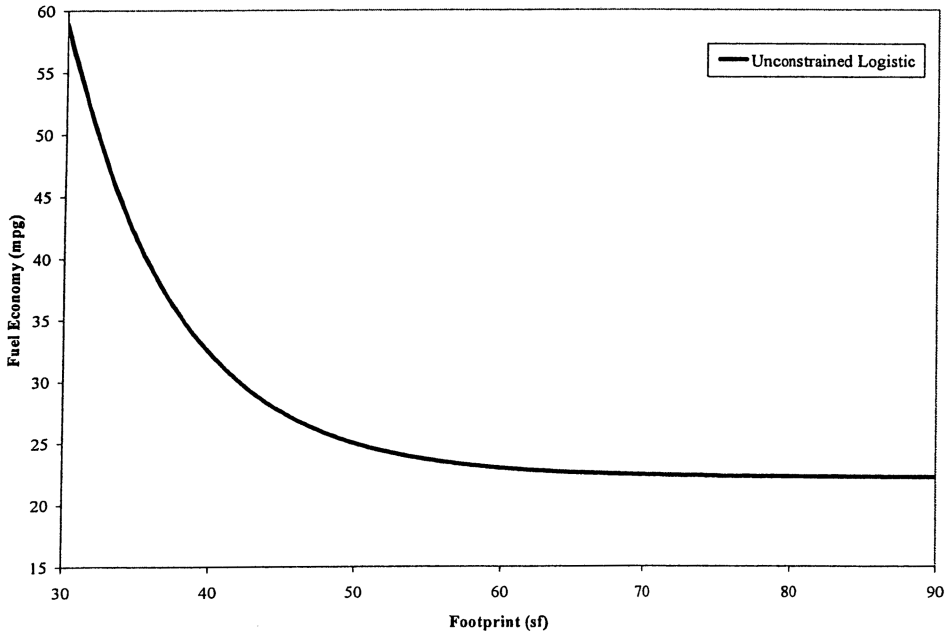


**Figure 6B: Logistic function fit through sales weighted "socially optimized" light truck fleet (mpg as a function of footprint)**

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After evaluating the functions above, we determined that none of the functions as presented would be appropriate for the CAFE program. Each of the four forms fit the data relatively well within the footprint range observed in the manufacturers' product plans (from about 40 square feet to about 85 square feet). However, at slightly beyond the endpoints of the observed range, the functional forms tended towards excessively high stringency levels at the smaller end of the footprint range, excessively low stringency levels at the higher end of the footprint end, or both. Excessively high stringency levels at the smaller end of the footprint range potentially could result in target values beyond the technological capabilities of manufacturers. Excessively low stringency levels at the higher end of the footprint range standards would reduce fuel savings below that of the socially optimized fleet.

As Figure 3A shows, a simple linear functional form provides a reasonably good fit for small vehicles, but results in very low stringency for vehicles above 80 square feet would correspond to fuel consumption values for very large vehicles greater than the fuel consumption for those vehicles under the optimized fleet. Reliance on a linear function would result in targets for large light trucks that are well below the optimized fuel economy, in terms of mpg, for those vehicles. These low target values would reduce fuel savings and provide a fuel economy incentive for upsizing. Additionally, depending on the distribution of the fleet, a simple linear relationship could also produce targets for very small vehicles well above the corresponding data points.

Polynomial relationships between footprint and fuel economy, such as a quadratic function, result in fuel consumption values that deviate substantially from the data points at either end of the footprint range. Further, because of their inherent curvature, polynomial functions often result in less stringent mpg targets for the smallest models than for slightly larger vehicles, or mpg targets for the largest models that are more stringent than those for slightly smaller models. As illustrated in Figure 4B, the convex curvature of the function results in increases in stringency for vehicles with a footprint larger than about 70 square feet. This increase is contrary to the data points of the socially optimized fleet.

Under an exponential relationship, the fuel economy targets tend towards very high levels of stringency as footprint declines below 40 square feet (see Figure 5B). Under the exponential function for footprint values smaller than the smallest vehicle in the planned fleet are more a characteristic of the function, as opposed to representing the technological capabilities of such vehicles. A similar increase in targets occurs under a logistic function, although not to the extent as with an exponential function (see Figure 6B).

Under either an unconstrained exponential or an unconstrained logistic function, if a manufacturer were to introduce a vehicle with a footprint smaller than that considered in the optimized fleet, that vehicle would be compared to a fuel economy target potentially beyond the level that would be achieved had the agency ''optimized'' that vehicle. Such a target likely would be difficult to achieve using available technology. If a market demand were to develop for light trucks smaller than the smallest light truck currently planned by manufacturers, targets based on an exponential relationship or a logistic relationship could be technologically infeasible and limit consumer choice.

To address this issue the agency determined that it is necessary to constrain the chosen function at the end points of the footprint range. However, imposing a constraint on an exponential function prevents the curve from closely fitting the actual relationship between vehicle footprint and fuel economy across much of the size spectrum. In addition, exponential functions constrained to reach a maximum mpg value tended to have inconsistent shapes when fitted to light truck data for

different model years.[89] Therefore, the agency decided to use a constrained logistic function to fit the target curve to the data points. The constrained logistic function is illustrated below in gallons per mile and inverted in miles per gallon:

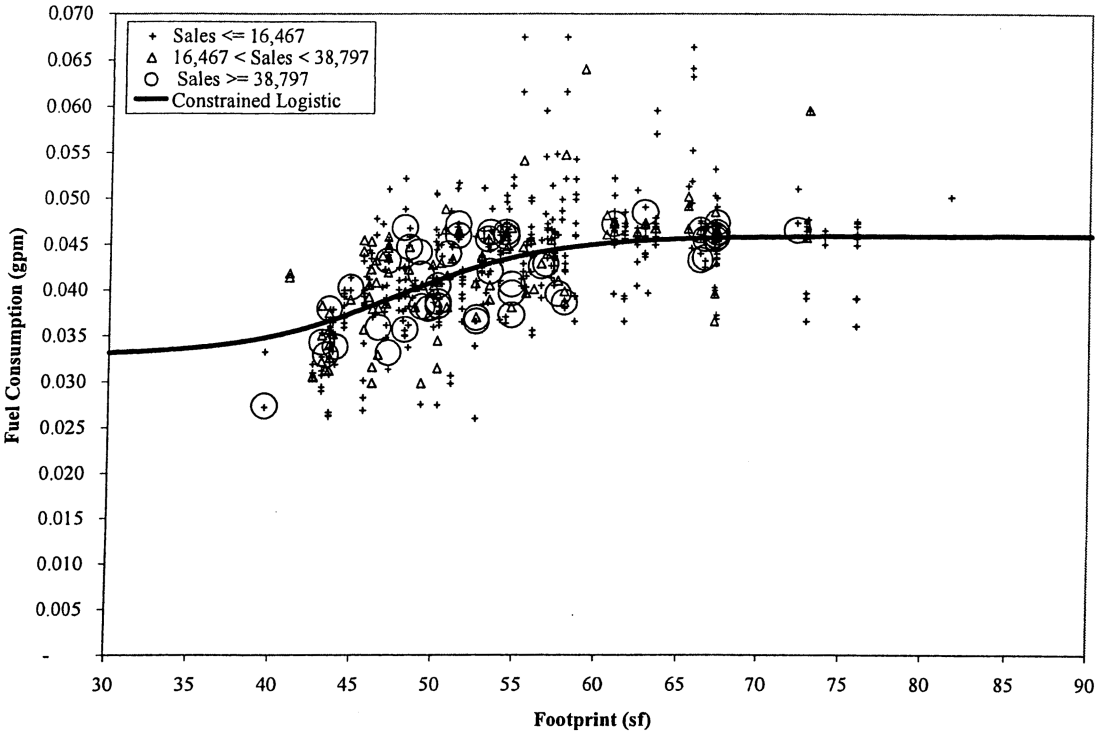


**Figure 7: Constrained logistic function fit through sales weighted "socially optimized" light truck fleet (gpm as a function of footprint)**

[89] That is, the targets they established for models for some footprint values declined rather than increased between successive model years.

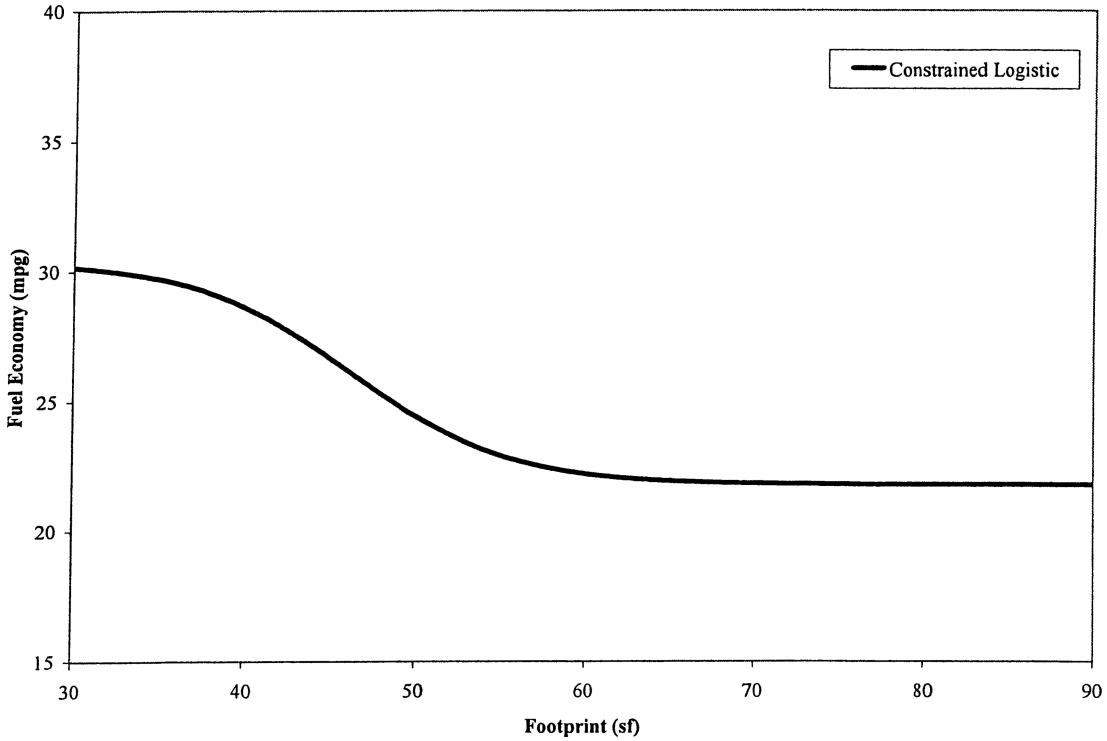


**Figure 8: Constrained logistic function**

The constrained logistic function provides a relatively good fit to the data points without creating excessively high targets for small vehicles, excessively low targets for large vehicles, or regions in which targets for large vehicles exceed those for small vehicles. The constrained logistic function also produces a curve that provides an acceptable fit to the light truck data across all four model years.

Further, by constraining the function at the ends of the footprint range, we limit the potential for the curve to be disproportionately influenced by a single vehicle model located at either end of the range. The vehicle population decreases as the curve moves away from the middle of the footprint range. The low vehicle population levels provide for a single vehicle model located at either end of the range to have a greater influence on its target, than a vehicle with comparable production numbers located in the middle of the range. This greater influence translates to greater influence on the shape of the curve. As demonstrated in the unconstrained logistic function, at a footprint value of 40 square feet a single model produced in larger numbers than other vehicles at or near this footprint value causes associated fuel consumption values to sharply decrease. This translates to rapidly increasing targets as footprint decreases below 40 square feet. Constraining the function also minimizes the potential for a disproportionate influence from a single vehicle model on the curve, the agency has constrained the target values at the ends of the range.

Constraining the upper and lower bounds in this manner has the additional benefit of generating a curve that closely tracks the shape of the proposed step-function. We have constrained this function so that the smallest/largest vehicles face similar stringency that was found in the smallest/largest categories in the step function.

The constrained logistic function selected by the agency is defined by four parameters. Two parameters establish the function's upper and lower bounds (i.e., asymptotes), respectively. A third parameter specifies the footprint at which the function is halfway between the upper and lower bounds. The last parameter establishes the rate or ''steepness'' of the function's transition between the upper (at low footprint) and lower (at high footprint) boundaries.

The agency determined the values of the parameters establishing the function's upper and lower bounds by calculating the sales-weighted harmonic average values of optimized fuel economy levels for light trucks with footprints below 43 square feet and above 65 square feet, respectively. Because these ranges respectively include the smallest and largest models represented in the current light truck fleet, the agency determined that these two segments of the light truck fleet are appropriate for establishing the upper and lower fuel economy bounds of a continuous function.

The remaining two parameters (i.e., the ''midpoint'' and ''curvature'' parameters) were estimated using production-weighted nonlinear least-squares regression to achieve the closest fit to data on footprint and optimized fuel economy for all light truck models expected to be produced during each of model years 2008–2011.[90] Described mathematically, the logistic function is as follows:

[90] More precisely, these two parameters determine the range between the vehicle footprints where the upper and lower limits of fuel economy are reached, and the value of footprint for which the value of fuel economy is midway between its upper and lower bounds.

$$T = \frac{1}{\frac{1}{a} + \left(\frac{1}{b} - \frac{1}{a}\right)\frac{e^{(x-c)/d}}{1+e^{(x-c)/d}}}$$

Where,

T = the fuel economy target (in mpg)

a = the maximum fuel economy target (in mpg)

b = the minimum fuel economy target (in mpg)

c = the footprint value (in square feet) at which the fuel economy target is midway between a and b

d = the parameter (in square feet) defining the rate at which the value of targets decline from the largest to smallest values

e = 2.718 [91]

x = footprint (in square feet, rounded to the nearest tenth) of the vehicle model

The resulting curve is an elongated ''S''-shape, with fuel economy targets decreasing as footprint increases.

e. Final Level of the Curve (and Targets)

The final step in the target setting process is to adjust the level of the preliminary curve defined in step two to a level ''optimized'' for the entire fleet produced by the seven largest manufacturers. The preliminary curve is gradually adjusted, by changing the values of parameters (a) and (b) by equal increments of fuel savings [92] until the incremental change in total costs incurred by all manufacturers for complying with their respective CAFE requirements (the sales-weighted harmonic averages of the mpg targets for their individual models specified by the function) from a further adjustment equals (within precision limits of the analysis) the incremental change in the benefits. Each light truck model's final fuel economy target can be determined by entering its footprint (in square feet) into the function with these revised parameter values appropriate for its model year, and calculating the resulting value of fuel economy in miles per gallon.

Once targets are calculated for each vehicle in a manufacturer's fleet under the continuous function, the corporate average fuel economy level required of the manufacturer is calculated using a harmonic average, as under the proposed step function. A manufacturer's actual fuel economy is calculated according to the procedure used in the current CAFE system, and compared to its required CAFE level in order to assess whether it has complied with the standard. Penalties and credits are also determined and applied as under the current and proposed CAFE systems.

MYs 2008–2010. In each of the transition years, we did not adjust the curve to the optimal level. Instead, we adjusted the curve until the total industry costs under the Reformed CAFE program approximately equaled the total industry costs under the Unreformed CAFE program. Cost equalization has several important advantages, as explained above in the discussion of the transition period. Since the Unreformed CAFE standards were judged to be economically practicable and since the Reformed CAFE standards spread the cost burden across the industry to a greater extent, equalizing the costs between the two systems ensures that the Reformed CAFE standards are within the realm of economic practicability.[93] Also, cost equalization promotes an orderly and effective transition to the Reformed CAFE system by minimizing the cost differences between the two choices.

MY 2011. The Reformed CAFE standard for MY 2011 is set at the social optimal level as described above, and is not constrained by the costs of an Unreformed standard. As previously stated, all manufacturers are required to comply with the Reformed CAFE standard in MY 2011.

The parameter values for MYs 2008–2011 are as follows:

TABLE 4.—PARAMETER VALUES FOR LOGISTIC FUNCTION

| Parameter | Model year | | | |
|---|---|---|---|---|
| | 2008 | 2009 | 2010 | 2011 |
| a | 28.56 | 30.07 | 29.96 | 30.42 |
| b | 19.99 | 20.87 | 21.20 | 21.79 |
| c | 49.30 | 48.00 | 48.49 | 47.74 |
| d | 5.58 | 5.81 | 5.50 | 4.65 |

3. Application of the Continuous Function Based Standard

The Reformed CAFE standard establishes a relationship between vehicle footprint and the fuel economy target for light trucks with different footprint values. In effect, today's final rule establishes a category system like that proposed in the NPRM, in which each footprint value is its own category, and has an associated fuel economy target.

The required level of CAFE for each manufacturer during a model year is the production-weighted harmonic average of the fuel economy targets for each model in its product line for that model year. While individual manufacturers may face different requirements for their overall CAFE levels depending on the distribution of footprint values for the models making up their respective product lines, each manufacturer is subject to identical fuel economy target for light truck models with the same footprint value. Moreover, the same

[91] For the purpose of the Reformed CAFE standard, we are carrying e out to only three decimal places.

[92] Equal increments of mpg have differing energy values. A 0.1 mpg increment added to a vehicle with a higher mpg performance will have a lower fuel savings value than an equal mpg increment added to a vehicle with a lower mpg performance. As such, we adjust the curve by equal increments of fuel savings as opposed to mpg.

[93] We equalized aggregate industry costs between Reformed and Unreformed CAFE. The costs are not borne by manufacturers in the same way and costs for individual manufacturers may differ between the two systems.

formula is used to determine each manufacturer's required level of CAFE using the fuel economy targets for different footprint values, footprint values for its individual models, and the production levels of each of its models. Individual manufacturers face different required CAFE levels only to the extent that they produce different size mixes of vehicle models.

To determine whether it has achieved its required overall CAFE level, each manufacturer's production-weighted harmonic average of the actual fuel economy levels for each model in its entire product line is compared to this required CAFE level. If the weighted average of its models' actual fuel economy levels is at least equal to the manufacturer's required level of average fuel economy, then it has complied with the Reformed CAFE standard. If its actual fleet-wide average fuel economy level is greater than its required CAFE level, the manufacturer earns credits equal to that difference that can be used in any of the three preceding or following model years.

More specifically, the manner in which a manufacturer's required overall CAFE for a model year under the Reformed system is computed is similar to the way in which its actual CAFE for a model year has always been calculated. Its required CAFE level is computed on the basis of the production and the footprint target as follows:

$$\frac{\text{Manufacturer X's Total Production of Light Trucks}}{\dfrac{\text{X's production at footprint m}}{\text{Target for footprint m}} + \dfrac{\text{X's production at footprint n}}{\text{Target for footprint n}} + \text{etc}} = \text{X's required level of CAFE}$$

This formula can be restated as follows:

$$Required_Fuel_Economy_Level = \frac{N}{\sum_i \frac{N_i}{T_i}}$$

Where:

N is the total number (sum) of light trucks produced by a manufacturer,

$N_i$ is the number (sum) of the $i^{th}$ model light truck produced by the manufacturer, and

$T_i$ is fuel economy target of the $i^{th}$ model light truck.

The required level is then compared to the CAFE that the manufacturer actually achieves in the model year in question:

$$CAFE = \frac{N}{\sum_i \frac{N_i}{mpg_i}}$$

Where,

N is the total number (sum) of light trucks produced by the manufacturer,

$N_i$ is the number (sum) of the $i^{th}$ model light trucks produced by the manufacturer,

$mpg_j$ is the fuel economy of the $i^{th}$ model light truck.

A manufacturer is in compliance if the actual CAFE meets or exceeds the required CAFE.

The method of assessing compliance under Reformed CAFE can be further explained using an illustrative example of a manufacturer that produces four models in two footprint categories with fuel economy targets assumed for the purposes of the example shown in Table 3:

TABLE 5.—ILLUSTRATIVE EXAMPLE OF METHOD OF ASSESSING COMPLIANCE UNDER A CONTINUOUS FUNCTION APPROACH

| Model | Fuel economy (mpg) | Production (units) | Footprint (sq. ft.) | Footprint (mpg) |
|---|---|---|---|---|
| A | 27.0 | 100,000 | 43.00 | 27.5 |
| B | 24.0 | 100,000 | 42.00 | 27.8 |
| C | 22.0 | 100,000 | 52.00 | 23.7 |
| D | 19.0 | 100,000 | 54.00 | 23.2 |

Under Reformed CAFE, the manufacturer would be required to achieve an average fuel economy level of:

$$\text{Required CAFE Level} = \frac{400{,}000}{\frac{100{,}000}{27.5mpg} + \frac{100{,}000}{27.8mpg} + \frac{100{,}000}{23.7mpg} + \frac{100{,}000}{23.2mpg}} = 25.4 \text{ mpg}$$

This fuel economy figure would be compared with the manufacturer's actual CAFE for its entire fleet (*i.e.*, the production-weighted harmonic mean fuel economy level for four models in its fleet):

$$\text{Actual CAFE} = \frac{400{,}000}{\frac{100{,}000}{27.0mpg} + \frac{100{,}000}{24.0mpg} + \frac{100{,}000}{22.0mpg} + \frac{100{,}000}{19.0mpg}} = 22.6 \text{ mpg}$$

In the illustrative example, the manufacturer's actual CAFE (22.6 mpg) is less than the required level (25.4 mpg), indicating that the manufacturer is not in compliance.

4. Why This Approach To Reform and Not Another?

a. Continuous Function vs. the Proposed Step-Function (Categories)

The NPRM proposed a Reformed CAFE system that would establish a system of six size categories based on vehicle footprint, and specify a target fuel economy level for the vehicles in each category. The categories and their respective targets were incorporated into a step function (see Figure 1, above). The CAFE level required of each manufacturer then would be determined by computing the sales-weighted harmonic average of the fuel economy targets for each light truck category in which it produces light trucks.

The NPRM also discussed and sought comment upon the alternative of incorporating the fuel economy targets into a continuous function based on vehicle footprint, which could have some important advantages over a stepwise function. However, we did not propose a specific mathematical form for a continuous function.

As explained above, the agency has elected to adopt a Reformed CAFE system that employs a continuous function to set fuel economy targets. Use of a continuous function addresses three major concerns raised by commenters with regard to the proposed Reformed CAFE structure. Reliance on a continuous function (1) eliminates potential problems associated with the need to redefine category boundaries in future rulemakings; (2) substantially reduces the incentive for manufacturers to ''upsize'' vehicles; and (3) substantially reduces the incentive for manufacturers to respond to the CAFE requirements through downsizing, a compliance option that can reduce a vehicle's safety. The following explains these three benefits in detail.

First, reliance on a continuous function eliminates the footprint based categories. By eliminating categories, we eliminate the need to redefine categories as the light truck distribution changes.

In the NPRM, we prescribed a method for determining category boundaries. The method was intended to reduce the potential for ''edge effects.'' We noted that when the distribution of light trucks was graphed such that footprint increased from left to right, vehicles just to the left of a boundary faced the greatest incentive for upsizing. These vehicles could be moved into a less stringent category with relatively minor increases in size.

In order to minimize this potential, we defined the proposed boundaries generally at points on the graph where there was relatively low vehicle volume immediately to the left and high vehicle volume immediately to the right. Identification of points between low and high volume was based on the distribution of vehicles from the product plans provided to the agency in response to the 2003 ANPRM. Based on this distribution, the agency was able to readily identify appropriate boundary locations, as illustrated in Figure 9 below.

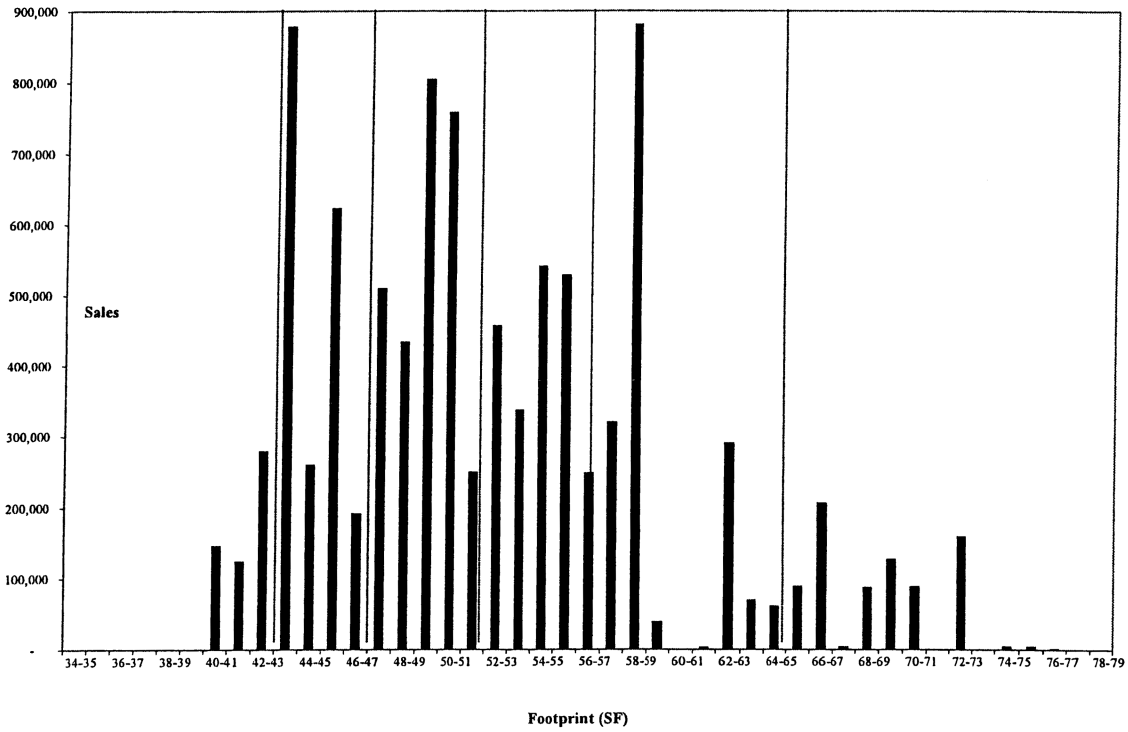


**Figure 9: MY 2011 Sales distribution of light truck fleet by footprint used in the NPRM**

A variety of commenters also recognized the potential for ''edge effects.'' The Alliance asserted that the agency's selection of boundaries under the step function effectively addressed this potential problem, noting that it ''agrees with the agency's assessment that both the number and the location of the boundaries for the footprint categories would likely minimize any such edge effects.''

As previously indicated, manufacturers provided updated product plans in response to the NPRM and RFC. The new product plans reflected a new distribution of vehicles. When the proposed boundaries were applied to the updated manufacturer plans, the boundaries did not align with low and high volume points, as in the NPRM.

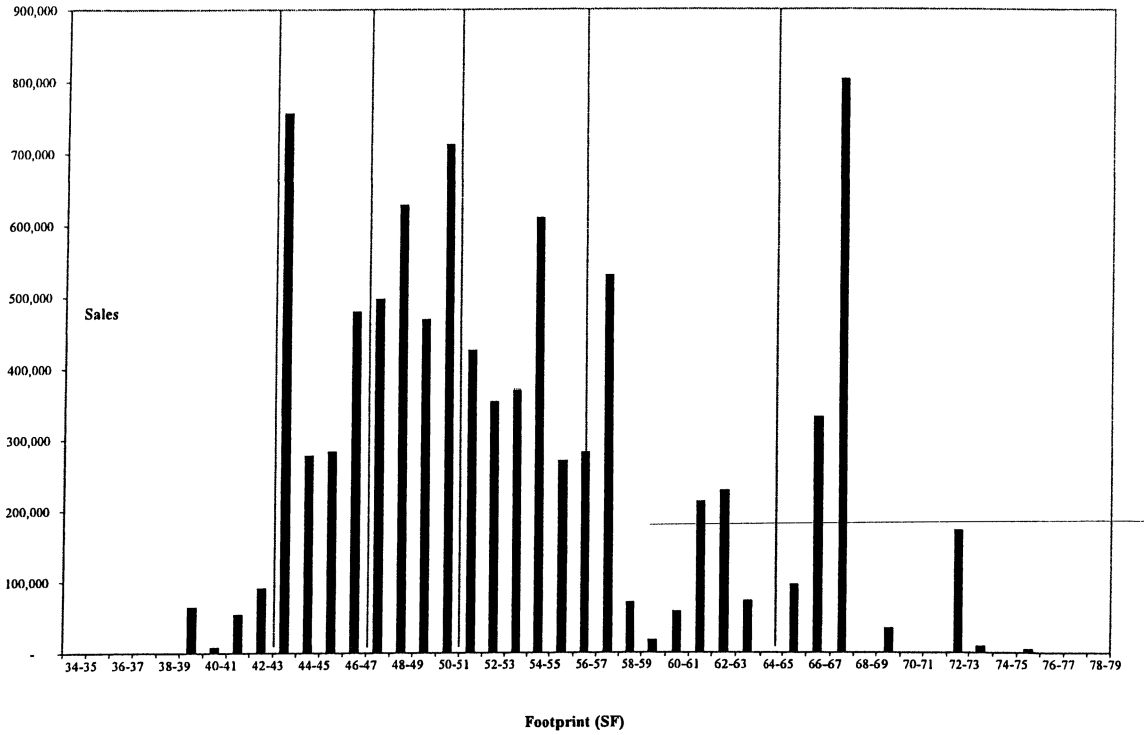


**Figure 10: Proposed category boundaries and updated MY 2011 light truck fleet distribution**

As illustrated in Figure 10 above, the distribution of the updated light truck fleet does not provide clear points of low volume adjacent to high volume as was the case with the older fleet that was the basis for the NPRM. Because the updated fleet has a more uniform distribution of vehicles across the footprint range, there are multiple potential boundary assignments that would segment the light truck fleet into six categories, and there is less opportunity to find boundaries that would minimize ''edge effects'' to the same extent as in the NPRM. Figures 11 and 12 illustrate potential ways by which the agency might have attempted to redefine the boundaries.

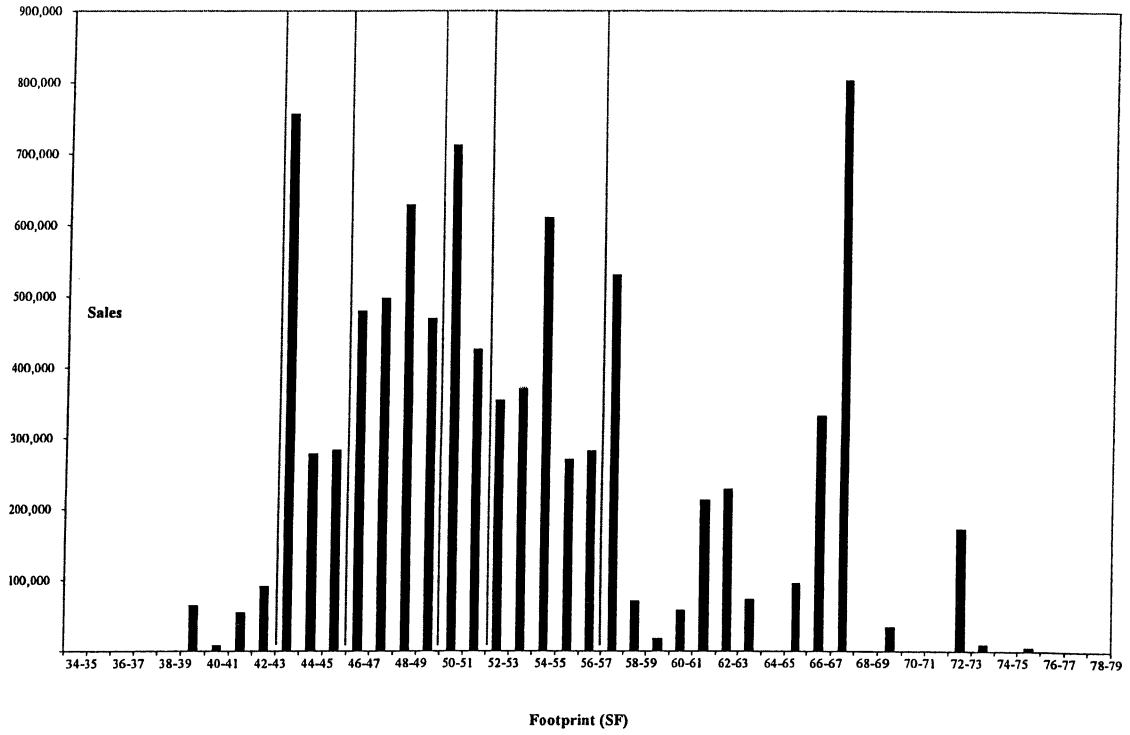


**Figure 11: Potential boundary locations**

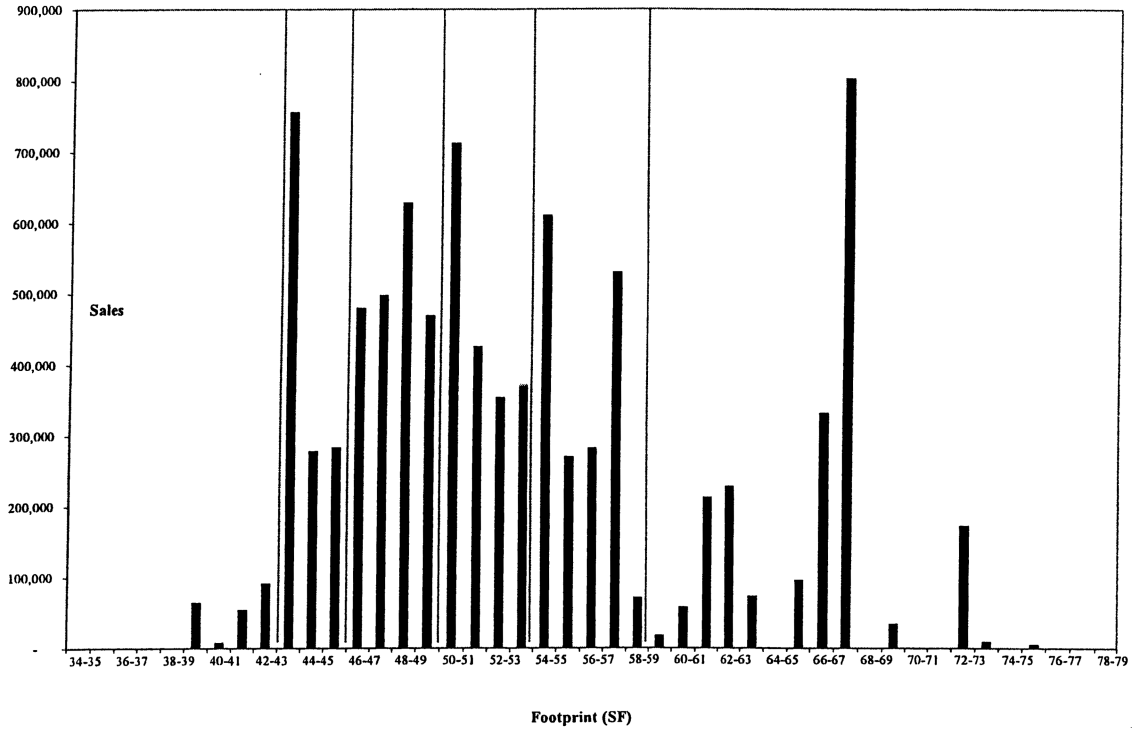


**Figure 12: Potential boundary locations**

However, it was clear that because of the distribution of the light truck fleet in the revised product plans, there was not the opportunity to provide category divisions that similarly minimize ''edge effects'' to the same degree as in the NPRM. Moreover, Toyota was concerned that changes to boundaries could significantly alter a

manufacturer's compliance responsibility, and urged the agency to rely on the proposed boundaries for the final rule.

As recognized by Toyota, the required fuel economy level of individual manufacturers is highly influenced by boundary location. Table 6 below illustrates the required fuel economy for a sampling of manufacturers if boundaries were set according to the figures above.

TABLE 6.—REQUIRED FUEL ECONOMY LEVELS UNDER VARIOUS BOUNDARY LOCATIONS

| Manufacturer | Required fuel economy (mpg)—boundaries set according to figure 11 | Required fuel economy (mpg)—boundaries set according to figure 12 |
|---|---|---|
| General Motors | 23.3 | 23.2 |
| Toyota | 23.8 | 23.8 |
| Nissan | 24.2 | 23.7 |

The potential need to redefine category boundaries from one model year to the next and one rulemaking to the next would create uncertainty for manufacturers. Manufacturers would face not only the potential of a vehicle facing a higher target resulting from shifts in the function, but would also face the potential of a vehicle being compared to a much more stringent target as the result of a boundary shift. By utilizing a continuous function, the agency eliminates boundaries and thus the potential difficulties associated with defining and redefining category boundaries.

Second, reliance on a continuous function substantially reduces the incentive for manufacturers to respond to Reformed CAFE by ''upsizing'' vehicles. IIHS said that although the boundaries in the proposed categorical system were carefully chosen to minimize the number of models that were just below them, the differences between fuel economy targets for some adjacent categories were nevertheless large enough to make upsizing an important potential concern. For vehicles just below boundaries, small increases in footprint could produce a significant reduction in fuel economy target. As an example, IIHS stated that based on the proposed categories, General Motors could reduce the fuel economy target applicable to the 2005 Chevrolet Trailblazer EXT by 1.5 mpg by increasing that model's track width by 1.5 inches. The Mercatus Center echoed this concern, citing calculations showing that 14 of 55 light truck models could be moved to the next larger footprint category with an increase in footprint of less than 2 percent.

Conversely, under a continuous function, significant reductions in fuel economy targets cannot be achieved through small increases in footprint. Fuel economy targets decrease gradually as vehicle size increases, as compared to the punctuated changes under a step-function. Again, using the Chevrolet Trailblazer as an example, IIHS noted that in order to gain a 1.5 mpg difference in its fuel economy target, ''the Trailblazer's footprint would have to change by about the entire range of one of the proposed footprint categories.'' Natural Resources Canada stated that although any erosion of fuel savings resulting from upsizing is unlikely to be significant under a stepwise function, ''it is our opinion that setting fuel economy targets using a continuous function, based on footprint, would eliminate any concern in this regard.''

In contrast to IIHS's assertions, Toyota argued that because a continuous function relaxes a vehicle's fuel economy target for any increase in size, a continuous function provides a greater incentive for vehicle ''upsizing.'' Toyota stated that under a continuous function, manufacturers have a small incentive to increase the size of every vehicle model they produce, instead of a stronger incentive to upsize only a few models.

The agency disagrees with Toyota. While the agency acknowledges Toyota's argument that a continuous function reduces a model's fuel economy target in response to any increase in its size, this feature need not provide an incentive for manufacturers to upsize their vehicles if the form of the function reflects the underlying engineering relationship between size and fuel economy.

Under the continuous function, as a vehicle's footprint increases, its applicable target decreases. However, the rate at which target levels decrease is gradual. Further, an increase in a vehicle's footprint is not without cost. Generally, as vehicle size increases, its fuel economy performance decreases. The decrease in fuel economy performance can result from additional weight added to achieve increased size or result from design implications of upsizing the vehicle (*e.g.*, an increase drag resistance from increased frontal area). As such, increasing footprint can decrease a vehicle's fuel economy, further reducing the incentive to upsize.

Under the step function approach, some vehicles were located near the upper boundaries of the categories despite agency efforts to minimize the number. Under the step function approach, a small change to the footprint of these vehicles would result in a substantial decrease in their targets, as much as 1.2 mpg. The continuous function approach does not provide an opportunity for substantial decreases in a vehicle's target based on slight increases to footprint.

This point can be illustrated by comparing the proposed boundaries and the adopted continuous function. When the agency plotted the revised product plans against the proposed boundaries, we found that there were approximately 1.25 million vehicles that could move to a less stringent category with changes in footprint of less than one square foot. These minor changes would reduce applicable target values by 1.0–3.3 mpg. Under a continuous function, footprint increases of similar magnitude would reduce applicable targets by no more than 0.2 mpg.

Third, reliance on a continuous function substantially reduces an incentive present in the proposed step-function standard for manufacturers to ''downsize'' vehicles. IIHS raised concern that under the proposed step function system, manufacturers might reduce the sizes of models within the limits of the footprint range for a category to make it easier to comply with their required fuel economy levels. The IIHS commented that there ''is room within NHTSA's proposed system of footprint categories to retain the same fuel economy target but reduce size * * *'' and that ''the safety of the resulting vehicle would be compromised.'' General Motors also acknowledged this possibility, stating that the category structure of the Reformed CAFE system:

[S]till may incentivize manufacturers to use reductions in track width and/or wheelbase (to create a smaller and/or lighter vehicle) to meet CAFE targets within a category or overall. While changes in vehicle dimensions may not be the first choice for manufacturers, they remain an option-one that can adversely affect safety.

In contrast, IIHS stated that any downsizing under a continuous function would subject a vehicle to a more stringent target. As such, IIHS stated that a continuous function would better minimize the potential for manufacturers to respond to the CAFE program through unsafe downsizing.

With respect to minimizing the incentive to downsize, the agency agrees with IIHS. We concur with IIHS's concern over the potential to downsize within a step function category, particularly within the smallest size categories, where reducing vehicles' size or weight likely would have the largest impact on occupant safety.

Commenters raised a variety of other procedural and administrative concerns that the agency should take into account in choosing between stepwise and continuous functions. General Motors and Nissan expressed concern that setting fuel economy targets using a continuous function could present an even greater challenge to public understanding of the Reformed CAFE program than relying on a category system to set vehicles' fuel economy targets. Neither commenter explained why they believed a stepwise function would be more readily understood. Honda commented that it would be easier for manufacturers of high fuel economy vehicles to demonstrate the ''superiority of their products'' to potential buyers under a stepwise function than under a continuous function.

We do not believe that a standard based on a continuous function is harder to understand than one based on a step function. The main difference is that instead of identifying an appropriate category to determine a vehicle's target, a target under a continuous function standard is located along a curve. Calculating a manufacturer's required fuel economy is done in a similar manner under both systems and calculating a manufacturer's compliance is performed in exactly the same manner.

While manufacturers may not be able to advertise ''best in CAFE category'' under a continuous function, the Reformed CAFE does not prevent such comparisons from being made under non-CAFE classifications. Manufacturers currently promote ''best in class'' claims based on industry and marketing classifications. For example, Honda advertises that its Ridgeline is the ''only 4-door pickup to achieve the highest government crash test rating (5 stars) for both frontal and side-impact tests.''[94] Under the current CAFE program, light trucks are all within a single fleet, yet manufacturers still advertise ''best in class.'' Presumably, such claims could continue to be made under Reformed CAFE.

Nissan asserted that compliance calculations would be ''unduly cumbersome'' under a continuous function. Nissan also stated that the agency's administration and enforcement process would be more burdensome under a continuous function than under a stepwise function because NHTSA would need to review complex compliance calculations submitted by each manufacturer.

In the NPRM, we proposed requiring manufacturers to submit a vehicle's footprint along with the CAFE data currently collected. Manufacturers and the agency would rely on this data to determine required fuel economy levels and compliance. An additional calculation would be required to determine a vehicle's target, as opposed to determining the appropriate category and corresponding target. However, we do not believe that the additional calculation—one easily performed using a programmable hand calculator or spreadsheet program—will be overly cumbersome.

Ford indicated that the use of a harmonic average to calculate a manufacturer's compliance obligation, combined with the use of categories, would provide manufacturers the greater flexibility to make improvements in an appropriate manner as opposed to use of a harmonic average with a continuous function.

The standard adopted in this document retains the flexibility provided by use of a harmonic average to determine a manufacturer's compliance requirement and a manufacturer's actual fuel economy level. Additional flexibility is provided by the fact that fuel economy targets are more specific to a vehicle. As opposed to being compared to a target representative of the capabilities of vehicles within a range of footprint values, the final rule compares a vehicle to the potential fuel economy achievable by vehicles of equal size. A manufacturer still has the ability to compensate for a vehicle that performs below its set fuel economy target by exceeding the target for one or more of its other models.

Toyota argued that because the NPRM did not propose a specific continuous function for review, ''additional notice and comment would be necessary should NHTSA wish to pursue a continuous line function in place of size-based targets, since it is simply not possible for manufacturers or the public to determine the implications of such a system in the context of new standards for model years 2008 through 2011.'' In contrast, Nissan asserted that switching to a continuous function would ''result in little to no difference in fuel economy compliance levels,'' suggesting that the NPRM's discussion of a continuous function was sufficiently detailed to allow a manufacturer to assess the costs and other challenges of complying with a Reformed CAFE standard that uses a continuous function.

Although the agency is not adopting the category system as proposed, the targets under today's final rule are consistent with the category targets proposed in the NPRM. Figure 13 below shows the resulting relationship between vehicle footprint and target fuel economy level for 2011 described by the logistic function with parameter values statistically calibrated for that model year and subsequently optimized. The figure also compares its curved shape to that stair step shape of the fuel economy targets established in the previously proposed category system for that model year.

[94] *http://automobiles.honda.com/models/model_overview.asp?ModelName=Ridgeline* (last visited January 15, 2006).

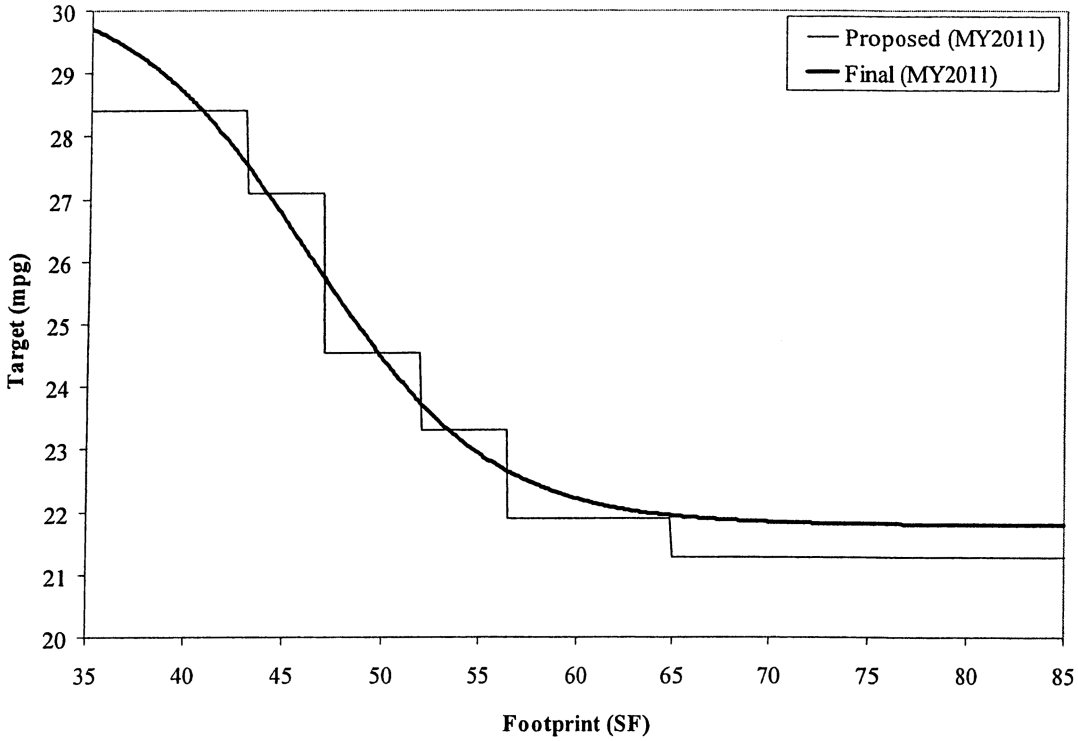


**Figure 13: Final "optimized" curve compared to the proposed step function**

RMI favored a step-function, because its ''size neutrality'' provides a better foundation for replacing fuel economy standards with a ''feebate'' system. In context of fuel economy, ''feebate'' refers to a transportation initiative in which consumers of low-fuel economy vehicles would pay into a fund from which payments would be made to purchasers of high-fuel economy vehicles. In response to RMI's comment, we note that EPCA does not provide for a feebate system, but instead requires the agency to establish average fuel economy standards. However, as discussed above, the continuous function adopted today provides greater ''size neutrality'' than a step function (i.e., a continuous function reduces incentives to downsize or upsize a vehicle).

Although the continuous function standard adopted in today's final rule eliminates the abrupt changes in fuel economy targets present in a step-function standard, it is important to recognize that the function does not ''smooth'' the targets as requested by some commenters. Toyota, Porsche, BMW, and the Alliance questioned why the stringency in Category 3 increased at a higher rate than the stringency levels of other categories. Toyota stated that vehicles in this size category tend to be fairly fuel-efficient unibody SUVs and minivans. Toyota also noted that the proposed Category 3 target experienced a 5.4 percent increase between 2008 and 2009, while the target for Category 6 actually went down from 2009 to 2010. Toyota suggested that the agency consider ''smoothing'' the target levels for the interim model years by linearly increasing the target levels between 2008 and 2011. Similarly, Honda questioned the increases in stringency proposed for the smaller footprint vehicles. Honda stated that, at least in theory, the agency's methodology (i.e., adding technology to each vehicle until the marginal cost exceeds the marginal benefits) should result in more stringent standards for larger vehicles, since the higher baseline fuel consumption would justify the addition of more technology. Honda observed that under the proposed step function light trucks in the smallest footprint category were projected to achieve an increase in fuel economy of 22 percent, while the increase for light trucks in the largest footprint category was only 16 percent. Honda questioned whether technologies have been applied uniformly and fairly to all vehicles.

As explained above, the stringency of the targets is based on the opportunity to apply fuel savings technology to vehicles within the light truck fleet. Differences in increases in stringency between vehicles of different sizes reflect differences in the potential improvements for those vehicles, and the costs and benefits of those improvements. While larger vehicles typically have low fuel economy performance, that does not mean that such vehicles are not equipped with fuel saving technologies. Conversely, the higher fuel economy performance of smaller vehicles is not necessarily reflective of fuel savings technologies, but may be more indicative of the vehicles small size. The reformed CAFE system recognizes variations in the baseline fuel economy levels between vehicles, in the costs of improving fuel economy, and in the resulting fuel savings and related benefits. Manufacturers' efforts to improve fuel economy are reflected in the degree of projected improvement across the range of footprint values. Increases in stringency above a manufacturer's baseline are consequences of the agency's improving the overall fuel efficiency of the light truck fleet to a maximum feasible level.[95]

[95] Additionally with regard to Honda's comment, it is also important to distinguish between improvements in fuel economy (which is measured

Continued

b. Continuous Function and Targets vs. Classes and Standards

As explained in the NPRM, we considered an approach under which we would establish separate classes based on footprint and establish a standard for each class. However, there were two primary shortcomings that led us to evaluate other approaches for our Reformed CAFE. Nothing provided by the commenters caused us to re-evaluate our decision not to establish a multi-class system based on footprint.

First, transfers of credits earned in a footprint class in a model year to a different footprint class in a different model year would have required a complicated process of adjustments to ensure that fuel savings are maintained.[96] This is because credits (denominated in mpg) earned under the multiple classes and standards approach would have differing energy value. Credits earned for exceeding the higher fuel economy standard for the smaller footprint vehicles would have less energy value than exceeding the lower fuel economy standard for the larger footprint vehicles by an equal increment. In fact, if credits were generated in a class with relatively high CAFE standards and transferred to another class with relatively low CAFE standards, total fuel use by all vehicles in the two classes might increase. That result would undermine the entire reform effort by producing lessened energy security.

One can calculate the appropriate adjustments for such a credit transfer system to ensure no loss of fuel savings. This would ensure equivalent energy savings. However, instituting a complicated new process of credit adjustments would detract from the benefits of reforming the CAFE program by making it more difficult to plan for and determine compliance. Further, taking this step would not cure another problem associated with credits. Credits earned by exceeding a standard in a model year may be used in any of the three model years preceding that model year and, to the extent not so used, in any of the three model years following that model year (49 U.S.C. 32903(a)). They may not, however, be used within the model year in which they were earned (Id.).

Second, establishing separate standards for each class would needlessly restrict manufacturer flexibility in complying with the CAFE program. A requirement for manufacturers to comply with separate standards, combined with the inability either to apply credits within the same model year or to average performance across the classes during a model year, could increase costs without saving fuel. This would happen by forcing the use of technologies that might not be cost-effective. Further, Congressional dialogue when considering the enactment of the EPCA and amendments to it has repeatedly expressed the view that manufacturers should have flexibility in complying with a CAFE program so that they can ensure fuel savings, while still responding to other external factors.

Reliance on a continuous function avoids these shortcomings just as the proposed step function would have avoided these shortcomings. Instead of establishing distinct standards for multiple classes, our proposal establishes targets across the range of footprint values and applies them through a harmonically weighted formula to derive regulatory obligations. Credits are earned and applied under today's final rule in the same way as they are earned and applied under Unreformed CAFE and in a manner fully consistent with the statute. Thus, no complicated new provisions for credits are needed. Further, the use of targets instead of standards allows us to retain the benefits of a harmonically weighted fleet average for compliance. This ensures that manufacturers must provide the requisite fuel economy in their light truck fleet, while giving the manufacturers the ability to average performance across their entire fleet and thus the flexibility to provide that level of fuel economy in the most appropriate manner.

c. Consideration of Additional Attributes

In the NPRM, the agency sought comment on whether Reformed CAFE should be based on vehicle size (footprint) alone, or whether other attributes, such as towing capability and/or cargo-hauling capability, should be considered. The comments received in response to our request were either strongly supportive or strongly opposed to including additional attributes. Commenters supporting consideration of additional attributes (General Motors, Nissan, DaimlerChrysler, Ford, Alliance, Sierra Research, NADA, and SUVOA) stated that such consideration is necessary to account for the varying degrees of utility among vehicles with similar footprint values. Commenters opposed to including additional attributes (NRDC, Environmental Defense, ACEEE, NESCAUM, and Rocky Mountain Institute) stressed the potential of using these attributes to manipulate vehicles into categories with less stringent targets.

The most frequently mentioned attribute was towing capability. However, Nissan stated that NHTSA should incorporate a mechanism providing fuel economy credits for all optional safety and utility features. The Alliance suggested 4WD/AWD capability in addition to towing.

Among the commenters supporting a modification for towing ability, the criteria for that classification differed. General Motors defined ''heavy-tow capable'' vehicles as a vehicle with a maximum towing capacity that is equal to or greater than 8,000 pounds. The Alliance suggested that the definition should be based on towing capacity equal to or greater than a set percentage of the vehicle's curb weight. That association argued that extra towing capacity means different things for different size vehicles.

Among those supporting consideration of additional attributes, the means suggested for providing credit for those attributes also differed. Nissan presented a method for calculating credits based on weight differences between a vehicle's base model and versions with optional safety and utility enhancing equipment, such that each additional 3 pounds of weight would provide a 0.01 mpg credit. Some commenters suggested a set percentage reduction; 5 percent with respect to towing capacity or 10 percent for 4WD/AWD. DaimlerChrysler suggested a provision which essentially created a second category for any MY 2005 product that is at least 25 percent below the 2008 MY target for its size class, rather than considering specific attributes. Under DaimlerChrysler's provision, the fuel economy target for such a vehicle would be set at its 2005 level plus 5 percent and would then increase 1.5 percent per year.

NRDC, Environmental Defense, ACEEE, NESCAUM, and Rocky Mountain Institute opposed consideration of additional attributes in determining a vehicle's target fuel economy. These commenters, along with Honda and Toyota, were concerned with the potential for

in miles per gallon) and reductions in fuel consumption (which is measured in gallons per mile). Because of differences between their initial fuel economy levels, the improvements in fuel economy that would be required by the proposed targets for the smallest and largest categories of light trucks cited by Honda (22 and 16 percent, respectively) actually correspond to reductions in fuel consumption of 18% and 14% percent, respectively.

[96] The 2003 ANPRM on reforming CAFE noted that the agency had previously concluded that the credits earned in one class could not be transferred to another class, but re-examined the legislative history of the CAFE statute and called that interpretation into question.

manufacturers to ''game'' such considerations. These commenters argued that manufacturers might find it more cost-effective to include whatever attribute was relied upon for adjustment, even if not requested or required by customers, rather than redesigning the vehicle for increase fuel efficiency.

Toyota raised specific concern with the attribute of tow rating, stating that there is not an objective method for quantifying this metric. Toyota also opposed adjustments for attributes, arguing that the targets already reflect the presence of such designs in the vehicles. Toyota stated that if these vehicles were permitted adjustments, the agency would essentially be ''double counting'' the effect of the attribute considered. Toyota further stated that depending on the attribute relied upon for adjustment, some manufacturers might be provided a competitive advantage based on their current fleet mix.

After reviewing these comments, NHTSA has decided not to consider any additional attributes for MYs 2008–2011. First, NHTSA notes that even some manufacturers noted the potential for abuse of a system that provided credits or lower targets for vehicles with certain attributes. Second, NHTSA believes the ''list of eligible features'' suggested by Nissan would be very confusing for both manufacturers and the agency.

With regard to the suggestion that the agency consider 4WD/AWD capability, the agency notes that it discontinued the option of a separate standard for 2WD vs. 4WD light trucks beginning with the standard for the 1992 model year.[97] The agency noted that separate standards were originally intended to provide an alternative means of compliance for manufacturers that manufactured primarily 4WD vehicles, and that these intended beneficiaries had disappeared. The agency noted that most manufacturers were choosing to comply with the combined standard. The agency also expressed concerns that separate standards could decrease fuel economy by encouraging the production of less fuel-efficient 4WD vehicles. Since there are no specialized manufacturers that need relief to comply with the standard, NHTSA is not reversing this decision.

With regard to towing capacity, in addition to the above concerns the agency notes that manufacturers suggested different approaches on how to define vehicles which would qualify for consideration. The agency is aware that the SAE is working on a uniform metric to rate towing capacity, and this may provide at least some of the information NHTSA would need to reconsider this issue with regard to towing capacity in the future.

d. Backstop and ''Fuel Saving'' Mechanisms

The agency is not establishing a backstop or fuel economy ''ratcheting'' mechanism under the Reformed CAFE system. As explained above, incorporating a backstop or fuel economy ratcheting system would be contrary to the intent of EPCA. The intent of the CAFE program is not to preclude future mix shifts and design changes in response to consumer demand. A backstop would likely have this influence. As discussed, a backstop or a ratcheting mechanism would limit the ability of a manufacturer to respond to market shifts arising from changes consumer demand. Such a system would be in opposition to congressional intent to establish a regulatory system that does not unduly limit consumer choice.

Additionally, supplementing the Reformed CAFE standards with a backstop would negate the value of establishing the attribute-based standards for some manufacturers and perpetuate the shortcomings of Unreformed CAFE. A backstop would essentially be a required fuel economy level akin to the Unreformed CAFE standard that would apply to a manufacturer if the required fuel economy for that manufacturer as determined under the Reformed CAFE system was below some determined threshold. For example, if consumer demand shifted to larger light trucks such that a manufacturer's required fuel economy level under the Reformed CAFE system was below the backstop fuel economy level, that manufacturer would be required to comply with the backstop. By requiring such a manufacturer to comply with the backstop, there would be a risk that the backstop would not be economically practicable given the change in the market, as occurred under the Unreformed CAFE standards in the mid-1980s. With regard to a ''ratcheting'' mechanism, an ''automatic'' increase in the stringency of targets or requirements could potentially subject manufacturers to required levels of average fuel economy level that are not technologically feasible.

Furthermore, the structure of the Reformed CAFE system addresses concerns commenters cited as the rationale for establishing a backstop, *i.e.*, concerns with manufacturers' upsizing vehicles and their fleets for the sole purpose of reducing the stringency of their light truck CAFE requirement.

First, the structure of the Reformed CAFE system minimizes the incentive for manufacturers to upsize vehicles, more so under the continuous function approach. Second, manufacturers are limited in their ability to increase the size of their vehicles beyond that extent demanded by consumers. Finally, making vehicles larger for CAFE compliance purposes is not cost-free. Market forces or fuel price increases will restrain consumer demand for large light trucks with low fuel economy. These reasons lead us to the conclusion, more so given the structure of the adopted reform, not to establish a backstop. These points apply equally to determination not to adopt a fuel economy ''ratcheting'' mechanism as recommended by several commenters.

With regard to the first point, reliance on a continuous function minimizes the incentive for manufacturers to increase vehicle size solely for the purpose of subjecting that vehicle to a less stringent target. As explained in the discussion of continuous function versus step function above, we explained that increases in vehicle size will more likely be accompanied by a decrease in fuel economy performance that offsets the reduction in target stringency. This is a result of targets decreasing gradually as vehicle size increases across the footprint continuum. This offset reduces the incentive for manufacturers to increase vehicle size solely in response to the CAFE program. The decrease in a vehicle's fuel economy performance from increasing its footprint will offset, to a degree, the advantage of the lower target.

With regard to the second point, manufacturers are limited in what changes they can make based on what will be accepted by the market. Changes in footprint result in perceptible changes in performance and design (*e.g.*, a longer and/or wider vehicle). As noted above, the track-width component of footprint, as defined in today's final rule, directly affects vehicle handling and stability. The connection between footprint and vehicle performance limits the ability of manufacturers to increase footprint in a manner not perceptible to the consumer. As stated by IIHS, under a continuous based function, customers would be more likely to notice any design changes that achieved a substantial CAFE benefit, as opposed to small changes that would move a vehicle into a less stringent category under the step-function approach.

Finally, making vehicles larger for CAFE compliance purposes is not cost-

[97] 55 FR 12487, April 4, 1990.

free. All else being equal, larger vehicles are more costly to build and operate. Market forces or fuel price increases will restrain consumer demand for large light trucks with low fuel economy, unless the need for utility justifies the expense to the manufacturers of producing and to the consumers of operating large trucks.

The agency did a preliminary evaluation of the cost associated with increasing a vehicle's footprint. We relied on the databases provided by manufacturers in which the manufacturers included a vehicle's manufacturer's suggested retail price (MSRP). We identified 22 nameplate vehicles that had data indicating more than one footprint value, either from a manufacturer offering different configurations of a nameplate or as a result of changes between model years.

We then separated out the 22 nameplates into 44 pairs and compared MSRP. Some of the price differences within the pairs appeared to represent differences in levels of options as well as footprint. The costs per square foot for these changes were in excess of $1000. These data point pairs were excluded.

The remaining pairs were evaluated. The average cost per square foot increase of the remaining 25 pairs was $119; the median cost was $46. Deleting the 5 percent highest and lowest costs resulted in a mean cost per square foot increase of $85. We note that this is a preliminary evaluation and that these costs represent those associated with increases in footprint that occur as part of a planned model redesign. We expect that the costs associated outside a planned redesign would be substantially higher.

We believe that the costs associated with increasing a vehicle's wheelbase would be even greater than those associated with an increase in track width. Based on a review of confidential information provided by a manufacturer, we estimate that the cost of redesigning a vehicle mid-product cycle such that the vehicle has a longer wheelbase would be at least equal to 50 percent of the costs associated with introducing the original vehicle design. Given this high estimate, it would be unlikely that a manufacturer would extend a vehicle's wheelbase solely in response to the CAFE program. The agency intends to further explore the costs associated with changes in footprint.

Comments from the environmental organizations raised a number of concerns, which they stated necessitated a back stop or ratcheting mechanism. These concerns can be categorized into three areas: (1) Increases in fleet size based on historic trends and potential market shift, (2) increases in a vehicle's footprint to take advantage of a less stringent category, and (3) upweighting of a vehicle to remove it form the light truck CAFE program.

With regard to the environmental organizations' first concern, we explained above that the light truck CAFE program is not intended to constrain consumer choice. Any historic upsizing of manufacturers' fleets occurred under Unreformed CAFE in response to market demands, and market demands will continue to influence the size of the light truck fleet. Moreover, the agency established the MYs 2008–2011 standards after evaluating the product plans provided by manufacturers. Planned shifts in fleet mix have been taken into consideration in establishing the final rule. Future standards will also rely, in part, on product plans provided by manufacturers. As such, projected trends in fleet mix and fleet size will continue to be a consideration in establishing future CAFE standards.

With regard to the second concern, both NRDC and Union of Concerned Scientists stated that a number of vehicles would need only changes ranging from one-tenth of an inch to 1.5 inches in wheelbase and track width to become subject to a less stringent category. The Union of Concerned Scientists stated that an increase in vehicle size of 1–10 percent would be equivalent to a 0.05 to 1.18 mpg decrease in the fleet wide average fuel economy, respectively. This concern was also echoed by IIHS.

Again, as explained above, the agency is adopting a standard based on a continuous function as opposed to the step function. Under the continuous function small changes in vehicle footprint are not rewarded with large decreases in target values. Target values decrease gradually, as opposed the larger decreases that occur as a vehicle moves between categories under the proposed system. As such, the incentive for upsizing has been further minimized by adopting a continuous function approach.

Environmental groups' third major concern was that of uprating, *i.e.*, manufacturers increasing the GVWR of vehicles beyond the 8,500 lbs GVWR boundary for the light truck CAFE program. As explained in greater detail below, the agency is extending the definition of light truck to MDPVs. By including MDPVs, we are capturing essentially all SUVs with a GVWR less than 10,000 lbs.[98]

Aside from our concerns with the legality of a backstop, the agency has concluded that the potential for fuel loss from manufacturers increasing the footprint values of vehicles or through shifting their fleet mix has been substantially reduced by the structure of the final rule. By gradually decreasing the value of targets as footprint increase, minor increases to footprint do not result in significant decreases in applicable target values. Further, increases to footprint come at a cost in terms of fuel economy performance, vehicle handling, and consumer acceptance.

5. Benefits of reform

a. Increased Energy Savings

The Reformed CAFE system increases the energy savings of the CAFE program over the longer term because fuel saving technologies will be required to be applied to light trucks throughout the entire industry, not just by a limited number of manufacturers. The energy-saving potential of Unreformed CAFE is limited because it requires only a few full-line manufacturers to make improvements. In effect, the capabilities of these full-line manufacturers, whose offerings include larger and heavier light trucks, constrain the stringency of the uniform, industry-wide standard. The Unreformed CAFE standard is generally set below the capabilities of limited-line manufacturers, who sell predominantly lighter and smaller light trucks. Under Reformed CAFE, which accounts for fuel economy potential of the fleets of individual manufacturers, virtually all light-truck manufacturers will be required to improve the fuel economy of their vehicles. Thus, Reformed CAFE continues to require full-line manufacturers to improve the overall fuel economy of their fleets, while also requiring limited-line manufacturers to enhance the fuel economy of the vehicles they sell.

Our estimates indicate that the Reformed CAFE system will result in greater fuel savings than the Unreformed CAFE system during the transition period, even though the industry-wide compliance costs were equalized for those model years:

[98] With MDPVs included in the definition of light truck, only approximately 50,000 vehicles could be removed from the light truck CAFE program with an uprating of 1,000 lbs or less.

TABLE 7.—ESTIMATED FUEL SAVINGS FROM REFORMED AND UNREFORMED CAFE SYSTEMS FOR MYS 2008–2010

[in billions of gallons]

| | MY 2008 | MY 2009 | MY 2010 |
|---|---|---|---|
| Reformed CAFE system | 0.7 | 1.9 | 2.2 |
| Unreformed CAFE system | 0.6 | 1.8 | 2.0 |

The improvement in fuel savings made possible by the switch to the Reformed CAFE system will be even greater beginning MY 2011. By requiring improvements across the entire industry, the Reformed CAFE system produces greater fuel savings at levels that remain economically practicable. For comparison, the agency performed a cursory Stage analysis for MY 2011. On the basis of that cursory analysis, the agency determined that, under the Unreformed CAFE system, the fleet wide (including MDPVs) fuel economy standard would be 23.3 mpg. We note that the Stage Analysis for MY 2011 results in a lower Unreformed standard for that year than the Unreformed standard for MY 2010. This is due to the inclusion of MDPVs in MY 2011. MDPVs, which have low fuel economies, are produced primarily by General Motors. Under the Unreformed CAFE system, General Motors would be the least capable manufacturer. Because of this, and because including the MDPVs lowers the CAFE level projected for General Motors, the inclusion of MDPVs would depress the Unreformed CAFE standard. Table 8 below illustrates the difference in fuel savings between the Unreformed CAFE system and the fully implemented Reformed CAFE system in MY 2011.

TABLE 8.—COMPARISON OF THE ESTIMATED FUEL SAVINGS FROM REFORMED IN MY 2011 AND AN UNREFORMED STANDARD OF 23.3 MPG IN MY 2011

[in billions of gallons]

| | MY 2011 |
|---|---|
| Reformed CAFE system | 2.8 |
| Unreformed CAFE system | 2.1 |

As illustrated above, the Reformed CAFE system saves an additional 700 million gallons of fuel over the Unreformed CAFE system over the lifetime of the vehicles in the MY 2011 fleet. Further, we estimate that the fuel savings under a 23.3 mpg Unreformed standard in MY 2011 would have come at a cost of approximately $ 1.9 billion. While the cost of the Reformed fuel savings in MY 2011 is approximately $2.5 billion, this cost is distributed across a greater number of manufacturers. Additional discussion of the Reformed CAFE costs is provided below.

b. Reduced Incentive To Respond to the CAFE Program in Ways Harmful to Safety

In the NPRM, we noted the key trends in the light vehicle population and in the crashes that produce serious and fatal injuries to highlight the safety impacts of reforming CAFE. Specifically, we identified rollovers and crash compatibility. Both are related to reforming CAFE.

Pickups and SUVs have a higher center of gravity than passenger cars and thus are more susceptible to rolling over, if all other variables are identical. Their rate of involvement in fatal rollovers is higher than that for passenger cars—the rate of fatal rollovers for pickups and SUVs is twice that for passenger cars. Rollovers are a particularly dangerous type of crash. Overall, rollover affects about three percent of light vehicles involved in crashes, but accounts for 33 percent of light vehicle occupant fatalities. Single vehicle rollover crashes account for nearly 8,500 fatalities annually. Rollover crashes involving more than one vehicle account for another 1,900 fatalities, bringing the total annual rollover fatality count to more than 10,000.

Crash compatibility is the other prominent issue. Light trucks are involved in about half of all fatal two-vehicle crashes involving passenger cars. In the crashes between light trucks and passenger cars, over 80 percent of the fatally injured people are occupants of the passenger cars.

In regard to reducing regulatory incentives for design changes adversely affecting safety, commenters generally supported the proposed reliance on footprint, recognizing the safety concerns that led the agency to base the Reformed CAFE system on a size metric. Both General Motors and Nissan stated that weight provides the best correlation to fuel economy, but given the safety concerns about downsizing and the concerns about creating a potential for upsizing, these commenters support the use of footprint. RVIA stated that vehicle weight does have a direct impact on overall fuel economy, but the proposed reliance on footprint is reasonable.

The Alliance also supported the size-safety correlation and stated that use of footprint and the structure of Reformed CAFE would reduce the incentive to produce small vehicles in order to offset larger light trucks. However, the Alliance stated that the agency did not acknowledge improvements made by manufacturers in the static stability factor and industry's commitment to address the compatibility issue.

The Rocky Mountain Institute supported the use of footprint, stating that the proposal would create an incentive for decoupling size from weight by adopting lighter-but-stronger materials and would encourage manufacturers to make vehicles that are ''big, hence protective and comfortable, without also making them heavy, hence hostile and inefficient.'' The Aluminum Association stated that use of footprint would provide opportunities to increase safety while saving fuel by substituting aluminum for steel.

The agency continues to believe that the manner in which fuel economy is regulated can have substantial effects on vehicle design and the composition of the light vehicle fleet. Reforming CAFE is important for vehicle safety because the current structure of the CAFE system provides an incentive to manufacturers to reduce the weight and size of vehicles, and to increase the production of vehicle types (particularly pickup trucks and SUVs) that are more susceptible to rollover crashes and are less compatible with other light vehicles. For these reasons, reforming CAFE is a critical part of the agency's effort to address the vehicle rollover and compatibility problems.

The final rule based on footprint substantially reduces the incentive to introduce smaller vehicles or to reduce vehicle size to offset the lower fuel economy of larger vehicles. Adding the continuous function concept to footprint eliminates the opportunity that existed under the proposal to downweight by reducing vehicle size to the lower edge of a category (which would have increased vehicle fuel economy without subjecting the vehicle to a higher target). It does this by

eliminating the categories that covered a range of footprint sizes. Thus, under the final rule, each change in footprint results in a different target.

i. Reduces Incentive To Reduce Vehicle Size and To Offer Smaller Vehicles

Without CAFE reform, significant increases in Unreformed light truck CAFE standards, especially if accompanied by high fuel prices, would likely induce a wave of shifting production mix toward smaller light trucks and reducing the size and/or weight of light trucks. Such a shift occurred in the 1970's and early 1980's when fuel price increases and competitive pressures induced vehicle manufacturers to shift their production mix toward their smaller and lighter vehicles to offset the lower fuel economy of larger and heavier vehicles and to redesign their vehicles by reducing their size and/or weight.[99] The need for manufacturers to make rapid and substantial increases in passenger car and light truck CAFE in response to the CAFE standards in late 1970's and early 1980's provided an added incentive for them to take those actions.

The shift in production mix and reduction in vehicle size/weight that occurred in the 1970's and early 1980's contributed to many additional deaths and injuries.[100] While the adoption of additional safety performance requirements for those vehicles has saved lives, even more lives would have been saved if the shifting of production mix toward smaller vehicles and the reduction in size and/or weight had not occurred.

By relying on vehicle size to determine required fuel economy levels, the agency will minimize the incentive for manufacturers to comply through downsizing vehicles or by increasing the production of smaller vehicles solely to offset the sales of larger vehicles. These compliance strategies reduce safety by reducing the crashworthiness of individual vehicles, and compound the problem of fleet compatibility.

Reforming CAFE such that required fuel levels are determined through the use of footprint-based fuel economy targets discourages reductions in vehicle size. As a vehicle decreases in size, the fuel economy target against which that vehicle is compared increases.

Several commenters raised concern that the structure as proposed (i.e., a category-based system) would still reward downsizing. IIHS stated that a manufacturer could rely on limited reduction in size as a method to reduce weight, without moving a vehicle into a different category.

The agency recognizes the potential for limited downsizing being rewarded in a category based system. However, this potential reward is substantially reduced and possibly eliminated under the continuous function adopted today. Under the continuous function, any reduction in size will result in a vehicle becoming subject to higher target. Where a step-function would permit limited reduction in footprint within a category, under a continuous function any reduction in footprint will subject a vehicle to a more stringent target.

IIHS further stated that even if a manufacturer maintained a vehicle's size, the manufacturer still could reduce a vehicle's weight in order to improve the vehicle's fuel economy. IIHS cautioned that such weight reduction would likely reduce a vehicle's crashworthiness because decreased size and weight have separate effects on a vehicle's ability to protect its occupants. IIHS, citing the NAS report and Kahane study, stated that although the potential safety cost is greater when both decrease, a decrease in mass alone will, on average, reduce the crashworthiness of the light truck fleet.

The potential for downweighting through limited reductions in footprint is minimized under the Reformed CAFE structure adopted in this document. Reliance on a continuous function further discourages footprint reduction because as a vehicle model's footprint is reduced, the vehicle is subject to a higher target. Reformed CAFE, as adopted today, links the level of the average fuel economy targets to the size of footprint so that there is an incentive to reduce weight only to the extent one can do so while also preserving size. Thus, we have minimized the incentive for a compliance strategy that could increase rollover propensity and cause further divergence in the size of the light truck fleet.

By basing Reformed CAFE on a measure of vehicle size (footprint) instead of weight, the agency is aware that the CAFE program will continue to permit and to some extent reward weight reduction as a compliance strategy. The safety ramifications of downweighting—especially downweighting that is not achieved through downsizing—will need to be examined on a case-by-case basis in future rulemakings. Historically, the size and weight of light-duty vehicles have been so highly correlated that it has not been technically feasible to fully disentangle their independent effects on safety.[101] The agency remains concerned about compliance strategies that might have adverse safety consequences.

As explained in more detail below in Section VIII, Technology issues, in determining the fuel saving potential of a manufacturer's fleet, the agency employed weight reduction as a compliance strategy only in limited instances. The agency only considered weight reduction for vehicles with a curb weight greater than 5,000 lbs. This limitation was based on the Kahane study, which indicated that weight reduction of the heaviest vehicles would not negatively impact safety. If downweighting were concentrated among the heaviest of the light trucks, any extra risk to the occupants of those vehicles might be more than offset by lessened risk in multi-vehicle crashes to occupants of smaller light trucks and cars. IIHS agreed with the agency that downweighting of the heaviest vehicles would likely not harm safety.

Additionally, it is possible that some of the lightweight materials used in a downweighting strategy may have the strength and flexibility to retain or even improve the crashworthiness of vehicles and the safety of occupants. General Motors expressed some concern with the practicality of using lightweight materials, stating that it does not intentionally reduce mass by replacing it with advanced materials. However, General Motors did state that it seeks to use advanced materials and technologies in new generation vehicles. As stated above, the agency used limited weight reduction in our modeling;

[99] Shifting production mix down toward smaller vehicles involves decreasing the production volumes of vehicles that are heavier or larger and thus have relatively low fuel economy and increasing the production volumes of lighter or smaller vehicles.

[100] NAS Report, p. 3.

[101] Kahane, C.J., Response to Docket Comments on NHTSA Technical Report, Vehicle Weight, Fatality Risk and Crash Compatibility of Model Year 1991–99 Passenger Cars and Light Trucks, Docket No. NHTSA–2003–16318–16, 2004 discusses the historic correlation and difficulty of disaggregating weight and ''size.'' Except for a strong correlation of track width with rollover risk, it shows weak and inconsistent relationships between fatality risk and two specific ''size'' measures, track width and wheelbase, when these are included with weight in the analyses. See also Kahane, C.J., Vehicle Weight, Fatality Risk and Crash Compatibility of Model Year 1991–99 Passenger Cars and Light Trucks, NHTSA Technical Report No. DOT HS 809 662, Washington, 2003, pp. 2–6. Evans, L. and Frick, M.C., Car Size or Car Mass—Which Has Greater Influence on Fatality Risk? American Journal of Public Health 82:1009–1112, 1992, discusses the intense historical correlation of mass and wheelbase and finds that relative mass, not relative wheelbase is the principal determinant of relative fatality risk in two-car collisions. See also, Evans, L. ''Causal Influence of Car Mass and Size on Driver Fatality Risk,'' American Journal of Public Health, 91:1076–81, 2001.

however, we cannot dictate which technologies a manufacturer must employ in order to comply with the standards. The stringency of today's standards should not make it necessary for any manufacturers to rely on unsafe or unproven compliance strategies.

Reformed CAFE also reduces the incentive for manufacturers to comply through increasing the number of smaller vehicles, with higher fuel economies, to offset larger vehicles, with lower fuel economies. The way in which Reformed CAFE dilutes the effect of this action as compliance strategy can be seen by looking at a Reformed CAFE standard. The fuel economy targets, as determined by the continuous function, are constants. Regardless of what compliance strategy is chosen by a manufacturer, nothing that the manufacturer does will change those values.

The distribution of vehicle models along the continuous function and the production volume of each model, however, are variables under the control of the manufacturers. Further, they are variables not only in the formula for calculating a manufacturer's actual level of CAFE for a model year, but also in the formula for calculating a manufacturer's required level of CAFE for that model year.

Thus, by changing the distribution of its production across the footprint based-function, a manufacturer will change not only its actual level of CAFE, but also its required level of CAFE. For example, all other things being equal, if a manufacturer were to increase the production of one of its higher fuel economy models and decrease the production of one of its lower fuel economy models, both its actual level of CAFE and its required level of CAFE would increase.

Likewise, again all other things being equal, if a manufacturer were to redesign a model so as to decrease its footprint (thereby presumably also decreasing its weight), the model will become subject to a higher target. Again, as a result, both the manufacturer's actual CAFE and required CAFE would increase. Thus, we have substantially reduced the incentive for a compliance strategy that could cause further divergence in the size of the light truck fleet and increase rollover propensity.

The reduced effectiveness of those actions as compliance strategies under Reformed CAFE increase the likelihood that manufacturers will choose two other actions as the primary means of closing the gap between those two levels: (1) Reducing vehicle weight while keeping footprint constant, and (2) adding fuel-saving technologies. Both of those actions would increase a manufacturer's actual CAFE without changing its required CAFE. Nevertheless, since a change in a vehicle's footprint will result in a change in both actual and required CAFE, manufacturers will have more flexibility to respond to consumer demand for vehicles with different footprint values without harming their ability to comply with CAFE standards or adversely affecting safety.

ii. Reduces the Difference Between Car and Light Truck CAFE Standards

In discussing the proposed step-function CAFE standard, we stated that the Reformed CAFE system would reduce the disparity between car and light truck standards—the so called ''SUV loophole''—which in turn would promote increased safety because the disparity has created an incentive (beyond that provided by the market by itself) to design vehicles to be classified as light trucks instead of cars.[102] The continuous function standard adopted today will operate in the same manner. The fuel economy targets along the continuous function for the smaller footprint categories of light trucks would, by MY 2011, be at or near (and for the smallest light trucks above) the level of the current 27.5 mpg CAFE standard for cars.

One way to design vehicles so that they are classified as light trucks instead of passenger cars is to design them so that they have higher ground clearance and higher approach angles.[103] Designing vehicles so that they have higher ground clearance results in their also having a higher center of gravity. Generally speaking, light trucks have a higher center of gravity than cars, and thus are more likely than cars to rollover. Moreover, in order to create a higher approach angle, it is necessary to raise or minimize the front structure below the front bumper, which increases the likelihood that a light truck will override a car's body in a front or rear end crash. It also increases the likelihood that when a light truck crashes into the side of a car, its front end will pass over the car's door sill and intrude farther into the car's occupant compartment. In addition to not being structurally aligned with cars, light trucks are generally heavier than passenger cars, which add to their compatibility problems with cars.

Both NRDC and the Union of Concerned Scientists questioned the effectiveness of the proposed Reformed CAFE system in limiting the incentive to produce light trucks as opposed to passenger cars. The Union of Concerned Scientists stated that not all passenger car-like light trucks would be in the first two of the proposed categories. The Union of Concerned Scientists listed the Ford Freestyle and the Dodge Magnum as examples of passenger car-like light trucks that have footprint values larger than proposed categories one and two, and thus would be subject to fuel economy targets lower that the passenger car standard. NRDC cited a forecast from The Planning Edge forecast which suggested that 27 new models of small and crossover vehicles would be added to the light truck fleet between MY 2005 and MY 2010, some of which would not be in the first category of the proposed CAFE structure. NRDC stated that the Reformed CAFE structure would still provide an incentive for automakers to classify vehicles as light trucks.

As stated above, the Reformed CAFE system will compare smaller light trucks to fuel economy levels more comparable to the passenger car standard. A vehicle such as the Ford Escape, with a footprint of 43.5 square feet, will be compared to a fuel economy target of 27.3 mpg in MY 2011. This significantly minimizes the incentive to manufacturer a vehicle as a light truck as opposed to a passenger car, solely for CAFE purposes.

c. More Equitable Regulatory Framework

The Reformed CAFE system adopted today provides a more equitable regulatory framework for full-line vehicle manufacturers and creates a level playing field for all manufacturers.

The Unreformed CAFE system cannot match the Reformed CAFE system in terms of providing an equitable regulatory framework for different vehicle manufacturers. Under Unreformed CAFE, all vehicle manufacturers are required to comply with the same fleet-wide average CAFE requirement, regardless of their product mix. For full-line manufacturers, this creates an especially burdensome task. We note that these manufacturers often offer vehicles that have high fuel economy performance relative to others in the same size class, yet because they sell many vehicles in the larger end of the light truck market, their overall CAFE is low relative to those

[102] NAS Report (p. 88) noted that that gap created an incentive to design vehicles as light trucks instead of cars.

[103] The term ''approach angle'' is defined by NHTSA in 49 CFR 523.2 as meaning ''the smallest angle, in a plane side view of an automobile, formed by the level surface on which the automobile is standing and a line tangent to the front tire static loaded radius arc and touching the underside of the automobile forward of the front tire.''

manufacturers that concentrate in offering smaller light trucks. As a result, Unreformed CAFE is binding for such full-line manufacturers, but not for limited-line manufacturers who sell predominantly smaller light trucks. The full-line vehicle manufacturers have expressed a legitimate competitive concern that the part-line vehicle manufacturers are entering the larger end of the light-truck market with an accumulation of CAFE credits. While this concern has merit, it is also the case that some part-line manufacturers (e.g., Toyota and Honda) have been industry innovators in certain technological aspects of fuel-economy improvement.

As with the proposed step-function, the Reformed CAFE program adopted today requires manufacturers to comply with a fuel economy level that is representative of that manufacturer's actual production mix. Under both functions, vehicles are compared to fuel economy targets more representative of a vehicle's fuel saving capabilities than comparison to a single flat standard. In fact, a required fuel economy level under the continuous function is more representative of a manufacturer's capabilities, because a target is established for each specific vehicle footprint, as opposed to the proposed step function for which a target would have been established for a range of footprint values.

d. More Responsive to Market Changes

Reformed CAFE is more market-oriented because it respects economic conditions and consumer choice. Reformed CAFE does not force vehicle manufacturers to adjust fleet mix toward smaller vehicles unless that is what consumers are demanding. As the industry's sales volume and product mix changes in response to economic conditions (e.g., gasoline prices and household income) and consumer preferences (e.g., desire for seating capacity or hauling capability), the expectations of manufacturers under Reformed CAFE will, at least partially, adjust automatically to these changes. Accordingly, Reformed CAFE may reduce the need for the agency to revisit previously established standards in light of changed market conditions, a difficult process that undermines regulatory certainty for the industry. In the mid-1980's, for example, the agency relaxed several Unreformed CAFE standards because fuel prices fell more than expected when those standards were established and, as a result, consumer demand for small vehicles with high fuel economy did not materialize as expected. By moving to a market-oriented system, the agency may also be able to pursue more multi-year rulemakings that span larger time frames than the agency has attempted in the past.

*E. Comparison of Estimated Costs To Estimated Benefits*

1. Costs

In order to comply with the Reformed CAFE standards, we estimate the average incremental cost per vehicle to be $66 for MY 2008, $201 for MY 2009, $213 for MY 2010, and $271 for MY 2011. Under the Reformed CAFE system, a greater number of manufacturers will be required to improve their fleets and make additional expenditures than under the Unreformed CAFE system. The level of additional expenditure that would be necessary beyond already planned investment varies for each individual manufacturer. These individual expenditures are discussed in more detail in Chapter VII of the FRIA. As stated above, these costs are distributed across a greater share of the industry.

The total incremental costs (the costs necessary to bring industry from 22.2 mpg, the level required by the standard for MY 2007, to the final rule levels) are estimated to be $553 million for MY 2008, $1,724 million for MY 2009, $1,903 million for MY 2010, and $2,531 million for MY 2011. A comparison between the Reformed and Unreformed CAFE system costs is shown in Table 9. By policy design, the mpg levels under Reformed CAFE were set so that the industry-wide costs of Reformed CAFE are roughly equal to the industry-wide costs of Unreformed CAFE for MY 2008–2010.

TABLE 9.—ESTIMATED COST FROM REFORMED AND UNREFORMED CAFE SYSTEMS FOR MYS 2008–2010

[in millions of year 2003 dollars]

| | MY 2008 | MY 2009 | MY 2010 |
|---|---|---|---|
| Reformed CAFE system | 553 | 1,724 | 1,903 |
| Unreformed CAFE system | 536 | 1,621 | 1,752 |

2. Benefits

The benefits analysis applied to the final standards under the Unreformed CAFE system was also applied to the standards under the final Reformed CAFE system. Benefit estimates include both the benefits from fuel savings and other economic benefits from reduced petroleum use. A more detailed discussion of the application of this analysis to the required fuel economy levels under the Reformed CAFE system can be located in Chapter VIII of the FRIA.

Adding benefits from fuel savings to other economic benefits from reduced petroleum use as a result of the Reformed CAFE standards produced an estimated incremental benefit to society. The total value of these benefits is estimated to be $782 million for MY 2008, $2,015 million for MY 2009, $2,336 million for MY 2010, and $2,992 million for MY 2011, based on fuel prices ranging from $1.96 to $2.39 per gallon. These estimates are provided as present values determined by applying a 7 percent discount rate to the future impacts. We translated impacts other than fuel savings into dollar values, where possible, and then factored them into our total benefit estimates. The benefits analysis for Reformed CAFE is based on the same assumptions as the benefits analysis for Unreformed CAFE.

Based on the forecasted light truck sales from AEO 2005 and an assumed baseline fuel economy (i.e., the industry wide fuel economy level if the MY 2007 standard were to remain in effect), we estimated the fuel savings from the Reformed CAFE program. This analysis resulted in estimated lifetime fuel savings of 746 million, 1,940 million, 2,230 million, and 2,834 million gallons under the Reformed CAFE standards for MY 2008, 2009, 2010, and 2011 respectively.

NHTSA estimates that the direct fuel-savings to consumers account for the majority of the total benefits, and by themselves exceed the estimated costs of adopting more fuel-efficient technologies. In sum, the total incremental costs by model year compared to the incremental societal benefits by model year are as follows:

TABLE 10.—COMPARISON OF INCREMENTAL COSTS AND BENEFITS FOR THE REFORMED CAFE STANDARDS

[In millions]

| | MY 2008 | MY 2009 | MY 2010 | MY 2011 |
|---|---|---|---|---|
| Total Incremental Costs* | $553 | $1,724 | $1,903 | $2,531 |
| Total Incremental Benefits* | 782 | 2,015 | 2,336 | 2,992 |

* Relative to the 22.2 mpg standard for MY 2007

These estimates are provided as present values determined by applying a 7 percent discount rate to the future impacts.

In light of these figures, we have concluded that the standards established under the Reformed CAFE system serve the overall interests of the American people and are consistent with the balancing that Congress has directed us to do when establishing CAFE standards. For all the reasons stated above, we believe the Reformed CAFE standards represent fuel economy levels that are economically practicable and, independently, that are a cost beneficial advancement for American society. A more detailed explanation of our analysis is provided in Chapter IX of the FRIA.

3. Uncertainty

As with the Unreformed CAFE standards, the agency recognizes that the data and assumptions relied upon in our analysis have inherent limitations that do not permit precise estimates of benefits and costs. NHTSA performed a probabilistic uncertainty analysis on the Reformed CAFE standards to examine the degree of uncertainty in its costs and benefits estimates. Factors examined included technology costs, technology effectiveness in improving fuel economy, fuel prices, the value of oil import externalities, and the rebound effect. This analysis employed Monte Carlo simulation techniques to examine the range of possible variation in these factors. As a result of this analysis, the agency thinks it very likely that the benefits of the Reformed CAFE standards will exceed their costs for all four model years. A detailed discussion of the uncertainty analysis is provided in Chapter X of the FRIA.

*F. MY 2008–2011 Reformed CAFE standards*

The manner in which a manufacturer's required overall CAFE for a model year under the Reformed system is computed is similar to the way in which its actual CAFE for a model year has always been calculated. Its required CAFE level is computed on the basis of the production and the footprint target as follows.

$$Required_Fuel_Economy_Level = \frac{N}{\sum_i \frac{N_i}{T_i}}$$

Where:

N is the total number (sum) of light trucks produced by a manufacturer,

$N_i$ is the number (sum) of the ith model light truck produced by the manufacturer, and

$T_i$ is fuel economy target of the ith model light truck, which is determined according to the following formula, rounded to the nearest hundredth: where,

$$T = \frac{1}{\frac{1}{a} + \left(\frac{1}{b} - \frac{1}{a}\right)\frac{e^{(x-c)/d}}{1+e^{(x-c)/d}}}$$

a = the maximum fuel economy target (in mpg)

b = the minimum fuel economy target (in mpg)

c = the footprint value (in square feet) at which the fuel economy target is midway between a and b

d = the parameter (in square feet) defining the rate at which the value of targets decline from the largest to smallest values

e = 2.718

x = footprint (in square feet, rounded to the nearest tenth) of the vehicle model

TABLE 11.—CALIBRATED PARAMETER VALUES FOR TARGET

| Parameter | Model year | | | |
|---|---|---|---|---|
| | 2008 | 2009 | 2010 | 2011 |
| a | 28.56 | 30.07 | 29.96 | 30.42 |
| b | 19.99 | 20.87 | 21.20 | 21.79 |

TABLE 11.—CALIBRATED PARAMETER VALUES FOR TARGET—Continued

| Parameter | Model year | | | |
|---|---|---|---|---|
| | 2008 | 2009 | 2010 | 2011 |
| c | 49.30 | 48.00 | 48.49 | 47.74 |
| d | 5.58 | 5.81 | 5.50 | 4.65 |

The following is a representative sample of footprint values for MY 2005 light trucks and their associated targets for MY 2011:

TABLE 12.—REPRESENTATIVE VEHICLES AND THEIR APPLICABLE FUEL ECONOMY TARGETS FOR MY 2011

| Representative vehicle(s) | Footprint (square feet) | Target (mpg) |
|---|---|---|
| Ford F–150 Super Cab | 75.8 | 21.81 |
| GM Silverado Extended Cab | 65.3 | 21.93 |
| Lincoln Navigator | 55.4 | 22.84 |
| Honda Odyssey | 54.7 | 22.98 |
| Hummer H3 | 50.7 | 24.16 |
| GM Equinox | 48.2 | 25.19 |
| Saturn Vue | 45.2 | 26.56 |
| Ford Escape | 43.5 | 27.32 |

Based on the product plans provided by the manufacturers, we project that manufacturers will be required to comply with fuel economy levels in MYs 2008–2011 under the Reformed CAFE system as follows:

TABLE 13.—PROJECTED REQUIRED FUEL ECONOMY LEVELS BY MANUFACTURER

| Manufacturer | MY 2008 (mpg) | MY 2009 (mpg) | MY 2010 (mpg) | MY 2011 (mpg) |
|---|---|---|---|---|
| General Motors | 21.9 | 22.6 | 22.9 | 23.2 |
| Ford | 22.7 | 23.2 | 23.8 | 23.9 |
| DaimlerChrysler | 23.2 | 23.7 | 24.1 | 24.3 |
| Nissan | 22.3 | 23.3 | 23.7 | 23.9 |
| Mitsubishi | 25.1 | 25.8 | 26.3 | 27.0 |
| Subaru | 25.4 | 26.4 | 26.3 | 26.8 |
| Toyota | 22.6 | 23.0 | 23.2 | 23.8 |
| Hyundai | 23.9 | 25.0 | 25.0 | 25.4 |
| BMW | 24.5 | 25.1 | 25.5 | 25.8 |
| Porsche | 23.0 | 23.7 | 24.0 | 24.2 |
| VW | 23.1 | 23.7 | 24.1 | 24.2 |
| Isuzu | 22.2 | 22.9 | 23.2 | 23.4 |
| Honda | 23.3 | 24.0 | 24.4 | 24.6 |
| Suzuki | 25.5 | 26.3 | 26.6 | 27.1 |

The projected required industry wide fleet fuel economy levels for MY 2008–2010 are 22.7 mpg, 23.4 mpg, and 23.7 mpg, respectively. These levels are more stringent than those in the NPRM. The projected required fleet wide required fuel economy levels in the NPRM for MYs 2008–2010 were 22.6 mpg, 23.1 mpg, and 23.4 mpg, respectively. The increase in stringency is a result of higher compliance costs associated with the Unreformed CAFE standards. Even though the Unreformed CAFE standards are the same as those proposed in the NPRM, the associated compliance costs have increased because the updated product plans reflect the fact that manufacturers have already planned to apply several of the lower cost fuel improvement technologies. As a result, the Stage analysis applies technologies with higher costs in order to achieve the same fuel economy level under the proposed Unreformed CAFE system. Because the Reformed CAFE system is constrained by costs of the Unreformed CAFE system in the transition period, the Volpe model has more to ''spend'' (and spend more efficiently than under an Unreformed standard) when applying technologies in the Reformed CAFE system. The result is Reformed CAFE standards with higher stringency than in the NPRM.

We estimate that the industry wide fleet fuel economy average in MY 2011 will be 24.0 mpg. Based on the product plans submitted in response to the ANPRM, we estimated that manufacturers intended to achieve an industry wide fuel economy level of approximately 22.0 mpg. In the NPRM the proposed Reformed standard for MY 2011 would have been 23.9 mpg, with MDPVs remaining unregulated. As a result of today's final rule, we project a required industry wide fuel economy of 24.0 in MY 2011, with MDPVs included in the light truck fleet.

While the reformed standards adopted today are more stringent than those proposed, and we are regulating a larger fleet in MY 2011, we have determined that the Reformed CAFE system and associated target levels for MYs 2008–2011 will result in required fuel economy levels that are both

technologically feasible and economically practicable for manufacturers.

## VII. Technology issues

### *A. Reliance on the NAS Report*

The agency affirms our reliance on the cost and fuel saving estimates provided in the NAS report for the technologies relied upon in our analysis. The NAS cost and effectiveness numbers are the best available estimates at this time. They were determined by a panel of experts formed by the National Academy of Sciences. The report has been reviewed by individuals chosen for their diverse perspectives and technical expertise, in accordance with procedures approved by the Report Review Committee of the National Research Council. The purpose of the independent review was to provide candid and critical comments that assisted the authors and the NAS in making the published report as sound as possible and to ensure that the report met institutional standards for objectivity, evidence and responsiveness to the study charge. The agency has reviewed other studies of technologies available to improve fuel economy and have concluded that the estimates of fuel economy technology effectiveness and costs developed by the NAS are the most reliable available. Alternative estimates recommended by some commenters have not been subject to the same level of expert and public review, and thus are not suitable for use by NHTSA in establishing fuel economy standards.

### *B. Technologies Included in the Manufacturers' Product Plans*

The Alliance, DaimlerChrysler, Ford, General Motors, Nissan, Toyota, and Sierra Research argued that the agency's analyses incorrectly projected the use of certain technologies that were either already featured on vehicles or were included in the manufacturer's product plans. Because the benefits of these technologies are already incorporated into the manufacturer's baseline capabilities, any further projected fuel economy improvements were incorrectly attributed. The commenters urged the agency to revise our analyses to account for technologies that were already on vehicles or in the product plans submitted to the agency.

In performing the Stage Analysis and the Reformed CAFE analysis to determine the final CAFE standards, the agency relied on manufacturers' comments and confidential product plan information to adjust our calculations. Accordingly, the technologies that were already featured on certain vehicles or already incorporated into the manufacturers' baseline product plans were removed from the Stage Analysis. We note that the detailed description of the adjustments made to the Stage Analysis contains confidential information and is discussed in general terms in the FRIA. However, this final rule provides a description of the steps taken in order to address comments and discrepancies between the product plan information available to NHTSA in preparing the August 2005 NPRM and this final rule.

### *C. Lead Time*

In developing the proposal, the agency relied on lead time assumptions for the introduction of technologies based on technology availability and its fuel saving benefits. The Alliance, Sierra Research, and most vehicle manufacturers argued that our application rates and timing did not adequately consider technology readiness and the typical automotive product lifecycle in proposing the Unreformed CAFE standards. Honda and Toyota cited the NAS report, which stated that ''the widespread penetration of even existing technologies will probably require 4 to 8 years.'' [104] Honda and Toyota supported the NAS findings with regard to lead time assumptions.

Underscoring the importance of lead time, Toyota asked NHTSA to propose CAFE standards for model years beyond 2011 as soon as possible in order to afford the manufacturers an opportunity for timely product development and planning. Toyota argued that in Japan and Europe, fuel economy targets for the 2008 to 2010 model years have been in place since 1999 and 2000 respectively.

Manufacturers offered the following specific arguments in favor of reduced phase-in rates and extending lead time.

Product cycles and finite engineering resources. The commenters argued that technologies cannot be incorporated in every vehicle at the same time due to capital costs, differing vehicle and powertrain planning cycles, and engineering resource constraints, both at the manufacturer level as well as at the supplier level. As DaimlerChrysler explained, resource constraints dictate that a new technology is first integrated into a single product and later deployed fleet-wide. Similarly, Ford argued that there are not enough resources available to develop and implement multiple technologies simultaneously across the entire product lineup within a short period of time. Toyota stressed that the lead time is not how long it takes to develop a given technology, but how long it takes to incorporate this technology into different vehicle configurations. The manufacturers stated that product cycles are typically staggered so that not all light trucks undergo changes in the same timeframe. These commenters argued that in order to realistically reflect the manufacturers' capabilities, the Stage Analysis should stagger technology application and avoid projecting fleet-wide application of any one technology within a single model year.

With respect to the actual duration of product cycles, different manufacturers argued that for light trucks, they last from at least 5 to more that 8 years. Further, they argued that the product and technology plans for each model are usually finalized several years prior to their introduction. Manufacturers stated that after design decisions affecting the powertrain are ''frozen,'' it is nearly impossible to implement any major changes to address fuel economy.

Incorporating ''off-the-shelf'' technologies. The Alliance and vehicle manufacturers argued that even readily available ''off-the-shelf'' technology cannot be simply bolted onto an existing vehicle because integrating any technology into the vehicle is a complex task requiring advance preparations, not just with respect to vehicle integration, but also with respect to the automated assembly lines. They also argued that the manufacturers need time to ensure that the new technology is optimized not just for vehicle integration and assembly, but also for serviceability and customer satisfaction in-use. The manufacturers also argued that NHTSA should not assume that manufacturers can readily adopt ''off-the-shelf'' technologies from one vehicle application to another.

Customer acceptance. The Alliance and vehicle manufacturers argued that incorporation of specific technologies is also dependent upon customer acceptance. For example, DaimlerChrysler argued that a premature fleet-wide application of new technology could result in widespread customer rejection, which can be avoided if a given technology is slowly phased in and allowed to mature. Many commenters also argued that simultaneous fleet-wide incorporation of new technology raises product quality and durability concerns that could affect customer acceptance. For example, Honda argued that new technologies need to be ''piloted'' on a limited number of vehicles, to ensure

[104] Honda comment p. 6, and Toyota comment p. 3, quoting the NAS report.

adequate quality before being spread to a wider number of sales.

The agency recognizes that vehicle manufacturers must have sufficient lead time to incorporate changes and new features into their vehicles. In making its lead time determinations, the agency considered the fact that vehicle manufacturers follow design cycles when introducing or significantly modifying a product. For the final rule, the agency based our lead time assumptions more closely on the findings of the NAS report, typically relying on the mid-point of the NAS range for full market penetration, *i.e.*, 6 years or approximately a 17 percent phase-in rate. As illustrated in Appendix B of this document, and as discussed further below, the agency made numerous adjustments to timing when applying technologies in order to address lead time concerns.

*D. Technology Effectiveness and Practical Limitations*

The Alliance, General Motors, DaimlerChrysler, Ford, Toyota, and Sierra Research argued that the agency overstated potential fuel economy benefits of certain technologies in its analyses. The manufacturers argued that benefits assigned to a given technology are not the same for every vehicle. Instead, these commenters asserted, actual fuel economy benefits depend on vehicle characteristics. Additionally, the Alliance, Toyota, DaimlerChrysler, Ford, and General Motors argued that the agency's analyses incorporate a number of technologies that have not yet been fully developed or have implementation issues that limit their wide-spread availability. Manufacturers provided the following examples of instances in which they believe the agency overestimated fuel saving potentials or applied technologies in an overly aggressive manner:

- Aerodynamic Drag Reduction—Manufacturers stated that some aerodynamic changes could impact vehicle compatibility and result in styling constraints that could affect consumer demand;
- Improved Rolling Resistance—These commenters stated that recently improved Federal tire safety standards are so stringent they limit the availability of low rolling resistance tires. Further, these commenters stated that consumers demand all-season tires that perform well in winter weather conditions but sacrifice rolling resistance.
- Variable Valve Lift and Timing—Manufacturers stated that benefits of this technology must be offset by friction due to the increased number of sliding components required for a 2-step lift system, and by increased oil pump losses due to the need for more oil pump capacity. Further, these commenters stated that application of this technology to a multi-valve base engine will not result in sufficient incremental performance improvement to allow downsizing the engine;
- Hybrids and Diesels—Manufacturers asserted that the fuel economy benefit of hybrids varies depending on the type of hybrid, the application, and the driving cycle. With respect to diesels, manufacturers stated that widespread customer acceptance is still to be determined due to higher costs, past experience with older diesel technology, and challenges faced by manufacturers regarding Tier 2 and LEV II emissions compliance.

The manufacturers also argued that some estimates did not account for synergy or ''system effects.'' That is, when multiple technologies that address the same opportunity for improvement (*e.g.*, pumping losses) are combined, their effectiveness is diminished because they address the same type of loss. Thus, the manufacturers argued that the lack of a full examination of ''system effects'' has resulted in a set of projected fuel economy improvements that overestimate the technologies' combined capabilities. With respect to hybrid engines, several manufacturers argued that the fuel economy benefit of hybrid vehicles varies depending on the type of hybrid, the application, and the driving cycle.

In contrast, environmental organizations generally stated that the agency underestimated the availability of fuel saving technologies. These commenters generally held that existing technologies could be applied to manufacturers' fleets and result in fuel economy performances in excess of 26 mpg. The Union of Concerned Scientists stated that the agency underestimated the availability of hybrids, and noted that Toyota has stated that it plans for hybrids to account for 25 percent of its sales by early next decade. The Union of Concerned Scientists also cited Ford's goal of having the capacity to produce 250,000 hybrids by 2010. The comment provided by Sierra Club, U.S. PIRG, and NET described a study in which ''existing fuel saving and safety technology'' applied to a Ford Explorer would result in a 71 percent improvement in fuel economy.[105]

We note that the hybrid numbers cited by the Union of Concerned Scientists refer to Ford's goal for introducing hybrids in both its light truck fleet and its passenger car fleet. With respect to the study cited by Sierra Club *et al.*, the technology applications applied to the Ford Explorer have not all been proven to be feasible through application in a production vehicle.

With respect to ''systems effects,'' NHTSA's analysis used fuel economy benefit values that account for the diminished effectiveness that one technology may have when used in concert with other similar technologies. For instance, a number of technologies reduce an engine's pumping losses. For these technologies, NAS offers two fuel economy benefit values—a higher value for a ''baseline'' engine, with no such technologies applied, and a lower value for a ''reference'' engine with pumping loss partially reduced. The difference between the ''reference'' and ''baseline'' values is an estimate of the synergistic effect that results from applying similar technologies to the same vehicle. Whenever an additional technology is selected for a vehicle that already has one or more similar technologies, NHTSA always chooses the lower value to account for these synergies.

*E. Technology Incompatibility*

The Alliance, DaimlerChrysler, Ford, General Motors, Nissan, and Toyota argued that certain technologies projected in the agency analyses are incompatible with their vehicle or engine architecture. While their specific comments regarding NHTSA's technology projections are confidential, we are able to provide some generic examples.

Manufacturers argued that not all engines are readily compatible with cylinder deactivation. For some, incorporation of this technology would require substantial investment and engineering resources. Similarly, manufacturers argued that switching from a single overhead cam design to a dual overhead cam design would, in some instances, require a complete engine redesign. Manufacturers also argued that because of greater torque, CVTs are not compatible with heavier vehicles equipped with large V8 engines. Instead, they work best on lighter light trucks based on passenger car platforms. Similarly, manufacturers argued that electrical power steering is compatible with only smaller light trucks, unless the heavier vehicles were also switched to 42-volt electrical systems. At least one manufacturer asserted that low friction oil might be incompatible with some engine designs

[105] Friedman *et al.*, Building a Better SUV: A Blueprint for Saving Lives, Money and Gasoline. Union of Concerned Scientists and the Center for Auto Safety. September 2003.

and expressed concerns about the availability of low friction oil in some markets. Finally, the manufacturers argued that because of the consumer demand and expectations for off-road capabilities, all-season traction, and greater stopping performance, low rolling resistance tires are incompatible with some light truck models.

In applying technology in the Stage Analysis and the Reformed CAFE analysis to determine the final standards, the agency carefully considered the manufacturers' comments and confidential product plan information to adjust our calculations. In some instances, the manufacturers' comments reflected strategies already employed in the agency's analysis. For example, the NPRM analysis did not apply CVTs to larger light trucks equipped with V8 engines. Further, the technologies that turned out to be incompatible with certain vehicles were removed from the Stage Analysis. When it was practicable to do so, the agency substituted different technology applications that were compatible with those vehicles. As explained above, the detailed description of the adjustments made to the Stage Analysis contains confidential information and is not publicly available. However, Appendix A of this document and the FRIA provide a description of the steps taken in order to address the issue of incompatible technologies (see FRIA p. VI–10).

*F. Weight Reduction*

In the analyses for the NPRM, we included the possibility of limited vehicle weight reduction for vehicles over 5,000 lbs. curb weight where we determined that weight reduction would not reduce overall safety and would be a cost effective choice.[106] Use of the 5,000 lbs cut-off point was based on analysis in the Kahane study. The Kahane study found that the net safety effect of removing 100 pounds from a light truck is zero for light trucks with a curb weight greater than 3,900 lbs.[107] However, given the significant statistical uncertainty around that figure, we assumed a confidence bound of approximately 1,000 lbs. and used 5,000 lbs. as the threshold for considering weight reduction.[108]

Several commenters supported our assumption that manufacturers could respond to the CAFE standards with limited weight reductions that would not reduce safety. Conversely, several commenters stated that any weight reduction will lead to a reduction in safety. These comments are discussed below.

Before discussing the comments, we would like to clarify that our analysis does not mandate weight reduction, or any specific technology application for that matter. We performed the analysis for the NPRM and the final rule on the assumption that manufacturers would find it cost-effective to cut some weight out of light trucks that have a curb weight greater than 5,000 lbs. Our analysis relied exclusively on other fuel-saving technologies for lighter light trucks to demonstrate that manufacturers can comply with the required fuel economy levels established today without the need for unsafe compliance measures.

Honda cited several reports, which it asserted demonstrated that limited weight reductions would not reduce safety and could possibly decrease overall fatalities. Honda stated that the 2003 study by DRI found that reducing weight without reducing size slightly decreased fatalities, and that this was confirmed in a 2004 study by DRI that assessed new data and methodology changes in the 2003 Kahane Safety Study. Honda asserted that the DRI results tend to confirm ''that curb weight reduction would be expected to decrease the overall number of fatalities.''

DRI submitted an additional study, *Supplemental Results on the Independent Effects of Curb Weight, Wheelbase, and Track Width on Fatality Risk in 1985–1998 Model Year Passenger Cars and 1985–1997 Model Year LTVs,* Van Auken, R.M. and J. W. Zellner, May 20, 2005. This DRI study concluded that reductions in footprint are harmful to safety, whereas reductions in mass while holding footprint constant would benefit safety. The DRI study disagreed with NHTSA's finding that mass had greater influence than track width or wheelbase on the fatality risk of passenger cars in non-rollover crashes.

The Union of Concerned Scientists stated that recent studies indicate that increases in weight have very little impact. However, the Union of Concerned Scientists did not cite any specific study. Further, Environmental Defense stated that the Kahane study on which the agency relied for determining the weight reduction limitations was flawed. Environmental Defense stated that the Kahane study[109] does not adequately distinguish between the effects of size and weight on motor vehicle accident mortality, despite the large body of evidence suggesting that other factors besides vehicle weight, such as vehicle size and design, have critical implications for vehicle safety.

While NHTSA agrees that limited weight reduction to heavier vehicles will not reduce safety, we continue to disagree with DRI's overall conclusion, cited by Honda, that weight reductions while holding footprint constant would significantly benefit safety in lighter vehicles. NHTSA's analyses of the relationships between fatality risk, mass, track width and wheelbase in 4-door 1991–1999 passenger cars (Docket No. 2003–16318–16) found a strong relationship between track width and the rollover fatality rate, but only a modest (although significant) relationship between track width and fatality rate in non-rollover crashes. Even controlling for track width and wheelbase—*e.g.*, by holding footprint constant—weight reduction in the lighter cars is strongly, significantly associated with higher non-rollover fatality rates in the NHTSA analysis. By contrast, the DRI study of May 20, 2005 analyzed 4-door cars and found a strong relationship between track width and fatality risk, and non-significant associations of mass and wheelbase with fatality risk (Docket No. 2005–22223–78, p. 31). In other words, when DRI analyzed the same group of vehicles as NHTSA, they did not get the same results. This difference indicates that DRI's analytical method and/or database are not the same as NHTSA's.

The agency continues to stand by our analytical method and database and we continue to believe that weight reduction in lighter vehicles would reduce safety. We also continue to believe that weight reductions in the heavier light trucks, while holding footprint constant, will not likely result in net reduction in safety.

IIHS expressed similar concern with weight reduction as the agency, stating that the safety cost of reduced mass would be most apparent if the weight reductions were to occur among the smallest and lightest vehicles. Referencing the 2003 Kahane report, IIHS indicated that decreases in mass among vehicles weighing more than

[106] The amount of projected weight reduction was two percent for light trucks with a curb weight between 5,000 and 6,000 lbs and up to four percent for light trucks with a curb weight over 6,000 lbs.

[107] Kahane, Charles J., PhD, Vehicle Weight, Fatality Risk and Crash Compatibility of Model Year 1991–99 Passenger Cars and Light Trucks, October 2003. DOT HS 809 662. Page 161. Docket No. NHTSA–2003–16318 (*http://www.nhtsa.dot.gov/cars/rules/regrev/evaluate/pdf/809662.pdf*)

[108] See the discussion of ''Effect of Weight and Performance Reductions on Light Truck Fuel Economy'' in Chapter V of the PRIA.

[109] See footnote 90.

5,000 pounds could result in a net safety benefit. However, IIHS continued to caution that reducing mass reduces, on average, a vehicle's ability to protect its occupants, noting that the effects of mass on vehicle crashworthiness have been observed and documented (Kahane, 1997; Partyka, 1996; O'Neill *et al.*, 1974).

General Motors and the Alliance were more explicit in their concerns over the safety impact associated with weight reduction. The Alliance stated that the fundamental laws of physics dictate that smaller and/or lighter vehicles are less safe than larger/heavier counterparts with equivalent safety designs and equipment.

General Motors agreed that improvements in material strength, flexibility, and vehicle design have helped improve overall vehicle and highway safety. But, General Motors added, for a given vehicle, reducing mass generally reduces net safety. Further, General Motors stated that it does not intentionally reduce mass by replacing it with advanced materials, presuming that such action alone will result in improved protection for the occupants in a lighter vehicle: vehicles with larger mass will provide better protection to occupants involved in a crash than a vehicle of the same design with less mass, given equivalent crashes.

General Motors also questioned the agency's reliance on a 5,000 lbs. minimum vehicle weight for considering weight reduction, which was based on the finding of the 2003 Kahane report that reducing curb weight negatively impacts safety only at curb weights under 3,900 pounds. General Motors stated that the agency's conclusion is inconsistent with the sensitivity analysis performed by William E. Wecker Associates, Inc. and submitted to the ANPRM docket. General Motors stated that the inflection point on the Wecker report's graph for General Motors light trucks in both the periods of MYs 1991–1995 and MYs 1996–1999 is higher than 5,000 pounds.

Additionally, General Motors stated that the NPRM did not acknowledge or rationally respond to the main point of the Wecker report, which was that Dr. Kahane's ''analysis alone does not support the proposition that a crossover weight at or near 5,085 pounds is a robust, accurate description of the field performance of the [light truck] fleet[.]''

We believe that General Motors is confusing the 5,085 lbs. crossover weight (where the safety effect of mass reduction in a vehicle weighing exactly 5,085 lbs., is zero) with the breakeven point described in the NPRM, which is the point where the total effect of reducing all vehicles heavier than the breakeven weight by an equal amount is zero. NHTSA estimated that the breakeven point as described in the NPRM is 3,900 lbs., if footprint is held constant.

If the 3,900 lbs. estimate were perfectly accurate, we would be confident that weight reductions in vehicles down to 3,900 pounds would not result in net harm to safety. However, we agree with commenters that there is considerable uncertainty about the crossover weight and also the breakeven point. Therefore, in our analysis, we limited weight reduction to vehicles with a curb weight greater than 5,000 pounds. We believe that the 5,000 lbs. limit is sufficient so that we can be confident that such weight reductions will not have net harm on safety.

SUVOA encouraged NHTSA to emphasize the importance of making sure that CAFE requirements do not encourage vehicle downsizing ''or any other action that might have an adverse effect on safety.'' SUVOA cited several reports in support of its assertion that downsizing harms safety.[110]. As explained above, the agency has applied weight reduction only to those vehicles for which we are confident that such reduction will not negatively impact safety.

The Competitive Enterprise Institute stated that the agency's own rulemaking demonstrates the safety of weight, specifically the FMVSS No. 216, *Roof crush,* rulemaking. The Competitive Enterprise Institute noted that in that rulemaking, NHTSA determined that the proposed requirement of more protective roofs would ''add both cost and weight'' to the vehicles. This commenter also stated that NHTSA found that the stronger the roof crush standard, the more added weight it would entail. The Competitive Enterprise Institute also cited the IIHS, March 19, 2005 Status Report on fatality risks in different vehicles, which the commenter stated concluded that in each vehicle group, ''the heavier vehicles, like bigger ones, generally had lower death rates.''

The weight safety analysis performed by the agency for this rulemaking accounted for not only the occupant safety (crashworthiness) of the vehicle, but also the rollover propensity of the vehicle, and the safety of the occupants of other vehicles it strikes. While in some instances, the crashworthiness of a vehicle can be improved through design changes that add weight to a vehicle, design changes can also reduce a vehicle's weight without reducing crashworthiness, and may in some instances improve the safety of a vehicle (*e.g.*, reduce rollover propensity).

Environmental Defense commented that by limiting the use of weight reduction to heavier vehicles, the agency disregarded the likelihood that manufacturers would rely on weight reduction in smaller, lighter vehicles. Environmental Defense suggested that the improved baselines should reflect this weight reduction strategy.

Environmental Defense asserted that weight reduction is among the most common and cost-effective options available to manufacturers for improving vehicle fuel economy across the light truck fleet. However, Environmental Defense referenced estimates presented in DeCicco (2005) that suggest that the cost per pound of weight reduced through use of high-strength steel and advanced engineering techniques has been as low as, or lower than, 31 cents per pound reduced.

Moreover, Environmental Defense stated, the exclusion of mass reduction in NHTSA's analysis bears no relation to what will actually happen in the marketplace when standards are implemented. Environmental Defense argued that absent safety regulations prohibiting the use of mass reductions, manufacturers are likely to choose this compliance alternative in vehicles of all weights as a cost effective way to comply with CAFE. Environmental Defense stated that NHTSA should include mass reduction among its compliance alternatives for all light trucks.

As stated above, the agency does not dictate which fuel savings technologies must be applied to vehicles. Mass reduction is a compliance alternative for all light trucks. However, one of the considerations in setting fuel economy standards is to set standards that will not lead to a reduction in the safety of the light truck fleet. The standards established by the agency are those capable of being achieved by the manufacturers without the need to

[110] SUVOA provided the following cites in support of its assertion:

- 2001, the National Academy of Sciences affirmed that earlier downsizing of vehicles following the imposition of CAFE regulations resulted in an additional 1,300 to 2,600 deaths and an additional 20,000 serious injuries per year.
- A Harvard School of Public Health-Brookings Institution study in the 1990s found that vehicle downsizing due to federal fuel economy mandates increased occupant deaths by 14 to 27 percent.
- An in-depth analysis by USA Today in 1999, using NHTSA and automobile insurance industry data, found that since 1975, 7,700 additional deaths occurred for every mile per gallon gained. By 1999, vehicle downsizing had killed more than 46,000 Americans. Factoring in the ensuing six years through 2005, the total conservatively eclipses 55,000 deaths.

reduce safety. If the agency were to consider weight reduction as a compliance option for all light trucks, we are concerned that the resulting increased stringency would force unsafe downweighting.

**VIII. Economic Assumptions**

A number of commenters raised global issues related to the agency's proposed CAFE standards, questioning everything from how costs and benefits were calculated to whether the standard is necessary or beneficial at all. Aside from raising issues with specific economic assumptions relied upon by the agency, commenters also more broadly questioned the rationale of the light truck CAFE program in general.

The Competitive Enterprise Institute (CEI) argued that NHTSA's proposed CAFE standards are unnecessary and that they could potentially increase the nation's dependence on foreign oil. CEI argued that particularly since the 2005 hurricane season dramatically drove up fuel prices at the pump, vehicle sales of large SUVs and other relatively inefficient vehicles have plummeted. According to CEI, market forces have acted to improve the overall fuel economy of new vehicles without the need for regulatory intervention. (General Motors made a similar argument, as to how fuel economy standards are less efficient than market forces in terms of achieving economically optimal levels of fuel economy.)

Although the effect of market forces on fuel economy levels is a matter of debate, NHTSA does not have the option of leaving fuel economy to the markets. The agency is required by Congress to set light truck fuel economy standards for every model year at the maximum feasible level considering the need of the nation to conserve fuel, technological feasibility and economic practicability.

*A. Costs of Technology*

The Alliance, Sierra Research and most vehicle manufacturers argued that NHTSA has underestimated the costs of certain technologies. Specific comments are set forth below.

First, General Motors stated that the costs relied upon by the agency were derived from technologies designed for application to passenger cars, but which are being applied to light-duty trucks without consideration of the necessary adjustments for integrating such technologies while maintaining the truck's utility and function. For example, for heavier light trucks, installation of electric power steering would also require a switch to a 42-volt electrical system, and probably increased battery maintenance costs. General Motors argued that the additional costs associated with integrating technologies available on light vehicles into heavier vehicles was one of the primary reasons for the discrepancy between their internal costs estimates and NHTSA's costs estimates in the PRIA. General Motors further argued that both NAS and the estimates of Energy and Environmental Analysis (a consulting firm), inadequately document sources for the costs they include.

The Alliance, Ford, Honda, Nissan and DaimlerChrysler reiterated that technologies are not simply bolted onto the vehicle. Instead, extensive modifications are often required. These modifications involve a substantial investment. For example, the cost estimates of a given piece of engine technology do not include the costs of redesigning the engine, testing prototypes, mapping the engine, developing new vehicle calibrations, and integrating the technology with the vehicle. For this reason, Sierra Research and at least one vehicle manufacturer disagreed with the NAS cost multiplier of 1.4 and argued that it should be substantially greater.

For this rulemaking, the agency has decided to use the cost and effectiveness numbers that appear in the NAS report. The NAS committee reviewed many sources of information including presentations at public meetings, and available studies and reports. It also met with automotive suppliers and industry consultants including Sierra Research. The committee then used its expertise and engineering judgment aided by the information described above to derive its own estimates of costs and effectiveness. After the prepublication copy was released in July 2001, the committee reexamined its analysis. Representatives from the industry and other stakeholders were invited to critique the findings. Several minor errors were discovered and corrected before publication of the final report.

The NAS cost and effectiveness numbers are presented as ranges that reflect estimates for passenger cars, pickup trucks, and SUVs/minivans. However, under the NAS report, the availability of these technologies differs for various segments of the vehicle fleet. The NAS report breaks down the availability of technology for two classes of pickups (small and large) and four classes of SUVs/minivans (small SUV, midsize SUV, large SUV, and minivan). Each class has a unique set of technologies available to it. While some individual technologies can be applied to any type of vehicle, the sets of technologies available to passenger cars are not the same as the sets of technologies available to light trucks. Thus, the costs assigned to passenger cars are not being used for light trucks because the technologies differ and each set of technologies has a unique cost estimate. Further, the cost estimates in the NAS report include consideration of costs for light trucks (NAS, p. 40).

Second, commenters argued that the agency did not consider ''stranded'' costs (General Motors, Sierra Research). For example, the stringency of the Unreformed CAFE standard may force a manufacturer to begin purchasing 6-speed transmissions from an external supplier immediately. Consequently, in-house manufacturing efforts for which considerable resources may have already been spent would be abandoned without any return on that investment. Sierra Research also argued that NHTSA has not properly accounted for costs associated with the premature retirement of existing technology before its costs have been fully amortized. Thus, commenters argued that NHTSA incorrectly assumed costs of technologies introduced during normal product cycle turnover even when the technologies were actually attributed to vehicles mid-cycle.

Stranded costs are essentially one time write-offs that would be difficult to identify and even more difficult to quantify, especially in light of their offsetting tax savings implications. Write-offs of stranded costs are likely to occur occasionally during the routine course of business as manufacturers periodically find it necessary to curtail production plans in response to unplanned regulatory or market impacts. These write-offs will thus influence the long run cost of doing business. Although manufacturers typically attempt to price vehicles to maximize their profits, the impact of stranded costs on vehicle prices will be constrained by market conditions, and measuring their impact would be problematic.

As explained above in the technology discussion, the agency has constrained its fuel economy model to give deference to manufacturers' production plans. In determining manufacturer capabilities, significant design changes are initiated in conjunction with redesigns and vehicle introductions stipulated in production plans provided to NHTSA by vehicle manufacturers. The potential for stranded costs is thus minimized. Overall, NHTSA does not believe that the revised phase-in schedule of technologies assumed in its

model would force manufacturers to incur significant stranded costs.

*B. Fuel Prices*

Many commenters stated that the fuel price estimates used in the agency's analysis and modeling were too low and should be revised to reflect the best current projections of market prices (SUVOA, NADA, Mercatus Center, Union of Concerned Scientists, and California State Energy Commission). Environmental organizations, citing the record prices for fuel at the pump, went further, arguing that more stringent standards are justified (Environmental Defense, NRDC, ACEEE).

In contrast, vehicle manufacturers requested that the agency not rely solely on higher fuel price forecasts to automatically increase the stringency of the CAFE standards (the Alliance, General Motors, Mitsubishi). Such commenters urged the agency to not allow CAFE standards to rise precipitously based upon a spike in oil commodity prices, thereby disregarding technology costs and other limitations. Specific comments related to fuel prices follow below.

Environmental Defense argued that NHTSA's fuel prices estimates in its CAFE proposal, based upon AEO2005, are too low. While Environmental Defense acknowledged NHTSA's stated intention to revise its fuel prices estimates in light of AEO2006 projections, it argued that even this forecast may be too low, particularly in light of private oil prices estimates of $42 to $100 per barrel over the analysis period. Accordingly, Environmental Defense urged NHTSA to utilize the best available fuel price forecasts in revising the level of the standards in the final rule.

NRDC made a similar argument regarding the proposal's fuel prices estimates, which it perceives to be too low. To remedy this problem, NRDC recommended that the agency use fuel price forecasts consistent with the world oil price forecasts reported in EIA's ''High B Oil Price Scenario'' or the International Energy Agency's World Energy Outlook 2005 ''Deferred Investment Scenario,'' forecasts which NRDC suggested are more consistent with recent world oil prices and current petroleum futures market prices.

As another suggestion for revising the NPRM's fuel prices estimates, the California State Energy Commission stated that future fuel prices are likely to be at least as high as the ''Base Case'' scenario adopted in the 2005 Integrated Energy Policy Report for California, which forecasts retail fuel prices (including Federal and California State taxes). The Commission recommended using this forecast, which it argued is more consistent with current fuel prices. According to the commenter, recent EIA forecasts (at least since 1996) have significantly underestimated actual future fuel prices.

The Alliance stated that while higher gasoline price forecasts may appear to justify further increases in fuel economy levels, ''NHTSA must proceed carefully and consider all of the ramifications of moving to higher levels than those proposed.'' Along the same lines, General Motors commented that increased fuel prices could lead to significantly higher CAFE standards under NHTSA's model; according to General Motors, a recent study by Resources for the Future (RFF) found that increasing the price per barrel of oil by $20 would lead to a CAFE target as much as 4 mpg higher.

In its comments, General Motors also compared the American light truck fleet with the European light truck fleet, stating that Europeans pay approximately $5 per gallon for gasoline, yet their vehicles do not use technologies beyond those present in the U.S. fleet. An appendix to General Motors' comments further analyzed the differences in fuel economy between American and European vehicles, suggesting that the fuel economy of vehicles on both side of the Atlantic is roughly comparable, once other relevant factors are taken into account (e.g., vehicle weight, transmission type, engine power, engine type, and premium gas usage). General Motors asked the agency to explain this apparent discrepancy between real world experience in Europe and NHTSA's analysis.

General Motors also stated that NHTSA's analysis did use the proper value for the tax on gasoline, which the American Petroleum Institute (API) currently reports to be $0.46 per gallon.

Mitsubishi stated that fuel prices are currently in a state of flux and recommended using AEO2006 in the final rule. However, Mitsubishi cautioned that raising the fuel economy target levels, based upon higher fuel prices, might not be economically practicable and could force manufacturers to completely reanalyze their business strategies.

The Mercatus Center commented that as part of the final rule, the agency should increase its fuel price forecasts and take steps to adequately address likely future volatility on fuel prices. Specifically, the Mercatus Center recommended adjusting the baseline sale mix and fuel economy levels from manufacturer product plans for future model years to reflect shifts in sales patterns toward more fuel-efficient models resulting from current high fuel prices and buyer concerns about continued fuel price volatility. It also urged NHTSA to include a separate estimate of the economic value of reduced fuel price volatility expected to result from lower fuel use.

Several commenters also noted that the State gasoline taxes in some states were changing as of January 1, 2006 and that the agency should update their gasoline tax estimates accordingly.

The agency will continue to rely on the most recent fuel price projections from the EIA from the Department of Energy. We consider the EIA projections to be the most reliable long-range projections. No one can predict the impact of hurricanes and other external factors that could affect the price of gasoline at particular points in time or in the short term. However, what we need are long range projections for 2008 to 2011, when this CAFE standard takes effect. In addition, the EIA's AEO2006 Early Release is the most recent projection available, and considers the most recent events.

Further, while commenters recommended that the agency rely on higher fuel prices, no commenter provided an alternative forecast that the agency believes to be more reliable than those published by EIA as part of its Annual Energy Outlook (AEO). NRDC did recommend that the agency rely on fuel price forecasts consistent with the world oil price forecasts reported in EIA's AEO 2005 ''High B Oil Price Scenario'' or the International Energy Agency's World Energy Outlook 2005. The ''Reference Case Scenario'' presented in AEO 2006, which is relied upon by the agency in the final rule, is on average almost 14 cents per gallon higher than the scenario suggested by NRDC.

The latest fuel price projections are taken from the EIA's Annual Energy Outlook 2006 (AEO2006 Early Release) reference case, which is the most recent projection available, translated into 2003 economics to match other cost estimates in the analysis, and are extended until 2047 to match the 36 year lifetime for light trucks produced for MY 2011. The estimated gasoline price per gallon in 2003 economics varies over the time period, starting at $2.16 in 2008, reducing to $1.96 in 2014, and then increasing to $2.39 by 2047.

The agency will consider additional fuel price projections (higher and lower than the reference case) from EIA in its uncertainty analysis; however, there is

no way to adequately predict or analyze the volatility of fuel prices.

Since gasoline taxes are a transfer payment and not a societal cost, the value of gasoline taxes is subtracted from the estimated gasoline price to estimate the value of gasoline to society. The agency has updated its estimates of gasoline taxes, using the January 1, 2006, update in State gasoline taxes. In 2003 economics, Federal taxes are $0.176 and State and local taxes average $0.262 for a total of $0.438.

As will be discussed in this document, the agency has carefully considered the broad ramifications of the final rule and alternative stringency levels, and has not increased the fuel economy levels solely on the basis of a projection of higher gasoline prices.

The agency does not see the value of trying to explain the difference in fuel prices and technology between Europe and the United States, as requested by General Motors. As General Motors points out in its comments, there are a variety of factors which differentiate the U.S. and Europe. These jurisdictions have different legal/regulatory frameworks, and their driving publics have different expectations, all of which vehicle manufacturers endeavor to accommodate. Thus, the fuel economy situations in Europe and the U.S. are not directly comparable and any such effort would entail an extensive analysis, which is likely to generate inconclusive results and which is well beyond the scope of this rulemaking.

*C. Consumer Valuation of Fuel Economy and Payback Period*

Commenters differed in terms of their recommended approach for properly assessing consumer valuation of fuel economy and the payback period for fuel-saving technologies. As discussed below, some commenters favored focusing on the preferences of individual consumers using a short-term perspective, while others recommended focusing on the societal benefits to all consumers over the long term.

General Motors requested that the agency compare consumer preference for fuel economy versus vehicle utility, in order to determine consumer valuation of improved fuel economy. General Motors also asked NHTSA to consider how many vehicle sales would be deferred due to CAFE-related price increases. According to General Motors, history has shown that consumers value fuel economy increases of up to 1.2 percent per year, so any higher standard forces consumers to accept a lower level of performance utility than they would otherwise choose. However, General Motors did state that consumers are well informed and extremely rational, arguing that car buyers are less concerned with fuel economy improvements when gasoline cost $1.50 per gallon, as compared to marginal improvements when gasoline costs $2.50 per gallon.

According to the NADA, recent new light truck sales data suggest that, despite higher fuel prices, consumers continue to rank fuel economy below other purchase considerations, such as capacity, convenience, utility, performance, and durability. Thus, NADA suggested that NHTSA's fuel economy standards should not be permitted to result in undue constraints on light truck product availability or in significant price increases, which could in turn result in reduced sales, profits, and workforces, and the retention of older vehicles with poorer fuel efficiency.

The California State Energy Commission commented that stringency levels of fuel economy targets should be established by considering the value of fuel savings from vehicle owners' perspective over the first few years of each model year's lifetime, rather than from a society-wide perspective. For example, the California State Energy Commission argued that consumers appear to attach some value to owning hybrid vehicles beyond the fuel savings they produce, sometimes paying large price premiums (up to $3,500 compared to equivalent gasoline-powered models) and waiting extended periods of time for such vehicles to become available. The commenter stated that the size of the hybrid vehicle market is expected to grow significantly by MY 2010. According to the California State Energy Commission, such consumer valuation considerations should be taken into account as part of the CAFE standards.

Conversely, Environmental Defense argued that technology application should be based on societal costs, not private costs, and that the agency needs to consider benefits over the lifetime of the vehicle, as opposed to the consumer time horizon of 4.5 years.

The CAFE program's most immediate impacts are on individual consumers, but regulating fuel economy also has a broader societal effect that must be considered. The agency believes that CAFE standards should reflect the true economic value of resources that are saved when less fuel is produced and consumed, higher vehicle prices, and, to the extent possible, any externalities that impact the broader society. Consumer's perceptions of these values may differ from their actual impacts, but they will nonetheless experience the full value of actual fuel savings just as they will pay the full increased cost when the vehicle is purchased. Moreover, owners will realize these savings throughout the entire on-road life of each vehicle. While initial purchasers will only experience fuel savings for the limited time they typically own a new vehicle (4.5 years), subsequent (used vehicle) purchasers will continue to experience savings throughout the vehicle's useful life. The agency does restrict its analysis of sales impacts to the initial 4.5 year period under the assumption that initial buyer's purchase behavior will be influenced only by their perception of benefits they will receive while owning the vehicle, as opposed to benefits flowing to subsequent owners. However, the agency believes that the lifetime value of impacts from CAFE improvements should be fully reflected in its analysis of societal impacts.

*D. Opportunity Costs*

The Alliance commented that, in proposing its fuel economy standards, NHTSA did not consider the opportunity costs to consumers who may be forced to forego incremental improvements in vehicle performance, safety, capacity, comfort, and aesthetics (citing a 2003 study by the Congressional Budget Office (CBO) titled, ''The Economic Costs of Fuel Economy Standards Versus a Gasoline Tax,'' Chapter 2, pages 1–5). The Alliance also cited a recent study which found that a CAFE increase of 3 mpg results in a hidden tax of $0.78 per gallon of fuel conserved.[111] General Motors added that to the extent the CAFE standards force trade-offs between fuel economy and other vehicle attributes that consumers value, consumer welfare will be reduced and ''lost opportunity costs'' will be imposed on vehicle manufacturers.

Further, General Motors argued that NHTSA's engineering and economic analyses are incomplete because they do not account for the potential economic harm to automobile companies (which are already facing difficult financial challenges) and their employees, and the analyses do not include producer and consumer welfare losses. General Motors stated the Congressional Budget Office estimated a consumer welfare loss of $230 per vehicle.

In response, the agency notes that the CBO report cited by General Motors and the Alliance is based on estimates of consumer's preferences over a period

[111] The Alliance cited this study as: Andrew N. Kleit, ''Impacts of Long-Range Increases in Fuel Economy (CAFE) Standard,'' *Economic Inquiry* (April 2004), pages 279–294.

from roughly 1980 through 2001. The CBO report states that ''Consumers' preferences over the past 15 or 20 years have led automakers to increase vehicles' size and horsepower, while holding gasoline mileage more or less constant.'' The CBO report also acknowledges that if consumers' tastes change significantly, the report's conclusions would be affected. The period examined by CBO corresponds to the period when automakers created and successfully marketed SUVs as an alternative to passenger cars for routine driving. For most of this period, gasoline prices were stable and low by historical standards. Near the end of the period, prices began to rise, but since that time they have reached levels that are more than double the typical price during the period. In response, consumers have shown a dramatic shift in their purchase preferences. Sales of small passenger cars and fuel-efficient hybrids have increased, while sales of large SUVs have dropped. Circumstances have, thus, already overtaken the assumptions regarding consumer preferences used in the CBO analysis. Moreover, the CBO analysis is based on a CAFE regulation that achieves an assumed 10 percent reduction in gasoline consumption, a greater reduction than that which would be accomplished by this regulation. Thus, the agency does not believe that the $230 loss in consumer welfare estimated in the CBO report is an appropriate measure of the impact of CAFE reform.

NHTSA acknowledges that there are potential shifts in consumer welfare which are not reflected in its model (e.g., if a manufacturer reduced horsepower as a strategy to improve fuel economy, some consumers would value that horsepower loss more than the fuel economy gain). However, it believes that measuring these impacts is problematic, especially in light of the recent dramatic shift in gasoline prices and geopolitical events surrounding the world oil supply. Moreover, the agency is using its model, not as an absolute standard, but rather as an initial measure to consider in setting standards. The agency is cognizant of the financial difficulty facing automobile manufacturers and is striving to minimize costs by scheduling improvements in such a way that they would coincide with normal design cycles. Further, the agency believes that incrementally improving fuel economy across the vehicle fleet will not deprive consumers of their choice of vehicles. A wide variety of vehicle types will continue to be available, and consumers' selection of vehicles should still reflect their judgments of the relative value of fuel economy versus horsepower at the margin.

*E. Rebound Effect*

The ''rebound effect'' refers to the tendency for vehicle owners to increase the number of miles they drive a vehicle in response to an increase in its fuel economy, such as would result from more stringent CAFE standards. The rebound effect occurs because an increase in fuel economy reduces vehicle owners' fuel cost per mile driven, which is the typically largest component of the cost of operating a vehicle. Because even with improved fuel economy this additional driving uses some fuel, the rebound effect somewhat reduces the fuel savings (and related benefits) that result when fuel economy increases. The rebound effect is usually expressed as the percentage by which vehicle use increases when the cost of driving decreases due to an increase in fuel economy and/or a decrease in the price of fuel.

Commenters expressed a variety of views regarding the agency's estimate of the rebound effect that would be anticipated in response to the new CAFE standards. While some reviewers suggested that the estimate of the rebound effect the agency used is too low (Alliance, General Motors), others suggested that it is too high (Environmental Defense, NRDC, ACEEE, Union of Concerned Scientists, California State Energy Commission). Specific comments related to the rebound effect are set forth below.

In general, manufacturers and their associations deemed the 20-percent rebound rate relied upon by the agency to be conservative. For example, the Alliance argued that a 20-percent rebound effect is overly conservative, based upon recent studies. Specifically, the Alliance stated that a recent study of variation in U.S. light-duty vehicle use among different states over the period from 1966 to 2001 by Small and Van Dender estimated a long-term rebound effect of 24 percent over the entire period covered by the study.[112] This estimate implies that a 10-percent increase in fuel economy, which translates into a 10-percent decrease in fuel cost-per-mile driven, would ultimately stimulate a 2.4-percent increase in average annual miles driven using vehicles whose fuel economy is improved. According to the Alliance, an independent analysis by the Small and Van Dender data found that despite those authors' claim that the rebound effect had declined during the period they studied, the rebound effect remained at 24.6 percent at the end of this period.[113] The Alliance opined that the rebound effect is probably on the order of 35 percent, although it did not supply any data to substantiate this estimate.

According to General Motors, previous studies of changes in household motor vehicle and appliance use in response to improvements in their energy efficiency (which is measured by fuel economy in the case of vehicles) have shown that the rebound effect lowers energy savings by 20–50 percent. General Motors agreed with the agency that the increased driving resulting from the rebound effect also imposes various external costs, including increased collisions and traffic congestion. General Motors stated that it commissioned four studies of the rebound effect, each of which concluded that the rebound effect would be approximately 25 percent. However, it did not provide copies of the referenced studies. As General Motors did not provide these studies, the agency was unable to evaluate them. Nevertheless, General Motors stated that 20 percent is adequate for calculations related to rebound effect. No other vehicle manufacturers commented on this issue.

The National Automobile Dealers' Association commented that fuel savings should clearly be adjusted to reflect the rebound effect, but did not recommend a specific value of the rebound effect.

In contrast to the above commenters, Environmental Defense argued that the agency has overestimated the rebound effect because it relies upon earlier studies in the literature that tended to miss significant effects of variables such as income growth, and that did not have sufficiently large datasets to capture long-term changes in vehicle use. Citing the same 2004 study by Small and Van Dender referred to in the Alliance comments,[114] which combined data for each of the 50 states over a 36-year period, Environmental Defense noted the authors' finding that the rebound effect had declined to 12.1 percent when measured over the period from 1997–2001, primarily as a consequence

[112] Kenneth A. Small and Kurt Van Dender, ''The Effect of Improved Fuel Economy on Vehicle Miles Traveled: Estimating the Rebound Effect Using U.S. State Data, 1996–2001, Paper EPE–014, University of California Energy Institute, 2005; item #1702 in NHTSA Docket 22223. An earlier version of the study is item 15 in the same docket.

[113] Robert Crawford, ''Review and Assessment of VMT Rebound Effect in California,'' RW Crawford Energy Systems, Sept. 2004.

[114] See footnote 95.

of the higher income levels that prevailed during those years than over the entire period covered by the study. Environmental Defense argued further that if income growth continues during the period analyzed under the CAFE proposal, Small and Van Dender's analysis indicates that the rebound effect would continue to decline. The analyses Environmental Defense presented in its comments used an estimate of 5 percent for rebound effect, and it also urged NHTSA to adopt a similarly low estimate of the rebound effect, which Environmental Defense argued is in keeping with the most recent research in this area.

Other commenters also urged NHTSA to adopt a lower rate for the rebound effect, and they generally referred to the study by Small and Van Dender to support their positions. For example, NRDC suggested using a 6-percent rate for the rebound effect over the lifetime of MY 2008–2011 vehicles, which it argued would correctly recognize the effect of anticipated future income growth. ACEEE urged the agency to use a 10-percent rate, a change which it suggested would increase the monetized social benefits of Reformed CAFÉ for MY 2011 vehicles by about $1.3 billion, or approximately 30 percent.

Again, relying on results from the Small and Van Dender study, the Union of Concerned Scientists recommended that NHTSA reduce the rebound effect rate to not more than 10 percent. The commenter stated that NHTSA offered no justification for choosing the upper end of its discussed range (10–20 percent), arguing that results for the last years of the period analyzed in the study supported a long-run rebound effect of 6.8 percent or lower. Accordingly, the Union of Concerned Scientists stated that NHTSA should adopt 10 percent as a reasonable and conservative estimate of the rebound effect, and asserted that doing so would increase the ''social optimum'' fuel economy targets for 2011 by 1.4–1.9 mpg.

The California State Energy Commission called for a rebound effect of 12 percent, which it believes is reflective of the long-term rebound effect of 12.1 percent for California estimated by Small and Van Dender.[115]

NHTSA notes that all commenters who recommended a lower value for the rebound effect than the 20 percent estimate used in the NPRM analysis relied exclusively upon the recent study by Small and Van Dender as evidence supporting a smaller rebound effect. While the agency regards the Small and Van Dender study as an important contribution to the extensive literature on the magnitude of the rebound effect, it does not regard the very low values for the rebound effect reported in that study as persuasive for several reasons.

Unlike the studies relied upon by the agency in developing its estimate of the rebound effect, the Small and Van Dender analysis remains an unpublished working paper that has not been subjected to formal peer review, so the agency does not yet consider the estimates it provides to have the same credibility as the published and widely-cited estimates it relied upon.[116] The agency's interpretation of previously published estimates is that they support a range of 10–30 percent for the rebound effect in vehicle use. The agency elected to use the midpoint of that range in its analysis for the NPRM. If a peer-reviewed version of the Small and Van Dender study is subsequently published, the agency will consider it in developing its own estimate of the rebound effect for use in subsequent CAFE rulemakings.

After reviewing the various comments on the NPRM, the agency has elected to continue using a value of 20 percent for the rebound effect in its analysis of potential fuel savings from stricter CAFE standards for MY 2008–2011 light trucks. The agency will continue to monitor newly published research on the rebound effect (as well as on other critical parameters affecting fuel savings from CAFE regulation), and it will revise the estimates of the rebound effect it employs in future analyses of fuel savings if it concludes that new evidence points persuasively toward a different value.

*F. Discount Rate*

Discounting future fuel savings and other benefits is intended to measure the reduction in the value to society of these benefits when they are deferred until some future date rather than received immediately. The discount rate expresses the percent decline in the value of these benefits—as viewed from today's perspective—for each year they are deferred into the future. The agency used a discount rate of 7 percent per year to discount the value of future fuel savings and other benefits when it analyzed the CAFE standards proposed in the NPRM.

The Alliance, General Motors, the Mercatus Center, and Criterion Economics all argued that in assessing benefits and costs associated with the CAFE standards, the agency should rely on a discount rate greater than 7 percent. The Alliance stated that the Congressional Budget Office discounts consumers' fuel savings at a rate of 12 percent per year and that other recent studies of CAFE standards have also used that rate. According to the Alliance, that rate is slightly higher than the average interest rate that consumers reported paying to finance used car purchases in the most recent Consumer Expenditure Survey.[117] The Alliance argued further that consumers can be expected to discount the value of future fuel savings at a rate at least as high as their cost for financing the purchase of a vehicle whose higher price was justified by its higher fuel economy.

The Alliance based its assertion for use of 12 percent because, as it stated, this value was used in the NAS report and approximates the used car loan rate published in the Consumer Expenditure Survey. However, we note that the NAS report did not use a single discount rate. Instead, the NAS used both 12 percent and 0 percent discount rates due to the assumption that the proper discount rate was ''subjective.'' Therefore, NAS did not advocate a discount rate. As explained below, the vehicle loan rate faced by consumers is an appropriate measure of the discount rate.

General Motors suggested a discount rate of 9 percent, based on its assertions that new vehicles are financed at 8 percent and used vehicles at 10 percent. Essentially, General Motors is recommending that the agency rely on the interest for a car loan as the discount rate. General Motors also argued that fuel economy is not the only thing

[115] Kenneth A. Small and Kurt Van Dender, ''The Effect of Improved Fuel Economy on Vehicle Miles Traveled: Estimating the Rebound Effect Using U.S. State Data, 1996–2001, Paper EPE–014, University of California Energy Institute, 2005, Docket 22223–1702, Table 5, p. 19.

[116] These include, among others, David L. Greene, ''Vehicle Use and Fuel Economy: How Big is the Rebound Effect?'' The Energy Journal, 13:1 (1992), 117–143; David L. Greene, James R. Kahn, and Robert C. Gibson, ''Fuel Economy Rebound Effect for Household Vehicles,'' The Energy Journal, 20:3 (1999), 1–21; Jonathan Haughton and Soumodip Sarkar, ''Gasoline Tax as a Corrective Tax: Estimates for the United States,'' The Energy Journal, 17:2, pp. 103–126; S.L. Puller and L.A. Greening, ''Household Adjustment to Gasoline Price Changes: An Analysis Using Nine Years of U.S. Survey Data,'' Energy Economics, 21:1, pp. 37–52; Jones, Clifton T., ''Another Look at U.S. Passenger Vehicle Use and the 'Rebound' Effect from Improved Fuel Efficiency, The Energy Journal, 14:4 (1993), 99–110; and Goldberg, Pinelopi Koujianou, ''The Effects of the Corporate Average Fuel Efficiency Standards in the U.S.,'' The Journal of Industrial Economics, 46:1 (1998), 1–33.

[117] The Consumer Expenditure Survey (CE) program consists of two surveys collected for the Bureau of Labor Statistics by the Census Bureau—the quarterly Interview survey and the Diary survey—that provide information on the buying habits of American consumers, including data on their expenditures, income, and consumer unit (families and single consumers) characteristics. *http://www.bls.gov/cex/home.htm.*

which consumers value and that the agency should take efforts to separate private benefits from public externalities. While we are uncertain as to what General Motors is recommending, we assume that its comment suggests that a higher discount rate, based on car loan rates, is appropriate for discounting private benefits (those to buyers), while a lower rate is appropriate for social benefits (such as reductions in externalities). Criterion Economics also recommended use of a 9 percent discount rate in its comments, which it suggested is a conservative rate between the average real rates for new and used cars that adequately accounts for volatility in future energy prices.

As discussed further below, we agree in that loan rates for new and used cars should be considered when determining the appropriate discount rate. However, loan estimates made by both General Motors and Criterion Economics are considerably higher than data provided by the Federal Reserve Board, which estimates new loan rates (as of October 2005) of 6 percent for new cars and 9 percent for used cars.[118]

The Mercatus Center stated that the 7 percent discount rate selected by the agency is too low, and as a result, it results in the setting of standards that are inequitable, particularly to low-income households. According to published academic research referenced by the Mercatus Center, most households have discount rates higher than 7 percent, with low-income households having particularly high discount rates. Therefore, the Mercatus Center urged NHTSA to rely on discount rates of 12 percent for all households and as high as 20 percent for low-income households in evaluating proposed standards. However, the studies cited by Mercatus Center to justify these discount rates examine the implied discount rate for future energy savings that result when households purchase more energy-efficient appliances such as furnaces and air conditioners. These studies were generally conducted in the late 1970's and early 1980's and may not be representative of the discount rates for motor vehicles of the economic conditions 20–25 years later.

Environmental Defense, NRDC, and the Union of Concerned Scientists provided comments endorsing use of a lower discount rate. These organizations expressed their belief that a 7-percent discount rate is too high, proposing instead a rate of 3 percent. Environmental Defense and NRDC stated that OMB Circular A–4, *Regulatory analysis* (2003), recommends a discount rate of 3 percent when the regulation directly affects private consumption. These commenters asserted that the proposed CAFE regulation primarily and directly affects private consumption (i.e., by affecting the sales price of new vehicles and reducing the per-mile cost of driving). NRDC also argued that OMB Circular A–4 further indicates that lower rates may be appropriate for rules that produce benefits over multiple generations. Thus, these commenters recommended that a discount rate reflecting the social rate of time preference (i.e., a 3 percent real rate) should be used.

In response to Environmental Defense, the Union of Concerned Scientists, and NRDC, the guidelines in OMB circular A–4, New Guidelines for the Conduct of Regulatory Analysis, state that the agency should analyze the costs and benefits of a regulation at 3 percent and 7 percent discount rates, as suggested by guidance issued by the federal OMB.[119] The 3 percent and 7 percent rates reflect two potential evaluations of impacts: Foregone private consumption and foregone capital investment, respectively. In accordance with these guidelines, the agency analyzes the impacts of costs and benefits using both discount rates. However, this guidance does not state what discount rate should be used to determine the standards.

There are several reasons for the agency's choice of 7 percent as the appropriate discount rate to determine the standards. First, OMB Circular A–4 indicates that this rate reflects the economy-wide opportunity cost of capital. The agency believes that a substantial portion of the cost of this regulation may come at the expense of other investments the auto manufacturers might otherwise make. Several large manufacturers are resource-constrained with respect to their engineering and product-development capabilities. As a result, other uses of these resources will be foregone while they are required to be applied to technologies that improve fuel economy.

Second, 7 percent is also an appropriate rate to the extent that the costs of the regulation come at the expense of consumption as opposed to investment. As explained below, the agency believes a car loan rate is an appropriate discount rate because it reflects the opportunity cost faced by consumers when buying vehicles with greater fuel economy and a higher purchase price. The agency assumed that a majority of both new and used vehicles is financed and since the vast majority of the benefits of higher fuel economy standards accrue to vehicle purchasers in the form of fuel savings, the appropriate discount rate is the car loan interest rate paid by consumers.[120]

According to the Federal Reserve, the interest rate on new car loans made through commercial banks has closely tracked the rate on 10-year treasury notes, but exceeded it by about 3 percent.[121] The official Administration forecast is that real interest rates on 10-year treasury notes will average about 3 percent through 2016, implying that 6 percent is a reasonable forecast for the real interest rate on new car loans.[122] During the last five years, the interest rate on used car loans made through automobile financing companies has closely tracked the rate on new car loans made through commercial banks, but exceeded it by about 3 percent.[123] Consideration is given to the loan rate of used cars because some of the fuel savings resulting from improved fuel economy accrue to used car buyers. Given the 6 percent estimate for new car loans, a reasonable forecast for used car loans is 9 percent. Since the benefits of fuel economy accrue to both new and used car owners, a discount rate between 6 percent and 9 percent is appropriate. Assuming that new car buyers discount fuel savings at 6 percent for 5 years (the average duration of a new car loan) [124] and that used car buyers discount fuel savings at 9 percent for 5 years (the average duration of a used car loan),[125] the single constant discount rate that yields equivalent present value fuel savings is very close to 7 percent.

Further, reliance on the consumer borrowing rate is consistent with that of the Department of Energy (DOE) program for energy efficient appliances. For more than a decade, the Department of Energy has used consumer borrowing interest rates or ''finance cost'' to discount the value of future energy

[118] Federal Reserve Board, Statistical Release G.19: Consumer Credit, *http://www.federalreserve.gov/releases/g19/.*

[119] White House Office of Management and Budget, Circular A–4, September 17, 2003, p. 34, *http://www.whitehouse.gov/omb/inforeg/circular_a4.pdf.*

[120] Empirical evidence also demonstrates that used car purchasers do pay for greater fuel economy (Kahn, *Quarterly Journal of Economics*, 1986).

[121] See, *http://www.federalreserve.gov/releases/g20/hist/fc_hist_tc.txt.*

[122] See, *http://www.federalreserve.gov/releases/h15/data/Monthly/H15_TCMNOM_Y10.txt.*

[123] See, *http://www.federalreserve.gov/releases/g20/hist/fc_hist_tc.txt.*

[124] Id.

[125] Id.

savings in establishing minimum energy efficiency standards for household appliances. This includes (1) the financial cost of any debt incurred to purchase appliances, principally interest charges on debt, or (2) the opportunity cost of any equity used to purchase appliances, principally interest earnings on household equity. For example, for appliances purchased in conjunction with a new home, DOE uses real mortgage interest rates to discount future energy savings.[126] This approach is analogous to NHTSA's use of real auto loan rates to discount future gasoline savings in establishing CAFE standards.

The Union of Concerned Scientists also commented that NHTSA's methodology for calculating the discounted present value of certain external costs and benefits appears to be inconsistent. Specifically, the commenter stated that the benefits of petroleum market effects (monopsony[127] and disruption cost reductions) and reduced emissions of particulate matter (PM) and sulphur oxides ($SO_X$) and the external costs of increased congestion, noise, and crashes, appear to be discounted differently from the fuel cost savings, driving time, and refueling time savings. The Union of Concerned Scientists urged NHTSA to utilize the same methodology for calculating the discounted present value of all such CAFE-related elements.

In response to the Union of Concerned Scientists comment that the agency appears to have discounted different categories of benefits inconsistently, the agency notes that the three different categories identified in its comment each bear a different relationship to total fuel savings. As the commenter notes, fuel cost savings, the value of increased driving range (identified incorrectly as ''driving time'' in the PRIA), and the value of refueling time savings are directly related to lifetime vehicle use, and the agency's estimates of the values of these benefits reflect this relationship. However, benefits resulting from lower emissions of the pollutants PM and $SO_X$ (which occur during petroleum refining) also depend partly on the fraction of fuel savings that is reflected in reduced domestic fuel refining (rather than reduced imports of refined gasoline), and in turn on the fractions of domestic refining that utilize domestically-produced and imported crude petroleum.[128] Similarly, the external costs of congestion, accidents, and noise resulting from added vehicle use depend on the magnitude of the rebound effect as well as on lifetime fuel savings. Thus these three categories of benefits would be expected to bear different relationships to total fuel savings, as confirmed by the Union of Concerned Scientists' comments.

*G. Import Externalities (Monopsony, Oil Disruption Effects, Costs of Maintaining U.S. Presence and Strategic Petroleum Reserve)*

General Motors commented extensively on the issue of externalities associated with the agency's CAFE proposal. As a general observation, General Motors stated that the CAFE proposal would result in a net externality cost on consumer welfare, because the externality costs (*e.g.*, congestion, noise, highway fatalities/injuries) exceed the externality benefits (*e.g.*, reduction in oil import dependence, reduction in pollution). General Motors stated that the agency's proposal did not identify any specific market failures that would justify its fuel economy regulation. The commenter asked the agency to present empirical estimates of reduced economic and environmental externalities resulting from the proposed CAFE standards, along with supporting analyses demonstrating how these benefits were estimated.

In its comments, General Motors also challenged certain specific figures related to externalities incorporated by the agency as part of the CAFE proposal. For example, General Motors expressed disagreement with the proposal's externality estimate of $0.106 per gallon, as well as the estimate of costs related to pollution. The commenter stated that the National Research Council estimates the total cost of economic and environmental externalities from fuel production and use to be $0.26 per gallon, and if this estimate is correct, consumers are already paying fuel taxes (which it estimated at $0.46 per gallon) that exceed the cost of these externalities. General Motors also asked the agency to address the research finding by Dr. Kleit purporting to show negative net benefits (*i.e.*, it will have net costs) for the MY 2005–2007 CAFE standards.[129]

In addition, General Motors argued that higher steady-state oil prices reduce any demand costs or monopsony power, and energy demand from China and other emerging economies will only strengthen this trend. The company disagreed with the monopsony estimate of $0.061 per gallon relied upon by the agency. General Motors further argued that the agency relied upon the monopsony value reported in a 1997 study by Lieby *et al.*, but stated that this study assumes no cartel of producers such as OPEC. According to General Motors, in light of the potential for OPEC to respond to U.S. efforts to decrease demand, the monopsony value of $0.061 is too high. General Motors stated that like Resources for the Future, it believes that using U.S. monopsony power has marginal benefits at best, and that at worst, attempting to use it could actually provoke retaliatory pricing or supply responses by OPEC that would harm the U.S. economy.

General Motors also challenged the oil disruption cost of $0.045 per gallon included in the proposal. According to General Motors, the agency has not addressed Congressional Research Service and the Bohi and Toman studies which reported that the only reason for oil disruption is an increase in price (*i.e.*, an oil price ''shock''), so because the CAFE standards do not affect the price of gasoline, there should be no disruption effect.

General Motors expressed skepticism regarding the externality costs related to pollution contained in the CAFE proposal. According to General Motors, because U.S. refineries operate at 95 percent of capacity and routinely

[126] See, Residential Furnaces and Boilers ANOPR Technical Support Document, Chapter 8, at *http://www.eere.energy.gov/buildings/appliance_standards/residential/furnaces_boilers_1113_r.html.*

[127] Demand costs for imported oil (often termed market power or ''monopsony'' costs) arise because the world oil price appears to be partly determined through the exercise of market power by the OPEC cartel, and because the U.S. is a sufficiently large purchaser of foreign oil supplies that its purchases can affect the world price. The combination of OPEC market power and U.S. ''monopsony'' power means that increasing domestic petroleum demand that is met through higher oil imports can cause the world price of oil to rise, and conversely that declining U.S. imports can reduce the world price of oil.

[128] In the NPRM, benefits from reduced petroleum market externalities were also incorrectly assumed to depend on the fraction of fuel savings that is reflected in lower imports of crude petroleum and refined gasoline (rather than on total U.S. petroleum consumption). In response to comments by the Union of Concerned Scientists and other reviewers, this error has been corrected in the Final Regulatory Impact Analysis accompanying this Rule.

[129] Dr. Kleit's analysis simply assumes that manufacturers have already made all applications of fuel economy technology to their models for which the value of the resulting fuel savings exceeds the cost of installing the technology. Andrew N. Kleit, ''Short- and Long-Range Impacts of Increases in the Corporate Average Fuel Economy (CAFE) Standard,'' February 7, 2002, Docket #11419–168159.

Under this assumption, any increase in the stringency of CAFE will always produce negative net benefits (i.e., net costs), because the technology applications necessary to comply with the more stringent standard will each have costs that exceed the value of fuel savings they produce.

purchase pollution permits (credits) from others, any reduction in demand for fuel would likely result in these refineries simply purchasing fewer permits, rather than reducing emissions or capacity. General Motors stated that the only pollution cost externality resulting from the CAFE standards is likely to be increased tailpipe emissions from the rebound effect.

Criterion Economics commented that NHTSA's CAFE proposal ''argued the wrong case,'' in that externalities alone should be the determinant of socially optimal CAFE levels (*i.e.*, allowing the marketplace to determine privately optimized CAFE targets). According to Criterion Economics, mandatory increases in fuel economy above market-determined levels would generate marginal private costs that exceed marginal private benefits. In support of its position that only externalities should be considered in setting CAFE standards, Criterion Economics provided a figure illustrating the interaction of marginal social benefits, marginal social costs, marginal private benefits, and marginal private costs to argue that the market automatically determines the optimal level for private benefits. Criterion Economics recommended that the agency revise the CAFE standards to reflect socially optimal levels based on externality costs and benefits.

In contrast, NRDC and Environmental Defense argued that monopsony costs are underestimated in the proposal. Environmental Defense stated that monopsony costs should range from $0.083 (under the EIA reference scenario) to $0.198 per gallon (under a $65 per barrel oil price scenario). Environmental Defense also commented that there is an arithmetic error in NHTSA's application of disruption and adjustment costs (which are otherwise conceptually correct), and it argued that in setting final CAFE standards, the agency should address non-quantified externalities such as strategic petroleum reserve and national security costs, at least qualitatively if not quantitatively.

The California State Energy Commission argued that the agency's estimate of $0.106 for oil import externalities is too low and should be increased to $0.33 per gallon of gasoline. The California State Energy Commission broke down this estimate as follows: $0.12 per gallon for oil import externalities; $0.01 to reflect costs of gasoline spill remediation; $0.02 to reflect damage from criteria pollutant emissions resulting from fuel delivery volumes, and $0.18 to reflect damage costs of greenhouse gas emissions. The Commission based its recommendation upon values reported in a 2003 report titled ''Benefits of Reducing Demand for Gasoline and Diesel.''

The agency believes that assessing the economic case for increasing the stringency of the light truck CAFE standard requires a comprehensive analysis of the resulting benefits and costs to the U.S. economy, rather than simply comparing the external costs associated with petroleum use and fuel production to current fuel taxes. The benefits of more stringent CAFE standards include the market value of the savings in resources from producing less fuel, together with the resulting reductions in the costs of economic externalities associated with petroleum consumption, and of environmental externalities caused by fuel production. The costs imposed on the U.S. economy by more stringent CAFE regulation include those costs for manufacturing more fuel-efficient vehicles, as well as the increased external costs of congestion, accidents, and noise from added driving caused by the rebound effect.

Vehicle buyers value improved fuel economy using retail fuel prices and miles per gallon, but may consider fuel savings only over the time they expect to own a vehicle, while the value to the U.S. economy of saving fuel is measured by its pre-tax price, and includes fuel savings over the entire lifetime of vehicles. Thus it cannot simply be assumed that the interaction of manufacturers' costs and vehicle buyers' demands in the private marketplace will determine optimal fuel economy levels, and that these levels should only be adjusted by Federal regulation if the external costs of fuel production and use exceed current fuel taxes.

The analysis reported in the FRIA estimates the value of each category of benefits and costs separately, and it compares the total benefits resulting from each alternative CAFE level to its total costs in order to assess its desirability. This more complete accounting of benefits and costs to the U.S. economy from reducing fuel use is necessary to assess the case for CAFE regulation generally, and for increasing the stringency of the current light truck CAFE standard in particular.

In response to comments on the specific values of certain externalities employed in the NPRM analysis, the agency agrees that higher world oil prices increase the monopsony or demand costs imposed by U.S. petroleum purchases, while greater sensitivity of the supply of oil imported by the U.S. to variation in its price (a higher elasticity of petroleum supply) reduces the monopsony costs associated with variation in U.S. oil demand.[130] Thus, the value of the monopsony effect used in the FRIA analysis reflects the Energy Information Administration's recent Annual Energy Outlook 2006 forecast of future world oil prices, which is significantly higher than previously projected by EIA (see FRIA p. VIII–31). The FRIA continues to use the midpoint of the range of values for the elasticity of oil imports suggested in the study by Leiby *et al.* to estimate the monopsony cost of increased U.S. petroleum use (see FRIA p. VIII–33).

However, the agency also notes that only a fraction of the monopsony cost of increased U.S. oil consumption is imposed on domestic purchasers of petroleum and refined products, since part of the burden of higher world oil prices is borne by foreign purchasers. As a result, that same fraction of any reduction in monopsony costs resulting from lower U.S. oil purchases is exactly offset by revenue losses to domestic petroleum producers, so it does not represent a net savings to the U.S. economy. Thus, in order to include only the fraction that represents a net savings to U.S. purchasers, the savings in monopsony costs from reduced fuel use must be adjusted by the percent of U.S. petroleum consumption that is imported. This results in a monopsony value of $0.044 per gallon.

In contrast, the entire reduction in total U.S. petroleum demand that results from more stringent CAFE standards reduces potential costs to the U.S. economy from rapid increases in world oil prices, because (as the studies cited by reviewers of the NPRM point out) these costs depend on total U.S. petroleum consumption rather than on the fraction that is imported. The agency agrees that petroleum buyers' use of hedging strategies and private oil inventories can reduce these costs, but the significant costs of adopting these strategies will also be reduced as declines in U.S. petroleum demand moderate the potential effect of rapid fluctuations in world oil prices. Thus the analysis presented in the FRIA continues to employ the agency's previous estimate ($0.045 per gallon) of the reduction in the price shock component of U.S. oil consumption externalities that is likely to result from more stringent CAFE regulation (see FRIA VIII–34).

Finally, the agency believes that while costs for U.S. military security in oil-

[130] For the exact relationship among monopsony costs, oil prices, and the elasticity of supply of imported oil, see Leiby *et al.*, p. 26 Docket No. NHTSA–2005–22223–27.

producing regions and for maintaining the Strategic Petroleum Reserve will vary in response to long-term changes in U.S. oil imports, these costs are unlikely to decline significantly in response to the modest reduction in the level of U.S. oil imports that would result from the proposed CAFE standard for MY 2008–2011 light trucks. The U.S. military presence in world regions that represent vital sources of oil imports also serves a range of security and foreign policy objectives that is considerably broader than simply protecting oil supplies. As a consequence, no savings in government outlays for maintaining the Strategic Petroleum Reserve or a U.S. military presence are included among the benefits of the light truck CAFE standard adopted for MY 2008–2011.

Combined, the externalities cost per gallon added to the pre-tax price per gallon in the FRIA is $0.088.[131] This compares to the PRIA estimate of $0.106 per gallon.

*H. Uncertainty Analysis*

The California State Energy Commission stated NHTSA's proposal does not adequately deal with the primary source of uncertainty in setting standards—the extent to which the application of additional technology could be justified by higher future fuel prices. This commenter stated that the agency's uncertainty analysis should first examine the sensitivity of optimum standards to variation in retail fuel prices only, and then analyze effect of alternative stringency levels on social benefits.

In response, we note that the purpose of the uncertainty analysis is to examine uncertainty surrounding the impact of the proposed and final rules. OMB Circular A–4 requires formal probabilistic uncertainty analysis of complex rules where there are large, multiple uncertainties whose analysis raises technical challenges or where effects cascade and where the impacts of the rule exceed $1 billion. CAFE meets these criteria on all counts. However, the commenter appears to be concerned primarily with uncertainty surrounding the CAFE standard selection process, rather than that surrounding the impacts of the selected standards. The agency believes that its selection of CAFE levels should be based on its best estimates of all input variables used to estimate optimized social benefits. An examination of the uncertainty of outcomes in this process would produce information of academic interest but would not alter the agency's reliance on the most probable outcome for setting standards. It is also not clear that uncertainty surrounding the price of gasoline is greater than that surrounding other variables used in the NHTSA model. In fact, the range of uncertainty for both the effectiveness and cost of technologies includes more potential variation than the three fuel price scenarios examined in the uncertainty analysis. Since each of these factors influences the calculation of optimized social benefits, the agency does not believe it would be useful to isolate only the uncertainty in fuel prices.

*I. The 15 Percent Gap*

The agency assumes that there is a 15 percent difference between the EPA fuel economy rating and the actual fuel economy achieved by vehicles on the road. For example, if the overall EPA fuel economy rating of a light truck is 20 mpg, the actual on-road fuel economy achieved by the average driver of that vehicle is expected to be 17 mpg (20*.85). NRDC and the Union of Concerned Scientists commented that the 15-percent reduction the agency applied to reported fuel economies to adjust for in-use fuel economy performance is too low, and both commenters recommended using an on-road gap of 20 percent. The Union of Concerned Scientists stated that the EPA is in the process of revising its estimates of real-world fuel economy in response to widespread consumer dissatisfaction with the reliability of its present adjustment. In support of its recommendation to use a 20-percent reduction, NRDC cited the range of 20 to 23 percent relied upon by EIA's National Energy Modeling System (NEMS) over the expected lifetimes of MY 2008–2011 vehicles (See AEO2005 Table 47). General Motors stated that it agrees with a 15 percent on-road fuel economy gap.

On February 1, 2006, the Environmental Protection Agency proposed test changes to their fuel economy testing to bring them closer to on-road fuel economy (71 FR 5426). In its proposal, EPA estimated that the actual highway driving fuel economy estimate would be 5 to 15 percent lower than the EPA fuel economy rating and that the actual city driving fuel economy estimate would be 10 to 20 percent lower than the EPA fuel economy rating for most vehicles. However, the EPA has not issued a final rule on this issue. NHTSA will continue to rely on an overall fuel economy adjustment factor of 15 percent, consistent with current EPA regulations. In future rulemakings the agency will consider new regulations as issued by the EPA.

*J. Pollution and Greenhouse Gas Valuation*

In its comments, General Motors maintained that increases in emissions of criteria pollutant resulting from the rebound effect are not likely to be offset by reduced refinery emissions, as assumed in the agency's analysis. As noted earlier, General Motors argued that domestic refineries are subject to strict emission caps, and they must buy permits (credits) in order to support current production. It concluded that a small reduction in overall ''demand for fuel would allow domestic refineries to simply buy fewer pollution permits without changing the emissions at the refineries.''

General Motors also asserted that domestic refineries produce at over 95 percent of capacity, and that all increases in demand for refined products must be met by imports. Therefore, General Motors concluded that a reduction in demand for fuel would not reduce domestic refinery output and corresponding pollutants, but instead would cause a reduction in imports of refined products such as gasoline.

In response to General Motors' comments, the agency notes that there are currently two cap-and-trade programs governing emissions of criteria pollutants by large stationary sources. The Acid Rain Program seeks to limit $NO_X$ and $SO_2$ emissions, but applies only to electric generating facilities and thus will not affect refinery emissions.[132] The $NO_X$ Budget Trading Program is also primarily intended to reduce electric utility emissions, but does include some other large industrial sources such as refineries. However, as of 2003, refineries participating in the program accounted for less than 5% of total $NO_X$ emissions by U.S. refineries.[133] In addition, some refineries could be included among the sources of $NO_X$ emissions that will be controlled under the recently-adopted Clean Air Interstate Rule, which is scheduled to take effect beginning in 2009.[134] However, refinery $NO_X$

[131] The $0.088 value represents the value for reducing U.S. demand on the world market plus the value for reducing the threat of supply disruptions. See Table X–3 in the FRIA.

[132] See *http://www.epa.gov/airmarkets/arp/index.html.*

[133] Estimated from EPA, $NO_X$ Budget Trading Program (SIP Call) 2003 Progress Report, Appendix A, *http://www.epa.gov/airmarkets/cmprpt/nox03/NBP2003AppendixA.xls,* and National Air Quality and Emissions Trends Report 2003, Table A–4, *http://www.epa.gov/air/airtrends/aqtrnd03/pdfs/a4.pdf.*

[134] The Clean Air Interstate Rule also requires reductions in $SO_2$ emissions and establishes an emissions trading program to achieve them, but

Continued

emissions could only be affected in states that specifically elect to include sources other than electric generating facilities in their plans to comply with the rule. The EPA has indicated that it expects states to achieve the emissions reductions required by the Clean Air Interstate Rule primarily from the electric power industry.[135] Thus the agency continues to believe that any reduction in domestic gasoline refining resulting from the adopted CAFE standard will be reflected in reduced refinery emissions of criteria pollutants.

Environmental organizations stated that the agency must attach some value to reducing greenhouse gas emissions, and adjust the benefits of more stringent CAFE standards accordingly. NRDC recommended a value of $10 to $25 per ton of $CO_2$ emissions reduced by fuel savings from stricter CAFE, based on values assigned by the California Public Utilities Commission, Idaho Power Co., and the European Union emissions program. Environmental Defense stated that the agency should use a value of $50 per ton of reduced $CO_2$ emissions. The Union of Concerned Scientists similarly objected to the zero value assigned to reduced emissions of greenhouse gases in the CAFE proposal, and instead recommended using a value of $50 per ton of carbon (corresponding to approximately $0.15 per gallon of gasoline).

The estimated reductions in emissions of criteria pollutants from gasoline refining and distribution used in the PRIA analysis were adjusted to reflect only the fraction of fuel savings that is expected to reduce domestic refining, rather than imports of refined gasoline. They were also adjusted to include only reductions in emissions that occur during domestic extraction and transportation of crude petroleum feedstocks. The estimates of these reduced emissions from crude oil extraction and gasoline refining used in the FRIA continue to reflect these adjustments (see FRIA p. VIII–60).

The agency continues to view the value of reducing emissions of $CO_2$ and other greenhouse gases as too uncertain to support their explicit valuation and inclusion among the savings in environmental externalities from reducing gasoline production and use. There is extremely wide variation in published estimates of damage costs from greenhouse gas emissions, costs for controlling or avoiding their emissions, and costs of sequestering emissions that do occur, the three major sources for developing estimates of economic benefits from reducing emissions of greenhouse gases.[136] Moreover, as stated above, commenters did not reliably demonstrate that the unmonetized benefits, which include $CO_2$, and costs, taken together, would alter the agency's assessment of the level of the standard for MY 2011. Thus, the agency determined the stringency of that standard on the basis of monetized net benefits.

Additionally, costs for remediating gasoline spills are highly variable depending on the volume of fuel released, the environmental sensitivity of the immediate environment, and the presence of specific fuel additives. As a consequence, the agency has elected to include no monetary value for reducing greenhouse gas emissions or remediating fuel spills among the benefits of reducing gasoline use via more stringent fuel economy regulation.

### *K. Increased Driving Range and Vehicle Miles Traveled*

General Motors argued that the value of time spent refueling should be zero. General Motors stated that during the fuel economy test EPA requires fuel tanks to contain a fixed percentage of gasoline compared to tank capacity and that manufacturers have reduced gasoline tank volume on average in response to higher fuel efficiency.

Sierra Research added that range is a design criterion and that there is no basis for assuming that this criterion will change in response to an increase in CAFE standards. Sierra Research provided illustrations purported to show the relationship between fuel capacity and fuel economy standards, and fuel economy and range for 2004 light trucks, in order to demonstrate that increased fuel economy standards might not result in increased vehicle range.

The following reflects our understanding of vehicle driving range and tank size. Typically, the tank size for a model is determined when the model is designed, and the tank size does not change for small incremental improvements in fuel economy (as would occur by virtue of these standards) until the vehicle is redesigned. Thus, until redesign, increased fuel economy would result in increased driving range, and the value of time for reduced refueling is real. If tank downsizing does occur, then there is a cost savings to manufacturers which could be subtracted from technology costs. One way or another, there is a benefit. Thus, the agency is retaining its benefit estimates for increased driving range.

General Motors questioned whether NHTSA's estimate of the average vehicle's lifetime mileage (152,032 miles) was overstated. NADA also cautioned that the agency's fuel conservation predictions should reflect an appropriate range of fuel price and vehicle-miles-traveled assumptions.

In response to the comments by General Motors and NADA, the agency notes that the lifetime mileage estimate reported in the NPRM does not apply to the average vehicle; instead, it represents the average accumulated mileage of a vehicle that survives for a full 36 years. As the accompanying vehicle survival rates indicate, only a small fraction of vehicles originally produced in any model year are expected to survive to this age. The agency has recently updated its estimates of survival probabilities and average annual mileage by vehicle age, and these updated estimates are utilized to calculate the impacts of CAFE standards reported in the FRIA accompanying this final rule.[137] Further, as discussed below in Section XII. Comparison of the final and proposed rule, the agency has adjusted the vehicle miles traveled schedule to reflect increases in the fuel price forecasts.

### *L. Added costs from congestion, crashes and noise*

General Motors agreed with the agency's cost estimates related to traffic congestion, crashes, and noise. However, the commenter again stated its belief that the proposed CAFE standards would result in a net externality cost—not benefit—in terms of consumer welfare. Specifically, General Motors stated that the costs associated with increased congestion, noise, and highway fatalities and injury costs resulting from increases in driving outweigh the benefits associated with

only electric generating facilities are included in the rule's $SO_2$ emissions trading program; see EPA, Clean Air Interstate Rule: Basic Information, *http://www.epa.gov/cair/basic.html#timeline.*

[135] See EPA, Clean Air Interstate Rule: Basic Information, *http://www.epa.gov/cair/basic.html#timeline,* and ''Fact Sheet: Clean Air Interstate Rule,'' *http://www.epa.gov/cair/pdfs/cair_final_fact.pdf.*

[136] Environmental Defense submitted studies regarding the valuation of greenhouse gases. However, the studies were submitted over three months after the close of the comment period and less than one month before the agency's statutory deadline for issuing a MY 2008 standard. These studies have been docketed (NHTSA–2005–2223–2250, 2251).

[137] The data sources and procedures used to develop these updated estimates of vehicle survival and usage are reported in NHTSA, ''Vehicle Survivability and Travel Mileage Schedules,'' Report DOT HS 809 952, National Center for Statistics and Analysis, January 2006, Docket NHTSA–2005–22223–2218. See FRIA p. VIII–11.

decreased oil import dependence and pollution reduction.

NHTSA agrees that this is a true observation made by General Motors on the agency's analysis, although we believe the commenter overstates its significance. We say this because the savings in lifetime fuel expenditures significantly outweigh the combined net externalities costs and the costs of added technology, making this a cost-beneficial rule.

*M. Employment Impacts*

The California State Energy Commission commented that the agency mentioned the potential for the CAFE proposal to result in job losses, but it did not discuss the issue of employment in detail. The Commission stated that increasing CAFE stringency may actually increase employment among automobile manufacturers and related sectors, although union employment and employment in the petroleum manufacturing industry might decline. Without going into detail, the commenter stated that several previous studies have concluded that increasing CAFE standards could increase U.S. employment and economic output. The Commission also suggested that by requiring U.S. automakers to produce more fuel-efficient vehicles, stricter CAFE standards could enhance the competitive positions of those manufacturers in international markets where fuel prices are typically higher, thereby increasing total sales, production volumes, and domestic employment. The Commission asked the agency to address the issue of the employment impacts of its CAFE standards more explicitly in the final rule.

The Marine Retailers Association of America (MRAA) expressed concern that increases in CAFE levels could lead to vehicle downsizing, which in turn could have a negative impact upon the boating industry. According to the MRAA, there are approximately 17 million recreational boats in the U.S., about 80 percent of which are pulled by a light truck or SUV. MRAA stated that to the extent vehicle downsizing occurs, manufacturers may find it more difficult to produce a vehicle with adequate horsepower and torque to tow a boat, and without an adequate vehicle to tow a boat, many consumers may simply decide not to purchase a boat. Accordingly, the MRAA asked NHTSA to carefully consider the employment, sales, and other impacts of its CAFE proposal upon the boating industry.

The agency believes that the CAFE impact on jobs is fairly minor and there are counterbalancing impacts. The agency estimates that higher prices will result in a small loss of sales, which negatively impacts employment. On the other hand, in a few limited cases, the requirements could result in the use of additional new technology, which would increase employment. Both of these impacts on jobs are anticipated to be very minor, and the counterbalancing impacts will be near zero. Very few light trucks are exported for sale and we believe that the proposed increases in fuel economy are unlikely to change these sales volumes appreciably. Thus, we expect that there is little chance of improving the competitive position of the manufacturers in international markets as a result of revised light truck CAFE standards.

The agency has not included changes in vehicle performance as part of its strategy for the manufacturers to improve fuel economy and changes in weight were not accompanied by changes in horsepower. Thus, our assumptions include no changes that would affect the boating industry. However, our assumptions do not require a manufacturer to follow our predicted course of action.

## IX. MY 2008–2010 Transition Period

As stated above, the agency is providing a transition period during MYs 2008–2010. During this period, manufacturers have the option of complying under the standard established under the Unreformed CAFE system or the standard established under the Reformed CAFE system.

*A. Choosing the Reformed or Unreformed CAFE System*

As part of the transition to a fully phased-in Reform CAFE system in MY 2011, during MYs 2008–2010, manufacturers have the option of complying under the Reformed CAFE system or the Unreformed CAFE system. Manufacturers are required to announce their selection for a model year, and that selection will be irrevocable for that MY. However, a manufacturer is permitted to select the alternate compliance option in the following MY. Beginning MY 2011, a manufacturer must comply only under the Reformed CAFE system.

In the NPRM, we proposed that a manufacturer would announce its selection as part of its mid-model year report, as filed according to 49 CFR 537.7. In order to provide manufacturers a greater level of flexibility, the final rule does not require a manufacturer to elect one of the two compliance options until the end of the model year. This will permit a manufacturer to determine its actual fuel economy before determining whether to elect compliance under the Unreformed or Reformed CAFE system. Within 45 days following the end of the model year, a manufacturer must submit to the agency a report indicating whether it has elected to comply with the Reformed or Unreformed CAFE program for that model year.

*B. Application of Credits Between Compliance Options*

The EPCA credit provisions operate under the Reformed CAFE system in the same manner as they do under the Unreformed CAFE system. The harmonic averages used to determine compliance under the Reformed CAFE system permit the amount, if any, of the credits earned to be calculated as under the Unreformed CAFE system:

Credits = (Actual CAFE – Required CAFE) * 10 * Total Production Credits earned in a model year can be carried backward or forward as currently done in the Unreformed CAFE system.

Further, credits are transferable between the two systems. Both Unreformed CAFE and Reformed CAFE use harmonic averaging to determine fuel economy performance of a manufacturer's fleet. Under Reformed CAFE, fuel savings from under- and over-performance with each category are generated and applied almost identically to the way in which this occurs under the Unreformed CAFE system. As a result, the two systems generate credits with equal fuel savings value. Therefore, credits earned in a model year under Unreformed CAFE are fully transferable forward to a model year under the Reformed CAFE system, up to the statutory limit of three years. Likewise, credits under Reformed CAFE can be carried back to Unreformed CAFE.

## X. Impact of Other Federal Motor Vehicle Standards

*A. Federal Motor Vehicle Safety Standards*

The EPCA specifically directs us to consider the impact of other Federal vehicle standards on fuel economy. This statutory factor constitutes an express recognition that fuel economy standards should not be set without due consideration given to the effects of efforts to address other regulatory concerns, such as motor vehicle safety and emissions. The primary influence of many of these regulations is the addition of weight to the vehicle, with the commensurate reduction in fuel economy.

Several manufacturers commented on the evaluation of Federal motor vehicle

standards, generally stating that the agency's estimated weight impacts were too low. Our response to these comments and a summary of our evaluation are provided below. A detailed discussion of the evaluation is provided for in the FRIA (see FRIA p. IV–2).

The agency has evaluated the impact of the Federal motor vehicle safety standards (FMVSS) using MY 2007 vehicles as a baseline. We have issued or proposed to issue a number of FMVSSs that become effective between the MY 2007 baseline and MY 2011. These have been analyzed for their potential impact on light truck fuel economy weights for MYs 2008–2011: The fuel economy impact, if any, of these new requirements will take the form of increased vehicle weight resulting from the design changes needed to meet new FMVSSs.

The average test weights (curb weight plus 300 pounds) of the light truck fleet for General Motors, Ford, and DaimlerChrysler in MY 2008, MY 2009, MY 2010 and MY 2011 are 4,744, 4,800, 4,792, and 4,786,[138] respectively. Thus, overall, the three largest manufacturers of light trucks expect weight to remain almost unchanged during the time period addressed by this rulemaking. The changes in weight include all factors, such as changes in the fleet mix of vehicles, required safety improvements, voluntary safety improvements, and other changes for marketing purposes. These changes in weight over the three model years would have a negligible impact on fuel economy.

1. FMVSS 138, Tire Pressure Monitoring System

As required by the Transportation Recall Enhancement, Accountability, and Documentation (TREAD) Act, NHTSA is requiring a Tire Pressure Monitoring System (TPMS) be installed in all passenger cars, multipurpose passenger vehicles, trucks and buses that have a Gross Vehicle Weight Rating of 10,000 pounds or less. The effective dates are based on the following phase-in schedule:

20 percent of light vehicles produced between September 1, 2005 and August 31, 2006,

70 percent of light vehicles produced between September 1, 2006 and August 31, 2007,

All light vehicles produced after September 1, 2007 are required to comply.

Thus, for MY 2008, an additional 30 percent of the fleet will be required to meet the standard as compared to MY 2007. We estimate from a cost teardown study that the added weight for an indirect system is about 0.156 lbs. and for a direct system is 0.275 to 0.425 lbs. Initially, direct systems will be more prevalent, thus, the increased weight is estimated to be average 0.35 lbs. (0.16 kilograms). Beginning in MY 2008, the weight increase from FMVSS No. 138 is anticipated to be 0.11 pounds (0.05 kilograms).

As stated in the TPMS final rule,[139] by promoting proper tire inflation, the installation of TPMS will result in better fuel economy for vehicle owners that previously had operated their vehicles with under-inflated tires. However, this will not impact a manufacturer's compliance under the CAFE program. Under the CAFE program, a vehicle's fuel economy is calculated with the vehicle's tires at proper inflation. Therefore, the fuel economy benefits of TPMS have not been considered in this rulemaking.

2. FMVSS 202, Head Restraints

The final rule requires an increase in the height of front seat outboard head restraints in pickups, vans, and utility vehicles, effective September 1, 2008 (MY 2009). If the vehicle has a rear seat head restraint, it is required to be at least a certain height.[140] The initial head restraint requirement, established in 1969, resulted in the average front seat head restraints being 3 inches taller than pre-standard head restraints and adding 5.63 pounds [141] to the weight of a passenger car. With the new final rule, we estimate the increase in height for the front seats to be 1.3 inches and for the rear seat to be 0.26 inch, for a combined average of 1.56 inches.[142] Based on the relationship of pounds to inches from current head restraints, we estimate the average weight gain across light trucks would be 2.9 pounds (1.3 kilograms).

3. FMVSS 208, Occupant Crash Protection (Rear Center Seat Lap/Shoulder Belts)

This final rule requires a lap/shoulder belt in the center rear seat of light trucks. There are an estimated 5,061,079 [143] seating positions in light trucks needing a shoulder belt, where they currently have a lap belt. This estimate of seating positions is a combination of light trucks, SUVs, minivans and 15 passenger vans that have either no rear seat, or one to four rear seats that need shoulder belts. This estimate was based on sales of 7,521,302 light trucks in MY 2000. Thus, the average light truck needs 0.67 shoulder belts. The average weight of a rear seat lap belt is 0.92 lbs. and the average weight of a manual lap/shoulder belt with retractor is 3.56 lbs.[144] Thus, the anticipated weight gain is 2.64 pounds per shoulder belt. We estimate the average weight gain per light truck for the shoulder belt would be 1.8 pounds (0.8 kilograms).

A second, potentially more important, weight increase depends upon how the center seat lap/shoulder belt is anchored. The agency has allowed a detachable shoulder belt in this seating position, which could be anchored to the ceiling or other position, without a large increase in weight. If the center seat lap/shoulder belt were anchored to the seat itself, typically the seat would need to be strengthened to handle this load. If the manufacturer decides to change all of the seats to integral seats, having all three seating positions anchored through the seat, then both the seat and flooring needs to be strengthened. The agency requested information about manufacturer plans for complying with this requirement and after reviewing the confidential submissions, NHTSA estimates that the average weight gain per light truck for the shoulder belt would be 0.36 lbs (0.16 kg) compared to MY 2007. For the anchorage, the average weight increase would be 0.2 lbs (0.09 kg) or more.

The effective dates are based on the following phase-in schedule:

50 percent of light vehicles produced between September 1, 2005 and August 31, 2006,

80 percent of light vehicles produced between September 1, 2006 and August 31, 2007,

100 percent of light vehicles produced after September 1, 2007.

[138] This figure is for the fleet not including MDPVs for a more accurate comparison to the fleet numbers for MYs 2008 through 2010. The figure including MDPVs is 4,832 lbs.

[139] 70 FR 18136, 18139; April 8, 2005; Docket No. 2005–28506.

[140] The compliance date for the upgraded requirements applicable to head restraints voluntarily installed at rear outboard seating positions recently was amended from September 1, 2008, to September 1, 2010 (see, 71 FR 12415; March 9, 2006).

[141] Tarbet, Marcia J., ''Cost and Weight Added by Federal Motor Vehicle Safety Standards for Model Years 1968–2001 in Passenger Cars and Light Trucks'', NHTSA, December 2004, DOT–HS–809–834. Pg. 51. (*http://www.nhtsa.dot.gov/cars/rules/regrev/evaluate/809834.html*).

[142] ''Final Regulatory Impact Analysis, FMVSS No. 202 Head Restraints for Passenger Vehicles'', NHTSA, November 2004, Docket No. 19807–1, p. 74.

[143] ''Final Economic Assessment and Regulatory Flexibility Analysis, Cost and Benefits of Putting a Shoulder Belt in the Center Seats of Passenger Cars and Light Trucks'', NHTSA, June 2004, Docket No. 18726–2, p. 33.

[144] Tarbet 2004, p. 84.

Thus, for MY 2008, an additional 20 percent of the fleet will be required to meet the standard. We estimate the average weight gain per light truck for the shoulder belt would be 0.36 lbs (0.16 kg) [1.8 pounds (0.8 kilograms) * 0.2] compared to MY 2007. For the anchorage, the average weight increase would be 0.2 pounds (0.09 kg) or more.

4. FMVSS 208, Occupant Crash Protection (35 mph Frontal Impact Testing)

The advanced air bag rule requires 35 mph belted testing with the 50th percentile male dummy with a phase-in schedule of:

35 percent of light vehicles produced between September 1, 2007 and August 31, 2008,

65 percent of light vehicles produced between September 1, 2008 and August 31, 2009,

100 percent of light vehicles produced after September 1, 2009.[145]

The impacts of this requirement were not considered in the evaluation for the NPRM. Evaluation of the 35 mph belted test has been added in response to comment from General Motors that raised the issue. About 85 percent of the fleet already meets the test based on NCAP results. It is assumed that pretensioners and load limiters would be the countermeasures used to pass the test. The estimated combined weight of these features is 2.4 pounds for the two front outboard seats. Thus, the average incremental weight would be 0.36 lbs (0.16 kg).

5. FMVSS 301, Fuel System Integrity

This final rule amends the testing standards for rear end crashes and resulting fuel leaks. Many vehicles already pass the more stringent standards, and those affected are not likely to be pick-up trucks or vans. It is estimated that weight added will be only lightweight items such as a flexible filler neck. We estimate the average weight gain across this vehicle class would be 0.24 lbs (0.11 kg).

The effective dates are based on the following phase-in schedule:

40 percent of light vehicles produced between September 1, 2006 and August 31, 2007,

70 percent of light vehicles produced between September 1, 2007 and August 31, 2008,

100 percent of light vehicles produced after September 1, 2008 are required to comply.

Thus, 60 percent of the fleet must meet FMVSS 301 during the MY 2008–2010 time period. Thus, the average weight gain during this period would be 0.14 lbs (0.07 kg).

*B. Potential Future Safety Standards and Voluntary Safety Improvements*

There are several safety standards that have recently been proposed, or that the agency is required by Congress to propose in the near future that could impact some of the MY 2008–2011 vehicles. In most cases, these proposals or future proposals are already being met voluntarily by a part of the fleet.

Additionally, the agency has historically considered the impact of voluntary safety improvements. The agency has expressed concern that overly stringent CAFE standards might discourage manufacturers from pursuing voluntary improvements (53 FR 39275, 39296; October 6, 1988). Currently, there are improvements that are being made voluntarily to meet market demand and/or to perform better on government or insurance industry tests involving vehicle ratings. In our analysis for this final rule, the potential future safety standards and voluntary improvements have been combined without regard to effective date, even though the final effective dates for the potential future safety standards may be later than MY 2011.

1. Anti-Lock Brakes and Electronic Stability Control (ESC)

Many manufacturers are planning to install ESC on all their light vehicles. Recent congressional legislation contained in section 10301 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users of 2005 (SAFETEA–LU)[146] requires the Secretary of Transportation to ''establish performance criteria to reduce the occurrence of rollovers consistent with stability enhancing technologies'' and to ''issue a proposed rule * * * by October 1, 2006, and a final rule by April 1, 2009.'' A requirement by NHTSA in this area could potentially be effective with MY 2011.

The ESC system needs anti-lock brakes to work appropriately. Anti-lock brakes add about 20 pounds to the weight of a light truck. Currently, about 91 percent of all light trucks have anti-lock brakes. Thus, if all light trucks added anti-lock brakes, average light truck weight would increase by 1.8 pounds. ESC is estimated to add about 9 pounds to a vehicle. In 2005, an estimated 23 percent of light trucks have ESC. Thus, if all light trucks added ESC, average light truck weight would increase by 6.9 pounds. So, the total weight increase is 8.7 pounds (3.95 kg.).

2. Roof Crush, FMVSS 216

On August 23, 2005, NHTSA published an NPRM proposing to upgrade the agency's safety standard on roof crush resistance. (70 FR 49223) The NPRM proposed to extend the standard to vehicles with a GVWR of 10,000 pounds or less, increase the force applied to 2.5 times each vehicle's unloaded weight, and replace the current limit on the amount of roof crush with a requirement to maintain enough headroom for a mid-size adult male occupant.

The Alliance, Ford, DaimlerChrysler and Toyota commented that the agency should have included the weight impact of the FMVSS 216 amendments in its analysis. The agency agrees. Manufacturers' estimates of the weight implications of compliance with the proposed FMVSS No. 216 ranged from minimal to tens of pounds.

As estimated at the time of the FMVSS 216 NPRM, the proposed upgrade was estimated to increase average vehicle weight by 6.07 pounds. The proposed effective date was the first September 1 occurring three years after publication of the final rule.

In addition to the comments on the CAFE NPRM, NHTSA received a number of comments on the weight estimates in response to the Roof Crush NPRM. Other manufacturers commented on the Roof Crush NPRM that the agency's weight estimates were too low. However, other commenters indicated that weight estimates were too high because they said that the agency did not consider alternative, lighter, materials that manufacturers could use to comply with the standard. The agency is still evaluating all of the comments to the Roof Crush NPRM and estimates that, if a final rule were issued, it would be in 2007. Therefore, for purposes of this CAFE rule, the agency is using the estimates made at the time of the Roof Crush NPRM and assuming an effective date of September 1, 2010.

3. Side Impact and Ejection Mitigation Air Bags (Thorax and Head Air Bags)

Many manufacturers are installing side impact air bags (thorax bags, combination head/thorax bags, or window curtains). NHTSA proposed an oblique pole test as part of FMVSS 214 on May 17, 2004 (69 FR 27990). Based on current technology, this NPRM would result in head protection by either a combination head/thorax side

[145] The standard will be fully effective on September 1, 2010 when it includes small manufacturers, multi-stage manufacturers and alterers.

[146] Pub. L. 109–59, 119 Stat. 1144 (2005).

air bag or window curtains. SAFETEA–LU also requires the use of window curtain air bags for ejection mitigation, which would result in taller and wider window curtains that would be tethered or anchored low to keep occupants in the vehicle.

Assuming in the future that the typical system will be thorax bags with a window curtain, the average weight increase would be 11.55 pounds (4.77 + 6.78) or 5.25 kg (2.07 + 3.08). In MY 2005, about 31 percent of the fleet had thorax air bags, 7 percent had combination air bags and, and 25 percent had window curtains. The combined average weight for these systems in MY 2005 was 3.49 pounds (1.59 kg). Thus, the future increase in weight for side impact air bags and window curtains compare to MY 2005 installations is 8.06 pounds (11.55–3.49) or 3.66 kg (5.25–1.59).

Another area that could result in an increase in weight is if the manufacturers include structure to get a higher score in the IIHS higher side impact barrier test. Public data is not available to estimate what voluntary weight increases have been added or will be added to get a better score in this test.

4. Offset Frontal Crash Testing

IIHS has been testing and rating vehicles using an offset deformable barrier crash test at 64 km/h. Many manufacturers have redesigned their vehicles to do better in these tests and have increased the weight of their vehicles. Four light trucks that the agency has tested, which improved from a poor rating to a marginal or good rating in the IIHS testing, increased their weights, some with other redesigns, as follows:

TABLE 14.—INCREASES IN WEIGHT TO IMPROVE OFFSET FRONTAL TESTING

| | Before | After redesign | Increase in weight |
|---|---|---|---|
| SUV | 1997 Chevrolet Blazer (4,686 lbs.) | 2002 Trailblazer (5,181 lbs.) | [147] 495 lbs. |
| SUV | 1999 Mitsubishi Montero Sport (4,646 lbs.) | 2001 Mitsubishi Montero Sport (4,715 lbs.) | 69 lbs. |
| Pickup | 2001 Dodge Ram 1500 (4,930 lbs.) | 2002 Dodge Ram 1500 (4,969 lbs.) | 39 lbs. |
| Minivan | 1996 Toyota Previa (3,810 lbs.) | 1998 Toyota Sienna (3,937 lbs.) | 127 lbs. |

[147] Part of the explanation for the weight increase between the Blazer and Trailblazer is an increase of approximately 1,070 sq. in. in footprint.

These weight increases have an affect on the vehicle's fuel economy. However, many vehicles have already been redesigned with this offset frontal test in mind. Whether increases in weight like this will continue for other vehicles in the future is unknown.

*C. Cumulative Weight Impacts of the Safety Standards and Voluntary Improvements*

After making the changes in response to comments discussed above, NHTSA estimates that weight additions required by FMVSS regulations that will be effective in MYs 2008–2011, compared to the MY 2007 fleet will increase light truck weight by an average of 4.07 pounds or more (1.83 kg or more). Likely weight increases from future safety standards or voluntary safety improvements will add 22.83 pounds or more (10.37 kg or more) compared to MY 2005 installations.

The Alliance, DaimlerChrysler, Ford, General Motors and Toyota argued that the weight additions projected by NHTSA for FMVSS regulations that will be effective in MYS 2008–2011 is too low. NHTSA projected an average of 15.46 pounds (including both FMVSS requirements and voluntary safety improvements) and a CAFE impact of 0.04 mpg. Only Ford provided a total estimate which could be compared to this number, and their estimate was significantly higher.

In some instances the manufacturers' weight estimates are similar to NHTSA's, in some instances they are less than NHTSA's, but often they are more than NHTSA's. The agency's estimates are based on cost and weight tear down studies of a few vehicles and cannot possibly cover all the variations in the manufacturers' fleets. The manufacturer's estimates of the fuel economy impact of added weight on mpg have typically been less than NHTSA's estimates. NHTSA estimated that an increase of 3–4 pounds [148] results in a decrease of 0.01 mpg, the manufacturers' data show that an increase of up to 7 pounds results in a decrease of 0.01 mpg. The combination of the manufacturers estimating more safety weight impacts, but that weight having less impact on miles-per-gallon, has resulted in similar impacts being estimated by NHTSA and the manufacturers. The agency has not questioned the manufacturers' estimates closely because the differences in the overall fuel economy impact due to required safety standards as estimated by Ford, General Motors, and NHTSA is small. A more detailed discussion of the impact of safety improvements is provided in the FRIA (see FRIA p. IV–2).

*D. Federal Motor Vehicle Emissions Standards*

1. Tier 2 Requirements

Pursuant to its authority under the Clean Air Act, on February 10, 2000, the Environmental Protection Agency (EPA) published a final rule establishing new Federal emission standards for passenger cars and light trucks (*see* 65 FR 6698). Known as the ''Tier 2'' Program, the new emissions standards in EPA's final rule cover both light-duty vehicles (i.e., passenger cars and light trucks with a GVWR of 6,000 pounds or less) and medium-duty passenger vehicles (MDPVs) (i.e., vehicles with either a curb weight of more than 6,000 pounds or a GVWR of more than 8,500 pounds and which otherwise meet the EPA definition (as discussed previously in this notice)).

The ''Tier 2'' standards are designed to focus on reducing the emissions most responsible for the ozone and particulate matter (PM) impact from these vehicles (*e.g.*, $NO_X$ and non-methane organic gases (NMOG), consisting primarily of hydrocarbons (HC)) and contributing to ambient volatile organic compounds (VOC). In addition to establishing new emissions standards for vehicles, the Tier 2 standards also establish standards for the sulfur content of gasoline.

For new passenger cars and lighter light trucks (rated at less than 6,000 pounds GVWR), the Tier 2 standards' phase-in began in 2004, and the standards are to be fully phased in by 2007. For MDPVs, the phase-in schedule under the Tier 2 Program requires that 50 percent of the MDPV fleet must comply in MY 2008 and that 100 percent comply by MY 2009.

Prior to model year 2008, EPA also regulates MDPVs under ''Interim-Non-

[148] In reality, the fuel economy impact depends on the baseline weight of the vehicle.

Tier 2'' standards, applicable to MDPVs in accordance with a phase-in schedule beginning with MY 2004. The phase-in schedule requires compliance at the following levels: 25 percent in 2004, 50 percent in 2005, 75 percent in 2006, and 100 percent in 2007. Thus, beginning in 2008, half of new MDPVs are expected to comply with Tier 2 and the other half with ''Interim Non-Tier 2 Standards.'' (Once the Tier 2 standards for MDPVs are fully implemented, the Interim-Non-Tier 2 standards will be eliminated.)

When issuing the Tier 2 standards, EPA responded to comments regarding the Tier 2 standard and its impact on CAFE by indicating that it believed that the Tier 2 standards would not have an adverse effect on fuel economy.

In their confidential product plan submissions, several manufacturers stated that the Tier 2 requirements have an effect on fuel economy through additional weight and design requirements. However, after careful consideration, we have concluded that the impacts of the Tier 2 standards on fuel economy would not be significant for the following reasons. First, manufacturers themselves have estimated that the resulting reduction in fuel economy during MYs 2008–2010, in comparison to MY 2007, would be no greater than 0.04 mpg. Furthermore, with the exception of MDPVs, the Tier 2 requirements will be fully implemented in MY 2007, prior to the MYs that are the subject of this rulemaking for CAFE.

2. Onboard Vapor Recovery

On April 6, 1994, EPA published a final rule controlling vehicle-refueling emissions through the use of onboard refueling vapor recovery (ORVR) vehicle-based systems (*see* 59 FR 16262). These requirements applied to light-duty vehicles (cars) beginning in the 1998 model year, and were phased in over three model years. The ORVR requirements also apply to light-duty trucks with a GVWR of 6,000 pounds or less beginning in model year 2001, being phased in over three model years. For light-duty trucks with a GVWR of 6,001–8,500 lbs, the ORVR requirements first applied in the 2004 model year and were phased in over three model years.

The ORVR requirements impose a weight penalty on vehicles, as they necessitate the installation of vapor recovery canisters and associated tubing and hardware. However, the operation of the ORVR system results in fuel vapors being made available to the engine for combustion while the vehicle is being operated. As these vapors provide an additional source of energy that would otherwise be lost to the atmosphere through evaporation, the ORVR requirements do not have a negative impact on fuel economy, despite the associated weight increase.

In its comments, Honda disagreed with the agency's assertion that ORVR systems do not have a negative impact on fuel economy because the systems make available for combustion vapors that would otherwise be lost to the environment. Honda stated that the agency's assertion is correct for ''in-use fuel economy,'' but it is not true for the test procedures used to determine fuel economy under CAFE, because the fuel economy test procedures rely on a carbon balance equation. Honda stated that the measured fuel economy of a vehicle under the fuel economy test procedures is exactly the same, whether or not the ORVR system makes fuel vapors available to the engine for combustion.

NHTSA reiterates that ORVR provides a slight fuel economy benefit with respect to in-use fuel economy. NHTSA acknowledges that Honda's point is also correct—that this fuel economy benefit is not distinguishable in the Federal test procedure (FTP) or highway test cycle measurements. However, ORVR is not expected to have a significant effect on the fuel economy values measured on the FTP and highway tests. Further, the slight on-road fuel economy benefit realized is not utilized by NHTSA to set fuel economy standards.

In its rulemaking proceedings for ORVR, EPA conducted an extensive analysis on increases in vehicle weight due to the addition of ORVR hardware and software. A discussion of the ORVR weight penalty is contained in EPA's ''Final Regulatory Impact Analysis: Refueling Emission Regulations for Light-Duty Vehicles and Trucks and Heavy-Duty Vehicles,'' January 1994; Chapter 5 Economic Impact, section 5.3.2.1. If mechanical seal ORVR systems are more widely used in the future than liquid seal ORVR systems (which represent approximately 95–98 percent of today's vehicles), the weight penalty could increase above that discussed in EPA's RIA. However, any increase in vehicle weight due to more widespread use of mechanical seal ORVR systems would be negligible and not be expected to be a major fuel economy design consideration.

3. California Air Resources Board—Clean Air Act Section 209 Standards

The Clean Air Act (CAA) generally prohibits States or any other political subdivision from adopting any standard relating to the control of emissions from new motor vehicles (CAA section 209(a); 42 U.S.C. 7543(a)). However, the statute provides that the State of California may issue such standards upon obtaining a waiver from the EPA (CAA section 209(b); 42 U.S.C. 7543(b)). The State of California has established several emission requirements under section 209(b) of CAA as part of its Low Emission Vehicle (LEV) program. California initially promulgated these section 209(b) standards in its LEV I standards, and it has subsequently adopted more stringent requirements under section 209(b) of the CAA in its LEV II regulations. The relevant LEV II regulations are being phased in for passenger cars and light trucks during the 2004–2007 model years.[149]

The LEV II amendments restructure the light-duty truck category so that trucks with a GVWR rating of 8,500 pounds or less are subject to the same low-emission vehicle standards as passenger cars. The LEV II Program also includes more stringent (than LEV I) emission standards for passenger car and light-duty truck LEVs and establishes standards for ''ultra low emission vehicles'' (ULEVs).

The LEV II Program also has requirements for ''zero emission vehicles'' (ZEVs) that apply to passenger cars and light trucks up to 3,750 lbs. loaded vehicle weight (LVW), beginning in MY 2005. Trucks between 3,750 lbs. LVW and 8,500 lbs. GVWR are phased in to the ZEV regulation from 2007–2012. The ZEV requirements begin at 10 percent in 2005 and ramp up to 16 percent for 2018 under different paths.

Compliance with more stringent emission requirements of the section 209 CAA requirements in the LEV II program is most often achieved through more sophisticated combustion management. The associated improvements and refinement in engine controls generally improve fuel efficiency and have a positive impact on fuel economy.[150] However, such gains may be diminished because the advanced technologies required by the program can affect the impact of other fuel-economy improvements (primarily due to increased weight). The agency has considered this potential impact in our evaluation of manufacturers' product plans.

[149] As of the end of 2005, ten states have adopted the LEV II program, including Connecticut, Maine, Massachusetts, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Vermont, and Washington.

[150] Northeast States for Coordinated Air Use Management, ''White Paper: Comparing the Emissions Reductions of the LEV II Program to the Tier 2 Program,'' October 2003.

## XI. Need of the Nation To Conserve Energy

EPCA specifically directs the Department to balance the technological and economic challenges related to fuel economy with the nation's need to conserve energy. While EPCA grew out of the energy crisis of the 1970s, the United States still faces considerable energy challenges today. U.S. energy consumption has been outstripping U.S. energy production at an increasing rate. This imbalance, if allowed to continue, will undermine our economy, our standard of living, and our national security. (May 2001 National Energy Policy (NEP) Overview, p. viii)

As was made clear in the first chapter of the NEP, efficient energy use and conservation are important elements of a comprehensive program to address the nation's current energy challenges:

> America's current energy challenges can be met with rapidly improving technology, dedicated leadership, and a comprehensive approach to our energy needs. Our challenge is clear—we must use technology to reduce demand for energy, repair and maintain our energy infrastructure, and increase energy supply. Today, the United States remains the world's undisputed technological leader: but recent events have demonstrated that we have yet to integrate 21st-century technology into an energy plan that is focused on wise energy use, production, efficiency, and conservation.
> (Page 1–1)

The concerns about energy security and the effects of energy prices and supply on national economic well-being that led to the enactment of EPCA persist today. The demand for petroleum is steadily growing in the U.S. and around the world.

The Energy Information Administration's International Energy Outlook 2005 (IEO2005)[151] and Annual Energy Outlook 2006 (Early Release) (AEO2006) indicate growing demand for petroleum in the U.S. and around the world. U.S. demand for oil is expected to increase from 21 million barrels per day in 2004 to 28 million barrels per day in 2030. In the AEO2006 reference case, world oil demand increases through 2030 at a rate of 1.4 percent annually, from 82 million barrels per day in 2004 to 118 million barrels per day in 2030 (AEO2006). Approximately 67 percent of the increase in world demand is projected to occur in North America and emerging Asia. Energy use in the transportation sector is projected to increase at an annual rate of 1.8 percent through 2025 (AEO2006).

To meet this projected increase in demand, worldwide productive capacity would have to increase by more than 36 million barrels per day over current levels. OPEC producers are expected to supply 40 percent of the increased production. In contrast, U.S. crude oil production is projected to increase from 8.4 million barrels per day in 2004 to 9.62 million in 2015, and then begin declining, falling to 8.9 million barrels per day in 2025. By 2025, 60 percent of the oil consumed in the U.S. would be imported oil. [152]

Energy is an essential input to the U.S. economy, and having a strong economy is essential to maintaining and strengthening our national security. Secure, reliable, and affordable energy sources are fundamental to economic stability and development. Rising energy demand poses a challenge to energy security, given increased reliance on global energy markets. As noted above, U.S. energy consumption has increasingly been outstripping U.S. energy production.

Conserving energy, especially reducing the nation's dependence on petroleum, benefits the U.S. in several ways. Improving energy efficiency has benefits for economic growth and the environment, as well as other benefits, such as reducing pollution and improving security of energy supply. More specifically, reducing total petroleum use decreases our economy's vulnerability to oil price shocks. Reducing dependence on oil imports from regions with uncertain conditions enhances our energy security and can reduce the flow of oil profits to certain states now hostile to the U.S. Reducing the growth rate of oil use will help relieve pressures on already strained domestic refinery capacity, decreasing the likelihood of product price volatility.

We believe that the continued development of advanced technology, such as fuel cell technology, and an infrastructure to support it, may help in the long term to achieve reductions in foreign oil dependence and stability in the world oil market. The continued infusion of advanced diesels and hybrid propulsion vehicles into the U.S. light truck fleet may also contribute to reduced dependence on petroleum. In the shorter term, our Reformed CAFE final rule will encourage broader use of fuel saving technologies, resulting in more fuel-efficient vehicles and greater overall fuel economy.

We have concluded that the increases in the light truck CAFE standards that will result from today's final rule will contribute appropriately to energy conservation and the comprehensive energy program set forth in the NEP. In assessing the impact of the standards, we accounted for the increased vehicle mileage that accompanies reduced costs to consumers associated with greater fuel economy and have concluded that the final rule will lead to considerable fuel savings. While increasing fuel economy without increasing the cost of fuel will lead to some additional vehicle travel, the overall impact on fuel conservation remains decidedly positive.

We acknowledge that, despite the CAFE program, the United States' dependence on foreign oil and petroleum consumption has increased in recent years. Nonetheless, data suggest that past fuel economy increases have had a major impact on U.S. petroleum use. The NAS determined that if the fuel economy of the vehicle fleet had not improved since the 1970s, U.S. gasoline consumption and oil imports would be about 2.8 million barrels per day higher than they are today. Increasing fuel economy by 10 percent would produce an estimated 8 percent reduction in fuel consumption. Increases in the fuel economy of new vehicles eventually raise the fuel economy of all vehicles as older cars and trucks are scrapped.

Our analysis in the EA indicates that Reformed CAFE standards will result in an estimated 73 million metric tons of $CO_2$ over the lifetime of the vehicles (see EA p. 31). They will further reduce the intensity of the greenhouse gas emissions generated by the transportation sector of the national economy, consistent with the President's overall climate change policies. However, NHTSA has not monetized greenhouse gas reduction benefits in this rule, given the scientific and economic uncertainties associated with developing a proper estimation of avoided costs due to climate change.

## XII. Comparison of the Final and Proposed Standards

The standards established in today's final rule are more stringent than those proposed in the NPRM. Moreover, the Final Rule subjects MDPVs to the light truck CAFE program beginning in MY 2011, where as the NPRM did not include the regulation of these vehicles. By applying more stringent standards to a more encompassing definition of light trucks, the final rule requires higher fuel efficiency from more vehicles than was proposed in the NPRM. The fuel savings estimated to result from the standards adopted today are 4.4 billion gallons from the MYs 2008–2010 Unreformed standards, 4.9 billion gallons from the

[151] See *http://www.eia.doe.gov/oiaf/ieo/pdf/0484(2005).pdf.*

[152] AEO2006, Table A20, International Petroleum Supply and Disposition Summary.

MYs 2008–2010 Reformed standards, and an additional fuel savings of over 2.8 billion gallons from the MY 2011 Reformed standard.

TABLE 15.—INDUSTRY-WIDE FUEL ECONOMY LEVELS REQUIRED BY PROPOSED AND FINAL REFORMED CAFE STANDARDS

| MY | Proposed | Final | Increase |
|---|---|---|---|
| 2008 | 22.6 | 22.7 | +0.1 |
| 2009 | 23.1 | 23.4 | +0.3 |
| 2010 | 23.4 | 23.7 | +0.3 |
| 2011 | 23.9 | 24.0 | +0.1 |

The total fuel saving estimated to result from the Reformed CAFE standards for MYs 2008–2011 is approximately 7.8 billion gallons. However, in the NPRM the agency estimated that the Reformed CAFE standards as proposed would potentially save 10.2 billion gallons of fuel over the lifetimes of light trucks manufactured during these same model years. The lower estimated fuel savings of the final rule despite adopting more stringent standards can be explained by a number of factors that affected the agency's analysis. These include: changes in the Volpe model, higher fuel price forecasts, revisions to the Reformed CAFE standard, and changes to manufacturers' product plans.

Some of these factors increased the estimated fuel savings for the final rule compared to the level reported in the NPRM, while others reduces the rule's estimated fuel savings. These factors are each discussed below.

*A. Changes in the Volpe Model*

There were two changes made to the Volpe model between the analysis reported in the NPRM and the analysis conducted for the final rule, a revision to the maximum lifetime of light trucks and a revision to how the model applied technologies. First, the maximum lifetime of light trucks was extended from 25 to 36 years, and the fraction of vehicles originally produced during a model year that remain in service at each age was increased to reflect this longer lifetime. These changes were made in response to NHTSA's detailed analysis of R.L. Polk registration data for recent model year light trucks. These changes increase fuel savings resulting from any increase in CAFE standards because they increase the number of miles driven (and the amount of fuel consumed under the Baseline standard) during a vehicle's expected lifetime. This change increased the total fuel savings estimated to result from the Reformed CAFE standards by 0.2 billion gallons.

The second change to the Volpe CAFE model was a revision to the way it applied technology to achieve increased fuel economy. The Reformed CAFE system establishes required fuel economy levels, in part, by setting fuel economy targets through a marginal cost-benefit analysis. As noted above, this analysis applies technologies until the marginal cost of the technology equals the marginal benefits of that technology. The higher fuel prices projected by EIA after the NPRM might be expected to cause the model to apply a greater amount of fuel saving technology in the final rule than in the NPRM, and potentially result in final standards that are more stringent than those adopted today. This did not occur, in part, because of the revised technology assumptions incorporated in the Volpe model, as explained below.

The agency revised its technology assumptions to be more consistent with the estimates in the NAS report about the number of years needed to implement each of the various technologies and in response to comments from manufacturers. To achieve consistency with the NAS report, we reduced the projected rates of technology implementation employed by the model. In their comments, several manufacturers stated that greater leadtime than that provided in the NPRM is needed for the introduction of technologies across a manufacturer's fleet of vehicles and that some technologies would only be introduced or added to vehicles in conjunction with a major vehicle redesign or a vehicle introduction. Honda stated that it can take 10 years from the point of initial introduction of a technology until the point at which that technology is employed throughout a manufacturer's fleet. Honda and Toyota cite the NAS report which concluded that application of existing technologies will ''probably require 4 to 8 years.'' Honda further stated that phase-in rates have a critical impact on lead time requirements. Nissan, citing the NAS report, stated that overly aggressive implementation of technologies has the potential to ''adversely affect manufacturers, their suppliers, their employees, and consumers.'' These concerns were echoed by Ford and the Alliance.

In response to these comments, the agency re-evaluated the ''phase-in'' assumptions used in the Volpe model. ''Phase-in'' caps represent the maximum fraction of a manufacturer's model line or fleet to which a technology can be applied when it is initially introduced. For example, we assumed that low friction lubricants could be fully implemented in a period of four years, with equal rates of implementation in each year. This translates to a ''phase-in'' cap of 25 percent (100 percent phase-in divided by 4 years).

The agency has decreased the implementation rate for most technologies to provide implementation rates consistent with the NAS estimate of 4 to 8 years. This resulted in decreasing phase-in caps, with many ranging from 25 percent (4 year introduction) to 17 percent (approximately 6 years, the midpoint of the NAS estimate). The agency assumed shorter implementation rates for technologies that did not require changes to the manufacturing line. For other technologies (*e.g.*, hybrid and diesel powertrains) we employed phase-in caps as low as 3 percent, to reflect the major redesign efforts and capital investments required to implement these technologies. A detailed comparison of the phase-in caps used in the NPRM analysis and the final rule analysis is provided in Appendix B of this document.

In addition to revisions based on the NAS report, the agency also made revisions to the Volpe model in response to specific manufacturers' comments. Changes to the Volpe model include deleting the use of some technologies for specific manufacturers and delaying implementation of some technologies to coincide with product redesigns/model introduction. The changes instituted by the agency involve technology phase-in schedules and deleting some technologies from consideration. For the NPRM, the Volpe analysis excluded additional application of automatic transmissions with aggressive shift logic. In consideration of the extremely limited planned use of automatically-shifted manual (*i.e.*, clutch) transmissions (ASMTs) the revised Volpe analysis also excludes additional applications of ASMTs. Although these technologies may eventually appear on vehicles during the MY 2011 timeframe, the agency is aware of technical and regulatory burdens that likely will be difficult to overcome during MYs 2008–2011.

Manufacturers' updated 2005 product data showed that they plan to include some technologies on their MY 2008–11 light trucks that had previously been utilized in the agency's NPRM analysis to increase fuel economy from its baseline level originally specified in manufacturers' 2004 product plans. Manufacturers claimed that because they added these technologies after submitting product plan data to the

agency in 2004, that the agency was double counting the effect of these technologies. The agency disagrees. The analysis for the NPRM was based on the product plans submitted in 2004. The analysis for the final rule is based on the updated product plans manufacturers provided the agency in response to the August 2005 RFC. If a technology was applied to a vehicle model in the NPRM, and that same technology was utilized by manufacturers on the same vehicle in their updated product plans, the agency did not apply that technology to that vehicle in the analysis it conducted for the final rule. In other words, the agency did not project the use of a technology on a model that a manufacturer stated was already equipped with that technology.

Manufacturers also provided information stating that certain technologies, which the agency had projected in its NPRM analysis, were incompatible with their products. In response, the agency hasn't projected the use of certain technologies on specific products for specific manufacturers that claimed technology incompatibility. In almost all cases, these technologies were classified as being available for use on other products, both for the specific manufacturers that claimed incompatibility with some products and for other manufacturers' products. The computer model used to implement the Volpe Analysis, as well as the Stage analysis, used ''engineering constraints'' to apply general (*i.e.*, industry-wide) limits on the application of some technologies in consideration of technical issues (as opposed to product planning or lead time considerations, which are addressed separately).

Further, the agency constrained the introduction of two technologies (aerodynamic drag reduction and materials substitution) to coincide with a major vehicle redesign or a vehicle introduction. Constraining these technologies to major redesigns is consistent with manufacturer practice, given that applying such technologies requires changes to integral design components such as paneling. These constraints are in addition to the ''engineering constraints'' discussed above.

Additionally, the agency itself has removed technologies included in the NAS report from consideration due to indications that these technologies will not be available for implementation nor are any manufacturers planning to incorporate these technologies in their vehicles during the MYs 2008–2011 time frame. For the NPRM, the Volpe analysis excluded additional application of automatic transmissions with aggressive shift logic. For the final rule the Volpe analysis also excluded application of automatically-shifted manual (*i.e.*, clutch) transmissions in consideration of its limit planned application.

The changes to the technology assumptions relied upon by the Volpe model reduced the estimated fuel savings for the final Reformed CAFE standards, in comparison to the proposed Reformed CAFE standards, by 1.5 billion gallons of fuel. Considered together, the changes to the Volpe model reduced the fuel savings estimated for the Reformed CAFE standards, again in comparison with the proposed standards, by 1.3 billion gallons of fuel.

*B. Higher Fuel Price Forecasts*

As stated above, the agency is relying on the most recent EIA forecasts for fuel prices for the final rule. In the NPRM, the agency relied on gasoline prices ranging from $1.51–1.58 a gallon. In the final rule, the agency is relying on the updated fuel price forecast, which provides a range of gasoline prices of $1.96–2.39 a gallon. These higher fuel prices had the effect of raising the optimized fuel economy targets for MY 2011 under the Reformed CAFE standard.[153] This, in turn, raised the estimate of fuel savings resulting from the Reformed standard by 0.7 billion gallons.

However, as discussed in Chapter VIII, higher fuel prices increase the per-mile cost of driving and therefore are expected to reduce the average number of miles driven each year by light trucks (an impact of the ''rebound effect,'' discussed above). The effect of the resulting reduction in lifetime use of MY 2008–11 light trucks is to reduce fuel savings resulting from the Reformed CAFE standard by 0.7 billion gallons, offsetting the gain that occurred due to higher fuel prices. However, this 0.7 billion gallon reduction results from the effect of higher fuel prices on usage of all four model years of light trucks affected by the Reformed CAFE standard (2008–11), while the 0.7 billion increase in fuel savings resulting from higher fuel prices resulted from higher fuel economy targets for only MY 2011 light trucks. The impact of higher standards for MY 2011 was thus offset by the combined impact of less driving over the 4 model years combined.

*C. Revisions to the Reformed CAFE System*

The fuel savings estimates for the Reformed CAFE system reported in the NPRM and final rule also differ because the Reformed CAFE system adopted by the final rule differs in certain details from the Reformed CAFE system described in the NPRM. First, the Reformed CAFE system adopted in the final rule replaces the footprint category system for setting fuel economy targets with a continuous function. While the continuous function closely follows the shape of the step function of the category system, slight differences reduced the fuel savings estimate for the Reformed CAFE standard reported in the NPRM by less than 0.1 billion gallons.

Second, as stated above, the Reformed CAFE standards adopted in the final rule set fuel economy targets for MY 2008–10 that are more stringent than those proposed in the NPRM. This occurs because the targets for those model years are set by equalizing total industry-wide compliance costs with those of the Unreformed CAFE standards. Estimated compliance costs for the Unreformed standards are higher in the final rule than in the NPRM because manufacturers' updated product plans already include several of the lower cost fuel improvement technologies, and therefore, the analysis applies technologies with higher costs in order to achieve the same fuel economy level under the proposed Unreformed CAFE system. Setting fuel economy targets under the Reformed CAFE system to equal these higher Unreformed CAFE compliance costs therefore results in more stringent targets. This change increased the estimated fuel savings resulting from the Reformed standard described in the NPRM by 1.6 billion gallons.

Finally, the Reformed CAFE system adopted in the final rule includes MDPVs beginning in MY 2011, while the NPRM excluded MDPVs in all model years. Including MDPVs under the Reformed standard in MY 2011 increased the estimate of fuel savings by 0.3 billion gallons.

The net effect of changes to the Reformed CAFE system in the final rule, as opposed to the Reformed CAFE system in the NPRM, accounts for 1.8 billion more gallons of fuel saved.

*D. Updated Product Plans*

The most important factor contributing to the difference between the fuel savings estimated for the

[153] Because the fuel economy targets for MY 2008–10 are set by equating industry-wide compliance costs for the Reformed CAFE standard to those under the Unreformed standard (rather than by the optimization process used in MY 2011), higher fuel prices do not affect the targets for those years.

proposed and final rules is changes in the product plans supplied by the manufacturers between the NPRM and final rule. In developing the NPRM, the agency relied upon manufacturer product plans provided in response to the 2003 ANPRM. Following publication of the RFC in association with the 2005 NPRM, manufacturers provided updated product plans. These updated product plans indicate that in comparison to their previous plans, several manufacturers intend to increase production of smaller vehicles, which typically have higher fuel economies, and to utilize more fuel-saving technologies across their fleets.

Table 16 below illustrates a sampling of the fuel-economy baselines relied on in the NPRM and the baselines relied upon for the final rule.

TABLE 16.—BASELINE FUEL ECONOMIES RELIED UPON IN THE NPRM AND FINAL RULE

| Manufacturer | MY 2008 (mpg) | | MY 2009 (mpg) | | MY 2010 (mpg) | |
|---|---|---|---|---|---|---|
| | NPRM | Final | NPRM | Final | NPRM | Final |
| General Motors | 21.2 | 21.3 | 21.4 | 21.4 | 21.4 | 21.6 |
| Ford | 21.7 | 21.7 | 22.1 | 21.9 | 22.4 | 22.9 |
| DaimlerChrysler | 21.9 | 22.0 | 22.3 | 22.0 | 22.3 | 22.4 |
| Toyota | 22.9 | 22.5 | 22.9 | 22.4 | 22.9 | 22.9 |
| Honda | 24.5 | 24.5 | 24.5 | 24.5 | 24.5 | 24.5 |
| Nissan | 20.7 | 21.0 | 20.8 | 21.0 | 21.3 | 21.2 |

The changes to product plans reflect a decrease in the planned production of larger light trucks, which typically have lower fuel economy performances. The product plans indicate that manufacturers are planningto produce less of the ladder-frame type of SUVs and more unibody crossover vehicles, which typically have higher fuel economy. This shift in the mix of vehicle sizes results in a higher overall average CAFE requirement for the entire vehicle fleet, which increases lifetime fuel savings for MY 2008–2011 light trucks by 2.4 billion gallons.

At the same time, many of the technology improvements that the agency applied in setting standards for the NPRM are thus no longer available to increase fuel economy, because they are now being utilized to achieve the higher baseline fuel economy levels reflected in manufacturers' revised product plans. These technologies include a variety of engine improvements and upgraded transmissions, many of which were applied by the agency to increase baseline fuel economy to the level of the standards proposed in the NPRM, and others that represent changes in manufacturers' plans for technology introduction. Other changes in the revised product plans include an increase in the projected number of hybrid vehicles that manufacturers plan to produce. Not only do manufacturers plan to increase their production of current hybrid models, but they also are planning to introduce hybrid versions of both existing and new vehicles. As to be expected, the additional hybrid vehicles had a beneficial effect on manufacturers' baseline CAFE levels.

If the agency's analysis for the NPRM applied a technology to improve the fuel economy of a light truck model but its manufacturer's updated product plan indicated that it now planned to utilize the same technology on that model, that technology was then unavailable to the agency in its analysis of how manufacturers could improve fleet fuel economy to meet the standards considered in the final rule. While the effect of that technology is still reflected in the vehicle's lower lifetime fuel consumption, that effect now appears to result from its manufacturer's decision to utilize it even in the absence of any action by the agency to increase CAFE standards, rather than from its efforts to comply with the standard established by the final rule.

Thus the limited availability of technologies during the period subject to this rulemaking, in part, has resulted in the final standards being set at the same or similar levels as those initially proposed. The fuel savings attributable directly to the rule is the reduction in fuel consumption from the level that would occur with a manufacturer's planned baseline. Because the level of the final standards is close to what was proposed, but the fuel economy levels represented in manufacturers' baselines have generally improved, the amount of fuel savings directly attributable to the final standards appears to be less than that projected in the NPRM.

The increase in baseline fuel economy of resulting from additional technologies accounts for a lifetime fuel savings of 5.3 billion gallons for MY 2008–2011 light trucks, which are no longer included in the fuel savings estimated for the Final Rule. Thus the net effect of revised manufacturer product plans is to reduce the fuel savings attributed to the Reformed CAFE standard in the NPRM by 2.9 billion gallons (5.3 minus 2.4 billion gallons).

*E. Evaluating the Adopted Reformed CAFE System*

The variety of factors that contributed to the revised fuel savings estimate for the Reformed CAFE standard adopted in the final rule make it difficult to compare the fuel savings estimate reported in the final rule with the estimate reported in the NPRM for the proposed Reformed CAFE standards. The combination of changes to manufacturers' product plans with revisions to the Volpe model and its assumptions account for a decrease in the agency's estimate of fuel savings that will result from the Reformed CAFE standards from the 10.2 billion gallons reported in the NPRM to 7.8 billion gallons in this rule. Had these changes not been made, the adopted Reformed CAFE standards would likely have saved significantly more fuel than the 10.2 billion gallons reported in the NPRM.

In a broader sense, the fuel efficiency of the light truck fleets that will be produced in MYs 2008–2011 will be significantly higher than that of the fleets that were originally planned when manufacturers submitted their initial product plans to NHTSA in 2004. This improvement in fuel efficiency reflects manufacturers' response to the higher fuel prices through fuel economy improvements to their fleets and a shift towards smaller vehicles, as well as the improvements in fuel economy required by the CAFE standards adopted in this rule. Because current and forecasted gasoline prices have risen dramatically since manufacturers submitted their initial plans, consumer preferences have shifted away from the largest models toward more modestly-sized and fuel efficient light trucks. Some of the fuel savings previously attributed to the proposed CAFE standards now appear

to result from manufacturers' responses to changed market conditions.

In addition, the Reformed CAFE proposal announced in the NPRM put manufacturers on notice that fuel efficiency standards for light trucks would increase, and that future standards would challenge manufacturers to improve fuel efficiency for all light truck models, regardless of their size. The revised product plans that manufacturers submitted in response to the NPRM responded to these factors, and the changes to model assumptions discussed above, in conjunction with the more stringent Reformed CAFE standards adopted by the final rule, will significantly improve the fuel efficiency of light trucks produced in MY 2008–2011. The revised product plans that manufacturers submitted following publication of the NPRM responded to these changed conditions, and together with the more stringent standards adopted by this rule, the more fuel efficient vehicles that will be produced in MYs 2008–2011 will consume approximately 11 billion fewer gallons of fuel over their lifetimes than they would have based on the manufacturers' initial product plans.

A more meaningful comparison can be made between the fuel savings estimates for the adopted Reformed CAFE standard and the NPRM Reformed CAFE standard when both are calculated using the modeling assumptions and manufacturer product plan data that were used in the analysis conducted for the Final Rule. We re-estimated fuel savings for the NPRM Reformed CAFE standards using the revised Final Rule modeling assumptions and product plans, and found that the Reformed standard presented in the NPRM would save 5.5 billion gallons under these revised assumptions. This contrasts with the previously-reported fuel savings estimate of 7.8 billion gallons for the adopted Reformed CAFE standard. Thus increasing the stringency of the final rule and including MDPVs in 2011 together increased lifetime fuel savings projected to result from the rule by 2.3 billion gallons (equal to 7.8 billion minus 5.5 billion gallons).

## XIII. Applicability of the CAFE Standards

### *A. Inclusion of MDPVs in MY 2011*

The agency is extending the applicability of the light truck CAFE program to include vehicles defined by the EPA as ''medium duty passenger vehicles'' (MDPVs) beginning in MY 2011. As explained below, the agency finds that standards for these vehicles are feasible, and that these vehicles are used for substantially the same purpose as vehicles rated at not more than 6,000 lbs. GVWR. Further, the inclusion of these vehicles in MY 2011 will result in a savings of 251 million gallons of fuel over the lifetime of those vehicles. The regulation of these vehicles under the CAFE program will begin with the 2011 MY.

In the NPRM, the agency requested comment on extending the applicability of the CAFE program to include MDPVs. The EPA defines ''MDPV''as a ''heavy duty vehicle'' [154] with a GVWR less than 10,000 lbs. that is designed primarily for the transportation of persons. The MDPV definition excludes any vehicle which:

(1) Is an ''incomplete truck'' as defined in this subpart; or

(2) Has a seating capacity of more than 12 persons; or

(3) Is designed for more than 9 persons in seating rearward of the driver's seat; or

(4) Is equipped with an open cargo area (for example, a pick-up truck box or bed) of 72.0 inches in interior length or more. A covered box not readily accessible from the passenger compartment will be considered an open cargo area for purposes of this definition.[155]

The agency is incorporating the EPA MDPV definition into the definition of ''automobile'' in 49 U.S.C. 523.3, such that these vehicles will be regulated as light trucks. The MDPV definition essentially includes SUVs, short bed pick-up trucks, and passenger vans, which are within the specified weight and weight-rated ranges.

Under EPCA, the agency can regulate vehicles with a GVWR between 6,000 lb. and 10,000 lb. under CAFE if we determine that (1) standards are feasible for these vehicles, and (2) either that these vehicles are used for the same purpose as vehicles rated at not more than 6,000 lbs. GVWR, or that their regulation will result in significant energy conservation.

In the NPRM, the agency discussed its preliminary analysis of the feasibility of including MDPVs and the impact of their inclusion on the fuel savings of the CAFE standards. The agency expressed its belief that fuel economy technologies applicable to vehicles with a GVWR below 8,500 lbs. might be applicable to MDPVs, *e.g.*, low-friction lubricants, 6-speed transmissions and cylinder deactivation. In addition, since MDPVs are already required by EPA to undergo a portion of the testing necessary to determine fuel economy performance under the CAFE program (See 40 CFR Part 600 Subpart F), the agency expressed its belief that meeting the additional testing requirements would not be unreasonably burdensome.

Moreover, the agency's preliminary estimate was that inclusion of MDPVs in the MY 2011 Reformed CAFE standard could save additional fuel. The agency stated that we were not considering inclusion of the heavier rated vehicles in MYs 2008–2010, as our estimates indicated that their inclusion would lead to a loss in overall fuel savings. The agency sought comment on whether MDPVs should be included in the final rule for MY 2011.

Commenters were divided as to whether MDPVs should be included in the CAFE definition of light trucks. Although the NPRM requested comment on the inclusion of MDPVs, most responses addressed all vehicles up to 10,000 lbs. GVWR. Manufacturers and their trade associations were opposed to including these heavier vehicles in the CAFE program, stating that subjecting these vehicles to CAFE standards was not feasible and that these vehicles are used for substantially different purposes than vehicles with a GVWR under 6,000 lbs. Environmental organizations, States, and state organizations supported the inclusion of these vehicles, stating that including these vehicles is feasible, will result in significant fuel savings, and is appropriate as the primary use of most of these vehicles is to transport passengers. No commenter addressed the questions concerning alternate ways to encourage improving fuel economy of these vehicles.

The Alliance, Ford, Nissan, General Motors, and the Recreational Vehicle Industry Association (RVIA) opposed establishing standards applicable to any vehicle with a gross vehicle weight rating (GVWR) greater than 8,500 lbs. (heavier light trucks). Manufacturers stated that subjecting such vehicles to the CAFE program was not feasible and that these vehicles are used for a substantively different purpose than vehicles with a GVWR less than 6,000 lbs. (lighter light trucks). Additionally, compared to the 120 billion gallons of fuel used by light trucks per year, General Motors stated that the estimated fuel savings cannot be considered significant. Moreover, the Alliance and Ford stated that inclusion of these vehicles would primarily impact only one manufacturer (a domestic manufacturer) and therefore would undercut the agency's goal of establishing a more equitable regulatory

[154] The EPA defines ''heavy duty vehicle'' as a motor vehicle that is rated at more than 8,500 lbs. GVWR; or that has a vehicle curb weight of more than 6,000 lbs.; or that has a basic vehicle frontal area in excess of 45 square feet.

[155] 40 CFR 86.1803–01.

framework. Therefore, these commenters argued, inclusion of such vehicles in the CAFE program is impermissible under EPCA.

The Union of Concerned Scientists, NRDC, NESCAUM, Environmental Defense, U.S. PIRG, Sierra Club, National Environmental Trust, Rocky Mountain Institute, SUN DAY, Connecticut Department of Environmental Protection, AAA, Representatives Baldwin *et al.*, Pennsylvania Department of Environmental Protection, ACEEE and STAPPA and ALAPCO supported expanding the definition of light truck to include all vehicles with a GVWR between 8,500 lbs. and 10,000 lbs.

NRDC and Environmental Defense stated EPCA not only permitted the expansion of the light truck definition, but that the statute's directive to consider the Nation's need to conserve energy mandated an expansion. First, NRDC stated that many of the technologies evaluated in the NAS report could be applied to all vehicles with a GVWR between 8,500 lbs. and 10,000 lbs. Second, NRDC stated the fuel savings from including MDPVs would be significant. However, NRDC did not provide any discussion as to why the savings would be considered significant. Third, NRDC stated that the EPA and CARB already recognize a segment of these vehicles as primarily passenger-carrying vehicles through the MDPV classification. UCS and Environmental Defense cited a Polk survey to support the proposition that the heavier light trucks are used for substantially the same purposes as the lighter light trucks.

Environmental Defense stated that a separate class could be established for all vehicles with a GVWR between 8,500 lbs. and 10,000 lbs., so as not to detract from the fuel savings of the fleet currently regulated. NESCAUM stated that by not including all vehicles with a GVWR less than 10,000 lbs in the CAFE program, the structure would maintain an incentive for manufacturers to ''upweight'' vehicles in order to remove vehicles from the standards.

The agency concludes that inclusion of MDPVs in MYs 2008–2010 would lower the fleet-wide required fuel economy level for those years by approximately 0.3 mpg.[156] The net effect of including MDPVs in the MY 2008–2010 Reformed CAFE standards would be a reduction in overall fuel savings of almost 1.1 billion gallons.

The agency has determined that regulation of the MDPV fuel economy beginning MY 2011 is consistent with the criteria set forth in EPCA for expanding the applicability of the light truck CAFE program. First, regulation of these vehicles is feasible. Second, in establishing the MDPV definition, the EPA determined that these vehicles are used primarily to transport passengers,[157] a use substantially similar to vehicles with a GVWR less than 6,000 lbs. GVWR. Moreover, the analysis performed for the final rule indicates that inclusion of MDPVs in the light truck CAFE program for MY 2011 will lead to a savings of 251 million gallons of fuel.

In 1977, the agency extended the definition of ''automobile'' under CAFE to include certain light trucks with a GVWR greater than 6,000 lbs. The agency stated that for regulation of these vehicles to be feasible the expanded definition of ''automobile'' must be consistent with that adopted by the EPA for emissions purposes (42 FR 63184, 63185–6; December 15, 1977). In 1976, the EPA established maximum curb weight (6,000 lbs.) and maximum frontal area (45 $ft^3$) limitations on the trucks subject to emissions testing. The agency noted that the EPA concluded that vehicles that exceed those limitations are not used for the same type of service as those with smaller cab areas and curb weights (42 FR 63186). Consistent with the EPA regulations we amended the definition of automobile to include light trucks with a GVWR up to and including 8,500 lbs., that have a curb weight of less than 6,000 lbs. and a frontal compartment space less than 45 $ft^2$ (49 CFR 523.3). As General Motors noted in its comments, the agency linked the feasibility of regulating vehicles to the existence of EPA emission test procedures and data.

To generate data necessary to determine compliance with the fuel economy requirements, vehicles representative of manufacturer's model lines are subject to city and highway chassis dynamometer tests (40 CFR Part 600). Vehicles classified as ''light trucks'' under the current CAFE definition are required to undergo this testing for the EPA emissions requirements. Because both the fuel economy and emissions requirements rely on the same tests, the test burden to manufacturers is minimized.

Under the EPA's Tier 2 requirements, requirements for MDPVs to undergo city chassis dynamometer emission testing under Tier 2 are being phased-in starting in MY 2008 (50 percent) with all MDPVs subject to the testing in MY 2009 (40 CFR 86.1811–04(j)). The Tier 2 regulation exempts MDPVs from highway chassis dynamometer testing. Therefore, MDPVs are not subject under Tier 2 to the complete set of tests necessary for the fuel economy requirements. However, we have determined that this additional testing will not be burdensome for the manufacturers.

The EPA estimates that regulating MDPVs under the fuel economy standards would require approximately 50–100 city/highway paired tests at a cost of $2,000 per pair, plus an additional $50,000–100,000 per test vehicle for test preparation (i.e., a coast-down analysis[158] and appropriate mileage accumulation). Based on these estimates, the industry-wide compliance test costs for MDPVs range from $2.1 million to $8.2 million. The EPA noted that this cost could potentially be further reduced due to carry-over tests and the fact that a manufacturer is permitted to certify up to 20 percent of its fleet through an analytical process that does not require vehicle testing.

The Alliance and Ford stated that the fuel economy of the heavier light trucks is currently not known; therefore the agency has no baseline from which to set standards. As MDPVs are not currently required to undergo chassis dynamometer testing, several manufacturers asserted that the agency did not have adequate information to determine a baseline fuel economy for these vehicles from which potential fuel savings could be projected. The EPA and several manufacturers provided the agency with data that has allowed us to estimate a fuel economy baseline for MDPVs. These data predominately cover MDPVs with gasoline power trains. NHTSA has developed additional data for MDPVs, including diesels, by extrapolating from the performance of sister vehicles with a GVWR less than 8,500 lbs. Since the data supplied by the EPA was based on emission testing

[156] Under the Unreformed CAFE structure, maximum feasible standards are set with particular consideration given to the least capable manufacturer, which has been determined to be General Motors for this proposed rule. A large percentage of the MDPVs are produced by General Motors and, due to their weight, have very low fuel economy. The inclusion of these vehicles would lead to greater fuel savings by General Motors, but less by the other manufacturers. This would occur because the addition of the low fuel economy MDPVs in MYs 2008–2010 would depress the level of General Motors' CAFE and therefore depress the level of the Unreformed CAFE standards. Since the MY 2008–2010 Reformed CAFE standards are set so as to roughly equalize industry-wide costs with the MY 2008–2010 Unreformed CAFE standards, depressing the Unreformed CAFE standards for MYs 2008–2010 would also depress the Reformed CAFE standards for those years.

[157] 65 FR 6698; February 10, 2000.

[158] A coast-down analysis is used to determine a vehicle's horsepower for running the chassis dynamometer tests.

conducted on ''worst case'' vehicles, rather than best sellers as would be done for fuel economy, the baseline derived from this data is conservative.

Vehicles with a GVWR greater than 8,500 lbs that are not defined as MDPVs (e.g., heavier rated long bed pick-up trucks) are not subject to EPA testing that provides the data necessary to determine compliance with the CAFE program. Inclusion of the heavier-rated-non-MDPVs would increase the test burden for manufacturers. These vehicles would be subject to a whole new testing regime. Moreover, because these vehicles are not subject to comparable testing requirements, there is not sufficient data to estimate a fuel economy baseline. Without a reliable baseline, the agency is unable to determine fuel economy targets that would result in required fuel economy levels that are economically practicable and technologically feasible.

Aside from the ability to obtain test data and the determination of a baseline, technologies are available that can be applied to MDPVs in order to improve fuel economy performance. The agency recognizes that not all technologies that are applied to vehicles with lighter weight ratings are applicable to MDPVs. However, we have identified several technologies that could be applied, for example, 6-speed transmissions, multiple valves per cylinder, variable valve timing, and cylinder deactivation.

Commenters provided a variety of survey data on the use of vehicles with a GVWR greater than 8,500 lbs and less than 10,000 lbs. The Alliance, General Motors, Ford, and Nissan stated that the heavier light trucks are used for commercial, agricultural and utility reasons distinct from the uses of vehicles with a GVWR less than 6,000 lbs. Ford cited recent Ford New Vehicle Customer Studies (NVCS) that determined that SUVs in the MDPV category are used for towing 80 percent more often than midsize SUVs. In addition, Ford stated that for the 2004 MY, commercial and fleet users made up 63 percent of Ford Excursion buyers. However, Ford did not indicate as to whether the use of the Excursions in these fleets was primarily to transport people, or to perform more ''work-like'' functions. Ford also stated that full size vans in the MDPV category are used for significantly different purposes; of all the E-Series trucks sold, 84 percent are purchased for commercial purposes, and as commercial use of these full size vans increases, consumer use of these vehicles as passenger or conversion vans is decreasing. General Motors asserted that when considering vehicle use, the agency must focus on ''peak'' use.

The Union of Concerned Scientists and Environmental Defense cited a Polk survey to support the proposition that the heavier light trucks are used for substantially the same purpose as the lighter light trucks. According to the Polk survey, the daily use light trucks, broken down by percentage, is as follows: Commuting (53.8 percent), personal trips (33.6 percent), carrying passengers (29.6 percent), hauling (4.3 percent), towing (4.0 percent), and off-road use (3.7 percent). Union of Concerned Scientists stated that the Polk study found that use patterns of light, medium, and heavy pickup trucks are substantially the same overall, with a few notable exceptions. The Union of Concerned Scientists and Environmental Defense stated that this data demonstrate that vehicles with a GVWR greater than 8,500 lbs. and less 10,000 lbs are used for substantially similar purposes.

As stated above, the EPA determined that MDPVs are used primarily to transport passengers. In establishing the definition, the EPA stated:

> We are defining medium-duty passenger vehicles as any complete heavy duty vehicle less than 10,000 pounds GVWR *designed primarily for the transportation of persons*. (65 FR 6698, 6849; February 10, 2000; emphasis added).

Additionally, the EPA noted that that in crafting the definition, it made a distinction based on bed length,

> [B]ecause a vehicle introduced with a shorter bed would have reduced cargo capacity and would likely have increased seating capacity relative to current pick-ups, making it more likely to be used primarily as a passenger vehicle. Id.

In establishing the final rule, the EPA demonstrated an effort to distinguish vehicles that are used primarily to transport people from vehicles used for more ''work-like'' functions. The transportation of passengers is a use that is substantially similar to the use of vehicles with a GVWR less than 6,000 lbs. As in the 1977 final rule, we are amending the definition of automobile consistent with the EPA's determination.

The agency also considered Ford's comment that inclusion of MDPVs would result in disparate impacts under Reform CAFE. Ford specifically stated that the target for a category containing MDPVs would have to be lowered to account for the reduction in the overall capability of the category fleet. Therefore, manufacturers that do not produce MDPVs, but that have other vehicles in that category, would receive a less stringent target. On the other hand, Environmental Defense stated that a separate class could be created for heavier vehicles so as to not reduce the target for vehicles which are already regulated.

After considering these comments, the agency has decided not to regulate MDPVs as a separate class of light truck. First, we note that issues regarding the impact of MDPVs on the largest vehicle category are no longer applicable. Under the continuous function, vehicles will be compared to targets assigned to each vehicle's footprint value. Further, as the agency has stated previously when deciding whether to establish separate standards for 2WD and 4WD vehicles, ''the fact that standards must be average fuel economy standards indicates that the manufacturers should be given some opportunity to balance vehicles with different fuel economies to ensure, consistent with the need to conserve energy, that a reasonable variety of vehicle types can be produced to satisfy consumer demand.'' (42 FR 13807, 13811; March 14, 1977)

Since the manufacturers of MDPVs are all full-line manufacturers, the agency has decided that on balance it is advantageous to regulate these vehicles with all light trucks in order to provide manufacturers the flexibility of either improving the fuel economy of these vehicles, relying on improvements in other vehicles to offset the fuel economy of these vehicles, or some combination of these two strategies.

Finally, we have determined that inclusion of MDPVs in MY 2011 will result in an additional fuel savings of 251 million gallons of fuel.

**B. ''Flat-Floor'' Provision**

In the NPRM, the agency tentatively decided to amend the ''flat floor provision'' in the light truck definition (49 CFR 523.5) so that the definition expressly includes vehicles with seats that fold and stow in a vehicle's floor pan. The agency stated that we tentatively determined that these seats are functionally equivalent to removable seats and minimize safety concerns that arise from the potential to improperly re-installed seats. The agency said that its goal was treating passenger vans and mini vans in a similar fashion.

In response to commenters, the agency is amending the flat-floor provision to accommodate certain folding seats, but also to restrict the group of vehicles relying on the flat floor provision to qualify as a light truck to those vehicles having at least 3 rows of designated seating positions as standard equipment. That is, a vehicle would qualify only if it had at least 3

rows of seats, the 2nd and 3rd of which are capable of creating a flat cargo surface through either folding or detachment.

The current regulation classifies as a light truck any vehicle with readily removable seats that, once removed, leave a flat floor level surface. In pertinent part, the current regulatory text reads as follows:

> Permit expanded use of the automobile for cargo-carrying purposes or other nonpassenger-carrying purposes through the removal of seats by means installed for that purpose by the manufacturer or with simple tools, such as screwdrivers and wrenches, so as to create a flat, floor level, surface extending from the forwardmost point of installation of those seats to the rear of the automobile's interior.[159]

This definition is only one of several classifying light trucks, and historically, it has operated, as originally intended, to bring only minivans and full size passenger vans into the light truck category. Sport utility vehicles qualify as light trucks because they have the indices of off-road capability: a 4-wheel drive system and certain dimensional characteristics.[160] While the criteria used for SUVs remain viable, the definition pertaining to minivans has become outdated in that it does not bring all minivans and passenger vans into the light truck category.

The Alliance, Ford, Nissan, AIAM, and General Motors stated that the proposed revision to the flat floor provision reflects current market conditions and that the agency properly acknowledged the risks of improperly re-installed seats. However, Ford, Nissan, and General Motors, requested that the agency clarify the term ''stowing of foldable seats in the vehicle floor pan'' to appropriately capture minivans and exclude passenger vehicles with seats that have only the seatback fold (e.g., station wagons). DaimlerChrysler, Mitsubishi, and Johnson Controls raised concern that the proposed amendment would not capture all minivans, given that the design of folding seats is not limited to those that stow under the floor pan. DaimlerChrysler and Johnson Controls recommended that the agency adopt a flat loading surface requirement in conjunction with a minimum volume criterion.

As discussed in the NPRM, minivans traditionally subject to light truck CAFE standards began offering various seat designs that are intended to be functionally similar to removable seats, while remaining attached at some point to the vehicle. In the NPRM we recognized seats that fold and stow in a vehicle's floor pan; i.e., flush with the vehicle's floor, thereby creating a flat surface that is dimensionally indistinguishable from the surface floor that would exist if the same seats were removed instead of being stowed.[161] There are still other minivans that offer seats that fold so as to create a different/new continuous flat cargo surface that is located above the floor level. The current definition of light trucks has the potential of subjecting minivans that offer stowable seats to passenger vehicle CAFE standards, while subjecting very similar minivans featuring removable seats to light truck standards.

In response to comments, we are adopting a revision to the flat-floor provision that recognizes the various designs that permit seats to fold and stow. The provision adopted today replaces the ''flat, floor level surface'' language with a requirement that removal or stowing of seats creates a ''flat, leveled surface extending from the forwardmost point of installation of those seats to the rear of the automobile's interior.'' This new language eliminates the need to define ''floor pan'' and does not require seat designs to store in any particular manner.

Several commenters raised concern with revising the flat-floor provision. The Union of Concerned Scientists, Environmental Defense, and the New York Department of Environmental Conservation opposed the proposed revision, stating that it would widen the existing light truck ''loophole.'' Furthermore, the Union of Concerned Scientists stated that the original justification for the flat floor provision no longer applies. The Union of Concerned Scientists stated that the flat floor provision was established to reflect that passenger vans were derived from cargo vans, but that this is no longer true. (In the July 28, 1977 rulemaking, the agency stated that station wagons should not be classified as light trucks because, in part, they are built on a car chassis rather than a truck chassis (see 42 FR 38362, 38367). The Union of Concerned Scientists stated that while cargo vans and pickup trucks currently share the same platform, minivans do not.

First, the agency continues to conclude that in general, minivans are appropriately classified as light trucks. Minivans offer fuel economy compromising utility features normally associated with light trucks. Specifically, unlike the smaller passenger cars, all minivans feature three rows of seats, thus offering greater passenger carrying capability.[162] Further, data from *http://www.Edmunds.com,* NHTSA CAFE Database, and the Automotive News Data Center indicate that minivans offer significantly larger cargo carrying capacity compared to passenger cars (see Table 17 below).

TABLE 17.—MAXIMUM CARGO CAPACITY OF MINIVANS

| Vehicle | Type | Maximum cargo capacity |
|---|---|---|
| DCX R-class | Minivan | 85 cu. ft. |
| DCX Pacifica | Minivan | 80 cu. ft. |
| DCX Caravan/Town & Country SWB | Minivan | 147 cu. ft. |
| Honda Odyssey | Minivan | 147 cu. ft. |
| Toyota Sienna | Minivan | 149 cu. ft. |
| Ford Freestar/Mercury Monterey | Minivan | 137 cu. ft. |
| GM Uplander/Terraza/Montana | Minivan | 120 to 137 cu. ft. |
| Nissan Quest | Minivan | 149 cu. ft. |
| Mazda MPV | Minivan | 127 cu. ft. |
| Chevy HHR | Wagon | 56 cu. ft. |
| Audi A4 | Wagon | 59 cu. ft. |
| DCX E-class | Wagon | 69 cu. ft. |
| Saab 9–5 | Wagon | 73 cu. ft. |

[159] See 49 CFR 523.5(a)(5).

[160] Sport Utility Vehicles of different sizes qualify as light trucks because they are equipped with a 4-wheel drive system and because they have higher ground clearance and steeper approach and departure angles.

[161] For example, Chrysler Town and Country and Dodge Caravan feature ''Stow 'n Go'' seating.

[162] Only one minivan, the Chrysler Pacifica, does not offer a third row as standard equipment.

TABLE 17.—MAXIMUM CARGO CAPACITY OF MINIVANS—Continued

| Vehicle | Type | Maximum cargo capacity |
|---|---|---|
| Volvo V70 | Wagon | 71 cu. ft. |
| Volvo V50 | Wagon | 63 cu. ft. |
| Jaguar X-type | Wagon | 50 cu. ft. |
| BMW 530 ix | Wagon | 58 cu. ft. |
| Dodge Magnum | Wagon | 72 cu. ft. |
| Pontiac Vibe/Toyota Matrix | 5-door hatchback | 54 cu. ft. |
| Mazda 3 | 5-door hatchback | 31 cu. ft. |

Both of these capabilities affect fuel economy because in order to accommodate additional seats and provide greater cargo carrying capacity, Minivans are made larger and heavier than passenger cars. The seats themselves add significant weight to these vehicles. In addition to fuel economy compromising utility features, we previously explained that continued inclusion of minivans in the light truck standard is justified, in part, based on their good performance in crash tests.[163] The same cannot be readily said for a diverse population of station wagons and hatchbacks that may have flat-folding seats, because some of them are very small and potentially less safe.

However, the agency recognizes the risk of expanding the light truck definition to include vehicles not intended to be in that class, i.e., station wagons and hatchbacks. In order to focus the definition only on those vehicles that the agency believes should be included in the light truck category, we believe it is appropriate to restrict the group of vehicles relying on the flat floor provision to qualify as a light truck to those also having at least 3 rows of designated seating positions as standard equipment. That is, a vehicle could qualify only if it had at least 3 rows of seats, the 2nd and 3rd of which are capable of creating a flat cargo surface through either folding or detachment. The regulatory text would read as follows:

For vehicles equipped with at least 3 rows of designated seating positions as standard equipment, permit expanded use of the automobile for cargo-carrying purposes or other nonpassenger-carrying purposes through the removal or stowing of seats so as to create a flat, leveled surface extending from the forwardmost point of installation of those seats to the rear of the automobile's interior.

The agency has chosen to adopt the ''third row'' criterion for four reasons. First, this definition best advances our goal of subjecting all minivans to one CAFE standard, and eliminates an artificial distinction between minivans depending on whether they have folding seats or removable seats. Second, an obvious advantage of this approach is simplicity and objectivity. For example, this definition would not require complicated cargo capacity measurements in order to determine whether a vehicle is a light truck, as would be required under DaimlerChrysler's suggestion. Third, compared to geometric criteria, such as a minimum cargo volume, this approach is less susceptible to gaming, as it is unlikely that smaller vehicles that the agency believes should not be subject to the light truck standards would be equipped with 3rd row seats. Finally, the 3rd row seat criterion ensures that vehicles classified as light trucks continue to include those that offer added utility features contemplated by Congress when it created a separate CAFE standard for light trucks.

In addition to furthering our goal of subjecting all minivans to the CAFE standard for light trucks, the provision adopted today limits the number of vehicles that will be reclassified as light trucks. After examining *http://www.Edmunds.com,* NHTSA CAFE Database, and the Automotive News Data Center, we found that only a Volvo V70 (≤ 10,000 annual sales) has a flat-folding 3rd row seat, and would thus qualify as a light truck. By contrast, other alternatives considered by the agency would not necessarily bring all minivans under one standard, and could also have the unintended effect of reclassifying a more substantial number of passenger cars as light trucks.

We note that small sport utility vehicles without 3rd row seats would nevertheless qualify as light trucks based on other existing criteria; i.e., availability of 4-wheel drive or approach angles and minimum clearance. Thus, our approach is expected to have few unintended consequences. Nevertheless, some vehicles previously classified as light trucks would no longer be subject to the light truck CAFE standard. One such vehicle is a Chrysler PT Cruiser, which qualifies now as a light truck because it has a removable rear seat which creates a flat floor. However, the PT cruiser does not have a 3rd row of seats. Also, one minivan, the Chrysler Pacifica does not offer a third row as standard equipment. To provide manufacturers adequate time to adjust their product plans to the new provision we are making the new definition effective beginning in MY 2012, the change will not have any immediate impact on MYs 2008–2011 vehicles.

In order to provide additional flexibility we are permitting manufacturers to rely on either the old or the revised definition of light trucks until MY 2012. This will ensure that a vehicle previously subject to light truck CAFE standards would not immediately become subject to the pasenger car standard thus upsetting the manufacturers' compliance plans. At the same time, those manufacturers currently offering minivans with folding seats would be able to take advantage of the new definition immediately.

We do not anticipate that the provision adopted today will result in manufacturers installing third row seating for the sole purpose of compliance with the light truck CAFE program. Installing third row seats presents practical difficulties (*e.g.*, limited headroom) and costs associated with making this change in vehicles with smaller interior volume. Specifically, we believe the costs of redesigning small vehicles to feature 3rd row seats will outweigh potential benefits of subjecting these vehicles to the light truck standard. Further, small vehicles such as hatchbacks, will likely be compared to fuel economy targets comparable to that of the passenger car CAFE standard, thus further reducing the incentive to make major design changes for the purpose of classifying such vehicle as a light truck.

## XIV. Additional Issues

### *A. Limited-Line Manufacturer Standard*

Porsche requested that the agency establish a separate standard for limited-line manufacturers, stating that manufacturers that produce only one or two light trucks are not afforded the flexibility provided through fleet-wide

[163] See August 2005 NPRM (70 FR 51414 at 51456).

averaging. Porsche noted that it manufacturers only a single model of light truck that Porsche stated is designed to ''satisfy a specific consumer demand.'' Porsche argued that it would have even greater difficulty in complying under the Reformed CAFE system, as its light truck would fall within a category that has a target more stringent than the Unreformed CAFE standard. Porsche stated that the agency had authority to establish a limited-line manufacturer standard, and had previously done so for ''limited product line trucks'' for MYs 1980 and 1981.

When the agency first established the light truck CAFE program, we established a separate standard for limited product line light trucks. This standard was to accommodate light trucks manufactured by companies which did not produce passenger automobiles and thus did not have access to passenger automobile engine and emission control technology (43 FR 11995, 11996; March 23, 1978). The limited product line light truck standard was established primarily to address the unique compliance issues facing International Harvester, as International Harvester's engines were derivatives of medium duty trucks (above 10,000 lbs GVWR). We noted that International Harvester did not have experience with ''state-of-the-art'' emission controls, which other manufacturers had obtained in the passenger car market, and that International Harvester would be at a disadvantage attempting to comply with both the emission and fuel economy standards then being established (43 FR 11995, 11998).

While the limited product line light truck standard was established to address compliance difficulties of a limited line light truck manufacturer, the light truck class was defined, in part, by vehicle characteristic, *i.e.*, it applied only to trucks with basic engines, as that term was defined by the EPA. The agency discontinued the limited line truck classification beginning in MY 1982, stating that the vehicle class was designated merely to provide a transition period (45 FR 20871, 20877; March 31, 1980).

The agency does not agree with Porsche's suggestion that the company's particular circumstances support establishment of a separate fuel economy standard for limited-line manufacturers, or for vehicles of the type manufactured by limited-line manufacturers as was previously done in response to issues faced by International Harvester. Porsche stated that it faces a disadvantage because it makes only a single high performance truck and has no ''legitimate'' opportunity to comply, and that compliance is made more difficult by the reforms established today. Although some manufacturers have chosen to participate in market segments that make it easier for them to meet CAFE, we note that all manufacturers must meet particular challenges when complying with a standard.

Porsche is correct in that in the very first years in which CAFE standards were in effect, the agency established a separate light truck standard for light truck manufacturers who did not use passenger car engines in their trucks. This separate standard, promulgated in 1978, offered a degree of relief to International Harvester, a company struggling to meet both CAFE and emissions standards with limited resources. As indicated above, the separate standard was not intended to provide International Harvester permit relief, but to provide it with additional time to gain the expertise necessary to comply with the standards.

NHTSA finds it difficult to equate Porsche's present position with that of International Harvester in 1978. Unlike International Harvester, which had been producing a family of larger light trucks whose basic design remained unchanged from the early 1960's, Porsche began the design process knowing that CAFE standards would apply to its product. Porsche presumably entered the light truck market after determining that the costs of compliance or paying penalties were offset by the benefits of doing so. While the increase in CAFE standards established by this final rule will require that Porsche increase its efforts to build more fuel efficient light trucks, the company cannot state that its designs pre-date CAFE, that an increase in CAFE standards was not foreseeable or that it is not technologically feasible for Porsche to meet the standards.

As indicated above, NHTSA does not believe that present market conditions dictate establishing a separate fuel economy standard for Porsche or other limited-line manufacturers. We are also not convinced by Porsche's argument that doing so would be consistent with Congressional intent. Porsche has correctly noted that the House Report for EPCA stated that ''the Secretary could, in setting classes of non-passenger automobiles, establish separate classes for types of non-passenger automobiles manufactured by small manufacturers.'' (H.R. Rep. No. 94–340 at 90.) However, we point out that the report refers to ''types of vehicles.'' We question whether Congress intended for the agency to set standards based on manufacturer characteristics, as opposed to vehicle characteristics.

When the agency established CAFE standards for limited product line light trucks, that class included only vehicles with a specific engine type. While the reform established today results in different required fuel economy standards for different manufacturers based on product mix, the standard still relies on differentiating vehicles based on a vehicle characteristic, *i.e.*, footprint.

*B. Credit Trading*

Nissan recommended that the agency implement a credit trading program that permits manufacturers to buy and sell credits. Nissan stated that such a program would allow manufacturers to earn credits for exceeding their fleet-wide fuel economy target, and sell or trade those credits to other manufacturers. Nissan believes that such a program is consistent with the goals of the EPCA statute and would improve overall fuel economy by providing added incentives for the achievement of greater fuel economy improvements. Nissan asserted that such a program also would allow greater flexibility in CAFE compliance without causing a negative overall impact on fuel economy, and in fact, it could successfully benefit the environment. Nissan provided an analysis in support of the agency's authority to establish such a credit trading program.

The agency is not adopting a credit trading program as suggested by Nissan. While the agency has not explored in detail a credit trading program, we question whether the agency has authority for such a program. A review of 49 U.S.C. 32903—the specific provision addressing CAFE credits for exceeding fuel economy standards—does not appear to support credit trading. That section persistently refers only to ''a manufacturer'' or ''the manufacturer,'' thereby suggesting to us that Congress intended that only the particular manufacturer who earned the credits be permitted to use them. For example, section 32903(a) provides that

> When the average fuel economy of passenger automobiles manufactured by a manufacturer . . . exceeds an applicable average fuel economy standard . . . the manufacturer earns credits. The credits may be applied to—(1) any of the 3 consecutive model years immediately before the model year for which the credits are earned; and (2) to the extent not used under clause (1) of this subsection, any of the 3 consecutive model years immediately after the model year for which the credits are earned.

(Emphasis added.) Also, section 32903(d) states that,

The Secretary of Transportation shall apply credits to a model year on the basis of the number of tenths of a mile of gallon by which the manufacturer involved was below the applicable average fuel economy standard.

(Emphasis added.) Moreover, we believe that the Reformed CAFE program adopted today provides manufacturers with sufficient flexibility as to obviate the need for a credit trading program.

*C. Reporting Requirements*

Today's final rule requires manufacturers to report on a model and configuration level, a vehicle's footprint. This information will be used to determine a vehicle's applicable fuel economy target.

The Alliance opposed reporting footprint on at a vehicle-configuration level. The Alliance suggested that footprint values should be reported by model on a body style and wheelbase level along with associated projected sales volumes. The Alliance stated that body-style and wheelbase level of detail could be easily compiled and submitted. Conversely, for some manufacturers, the Alliance stated, reporting on a configuration level would require programming changes in corporate databases and reports.

The agency is maintaining the footprint reporting requirements as proposed. If reporting were to be required at the level suggested by the Alliance, models that are offered with varying footprint values may not be captured. For example, the Ford base F150, is offered with in several versions with different body styles and wheelbases. However, these versions are each offered in with different engine, transmission, and drive type configurations. Each of these configurations may have a different fuel economy performance. Under the Alliance's suggestion, these configurations would not be captured.

The Alliance also stated that the agency should eliminate some of data required for the CAFE reports, specifically: Catalytic converter, SAE net rated power in kilowatts, total drive ratio, axle ratio, frontal area, optional equipment, number of forward speeds (already indicated by transmission class). The Alliance stated that this information is no longer relevant.

The NPRM did not propose to revise the data reporting requirements aside from requiring the footprint related data and elimination of data currently required to be reported is outside the scope of this rulemaking. Moreover, consideration of such revisions would require coordination with the EPA to ensure consistency between the two agencies' regulatory programs, given the joint responsibilities under EPCA. However, the agency will work to evaluate the necessity of the data currently required to be reported and will consider potential revisions in future rulemakings.

*D. Preemption*

Summary of NHTSA's position

In mandating federal fuel economy standards under EPCA, Congress has expressly preempted any state laws or regulations relating to fuel economy standards. A State requirement limiting $CO_2$ emissions is such a law or regulation because it has the direct effect of regulating fuel consumption. $CO_2$ emissions are directly linked to fuel consumption because $CO_2$ is the ultimate end product of burning gasoline. Moreover, because there is but one pool of technologies for reducing tailpipe $CO_2$ emissions and increasing fuel economy available now and for the foreseeable future, regulation of $CO_2$ emissions and fuel consumption are inextricably linked. It is therefore NHTSA's conclusion that such regulation is expressly preempted.

A State requirement limiting $CO_2$ emissions is also impliedly preempted under EPCA. It would be inconsistent with the statutory scheme, as implemented by NHTSA, to allow another governmental entity to make inconsistent judgments made about how quickly and how much of that single pool of technology can and should be required to be installed, consistent with the need to conserve energy, technological feasibility, economic practicability, employment, vehicle safety and other relevant concerns.

NHTSA's statement in the NPRM about preemption

In the NPRM, NHTSA reaffirmed its judgment that State regulation of motor vehicle tailpipe emissions of $CO_2$ is both expressly and impliedly preempted by statute:

We reaffirm our view that a state may not impose a legal requirement relating to fuel economy, whether by statute, regulation or otherwise, that conflicts with this rule. A state law that seeks to reduce motor vehicle carbon dioxide emissions is both expressly and impliedly preempted.

Our statute contains a broad preemption provision making clear the need for a uniform, federal system: ''When an average fuel economy standard prescribed under this chapter is in effect, a State or a political subdivision of a State may not adopt or enforce a law or regulation related to fuel economy standards or average fuel economy standards for automobiles covered by an average fuel economy standard under this chapter.'' 49 U.S.C. 32919(a). Since the way to reduce carbon dioxide emissions is to improve fuel economy, a state regulation seeking to reduce those emissions is a ''regulation related to fuel economy standards or average fuel economy standards.''

Further, such a regulation would be impliedly preempted, as it would interfere [with] our implementation of the CAFE statute. For example, it would interfere the careful balancing of various statutory factors and other related considerations, as contemplated in the conference report on EPCA, we must do in order to establish average fuel economy standards at the maximum feasible level. It would also interfere with our effort to reform CAFE so to achieve higher fuel savings, while reducing the risk of adverse economic and safety consequences.[164]

During the comment period on the NPRM, some commenters questioned the correctness of NHTSA's judgment as well as the appropriateness of reaffirming it in the NPRM.

The appropriateness of our discussing preemption in the NPRM

We discussed our views about preemption in the NPRM for several reasons. First, the agency was guided by Executive Order 13132, Federalism, and by Section 3(b)(1)(B) of Executive Order 12988, Civil Justice Reform. Second, we were guided by a desire to obtain comments from State and local officials and other members of the public in order to inform fully the agency's position on this important issue.

Third, we were also guided by statements of the Supreme Court, which has encouraged agencies to consider the preemptive effects of their rulemakings during the rulemaking process, rather than waiting until litigation ensues to do so.[165] Finally, from time to time over the years, NHTSA has raised the issue of preemption in its rulemaking notices when the agency judged it appropriate to do so, as have other agencies within the Department of Transportation. E.g., 54 FR 11765 (March 1989); 58 FR 68274 (December 1993) and 70 FR 21844 (April 2005).

Public Comments About the Merits of Our Views on Preemption

The motor vehicle manufacturers and their associations agreed with the agency's position regarding federal preemption under § 32919(a) of EPCA. Nissan supported that position with a detailed legal analysis. Conversely, several of the environmental groups and

[164] 70 FR 51414, 51457.

[165] *See, e.g., Hillsborough County* v. *Automated Medical Laboratories, Inc.*, 471 U.S. 707, 718 (1985); *Medtronic, Inc.*, v. *Lohr*, 518 U.S. 470, 506 (1996) (Justice Breyer, in concurrence); and *Geier* v. *American Honda Motor Co.*, 529 U.S. 861, 908 (2000) (Justice Stevens, in dissent).

States,[166] and a number of U.S. Senators and Representatives, disagreed with the agency's position that a State carbon dioxide ($CO_2$) standard is expressly and impliedly preempted.

Nissan argued that California's proposed $CO_2$ standard is expressly preempted by EPCA's broadly worded preemption provision. A State standard is preempted even if it does not directly address fuel economy; it is sufficient if it simply relates to fuel economy.

That commenter noted that the text of EPCA's preemption provision is similar to that of the preemption provision in the Employee Retirement Income Security Act (ERISA). The Supreme Court has found that a state law is ''related to'' a benefits plan under ERISA and thus preempted by ERISA's preemption provision ''if it has a connection with or reference to such a plan.''

Nissan said that California's greenhouse gas standard is connected to fuel economy. California's greenhouse gas regulation is, in effect, a fuel economy regulation. The emission of one greenhouse gas, $CO_2$, is related to fuel economy. The only means for vehicle manufacturers to reduce vehicular $CO_2$ emissions is through making improvements to fuel economy. This is evident from CARB's report, which discusses the maximum feasible and cost effective technologies available and the identification of technologies that are in fact fuel economy improvements.

Nissan also said that California's standard also interferes with the nationally uniform plan that CAFE establishes for governing the fuel efficiency of the U.S. fleet and is therefore impliedly preempted. A state law or standard may be impliedly pre-empted because the federal interest is so dominant that Congress intends to occupy a regulatory field with no room for state supplementation (field preemption) or because the federal government has enacted a complete regulatory scheme in an area such that any state action would be inconsistent with the federal legislation (conflict preemption).

Nissan concluded by arguing that individual state laws setting fuel economy standards would be impliedly as well as expressly preempted. It argued that those laws would conflict with EPCA, which authorizes DOT to develop and administer a national CAFE program. Neither the EPA, nor States are permitted to interfere with the CAFE regulatory regime currently established by Congress under EPCA. Because, as noted above, the emission of $CO_2$ is related to fuel economy and because the only way to reduce $CO_2$ is through fuel economy technologies, any effort to do so by EPA or the States would interfere with Congressional objectives under EPCA.

Taken together, the primary arguments of the opponents of preemption were as follows:

The opponents argued that the preemption waiver provision of the Clean Air Act expressly recognizes the right of California to adopt and enforce its own standards for ''air pollutants'' emitted by motor vehicles (*i.e.*, emissions standards), and the right of the other States to adopt and enforce standards identical to California's standards.[167] They said that Congress ratified and strengthened the preemption waiver provision in 1977, two years after the enactment of EPCA in 1975. Thus, they argue, Congress could not have intended EPCA to limit the rights they believe are recognized by the Clean Air Act.

The opponents believe further that a State $CO_2$ standard, including California's GHG/$CO_2$ equivalent emissions standard, is not preempted under EPCA's express preemption provision, Section 32919(a). They offered two arguments in support of this belief.

First, they argued that EPCA does not expressly preempt a State $CO_2$ standard. They believe that statute's express preemption provision should be read narrowly, preempting State standards that regulate fuel economy itself, but not State standards that have a stated purpose other than improving fuel economy (*i.e.*, reducing emissions) and merely have the effect of increasing fuel economy.

Second, they argued that the intent of Congress concerning the relationship between State motor vehicle emissions standards and CAFE standards under EPCA is expressed in the Act's provision setting out the factors to be considered in setting CAFE standards (''decisionmaking factors provision''), Section 32902(f), not its express preemption provision. The decisionmaking factors provision requires NHTSA to consider technological feasibility, economic practicability, the effect of other Government standards on fuel economy, and the need of the nation to conserve energy, in determining the level at which it should set each CAFE standard. The opponents said the decisionmaking factors provision subordinates the CAFE standards to all State emissions standards, not vice versa.

In addition, the opponents of preemption appear to have argued that there is no implied (conflict) preemption because State $CO_2$ standards and CAFE standards have different objectives and because NHTSA did not show how a State $CO_2$ standard would adversely affect the CAFE standards. They argue further that, in the event of a conflict, CAFE standards must give way to the emissions standards per the decisionmaking factors provision.

NHTSA's Response to Public Comments on the Merits

Background

Fuel Economy Provisions of the Energy Policy and Conservation Act

EPCA established the CAFE program, mandating the issuance and implementation of standards for passenger cars and light trucks. The statute specifies that the passenger car standard is 27.5 mpg unless the agency finds that the maximum feasible level for a model year is different, and sets it at that level. It directs NHTSA to establish light truck standards at the maximum feasible level, subject to four statutorily specified factors.[168]

The Act specifies that the agency is to determine the maximum feasible level after considering technological feasibility, economic practicability, the effect of other motor vehicle standards on fuel economy, and the need of the Nation to conserve energy.[169] The agency has historically included the potential for adverse safety consequences when deciding upon a maximum feasible level. The overarching principle that emerges from the enumerated factors and the court-sanctioned practice of considering safety and links them together is that CAFE standards should be set at a level that will achieve the greatest amount of fuel savings without leading to significant adverse economic or other societal consequences.[170]

EPCA specifies that compliance with CAFE standards is to be determined in accordance with test and calculation procedures established by EPA. 49 U.S.C. 32904(c). Under the procedures established by EPA, compliance with the CAFE standards is based on the rates

[166] California, Connecticut, Maine, Massachusetts, New York, New Jersey, Oregon, Pennsylvania, and Vermont.

[167] Clean Air Act §§ 209(b), 177, 42 U.S.C. 7543 and 7507.

[168] 49 U.S.C. 32902(a).

[169] 49 U.S.C. 32902(f).

[170] Average Fuel Economy Standards for Light Trucks; Model Years 2008–2011, 70 FR 51414, 51424 (August 30, 2005) (to be codified at 49 CFR pt. 533).

of emission of $CO_2$, CO, and hydrocarbons from covered vehicles, but primarily on the emission rates of $CO_2$. In the measurement and calculation of a given vehicle model's fuel economy for purposes of determining a manufacturer's compliance with federal fuel economy standards, the role of $CO_2$ is approximately 100 times greater than the combined role of the other two relevant carbon exhaust gases. Given that the amount of $CO_2$, CO, and hydrocarbons emitted by a vehicle varies directly with the amount of fuel it consumes, EPA can reliably and accurately convert the amount of those gases emitted by that vehicle into the miles per gallon achieved by that vehicle.

Congress explicitly and broadly preempted all state laws and standards relating to fuel economy standards:

> [w]hen an average fuel economy standard prescribed under this chapter [49 U.S.C.S. §§ 32901 *et seq.*] is in effect, a State or a political subdivision of a State may not adopt or enforce a law or regulation related to fuel economy standards or average fuel economy standards for automobiles covered by an average fuel economy standard under this chapter.[171]

Congress did not include a provision authorizing any waivers of that preemption provision for any State for any reason.

Clean Air Act

Congress has also preempted all state standards relating to the control of motor vehicle emissions:

> [n]o State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines.[172]

However, Congress has also expressly authorized EPA to waive the preemption provision under the Clean Air Act for states that adopted emissions control standards before 1966.[173] While California is the only State that meets that criterion, and thus is the only state that can obtain a waiver of the preemption provision, the Clean Air Act permits other States to adopt California emission standards.[174]

Current State GHG Standards [175]

The GHG standard purports to regulate four motor vehicle climate change emissions:

- $CO_2$, $CH_4$ and $N_2O$ emissions resulting directly from operation of the vehicle,
- $CO_2$ emissions resulting from operating the air conditioning system,
- HFC (refrigerant) emissions from the air conditioning system due to either leakage, losses during recharging, or release from scrappage of the vehicle at end of life, and
- Upstream emissions associated with the production of the fuel used by the vehicle.[176]

As is shown later in the discussion of preemption, compliance with the GHG standards will be based primarily on the $CO_2$ emission rates of vehicles. The States will measure the amounts of emissions of these four gases and then convert them into ''$CO_2$-equivalent'' emissions.[177] This reflects the status of $CO_2$ as the reference gas for measuring the global warming potential of greenhouse gases.

Constitutional basis for preemption

Preemption results from Article VI of the U.S. Constitution, which provides that federal law ''shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.''

Principles of preemption

The Supreme Court has held that preemption may be express or implied:

> State law may be preempted by express language in a congressional enactment,* * * by implication from the depth and breadth of a congressional scheme that occupies the legislative field * * *, or by implication because of a conflict with a congressional enactment.[178]

Discussion

In response to the public comments and letters from members of Congress, we have re-analyzed all issues carefully as set forth below, and determined, based on existing and foreseeable technologies for reducing $CO_2$ emissions from motor vehicles, that the effect under EPCA and the Supremacy Clause of the U.S. Constitution is that State regulation of those emissions is preempted.

Any Regulation Governing Carbon Dioxide Emissions From Motor Vehicles Relates to Average Fuel Economy Standards and Is Expressly Preempted Under 49 U.S.C. Chapter 329

EPCA contains a broadly worded provision expressly preempting any State standard or regulation that is ''related to'' a fuel economy standard:[179]

> [49 U.S.C.] 32919. Preemption
>
> (a) General. When an average fuel economy standard prescribed under this chapter [49 U.S.C.S. §§ 32901 *et seq.*] is in effect, a State or a political subdivision of a State may not adopt or enforce a law or regulation *related to* fuel economy standards or average fuel economy standards for automobiles covered by an average fuel economy standard under this chapter.

(Emphasis added.)

While the express preemption provision on its face uses expansive language, any ambiguity regarding the appropriate reading of the provision, particularly in relation to other statutory provisions, must be resolved in light of the policy considerations embodied in EPCA. In NHTSA's judgment, this language includes, but is not limited to, explicit fuel economy standards issued by States. Because the only technologically feasible, practicable way for vehicle manufacturers to reduce $CO_2$ emissions is to improve fuel economy,[180] NHTSA's considered view is that a State regulation that requires vehicle manufacturers to reduce those emissions is a ''regulation related to fuel economy standards or average fuel economy standards.'' [181] This view is consistent with the legislative history of the preemption provision, and with the

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[171] 49 U.S.C. 32919(a).

[172] 42 U.S.C. 7543 (a).

[173] 42 U.S.C. 7543 (b).

[174] 42 U.S.C. 7507.

[175] According to the National Academy of Sciences, Massachusetts, New York, New Jersey, Connecticut, Rhode Island, Vermont, and Maine have adopted the California GHG emissions standard. In addition, Washington State has adopted the standard contingent upon Oregon's adoption of it. Oregon ''has adopted temporary rules . . . and is scheduled to propose permanent rules in the summer of 2006.'' State and Federal Standards for Mobile Source Emissions, prepublication copy, 145 (2006).

This discussion of preemption focuses on the details of the California standard in order to provide the clearest possible expression of the underlying technical rationale for why that standard is not consistent with NHTSA's authority to regulate fuel economy. This specific discussion should not be interpreted to mean that other standards would be acceptable.

[176] Title 13, California Code of Regulations (CCR) § 1961.1(a)(1)(B)1.a. For vehicles certified on conventional fuels (*e.g.*, gasoline), CARB's regulation does not encompass upstream emissions (*i.e.*, emissions associated with the production and transportation of the fuel used by the vehicle). California Environmental Protection Agency, Air Resources Board, Regulations To Control Greenhouse Gas Emissions From Motor Vehicles, Final Statement Of Reasons (FSOR), at 6–7.

[177] California Environmental Protection Agency, Air Resources Board, Regulations To Control Greenhouse Gas Emissions From Motor Vehicles, Initial Statement Of Reasons (ISOR), p. 48.

[178] *Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525, 540 (2001).

[179] 70 FR, at 51457 (August 30, 2005).

[180] NHTSA recognizes that regulating the producers of motor vehicle fuels can contribute to the reduction of $CO_2$ emissions. The preemption provision of EPCA does not preempt State regulation of those fuels. However, it does preempt State regulation of the manufacturers of motor vehicles directly related to fuel economy, including regulation of $CO_2$ emissions of their vehicles.

[181] Id.

Supreme Court's interpretation of similar provisions.

The legislative history of that provision confirms that Congress intended to be broadly preemptive in the area of fuel economy regulation. The Senate bill [182] would have preempted State laws only if they were ''inconsistent'' with federal fuel economy standards, labeling, or advertising, while the House bill [183] would have preempted State laws only if they were not ''identical to'' a Federal requirement. The express preemption provision as enacted preempts all State laws that relate to fuel economy standards. No exception is made for State laws on the ground that they are consistent with or identical to federal requirements.

In interpreting the express preemption provisions of other statutes containing the identical ''relates to'' language found in EPCA, the Supreme Court has found this language to be very expansive. A State law relates to a Federal law if the State law ''has a connection with or refers to'' the subject of the Federal law. The Court made the latter finding first under ERISA [184] and then, based on its ERISA cases and the use of identical language, under the Airline Deregulation Act (ADA).[185] ''Since the relevant language of the ADA is identical, we think it appropriate to adopt the same standard here * * * ''[186] Particularly since the Airline Deregulation Act's situation is a law involving transportation, we think its interpretation of the phrase ''relates to'' is instructive here.

In particular, the Court has provided guidance on the ultimate limits of a strictly textual approach in interpreting either the phrase ''relates to'' or the phrase ''has a connection with,'' given the existence of unending relationships and ''infinite connections'' and the resulting potential for an overly extensive application of ERISA's preemption provision, the Court declined to take that approach in interpreting that provision in *Blue Cross & Blue Shield Plans* v. *Travelers Ins. Co.*[187] The Court said that to determine whether a State law has a forbidden connection, it would instead look ''both to the *objectives of the ERISA statute as a guide to the scope of the state law* that Congress understood would survive, as well as to *the nature of the effect of the state law on ERISA plans. California Div. of Labor Standards Enforcement* v. *Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 325 (1997), quoting *Travelers,* * * *, at 656 * * * '' (Emphasis added.) (Internal quotations omitted.) [188]

Even under that sort of analysis, however, the results would be unchanged here. Congress had a variety of interrelated goals in enacting EPCA and has charged NHTSA with balancing and achieving them. Among them was the overarching one of improving motor vehicle fuel economy.[189] To achieve that goal, Congress did not simply mandate the issuance of fuel economy standards set at whatever level NHTSA deemed appropriate. Nor did it simply say that levels must be set consistent with the criteria it specified in Section 32902(f). It went considerably further, mandating the setting of standards at the maximum feasible level.

Congress also sought national uniform fuel economy standards ''[i]n order to avoid any manufacturer being required to comply with differing State and local regulations with respect to automobile or light-duty truck fuel economy.'' [190] To that end, it expressly preempted State and local laws and regulations relating to fuel economy standards.

Other congressional objectives underlying EPCA include avoiding serious adverse economic effects on manufacturers and maintaining a reasonable amount of consumer choice among a broad variety of vehicles. Congress was explicitly concerned that the CAFE program be carefully drafted so as to require levels of average fuel economy that do not have the effect of either ''imposing impossible burdens or unduly limiting consumer choice as to capacity and performance of motor vehicles.'' [191] These concerns are equally applicable to the manner in which that program is implemented.

To guide the agency toward the selection of standards meeting these competing objectives, Congress specified four factors that NHTSA must consider in determining which level is the maximum feasible level of average fuel economy and thus the level at which each standard must be set.

These are technological feasibility, economic practicability, the effect of other Government standards on fuel economy, and the need of the Nation to conserve energy. In addition, ''NHTSA has always examined the safety consequences of the CAFE standards in its overall consideration of relevant factors since its earliest rulemaking under the CAFE program.'' [192]

While the Court in *Travelers* said State laws found to have ''only a tenuous, remote, or peripheral connection'' to ERISA's purposes, especially in areas of traditional State regulation, are not preempted,[193] NHTSA has concluded that a State GHG standard is not such a law. As explained at length below, to the extent that it regulates tailpipe $CO_2$ emissions, a State GHG standard has a direct and very substantial effect on EPCA's objectives, placing it virtually at the very center of the reach of EPCA's express preemption provision, not at or even near its periphery. Thus, there is no need here to address issues about the definition or location of the outer reaches of the provision's application.

As explained below, $CO_2$ emissions account for over 90 percent of all $CO_2$ equivalent emissions from a motor vehicle. Accordingly, a State standard regulating GHG emissions expressed as $CO_2$ equivalent emissions is, to a very substantial extent, a State $CO_2$ emissions standard. To that extent, a State GHG standard is fuel economy standard in almost all but name and stated purpose. It would have virtually the same effects as a fuel economy standard. Thus, NHTSA has concluded that a State GHG standard does not incidentally affect vehicle manufacturers; it directly targets them.

Likewise, in NHTSA's view, such a standard does not incidentally affect decisions by manufacturers to add fuel saving technologies to their vehicles. Because the only currently practical way for vehicle manufacturers to reduce $CO_2$ tailpipe emissions is through application of fuel saving technologies [194] and no technologies are even under development that would make possible reduction of $CO_2$ emissions independent of reducing fuel consumption,[195] such a standard directly targets manufacturers and compels the use of those technologies. Therefore, the agency has concluded

[182] S. 1883, 94th Cong., 1st Sess., Section 509.

[183] H.R. 7014, 94th Cong., 1st Sess., Section 507 as introduced, Section 509 as reported.

[184] *Shaw* v. *Delta Airlines, Inc.,* 463 U.S. 85, 97 (1983).

[185] *Morales* v. *Trans World Airlines, Inc.,* 504 U.S. 374, 384 (1992).

[186] Ibid.

[187] 514 U.S. 645, 656, 658–662 (1995),

[188] *Egelhoff* v. *Egelhoff*, 532 U.S. 141, 147 (2001).

[189] *Center for Auto Safety* v. *NHTSA*, 793 F.2d 1322, 1340 (D.C. Cir. 1986).

[190] S. Rep. No. 94–179, 25 (1975).

[191] H. Rep. No. 94–340, 87 (1975).

[192] *Competitive Enterprise Institute* v. *NHTSA*, 901 F.2d 107, 120 at n.11 (D.C. Cir. 1990).

[193] *Blue Cross & Blue Shield Plans* v. *Travelers Ins. Co.*, 514 U.S. 645, 658–662 (1995).

[194] Essentially all of the technologies identified by the California Air Resources Board for reducing $CO_2$ emissions are among the technologies listed by the National Academy of Science in its 2002 report on reforming the CAFE program and improving fuel economy. The essential identity of the two lists confirms the fact that, currently, the only method for reducing $CO_2$ emissions is to reduce fuel consumption.

[195] EPA has reached a similar conclusion. See 68 FR 52922, 52929.

that the effect of a State GHG standard on vehicle design and performance is the same as that of fuel economy standards.

Commenters opposing preemption suggested that the purpose of a State law, not its effects, should determine whether there is preemption. Since the purpose of a State GHG regulation for motor vehicles is regulating $CO_2$ and other GHG emissions from motor vehicles, not fuel economy, they suggest that there can be no preemption under EPCA's express preemption provision. This limited view regarding the extent of preemption under that provision is inconsistent with NHTSA's expert analysis, which is guided by and comports with the Supreme Court's discussion of the similarly worded express preemption provisions in ERISA and the ADA. As noted above, in resolving ambiguity regarding preemption under a Federal law, the Court looks at the effects of a State law on the subject addressed by the Federal law to aid in determining if there is preemption.[196]

A federal statute's broadly worded express preemption provision does not lose its preemptive effect because a State cites a purpose other than or in addition to the purpose of that federal statute.[197] In *Gade*, the Supreme Court said that ''[i]n assessing the impact of a state law on the federal scheme, we have refused to rely solely on the legislature's professed purpose and have looked as well to the effects of the law.'' [198]

The agency's conclusions here that the EPCA preemption provision is expansive and preempts State emissions regulations that have the practical effect of regulating fuel economy are fully in keeping with earlier views expressed by the government. Further, they are consistent with views that EPA has articulated.

In June 2002, the U.S. District Court for the Eastern District of California issued an order granting plaintiff automobile manufacturers' and dealers' motion for preliminary injunction and issuing a preliminary injunction in *Central Valley Chrysler-Plymouth* v. *California Air Resources Bd.*, No. CV–F–02–5017 REC/SMS, 2002 U.S. Dist. LEXIS 20403 (E.D. Cal. June 11, 2002) (enjoining California zero-emission-vehicle (ZEV) rule). The court found that the plaintiffs had shown that the ZEV rule was ''related to'' fuel economy standards because it had the purpose and practical effect of regulating fuel economy. The court also found that ''preemption cannot be avoided by intertwining preempted requirements with nonpreempted requirements.''

In October 2002, the United States filed an amicus curiae brief in support of affirming the June 2002 order in *Central Valley Chrysler-Plymouth, Inc. et al.* v. *Michael P. Kenny*, No. 02–16395, (9th Cir. 2002), pointing out that EPCA contains a broadly stated provision expressly preempting state regulations ''related to'' fuel economy standards. The government further pointed out that, unlike the Clean Air Act, EPCA does not contain an exception allowing a state law that regulates fuel economy, regardless of the purpose of the law. Given that Congress had included some exceptions, but not that particular one, the government said that it would be inappropriate to read in or imply that exception.

In December 2002, NHTSA published a CAFE NPRM for MY 2005–2007 light trucks in which the agency addressed certain court filings by the State of California relating to CAFE preemption. The agency noted that California had:

> [I]n recent court filings, asserted that NHTSA has not treated the CAFE statute as preempting state efforts to engage in CAFE related regulation, stating that ''time and time again, NHTSA in setting CAFE standards has commented on the fuel economy effects of California's emissions regulations, and not once has it even suggested that these were preempted.'' See Appellants Opening Brief filed on behalf Michael P. Kenny in Central Valley Chrysler-Plymouth, Inc. *et. al.* v. Michael P. Kenny, No. 02–16395, at p. 33 (9th Cir. 2002). As a result, the State suggests that it may, consistent with federal law, issue regulations that relate to fuel economy.

The State misses the point. The agency reviews emissions requirements to ensure that we do not establish a standard that is infeasible in light of other public policy considerations, including federal and state efforts to regulate emissions. Thus, we consider potential fuel economy losses due to more stringent emissions requirements when we determine maximum feasible fuel economy levels.

This does not mean that a state may issue a regulation that relates to fuel economy and which addresses the same public policy concern as the CAFE statute. Our statute contains a broad preemption provision making clear the need for a uniform, federal system: ''When an average fuel economy standard prescribed under this chapter is in effect, a State or a political subdivision of a State may not adopt or enforce a law or regulation related to fuel economy standards or average fuel economy standards for automobiles covered by an average fuel economy standard under this chapter.'' 49 U.S.C. 32919(a).

The fact that NHTSA had not expressly addressed this particular aspect of California's requirements should not have been interpreted as tacit acceptance. Indeed, the United States has taken the express position in the Kenny case that it has a substantial interest in enforcing the federal fuel economy standards and in ensuring that states adhere to the Congressional directive prohibiting them from adopting or enforcing any law or regulation related to fuel economy or average fuel economy standards.[199]

In its CAFE final rule for MY 2005–07 light trucks, NHTSA stated that its ''position with regard to the relationship between state laws and our federal fuel economy responsibility was set forth in the [December 2002] NPRM and has not changed. The EPCA statute contains a preemption provision intended to ensure a unified federal program to address motor vehicle fuel economy.''

In September 2003, the Environmental Protection Agency specifically discussed the relationship between $CO_2$ standards and fuel economy. In denying an October 1999 petition by the International Center for Technology Assessment (ICTA) asking the EPA to regulate $CO_2$ and other greenhouse gas emissions from motor vehicles under the Clean Air Act for the purpose of addressing global climate change, the EPA included a discussion of how regulating $CO_2$ emissions would cause ''[i]nterference with Fuel Economy Standards:''

> Even if GHGs were air pollutants generally subject to regulation under the CAA, Congress has not authorized the Agency to regulate $CO_2$ emissions from motor vehicles to the extent such standards would effectively regulate the fuel economy of passenger cars and light duty trucks. No technology currently exists or is under development that can capture and destroy or reduce emissions of $CO_2$, unlike other emissions from motor vehicle tailpipes. At present, the only practical way to reduce tailpipe emissions of $CO_2$ is to improve fuel economy. Congress has already created a detailed set of mandatory standards governing the fuel economy of cars and light duty trucks, and has authorized DOT—not EPA—to implement those standards. The only way for EPA to proceed with $CO_2$ emissions standards without upsetting this

[196] *Egelhoff*, at 147.

[197] *Gade* v. *National Solid Wastes Management Ass'n.*, 505 U.S. 88, 105 (1992).

[198] Id., at 106; see also *Morales*, at 386: ''petitioner advances the notion that only state laws specifically addressed to the airline industry are pre-empted, whereas the ADA imposes no constraints on laws of general applicability. Besides creating an utterly irrational loophole (there is little reason why state impairment of the federal scheme should be deemed acceptable so long as it is effected by the particularized application of a general statute), this notion similarly ignores the sweep of the 'relating to' language. We have consistently rejected this precise argument in our ERISA cases: '[A] state law may ''relate to'' a benefit plan, and thereby be pre-empted, even if the law is not specifically designed to affect such plans, or the effect is only indirect.' '' (Citations omitted.)

[199] Light Truck Average Fuel Economy Standards Model Years 2005–2007, 67 FR 77015, at 77025 (Proposal to establish standards December 16, 2002).

statutory scheme would be to set a standard less stringent than CAFE for cars and light duty trucks. But such an approach would be meaningless in terms of reducing GHG emissions from the U.S. motor vehicle fleet.[200]

EPA further explained this position in its brief filed in early 2005 in the Court of Appeals for the D.C. Circuit in *Commonwealth of Massachusetts* v. *EPA*, No. 03–1361, in which 12 states and a number of environmental groups filed a petition for review challenging EPA's denial of ICTA's petition:

Further reinforcing both the legal and policy rationales for the ICTA Petition Denial is the fact that at present, the only practical way of making a meaningful reduction in motor vehicle emissions of $CO_2$ (the most significant greenhouse gas) is by increasing fuel economy. See 68 FR at 52929. Consequently, even if EPA possessed CAA authority to regulate $CO_2$ for climate change purposes, any motor vehicle standard EPA might set under the Act that required meaningful reductions in $CO_2$ emissions would effectively require a corresponding increase in fuel economy. However, in the Energy Policy and Conservation Act (''EPCA''), 49 U.S.C. 32901–18, Congress established a detailed program for regulating the fuel economy of passenger cars and light trucks—the bulk of the motor vehicle fleet—and it authorized DOT, not EPA, to implement that program. EPA thus reasonably concluded that it would be inconsistent with EPCA for EPA to set $CO_2$ emission standards under the CAA that would effectively require significant increases in the fuel economy of vehicles subject to EPCA. 68 FR at 52929. In arguing that EPCA does not expressly abrogate EPA's authority under the CAA, see Pet. Br. at 38–43, Petitioners ignore those EPCA provisions that clearly signal Congress' intent that regulation of motor vehicle fuel economy be governed by EPCA alone.

## NHTSA Has Concluded That Any Effort to Regulate Carbon Dioxide Emissions From Motor Vehicles Is Related to Average Fuel Economy Standards for Motor Vehicles Under 49 U.S.C. Chapter 329

### 1. Motor Vehicle Fuel Economy Is Directly Related to Emissions of Carbon Dioxide

Fossil fuels such as petroleum contain mostly hydrocarbons (compounds containing hydrogen and carbon). In the combustion process, these fuels are oxidized to produce heat. In perfect combustion, the oxygen ($O_2$) in the air combines with all of the carbon (C) in the fuel to form carbon dioxide ($CO_2$) and all of the hydrogen (H) in the fuel to form water ($H_2O$).

Most light trucks are powered by gasoline internal combustion engines. The combustion of gasoline produces $CO_2$ in amounts that can be readily calculated. Based on its content (carbon and hydrogen), as a matter of basic chemistry, the burning of a gallon of gasoline produces about 20 pounds of $CO_2$.[201] [202]

In practice, the combustion process is not 100 percent efficient and engines produce several types of emissions as combustion byproducts or as a result of incomplete combustion. In an internal combustion engine, these include nitrogen oxides ($NO_X$) (from nitrogen and oxygen in the atmosphere), carbon monoxide (CO) and hydrocarbons (HC), including methane. These emissions do not alter the fact that combustion of gasoline produces $CO_2$. Moreover, the amounts of $CO_2$ emitted per mile are far greater than the amounts of HC, CO, and $NO_X$, singly or combined.[203] [204]

$CO_2$ emissions are always and directly linked to fuel consumption because $CO_2$ is the ultimate end product of burning gasoline.[205] The more fuel a vehicle burns or consumes, the more $CO_2$ it emits.[206] Viewed another way, fuel economy is directly related to emissions of greenhouse gases such as $CO_2$.[207] Fuel consumption and $CO_2$ emissions from a vehicle are two ''indissociable'' parameters.[208]

### 2. The Most Significant Factor in Determining the Compliance of Motor Vehicles With NHTSA's Fuel Economy Standards Is Their Rate of Carbon Dioxide Emissions

A manufacturer's compliance with the federal average fuel economy standards is based on the collective fuel economies of its covered vehicles. For purposes of determining compliance with federal fuel economy standards, EPA and manufacturers measure the amount of $CO_2$, CO, and HC emitted from the vehicle. The regulations requiring this approach do so because of the scientific relationship between fuel consumption and carbon emissions.

As noted above, gasoline is comprised of carbon and hydrogen in the form of HC compounds. Carbon and hydrogen are basic elements that are not converted to other elements in either internal combustion engines or catalytic converters. As a component of the fuel, the carbon is conveyed to the engine, where combustion occurs. Thereafter, the carbon, largely in different compounds than in gasoline, is emitted through the tailpipe. Thus, if the carbon content of the fuel is known, the amount of fuel consumed by the engine can be determined by measuring tailpipe emissions of carbon-containing compounds.[209] Fully combusted carbon

[200] Control of Emissions from New Highway Vehicles and Engines, 68 FR 52922, 52929 (denial of petition September 8, 2003).

[201] Most of that weight comes from the oxygen in the air. A carbon atom has an atomic weight of 12, and each oxygen atom has an atomic weight of 16, giving each single molecule of $CO_2$ an atomic weight of $12 + (16 \times 2)$ or 44. Therefore, to calculate the weight of the $CO_2$ produced from a gallon of gasoline, the weight of the carbon in the gasoline is multiplied by 44/12 or 3.7. Since gasoline is about 87% carbon and 13% hydrogen by weight, and since a gallon of gasoline weighs about 6.3 pounds, the carbon in a gallon of gasoline weighs (6.3 lbs. $\times$ .87) or 5.5 pounds. If the weight of the carbon (5.5 pounds) is then multiplied by 3.7, the answer is about 20 pounds. (Source: *http://www.fueleconomy.gov/feg/co2.shtml*. The website, *http://www.fueleconomy.gov*, is operated jointly by the Department of Energy and the Environmental Protection Agency.)

[202] In addition, $CO_2$ emissions can be determined from the carbon content of the fuel by using a carbon content coefficient that reflects the amount of carbon per unit of energy in each fuel. $CO_2$ emissions = energy consumption [*e.g.*, in Btu] $\times$ carbon content coefficient for the fuel $\times$ fraction of carbon oxidized [99% for petroleum] $\times$ 3.67 [conversion of carbon to carbon dioxide (44/12) based on molecular weights]. T.J. Blasing, G. Marland and C. Broniak, Estimates of Annual Fossil-Fuel $CO_2$ Emitted for Each State in the U.S.A. and the District of Columbia for Each Year from 1960 through 2001, at *http://cdiac.ornl.gov/trends/emis_mon/stateemis/emis_state.htm*. The carbon content coefficients for petroleum products have varied very little over time—less than one percent per year since 1990. *Id.* Reformulated gasoline introduced in the 1990s pursuant to the Clean Air Act Amendments of 1990 has a carbon emissions coefficient approximately one percent smaller than that of standard gasoline.

[203] U.S. EPA, Average Annual Emissions and Fuel Consumption for Passenger Cars and Light Trucks, EPA420–F–00–013, April 2000. Available on the Internet at *http://www.epa.gov/otaq/consumer/f00013.pdf*.

[204] Good, David, U.S. EPA, 2006 test-car-list-and analysis for DD 206.xls, February 2006. (unpublished analysis of 2006 test car list available at *http://www.epa.gov/otaq/tcldata.htm*).

[205] See also EPA's denial of petition to regulate $CO_2$ tailpipe emissions from motor vehicles, 68 FR 52922, 52931, September 8, 2003; *Center for Biological Diversity* (November 22, 2005, NHTSA 2005–22223–1382) (p. 2–3); RAND Europe, Preparation of Measures to Reduce $CO_2$ Emissions from N1 Vehicles, Final Report, at 4, prepared for the European Commission, 11th April 2003.

[206] ''Vehicles with lower fuel economy burn more fuel, creating more $CO_2$. Your vehicle creates about 20 pounds of $CO_2$ (170 cu. ft.) per gallon of gasoline it consumes. Therefore, you can reduce your contribution to global climate change by choosing a vehicle with higher fuel economy. By choosing a vehicle that achieves 25 miles per gallon rather than 20, you can prevent the release of about 17 (260 thousand cu. ft.) tons of greenhouse gases over the lifetime of your vehicle.'' Model Year 2006 Fuel Economy Guide, at 2, Department of Energy and Environmental Protection Agency, DOE/EE–0309.

[207] 68 FR 52922, 52931; Light-Duty Automotive Technology and Fuel Economy Trends: 1975 through 2005—Executive Summary, EPA420–S–05–0001, July 2005, at *http://www.epa.gov/otaq/cert/mpg/fetrends/420s05001.htm*.

[208] P. Leduc, B. Dubar, A. Ranini and G. Monnier, Downsizing of Gasoline Engine: an Efficient Way to Reduce $CO_2$ Emissions, at 2, Institut Français du Pétrole, Division Techniques d'Applications Energétiques, 92852 Rueil-Malmaison Cedex—France).

[209] DOT FHWA, Perspectives on Fuel Consumption and Air Contaminant Emission Rates

Continued

takes the form of $CO_2$. Partially combusted carbon takes the form of CO or HC (generally unburned hydrocarbons). Therefore, fuel consumption may be determined by measuring tailpipe emissions of $CO_2$, CO, and HC.

As a result of incomplete combustion, CO and HC are emitted from a vehicle's engine. However, in the years since vehicle manufacturers were first required to meet federal fuel economy standards, the manufacturers have also been required under the Clean Air Act to meet increasingly stringent standards for emission of CO, HC, $NO_X$, and particulates.[210] They have been able to meet these standards because fuels have been reformulated to burn cleaner, and vehicle manufacturers have applied many significant technological advances to the engines and vehicles (e.g., multipoint fuel injection, closed-loop computer-controlled mixture control, and close-coupled 3-way exhaust catalysts). As a result, emissions of CO and HC have fallen dramatically. Moreover, the technologies that produce these reductions in air pollution do so by more completely converting CO and HC to $CO_2$ (and water).[211] Over the same time period, there has not been a corresponding decline in $CO_2$ emissions, which, as noted above, are the necessary result of gasoline consumption. CO and HC play an increasingly and extremely minor role in the measurement of fuel economy, such that fuel economy has become virtually synonymous with $CO_2$ emission rates.

The fuel economy of a particular vehicle is determined by a formula promulgated by EPA. That formula (an equation) calculates fuel economy based on carbonaceous emissions from the vehicle, taking into account the normalization of the fuel to a standardized test fuel. Under the formula, in determining fuel economy, all carbon emissions—i.e., the $CO_2$ emission rate, HC emission rate, and CO emission rate—are considered.

Significantly, as demonstrated by the example below, in determining fuel economy the role of $CO_2$ emissions greatly outweighs that of these other exhaust gases. This is reflected by the relative magnitudes of the $CO_2$ term and non-$CO_2$ terms in the equation. In other words, calculating fuel economy is largely a function of $CO_2$ emissions.

Under 40 CFR 600.113, fuel economy (mpg) is calculated using the following equation:

$$mpg = \frac{51,740,000 \times CWF \times SG}{\left(CWF \times HC + 0.429 \times CO + 0.273 \times CO_2\right) \times \left(0.6 \times SG \times NHV + 5,471\right)}$$

Where:

HC = hydrocarbon emission rate (grams per mile)

CO = carbon monoxide emission rate (grams per mile)

$CO_2$ = carbon dioxide emission rate (grams per mile)

CWF = carbon weight fraction of test fuel

NHV = net heating value (by mass) of test fuel

SG = specific gravity of test fuel

Under the regulation, separate measurements and calculations under the Federal Test Procedure (i.e., city cycle) and Federal Highway Fuel Economy Test Procedure (i.e., highway cycle) are required, with the resultant city ($mpg_c$) and highway ($mpg_h$) fuel economy values being harmonically averaged using weights of 0.55 and 0.45, respectively.[212]

Determining the characteristics of a test fuel and inserting them into the above equation is a preliminary step toward assessing the relative importance of $CO_2$ emissions in determining compliance with the fuel economy standards.

For this purpose, we will use the characteristics of a test fuel set forth in the sample calculation in Appendix II to 40 CFR part 600:

CWF = 0.868

NHV = 18,478 Btu per pound

SG = 0.745

These values are within about 8 percent of other values in the record (given relatively minor variations, particularly in heating value, in gasolines) and are reasonable for the purposes of this assessment, although very precise data would be collected for a test for compliance with the rule.[213]

Substituting these values into EPA's general equation for fuel economy shown above yields

$$mpg = \frac{51,740,000 \times 0.868 \times 0.745}{\left(0.868 \times HC + 0.429 \times CO + 0.273 \times CO_2\right) \times \left(0.6 \times 0.745 \times 18,478 + 5,471\right)}$$

which algebraically reduces to the following:

$$mpg = \frac{2,437}{\left(0.868 \times HC + 0.429 \times CO + 0.273 \times CO_2\right)}$$

by Highway Vehicles. *http:// www.tfhrc.gov/structur/pdf/01100.pdf.*

[210] As explained below in the final section of the discussion of preemption, NHTSA does not believe that regulation of these emissions is preempted by EPCA since it is the agency's judgment that such regulation only tangentially affects fuel economy.

[211] Because carbon dioxide is, like water, an ultimate byproduct of combustion, it cannot be further converted on the vehicle to some other compound through any practical means.

[212] 40 CFR 600.206–93.

[213] See, e.g., Fuel economy impact of reformulated gasoline (energy (NHV) of fuel, at *http://www.epa.gov/otaq/rfgecon.htm;* Motor Gasolines Technical Review, at *http:// www.chevron.com/products/prodserv/fuels/ bulletin/motorgas/;* Carbon Coefficients, at *http:// www.eia.doe.gov/oiaf/1605/87-92rpt/appa.html;* and Specific Gravity—Liquids, at *http:// www.engineeringtoolbox.com/specific-gravity-liquids-d_336.html.*

Based on EPA data [214] averaged across all MY 2006 truck test data available at *http://www.epa.gov/otaq/tcldata.htm* (which does not include production data), model year 2006 light trucks have the following city cycle emission rates as determined by testing by the Federal Test Procedure:

HC = 0.042 g/mi
CO = 0.056 g/mi
$CO_2$ = 471 g/mi

Substituting these values and the fuel characteristics noted above into the algebraically reduced equation shown above,

$$mpg_c = \frac{2,421}{\left(\underbrace{0.868 \times 0.042}_{HC\ term} + \underbrace{0.429 \times 0.56}_{CO\ term} + \underbrace{0.273 \times 471}_{CO_2\ term}\right)}$$

which produces the following city fuel economy in miles per gallon:

$$mpg_c = \frac{2,421}{(0.037 + 0.240 + 128.583)} = \frac{2,421}{\left(\underbrace{0.277}_{non-CO_2\ term} + \underbrace{128.583}_{CO_2\ term}\right)} = 18.8$$

The average model year 2006 light truck emission rates on the highway cycle were as follows: [215]

HC = 0.011 g/mi
CO = 0.17 g/mi
$CO_2$ = 316 g/mi

which, using the formula above, yields the following highway fuel economy in miles per gallon:

$$mpg_h = \frac{2,421}{\left(\underbrace{0.868 \times 0.011}_{HC\ term} + \underbrace{0.429 \times 0.17}_{CO\ term} + \underbrace{0.273 \times 316}_{CO_2\ term}\right)} = \frac{2,421}{\left(\underbrace{0.082}_{non-CO_2\ term} + \underbrace{86.268}_{CO_2\ term}\right)} = 28.0$$

For both the city and highway calculations, the controlling independent variable is the large number (term) in the denominator, given that the numerator is a fixed number. That number is the $CO_2$ term (86.268). The other numbers (denominated the HC term and the CO term) are not significant. More particularly, for the 2006 model year light trucks, the typical city and highway $CO_2$ terms for light trucks are more than four hundred and one thousand, respectively, times the magnitude of the corresponding non-$CO_2$ terms. NHTSA has concluded that this proportion will not change, especially in light of its conclusion that emission limitations on the other types of emissions are permissible under EPCA.

As shown above, in the measurement and calculation of a given vehicle model's fuel economy for purposes of federal fuel economy standards, the role of $CO_2$ is controlling and far greater than the combined role of the other two relevant exhaust gases (CO and HC). A manufacturer's compliance with the applicable CAFE standard is determined by averaging model-specific fuel economy values. This demonstrates that compliance with federal fuel economy standards is based primarily on $CO_2$ emission rates of covered vehicles.[216]

3. NHTSA Has Concluded That a Reduction of $CO_2$ Emissions From Motor Vehicles Is Possible Only Through the Incorporation of the same Technologies That Would Be Employed To Increase Fuel Economy

The technologies that would be employed to reduce $CO_2$ emissions are, in all relevant ways, the same technologies as underlie NHTSA's judgment about the appropriate CAFE standards for light trucks, as explained below.[217]

The CAFE standards promulgated by NHTSA are performance standards. As such, they do not require the employment of any particular technology. But the standards are the maximum feasible average fuel economy level that NHTSA decides the manufacturers can achieve in a particular year. [218] They are based on various technologies. Those technologies are addressed in the NHTSA CAFE rulemaking record. In large measure, they are summarized in Table 3–2 of the 2002 National Academy of Sciences (NAS) CAFE study, which is reproduced below in Tables 18 and 19 (numbered as Tables 3–2 and 3–3, respectively, in the NAS study).

[214] Good, David, op. cit.

[215] Ibid.

[216] The vast majority of vehicles covered by NHTSA's light truck CAFE standard are powered by gasoline fueled engines. Hybrids are expected to comprise from 1.7 to 2.9 percent of the fleet of new vehicles, while diesels are expected to comprise from 0 to 2.6 percent. These non-gasoline fueled vehicles will have a minor effect on the average fuel economy of the overall fleet of new vehicles.

[217] The agency has not identified any technologies, let alone realistic ones, that could be added to vehicle exhaust pipes to reduce $CO_2$ emissions. Above and beyond the application of the technologies addressed in this discussion of preemption, to meet $CO_2$ standards, in theory the manufacturer could make the vehicle much smaller or substantially reduce the size of its engine, depending on the stringency of the $CO_2$ regulation. P. Leduc et al., op cit. see fn above; see also, *http://www4.nationalacademies.org/news.nsf/isbn/0309076013?OpenDocument*

[218] See 49 U.S.C. 32902(a).

## Table 18: Fuel Consumption Technology Matrix – SUVs and Minivans (Table 3-2 NAS report)

| Baseline (small SUV): overhead cams, 4-valve, fixed timing, roller finger follower. Baseline (others): 2-valve, fixed timing, roller finger follower. | Fuel Consumption Improvement (%) | Retail Price Equivalent (RPE) ($) | | Small SUV | | | Mid SUV | | | Large SUV | | | Minivan | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | | Low | High | 1 | 2 | 3 | 1 | 2 | 3 | 1 | 2 | 3 | 1 | 2 | 3 |
| Production-intent engine technology | | | | | | | | | | | | | | | |
| Engine friction reduction | 1-5 | 35 | 140 | x | x | x | x | x | x | x | x | x | x | x | x |
| Low-friction lubricants | 1 | 8 | 11 | x | x | x | x | x | x | x | x | x | x | x | x |
| Multivalve, overhead camshaft (2-V vs. 4-V) | 2-5 | 105 | 140 | | | | x | x | x | x | x | x | x | x | x |
| Variable valve timing | 2-3 | 35 | 140 | x | x | x | x | x | x | x | x | x | x | x | x |
| Variable valve lift and timing | 1-2 | 70 | 210 | | x | x | | x | x | | x | x | | x | x |
| Cylinder deactivation | 3-6 | 112 | 252 | | | | x | x | | x | x | | | x | |
| Engine accessory improvement | 1-2 | 84 | 112 | x | x | x | x | x | x | x | x | x | x | x | x |
| Engine supercharging and downsizing | 5-7 | 350 | 560 | | | x | | | x | | | x | | | x |
| Production-intent transmission technology | | | | | | | | | | | | | | | |
| Five-speed automatic transmission | 2-3 | 70 | 154 | x | | | x | x | | x | x | x | x | x | x |
| Continuously variable transmission | 4-8 | 140 | 350 | | x | x | | | x | | | | | | |
| Automatic transmission w/aggressive shift logic | 1-3 | 0 | 70 | x | | | x | | | x | x | | x | | |
| Six-speed automatic transmission | 1-2 | 140 | 280 | | | | | x | | | x | x | | x | x |
| Production-intent vehicle technology | | | | | | | | | | | | | | | |
| Aero drag reduction | 1-2 | 0 | 140 | | x | x | | x | x | | x | x | | x | x |
| Improved rolling resistance | 1-1.5 | 14 | 56 | x | x | x | x | x | x | x | x | x | x | x | x |
| Safety technology | | | | | | | | | | | | | | | |
| Safety weight increase | –3 to –4 | 0 | 0 | x | x | x | x | x | x | x | x | x | x | x | x |
| Emerging engine technology | | | | | | | | | | | | | | | |
| Intake valve throttling | 3-6 | 210 | 420 | | x | | | x | | | x | | | x | |
| Camless valve actuation | 5-10 | 280 | 560 | | | x | | | x | | | x | | | x |
| Variable compression ratio | 2-6 | 210 | 490 | | | x | | | x | | | x | | | x |
| Emerging transmission technology | | | | | | | | | | | | | | | |
| Automatic shift/manual transmission (AST/AMT) | 3-5 | 70 | 280 | | | | | x | | | | x | | x | x |
| Advanced CVTs—allows higher torque | 0-2 | 350 | 840 | | | | | | x | | | | | | |
| Emerging vehicle technology | | | | | | | | | | | | | | | |
| 42-V electrical systems | 1-2 | 70 | 280 | | x | x | | x | x | | x | x | | x | x |
| Integrated starter/generator (idle off–restart) | 4-7 | 210 | 350 | | x | x | | x | x | | x | x | | x | x |
| Electric power steering | 1.5-2.5 | 105 | 150 | | | x | | x | x | | x | x | | x | x |
| Vehicle weight reduction (5%) | 3-4 | 210 | 350 | | | | | | x | | | x | | | |

NOTE: An *x* means the technology is applicable to the particular vehicle. Safety weight added (EPA baseline + 3.5%) to initial average mileage/consumption values.

| Baseline: 2-valve, fixed timing, roller finger follower. | Fuel Consumption Improvement (%) | Retail Price Equivalent (RPE) ($) | | Small Pickup | | | Large Pickup | | |
|---|---|---|---|---|---|---|---|---|---|
| | | Low | High | 1 | 2 | 3 | 1 | 2 | 3 |
| Production-intent engine technology | | | | | | | | | |
| Engine friction reduction | 1-5 | 35 | 140 | x | x | x | x | x | x |
| Low-friction lubricants | 1 | 8 | 11 | x | x | x | x | x | x |
| Multivalve, overhead camshaft (2-V vs. 4-V) | 2-5 | 105 | 140 | x | x | x | x | x | x |
| Variable valve timing | 2-3 | 35 | 140 | | x | x | x | x | x |
| Variable valve lift and timing | 1-2 | 70 | 210 | | x | x | | x | x |
| Cylinder deactivation | 3-6 | 112 | 252 | x | x | | | x | |
| Engine accessory improvement | 1-2 | 84 | 112 | x | x | x | x | x | x |
| Engine supercharging and downsizing | 5-7 | 350 | 560 | | | x | | x | x |
| Production-intent transmission technology | | | | | | | | | |
| Five-speed automatic transmission | 2-3 | 70 | 154 | x | x | | x | x | x |
| Continuously variable transmission | 4-8 | 140 | 350 | | | x | | | |
| Automatic transmission w/aggressive shift logic | 1-3 | 0 | 70 | x | | | x | x | |
| Six-speed automatic transmission | 1-2 | 140 | 280 | | x | | | x | x |
| Production-intent vehicle technology | | | | | | | | | |
| Aero drag reduction | 1-2 | 0 | 140 | | x | x | | x | x |
| Improved rolling resistance | 1-1.5 | 14 | 56 | x | x | x | x | x | x |
| Safety technology | | | | | | | | | |
| 5% safety weight increase | –3 to –4 | 0 | 0 | x | x | x | x | x | x |
| Emerging engine technology | | | | | | | | | |
| Intake valve throttling | 3-6 | 210 | 420 | | x | | | x | |
| Camless valve actuation | 5-10 | 280 | 560 | | | x | | | x |
| Variable compression ratio | 2-6 | 210 | 490 | | | x | | | x |
| Emerging transmission technology | | | | | | | | | |
| Automatic shift/manual transmission (AST/AMT) | 3-5 | 70 | 280 | | x | | | | x |
| Advanced CVTs | 0-2 | 350 | 840 | | | x | | | |
| Emerging vehicle technology | | | | | | | | | |
| 42-V electrical systems | 1-2 | 70 | 280 | | x | x | | x | x |
| Integrated starter/generator (idle off–restart) | 4-7 | 210 | 350 | | x | x | | x | x |
| Electric power steering | 1.5-2.5 | 105 | 150 | | x | x | | x | x |
| Vehicle weight reduction (5%) | 3-4 | 210 | 350 | | | | | | |

NOTE: An *x* means the technology is applicable to the particular vehicle. Safety weight added (EPA baseline + 3.5%) to initial average mileage/consumption values.

## Table 19: Fuel Consumption Technology Matrix – Pickup Trucks (Table 3-3 NAS report)

If a state regulation required manufacturers to reduce $CO_2$ emissions from motor vehicles, the state regulation would be predicated on the manufacturers' employment of the same technologies they would employ to meet federal fuel economy standards. As an example, for discussion purposes, we will consider a California regulation. In 2005, CARB adopted amendments to its regulations that it referred to as "California Exhaust Emission Standards and Test Procedures for 2001 and Subsequent Model Passenger Cars, Light Duty Trucks and Medium Duty Vehicles."[219] In support of its regulations, CARB released a report that listed more than 20 technologies that manufacturers could be applied in order to achieve compliance with its $CO_2$-based standards.[220] The technologies identified in the State's report with respect to large trucks are identified in the second column of the table reproduced below from its report, which employs acronyms that are explained below.

[219] See *http://www.arb.ca.gov/regact/grnhsgas/grnhsgas.htm*. The regulations are codified at Title 13 of the California Code of Regulations (CCR). See 13 CCR § 1961.1 (2006).

[220] California Environmental Protection Agency, Air Resources Board, Regulations To Control Greenhouse Gas Emissions From Motor Vehicles, Initial Statement of Reasons.

TABLE 20.—CARB "TECHNOLOGY PACKAGES" TO REDUCE $CO_2$ EMISSIONS FROM A LARGE TRUCK [221]

| Light truck | Combined technology packages | $CO_2$ (g/mi) | Potential $CO_2$ reduction from 2002 baseline (percent) | Retail price equivalent 2002 | Potential $CO_2$ reduction from 2009 baseline (percent) | Retail price equivalent 2009 |
|---|---|---|---|---|---|---|
| Near | CCP, A6, (2009 baseline) | 484 | −5.5 | $126 | 0 | 0% |
| Term 2009–2012 | DVVL, DCP, A6 | 442 | −13.6 | 549 | −8.6 | $423 |
| | CCP, DeAct, A6 | 433 | −15.4 | 480 | −10.5 | 354 |
| | DCP, DeAct, A6 | 430 | −15.9 | 845 | −11.0 | 931 |
| | DeAct, DVVL, CCP, A6, EHPS, ImpAlt | 418 | −18.4 | 789 | −13.6 | 663 |
| | DeAct, DVVL, CCP, AMT, EHPS, ImpAlt | 396 | −22.6 | 677 | −18.1 | 551 |
| Mid Term 2013–2015 | CCP, DeAct, GDI–S, AMT, EHPS, ImpAlt | 416 | −18.6 | 827 | −13.9 | 701 |
| | DeAct, DVVL, CCP, A6, ISG, EHPS, eACC | 378 | −26.2 | 1885 | −21.9 | 1759 |
| | ehCVA, GDI–S, AMT, EHPS, ImpAlt | 381 | −25.5 | 1621 | −21.2 | 1495 |
| Long Term 2015– | GDI–L, AMT, EHPS, ImpAlt | 354 | −24.4 | 1460 | −20.0 | 1334 |
| | Mod HEV | 372 | −44.5 | 2630 | −41.3 | 2504 |
| | dHCCI, AMT, ISG, EPS, eACC | 362 | −29.3 | 2705 | −25.2 | 2579 |
| | GDI–L, AMT, ISG, EPS, ImpAlt | 354 | −30.7 | 2537 | −26.7 | 2411 |
| | HSDI, AdvHEV | 244 | −52.2 | 8363 | −49.5 | 8237 |
| | AdvHEV | 241 | −52.5 | 5311 | −49.8 | 5185 |

The acronyms in the table above refer to the following technologies: [222]

A5: 5-speed automatic transmission
A6: 6-speed automatic transmission
AdvHEV: Advanced hybrid
AMT: Automatic Manual Transmission
CCP: Coupled cam phasing
CVVL: Continuous variable valve lift
DCP: Dual cam phasing
DeAct: Cylinder deactivation
dHCCI: Diesel homogeneous charge compression ignition
DVVL:Discrete variable valve lift
eACC: Improved electric accessories
ehCVA: Electrohydraulic camless valve actuation
EHPS: Electrohydraulic power steering
EPS: Electric power steering
GDI–S: Stoichiometric gasoline direct injection
GDI–L: Lean-burn gasoline direct injection
HSDI: High-speed (diesel) direct injection
ImpAlt: Improved efficiency alternator
ISG: Integrated starter-generator systems
ModHEV: Moderate hybrid
Turbo: Turbocharging

As is evident from a comparison of the excerpt from the NAS report above with the excerpt from the CARB statement of reasons above, nearly all of the technologies relied upon by CARB are technologies that NHTSA largely relies on in formulating the federal average fuel economy standards. Thus, vehicle manufacturers would have to install many of the same types of technologies under the NHTSA CAFE rule and under the CARB greenhouse gas rule.

California's Regulation of Greenhouse Gas/Carbon Dioxide Equivalent Emissions From Motor Vehicles Is Related to Average Fuel Economy Standards for Motor Vehicles Under 49 U.S.C. Chapter 329 and Therefore Preempted

California's GHG regulations include new requirements on greenhouse gas emissions from motor vehicles including model year 2009 and subsequent model year light duty trucks (LDT) and medium duty passenger vehicles (MDPV). The CARB greenhouse gas rules include two sets of standards for motor vehicles. One set applies to all passenger cars and to LDTs with a loaded vehicle weight (LVW) up to 3750 pounds. The other set applies to LDTs with a loaded vehicle weight of greater than 3750 pounds and to MDPVs with a gross vehicle weight of less than 10,000 pounds.

NHTSA's CAFE rulemaking covers MY 2008–2011 light trucks. It also includes MY 2011 MDPVs. Thus, the CARB regulations cover vehicles covered by NHTSA's rulemaking.

As noted above, CARB's regulations govern the emission of greenhouse gases from passenger cars, light duty trucks and medium duty passenger vehicles. Greenhouse gases (GHG) is defined to "mean[] the following gases: $CO_2$, methane, nitrous oxide, and hydrofluorocarbons." [223]

CARB's GHG regulation states that the fleet average greenhouse gas exhaust emission values from passenger cars, light-duty trucks and medium-duty passenger vehicles that are produced and delivered for sale in California shall not exceed specified values.[224] Table 21 provides the following requirements for Fleet Average Greenhouse Gas Exhaust Emissions, specified in terms of grams per mile $CO_2$—equivalent:

TABLE 21.—CARB FLEET AVERAGE GREENHOUSE GAS EXHAUST EMISSION REQUIREMENTS

[In grams/mi $CO_2$-equivalent]

| Model year | LDTs 0–3750 lbs LVW and passenger cars | LDTs 3751 LVW–8500 GVW and MDPVs |
|---|---|---|
| 2009 | 323 | 439 |
| 2010 | 301 | 420 |
| 2011 | 267 | 390 |

[221] California Environmental Protection Agency, Air Resources Board, Regulations To Control Greenhouse Gas Emissions From Motor Vehicles Initial Statement of Reasons (CARB ISOR) at 68.

[222] The acronyms appear in the CARB ISOR report at 205–06.

[223] 13 CCR §§ 1961.1(d), (e)(4)

[224] 13 CCR § 1961.1(a)(1)(A).

TABLE 21.—CARB FLEET AVERAGE GREENHOUSE GAS EXHAUST EMISSION REQUIREMENTS—Continued

[In grams/mi $CO_2$-equivalent]

| Model year | LDTs 0–3750 lbs LVW and passenger cars | LDTs 3751 LVW–8500 GVW and MDPVs |
|---|---|---|
| 2012 | 233 | 361 |
| 2013 | 227 | 355 |
| 2014 | 222 | 350 |
| 2015 | 213 | 341 |
| 2016+ | 205 | 332 |

As explained in CARB's ''Final Statement of Reasons'' for its vehicular GHG regulations, the following emission sources are covered:

Vehicle climate change emissions comprise four main elements (1) $CO_2$, $CH_4$, and $N_2O$ emissions resulting directly from the operation of the vehicle, (2) $CO_2$ emissions resulting from operating the air conditioning system (indirect AC emissions), (3) refrigerant emissions from the air conditioning system due to either leakage, losses during recharging, sudden releases due to accidents, or release from scrappage of the vehicle at the end of life (direct AC emissions), and (4) upstream emissions associated with the production of the fuel used by the vehicle. The climate change emission standard incorporates all of these elements.[225]

For vehicles certified on conventional fuels (*e.g.*, gasoline), CARB's regulation does not encompass upstream emissions (*i.e.*, emissions associated with the production and transportation of the fuel used by the vehicle).[226]

More particularly, under the CARB regulation, for each GHG vehicle test group, a manufacturer shall calculate both a ''city'' grams per mile average of $CO_2$ equivalent value and a ''highway'' grams per mile average of $CO_2$ equivalent value.[227] The use of $CO_2$ equivalence is an approximation that CARB used to place the gases included in CARB's definition of greenhouse gas on the same scale so that they could be added together. CARB based this on a statement of global warming potential:[228]

TABLE 22.—GWP VALUES FROM CARB INITIAL STATEMENT OF REASONS, P. 48

| Greenhouse gas compound | Global warming potential |
|---|---|
| Carbon Dioxide | 1 |
| Methane | 23 |
| Nitrous Oxide | 296 |
| HFC 134a | 1300 |
| HFC 152a | 120 |

Under the CARB GHG regulation, the basic calculation of a given vehicle model's GHG emission rate is as follows:[229]

$CO_2$ equivalent value = $CO_2 + 296 \times N_2O + 23 \times CH_4 - $ A/C Direct Emissions Allowances $-$ A/C Indirect Emissions Allowances.

This calculation may be expressed as follows:

$$GHG = \underbrace{CO_2}_{CO_2\ term} + \underbrace{\left(296 \times N_2O\right) + \left(23 \times CH_4\right)}_{non\text{-}CO_2\ term} - \underbrace{\left(\Delta AC_{direct} + \Delta AC_{indirect}\right)}_{AC\ term}$$

Where:

GHG = $CO_2$-equivalent greenhouse gas emission rate (per FTP and highway tests)

$CO_2$ = tailpipe carbon dioxide emission rate

$N_2O$ = tailpipe nitrous oxide emission rate

$CH_4$ = tailpipe methane emission rate

$\Delta AC_{direct}$ = credit for reducing direct emissions from air conditioning system (refrigerant emissions from the air conditioning system)

$\Delta AC_{indirect}$ = credit for reducing indirect emissions from air conditioning system use $CO_2$ emissions resulting from operating the air conditioning system,

As detailed in its ''Initial Statement of Reasons,'' CARB estimates demonstrated that of the total covered GHG emissions, vehicle tailpipe $CO_2$ emissions would be a much larger component than $CO_2$-equivalent baseline emission rates for all the other components combined. The following table shows CARB's estimates of the baseline emission rate for each covered GHG component[230] (column 2) along with the NHTSA's arithmetic calculation of corresponding shares of baseline emissions reported by CARB (column 3).

TABLE 23.—CARB ESTIMATES OF BASELINE GREENHOUSE GAS EMISSION RATES

| GHG emissions component | Rate ($CO_2$-equiv. g/mi) | Calculated share (percent total) |
|---|---|---|
| $CO_2$ emissions resulting directly from the operation of the vehicle | 291–512 | 92–95 |
| $CH_4$ emissions resulting directly from the operation of the vehicle | 0.1 | 0.02–0.03 |
| $N_2O$ emissions resulting directly from the operation of the vehicle | 1.8 | 0.3–0.6 |

[225] California Environmental Protection Agency, Air Resources Board, Regulations To Control Greenhouse Gas Emissions From Motor Vehicles, Final Statement Of Reasons (FSOR), at 7–8.

[226] CARB, FSOR at 8.

[227] 13 CCR 1961.1(a)(1)(B)1.a.

[228] The global warming potential is a relative index used to compare the climate impact of an emitted greenhouse gas, relative to an equal amount of carbon dioxide.

[229] Ibid.

[230] CARB ISOR at 48, 59, 70–72, 75 and 79.

TABLE 23.—CARB ESTIMATES OF BASELINE GREENHOUSE GAS EMISSION RATES—Continued

| GHG emissions component | Rate ($CO_2$-equiv. g/mi) | Calculated share (percent total) |
|---|---|---|
| $CO_2$ emissions resulting from operating the air conditioning system | 13.5–19.0 | 4 |
| Refrigerant emissions from the air conditioning system | 8.5 | 2–3 |

As is evident from the above table, $CO_2$ emissions resulting directly from the operation of the vehicle account for more than ninety two percent of the emissions potentially covered by CARB's vehicular GHG regulation.[231] This demonstrates that $CO_2$ emissions from the operation of the vehicle are the predominant factor under CARB's greenhouse gas regulation.

This is corroborated by data in the record. As discussed above, a reasonably representative MY2006 light truck emits 471 g/mi and 316 g/mi of $CO_2$ on the city and highway test cycles respectively. Like federal fuel economy standards, CARB's GHG regulation weights these cycles at 55% and 45% respectively,[232] such that representative $CO_2$ value would be 401 gr/mile for a MY 2006 light truck. According to CARB's ''Initial Statement of Reasons'',[233] a typical baseline vehicle emits 0.005 grams per mile of $CH_4$. Under the regulation, manufacturers may use a default value of 0.006 grams per mile for $N_2O$ in lieu of actually measuring emissions of that gas.[234] Also according to the regulation, manufacturers could be granted as much as 9 and 11 grams per mile in direct and indirect emissions allowances, respectively, for improvements to air conditioners.[235]

Therefore, the $CO_2$-equivalent GHG emission rate for a typical light truck granted the maximum credit for air conditioner improvements might be computed as follows:

$$GHG = \underbrace{401}_{CO_2\ term} + \underbrace{(296 \times 0.006) + (23 \times 0.005)}_{non\text{-}CO_2\ term} - \underbrace{(9 + 11)}_{AC\ term}$$

which reduces, with rounding, to:

$$GHG = \underbrace{401}_{CO_2\ term} + \underbrace{2}_{non\text{-}CO_2\ term} - \underbrace{20}_{AC\ term}$$

Therefore, for a typical light truck, the term representing $CO_2$ emissions that are also subject to regulation under federal CAFE standards (in the above equation, the term labeled ''$CO_2$ term'') would have a magnitude about 200 times that of the term representing its other emissions (''non-$CO_2$ term'' in the above), and about 20 times that of the term account for improvements to its air conditioning system (''AC term'' in the above). Consistent with CARB's estimate, discussed above, that tailpipe $CO_2$ emissions dominate total GHG emissions considered by CARB, this calculation indicates that $CO_2$ emissions account for on the order of 95 per cent ($1 - 22/(401 + 2 + 20) = 0.95$) of the emissions that enter into the calculation of total GHG emissions under CARB's regulation.

Alternatively, using the MY2011 values of CARB's standards for total GHG emissions—267 and 390 grams per mile for lighter and heavier vehicles, respectively, corresponding $CO_2$ emissions resulting directly from vehicle operation would be 285 and 408 grams per mile, respectively:

$$267 = \underbrace{CO_2}_{CO_2\ term} + \underbrace{2}_{non\text{-}CO_2\ term} - \underbrace{20}_{AC\ term}$$

$$390 = \underbrace{CO_2}_{CO_2\ term} + \underbrace{2}_{non\text{-}CO_2\ term} - \underbrace{20}_{AC\ term}$$

Solving these two equations for $CO_2$ yields values of 285 and 408 grams per mile, respectively. At these rates, $CO_2$ accounts for either 93% ($1 - 22/(285 + 2 + 20) = 0.93$) or 95% ($1 - 22/(408 + 2 + 20) = 0.95$) of the emissions that enter into the calculation of total GHG emissions under CARB's regulation.

Just as in the case of compliance with federal fuel economy standards, compliance with CARB's regulation is largely a function of tailpipe $CO_2$ emissions.[236] The same emissions provide the primary basis for determining compliance with federal fuel economy standards. In addition, CARB's own analysis anticipates that manufacturers would comply with its GHG regulation primarily by applying technologies that increase fuel economy.

With only one exception—improvements to air conditioning systems—those technologies would have a parallel impact on fuel economy as measured for purposes of determining compliance with federal fuel economy standards.[237] For purposes of determining compliance with federal CAFE standards, testing is run with the air conditioning turned off. Thus, the federal CAFE rules do not ''credit'' improved air conditioning efficiency or reduced losses from air conditioners. CARB has included reductions in emissions associated with air conditioning (direct and indirect) in its GHG regulation, so the technologies it relies upon are in this one limited respect broader than those NHTSA relies on. However, those technologies are nevertheless fuel economy technologies in that they reduce $CO_2$ emissions by reducing the load on a vehicle's engine and in turn reduce fuel consumption. Further, air conditioning improvements are not the predominant factor in reducing $CO_2$-equivalent

[231] A CARB memorandum recognizes that $CO_2$ emissions are by far the largest amount of emissions produced by motor vehicles. *http://www.arb.ca.gov/msei/on-road/downloads/pubs/co2final.pdf.*

[232] 13 CCR 1961.1.

[233] ISOR at 48.

[234] 13 CCR § 1961.1(a)(1)(B)1.a.

[235] California Code of Regulations, Title 13, § 1961.1(a)(1)(B)(1)(b) allows a direct emissions allowance of up to 9 grams per mile. Section 1961.1(a)(1)(B)(1)(c) allows an indirect emissions allowance of up to 11 grams per mile.

[236] This conclusion follows even if the $CO_2$ emission rates in the examples are changed considerably, in line with the baseline estimates in CARB's ISOR.

[237] As demonstrated above, the CARB regulation would have the substantially the same effect as the Federal fuel economy regulation in terms of many of the technologies that manufacturers likely would have to install to meet the requirements. In addition to covered large trucks, addressed above, CARB's ISOR addressed the technologies that likely would be installed in small trucks and minivans. (ISOR, pp. 66–7). In general, those technologies are the same as in the NAS report referred to above.

emissions under the CARB regulation.[238]

CARB's vehicle greenhouse gas regulation is, therefore, clearly related to fuel economy standards[239] and thus subject to the preemption provision in EPCA.

NHTSA Has Also Concluded That Regulation of Carbon Dioxide Emissions From Motor Vehicles Conflicts With and Is Impliedly Preempted Under 49 U.S.C. Chapter 329

Pre-emption principles also provide that if a state law or regulation stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress in enacting a statute, that law or regulation may be preempted.[240] The presence of an express preemption provision in a statute neither precludes nor limits the ordinary working of conflict pre-emption principles, particularly in the absence of a saving clause.[241] Therefore, NHTSA has concluded that these principles are also fully operative under EPCA, in addition to its express preemption provision.

NHTSA has concluded that the State GHG standard, to the extent that it regulates tailpipe $CO_2$ emissions, would frustrate the objectives of Congress in establishing the CAFE program and conflict with the efforts of NHTSA to implement the program in a manner consistent with the commands of EPCA. Congress had a variety of interrelated objectives in enacting EPCA and has charged NHTSA with balancing and achieving them. Among them was improving motor vehicle fuel economy. To achieve that objective, Congress did not simply mandate the issuance of fuel economy standards set at whatever level NHTSA deemed appropriate. Nor did it simply say that levels must be set consistent with the criteria it specified in Section 32902(f). It went considerably further, mandating the setting of standards at the maximum feasible level.

Other congressional objectives underlying EPCA include avoiding serious adverse economic effects on manufacturers and maintaining a reasonable amount of consumer choice among a broad variety of vehicles. Congress was explicitly concerned that the CAFE program be carefully drafted so as to require levels of average fuel economy that do not have the effect of either ''imposing impossible burdens or unduly limiting consumer choice as to capacity and performance of motor vehicles.''[242] These concerns are equally applicable to the manner in which that program is implemented.

To guide the agency toward the selection of standards meeting these competing objectives, Congress specified four factors that NHTSA must consider in determining which level is the maximum feasible level of average fuel economy and thus the level at which each standard must be set. These are technological feasibility, economic practicability, the effect of other Government standards on fuel economy, and the need of the Nation to conserve energy.[243] In addition, the agency had traditionally considered the safety consequences in selecting the level of future CAFE standards.

Congress expected the agency to balance these factors in a fashion that ensures the standards are neither too low, nor too high. The Conference Report for EPCA states that the fuel economy standards were to be the product of balancing the benefits of higher fuel economy levels against the difficulties individual manufacturers would face in achieving those levels:

> Such determination should take industry-wide considerations into account. For example, a determination of maximum feasible average fuel economy should not be keyed to the single manufacturer which might have the most difficulty achieving a given level of average fuel economy. Rather, the Secretary must weigh the benefits to the nation of a higher average fuel economy standard against the difficulties of individual automobile manufacturers. Such difficulties, however, should be given appropriate weight in setting the standard in light of the small number of domestic automobile manufacturers that currently exist, and the possible implications for the national economy and for reduced competition association [sic] with a severe strain on any manufacturer. However, it should also be noted that provision has been made for granting relief from penalties under Section 508(b) in situations where competition will suffer significantly if penalties are imposed.[244]

NHTSA has concluded that were a State to establish a fuel economy standard or de facto fuel economy standard, e.g., a $CO_2$ emission standard, it would not choose one that has the effect of requiring lower levels of average fuel economy than the CAFE standards applicable under EPCA or even one requiring the same level of average fuel economy. Given that the only practical way to reduce tailpipe emissions of $CO_2$ is to improve fuel economy, such a State standard would be meaningless since it would not reduce $CO_2$ emissions to an extent greater than the CAFE standards.[245] Instead, a State would establish a standard that has the effect of requiring a higher level of average fuel economy.

Setting standards that are more stringent than the fuel economy standards promulgated under EPCA would upset the efforts of NHTSA to balance and achieve Congress's competing goals. Setting a standard too high, above the level judged by NHTSA to be consistent with the statutory consideration after careful consideration of these issues in a rulemaking proceeding, would negate the agency's analysis and decisionmaking. NHTSA makes its judgments only after considering extensive technical

[238] Based on its own analysis of warming-potential weighted emissions, CARB estimates that upgrading to a low-leak HFC–152a air conditioning system or a $CO_2$ system would reduce GHG emissions by ''approximately 8.5 or 9 $CO_2$-equivalent grams per mile, respectively.'' (ISOR, p. 72). CARB further states that ''upgrading to a VDC with external controls, air recirculation, and HFC–152a as the refrigerant, the estimated indirect emission reduction is 7 $CO_2$-equivalent grams per mile for a small car, 8 $CO_2$-equivalent grams per mile for a large car, and 9.8 $CO_2$-equivalent grams per mile for minivans, small trucks, and large trucks.'' (ISOR, p. 75). According to the regulation, combined direct and indirect emissions allowances for air conditioners could total as much as $CO_2$-equivalent 20 grams per mile. California Code of Regulations, Title 13, section 1961.1(a)(1)(B)(1)(b) allows a direct emissions allowance of up to 9 grams per mile. Section 1961.1(a)(1)(B)(1)(c) allows an indirect emissions allowance of up to 11 grams per mile.

[239] A CARB memorandum recognizes that $CO_2$ emissions are related to fuel economy. It points out that $CO_2$ emissions can be modeled to estimate fuel economy. It also noted in the context of $CO_2$ that emission rates for vehicles from a certain period (MY 1990—MY 1997) were assumed to be the same as the preceding model year (1989) because CAFE standards did not change dramatically after the initial model year (MY 1989). *http://www.arb.ca.gov/msei/on-road/downloads/pubs/co2final.pdf* (this document apparently was prepared in the late 1990s, based on its reference to the EMFAC7G model, which was approved by EPA on April 16, 1998.) Similarly, a National Academies Press (NAP) release on Automotive Fuel Economy, recognized the relationship between automotive fuel economy and $CO_2$ emission rates: ''Fuel economy improvements in new light-duty vehicles will reduce carbon dioxide emissions per mile because less fuel will be consumed per vehicle mile driven.'' *http://www.nap.edu/openbook/0309045304/html/7html.* (NAP was created by the National Academies to publish the reports issued by the National Academy of Sciences, the National Academy of Engineering, the Institute of Medicine, and the National Research Council.) See also NAP report at *http://www.nap.edu/books/0309076013/html/7.html.* In addition, CARB recognized that the GHG ($CO_2$-equivalent emission standards are related to fuel economy in another way. CARB recognized that the standards would result in savings in reduced operating costs. Those lower costs are based on lower costs for fuel based on improved fuel efficiency. (ISOR, p. 196; FSOR, pp. 166, 168).

[240] *Spriestma* v. *Mercury Marine,* 537 U.S. 51, 64–5 (2002).

[241] *Geier* v. *Honda,* 529 U.S. 861, 869 (2000).

[242] H. Rep. No. 94–340, 87 (1975).

[243] 49 U.S.C. 32902(f).

[244] S. Rep. No. 94–516, 154–155 (1975).

[245] This is also EPA's conclusion. See 68 FR 52922, 52929.

information such as detailed product information submitted by the vehicle manufacturers and NAS' report on the future of the CAFE program and conducting analyses of potential impacts on employment and safety.

As noted above, manufacturers confronted with requirements for the reduction of tailpipe $CO_2$ emissions would look at the same pool of technology used to reduce fuel consumption. NHTSA concludes that it is disruptive to the orderly implementation of the CAFE program, and to NHTSA's reasonable balancing of competing concerns, to have two different governmental entities assessing the need to conserve energy, technological feasibility, economic practicability, employment, vehicle safety and other concerns, and making inconsistent judgments made about how quickly and how much of that single pool of technology could and should be required to be installed consistent with those concerns. EPCA does not specify how to weight each concern; thus, NHTSA determines the appropriate weighting based on the circumstances in each CAFE standard rulemaking. More important, ignoring the judgments made by NHTSA at the direction of Congress could result in setting standards at levels higher than NHTSA can legally justify under EPCA, increasing the risk of the harms that that body sought to avoid, e.g., serious adverse economic consequences for motor vehicle manufacturers and unduly limited choices for consumers.

Through EPCA, Congress committed the reasonable accommodation of these conflicting policies and concerns to NHTSA.[246] ''Congress did not prescribe a precise formula by which NHTSA should determine the maximally-feasible fuel economy standard, but instead gave it broad guidelines within which to exercise its discretion.'' [247] A state's adoption and enforcement of a $CO_2$ standard for motor vehicles would infringe on NHTSA's discretion to establish CAFE standards consistent with Congress' guidance and threaten the goals that Congress directed NHTSA to achieve. The process of achieving those goals involves great expertise and care. The fuel economy standards delegated to NHTSA are to be the product of balancing the benefits of higher fuel economy levels against the difficulties individual manufacturers would face in achieving those levels.[248]

As EPA observed in its notice denying the petition to regulate motor vehicle $CO_2$ emissions, its issuance of standards for those emissions would ''abrogate EPCA's regime,'' [249] rendering NHTSA's careful balancing of consideration a nullity. This is equally true for State standards for those emissions.

There appear to be two misconceptions that have clouded proper analysis of these implied preemption issues. One is that since the term ''average fuel economy standard'' is defined in EPCA as meaning ''a performance standard specifying a *minimum* level of average fuel economy applicable to a manufacturer in a model year'' [250] (emphasis added), there can be no conflict or incompatibility between $CO_2$ standards and CAFE standards. Indeed, it has been suggested that in defining this term in this fashion, Congress endorsed the setting of other standards having the effect of regulating fuel economy.[251] NHTSA does not interpret the statute in this manner, because EPCA requires that CAFE standards be set at the maximum feasible level, consistent with the agency's assessment of impacts on the nation, consumers and industry.

An interpretation that allowed more stringent State fuel economy standards would nullify the statutory limits that Congress placed in EPCA on the level of CAFE standards, and the efforts of NHTSA in its CAFE rulemaking to observe those limits. Congress expressly listed four analytical, decision guiding factors in EPCA because fuel economy was not the only value that Congress sought to protect and promote in the mandating the setting of CAFE standards. Congress did not want improved fuel economy to come at the price of adverse effects on sales, jobs, and consumer choice. Further, in choosing the level of future CAFE standards, NHTSA has traditionally considered the potential impact on safety.

In selecting the maximum feasible level, NHTSA strives to set the standards as high as it can without causing significant adverse consequences for the manufacturers or consumers. Since NHTSA should not, as a matter of sound public policy, and in fact may not as a matter of law, set standards above the level it determines to be the maximum feasible level, EPCA should not be interpreted as permitting the States to do so. Indeed, NHTSA has concluded that, under EPCA, States may not set actual or de facto fuel economy standards at any level.

Second, as noted above, regulating fuel economy and regulating $CO_2$ emissions are inextricably linked, given current and foreseeable automotive technology. There are not two different pools of technology, one for reducing tailpipe $CO_2$ emissions, and the other for improving fuel economy. Thus, there is nothing to be gained by setting both tailpipe $CO_2$ standards and CAFE standards.

If the technology does not improve fuel economy, it does not reduce tailpipe $CO_2$ emissions. The technologies listed in Part 5 of CARB's Initial Statement of Reasons for its GHG standard for reducing tailpipe $CO_2$ emissions reduce those emissions by improving fuel economy.

This dichotomy of perception or characterization about fuel economy and $CO_2$ emissions does not appear to exist in other countries. According to the International Energy Agency:

> The existing approaches for achieving $CO_2$ reduction through fuel economy improvement in new cars vary considerably, with both regulatory approaches (China, Japan, US, CA) and voluntary approaches (EU). Some systems include financial incentives as well (Japanese tax credit for hybrids, U.S. gas guzzler tax, various EU member country differential taxation schemes based on fuel economy, such as in the UK and Denmark).[252]

Further, in Europe, the studies conducted for the European Commission in support of efforts to provide public information on fuel economy and $CO_2$ emissions to induce consumers to purchase vehicles with lower $CO_2$ emissions uniformly reflect the view that fuel economy and $CO_2$ emissions are directly related.[253]

[246] 901 F.2d 107, 120–21.

[247] 901 F.2d 107, 120–21.

[248] 793 F.2d 1322, 1338.

[249] Id.

[250] 49 U.S.C. 32901(a)(6).

[251] This suggestion cannot be reconciled with Congress' decision to include an express preemption provision in EPCA. 49 U.S.C. 32919(a).

[252] FUELING THE FUTURE: Workshop on Automobile $CO_2$ Reduction and Fuel Economy Improvement Policies, WORKSHOP REPORT, 13 October, 2004, Shanghai, China, *http://www.iea.org/textbase/work/2004/shanghai/UNEP_IEA.PDF.*

[253] RAND Europe, at 4; D. Elst, N. Gense, I.J. Riemersma, H.C. van de Burgwal, Z. Samaras, G. Frontaras, I. Skinner, D. Haines, M. Fergusson, and P. ten Brink, Measuring and preparing reduction measures for $CO_2$-emissions from N1 vehicles-final report the European Commission, Directorate-General for Environment, at 90, TNO TPD, (part of the Netherlands Organisation for Applied Scientific Research TNO), in partnership with Aristotle University of Thessaloniki and Institute for European Environmental Policy, Contract no. B4–3040/2003/364181/MAR/C1, December 2004 (observing that '' * * * reduction of $CO_2$ is equivalent to fuel economy improvement * * * ''); and A. Gartner, Study on the effectiveness of Directive 1999/94/EC relating to the availability of consumer information on fuel economy and $CO_2$ emissions in respect of the marketing of new passenger cars, Final report to the European Commission, Directorate-General for Environment, Contract No.: 07010401/2004/377013/MAR/C1, at

Similarly, in 2001, one of the leading U.S. environmental groups participating in this rulemaking issued a report that identified a vehicle's fuel consumption rate as the single vehicle design factor determining the amount of a vehicle's $CO_2$ emissions:

> The $CO_2$ emitted by a motor vehicle is the product of three factors: the amount of driving, the vehicle's fuel consumption rate and the carbon intensity of the fuel consumed. The fuel consumption rate (*e.g.*, the number of gallons needed to drive 100 miles) is the inverse of fuel economy (miles per gallon, or mpg).[254]

Later, in the same report, it was observed in a footnote (#26) that ''it is actual CAFE that determines fuel consumption and $CO_2$ emissions.'' [255]

EPCA's Provision Specifying Factors To Be Considered in Setting Average Fuel Economy Standards Does Not Limit Preemption Under 49 U.S.C. Chapter 329

EPCA does not include any exception to its preemption provision that would cover State GHG and $CO_2$ standards. Nevertheless, some commenters opposing preemption suggested that Section 32902(f), which lists the factors that NHTSA must consider in determining the level at which to set fuel economy standards, prevents preemption by requiring consideration, by NHTSA, of the effect of other Government standards, including emissions standards, on fuel economy.

EPCA's decisionmaking factor provision is neither a saving clause nor a waiver provision. Nor does NHTSA interpret it as saving state emissions standards that effectively regulate fuel economy from preemption. The agency interprets that provision only to direct NHTSA to consider those State standards that can otherwise be validly adopted and enforced under State and Federal law.

The decisionmaking factors provision does reflect an expectation by Congress that some state emissions standards would not be preempted under the express preemption provision. However, as an initial matter, NHTSA does not read the provision to imply a savings clause. This is particularly so given that Congress has considered and provided a different saving clause, *i.e.*, the one for a State law or regulation on disclosure of fuel economy or fuel operating costs for an automobile.

Moreover, even if EPCA did contain the saving clause desired by those commenters, NHTSA would not give it effect here, as doing so ''would upset the careful regulatory scheme established by federal law.'' [256]

First, and most important in this context, such a reading would upset the carefully calibrated CAFE regulatory program under which NHTSA is with setting CAFE standards at the maximum feasible level, taking care neither to set them too high nor too low. Because of the need to conserve energy, Congress did not simply mandate the setting of appropriate fuel economy standards. Instead, it mandated the setting of maximum feasible ones. At the same time, Congress was aware that setting overly stringent standards would excessively reduce consumer choice about vehicle design and performance and threaten adverse economic consequences. As noted by EPA in its Federal Register document denying ICTA's petition to regulate $CO_2$ emissions from motor vehicles, the setting of standards for $CO_2$ tailpipe emissions would displace NHTSA and upset EPCA's regulatory regime for CAFE.

Second, the requirement to consider these decisionmaking factors must be reconciled with the express preemption provision. NHTSA has concluded that reading the express preemption provision in the manner suggested by commenters opposing preemption would irrationally limit that provision and leave NHTSA's role in administering the CAFE program open to a substantial risk of abrogation. By the same token, in NHTSA's view, it is equally important that the ''relates to'' language in the express preemption provision should not be given so broad a reading that even State emissions standards having only an incidental effect on fuel economy standards are deemed to be preempted by it.

NHTSA has concluded that these two extreme readings, with their unacceptable impacts on EPCA and on the Clean Air Act, including its waiving preemption provision, can be avoided under a carefully calibrated interpretation of EPCA's express preemption provision that harmonizes the two acts to the extent possible.

NHTSA does not interpret EPCA's express preemption provision as preempting State emissions standards that only incidentally or tangentially affect fuel economy. These standards include, for example, given current and foreseeable technology, the existing emissions standards for CO, HC, $NO_X$, and particulates. They also include the limits on sulfur emissions that become effective in 2007. NHTSA considers such standards under the decisionmaking factors provision of EPCA since, under applicable law, they can be adopted and enforced and therefore can have an effect on fuel economy.

However, two groups of State emissions standards do not qualify under NHTSA's interpretation of the decisionmaking factors provision, and therefore would not be considered. One is State standards that cannot be adopted and enforced because there has been no waiver for California under the preemption waiver provision of the Clean Air Act. The other is the State emissions standards that are expressly or impliedly preempted under EPCA, regardless of whether or not they have received such a waiver. Preempted standards include, for example:

(1) A fuel economy standard; and

(2) A law or regulation that has essentially all of the effects of a fuel economy standard, but is not labeled as one (example: State tailpipe $CO_2$ standard).

This reading of EPCA's express preemption provision allows that provision to function in a consistent way, without irrational limitation, to protect the national CAFE program from interference by any State standard effectively regulating fuel economy. It also simultaneously maximizes the ability of EPCA and the Clean Air Act to achieve their respective purposes.

NHTSA's judgment is that the agency should distinguish between motor vehicle emission standards for emissions other than $CO_2$ (*e.g.*, HC, CO, $NO_X$ and PM) and motor vehicle emission standards for $CO_2$. Those other emissions are not directly and inextricably linked to fuel economy. NHTSA's current view is that standards for emissions other than $CO_2$ merely affect the level of CAFE that is achievable and thus only incidentally affect fuel economy standards. Accordingly, we believe that regulation of these emissions is not rulemaking inconsistent with the operation of preemption principles under EPCA.

HC, CO, and PM all result from incomplete combustion. Therefore, the first step toward controlling emissions of these pollutants involves improving

45 and 70, Allgemeine Deutsche Automobil-Club ADAC e.V., March 2005 (observing '' * * * that most consumers are not aware of the correlation of fuel consumption and $CO_2$ emissions of passenger cars * * * '' and that '' * * * the $CO_2$ emissions (g/km) can be calculated from fuel consumption * * * '').

[254] J. DeCicco and A. Feng, Automakers' Corporate Carbon Burden, Reframing Public Policy on Automobiles, Oil and Climate, at 7–8, Environmental Defense, 2001. The article explained that carbon intensity is how much $CO_2$ is emitted per unit of fuel consumed. For gasoline, this amounts to 19.4 pounds per gallon. Id. at 8.

[255] Ibid, at 22–23.

[256] *Geier* v. *American Honda Motor Co.*, 529 U.S. 861, 869 (2000). (Citations omitted.)

the combustion process. Doing so increases the production and emission of carbon dioxide. All three pollutants can also be substantially eliminated from tailpipe emissions by placing catalytic converters between the engine and the tailpipe. Catalytic converters reduce emissions of these pollutants through oxidation, which also increases the production and emission of carbon dioxide. PM emissions can also be controlled using PM traps, which temporarily trap and store PM. PM traps periodically regenerate by oxidizing away the stored PM. Doing so increases the production and emission of carbon dioxide.

$NO_X$ results from the oxidation of nitrogen at the high peak temperatures that occur in an efficiently-operating engine. The exposure of nitrogen to peak temperatures can be reduced by increasing turbulence in the combustion chamber, changing ignition and/or injection timing, and recirculating some exhaust gases through the engine. Increased turbulence and changes to ignition and/or injection timing tend to increase the production and emission of carbon dioxide. Catalytic converters can substantially eliminate $NO_X$ from the exhaust stream. However, doing so requires chemical reduction—oxidation in reverse. Modern catalytic converters perform both reduction and oxidation, reducing $NO_X$ to oxidize HC and CO, and further oxidizing HC and CO with oxygen available in the exhaust stream. These processes increase the production and emission of carbon dioxide.

Gasoline vehicles also emit HC through the evaporation of fuel. These emissions are controlled using canisters that temporarily store evaporated fuel. Periodically, these canisters are purged, releasing the stored fuel vapors to the engine to be combusted. Compared to simply releasing evaporative emissions to the atmosphere, these processes increase the formation and emission of carbon dioxide.

To summarize, the processes used to control HC, CO, $NO_X$, and PM emissions increase the formation and emission of carbon dioxide. Because carbon dioxide is, like water, an ultimate byproduct of combustion, it cannot be further converted on the vehicle to some other compound through any practical means. Plants use sunlight to convert carbon dioxide and water to biomass (and oxygen) through photosynthesis, but vehicles produce far too much exhaust to be consumed by plants that could conceivably be sustained by the amount of sunlight to which vehicles are exposed. Even if enough sunlight were available, biomass would be produced at a rate requiring impractically frequent removal from the vehicle. Theoretically, on-board scrubbers could be used separate carbon dioxide from the exhaust stream. Chemical processes for removing carbon dioxide are currently used in underwater rebreathers and space applications (*e.g.*, the international space station), and are contemplated for stationary applications (*e.g.*, electric utilities). (See, *e.g.*, *http://www.nas.nasa.gov/About/Education/SpaceSettlement/teacher/course/co2.html*, *http://www.frogdiver.com*, and *http://www.netl.doe.gov/publications/proceedings/01/carbon_seq/5a5.pdf*.) However, for a variety of reasons (*e.g.*, size, cost, energy demands, use of dangerous reactants such as calcium hydroxide), these processes would not be even remotely practical for motor vehicles.

Even if a practical process to separate carbon dioxide from the exhaust stream were available, the carbon dioxide would, to prevent its release, need to be compressed or solidified for temporary onboard storage, and frequently removed for disposal (*e.g.*, in underground facilities). For example if fifteen gallons of gasoline are added at each refueling of a vehicle, about 290 pounds of carbon dioxide (or, without any separation of the carbon dioxide, about 1,400 pounds of exhaust gases) would be produced through the combustion of that fuel. (This example assumes gasoline with a density of 6 pounds per gallon and a carbon content (by mass) of 87%. Each pound of carbon dioxide contains 0.273 pounds of elemental carbon. The combustion of 1 pound of gasoline requires about 14.7 pounds of air.) At these rates of production, no practical means of onboard storage and periodic removal are foreseeable.

For these reasons, a $CO_2$ emissions standard stands apart from those other emissions standards. NHTSA has concluded that such a standard functions as a fuel economy standard, given the direct relationship between a vehicle's fuel economy and the amount of $CO_2$ it emits. In contrast, no such relationship exists between a vehicle's fuel economy and the emissions currently regulated by EPA.

Interpreting EPCA's preemption provision as preempting only those State regulations that directly regulate or have the effect of directly regulating fuel economy gives, to the extent possible, maximum effect both to EPCA and to the preemption waiver provision in the Clean Air Act. This is necessary and appropriate, especially considering the importance of the goals of the Clean Air Act and the attention paid by Congress in drafting EPCA to the relationship of the CAFE program to the Clean Air Act. EPCA's express preemption provision cannot be interpreted as preempting all State laws relating to a fuel economy standard, no matter how tangential the relationship. Such an interpretation would largely, if not wholly, negate the Clean Air Act's preemption waiver provision and leave few, if any, emission standards to be considered by NHTSA under EPCA's decisionmaking factor provision. Our approach to reconciling EPCA and the Clean Air Act appropriately distinguishes between emissions other than $CO_2$ and $CO_2$. The Clean Air Act authorizes the States to regulate emissions other than $CO_2$, but not $CO_2$ itself, because of the nature of combustion and the availability of different technologies for regulating those other emissions.

Our approach also avoids interpreting EPCA's express preemption provision so narrowly as to produce the absurd and destructive result of preempting State fuel economy standards, but not State standards that are fuel economy standards in effect, but not in name. Giving EPCA this degree of primacy is particularly appropriate given the regulatory authority in this statute is quite narrow and specific: fuel economy standards, and their functional equivalents, $CO_2$ standards and GHG standards, to the extent that the latter regulate $CO_2$ emissions.

## XV. Rulemaking Analyses and Notices

### *A. Executive Order 12866 and DOT Regulatory Policies and Procedures*

Executive Order 12866, ''Regulatory Planning and Review'' (58 FR 51735, October 4, 1993), provides for making determinations whether a regulatory action is ''significant'' and therefore subject to OMB review and to the requirements of the Executive Order. The Order defines a ''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.

The rulemaking adopted in this document is economically significant. Accordingly, OMB reviewed it under Executive Order 12866. The rule is also significant within the meaning of the Department of Transportation's Regulatory Policies and Procedures.

We estimate that the total benefits under the Unreformed CAFE standards for MYs 2008–2010 and the Reformed CAFE standard for MY 2011 will be approximately $7,554 million at a 7 percent discount rate and at fuel prices (based on EIA long-term projections) ranging from $1.96 to $2.39 per gallon: $577 million for MY 2008, $1,876 million for MY 2009, $2,109 million for MY 2010, and $2,992 million for MY 2011. We estimate that the total costs under those standards, as compared to the MY 2007 standard of 22.2 mpg, will be a total of $6,440 million: $536 million for MY 2008, $1,621 million for MY 2009, $1,752 million for MY 2010, and $2,531 million for MY 2011.

Under the Reformed CAFE standards for MYs 2008–2011, as compared to the MY 2007 standard of 22.2 mpg, we estimate the total benefits under the Reformed CAFE system for MYs 2008–2011 at $8,125 million: $782 million for MY 2008, $2,015 million for MY 2009, $2,336 million for MY 2010, and $2,992 million for MY 2011. We estimate the total costs to be similar to the total costs under the Unreformed CAFE system, $6,711 million: $553 million for MY 2008, $1,724 million for MY 2009, $1,903 million for MY 2010, and $2,531 million for MY 2011.

Because the final rule is significant under both the Department of Transportation's procedures and OMB's guidelines, the agency has prepared a Final Regulatory Impact Analysis and placed it in the docket and on the agency's Web site.

*B. National Environmental Policy Act*

Consistent with the requirements of the National Environmental Policy Act (NEPA),[257] the regulations of the Council on Environmental Quality,[258] and relevant DOT regulations and orders,[259] the agency has prepared a final Environmental Assessment (EA) of this action and concludes that this rulemaking action will not have a significant effect on the quality of the human environment. Both the final EA and a Finding of No Significant Impact (FONSI) have been placed in the docket.

In comments on the draft EA, the Attorneys General and the Center for Biological Diversity challenged the adequacy of the environmental analysis performed by the agency. These commenters stated that the agency is required to prepare an EIS.

The agency disagrees that an EIS was required. Although not required to do so under NEPA, the agency first published a draft EA for comment, and carefully reviewed all comments.[260] Appropriate adjustments have been made in the final EA.

Based on the analysis in the final EA, which led to a determination that this rulemaking action will not have a significant effect on the quality of the human environment, the agency determined that it was not required to prepare an Environmental Impact Statement (EIS). The function of an EA is to present and analyze various alternatives so that an agency can consider the environmental concerns related to a particular action and other possible actions ''while reserving agency resources to prepare full EISs for appropriate cases.'' *Sierra Club* v. *DOT*, 753 F.2d 120, 126 (D.C. Cir. 1985). An EIS is required only when an agency has first determined that a major federal action will ''significantly affect [] the quality of the human environment.'' 42 U.S.C. 4332(2)(C). *See also Sierra Club*, 753 F.2d at 126, *Town of Cave Creek, Arizona* v. *FAA*, 325 F.3d 320, 327 (D.C. Cir. 2003) and *Fund for Animals* v. *Thomas*, 127 F.3d 80, 83 (D.C. Cir. 1997). This limitation reflects the courts' awareness of the time and expense involved in the preparation of an EIS. *See River Road Alliance* v. *Corps of Engineers of the United States Army*, 764 F.2d 445, 449 (7th Cir. 1985) (the decision to prepare an EIS is based on ''whether the time and expense of preparing an environmental impact statement are commensurate with the likely benefits from a more searching evaluation than an environmental assessment provides'') and *Metropolitan Edison Co.* v. *People Against Nuclear Energy*, 460 U.S. at 766, 776 (1983) (noting scarcity of time and resources in limiting the scope of NEPA review). The agency conducted a careful inquiry and assessed the potential environmental impacts of a variety of alternatives including the action adopted in this final rule. With respect to each alternative, the agency determined that projected impacts would be very small and generally constitute improvements compared to the baseline for this rulemaking.[261]

The Attorneys General and the Center for Biological Diversity stated that the agency did not consider a reasonable number of alternatives, and therefore did not take the requisite ''hard look'' when analyzing environmental impacts.[262] In particular, they asserted that Reformed CAFE creates incentives for manufacturers to build larger vehicles, ''which will jeopardize air quality and the climate'' and that NHTSA did not ''consider the environmental impact of its choices or the possibility of making other choices.''

In determining the impacts of this rulemaking, the agency analyzed a reasonable number of alternative actions, as required under NEPA. As the Supreme Court has recognized, an agency is required to examine only reasonable alternatives, not those that might result in the worst-case scenario and that are unlikely to occur. *See Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 354–55 (1989).

The agency recognizes that numerous alternatives exist, including alternatives with more stringent fuel economy requirements.[263] However, the agency did not analyze these alternatives in the final EA because we determined from our analytical model that they would not be consistent with the statutory criteria of EPCA. We note that the agency is required to set fuel economy standards at the ''maximum feasible'' levels achievable by manufacturers in the applicable model years, taking into consideration four statutory factors: Technological feasibility; economic practicability; the impact of other Federal standards on fuel economy; and the need of the nation to conserve

[257] 42 U.S.C. 4321 *et seq.*

[258] 40 CFR part 1500.

[259] 49 CFR part 520, DOT Order 5610.1C, and NHTSA Order 560–1.

[260] None of the commenters provided specific data to indicate that impacts from the proposed rule, final rule, or considered alternatives, would be significant.

[261] See Section 4 Environmental Consequences, in the final EA, which has been placed in the docket for this rulemaking.

[262] The term ''hard look'' refers to whether the agency fully evaluated, rather than cursorily examined, a particular issue. *See Marsh* v. *Oregon Natural Resources Council*, 490 U.S. 360, 374 (1989). Elements of a hard look include whether an agency demonstrated that ''it had responded to significant points made during the public comment period, had examined all relevant factors, and had considered significant alternatives to the course of action ultimately chosen.'' Merrick B. Garland, Deregulation and Judicial Review, 98 Harv. L. Rev. 505, 526 (1985). *See also Home Box Office* v. *FCC*, 567 F.2d 9, 35 (D.C. Cir.) (requiring agencies to consider all relevant factors and demonstrate a ''rational connection between the facts found and the choice made'') (citing *Burlington Truck Lines* v. *United States*, 311 U.S. 156, 168 (1962)), *cert. denied*, 434 U.S. 829 (1977).

[263] Commenters suggested that the agency consider more stringent standards, but provided no substantive data to support the general assertion that unspecified, but more stringent, standards be adopted.

energy. EPCA does not permit the agency to establish fuel economy standards at any chosen level, but instead requires NHTSA to balance these factors when setting an appropriate standard. For example, a fuel economy standard ''with harsh economic consequences for the auto industry * * * would represent an unreasonable balancing of EPCA's policies.'' *Center for Auto Safety* v. *NHTSA*, 793 F.2d 1322, 1340 (D.C. Cir. 1986).

The evaluated alternatives represent standards set under the traditional Unreformed CAFE process and under the marginal cost-benefit analysis previously described. These alternatives analyzed by the agency, which are described in greater detail in the final EA (see EA pp. 8–15), represent options that were reasonable, given the agency's authority under EPCA. All of these options were projected to result primarily in small emission reductions. We evaluated the selected alternatives against a reasonable baseline and we have evaluated the estimated cumulative impacts resulting from the alternative ultimately adopted in the final rule.[264] The alternative adopted today reflects the technological capabilities of the industry within the applicable time frame and does not result in harsh economic consequences for the industry. After carefully considering the statutory criteria, the agency has determined that the standards adopted today represent the ''maximum feasible'' levels achievable by manufacturers.[265]

Further, we considered, but did not evaluate, an alternative that would incorporate a backstop or ratcheting mechanism. There are several reasons for not including such a mechanism within the context of the Reformed CAFE system that we are adopting today. The suggestion that NHTSA must incorporate a backstop does not consider the fact, noted above several times, that CAFE does not command that NHTSA, in administering the CAFE program, either to ignore or seek to preclude mix shifts and design changes made due to consumer demand. NHTSA has traditionally considered consumer demand in setting new CAFE standards and likewise has considered it as necessary and appropriate in amending existing standards. The proponents of a backstop did not consider that the proposed Reformed CAFE system minimized the incentive for manufacturers to upsize vehicles. The Reformed system adopted in this final rule reduces that incentive even more. Further, manufacturers are limited in their ability to increase vehicle size by consumer demand and by other market forces, such as potential fuel prices. Adoption of a backstop would also undermine the benefits of attribute-based standards for some manufacturers and perpetuate the shortcomings of the Unreformed system.

The Attorneys General also expressed concern about the potential for vehicle upsizing and stated that the agency should analyze the impact on fuel savings that would occur if manufacturers enlarged their vehicles, making them subject to a less stringent requirement. As explained above, the agency chose footprint as the vehicle metric on which to base the standard because it would be difficult for manufacturers to make short term adjustments solely in response to the fuel economy levels. We based our analysis on manufacturer product plans, which reflect vehicle designs through MY 2011. As also explained above, footprint is closely tied to a vehicle's platform, which manufacturers typically rely upon without change for a multi-year product cycle.

The Center for Biological Diversity argued that the agency did not properly analyze the cumulative impacts of the light truck rule relative to greenhouse gas emissions and global warming. The commenter asserts that past, present and future actions must be adequately catalogued and considered, including a list and description of ''sources of United States [greenhouse gas] emissions by category and percent of the total to place the [greenhouse gas] emissions into perspective.'' The Center for Biological Diversity also stated that the agency needs a full understanding of how its proposed action impacts the overall ability of the U.S. to reduce its greenhouse gas emissions.

In the final EA, the agency has provided a discussion of the greenhouse gas emissions in the U.S. transportation sector, as well as in the U.S. generally, based on available data (see EA pp. 21, 31). Although the commenters urge the agency to promulgate a standard that results in larger reductions in $CO_2$ emissions, such a course of action would not be consistent with the EPCA constraints discussed earlier. The extent of NHTSA's analysis is dictated by the goals and requirements of EPCA. *Metropolitan Edison Co.*, 460 U.S. at 776 (noting that ''[t]he scope of the agency's inquiries must remain manageable if NEPA's goal of 'ensur[ing] a fully informed and well considered decision' * * * is to be accomplished.'') (citations omitted). The agency considered the impacts to greenhouse gas emissions from fuel economy standards set according to the statutory directive of EPCA. Moreover, as illustrated in the final EA, all of the analyzed alternatives were projected to reduce $CO_2$ emissions (see EA p. 30).

The commenters also contend that the agency has not taken into account changed circumstances that have occurred since the last EIS was completed. In addition to citing the passage of time since the agency last prepared an EIS for the CAFE program, commenters said that higher gas prices, heightened concerns about foreign oil dependence, climate changes, and advances in hybrid technologies constitute ''changed circumstances'' that dictate a full evaluation of environmental impacts in an EIS.

While we appreciate that changes have occurred since the last EIS was performed, we note that there must be sufficient information to show that this action will affect the quality of the human environment ''in a significant manner or to a significant extent not already considered'' to require an EIS. Further, as explained in the FRIA, higher gasoline prices were factored into the model relied on by the agency (see FRIA p. VIII–26). The incorporation of hybrid technology is addressed elsewhere in this notice and in the FRIA (see FRIA p. V–12). Consideration of the nation's dependence on foreign oil raises policy questions that lie outside the scope of NEPA. We address that matter elsewhere in this notice.

The setting of the MY 2005–2007 light truck standards in April 2003 (68 FR 16868) was the agency's first effort to set CAFE standards since the lifting of prior

[264] While a baseline typically represents the impact that would occur if an agency took no action (*i.e.*, if NHTSA did not establish standards at all for MYs 2008–2011), 49 U.S.C. § 32902(a) precludes this possibility by affirmatively requiring the Secretary of Transportation to prescribe, by rule, average fuel economy standards for light trucks—in other words, the agency must promulgate some standard to apply to light trucks. For these purposes, we chose to use the MY 2007 (22.2 mpg) standard as the baseline to assess the impacts of the various alternatives.

[265] Separately, NRDC provided several scenarios purportedly demonstrating the impact of upsizing on fleet-wide fuel economy. While the agency does not agree that the scenarios presented by NRDC are probable, we note that the fleet-wide fuel economy estimates for each one remains within the range of alternatives considered in the Environmental Assessment. That is, under NRDC's analysis, the fleet-wide fuel economy was not lower than the No Action Alternative evaluated in the final EA. Additionally, as discussed in the final EA, the range of impacts from the considered alternatives is very narrow and minimal. The projections for each of the alternatives examined by the agency indicated that none of them would result in a significant impact. An agency is only required to examine reasonable alternatives, not those that might result in the worst-case scenario and that are unlikely to occur. *See Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 354–55 (1989).

Congressional restrictions (other than the ministerial setting of standards at already prescribed levels during the intervening years). Based on the EA for that action,[266] the agency concluded that no significant environmental impact would result from the rule. As explained in the MY 2005–2007 EA, we believe that adopting that approach in that rulemaking action is consistent with our prior evaluations assessing the impacts of changes to CAFE.

The final EA in the current action also considered the effects of the different alternatives on nonattainment areas as well as on those areas that could be at risk of nonattainment status (see EA p. 31). The agency determined that the changes projected from the various alternatives that were considered would not increase the risk of any geographic areas incurring nonattainment status. As the projections in the final EA show, the levels of criteria pollutants are expected to decrease, with the exception of CO, and the projected increases in CO are not sufficient to result in an increase in nonattainment areas (see EA p. 30).

NRDC and the Center for Biological Diversity stated that the agency did not consider the impacts of the regulation on human health and endangered species. The final EA addresses human health issues. The final EA demonstrates that the changes in the emissions of criteria pollutants are not projected to result in any additional violations of the primary air standards, which are set at levels intended to protect against adverse effects on human health (see EA p. 31).

With regard to endangered species, the commenters expressed concern about the potential impact of increased greenhouse gas emissions and global warming on various species and their habitat. We first note that the Endangered Species Act does not require review in every instance that could have an impact on a particular endangered or threatened species, however remote. 16 U.S.C. 1531 *et seq.* Rather, review is triggered in instances where it is likely that such an impact will occur. *See Babbitt* v. *Sweet Home Chapter of Communities for a Great Oregon,* 515 U.S. 687, 703 (1995). As noted in the final EA, the agency projected that the final rule would produce, compared to U.S. emissions of $CO_2$, a small decrease in emissions of $CO_2$, the primary component of greenhouse gas emissions, under the selected alternative (see EA p. 32). Accordingly, the agency determined that the action we are adopting today will not have a significant impact on the environment.

In addition to commenting on the EA, the Center for Biological Diversity asserted that the Global Change Research Act (GCRA) requires the agency to rely on specific research in our analysis. The agency disagrees. The GCRA calls for the publication of a study on the effects of global climate changes every four years and to make these research findings available to agencies to use. It does not mandate, however, that Federal agencies rely on the research report. Instead, the statute only imposes a requirement that the report be made available to agencies. See 15 U.S.C. 2938 (ensuring that research findings are made available for use by Federal agencies in formulating policies addressing human-induced and natural processes of global change).

*C. Regulatory Flexibility Act*

Pursuant to the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effect of the rule on small entities (i.e., small businesses, small organizations, and small governmental jurisdictions). The Small Business Administration's regulations at 13 CFR part 121 define a small business, in part, as a business entity ''which operates primarily within the United States.'' (13 CFR 121.105(a)). No regulatory flexibility analysis is required if the head of an agency certifies the rule will not have a significant economic impact on a substantial number of small entities.

I certify that the final rule will not have a significant economic impact on a substantial number of small entities. The following is the agency's statement providing the factual basis for the certification (5 U.S.C. 605(b)).

The final rule directly affects fourteen single stage light truck manufacturers. According to the Small Business Administration's small business size standards (see 5 CFR 121.201), a single stage light truck manufacturer (NAICS code 336112, Light Truck and Utility Vehicle Manufacturing) must have 1,000 or fewer employees to qualify as a small business. None of the affected single stage light truck manufacturers are small businesses under this definition. All of the manufacturers of light trucks have thousands of employees. Given that none of the businesses directly affected are small business for purposes of the Regulatory Flexibility Act, a regulatory flexibility analysis was not prepared.

*D. Executive Order 13132 Federalism*

Executive Order 13132 requires NHTSA 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.'' The Order defines the term ''Policies that have federalism implications'' 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 the Order, NHTSA 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 NHTSA consults with State and local officials early in the process of developing the proposed regulation. The agency has complied with Order's requirements.

The issue of preemption of State emissions standard under EPCA is not a new one; there is an ongoing dialogue regarding the preemptive impact of CAFE standards whose beginning pre-dates this rulemaking. This dialogue has involved a variety of parties (i.e., the States, the federal government and the public) and has taken place through a variety of means, including rulemaking. This issue was explored in the litigation over the California ZEV regulations in 2002 (in which the federal government filed an amicus brief) and addressed at great length in California's 2004–2005 rulemaking proceeding on its GHG regulation.[267] NHTSA first addressed the issue in its rulemaking on CAFE standards for MY 2005–2007 light trucks.

In the current rulemaking proceeding, we sought again to engage the public in a discussion of the relationship between CAFE standards and State $CO_2$ standards and the applicability of EPCA's preemption provision to the latter. In response to our discussion of preemption in the August 2005 NPRM, the agency received communications from a variety of States and their representative organizations.

States objected generally to the preemption discussion in the NPRM. CARB, New Jersey Department of Environmental Protection, New York

[266] See Docket NHTSA–2002–11419–18360 (Final Environmental Assessment for MY 2005–2007 Light Truck CAFE Standards).

[267] FSOR, pp. 358–68.

Department of Environmental Conservation, STAPPA/ALAPCO, NESCAUM, and the Attorneys General (California et al.) each stated that the preemption discussion was irrelevant or beyond the scope of the light truck CAFE rulemaking. These commenters requested that the agency not address this issue in the final rule. The Connecticut Department of Environmental Protection, Pennsylvania Department of Environmental Protection, and STAPPA/ALAPCO made similar requests. These commenters also asserted that the issue of preemption should be left to the courts.

The Attorneys General (California et al.) stated that Executive Order 13132 directs the agency to be ''deferential to States when taking action that affects the policymaking discretion of the States and should act only with the greatest caution where State or local governments have identified uncertainties regarding the constitutional or statutory authority of the national government.''

We have carefully considered these comments, as well as closely examined our authority and obligations under EPCA and that statute's express preemption provision. For those rulemaking actions undertaken at an agency's discretion, Section 3(a) of Executive Order 13132 instructs agencies to closely examine their statutory authority supporting any action that would limit the policymaking discretion of the States and assess the necessity for such action. This is not such a rulemaking action. NHTSA has no discretion not to issue the CAFE standards established by this final rule. EPCA mandates that the ''Secretary of Transportation * * * prescribe by regulation average fuel economy standards'' for light trucks (49 U.S.C. 32902). Given that a State $CO_2$ regulation is the functional equivalent of a CAFE standard, there is no way that NHTSA can tailor a fuel economy standard for light trucks so as to avoid preemption. Further, EPCA itself precludes a State from adopting or enforcing a law or regulation related to fuel economy (49 U.S.C. 32919(a)).

For these reasons and those stated at greater length in the section above on preemption, we have not adopted the views presented by the States. Nevertheless, the agency continues to examine these issues and welcomes continued input.

*E. Executive Order 12988 (Civil Justice Reform)*

Pursuant to Executive Order 12988, ''Civil Justice Reform'' (61 FR 4729, February 7, 1996), the agency has considered whether this rulemaking will have any retroactive effect. This final rule does not have any retroactive effect.

*F. Unfunded Mandates Reform Act*

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) requires Federal agencies to prepare a written assessment of the costs, benefits, and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of more than $100 million in any one year (adjusted for inflation with base year of 1995 to $115 million for 2003). All cost estimates in the FRIA are in 2003 economics. Before promulgating a rule for which a written statement is needed, NHTSA is generally required by section 205 of the UMRA 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 NHTSA to adopt an alternative other than the least costly, most cost-effective, or least burdensome alternative if the agency publishes with the final rule an explanation why that alternative was not adopted.

This final rule will not result in the expenditure by State, local, or tribal governments, in the aggregate, of more than $115 million annually, but it will result in the expenditure of that magnitude by vehicle manufacturers and/or their suppliers. In promulgating this proposal, NHTSA considered whether average fuel economy standards lower and higher than those proposed would be appropriate. NHTSA is statutorily required to set standards at the maximum feasible level achievable by manufacturers and has tentatively concluded that the proposed standards are the maximum feasible standards for the light truck fleet for MYs 2008–2011 in light of the statutory considerations.

*G. Paperwork Reduction Act*

Under the procedures established by the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), a person is not required to respond to a collection of information by a Federal agency unless the collection displays a valid OMB control number. For the transition period reporting requirements, and the additional pre-model year reporting requirements, NHTSA is submitting to OMB a request for approval of the following collection of information.

In compliance with the Paperwork Reduction Act, this notice announces that the Information Collection Request (ICR) abstracted below has been forwarded to the Office of Management and Budget (OMB) for review and comment. The ICR describes the nature of the information collections and their expected burden. This is a request for an amendment of an existing collection.

*Agency:* National Highway Traffic Safety Administration (NHTSA).

*Title:* 49 CFR Part 537, Automotive Fuel Economy Reports (F.E.) Reports

Type of Request: Amended collection.

*OMB Clearance Number:* 2127–0019.

*Form Number:* This collection of information will not use any standard forms.

*Requested Expiration Date of Approval:* Three years from the date of approval.

*Summary of the Collection of Information:* So that NHTSA can ensure that light truck manufacturers are complying with the CAFE requirements, NHTSA would require light truck manufacturers to provide information on their election of a compliance option during model years 2008–2010, and provide light truck footprint data beginning model year 2008.

NHTSA established a transition period during MYs 2008–2010 during which manufacturers may opt to comply with light truck fuel economy standards established under the Reformed CAFE system. For each year of the transition period, manufacturers must, within 45 days after the end of the model year, provide to NHTSA information identifying the light truck CAFE system with which the manufacturer chooses to comply. The choice is irrevocable.

Further, the Reformed CAFE system relies on vehicle footprint to determine a manufacturer's required average fuel economy level. Beginning in MY 2008, the agency would need to collect data on vehicle footprint to determine manufacturers' compliance with the Reformed CAFE system and to evaluate the new system.

*Description of the Need for the Information and Proposed Use of the Information:* NHTSA need this information to ensure that vehicle manufacturers are complying with the light truck CAFE program and to evaluate the Reformed CAFE system.

*Description of the Likely Respondents (Including Estimated Number, and Proposed Frequency of Response to the Collection of Information):* NHTSA estimates that 14 light truck manufacturers will be impacted by this amendment. The manufacturers are

makers of light trucks have gross vehicle weight ratings of 4,536 kg (10,000 pounds) or less. For each pre-model report currently required under 49 CFR 537.7, the manufacturer will provide data on vehicle footprint. Further, during MYs 2008–2010, the manufacturers will provide, in addition to its identity, a statement as to which light truck CAFE standard with which it has chosen to comply, 49 CFR 533.5(f) or 49 CFR 533.5(g).

During the transition period, each manufacturer will provide 1 additional report per year for three years, for a total of 3 additional reports over 3 years.

*Estimate of the Total Annual Reporting and Recordkeeping Burden Resulting from the Collection of Information:* NHTSA estimates that each manufacturer will incur an additional 10 burden hours per year. This estimate is based on the fact that data collection will involve only computer tabulation. Further, this is consistent with the range of burden hours suggested by the Alliance in its comments. Thus, as a result of this final rule each manufacturer will incur an additional burden of ten hours or a total on industry of an additional 140 hours a year (assuming there are 14 manufacturers).

NHTSA estimates that the recordkeeping burden resulting from the collection of information will be 0 hours because the information will be retained on each manufacturer's existing computer systems for each manufacturer's internal administrative purposes.

NHTSA estimates that the total annual cost burden will be 0 dollars. There would be no capital or start-up costs as a result of this collection. Manufacturers can collect and tabulate the information by using existing equipment. Thus, there would be no additional costs to respondents or recordkeepers.

Comments are invited on:

- Whether the collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility.
- Whether the Department's estimate for the burden of the information collection is accurate.
- Ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology. A comment to OMB is most effective if OMB receives it within 30 days of publication.

Send comments to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street, NW., Washington, DC 20503, Attention NHTSA Desk Officer. PRA comments are due within 30 days following the publication of this document in the **Federal Register**.

The agency recognizes that the amendment to the existing collection of information contained in today's final rule may be subject to revision in response to public comments and the OMB review. For additional information contact: Ken Katz, Lead Engineer, Fuel Economy Division, Office of International Policy, Fuel Economy, and Consumer Programs, National Highway Traffic Safety Administration, 400 Seventh St., SW., Washington, DC 20590. Mr. Katz can also be contacted at: telephone number (202) 366–0846, facsimile (202) 493–2290, electronic mail *kkatz@nhtsa.dot.gov.*

*H. Regulation Identifier Number (RIN)*

The Department of Transportation assigns a regulation identifier number (RIN) to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. You may use the RIN contained in the heading at the beginning of this document to find this action in the Unified Agenda.

*I. Executive Order 13045*

Executive Order 13045 (62 FR 19885, April 23, 1997) applies to any rule that: (1) Is determined to be economically significant as defined under E.O. 12866, and (2) concerns an environmental, health or safety risk that NHTSA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, we 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 us.

This rule does not have a disproportionate effect on children. The primary effect of this rule is to conserve energy resources by setting fuel economy standards for light trucks.

*J. National Technology Transfer and Advancement Act*

Section 12(d) of the National Technology Transfer and Advancement Act (NTTAA) requires NHTSA to evaluate and use existing voluntary consensus standards in its regulatory activities unless doing so would be inconsistent with applicable law (e.g., the statutory provisions regarding NHTSA's vehicle safety authority) or otherwise impractical.

Voluntary consensus standards are technical standards developed or adopted by voluntary consensus standards bodies. Technical standards are defined by the NTTAA as ''performance-based or design-specific technical specification and related management systems practices.'' They pertain to ''products and processes, such as size, strength, or technical performance of a product, process or material.''

In meeting the requirement of the NTTAA, we are required to consult with voluntary, private sector, consensus standards bodies. Examples of organizations generally regarded as voluntary consensus standards bodies include the American Society for Testing and Materials (ASTM), the Society of Automotive Engineers (SAE), and the American National Standards Institute (ANSI). If NHTSA does not use available and potentially applicable voluntary consensus standards, we are required by the Act to provide Congress, through OMB, an explanation of the reasons for not using such standards.

The final rule incorporates a function based on light truck footprint (average track width X wheelbase). For the purpose of this calculation, the agency based these measurements on those by the automotive industry. Determination of wheelbase is consistent with L101-wheelbase, defined in SAE J1100 SEP2005, Motor vehicle dimensions. The agency adopted a definition of track width consistent with SAE J1100 W101 SEP2005.

There are no voluntary consensus standards on fuel economy performance.

*K. Executive Order 13211*

Executive Order 13211 (66 FR 28355, May 18, 2001) applies to any rule that: (1) Is determined to be economically significant as defined under E.O. 12866, and is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (2) that is designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action. If the regulatory action meets either criterion, we must evaluate the adverse energy effects of the planned rule and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by us.

The final rule establishes light truck fuel economy standards that will reduce the consumption of petroleum and will not have any adverse energy effects. Accordingly, this rulemaking action is

not designated as a significant energy action.

*L. Department of Energy Review*

In accordance with 49 U.S.C. 32902(j), we submitted this rule to the Department of Energy for review. That Department did not make any comments that we have not addressed.

*M. Privacy Act*

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78) or you may visit *http://dms.dot.gov.*

**Regulatory Text**

**List of Subjects in 49 CFR Parts 523, 533, and 537**

Fuel economy and Reporting and recordkeeping requirements.

■ In consideration of the foregoing, 49 CFR Chapter V is amended as follows:

## PART 523—VEHICLE CLASSIFICATION

■ 1. The authority citation for part 523 continues to read as follows:

**Authority:** 49 U.S.C. 32902; delegation of authority at 49 CFR 1.50.

■ 2. Section 523.2 is amended by adding a definition of ''footprint'' and ''medium duty passenger vehicle'' to read as follows:

### § 523.2 Definitions.

* * * * *

*Footprint* means the product, in square feet rounded to the nearest tenth, of multiplying a vehicle's average track width (rounded to the nearest tenth) by its wheelbase (rounded to the nearest tenth). For purposes of this definition, track width is the lateral distance between the centerlines of the tires at ground when the tires are mounted on rims with zero offset. For purposes of this definition, wheelbase is the longitudinal distance between front and rear wheel centerlines. In case of multiple rear axles, wheelbase is measured to the midpoint of the centerlines of the wheels on the rearmost axle.

* * * * *

*Medium duty passenger vehicle* means a vehicle which would satisfy the criteria in § 523.5 (relating to light trucks) but for its gross vehicle weight rating or its curb weight, which is rated at more than 8,500 lbs GVWR or has a vehicle curb weight of more than 6,000 pounds or has a basic vehicle frontal area in excess of 45 square feet, and which is designed primarily to transport passengers, but does not include a vehicle that:

(1) Is an ''incomplete truck'' as defined in this subpart; or

(2) Has a seating capacity of more than 12 persons; or

(3)Is designed for more than 9 persons in seating rearward of the driver's seat; or

(4) Is equipped with an open cargo area (for example, a pick-up truck box or bed) of 72.0 inches in interior length or more. A covered box not readily accessible from the passenger compartment will be considered an open cargo area for purposes of this definition.

* * * * *

■ 3. Section 523.3(b) is amended by adding (b)(3) to read as follows:

### § 523.3 Automobile.

* * * * *

(b) * * *

(3) Vehicles that are defined as medium duty passenger vehicles, and which are manufactured during the 2011 model year or thereafter.

■ 4. Section 523.5(a)(5) is revised to read as follows:

### § 523.5 Light Truck.

(a) * * *

(5) Permit expanded use of the automobile for cargo-carrying purposes or other nonpassenger-carrying purposes through:

(i) For light trucks manufactured prior to model year 2012, the removal of seats by means installed for that purpose by the automobile's manufacturer or with simple tools, such as screwdrivers and wrenches, so as to create a flat, floor level, surface extending from the forwardmost point of installation of those seats to the rear of the automobile's interior; or

(ii) For light trucks manufactured in model year 2008 and beyond, for vehicles equipped with at least 3 rows of designated seating positions as standard equipment, permit expanded use of the automobile for cargo-carrying purposes or other nonpassenger-carrying purposes through the removal or stowing of foldable or pivoting seats so as to create a flat-leveled cargo surface extending from the forwardmost point of installation of those seats to the rear of the automobile's interior.''.

* * * * *

## PART 533—LIGHT TRUCK FUEL ECONOMY STANDARDS

■ 5. The authority citation for part 533 continues to read as follows:

**Authority:** 49 U.S.C. 32902; delegation of authority at 49 CFR 1.50.

■ 6. Part 533.5 is amended by:

■ A. In paragraph (a) by revising Table IV and adding Figure I and Table V; and

■ B. Adding paragraphs (g) and (h).

The revisions and additions read as follows:

### § 533.5 Requirements.

(a) * * *

TABLE IV

| Model year | Standard |
|---|---|
| 2001 | 20.7 |
| 2002 | 20.7 |
| 2003 | 20.7 |
| 2004 | 20.7 |
| 2005 | 21.0 |
| 2006 | 21.6 |
| 2007 | 22.2 |
| 2008 | 22.5 |
| 2009 | 23.1 |
| 2010 | 23.5 |

$$Required_Fuel_Economy_Level = \frac{N}{\sum_i \frac{N_i}{T_i}}$$

Where:

N is the total number (sum) of light trucks produced by a manufacturer,

$N_i$ is the number (sum) of the $i^{th}$ model light truck produced by the manufacturer, and

$T_i$ is fuel economy target of the $i^{th}$ model light truck, which is determined according to the following formula, rounded to the nearest hundredth:

$$T = \frac{1}{\frac{1}{a} + \left(\frac{1}{b} - \frac{1}{a}\right)\frac{e^{(x-c)/d}}{1+e^{(x-c)/d}}}$$

Where:

Parameters a, b, c, and d are defined in § 533.3 Table V;

e = 2.718; and

x = footprint (in square feet, rounded to the nearest tenth) of the vehicle model

TABLE V.—PARAMETERS FOR THE REFORMED CAFE FUEL ECONOMY TARGETS

| Model year | Parameters | | | |
|---|---|---|---|---|
| | a | b | c | d |
| 2008 | 28.56 | 19.99 | 49.30 | 5.58 |
| 2009 | 30.07 | 20.87 | 48.00 | 5.81 |
| 2010 | 29.96 | 21.20 | 48.49 | 5.50 |
| 2011 | 30.42 | 21.79 | 47.74 | 4.65 |

* * * * *

(g) For model years 2008–2010, at a manufacturer's option, a manufacturer's light truck fleet may comply with the fuel economy level calculated according to Figure I and the appropriate values in Table V, with said option being irrevocably chosen for that model year and reported as specified in § 537.8.

(h) For model year 2011, a manufacturer's light truck fleet shall comply with the fuel economy level, calculated according to Figure I and the appropriate values in Table V.

■ 7. Part 533 is amended by adding Appendix A to read as follows:

**Appendix A—Example of Calculating Compliance Under § 533.5 Paragraph (g)**

Assume a hypothetical manufacturer (Manufacturer X) produces a fleet of light trucks in MY 2008 as follows:

| Model | Fuel economy | Volume | Footprint ($ft^2$) |
|---|---|---|---|
| A | 27.0 | 1,000 | 42 |
| B | 25.6 | 1,500 | 44 |
| C | 25.4 | 1,000 | 46 |
| D | 22.1 | 2,000 | 50 |
| E | 22.4 | 3,000 | 55 |
| F | 20.2 | 1,000 | 66 |

**Note to Appendix A Table 1.** Manufacturer X's required corporate average fuel economy level under § 533.5(g) would be calculated by first determining the fuel economy targets applicable to each vehicle as illustrated in Appendix A Figure 1.

**Appendix A Figure 1**

| Model | Footprint ($ft^2$) | MY 2008 fuel economy target (mpg) |
|---|---|---|
| A | 42 | 26.2 |
| B | 44 | 25.5 |
| C | 46 | 24.8 |
| D | 50 | 23.3 |
| E | 55 | 21.7 |
| F | 66 | 20.3 |

**Note to Appendix A Figure 1.** Accordingly, vehicle models A, B, C, D, E, and F would be compared to fuel economy values of 26.2, 25.5, 24.8, 23.3, 21.7, and 20.3 mpg, respectively. With the appropriate fuel economy targets calculated, Manufacturer X's required fuel economy would be calculated as illustrated in Appendix A Figure 2.

**Appendix A Figure 2**

Manufacturer's Light Truck Production for Applicable Model Year

$$\frac{\text{Model A Volume}}{\text{Model A Target}} + \frac{\text{Model B Volume}}{\text{Model B Target}} + \frac{\text{Model C Volume}}{\text{Model C Target}} + \frac{\text{Model D Volume}}{\text{Model D Target}} + \frac{\text{Model E Volume}}{\text{Model E Target}} + \frac{\text{Model F Volume}}{\text{Model F Target}}$$

$$= \frac{1{,}000}{26.2} + \frac{1{,}500}{25.5} + \frac{1{,}000}{24.8} + \frac{2{,}000}{23.3} + \frac{3{,}000}{21.7} + \frac{1{,}000}{20.3}$$

$$= 23.1 \text{ mpg}$$

**Note to Appendix A Figure 2.** Manufacturer X's required fuel economy level is 23.1 mpg. Its actual fuel economy level would be calculated as illustrated in Appendix A Figure 3.

## Appendix A Figure 3

Manufacturer's Light Truck Production for Applicable Model Year

$$\frac{\text{Model A Volume}}{\text{Model A Fuel Econ.}} + \frac{\text{Model B Volume}}{\text{Model B Fuel Econ.}} + \frac{\text{Model C Volume}}{\text{Model C Fuel Econ.}} + \frac{\text{Model D Volume}}{\text{Model D Fuel Econ.}} + \frac{\text{Model E Volume}}{\text{Model E Fuel Econ.}} + \frac{\text{Model F Volume}}{\text{Model F Fuel Econ.}}$$

$$= \frac{9{,}500}{\frac{1{,}000}{27.0} + \frac{1{,}500}{25.6} + \frac{1{,}000}{25.4} + \frac{2{,}000}{22.1} + \frac{3{,}000}{22.4} + \frac{1{,}000}{20.2}}$$

$$= 23.2 \text{ mpg}$$

**Note to Appendix A Figure 3.** Since the actual average fuel economy of Manufacturer X's fleet is 23.2 mpg, as compared to its required fuel economy level of 23.1 mpg, Manufacturer X complies with the Reformed CAFE standard for MY 2008 as set forth in § 533.7(g).

## PART 537—AUTOMOTIVE FUEL ECONOMY REPORTS

■ 8. The authority citation for part 537 reads as follows:

**Authority:** 49 U.S.C. 32907; 49 CFR 1.50.

■ 9. Section 537.7 is amended by revising paragraphs (c)(4)(xvi) through (xxi) to read as follows:

### § 537.7 Pre-model year and mid-model year reports.

* * * * *

(c) *Model type and configuration fuel economy and technical information*

* * *

(4) * * *

(xvi)(A) In the case of passenger automobiles:

(*1*) Interior volume index, determined in accordance with subpart D of 40 CFR part 600, and

(*2*) Body style;

(B) In the case of light trucks:

(*1*) Passenger-carrying volume,

(*2*) Cargo-carrying volume;

(*3*) Beginning model year 2008, track width as defined in 49 CFR 523.2,

(*4*) Beginning model year 2008, wheelbase as defined in 49 CFR 523.2, and

(*5*) Beginning model year 2008, footprint as defined in 49 CFR 523.2

(xvii) Performance of the function described in § 523.5(a)(5) of this chapter (indicate yes or no);

(xviii) Existence of temporary living quarters (indicate yes or no);

(xix) Frontal area;

(xx) Road load power at 50 miles per hour, if determined by the manufacturer for purposes other than compliance with this part to differ from the road load setting prescribed in 40 CFR 86.177–11(d);

(xxi) Optional equipment that the manufacturer is required under 40 CFR parts 86 and 600 to have actually installed on the vehicle configuration, or the weight of which must be included in the curb weight computation for the vehicle configuration, for fuel economy testing purposes.

* * * * *

■ 10. Section 537.8 is amended by adding paragraph (e) to read as follows:

### § 537.8 Supplementary reports.

* * * * *

(e) *Reporting compliance option in model years 2008–2010.* For model years 2008, 2009, and 2010, each manufacturer of light trucks, as that term is defined in 49 CFR 523.5, shall submit a report, not later than 45 days following the end of the model year, indicating whether the manufacturer is opting to comply with 49 CFR 533.5(f) or 49 CFR 533.5(g).

**Note:** The following Appendices will not appear in the Code of Federal Regulations

## Appendix A—Comparison of Engineering Constraints Employed by the NPRM and the Final Rule Analyses

| Technology | Engineering constraint | | Reason for change |
|---|---|---|---|
| | NPRM | Final | |
| Low-Friction Lubricants | Do not apply if engine oil is 5W30 or better. | Do not apply if engine oil is better than 5W30. | Availability of lower friction (*e.g.*, 0W) oils. |
| Variable Valve Timing (VVT) | Do not apply to engines with displacement greater than 4.7 *l*. | Do not apply to OHV engines | OHV engines more likely to use cylinder deactivation. |
| Variable Valve Lift and Timing (VVLT). | Do not apply to engines with displacement greater than 3.0 *l*. | Do not apply to engines that do not already have VVT. | Next logical step from VVT. |

| Technology | Engineering constraint | | Reason for change |
|---|---|---|---|
| | NPRM | Final | |
| Cylinder Deactivation | Do not apply to engines with VVT, VVLT, and/or fewer than 6 cylinders. | As a general rule, do not apply to engines with VVT, VVLT, multivalve OHC, and/or fewer than 6 cylinders. | Multivalve OHC engines more likely to use VVT or VVLT. |
| Continuously Variable Transmission. | Do not apply to frame vehicles or 4WD SUVs. | Apply only to FWD unibody vehicles. | Less likely to mistakenly apply CVT to some RWD SUVs. |
| Front Axle Disconnect | Apply only to 4WD vehicles | Apply only to 4WD vehicles with cylinder count greater than six. | Expected to be more applicable to large vehicles. |
| Electric Power Steering | No universal constraints | For vehicles with curb weights over 4,000 pounds, do not apply unless 42-Volt systems are already present. | Higher power demands for large vehicle steering. |
| Integrated Starter-Generator | No universal constraints | Start application with the largest vehicles, which have lower fuel economy, prior to applying to smaller, more fuel efficient vehicles. | Mild hybridization expected to be more suitable for large vehicles due to packaging issues and fuel savings potential. |
| Weight Reduction | Do not apply to vehicles with curb weights below 3,900 pounds. | Do not apply to vehicles with curb weights below 5,000 pounds. | Correction to placement of safety threshold. |

## Appendix B—Changes to Technology "Phase-In Constraints" Employed by the Volpe Model

| Technology | NPRM (percent) | Final (percent) |
|---|---|---|
| Low Friction Lubricants | 50 | 25 |
| Improved Rolling Resistance | 50 | 25 |
| Low Drag Brakes | 50 | 17 |
| Engine Friction Reduction | 33 | 17 |
| Front Axle Disconnect (for 4WD) | 5 | 17 |
| Cylinder Deactivation | 25 | 17 |
| Multi-Valve, Overhead Camshaft | 33 | 17 |
| Variable Valve Timing | 33 | 17 |
| Electric Power Steering | 33 | 17 |
| Engine Accessory Improvement | 33 | 25 |
| 5-Speed Automatic Transmission | 33 | 17 |
| 6-Speed Automatic Transmission | 25 | 17 |
| Automatic Transmission w/Aggressive Shift Logic | 33 | 17 |
| Continuously Variable Transmission (CVT) | 33 | 17 |
| Automatic Shift Manual Transmission (AST/AMT) | 10 | 17 |
| Aero Drag Reduction | 33 | 17 |
| Variable Valve Lift & Timing | 25 | 17 |
| Spark Ignited Direct Injection (SIDI) | 3 | 3 |
| Engine Supercharging & Downsizing | 25 | 17 |
| 42 Volt Electrical Systems | 33 | 17 |
| Integrated Starter/Generator | 33 | 5 |
| Intake Valve Throttling | 25 | 17 |
| Camless Valve Actuation | 25 | 10 |
| Variable Compression Ratio | 25 | 10 |
| Advanced CVT | 25 | 17 |
| Dieselization | 3 | 3 |
| Material Substitution | 20 | 17 |
| Midrange Hybrid Vehicle | 3 | 3 |

Issued: March 28, 2006.

**Jacqueline Glassman,**

*Deputy Administrator.*

[FR Doc. 06–3151 Filed 3–29–06; 1:29 pm]

BILLING CODE 4910–59–U

Federal Register

Thursday,
April 6, 2006

# Part III

# Department of the Interior

## Office of Surface Mining Reclamation and Enforcement

## 30 CFR Part 942

## Tennessee Federal Program; Proposed Rule

**DEPARTMENT OF THE INTERIOR**

**Office of Surface Mining Reclamation and Enforcement**

**30 CFR Part 942**

**RIN 1029–AC50**

## Tennessee Federal Program

**AGENCY:** Office of Surface Mining Reclamation and Enforcement, Interior.

**ACTION:** Proposed rule; public comment period and opportunity for public hearing on revisions to the Tennessee Federal program.

**SUMMARY:** We, the Office of Surface Mining Reclamation and Enforcement (OSM or Office), are proposing three revisions to the Tennessee Federal program. The revisions would: (1) Provide regulations establishing trust funds or annuities to fund the treatment of long-term postmining pollutional discharges; (2) delete the minimum requirements of eighty percent (80%) ground cover for certain postmining land uses and provide that herbaceous ground cover be limited to that necessary to control erosion and support the postmining land use; and (3) exempt areas developed for wildlife habitat, undeveloped land, recreation, or forestry from the requirements that bare areas shall not exceed one-sixteenth (1/16) acre in size and total not more than ten percent (10%) of the area seeded.

**DATES:** Comments on the proposed rule must be received on or before 4 p.m., eastern time on May 8, 2006, to ensure our consideration. If requested, we will hold a public hearing on the amendment on May 1, 2006. We will accept requests to speak at a hearing until 4 p.m., eastern time on April 21, 2006.

**ADDRESSES:** You may submit comments identified by RIN 1029–AC50, by any of the following methods:

- E-Mail: *tdieringer@osmre.gov.* Include docket number 1029–AC50 in the subject line of the message.
- Mail/Hand-Delivery/Courier: Knoxville Field Office, Office of Surface Mining Reclamation and Enforcement, 710 Locust Street, 2nd Floor, Knoxville, Tennessee 37902.
- Federal e-Rulemaking Portal: *http://www.regulations.gov.* Follow the instructions for submitting comments.

For detailed instructions on submitting comments and additional information on the rulemaking process, see ''III. Public Comment Procedures'' in the **SUPPLEMENTARY INFORMATION** section of this document.

You may submit requests for public hearings, review copies of the Tennessee program, view a listing of any scheduled public hearings, and all written comments received in response to this document at the address listed below during normal business hours, Monday through Friday, excluding holidays at the Knoxville Field Office, Office of Surface Mining Reclamation and Enforcement, 710 Locust Street, 2nd Floor, Knoxville, Tennessee 37902.

**FOR FURTHER INFORMATION CONTACT:** Tim Dieringer, Field Office Director, Telephone: 865–545–4103; E-mail: *tdieringer@osmre.gov*.

**SUPPLEMENTARY INFORMATION:**

I. Background on the Tennessee Program
II. Description of the Proposed Amendment
III. Public Comment Procedures
IV. Procedural Determinations

### I. Background on the Tennessee Program

Section 503(a) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act) permits a State to assume primacy for the regulation of surface coal mining and reclamation operations on non-Federal and non-Indian lands within its borders under certain conditions. The Secretary of the Interior conditionally approved the Tennessee program on August 10, 1982, at 30 CFR part 942. However, because of actions taken by OSM pursuant to 30 CFR part 733, on May 16, 1984, the State repealed most of the Tennessee Coal Surface Mining Law of 1980, Tennessee Code Annotated 59–8–301—59–8–339 and its implementing regulations, effective October 1, 1984. As a result, on October 1, 1984, we withdrew approval of the Tennessee permanent regulatory program and promulgated a Federal program for Tennessee under authority of section 504(a) of the Act. The Federal program in Tennessee was promulgated at 30 CFR part 942, where it replaced the State program. On that date, OSM became the regulatory authority under SMCRA in Tennessee. You can find background information on the Tennessee Federal program, including findings, and the disposition of comments in the October 1, 1984, **Federal Register** (49 FR 38874). The regulations proposed today would amend the Federal program applicable to mining in Tennessee.

### II. Description of the Proposed Actions

*A. Revision to 30 CFR 942.800(b)*

We are proposing to amend the regulations that govern the Federal program in Tennessee by providing express authority to accept trust funds or annuities as assurance for the long-term treatment of pollutional discharges.

SMCRA, its implementing regulations and OSM policy have provided guidance on bonding for treatment of postmining pollutional discharges. Section 509(a) of the Act requires that each permittee post a performance bond conditioned upon faithful performance of all the requirements of the Act and the permit. That section of the Act specifies that ''[t]he amount of the bond shall be sufficient to assure the completion of the reclamation plan if the work had to be performed by the regulatory authority in the event of forfeiture.''

Our regulations implementing the requirements of section 509 of the Act can be found in the Code of Federal Regulations at 30 CFR part 800. These regulations, first promulgated in 1979, have evolved over the years to make it clear that performance bonds must be adjusted when the cost of reclamation increases. Unanticipated events such as postmining pollutional discharges which increase the cost of reclamation are among the events that would require a regulatory authority to adjust bonds to reflect the increased reclamation (treatment) costs that such discharges would present.

In our discussion of determining bond amounts in the March 13, 1979, **Federal Register** (44 FR at 15111), we noted:

> The Office recognizes that the regulatory authority cannot reasonably establish the initial bond amount based upon speculative events such as the need to abate ground water pollution, since the operation must be designed initially to prevent such consequences in order to qualify for a permit. However, such unplanned consequences occasionally occur due to improper mining or reclamation, or because an important variable was not evaluated properly. When such consequences are identified prior to the release of all liability and termination of the permit in accordance with part 807, the permittee's legal obligation to abate them necessarily adds to the cost of reclamation.
>
> Under such circumstances, the regulatory authority would be authorized to impose additional bond liability under that permit, or to retain a larger portion of the total liability than otherwise required in response to an application for release of bond, in order to ensure adequate funding to complete the abatement work required (Sections 805.14(a) and 807.12(d)).

While this discussion notes that State regulatory authorities had discretionary authority to increase bonds to reflect the increased costs of reclamation from unanticipated events such as postmining pollutional discharges, in 1983 OSM specifically indicated that such increases were required. In the July 19, 1983, **Federal Register**, we noted:

Each regulatory authority should be able to estimate the cost of all potential reclamation with reasonable accuracy. If at any time the cost of future reclamation under the bond changes, the regulatory authority is required to adjust the bond accordingly (Sec.800.15(a)). Thus, the amount of the bond for any increment must at all times be sufficient to assure the completion of the reclamation plan if the work had to be performed by the regulatory authority. (48 FR 32937)

On September 26, 1983 (48 FR 43956), OSM's revised hydrology regulations included the concept of a hydrology reclamation plan, which includes any required water treatment. Thus, completion of the reclamation plan includes any required water treatment.

OSM further affirmed its position on financial guarantees for postmining pollutional discharges in its March 31, 1997, document titled, ''Policy Goals and Objectives on Correcting, Preventing and Controlling Acid/Toxic Mine Drainage.'' Objective 2 of the policy requires that financial responsibility associated with acid mine drainage (AMD) be fully addressed. Strategies discussed within the policy to achieve this objective include: requiring operators to adjust financial assurance if, subsequent to permit issuance, monitoring identifies acid- or toxic-forming conditions; and where inspections conducted in response to bond release requests identify surface or subsurface water pollution, holding bond in an amount adequate to abate the pollution as long as water treatment is required, unless a financial guarantee or some other enforceable contract or mechanism to ensure continued treatment exists.

When responding to commenters who objected to the requirement that permittees post financial guarantees for treatment of pollutional discharges during and after land reclamation, OSM noted:

[T]here is no doubt that, under SMCRA, the permittee must provide a financial guarantee to cover treatment of postmining discharges when such discharges develop and require treatment.

On May 30, 2000, OSM's Knoxville, Tennessee Field Office (KFO) issued Field Office Policy Memorandum No. 37 titled ''Policy for Requiring Bond Adjustments on Permitted Sites Requiring Long-Term Treatment of Pollutional Discharges.'' This policy described the general procedure that KFO would utilize to require adjustments to performance bonds on sites in Tennessee where unanticipated pollutional discharges are occurring and long-term treatment is required. Subsequently, KFO notified some permittees in Tennessee to submit revisions for approval of long-term treatment systems and provided the permittees the opportunity to submit annual operating and maintenance costs as well as capital costs for replacement of the system during the 75-year treatment period.

The permittees required to adjust their performance bonds for long-term treatment sought administrative review of KFO's decisions. In a related matter, the National Mining Association (NMA) filed suit, on October 2, 2000, in the United States District Court for the Eastern District of Tennessee seeking relief from OSM for acting in violation of the Administrative Procedure Act and SMCRA relative to implementation of the policy. Administrative review of individual actions has been placed in abeyance pending resolution of that litigation which is still pending.

The bonding regulations for the Tennessee Federal program are located in 30 CFR 942.800. Those regulations incorporate the Federal rules in part 800 by reference. They also add a few Tennessee-specific clarifications. The Tennessee Federal program relies upon a conventional bonding system in which site-specific performance bonds are required to be filed with OSM. The amount of the performance bond is based on the approved reclamation plan and is adjusted periodically when the cost of future reclamation changes. The bond must be sufficient to assure completion of the plan if OSM has to perform the work in the event of bond forfeiture.

Our experience has shown that bonding systems which do not provide an income stream are not well-suited to ensuring the treatment of long-term pollutional discharges, such as AMD. Surety bonds, the most common form of conventional bond, are especially ill-suited for this purpose because no surety will underwrite a bond where there is no expectation of release of liability. Further, mandating that the permittee immediately post other forms of conventional bonds, such as cash or negotiable bonds, may force insolvency on a permittee that is currently treating pollutional discharges. Bankruptcy will lead to bond forfeiture and forfeited amounts are not likely to be sufficient to ensure perpetual treatment of discharges. Comments received from an OSM advance notice of proposed rulemaking (ANPRM) of May 17, 2002 (67 FR 35070), titled, ''Bonding and Other Financial Assurance Mechanisms for Treatment of Long-Term Pollutional Discharges and Acid/Toxic Mine Drainage (AMD) Related Issues,'' confirms our experience regarding the unsuitability of bonds that do not generate income for water treatment. In that ANPRM, we sought comment on, among other things, the form and amount of financial assurance that should be required to guarantee treatment of postmining pollutional discharges. Commenters on the ANPRM disagreed as to whether financial assurance should be required, but they largely agreed that, if it was, surety bonds are not the best means—or even an appropriate means—of accomplishing that purpose. The Surety Association of America stated that surface coal mining operations ''would not be prudently bondable if the scope of the obligation included perpetual treatment of discharge[s].'' According to the Association, ''the problem of acid mine drainage requires a funding vehicle, and a surety bond is not a funding vehicle.''

We believe that the best approach to providing financial assurances for long-term treatment of pollutional discharges is to require that the permittee establish dedicated income-producing accounts such as trust funds or annuities that are held by a third party as trustee for the regulatory authority. However, the Tennessee Federal program currently lacks express authority to accept such accounts as bond. If adopted, this proposed amendment would allow Tennessee to accept trust funds or annuities to fund treatment of postmining pollutional discharges. It also would establish the parameters under which those trust funds or annuities must operate.

In this proposal, we are building on the experience of Pennsylvania, which has successfully implemented similar provisions. The provisions included in our proposed rule are based upon the Pennsylvania provisions and its experience with those provisions.

Pennsylvania amended its Surface Mining Conservation and Reclamation Act and implementing regulations in 1998 to include trust funds to fund treatment of postmining discharges. As of today, Pennsylvania has executed eight trust fund account agreements involving thirty-five treatment facilities. The first two agreements were executed in March, 1999; followed by one each in October 2001; November 2002; June 2003; September 2003; June 2004; and November 2004. Six of the trust fund accounts are fully funded and two are partially funded. There are 45 agreements in various stages of processing that remain to be completed for a total of 53 trust fund agreements.

Pennsylvania's law and regulations allow the complete release of any conventional bonds remaining after land

reclamation has been fully completed and the revegetation responsibility period has expired for a site with a pollutional discharge if provisions have been made for sound future treatment of that discharge. The provisions for sound future treatment must be another approved financial instrument, such as a trust fund, that will fully secure the long-term treatment obligation and is applicable to the area associated with that treatment.

When Pennsylvania submitted the amendment to its program authorizing the use of trust funds and annuities, it characterized those financial instruments as collateral bonds and we approved them as such (70 FR 25472). However, the Federal regulations under 30 CFR 800.11(e) provide another option for approving trust funds and annuities. Trust funds and annuities held by a third party would fit under the alternative bonding system (ABS) criteria of 30 CFR 800.11(e), which implement the provision in section 509(c) of SMCRA authorizing OSM and the States to establish an ABS if they ''will achieve the objectives and purposes of the bonding program.'' The regulations require that such systems (1) ensure that the regulatory authority have available sufficient funds to complete the reclamation plan for any areas that may be in default at any time and (2) provide a substantial economic incentive for the permittee to comply with all reclamation provisions. Establishment of a trust fund would satisfy the first criterion, while the permittee's provision of the monies needed to establish a trust fund would satisfy the second criterion. Approval of trust funds and annuities as an ABS as proposed here will allow a reasonable time to fully fund such accounts. This is preferable to the lump sum deposit required for collateral bonds, particularly in those cases where treatment of the discharge will involve a large capital expense. As part of this proposed rulemaking, we are seeking comments on approving trust funds and annuities as an ABS under 30 CFR 800.11(e) as opposed to approval of those instruments as a collateral bond under 30 CFR 800.21.

Postmining pollutional discharges exist in Tennessee and treatment of the discharges is a necessity. We are committed to establishing a workable means in Tennessee to secure the necessary funds to ensure that treatment can continue. We believe that properly managed trust funds will provide the necessary funds and will result in treatment of the discharges to the standards in the Tennessee program. We are issuing this proposed rulemaking to seek comments on providing the Tennessee Federal program with the authority to establish trust funds or annuities as an ABS to fund long-term treatment of postmining pollutional discharges in Tennessee by adding paragraph (4) to 30 CFR 942.800(b) as noted below.

Proposed 30 CFR 942.800(b)(4) would provide the authority for establishing trust funds and annuities. Establishing trust funds and annuities as an ABS will keep bonds in place on those areas where discharges are occurring as well as on the areas necessary for the construction of treatment facilities and areas in support of treatment facilities (*i.e.*, access roads). Additionally, a trust fund or annuity will be available to fund treatment of discharges in the event of an operator's bankruptcy. The conditions for establishing trust funds are found in paragraphs (i) through (ix) and are discussed individually below.

In paragraph (i), we are proposing that the amount of the trust fund or annuity be determined by OSM. We believe OSM is in the best position for evaluating the site conditions and impact of the discharges and, therefore, can most accurately evaluate the costs necessary for treatment, including both capital and operational expenses.

In paragraph (ii), we are proposing that the trust fund or annuity be in a form specified by OSM and contain terms and conditions required by OSM. As we stated earlier, OSM is in the best position to establish the terms of the trust fund based on its knowledge of the site conditions. This provision will give OSM the flexibility to tailor individual trust agreements to best reflect treatment options.

In paragraph (iii), we are proposing that at a minimum, a trust fund or annuity shall provide that OSM is irrevocably established as the beneficiary of the trust fund or of the proceeds from the annuity. This provision will ensure that all of the monies in the trust funds will be available for treatment regardless of an operator's financial circumstances.

In paragraph (iv), we are proposing that the investment objectives of the trust fund or annuity be specified by OSM. This will ensure the stability of investments for the trust funds and allow OSM to focus on the goal of producing sufficient revenue for treatment of discharges.

In paragraph (v), we are proposing that termination of the trust fund or annuity may occur only as specified by OSM upon a determination that treatment is no longer necessary, that reclamation has been completed, or that a replacement bond has been posted. This provision will allow OSM to keep the trust fund in place for as long as necessary to maintain treatment facilities and will ensure that the only reason for termination of the trust fund is that the treatment goals have been attained or that a replacement bond has been posted.

In paragraph (vi), we are proposing that release of money to the permittee from the trust fund or annuity may be made only upon written authorization of OSM. This provision is designed to ensure that only funds necessary for treatment of discharges are released to an operator and that OSM is made aware of all expenditures from the funds.

In paragraph (vii), we provide the requirements for institutions who serve as trustees or issue annuities. We are proposing to allow only the following types of financial institutions to serve as a trustee or issue an annuity for the purposes of this rule:

- A bank or trust company chartered by the Tennessee Department of Financial Institutions.
- A national bank chartered by the Office of the Comptroller of the Currency.
- An operating subsidiary of a national bank chartered by the Office of the Comptroller of the Currency.
- Any other financial institution with trust powers and with offices located in Tennessee, provided that institution's or company's activities are examined or regulated by a State or Federal agency.

We are further proposing to require that an insurance company issuing an annuity be licensed or authorized to do business in Tennessee by the Tennessee Department of Commerce and Insurance or be designated by the Commissioner of that Department as an eligible surplus lines insurer. We are proposing these requirements to ensure that only qualified business institutions are administering the trust funds. This will ensure that the trust funds are administered in a way that meets the treatment goals of OSM and will provide the security this program requires to ensure the funds are available for treatment. In paragraph (viii), we are proposing that trust funds and annuities, as described in this paragraph, are established to guarantee that moneys are available to pay for treatment of postmining pollutional discharges or reclamation of the mine site or both. This provision is necessary to codify the intent of the program. Reclamation of the mine site will be an objective of the program if such reclamation reduces or eliminates the discharge.

Finally, in paragraph (ix), we are proposing to allow the release of conventional bonds if, apart from the pollutional discharge, the permittee has met all applicable reclamation requirements and has made provisions, as noted in this section, for treatment of pollutional discharges. The establishment of trust funds or annuities for treatment of long-term pollutional discharges will constitute a replacement of bonds as authorized in 30 CFR 800.30; there is no need to retain bonds for other areas for which all reclamation requirements have been met and the revegetation responsibility period has expired.

*B. Revisions to 30 CFR 942.816(f)(3) and 30 CFR 942.817(e)(3)*

The Federal requirements for revegetation success are discussed in both SMCRA and the Federal regulations. Section 515(b)(19) of SMCRA requires establishment of a diverse, effective, and permanent vegetative cover, at least equal to the premining cover, that is capable of self generation and plant succession. The Federal regulations at 30 CFR 816.116 (for surface mining activities) and 30 CFR 817.117 (for underground mining activities) provide national standards for revegetation success. At 30 CFR 816.116(b)(3)) and 30 CFR 817.116(b)(3), the Federal regulations discuss revegetation success standards for areas to be developed for postmining land uses of fish and wildlife habitat, recreation, shelter belts, or forest products. These regulations, last revised on September 7, 1988, provide that success of vegetation shall be determined on the basis of tree and shrub stocking and vegetative ground cover. The regulations further provide that minimum stocking and planting arrangements for these postmining land uses shall be specified by the regulatory authority on the basis of local and regional conditions.

In promulgating a Federal program for Tennessee, we noted that 30 CFR 816.116(a)(1) requires the regulatory authority to select the standards for revegetation success and include them in the regulatory program. Therefore, we included specific standards at 30 CFR 942.816(f)(3) and 30 CFR 942.817(e)(3) that provide revegetation success standards for areas developed for wildlife habitat, recreational or forest products. These regulations require a minimum eighty percent (80%) ground cover for those postmining land uses. In the preamble discussion of those rules, we noted that we believed that a minimum level of 80% vegetative coverage was necessary to control erosion on the steep terrain that is common to eastern Tennessee coal fields. The regulations also stated that stocking requirements for woody plants for areas developed for wildlife habitat, recreational or forest products would be determined on a case-by-case basis and specified in the approved mining and reclamation plan. We noted in our preamble discussion that we believed that such case-by-case approvals would allow the flexibility necessary to accommodate the specialized requirements of various wildlife and forest management plans (49 FR 38888). The corresponding Federal standards at 30 CFR 816.116(b)(3) for stocking of woody plants have since been revised and are not as stringent as those currently contained at 30 CFR 942.816(f)(3), which have not been changed since October 1, 1984.

Finally, we promulgated 30 CFR 942.816(f)(4), which prohibits bare areas larger than one-sixteenth of an acre in size and that total more than 10% of the area seeded. We promulgated this provision because we believed that it was necessary to avoid releasing bond on lands that meet the overall cover requirements of 80% or 90% ground cover, but still have localized areas that are not yet stabilized with respect to soil erosion (49 FR 38888).

Since these requirements were promulgated in 1984, a great deal has been learned about reestablishing vegetation on mined land, particularly trees. It has also become apparent that permittees generally prefer pasture or grazing land as postmining land uses because they do not require the extra work and expense of planting trees and ensuring successful tree establishment. Thus, the reclamation of minesites has typically resulted in dense grasslands, with few trees. Many trees that were planted had low survival rates and required replanting, and those that survived did not reach their optimal growth potential, which further discouraged operators from considering a land use that required planting trees.

Virtually all of the land being mined in Tennessee was woodland or forest at the time it was mined. We recognize the importance and benefits of promoting the reestablishment of forests on mined land, which involves encouraging postmining land uses that include trees, such as wildlife habitat, undeveloped land, recreation, or forestry. However, without healthy, vigorously growing trees, these postmining land uses cannot be successfully achieved. Therefore we need to reconsider our revegetation standards to assure that they do not unduly impair tree seedling survival and growth or discourage operators and landowners from considering land uses that involve planting trees.

We have reviewed available literature and met with recognized experts to determine what site conditions resulted in tree mortality or stunted growth and we reviewed our regulations to identify any impediments to successful forest establishment. Our goal is to have regulations that promote planting trees and reclamation techniques that increase tree survival and growth rates, as well as ensure natural succession of native plants and trees on minesites. In short, our goal is to reestablish diverse and productive forest land.

We found that to promote and enable diverse, vigorous forested lands on minesites, changes to our regulations are necessary. The conventional method of reclaiming minesites, developed with the passage of the Act, typically includes using bulldozers to grade and track-in spoil, creating smooth slopes. This method results in a compacted surface that not only inhibits root growth of seedlings, but restricts infiltration of precipitation and increases runoff. To prevent erosion from the runoff, operators seed the regraded areas with aggressive, quick growing ground covers. This method of reclamation is very effective in producing dense hayland and pastureland. However, it is very detrimental to establishing forested land on minesites for three reasons: The dense vegetative covers used to control erosion compete with trees for soil nutrients, water and sunlight, the compaction of the minesite inhibits root growth as well as water infiltration, and the dense ground cover provides habitat for animals that eat the tree seedlings.

In summarizing the research into ground cover and its effects on trees in 2003, Jim King and Jeff Skousen of West Virginia University noted that:

> The negative effects of overly abundant and aggressive ground cover on the survival and growth of trees planted on reclaimed mine lands has long been known. Trees planted into introduced, aggressive forages [especially tall fescue and sericea lespedeza] often are overtopped by the grass or legume and are unable to break free (Burger and Torbert, 1992; Torbert *et al.*, 1995). The seedlings are pinned to the ground and have little chance for survival. If it is known that trees are to be planted, a tree-compatible ground cover should be seeded that will be less competitive with trees. Tree compatible ground cover should be slow growing, sprawling or low growing, not allopathic, and non-competitive with trees (Burger and Torbert, 1992). Plass (1968) reported that after four growing seasons the height growth of sweetgum and sycamore planted into an established stand of tall fescue on spoil banks was significantly retarded. Andersen *et al.*

(1989) found that survival and height growth for red oak and black walnut was significantly greater on sites where ground cover was chemically controlled.[1]

The amount of ground cover for reclaiming minesites to be used as forestland was also discussed by researchers affiliated with the Virginia Polytechnic Institute and State University:

The use of tree-compatible ground covers during reclamation can allow seedlings to survive at rates exceeding the 70% that is necessary to achieve regulatory compliance without the expense of follow-up herbicide treatment. Furthermore, our experience indicates that sowing tree-compatible groundcovers at reduced rates often allows invasion by woody vegetation from adjacent forests. The results of this study suggest that sowing ground cover at reduced rates achieving 50 to 70% cover, instead of 90% currently required by Virginia's regulations, would also greatly improve the likelihood of hardwood reforestation success.[2]

Researchers from the University of Maine have found that only a small amount of ground cover can inhibit tree growth:

Additional research has found that herbaceous vegetation (grasses and broadleaves) in small amounts (<20% cover) around seedlings immediately after planting will substantially reduce early stand growth.[3]

The researchers are united in their findings that even ground cover significantly less dense than the 80% ground cover required in Tennessee's rules for sites to be developed for wildlife habitat, undeveloped land, recreation, or forestry would still be detrimental to tree survival and growth. We have also found that heavy ground cover impedes the natural succession of native forest plants, thereby frustrating SMCRA's goal of establishment of a diverse, effective, and permanent vegetative cover of the same seasonal variety native to the area and capable of self-regeneration and plant succession. As Burger and Zipper noted:

Another purpose of low ground cover seeding rates is to allow the invasion of native plant species such as yellow poplar, red maple, birches and other light-seeded trees. Dense ground covers prevent the natural seeding-in of native plants.[4]

While we have found that excessive vegetative cover is detrimental to tree growth and survival and natural succession, we are cognizant of the general expectation that vegetative cover is needed to control erosion on newly reclaimed minesites. However, the amount of ground cover necessary to control erosion on any particular site is a function of the site topography, composition of surface material, precipitation amounts, and the level of site compaction. Loose or uncompacted material, particularly if relatively flat, may have virtually no runoff or erosion and would require little or no vegetation to control erosion. Conversely, a highly compacted steep slope severely limits infiltration and increases runoff so that a dense vegetative cover is needed to control erosion. Forestry researchers agree that productive forest land can best be created on reclaimed mine land by using techniques that we will refer to as the Forestry Reclamation Approach. This approach requires loosely grading the final 4 to 6 feet of topsoil or topsoil substitute to create a non-compacted growth medium.

Non-compacted mine soils have higher infiltration rates and erode less than graded soils. When using the Forestland Reclamation Approach, less ground cover is needed to prevent erosion and protect water quality, and in the process, diverse mixes of trees are able to survive and grow at rates that will create an economically viable forest.[5]

Also in support:

Third-year results show that intensive grading did not result in better ground cover establishment or erosion control. In fact, erosion was highest on the intensively graded plots.[6]

Reduced grading of minesites will result in less compacted growing media on the surface that will increase water infiltration and limit the amount of water running off a minesite. This in turn will limit erosion and sedimentation from that site as well as making more water available for tree growth. Limited compaction is also more favorable to tree root growth which will increase survivability and growth rates.

In proposing these changes, we have also considered many additional studies conducted to determine the effects of vegetation and reclamation practices on the development of trees planted on reclaimed minesites.

Our regulations are clear in providing that erosion from minesites must be controlled. At the same time, research has found that ground covers in excess of those required for controlling erosion could be detrimental to tree growth and natural succession which would impede establishing postmining land uses of wildlife habitat, undeveloped land, recreation, or forestry. We believe the best way to ensure creation of a planting plan that controls erosion and encourages tree survival, growth and natural succession, would be to eliminate the current arbitrary success standard of 80% ground cover, which applies to all sites regardless of local site conditions and proposed land uses. Conditions at each site are unique and methods to reclaim them will vary. Allowing OSM the latitude to determine the success standards on a site-by-site basis will ensure that localized conditions are taken into account, successful postmining land uses are achieved, and erosion is effectively controlled. As a result, we are proposing to revise 30 CFR 942.816(f)(3) and 30 CFR 942.817(e)(3) as noted below by eliminating the 80% ground cover standard. Please note that paragraphs (i)–(iii) of those sections are not affected by this rulemaking.

We are also proposing to expand the postmining land uses to which the regulations at 30 CFR 942.816(f)(3) and 30 CFR 942.817(e)(3) apply by including undeveloped land and by modifying the postmining land use of forest products to forestry. We are proposing these changes to accurately reflect the postmining land uses that involve the establishment of forested lands.

*C. Revision to 30 CFR 942.816(f)(4) and 30 CFR 942.817(e)(4)*

We propose to exempt sites to be developed for wildlife habitat, undeveloped land, recreation, or forestry from the bare area provisions of 30 CFR 942.816(f)(4) and 942.817(e)(4). The Forestry Reclamation Approach calls for using herbaceous ground covers that are compatible with growing trees. Using less competitive ground covers at lower seeding rates, or in some cases no herbaceous groundcover at all, will result in areas that may be essentially bare except for tree seedlings and volunteer herbaceous vegetation. As we noted earlier in this preamble, reduced levels of herbaceous ground cover are necessary for natural succession of

[1] *Tree Survival on a Mountaintop Surface Mine in West Virginia,* King, J., J. Skousen, West Virginia University Morgantown, American Society of Mining and Reclamation, 2003.

[2] *Herbaceous Ground Cover Effects on Native Hardwoods Planted on Mined Land,* Burger, J.A., D.O. Mitchem, C.E. Zipper, R. Williams, Virginia Polytechnic Institute and State University, American Society of Mining and Reclamation, 2005.

[3] *Top 10 Principles for Managing Competing Vegetation to Maximize Regeneration Success and Long-Term Yields,* R.G. Wagner, University of Maine.

[4] *How to Restore Forests on Surface-Mined Land,* Burger, J.A., C.E. Zipper, Virginia Polytechnic Institute and State University, Powell River Project, Virginia Cooperative Extension Publication 460–123, Revised 2002.

[5] *Herbaceous Ground Cover Effects on Native Hardwoods Planted on Mined Land,* Burger, J.A., D.O. Mitchem, C.E. Zipper, R. Williams, Virginia Polytechnic Institute and State University, American Society of Mining and Reclamation, 2005.

[6] *Influence on Grading Intensity on Ground Cover Establishment, Erosion, and Tree Establishment on Steep Slopes,* Torbert, J.L., Burger, J.A., Virginia Polytechnic Institute and State University, International Land Reclamation and Mine Drainage Conference and the Third International Conference on the Abatement of Acidic Drainage, 1994.

native forest plants and to reduce competition between grasses and tree seedlings for water, nutrients and sunlight. While striving to achieve this goal, some areas will be void of herbaceous ground cover. This is desirable because many native woody plants and forbs require bare soil conditions in order to seed-in naturally. Also, most traditionally planted herbaceous ground cover species are not expected to be part of the mature forest plant community.

We noted in the October 1, 1984, **Federal Register** our reason for requiring the bare area standard was to avoid releasing bond on localized areas on reclaimed minesites that are not yet stabilized from soil erosion. The Forestry Reclamation Approach calls for loosely graded growth media, which will increase water infiltration and reduce runoff thereby decreasing or eliminating erosion. In any event, 30 CFR 816.45 and 817.45 require the construction and maintenance of appropriate sediment control measures to minimize erosion and runoff outside the permit area. As a result, we believe that exempting sites to be developed for wildlife habitat, undeveloped land, recreation, or forestry from the bare area standard of 30 CFR 942.816(f)(4) and 942.817(e)(4), coupled with the revegetation success standards in the approved mining and reclamation plan as specified in the proposed revision of 30 CFR 942.816(f)(3) and 942.817(e)(3), will supply sufficient standards to both prevent erosion and to provide a proper environment for tree growth and natural succession.

## III. Public Comment Procedures

Under the provisions of 30 CFR 736.12, we are seeking your comments on the proposed revisions to the regulations. Because the proposed revisions are limited to the Tennessee Federal Program, our regulations at 30 CFR 736.12(a)(2) allow for a 30 day comment period. Comments and requests for a public hearing may be submitted as noted below.

*Written Comments*

Send your written or electronic comments to OSM at the address given above. Your written comments should be specific, pertain only to the issues proposed in this rulemaking, and include explanations in support of your recommendations. We will make every attempt to log all comments into the administrative record, but comments delivered to an address other than the Knoxville Field Office may not be logged in, and comments received after the close of the comment period may not be considered.

*Electronic Comments*

Please submit Internet comments as an ASCII or Word file avoiding the use of special characters and any form of encryption. Please also include ''Attn: RIN 1029–AC50'' and your name and return address in your Internet message. If you do not receive a confirmation that we have received your Internet message, contact the Knoxville Field Office at 865–545–4103.

*Availability of Comments*

We will make comments, including names and addresses of respondents, available for public review during normal business hours. We will not consider anonymous comments. If individual respondents request confidentiality, we will honor their request to the extent allowable by law. Individual respondents who wish to withhold their name or address from public review, except for the city or town, must state this prominently at the beginning of their comments and submit their comments by regular mail, not electronic mail. 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 review in their entirety.

*Public Hearing*

If you wish to speak at the public hearing, contact the person listed under **FOR FURTHER INFORMATION CONTACT** by 4 p.m., eastern time on April 21, 2006. If you are disabled and need special accommodations to attend a public hearing, contact the person listed under **FOR FURTHER INFORMATION CONTACT**. We will arrange the location and time of the hearing with those persons requesting the hearing. If no one requests an opportunity to speak, we will not hold a hearing.

To assist the transcriber and ensure an accurate record, we request, if possible, that each person who speaks at the public hearing provide us with a written copy of his or her comments. The public hearing will continue on the specified date until everyone scheduled to speak has been given an opportunity to be heard. If you are in the audience and have not been scheduled to speak and wish to do so, you will be allowed to speak after those who have been scheduled. We will end the hearing after everyone scheduled to speak and others present in the audience who wish to speak, have been heard.

*Public Meeting*

If only one person requests an opportunity to speak, we may hold a public meeting rather than a public hearing. If you wish to meet with us to discuss the amendment, please request a meeting by contacting the person listed under **FOR FURTHER INFORMATION CONTACT**. All such meetings are open to the public and, if possible, we will post notices of meetings at the locations listed under **ADDRESSES**. We will make a written summary of each meeting a part of the administrative record.

## IV. Procedural Determinations

*Executive Order 12866—Regulatory Planning and Review*

This document is not a significant rule and is not subject to review by the Office of Management and Budget under Executive Order 12866.

a. This rule will not have an effect of $100 million or more on the economy. The revisions to the bonding requirements and revegetation standards will not adversely affect in a material way the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities.

As discussed in the preamble to the proposed rule, the bonding provisions should benefit coal operators who experience unanticipated pollutional discharges by providing them with an alternative financial mechanism for the treatment of AMD. The proposed bonding revisions will not add to the operator's cost of doing business since the existing regulations in 30 CFR 942.800 and 30 CFR part 800 already require that a bond amount be adequate for the cost of reclamation and, when necessary, be adjusted to insure that adequate funds are available. The trust funds or annuities will allow continued treatment of postmining pollutional discharges by the operator and will assist in preventing bankruptcies and potential bond forfeitures since sureties will not likely fund treatment. There are approximately 52 mining operations in Tennessee with AMD problems that may avail themselves of the new bonding provisions.

Our estimates have found that approximately 10 companies will take advantage of the rule that eliminates the arbitrary ground cover requirements on minesites to be reclaimed for wildlife habitat, undeveloped land, recreation, or forestry. Approximately 1000–1500 acres are eligible for Phase III bond release annually in Tennessee. The changes to the rules proposed will encourage reforestation of this acreage and provide the basis for healthy,

vigorous tree growth. While economic benefits of reforestation to mine operators are limited, the benefits to the environment are numerous and include: creating diverse, productive forests that provide watershed protection, wildlife habitat, recreational opportunities, and remove carbon dioxide from the air. Additionally, there are economic benefits of reforested sites because forests can offer substantial revenue for landowners who own the trees and job opportunities for local residents who harvest the trees and use the lumber.

b. This rule will not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency.

c. This rule does not alter the budgetary effects of entitlements, grants, user fees, or loan programs or the rights or obligations of their recipients.

d. This rule does not raise novel legal or policy issues.

*Regulatory Flexibility Act*

The Department of the Interior certifies that this proposed 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.*). As previously stated, the revisions to the existing provisions may benefit the regulated industry by allowing an alternative source of bonding. Further, the rule produces no adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States enterprises to compete with foreign-based enterprises in domestic or export markets.

*Small Business Regulatory Enforcement Fairness Act*

For the reasons previously stated, this rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This proposed rule:

a. Does not have an annual effect on the economy of $100 million or more.

b. Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions.

c. Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises for the reasons stated above.

*Unfunded Mandates*

This proposed rule does not impose an unfunded mandate on State, local, or Tribal governments or the private sector of more than $100 million per year. The rule does not have a significant or unique effect on State, Tribal, or local governments or the private sector. A statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*) is not required.

*Executive Order 12630—Takings*

In accordance with Executive Order 12630, the proposed rule does not have significant takings implications. The revisions to the bonding and revegetation regulations do not affect the use or value of private property.

*Executive Order 12988—Civil Justice Reform*

In accordance with Executive Order 12988, the Office of the Solicitor has determined that this proposed rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order.

*Executive Order 13132—Federalism*

In accordance with Executive Order 13132, the proposed rule does not have significant Federalism implications to warrant the preparation of a Federalism Assessment for the reasons discussed above.

*Executive Order 13175—Consultation and Coordination With Indian Tribal Governments*

In accordance with Executive Order 13175, we have evaluated the potential effects of this proposed rule on Federally-recognized Indian tribes and have determined that the proposed revisions would not have substantial direct effects 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.

*Executive Order 13211—Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use*

This proposed rule is not considered a significant energy action under Executive Order 13211. The proposed revisions would not have a significant effect on the supply, distribution, or use of energy.

*Paperwork Reduction Act*

This proposed rule does not contain collections of information which require approval by the Office of Management and Budget under 44 U.S.C. 3501 *et seq.*

*National Environmental Policy Act*

This proposed rule does not require an environmental impact statement because section 702(d) of SMCRA (30 U.S.C. 1292(d)) provides that promulgation of Federal programs do not constitute major Federal actions within the meaning of section 102(2)(C) of the National Environmental Policy Act (42 U.S.C. 4332(2)(C)).

*Clarity of This Regulation*

Executive Order 12866 requires each agency to write regulations that are easy to understand. We invite your comments on how to make this proposed rule easier to understand, including answers to questions such as the following: (1) Are the requirements in the proposed rule clearly stated? (2) Does the proposed rule contain technical language or jargon that interferes with its clarity? (3) Does the format of the proposed rule (grouping and order of sections, use of headings, paragraphing, etc.) aid or reduce its clarity? (4) Would the rule be easier to understand if it were divided into more (but shorter) sections? (A ''section'' appears in bold type and is preceded by the symbol ''§ '' and a numbered heading; for example, § 942.800). (5) Is the description of the proposed rule in the **SUPPLEMENTARY INFORMATION** section of this preamble helpful in understanding the proposed rule? What else could we do to make the proposed rule easier to understand? Send a copy of any comments that concern how we could make this proposed rule easier to understand to: Office of Regulatory Affairs, Department of the Interior, Room 7229, 1849 C Street NW., Washington, DC 20240. You may also e-mail the comments to this address: *Exsec@ios.doi.gov.*

**List of Subjects in 30 CFR Part 942**

Intergovernmental relations, Surface mining, Underground mining.

Dated: March 21, 2006.

**R.M. ''Johnnie'' Burton,**

*Acting Assistant Secretary, Land and Minerals Management.*

For the reasons given in the preamble, we are proposing to amend 30 CFR part 942 as set forth below:

## PART 942—TENNESSEE

1. The authority citation for part 942 continues to read as follows:

**Authority:** 30 U.S.C. 1201 *et seq.*

2. Amend § 942.800 by adding new paragraph (b)(4) to read as follows:

### § 942.800 Bond and insurance requirements for surface coal mining and reclamation operations.

* * * * *

(b) * * *

(4) Special consideration for sites with long-term postmining pollutional

discharges. With the approval of the Office, the permittee may establish a trust fund or annuity to guarantee treatment of long-term postmining pollutional discharges. The trust fund or annuity will be subject to the following conditions:

(i) The Office will determine the amount of the trust fund or annuity, which must be adequate to meet all anticipated treatment needs, including both capital and operational expenses;

(ii) The trust fund or annuity must be in a form approved by the Office and contain all terms and conditions required by the Office;

(iii) The trust fund or annuity must provide that the Office is irrevocably established as the beneficiary of the trust fund or of the proceeds from the annuity;

(iv) The Office will specify the investment objectives of the trust fund or annuity;

(v) Termination of the trust fund or annuity may occur only as specified by the Office upon a determination that no further treatment or other reclamation measures are necessary or that a replacement bond or other financial instrument has been posted;

(vi) Release of money to the permittee from the trust fund or annuity may be made only upon written authorization of the Office;

(vii) A financial institution serving as a trustee or issuing an annuity must be one of the following: a bank or trust company chartered by the Tennessee Department of Financial Institutions; a national bank chartered by the Office of the Comptroller of the Currency; an operating subsidiary of a national bank chartered by the Office of the Comptroller of the Currency; any other financial institution with trust powers and with offices located in Tennessee, provided that institution's or company's activities are examined or regulated by a State or Federal agency;

(viii) Trust funds and annuities, as described in this paragraph, must be established to guarantee that moneys are available for the Office to pay for treatment of postmining pollutional discharges or reclamation of the mine site or both; and

(ix) When a trust fund or annuity is fully in place, the Office may approve final bond release under § 800.40(c)(3) for conventional bonds posted for a permit or permit increment, provided that, apart from the pollutional discharge, the area fully meets all applicable reclamation requirements and the trust fund is sufficient for treatment of pollutional discharges and reclamation of all areas involved in such treatment.

3. In § 942.816, revise paragraph (f)(3) introductory text and paragraph (f)(4) as follows:

**§ 942.816 Performance standards—Surface mining activities.**

* * * * *

(f) * * *

(3) For areas developed for wildlife habitat, undeveloped land, recreation, or forestry the stocking of woody plants shall be at least equal to the rates specified in the approved mining and reclamation plan. In order to minimize competition with woody plants, herbaceous ground cover should be limited to that necessary to control erosion and support the postmining land use. Seed mixes and seeding rates will be specified in the permit.

* * * * *

(4) Bare areas shall not exceed one-sixteenth (1/16) acre in size and total not more than ten percent (10%) of the area seeded, except for areas developed for wildlife habitat, undeveloped land, recreation, or forestry.

* * * * *

4. In § 942.817, revise paragraph (e)(3) introductory text and paragraph (e)(4) as follows:

**§ 942.817 Performance standards—Underground mining activities.**

* * * * *

(e) * * *

(3) For areas developed for wildlife habitat, undeveloped land, recreation, or forestry, the stocking of woody plants shall be at least equal to the rates specified in the approved mining and reclamation plan. In order to minimize competition with woody plants, herbaceous ground cover should be limited to that necessary to control erosion and support the postmining land use. Seed mixes and rates shall be specified in the permit.

* * * * *

(4) Bare areas shall not exceed one-sixteenth (1/16) acre in size and total not more than ten percent (10%) of the area seeded, except for areas developed for wildlife habitat, undeveloped land, recreation, or forestry.

* * * * *

[FR Doc. 06–3260 Filed 4–5–06; 8:45 am]

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## LIST OF PUBLIC LAWS

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**H.R. 4911/P.L. 109–212**

Higher Education Extension Act of 2006 (Apr. 1, 2006; 120 Stat. 321)

**Last List March 27, 2006**

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