



# Federal Register

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4. An introduction to the finding aids of the FR/CFR system.

**WHY:** To provide the public with access to information necessary to research Federal agency regulations which directly affect them. There will be no discussion of specific agency regulations.

**WHEN:** Tuesday, August 8, 2006  
9:00 a.m.-Noon

**WHERE:** Office of the Federal Register  
Conference Room, Suite 700  
800 North Capitol Street, NW.  
Washington, DC 20002

**RESERVATIONS:** (202) 741-6008



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Federal Register

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

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Part 39

[Docket No. FAA-2006-25537; Directorate Identifier 2006-NM-160-AD; Amendment 39-14708; AD 2006-16-08]

RIN 2120-AA64

#### Airworthiness Directives; Aerospatiale Model ATR42 and ATR72 Airplanes

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

**ACTION:** Final rule; request for comments.

**SUMMARY:** The FAA is adopting a new airworthiness directive (AD) for certain Aerospatiale Model ATR42 and ATR72 airplanes. This AD requires an inspection of the locking bolt of the upper attachment pin of the shock absorber on both main landing gears (MLGs) for the correct installation of the locking bolt and for any missing locking bolt, washer, nut, cotter pin, or compound, and applicable corrective action if necessary. This AD results from a report of migration and subsequent rupture of the attachment pin of the shock absorber of a MLG. We are issuing this AD to prevent failure of a MLG, which could result in significant structural damage to the airplane and possible injury to the occupants.

**DATES:** This AD becomes effective August 23, 2006.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in the AD as of August 23, 2006.

We must receive comments on this AD by October 10, 2006.

**ADDRESSES:** Use one of the following addresses to submit comments on this AD.

- DOT Docket Web site: Go to <http://dms.dot.gov> and follow the

instructions for sending your comments electronically.

- Government-wide rulemaking Web site: Go to <http://www.regulations.gov> and follow the instructions for sending your comments electronically.

- Mail: Docket Management Facility; U.S. Department of Transportation, 400 Seventh Street SW., Nassif Building, Room PL-401, Washington, DC 20590.

- Fax: (202) 493-2251.

- Hand Delivery: Room PL-401 on the plaza level of the Nassif Building, 400 Seventh Street SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Contact Messier Services, Customer Support Center (CSC) Americas, 45360 Severn Way, Sterling, Virginia 20166-8910, for service information identified in this AD.

**FOR FURTHER INFORMATION CONTACT:** Tom Rodriguez, Aerospace Engineer, International Branch, ANM-116, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98057-3356; telephone (425) 227-1137; fax (425) 227-1149.

#### SUPPLEMENTARY INFORMATION:

##### Discussion

The European Aviation Safety Agency (EASA), which is the airworthiness authority for the European Union, notified us that an unsafe condition may exist on certain Aerospatiale Model ATR42 and ATR72 airplanes. The EASA advises that it has received a report of migration and subsequent rupture of the attachment pin of the shock absorber of a main landing gear (MLG). Investigation revealed that the migration was due to the absence of the locking bolt, which was not installed during manufacturing. This condition, if not corrected, could result in failure of a MLG and consequent structural damage to the airplane and possible injury to the occupants.

Messier-Dowty has issued Special Inspection Service Bulletin 631-32-190, dated July 12, 2006. The service bulletin describes procedures for a visual inspection of the locking bolt of the upper attachment pin of the shock absorber on both MLGs for the correct installation of the locking bolt and for any missing locking bolt, washer, nut, cotter pin, or compound, and applicable corrective action if necessary. The

##### Relevant Service Information

Messier-Dowty has issued Special Inspection Service Bulletin 631-32-190, dated July 12, 2006. The service bulletin describes procedures for a visual inspection of the locking bolt of the upper attachment pin of the shock absorber on both MLGs for the correct installation of the locking bolt and for any missing locking bolt, washer, nut, cotter pin, or compound, and applicable corrective action if necessary. The

corrective action includes installing any missing locking bolt, cotter pin, nut, washer, or compound, and ensuring proper installation of the locking bolt. Accomplishing the actions specified in the service information is intended to adequately address the unsafe condition. The EASA mandated the service bulletin and issued emergency airworthiness directive 2006-0216-E, dated July 14, 2006, to ensure the continued airworthiness of these airplanes in the European Union.

#### FAA's Determination and Requirements of This AD

These airplane models are manufactured in France and are type certificated for operation in the United States under the provisions of section 21.29 of the Federal Aviation Regulations (14 CFR 21.29) and the applicable bilateral airworthiness agreement. As described in FAA Order 8100.14A, "Interim Procedures for Working with the European Community on Airworthiness Certification and Continued Airworthiness," dated August 12, 2005, the EASA has kept the FAA informed of the situation described above. We have examined the EASA's findings, evaluated all pertinent information, and determined that we need to issue an AD for products of this type design that are certificated for operation in the United States.

Therefore, we are issuing this AD to prevent failure of a MLG, which could result in significant structural damage to the airplane and possible injury to the occupants. This AD requires accomplishing the actions specified in the service information described previously, except as discussed under "Difference Between the AD and Service Bulletin."

#### Difference Between the AD and Service Bulletin

The service bulletin specifies to contact the manufacturer for instructions on how to repair certain conditions, but this AD requires repairing those conditions using a method that we or the EASA (or its delegated agent) approve. In light of the type of repair that is required to address the unsafe condition, and consistent with existing bilateral airworthiness agreements, we have determined that, for this AD, a repair we or the EASA approve is acceptable for compliance with this AD.

### FAA's Determination of the Effective Date

An unsafe condition exists that requires the immediate adoption of this AD; therefore, providing notice and opportunity for public comment before the AD is issued is impracticable, and good cause exists to make this AD effective in less than 30 days.

### Comments Invited

This AD is a final rule that involves requirements that affect flight safety and was not preceded by notice and an opportunity for public comment; however, we invite you to submit any relevant written data, views, or arguments regarding this AD. Send your comments to an address listed in the **ADDRESSES** section. Include "Docket No. FAA-2006-25537; Directorate Identifier 2006-NM-160-AD" at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of the AD that might suggest a need to modify it.

We will post all comments we receive, without change, to <http://dms.dot.gov>, including any personal information you provide. We will also post a report summarizing each substantive verbal contact with FAA personnel concerning this AD. Using the search function of that Web site, anyone can find and read the comments in any of our dockets, including the name of the individual who sent the comment (or signed the comment on behalf of an association, business, labor union, etc.). You may review the DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477-78), or you may visit <http://dms.dot.gov>.

### Examining the Docket

You may examine the AD docket on the Internet at <http://dms.dot.gov>, or in person at the Docket Management Facility office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Management Facility office (telephone (800) 647-5227) is located on the plaza level of the Nassif Building at the DOT street address stated in the **ADDRESSES** section. Comments will be available in the AD docket shortly after the Docket Management System receives them.

### Authority for This Rulemaking

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

detail the scope of the Agency's authority.

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

### Regulatory Findings

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

For the reasons discussed above, I certify that the regulation:

1. Is not a "significant regulatory action" under Executive Order 12866;
2. Is not a "significant rule" under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and
3. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

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

### List of Subjects in 14 CFR Part 39

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

### Adoption of the Amendment

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

### PART 39—AIRWORTHINESS DIRECTIVES

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

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

#### § 39.13 [Amended]

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

**2006-16-08 Aerospatiale:** Amendment 39-14708. Docket No. FAA-2006-25537; Directorate Identifier 2006-NM-160-AD.

### Effective Date

(a) This AD becomes effective August 23, 2006.

### Affected ADs

(b) None.

### Applicability

(c) This AD applies to airplanes identified in Table 1 of this AD, certificated in any category.

TABLE 1.—APPLICABILITY

Aerospatiale model	Manufacturer serial numbers (MSN)
(1) ATR42-200, -300, -320, and -500 airplanes.	Up to MSN 645 inclusive.
(2) ATR72-101, -201, -102, -202, -211, -212, and -212A airplanes.	Up to MSN 730 inclusive, excluding MSN 723.

### Unsafe Condition

(d) This AD results from a report of migration and subsequent rupture of the attachment pin of the shock absorber of a main landing gear (MLG). We are issuing this AD to prevent failure of a MLG, which could result in significant structural damage to the airplane and possible injury to the occupants.

### Compliance

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

### General Visual Inspection and Corrective Action

(f) Within 15 days after the effective date of this AD, do a general visual inspection of the locking bolt of the upper attachment pin of the shock absorber on both MLGs for the correct installation of the locking bolt and for any missing locking bolt, washer, nut, cotter pin, or compound; and before further flight, do all applicable corrective actions. Do the actions in accordance with the Accomplishment Instructions of Messier-Dowty Special Inspection Service Bulletin 631-32-190, dated July 12, 2006, except as provided by paragraph (g) of this AD.

**Note 1:** For the purposes of this AD, a general visual inspection is: "A visual examination of an interior or exterior area, installation, or assembly to detect obvious damage, failure, or irregularity. This level of inspection is made from within touching distance unless otherwise specified. A mirror may be necessary to ensure visual access to all surfaces in the inspection area. This level of inspection is made under normally available lighting conditions such as daylight, hangar lighting, flashlight, or droplight and may require removal or opening of access panels or doors. Stands, ladders, or platforms may be required to gain proximity to the area being checked."

(g) Where Messier-Dowty Special Inspection Service Bulletin 631-32-190, dated July 12, 2006, specifies contacting Messier-Dowty for appropriate action: Before further flight, repair the locking bolt using a method approved by either the Manager, International Branch, ANM-116, Transport Airplane Directorate, FAA; or the European Aviation Safety Agency (EASA) (or its delegated agent).

#### Alternative Methods of Compliance (AMOCs)

(h)(1) The Manager, International Branch, ANM-116, has the authority to approve AMOCs for this AD, if requested in accordance with the procedures found in 14 CFR 39.19.

(2) Before using any AMOC approved in accordance with § 39.19 on any airplane to which the AMOC applies, notify the appropriate principal inspector in the FAA Flight Standards Certificate Holding District Office.

#### Related Information

(i) EASA emergency airworthiness directive 2006-0216-E, dated July 14, 2006, also addresses the subject of this AD.

#### Material Incorporated by Reference

(j) You must use Messier-Dowty Special Inspection Service Bulletin 631-32-190, dated July 12, 2006, to perform the actions that are required by this AD, unless the AD specifies otherwise. The Director of the Federal Register approved the incorporation by reference of this document in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Contact Messier Services, Customer Support Center (CSC) Americas, 45360 Severn Way, Sterling, Virginia 20166-8910, for a copy of this service information. You may review copies at the Docket Management Facility, U.S. Department of Transportation, 400 Seventh Street, SW., Room PL-401, Nassif Building, Washington, DC; on the Internet at <http://dms.dot.gov>; or at the National Archives and Records Administration (NARA). For information on the availability of this material at the NARA, call (202) 741-6030, or go to [http://www.archives.gov/federal\\_register/code\\_of\\_federal\\_regulations/ibr\\_locations.html](http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html).

Issued in Renton, Washington, on July 28, 2006.

**Ali Bahrami,**

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

[FR Doc. E6-12726 Filed 8-7-06; 8:45 am]

**BILLING CODE 4910-13-P**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Part 71

[Docket No. FAA-2006-25008; Airspace Docket No. 06-ACE-6]

#### Modification of Class E Airspace; Kaiser/Lake Ozark, MO

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

**ACTION:** Direct final rule; request for comments.

**SUMMARY:** This action amends Title 14 Code of Federal Regulations, part 71 (14 CFR 71) by modifying Class E airspace at Kaiser/Lake Ozark, MO. Standard Instrument Approach Procedures have been developed for Lee C. Fine Memorial Airport, Kaiser/Lake Ozark, MO. Controlled airspace extending upward from 700 feet or more above the surface of the earth is needed to contain aircraft executing these approaches. This action increases the area of the existing controlled airspace for Kaiser/Lake Ozark, MO.

**DATES:** This direct final rule is effective on 0901 UTC, November 23, 2006. Comments for inclusion in the Rules Docket must be received on or before September 1, 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 the docket number FAA-2006-25008/Airspace Docket No. 06-ACE-6, at the beginning of your comments. You may also submit comments on the Internet at <http://dms.dot.gov>. You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Office (telephone 1-800-647-5527) is on the plaza level of the Department of Transportation NASSIF Building at the above address.

**FOR FURTHER INFORMATION CONTACT:** Grant Nichols, Airspace Branch, ACE-520G, DOT Regional Headquarters Building, Federal Aviation Administration, 901 Locust, Kansas City, MO 64106; telephone: (816) 329-2522.

**SUPPLEMENTARY INFORMATION:** This amendment to 14 CFR 71 modifies the Class E airspace area extending upward from 700 feet above the surface of the earth at Lee C. Fine Memorial Airport, Kaiser/Lake Ozark, MO. The radius of

the Class E airspace area extending upward from 700 feet above the surface of the earth is expanded from within a 6.5-mile radius to within a 7-mile radius of the airport, and the northeast extension from the Kaiser Nondirectional Beacon (NDB) is deleted. These modifications bring the legal description of the Lee C. Fine Memorial Airport, Kaiser/Lake Ozark, MO Class E airspace area into compliance with FAA Orders 7400.2F and 8260.19C. Class E airspace areas extending upward from 700 feet or more above the surface of the earth are published in Paragraph 6005 of FAA Order 7400.9N, Airspace Designations and Reporting Points, dated September 1, 2005, and effective September 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 Direct Final Rule Procedure

The FAA anticipates that this regulation will not result in adverse or negative comment and, therefore, is issuing it as a direct final rule. Previous actions of this nature have not been controversial and have not resulted in adverse comments or objections. Unless a written adverse or negative comment or a written notice of intent to submit an adverse or negative comment is received within the comment period, the regulation will become effective on the date specified above. After the close of the comment period, the FAA will publish a document in the **Federal Register** indicating that no adverse or negative comments were received and confirming the date on which the final rule will become effective. If the FAA does receive, within the comment period, an adverse or negative comment, or written notice of intent to submit such a comment, a document withdrawing the direct final rule will be published in the **Federal Register**, and a notice of proposed rulemaking may be published with a new comment period.

#### Comments Invited

Interested parties are invited to participate in this rulemaking by submitting such written data, views, or arguments, as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal. Communications should identify both docket numbers and be submitted in

triplicate to the address listed above. Commenters wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket No. FAA 2006-25008/Airspace Docket No. 06-ACE-6." The postcard will be date/time stamped and returned to the commenter.

#### Agency Findings

The regulations adopted herein will not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, it is determined that this final rule does not have federalism implications under Executive Order 13132.

The FAA has determined that this regulation is noncontroversial and unlikely to result in adverse or negative comments. For the reasons discussed in the preamble, I certify that this 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) if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

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

#### List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

#### Adoption of the Amendment

■ Accordingly, the Federal Aviation Administration amends 14 CFR part 71 as follows:

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

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

**Authority:** 49 U.S.C. 106(g), 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959-1963 Comp., p. 389.

#### § 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of Federal Aviation Administration Order 7400.9N, dated September 1, 2005, and effective September 16, 2005, is amended as follows:

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

\* \* \* \* \*

#### ACE MO E5 Kaiser/Lake Ozark, MO

Kaiser/Lake Ozark, Lee C. Fine Memorial Airport, MO

(Lat. 38°05'46" N., long. 92°32'58" W.)

Camdenton Memorial Airport, MO

(Lat. 37°58'26" N., long. 92°41'28" W.)

Osage Beach, Grand Glaize-Osage Beach Airport, MO

(Lat. 38°06'38" N., long. 92°40'50" W.)

That airspace extending upward from 700 feet above the surface of the earth within a 7-mile radius of Lee C. Fine Memorial Airport and within a 6.3-mile radius of Camdenton Memorial Airport and within a 6.3-mile radius of Grand Glaize-Osage Beach Airport.

\* \* \* \* \*

Dated: Issued in Kansas City, MO, on July 26, 2006.

**Donna R. McCord,**

*Acting Area Director, Western Flight Services Operations.*

[FR Doc. 06-6698 Filed 8-7-06; 8:45am]

**BILLING CODE 4910-13-M**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

#### 21 CFR Part 558

#### New Animal Drugs For Use in Animal Feeds; Oxytetracycline

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Final rule.

**SUMMARY:** The Food and Drug Administration (FDA) is amending the animal drug regulations to reflect approval of a supplemental new animal drug application (NADA) filed by Phibro Animal Health. The

supplemental NADA provides for the approval of the dihydrate salt of oxytetracycline in their Type A medicated article used in aquaculture feed, a change of oxytetracycline concentration in the Type A medicated article, and the addition of an indication for control of gaffkemia in lobsters.

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

**FOR FURTHER INFORMATION CONTACT:** Joan C. Gotthardt, Center for Veterinary Medicine (HFV-130), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 301-827-7571, e-mail: [joan.gotthardt@fda.hhs.gov](mailto:joan.gotthardt@fda.hhs.gov).

**SUPPLEMENTARY INFORMATION:** Phibro Animal Health, 65 Challenger Rd., 3d floor, Ridgefield Park, NJ 07660, filed a supplement to NADA 38-439 for TERRAMYCIN for Fish (oxytetracycline) Type A medicated article used for control of certain bacterial diseases in several aquaculture species and for skeletal marking of Pacific salmon. The supplement provides for the approval of the dihydrate salt of oxytetracycline, a change of oxytetracycline concentration in the Type A medicated article, and the addition of an indication for control of gaffkemia in lobsters. The supplemental NADA is approved as of June 30, 2006, and the regulations are amended in 21 CFR 558.450 to reflect the approval. The basis of approval is discussed in the freedom of information summary.

In accordance with the freedom of information provisions of 21 CFR part 20 and 21 CFR 514.11(e)(2)(ii), a summary of safety and effectiveness data and information submitted to support approval of this application may be seen in the Division of Dockets Management (HFA-305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852, between 9 a.m. and 4 p.m., Monday through Friday.

The agency has determined under 21 CFR 25.33(a) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

This rule does not meet the definition of "rule" in 5 U.S.C. 804(3)(A) because it is a rule of "particular applicability." Therefore, it is not subject to the congressional review requirements in 5 U.S.C. 801-808.

#### List of Subjects in 21 CFR Part 558

Animal drugs, Animal feeds.

■ Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner

of Food and Drugs and redelegated to the Center for Veterinary Medicine, 21 CFR part 558 is amended as follows:

**PART 558—NEW ANIMAL DRUGS FOR USE IN ANIMAL FEEDS**

■ 1. The authority citation for 21 CFR part 558 continues to read as follows:

**Authority:** 21 U.S.C. 360b, 371.

**§ 558.450 [Amended]**

■ 2. In § 558.450, in the table in paragraph (d)(2)(i) in the “Limitations” column, remove “in feed containing oxytetracycline hydrochloride or mono-alkyl (C<sub>8</sub>–C<sub>18</sub>) trimethyl ammonium oxytetracycline”; in the table in paragraph (d)(2)(ii) in the “Limitations” column for both entries “1” and “2”, remove “as mono-alkyl (C<sub>8</sub>–C<sub>18</sub>) trimethyl ammonium oxytetracycline”; and in the table in paragraph (d)(2)(iii) in the “Limitations” column, remove “in feed containing monoalkyl (C<sub>8</sub>–C<sub>18</sub>) trimethyl ammonium oxytetracycline”.

Dated: July 25, 2006.

**Bernadette A. Dunham,**

*Deputy Director, Office of New Animal Drug Evaluation, Center for Veterinary Medicine.*

[FR Doc. E6–12862 Filed 8–7–06; 8:45 am]

**BILLING CODE 4160–01–S**

**DEPARTMENT OF THE TREASURY**

**Internal Revenue Service**

**26 CFR Part 1**

[TD 9273]

RIN 1545–AX65

**Stock Transfer Rules: Carryover of Earnings and Taxes**

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Final regulations.

**SUMMARY:** This document contains final regulations addressing the carryover of certain tax attributes, such as earnings and profits and foreign income tax accounts, when two corporations combine in a corporate reorganization or liquidation that is described in both section 367(b) and section 381 of the Internal Revenue Code (Code).

**DATES:** *Effective Date:* These regulations are effective August 8, 2006.

*Applicability Date:* These regulations apply to certain section 367(b) exchanges that occur on or after November 6, 2006.

**FOR FURTHER INFORMATION CONTACT:** Jeffrey L. Parry at (202) 622–3850 (not a toll-free number).

**SUPPLEMENTARY INFORMATION:**

**Background**

The Treasury Department and the IRS issued final regulations ”1.367(b)–1 through 1.367(b)–6, dealing with tax consequences of certain foreign-to-foreign and inbound corporate transactions, in June 1998 and January 2000 (the January 2000 final regulations). The preamble to the January 2000 final regulations referred to proposed regulations that would be issued to address the carryover of certain corporate tax attributes in transactions involving one or more foreign corporations. Those proposed regulations were issued on November 15, 2000, in the **Federal Register** (65 FR 69138) (REG–116050–99)) (the 2000 proposed regulations). The public hearing with respect to the 2000 proposed regulations was cancelled because no request to speak was received. However, the Treasury Department and the IRS received and considered several written comments, which are discussed in this preamble.

After consideration of the 2000 proposed regulations and the comments received, the Treasury Department and the IRS adopt substantial portions of those proposed regulations with significant modifications as final regulations under section 367(b).

**Overview**

*A. General Policies of Section 367(b)*

In general, section 367 governs corporate restructurings under sections 332, 351, 354, 355, 356, and 361 (Subchapter C nonrecognition transactions) in which the status of a foreign corporation as a “corporation” is necessary for the application of the relevant Subchapter C nonrecognition provisions. Other provisions in Subchapter C (Subchapter C carryover provisions) apply to such transactions in conjunction with the enumerated provisions and detail additional consequences that occur in connection with the transactions. For example, sections 362 and 381 govern the carryover of basis and earnings and profits from the transferor corporation to the transferee corporation in applicable transactions.

The Subchapter C carryover provisions generally are drafted to apply to domestic corporations and U.S. shareholders. As a result, those provisions often do not fully take into account the relevant cross-border aspects of U.S. taxation. For example, section 381 does not specifically take into account source and foreign tax credit issues that arise when earnings

and profits move from one corporation to another.

Congress enacted section 367(b) to ensure that international tax considerations in the Code are adequately addressed when the Subchapter C provisions apply to an exchange involving a foreign corporation. A primary consideration in this regard is to prevent the avoidance of U.S. taxation. Because determining the proper interaction of the Code’s international and Subchapter C provisions is “necessarily highly technical,” Congress granted the Secretary broad regulatory authority to provide the “necessary or appropriate” rules rather than enacting a more comprehensive statutory regime. H.R. Rep. No. 658, 94th Cong., 1st Sess. 241 (1975). Thus, section 367(b)(2) provides in part that the regulations “shall include (but shall not be limited to) regulations \* \* \* providing \* \* \* the extent to which adjustments shall be made to earnings and profits, basis of stock or securities, and basis of assets.”

These final regulations address the carryover of foreign earnings and profits and foreign income taxes in tax-free corporate asset acquisitions by generally applying the principles of Subchapter C provisions such as section 381, which governs the carryover of earnings and profits (and other tax attributes) in certain tax-free corporate reorganizations described in section 368 and in corporate liquidations described in section 332. However, these regulations (like the 2000 proposed regulations) modify certain of the mechanics of the Subchapter C rules as necessary or appropriate to ensure that those rules are as consistent as possible with key international tax policies of the Code and to prevent material distortions of income.

These final regulations address the portions of the 2000 proposed regulations (Prop. Reg.) dealing with inbound nonrecognition transactions (Prop. Reg. § 1.367(b)–3) and foreign section 381 transactions (Prop. Reg. § 1.367(b)–7). They also address the special rules of Prop. Reg. § 1.367–9. The final regulations, however, do not address the portions of the 2000 proposed regulations involving corporate divisions of one or more foreign corporations (Prop. Reg. § 1.367(b)–8). The Treasury Department and the IRS believe that relevant cross-border tax consequences of section 355 transactions should be dealt with in a separate guidance project.

*B. Specific Policies Related to Inbound Nonrecognition Transactions*  
(§ 1.367(b)-3)

Section 1.367(b)-3 addresses acquisitions by a domestic corporation (domestic acquiring corporation) of the assets of a foreign corporation (foreign acquired corporation) in a section 332 liquidation or an asset acquisition described in section 368(a)(1), such as an A, C, D, or F reorganization (inbound nonrecognition transaction). Regulations applying section 367 and section 368 to cross-border A reorganizations were recently issued. See TD 9242 (2006-7 I.R.B. 422).

As a general policy matter, the importation of various tax attributes in inbound transactions is carefully scrutinized. In fact, inbound importation issues have been the subject of recent legislative reforms (see section 362(e)). The policy relating to importation of tax attributes also has been reflected in prior section 367 regulations. For example, the preamble to the January 2000 final regulations generally describes international policy issues that can arise in inbound nonrecognition transactions. The preamble states that the "principal policy consideration of section 367(b) with respect to inbound nonrecognition transactions is the appropriate carryover of attributes from foreign to domestic corporations. This consideration has interrelated shareholder-level and corporate-level components." The January 2000 final regulations clarify that a domestic acquiring corporation succeeds to those foreign taxes paid or accrued by a foreign target corporation only to the extent those taxes are eligible for credit under section 906.

The preamble to the January 2000 final regulations also notes that it would be consistent with the policy considerations of section 367(b) for future regulations to provide additional rules with respect to the extent to which attributes carry over from a foreign corporation to a U.S. corporation. Accordingly, the 2000 proposed regulations provided rules concerning several attributes, specifically net operating loss and capital loss carryovers, and earnings and profits that are not included in income as an all earnings and profits amount (or a deficit in earnings and profits). The 2000 proposed regulations generally provided that these tax attributes carry over from a foreign acquired corporation to a domestic acquiring corporation only to the extent that they are effectively connected with a U.S. trade or business (or attributable to a permanent establishment, in the case of an

applicable U.S. income tax treaty). These final regulations adopt the rules set forth in the 2000 proposed regulations.

*C. Specific Policies Related to Foreign Section 381 Transactions* (§ 1.367(b)-7)

Section 1.367(b)-7 applies to an acquisition by a foreign corporation (foreign acquiring corporation) of the assets of another foreign corporation (foreign target corporation) in a transaction described in section 381 (foreign section 381 transaction) and addresses the manner in which earnings and profits and foreign income taxes of the foreign acquiring corporation and foreign target corporation carry over to the surviving foreign corporation (foreign surviving corporation). These rules apply, for example, to A, C, D, or F reorganizations or section 332 liquidations between two foreign corporations.

The principal Code sections implicated by the carryover of earnings and profits and foreign income taxes in a foreign section 381 transaction are sections 381, 902, 904, and 959. Section 381 generally permits earnings and profits (or deficit in earnings and profits) to carry over to a surviving corporation, thus enabling "the successor corporation to step into the 'tax shoes' of its predecessor. \* \* \* [and] represents the economic integration of two or more separate businesses into a unified business enterprise." H. Rep. No. 1337, 83rd Cong. 2nd Sess. 41 (1954). However, a deficit in earnings and profits of either the transferee or transferor corporation can only be used to offset earnings and profits accumulated after the date of transfer. Section 381(c)(2)(B). This is commonly known as the "hovering deficit rule". The hovering deficit rule is a legislative mechanism designed to deter the trafficking in favorable tax attributes that the IRS and courts had repeatedly encountered. See, for example, *Commissioner v. Phipps*, 336 U.S. 410 (1949) final regulations generally adopt the principles of section 381 in the cross-border context, but adapt the operation of those rules in consideration of the international provisions, such as sections 902, 904, and 959, that address foreign corporations' earnings and profits and their related foreign income taxes. Thus, for example, these final regulations apply the section 381 earnings and profits combination and deficit rules by reference to the separate categories income described in section 904(d) and elsewhere (baskets) that are used to compute foreign tax credit limitations.

Section 902 generally provides that a deemed paid foreign tax credit is available to a domestic corporation that receives a dividend from a foreign corporation in which it owns 10 percent or more of the voting stock. The Code computes deemed-paid taxes with regard to dividends from a relevant foreign corporation by looking first to the multi-year pools of earnings and profits accumulated (and related foreign income taxes paid or deemed paid) in taxable years beginning after December 31, 1986, or beginning with the first year in which a domestic corporation owns 10 percent or more of the voting stock of the foreign corporation, whichever is later. Section 902(c). (The Code and regulations refer to pooled earnings and profits and foreign income taxes as post-1986 undistributed earnings and post-1986 foreign income taxes even though a particular corporation may not begin to maintain multi-year pools until after 1986. Sections 902(c)(1) and (2), § 1.902-1(a)(8) and (9).)

Congress enacted the pooling rules because it believed that blending foreign income taxes and earnings and profits into "pools" from which distributions are made was fairer and more appropriate than computing deemed-paid taxes with reference to annual layers of earnings and profits (and foreign income taxes). Joint Committee on Taxation, 99th Cong., 2nd sess., General Explanation of the Tax Reform Act of 1986 (JCS-10-87) (1986 Bluebook), at 870 (May 4, 1987). Averaging foreign income taxes through these blended pools prevents taxpayers from inflating their foreign subsidiary's effective tax rate for a particular year in order to obtain artificially enhanced foreign tax credits. *Id.* Averaging also prevents the loss of credits for foreign income taxes that are trapped in years in which a foreign subsidiary has no earnings and profits for U.S. tax purposes. *Id.*

However, Congress enacted pooling on a limited basis. Earnings and profits accumulated (and related foreign income taxes paid or deemed paid) in taxable years before the first year a foreign corporation qualifies as a pooling corporation and pre-1987 earnings and profits accumulated (and related foreign income taxes paid or deemed paid) by a pooling corporation are not subject to the pooling rules. Rather, such earnings and profits (and related foreign income taxes) are maintained in separate annual layers. Section 902(c)(6). The Code and regulations refer to earnings and profits and foreign income taxes in annual layers as pre-1987 accumulated profits and pre-1987 foreign income taxes even

though a particular corporation may have annual layers for years after 1986 (because of the absence of the requisite domestic corporate shareholder). Section 902(c)(6); § 1.902-1(a)(10).

A distribution of earnings and profits is treated as first out of pooled earnings and profits and then, only after all pooled earnings and profits have been distributed, out of annual layers of earnings and profits on a LIFO basis. Section 902(a) and (c). The retention of annual layers beneath pooled earnings and profits limits the need to recreate tax histories, an administrative burden that is more significant for periods during which a corporation had limited nexus to the U.S. taxing jurisdiction and for pre-1987 earnings and profits when pooling was not required.

The foreign tax credit limitation ensures that taxpayers can use foreign tax credits only to offset U.S. tax on foreign source income. The limitation is computed separately with respect to different baskets of income derived from different types of activities. (From 1987 through 2006, section 904 provides for eight different baskets of income; for tax years beginning after December 31, 2006, all but two section 904(d) baskets of income are eliminated. Separate baskets described in other Code sections such as sections 56(g)(4)(C)(iii)(IV), 245(a)(10), 865(h), 901(j), and 904(g)(10) will continue in effect after 2006. The American Jobs Creation Act of 2004, Public Law 108-357, 118 Stat. 1418 (AJCA), section 404(a).) The purpose of the baskets is to limit taxpayers' ability to cross-credit taxes imposed with respect to different categories of income. Congress was concerned that, without separate limitations, cross-crediting opportunities would distort economic incentives as to whether to invest in the United States or abroad. 1986 Bluebook at 862.

Another international provision implicated by the movement of earnings and profits in foreign section 381 transactions is section 959. Section 959 governs the distribution of earnings and profits that represent income that has been previously taxed to U.S. shareholders under section 951(a) (PTI). After studying the interaction of section 367(b) and the PTI rules, the Treasury Department and the IRS determined that more guidance under section 959 would be useful before issuing regulations to address PTI issues that arise under section 367(b). Accordingly, the Treasury Department and the IRS have opened a separate regulations project under section 959 and expect to issue regulations that address PTI issues under section 959 in the future. Because this project is still ongoing, these final

regulations reserve on section 367(b) issues related to PTI. Guidance in this area will come in a separate project.

### Summary of Comments Received and Changes Made

#### A. Inbound Nonrecognition Transactions

A comment was received regarding the provision under the 2000 proposed regulations that limits the carryover of earnings and profits (or deficit in earnings and profits) from a foreign corporation to a domestic corporation in an inbound nonrecognition transaction to those earnings and profits that are effectively connected with the conduct of a trade or business within the United States (or are attributable to a permanent establishment in the United States, in the context of an applicable U.S. income tax treaty). The comment suggests that there are better ways to avoid the two most significant problems of importing foreign earnings into domestic corporate solution: Potential dividends-received deductions on subsequent distribution of the previously untaxed foreign earnings, and taxing distributions of previously taxed earnings and profits described in section 959. The comment goes on to state that, in particular, eliminating deficits but taxing positive earnings on an inbound nonrecognition transaction by way of the all earnings and profits inclusion under § 1.367(b)-3 is inappropriate.

The Treasury Department and the IRS have considered this comment. While the comment identifies asymmetries in the tax treatment of inbound reorganizations, on balance the Treasury Department and the IRS believe that the 2000 proposed regulations reached the appropriate result. As indicated above, the importation of favorable tax attributes has been subject to greater scrutiny in recent years. See, for example, section 362(e). In that context, it is not appropriate to provide for the carryover of deficits or of earnings and profits in excess of the all earnings and profits inclusion. This conclusion also has the benefit of administrative ease for taxpayers and the IRS. Accordingly, these final regulations do not modify the rules regarding inbound nonrecognition transactions as set forth in the 2000 proposed regulations, except to reserve on the treatment of PTI for further consideration.

#### B. Paradigm Based on Pooling Rather Than Look-Through

The structure of the 2000 proposed regulations was based in large part on the categorization of foreign acquiring, target, and surviving corporations as

look-through corporations, non-look-through corporations, or less-than-10%-U.S.-owned foreign corporations. Under the international provisions of the Code in effect at the time the 2000 proposed regulations were published, a look-through-corporation included a controlled foreign corporation as defined in section 957 (CFC) or a noncontrolled section 902 corporation as defined in section 904(d)(2)(E) after 2003 (a look-through 10/50 corporation), the effective date of section 1105(b) of Public Law 105-34 (111 Stat. 788) (the 1997 Act). A non-look-through corporation was a noncontrolled section 902 corporation before 2003 (non-look-through 10/50 corporation) and a less-than-10%-U.S.-owned foreign corporation was a foreign corporation that was neither a CFC nor a 10/50 corporation.

The pools of earnings and profits and foreign taxes associated with these three categories of corporations were referred to as the look-through pool, the non-look-through pool, and the pre-pooling annual layers, respectively. A number of statutory and regulatory changes that have occurred since the time the 2000 proposed regulations were published, however, have necessitated appropriate changes (and simplification) in the organizational paradigm for these final regulations.

At the time the 2000 proposed regulations were issued (and continuing prior to the AJCA), the treatment of dividends from a 10/50 corporation paid after 2002 varied according to the year in which the earnings and profits from which the dividend was paid were accumulated. The look-through approach applied to dividends paid out of earnings and profits accumulated after 2002, whereas dividends paid out of earnings and profits accumulated prior to 2003 were subject to a single separate limitation for dividends from all 10/50 corporations. Joint Committee on Taxation, 105th Cong., 1st sess., General Explanation of Tax Legislation enacted in 1997 (JCS-23-97), at 303 (December 17, 1997). The AJCA conference report indicates that Congress changed the treatment of dividends from 10/50 corporations for purposes of simplification. H.R. Rep. No. 108-548, pt. 1 at 192 (2004).

In 2004, Congress amended the Code (the 2004 amendment) to provide that any dividend paid by a noncontrolled section 902 corporation (10/50 corporation), as defined in section 904(d)(2)(E), to a 10 percent or greater U.S. corporate shareholder is treated as income in a basket based on the ratio of the earnings and profits attributable to income in such basket to the foreign

corporation's total earnings and profits (the "look-through" approach). AJCA, section 403. The 2004 amendment was effective retroactively, for taxable years beginning after December 31, 2002. Section 403(l) of the Gulf Opportunity Zone Act of 2005, Public Law 109-135 (119 Stat. 2577), permitted taxpayers to elect to defer the effective date of the 2004 amendment to taxable years beginning after December 31, 2004.

Also, as part of the 2004 amendment, dividends paid to 10% domestic corporate shareholders of a CFC are eligible for look-through treatment, even if they are paid out of earnings that were accumulated while the corporation was not a CFC. Section 904(d)(4); see also § 1.904-7T(f)(3) and (6). Prior to the effective date of the 2004 amendment, dividends paid out of such earnings were subject to a separate limitation. See 26 CFR 1.904-4(g)(2)(ii) (revised as of April 1, 2006).

As a result of the 2004 amendment, the terms *non-look-through 10/50 corporation* and the related *non-look-through pool* as defined in the 2000 proposed regulations have become obsolete and therefore have been eliminated in these final regulations. More generally, in light of the broader availability of look-through treatment to earnings paid out of pre-pooling annual layers, the Treasury Department and the IRS believe that a paradigm centered on look-through or non-look-through status is less relevant. Accordingly, the organization of these final regulations is based on the categorization of foreign acquiring, target, and surviving corporations as pooling or nonpooling corporations. The relevant pools of earnings and profits and associated foreign taxes are referred to as post-1986 pools and pre-pooling annual layers. Qualifying shareholders are eligible for look-through treatment on dividends out of post-1986 pools and pre-pooling annual layers to the extent provided in section 904(d)(3) and (4).

### C. Hovering Deficits and Section 316

Comments were received regarding the application under the 2000 proposed regulations of the hovering deficit rules on a "basket-by-basket" basis. Under the 2000 proposed regulations, a pre-transaction deficit in a particular basket is generally subject to the hovering deficit rule of section 381. As a result, that deficit is not taken into account in determining the current or accumulated earnings and profits of the surviving corporation for any purpose, including for purposes of determining dividends under section 316 and for determining foreign tax credits under section 902. However, any such pre-

transaction deficits in earnings and profits may be used to offset a foreign surviving corporation's accumulated (but not current) post-transaction earnings and profits in the same basket as the deficit.

Several comments noted that, in certain circumstances, this rule can give rise to hovering deficits from one (or both) of the merging corporations even if it (or they) had aggregate positive earnings and profits immediately prior to the section 381 transaction. In addition, if one (or both) of the merging corporations' pre-transaction earnings consist both of positive earnings in one basket and a deficit in another basket, the earnings and profits of that corporation available to support a dividend under section 316 will increase solely as a result of entering into the section 381 transaction. This is because the hovering deficit will no longer offset the positive earnings in the other basket for purposes of section 316. As a result, even if a corporation has an aggregate deficit in earnings and profits, any positive baskets of earnings will be able to support the distribution of a dividend immediately after the transaction.

The comments contend that the prohibition described above against the use of an earnings and profits deficit in one basket from offsetting positive earnings and profits in another basket can produce results that are inconsistent with the result of applying a pure section 381(c)(2)(B) approach in determining the amount of a distribution that is a "dividend" under section 316, and more generally are inconsistent with the principles and legislative history of the section 381(c)(2)(B) hovering deficit rule, which was adopted to preserve, but not create, the taxation of distributions by corporations that engage in tax-free reorganizations or liquidations.

To address these concerns, the comments requested that (among other things) the proposed regulations be modified to conform to the principles contained in Notice 88-71 (1988-2 C.B. 374), and § 1.960-1(i)(4), which pro-rate an earnings and profits deficit in one basket against positive earnings and profits in other baskets for purposes of computing post-1986 undistributed earnings under section 902. It was also requested that the rules under § 1.960-1(i)(4) should be modified for purposes of the hovering deficit rules to eliminate the "springing" effect of an earnings and profits deficit. Section 1.960-1(i)(4) provides that a deficit in any basket does not permanently reduce earnings in other baskets, but after the deemed-paid taxes are computed, the deficit

reverts to and is carried forward in the same basket in which it was incurred. It was asserted in the comments that once a hovering deficit is used to reduce earnings in another basket, it should not revert to its original basket in a subsequent taxable year because this deficit reincarnation results in unnecessary complexity in the calculation of earnings and profits.

The Treasury Department and the IRS have carefully considered these comments. After this consideration, they have concluded that the arguments in these comments ultimately are not persuasive. The purpose of the hovering deficit rule in the domestic context is to prevent trafficking in deficits in earnings and profits. Absent this rule, a corporation with positive earnings and profits could acquire or be acquired by another corporation with a deficit in earnings and profits and immediately reduce the amount of its positive earnings and profits, thereby reducing the amount of potentially taxable distributions.

In transactions involving foreign corporations, similar concerns exist regarding the possibility of trafficking in deficits in earnings and profits. In light of the foreign tax credit rules, unique tax benefits may arise from combining positive and deficit earnings and profits of different foreign corporations. In a reorganization involving two domestic corporations, the hovering deficit rule applies to a corporation with a net accumulated deficit in earnings and profits because the relevant statutory rules do not distinguish among classes of earnings and profits. In contrast, the foreign tax credit rules require categorization of earnings and profits according to the pooling and basket rules. Because of these distinctions, taxpayers may inappropriately benefit by trafficking in an earnings and profits deficit in a basket, pool, or particular annual layer, even though a corporation may have net positive earnings and profits. The Treasury Department and the IRS believe that these issues merit targeted differences in the application of the hovering deficit rule in this context. Accordingly, these final regulations retain the provisions of the 2000 proposed regulations that apply the hovering deficit rule on a basket-by-basket basis.

The final regulations also include a clarification that post-transaction earnings and profits that may be offset by hovering deficits do not include earnings and profits that are distributed or deemed distributed in the same taxable year that they are earned. That is, the hovering deficit rule does not permit deficits to be offset against post-

transaction earnings and profits until those earnings and profits become accumulated (as opposed to current) for tax purposes. This rule is consistent with a similar provision in the hovering deficit regulations under section 381. See § 1.381(c)(2)–1(a)(5).

#### *D. Hovering Deficits and Section 902*

Under section 902, the amount of foreign taxes that are deemed paid by a 10% domestic corporate shareholder receiving dividends from a foreign corporation is equal to the foreign corporation's post-1986 foreign income taxes multiplied by a fraction, the numerator of which is the amount of the dividend, and the denominator of which is the foreign corporation's post-1986 undistributed earnings. Post-1986 undistributed earnings include both accumulated and current year earnings and deficits, not taking into account current year distributions. The section 902 calculation is done on a basket-by-basket basis. The 2000 proposed regulations provide that a pre-transaction deficit will only be taken into account for purposes of determining the accumulated earnings and profits of the surviving corporation in the section 902 denominator to the extent of post-transaction earnings that are accumulated in the same basket as the deficit.

A comment was made requesting that the hovering deficit rule not apply for purposes of computing deemed-paid credits under section 902, particularly in the determination of accumulated earnings and profits in the denominator of the section 902 fraction. Under this approach, the effect of the inclusion of an otherwise hovering deficit on the section 902 calculation could be beneficial or detrimental to the taxpayer, depending on the particular taxpayer's facts. For example, the suggested approach would be detrimental to taxpayers if the unrestricted use of the otherwise hovering deficit reduced the denominator of the section 902 fraction to or below zero. See § 1.902–1(b)(4) (providing that no taxes are deemed paid with respect to a “nimble dividend” if post-1986 undistributed earnings are zero or less than zero). The rationale offered for this request is that it would more properly follow the intent of Congress when it amended section 902 in 1986 to average earnings and profits and foreign taxes under a pooling method.

After consideration of the comment, the Treasury Department and the IRS have concluded that it would not be appropriate to allow a pre-transaction hovering deficit from one corporation to

offset pre-transaction earnings and profits of another corporation for purposes of determining the denominator of the section 902 fraction. Such an offset could increase the ratio of foreign taxes to earnings and profits in the pool and thereby in certain cases could “supercharge” the amount of foreign taxes that could be drawn out by a given distribution. The Treasury Department and the IRS believe this is not an appropriate result and could encourage taxpayers to enter into section 381 transactions to take advantage of the distortion that would result from accelerating foreign tax credits in certain cases. It is also possible that such a rule could be detrimental to taxpayers by otherwise denying them access to creditable foreign income taxes if their section 902 denominator were eliminated. Moreover, the comment would further complicate an already complex area by mandating one set of hovering deficit treatment and calculations of earnings for section 316 and another for section 902.

An alternative request was made to the effect that, if the hovering deficit rule is retained, it should be modified to allow a pre-transaction earnings and profits deficit to offset the surviving corporation's post-transaction current year earnings and profits for purposes of determining the section 902 denominator, irrespective of whether such earnings are distributed during the taxable year.

After considering this comment, the Treasury Department and the IRS concluded that on balance it would not be appropriate to modify the proposed regulations in this manner. In many cases, allowing the hovering deficit to offset current year distributed earnings and profits for purposes of the section 902 denominator would effectively allow an offset of pre-transaction earnings and profits. This is because the opening balance of post-1986 undistributed earnings in the year following the distribution would be reduced a second time (the first reduction having occurred as a result of offsetting the current year distributed earnings and profits by the hovering deficit) as required by section 902 and the regulations thereunder to account for the distribution itself. This second reduction would reduce pre-transaction earnings and profits or, to the extent of any excess over that amount, create a deficit in accumulated earnings and profits. As described, the Treasury Department and the IRS believe that in order to minimize credit trafficking problems, pre-transaction deficits of one corporation should not be allowed to

offset pre-transaction earnings of another corporation.

Additionally, implementing the modification requested in the comment would create administrative burdens for taxpayers and the IRS. If hovering deficits offset current year distributed earnings solely for purposes of section 902 but not for purposes of section 316, dual accounts would be necessary to track hovering deficits as they are separately used under each section.

Moreover, certain taxpayers would be disadvantaged under the requested modification as compared to how those taxpayers would be treated under the rule adopted in these final regulations. For example, if a foreign subsidiary has a hovering deficit in a separate basket that exceeds the sum of current plus accumulated earnings in the basket and the foreign subsidiary distributes current year post-transaction earnings in that same basket, under the requested modification, the hovering deficit would reduce the section 902 denominator to zero, with the result that no deemed-paid taxes could be claimed on the distribution. In fact, for this reason certain taxpayers have specifically requested that the hovering deficit rule apply for purposes of the section 902 fraction. Under the rules adopted by the final regulations, the hovering deficit would not reduce the section 902 denominator and therefore taxpayers would have access to deemed-paid taxes on the distribution.

#### *E. Hovering Taxes*

Under the 2000 proposed regulations, taxes associated with a hovering deficit do not enter into the surviving corporation's post-1986 foreign income taxes pool until the entire deficit has been offset against post-transaction accumulated earnings and profits. Comments were made requesting that the regulations be changed to provide that foreign taxes related to a hovering deficit enter the post-1986 foreign income taxes pool on a pro rata basis as the hovering deficit to which the foreign taxes relate is used to offset post-transaction accumulated earnings and profits. The Treasury Department and IRS agree that a pro rata approach of this nature more accurately ties the availability of the foreign income taxes with the use of the related hovering deficit. Accordingly, this requested change is reflected in the final regulations.

#### *F. Zipping Rule*

The 2000 regulations provide that if the foreign target corporation or foreign acquiring corporation (or both) was a look-through corporation and the

foreign surviving corporation is a less-than-10%-U.S.-owned foreign corporation, the post-1986 pools of earnings and profits of the look-through corporation in the separate baskets are recharacterized as a single, non-look-through pre-pooling annual layer which accumulated immediately prior to the 381 transaction (the zipping rule). In addition, the 2000 proposed regulations provide that if the foreign surviving corporation later changes to look-through status, any such recharacterized earnings and profits do not regain either their pooling or their look-through character.

A comment was made that in a case where the foreign surviving corporation subsequently changes to look-through status, if the recharacterized earnings and profits do not revert to their look-through character, a dividend paid out of those earnings would not be afforded look-through treatment. The comment argued that this would run counter to section 904(d)(2)(E)(i) which provides that look-through treatment applies to distributions by a CFC out of any earnings and profits accumulated during periods in which it was a CFC.

The Treasury Department and IRS note that this concern has been addressed by intervening statutory and regulatory changes. All distributions from a look-through corporation now receive look-through treatment, regardless of whether they are paid out of earnings and profits from post-1986 pools or pre-pooling annual layers. As a result, the concern raised in the comment is now effectively moot, and look-through treatment generally prevails. The final regulations otherwise retain the zipping rule, however, because with respect to the maintenance of pools or annual layers, this rule provides administrative advantages for both taxpayers and the IRS by not requiring subsequent U.S. shareholders of a foreign surviving corporation that continued to accumulate earnings on an annual layer basis to recreate post-1986 pools of pre-transaction earnings and profits carried over from a pooling foreign target corporation. Accordingly, the Treasury Department and the IRS decided to retain the general zipping rule provisions of the 2000 proposed regulations in these final regulations for pooling purposes, while allowing full preservation of look-through treatment.

Moreover, it should be noted that these final regulations define a pooling corporation as one that has at any time met the requirements of section 902(c)(3)(B). Accordingly, even if the foreign surviving corporation does not meet those requirements immediately after the foreign section 381 transaction,

it will still be a pooling corporation if it had met those requirements at any time prior to the transaction. See § 1.902-1(a)(13)(i).

#### *G. Qualified and Chain Deficit Rules Under Section 952(c)(1)(B) and (C)*

The section 952(c)(1)(B) subpart F qualified deficit rule and section 952(c)(1)(C) subpart F chain deficit rule allow the use of a CFC's deficit in earnings and profits to limit subpart F income inclusions for another year with respect to the stock of the same CFC or for the same year with respect to stock of another CFC in certain cases. Under the qualified deficit rule of section 952(c)(1)(B), a prior-year earnings and profits deficit may be used to limit a qualified shareholder's current year subpart F income in the same CFC if such deficit is attributable to the same qualified activity as the activity that gives rise to the current year subpart F income. Under the chain deficit rule of section 952(c)(1)(C), a current year earnings and profits deficit may be used to limit a related corporation's current year subpart F income subject to the same qualified activity restrictions.

The 2000 proposed regulations provide that a pre-transaction deficit is not taken into account for purposes of calculating the earnings and profits limitation under the chain deficit rule. The 2000 proposed regulations are silent, however, as to the qualified deficit rule. A comment was made requesting that pre-transaction deficits be taken into account for purposes of calculating the earnings and profits limitations under both the qualified deficit rules and the chain deficit rules.

The Treasury Department and the IRS agree with this comment. The qualified deficit rule does not limit the amount of the subpart F income at the CFC level, but rather limits the amount of a particular shareholder's subpart F income inclusion under section 951(a). Because qualified deficits in earnings and profits are shareholder-level attributes and anti-trafficking provisions are already incorporated in the rules regarding qualified deficits under section 952(c)(1)(B), the Treasury Department and the IRS believe that it is appropriate to allow pre-transaction deficits to be taken into account for purposes of the calculation of qualified deficits. Though the Treasury Department and IRS believe this was already a reasonable position that could have been taken under the 2000 proposed regulations, the final regulations include a more explicit clarification of this position.

The final regulations also provide that a current year pre-transaction deficit

may be taken into account for purposes of limiting subpart F income under the chain deficit rule. The Treasury Department and the IRS believe that the narrow restrictions that apply to application of the chain deficit rule are not subject to manipulation through entering into foreign section 381 transactions. Accordingly there is no policy reason for denying a qualified chain member access to a pre-transaction deficit that otherwise qualifies as a chain deficit solely because the CFC with the chain deficit engaged in a foreign section 381 transaction during the taxable year. Any such pre-transaction deficit that qualifies as a chain deficit will nonetheless remain a hovering deficit of the surviving corporation for purposes of section 316 and section 902.

#### *H. Allocation of Earnings and Profits, Deficits, and Taxes During the Transaction Year*

The 2000 proposed regulations include a rule that allocates the earnings and profits for the taxable year of a foreign surviving corporation in which a foreign section 381 transaction occurs as either pre-transaction earnings or post-transaction earnings on the basis of the number of days in the taxable year before and after the date of the foreign section 381 transaction. This rule parallels a similar rule found under § 1.381(c)(2)-1(a)(6) and is necessary in order to determine the amount of post-transaction earnings that may be offset by hovering deficits. This rule is applied on a basket-by-basket basis for any basket in which there are positive earnings and profits for the taxable year in which the transaction occurred. No comments were received on this point, and the final regulations adopt this provision, extending it to related foreign income taxes as well.

These final regulations also contain a rule for allocating deficits, and related foreign income taxes, for the taxable year in which a foreign section 381 transaction occurs as pre- and post-transaction deficits. If the surviving corporation has a deficit in any basket for the taxable year in which the transaction occurred, unless the actual accumulated earnings and profits, or deficit, as of the date of the transaction can be shown, the deficit shall be allocated in the same pro rata manner described above for positive earnings and profits. This rule also parallels a similar rule found under § 1.381(c)(2)-1(a)(6) and is necessary in order to determine the amount of pre-transaction deficits that will hover. This rule is applied on a basket-by-basket basis for any basket in which there is a deficit in

earnings and profits for the taxable year in which the transaction occurred.

The Treasury Department and the IRS believe that the addition of the allocation rule for deficits provides greater consistency with the principles and rules of section 381. It is a neutral provision and is consistent with appropriate results that could be reached under present law.

#### *I. Special Rule for F Reorganizations and Similar Transactions*

The 2000 proposed regulations (Prop. Reg. § 1.367(b)-9) provide that the hovering deficit rules do not apply in the case of a foreign section 381 transaction that is described in section 368(a)(1)(F) or in which either the foreign target corporation or the foreign acquiring corporation is newly created. This rule was intended to prevent inappropriate tax consequences that could result from application of the hovering deficit rules to the combination of two corporations where only one of those corporations has meaningful tax attributes. For example, under the generally applicable hovering deficit rules, a foreign corporation with significant deficits in earnings and profits could combine with a newly created foreign corporation and thereafter distribute dividends (along with deemed paid foreign income taxes under section 902), despite the presence of a significant deficit that would have precluded a dividend distribution before the transaction.

The rule under the 2000 proposed regulations addressing newly created corporations was meant to capture any transactions that are functionally equivalent to F reorganizations. However, the Treasury Department and the IRS have determined that the newly-created corporation standard under the 2000 proposed regulations is both potentially underinclusive and overinclusive in scope. It is underinclusive in that it would not apply to include foreign section 381 transactions that do not otherwise qualify as an F reorganization but that are between one foreign corporation with meaningful tax attributes and a shell corporation that is not newly created, but nevertheless has no meaningful tax attributes. In contrast, this standard is overinclusive in that it might be read to include a foreign section 381 transaction involving multiple foreign corporations with meaningful tax attributes as long as at least one party to the transaction is a newly created corporation. These transactions are neither F reorganizations nor are they

functionally equivalent to F reorganizations.

Accordingly, these final regulations clarify the 2000 proposed regulations by providing that the hovering deficit rules do not apply to a foreign section 381 transaction involving at least one corporation that does not own more than a nominal amount of property or does not have more than a nominal amount of tax attributes, but no more than one corporation that does own more than a nominal amount of property or have more than a nominal amount of tax attributes. In most cases the transactions covered by this special rule will be standard F reorganizations.

#### *J. Anti-Abuse Rule*

The 2000 proposed regulations include an anti-abuse rule that gives the Commissioner the discretion to turn off the hovering deficit rules if a principal purpose of a foreign section 381 transaction is to gain a tax benefit from affirmative use of those rules. Comments have criticized the anti-abuse rule as overly broad and inconsistent with establishing objective rules regarding the taxation of earnings distributed (or deemed distributed) by foreign subsidiaries. Moreover, the point was raised in some comments that the proposed anti-abuse rule would prevent taxpayers from relying on the existing detailed set of rules for the calculation of earnings and profits following a corporate combination in any case in which a taxpayer receives a U.S. tax benefit related to the application of the hovering deficit rule.

Upon consideration of these comments, the Treasury Department and the IRS have concluded that the anti-abuse rule in the 2000 proposed regulations should be eliminated. While the anti-abuse rule has been eliminated, the IRS will continue to examine the application of the regulations to transactions to which they apply, or potentially apply, and will be prepared to pursue issues where appropriate under the regulations and other established principles of existing law. The Treasury Department and the IRS may revisit the rules in light of experience and propose prospective changes as appropriate.

#### *K. Miscellaneous*

A number of conforming revisions have been made to the 2000 proposed regulations to account for relevant statutory and regulatory changes discussed above that have occurred in the intervening time period since the 2000 proposed regulations were issued. This includes the reduction of the number of baskets under section

904(d)(1), applicable for tax years beginning after December 31, 2006, as well as the fact that distributions by look-through corporations out of annual layers accumulated during a non-look-through period are now accorded look-through treatment.

It is possible that special transition rules might be needed relating to the effect on hovering deficits in existence on the effective date of the reduction in the number of baskets under section 904(d)(1). If it is determined that such rules are necessary, they would be provided as part of a broader guidance project currently under consideration to address generally transition issues relating to the reduction in baskets.

#### **Special Analyses**

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

#### **Drafting Information**

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

#### **List of Subjects in 26 CFR Part 1**

Income taxes, Reporting and recordkeeping requirements.

#### **Amendments to the Regulations**

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

#### **PART 1—INCOME TAXES**

■ **Paragraph 1.** The authority citation for part 1 is amended by revising the entries for §§ 1.367(b)-7 and 1.367(b)-9 to read in part as follows:

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

Section 1.367(b)-7 also issued under 26 U.S.C. 367(a) and (b), 26 U.S.C. 902, and 26 U.S.C. 904.

Section 1.367(b)-9 also issued under 26 U.S.C. 367(a) and (b), 26 U.S.C. 902, and 26 U.S.C. 904. \* \* \*

■ **Par. 2.** Section 1.367(b)-0 is amended by:

- 1. Revising the introductory text.
- 2. Adding entries for § 1.367(b)-2(l).
- 3. Adding entries for § 1.367(b)-3(e) and (f).
- 4. Adding entries for §§ 1.367(b)-7 through 1.367(b)-9.

The revisions and additions read as follows:

**§ 1.367(b)-0 Table of contents.**

This section lists the paragraphs contained in §§ 1.367(b)-1 through 1.367(b)-9.

\* \* \* \* \*

**§ 1.367(b)-2 Definitions and special rules.**

\* \* \* \* \*

- (l) Additional definitions.
- (1) Foreign income taxes.
- (2) Post-1986 undistributed earnings.
- (3) Post-1986 foreign income taxes.
- (4) Pre-1987 accumulated profits.
- (5) Pre-1987 foreign income taxes.
- (6) Pre-1987 section 960 earnings and profits.
- (7) Pre-1987 section 960 foreign income taxes.
- (8) Earnings and profits.
- (9) Pooling corporation.
- (10) Nonpooling corporation.
- (11) Separate category.
- (12) Passive category.
- (13) General category.

**§ 1.367(b)-3 Repatriation of foreign corporate assets in certain nonrecognition transactions.**

\* \* \* \* \*

- (e) Net operating loss and capital loss carryovers.
- (f) Carryover of earnings and profits.
- (1) General rule.
- (2) Previously taxed earnings and profits. [Reserved]

\* \* \* \* \*

**§ 1.367(b)-7 Carryover of earnings and profits and foreign income taxes in certain foreign-to-foreign nonrecognition transactions.**

- (a) Scope.
- (b) General rules.
- (1) Non-previously taxed earnings and profits and related taxes.
- (2) Previously taxed earnings and profits. [Reserved]
- (c) Ordering rule for post-transaction distributions.
- (1) If foreign surviving corporation is a pooling corporation.
- (2) If foreign surviving corporation is a nonpooling corporation.
- (d) Post-1986 pool.
- (1) In general.
- (i) Qualifying earnings and taxes.
- (ii) Carryover rule.
- (2) Hovering deficit.
- (i) In general.
- (ii) Offset rule.
- (iii) Related taxes.
- (3) Examples.
- (e) Pre-pooling annual layers.
- (1) If foreign surviving corporation is a pooling corporation.

- (i) Qualifying earnings and taxes.
- (ii) Carryover rule.
- (iii) Deficits.
- (A) In general.
- (B) Aggregate positive pre-1987 accumulated profits.
- (C) Aggregate deficit in pre-1987 accumulated profits.
- (D) Deficit and positive separate categories within annual layers
- (iv) Pre-1987 section 960 earnings and profits and foreign income taxes.
- (v) Examples.
- (2) If foreign surviving corporation is a nonpooling corporation.
- (i) Qualifying earnings and taxes.
- (ii) Carryover rule.
- (iii) Deficits.
- (A) In general.
- (B) Aggregate positive pre-1987 accumulated profits.
- (C) Aggregate deficit in pre-1987 accumulated profits.
- (D) Deficit and positive separate categories within annual layers.
- (iv) Pre-1987 section 960 earnings and profits and foreign income taxes.
- (v) Examples.
- (f) Special rules.
- (1) Treatment of deficit.
- (i) General rule.
- (ii) Exceptions.
- (iii) Examples.
- (2) Reconciling taxable years.
- (3) Post-transaction change of status.
- (4) Ordering rule for multiple hovering deficits.
- (i) Rule.
- (ii) Example.
- (5) Pro rata rule for earnings and deficits during transaction year.
- (g) Effective date.

**§ 1.367(b)-8 Allocation of earnings and profits and foreign income taxes in certain foreign corporate separations. [Reserved]**

**§ 1.367(b)-9 Special rule for F reorganizations and similar transactions.**

- (a) Scope.
- (b) Hovering deficit rules inapplicable.
- (c) Foreign divisive transactions. [Reserved]
- (d) Examples.
- (e) Effective date.

\* \* \* \* \*

■ **Par. 3.** Section 1.367(b)-1 is amended by:

- 1. Removing the language “and” at the end of paragraph (c)(2)(iii).
- 2. Removing the period at the end of paragraph (c)(2)(iv)(B) and adding “; and” in its place.
- 3. Adding paragraph (c)(2)(v).
- 4. Revising paragraphs (c)(3)(ii)(A), (c)(4)(iv), and (c)(4)(v).

The additions and revisions read as follows:

**§ 1.367(b)-1 Other transfers.**

\* \* \* \* \*

- (c) \* \* \*
- (2) \* \* \*
- (v) A foreign surviving corporation described in § 1.367(b)-7(a).

(3) \* \* \*

(ii) \* \* \*

(A) United States shareholders (as defined in § 1.367(b)-3(b)(2)) of foreign corporations described in paragraph (c)(2)(i) or (v) of this section; and

\* \* \* \* \*

(4) \* \* \*

(iv) A statement that describes any amount (or amounts) required, under the section 367(b) regulations, to be taken into account as income or loss or as an adjustment (including an adjustment under § 1.367(b)-7 or 1.367(b)-9) to basis, earnings and profits, or other tax attributes as a result of the exchange;

(v) Any information that is or would be required to be furnished with a Federal income tax return pursuant to regulations under section 332, 351, 354, 355, 356, 361, 368, or 381 (whether or not a Federal income tax return is required to be filed), if such information has not otherwise been provided by the person filing the section 367(b) notice;

\* \* \* \* \*

■ **Par. 4.** Section 1.367(b)-2 is amended by:

- 1. Revising paragraph (j)(1)(i).
- 2. Adding paragraph (l).

The revision and addition read as follows:

**§ 1.367(b)-2 Definitions and special rules.**

\* \* \* \* \*

(j) *Sections 985 through 989*—(1) *Change in functional currency of a qualified business unit*—(i) *Rule.* If, as a result of a section 367(b) exchange described in section 381(a), a qualified business unit (as defined in section 989(a)) (QBU) has a different functional currency determined under the rules of section 985(b) than it used prior to the transaction, then the QBU shall be deemed to have automatically changed its functional currency immediately prior to the transaction. A QBU that is deemed to change its functional currency pursuant to this paragraph (j) must make the adjustments described in § 1.985-5.

\* \* \* \* \*

(l) *Additional definitions*—(1) *Foreign income taxes.* The term *foreign income taxes* has the meaning set forth in § 1.902-1(a)(7).

(2) *Post-1986 undistributed earnings.* The term *post-1986 undistributed earnings* has the meaning set forth in § 1.902-1(a)(9).

(3) *Post-1986 foreign income taxes.* The term *post-1986 foreign income taxes* has the meaning set forth in § 1.902-1(a)(8).

(4) *Pre-1987 accumulated profits.* The term *pre-1987 accumulated profits*

means the earnings and profits described in § 1.902-1(a)(10)(i), computed in accordance with the rules of § 1.902-1(a)(10)(ii).

(5) *Pre-1987 foreign income taxes.* The term *pre-1987 foreign income taxes* has the meaning set forth in § 1.902-1(a)(10)(iii).

(6) *Pre-1987 section 960 earnings and profits.* The term *pre-1987 section 960 earnings and profits* means the earnings and profits of a foreign corporation accumulated in taxable years beginning before January 1, 1987, computed under § 1.964-1(a) through (e), and translated into the functional currency (as determined under section 985) of the foreign corporation at the spot rate on the first day of the foreign corporation's first taxable year beginning after December 31, 1986. For further guidance, see Notice 88-70 (1988-2 C.B. 369, 370) (see also § 601.601(d)(2) of this chapter). The term *pre-1987 section 960 earnings and profits* does not include earnings and profits that represent previously taxed earnings and profits described in section 959.

(7) *Pre-1987 section 960 foreign income taxes.* The term *pre-1987 section 960 foreign income taxes* means the foreign income taxes related to pre-1987 section 960 earnings and profits, determined in accordance with the principles of § 1.902-1(a)(10)(iii), except that the U.S. dollar amounts of pre-1987 section 960 foreign income taxes are determined by reference to the exchange rates in effect when the taxes were paid or accrued.

(8) *Earnings and profits.* The term *earnings and profits* means post-1986 undistributed earnings, pre-1987 accumulated profits, and pre-1987 section 960 earnings and profits.

(9) *Pooling corporation.* The term *pooling corporation* means a foreign corporation with respect to which the requirements of section 902(c)(3)(B) have been met in the current taxable year or any prior taxable year.

(10) *Nonpooling corporation.* The term *nonpooling corporation* means a foreign corporation that is not a pooling corporation.

(11) *Separate category.* The term *separate category* has the meaning set forth in section 904(d)(1), and shall also include any other category of income to which section 904(a), (b), and (c) are applied separately under any other provision of the Internal Revenue Code (e.g., sections 56(g)(4)(C)(iii)(IV), 245(a)(10), 865(h), 901(j), and 904(h)(10) (or section 904(g)(10) for taxable years beginning on or before December 31, 2006).

(12) *Passive category.* The term *passive category* means the separate

category that includes income described in section 904(d)(1)(A).

(13) *General category.* The term *general category* means the separate category that includes income described in section 904(d)(1)(B) (or section 904(d)(1)(I) for taxable years beginning on or before December 31, 2006).

■ **Par. 5.** Section 1.367(b)-3 is amended by adding paragraphs (e) and (f) to read as follows:

**§ 1.367(b)-3 Repatriation of foreign corporate assets in certain nonrecognition transactions.**

\* \* \* \* \*

(e) *Net operating loss and capital loss carryovers.* A net operating loss or capital loss carryover of the foreign acquired corporation is described in section 381(c)(1) and (c)(3) and thus is eligible to carry over from the foreign acquired corporation to the domestic acquiring corporation only to the extent the underlying deductions or losses were allowable under chapter 1 of subtitle A of the Internal Revenue Code. Thus, only a net operating loss or capital loss carryover that is effectively connected with the conduct of a trade or business within the United States (or that is attributable to a permanent establishment, in the context of an applicable United States income tax treaty) is eligible to be carried over under section 381. For further guidance, see Rev. Rul. 72-421 (1972-2 C.B. 166) (see also § 601.601(d)(2) of this chapter).

(f) *Carryover of earnings and profits—*  
(1) *General rule.* Except to the extent otherwise specifically provided (see, e.g., Notice 89-79 (1989-2 C.B. 392) (see also § 601.601(d)(2) of this chapter)), earnings and profits of the foreign acquired corporation that are not included in income as a deemed dividend under the section 367(b) regulations (or deficit in earnings and profits) are eligible to carry over from the foreign acquired corporation to the domestic acquiring corporation under section 381(c)(2) only to the extent such earnings and profits (or deficit in earnings and profits) are effectively connected with the conduct of a trade or business within the United States (or are attributable to a permanent establishment in the United States, in the context of an applicable United States income tax treaty). All other earnings and profits (or deficit in earnings and profits) of the foreign acquired corporation shall not carry over to the domestic acquiring corporation and, as a result, shall be eliminated.

(2) *Previously taxed earnings and profits.* [Reserved]

■ **Par. 6.** In § 1.367(b)-6, paragraph (a)(1) is revised to read as follows:

**§ 1.367(b)-6 Effective dates and coordination rules.**

(a) *Effective date—*(1) *In general.* Sections 1.367(b)-1 through 1.367(b)-3, and this section, apply to section 367(b) exchanges that occur on or after November 6, 2006. For guidance with respect to section 367(b) exchanges that occur prior to November 6, 2006, see §§ 1.367(b)-1 through 1.367(b)-6 in effect prior to November 6, 2006 (see 26 CFR part 1 revised as of April 1, 2006).

\* \* \* \* \*

■ **Par. 7.** Section 1.367(b)-7 is added to read as follows:

**§ 1.367(b)-7 Carryover of earnings and profits and foreign income taxes in certain foreign-to-foreign nonrecognition transactions.**

(a) *Scope.* This section applies to an acquisition by a foreign corporation (foreign acquiring corporation) of the assets of another foreign corporation (foreign target corporation) in a transaction described in section 381 (foreign section 381 transaction). This section describes the manner and extent to which earnings and profits and foreign income taxes of the foreign acquiring corporation and the foreign target corporation carry over to the surviving foreign corporation (foreign surviving corporation) and the ordering of distributions by the foreign surviving corporation. See § 1.367(b)-9 for special rules governing reorganizations described in section 368(a)(1)(F) and foreign section 381 transactions involving foreign corporations that hold no property and have no tax attributes immediately before the transaction, other than a nominal amount of assets (and related tax attributes).

(b) *General rules—*(1) *Non-previously taxed earnings and profits and related taxes.* Earnings and profits and related foreign income taxes of the foreign acquiring corporation and the foreign target corporation (pre-transaction earnings and pre-transaction taxes, respectively) shall carry over to the foreign surviving corporation in the manner described in paragraphs (d), (e), and (f) of this section. Dividend distributions by the foreign surviving corporation (post-transaction distributions) shall be out of earnings and profits and shall reduce related foreign income taxes in the manner described in paragraph (c) of this section.

(2) *Previously taxed earnings and profits.* [Reserved]

(c) *Ordering rule for post-transaction distributions.* Dividend distributions out

of a foreign surviving corporation's earnings and profits shall be ordered in accordance with the rules of paragraph (c)(1) or (2) of this section, depending on whether the foreign surviving corporation is a pooling corporation or a nonpooling corporation.

(1) *If foreign surviving corporation is a pooling corporation.* In the case of a foreign surviving corporation that is a pooling corporation, post-transaction distributions shall be first out of the post-1986 pool (as described in paragraph (d) of this section) and second out of the pre-pooling annual layers (as described in paragraph (e)(1) of this section) under an annual last-in, first-out (LIFO) method.

(2) *If foreign surviving corporation is a nonpooling corporation.* In the case of a foreign surviving corporation that is a nonpooling corporation, post-transaction distributions shall be out of the pre-pooling annual layers (as described in paragraph (e)(2) of this section) under the LIFO method.

(d) *Post-1986 pool.* If the foreign surviving corporation is a pooling corporation, then the post-1986 pool shall be determined under the rules of this paragraph (d).

(1) *In general—(i) Qualifying earnings and taxes.* The post-1986 pool shall consist of the post-1986 undistributed earnings and related post-1986 foreign income taxes of the foreign acquiring corporation and the foreign target corporation.

(ii) *Carryover rule.* Subject to paragraph (d)(2) of this section, the amounts described in paragraph (d)(1)(i) of this section attributable to the foreign acquiring corporation and the foreign target corporation shall carry over to the foreign surviving corporation and shall be combined on a separate category-by-separate category basis.

(2) *Hovering deficit—(i) In general.* If immediately prior to the foreign section 381 transaction either the foreign acquiring corporation or the foreign target corporation has a deficit in one or more separate categories of post-1986 undistributed earnings or an aggregate deficit in pre-1987 accumulated profits, such deficit will be a hovering deficit of the foreign surviving corporation. The rules of this paragraph (d)(2) apply to hovering deficits in separate categories of post-1986 undistributed earnings. See paragraphs (e)(1)(iii) and (e)(2)(iii) of this section for rules that apply to hovering deficits in pre-1987 accumulated profits. If the foreign acquiring corporation and the foreign target corporation each have a post-1986 hovering deficit in the same separate category of post-1986 undistributed earnings, such deficits and their related

post-1986 foreign income taxes shall be combined for purposes of applying this paragraph (d)(2). See also paragraphs (f)(1) and (4) of this section (describing other rules applicable to a deficit described in this paragraph (d)(2)).

(ii) *Offset rule.* A hovering deficit in a separate category of post-1986 undistributed earnings shall offset only earnings and profits accumulated by the foreign surviving corporation after the foreign section 381 transaction (post-transaction earnings) in the same separate category of post-1986 undistributed earnings. For purposes of this rule, however, post-transaction earnings do not include post-1986 undistributed earnings in the same category that are earned after the foreign section 381 transaction, but are distributed or deemed distributed in the same year they are earned (that is, that do not become accumulated). The offset shall occur as of the first day of the foreign surviving corporation's first taxable year following the year in which the post-transaction earnings accumulated.

(iii) *Related taxes.* Post-1986 foreign income taxes that are related to a hovering deficit in a separate category of post-1986 undistributed earnings shall only be added to the foreign surviving corporation's post-1986 foreign income taxes in that separate category on a pro rata basis as the hovering deficit is absorbed. Pro rata means in the same proportion as the portion of the hovering deficit that offsets post-transaction earnings in the separate category under paragraph (d)(2)(ii) of this section bears to the total amount of the hovering deficit.

(3) *Examples.* The following examples illustrate the rules of this paragraph (d). The examples assume the following facts: Foreign corporations A and B are controlled foreign corporations (CFCs) that were incorporated after December 31, 1986, have always been pooling corporations, and have always had calendar taxable years. None of the shareholders of foreign corporations A and B are required to include any amount in income under § 1.367(b)-4 as a result of the foreign section 381 transaction. Foreign corporations A and B (and all of their respective qualified business units as defined in section 989) maintain a "u" functional currency. Finally, unless otherwise stated, any post-1986 undistributed earnings in the passive category resulted from a look-through dividend that was paid by a lower-tier CFC out of earnings accumulated when the CFC was a noncontrolled section 902 corporation and that qualified for the subpart F same-country exception under section

954(c)(3)(A). The examples are as follows:

*Example 1. (i) Facts.* (A) On December 31, 2006, foreign corporations A and B have the following post-1986 undistributed earnings and post-1986 foreign income taxes:

Separate category	E&P	Foreign taxes
<b>Foreign Corporation A</b>		
General .....	300u	\$60
Passive .....	100u	40
	400u	\$100

Separate category	E&P	Foreign taxes
<b>Foreign Corporation B</b>		
General .....	300u	\$70

(B) On January 1, 2007, foreign corporation B acquires the assets of foreign corporation A in a reorganization described in section 368(a)(1)(C). Immediately following the foreign section 381 transaction, foreign surviving corporation is a CFC.

(ii) *Result.* Under the rules described in paragraph (d)(1) of this section, foreign surviving corporation has the following post-1986 undistributed earnings and post-1986 foreign income taxes:

Separate category	E&P	Foreign taxes
General .....	600u	\$130
Passive .....	100u	40
	700u	\$170

(iii) *Post-transaction distribution.* (A) During 2007, foreign surviving corporation does not accumulate any earnings and profits or pay or accrue any foreign income taxes. On December 31, 2007, foreign surviving corporation distributes 350u to its shareholders. Under the rules described in § 1.902-1(d)(1) and paragraph (c)(1) of this section, the distribution is out of, and reduces, post-1986 undistributed earnings and post-1986 foreign income taxes in the separate categories on a pro rata basis, as follows:

Separate category	E&P	Foreign taxes
General .....	300u	\$65
Passive .....	50u	20
	350u	\$85

(B) The foreign income taxes deemed paid by qualifying shareholders of foreign surviving corporation upon the distribution are subject to generally applicable rules and limitations, such as those of sections 78, 902, and 904(d).

(C) Immediately after the distribution, foreign surviving corporation has the following post-1986 undistributed earnings and post-1986 foreign income taxes:

Separate category	E&P	Foreign taxes
General .....	300u	\$65
Passive .....	50u	20
	350u	\$85

Example 2. (i) *Facts.* (A) On December 31, 2006, foreign corporations A and B have the following post-1986 undistributed earnings and post-1986 foreign income taxes:

Separate category	E&P	Foreign taxes
<b>Foreign Corporation A</b>		
General .....	200u	\$30
Passive .....	(100u)	10
	100u	\$40
<b>Foreign Corporation B</b>		
General .....	300u	\$60
Passive .....	100u	30

Separate category	E&P	Foreign taxes
	400u	\$90

(B) On January 1, 2007, foreign corporation B acquires the assets of foreign corporation A in a reorganization described in section 368(a)(1)(C). Immediately following the foreign section 381 transaction, foreign surviving corporation is a CFC.

(ii) *Result.* Under the rules described in paragraphs (d)(1) and (2) of this section, foreign surviving corporation has the following post-1986 undistributed earnings and post-1986 foreign income taxes:

Separate category	Earnings & profits		Foreign taxes	
	Positive E&P	Hovering deficit	Foreign taxes available	Foreign taxes associated with hovering deficit
General .....	500u	.....	\$ 90	.....
Passive .....	100u	(100u)	30	\$10
	600u	(100u)	\$120	\$10

(iii) *Post-transaction distribution.* (A) During 2007, foreign surviving corporation does not accumulate any earnings and profits or pay or accrue any foreign income taxes. On December 31, 2007, foreign surviving corporation distributes 300u to its shareholders. Under the rules described in § 1.902-1(d)(1) and paragraph (c)(1) of this section, the distribution is out of, and reduces, post-1986 undistributed earnings

and post-1986 foreign income taxes on a pro rata basis as follows:

Separate category	E&P	Foreign taxes
General .....	250u	\$45
Passive .....	50u	15
	300u	\$60

(B) The foreign income taxes deemed paid by qualifying shareholders of foreign surviving corporation upon the distribution are subject to generally applicable rules and limitations, such as those of sections 78, 902, and 904(d).

(C) Immediately after the distribution, foreign surviving corporation has the following post-1986 undistributed earnings and post-1986 foreign income taxes:

Separate category	Earnings & profits		Foreign taxes	
	Positive E&P	Hovering deficit	Foreign taxes available	Foreign taxes associated with hovering deficit
General .....	250u	.....	\$45	.....
Passive .....	50u	(100u)	15	\$10
	300u	(100u)	\$60	\$10

(iv) *Post-transaction earnings.*—(A) In its taxable year ending on December 31, 2008, foreign surviving corporation accumulates

earnings and profits and pays related foreign income taxes as follows:

Separate category	E&P	Foreign taxes
General .....	100u	\$20
Passive .....	50u	\$10
	150u	\$40

(B) None of foreign surviving corporation's earnings and profits for its 2008 taxable year qualifies as subpart F income as defined in section 952(a). Under the rules described in paragraphs (d)(2)(ii) and (iii) of this section, the hovering deficit in the passive category

will offset the post-transaction earnings in that category and a proportionate amount of the foreign taxes related to the hovering deficit will be added to the post-1986 foreign income taxes pool. Because the post-transaction earnings in the passive category

are half of the amount of the hovering deficit, half of the related taxes are added to the post-1986 foreign income taxes pool. Accordingly, foreign surviving corporation has the following post-1986 undistributed earnings

and post-1986 foreign income taxes on January 1, 2009:

Separate category	Earnings & profits		Foreign taxes	
	Positive E&P	Hovering deficit	Foreign taxes available	Foreign taxes associated with hovering deficit
General .....	350u	.....	\$65	.....
Passive .....	50u	(50u)	30	\$5
	400u	(50u)	\$95	\$5

*Example 3. (i) Facts.* The facts are the same as *Example 2*, except that the 50u of earnings in the passive category accrued by foreign surviving corporation during 2008 is subpart F income, all of which is included in income under section 951(a) by United States shareholders (as defined in section 951(b)). This example assumes that none of the United States shareholders are able to reduce their subpart F income inclusion with a qualified deficit under section 952(c)(1)(B).

*(ii) Result.* (A) Under the rule described in paragraph (f)(1) of this section, the (100u) hovering deficit in the passive category does

not reduce foreign surviving corporation's current passive earnings and profits for purposes of determining subpart F income or associated deemed paid credits. Thus, foreign surviving corporation's United States shareholders include their pro rata shares of 50u in taxable income for the year and are eligible for a deemed paid foreign tax credit under section 960, computed by reference to their pro rata shares of \$12.50 (50u subpart F inclusion / (50u + 50u post-1986 undistributed earnings in the passive category = 100u) = 50%, × \$25 post-1986 foreign income taxes in the passive category

= \$12.50). The United States shareholders will also include their pro rata shares of the deemed-paid taxes of \$12.50 in taxable income for the year as a deemed dividend pursuant to section 78.

(B) Immediately after the subpart F inclusion and section 960 deemed paid taxes (and taking into account the taxable year 2008 earnings and profits and related taxes in the general category), foreign surviving corporation has the following post-1986 undistributed earnings and post-1986 foreign income taxes:

Separate category	Earnings & profits		Foreign taxes available	Foreign taxes
	Positive E&P	Hovering deficit		Foreign taxes associated with hovering deficit
General .....	350u	.....	\$65.00	.....
Passive .....	50u	(100u)	12.50	\$10
	400u	(100u)	77.50	10

(C) The 50u included as subpart F income constitutes previously taxed earnings and profits under section 959.

*Example 4. (i) Facts.* (A) On December 31, 2006, foreign corporations A and B have the following post-1986 undistributed earnings and post-1986 foreign income taxes:

Separate category	E&P	Foreign taxes
<b>Foreign Corporation A</b>		
General .....	50u	\$10
<b>Foreign Corporation B</b>		
General .....	(100u)	\$20

(B) On January 1, 2007, foreign corporation B acquires the assets of foreign corporation A in a reorganization described in section 368(a)(1)(C). Immediately following the foreign section 381 transaction, foreign surviving corporation is a CFC.

*(ii) Result.* (A) Under the rules described in paragraphs (d)(1) and (2) of this section, foreign surviving corporation has the following post-1986 undistributed earnings and post-1986 foreign income taxes:

Separate category	Earnings & profits		Foreign taxes available	Foreign taxes
	Positive E&P	Hovering deficit		Foreign taxes associated with hovering deficit
General .....	50u	(100u)	\$10	\$20

*(iii) Post-transaction earnings and distribution.* (A) In its taxable year ending on December 31, 2007, foreign surviving corporation earns 100u in the general category and pays related foreign income

taxes of \$24. On December 31, 2007, foreign surviving corporation distributes 75u to its shareholders.

(B) *Result.* For purposes of determining the dividend amount under section 316 and the

foreign income taxes deemed paid with respect to that dividend under section 902, under paragraph (d)(2)(ii) of this section the hovering deficit does not offset the post-transaction current year earnings.

Accordingly, the full 75u will be a dividend under section 316. The deemed paid taxes on that dividend are \$17 (75u distribution / (100u current earnings + 50u accumulated earnings) = 50%, × (\$10 accumulated foreign taxes + \$24 current year foreign taxes) = \$17). The 25u of undistributed earnings and profits

in 2007 will be offset by (25u) of the hovering deficit for purposes of determining the opening balance of the post-1986 undistributed earnings pool in 2008. Because the amount of earnings offset by the hovering deficit is 25% of the amount of the hovering deficit, under paragraph (d)(2)(iii) of this

section \$5 (25% of \$20) of the related taxes are added to the post-1986 foreign income taxes pool at the beginning of the next taxable year. Accordingly, foreign surviving corporation has the following post-1986 undistributed earnings and post-1986 foreign income taxes on January 1, 2008:

Separate category	Earnings & profits		Foreign taxes	
	Positive E&P	Hovering deficit	Foreign taxes available	Foreign taxes associated with hovering deficit
General .....	50u	(75u)	\$22	\$15

(e) *Pre-pooling annual layers*—(1) *If foreign surviving corporation is a pooling corporation.* If the foreign surviving corporation is a pooling corporation, the pre-pooling annual layers shall be determined under the rules of this paragraph (e)(1).

(i) *Qualifying earnings and taxes.* The pre-pooling annual layers shall consist of the pre-1987 accumulated profits and the pre-1987 foreign income taxes of the foreign acquiring corporation and the foreign target corporation.

(ii) *Carryover rule.* Subject to paragraph (e)(1)(iii) of this section, the amounts described in paragraph (e)(1)(i) of this section shall carry over to the foreign surviving corporation but shall not be combined. If the foreign acquiring corporation and the foreign target corporation have pre-1987 accumulated profits in the same year and a distribution is made therefrom, the rules of § 1.902-1(b)(2)(ii) and (b)(3) shall apply separately to reduce pre-1987 accumulated profits and pre-1987 foreign income taxes of the foreign acquiring corporation and the foreign target corporation on a pro rata basis. For further guidance, see Rev. Rul. 68-351 (1968-2 C.B. 307); Rev. Rul. 70-373 (1970-2 C.B. 152) (see also § 601.601(d)(2) of this chapter); see also paragraph (f)(2) of this section (governing the reconciliation of taxable years).

(iii) *Deficit*—(A) *In general.* The rules of this paragraph (e)(1)(iii) apply when, immediately prior to the foreign section 381 transaction, the foreign acquiring corporation or the foreign target corporation (or both) has a deficit in earnings and profits for one or more of the years that comprise its pre-1987 accumulated profits (see also paragraphs (f)(1) and (4) of this section, describing other rules applicable to a deficit described in this paragraph (e)(1)(iii)).

(B) *Aggregate positive pre-1987 accumulated profits.* If the foreign acquiring corporation or the foreign

target corporation (or both) has an aggregate positive (or zero) amount of pre-1987 accumulated profits, but a deficit in earnings and profits for one or more years, then the rules otherwise applicable to such deficits shall apply separately to the pre-1987 accumulated profits and related pre-1987 foreign income taxes of such corporation. A deficit in pre-1987 accumulated profits for one or more years is applied to reduce pre-1987 accumulated profits on a LIFO basis. Any remaining deficit shall be applied to reduce pre-1987 accumulated profits in succeeding years. See Rev. Rul. 74-550 (1974-2 C.B. 209) (see also § 601.601(d)(2) of this chapter); *Champion Int'l Corp. v. Commissioner*, 81 T.C. 424 (1983), acq. in result, 1987-2 C.B. 1; Rev. Rul. 87-72 (1987-2 C.B. 170) (see also § 601.601(d)(2) of this chapter). As a result, no amount in excess of the aggregate positive amount of pre-1987 accumulated profits shall be distributed from the pre-transaction earnings of the foreign acquiring corporation or the foreign target corporation.

(C) *Aggregate deficit in pre-1987 accumulated profits.* If the foreign acquiring corporation or the foreign target corporation (or both) has an aggregate deficit in pre-1987 accumulated profits, a hovering deficit as defined under paragraph (d)(2)(i) of this section, then the rules under § 1.902-2(b) shall apply to such hovering deficit (and related pre-1987 foreign income taxes) immediately prior to the transaction, except that the aggregate hovering deficit that is carried forward into the foreign surviving corporation's post-1986 pool shall offset only post-transaction earnings accumulated by the foreign surviving corporation in the same separate category of post-1986 undistributed earnings to which the relevant portion of the hovering deficit is attributable. Post-transaction earnings do not include earnings and profits that are earned after

the foreign section 381 transaction but distributed or deemed distributed in the same year they are earned.

(D) *Deficit and positive separate categories within annual layers.* For purposes of applying the rules of paragraphs (e)(1)(iii)(B) and (C) of this section, if within a single pre-pooling annual layer, the foreign acquiring corporation or the foreign target corporation (or both) has a deficit in pre-1987 accumulated profits in a separate category and positive pre-1987 accumulated profits in another separate category, the deficit shall first be used to offset the positive pre-1987 accumulated profits in the other separate category in the same pre-pooling annual layer. Any remaining deficit shall be carried forward or back to other years according to the rules of paragraph (e)(1)(iii)(B) or (C) of this section as applicable.

(iv) *Pre-1987 section 960 earnings and profits and foreign income taxes.* The pre-1987 section 960 earnings and profits and pre-1987 section 960 foreign income taxes of the foreign acquiring corporation and the foreign target corporation shall carry over to the foreign surviving corporation but shall not be combined. The rules otherwise applicable to such amounts shall apply separately to the pre-1987 section 960 earnings and profits and pre-1987 section 960 foreign income taxes of the foreign acquiring corporation and the foreign target corporation on a pro rata basis. For further guidance, see Notice 88-70 (1988-2 C.B. 369) (see also § 601.601(d)(2) of this chapter).

(v) *Examples.* The following examples illustrate the rules of this paragraph (e)(1). The examples assume the following facts: Foreign corporation A was incorporated in 2003 and was a nonpooling corporation through December 31, 2004. Foreign corporation A became a CFC on January 1, 2005 and, as a result, began to maintain a pool of post-1986 undistributed earnings on

that date. Foreign corporation B was incorporated in 2003 and has always been owned by foreign shareholders (and thus never has met the requirements of section 902(c)(3)(B)). Both foreign corporation A and foreign corporation B have always had calendar

taxable years. Foreign corporations A and B (and all of their respective qualified business units as defined in section 989) maintain a “u” functional currency. Finally, unless otherwise stated, all earnings and profits of foreign

corporations A and B are in the general category. The examples are as follows:

*Example 1. (i) Facts.* (A) On December 31, 2006, foreign corporations A and B have the following earnings and profits and foreign income taxes:

	E&P	Foreign taxes
<i>Foreign Corporation A:</i>		
Post-1986 pool .....	1,000u	\$350
2004 .....	400u	160u
2003 .....	100u	5u
<i>Foreign Corporation B:</i>		
2006 .....	100u	20u
2005 .....	150u	30u
2004 .....	0u	50u
2003 .....	50u	5u
	300u	105u

(B) On January 1, 2007, foreign corporation B acquires the assets of foreign corporation A in a reorganization described in section 368(a)(1)(C). Immediately following the

foreign section 381 transaction, foreign surviving corporation is a CFC.  
(ii) *Result.* Under the rules described in paragraphs (e)(1)(i) and (ii) of this section,

foreign surviving corporation has the following earnings and profits and foreign income taxes:

	E&P	Foreign taxes
Post-1986 Pool .....	1,000u	\$350
2006 .....	100u	20u
2005 .....	150u	30u
<i>Two Side-by-Side Layers of 2004 E&amp;P:</i>		
2004 layer #1 (from Corp A) .....	400u	160u
2004 layer #2 (from Corp B) .....	0u	50u
<i>Two Side-by-Side Layers of 2003 E&amp;P:</i>		
2003 layer #1 (from Corp A) .....	100u	5u
2003 layer #2 (from Corp B) .....	50u	5u
	1,800u	.....

(iii) *Post-transaction distribution.* (A) During 2007, foreign surviving corporation does not accumulate any earnings and profits or pay or accrue any foreign income taxes.

On December 31, 2007, foreign surviving corporation distributes 1,725u to its shareholders. Under the rules of paragraph (c)(1) of this section, the distribution is first

out of the post-1986 pool, and then out of the pre-pooling annual layers under the LIFO method, as follows:

	E&P	Foreign taxes
Post-1986 pool .....	1,000u	\$350
2006 .....	100u	20u
2005 .....	150u	30u
<i>Two Side-by-Side Layers of 2004 E&amp;P:</i>		
2004 layer #1 .....	400u	160u
2004 layer #2 .....	0u	0u
<i>Two Side-by-Side Layers of 2003 E&amp;P:</i>		
2003 layer #1 .....	* 50u	2.5u
2003 layer #2 .....	** 25u	2.5u
	1,725u	

\* 100u in layer/150u aggregate 2003 earnings = 66.67% × 75u distribution.  
\*\* 50u in layer/150u aggregate 2003 earnings = 33.33% × 75u distribution.

(B) The foreign income taxes deemed paid by qualifying shareholders of foreign surviving corporation upon the distribution are subject to generally applicable rules and

limitations, such as those of sections 78, 902, and 904(d).  
(C) Immediately after the distribution, foreign surviving corporation has the

following earnings and profits and foreign income taxes:

	E&P	Foreign taxes
2004 layer #2 .....	0u	50u
<i>Two Side-by-Side Layers of 2003 E&amp;P:</i>		
2003 layer #1 .....	50u	2.5u
2003 layer #2 .....	25u	2.5u
	75u	55u

(iv) *Post-transaction earnings.* For the taxable year ending on December 31, 2008, foreign surviving corporation has 500u of current earnings and profits in the general

category, none of which qualify as subpart F income under section 952(a), and pays \$70 in foreign income taxes. As of the close of the 2008 taxable year, foreign surviving

corporation has the following earnings and profits and foreign income taxes:

	E&P	Foreign taxes
Post-1986 pool .....	500u	\$70
2004 .....	0u	50u
<i>Two Side-by-Side Layers of 2003 E&amp;P:</i>		
2003 layer #1 .....	50u	2.5u
2003 layer #2 .....	25u	2.5u
	575u	

*Example 2. (i) Facts.* (A) On December 31, 2006, foreign corporations A and B have the

following earnings and profits and foreign income taxes:

	E&P	Foreign taxes
<i>Foreign Corporation A:</i>		
Post-1986 pool .....	1,000u	\$350
2004 .....	100u	20u
2003 .....	(50u)	5u
	1,050u	
<i>Foreign Corporation B:</i>		
2006 .....	100u	20u
2005 .....	(50u)	5u
2004 .....	0u	50u
2003 .....	100u	10u
	150u	85u

(B) On January 1, 2007, foreign corporation B acquires the assets of foreign corporation A in a reorganization described in section 368(a)(1)(C). Immediately following the foreign section 381 transaction, foreign surviving corporation is a CFC.

(ii) *Result.* Because foreign corporations A and B have aggregate positive amounts of pre-1987 accumulated profits with a deficit in one or more years, the rules of paragraph (e)(1)(iii)(B) of this section apply. Accordingly, after the foreign section 381

transaction, foreign surviving corporation has the following earnings and profits and foreign income taxes:

	Earnings & profits		Foreign taxes	
	Positive E&P	Deficit E&P	Foreign taxes available	Foreign taxes associated with deficit E&P
Post-1986 pool .....	1,000u		\$350	
2006 .....	100u		20u	
2005 .....		(50u)		5u
<i>Two Side-by-Side Layers of 2004 E&amp;P:</i>				
2004 layer #1 (from Corp A) .....	100u		20u	
2004 layer #2 (from Corp B) .....	0u		50u	
<i>Two Side-by-Side Layers of 2003 E&amp;P:</i>				
2003 layer #1 (from Corp A) .....		(50u)		5u
2003 layer #2 (from Corp B) .....	100u		10u	

	Earnings & profits		Foreign taxes	
	Positive E&P	Deficit E&P	Foreign taxes available	Foreign taxes associated with deficit E&P
	1,300u	(100u)	.....	10u

(iii) *Post-transaction distribution.* (A) During 2007, foreign surviving corporation does not accumulate any earnings and profits or pay or accrue any foreign income taxes.

On December 31, 2007, foreign surviving corporation distributes 1,175u to its shareholders. Under the rules described in paragraphs (c)(1) and (e)(1)(iii)(B) of this

section, the distribution is first out of the post-1986 pool, and then out of the pre-pooling annual layers, as follows:

Distribution	E&P	Foreign taxes
Post-1986 pool .....	1,000u	\$350
2006 .....	100u	20u
2005 .....	0u	0u
Two Side-by-Side Layers of 2004 E&P:		
2004 layer #1 .....	50u	20u
2004 layer #2 .....	0u	0u
Two Side-by-Side Layers of 2003 E&P:		
2003 layer #1 .....	0u	0u
2003 layer #2 .....	25u	5u
	1,175u	

(B) Under paragraph (e)(1)(iii)(B) of this section, the rules otherwise applicable when a foreign corporation has an aggregate positive (or zero) amount of pre-1987 accumulated profits, but a deficit in one or more years, apply separately to the pre-1987 accumulated profits and related foreign income taxes of foreign corporation A and foreign corporation B. As a result, distributions out of the pre-pooling annual layers of foreign corporation A and foreign corporation B cannot exceed the aggregate positive amount of pre-1987 accumulated profits of each corporation. Accordingly, only

50u can be distributed from foreign corporation A's pre-pooling annual layers and is out of its 2004 layer #1 (after rolling forward the (50u) deficit in 2003 layer #1 to reduce earnings in 2004 layer #1 to 50u (100u - 50u)). Under the principles of § 1.902-1(b)(3), the full 20u of taxes related to 2004 layer #1 is reduced or deemed paid (\$20 × (50/50)). 100u is distributed from foreign corporation B's 2006 annual layer. Foreign corporation B's (50u) deficit in 2005 is then rolled back to offset its 2003 annual layer to reduce earnings in that layer to 50u, 25u of which is distributed. Thus, after the

distribution, 25u remains in 2003 layer # 2 along with 5u of foreign income taxes (10u × (25u/50u)).

(C) The foreign income taxes deemed paid by qualifying shareholders of foreign surviving corporation upon the distribution are subject to generally applicable rules and limitations, such as those of sections 78, 902, and 904(d).

(D) Immediately after the distribution, foreign surviving corporation has the following earnings and profits and foreign income taxes:

	E&P	Foreign taxes
2005 .....	0u	5u
2004 layer #2 .....	0u	50u
Two Side-by-Side Layers of 2003 E&P:		
2003 layer #1 .....	0u	5u
2003 layer #2 .....	25u	5u
	25u	65u

(E) Under paragraph (e)(1)(iii)(B) of this section, the 5u, 50u, and 5u of pre-1987 foreign income taxes related to foreign surviving corporation's 2005 layer, 2004 layer #2, and 2003 layer #1, respectively, remain in those layers. These foreign income

taxes generally will not be reduced or deemed paid unless a foreign tax refund restores a positive balance to the associated earnings pursuant to section 905(c), and thus will be trapped. See § 1.902-2(b)(2).

*Example 3.* (i) Facts. (A) On December 31, 2006, foreign corporations A and B have the following earnings and profits and foreign income taxes:

	E&P	Foreign taxes
Foreign Corporation A:		
Post-1986 pool .....	1,000u	\$350
2004 .....	150u	20u
2003 .....	100u	5u
	1,250u	

	E&P	Foreign taxes
Foreign Corporation B:		
2006 .....	100u	20u
2005 .....	(250u)	5u
2004 .....	0u	50u
2003 .....	100u	10u
	(50u)	85u

(B) On January 1, 2007, foreign corporation B acquires the assets of foreign corporation A in a reorganization described in section 368(a)(1)(C). Immediately following the foreign section 381 transaction, foreign surviving corporation is a CFC.

(ii) *Result.* (A) Because foreign corporation B has an aggregate hovering deficit in pre-

1987 accumulated profits, the rules of paragraph (e)(1)(iii)(C) of this section apply. Accordingly, § 1.902-2(b) applies immediately prior to the foreign section 381 transaction, except that the hovering deficit is carried forward into the foreign surviving corporation's post-1986 undistributed earnings pool and will offset only post-

transaction earnings accumulated by foreign surviving corporation in the general category. Accordingly, after the foreign section 381 transaction, foreign surviving corporation has the following earnings and profits and foreign income taxes:

	Earnings & profits		Foreign taxes	
	Positive E&P	Hovering deficit	Foreign taxes available	Foreign taxes associated with hovering deficit
Post-1986 pool .....	1,000u	(50u)	\$350	\$0
2006 .....	0u		20u	
2005 .....	0u		5u	
Two Side-by-Side Layers of 2004 E&P:				
2004 layer #1 (from Corp A) .....	150u		20u	
2004 layer #2 (from Corp B) .....	0u		50u	
Two Side-by-Side Layers of 2003 E&P:				
2003 layer #1 (from Corp A) .....	100u		5u	
2003 layer #2 (from Corp B) .....	0u		10u	
	1,250u	(50u)		\$0

(B) Under paragraph (e)(1)(iii)(C) of this section, the 20u, 5u, 50u, and 10u of pre-1987 foreign income taxes associated with foreign corporation B's pre-1987 accumulated profits for 2006, 2005, 2004 layer #2, and 2003 layer #2, respectively, remain in those layers. These foreign income taxes generally will not be reduced or deemed paid unless a foreign tax refund restores a positive balance to the associated earnings pursuant to section 905(c), and thus will be trapped. See § 1.902-2(b)(2).

(2) *If foreign surviving corporation is a nonpooling corporation.* If the foreign surviving corporation is a nonpooling corporation, then the pre-pooling annual layers shall be determined under the rules of this paragraph (e)(2).

(i) *Qualifying earnings and taxes.* The pre-pooling annual layers shall consist of the pre-1987 accumulated profits and the pre-1987 foreign income taxes of the foreign acquiring corporation and the foreign target corporation. If the foreign acquiring corporation or the foreign target corporation (or both) has post-1986 undistributed earnings or a deficit in post-1986 undistributed earnings, then those earnings or deficits and any related post-1986 foreign income taxes shall be recharacterized as pre-1987

accumulated profits or deficits and pre-1987 foreign income taxes of the foreign acquiring corporation or the foreign target corporation accumulated immediately prior to the foreign section 381 transaction.

(ii) *Carryover rule.* Subject to paragraph (e)(2)(iii) of this section, the amounts described in paragraph (e)(2)(i) of this section shall carry over to the foreign surviving corporation but shall not be combined. If the foreign acquiring corporation and the foreign target corporation have pre-1987 accumulated profits in the same year and a distribution is made therefrom, the principles of § 1.902-1(b)(2)(ii) and (3) shall apply separately to reduce pre-1987 accumulated profits and pre-1987 foreign income taxes of the foreign acquiring corporation and the foreign target corporation on a pro rata basis. For further guidance, see Rev. Rul. 68-351 (1968-2 C.B. 307); Rev. Rul. 70-373 (1970-2 C.B. 152) (see also § 601.601(d)(2) of this chapter); see also paragraph (f)(2) of this section (governing the reconciliation of taxable years).

(iii) *Deficits—(A) In general.* The rules of this paragraph (e)(2)(iii) apply when, immediately prior to the foreign section 381 transaction (and after application of the last sentence of paragraph (e)(2)(i) of this section), the foreign acquiring corporation or the foreign target corporation (or both) has a deficit in one or more years that comprise its pre-1987 accumulated profits. See also paragraphs (f)(1) and (4) of this section (describing other rules applicable to a deficit described in this paragraph (e)(2)(iii)).

(B) *Aggregate positive pre-1987 accumulated profits.* If the foreign acquiring corporation or the foreign target corporation (or both) has an aggregate positive (or zero) amount of pre-1987 accumulated profits, but a deficit in pre-1987 accumulated profits in one or more years, then the rules otherwise applicable to such deficits shall apply separately to the pre-1987 accumulated profits and related foreign income taxes of such corporation. A deficit in pre-1987 accumulated profits for one or more years is applied to reduce pre-1987 accumulated profits on a LIFO basis. Any remaining deficit

shall be applied to reduce pre-1987 accumulated profits in succeeding years. See Rev. Rul. 74-550 (1974-2 C.B. 209) (see also § 601.601(d)(2) of this chapter); *Champion Int'l Corp. v. Commissioner*, 81 T.C. 424 (1983), acq. in result, 1987-2 C.B. 1; Rev. Rul. 87-72 (1987-2 C.B. 170) (see also § 601.601(d)(2) of this chapter). As a result, no amount in excess of the aggregate positive amount of pre-1987 accumulated profits shall be distributed from the pre-transaction earnings of the foreign acquiring corporation or the foreign target corporation.

(C) *Aggregate deficit in pre-1987 accumulated profits.* If the foreign acquiring corporation or the foreign target corporation (or both) has an aggregate deficit in pre-1987 accumulated profits, a hovering deficit as defined under paragraph (d)(2)(i) of this section, then the rules otherwise applicable to such hovering deficits shall apply separately to the pre-transaction earnings and profits and related taxes of the relevant corporation. See, e.g., sections 316(a) and 381(c)(2)(B). Thus, any hovering deficit shall offset only post-transaction earnings accumulated by the foreign surviving corporation in the same separate category of earnings and profits to which the relevant portion of the hovering deficit is attributable. Post-transaction earnings do not include earnings and profits that are earned after the foreign section 381 transaction but distributed or deemed distributed in the

same year they are earned. Following the principles of § 1.902-2(b), if there is an aggregate deficit in pre-1987 accumulated profits, any related pre-1987 foreign income taxes generally will not be reduced or deemed paid unless a foreign tax refund restores a positive balance to the associated earnings pursuant to section 905(c), and creates a pre-transaction aggregate positive balance for pre-1987 accumulated profits.

(D) *Deficit and positive separate categories within annual layers.* For purposes of applying the rules of paragraphs (e)(2)(iii)(B) and (C) of this section, if within a single pre-pooling annual layer, the foreign acquiring corporation or the foreign target corporation (or both) has a deficit in pre-1987 accumulated profits in a separate category and positive pre-1987 accumulated profits in another separate category, the deficit shall first be used to offset the positive pre-1987 accumulated profits in the other separate category in the same pre-pooling annual layer. Any remaining deficit shall be carried forward or back to other years according to the rules of paragraph (e)(2)(iii)(B) or (C) as applicable.

(iv) *Pre-1987 section 960 earnings and profits and foreign income taxes.* The pre-1987 section 960 earnings and profits and pre-1987 section 960 foreign income taxes of the foreign acquiring corporation and the foreign target corporation shall carry over to the foreign surviving corporation but shall

not be combined. The rules otherwise applicable to such amounts shall apply separately to the pre-1987 section 960 earnings and profits and pre-1987 section 960 foreign income taxes of the foreign acquiring corporation and the foreign target corporation on a pro rata basis. For further guidance, see Notice 88-70 (1988-2 C.B. 369) (see also § 601.601(d)(2) of this chapter).

(v) *Examples.* The following examples illustrate the rules of this paragraph (e)(2). The examples assume the following facts: Both foreign corporation A and foreign corporation B have always had calendar taxable years. Foreign corporations A and B (and all of their respective qualified business units as defined in section 989) maintain a “u” functional currency, and 1u = US\$1 at all times. Finally, unless otherwise stated, all earnings and profits of foreign corporations A and B are in the general category. The examples are as follows:

*Example 1.* (i) *Facts.* (A) Foreign corporations A and B both were incorporated in 2003. Nine percent of the voting stock of foreign corporation A is owned by domestic corporate shareholder C. Nine percent of the voting stock of foreign corporation B is owned by domestic corporate shareholder D. Shareholders C and D are unrelated. The remaining 91% of the voting stock of each foreign corporation is owned by unrelated foreign shareholders. Thus, neither corporation meets the requirements of section 902(c)(3)(B). On December 31, 2006, foreign corporations A and B have the following earnings and profits and foreign income taxes:

	E&P	Foreign taxes
<i>Foreign Corporation A:</i>		
2006 .....	500u	350u
2005 .....	400u	300u
2004 .....	400u	160u
2003 .....	100u	5u
	1,400u	815u
<i>Foreign Corporation B:</i>		
2006 .....	100u	20u
2005 .....	300u	60u
2004 .....	0u	50u
2003 .....	50u	5u
	450u	135u

(B) On January 1, 2007, foreign corporation B acquires the assets of foreign corporation A in a reorganization described in section 368(a)(1)(C). Immediately following the foreign section 381 transaction, foreign

surviving corporation is a nonpooling corporation that does not meet the requirements of section 902(c)(3)(B).

(ii) *Result.* Under the rules described in paragraphs (e)(2)(i) and (ii) of this section,

foreign surviving corporation has the following earnings and profits and foreign income taxes:

	E&P	Foreign taxes
<i>Two Side-by-Side Layers of 2006 E&amp;P:</i>		

	E&P	Foreign taxes
2006 layer #1 (from Corp A) .....	500u	350u
2006 layer #2 (from Corp B) .....	100u	20u
<i>Two Side-by-Side Layers of 2005 E&amp;P:</i>		
2005 layer #1 (from Corp A) .....	400u	300u
2005 layer #2 (from Corp B) .....	300u	60u
<i>Two Side-by-Side Layers of 2004 E&amp;P:</i>		
2004 layer #1 (from Corp A) .....	400u	160u
2004 layer #2 (from Corp B) .....	0u	50u
<i>Two Side-by-Side Layers of 2003 E&amp;P:</i>		
2003 layer #1 (from Corp A) .....	100u	5u
2003 layer #2 (from Corp B) .....	50u	5u
	1,850u	950u

(iii) *Post-transaction distribution.* (A) During 2007, foreign surviving corporation does not accumulate any earnings and profits or pay or accrue any foreign income taxes. On December 31, 2007, foreign surviving corporation distributes 600u to its shareholders. Under the rules of paragraph (c)(3) of this section, the distribution is out of pre-pooling annual layers under the LIFO method as follows:

	E&P	Foreign taxes
<i>Two Side-by-Side Layers of 2006 E&amp;P:</i>		
2006 layer #1 (from Corp A) .....	500u	350u
2006 layer #2 (from Corp B) .....	100u	20u
	600u	370u

(B) Foreign surviving corporation's foreign income tax accounts are reduced to reflect the distribution of earnings and profits notwithstanding that no shareholders are eligible to claim deemed paid foreign income taxes under section 902. See § 1.902-1(a)(10)(iii). (C) Immediately after the distribution, foreign surviving corporation has the following earnings and profits and foreign income taxes:

	E&P	Foreign taxes
<i>Two Side-by-Side Layers of 2005 E&amp;P:</i>		
2005 layer #1 (from Corp A) .....	400u	300u
2005 layer #2 (from Corp B) .....	300u	60u
<i>Two Side-by-Side Layers of 2004 E&amp;P:</i>		
2004 layer #1 (from Corp A) .....	400u	160u
2004 layer #2 (from Corp B) .....	0u	50u
<i>Two Side-by-Side Layers of 2003 E&amp;P:</i>		
2003 layer #1 (from Corp A) .....	100u	5u
2003 layer #2 (from Corp B) .....	50u	5u
	1,250u	580u

*Example 2.* (i) *Facts.* (A) The facts are the same as in *Example 1* (i)(A), except that foreign corporation A met the requirements of section 902(c)(3)(B) on January 1, 2005, when U.S. corporate shareholder C acquired an additional 1% of voting stock for a total ownership interest of 10%; foreign corporation A thereby became a pooling corporation. On December 31, 2006, foreign corporations A and B have the following earnings and profits and foreign income taxes:

	E&P	Foreign taxes
<i>Foreign Corporation A:</i>		
Post-1986 pool .....	900u	\$650
2004 .....	400u	160u
2003 .....	100u	5u
	1,400u	.....
<i>Foreign Corporation B:</i>		
2006 .....	100u	20u
2005 .....	300u	60u

	E&P	Foreign taxes
2004 .....	0u	50u
2003 .....	50u	5u
	450u	135u

(B) On January 1, 2007, foreign corporation B acquires the assets of foreign corporation A in a reorganization described in section 368(a)(1)(C). Immediately following the foreign section 381 transaction, foreign surviving corporation is a nonpooling corporation that does not meet the requirements of section 902(c)(3)(B). (ii) *Result.* Under the rules described in paragraphs (e)(2)(i) and (ii) of this section, foreign surviving corporation has the following earnings and profits and foreign income taxes:

	E&P	Foreign taxes
<i>Two Side-by-Side Layers of 2006 E&amp;P:</i>		
2006 layer #1 (from Corp A's pool) .....	900u	\$650
2006 layer #2 (from Corp B's layer) .....	100u	20u
2005 (from Corp B): .....	300u	60u
<i>Two Side-by-Side Layers of 2004 E&amp;P:</i>		
2004 layer #1 (from Corp A) .....	400u	160u
2004 layer #2 (from Corp B) .....	0u	50u
<i>Two Side-by-Side Layers of 2003 E&amp;P:</i>		
2003 layer #1 (from Corp A) .....	100u	5u
2003 layer #2 (from Corp B) .....	50u	5u
	1,850u	

(iii) *Subsequent ownership change.* On July 1, 2010, USS (a domestic corporation) acquires 100% of the stock of foreign surviving corporation. Under the rules of paragraph (f)(3) of this section, foreign surviving corporation begins to pool its earnings and profits under section 902(c)(3) as of January 1, 2010. Foreign surviving corporation's earnings and profits and foreign income taxes accrued before January 1, 2010 retain their character as pre-1987 accumulated profits and pre-1987 foreign income taxes. *Example 3. (i) Facts.* (A) The facts are the same as in *Example 2(i)(A)*, except that on December 31, 2006, foreign corporations A and B have the following earnings and profits and foreign income taxes:

	E&P	Foreign Taxes
<i>Foreign Corporation A:</i>		
Post-1986 pool .....	1,000u	\$500
2004 .....	(200u)	10u
2003 .....	400u	5u
	1,200u	
<i>Foreign Corporation B</i>		
2006 .....	300u	20u
2005 .....	(100u)	60u
2004 .....	0u	50u
2003 .....	50u	5u
	250u	135u

(B) On January 1, 2007, foreign corporation B acquires the assets of foreign corporation A in a reorganization described in section 368(a)(1)(C). Immediately following the foreign section 381 transaction, foreign surviving corporation is a nonpooling corporation that does not meet the requirements of section 902(c)(3)(B). (ii) *Result.* Because foreign corporations A and B have aggregate positive amounts of pre-1987 accumulated profits with a deficit in one or more years, the rules of paragraph (e)(2)(iii)(B) of this section apply. Accordingly, after the foreign section 381 transaction, foreign surviving corporation has the following earnings and profits and foreign income taxes:

	Earnings & profits		Foreign taxes	
	Positive E&P	Deficit E&P	Foreign taxes available	Foreign taxes associated with deficit E&P
<i>Two Side-by-Side Layers of 2006 E&amp;P:</i>				
2006 layer #1 (from Corp A's pool) .....	1,000u		\$500	

	Earnings & profits		Foreign taxes	
	Positive E&P	Deficit E&P	Foreign taxes available	Foreign taxes associated with deficit E&P
2006 layer #2 (from Corp B's layer) .....	300u	.....	20u	
2005 (from Corp B) .....		(100u)	.....	60u
<i>Two Side-by-Side Layers of 2004 E&amp;P:</i>				
2004 layer #1 (from Corp A) .....		(200u)	.....	10u
2004 layer #2 (from Corp B) .....	0u	.....	50u	
<i>Two Side-by-Side Layers of 2003 E&amp;P:</i>				
2003 layer #1 (from Corp A) .....	400u	.....	5u	
2003 layer #2 (from Corp B) .....	50u	.....	5u	
	1,750u	(300u)	.....	70u

(iii) *Post-transaction distribution.* (A) During 2007, foreign surviving corporation does not accumulate any earnings and profits or pay or accrue any foreign income taxes.

On December 31, 2007, foreign surviving corporation distributes 1,300u to its shareholders. Under the rules described in paragraphs (c)(3) and (e)(2)(iii)(B) of this

section, the distribution is out of the pre-pooling annual layers, as follows:

	E&P	Foreign taxes
<i>Two Side-by-Side Layers of 2006 E&amp;P:</i>		
2006 layer #1 .....	1,000u	\$500
2006 layer #2 .....	250u	20u
<i>2003 E&amp;P:</i>		
2003 layer #1 .....	50u	1.25u (25% of 5u taxes)
	1,300u	

(B) Under paragraph (e)(2)(iii)(B) of this section, the rules otherwise applicable when a foreign corporation has an aggregate positive (or zero) amount of pre-1987 accumulated profits, but a deficit in one or more years, apply separately to the pre-1987 accumulated profits and related pre-1987 foreign income taxes of foreign corporation A and foreign corporation B. As a result, distributions out of the pre-pooling annual layers of foreign corporation A and foreign corporation B cannot exceed the aggregate positive amount of pre-1987 accumulated profits of each corporation. Accordingly, only 1,200u and 250u can be distributed out of

foreign corporation A's and foreign corporation B's pre-pooling annual layers, respectively. Thus, 1,000u of the distribution is out of foreign corporation A's 2006 layer #1 and 250u is out of foreign corporation B's 2006 layer #2 (after rolling forward (50u) of the deficit in 2005 layer to reduce earnings in 2006 layer #1 to 250u (300u - 50u)). Under the principles of § 1.902-1(b)(3), all of the taxes in each of those respective layers are reduced. The remaining 50u is distributed from foreign corporation A's 2003 layer #1 (after rolling back the (200u) deficit in 2004 layer #1 to 200u (400u - 200u)). Thus, after the

distribution, 150u remains in the 2003 layer #1 along with 3.75u of foreign income taxes (5u x (150u/200u)).

(C) Foreign surviving corporation's foreign income tax accounts are reduced to reflect the distribution of earnings and profits notwithstanding that no shareholders are eligible to claim a credit for deemed paid foreign income taxes under section 902. See § 1.902-1(a)(10)(iii).

(D) Immediately after the distribution, foreign surviving corporation has the following earnings and profits and foreign income taxes:

	E&P	Foreign taxes
2005 .....	0u	60u
<i>Two Side-by-Side Layers of 2004 E&amp;P:</i>		
2004 layer #1 .....	0u	10u
2004 layer #2 .....	0u	50u
<i>Two Side-by-Side Layers of 2003 E&amp;P:</i>		
2003 layer #1 .....	150u	3.75u
2003 layer #2 .....	0u	5u
	150u	128.75u

(E) Under paragraph (e)(2)(iii)(B) of this section, the 60u, 10u, 50u, and 5u of foreign income taxes related to foreign surviving corporation's 2005 layer, 2004 layer #1, 2004 layer #2, and 2003 layer #2, respectively, remain in

those layers. These foreign income taxes generally will not be reduced or deemed paid unless a foreign tax refund restores a positive balance to the associated earnings pursuant to section 905(c), and

thus will be trapped. See § 1.902-2(b)(2).

*Example 4.* (i) *Facts.* (A) The facts are the same as in *Example 2* (i)(A), except that on December 31, 2006, foreign corporations A and B have the following earnings and profits and foreign income taxes:

	E&P	Foreign Taxes
<i>Foreign Corporation A:</i>		
Post-1986 pool .....	(1,000u)	\$20
2004 .....	(200u)	10u
2003 .....	400u	5u
	(800u)	
<i>Foreign Corporation B:</i>		
2006 .....	100u	20u
2005 .....	300u	60u
2004 .....	0u	50u
2003 .....	50u	5u
	450u	135u

(B) On January 1, 2007, foreign corporation A acquires the assets of foreign corporation B in a reorganization described in section 368(a)(1)(C). Immediately following the foreign section 381 transaction, foreign surviving corporation is a nonpooling corporation.

(ii) Result. (A) Under paragraph (e)(2)(i) of this section, foreign corporation A's post-1986 pool is recharacterized as a 2006 layer

of pre-1987 accumulated profits. Because after the foreign section 381 transaction foreign corporation A has an aggregate deficit in pre-1987 accumulated profits, the rules of paragraph (e)(2)(iii)(C) of this section apply and the rules otherwise applicable apply separately to the pre-1987 accumulated profits that carry over to foreign surviving corporation from foreign corporation A. The (800u) aggregate deficit in foreign corporation

A's pre-1987 accumulated profits is a hovering deficit that will offset only post-transaction earnings accumulated by foreign surviving corporation in the general category. Accordingly, after the foreign section 381 transaction, foreign surviving corporation has the following earnings and profits and foreign income taxes:

	Earnings & profits		Foreign taxes	
	Positive E&P	Deficit E&P	Foreign taxes available	Foreign taxes associated deficit E&P
Hovering deficit from Corp A's annual layers .....		(800u)		0
<i>Two Side-by-Side Layers of 2006 E&amp;P:</i>				
2006 layer #1 (from Corp A's pool) .....		0u		\$20
2006 layer #2 (from Corp B's layer) .....	100u		20u	
2005 (from Corp B) .....	300u		60u	
<i>Two Side-by-Side Layers of 2004 E&amp;P:</i>				
2004 layer #1 (from Corp A) .....		0u		10u
2004 layer #2 (from Corp B) .....	0u		50u	
<i>Two Side-by-Side Layers of 2003 E&amp;P:</i>				
2003 layer #1 (from Corp A) .....	0u		5u	
2003 layer #2 (from Corp B) .....	50u		5u	
	450u	(800u)	140u	

(B) Under paragraph (e)(2)(iii)(C) of this section, the \$20, 10u, and 5u of pre-1987 foreign income taxes associated with foreign corporation A's pre-1987 accumulated profits for 2006 layer #1, 2004 layer #1, and 2003 layer #1, respectively, remain in those layers. These foreign income taxes generally will not be reduced or deemed paid unless a foreign tax refund restores a positive balance to the

associated earnings pursuant to section 905(c), and thus will be trapped. See § 1.902-2(b)(2).

(iii) Post-transaction distribution. (A) During 2007, foreign surviving corporation does not accumulate any earnings and profits or pay or accrue any foreign income taxes. On December 31, 2007, foreign surviving corporation distributes 200u to its

shareholders. Under the rules described in paragraph (e)(2)(iii)(C) of this section, no distribution can be made out of the pre-1987 accumulated profits of foreign corporation A (and the (800u) aggregate hovering deficit will offset only post-transaction earnings accumulated by foreign surviving corporation). Thus, the distribution is out of pre-pooling annual layers as follows:

	E&P	Foreign taxes paid
2006 layer #2 .....	100u	20u
2005 .....	100u	20u
	200u	40u

(B) Foreign surviving corporation's foreign income tax accounts are reduced to reflect the distribution of earnings and profits notwithstanding that no shareholders are

eligible to claim deemed paid foreign income taxes under section 902. See § 1.902-1(a)(10)(iii).

(C) Immediately after the distribution, foreign surviving corporation has the following earnings and profits and foreign income taxes:

	Earnings & profits		Foreign taxes	
	Positive E&P	Deficit E&P	Taxes available	Foreign taxes associated with deficit E&P
Hovering deficit from Corp A's annual layers .....		(800u)		0
<i>Two Side-by-Side Layers of 2006 E&amp;P:</i>				
2006 layer #1 (from Corp A's pool) .....		0u		\$20
2006 layer #2 (from Corp B's layer) .....	0u		0u	
2005 (from Corp B) .....	200u		40u	
<i>Two Side-by-Side Layers of 2004 E&amp;P:</i>				
2004 layer #1 (from Corp A) .....		0u		10u
2004 layer #2 (from Corp B) .....	0u		50u	
<i>Two Side-by-Side Layers of 2003 E&amp;P:</i>				
2003 layer #1 (from Corp A) .....	0u		5u	
2003 layer #2 (from Corp B) .....	50u		5u	
	250u	(800u)	140u	

(f) *Special rules—(1) Treatment of deficit—*  
 (i) *General rule.* Any deficit described in paragraph (d)(2), (e)(1)(iii), or (e)(2)(iii) of this section shall not be taken into account in determining current or accumulated earnings and profits of a foreign surviving corporation other than to offset post-transaction accumulated earnings, as defined in paragraph (d)(2)(ii) of this section, including for purposes of calculating—

(A) The earnings and profits limitation of section 952(c)(1)(A); and

(B) The amount of the foreign surviving corporation's subpart F income as defined in section 952(a).

(ii) *Exceptions.* The rule in paragraph (i) shall not apply for purposes of calculating an earnings and profits limitation under section 952(c)(1)(B) or (C).

(iii) *Examples.* The following examples illustrate the principles of this paragraph (f)(1). The examples assume the following facts: foreign corporation A, incorporated in 2002, is and always has been a wholly owned subsidiary of USP, a domestic corporation. Foreign corporation B, incorporated in 2004, is and always has been a wholly owned subsidiary of foreign corporation A. Both foreign corporation A and foreign corporation B are organized under the laws of foreign country X and have always had a calendar taxable year. Foreign corporations A and B (and all of their respective qualified business units as defined in section 989) maintain a "u" functional currency. Unless otherwise stated, any earnings and profits or deficit in earnings and profits of foreign corporation A and B in the general category are attributable

to subpart F income derived from foreign base company sales income. Foreign corporation C is a wholly owned subsidiary of USP2 and was organized in 2004 under the laws of foreign country Y. Foreign corporation C (and all of its qualified business units as defined in section 989) maintains a "u" functional currency. Earnings and profits of foreign corporation C in the general category are not attributable to subpart F income. The examples are as follows:

*Example 1. (i) Facts.* (A) On December 31, 2007, foreign corporations A and B have the following post-1986 undistributed earnings and post-1986 foreign income taxes:

	E&P	Foreign taxes
<i>Foreign Corporation A Separate Category:</i>		
General .....	(100u)	\$25
<i>Foreign Corporation B Separate Category:</i>		
General .....	0u	\$10

(B) On January 1, 2008, foreign corporation B elects under § 301.7701-3(c) of this chapter to be disregarded as an entity separate from foreign corporation A. Accordingly, foreign corporation B is deemed to have distributed

all its property to foreign corporation A in a liquidation described in section 332.

(ii) *Result.* Under the rules described in paragraphs (d)(1) and (2) of this section, foreign surviving corporation A has the

following post-1986 undistributed earnings and post-1986 foreign income taxes:

Separate category	Earnings & profits:		Foreign taxes:	
	Positive E&P	Hovering deficit	Foreign taxes available	Foreign taxes associated with hovering deficit
General .....	0u	(100u)	\$10	\$25

(iii) *Post-transaction earnings and subpart F limitations.* (A) In its taxable year ending

on December 31, 2008, foreign surviving corporation A earns 300u of subpart F

general category income with respect to which it pays \$50 in foreign income taxes.

The hovering deficit of (100u) meets the requirements under section 952(c)(1)(B) and therefore is taken into account as a qualified deficit that may be used by USP to offset a portion of its income inclusion related to foreign surviving corporation A's subpart F income of 300u in the 2008 taxable year. Accordingly, USP includes 200u in taxable income for the year and is eligible for a deemed paid foreign tax credit under section

960 of \$40 (200u subpart F inclusion/300 post-1986 undistributed earnings in the general category = 66.67%, × \$60 foreign income taxes in the general category = \$40). USP will also include the deemed paid foreign taxes of \$40 in taxable income for the year as a deemed dividend pursuant to section 78. Though the (100u) hovering deficit of foreign surviving corporation A is taken into account for purposes of limiting

USP's subpart F income inclusion under section 952(c)(1)(B), the amount of the hovering deficit is not reduced for purposes of sections 316 and 902 and none of the associated foreign income taxes are included in the post-1986 foreign income taxes pool. (B) As of January 1, 2009, foreign surviving corporation A has the following post-1986 undistributed earnings and post-1986 foreign income taxes:

Separate category	Earnings & profits		Foreign taxes	
	Positive E&P	Hovering deficit	Foreign taxes available	Foreign taxes associated with hovering deficit
General .....	100u	(100u)	\$20	\$25

(C) The 200u included as subpart F income constitutes previously taxed earnings under section 959. Example 2. (i) Facts. (A) On July 1, 2007, foreign corporation B elects under § 301.7701-3(c) of this chapter to be disregarded as an entity separate from foreign

corporation A. Accordingly, foreign corporation B is deemed to have distributed all of its property to foreign corporation A in a liquidation described in section 332. (B) Neither foreign corporation A nor B has any post-1986 undistributed earnings or post-1986 foreign income taxes as of the beginning

of the 2007 taxable year. For its short taxable year ending on June 30, 2007, foreign corporation B has the following post-1986 undistributed earnings and post-1986 foreign income taxes:

**FOREIGN CORPORATION B**

Separate category	E&P	Foreign taxes
General .....	(200u)	\$30

(C) For the 2007 taxable year, foreign surviving corporation A earns a total of 200u of subpart F foreign based company sales income in the general category with respect to which it pays \$40 in foreign income taxes. (ii) Result. (A) Under paragraph (d)(2) of this section, foreign corporation B's (200u) deficit carries over to foreign surviving corporation A as a hovering deficit. Nevertheless, because it is a deficit of a qualified chain member for a taxable year ending within the 2007 taxable year of foreign surviving corporation A, the (200u) deficit meets the requirements under section 952(c)(1)(C) and therefore may still be taken into account for purposes of limiting foreign surviving corporation A's subpart F income. Accordingly, foreign surviving corporation A's 200u of subpart F income for the 2007

taxable year is fully offset by the (200u) deficit of foreign corporation B, and USP will have no subpart F income inclusion for the 2007 taxable year. The offset under section 952(c)(1)(C) does not result in a reduction of the hovering deficit for purposes of section 316 or section 902. The hovering deficit may not also be taken into account under section 952(c)(1)(B). (B) Because USP has no subpart F income inclusion, foreign surviving corporation A's subpart F earnings of 200u will accumulate and be added to its post-1986 undistributed earnings as of the beginning of 2008. Under the rules of paragraph (f)(5) of this section, a pro rata amount, in this case 50% or 100u, will be deemed to have been accumulated prior to the foreign section 381 transaction and the other 50%, or 100u, will be deemed

to have been accumulated after the foreign section 381 transaction. The 100u of post-transaction earnings will be offset by (100u) of the hovering deficit for purposes of determining the opening balance of the post-1986 undistributed earnings pool in 2008. Because the amount of earnings offset by the hovering deficit is 50% of the total amount of the hovering deficit, \$15 (50% of \$30) of the related taxes are added to the post-1986 foreign income taxes pool as well. The 100u of pre-transaction earnings remain in the post-1986 undistributed earnings pool. Accordingly, foreign surviving corporation A has the following post-1986 undistributed earnings and post-1986 foreign income taxes on January 1, 2008:

Separate category	Earnings & profits		Foreign taxes	
	Positive E&P	Hovering deficit	Foreign taxes available	Foreign taxes associated with hovering deficit
General .....	100u	(100u)	\$55	\$15

Example 3. (i) Facts. (A) On January 1, 2007, foreign corporation B and foreign corporation C have the following post-1986

undistributed earnings and post-1986 foreign income taxes:

	E&P	Foreign taxes
<i>Foreign Corporation B Separate Category:</i>		
General .....	(100u)	\$0
<i>Foreign Corporation C Separate Category:</i>		
General .....	0u	\$10

(B) On July 1, 2007, foreign corporation B acquires the assets of foreign corporation C in a reorganization described in section 368(a)(1)(C). Immediately following the foreign section 381 transaction, foreign surviving corporation B is a CFC.

(C) During the 2007 taxable year foreign surviving corporation B has a current deficit of (400u) and \$60 of related foreign income taxes. During its short taxable year ending on June 30, 2007, foreign corporation C has no

additional earnings and pays or accrues no foreign income taxes.

(ii) *Result.* (A) Under the rules of paragraph (f)(5) of this section, a pro rata amount, in this case 50% or (200u), of foreign surviving corporation B's (400u) current year deficit for the 2007 taxable year will be deemed to have been accumulated prior to the foreign section 381 transaction and be treated as a hovering deficit. The other 50%, or (200u) of the deficit will be deemed to have been

accumulated after the foreign section 381 transaction. The related foreign income taxes of \$60 will also be allocated on a similar 50/50 basis.

(B) Under the rules described in paragraphs (d)(1) and (2) of this section, foreign surviving corporation B has the following post-1986 undistributed earnings and post-1986 foreign income taxes as of January 1, 2008:

Separate category	Earnings & profits		Foreign taxes	
	E&P	Hovering deficit	Foreign taxes available	Foreign taxes associated with hovering deficit
General .....	(200u)	(300u)	\$40	\$30

(iii) *Subpart F income limitations.* Even though (200u) of the current year deficit is treated as a hovering deficit, the full (400u) current year deficit in 2007 of foreign surviving corporation B meets the requirements under section 952(c)(1)(C) and therefore is available as a limitation on subpart F income, to the extent foreign corporation A, which wholly owns foreign surviving corporation B, earns any subpart F income in the 2007 taxable year. Any such offset under section 952(c)(1)(C) will have no effect on the earnings and profits and foreign income tax accounts above of foreign surviving corporation B for purposes of sections 316 and 902. Moreover, to the extent the hovering deficit reduces subpart F income under section 952(c)(1)(C), it may not also be taken into account under section 952(c)(1)(B).

(2) *Reconciling taxable years.* If a foreign acquiring corporation and a foreign target corporation had taxable years ending on different dates, then the pro rata distribution rules of paragraphs (e)(1)(ii) and (e)(2)(ii) of this section shall apply with respect to the taxable years that end within the same calendar year.

(3) *Post-transaction change of status.* If a foreign surviving corporation that is subject to the rules of paragraph (c)(2) of this section subsequently becomes a pooling corporation (by reason, for example, of a reorganization, liquidation, or change of ownership), then post-1986 undistributed earnings and post-1986 foreign income taxes that were recharacterized as pre-1987 accumulated profits and pre-1987 foreign income taxes, respectively, under paragraph (e)(2)(i) of this section retain their characterization as a pre-pooling annual layer.

(4) *Ordering rule for multiple hovering deficits—(i) Rule.* A foreign surviving corporation shall apply the deficit rules of paragraphs (d)(2), (e)(1)(iii), and (e)(2)(iii) of this section in that order if more than one of such rules applies to the foreign surviving corporation.

(ii) *Example.* The following example illustrates the principles of this paragraph (f)(4). The example assumes the following facts: Foreign corporation A has been a pooling corporation since

its incorporation on January 1, 1998. Foreign corporation B has been a nonpooling corporation since its incorporation on January 1, 2000. Foreign corporations A and B have always had calendar taxable years. Foreign corporations A and B (and all of their respective qualified business units as defined in section 989) maintain a "u" functional currency. All earnings and profits of foreign corporation B are in the general category. Finally, unless otherwise stated, any earnings and profits in the passive category resulted from a look-through dividend that was paid by a lower-tier CFC out of earnings accumulated when the CFC was a noncontrolled section 902 corporation and that qualified for the subpart F same-country exception under section 954(c)(3)(A). The example is as follows:

*Example—(i) Facts.* (A) On December 31, 2006, foreign corporations A and B have the following earnings and profits and foreign income taxes:

	E&P	Foreign taxes
<i>Foreign Corporation A Post-1986 Pool Separate Category:</i>		
Passive .....	400u	\$160
General .....	(300u)	25
	100u	185
Foreign Corporation B:		
2006 .....	(300u)	50u
2005 .....	100u	25u

	E&P	Foreign taxes
	(200u)	75u

(B) On January 1, 2007, foreign corporation B acquires the assets of foreign corporation A in a reorganization described in section 368(a)(1)(C). Immediately following the

foreign section 381 transaction, foreign surviving corporation is a CFC.  
(ii) *Result.* Under the rules described in paragraphs (d)(1), (d)(2), (e)(1)(i), (e)(1)(ii),

and (e)(1)(iii) of this section, foreign surviving corporation has the following earnings and profits and foreign income taxes:

	Earnings & profits		Foreign taxes	
	Positive E&P	Hovering deficit	Foreign taxes available	Foreign taxes associated with hovering deficit
Post-1986 pool separate category:				
Passive .....	400u	.....	\$160	.....
General .....	.....	(300u)	.....	\$25
Carryforward pre-pooling deficit from Corp B .....	.....	(200u)	.....	0
2006 (from Corp B) .....	0u	.....	50u	.....
2005 (from Corp B) .....	0u	.....	25u	.....
	400u	(500u)	.....	\$25

(iii) *Post-transaction earnings.* (A) In the taxable year ending on December 31, 2007, foreign surviving corporation accumulates

earnings and profits and pays related foreign income taxes as follows:

	E&P	Foreign taxes
Post-1986 pool separate category:		
Passive .....	150u	\$40
General .....	400u	60
	550u	100

(B) None of the earnings and profits qualify as subpart F income as defined in section 952(a). Under paragraph (f)(4)(i) of this section, the rules of paragraph (d)(2) of this section apply before the rules of paragraph (e)(1)(iii) of this section. Accordingly, post-transaction earnings in a separate category

are first offset by a hovering deficit in the same separate category in the post-1986 pool. Thus, foreign surviving corporation's (300u) deficit in the general category offsets 300u of post-transaction earnings in the general category. After application of paragraph (d)(2) of this section, the (200u) deficit in the

general category carried forward from foreign corporation B's pre-pooling aggregate deficit offsets the remaining 100u of post-transaction earnings in the general category. Accordingly, foreign surviving corporation has the following earnings and profits and foreign income taxes at the end of 2007:

	Earnings & profits		Foreign taxes	
	Positive E&P	Hovering deficit	Foreign taxes available	Foreign taxes associated with hovering deficit
Post-1986 pool separate category:				
Passive .....	550u	.....	\$200	.....
General .....	.....	.....	\$85	.....
Carryforward pre-pooling deficit from Corp B .....	.....	(100u)	.....	\$0
2006 (from Corp B) .....	0u	.....	50u	.....
2005 (from Corp B) .....	0u	.....	25u	.....
	550u	(100u)	.....	\$0

(C) Under paragraph (d)(2)(iii) of this section, all of the \$25 of post-1986 foreign income taxes related to the (300u) hovering deficit in the general category is added to the foreign surviving corporation's post-1986 foreign income taxes of \$60 in that category

(because post-transaction earnings in the general category have exceeded the deficit in that category). Under paragraph (e)(1)(iii)(C) of this section, the 50u and 25u of foreign income taxes associated with foreign corporation B's pre-1987 accumulated profits

for 2006 and 2005 remain in those layers. These foreign income taxes generally will not be reduced or deemed paid unless a foreign tax refund restores a positive balance to the associated earnings pursuant to section

905(c), and thus will be trapped. See § 1.902-2(b)(2).

(5) *Pro rata rule for earnings and deficits during transaction year.* (i) For purposes of offsetting post-transaction earnings of a foreign surviving corporation under the rules described in paragraphs (d)(2), (e)(1)(iii), and (e)(2)(iii) of this section, the earnings and profits, and any related foreign income taxes, in each separate category for the taxable year of the foreign surviving corporation in which the transaction occurs shall be deemed to have been accumulated after such transaction in an amount which bears the same ratio to the undistributed earnings and profits of the foreign surviving corporation for such taxable year (computed without regard to any earnings and profits carried over) as the number of days in the taxable year after the date of transaction bears to the total number of days in the taxable year. See, e.g., § 1.381(c)(2)-1(a)(7) *Example 2* (illustrating application of this rule with respect to domestic corporations).

(ii) For purposes of determining the amount of pre-transaction deficits described in paragraphs (d)(2), (e)(1)(iii), and (e)(2)(iii) of this section, of a foreign surviving corporation that has a deficit in earnings and profits in any separate category for its taxable year in which the

transaction occurs, unless the actual accumulated earnings and profits, or deficit, as of such date can be shown, such pre-transaction deficit, and any related foreign income taxes, shall be deemed to have accumulated in a manner similar to that described in paragraph (f)(5)(i) of this section. See, e.g., § 1.381(c)(2)-1(a)(7) *Example 4* (illustrating application of this rule with respect to domestic corporations).

(g) *Effective date.* This section shall apply to section 367(b) transactions that occur on or after November 6, 2006.

■ **Par. 8.** Section 1.367(b)-8 is added and reserved to read as follows:

**§ 1.367(b)-8 Allocation of earnings and profits and foreign income taxes in certain foreign corporate separations. [Reserved]**

■ **Par. 9.** Section 1.367(b)-9 is added to read as follows:

**§ 1.367(b)-9 Special rule for F reorganizations and similar transactions.**

(a) *Scope.* This section applies to a foreign section 381 transaction (as defined in § 1.367(b)-7(a)) either—

(1) That is described in section 368(a)(1)(F); or

(2) That involves—

(i) At least one foreign corporation that holds no property and has no tax attributes immediately before the transaction, other than a nominal

amount of assets (and related tax attributes) to facilitate its organization or preserve its existence as a corporation; and

(ii) No more than one foreign corporation that holds more than a nominal amount of property or has more than a nominal amount of tax attributes immediately before the transaction.

(b) *Hovering deficit rules inapplicable.* If a transaction is described in paragraph (a) of this section, a foreign surviving corporation shall succeed to earnings and profits, and foreign income taxes without regard to the hovering deficit rules of § 1.367(b)-7(d)(2), (e)(1)(iii), and (e)(2)(iii).

(c) *Foreign divisive transactions.* [Reserved]

(d) *Examples.* The following examples illustrate the principles of this section:

*Example 1.* (i) *Facts.* (A) Foreign corporation A is and always has been a wholly owned subsidiary of USP, a domestic corporation. Foreign corporation A was incorporated in 1995, and has always had a calendar taxable year. Foreign corporation A (and all of its respective qualified business units as defined in section 989) maintains a “u” functional currency. On December 31, 2006, foreign corporation A has the following post-1986 undistributed earnings and post-1986 foreign income taxes:

Separate Category	E&P	Foreign taxes
Passive .....	(1,000u)	\$5
General .....	200u	200
	(800u)	205

(B) On January 1, 2007, foreign corporation A moves its place of incorporation from Country 1 to Country 2 in a reorganization described in section 368(a)(1)(F).

(ii) *Result.* Under § 1.367(b)-7(d), as modified by paragraph (b) of this section, the pre-transaction deficit of foreign corporation A will not hover. Accordingly, foreign

surviving corporation has the following post-1986 undistributed earnings and post-1986 foreign income taxes immediately after the foreign section 381 transaction:

Separate category	E&P	Foreign taxes
Passive .....	(1,000u)	\$5
General .....	200u	200
	(800u)	205

*Example 2.* (i) *Facts.* (A) Foreign corporations B, C and D are and always have been wholly owned subsidiaries of USP, a domestic corporation. Foreign corporation B was incorporated in 2000 and foreign corporations C and D were incorporated in

2001. Foreign corporation B does not own any significant property and has no earnings and profits or foreign income taxes accounts. Both foreign corporations C and D have always had a calendar taxable year. Foreign corporations C and D (and all of their

respective qualified business units as defined in section 989) maintain a “u” functional currency. On December 31, 2006, foreign corporations C and D have the following post-1986 undistributed earnings and post-1986 foreign income taxes:

	E&P	Foreign taxes
<i>Foreign corporation C Separate Category:</i>		
Passive .....	(900u)	\$50

	E&P	Foreign taxes
General .....	(200u)	100
	(1100u)	150
<i>Foreign corporation D Separate Category:</i>		
Passive .....	1200u	400
General .....	400u	100
	1600u	500

(B) On January 1, 2007, USP foreign corporations C and D merge into foreign corporation B in a reorganization described in section 368(a)(1)(A).  
 (ii) *Result.* Although the merger is a foreign section 381 transaction involving a foreign

corporation with no property or tax attributes, paragraph (b) of this section does not apply because more than one foreign corporation with significant tax attributes is involved in the foreign section 381 transaction. Accordingly, under § 1.367(b)-

7(d), foreign surviving corporation B has the following post-1986 undistributed earnings and post-1986 foreign income taxes immediately after the foreign section 381 transaction:

Separate Category	Earnings & profits		Foreign taxes	
	Positive E&P	Hovering deficit	Foreign taxes available	Foreign taxes associated with hovering deficit
General .....	1200u	(900u)	\$400	\$50
Passive .....	400u	(200u)	100	100
	1600u	(1100u)	500	150

(e) *Effective date.* This section shall apply to section 367(b) transactions that occur on or after November 6, 2006.

■ **Par. 10.** In § 1.381(a)-1, paragraph (c) is revised to read as follows:

**§ 1.381(a)-1 General rule relating to carryovers in certain corporate acquisitions.**

\* \* \* \* \*

(c) *Foreign corporations.* For additional rules involving foreign corporations, see §§ 1.367(b)-7 through 1.367(b)-9.

\* \* \* \* \*

**Mark E. Matthews,**  
*Deputy Commissioner for Services and Enforcement.*

Approved: July 20, 2006.

**Eric Solomon,**  
*Acting Deputy Assistant Secretary (Tax Policy).*  
 [FR Doc. 06-6740 Filed 8-7-06; 8:45 am]

**BILLING CODE 4830-01-P**

**DEPARTMENT OF HOMELAND SECURITY**

**Coast Guard**

**33 CFR Part 117**

[CGD08-06-024]

**Drawbridge Operation Regulations; Gulf Intracoastal Waterway, Galveston, TX**

**AGENCY:** Coast Guard, DHS.

**ACTION:** Notice of temporary deviation from regulations.

**SUMMARY:** The Commander, Eighth Coast Guard District, has issued a temporary deviation from the regulation governing the operation of the Galveston Causeway Railroad Bascule Bridge across the Gulf Intracoastal Waterway, mile 357.2 west of Harvey Locks, at Galveston, Galveston County, Texas. This deviation provides for two (2) three-hour closures to conduct scheduled maintenance to the drawbridge.

**DATES:** This deviation is effective from 7 a.m. until 4 p.m. on Wednesday, August 16, 2006.

**ADDRESSES:** Materials referred to in this document are available for inspection or copying at the office of the Eighth Coast Guard District, Bridge Administration Branch, Hale Boggs Federal Building,

room 1313, 500 Poydras Street, New Orleans, Louisiana 70130-3310 between 7 a.m. and 3 p.m., Monday through Friday, except Federal holidays. The telephone number is (504) 671-2128. The Bridge Administration Branch of the Eighth Coast Guard District maintains the public docket for this temporary deviation.

**FOR FURTHER INFORMATION CONTACT:** David Frank, Bridge Administration Branch, telephone (504) 671-2129.

**SUPPLEMENTARY INFORMATION:** The Burlington Northern Railway Company has requested a temporary deviation from the bridge operating requirements of 33 CFR 117.5 in order to perform necessary maintenance on the rail joints of the Galveston Causeway Railroad Bascule Bridge across the Gulf Intracoastal Waterway, mile 357.2 west of Harvey Locks, at Galveston, Galveston County, Texas. The maintenance is essential for the continued safe operation of the railroad bridge. This temporary deviation will allow the bridge to remain in the closed-to-navigation position from 7 a.m. until 10 a.m. and from 1 p.m. until 4 p.m. on Wednesday, August 16, 2006.

The bridge has a vertical clearance of 10 feet above mean high water in the closed-to-navigation position. Navigation at the site of the bridge consists mainly of tows with barges and some recreational pleasure craft. Due to

prior experience, as well as coordination with waterway users, it has been determined that this closure will not have a significant effect on these vessels. No alternate routes are available.

In accordance with 33 CFR 117.35(c), this work will be performed with all due speed in order to return the bridge to normal operation as soon as possible. This deviation from the operating regulations is authorized under 33 CFR 117.35.

Dated: July 31, 2006.

**Marcus Redford,**

*Bridge Administrator.*

[FR Doc. E6-12790 Filed 8-7-06; 8:45 am]

BILLING CODE 4910-15-P

## DEPARTMENT OF HOMELAND SECURITY

### Coast Guard

#### 33 CFR Part 125

[USCG-2006-24189]

#### Maritime Identification Credentials

**AGENCY:** Coast Guard, DHS.

**ACTION:** Notice of acceptable identification credentials; correction.

**SUMMARY:** This document corrects a typographical error to a statutory citation in the Coast Guard document entitled "Notice of acceptable identification credentials" (USCG-2006-24189) published on April 28, 2006, in the **Federal Register** (71 FR 25066).

**DATES:** This correction is effective August 8, 2006.

**ADDRESSES:** Documents indicated in this preamble as being available in the docket are part of docket USCG-2006-24189 and are available for inspection or copying at the Docket Management Facility, U.S. Department of Transportation, room PL-401, 400 Seventh Street, SW., Washington, DC 20590-0001 between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. They may also be viewed online at <http://dms.dot.gov> at any time. Conduct a simple search and enter in the last five digits of the docket number listed above.

**FOR FURTHER INFORMATION CONTACT:** If you have questions on this correction document, call Amy Bunk, Office of Regulations and Administrative Law, Coast Guard, telephone 202-372-3864. If you have questions on viewing material in the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202-493-0402.

**SUPPLEMENTARY INFORMATION:** The document entitled "Maritime Identification Credentials" (USCG-2006-24189), which published in the **Federal Register** (71 FR 25066) on April 28, 2006, informed the public that the Commandant of the Coast Guard was directing Coast Guard Captains of the Port to prevent access to waterfront facilities to persons that do not have appropriate identification credentials as defined under Coast Guard regulations. The document also identified additional identification documents approved by the Commandant as identification credentials.

In that document the statutory citation for the United States Code section entitled "Annual admission of refugees and admission of emergency situation refugees" had a typographical error and read 8 U.S.C. 1137. The correct citation for that section of the United States Code is 8 U.S.C. 1157.

In FR Doc. 06-4026 published on April 28, 2006, (71 FR 25066) make the following correction. On page 25068, in the first column, change the fifth sentence in the first paragraph to read as follows:

Other acceptable immigration statuses include individuals who possess valid evidence of unrestricted employment and are in a lawful nonimmigrant status, are a refugee admitted under 8 U.S.C. 1157, or are an alien granted asylum under 8 U.S.C. 1158.

Dated: August 2, 2006.

**Stefan G. Venckus,**

*Chief, Office of Regulations and Administrative Law, United States Coast Guard.*

[FR Doc. E6-12843 Filed 8-7-06; 8:45 am]

BILLING CODE 4910-15-P

## DEPARTMENT OF VETERANS AFFAIRS

### 38 CFR Part 3

RIN 2900-AM27

#### Veterans Benefits Act of 2003 and Veterans Benefits Improvement Act of 2004

**AGENCY:** Department of Veterans Affairs.

**ACTION:** Final rule.

**SUMMARY:** This document amends the Department of Veterans Affairs (VA) adjudication regulations to incorporate certain provisions from the Veterans Benefits Act of 2003 and the Veterans Benefits Improvement Act of 2004. Specifically, this document amends VA's adjudication regulations regarding plot or interment allowance eligibility, forfeiture of benefits, dependency and

indemnity compensation payments, the Radiation Exposure Compensation Act of 1990, as amended, exclusions from income for pension purposes, benefits for persons disabled by treatment or vocational rehabilitation provided by VA, effective date of death pension, and diseases subject to presumptive service connection. This document also amends VA's adjudication regulations to reflect the establishment of the Social Security Administration as an independent agency and that the Coast Guard is now under the jurisdiction of the Secretary of Homeland Security. These amendments are necessary to conform the regulations to the statutory amendments.

**DATES:** *Effective Date:* August 8, 2006.

*Applicability Dates:* In accordance with statutory provisions, the following amendments in this final rule will be applied as follows. The amendment to 38 CFR 3.309 is applicable to payments for periods beginning on or after March 26, 2002. The amendment to 38 CFR 3.715 is applicable to compensation and dependency and indemnity compensation payments for months beginning April 1, 2002. The amendment to 38 CFR 3.1(g)(4) is applicable March 1, 2003. The amendments to 38 CFR 3.152, 3.153, and 3.714 are applicable December 16, 2003. The amendments to 38 CFR 3.1600 and 3.1604 are applicable to claims filed on or after December 16, 2003. The amendment to 38 CFR 3.903 is applicable to claims filed on or after December 17, 2003. The amendment to 38 CFR 3.272 is applicable for periods on or after December 10, 2004. The amendments to 38 CFR 3.362 and 3.800 are applicable in the case of a judgment, settlement, or compromise covered by 38 U.S.C. 1151(b)(1) that becomes final on or after December 10, 2004. The amendment to 38 CFR 3.400 is applicable to claims filed on or after December 10, 2004. The amendment to 38 CFR 3.808 is applicable to benefits awarded pursuant to these regulations by VA on or after December 10, 2004. The amendment to 38 CFR 3.10 is applicable to payments beginning January 1, 2005.

**FOR FURTHER INFORMATION CONTACT:**

Maya Ferrandino, Consultant, Compensation and Pension Service, Policy and Regulations Staff, Veterans Benefits Administration, Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 273-7210.

**SUPPLEMENTARY INFORMATION:** The Veterans Benefits Act of 2003 and the Veterans Benefits Improvement Act of 2004, Public Law 108-183 and Public Law 108-454 respectively, added and

revised sections of title 38 of the United States Code, which addresses veterans benefits law. To ensure consistency with statutory changes, VA regulations will be amended as further described below.

Section 501 of the Veterans Benefits Act of 2003 amended 38 U.S.C. 2303(b)(1) and (2), Death in Department facility; plot allowance, and 38 U.S.C. 2307, Death from service-connected disability, to allow States to receive a plot or interment allowance for the interment, in a state cemetery or portion thereof used solely for the burial of veterans, of any veteran eligible for burial in a national cemetery. Under prior law, the allowance was payable only for veterans of a war, veterans discharged for disability incurred or aggravated in the line of duty, veterans entitled to VA compensation or pension, and certain other veterans. VA's regulation regarding payment of burial expenses for deceased veterans is 38 CFR 3.1600 and VA's regulation regarding payment of a plot or interment allowance to a State is 38 CFR 3.1604(c) and (d). This document amends §§ 3.1600(a) and (f) and 3.1604(c) and (d)(1)(i) and (5) to provide, in accordance with the statutory amendments, that States may be paid a plot or interment allowance on behalf of veterans buried in a state veterans' cemetery who were eligible for burial in a national cemetery and that the allowance is payable to States in addition to burial or funeral expenses to which they are eligible. The amendments to 38 CFR 3.1600 and 3.1604 are applicable to claims for an allowance filed on or after December 16, 2003.

Section 705(a) of the Veterans Benefits Act of 2003 amended 38 U.S.C. 6105(b)(2), Forfeiture for subversive activities, by adding certain offenses under title 18, United States Code, for which an individual forfeits his or her right to gratuitous benefits under the laws administered by the Secretary of Veterans Affairs. Section 6105(b)(2) as amended by the Veterans Benefits Act of 2003 applies to claims filed on or after December 17, 2003. Public Law 108-183, § 705(b), 117 Stat. 2672. VA's regulation regarding forfeiture of VA benefits for subversive activities is 38 CFR 3.903. This document amends § 3.903(a) to reflect the statutory change by adding 18 U.S.C. 175, 229, 831, 1091, 2332a, and 2332b to the current list of 18 U.S.C. sections cited in the regulation.

Section 708(c) of the Veterans Benefits Act of 2003 amended various sections of title 38 of the United States Code to reflect the establishment of the

Social Security Administration as an independent agency by replacing references to the Secretary of Health and Human Services with references to the Commissioner of Social Security, and striking "Department of Health and Human Services" and inserting "Social Security Administration" each time it appears in the provisions. This document amends 38 CFR 3.152(a), 3.153, and 3.714(f) to reflect the statutory changes.

In a similar manner, this document amends 38 CFR 3.1(g)(4), to reflect that the Coast Guard is now under the jurisdiction of the Secretary of Homeland Security, not the Secretary of Transportation. See Homeland Security Act of 2002, Public Law 107-296, § 1704(d), 116 Stat. 2135, 2314. The authorizing statute for § 3.1(g)(4) is 38 U.S.C. 101(25)(D), which was amended by section 1704(d) of Public Law 107-296 to reflect that the Coast Guard is under the jurisdiction of the Secretary of Homeland Security. To ensure consistency with section 101(25)(D), we are amending the corresponding regulation, § 3.1(g)(4).

Section 301 of the Veterans Benefits Improvement Act of 2004 amended 38 U.S.C. 1311, Dependency and indemnity compensation to a surviving spouse, by adding subsection (e), which provides for a \$250 increase in the monthly rate of dependency and indemnity compensation to which a surviving spouse with one or more children below the age of 18 is otherwise entitled. The increased rate is payable for the two-year period beginning on the date on which entitlement to dependency and indemnity compensation commenced. The increase ceases the first month after the month in which all children of the surviving spouse have attained the age of 18. The increase in dependency and indemnity compensation under section 1311(e) is applicable to payments beginning January 1, 2005. Public Law 108-454, § 301, 118 Stat. 3610. This document amends § 3.10(e) by adding § 3.10(e)(4) to reflect the statutory change.

We note that the Veterans Benefits Act of 2003 added a different subsection (e) to section 1311 than the subsection (e) added by the Veterans Benefits Improvement Act of 2004. There is no indication that Congress intended to replace section 1311(e) as added by the Veterans Benefits Act of 2003 with section 1311(e) as added by the Veterans Benefits Improvement Act of 2004, and for the purposes of this rulemaking document, VA assumes that Congress intended to include both paragraphs

designated as subsection (e) in the statute.

Section 302(a) of the Veterans Benefits Improvement Act of 2004 amended 38 U.S.C. 1112(c) to provide that a radiation-exposed veteran's receipt of a payment under the Radiation Exposure Compensation Act of 1990 as amended (42 U.S.C. 2210 note) (RECA) does not deprive such a veteran of receipt of VA compensation. Section 302(b) of the Veterans Benefits Improvement Act of 2004 amended 38 U.S.C. 1310, Deaths entitling survivors to dependency and indemnity compensation, to provide that a person's receipt of a RECA payment does not deprive the person of receipt of dependency and indemnity compensation. However, the statutory amendment also provides for an offset of RECA payments against VA compensation awarded pursuant to 38 U.S.C. 1112(c)(1) and dependency and indemnity compensation. The statutory changes are applicable to compensation and dependency and indemnity compensation payments for months beginning after March 26, 2002. Public Law 108-454, § 302(c), 118 Stat. 3610.

VA's regulation regarding RECA is 38 CFR 3.715. This document amends § 3.715 by adding paragraph (a)(1), which states that a RECA payment to a "radiation-exposed veteran," as defined in 38 CFR 3.309(d)(3), does not bar payment of VA compensation to the veteran for months beginning after March 26, 2002. New § 3.715(b) provides that a person's receipt of a RECA payment does not bar the person's receipt of dependency and indemnity compensation for months beginning after March 26, 2002. Also, § 3.715(c) states: "Notwithstanding paragraph (a) or (b), the amount of a RECA payment will be deducted from the amount of compensation payable pursuant to § 3.309(d) or the amount of dependency and indemnity compensation payable."

We have made one further amendment to 38 CFR 3.715 to correct an inconsistency with RECA, as amended. Section 6(e) of RECA states that, "[e]xcept as otherwise authorized by law, the acceptance of payment by an individual under this section shall be in full satisfaction of all claims of or on behalf of that individual against the United States \* \* \* that arise out of exposure to radiation, from atmospheric nuclear testing, in the affected area (as defined in section 4(b)(1)) at any time during the period described in subsection (a)(1), (a)(2)(A), or (a)(2)(B) of section 4(a), exposure to radiation in a uranium mine, mill, or while employed in the transport of uranium ore or

vanadium-uranium ore from such mine or mill at any time during the period described in section 5(a) or exposure to radiation as a result of onsite participation in a test involving the atmospheric detonation of a nuclear device." Currently, 38 CFR 3.715 is broader than RECA. The RECA statute provides that RECA payments satisfy all further claims against the United States, including claims for VA compensation, arising out of exposure to radiation covered by that Act. Section 3.715, however, currently precludes payment of compensation for disability, no matter what the cause of the disease. We are therefore amending § 3.715 to make the regulation consistent with statute by adding paragraph (a)(2) to provide that payment of VA compensation to a veteran who is not a radiation-exposed veteran is barred only if the veteran's disability resulted from a disease that is attributable to exposure to radiation for which payments have been received under RECA.

Section 303 of the Veterans Benefits Improvement Act of 2004 amended 38 U.S.C. 1503, Determinations with respect to annual income, by adding subsection 1503(a)(11) to exclude lump-sum proceeds of a life insurance policy on a veteran from consideration as income for pension purposes. VA's regulation regarding exclusions from income for pension purposes is 38 CFR 3.272. This document amends § 3.272 by adding § 3.272(x) to reflect the statutory changes. New § 3.272(x) is applicable for periods on or after December 10, 2004.

Section 304 of the Veterans Benefits Improvement Act of 2004 amended 38 U.S.C. 1151, Benefits for persons disabled by treatment or vocational rehabilitation, by adding subsection (c), which states that a qualifying additional disability under section 1151 shall be treated as if it were a service-connected disability for purposes of entitlement to chapter 21 (specially adapted housing) and chapter 39 benefits (automobiles and adaptive equipment). This is an expansion of the benefits to which persons receiving compensation under section 1151 are entitled. This statutory amendment to 38 U.S.C. 1151 is applicable with respect to eligibility for these benefits and services on or after December 10, 2004. Public Law 108-454, § 304(b), 118 Stat. 3611.

VA's regulation regarding automobiles and adaptive equipment is 38 CFR 3.808, Automobiles or other conveyances; certification. This document therefore amends § 3.808 to reflect the statutory change. To implement the statutory change, we are amending the introduction and

paragraphs (a) and (b) in § 3.808. While the format of the current regulation is being amended for ease of use, we are making no substantive change to the content of the regulation, other than implementation of the statutory change.

In this rulemaking, however, we are not amending 38 CFR 3.809, Specially adapted housing under 38 U.S.C. 2101(a), and 3.809a, Special home adaptation grants under 38 U.S.C. 2101(b), to reflect new 38 U.S.C. 1151(c)(1). We have decided to promulgate a separate rulemaking that will amend 38 CFR 3.809 and 3.809a to implement section 304 of the Veterans Benefits Improvement Act of 2004, as well as section 401 of the 2004 Act, which amended 38 U.S.C. 2101, which provides the eligibility criteria for chapter 21 benefits. In that rulemaking, we will also amend relevant regulations in part 36 of title 38, Code of Federal Regulations, to reflect these statutory amendments.

Section 304(c) of the Veterans Benefits Improvement Act of 2004 amended 38 U.S.C. 1151(b) by adding section 1151(b)(2) to provide that, where a judgment, settlement, or compromise of a claim specifically designates a portion of the award for the type of benefits provided under chapter 21 or 39 of title 38, United States Code, and VA later awards chapter 21 or 39 benefits, VA may reduce the amount of the chapter 21 or 39 benefits payable by the amount of benefits specifically designated for these purposes in the judgment, settlement, or compromise. Section 1151(b)(2) applies to a judgment, settlement, or compromise that became final on or after December 10, 2004. Section 1151(b)(2) also states that, if the amount received as a result of the judgment, settlement, or compromise is greater than the amount of the chapter 21 or 39 benefits, the excess amount received will be offset against benefits otherwise payable under 38 U.S.C. chapter 11. This document amends 38 CFR 3.362, Offsets under 38 U.S.C. 1151(b) of benefits awarded under 38 U.S.C. 1151 for claims filed on or after October 1, 1997, by adding § 3.362(e) and 38 CFR 3.800, Disability or death due to hospitalization, etc. for claims filed before October 1, 1997, by adding § 3.800(a)(4) to reflect the statutory changes with regard to chapter 39 benefits only. We will amend 38 CFR 3.362 and 3.800 to reflect new 38 U.S.C. 1151(b)(2) and (c)(1) regarding chapter 21 benefits in the separate rulemaking described above.

Section 305 of the Veterans Benefits Improvement Act of 2004 amended 38 U.S.C. 5110, Effective date of awards, by

removing the effective date restriction for death pension in section (d)(2), which required an application to be received within 45 days from the date of death for an effective date for an award of death pension to be the first day of the month in which the death occurred. The amendment allows the effective date for an award of death pension to be governed by the same rule as the effective date for an award of death compensation or dependency and indemnity compensation, which is that, if an application for death pension is received within one year from the date of death, the effective date of an award shall be the first day of the month in which the death occurred. VA's regulation regarding effective dates is 38 CFR 3.400. This document amends § 3.400(c)(3) by amending paragraphs (c)(3)(i) and (ii) to reflect the statutory change. We have determined that amended paragraphs 3.400(c)(3)(i) and (ii) are applicable to claims filed on or after December 10, 2004, the effective date of the Veterans Benefits Improvement Act of 2004.

Section 306(b) of the Veterans Benefits Improvement Act of 2004 amended 38 U.S.C. 1112, Presumptions relating to certain diseases and disabilities, by further defining a "radiation-risk activity" in section 1112(c)(3)(B)(iv) to include service in a capacity which, if performed as an employee of the Department of Energy, would qualify the individual for inclusion as a member of the Special Exposure Cohort under the Energy Employees Occupational Illness Compensation Program Act of 2000, codified as amended at 42 U.S.C. 73481(14). The amendment to section 1112(c)(3)(B) is effective as of March 26, 2002. VA's regulation regarding diseases subject to presumptive service connection for radiation-exposed veterans is 38 CFR 3.309(d). This document amends § 3.309(d)(3)(ii) by adding a new paragraph § 3.309(d)(3)(ii)(E) to reflect the statutory change.

#### **Administrative Procedure Act**

This final rule merely restates statutory provisions. Accordingly, there is a basis for dispensing with prior notice and comment and the delayed effective date provisions of 5 U.S.C. 553.

#### **Paperwork Reduction Act**

This document contains no provisions constituting a collection of information under the Paperwork Reduction Act (44 U.S.C. 3501-3521).

**Regulatory Flexibility Act**

The Secretary hereby certifies that this regulatory amendment will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612. Only VA beneficiaries could be directly affected. Therefore, pursuant to 5 U.S.C. 605(b), this amendment is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

**Executive Order 12866**

Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). The Order classifies a rule as a significant regulatory action requiring review by the Office of Management and Budget if it meets any one of a number of specified conditions, including: Having an annual effect on the economy of \$100 million or more, creating a serious inconsistency or interfering with an action of another agency, materially altering the budgetary impact of entitlements or the rights of entitlement recipients, or raising novel legal or policy issues. VA has examined the economic, legal, and policy implications of this final rule and has concluded that it is a significant regulatory action because it may raise novel legal or policy issues.

**Unfunded Mandates**

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any year. This final rule would have no such effect on State, local, and tribal governments, or on the private sector.

**Catalog of Federal Domestic Assistance Numbers**

The Catalog of Federal Domestic Assistance program numbers and titles for this proposal are 64.100, Automobiles and Adaptive Equipment for Certain Disabled Veterans and Members of the Armed Forces; 64.101, Burial Expenses Allowance for Veterans; 64.102, Compensation for Service-Connected Deaths for Veterans' Dependents; 64.104, Pension for Non-

Service-Connected Disability for Veterans; 64.105, Pension to Veterans Surviving Spouses, and Children; 64.109, Veterans Compensation for Service-Connected Disability; and 64.110, Veterans Dependency and Indemnity Compensation for Service-Connected Death.

**List of Subjects in 38 CFR Part 3**

Administrative practice and procedure, Claims, Disability benefits, Health care, Pensions, Radioactive materials, Veterans, Vietnam.

Approved: April 25, 2006.

**Gordon H. Mansfield,**  
*Deputy Secretary of Veterans Affairs.*

■ For the reasons set forth in the preamble, 38 CFR part 3 is amended as follows:

**PART 3—ADJUDICATION**

**Subpart A—Pension, Compensation, and Dependency and Indemnity Compensation**

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

**Authority:** 38 U.S.C. 501(a), unless otherwise noted.

■ 2. Amend § 3.1(g)(4) by removing “Secretary of Transportation” and adding, in its place, “Secretary of Homeland Security”.

■ 3. Amend § 3.10 by adding paragraph (e)(4) to read as follows:

**§ 3.10 Dependency and indemnity compensation rate for a surviving spouse.**

\* \* \* \* \*

(e) \* \* \*

(4) For a two-year period beginning on the date entitlement to dependency and indemnity compensation commenced, the dependency and indemnity compensation paid monthly to a surviving spouse with one or more children below the age of 18 shall be increased by the amount set forth in 38 U.S.C. 1311(e), regardless of the number of such children. The dependency and indemnity compensation payable under this paragraph is in addition to any other dependency and indemnity compensation payable. The increase in dependency and indemnity compensation of a surviving spouse under this paragraph shall cease beginning with the first month commencing after the month in which all children of the surviving spouse have attained the age of 18.

(Authority: 38 U.S.C. 1311(e))

\* \* \* \* \*

**§ 3.152 [Amended]**

■ 4. Amend § 3.152(a) by removing “Secretary of Health and Human Services” and adding, in its place, “Commissioner of Social Security”.

**§ 3.153 [Amended]**

■ 5. Amend § 3.153 by removing “Secretary of Health, Education, and Welfare” and adding, in its place, “Commissioner of Social Security”.

■ 6. Amend § 3.272 by adding paragraph (x) immediately following the authority citation at the end of paragraph (w) to read as follows:

**§ 3.272 Exclusions from income.**

\* \* \* \* \*

(x) *Life insurance proceeds.* Lump-sum proceeds of any life insurance policy on a veteran.

(Authority: 38 U.S.C. 1503(a)(11))

■ 7. Amend § 3.309 by adding paragraph (d)(3)(ii)(E) immediately following paragraph (d)(3)(ii)(D)(3) to read as follows:

**§ 3.309 Disease subject to presumptive service connection.**

\* \* \* \* \*

(d) \* \* \*

(3) \* \* \*

(ii) \* \* \*

(E) Service in a capacity which, if performed as an employee of the Department of Energy, would qualify the individual for inclusion as a member of the Special Exposure Cohort under section 3621(14) of the Energy Employees Occupational Illness Compensation Program Act of 2000 (42 U.S.C. 73841(14)).

\* \* \* \* \*

■ 8. Amend § 3.362 by adding paragraph (e) immediately following the last sentence at the end of paragraph (d) to read as follows:

**§ 3.362 Offset under 38 U.S.C. 1151(b) of benefits awarded under 38 U.S.C. 1151(a).**

\* \* \* \* \*

(e) *Offset of award of benefits under 38 U.S.C. chapter 39.* (1) If a judgment, settlement, or compromise covered in paragraphs (b) through (d) of this section becomes final on or after December 10, 2004, and includes an amount that is specifically designated for a purpose for which benefits are provided under 38 U.S.C. chapter 39 (38 CFR 3.808), and if VA awards chapter 39 benefits after the date on which the judgment, settlement, or compromise becomes final, the amount of the award will be reduced by the amount received under the judgment, settlement, or compromise for the same purpose.

(2) If the amount described in paragraph (e)(1) of this section is greater than the amount of an award under 38 U.S.C. chapter 39, the excess amount received under the judgment, settlement, or compromise will be offset against benefits otherwise payable under 38 U.S.C. chapter 11.

\* \* \* \* \*

#### § 3.400 [Amended]

■ 9. Amend § 3.400 by:

■ a. In paragraph (c)(3)(i), adding “or on or after December 10, 2004,” following “October 1, 1984,”; and

■ b. In paragraph (c)(3)(ii), removing “on or after October 1, 1984,” and adding, in its place, “between October 1, 1984, and December 9, 2004.”.

■ 10. Amend § 3.714(f) by:

■ a. Revising the paragraph heading.

■ b. In the introductory text, by removing “Department of Health and Human Services” and adding, in its place, “Social Security Administration”.

The revision reads as follows:

#### § 3.714 Improved pension elections—public assistance beneficiaries.

\* \* \* \* \*

(f) *Notification to the Social Security Administration.* \* \* \*

\* \* \* \* \*

■ 11. Revise § 3.715 to read as follows:

#### § 3.715 Radiation Exposure Compensation Act of 1990, as amended.

(a) *Compensation.* (1) A radiation-exposed veteran, as defined in 38 CFR 3.309(d)(3), who receives a payment under the Radiation Exposure Compensation Act of 1990, as amended (42 U.S.C. 2210 note) (RECA), will not be denied compensation to which the veteran is entitled under 38 CFR 3.309(d) for months beginning after March 26, 2002.

(2) A veteran who is not a “radiation-exposed veteran,” as defined in 38 CFR 3.309(d)(3), is not entitled to VA compensation for disability caused by a disease that is attributable to exposure to radiation for which the veteran has received a payment under RECA.

(b) *Dependency and indemnity compensation.* A person who receives a payment under RECA based upon a veteran’s death will not be denied dependency and indemnity compensation to which the person is entitled under 38 CFR 3.5 and 3.22 for months beginning after March 26, 2002.

(c) *Offset of RECA payment against VA benefits.* Notwithstanding paragraph (a) or (b) of this section, the amount of a RECA payment will be deducted from the amount of compensation payable pursuant to § 3.309(d) or the amount of

dependency and indemnity compensation payable.

(Authority: 38 U.S.C. 1112(c)(4), 1310(c); 42 U.S.C. 2210 note)

■ 12. Amend § 3.800 by adding paragraph (a)(4) to read as follows:

#### § 3.800 Disability or death due to hospitalization, etc.

\* \* \* \* \*

(a) \* \* \*

(4) *Offset of award of benefits under 38 U.S.C. chapter 39.* (i) If a judgment, settlement, or compromise covered by paragraph (a)(2) of this section becomes final on or after December 10, 2004, and includes an amount that is specifically designated for automobile assistance benefits under 38 U.S.C. chapter 39 (38 CFR 3.808), and if VA awards chapter 39 benefits after the date on which the judgment, settlement, or compromise becomes final, the amount of the award will be reduced by the amount received under the judgment, settlement, or compromise for the same purpose.

(ii) If the amount described in paragraph (4)(i) of this section is greater than the amount of an award under 38 U.S.C. chapter 39, the excess amount received under the judgment, settlement, or compromise will be offset against benefits otherwise payable under 38 U.S.C. chapter 11.

(Authority: 38 U.S.C. 1151(b)(2))

\* \* \* \* \*

■ 13. Amend § 3.808 by:

■ a. Removing the introductory text.

■ b. Revising paragraph (a).

■ c. Redesignating the paragraph (b)(1) introductory text as paragraph (b) introductory text and revising it.

■ d. Removing paragraph (b)(2).

■ e. Redesignating former paragraphs (b)(1)(i) through (b)(1)(iv) as paragraphs (b)(1) through (b)(4), respectively.

■ f. Removing the authority citations at the end of paragraphs (c) and (d).

■ g. Adding an authority citation at the end of paragraph (e)(3).

The revisions and addition read as follows:

#### § 3.808 Automobiles or other conveyances; certification.

(a) *Entitlement.* A certificate of eligibility for financial assistance in the purchase of one automobile or other conveyance in an amount not exceeding the amount specified in 38 U.S.C. 3902 (including all State, local, and other taxes where such are applicable and included in the purchase price) and of basic entitlement to necessary adaptive equipment will be provided to—

(1) A veteran who is entitled to compensation under chapter 11 of title

38, United States Code, for a disability described in paragraph (b) of this section; or

(2) A member of the Armed Forces serving on active duty who has a disability described in paragraph (b) of this section that is the result of an injury or disability incurred or disease contracted in or aggravated by active military, naval, or air service.

(b) \* \* \* One of the following must exist:

\* \* \* \* \*

(e) \* \* \*

(Authority: 38 U.S.C. 501(a), 1151(c)(2), 3902).

■ 14. Amend § 3.903 by:

■ a. Redesignating paragraphs (a)(2) through (a)(4) as paragraphs (a)(3) through (a)(5), respectively.

■ b. Adding a new paragraph (a)(2).

The addition reads as follows:

#### § 3.903 Subversive activities.

(a) \* \* \*

(2) In title 18 U.S.C., sections 175, 229, 831, 1091, 2332a, and 2332b, for claims filed on or after December 17, 2003.

\* \* \* \* \*

■ 15. Amend § 3.1600 by:

■ a. In paragraph (a), removing “Payment” in the last sentence and adding, in its place, “Except as provided in § 3.1604(d)(5), payment”.

■ b. Revising paragraph (f) introductory text.

■ c. Redesignating paragraphs (f)(1) through (f)(5) as paragraphs (f)(2)(i) through (f)(2)(v), respectively.

■ d. Adding a new paragraph (f)(1).

■ e. Adding paragraph (f)(2) introductory text.

The revision and additions read as follows:

#### § 3.1600 Payment of burial expenses of deceased veterans.

\* \* \* \* \*

(f) *Plot or interment allowance.* A plot or interment allowance is payable to the person or entity who incurred the expenses in an amount not to exceed the amount specified in 38 U.S.C. 2303(b) (or if the entitlement is under § 3.40 (c) or (d), an amount computed in accordance with the provisions of § 3.40(c)) if the following conditions are met:

(1) For claims filed on or after December 16, 2003:

(i) The deceased veteran is eligible for burial in a national cemetery;

(ii) The veteran is not buried in a national cemetery or other cemetery under the jurisdiction of the United States;

(iii) The applicable further provisions of this section and §§ 3.1601 through 3.1610.

(2) For claims filed before December 16, 2003:

\* \* \* \* \*

■ 16. Amend § 3.1604 by:

■ a. Revising the authority citation at the end of paragraph (c).

■ b. Revising paragraph (d)(1)(i).

■ c. Adding paragraph (d)(5) following the authority citation at the end of paragraph (d)(4).

The revisions and addition read as follows:

**§ 3.1604 Payment from non-Department of Veterans Affairs sources.**

\* \* \* \* \*

(c) \* \* \*

(Authority: 38 U.S.C. 2303(b)(1)).

(d) \* \* \*

(1) \* \* \*

(i) The plot or interment allowance is payable based on the deceased veteran's eligibility for burial in a national cemetery (or, in claims filed prior to December 16, 2003, the deceased veteran's service). See § 38.620 of this chapter.

\* \* \* \* \*

(5) A plot or interment allowance may be paid to a state in addition to a burial allowance under § 3.1600(a) for claims filed on or after December 16, 2003.

[FR Doc. E6-12787 Filed 8-7-06; 8:45 am]

BILLING CODE 8320-01-P

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 81

[EPA-R09-OAR-2006-AZ-0388; FRL-8206-4]

#### Approval and Promulgation of Implementation Plans; Designation of Areas for Air Quality Planning Purposes; State of Arizona; Finding of Attainment for Rillito Particulate Matter of 10 Microns or Less (PM<sub>10</sub>) Nonattainment Area; Determination Regarding Applicability of Certain Clean Air Act Requirements; Correction

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

**ACTION:** Direct final rule.

**SUMMARY:** EPA is taking direct final action to determine that the Rillito moderate PM<sub>10</sub> nonattainment area in Arizona attained the National Ambient Air Quality Standards for particulate matter with an aerodynamic diameter

less than or equal to a nominal 10 micrometers (PM<sub>10</sub>) by the applicable attainment date. EPA also finds that the Rillito area is currently attaining the PM<sub>10</sub> standards, and based on this latter finding, EPA is determining that certain Clean Air Act requirements are not applicable for so long as the Rillito area continues to attain the PM<sub>10</sub> standards. Lastly, EPA is correcting an error in a previous rulemaking that involved the classification of PM<sub>10</sub> nonattainment areas within the State of Arizona.

**DATES:** This rule is effective on October 10, 2006, without further notice, unless EPA receives adverse comments by September 7, 2006. If adverse comment is received, EPA will publish a timely withdrawal of the direct final rule in the **Federal Register** informing the public that the rule will not take effect.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA-R09-OAR-2006-AZ-0388 by one of the following methods:

- Federal eRulemaking portal: <http://www.regulations.gov>. Follow the on-line instructions for submitting comments.

- E-mail: [tax.wienke@epa.gov](mailto:tax.wienke@epa.gov).

- Fax: (415) 947-3579 (please alert the individual listed in the **FOR FURTHER INFORMATION CONTACT** if you are faxing comments).

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**SUPPLEMENTARY INFORMATION:**

Throughout this document, wherever "we," "us," or "our" is used, we mean the EPA.

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## I. Background

### A. What National Ambient Air Quality Standards (NAAQS) Are Considered In Today's Finding?

National Ambient Air Quality Standards (NAAQS) are safety thresholds for certain ambient air pollutants set by EPA to protect public health and welfare. Particulate matter with an aerodynamic diameter of less than or equal to 10 micrometers, or PM<sub>10</sub>, is the subject of this action. PM<sub>10</sub> is among the ambient air pollutants for which EPA has established health-based standards.

PM<sub>10</sub> causes adverse health effects by penetrating deep in the lungs, aggravating the cardiopulmonary system. Children, the elderly, and people with asthma and heart conditions are the most vulnerable.

On July 1, 1987 (52 FR 24634), EPA revised the NAAQS for particulate matter with an indicator that includes only those particles with an aerodynamic diameter less than or equal to a nominal 10 micrometers. See 40 CFR 50.6. The 24-hour primary PM<sub>10</sub> standard is 150 micrograms per cubic meter (µg/m<sup>3</sup>) with no more than one expected exceedance per year. The annual primary PM<sub>10</sub> standard is 50 µg/m<sup>3</sup> as an annual arithmetic mean. The secondary PM<sub>10</sub> standards, promulgated to protect against adverse welfare effects, are identical to the primary standards.

### B. What Is the Designation and Classification of This PM<sub>10</sub> Nonattainment Area?

Upon enactment of the 1990 Clean Air Act Amendments (CAA or the Act), PM<sub>10</sub> areas meeting the requirements of either (i) or (ii) of section 107(d)(4)(B) of the Act were designated nonattainment for PM<sub>10</sub> by operation of law and classified "moderate." These areas included all former Group I PM<sub>10</sub> planning areas identified in 52 FR 29383 (August 7, 1987) and further clarified in 55 FR 45799 (October 31, 1990), and any other areas violating the NAAQS for PM<sub>10</sub> prior to January 1, 1989 (many of these areas were identified by footnote 4 in the October 31, 1990 **Federal Register** document). A

**Federal Register** notice announcing the areas designated nonattainment for PM<sub>10</sub> upon enactment of the 1990 Act Amendments, known as "initial" PM<sub>10</sub> nonattainment areas, was published on March 15, 1991 (56 FR 11101). A subsequent **Federal Register** document correcting some of these areas was published on August 8, 1991 (56 FR 37654). These nonattainment designations and moderate area classifications were codified in 40 CFR part 81 in a **Federal Register** document published on November 6, 1991 (56 FR 56694). All other areas in the nation not designated nonattainment at enactment were designated unclassifiable (see section 107(d)(4)(B)(iii) of the Act).

The Rillito planning area was among the areas listed by EPA as a Group I area (see 52 FR 29383, August 7, 1987) and was designated nonattainment for PM<sub>10</sub> by operation of law and classified "moderate." In accordance with section 189(a)(2) of the CAA, Arizona was to submit a state implementation plan (SIP) by November 15, 1991 demonstrating attainment of the PM<sub>10</sub> standards by December 31, 1994 for the Rillito area.<sup>1</sup>

### C. How Do We Make Attainment Determinations?

Pursuant to sections 179(c)(1) and 188(b)(2) of the Act, we have the responsibility of determining within six months of the applicable attainment date whether, based on air quality data, PM<sub>10</sub> nonattainment areas attained the NAAQS by that date. The "applicable attainment date" is December 31, 1994 for areas, such as Rillito, that were designated as "moderate" nonattainment for PM<sub>10</sub> by operation of law under the 1990 Amended Act. Determinations under section 179(c)(1) of the Act are to be based upon an area's "air quality as of the attainment date." Section 188(b)(2) is consistent with this requirement.

Generally, we will determine whether an area's air quality meets the PM<sub>10</sub> NAAQS for purposes of section 179(c)(1) and 188(b)(2) based upon data gathered at established state and local air monitoring stations (SLAMS) and national air monitoring stations (NAMS) in the nonattainment area and entered into EPA's Air Quality System (AQS) database. Data entered into the AQS have been determined to meet federal monitoring requirements (see 40 CFR

50.6; 40 CFR part 50, appendix J; 40 CFR part 53; 40 CFR part 58, appendices A and B) and may be used to determine the attainment status of areas. We will also consider air quality data from other air monitoring stations in the nonattainment area provided that the stations meet the federal monitoring requirements for SLAMS. All data are reviewed to determine the area's air quality status in accordance with our guidance at 40 CFR part 50, appendix K.

Attainment of the annual PM<sub>10</sub> standard is achieved when the annual arithmetic mean PM<sub>10</sub> concentration over a three-year period is equal to or less than 50 µg/m<sup>3</sup>. Attainment of the 24-hour standard is determined by calculating the expected number of days in a year with PM<sub>10</sub> concentrations greater than 150 µg/m<sup>3</sup>. The 24-hour standard is attained when the expected number of days with levels above 150 µg/m<sup>3</sup> (averaged over a three-year period) is less than or equal to one. Three consecutive years of air quality data are necessary to show attainment of the 24-hour and annual standards for PM<sub>10</sub>. See 40 CFR part 50, appendix K. A complete year of air quality data, as referred to in 40 CFR part 50, appendix K, is composed of all four calendar quarters with each quarter containing data from at least 75 percent of the scheduled sampling days.

## II. What Is the Basis for EPA's Determination That the Rillito Area Has Attained the PM<sub>10</sub> NAAQS?

The Rillito PM<sub>10</sub> nonattainment area is located in north central Pima County, just northwest of the Tucson metropolitan area in southern Arizona.<sup>2</sup> The nonattainment area encompasses the following nine townships: T11S, R9E through R12E; and T12S, R8E through R12E. The incorporated Town of Marana with a population of approximately 8,000 is located within the nonattainment area. A smaller community, the unincorporated town of Rillito, is located in the portion of the nonattainment area historically associated with maximum ambient PM<sub>10</sub> concentrations. The land use around Rillito is predominantly agricultural. The only major (i.e., greater than 100 tons per year) stationary point source of air pollution in the nonattainment area

<sup>2</sup> In a 1996 rulemaking (61 FR 21372, May 10, 1996) in which we found that the Phoenix Planning Area had not attained the PM<sub>10</sub> NAAQS by the applicable attainment date for moderate PM<sub>10</sub> nonattainment areas and thus reclassified the area as "serious", we inadvertently introduced an error into the "Arizona-PM-10" table in 40 CFR 81.303 by moving the entry for the Rillito planning area from Pima County to Santa Cruz County. We are correcting this error in today's notice under CAA section 110(k)(6).

<sup>1</sup> Arizona submitted a moderate area PM<sub>10</sub> plan for the Rillito area on November 14, 1991. EPA found this plan to be incomplete by letter dated May 14, 1992. On April 22, 1994, ADEQ submitted a revised PM<sub>10</sub> plan for Rillito, and EPA found it to be complete by letter dated August 18, 1994. EPA has not taken action on this 1994 PM<sub>10</sub> plan.

is an Arizona Portland Cement (APC) plant. APC is permitted by ADEQ. Most of the other stationary sources are sand and gravel operations mining the alluvial deposits of the Santa Cruz River basin. The area in and around the nonattainment area is expected to change from rural agricultural to

residential because it will absorb residential development from the Tucson metropolitan area.

The Rillito PM<sub>10</sub> nonattainment area has one SLAMS monitor operated by the Arizona Department of Environmental Quality (ADEQ). Located at 8820 West Water Street within the community of Rillito, this monitor is approximately

0.5 miles northwest of the Arizona Portland Cement plant. This monitor was selected by ADEQ to represent maximum PM<sub>10</sub> concentration in the area to which the public is exposed. Table 1 summarizes the one-in-six day PM<sub>10</sub> data collected there from 1988–2005.

TABLE 1.—SUMMARY OF 24 HOUR AND ANNUAL PM<sub>10</sub> CONCENTRATIONS (µG/M<sup>3</sup>) FOR RILLITO, 1988–2005

Year	PM <sub>10</sub> Concentrations		
	Maximum 24-hour concentration	Annual average	3-year annual average
1988	163	<b>*69.2</b>	NA
1989	170	<b>*83.3</b>	NA
1990	94	*39.0	<b>*63.8</b>
1991	133	37.1	<b>*53.1</b>
1992	96	33.6	*36.6
1993	68	27.6	32.8
1994	63	28.3	29.8
1995	91	36.2	30.7
1996	84	38.3	34.3
1997	129	41.9	38.8
1998	81	32.4	37.5
1999	102	37.8	37.4
2000	129	*42.1	*37.4
2001	89	33.6	*37.8
2002	70	37.1	*37.6
2003	118	39.5	36.7
2004	93	32.2	36.3
2005	84	39.1	36.9

\* Indicates that the mean does not satisfy criteria for a complete data set.  
 \* Values shown in **bold** text represent exceedances of the applicable standard.

As noted above, the 24-hour PM<sub>10</sub> standard is attained when the expected number of days with levels above 150 µg/m<sup>3</sup> (averaged over a three-year period) is less than or equal to one. Based on the data summarized in table 1, above, we find no exceedances of the 24-hour PM<sub>10</sub> standard for the 1992–1994 period and thus the expected number of days with levels above 150 µg/m<sup>3</sup> (averaged over that three-year period) is zero. As such, we find that Rillito attained the 24-hour PM<sub>10</sub> NAAQS by the applicable attainment date (1994). Furthermore, since 1994, no exceedances of the 24-hour PM<sub>10</sub> standard have been recorded at the Rillito monitoring station and thus, we find that the area has continued to attain, and is currently attaining, the 24-hour standard.

Also as noted above, attainment of the annual PM<sub>10</sub> standard is achieved when the annual arithmetic mean PM<sub>10</sub> concentration over a three-year period is equal to or less than 50 µg/m<sup>3</sup>. Review of the data for calendar years 1992–1994 reveals an arithmetic average of 29.8 µg/m<sup>3</sup>. As such, we find that Rillito attained the annual PM<sub>10</sub> standard by the applicable attainment date (1994).

Since 1994, there have been no exceedances of the annual PM<sub>10</sub> standard, and thus, we find that the area has continued to attain, and is currently attaining, the annual standard.

**III. What Are The Applicable Planning Requirements For The Rillito Area As A Result Of EPA’s Attainment Determination?**

The air quality planning requirements for moderate PM<sub>10</sub> nonattainment areas, such as the Rillito nonattainment area, are set out in part D, subparts 1 and 4 of title I of the Act. We have issued guidance in a General Preamble<sup>3</sup> describing how we will review SIPs and SIP revisions submitted under title I of the Act, including those containing moderate PM<sub>10</sub> nonattainment area SIP provisions.

In some designated nonattainment areas, monitored data demonstrates that the NAAQS has already been achieved. Based on its interpretation of the Act, EPA has determined that certain requirements of part D, subparts 1 and

2 (of title I) of the Act do not apply and therefore do not require certain submissions for an area that has attained the NAAQS. These include reasonable further progress (RFP) requirements, attainment demonstrations and contingency measures, because these provisions have the purpose of helping achieve attainment of the NAAQS.

EPA’s Clean Data Policy is the subject of two memoranda setting forth our interpretation of the provisions of the Act as they apply to areas that have attained the relevant NAAQS. EPA also finalized the statutory interpretation set forth in the policy in a final rule, 40 CFR 51.918, as part of its “Final Rule to Implement the 8-hour Ozone National Ambient Air Quality Standard—Phase 2” (Phase 2 Final Rule). See discussion in the preamble to the rule at 70 FR 71645–71646 (November 29, 2005). EPA believes that the legal bases set forth in detail in our Phase 2 Final Rule; our May 10, 1995 memorandum from John S. Seitz, entitled “Reasonable Further Progress, Attainment Demonstration, and Related Requirements for Ozone Nonattainment Areas Meeting the Ozone National Ambient Air Quality Standard” (Seitz memo); and our

<sup>3</sup>“General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990” (57 FR 13498, April 16, 1992, as supplemented 57 FR 18070, April 28, 1992).

December 14, 2004 memorandum from Stephen D. Page entitled "Clean Data Policy for the Fine Particle National Ambient Air Quality Standards" (Page memo) are equally pertinent to the interpretation of provisions of subparts 1 and 4 applicable to PM<sub>10</sub>. EPA's interpretation of how the provisions of the Act apply to areas with "clean data" is not logically limited to ozone and PM<sub>2.5</sub>, because the rationale is not dependent upon the type of pollutant. Our interpretation that an area that is attaining the standard is relieved of obligations to demonstrate RFP and to provide an attainment demonstration and contingency measures pursuant to part D of the CAA, pertains whether the standard is PM<sub>10</sub>, ozone, or PM<sub>2.5</sub>.

The reasons for relieving an area that has attained the relevant standard of certain part D, subparts 1 and 2 obligations, applies equally to part D, subpart 4, which contains specific attainment demonstration and RFP provisions for PM<sub>10</sub> nonattainment areas. As we have explained in the Phase 2 Final Rule and our ozone and PM<sub>2.5</sub> clean data memoranda, EPA believes it is reasonable to interpret provisions regarding RFP and attainment demonstrations, along with related requirements, so as not to require SIP submissions if an area subject to those requirements is already attaining the NAAQS (*i.e.*, attainment of the NAAQS is demonstrated with three consecutive years of complete, quality-assured air quality monitoring data). Three U.S. Circuit Courts of Appeals have upheld EPA rulemakings applying its interpretation of subparts 1 and 2 with respect to ozone. *Sierra Club v. EPA*, 99 F.3d 1551 (10th Cir. 1996); *Sierra Club v. EPA*, 375 F.3d 537 (7th Cir. 2004); *Our Children's Earth Foundation v. EPA*, No. 04-73032 (9th Cir. June 28, 2005)(memorandum opinion). It has been EPA's longstanding interpretation that the general provisions of part D, subpart 1 of the Act (sections 171 and 172) do not require the submission of SIP revisions concerning RFP for areas already attaining the ozone NAAQS. In the General Preamble, we stated:

[R]equirements for RFP will not apply in evaluating a request for redesignation to attainment since, at a minimum, the air quality data for the area must show that the area has already attained. Showing that the State will make RFP towards attainment will, therefore, have no meaning at that point. 57 FR at 13564.

EPA believes the same reasoning applies to the PM<sub>10</sub> provisions of part D, subpart 4.

With respect to RFP, section 171(1) states that, for purposes of part D of title

I, RFP "means such annual incremental reductions in emissions of the relevant air pollutant as are required by this part or may reasonably be required by the Administrator for the purpose of ensuring attainment of the applicable NAAQS by the applicable date." Thus, whether dealing with the general RFP requirement of section 172(c)(2), the ozone-specific RFP requirements of sections 182(b) and (c), or the specific RFP requirements for PM<sub>10</sub> areas of part D, subpart 4, section 189(c)(1), the stated purpose of RFP is to ensure attainment by the applicable attainment date. Section 189(c)(1) states that:

Plan revisions demonstrating attainment submitted to the Administrator for approval under this subpart shall contain quantitative milestones which are to be achieved every 3 years until the area is redesignated attainment and which demonstrate reasonable further progress, as defined in section 7501(1) of this title, toward attainment by the applicable date.

Although this section states that revisions shall contain milestones which are to be achieved until the area is redesignated to attainment, such milestones are designed to show reasonable further progress "toward attainment by the applicable attainment date", as defined by section 171. Thus, it is clear that once the area has attained the standard, no further milestones are necessary or meaningful. This interpretation is supported by language in section 189(c)(3), which mandates that a state that fails to achieve a milestone must submit a plan that assures that the state will achieve the next milestone or attain the NAAQS if there is no next milestone. Section 189(c)(3) assumes that the requirement to submit and achieve milestones does not continue after attainment of the NAAQS.

If an area has in fact attained the standard, the stated purpose of the RFP requirement will have already been fulfilled.<sup>4</sup> EPA took this position with

<sup>4</sup> Thus we believe that it is a distinction without a difference that section 189(c)(1) speaks of the RFP requirement as one to be achieved until an area is "redesignated attainment", as opposed to section 172(c)(2), which is silent on the period to which the requirement pertains, or the ozone nonattainment area RFP requirements in sections 182(b)(1) or 182(c)(2), which refer to the RFP requirements as applying until the "attainment date", since, section 189(c)(1) defines RFP by reference to section 171(1) of the Act. Reference to section 171(1) clarifies that, as with the general RFP requirements in section 172(c)(2) and the ozone-specific requirements of section 182(b)(1) and 182(c)(2), the PM-specific requirements may only be required "for the purpose of ensuring attainment of the applicable national ambient air quality standard by the applicable date." 42 U.S.C. section 7501(1). As discussed in the text of this rulemaking, EPA interprets the RFP requirements, in light of the definition of RFP in section 171(1), and incorporated in section

respect to the general RFP requirement of section 172(c)(2) in the April 16, 1992 General Preamble and also in the May 10, 1995 memorandum with respect to the requirements of sections 182(b) and (c). We are extending that interpretation to the specific provisions of part D, subpart 4. In the General Preamble, we stated, in the context of a discussion of the requirements applicable to the evaluation of requests to redesignate nonattainment areas to attainment, that the "requirements for RFP will not apply in evaluating a request for redesignation to attainment since, at a minimum, the air quality data for the area must show that the area has already attained. Showing that the State will make RFP towards attainment will, therefore, have no meaning at that point." (57 FR 13564). See also our September 4, 1992 memorandum from John Calcagni, entitled "Procedures for Processing Requests to Redesignate Areas to Attainment" (Calcagni memo), p. 6.

With respect to the attainment demonstration requirements of section 189(a)(1)(B), an analogous rationale leads to the same result. Section 189(a)(1)(B) requires that the plan provide for "a demonstration (including air quality modeling) that the [SIP] will provide for attainment by the applicable attainment date. \* \* \*" As with the RFP requirements, if an area is already monitoring attainment of the standard, EPA believes there is no need for an area to make a further submission containing additional measures to achieve attainment. This is also consistent with the interpretation of the section 172(c) requirements provided by EPA in the General Preamble, the Page memo, and the section 182(b) and (c) requirements set forth in the Seitz memo. As EPA stated in the General Preamble, no other measures to provide for attainment would be needed by areas seeking redesignation to attainment since "attainment will have been reached." (57 FR at 13564).

Other SIP submission requirements are linked with these attainment demonstration and RFP requirements, and similar reasoning applies to them. These requirements include the contingency measure requirements of sections 172(c)(9) and 182(c)(9). We have interpreted the contingency measure requirements of sections 172(c)(9) and 182(c)(9) as no longer applying when an area has attained the standard because those "contingency measures are directed at ensuring RFP

189(c)(1), to be a requirement that no longer applies once the standard has been attained.

and attainment by the applicable date.” (57 FR at 13564); Seitz memo, pp. 5–6.

Both sections 172(c)(1) and 189(a)(1)(C) require “provisions to assure that reasonably available control measures” (*i.e.*, RACM) are implemented in a nonattainment area. The General Preamble, 57 FR at 13560 (April 16, 1992), states that EPA interprets section 172(c)(1) so that RACM requirements are a “component” of an area’s attainment demonstration. Thus, for the same reason the attainment demonstration no longer applies by its own terms, the requirement for RACM no longer applies. EPA has consistently interpreted this provision to require only implementation of potential RACM measures that could contribute to reasonable further progress or to attainment. General Preamble, 57 FR at 13498. Thus, where an area is already attaining the standard, no additional RACM measures are required.<sup>5</sup> EPA is interpreting section 189(a)(1)(C) consistent with its interpretation of section 172(c)(1).

Here, as in both our Phase 2 Final Rule and ozone and PM<sub>2.5</sub> clean data memoranda, we emphasize that the suspension of a requirement to submit SIP revisions concerning these RFP, attainment demonstration, RACM, and other related requirements exists only for as long as a nonattainment area continues to monitor attainment of the standard. If such an area experiences a violation of the NAAQS, the basis for the requirements being suspended would no longer exist. Therefore, the area would again be subject to a requirement to submit the pertinent SIP revision or revisions and would need to address those requirements. Thus, a determination that an area need not submit one of the SIP submittals amounts to no more than a suspension of the requirements for so long as the area continues to attain the standard. However, once EPA ultimately redesignates the area to attainment, the area will be entirely relieved of these requirements to the extent the maintenance plan for the area does not rely on them.

Therefore, we believe that, for the reasons set forth here and established in our prior “clean data” memoranda and rulemakings, a PM<sub>10</sub> nonattainment area that has “clean data,” should be

<sup>5</sup> The EPA’s interpretation that the statute only requires implementation of RACM measures that would advance attainment was upheld by the United States Court of Appeals for the Fifth Circuit (*Sierra Club v. EPA*, 314 F.3d 735, 743–745 (5th Cir. 2002)), and by the United States Court of Appeals for the D.C. Circuit (*Sierra Club v. EPA*, 294 F.3d 155, 162–163 (D.C. Cir. 2002)).

relieved of the part D, subpart 4 obligations to provide an attainment demonstration pursuant to section 189(a)(1)(B), the RACM provisions of section 189(a)(1)(C), and the RFP provisions established by section 189(c)(1) of the Act, as well as the aforementioned attainment demonstration, RACM, RFP and contingency measure provisions of part D, subpart 1 contained in section 172 of the Act.<sup>6</sup>

Should EPA at some future time determine that an area that had clean data, but which has not yet been redesignated as attainment for a NAAQS, has violated the relevant standard, the area would again be required to submit the pertinent requirements under the SIP for the area. Attainment determinations under the policy do not shield an area from other required actions, such as provisions to address pollution transport.

As set forth above, EPA finds that because the Rillito area has continued to attain the NAAQS, the requirement of an attainment demonstration, reasonable further progress, reasonably available control measures and contingency measures no longer applies for so long as the area continues to monitor attainment of the PM<sub>10</sub> NAAQS. If measurements of ambient PM<sub>10</sub> concentration in the Rillito area reveal a violation of the PM<sub>10</sub> NAAQS, then the State of Arizona would again be required to submit the pertinent CAA requirements for this nonattainment area.<sup>7</sup>

<sup>6</sup> In prior rulemakings involving the Clean Data Policy and PM<sub>10</sub>, EPA has applied criteria in addition to that of attainment of the standard. See, *e.g.*, 67 FR 43020 (June 26, 2002). EPA does not believe that those additional criteria are required by statute or are necessary for application of the policy for PM<sub>10</sub> areas, and does not employ them in applying the policy to ozone and PM<sub>2.5</sub> areas. EPA intends to make its application of the policy consistent for ozone, PM<sub>10</sub>, and PM<sub>2.5</sub>, and does not intend to require an area to meet additional criteria for PM<sub>10</sub>.

<sup>7</sup> Note, however, that on January 17, 2006, EPA published proposed revisions to the NAAQS for particulate matter. See <http://www.epa.gov/fedrgstr/EPA-AIR/2006/January/Day-17/>. The proposed revisions address two categories of particulate matter: fine particles which are particles 2.5 micrometers in diameter and smaller; and “inhalable coarse” particles which are particles between 2.5 and 10 micrometers (PM<sub>10-2.5</sub>). Upon finalization of a primary 24-hour standard for PM<sub>10-2.5</sub>, EPA proposes to revoke the current 24-hour PM<sub>10</sub> standard in all areas of the country except in areas where there is at least one monitor located in an urbanized area (as defined by the U.S. Bureau of the Census) with a minimum population of 100,000 that violates the current 24-hour PM<sub>10</sub> standard based on the most recent three years of data. In addition, EPA proposes to revoke the current annual PM<sub>10</sub> standard upon finalization of a primary 24-hour standard for PM<sub>10-2.5</sub>.

#### IV. EPA’s Final Action

Based on quality-assured data meeting the requirements of 40 CFR part 50, appendix K, we find that the Rillito, Arizona nonattainment area attained the PM<sub>10</sub> NAAQS by the applicable attainment date (1994) and is currently attaining the standard. This action is not a redesignation to attainment under CAA section 107(d)(3) because we have not yet approved a maintenance plan as meeting the requirements of section 175A of the CAA or determined that the area has met the other CAA requirements for redesignation. The classification and designation status in 40 CFR part 81 will remain moderate nonattainment for this area until such time as Arizona meets the CAA requirements for redesignation of the Rillito area to attainment. See footnote 7.

EPA also finds that, because the Rillito area has continued to attain the NAAQS, the following CAA requirements no longer apply: The part D, subpart 4 obligations to provide an attainment demonstration pursuant to section 189(a)(1)(B), the RACM provisions of 189(a)(1)(C), the RFP provisions established by section 189(c)(1), and the attainment demonstration, RACM, RFP and contingency measure provisions of part D, subpart 1 contained in section 172 of the Act.

Lastly, under CAA section 110(k)(6), we are correcting the entry for the Rillito moderate PM<sub>10</sub> nonattainment area in the “Arizona—PM-10” table in 40 CFR 81.303 so that it is identified as a subarea within Pima County instead of Santa Cruz County.

We are publishing this rule without prior proposal because the Agency views this as a noncontroversial action and anticipates no adverse comments. However, in the proposed rules section of this **Federal Register** publication, EPA is publishing a separate document that will serve as the proposal should adverse comments be filed. This action will be effective October 10, 2006, without further notice unless the EPA receives relevant adverse comments by September 7, 2006.

If we receive such comments, then we will publish a document withdrawing the final rule and informing the public that the rule will not take effect. All public comments received will then be addressed in a subsequent final rule based on the proposed rule. We will not institute a second comment period. Parties interested in commenting should do so at this time. If no such comments are received, the public is advised that this rule will be effective on October 10,

2006 and no further action will be taken on the proposed rule.

**V. Statutory and Executive Order Reviews**

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a “significant regulatory action” and therefore is not subject to review by the Office of Management and Budget. For this reason, this action is also not subject to Executive Order 13211, “Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use” (66 FR 28355, May 22, 2001). This action merely makes a determination based on air quality data and does not impose any additional requirements. Accordingly, the Administrator certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Because this rule does not impose any additional enforceable duty, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4).

This rule also does not have tribal implications because it will not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175 (65 FR 97249, November 9, 2000). This action also does not have Federalism implications because it does not have substantial direct effects on the States, on the relationship between the national

government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). This action merely makes a determination based on air quality data and does not alter the relationship or the distribution of power and responsibilities established in the CAA. This rule also is not subject to Executive Order 13045 “Protection of Children from Environmental Health Risks and Safety Risks” (62 FR 19885, April 23, 1997), because it is not economically significant.

The requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

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

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by October 10, 2006. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

**List of Subjects in 40 CFR Part 81**

Environmental protection, Air pollution control, National parks, Wilderness areas.

Dated: July 25, 2006.

**Wayne Nastri,**

*Regional Administrator, Region 9.*

■ Part 81, chapter I, title 40 of the Code of Federal Regulations is amended as follows:

**PART 81—[AMENDED]**

■ 1. The authority citation for part 81 continues to read as follows:

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

**Subpart C—[Amended]**

■ 2. In § 81.303, the table entitled “Arizona—PM–10” is amended by revising the entries for Santa Cruz County and Pima County to read as follows:

**§ 81.303 Arizona.**

\* \* \* \* \*

**ARIZONA.—PM–10**

Designated area	Designation		Classification	
	Date	Type	Date	Type
* * * * *	* * * * *	* * * * *	* * * * *	* * * * *
Santa Cruz County:				
Nogales planning area .....	11/15/90	Nonattainment	11/15/90	Moderate.
The portions of the following Townships which are within the State of Arizona and lie east of 111 degrees longitude: T23S, R13E, T23S, R14E, T24S, R13E, T24S, R14E				
Pima County:				
Rillito planning area .....	11/15/90	Nonattainment	11/15/90	Moderate.
Townships: T11S, R9E, T11S, R10E, T11S, R11E, T11S, R12E, T12S, R8E, T12S, R9E, T12S, R10E, T12S, R11E, T12S, R12E				
Ajo planning area .....	11/15/90	Nonattainment	11/15/90	Moderate.
Township T12S, R6W, and the following sections of Township T12S, R5W:				
a. Sections 6–8				
b. Sections 17–20, and				
c. Sections 29–32				
* * * * *	* * * * *	* * * * *	* * * * *	* * * * *

\* \* \* \* \*

[FR Doc. E6-12756 Filed 8-7-06; 8:45 am]

BILLING CODE 6560-50-P

**DEPARTMENT OF DEFENSE****48 CFR Parts 204 and 253**

[DFARS Case 2005-D004]

**Defense Acquisition Regulations System; Defense Federal Acquisition Regulation Supplement; Contract Reporting**

**AGENCY:** Defense Acquisition Regulations System, Department of Defense (DoD).

**ACTION:** Final rule.

**SUMMARY:** DoD has issued a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to update text addressing DoD requirements for reporting of contracting actions. This rule is a result of a transformation initiative undertaken by DoD to dramatically change the purpose and content of the DFARS.

**DATES:** *Effective Date:* August 8, 2006.

**FOR FURTHER INFORMATION CONTACT:** Mr. Bill Sain, Defense Acquisition Regulations System, OUSD (AT&L) DPAP (DARS), IMD 3C132, 3062 Defense Pentagon, Washington, DC 20301-3062. Telephone (703) 602-0293; facsimile (703) 602-0350. Please cite DFARS Case 2005-D004.

**SUPPLEMENTARY INFORMATION:****A. Background**

DFARS Transformation is a major DoD initiative to dramatically change the purpose and content of the DFARS. The objective is to improve the efficiency and effectiveness of the acquisition process, while allowing the acquisition workforce the flexibility to innovate. The transformed DFARS will contain only requirements of law, DoD-wide policies, delegations of FAR authorities, deviations from FAR requirements, and policies/procedures that have a significant effect beyond the internal operating procedures of DoD or a significant cost or administrative impact on contractors or offerors. Additional information on the DFARS Transformation initiative is available at <http://www.acq.osd.mil/dpap/dars/dfars/transformation/index.htm>.

This final rule is a result of the DFARS Transformation initiative. The rule removes DFARS text addressing internal DoD requirements for reporting of contracting actions. These requirements have been relocated to the DFARS companion resource,

Procedures, Guidance, and Information (PGI), available at <http://www.acq.osd.mil/dpap/dars/pgi>.

This rule was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

**B. Regulatory Flexibility Act**

This rule will not have a significant cost or administrative impact on contractors or offerors, or a significant effect beyond the internal operating procedures of DoD. Therefore, publication for public comment is not required. However, DoD will consider comments from small entities concerning the affected DFARS subparts in accordance with 5 U.S.C. 610. Such comments should cite DFARS Case 2005-D004.

**C. Paperwork Reduction Act**

The Paperwork Reduction Act does not apply, because the rule does not impose any information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

**List of Subjects in 48 CFR Parts 204 and 253**

Government procurement.

**Michele P. Peterson,**

*Editor, Defense Acquisition Regulations System.*

■ Therefore, 48 CFR parts 204 and 253 are amended as follows:

■ 1. The authority citation for 48 CFR parts 204 and 253 continues to read as follows:

**Authority:** 41 U.S.C. 421 and 48 CFR chapter 1.

**PART 204—ADMINISTRATIVE MATTERS**

■ 2. Subpart 204.6 is revised to read as follows:

**Subpart 204.6—Contract Reporting**

204.670 Contract action reporting requirements.

Departments and agencies shall report contracting actions in accordance with the requirements at PGI 204.670.

**PART 253—FORMS**

■ 3. Section 253.204-70 is revised to read as follows:

**253.204-70 DD Form 350, Individual Contracting Action Report.**

Follow the instructions at PGI 253.204-70 for completion of DD Form 350.

**253.204-71 [Removed]**

■ 4. Section 253.204-71 is removed.

[FR Doc. E6-12783 Filed 8-7-06; 8:45 am]

BILLING CODE 5001-08-P

**DEPARTMENT OF DEFENSE****Defense Acquisition Regulations System****48 CFR Part 219**

[DFARS Case 2003-D060]

**Defense Federal Acquisition Regulation Supplement; Threshold for Small Business Specialist Review**

**AGENCY:** Defense Acquisition Regulations System, Department of Defense (DoD).

**ACTION:** Final rule.

**SUMMARY:** DoD has issued a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to revise text pertaining to DoD implementation of small business programs. This rule is a result of a transformation initiative undertaken by DoD to dramatically change the purpose and content of the DFARS.

**DATES:** *Effective Date:* August 8, 2006.

**FOR FURTHER INFORMATION CONTACT:** Ms. Deborah Tronic, Defense Acquisition Regulations System, OUSD (AT&L) DPAP (DARS), IMD 3C132, 3062 Defense Pentagon, Washington, DC 20301-3062. Telephone (703) 602-0289; facsimile (703) 602-0350. Please cite DFARS Case 2003-D060.

**SUPPLEMENTARY INFORMATION:****A. Background**

DFARS Transformation is a major DoD initiative to dramatically change the purpose and content of the DFARS. The objective is to improve the efficiency and effectiveness of the acquisition process, while allowing the acquisition workforce the flexibility to innovate. The transformed DFARS will contain only requirements of law, DoD-wide policies, delegations of FAR authorities, deviations from FAR requirements, and policies/procedures that have a significant effect beyond the internal operating procedures of DoD or a significant cost or administrative impact on contractors or offerors. Additional information on the DFARS Transformation initiative is available at <http://www.acq.osd.mil/dpap/dars/dfars/transformation/index.htm>.

This final rule is a result of the DFARS Transformation initiative. The rule—

- Deletes an unnecessary general policy statement at DFARS 219.201(a);
- Revises DFARS 219.201(d)(10)(A) to eliminate mandatory requirements for small business specialists to review proposed acquisitions that are under \$100,000 and totally set aside for small business concerns;

- Revises DFARS 219.201(d)(10)(C) for consistency with the procedures at FAR 19.402(a), regarding referral of small business matters to the appropriate party when a Small Business Administration procurement center representative is not assigned to a contracting activity (added at 71 FR 36925, June 28, 2006 (FAC 2005–10)); and

- Deletes text at DFARS 219.201(e) regarding the appointment and functions of DoD small business specialists. Text on this subject has been relocated to the DFARS companion resource, Procedures, Guidance, and Information (PGI), available at <http://www.acq.osd.mil/dpap/dars/pgi>.

DoD published a proposed rule at 69 FR 21997 on April 23, 2004. Five sources submitted comments on the proposed rule. A discussion of the comments is provided below.

1. *Comment: Review of Task Orders.* One respondent stated that the proposed language at 219.201(d)(10)(A)(1), “Within the scope and under the terms of the existing contract,” will not provide for a review of proposed task orders under multiple award contracts. This will preclude small business specialist efforts to steer requirements toward multiple award contracts set aside for small businesses.

*DoD Response:* DoD agrees that task orders should not be excluded from small business specialist review. The phrase “Within the scope and under the terms of the existing contract” has been eliminated from the final rule to make it clear that acquisitions being accomplished through placement of task orders are not excluded from small business specialist review. In addition, the phrase “including orders placed against Federal Supply Schedule contracts,” has been added to 219.201(d)(10)(A) to reinforce this requirement. The wording in the proposed rule had been intended to clarify that modifications to a contract that did not increase the scope of the contract, such as change of address or incremental funding actions, need not be reviewed by the small business specialist. Modifications that increase the scope of a contract or order would, however, be reviewed since these are considered to be acquisitions.

2. *Comment: Opportunities for Participation in Actions Between*

*\$10,000 and \$100,000.* Three respondents stated that actions between \$10,000 and \$100,000 provide significant opportunities for 8(a), HUBZone, and service-disabled veteran-owned small business concerns; and that the proposed rule does not provide small business specialists with an opportunity to review actions that have been set aside for small businesses to identify potential requirements for 8(a), HUBZone, or service-disabled veteran-owned small business concerns.

*DoD Response:* The language in the final rule does not preclude agencies from having a small business specialist review and make recommendations for acquisitions that are totally set aside for small businesses. The rule is intended to permit small business specialist resources to be focused on acquisitions where input from the small business specialist would be of the most benefit to an agency. An agency still may have its small business specialist review total small business set-asides if the agency believes this is necessary to assist contracting officers in identifying opportunities appropriate for particular categories of small businesses. By not requiring that all total small business set-asides over \$10,000 be reviewed, the DFARS rule provides needed flexibility.

3. *Comment: Movement of DFARS Text.* One respondent suggested that movement of DFARS text to PGI creates the perception of a reduced emphasis upon or weakening of the current small business programs.

*DoD Response:* The movement of procedural or informational text from DFARS to PGI is intended to improve the acquisition process by facilitating more efficient change to internal DoD requirements. DoD believes that the changes in this rule are in keeping with numerous other revisions to the DFARS involving movement of text into PGI and, when viewed in the aggregate, do not foster the perception of weakening the commitment to small business programs.

4. *Comment: 8(a) Program Participants.* One respondent recommended that DoD add language to PGI 219.201(e)(vii) to highlight the prohibition against participation by brokers in the 8(a) Program.

*DoD Response:* DFARS 219.201(e)(vii) addresses negotiation and administration of small business subcontracting plans. An 8(a) firm is not required to have a small business subcontracting plan. The clauses in the contract between the Small Business Administration and the 8(a) firm govern the conditions under which the 8(a) firm can subcontract work.

5. *Comment: Concurrence with the Change.* One respondent stated that small business specialist review of actions set aside for small business concerns or placed against another contract is an unnecessary step in the process, and that small business specialists could use their time to better advantage.

*DoD Response:* Noted.

This rule was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

## B. Regulatory Flexibility Act

DoD certifies that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq., because the rule pertains to internal DoD procedures for the implementation of small business programs.

## C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply, because the rule does not impose any information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, et seq.

## List of Subjects in 48 CFR Part 219

Government procurement.

Michele P. Peterson,

Editor, Defense Acquisition Regulations System.

■ Therefore, 48 CFR part 219 is amended as follows:

### PART 219—SMALL BUSINESS PROGRAMS

■ 1. The authority citation for 48 CFR Part 219 continues to read as follows:

**Authority:** 41 U.S.C. 421 and 48 CFR Chapter 1.

■ 2. Section 219.201 is amended as follows:

■ a. By removing paragraph (a); and

■ b. By revising paragraphs (d)(10) and (e) to read as follows:

#### 219.201 General policy.

(d) \* \* \*

(10) Contracting activity small business specialists perform this function by—

(A) Reviewing and making recommendations for all acquisitions (including orders placed against Federal Supply Schedule contracts) over \$10,000, except those under \$100,000 that are totally set aside for small business concerns in accordance with FAR 19.502–2. Follow the procedures at PGI 219.201(d)(10) regarding such reviews;

(B) Making the review before issuance of the solicitation or contract modification and documenting it on DD Form 2579, Small Business Coordination Record; and

(C) Referring recommendations that have been rejected by the contracting officer to the Small Business Administration (SBA) procurement center representative. If an SBA procurement center representative is not assigned, see FAR 19.402(a).

\* \* \* \* \*

(e) For information on the appointment and functions of small business specialists, see PGI 219.201(e).

\* \* \* \* \*

[FR Doc. E6-12781 Filed 8-7-06; 8:45 am]

BILLING CODE 5001-08-P

## DEPARTMENT OF DEFENSE

### Defense Acquisition Regulations System

#### 48 CFR Part 242

[DFARS Case 2003-D051]

#### Defense Federal Acquisition Regulation Supplement; Contract Administration Functions

**AGENCY:** Defense Acquisition Regulations System, Department of Defense (DoD).

**ACTION:** Final rule.

**SUMMARY:** DoD has issued a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to update text addressing functions performed by DoD contract administration offices. This rule is a result of a transformation initiative undertaken by DoD to dramatically change the purpose and content of the DFARS.

**DATES:** *Effective Date:* August 8, 2006.

**FOR FURTHER INFORMATION CONTACT:** Ms. Deborah Tronic, Defense Acquisition Regulations System, OUSD (AT&L) DPAP (DARS), IMD 3C132, 3062 Defense Pentagon, Washington, DC 20301-3062. Telephone (703) 602-0289; facsimile (703) 602-0350. Please cite DFARS Case 2003-D051.

#### SUPPLEMENTARY INFORMATION:

##### A. Background

DFARS Transformation is a major DoD initiative to dramatically change the purpose and content of the DFARS. The objective is to improve the efficiency and effectiveness of the acquisition process, while allowing the acquisition workforce the flexibility to innovate. The transformed DFARS will

contain only requirements of law, DoD-wide policies, delegations of FAR authorities, deviations from FAR requirements, and policies/procedures that have a significant effect beyond the internal operating procedures of DoD or a significant cost or administrative impact on contractors or offerors. Additional information on the DFARS Transformation initiative is available at <http://www.acq.osd.mil/dpap/dars/dfars/transformation/index.htm>.

This final rule is a result of the DFARS Transformation initiative. The rule revises the list of contract administration functions at DFARS 242.302 to—

- Clarify responsibilities for payment administration and for verification of contractor compliance with earned value management system requirements;
- Delete obsolete text on mobilization production planning surveys; and
- Delete procedures for designation of contract payment offices. Text on this subject has been relocated to the DFARS companion resource, Procedures, Guidance, and Information (PGI), available at <http://www.acq.osd.mil/dpap/dars/pgi>.

DoD published a proposed rule at 70 FR 67955 on November 9, 2005. One respondent submitted comments on the proposed rule. The respondent stated that (1) there is a lack of clear regulatory authority for acceptance other than FAR 46.502, which assigns acceptance responsibility to contracting officers; (2) acceptance is not one of the contract administration functions at FAR 42.302; and (3) FAR 46.502, where it refers to delegation of responsibility for acceptance to a contract administration office, errs in its reference to FAR 42.202(g), since refusal of a contract administration delegation is exclusive of actions inferred in performing acceptance when an administration office is assigned. The respondent recommended that, since acceptance actions can be performed on behalf of a contracting officer when a contract is not assigned for administration (e.g., destination acceptance) by an activity other than a contract administration office, DFARS 242.302 should provide coverage of acceptance responsibility when a contracting officer intends that a contract administration office perform acceptance.

DoD does not agree that DFARS 242.302 should be amended to provide coverage of acceptance responsibility when a contracting officer intends that a contract administration office perform acceptance. FAR 42.302 lists the functions that are normally delegated to a contract administration office. Even though acceptance is not specifically

mentioned, it is covered under FAR 42.302(a)(38), which provides for ensuring contractor compliance with contractual quality assurance requirements and references FAR Part 46. In particular, FAR 46.502 provides for delegation of responsibility for acceptance to a contract administration office. However, DoD recognizes that there are times when a contract administration office has been assigned responsibility for ensuring contractor compliance with contract quality assurance requirements, but where actual product acceptance is performed by an activity other than the contract administration office (i.e., destination acceptance). DoD has established a separate DFARS Case, 2005-D024, to address this situation.

This rule was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

##### B. Regulatory Flexibility Act

DoD certifies that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the rule addresses internal DoD responsibilities for performance of contract administration functions.

##### C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply, because the rule does not impose any information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

##### List of Subjects in 48 CFR Part 242

Government procurement.

##### Michele P. Peterson,

*Editor, Defense Acquisition Regulations System.*

■ Therefore, 48 CFR part 242 is amended as follows:

#### PART 242—CONTRACT ADMINISTRATION AND AUDIT SERVICES

■ 1. The authority citation for 48 CFR Part 242 continues to read as follows:

**Authority:** 41 U.S.C. 421 and 48 CFR Chapter 1.

■ 2. Section 242.302 is revised to read as follows:

##### 242.302 Contract administration functions.

(a)(4) Also, review and evaluate—  
(A) Contractor estimating systems (see FAR 15.407-5); and

(B) Contractor material management and accounting systems under subpart 242.72.

(7) See 242.7502 for ACO responsibilities with regard to receipt of an audit report identifying significant accounting system or related internal control deficiencies.

(9) For additional contract administration functions related to IR&D/B&P projects performed by major contractors, see 242.771-3(a).

(12) Also perform all payment administration in accordance with any applicable payment clauses.

(13)(A) Do not delegate the responsibility to make payments to the Defense Contract Management Agency (DCMA).

(B) Follow the procedures at PGI 242.302(a)(13)(B) for designation of payment offices.

(39) See 223.370 for contract administration responsibilities on contracts for ammunition and explosives.

(67) Also support program offices and buying activities in precontractual efforts leading to a solicitation or award.

(S-70) Serve as the single point of contact for all Single Process Initiative (SPI) Management Council activities. The ACO shall negotiate and execute facilitywide class modifications and agreements for SPI processes, when authorized by the affected components.

(S-71) DCMA has responsibility for reviewing earned value management system (EVMS) plans and for verifying initial and continuing contractor compliance with DoD EVMS criteria. The contracting officer shall not retain this function.

(b)(S-70) Issue, negotiate, and execute orders under basic ordering agreements for overhaul, maintenance, and repair.

[FR Doc. E6-12778 Filed 8-7-06; 8:45 am]

BILLING CODE 5001-08-P

## DEPARTMENT OF TRANSPORTATION

### Pipeline and Hazardous Materials Safety Administration

#### 49 CFR Part 171

[Docket No. PHMSA-2005-22208 (HM-240)]

RIN 2137-AE12

#### Hazardous Materials: Incorporation of Statutorily Mandated Revisions to the Hazardous Materials Regulations; Correction

**AGENCY:** Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

**ACTION:** Final rule; correction.

**SUMMARY:** On December 9, 2005, PHMSA published a final rule to revise

terminology, definitions, and requirements for consistency with the Hazardous Materials Safety and Security Reauthorization Act of 2005. These amendments included revising the definitions of “hazmat employee” and “hazmat employer”; modifying shipping paper retention requirements; providing a security plan exception for farmers; and replacing the term “Exemption” with “Special permit.” This final rule corrects an error in the final rule. In addition, we are clarifying the amendments applicable to shipping paper retention requirements, the definition of “hazmat employer,” and the transition from “Exemption” to “Special permit.”

**DATE:** *Effective date:* August 8, 2006.

**FOR FURTHER INFORMATION CONTACT:**

Cameron Satterthwaite or Kurt Eichenlaub, Office of Hazardous Materials Standards, (202) 366-8553, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590-0001.

**SUPPLEMENTARY INFORMATION:**

#### I. Background

On December 9, 2005, the Pipeline and Hazardous Materials Safety Administration (PHMSA, we) published a final rule under Docket No. PHMSA-2005-22208 (HM-240) revising the Hazardous Materials Regulations (HMR; 49 CFR parts 171-180) to reflect amendments made to the Federal hazardous materials law (Federal hazmat law; 49 U.S.C. 5101 *et seq.*) by the Hazardous Materials Safety and Security Reauthorization Act of 2005 (the Act; Title VII of Pub. L. 109-59, 119 Stat. 1144 (August 10, 2005)).

The December 9, 2005 final rule made the following amendments to the HMR:

- Revised the definitions of “hazmat employee” and “hazmat employer”;
- Revised shipping paper retention requirements;
- Added a security plan exception for farmers;
- Revised applicability of the HMR to matter subject to postal laws and regulations; and
- Replaced “Exemption” with “Special permit.”

We received a number of questions from the regulated community concerning the amendments in the final rule applicable to the revised definition of “hazmat employer”, new shipping paper retention requirements, and the transition from “Exemption” to “Special permit.” To ensure our responses to these questions reach a broad audience, we are addressing them in this final rule.

## II. Clarifications

### A. Definition of “Hazmat Employer”

We revised the definition of “hazmat employer” in § 171.8 for consistency with editorial revisions adopted under the Act. The revised definition is not intended to apply more broadly than the previous definition. The amendment does not expand the scope of the definition or revise the training requirements applicable to hazmat employers in subpart H of part 172 or the operational requirements applicable to training in parts 173-180 of the HMR.

### B. Revision of Shipping Paper Retention Requirements

In accordance with the Act, we revised the HMR to require shippers to retain a copy of a shipping paper for a period of two years after the shipping paper is provided to a carrier and to require carriers to retain a copy of a shipping paper for a period of one year after the date the shipping paper is received from the shipper. We also specified that shippers and carriers of a hazardous waste must continue to retain a shipping paper for 3 years after the material is accepted by the initial carrier. PHMSA is aware of confusion in the regulated community regarding the implementation of these provisions. The provisions for shipping paper retention in this rulemaking became effective on January 9, 2006 (the effective date of the final rule). It was not our intention to apply the revised shipping paper retention requirements retroactively to documents retained for shipments made prior to the effective date of the final rule. Shipments offered or accepted for transportation prior to January 9, 2006 are not subject to the new shipping paper retention provisions. For shipments offered or accepted for transportation prior to January 9, 2006, each person who provides a shipping paper and each person who receives a shipping paper must retain a copy of the shipping paper or an electronic image thereof for 375 days after the shipment is accepted by the initial carrier. For shipments offered or accepted for transportation on or after January 9, 2006, each person who provides a shipping paper must retain a copy of the shipping paper or an electronic image thereof for two years after the shipment is accepted by the initial carrier; each person who receives a shipping paper must retain a copy of the shipping paper or an electronic image thereof for one year after the shipment is accepted by the initial carrier.

### C. Conversion of Exemptions to Special Permits

The final rule adopted amendments to replace most of the references in the HMR to the term "exemption" with "special permit." See §§ 171.1, 171.2, 171.6, 171.8, 172.102, 172.203, 172.301, 172.302, 173.22, 173.22a, 173.124, 173.301, 173.403, 175.33, 176.31, 178.3, 179.3, 179.4, 180.3, 180.201, 180.205, 180.209, 180.213, and 180.215. In addition, we adopted the following revisions to the HMR to address the transition to special permits:

- Current exemptions will be effective until they expire, are terminated, or become due for renewal. Current exemptions will be replaced by special permits at the time when a renewal application is approved by the Associate Administrator. See definition of "Special permit" in § 171.8.
- Packagings and shipping papers prepared in accordance with a new special permit issued on or after October 1, 2005 must be marked with "DOT-SP" and the appropriate special permit number, unless otherwise specified by the special permit. However, packagings and shipping papers previously marked "DOT-E" in accordance with a current exemption generally may continue in use so long as the provisions in the exemption remain valid. See §§ 172.203, 172.302, and 173.23.
- An initial special permit will be valid for up to two years before it expires or becomes due for renewal. A separate person wishing to transport in the same manner as the applicant for a special permit may apply for "party status" to the special permit. In this situation, the party applying for party status will be considered a "new" special permit holder and will be issued a special permit authorization letter, authorizing the party to operate as a grantee to the special permit with an expiration date (up to two years) based on the date of its application. If renewed, a special permit may be issued an expiration date of up to four years from the date of issuance. See §§ 107.107, and 107.113.
- The Office of Hazardous Materials Exemptions and Approvals (OHMEA) is renamed the Office of Hazardous Materials Special Permits and Approvals (OHMSPA).
- The e-mail address for OHMSPA is revised from [Exemptions@rspa.dot.gov](mailto:Exemptions@rspa.dot.gov) to [Specialpermits@dot.gov](mailto:Specialpermits@dot.gov). See §§ 107.105, 107.107, and 107.109.

The provisions of the final rule applicable to the change from "Exemptions" to "Special permits" have caused some confusion among current exemption holders concerning the continued use of the "DOT-E" exemption marking on packages and shipping papers. The final rule allows for packagings authorized by an exemption issued prior to October 1, 2007, to be plainly and durably marked "DOT-E" in lieu of "DOT-SP" (see § 172.301(c)). This does not mean that all "DOT-E" exemption markings must be changed to "DOT-SP" after October 1, 2007. As provided in § 173.23(h), an exemption packaging that is permanently marked "DOT-E" prior to October 1, 2007, may continue in use with the "DOT-E" marking for the life of that exemption packaging, so long as the terms of the exemption or special permit remain valid.

As provided in § 172.203(a), a shipping paper for a shipment made under a special permit must include the notation "DOT-SP" followed by the special permit number assigned. As an alternative, shipping papers for shipments made under an exemption or special permit issued prior to October 1, 2007, may include the notation "DOT-E" instead of "DOT-SP" followed by the number assigned. Thus, a shipper may use either notation for shipments made under an exemption or special permit issued prior to October 1, 2007.

### III. Correction

This final rule corrects an error in the December 9, 2005 final rule. The final rule revised § 171.1(d)(7) to read: "Any matter subject to the postal laws and regulations of the United States, except in the case of an imminent hazard." This final rule is removing that language from § 171.1(d)(7) and restoring the language previously in effect. In correcting this error, we confirm that the HMR do not apply to any matter subject to the postal laws and regulations of the United States and that the scope of the HMR has not changed.

### IV. Regulatory Analyses and Notices

#### A. Statutory/Legal Authority for This Rulemaking

This final rule is published under authority of Federal Hazardous Materials Transportation Law (Federal Hazmat Law; 49 U.S.C. 5101 *et seq.*). Section 5103(b) of Federal Hazmat Law authorizes the Secretary of Transportation to prescribe regulations for the safe transportation, including security, of hazardous materials in intrastate, interstate, and foreign commerce. The amendments in this

final rule are being adopted for consistency with the Hazardous Materials Safety and Security Reauthorization Act of 2005.

#### B. Executive Order 12866 and DOT Regulatory Policies and Procedures

This final rule is not considered a significant regulatory action under section 3(f) of Executive Order 12866 and, therefore, was not reviewed by the Office of Management and Budget. This rule is not significant under the Regulatory Policies and Procedures of the Department of Transportation (44 FR 11034). There are no cost impacts associated with this final rule.

#### C. Executive Order 13132

This final rule has been analyzed in accordance with the principles and criteria in Executive Order 13132 ("Federalism"). This final rule does not adopt any regulation that: (1) Has substantial direct effects on the States, the relationship between the national government and the States, or the distribution of power and responsibilities among the various levels of government; (2) imposes substantial direct compliance costs on State and local governments; or (3) preempts state law. Therefore, preparation of a federalism assessment is not warranted.

#### D. Executive Order 13175

This final rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13175 ("Consultation and Coordination with Indian Tribal Governments"). Because this final rule does not have tribal implications, does not impose substantial direct compliance costs on Indian tribal governments, and does not preempt tribal law, the funding and consultation requirements of Executive Order 13175 do not apply.

#### E. Regulatory Flexibility Act, Executive Order 13272, and DOT Procedures and Policies

I certify this final rule will not have a significant economic impact on a substantial number of small entities. This rule corrects a previously issued final rule for consistency with the Hazardous Materials Safety and Security Reauthorization Act of 2005. There are no cost impacts associated with this rule.

#### F. Unfunded Mandates Reform Act of 1995

This rule does not impose unfunded mandates under the Unfunded Mandates Reform Act of 1995. It does not result in costs of \$120.7 million or

more to either State, local, or tribal governments, in the aggregate, or to the private sector, and is the least burdensome alternative that achieves the objective of the rule.

#### G. Paperwork Reduction Act

There are no new information collection requirements in this final rule.

#### H. Environmental Impact Analysis

There are no environmental impacts associated with this final rule.

#### I. Regulation Identifier Number (RIN)

A regulation identifier number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN number contained in the heading of this document can be used to cross-reference this action with the Unified Agenda.

#### List of Subjects in 49 CFR Part 171

Applicability, Hazardous materials transportation, Reporting and recordkeeping requirements.

■ In consideration of the foregoing, amend 49 CFR Chapter I as follows:

#### PART 171—GENERAL INFORMATION, REGULATIONS, AND DEFINITIONS

■ The authority citation for part 171 continues to read as follows:

**Authority:** 49 U.S.C. 5101–5127, 44701; 49 CFR 1.45 and 1.53; Public Law 101–410 section 4 (28 U.S.C. 2461 note); Public Law 104–134 section 31001.

■ 2. In § 171.1, revise paragraph (d)(7) to read as follows:

#### § 171.1 Applicability of Hazardous Materials Regulations (HMR) to persons and functions.

\* \* \* \* \*

(d) \* \* \*

(7) Any matter subject to the postal laws and regulations of the United States.

\* \* \* \* \*

Issued in Washington, DC, on August 1, 2006, under authority delegated in 49 CFR part 1.

**Thomas J. Barrett,**  
Administrator.

[FR Doc. E6–12804 Filed 8–7–06; 8:45 am]

BILLING CODE 4910–60–P

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 679

[Docket No. 060216044–6044–01; I.D. 080206C]

#### Fisheries of the Exclusive Economic Zone Off Alaska; Pacific Ocean Perch in the West Yakutat District of the Gulf of Alaska

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

**ACTION:** Temporary rule; prohibition of retention.

**SUMMARY:** NMFS is prohibiting retention of Pacific ocean perch in the West Yakutat District of the Gulf of Alaska (GOA). NMFS is requiring that catch of Pacific ocean perch in this area be treated in the same manner as prohibited species and discarded at sea with a minimum of injury. This action is necessary because the 2006 total allowable catch (TAC) of Pacific ocean perch in this area has been reached.

**DATES:** Effective 1200 hrs, Alaska local time (A.l.t.), August 3, 2006, until 2400 hrs, A.l.t., December 31, 2006.

**FOR FURTHER INFORMATION CONTACT:** Jennifer Hogan, 907–586–7228.

**SUPPLEMENTARY INFORMATION:** NMFS manages the groundfish fishery in the GOA exclusive economic zone according to the Fishery Management Plan for the Groundfish Fishery of the Gulf of Alaska (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson-Stevens Fishery Conservation and Management Act. Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and CFR part 679.

The 2006 TAC of Pacific ocean perch in the West Yakutat District of the GOA is 1,101 metric tons as established by the 2006 and 2007 harvest specifications for groundfish of the GOA (71 FR 10870, March 3, 2006).

In accordance with § 679.20(d)(2), the Administrator, Alaska Region, NMFS, has determined that the 2006 TAC of Pacific ocean perch in the West Yakutat District of the GOA has been reached. Therefore, NMFS is requiring that further catches of Pacific ocean perch in the West Yakutat District of the GOA be treated as prohibited species in accordance with § 679.21(b).

## Classification

This action responds to the best available information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA (AA), finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B) as such requirement is impracticable and contrary to the public interest. This requirement is impracticable and contrary to the public interest as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion and would delay the prohibition of retention of Pacific ocean perch in the West Yakutat District of the GOA. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of July 27, 2006.

The AA also finds good cause to waive the 30-day delay in the effective date of this action under 5 U.S.C. 553(d)(3). This finding is based upon the reasons provided above for waiver of prior notice and opportunity for public comment.

This action is required by § 679.20 and is exempt from review under Executive Order 12866.

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

Dated: August 2, 2006.

**James P. Burgess,**

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 06–6755 Filed 8–3–06; 1:02 pm]

BILLING CODE 3510–22–S

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 679

[Docket No. 060216044–6044–01; I.D. 080206B]

#### Fisheries of the Exclusive Economic Zone Off Alaska; Pacific Ocean Perch in the Central Regulatory Area of the Gulf of Alaska

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

**ACTION:** Temporary rule; prohibition of retention.

**SUMMARY:** NMFS is prohibiting retention of Pacific ocean perch in the Central Regulatory Area of the Gulf of Alaska (GOA). NMFS is requiring that catch of Pacific ocean perch in this area be

treated in the same manner as prohibited species and discarded at sea with a minimum of injury. This action is necessary because the 2006 total allowable catch (TAC) of Pacific ocean perch in this area has been reached.

**DATES:** Effective 1200 hrs, Alaska local time (A.l.t.), August 3, 2006, until 2400 hrs, A.l.t., December 31, 2006.

**FOR FURTHER INFORMATION CONTACT:** Jennifer Hogan, 907-586-7228.

**SUPPLEMENTARY INFORMATION:** NMFS manages the groundfish fishery in the GOA exclusive economic zone according to the Fishery Management Plan for Groundfish of the Gulf of Alaska (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson-Stevens Fishery Conservation and Management Act. Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and 50 CFR part 679.

The 2006 TAC of Pacific ocean perch in the Central Regulatory Area of the GOA is 7,418 metric tons as established

by the 2006 and 2007 harvest specifications for groundfish of the GOA (71 FR 10870, March 3, 2006).

In accordance with § 679.20(d)(2), the Administrator, Alaska Region, NMFS, has determined that the Pacific ocean perch TAC in the Central Regulatory Area of the GOA has been reached. Therefore, NMFS is requiring that further catches of Pacific ocean perch in the Central Regulatory Area of the GOA be treated as prohibited species in accordance with § 679.21(b).

#### **Classification**

This action responds to the best available information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA (AA), finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B) as such requirement is impracticable and contrary to the public interest. This requirement is impracticable and contrary to the public interest as it would prevent NMFS from

responding to the most recent fisheries data in a timely fashion and would delay the prohibition of retention of Pacific ocean perch in the Central Regulatory Area of the GOA. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of July 27, 2006.

The AA also finds good cause to waive the 30-day delay in the effective date of this action under 5 U.S.C. 553(d)(3). This finding is based upon the reasons provided above for waiver of prior notice and opportunity for public comment.

This action is required by § 679.20 and is exempt from review under Executive Order 12866.

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

Dated: August 2, 2006.

**James P. Burgess,**

*Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.*

[FR Doc. 06-6756 Filed 8-3-06; 1:02 pm]

**BILLING CODE 3510-22-S**

# Proposed Rules

Federal Register

Vol. 71, No. 152

Tuesday, August 8, 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 TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Part 39

[Docket No. FAA-2006-22518; Directorate Identifier 2006-NM-092-AD]

RIN 2120-AA64

#### Airworthiness Directives; Boeing Model 747-100B SUD, 747-200B, 747-300, 747-400, 747-400D, and 747SP Series Airplanes

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

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** The FAA proposes to adopt a new airworthiness directive (AD) for certain Boeing Model 747-100B SUD, 747-200B, 747-300, 747-400, 747-400D, and 747SP series airplanes. This proposed AD would require repetitive inspections for cracking of the crease beam and adjacent intercostals, stringers, frames, and skin panels; and related investigative and corrective actions if cracking is found. This proposed AD results from a report indicating that an operator discovered crease beam cracking on two Model 747 airplanes. We are proposing this AD to detect and correct cracking of the crease beam and adjacent structure, which could become large and result in in-flight depressurization and inability of the airframe structure to sustain flight loads.

**DATES:** We must receive comments on this proposed AD by September 22, 2006.

**ADDRESSES:** Use one of the following addresses to submit comments on this proposed AD.

- DOT Docket Web site: Go to <http://dms.dot.gov> and follow the instructions for sending your comments electronically.
- Government-wide rulemaking Web site: Go to <http://www.regulations.gov>

and follow the instructions for sending your comments electronically.

- Mail: Docket Management Facility, U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, Room PL-401, Washington, DC 20590.
- Fax: (202) 493-2251.
- Hand Delivery: Room PL-401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Contact Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124-2207, for the service information identified in this proposed AD.

#### FOR FURTHER INFORMATION CONTACT:

Nicholas Kusz, Aerospace Engineer, Airframe Branch, ANM-120S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98057-3356; telephone (425) 917-6432; fax (425) 917-6590.

#### SUPPLEMENTARY INFORMATION:

##### Comments Invited

We invite you to submit any relevant written data, views, or arguments regarding this proposed AD. Send your comments to an address listed in the **ADDRESSES** section. Include the docket number "FAA-2006-22518; Directorate Identifier 2006-NM-092-AD" at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of the proposed AD. We will consider all comments received by the closing date and may amend the proposed AD in light of those comments.

We will post all comments we receive, without change, to <http://dms.dot.gov>, including any personal information you provide. We will also post a report summarizing each substantive verbal contact with FAA personnel concerning this proposed AD.

Using the search function of that Web site, anyone can find and read the comments in any of our dockets, including the name of the individual who sent the comment (or signed the comment on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477-78), or you may visit <http://dms.dot.gov>.

#### Examining the Docket

You may examine the AD docket on the Internet at <http://dms.dot.gov>, or in person at the Docket Management Facility office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Management Facility office (telephone (800) 647-5227) is located on the plaza level of the Nassif Building at the DOT street address stated in the **ADDRESSES** section. Comments will be available in the AD docket shortly after the Docket Management System receives them.

#### Discussion

We have received a report indicating that an operator discovered crease beam cracking due to fatigue on two Model 747 airplanes during inspections specified in the 747 Supplemental Structural Inspection Document. This condition, if not detected and corrected, could cause in-flight depressurization and inability of the structure to sustain flight loads.

#### Relevant Service Information

We have reviewed Boeing Alert Service Bulletin 747-53A2591, dated April 6, 2006. The service bulletin describes procedures for performing repetitive detailed inspections for cracking of the crease beam and adjacent intercostals, stringers, frames, and skin panels; and related investigative and corrective actions if cracking is found. Related investigative actions include performing a surface high-frequency eddy current (HFEC) inspection for cracking of the adjacent skin panel fastener locations, including all skin fasteners common to the crease beam in the areas between the next fuselage frame directly forward and aft of the crack location. Corrective actions include repair of any crack before further flight. If any crack is outside the limits specified in the Boeing 747 Structural Repair Manual, the service bulletin specifies to contact the manufacturer for repair data. The service bulletin also:

- Describes procedures for submitting a report if any skin panel or more than two intercostal webs or skin panel fastener clips are found to be cracked;
- Specifies a compliance time of 14,000 total flight cycles or 1,500 flight cycles after the date of the service bulletin, whichever occurs later; and

- Specifies an interval of 6,000 flight cycles for performing the repetitive inspections.

Accomplishing the actions specified in the service information is intended to adequately address the unsafe condition.

#### FAA's Determination and Requirements of the Proposed AD

We have evaluated all pertinent information and identified an unsafe condition that is likely to exist or develop on other airplanes of this same type design. For this reason, we are proposing this AD, which would require accomplishing the actions specified in the service information described previously, except as discussed under "Differences Between the Proposed AD and Service Bulletin."

#### Differences Between the Proposed AD and Service Bulletin

The service bulletin specifies to contact the manufacturer for instructions on how to repair certain conditions, but this proposed AD would require repairing those conditions in one of the following ways:

- Using a method that we approve; or
- Using data that meet the certification basis of the airplane, and that have been approved by an Authorized Representative for the Boeing Commercial Airplanes Delegation Option Authorization Organization whom we have authorized to make those findings.

Although the Accomplishment Instructions of the service bulletin describe procedures for submitting certain information to the manufacturer, this proposed AD would not require those actions.

#### Costs of Compliance

There are about 615 airplanes of the affected design in the worldwide fleet. This proposed AD would affect about 65 airplanes of U.S. registry. The proposed detailed inspection would take about 8 work hours per airplane, per inspection cycle, at an average labor rate of \$80 per work hour. Based on these figures, the estimated cost of the proposed AD for U.S. operators is \$41,600, or \$640 per airplane, per inspection cycle.

#### Authority for This Rulemaking

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

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

#### Regulatory Findings

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

For the reasons discussed above, I certify that the proposed regulation:

1. Is not a "significant regulatory action" under Executive Order 12866;
2. Is not a "significant rule" under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and
3. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

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

#### List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

#### The Proposed Amendment

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

#### PART 39—AIRWORTHINESS DIRECTIVES

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

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

#### § 39.13 [Amended]

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

**Boeing:** Docket No. FAA-2006-22518; Directorate Identifier 2006-NM-092-AD.

#### Comments Due Date

(a) The FAA must receive comments on this AD action by September 22, 2006.

#### Affected ADs

(b) None.

#### Applicability

(c) This AD applies to Boeing Model 747-100B SUD, 747-200B, 747-300, 747-400, 747-400D, and 747SP series airplanes, certificated in any category; as identified in Boeing Alert Service Bulletin 747-53A2591, dated April 6, 2006 (referred to after this paragraph as "the service bulletin").

#### Unsafe Condition

(d) This AD results from a report indicating that an operator discovered crease beam cracking on two Model 747 airplanes. We are issuing this AD to detect and correct cracking of the crease beam and adjacent structure, which could become large and result in in-flight depressurization and inability of the airframe structure to sustain flight loads.

#### Compliance

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

#### Repetitive Detailed Inspections and Related Investigative and Corrective Actions

(f) Perform a detailed inspection for cracking of the crease beam and adjacent intercostals, stringers, frames, and skin panels at the applicable initial and repetitive compliance times specified in Table 1 of paragraph 1.E., "Compliance," of the service bulletin; except, where the service bulletin specifies an initial compliance time after the date on the service bulletin, this AD requires compliance within the specified compliance time after the effective date of this AD. Do all applicable related investigative and corrective actions before further flight if any cracking is found. Do all applicable actions in and in accordance with the Accomplishment Instructions of the service bulletin, except as provided by paragraphs (f)(1) and (f)(2) of this AD.

(1) Where the service bulletin specifies to contact the manufacturer for instructions on how to repair certain conditions, before further flight, repair those conditions using a method approved in accordance with paragraph (g) of this AD.

(2) Where the service bulletin specifies to report certain information to the manufacturer, this AD does not include that requirement.

#### Alternative Methods of Compliance (AMOCs)

(g)(1) The Manager, Seattle Aircraft Certification Office (ACO), FAA, has the authority to approve AMOCs for this AD, if requested in accordance with the procedures found in 14 CFR 39.19.

(2) Before using any AMOC approved in accordance with § 39.19 on any airplane to which the AMOC applies, notify the appropriate principal inspector in the FAA Flight Standards Certificate Holding District Office.

(3) An AMOC that provides an acceptable level of safety may be used for any repair required by this AD, if it is approved by an Authorized Representative for the Boeing Commercial Airplanes Delegation Option Authorization Organization who has been authorized by the Manager, Seattle ACO, to make those findings. For a repair method to be approved, the repair must meet the certification basis of the airplane, and the approval must specifically refer to this AD.

Issued in Renton, Washington, on July 27, 2006.

**Ali Bahrami,**

Manager, Transport Airplane Directorate,  
Aircraft Certification Service.

[FR Doc. E6-12835 Filed 8-7-06; 8:45 am]

BILLING CODE 4910-13-P

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Part 39

[Docket No. FAA-2006-24440; Directorate Identifier 2006-NM-058-AD]

RIN 2120-AA64

#### Airworthiness Directives; Empresa Brasileira de Aeronautica S.A. (EMBRAER) Model EMB-145XR Airplanes

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

**ACTION:** Supplemental notice of proposed rulemaking (NPRM); reopening of comment period.

**SUMMARY:** The FAA is revising an earlier NPRM for an airworthiness directive (AD) that applies to certain EMBRAER Model EMB-145XR airplanes. The original NPRM would have required replacement of certain segments of the passenger seat tracks with new, improved seat tracks. The original NPRM resulted from instances where the shear plungers of the passenger seat legs were not adequately fastened. This action revises the original NPRM by requiring new service information. We are proposing this supplemental NPRM to prevent inadequate fastening of the seat leg shear plungers, which could result in failure of the passenger seat tracks during emergency landing conditions and consequent injury to passengers.

**DATES:** We must receive comments on this supplemental NPRM by September 5, 2006.

**ADDRESSES:** Use one of the following addresses to submit comments on this supplemental NPRM.

- DOT Docket Web site: Go to <http://dms.dot.gov> and follow the

instructions for sending your comments electronically.

- Government-wide rulemaking Web site: Go to <http://www.regulations.gov> and follow the instructions for sending your comments electronically.

- Mail: Docket Management Facility; U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, Room PL-401, Washington, DC 20590.

- Fax: (202) 493-2251.

- Hand Delivery: Room PL-401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Contact Empresa Brasileira de Aeronautica S.A. (EMBRAER), P.O. Box 343—CEP 12.225, Sao Jose dos Campos—SP, Brazil, for service information identified in this proposed AD.

#### FOR FURTHER INFORMATION CONTACT:

Todd Thompson, Aerospace Engineer, International Branch, ANM-116, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98057-3356; telephone (425) 227-1175; fax (425) 227-1149.

#### SUPPLEMENTARY INFORMATION:

##### Comments Invited

We invite you to submit any relevant written data, views, or arguments regarding this supplemental NPRM. Send your comments to an address listed in the **ADDRESSES** section. Include the docket number “Docket No. FAA-2006-24440; Directorate Identifier 2006-NM-058-AD” at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this supplemental NPRM. We will consider all comments received by the closing date and may amend this supplemental NPRM in light of those comments.

We will post all comments submitted, without change, to <http://dms.dot.gov>, including any personal information you provide. We will also post a report summarizing each substantive verbal contact with FAA personnel concerning this supplemental NPRM. Using the search function of that Web site, anyone can find and read the comments in any of our dockets, including the name of the individual who sent the comment (or signed the comment on behalf of an association, business, labor union, etc.). You may review the DOT’s complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477-78), or you may visit <http://dms.dot.gov>.

#### Examining the Docket

You may examine the AD docket on the Internet at <http://dms.dot.gov>, or in person at the Docket Management Facility office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Management Facility office (telephone (800) 647-5227) is located on the plaza level in the Nassif Building at the DOT street address stated in **ADDRESSES**. Comments will be available in the AD docket shortly after the Docket Management System receives them.

#### Discussion

We proposed to amend 14 CFR part 39 with a notice of proposed rulemaking (NPRM) for an airworthiness directive (AD) (the “original NPRM”). The original NPRM applies to certain EMBRAER Model EMB-145XR airplanes. The original NPRM was published in the **Federal Register** on April 13, 2006 (71 FR 19142). The original NPRM proposed to require replacement of certain segments of the passenger seat tracks with new, improved seat tracks.

Since the original NPRM was issued, the Departamento de Aviação Civil (DAC), which is the airworthiness authority for Brazil, has issued Brazilian airworthiness directive 2006-01-01R1, effective May 23, 2006. (We referenced Brazilian airworthiness directive 2006-01-01, effective February 2, 2006, as related information in the original NPRM.) The DAC issued Brazilian airworthiness directive 2006-01-01R1 to correct the airplane model designation and typographical error to a certain part number (P/N). Therefore, we have revised paragraph (i) of this supplemental NPRM to reference Brazilian airworthiness directive 2006-01-01R1 as related information. However, no change to the airplane model designation in this supplemental NPRM is necessary, since we differed from Brazilian airworthiness directive 2006-01-01, as explained in the original NPRM.

In addition, EMBRAER has published Revision 01 of EMBRAER Service Bulletin 145-53-0059, dated March 9, 2006, to correct the typographical error to a P/N in Figure 4 of the original issue of the service bulletin. (We referenced the original issue, dated July 1, 2005, in the original NPRM as the appropriate source of service information.) The procedures in Revision 01 of the service bulletin are essentially the same as those in the original issue, except that Figure 4 of Revision 01 specifies removing P/N 145-53769-007 at fuselage location x=14,827.8 and

replacing it with P/N 145-38912-003. Therefore, we have revised paragraphs (c) and (f) of this supplemental NPRM to reference Revision 01 of the service bulletin.

#### Comments

We have considered the following comments on the original NPRM.

#### Request to Reference Revision 01 of the Service Bulletin

EMBRAER requests that we revise paragraphs (c) and (f) of the NPRM to reference Revision 01 of EMBRAER Service Bulletin 145-53-0059, dated March 9, 2006. EMBRAER states that Revision 01 has been issued to correct a certain part number.

We agree. As stated previously, we have revised this supplemental NPRM to reference Revision 01 of the service bulletin.

#### Request To Reference New Brazilian Airworthiness Directive

EMBRAER states that the DAC has issued Brazilian airworthiness directive 2006-01-01R1, effective May 23, 2006, to correct the airplane applicability and the part number discussed previously. Therefore, EMBRAER requests that we revise paragraph (h) of the NPRM to reference Brazilian airworthiness directive 2006-01-01R1.

We agree. As stated previously we have revised paragraph (h) of this supplemental NPRM to reference Brazilian airworthiness directive 2006-01-01R1. No change to the applicability of this supplemental NPRM is necessary, since we differed from Brazilian airworthiness directive 2006-01-01, as explained in the original NPRM.

#### Request To Give Credit for the Original Issue of the Service Bulletin

EMBRAER states that actions accomplished before the effective date of the AD in accordance with the original issue of EMBRAER Service Bulletin 145-53-0059, dated July 1, 2005, are acceptable for compliance with actions done in accordance with Revision 01. We infer EMBRAER requests that we add a credit paragraph to this supplemental NPRM for accomplishment of the original service bulletin.

We disagree. Since Figure 4 of the original service bulletin incorrectly specifies removing P/N 145-53769-003 at fuselage location x=14,827.8, this supplemental NPRM would require additional work (*i.e.*, removing P/N 145-53769-007 at fuselage location x=14,827.8). Further, EMBRAER has confirmed that although P/N 145-

53769-003 does not exist at fuselage location x=14,827.8, it does exist elsewhere on the airplane; this could cause confusion in accomplishing the service bulletin. Therefore, we have not revised this supplemental NPRM is this regard.

#### FAA's Determination and Proposed Requirements of the Supplemental NPRM

Certain changes discussed above expand the scope of the original NPRM; therefore, we have determined that it is necessary to reopen the comment period to provide additional opportunity for public comment on this supplemental NPRM.

#### Costs of Compliance

This supplemental NPRM would affect about 97 airplanes of U.S. registry. The proposed actions would take about 10 work hours per airplane, at an average labor rate of \$80 per work hour. Required parts would cost about \$82 per airplane. Based on these figures, the estimated cost of this supplemental NPRM on U.S. operators is \$85,554, or \$882 per airplane.

#### Authority for This Rulemaking

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

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

#### Regulatory Findings

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

For the reasons discussed above, I certify that the proposed regulation:

1. Is not a "significant regulatory action" under Executive Order 12866;
2. Is not a "significant rule" under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and
3. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

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

#### List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

#### The Proposed Amendment

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

#### PART 39—AIRWORTHINESS DIRECTIVES

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

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

#### § 39.13 [Amended]

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

**Empresa Brasileira De Aeronautica S.A. (EMBRAER);** Docket No. FAA-2006-24440; Directorate Identifier 2006-NM-058-AD.

#### Comments Due Date

- (a) The FAA must receive comments on this AD action by September 5, 2006.

#### Affected ADs

- (b) None.

#### Applicability

- (c) This AD applies to EMBRAER Model EMB-145XR airplanes, certificated in any category; as identified in EMBRAER Service Bulletin 145-53-0059, Revision 01, dated March 9, 2006.

#### Unsafe Condition

- (d) This AD results from instances where the shear plungers of the passenger seat legs were not adequately fastened. We are issuing this AD to prevent inadequate fastening of the seat leg shear plungers, which could result in failure of the passenger seat tracks during emergency landing conditions and consequent injury to passengers.

#### Compliance

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

**Replacement of Passenger Seat Tracks**

(f) Within 5,000 flight hours after the effective date of this AD, replace segments of the internal and external passenger seat tracks with new, improved seat tracks, by accomplishing all of the actions specified in the Accomplishment Instructions of EMBRAER Service Bulletin 145-53-0059, Revision 01, dated March 9, 2006.

**Alternative Methods of Compliance (AMOCs)**

(g)(1) The Manager, International Branch, ANM-116, Transport Airplane Directorate, FAA, has the authority to approve AMOCs for this AD, if requested in accordance with the procedures found in 14 CFR 39.19.

(2) Before using any AMOC approved in accordance with § 39.19 on any airplane to which the AMOC applies, notify the appropriate principal inspector in the FAA Flight Standards Certificate Holding District Office.

**Related Information**

(h) Brazilian airworthiness directive 2006-01-01R1, effective May 23, 2006, also addresses the subject of this AD.

Issued in Renton, Washington, July 31, 2006.

**Ali Bahrami,**

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

[FR Doc. E6-12832 Filed 8-7-06; 8:45 am]

BILLING CODE 4910-13-P

**DEPARTMENT OF TRANSPORTATION****Federal Aviation Administration****14 CFR Part 39**

[Docket No. FAA-2006-24788; Directorate Identifier 2006-NM-073-AD]

RIN 2120-AA64

**Airworthiness Directives; Empresa Brasileira de Aeronautica S.A. (EMBRAER) Model ERJ 170 Airplanes**

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

**ACTION:** Proposed rule; withdrawal.

**SUMMARY:** The FAA withdraws a notice of proposed rulemaking (NPRM) that proposed a new airworthiness directive (AD) for certain EMBRAER Model ERJ 170 airplanes. The proposed AD would have required performing a one-time inspection for proper crimping of the terminal lugs for the power cables of each integrated drive generator (IDG), installing a new sleeve on the terminal, and re-crimping if necessary. Since the proposed AD was issued, we have received new data from the manufacturer that the proposed actions have been done on all affected

airplanes. Accordingly, the proposed AD is withdrawn.

**ADDRESSES:** You may examine the AD docket on the Internet at <http://dms.dot.gov>, or in person at the Docket Management Facility office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Management Facility office (telephone (800) 647-5227) is located on the plaza level of the Nassif Building at the U.S. Department of Transportation, 400 Seventh Street, SW., Room PL-401, Washington, DC. This docket number is FAA-2006-24788; the directorate identifier for this docket is 2006-NM-073-AD.

**FOR FURTHER INFORMATION CONTACT:**

Todd Thompson, Aerospace Engineer, International Branch, ANM-116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057-3356; telephone (425) 227-1175; fax (425) 227-1149.

**SUPPLEMENTARY INFORMATION:****Discussion**

We proposed to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) with a notice of proposed rulemaking (NPRM) for a new AD for certain EMBRAER Model ERJ 170 airplanes. That NPRM was published in the *Federal Register* on May 17, 2006 (71 FR 28628). The NPRM would have required performing a one-time inspection for proper crimping of the terminal lugs for the power cables of each integrated drive generator (IDG), installing a new sleeve on the terminal, and re-crimping if necessary. The NPRM resulted from a report that the terminal lugs for the power cables of the IDGs may not be adequately crimped, which could allow the cables to be pulled out of the terminals with no significant force. The proposed actions were intended to prevent loss of all normal electrical power for the airplane, and consequent reduced controllability of the airplane.

**Actions Since NPRM Was Issued**

Since we issued the NPRM, Empresa Brasileira de Aeronautica S.A. (EMBRAER), the airplane manufacturer, has informed us that the proposed actions have been done on all affected airplanes.

**FAA's Conclusions**

Upon further consideration, we have determined that the proposed actions are no longer necessary because the proposed actions have already been accomplished on all airplanes listed in the applicability of the NPRM. Accordingly, the NPRM is withdrawn.

Withdrawal of the NPRM does not preclude the FAA from issuing another related action or commit the FAA to any course of action in the future.

**Regulatory Impact**

Since this action only withdraws an NPRM, it is neither a proposed nor a final rule and therefore is not covered under Executive Order 12866, the Regulatory Flexibility Act, or DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979).

**List of Subjects in 14 CFR Part 39**

Air transportation, Aircraft, Aviation safety, Safety.

**The Withdrawal**

Accordingly, we withdraw the NPRM, Docket No. FAA-2006-24788, Directorate Identifier 2006-NM-073-AD, which was published in the *Federal Register* on May 17, 2006 (71 FR 28628).

Issued in Renton, Washington, on July 27, 2006.

**Ali Bahrami,**

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

[FR Doc. E6-12836 Filed 8-7-06; 8:45 am]

BILLING CODE 4910-13-P

**DEPARTMENT OF TRANSPORTATION****Federal Aviation Administration****14 CFR Part 39**

[Docket No. 2001-NM-381-AD]

RIN 2120-AA64

**Airworthiness Directives; Airbus Model A330-200, A330-300, A340-200, and A340-300 Series Airplanes**

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

**ACTION:** Supplemental notice of proposed rulemaking (NPRM); reopening of comment period.

**SUMMARY:** This document revises an earlier proposed airworthiness directive (AD), applicable to all Airbus Model A330, A340-200, and A340-300 series airplanes. The original NPRM would have required repetitive inspections for discrepancies of the grease and gear teeth of the radial variable differential transducer of the nose wheel steering gearbox; or repetitive inspections for damage of the chrome on the bearing surface of the nose landing gear (NLG) main fitting barrel, as applicable. And, for airplanes with any discrepancy or damage, the original NPRM would have required an additional inspection or

corrective actions. This new action revises the proposed rule by adding a terminating action and removing certain airplanes from the applicability. The actions specified by this new proposed AD are intended to prevent incorrect operation or jamming of the nose wheel steering, which could cause reduced controllability of the airplane on the ground. This action is intended to address the identified unsafe condition.

**DATES:** Comments must be received by September 5, 2006.

**ADDRESSES:** Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM-114, Attention: Rules Docket No. 2001-NM-381-AD, 1601 Lind Avenue, SW., Renton, Washington 98057-3356. Comments may be inspected at this location between 9 a.m. and 3 p.m., Monday through Friday, except Federal holidays. Comments may be submitted via fax to (425) 227-1232. Comments may also be sent via the Internet using the following address: [9-anm-nprmcomment@faa.gov](mailto:9-anm-nprmcomment@faa.gov). Comments sent via fax or the Internet must contain "Docket No. 2001-NM-381-AD" in the subject line and need not be submitted in triplicate. Comments sent via the Internet as attached electronic files must be formatted in Microsoft Word 97 or 2000 or ASCII text.

For the service information referenced in the proposed rule, contact Airbus, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France. This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington.

**FOR FURTHER INFORMATION CONTACT:** Tim Backman, Aerospace Engineer, International Branch, ANM-116, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98055-4056; telephone (425) 227-2797; fax (425) 227-1149.

**SUPPLEMENTARY INFORMATION:**

**Comments Invited**

Interested persons are invited to participate in the making of the

proposed rule by submitting such written data, views, or arguments as they may desire. Communications shall identify the Rules Docket number and be submitted in triplicate to the address specified above. All communications received on or before the closing date for comments, specified above, will be considered before taking action on the proposed rule. The proposals contained in this action may be changed in light of the comments received.

*Submit Comments Using the Following Format*

- Organize comments issue-by-issue. For example, discuss a request to change the compliance time and a request to change the service bulletin reference as two separate issues.
- For each issue, state what specific change to the proposed AD is being requested.
- Include justification (e.g., reasons or data) for each request.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the proposed rule. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report summarizing each FAA-public contact concerned with the substance of this proposal will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this action must submit a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket Number 2001-NM-381-AD." The postcard will be date stamped and returned to the commenter.

**Availability of NPRMs**

Any person may obtain a copy of this NPRM by submitting a request to the FAA, Transport Airplane Directorate, ANM-114, Attention: Rules Docket No. 2001-NM-381-AD, 1601 Lind Avenue, SW., Renton, Washington 98055-4056.

**Discussion**

A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to add an airworthiness directive (AD), applicable to all Airbus Model A330, A340-200, and A340-300 series airplanes, was published as a notice of proposed rulemaking (NPRM) in the **Federal Register** on June 16, 2004 (69 FR 33592). That original NPRM would have required repetitive detailed inspections for discrepancies of the grease and gear teeth of the radial variable differential transducer (RVDT) of the nose wheel steering (NWS) gearbox; or repetitive detailed inspections for damage of the chrome on the bearing surface of the nose landing gear (NLG) main fitting barrel; as applicable. For airplanes with any discrepancy or damage, the original NPRM would have required an additional inspection or corrective actions.

The original NPRM was prompted by a report from the Direction Générale de l'Aviation Civile (DGAC), which is the airworthiness authority for France, of the failure of the NWS system on a Model A340 airplane. Problems associated with this failure, if not corrected, could result in incorrect operation or jamming of the NWS, and reduced controllability of the airplane on the ground.

**Actions Since Issuance of Previous Proposal**

The original NPRM was intended to address the unsafe condition identified in French airworthiness directives 2001-503(B) and 2001-504(B). Since we issued that NPRM, the DGAC has cancelled those airworthiness directives and issued new rulemaking on this subject to add a terminating action and remove airplanes modified in production.

**Explanation of New Service Information**

Airbus has issued the following Airbus service bulletins:

**SERVICE BULLETINS**

Action	Airbus service bulletin	Airplane models	Messier-Dowty service bulletins referred to in Airbus service bulletins
Repetitive inspections	A330-32-3134, Revision 03, dated May 11, 2005, and Revision 04, dated April 3, 2006.	A330-200 and -300 series airplanes.	Special Inspection Service Bulletins D23285-32-037, Revision 2, dated May 23, 2002; and D23285-32-044, dated January 12, 2004.
	A340-32-4172, Revision 03, dated May 11, 2005, and Revision 04, dated April 3, 2006.	A340-200 and -300 series airplanes.	Special Inspection Service Bulletins D23285-32-037, Revision 2, dated May 23, 2002; and D23285-32-044, dated January 12, 2004.

## SERVICE BULLETINS—Continued

Action	Airbus service bulletin	Airplane models	Messier-Dowty service bulletins referred to in airbus service bulletins
Modification .....	A330-32-3164, dated June 27, 2003, and Revision 01, dated March 21, 2006.	A330-200 and -300 series airplanes.	Service Bulletin D23285-32-042, dated June 19, 2003.
Modification .....	A340-32-4204, dated June 27, 2003, and Revision 01, dated March 21, 2006.	A340-200 and -300 series airplanes.	Service Bulletin D23285-32-042, dated June 19, 2003.
Modification .....	A330-32-3192, dated December 8, 2005 .....	A330-200 and -300 series airplanes.	Service Bulletin D23581-32-047, dated December 1, 2005.
Modification .....	A340-32-4227, dated December 8, 2005 .....	A340-200 and -300 series airplanes.	Service Bulletin D23581-32-047, dated December 1, 2005.

Service Bulletins A330-32-3134 and A340-32-4172, both Revision 02, both dated August 8, 2003, were described in the original NPRM. Revisions 03 and 04 of these service bulletins provides minor changes only; the procedures remain essentially unchanged.

Service Bulletins A330-32-3164 and A340-32-4204 describe an inspection to identify the suffix number on the NLG leg assembly. For affected leg assemblies, the service bulletins also describe procedures for a modification that will improve the sealing between the RVDT gearboxes and the NLG steering collar to help prevent contamination of the RVDT gearboxes and the NLG main fitting. The modification involves replacing the RVDT drive gear ring and the housing of the NLG steering gear ring.

Service Bulletins A330-32-3192 and A340-32-4227 describe an inspection to identify the suffix number on the NLG leg assemblies. For affected leg assemblies, the service bulletins also describe procedures for an NLG modification that will reduce wear and damage of the reinforced NLG steering collar and NLG main fitting. The modification involves adding two grease points and new bushes with revised grease paths, which will allow better grease distribution into the steering collar assembly. The modification also involves increasing the internal diameter tolerances of the steering collar, which will reduce the risk of contact between the steering collar and the main fitting at low temperature.

Accomplishing both modifications described in Airbus Service Bulletins A330-32-3164, A340-32-4204, A330-32-3192, and A340-32-4227, as applicable, eliminates the need for the repetitive inspections.

Accomplishing the actions specified in the service information described above is intended to adequately address the unsafe condition. The DGAC mandated the service information and issued French airworthiness directives F-2005-209 and F-2005-210, both dated December 21, 2005, to ensure the

continued airworthiness of these airplanes in France.

#### FAA's Determination

In light of the DGAC's new rulemaking and the corresponding revised service bulletins described above, we have revised the supplemental NPRM to refer to the new information.

#### Comments

Interested persons have been afforded an opportunity to participate in the making of this amendment. Due consideration has been given to the comments received.

#### Support for the Proposed AD

One commenter, U.S. Airways, supports the original NPRM and the flexibility it offers in allowing operators the option of either inspecting the bearing surface or analyzing a grease sample. The commenter observes that this flexibility will allow operators to choose the inspection method and interval that best suit their maintenance schedules.

#### Request To Clarify Inspection Conditions

Paragraphs (b), (c), and (d) of the original NPRM specify inspection requirements and compliance times based on accomplishment of Airbus Modification 51381. The procedures for the modification are described in Airbus Service Bulletins A330-32-3164 and A340-32-4204. One commenter, Airbus, suggests that identifying those service bulletins in the AD would help operators define the configuration of their airplanes to determine the relevant inspections.

We infer that Airbus is requesting that we exclude from the AD applicability those airplanes on which the modification service bulletins have been accomplished in service. We disagree with the request. Although the applicability of French airworthiness directives F-2005-209 and F-2005-210 excludes airplanes on which Airbus Service Bulletins A340-32-4204 and

A330-32-3164 (as well as A340-32-4227 and A330-32-3192) were done in service, the applicability of this supplemental NPRM does not exclude those airplanes. This supplemental NPRM would instead require the applicable modification(s) for airplanes with affected NLG leg assemblies, as specified in those service bulletins. This requirement would ensure that the applicable actions specified in the service bulletins and proposed in this supplemental NPRM are accomplished for all affected airplanes.

#### Request To Revise Inspection Requirement for Certain Conditions

Paragraph (d)(1) of the original NPRM specifies detailed inspections for discrepancies of the grease and gear teeth. One commenter, Airbus, states that operators cannot do a detailed inspection, as that term is defined in the original NPRM, of the grease because the associated service information instead specifies that the grease sample be sent to a laboratory for analysis. (This procedure is described in the secondary service bulletin, Messier-Dowty Special Inspection Service Bulletin D23285-32-037, for airplanes without Airbus Modification 51381 installed in production.) The commenter requests that we revise paragraph (d)(1) of the original NPRM to require a detailed inspection only of the gear teeth, which would be in line with the wording and instructions of the applicable service bulletins.

Another commenter, Northwest Airlines, requests that we revise the original NPRM to clarify that it would require only a detailed inspection—not a lab analysis—of the grease.

We partially agree. We agree that the inspection of the grease and the inspection of the gear teeth are different types of actions. And we agree with Airbus that a detailed inspection of the grease is not the appropriate terminology. But paragraph 2.B. of the Accomplishment Instructions of Messier-Dowty Special Inspection Service Bulletin D23285-32-037

specifies a grease "inspection," which involves an analysis of the grease by sending grease samples to a lab for inspection and determination of further actions. We have revised the proposed requirement (paragraph (a)(1) in this supplemental NPRM) to distinguish an "inspection" of the grease (sending the grease to a laboratory for analysis) from a "detailed inspection" of the gear teeth. We disagree with Northwest Airlines' request to clarify that only a detailed inspection is required. As previously discussed, the AD requires two separate actions: A detailed inspection of the gear teeth and an inspection of the grease. The grease inspection specified in the Accomplishment Instructions involves analysis of the grease sample either by Messier-Dowty or another lab. We have not changed the final rule regarding this issue.

#### **Request To Cite Latest Service Information**

One commenter, Northwest Airlines, requests that we revise the original NPRM to refer to the latest revision of Messier-Dowty Special Inspection Service Bulletin D23285-32-037, which is Revision 2, dated May 23, 2002.

As revised, the service bulletin provides for the grease analysis to be done at a lab chosen by the operator; however, a reporting form with results must be returned to Messier-Dowty. Likewise, this supplemental NPRM would provide for the option that the grease analysis be done at a lab chosen by the operator with the results to be evaluated by Messier-Dowty. Note 2 in this supplemental NPRM refers to Revision 2 of the service bulletin.

#### **Request To Define Allowable Grease Particle Content**

One commenter, U.S. Airways, which operates Model A330 airplanes, notes that there are no allowable limits for the grease particle content provided in Airbus Service Bulletin A330-32-3134 or Messier-Dowty Special Inspection Service Bulletin D23285-32-037. The original NPRM would allow only Messier-Dowty to do the grease sample analysis. The commenter requests that we revise the original NPRM to define acceptable grease particle content and permit operators to use alternative lab facilities to analyze the grease.

We partially agree with the requests. As stated previously, Messier-Dowty Special Inspection Service Bulletin D23285-32-037 was revised to provide for the grease analysis to be done at a lab chosen by the operator. However, the criteria for acceptable grease particle content are complex and not appropriate to include in this

supplemental NPRM. The grease analysis process includes establishing reference spectra for new grease samples, establishing the spectra for each grease sample taken, comparing the sample spectra to the reference, and identifying polluting agents. The allowable pollutant constituents, their allowable size and weights, and specification of the acceptable ranges for constituent concentrations of the grease when compared to the reference would greatly increase the complexity of this supplemental NPRM. Therefore, we have determined that it is necessary for operators to send the results to Messier-Dowty for evaluation.

#### **Request To Revise Compliance Time for Analysis**

As stated previously, Messier-Dowty Special Inspection Service Bulletin D23285-32-037 specifies sending grease samples to Messier-Dowty for analysis. If the grease sample analysis indicates any discrepancy, paragraph (d)(1) of the original NPRM would require a detailed inspection of the bearing surface within 3 months. One commenter, U.S. Airways, questions whether the 3-month period should be counted from the day the grease sample was taken or the day the results were provided to the operator. The commenter requests that we revise the original NPRM to specifically require the bearing surface inspection within 3 months after Messier-Dowty advises operators of discrepant results. According to the commenter, this suggested compliance time would avoid problems associated with the possible lag time between the time the operator sends a sample to the manufacturer and the time the operator receives the results. If an extended time is required for the analysis, operators may be required to inspect the bearing surface without adequate planning time.

We do not agree with the request. We have determined that the bearing surface must be inspected within 3 months after the initial inspections of the grease and teeth. However, as previously stated, operators have their option of laboratories for the grease analysis, which could effectively lessen the impact on Messier-Dowty and decrease the lag time between submitting samples and receiving results. In addition, operators may request an extension of this time, in accordance with paragraph (j) of this supplemental NPRM, if data are supplied that will ensure the continued operational safety of the fleet pending receipt of the lab analysis. We have not changed this proposed requirement (paragraph (a)(1) in this supplemental NPRM).

#### **Request To Clarify Inspection Requirements**

One commenter, Airbus, considers that paragraph (e) of the original NPRM could be interpreted as requiring the same type of inspection at each interval. The commenter notes that Airbus Service Bulletins A330-32-3134 and A340-32-4172 offer operators the option of inspecting either the grease and gear teeth or the chrome on the bearing surface of the NLG main fitting barrel under the NWS rotating sleeve at the next inspection, within the applicable compliance times. The commenter requests that we clarify the repetitive inspection requirement.

We agree that clarification is necessary. For each subsequent repetitive inspection, operators have the option of doing either inspection—regardless of the most recent inspection type performed, provided subsequent inspections are done within the specified intervals. The revisions in paragraph (c) in this supplemental NPRM are intended to clarify this issue.

#### **Request To Clarify Inspection Compliance Time**

One commenter, Northwest Airlines, requests that we clarify the compliance times for the initial inspection in the original NPRM. The commenter suggests the following language: "If the NLG is more than 5 years old (since new or overhauled), accomplish the inspection within 700 flight hours of the effective date of the AD." The commenter states that this will agree with Airbus Service Bulletin A330-32-3134.

We do not agree. The commenter's requested change would allow additional time for some airplanes. We have determined that the compliance times, as proposed, will ensure an acceptable level of safety. We have not changed this supplemental NPRM regarding this issue.

#### **Request To Revise Cost Estimate**

The Cost Impact section of the original NPRM states that the chrome inspection (on the bearing surface under the rotating sleeve) would take about 2 work hours, and the grease and gear teeth inspection (on the RVDT ring) would take about 8 work hours. One commenter, Northwest Airlines, states that these estimates do not agree with those specified in the service information:

- For the chrome inspection, Airbus Service Bulletin A330-32-3134 specifies 17 work hours to inspect, including 9 hours to prepare, test, and close up; and Messier-Dowty Service Bulletin D23285-32-037 specifies 8

work hours to inspect the bearing surface.

- For the grease inspection, Airbus Service Bulletin A330-32-3134 (and A340-32-4172) specifies 10 work hours to inspect, including 8 hours to prepare, test, and close up; and Messier-Dowty Service Bulletin D23285-32-037 specifies 2 work hours to inspect the grease and gear teeth.

The commenter states that the differences between the work hours for actual and incidental tasks will significantly affect the planning and scheduling of these inspection tasks.

We partially agree with the commenter's interpretation of the service bulletin labor estimates. We have included work hours for post-inspection test preparation and tests. The cost estimates provided in the original NPRM generally reflect only the direct costs of the specific required actions based on the best data available from the manufacturer. We recognize that operators may incur incidental costs (such as the time for planning, access and close, and associated administrative actions) in addition to the direct costs. The cost analysis in ADs, however, typically does not include incidental costs. The

compliance times in this supplemental NPRM should allow ample time for operators to do the required actions at the same time as scheduled major airplane inspection and maintenance activities, which would reduce the additional time and costs associated with special scheduling.

**Additional Changes to Original NPRM**

1. We have revised the applicability of the original NPRM to identify model designations as published in the most recent type certificate data sheet for the affected models. Although Model A330-302 and -303 airplanes have not yet been type certificated, FAA approval of these models is in process. We have changed the applicability in this supplemental NPRM to more closely parallel the effectivity section of the French airworthiness directives; the revised reference to Model A330 airplanes includes Model A330-302 and -303 airplanes.

2. We revised the inspection requirements to distinguish airplanes by configuration. Paragraphs (a) through (c) in this supplemental NPRM apply to airplanes without Airbus Modification 51381. Paragraph (d) in this

supplemental NPRM applies to airplanes with the modification.

3. We have revised this action to clarify the appropriate procedure for notifying the principal inspector before using any approved AMOC on any airplane to which the AMOC applies.

4. After we issued the original NPRM, we reviewed the figures we have used over the past several years to calculate AD costs to operators. To account for various inflationary costs in the airline industry, we find it necessary to increase the labor rate used in these calculations from \$65 per work hour to \$80 per work hour. The cost impact information, below, reflects this increase in the specified hourly labor rate.

**Conclusion**

Since certain changes expand the scope of the originally proposed rule, the FAA has determined that it is necessary to reopen the comment period to provide additional opportunity for public comment.

**Cost Impact**

The following table provides the estimated costs for U.S. operators to comply with this supplemental NPRM.

ESTIMATED COSTS

Action	Work hours	Average labor rate per hour	Parts	Cost per airplane	Number of U.S.-registered airplanes	Fleet cost
RVDT inspection, per inspection cycle .....	6	\$80	None .....	\$480 .....	11	\$5,280.
Chrome inspection, per inspection cycle .....	13	80	None .....	\$1,040 .....	15	15,600.
Modification (Service Bulletin A330-32-3164 or A340-32-4204).	15	80	10,244 to \$11,337.	\$11,444 to \$12,537.	12	137,328 to \$150,444.
Rotating sleeve grease system modification (Service Bulletin A330-32-3192 or A340-32-4227).	15	80	Unknown .....	From \$1,200	23	From \$27,600.

**Authority for This Rulemaking**

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

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

that is likely to exist or develop on products identified in this rulemaking action.

**Regulatory Impact**

The regulations proposed herein would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, it is determined that this proposal would not have federalism implications under Executive Order 13132.

For the reasons discussed above, I certify that this proposed regulation (1) is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) if

promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A copy of the draft regulatory evaluation prepared for this action is contained in the Rules Docket. A copy of it may be obtained by contacting the Rules Docket at the location provided under the caption **ADDRESSES**.

**List of Subjects in 14 CFR Part 39**

Air transportation, Aircraft, Aviation safety, Safety.

**The Proposed Amendment**

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration proposes to amend part

39 of the Federal Aviation Regulations (14 CFR part 39) as follows:

**PART 39—AIRWORTHINESS DIRECTIVES**

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

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

**§ 39.13 [Amended]**

2. Section 39.13 is amended by adding the following new airworthiness directive:

**Airbus:** Docket 2001–NM–381–AD.

*Applicability:* The following airplanes, certificated in any category, except those modified in production by both Airbus Modifications 51381 and 53073:

- Model A330–201, –202, –203, –223, and –243 airplanes
- Model A330–301, –302, –303, –321, –322, –323, –341, –342, and –343 airplanes
- Model A340–211, –212, and –213 airplanes
- Model A340–311, –312, and –313 airplanes

*Compliance:* Required as indicated, unless accomplished previously.

To prevent incorrect operation or jamming of the nose wheel steering (NWS), which could cause reduced controllability of the airplane on the ground, accomplish the following:

**Inspections: Airplanes Without Modification 51381**

(a) For airplanes that were not modified in production by Airbus Modification 51381: Do the inspection specified in either paragraph (a)(1) or (a)(2) of this AD, in accordance with the required service bulletin identified in Table 1 of this AD, as applicable. The required compliance time is specified in paragraph (b) of this AD.

(1) Inspect for discrepancies of the grease by sending it to a laboratory for analysis, and do a detailed inspection for discrepancies of the gear teeth of the radial variable differential transducer (RVDT) driving ring and the gears in the RVDT gearboxes. If there are no discrepancies (such as metallic particles in the grease, abnormal wear of the gear teeth, or missing rubber sealant at the mating face between the main fitting and the

RVDT gearbox), repeat the inspection as specified in paragraph (c) of this AD. If there is any discrepancy, do the inspection in paragraph (a)(2) of this AD within 3 months after the inspection specified in paragraph (a)(1) of this AD.

(2) Do a detailed inspection for damage of the chrome on the bearing surface of the nose landing gear (NLG) main fitting barrel under the NWS rotating sleeve. If there is no damage (such as flaking, corrosion, or blistering), repeat the inspection as specified in paragraph (c) of this AD. If there is any damage, before further flight, do the corrective action in paragraph (e) of this AD.

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

TABLE 1.—INSPECTION SERVICE BULLETINS

Airplane models	Airbus service bulletin	Required revision level	Approved revision level (for actions done before the effective date of the AD)
A330–200 and A330–300 series airplanes.	A330–32–3134 .....	Revision 04, dated April 3, 2006 ..	Original, dated September 11, 2001. Revision 01, dated November 29, 2001. Revision 02, dated August 8, 2003. Revision 03, dated May 11, 2005.
A340–200 and A330–300 series airplanes.	A340–32–4172 .....	Revision 04, dated April 3, 2006 ..	Original, dated September 11, 2001. Revision 01, dated November 29, 2001. Revision 02, dated August 8, 2003. Revision 03, dated May 11, 2005.

(b) For airplanes identified in paragraph (a) of this AD: Do the initial inspection specified in paragraph (a) of this AD at the latest of the following times:

- (1) Within 60 months after the date that the new NLG was installed on the airplane.
- (2) Within 60 months after the last major NLG overhaul accomplished before the effective date of this AD.
- (3) Within 700 flight hours after the effective date of this AD.

(c) For airplanes identified in paragraph (a) of this AD: Repeat either inspection specified in paragraph (a)(1) or (a)(2) of this AD at intervals not to exceed the applicable interval specified in paragraph (c)(1) or (c)(2) of this AD, until the requirements of paragraph (g) of this AD are done.

(1) If the most recent inspection was the inspection specified in paragraph (a)(1) of this AD, then the next inspection must be done within 8 months.

(2) If the most recent inspection was the inspection specified in paragraph (a)(2) of

this AD, then the next inspection must be done within 18 months.

**Repetitive Inspections: Airplanes With Modification 51381**

(d) For airplanes modified in production by Airbus Modification 51381: Perform a detailed inspection for damage of the chrome on the bearing surface of the nose landing gear (NLG) main fitting barrel under the NWS rotating sleeve. Do the inspection at the later of the times specified in paragraphs (d)(1) and (d)(2) of this AD in accordance with the applicable required service bulletin identified in Table 1 of this AD. Repeat the inspection thereafter at intervals not to exceed 18 months, until the requirements of paragraph (g) of this AD have been done.

(1) Within 60 months after the date that the new NLG was installed on the airplane.

(2) Within 60 months after the last major NLG overhaul accomplished before the effective date of this AD.

**Follow-On Investigative and Corrective Actions**

(e) For all airplanes: If any damage or discrepancy is found during any inspection required by this AD, do the corrective action before further flight in accordance with the applicable required Airbus service bulletin identified in Table 1 of this AD, with the following exceptions:

(1) If discrepancies are found during any inspection specified in paragraph (a)(1) of this AD, the inspection in paragraph (a)(2) of this AD is required within 3 months.

(2) Where the service bulletin recommends contacting Messier-Dowty for appropriate action: Repair before further flight in accordance with a method approved by either the Manager, International Branch, ANM–116, FAA, Transport Airplane Directorate; or the Direction Generale de l’Aviation Civile (DGAC) (or its delegated agent).

**Note 2:** Airbus Service Bulletins A330–32–3134 and A340–32–4172 refer to Messier-

Dowty Special Inspection Service Bulletins D23285-32-037, Revision 2, dated May 23, 2002; and D23285-32-044, dated January 12, 2004; as additional sources of service information for the inspections.

**Credit for Prior Accomplishment**

(f) Actions done before the effective date of this AD in accordance with an applicable Approved Revision Level of the service bulletin identified in Table 1 of this AD are acceptable for compliance with the

corresponding requirements of paragraphs (a), (d), and (e) of this AD.

**Modification**

(g) For all airplanes: At the applicable time specified in paragraph (g)(1) or (g)(2) of this AD, modify the NLG as specified in Table 2 of this AD, as applicable.

(1) For NLGs overhauled before the effective date of this AD: At the later of the times specified in paragraphs (g)(1)(i) and (g)(1)(ii) of this AD:

(i) Within 60 months since the NLG was overhauled or 180 months since the NLG was new, whichever occurs first.

(ii) Within 6 months after the effective date of this AD.

(2) For NLGs not overhauled before the effective date of this AD: Within 120 months since the NLG was new, or within 6 months after the effective date of this AD, whichever occurs later.

TABLE 2.—MODIFICATION

For airplanes—	Modify the NLG in accordance with—
Without Airbus Modifications 51381 and 53073 done in production .....	Both Airbus Service Bulletins A330-32-3164, dated June 27, 2003, or Revision 1, dated March 21, 2006; and A330-32-3192, dated December 8, 2005; Or both Airbus Service Bulletins A340-32-4204, dated June 27, 2003, or Revision 1, dated March 21, 2006; and A340-32-4227, dated December 8, 2005.
With Airbus Modification 51381 but not Airbus Modification 53073 done in production.	Airbus Service Bulletin A330-32-3192, dated December 8, 2005; or A340-32-4227, dated December 8, 2005.
With Airbus Modification 53073 but not Airbus Modification 51381 done in production.	Airbus Service Bulletin A330-32-3164, dated June 27, 2003, or Revision 01, dated March 21, 2006; or A340-32-4204, dated June 27, 2003, or Revision 01, dated March 21, 2006.

**Terminating Action**

(h) Accomplishment of both NLG modifications specified in paragraph (g) of this AD terminates the repetitive inspection requirements of this AD.

**Note 3:** Airbus Service Bulletins A330-32-3164 and A340-32-4204 refer to Messier-Dowty Service Bulletin D23285-32-042, dated June 19, 2003, as an additional source of service information for the modification.

**Note 4:** Airbus Service Bulletins A330-32-3192 and A340-32-4227 refer to Messier-Dowty Service Bulletin D23581-32-047, dated December 1, 2005, as an additional source of service information for the modification.

**Reporting**

(i) Certain service bulletins specify to submit a report to the manufacturer. This AD does not require a report, unless the grease analysis required by paragraph (a)(1) of this AD is done at a lab chosen by the operator, which requires the results to be evaluated by Messier-Dowty.

**Alternative Methods of Compliance**

(j)(1) In accordance with 14 CFR 39.19, the Manager, International Branch, ANM-116, is authorized to approve alternative methods of compliance for this AD.

(2) Before using any AMOC approved in accordance with 14 CFR 39.19 on any airplane to which the AMOC applies, notify the appropriate principal inspector in the FAA Flight Standards Certificate Holding District Office.

**Note 5:** The subject of this AD is addressed in French airworthiness directives F-2005-209 and F-2005-210, both dated December 21, 2005.

Issued in Renton, Washington, on July 31, 2006.

**Ali Bahrami,**

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

[FR Doc. E6-12834 Filed 8-7-06; 8:45 am]

**BILLING CODE 4910-13-P**

**DEPARTMENT OF COMMERCE**

**Bureau of Industry and Security**

**15 CFR Parts 740, 742, 744, and 748**

**Meetings in Boston, Chicago, Houston and La Jolla With Interested Public on the Proposed Rule: Revisions and Clarification of Export and Reexport Controls for the People’s Republic of China (PRC); New Authorization Validated End-User**

**ACTION:** Notice of meetings.

**SUMMARY:** The Bureau of Industry and Security (BIS) will hold meetings on August 15, 17, 21 and 22, 2006 for those companies, organizations, and individuals that have an interest in understanding the United States’ revised policy for exports and reexports of dual-use items to the People’s Republic of China (PRC) as presented in the proposed rule published in the **Federal Register** on July 6, 2006. U.S. Government officials will explain the amendments proposed in the rule and answer questions from the public.

**DATES:** The meeting dates are:

1. August 15, 2006, 12:00 noon, Boston, Massachusetts.
2. August 17, 2006, 10:30 a.m., Chicago, Illinois.
3. August 21, 2006, 9:00 a.m., Houston, Texas.
4. August 22, 2006, 8:30 a.m., La Jolla, California.

**ADDRESSES:** The meeting locations are:

1. Boston—Doubletree Guest Suites Boston/Waltham, 550 Winter Street, Waltham, Massachusetts 02451.
2. Chicago—Four Points Sheraton/Chicago O’Hare, 10249 W. Irving Park Road, Schiller Park, Illinois 60176.
3. Houston—University of Houston, Small Business Development Center, Suite 200, 2302 Fannin Street, Houston, Texas 77002.
4. La Jolla—The University of California, San Diego Campus, Institute of the Americas, Copley International Conference Center, Hojel Hall of the Americas Auditorium, 10111 North Torrey Pines Road, La Jolla, California 92037.

**FOR FURTHER INFORMATION CONTACT:** For further information please contact the Outreach and Educational Services Division at telephone number (202) 482-4811, the Western Region Office at telephone number (949) 660-0144 ext. 0, or Kathleen Barfield at (202) 482-5491.

**SUPPLEMENTARY INFORMATION:** *Status:* These meetings will be open to the public.

## Background

On July 6, 2006, the Bureau of Industry and Security (BIS) published a rule in the **Federal Register** that proposed amendments to the Export Administration Regulations (EAR) that would revise and clarify the United States' policy for exports and reexports of dual-use items to the People's Republic of China (PRC). Specifically, the proposed rule states that it is the policy of the United States Government to prevent exports that would make a material contribution to the military capability of the PRC, while facilitating U.S. exports to legitimate civil end-users in the PRC. Consistent with this policy, BIS proposes to amend the EAR by revising and clarifying United States licensing requirements and licensing policy on exports and reexports of goods and technology to the PRC.

The proposed amendments include a revision to the licensing review policy for items controlled on the Commerce Control List (CCL) for reasons of national security, including a new control based on knowledge of a military end-use on exports to the PRC of certain CCL items that otherwise do not require a license to the PRC. The items subject to this license requirement will be set forth in a list. This rule further proposes to revise the licensing review policy for items controlled for reasons of chemical and biological proliferation, nuclear nonproliferation, and missile technology for export to the PRC, requiring that applications involving such items be reviewed in conjunction with the revised national security licensing policy.

This rule proposes the creation of a new authorization for validated end-users in certain destinations, including the PRC, to whom certain, specified items may be exported or reexported. Such validated end-users would be placed on a list in the EAR after review and approval by the United States Government.

Finally, this rule proposes to require exporters to obtain End-User Certificates, issued by the PRC Ministry of Commerce, for all items that both require a license to the PRC for any reason and exceed a total value of \$5,000. The current PRC End-Use Certificate applies only to items controlled for national security reasons. This rule also proposes to eliminate the current requirement that exporters submit PRC End-User Certificates to BIS with their license applications but provides that they must retain them for five years.

Dated: August 3, 2006.

**Matthew S. Borman,**

*Deputy Assistant Secretary for Export Administration, Bureau of Industry and Security.*

[FR Doc. E6-12864 Filed 8-7-06; 8:45 am]

**BILLING CODE 3510-33-P**

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 81

[EPA-R09-OAR-2006-AZ-0388; FRL-8206-3]

#### **Approval and Promulgation of Implementation Plans; Designation of Areas for Air Quality Planning Purposes; State of Arizona; Finding of Attainment for Rillito Particulate Matter of 10 Microns or Less (PM<sub>10</sub>) Nonattainment Area; Determination Regarding Applicability of Certain Clean Air Act Requirements; Correction**

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

**ACTION:** Proposed rule.

**SUMMARY:** EPA is proposing to determine that the Rillito moderate PM-10 nonattainment area in Arizona attained the National Ambient Air Quality Standards (NAAQS) for particulate matter with an aerodynamic diameter less than or equal to a nominal 10 micrometers (PM<sub>10</sub>) by the applicable attainment date. In addition, EPA proposes to find that the Rillito area is currently attaining the PM<sub>10</sub> standards, and based on this latter finding, EPA is proposing to determine that certain Clean Air Act requirements are not applicable for so long as the Rillito area continues to attain the PM<sub>10</sub> NAAQS. Lastly, EPA is proposing to correct an error in a previous rulemaking that involved the classification of PM<sub>10</sub> nonattainment areas within the State of Arizona.

**DATES:** Any comments on this proposal must arrive by September 7, 2006.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA-R09-OAR-2006-AZ-0388 by one of the following methods:

- Federal eRulemaking portal: <http://www.regulations.gov>. Follow the on-line instructions for submitting comments.
- E-mail: [tax.wienke@epa.gov](mailto:tax.wienke@epa.gov).
- Fax: (415) 947-3579 (please alert the individual listed in the **FOR FURTHER INFORMATION CONTACT** if you are faxing comments).
- Mail: Wienke Tax, Office of Air Planning, Environmental Protection

Agency (EPA), Region 9, Mailcode AIR-2, 75 Hawthorne Street, San Francisco, California 94105-3901.

• Hand Delivery: Wienke Tax, Office of Air Planning, Environmental Protection Agency (EPA), Region 9, Mailcode AIR-2, 75 Hawthorne Street, San Francisco, California 94105-3901. Such deliveries are only accepted Monday through Friday, 8 a.m. to 4:55 p.m., excluding Federal holidays. Special arrangements should be made for deliveries of boxed information.

**Instructions:** Direct your comments to Docket ID No. EPA-R09-OAR-2006-AZ-0388. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at <http://www.regulations.gov>, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through <http://www.regulations.gov> Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA, without going through <http://www.regulations.gov>, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at <http://www.epa.gov/epahome/dockets.htm>.

**Docket:** All documents in the docket are listed in the <http://www.regulations.gov> index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in [http://](http://www.regulations.gov)

[www.regulations.gov](http://www.regulations.gov) or in hard copy at the Office of Air Planning, Environmental Protection Agency (EPA), Region 9, Mailcode AIR-2, 75 Hawthorne Street, San Francisco, California 94105-3901. EPA requests that if at all possible, you contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section to view the hard copy of the docket. You may view the hard copy of the docket Monday through Friday, 8 a.m. to 4 p.m., excluding Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Wienke Tax, Office of Air Planning, U.S. Environmental Protection Agency, Region 9, (520) 622-1622, e-mail: [tax.wienke@epa.gov](mailto:tax.wienke@epa.gov).

**SUPPLEMENTARY INFORMATION:**

Throughout this document, wherever "we," "us," or "our" is used, we mean the EPA.

This proposal addresses the determination that the Rillito moderate PM<sub>10</sub> nonattainment area in Arizona attained the National Ambient Air Quality Standards (NAAQS) for particulate matter with an aerodynamic diameter less than or equal to a nominal 10 micrometers (PM<sub>10</sub>) by the applicable attainment date. This proposal also addresses the determination that, because the Rillito area continues to attain the PM<sub>10</sub> standards, certain attainment demonstration requirements, along with other related requirements of the CAA, are not applicable to the Rillito area. Lastly, EPA is proposing to correct an error in a previous rulemaking that involved the classification of PM<sub>10</sub> nonattainment areas within the State of Arizona.

In the Rules and Regulations section of this **Federal Register**, we are taking direct final action to make these determinations because we believe this action is not controversial. If we receive adverse comments, however, we will publish a timely withdrawal of the direct final rule and address the comments in subsequent action based on this proposed rule. We do not plan to open a second comment period, so anyone interested in commenting should do so at this time. If we do not receive comments, no further activity is planned.

For all the reasons explained in the parallel direct final notice, we propose to determine that the Rillito moderate PM<sub>10</sub> nonattainment area in Arizona attained the National Ambient Air Quality Standards (NAAQS) for particulate matter with an aerodynamic diameter less than or equal to a nominal 10 micrometers (PM<sub>10</sub>) by the applicable attainment date. A determination of attainment is not a redesignation to

attainment under CAA section 107(d)(3) because we have not yet approved a maintenance plan as required under section 175A of the CAA or determined that the area has met the other CAA requirements for redesignation.<sup>1</sup>

We further propose to determine that, because the Rillito area has continued to attain the PM<sub>10</sub> NAAQS, certain attainment demonstration requirements, along with other related requirements of the CAA, are not applicable to the Rillito area. Lastly, EPA is proposing to correct an error in a previous rulemaking that involved the classification of PM<sub>10</sub> nonattainment areas within the State of Arizona.

For further information on this proposal and the rationale underlying our proposed action, please see the direct final action.

Dated: July 26, 2006.

**Wayne Nastri,**

*Regional Administrator, Region 9.*

[FR Doc. E6-12762 Filed 8-7-06; 8:45 am]

**BILLING CODE 6560-50-P**

## DEPARTMENT OF LABOR

### Veterans' Employment and Training Service

#### 41 CFR Part 61-300

RIN 1293-AA12

#### Annual Report From Federal Contractors

**AGENCY:** Veterans' Employment and Training Service (VETS), Labor.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** This proposed rule would create a new part, 41 CFR part 61-300, to implement certain provisions of the Jobs for Veterans Act ("JVA") (Pub. L. 107-288) which amended the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended ("VEVRAA"). Prior to amendment by the JVA,

<sup>1</sup> Note, however, that on January 17, 2006, EPA published proposed revisions to the NAAQS for particulate matter. See <http://www.epa.gov/fedrgstr/EPA-AIR/2006/January/Day-17/>. The proposed revisions address two categories of particulate matter: fine particles which are particles 2.5 micrometers in diameter and smaller; and "inhalable coarse" particles which are particles between 2.5 and 10 micrometers (PM<sub>10-2.5</sub>). Upon finalization of a primary 24-hour standard for PM<sub>10-2.5</sub>, EPA proposes to revoke the current 24-hour PM<sub>10</sub> standard in all areas of the country except in areas where there is at least one monitor located in an urbanized area (as defined by the U.S. Bureau of the Census) with a minimum population of 100,000 that violates the current 24-hour PM<sub>10</sub> standard based on the most recent three years of data. In addition, EPA proposes to revoke the current annual PM<sub>10</sub> standard upon finalization of a primary 24-hour standard for PM<sub>10-2.5</sub>.

VEVRAA and its implementing regulations required all contractors and subcontractors with Federal contracts in excess of \$25,000 to use the Federal Contractor Veterans' Employment Report VETS-100 form ("VETS-100 Report") to report their efforts toward hiring veterans in four specified categories. The JVA raised the VETS-100 reporting threshold from \$25,000 to \$100,000, and modified the categories of veterans to be tracked in the reports, for contracts entered on or after December 1, 2003.

Prior to amendment by the JVA, VEVRAA required all covered contractors to report on incumbents who fall within the following veteran status categories: Veterans of the Vietnam era; special disabled veterans; other protected veterans; and recently separated veterans. The Jobs for Veterans Act changed the reporting categories to: disabled veterans; other protected veterans; Armed Forces service medal veterans; and recently separated veterans. Additionally, the JVA requires Federal contractors and subcontractors to report the total number of all current employees in each job category and at each hiring location. The JVA made these changes for all contracts entered into on or after December 1, 2003. The Veterans' Employment and Training Service ("VETS") proposes that the reporting requirements for this rule become effective for the calendar year 2007, which is reported on September 30, 2008. This rule would implement those changes, along with other changes to the VETS-100 Report that either are required by the JVA or will improve the administration of the related veterans' programs.

**DATES:** To be assured of consideration, comments must be received on or before October 10, 2006.

**ADDRESSES:** You may submit comments, identified by RIN number 1293-AA12, by any of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- E-mail: [FCP-NPRM-04-VETS@dol.gov](mailto:FCP-NPRM-04-VETS@dol.gov). Include "RIN number 1293-AA12" in the subject line of the message.
- Fax: (202) 693-4755 (for comments of 10 pages or less).
- Mail: Robert Wilson, Chief, Division of Investigation and Compliance, VETS, U.S. Department of Labor, Room S-1316, 200 Constitution Avenue, NW., Washington, DC 20210.

All submissions received must include the agency name and Regulatory Information Number (RIN) for this

rulemaking. Receipt of submissions, whether by U.S. Mail, e-mail or FAX transmittal, will not be acknowledged; however, the sender may request confirmation that a submission has been received, by telephoning VETS at (202) 693-4726 (VOICE) (this is not a toll-free number) or (877) 670-7008 (TTY/TDD).

All comments received, including any personal information provided, will be available for public inspection during normal business hours at the above address. People needing assistance to review comments will be provided with appropriate aids such as readers or print magnifiers. Copies of this Notice of Proposed Rulemaking will be made available in the following formats: large print; electronic file on computer disk; and audiotape. To schedule an appointment to review the comments and/or to obtain the Notice of Proposed Rulemaking in an alternate format, contact VETS at the telephone numbers or address listed above.

**FOR FURTHER INFORMATION CONTACT:**

Robert Wilson, Chief, Division of Investigation and Compliance, VETS, at the U.S. Department of Labor, Room S-1316, 200 Constitution Avenue, NW., Washington, DC 20210, or by e-mail at [FCP-NPRM-04-VETS@dol.gov](mailto:FCP-NPRM-04-VETS@dol.gov).

**SUPPLEMENTARY INFORMATION:** The preamble to this NPRM is organized as follows:

- I. Background—provides a brief description of the development of these proposed regulations.
- II. Section-by-Section Review of the Rule—summarizes pertinent aspects of the proposed regulatory text and describes its purposes and application.
- III. Regulatory Procedure—sets forth the applicable regulatory requirements.

**I. Background**

The Vietnam Era Veterans' Readjustment Assistance Act of 1974 ("VEVRAA") requires at 38 U.S.C. 4212(d) that Federal contractors report annually to the Secretary of Labor about their employment of certain categories of veterans. The Department of Labor has established the VETS-100 Report as the means of reporting the required information. On November 7, 2002, the President signed the Jobs for Veterans Act (JVA), which amended VEVRAA to make two changes to reporting requirements applicable to contracts entered into on or after December 1, 2003: (1) It raised from \$25,000 to \$100,000, the size of the contract required before an employer is covered by VEVRAA and is required to submit the VETS-100 Report; and (2) it modified the categories of veterans to be tracked in the reports. The part 61-300 rule proposed today is modeled upon

the current regulation implementing the VEVRAA Annual Report From Federal Contractors, found in part 61-250.

Today's proposal differs from the part 61-250 rule in two ways: it implements the changes made by the JVA to reporting requirements, and it makes changes designed to improve the readability of the rule. This rule is not intended to create other substantive differences from the part 61-250 rule.

Because the JVA amendments apply only to contracts entered on or after December 1, 2003, it will be necessary for VETS to maintain two sets of Federal contractor regulations. The regulations implementing the reporting requirements as amended by the JVA will be located in the new 41 CFR part 61-300 and will apply to contracts entered on or after December 1, 2003. The pre-JVA operating requirements will continue to be located at 41 CFR part 61-250 and will apply to contracts entered before December 1, 2003. Contractors with contracts entered both before, and on or after December 1, 2003, will be subject to both the requirements found in part 61-250 and the requirements proposed for this part 61-300.

To differentiate the VETS-100 Report required for contracts entered before December 1, 2003, from the VETS-100A Report required for contracts entered on or after December 1, 2003, we propose a slightly different name for the new Report form. The report required for contracts entered before December 1, 2003, would continue to be the VETS-100 Report. The report required for contracts entered on or after December 1, 2003, would be the VETS-100A Report.

VETS understands that contractors will need time to update their recordkeeping systems to collect the data required by the VETS-100A Report. Consequently, to give contractors time to update their recordkeeping systems and to collect the data required to complete the VETS-100A Report, the VETS-100A reporting requirement will become effective for the calendar year 2007, which will be reported in the VETS-100A Report to be filed by September 30, 2008.

The JVA changes the categories of qualified covered veterans under VEVRAA. Prior to the JVA, VEVRAA protected veterans of the Vietnam era, special disabled veterans, other protected veterans, and recently separated veterans. The JVA eliminated the coverage category of veterans of the Vietnam era. However, many individuals previously categorized under this category will continue to be covered under the categories of

campaign badge veterans and disabled veterans. The JVA added a new category of Armed Forces service medal veterans and expanded the coverage of veterans with disabilities to include all veterans with service-connected disabilities. It also expanded the coverage of recently separated veterans from one year after discharge or release from active duty, to three years. The category of "disabled veterans" is broader than the "special disabled veterans" category it replaces. The category of "disabled veterans" includes all veterans who are entitled to compensation (or who but for the receipt of military retired pay would be entitled to compensation) under laws administered by the Secretary of Veterans Affairs or who were discharged or released from active duty because of a service-connected disability.

The proposed rule differs from the pre-JVA VEVRAA implementing regulation by eliminating redundant definitions, references, and instructions, such as the twice-repeated definition of "job category." This streamlining is designed to make the part 300 rule more "reader friendly" and is not intended to create other substantive differences from the part 61-250 rule. Finally, the proposed rule would clarify that only veterans of the U.S. Armed Forces are covered by the JVA.

**II. Section-by-Section Review of the Rule**

This proposed rule is modeled on the pre-JVA VEVRAA regulations at 41 CFR part 61-250. The section-by-section review focuses on the differences between the proposed rule and the part 61-250 regulations. The proposed rule differs from part 61-250 in two respects: (1) it incorporates the requirements of the JVA, and (2) it contains several minor language differences designed to streamline and improve the readability of this version of the VEVRAA regulations. Unless specified below, none of these minor language differences are intended to create a difference in substantive meaning between the proposed rule and parallel provisions of part 61-250. For a discussion of provisions of the proposal that are the same as those found in part 61-250, see 65 FR 59684 (October 5, 2000) (**Federal Register** Notice of Propose Rulemaking for current part 61-250 rule) and 66 FR 51998 (October 11, 2001) (**Federal Register** Final Rule for current part 61-250 rule).

*Section 61-300.1 What are the purpose and scope of this part?*

This section would raise the threshold contract amount for filing reports from \$25,000 to \$100,000 for contracts

entered on or after December 1, 2003, and would substitute the term “qualified covered veterans” for “protected veterans” to implement the new statutory requirement in the JVA. Paragraph (a) also is proposed to state that these VEVRAA regulations apply only to contracts that were entered on or after December 1, 2003. Contracts that were entered before December 1, 2003, continue to be governed by the VEVRAA requirements located in part 61–250.

Paragraph (a) would make the point that any contractor covered by the affirmative action provision of VEVRAA (38 U.S.C. 4212(a)) would be required to file a VETS–100A Report under the part 61–300 regulations implementing the reporting provisions of VEVRAA (38 U.S.C. 4212(d)). Paragraph (a) of the parallel provision at 41 CFR 61–250.1(a) expresses the same point by stating that contractors subject to the regulations implementing the affirmative action provision of VEVRAA (41 CFR part 60–250) are required to file a VETS–100 Report. Section 61–300.1(a) would reference the affirmative action requirements of the statute, rather than the affirmative action implementing regulations, because those regulations have not yet been updated to reflect changes required by the JVA.

Paragraph (c) of this section would differ from 41 CFR 61–250.1 in that it corrects the citation to the “separate facility” exemption contained in 41 CFR 60–250.4(b)(3).

Paragraph (d) of this section would be identical to 41 CFR 61–250.1(d) but for the addition of a new footnote. The proposed footnote discusses the affirmative action obligation guidance contained in the OFCCP VEVRAA regulations located at 41 CFR part 60–250. The footnote would state that, although the categories of protected veterans have changed, the guidance in the OFCCP regulation is still valid.

#### *Section 61–300.2 What definitions apply to this part?*

Section 61–300.2 is nearly identical to section 61–250.2 but for the changes necessary to implement the JVA and one change to clarify the definition of “job category.” The JVA defines several new or revised categories of protected veterans. The proposal incorporates the JVA definitions of these categories of protected veterans into this definition section. Paragraph (b)(4) would define “disabled veteran,” paragraph (b)(5) would define “other protected veteran,” paragraph (b)(6) would define “Armed Forces service medal veteran,” paragraph (b)(7) would define “recently separated veteran,” paragraph (b)(8)

would define “covered veteran,” and paragraph (b)(9) would define the term “qualified,” as required by the JVA.

The JVA defines the term “recently separated veteran” as “any veteran during the three-year period beginning on the date of such veteran’s discharge or release from active duty.” See 38 U.S.C. 4211(6).

We propose to clarify the definitions of Armed Forces service medal veteran, other protected veteran, and recently separated veteran to state that only veterans of the U.S. Armed Forces are protected under these regulations.

The definition of “eligibility period” would not be carried over from the part 61–250 rule because it is not used in this regulation. Paragraph (b)(14) would add a definition for the phrase “covered incumbent veteran,” as it is defined in the JVA, to use as a shorthand phrase for collectively referring to all categories of protected veterans. Lastly, paragraph (b)(15) would define “covered contract” to explain the meaning of the term as used in part 61–300, incorporating by reference the definitions pertinent to contract coverage contained in the regulations implementing the affirmative action provisions of VEVRAA at 41 CFR 60–250.2.

#### *Section 61–300.10 What reporting requirements apply to Federal contractors and subcontractors, and what specific wording must the reporting requirements contract clause contain?*

This section is parallel to the requirement in 41 CFR part 61–250.10 that covered Federal contractors and subcontractors submit reports annually regarding their hiring and employment of qualified covered veterans in accordance with the VETS–100 reporting clause. The VETS–100A reporting clause proposed in section 61–300.10 would be the same as the clause at 61–250.10, except for updates to reflect changes required by the JVA. The categories would be those prescribed by the JVA and defined in section 61–300.2: (1) Disabled veterans; (2) other protected veterans; (3) Armed Forces service medal veterans, and (4) recently separated veterans. Section 61–300.10 would include the JVA requirement that covered Federal contractors and subcontractors include in the VETS–100A Report the total number of their employees, by job category and hiring location. Section 61–250.10 also includes required language for the reporting clause that must be included in each covered Federal contract and subcontract. Paragraph (a)(1) of the clause would add the requirement that contractors and subcontractors report on

their total employment. Paragraphs (a)(1) and (a)(2) of the clause would change the reporting categories of covered veterans (as defined in § 300.2). These changes are required by the JVA. Paragraph (a)(1) also differs from the parallel provision of part 61–250 in that the word “total” has been added to clarify that the report must reflect the total number of employees in the workforce of the contractor.

Paragraph (c), which prescribes the date for filing a VETS–100A Report, is the same as the parallel provision in 41 CFR 61–250.10 except for editing to improve readability and designating the name of the report as “VETS–100A Report.”

Paragraphs (b) and (e) also would differ in that the name of the report would be the “VETS–100A Report.”

#### *Section 61–300.11 On what form must the data required by this part be submitted?*

In part 61–250 some instructions for completing the VETS–100 Report are located in the regulations (section 61–250.11) and additional instructions are located in the VETS–100 Report form (Appendix A.) In part 61–300 we propose to consolidate the instructions for completing the VETS–100A Report onto the report form located in Appendix A (discussed below) without discussion of the instructions in the regulations. The proposed consolidation of instructions, as well as changes required by the JVA, are discussed below.

Paragraph (a) would provide that a copy of the VETS–100A Report and instructions may be found in Appendix A.

Additionally, in paragraph (a), VETS proposes to state that the report is “provided” annually to contractors who are included in the VETS–100 database. Part 61–250.11(a) states that the VETS–100 Report is “mailed” annually to contractors who are included in the VETS–100 database. The use of the term “provided” would allow VETS greater flexibility in distribution format of the VETS–100A Report. Paragraph (a) also states that VETS’ failure to provide a contractor with a VETS–100A Report does not excuse a contractor from the requirement of submitting a VETS–100A Report.

Paragraph (b) is identical to paragraph (b) in 41 CFR 61–250.11.

Paragraph (c) would contain the same information as 41 CFR 61–250.11(c). However, the proposed section 61–300.11(c) language, in accordance with plain language principles, is simplified. The requirement that a contractor or subcontractor must submit a VETS–

100A Report on September 30 of each year following a calendar year in which a contractor or subcontractor held a covered contract or subcontract is unchanged.

Paragraph (d) is identical to paragraph (d) in 41 CFR 61–250.11.

Paragraph (e) is identical to paragraph (e) in 41 CFR 61–250.11, except that the Internet address where requests for the VETS–100A Report may be made is updated.

*Section 61–300.20 How will DOL determine whether a contractor or subcontractor is complying with the requirements of this part?*

The proposed section 61–300.20 is identical to section 61–250.20.

*Section 61–300.99 What is the OMB control number for this part?*

This section is the same as section 61–250.99, except that the section title would read, “What is the OMB control number for this part?” instead of “What are the OMB control numbers for this part?” to reflect the single OMB control number assigned to this information collection.

*Appendix A to Part 61–300—Federal Contractor Veterans’ Employment Report VETS–100A*

The proposed part 61–300 VETS–100A Report and instructions contained in the proposed Appendix A are different in two ways from the VETS–100 Report form and instructions found in the part 61–250 regulation’s Appendix A. First, this proposal consolidates all information necessary to the completion of a VETS–100A Report into the proposed instructions. Second, the proposed VETS–100A Report and instructions would incorporate changes required by the JVA. A section-by-section description of differences between the part 61–250 and proposed part 61–300 instructions follows.

*Report Title:* The report’s title is proposed to read, “VETS–100A Report” to conform with the new naming convention used in the VETS–100 Reporting program. Also, directly under the Report title, we propose to add the instruction that the VETS–100A Report is for contracts entered on or after December 1, 2003.

*Who Must File:* This paragraph describes who must file a VETS–100A Report. The proposed paragraph sets forth a reporting threshold amount of \$100,000 or more for contracts entered on or after December 1, 2003, as required by the JVA. Additionally, this paragraph would state that nonexempt Federal contractors and subcontractors

whose contracts were entered before December 1, 2003 are required to complete a VETS–100 Report. Finally, this paragraph would reference the report as the “VETS–100A Report.”

*When/Where To File:* This paragraph describes when and where the VETS–100A Report must be filed. This proposed paragraph is identical to the corresponding paragraph in the part 61–250 VETS–100 Report form instructions. However, the title of the paragraph reads “When/Where To File” instead of “When To File” to more accurately reflect the instructions provided in the paragraph.

*Legal Basis for Reporting*

*Requirements:* This paragraph describes the statutory basis for requiring the VETS–100A Report. This proposed paragraph is different from the corresponding paragraph in the part 61–250 VETS–100 Report form instructions in that the individual categories of qualified covered veterans protected under VEVRAA would no longer be listed and a United States Code citation rather than a Public Law citation would be provided.

*How To Submit the VETS–100A Report:* This proposed paragraph describes how the VETS–100A Report must be submitted. This paragraph differs from the parallel paragraph of Appendix A in part 61–250 in that instructions from sections 61–250.11(b) and 61–250.11(c) are incorporated into this paragraph. Also, this paragraph would reference the report as the “VETS–100A Report.”

*Recordkeeping:* This proposed paragraph conforms to the paperwork package approved for the Federal Contractor Veterans’ Employment Report (VETS–100A), and references the report as the “VETS–100A Report.”

*How To Prepare Forms:* This proposed paragraph describes how to prepare the VETS–100A Report. This paragraph differs from the corresponding paragraph in the part 61–250 VETS–100 Report form instructions by moving an instruction that was on the VETS–100 Report form in Appendix A to the VETS–100A Report instructions in Appendix A. Additionally, an instruction is added discussing when to use the VETS–100 Report, when to use the VETS–100A Report, and when to use both the VETS–100 and VETS–100A Report forms. Finally, this paragraph would reference the report as the “VETS–100A Report.”

*Company Identification Information:* This proposed paragraph describes how to receive information if there are questions regarding a company’s identification number. This paragraph differs from the corresponding

paragraph in the part 61–250 VETS–100 Report form instructions by including an updated telephone number for contractors to call for information.

*Information on Employees:* This proposed paragraph describes how to count the number of veterans, employees, new hires, and the maximum and minimum number of employees in a contractor’s or subcontractor’s labor force. It differs from the corresponding paragraph in the part 61–250 VETS–100 Report form instructions by incorporating the new categories of protected veterans into the instructions and describing the renumbering of the VETS–100A Report. Additionally, in the subparagraph titled “maximum/minimum employees” we propose to update the regulatory citation.

*Definitions:* This proposed paragraph presents the definitions of the categories of veterans protected under the JVA: “disabled veteran;” “other protected veteran;” “Armed Forces service medal veteran;” and “recently separated veteran;” as well as a definition for “covered veteran” and “job categories.” The reference to “hiring location” would contain an updated regulatory citation. Additionally, this paragraph would include a website link where individuals can find the VETS–100 Report and the VETS–100A Report regulations in their entirety.

### III. Regulatory Procedures

#### *Paperwork Reduction Act*

This proposed rule contains information collections that are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995. The proposed rule would create a new part, 41 CFR part 61–300, to implement the new JVA reporting requirements. The VETS–100 reporting requirements applicable to contracts entered before December 1, 2003, are currently approved under OMB No. 1293–2005 and will be revised to reflect provisions of this regulation. We estimate the collection burden that would be imposed under the proposed rule to be 60 minutes per respondent. A description of the information to be collected is shown below.

Contractors and subcontractors will be required to collect data on modified categories of covered veterans, which is to include disabled veterans, other protected veterans, Armed Forces service medal veterans, and recently separated veterans. These changes are required by the JVA. VETS invites the public to comment on whether the proposed collection of information: (1) Ensures that the collection of

information is necessary to the proper performance of the agency, including whether the information will have practical utility; (2) estimates the projected burden, including the validity of the methodology and assumptions used, accurately; (3) enhances the quality, utility, and clarity of the information to be collected; and (4) minimizes 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).

#### *Executive Order 12866*

Executive Order (E.O.) 12866 requires that regulatory agencies assess both the costs and benefits of intended regulations. Under Executive Order 12866, the Department must determine whether the regulatory action is "significant" and therefore subject to the requirements of the Executive Order and subject to review by the Office of Management and Budget (OMB). Under section 3(f), the order defines a "significant regulatory action" as an action that is likely to result in a rule (1) having an annual effect on the economy of \$100 million or more, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities (also referred to as "economically significant"); (2) creating serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

The Department has determined that this proposed rule is a "significant regulatory action" within the meaning of E.O. 12866 because of the public interest and policy issues raised by the rulemaking. This rule is not an "economically significant regulatory action," however, because it will not have an economic 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.

#### *Unfunded Mandates*

Executive Order 12875—The proposed rule will not create an unfunded Federal Mandate upon any State, local, or tribal government.

Unfunded Mandate Reform Act of 1995—The proposed rule will not include any Federal mandate that may result in increased expenditures by State, local and tribal governments in the aggregate of \$100 million or more, or increased expenditures by the private sector of \$100 million or more.

#### *Executive Order 13132, Federalism*

This notice of proposed rulemaking will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, the requirements of section 6 of Executive Order 13132 do not apply to this rule.

#### *Regulatory Flexibility Act*

This notice of proposed rulemaking does not substantially change the existing obligation of Federal contractors or subcontractors. The Department of Labor certifies that the proposed rule will not have a significant economic impact on a substantial number of small business entities. Therefore, no regulatory flexibility analysis is required.

#### *Clarity of This Regulation*

Executive Order 12866 and the President's memorandum of June 1, 1998, require each agency to write all rules in plain language. The Department invites comments on how to make this proposed rule easier to understand.

#### **List of Subjects in 41 CFR Part 61-300**

Government contracts, Reporting and recordkeeping requirements, Veterans.

Signed at Washington, DC, this 1st day of August, 2006.

**Charles S. Ciccolella,**

*Assistant Secretary of Labor for Veterans' Employment and Training Service.*

For the reasons set forth in the preamble, 41 CFR part 61-300 is proposed to be added to read as follows:

#### **PART 61-300—ANNUAL REPORT FROM FEDERAL CONTRACTORS**

Sec.

61-300.1 What are the purpose and scope of this part?

61-300.2 What definitions apply to this part?

61-300.10 What reporting requirements apply to Federal contractors and subcontractors, and what specific

wording must the reporting requirements contract clause contain?

61-300.11 On what form must the data required by this part be submitted?

61-300.20 How will DOL determine whether a contractor or subcontractor is complying with the requirements of this part?

61-300.99 What is the OMB control number for this part?

Appendix A—Federal Contractor Veterans' Employment Report VETS-100A

**Authority:** 38 U.S.C. 4211 and 4212, VEVRAA as amended.

#### **§ 61-300.1 What are the purpose and scope of this part?**

(a) This part 61-300 implements 38 U.S.C. 4212(d) as amended by the Jobs for Veterans Act. Each contractor or subcontractor who enters into a contract on or after December 1, 2003, in the amount of \$100,000 or more with any department or agency of the United States for the procurement of personal property and non-personal services (including construction), and who is subject to 38 U.S.C. 4212(a), must submit a report according to the requirements of part 61-300. Any contractor or subcontractor whose only contract with any department or agency of the United States for the procurement of personal property and non-personal services (including construction) was entered into before December 1, 2003, must follow part 61-250 implementing 38 U.S.C. 4212(d). Any contractor or subcontractor who has a contract of \$25,000 or more entered before December 1, 2003, and has a contract of \$100,000 or more entered on or after December 1, 2003, is required to file both the VETS-100 Report and the VETS-100A Report as instructed in parts 61-250 and 61-300.

(b) Notwithstanding the regulations in this part, the regulations at 41 CFR part 60-250, administered by OFCCP continue to apply to contractors' and subcontractors' affirmative action obligations regarding veterans.

(c) Reporting requirements of this part regarding veterans will be deemed waived in those instances in which the Deputy Assistant Secretary, OFCCP, has granted a waiver under 41 CFR 60-250.4(b)(1), or has concurred in the granting of a waiver under 41 CFR 60-250.4(b)(3), from compliance with all the terms of the equal opportunity clause for those establishments not involved in government contract work. Where OFCCP grants only a partial waiver, compliance with these reporting requirements regarding veterans will be required.

(d) 41 CFR 60-250.42 and Appendix B to part 60-250 provide guidance concerning the affirmative action

obligations of Federal contractors and subcontractors toward applicants for employment who are qualified covered veterans.<sup>1</sup>

**§ 61–300.2 What definitions apply to this part?**

(a) For the purposes of this part, and unless otherwise indicated in paragraph (b) of this section, the terms set forth in this part have the same meaning as those set forth in 41 CFR part 60–250.

(b) For purposes of this part:

(1) *Hiring location* (this definition is identical to *establishment* as defined by the instructions for completing Employer Information Report EEO–1, Standard Form 100 (EEO–1 Report)) means an economic unit which produces goods or services, such as a factory, office, store, or mine. In most instances the establishment is at a single physical location and is engaged in one, or predominantly one, type of economic activity. Units at different locations, even though engaged in the same kind of business operation, should be reported as separate establishments. For locations involving construction, transportation, communications, electric, gas, and sanitary services, oil and gas fields, and similar types of physically dispersed industrial activities, however, it is not necessary to list separately each individual site, project, field, line, etc., unless it is treated by the contractor as a separate legal entity with a separate Employer Identification Number (EIN). For these physically dispersed activities, list as establishments only those relatively permanent main or branch offices, terminals, stations, etc., which are either:

(i) Directly responsible for supervising such dispersed activities; or

(ii) The base from which personnel and equipment operate to carry out these activities. (Where these dispersed activities cross State lines, at least one such establishment should be listed for each State involved.)

(2) *Employee* means any individual on the payroll of an employer who is an employee for purposes of the employer's withholding of Social Security taxes, except insurance salespersons, who are considered to be employees for such purposes solely because of the provisions of section 3121(d)(3)(B) of

the Internal Revenue Code (26 U.S.C.). The term *employee* does not include persons who are hired on a casual basis for a specified time, or for the duration of a specified job, and who work on remote or scattered sites or locations where it is not practical or feasible for the employer to make a visual survey of the work force within the report period; for example, persons at a construction site whose employment relationship is expected to terminate with the end of the employees' work at the site; persons temporarily employed in any industry other than construction, such as mariners, stevedores, waiters/waitresses, movie extras, agricultural laborers, lumber yard workers, etc., who are obtained through a hiring hall or other referral arrangement, through an employee contractor or agent, or by some individual hiring arrangement; or persons on the payroll of a temporary service agency who are referred by such agency for work to be performed on the premises of another employer under that employer's direction and control.

(3) *Job category* means any of the following: Officials and managers, professionals, technicians, sales workers, office and clerical, craft workers (skilled), operatives (semiskilled), laborers (unskilled), and service workers, as required by the Employer Information Report EEO–1, Standard Form 100 (EEO–1 Report), as follows:

(i) *Officials and managers* means occupations requiring administrative and managerial personnel who set broad policies, exercise overall responsibility for execution of these policies, and direct individual departments or special phases of a firm's operation. Includes: Officials, executives, middle management, plant managers, department managers and superintendents, salaried supervisors who are members of management, purchasing agents and buyers, railroad conductors and yard masters, ship captains and mates (except fishing boats), farm operators and managers, and kindred workers.

(ii) *Professionals* means occupations requiring either college graduation or experience of such kind and amount as to provide a background comparable to a college education. Includes: Accountants and auditors, airplane pilots and navigators, architects, artists, chemists, designers, dietitians, editors, engineers, lawyers, librarians, mathematicians, natural scientists, registered professional nurses, personnel and labor relations specialists, physical scientists, physicians, social scientists, surveyors, teachers, and kindred workers.

(iii) *Technicians* means occupations requiring a combination of basic scientific knowledge and manual skill which can be obtained through about 2 years of post-high school education, such as is offered in many technical institutes and junior colleges, or through equivalent on-the-job training. Includes: Computer programmers and operators, drafters, engineering aides, junior engineers, mathematical aides, licensed, practical or vocational nurses, photographers, radio operators, scientific assistants, technical illustrators, technicians (medical, dental, electronic, physical science), and kindred workers.

(iv) *Sales* means occupations engaging wholly or primarily in direct selling. Includes: Advertising agents and sales workers, insurance agents and brokers, real estate agents and brokers, stock and bond sales workers, demonstrators, sales workers and sales clerks, grocery clerks and cashier-checkers, and kindred workers.

(v) *Office and clerical* includes all clerical-type work regardless of level of difficulty, where the activities are predominantly non-manual though some manual work not directly involved with altering or transporting the products is included. Includes bookkeepers, cashiers, collectors (bills and accounts), messengers and office helpers, office machine operators, shipping and receiving clerks, stenographers, typists and secretaries, telegraph and telephone operators, legal assistants, and kindred workers.

(vi) *Craft Workers (skilled)* means manual workers of a relatively high skill level having a thorough and comprehensive knowledge of the processes involved in their work. These workers exercise considerable independent judgment and usually receive an extensive period of training. Includes: The building trades, hourly paid supervisors and lead operators who are not members of management, mechanics and repairers, skilled machining occupations, compositors and typesetters, electricians, engravers, job setters (metal), motion picture projectionists, pattern and model makers, stationary engineers, tailors, arts occupations, hand painters, coaters, decorative workers, and kindred workers.

(vii) *Operatives (semiskilled)* means workers who operate machine or processing equipment or perform other factory-type duties of intermediate skill level which can be mastered in a few weeks and require only limited training. Includes: Apprentices (auto mechanics, plumbers, bricklayers, carpenters, electricians, machinists, mechanics,

<sup>1</sup> 41 CFR 60–250.42 and Appendix B to part 60–250 refer to the protected categories of special disabled veterans and Vietnam era veterans. VEVRAA, as amended by the Jobs for Veterans Act, no longer contains these categories of veterans. However, with the exception of the specific categories of protected veterans contained in the above-cited regulations, the guidance on affirmative action obligations of covered contractors is still valid.

building trades, metalworking trades, printing trades, etc.), attendants (auto service and parking), blasters, chauffeurs, delivery workers, dressmakers and sewers (except factory), dryers, furnace workers, heaters (metal), laundry and dry cleaning operatives, milliners, mine operatives and laborers, motor operators, oilers and greasers (except auto), painters (except construction and maintenance), photographic process workers, stationary firefighters, truck and tractor drivers, weavers (textile), welders and flamecutters, electrical and electronic equipment assemblers, butchers and meat cutters, inspectors, testers and graders, handpackers and packagers, and kindred workers.

(viii) *Laborers (unskilled)* means workers in manual occupations which generally require no special training to perform elementary duties that may be learned in a few days and require the application of little or no independent judgment. Includes: garage laborers, car washers and greasers, gardeners (except farm) and grounds keepers, stevedores, wood choppers, laborers performing lifting, digging, mixing, loading and pulling operations, and kindred workers.

(ix) *Service Workers* means workers in both protective and non-protective service occupations. Includes: Attendants (hospital and other institutions, professional and personal service, including nurses aides and orderlies), barbers, charworkers and cleaners, cooks (except household), counter and fountain workers, elevator operators, firefighters and fire protection workers, guards, doorkeepers, stewards, janitors, police officers and detectives, porters, servers, amusement and recreation facilities attendants, guides, ushers, public transportation attendants, and kindred workers.

(4) *Disabled veteran* means a veteran who:

(i) Is entitled to compensation (or who but for the receipt of military retired pay would be entitled to compensation) under laws administered by the Secretary of Veterans Affairs, or

(ii) Was discharged or released from active duty because of a service-connected disability.

(5) *Other protected veteran* means a veteran who served on active duty in the U.S. military, ground, naval, or air service during a war or in a campaign or expedition for which a campaign badge has been authorized.

(6) *Armed forces service medal veteran* means a veteran who, while serving on active duty in the U.S. military, ground, naval or air service, participated in a United States military

operation for which an Armed Forces service medal was awarded pursuant to Executive Order 12985 (61 Fed. Reg. 1209).

(7) *Recently separated veteran* means a veteran, who served on active duty in the U.S. military, ground, naval or air service, during the three-year period beginning on the date of such veteran's discharge or release from active duty.

(8) *Covered veteran* means a veteran as defined in paragraphs (b)(4) through (b)(7) of this section.

(9) *Qualified* means, with respect to an employment position, having the ability to perform the essential functions of the position with or without reasonable accommodation for an individual with a disability.

(10) *OFCCP* means the Office of Federal Contract Compliance Programs, Employment Standards Administration, U.S. Department of Labor.

(11) *VETS* means the Office of the Assistant Secretary for Veterans' Employment and Training Service, U.S. Department of Labor.

(12) *States* means each of the several States of the United States, the District of Columbia, the Virgin Islands, the Commonwealth of Puerto Rico, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, Wake Island, and the Trust Territories of the Pacific Islands.

(13) *NAICS* means the North American Industrial Classification System.

(14) *Covered incumbent veteran* means a veteran as defined in paragraphs (b)(4) through (b)(7) of this section who is employed by a covered contractor.

(15) *Covered contract* means a contract as defined by 41 CFR 60-250.2 for at least \$100,000 entered on or after December 1, 2003.

**§ 61-300.10 What reporting requirements apply to Federal contractors and subcontractors, and what specific wording must the reporting requirements contract clause contain?**

Each contractor or subcontractor described in § 61-300.1 must submit reports in accordance with the following reporting clause, which must be included in each of its covered government contracts or subcontracts (and modifications, renewals, or extensions thereof if not included in the original contract). Such clause is considered as an addition to the equal opportunity action clause required by 41 CFR 60-250.5. The reporting requirements clause is as follows:

**Employment Reports on Disabled Veterans, Other Protected Veterans, Armed Forces Service Medal Veterans, and Recently Separated Veterans**

(a) The contractor or subcontractor agrees to report at least annually, as required by the Secretary of Labor, on:

(1) The total number of employees in the workforce of such contractor or subcontractor, by job category and hiring location, and the number of such employees by job category and hiring location, who are disabled veterans, other protected veterans, Armed Forces service medal veterans, and recently separated veterans;

(2) The total number of new employees hired by the contractor or subcontractor during the period covered by the report, and of such employees, the number who are disabled veterans, other protected veterans, Armed Forces service medal veterans, and recently separated veterans; and

(3) The maximum number and minimum number of employees of such contractor or subcontractor at each hiring location during the period covered by the report.

(b) The above items must be reported by completing the form entitled "Federal Contractor Veterans" Employment Report VETS-100A."

(c) VETS-100A Reports must be submitted no later than September 30 of each year following a calendar year in which a contractor or subcontractor held a covered contract or subcontract.

(d) The employment activity report required by paragraphs (a)(2) and (a)(3) of this clause must reflect total new hires and maximum and minimum number of employees during the 12-month period preceding the ending date that the contractor selects for the current employment report required by paragraph (a)(1) of this clause.

Contractors may select an ending date:

(1) As of the end of any pay period during the period July 1 through August 31 of the year the report is due; or

(2) As of December 31, if the contractor has previous written approval from the Equal Employment Opportunity Commission to do so for purposes of submitting the Employer Information Report EEO-1, Standard Form 100 (EEO-1 Report).

(e) The number of veterans reported according to paragraph (a) above must be based on data known to contractors and subcontractors when completing their VETS-100A Reports. Contractors' and subcontractors' knowledge of veterans status may be obtained in a variety of ways, including, in response to an invitation to applicants to self-identify in accordance with 41 CFR 60-

250.42, voluntary self-disclosures by covered incumbent veterans, or actual knowledge of an employee's veteran status by a contractor or subcontractor. Nothing in this paragraph (e) relieves a contractor from liability for discrimination under 38 U.S.C. 4212.

**§ 61-300.11 On what form must the data required by this part be submitted?**

(a) Data items required in paragraph (a) of the contract clause set forth in § 61-300.10 must be reported for each hiring location on the VETS-100A Report. This form is provided annually to those contractors who are included in the VETS-100 database. VETS failure to provide a contractor with a VETS-100A Report does not excuse the contractor from the requirement to submit a VETS-100A Report. The form, and instructions for preparing it, are set forth in Appendix A to 41 CFR part 61-300—Federal Contractor Veterans' Employment Report VETS-100A and Instructions.

(b) Contractors and subcontractors that submit computer-generated output for more than 10 hiring locations to satisfy their VETS-100A reporting obligations must submit the output in

the form of an electronic file. This file must comply with current Department of Labor specifications for the layout of these records, along with any other specifications established by the Department for the applicable reporting year. Contractors and subcontractors that submit VETS-100A Reports for 10 locations or less are exempt from this requirement, but are strongly encouraged to submit an electronic file. In these cases, state consolidated reports count as one location each.

(c) VETS-100A Reports must be submitted no later than September 30 of each year following a calendar year in which a contractor or subcontractor held a covered contract or subcontract.

(d) VETS or its designee will use all available information to distribute the required forms to contractors identified as subject to the requirements of this part.

(e) It is the responsibility of each contractor or subcontractor to obtain necessary supplies of the VETS-100A Report before the annual September 30 filing deadline. Contractors and subcontractors who do not receive forms should request them in time to meet the deadline. Requests for the VETS-100A

Report may be made by mail by contacting: Office of the Assistant Secretary for Veterans' Employment and Training, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210, Attn: VETS-100A Report Form Request; or on the Internet at the Internet address <http://www.vets100.cudenver.edu> and select on the "VETS-100" reporting form link.

**§ 61-300.20 How will DOL determine whether a contractor or subcontractor is complying with the requirements of this part?**

During the course of a compliance evaluation, OFCCP may determine whether a contractor or subcontractor has submitted its report as required by this part.

**§ 61-300.99 What is the OMB control number for this part?**

Pursuant to the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, and its implementing regulations at 5 CFR part 1320, the Office of Management and Budget has assigned Control No. 1293-NEW to the information collection requirements of this part.

**BILLING CODE 4510-79-P**



**WHO MUST FILE**

This VETS-100A Report is to be completed by all nonexempt federal contractors and subcontractors with a contract or subcontract for the furnishing of supplies or services or the use of real or personal property for \$100,000 or more entered on or after December 1, 2003. Services include but are not limited to the following services: utility, construction, transportation, research, insurance, and fund depository, irrespective of whether the government is the purchaser or seller. Entering into a covered federal contract or subcontract during a given calendar year establishes the requirement to file a VETS-100A Report during the following calendar year. A VETS-100 Report is to be completed by all nonexempt federal contractors and subcontractors with a contract or subcontract for the furnishing of supplies or services or the use of real or personal property for \$25,000 or more entered before December 1, 2003.

**WHEN/WHERE TO FILE**

This annual report must be filed no later than September 30. Mail to the address pre-printed on the front of the form.

**LEGAL BASIS FOR REPORTING REQUIREMENTS**

Title 38, United States Code, Section 4212(d) requires that federal contractors report at least annually the numbers of employees in the workforce by job category and hiring location, and the number of such employees, by job category and hiring location, who are qualified covered veterans. Federal contractors must report the total number of new hirers during the period covered by the report and the number of such employees who are qualified covered veterans. Additionally, federal contractors must report on the maximum and minimum number of employees during the period covered by the report.

**HOW TO SUBMIT THE VETS-100A REPORT**

Single-establishment employers must file one completed VETS-100A Report. All multi-establishment employers, i.e., those doing business at more than one hiring location, must file (A) one VETS-100A Report covering the principal or headquarters office; (B) a separate VETS-100A Report for each hiring location employing 50 or more persons; and (C) EITHER, (i) a separate VETS-100A Report for each hiring location employing fewer than 50 persons, OR (ii) consolidated reports that cover hiring locations within one State that have fewer than 50 employees. Each state consolidated report must also list the name and address of the hiring locations covered by the report. Company consolidated reports such as those required by EEO-1 reporting procedures are NOT required for the VETS-100A Report. Completed reports for the headquarters location and all other hiring locations for each company should be mailed in one package to the address indicated on the front of the form. Employers may submit their reports via the Internet at <http://vets100.cudenver.edu/vets100login.htm>. A company number is required in order to use this method of submission. This number is provided to employers on the VETS-100A Report mailed annually to those employers listed in the VETS-100 database. Other employers may obtain a company number by e-mailing their request to [newcompany@vets100.com](mailto:newcompany@vets100.com).

Employers that submit computer-generated output for more than 10 hiring locations to satisfy their VETS-100A reporting obligations must submit the output in the form of an electronic file. This file must comply with current DOL specifications for the layout of these records, along with any other specifications established by the Department for the applicable reporting year. Employers that submit VETS-100A Reports for ten locations or less are exempt from this requirement, but are strongly encouraged to submit an electronic file. In these cases, state consolidated reports count as one location each.

**RECORD KEEPING**

Employers must keep copies of the completed annual VETS-100A Report submitted to DOL for a period of one year.

**HOW TO PREPARE THE FORMS**

Shaded areas designate optional information. Answers to questions in all other areas of the form are mandatory.

Multi-establishment employers submitting hard copy reports should produce facsimile copies of the headquarters form for reporting data on each location.

**Type of Reporting Organization** Indicate the type of contractual relationship (prime contractor or subcontractor) that the organization has with the Federal Government. If the organization serves as both a prime contractor and a subcontractor on various federal contracts, check both boxes.

**Type of Form** If a reporting organization only has a covered contract entered on or after December 1, 2003, it then must use a VETS-100A Report. If a reporting organization only has a covered contract entered before December 1, 2003, it must use a VETS-100 Report. If a reporting organization has a covered contract entered both before and on or after December 1, 2003, it then must use both a VETS-100 and a VETS-100A Report.

If a reporting organization submits only one VETS-100A Report for a single location, check the Single Establishment box. If the reporting organization submits more than one form, only one form should be checked as Multiple Establishment-Headquarters. The remaining forms should be checked as either Multiple Establishment-Hiring Location or Multiple Establishment-State Consolidated. For state consolidated forms, the number of hiring locations included in that report should be entered in the space provided. For each form, only one box should be checked within this block.

**COMPANY IDENTIFICATION INFORMATION:**

**Company Number** Do not change the Company Number that is printed on the form. If there are any questions regarding your Company Number, please call the VETS-100 staff at (703) 461-2460 or e-mail [HELPDESK@VETS100.COM](mailto:HELPDESK@VETS100.COM).

**Twelve Month Period Ending** Enter the end date for the twelve month reporting period used as the basis for filing the VETS-100A Report. To determine this period, select a date in the current year between July 1 and August 31 that represents the end of a payroll period. That payroll period will be the basis for reporting Number of Employees, as described below. Then the twelve-month period preceding the end date of that payroll period will be your twelve-month period covered. This period is the basis for reporting New Hires, as described below.

Any federal contractor or subcontractor who has written approval from the Equal Employment Opportunity Commission to use December 31 as the ending date for the EEO-1 Report may also use that date as the ending date for the payroll period selected for the VETS-100A Report.

**Name and Address for Single Establishment Employers** COMPLETE the identifying information under the Parent Company name and address section. LEAVE BLANK all of the identifying information for the Hiring Location.

**Name and Address for Multi Establishment Employers** For parent company headquarters location, COMPLETE the name and address for the parent company headquarters. LEAVE BLANK the name and address of the Hiring Location. For hiring locations of a parent company, COMPLETE the name and address for the Parent Company location. COMPLETE the name and address for the Hiring Location.

**NAICS Code, DUNS Number, and Employer ID Number** Single Establishment and Multi Establishment Employers must COMPLETE the Employer ID Number, NAICS Code, DUNS Number, if available, as described below.

**NAICS Code** Enter the six (6) digit NAICS Code applicable to the hiring location for which the report is filed. If there is not a separate NAICS Code for the hiring location, enter the NAICS Code for the parent company.

**Dun and Bradstreet I.D. Number (DUNS)** If the company or any of its establishments has a Dun and Bradstreet Identification Number, please enter the nine (9) digit number in the space provided. If there is a specific DUNS Number applicable to the hiring location for which the report is filed, enter that DUNS Number. Otherwise, enter the DUNS number for the parent company.

**Employer I.D. Number (EIN)** Enter the nine (9) digit number assigned by the I.R.S. to the contractor. If there is a specific EIN applicable to the hiring location for which the report is filed, enter that EIN. Otherwise, enter the EIN for the parent company.

**INFORMATION ON EMPLOYEES**

**Counting Veterans.** Some veterans will fall into more than one of the qualified covered veteran categories. For example, a veteran may be both a disabled veteran and an other protected veteran. In such cases the veteran must be counted in each category.

**Number of Employees.** Select any payroll period ending between July 1 and August 31 of the current year. Provide all data for regular full-time and part-time employees who were disabled veterans, other protected veterans, armed forces service medal veterans, or recently separated veterans employed as of the ending date of the selected payroll period. Do not include employees specifically excluded as indicated in 41 CFR 61-300.2(b)(2). Employees must be counted by qualified covered veteran status for each of the nine occupational categories (Lines 1-9) in columns L, M, N, and O. Column P must count all employees, including qualified covered veterans, in each of the nine occupational categories (Lines 1-9). Blank spaces will be considered zeros.

**New Hires.** Report the number of regular full-time and part-time employees who were hired, both veterans and non-veterans, as well as those who were hired by veteran category, and who were included in the payroll for the first time during the 12-month reporting period ending between July 1 and August 31 of the current year. The total line in columns Q, R, S, T, and U (Line 10) is required. Enter all applicable numbers, including zeros.

**Maximum/Minimum Employees.** Report the maximum and minimum number of regular employees on board during the period covered as indicated by 41 CFR 61-300.10(a)(3).

**DEFINITIONS:**

**'Hiring location'** means an establishment as defined at 41 CFR 61-300.2(b)(1).

**'Job Categories'** means any of the following: Officials and managers, professionals, technicians, sales workers, office and clerical, craft workers (skilled), operatives (semi-skilled), laborers (unskilled), and service workers, and are defined in 41 CFR 61-300.2(b)(3).

**'Disabled Veteran'** means a veteran who: (i) is entitled to compensation (or who but for the receipt of military retired pay would be entitled to compensation) under laws administered by the Secretary of Veterans Affairs, or (ii) was discharged or released from active duty because of a service-connected disability.

**'Other Protected Veteran'** means a veteran who served on active duty in the U.S. military, ground, naval, or air service during a war or in a campaign or expedition for which a campaign badge has been authorized. For those with Internet access, the information required to make this determination is available at <http://www.opm.gov/veterans/html/vgmedal2.htm>. A replica of that list is enclosed with the annual VETS-100A mailing. A copy of the list also may be obtained by sending an e-mail to [OtherVets@vets100.com](mailto:OtherVets@vets100.com) or by calling (703) 461-2460 and requesting that a copy be mailed to you.

**'Armed Forces Service Medal Veteran'** means a veteran who, while serving on active duty in the U.S. military, ground, naval or air service, participated in a United States military operation for which an Armed Forces service medal was awarded pursuant to Executive Order 12985 (61 Fed. Reg. 1209) at <http://www.opm.gov/veterans/html/vgmedal2.asp>

**'Recently Separated Veteran'** means a veteran, who served on active duty in the U.S. military, ground, naval or air service, during the three-year period beginning on the date of such veteran's discharge or release from active duty.

**'Covered Veteran'** means a veteran as defined in the four veteran categories above.

A copy of 41 CFR part 61-300 can be found at [http://www.doi.gov/doi/allcfr/vets/Title\\_41/Chapter\\_61.htm](http://www.doi.gov/doi/allcfr/vets/Title_41/Chapter_61.htm).

Public reporting burden for this collection is estimated to average 60 minutes per response, including the time for reviewing instructions, searching existing data source, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden to the Department of Labor, Office of Information Management, Room N-1301, 200 Constitution Avenue, NW, Washington D.C. 20210 or electronically transmitted to [www.vets100.cudenver.edu](http://www.vets100.cudenver.edu). All completed VETS-100A Reports should be sent to the address indicated on the front of the form.

[FR Doc. 06-6759 Filed 8-7-06; 8:45 am]

BILLING CODE 4510-79-C

**DEPARTMENT OF TRANSPORTATION****Pipeline and Hazardous Materials Safety Administration****49 CFR Parts 110 and 178**

[Docket No. PHMSA-06-24304 (Notice No. 06-01)]

**Regulatory Flexibility Act Section 610 and Plain Language Reviews**

**AGENCY:** Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

**ACTION:** Notice of regulatory review; request for comments.

**SUMMARY:** PHMSA requests comments on the economic impact of its regulations on small entities. As required by the Regulatory Flexibility Act and as published in DOT's Semi-Annual Regulatory Agenda, we are analyzing the Hazardous Materials

Regulations applicable to specifications for non-bulk packagings and training and planning grants. We are also analyzing the Pipeline Safety Regulations applicable to oil pipeline response plans and the hazardous liquid reporting requirements. The purpose of these analyses is to identify requirements that may have a significant economic impact on a substantial number of small entities. We also request comments on ways to make these regulations easier to read and understand.

**DATES:** Comments must be received by November 6, 2006.

**ADDRESSES:** You may submit comments identified by the docket number PHMSA-06-24304 (Notice No. 06-01) by any of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- Web site: <http://dms.dot.gov>. Follow the instructions for submitting comments on the DOT electronic docket site.
- Fax: 1-202-493-2251.

- Mail: Docket Management System; U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, Room PL-401, Washington, DC 20590-0001.

- Hand Delivery: To the Docket Management System; 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.

*Instructions:* You must include the agency name and docket number PHMSA-06-24304 (Notice No. 06-01) at the beginning of your comment. Note that all comments received will be posted without change to <http://dms.dot.gov> including any personal information provided. Anyone is able to search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the document (or signing the document, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register**

published on April 11, 2000 (65 FR 19477) or you may visit <http://dms.dot.gov>.

*Docket:* You may view the public docket through the Internet at <http://dms.dot.gov> or in person at the Docket Management System office at the above address.

**FOR FURTHER INFORMATION CONTACT:** Kevin A. Leary, Office of Hazardous Materials Standards, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, telephone (202) 366-8553 (for the Hazardous Materials Regulations); Piyali Talukdar, U.S. Department of Transportation, telephone (617) 494-2999 (for the Pipeline Safety Regulations).

**SUPPLEMENTARY INFORMATION:**

**I. Section 610 of the Regulatory Flexibility Act**

*A. Background and Purpose*

Section 610 of the Regulatory Flexibility Act of 1980 (Pub. L. 96-354), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104-121), requires agencies to conduct periodic reviews of rules that have a significant economic impact on a substantial number of small business entities. The purpose of the review is to determine whether such rules should be continued without

change, amended, or rescinded, consistent with the objectives of applicable statutes, to minimize any significant economic impact of the rules on a substantial number of such small entities.

*B. Review Schedule*

The Department of Transportation (DOT) published its Semiannual Regulatory Agenda on October 31, 2005 (70 FR 64940), listing in Appendix D (70 FR 64954) those regulations that each operating administration will review under section 610 during the following 12 months. Appendix D also contains DOT's 10-year review plan for all of its existing regulations.

The Pipeline and Hazardous Materials Safety Administration (PHMSA, we) has divided its Hazardous Materials Regulations (HMR; 49 CFR parts 171-180) and its Pipeline Safety Regulations (49 CFR parts 190-199) into 10 groups by subject area. Each group will be reviewed once every 10 years, undergoing a two-stage process (an Analysis Year and Section 610 Review Year. For purposes of the review announced in this notice, the Analysis year began in October 2005, coincident with the fall 2005 publication of the Semiannual Regulatory Agenda.

During the Analysis Year, we will analyze each of the rules in a given year's group to determine whether any

rule has a significant impact on a substantial number of small entities and, thus, requires review in accordance with section 610 of the Regulatory Flexibility Act. In each fall's Regulatory Agenda, we will publish the results of the analyses we completed during the previous year. For rules that have a negative finding, we will provide a short explanation. For parts, subparts, or other discrete sections of rules that do have a significant impact on a substantial number of small entities, we will announce that we will be conducting a formal section 610 review during the following 12 months.

The section 610 review will determine whether a specific rule should be revised or revoked to lessen its impact on small entities. We will consider: (1) The continued need for the rule; (2) the nature of complaints or comments received from the public; (3) the complexity of the rule; (4) the extent to which the rule overlaps, duplicates, or conflicts with other federal rules or with state or local government rules; and (5) the length of time since the rule has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the rule. At the end of the Review Year, we will publish the results of our review.

The following table shows the 10-year analysis and review schedule:

**PHMSA SECTION 610 REVIEW PLAN 1999-2009**

Title	Regulation	Analysis year	Review year
Incident reports .....	§§ 171.15 and 171.16 .....	1998	N/A
Hazmat safety procedures .....	Parts 106 and 107 .....	1999	N/A
General Information, Regulations, and Definitions .....	Part 171.		
Pipeline Safety Procedures .....	Part 190.		
Hazardous Liquid Pipeline Corrosion Control .....	Part 195.		
Carriage by Rail and Highway .....	Parts 174 and 177 .....	2000	N/A
Gas Pipeline Transportation Reports .....	Part 191.		
Gas Pipeline Corrosion Control .....	Part 192.		
Carriage by Vessel .....	Part 176 .....	2001	N/A
Pipeline Employee Drug and Alcohol Testing .....	Part 199.		
Radioactive Materials .....	Parts 172, 173, 174, 175, 176, 177, 178.	2002	N/A
Explosives .....	Parts 172, 173, 174, 176, 177 .....	2003	N/A
Cylinders .....	Parts 172, 173, 174, 176, 177, 178, 180.		
Liquefied Natural Gas Facilities .....	Part 193.		
Shippers—General Requirements for Shipments and Packagings .....	Part 173 .....	2004	N/A
Onshore Oil Pipeline Response Plans .....	Part 194.		
Specifications for Non-bulk Packagings .....	Part 178 .....	2005/2006	2007
Training and Planning Grants .....	Part 110.		
Hazardous Liquid Pipeline Transportation .....	Part 195.		
Specifications for Bulk Packagings .....	Parts 178, 179, 180 .....	2006	2007
State Pipeline Safety Grants .....	Part 198.		
Hazardous Materials Table, Special Provisions, Hazardous Materials Communications, Emergency Response Information, and Training Requirements.	Part 172 .....	2007	2008
Carriage by Aircraft .....	Part 175.		

*C. Regulations Under Analysis*

During Year 8 (2006–2007), the Analysis Year, we will conduct a preliminary assessment of the rules in 49 CFR part 178 applicable to specifications for non-bulk packages. The review will include the following subparts:

## PART 178

Subpart	Title
Subpart B .....	Specifications for Inside Containers and Linings.
Subpart L .....	Non-bulk Performance Oriented Packaging Standards.
Subpart M .....	Testing of Non-bulk Packagings and Packages.

In addition, we will conduct a preliminary assessment of the rules in 49 CFR part 110 establishing procedures for the Hazardous Materials Public Sector Training and Planning Grants. These regulations include eligibility requirements, grant application procedures, disbursement of Federal funds, grant monitoring, and after-grant requirements.

The oil pipeline response plan regulations in Part 194 and the hazardous liquid pipeline safety regulations in Subpart B of Part 195 are also scheduled for review this year. The Part 194 regulations contain requirements for oil spill response plans to reduce the environmental impact of oil discharged from onshore oil pipelines. Part 195, Subpart B, addresses hazardous liquid reporting requirements, including annual reporting, accident reporting, and reporting of safety related conditions.

We are seeking comments on whether any requirements for training and planning grants in Part 110, specifications for non-bulk packagings in Part 178, oil response plans in Part 194, or hazardous liquid pipeline reporting requirements in Part 195 have a significant impact on a substantial number of small entities. "Small entities" include small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations under 50,000. If your business or organization is a small entity and if any of the above described regulatory requirements has a significant economic impact on your business or organization, please submit a comment explaining how and to what degree these rules affect you, the extent of the economic impact on your business or organization, and why you

believe the economic impact is significant.

**II. Plain Language***A. Background and Purpose*

Plain language helps readers find requirements quickly and understand them easily. Examples of plain language techniques include:

(1) Undesignated center headings to cluster related sections within subparts.

(2) Short words, sentences, paragraphs, and sections to speed up reading and enhance understanding.

(3) Sections as questions and answers to provide focus.

(4) Personal pronouns to reduce passive voice and draw readers into the writing.

(5) Tables to display complex information in a simple, easy-to-read format.

For an example of a rule drafted in plain language, you can refer to our final rule entitled "Revised and Clarified Hazardous Materials Safety Rulemaking and Program Procedures," which was published June 25, 2002 (67 FR 42948). This final rule revised and clarified the hazardous materials safety rulemaking and program procedures by rewriting 49 CFR Part 106 and Subpart A of Part 107 in plain language and creating a new Part 105 that contains definitions and general procedures.

*B. Review Schedule*

In conjunction with our section 610 reviews, we will be performing plain language reviews of the HMR and pipeline safety regulations over a 10-year period on a schedule consistent with the section 610 review schedule. Thus, our review of requirements in Part 110 applicable to training and planning grants, part 178 applicable to specifications for non-bulk packagings, Part 194 applicable to oil response plans, and Part 195 applicable to hazardous liquid pipeline reporting will also include a plain language review to determine if the regulations can be reorganized and/or rewritten to make them easier to read, understand, and use. We encourage interested persons to submit draft regulatory language that clearly and simply communicates regulatory requirements, and other recommendations, such as putting information in tables or consolidating regulatory requirements, that may make the regulations easier to use.

Issued in Washington, DC, on August 2, 2006.

**Robert A. McGuire,**

*Associate Administrator for Hazardous Materials Safety, Pipeline and Hazardous Materials Safety Administration.*

[FR Doc. E6–12859 Filed 8–7–06; 8:45 am]

**BILLING CODE 4910–60–P**

**DEPARTMENT OF TRANSPORTATION****Federal Transit Administration****49 CFR Part 601**

[Docket FTA–2006–22428]

RIN 2132–AA89

**Emergency Procedures for Public Transportation Systems**

**AGENCY:** Federal Transit Administration (FTA), DOT.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** This rulemaking proposes to establish a new subpart in 601 of Title 49 of the Code of Federal Regulations, to establish emergency relief procedures for granting relief from Federal transit policy statements, circulars, guidance documents, and regulations in times of national or regional emergencies.

**DATES:** *Comment Closing Date:* Comments should be submitted by October 10, 2006. Late-filed comments will be considered to the extent practicable.

**ADDRESSES:** You may submit comments identified by the docket number [FTA–2006–22428] by any of the following methods:

*Federal eRulemaking Portal:* Go to <http://www.regulations.gov>. Follow the online instructions for submitting comments.

*Web site:* <http://dms.dot.gov>. Follow the instructions for submitting comments on the DOT electronic docket site.

*Fax:* 202–493–2251.

*Mail:* Docket Management Facility; U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, 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.

*Instructions:* You must include the agency name (Federal Transit Administration) and Docket number (FTA–2006–22428) or the Regulatory Identification Number (RIN) for this rulemaking at the beginning of your comments. You should submit two copies of your comments if you submit

them by mail. If you wish to receive confirmation that FTA received your comments, you must include a self-addressed stamped postcard. Note that all comments received will be posted without change to <http://dms.dot.gov>, including any personal information provided, and will be available to internet users. Please see the Privacy Act section of this document.

*Docket:* For access to the docket to read background documents and comments received, go to <http://dms.dot.gov> at any time or to 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.

**FOR FURTHER INFORMATION CONTACT:** Bonnie L. Graves, Attorney-Advisor, Legislation and Regulations Division, Office of Chief Counsel, Federal Transit Administration, 400 Seventh Street, SW., Room 9316, Washington, DC 20590, phone: (202) 366-4011, fax: (202) 366-3809, or e-mail, [Bonnie.Graves@dot.gov](mailto:Bonnie.Graves@dot.gov).

#### **SUPPLEMENTARY INFORMATION:**

##### **I. Authority for This Rulemaking**

In addition to FTA's general rulemaking authority provided under 49 U.S.C. 15334, 42 U.S.C. 5141 (section 301 of the Stafford Act, Pub. L. 92-288, as amended) provides that "[a]ny Federal agency charged with the administration of a Federal assistance program may, if so requested by the applicant State or local authorities, modify or waive, for a major disaster, such administrative conditions for assistance as would otherwise prevent the giving of assistance under such programs if the inability to meet such conditions is a result of the major disaster."

This section allows FTA, at a State or local governmental entity's request, to waive or modify any administrative condition it has placed on any of its Federal transit assistance programs if the State or local governmental entity cannot meet the condition because of the major disaster. This provision does not, however, allow for the waiver or modification of any Federal transit program requirement mandated by statute, therefore, this rulemaking would apply only to non-statutory requirements in FTA regulations and policies.

##### **II. Background**

When a natural or man-made disaster occurs that results in significant damage to property and loss of life, such as Hurricanes Katrina and Rita or the

events of September 11, 2001, our nation's transit systems play a key role in evacuating people, providing necessary supplies, and moving displaced families and relief personnel to and from the area. In the aftermath of Hurricanes Katrina and Rita, FTA received numerous requests for relief from policy statements, circulars, guidance documents and regulations, from transit agencies in the immediate disaster zone as well as transit agencies receiving evacuees. In order to ensure consistent responses to similar requests, FTA regional offices had to forward all requests to headquarters, which then reviewed the request and sent a message back to the regional office. This was a time-consuming process that resulted in delayed responses to requests for relief. Therefore, FTA believes it is necessary to establish a process by which we can quickly and efficiently handle requests for relief from Federal requirements that are directly related to the effects of a national or regional emergency, such as Hurricanes Katrina and Rita. FTA recognizes that these types of petitions must be afforded special consideration and must be handled expeditiously in order to ensure that the safety of the public and the safety of those individuals and businesses providing aid are immediately addressed.

This NPRM would establish an Emergency Relief Docket within two business days of an emergency or disaster declaration in which it appears transit agencies are or will be impacted. In the event emergencies can be foreseen, such as hurricanes, FTA proposes setting up such a docket in advance of the event, so that emergency evacuation and other services can occur in a timely manner. FTA would place a message on its Web page (<http://www.fta.dot.gov>) indicating an Emergency Relief Docket has been established and including the docket number. Any person would be able to petition the Administrator for temporary relief from administrative requirements. The petition would be conditionally granted for three (3) business days, during which time anyone could provide comments on the petition. FTA would then post a decision to the Emergency Relief Docket.

In some instances, grantees or subrecipients may not have access to electronic means by which to request relief. In those situations, FTA proposes to allow the grantee or subrecipient to contact any FTA regional office and ask the office to submit a request for relief on its behalf. Further, in the event a State's subrecipient is impacted by an emergency, the State may request relief on behalf of the subrecipient, even if the

State (as the recipient) is not impacted by the emergency.

FTA believes this new emergency procedure would provide the agency with the ability to promptly and effectively address relief requests, while ensuring that the public and all interested parties are afforded proper notice of any such requests and are provided a sufficient opportunity to comment. FTA notes that these procedures would apply to policy statements, circulars, guidance documents and non-statutory requirements in regulations only, as FTA does not have the authority to waive statutory requirements.

In addition, FTA cannot independently waive regulations promulgated by the U.S. Department of Transportation (DOT). If a grantee needed relief from DOT regulations, such as the Americans with Disabilities Act (49 CFR part 37) or the Common Grant Rule (49 CFR part 18), the grantee would submit a request for relief to FTA's Emergency Relief Docket in the same manner it would request relief from FTA regulations. FTA would then work with DOT to process the petition for relief, including a request for a hearing, if any. Once DOT provides a response, FTA would post the response to the docket and the same review procedures would apply.

The proposed emergency procedures would establish FTA's criteria for requesting relief and would only be used to address petitions for relief that FTA determines are directly related to a Presidential declaration of a national or regional emergency, or anticipation of such a declaration, such as Hurricanes Katrina and Rita, or the events of September 11, 2001. FTA seeks comment on whether a State Governor's declaration of an emergency should also trigger these emergency relief procedures.

As FTA responds to emergencies, trends emerge as to the types of relief requests we are likely to receive. FTA seeks comment on whether it would be helpful, when opening an emergency relief docket, for FTA to proactively extend relief from certain policies, circulars, guidance or regulations to the geographical area(s) most impacted by the emergency, rather than waiting for transit agencies to request relief.

FTA remains mindful that as both public and private transportation providers move to expand service to address the needs of persons affected by national or regional emergencies, like Hurricanes Katrina and Rita, it is important to ensure that private companies are not placed at a competitive disadvantage in the

marketplace. FTA requests public comment on whether the procedures contained in this NPRM would provide the necessary relief while also allowing the private sector to participate in transit relief efforts.

Under the proposed relief procedures, FTA would reserve the right to reopen any docket and reconsider any decision on its own initiative or based upon information or comments received. FTA requests public comment on whether the proposed three business day period is a sufficient amount of time to provide comments on petitions for relief.

### III. Rulemaking Analysis and Notices

#### *Executive Order 12866*

This NPRM is nonsignificant for purposes of Executive Order 12866 and the Department of Transportation's Regulatory Policies and Practices. The NPRM proposes to establish emergency procedures and requests for relief from Federal transit regulations. FTA requests comment on whether this rulemaking may have unintended cost impacts.

#### *Federalism Assessment*

This NPRM has been analyzed in accordance with the principles and criteria contained in Executive Order 13132 ("Federalism"). FTA believes this rule would not impose any requirements that would have substantial direct effects on the States, the relationship between the national government and the States, or the distribution of power and responsibilities among the various levels of government.

#### *Executive Order 13175*

This NPRM has been analyzed in accordance with the principles and criteria contained in Executive Order 13175 ("Consultation and Coordination with Indian Tribal Governments"). Because this NPRM does not have tribal implications and does not impose direct compliance costs, the funding and consultation requirements of Executive Order 13175 do not apply.

#### *Regulatory Flexibility Act and Executive Order 13272*

Section 603 of the Regulatory Flexibility Act (RFA) requires an agency to prepare an initial regulatory flexibility analysis describing impacts on small entities whenever an agency is required by 5 U.S.C. 553 to publish a general notice of proposed rulemaking for any proposed rule. Similarly, section 604 of the RFA requires an agency to prepare a final regulatory flexibility analysis when an agency issues a final rule under 5 U.S.C. 553 after being

required to publish a general notice of proposed rulemaking. Because this rulemaking proposes a process by which small entities may seek relief from Federal transit requirements, FTA does not believe this NPRM would have a significant economic impact on a substantial number of small entities. FTA requests public comment on whether this rulemaking may have unintended impacts on small entities.

#### *Unfunded Mandates Reform Act of 1995*

This rule would not impose unfunded mandates under the Unfunded Mandates Reform Act of 1995. It does not result in costs of \$128.1 million or more, in the aggregate, to any of the following: State, local, or Native American tribal governments, or the private sector.

#### *Paperwork Reduction Act*

There are no new information collection requirements in this NPRM.

#### *Regulation Identifier Number (RIN)*

A regulation identifier number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN number contained in heading of this document may be used to cross-reference this action with the Unified Agenda.

#### *Environmental Assessment*

The National Environmental Policy Act of 1969 (NEPA), as amended (42 U.S.C. 4321-4347), requires Federal agencies to consider the consequences of major Federal actions and prepare a detailed statement on actions significantly affecting the quality of the human environment. We find that there are no significant environmental impacts associated with this NPRM, but ask for public comment on this issue.

#### *Privacy Act*

Anyone is able to search the electronic form for all comments received into any of our dockets by the name of the individual submitting the comments (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>.

#### **List of Subjects in 49 CFR Part 601**

Administrative Practice and Procedure; Organization, Functions, and Procedures.

For the reasons set forth in the preamble, part 601 of title 49 of the Code of Federal Regulations is proposed to be amended as follows:

Add subpart D, consisting of 601.40 through 601.46, to read as follows:

#### **Subpart D—Emergency Procedures for Public Transportation Systems**

Sec.

- 601.40 Applicability.
- 601.41 Petitions for relief.
- 601.42 Emergency relief docket.
- 601.43 Required information.
- 601.44 Processing of petitions.
- 601.45 Request for hearing on petition for relief.
- 601.46 Review procedures.

**Authority:** 49 U.S.C. 5334; 49 CFR 1.51, 42 U.S.C. 5141.

#### **Subpart D—Emergency Procedures for Public Transportation Systems**

##### **§ 601.40 General applicability.**

This part prescribes procedures that apply to FTA grantees and subgrantees when the President has declared a national or regional emergency, or in anticipation of such a declaration.

##### **§ 601.41 Petitions for relief.**

In the case of a national or regional emergency or disaster, or in anticipation of such a disaster, any person may petition the Administrator for temporary relief from the provisions of any policy statement, circular, guidance document or rule.

##### **§ 601.42 Emergency relief docket.**

(a) In an effort to maintain transparency regarding the approval or denial of requests for petitions for relief, FTA will establish an Emergency Relief docket in the Department's Docket Management System (DMS). FTA will place a message on its Web page (<http://www.fta.dot.gov>) indicating an Emergency Relief Docket has been established and including the docket number.

(b) The Emergency Relief Docket will be established within two business days of an emergency or disaster declaration in which it appears FTA grantees or subgrantees are or will be impacted. In cases in which emergencies can be anticipated, such as hurricanes, FTA will establish an Emergency Relief Docket in advance of the event. In the event any person believes an Emergency Relief Docket should be established and one has not been so established, that person may submit a petition in duplicate to the Administrator, Federal Transit Administration, 400 Seventh Street, SW., Washington, DC 20590, requesting establishment of the docket and including the information under § 601.43 below. The Administrator in

his/her sole discretion shall determine the need for an Emergency Relief Docket.

(c) All petitions for relief must be posted in the docket in order to receive consideration by FTA.

(1) The docket is publicly accessible and can be accessed 24 hours a day, seven days a week, via the Internet at the docket facility's Web site at <http://dms.dot.gov>. Petitions may also be submitted by U.S. mail or by hand delivery to the DOT Docket Management Facility, Room PL-401 (Plaza Level), 400 7th Street, SW., Washington, DC 20590.

(2) In the event a person needs to request immediate relief and does not have access to electronic means to request that relief, the person may contact any FTA regional office and request that the FTA regional office submit the petition on their behalf.

(3) Any person submitting petitions for relief or comments to the docket must include the agency name (Federal Transit Administration) and docket number, which will be assigned at the time the docket is established. Persons making submissions by mail or hand delivery should submit two copies.

(4) Note that all petitions for relief and comments received will be posted, without change, to <http://dms.dot.gov> including any personal information provided and will be available to Internet users.

(5) All documents in this docket are available for inspection and copying on the web site or are available for examination at the DOT Docket Management Facility during regular business hours (9 a.m. to 5 p.m. eastern time).

#### **§ 601.43 Required Information.**

A petition for relief under this section must:

- (a) Identify the grantee or subgrantee and its geographic location;
- (b) Specifically address how the petition for exemption from FTA policy statements, circulars, guidance documents and/or rules is related to the emergency relief efforts, or how the grantee or subgrantee is negatively impacted by the emergency or disaster;
- (c) Identify the policy statement, circular, guidance document and/or rule from which the petitioner seeks relief;
- (d) Specify if the petition for relief is one-time or ongoing, and if ongoing identify the time period for which the relief is in effect. The time period may not exceed three months, however, additional time may be requested through a second petition for relief; and
- (e) If relief is sought from charter service requirements, include a

certification that the grantee or subgrantee made good faith efforts to contact, by whatever means available, private charter or school bus operators to determine whether those entities are willing to provide the service. Documentation should include the name and address of the private charter operator(s), the date the requestor (e.g., the transit agency) contacted the operator(s), and what response the requestor received. In addition, the grantee or subgrantee must certify that it contacted the American Bus Association (e-mail: [abainfo@buses.org](mailto:abainfo@buses.org), phone: (202) 842-1645); the United Motor Coach Association (e-mail: [info@uma.org](mailto:info@uma.org), phone: (800) 424-8262); and the National School Transportation Association (e-mail: [info@yellowbuses.org](mailto:info@yellowbuses.org), phone: (800) 222Z-NSTA).

#### **§ 601.44 Processing of petitions.**

A petition for relief will be conditionally granted for a period of three (3) business days from the date it is submitted to the Emergency Relief Docket. FTA will review the petition after the expiration of the three business days and review any comments submitted thereto. FTA will then post a decision to the Emergency Relief Docket. FTA's decision will be based on whether the petition meets the criteria for use of these emergency procedures, the substance of the request, and the comments submitted regarding the petition.

#### **§ 601.45 Request for hearing on petition for relief.**

Parties interested in having a public hearing on any petition must notify FTA within three business days of the posting of the petition for relief in the Emergency Relief Docket. Upon receiving such a request, FTA will immediately arrange for a telephone conference to occur between all interested parties as soon as practicable. FTA may grant a petition for relief prior to conducting a public hearing if such action is in the public interest or in situations where a hearing request is received after the three business days has expired. In such an instance, FTA will immediately notify the party requesting the public hearing and will arrange to conduct such hearing as soon as practicable.

#### **§ 601.46 Review Procedures.**

FTA reserves the right to reopen any docket and reconsider any decision made pursuant to these emergency procedures based upon its own initiative or based upon information or comments received subsequent to the

three business day comment period or at a later scheduled public hearing.

Issued in Washington, DC, this 2nd day of August 2006.

**Sandra K. Bushue,**

*FTA Deputy Administrator.*

[FR Doc. 06-6771 Filed 8-7-06; 8:45 am]

BILLING CODE 4910-57-M

## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

#### 50 CFR Part 17

#### **Endangered and Threatened Wildlife and Plants; 90-Day Finding on a Petition To List the Casey's June Beetle (*Dinacoma caseyi*) as Endangered**

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice of 90-day petition finding and initiation of status review.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), announce a 90-day finding on a petition to list the Casey's June beetle (*Dinacoma caseyi*) as endangered under the Endangered Species Act of 1973, as amended (Act). We find the petition presents substantial scientific information indicating that listing the Casey's June beetle as endangered may be warranted. Therefore, with the publication of this notice, we are initiating a status review, and we will issue a 12-month finding on the petition to list the Casey's June beetle announcing our determination of whether listing the species as endangered is warranted. To ensure that the status review is comprehensive, we are soliciting scientific and commercial information regarding this species.

**DATES:** The finding announced in this document was made on August 8, 2006. To be considered in the 12-month finding for this petition, comments and information must be submitted to the Service by October 10, 2006.

**ADDRESSES:** If you wish to comment, you may submit new information, materials, comments, or questions concerning this species by any one of the following methods:

1. You may submit comments and information to the Field Supervisor, Carlsbad Fish and Wildlife Office, U.S. Fish and Wildlife Service, 6010 Hidden Valley Road, Carlsbad, California 92011.
2. You may hand-deliver written comments and information to the above address.
3. You may fax your comments to 760-431-9624.

4. You may go to the Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

5. You may e-mail your comments to [FW8CFWOCOMMENTS@fws.gov](mailto:FW8CFWOCOMMENTS@fws.gov). Please see the "Public Comments Solicited" section below for file format and other information about electronic filing.

See the "Public Comments Solicited" section below for more information on submitting comments. The complete file for this finding is available for public inspection, by appointment, during normal business hours at the above address.

**FOR FURTHER INFORMATION CONTACT:** Jim Bartel, Field Supervisor, Carlsbad Fish and Wildlife Office (see **ADDRESSES**); 760-431-9440.

#### **SUPPLEMENTARY INFORMATION:**

##### **Public Comments Solicited**

When we make a finding that a petition presents substantial information to indicate that listing a species may be warranted, we are required to promptly commence a review of the status of the species. Based on results of the status review, we make a 12-month finding as required by section 4(b)(3)(B) of the Act (16 U.S.C. 1531 *et. seq.*). To ensure that the status review of Casey's June beetle is complete and based on the best available scientific and commercial data, we are soliciting information on the species. We request any additional data, comments, and suggestions from the public, other concerned governmental agencies, Native American Tribes, the scientific community, industry, or any other interested parties concerning the status of the Casey's June beetle. Of particular interest is information pertaining to the factors the Service uses to determine if a species is threatened or endangered: (1) Present or threatened destruction, modification, or curtailment of its habitat or range; (2) overutilization for commercial, recreational, scientific, or educational purposes; (3) disease or predation; (4) inadequacy of existing regulatory mechanisms; and (5) other natural or human-caused factors affecting its continued existence. In addition, we request data and information regarding the status of the Casey's June beetle throughout its range, including:

(A) Information on taxonomy, distribution (including positive or negative survey and collection data), habitat selection, food habits, population density and trends, and habitat trends;

(B) Information of the effects of potential threat factors, including artificial lighting, pesticides, lighted swimming pools, development, and changes in the distribution and abundance of the Casey's June beetle over the short and long term; and

(C) Information on management programs for Casey's June beetle conservation, including mitigation measures related to development, and any private, Tribal, or governmental conservation programs that benefit the Casey's June beetle.

If we determine that listing the Casey's June beetle is warranted, it is our intent to propose critical habitat to the maximum extent prudent and determinable at the time we would propose to list the species. Therefore, we also request data and information on what may constitute physical or biological features essential to the conservation of the species, where these features are currently found, whether any of these features may require special management considerations or protection, and whether there are areas not containing these features which might of themselves be essential to the conservation of the species. Please provide specific comments as to what, if any, critical habitat should be proposed for designation if the species is proposed for listing, and why that proposed habitat meets the requirements of the Act.

We will base our 12-month finding on a review of the best available scientific and commercial information, including all information received during the public comment period.

If you wish to comment, you may submit your comments and materials concerning this proposal by any one of several methods (see **ADDRESSES** section). Electronic comments may be submitted to [FW8CFWOCOMMENTS@fws.gov](mailto:FW8CFWOCOMMENTS@fws.gov) in ASCII file format and avoid the use of special characters or any form of encryption. Please include "Attn: Casey's June beetle" in your e-mail subject header and your name and return address in the body of your message. If you do not receive a confirmation from the system that we have received your electronic message, contact the Carlsbad Fish and Wildlife Office directly at 760-431-9440.

Our practice is to make comments, including names and home addresses of respondents, available for public review during regular business hours. We will not consider anonymous comments, and we will make all comments available for public inspection in their entirety. Comments and materials received will be available for public inspection, by

appointment, during normal business hours at the Carlsbad Fish and Wildlife Office (see **ADDRESSES**).

##### **Background**

Section 4(b)(3)(A) of the Act requires us to make a finding on whether a petition to list, delist, or reclassify a species presents substantial scientific or commercial information to indicate that the petitioned action may be warranted. We are to base the finding on information provided in the petition and supporting information available in our files at the time we make a determination. To the maximum extent practicable, we are to make a finding within 90 days of our receipt of the petition and to publish a notice of the finding promptly in the **Federal Register**.

Our standard for substantial information within the Code of Federal Regulations (CFR) with regard to a 90-day petition finding is "that amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted" (50 CFR 424.14(b)). If we find that substantial information is presented, we are required to promptly commence a review of the status of the species.

In making this finding, we relied on information provided by the petitioners and information available in our files at the time we reviewed the petition, and we evaluated that information in accordance with 50 CFR 424.14(b). Our process for making a 90-day finding under section 4(b)(3)(A) of the Act and section 424.14(b) of our regulations is limited to a determination of whether the information contained in the petition meets the "substantial information" threshold.

On May 12, 2004, we received a petition, dated May 11, 2004, from David H. Wright, Ph.D.; the Center for Biological Diversity; and the Sierra Club requesting the emergency listing of the Casey's June beetle (*Dinacoma caseyi*) as endangered in accordance with section 4 of the Act. On October 4, 2005, the Center for Biological Diversity filed a complaint against us in the U.S. District Court for the Central District of California (Case No. ED CV-05-00922-SGL) challenging our failure to make the required 90-day and, if appropriate, 12-month findings on their petition to emergency list Casey's June beetle as endangered under the Act. We looked at the immediacy of possible threats to the species to determine if emergency listing may be warranted. Our initial review of the petition did not indicate that an emergency situation exists. We reached a settlement agreement with the

plaintiffs on March 28, 2006, in which we agreed to submit to the **Federal Register** a completed 90-day finding by July 27, 2006, and to complete and submit to the **Federal Register**, if applicable, a 12-month finding by June 30, 2007. This notice constitutes the 90-day finding on the May 12, 2004, petition.

#### Previous Federal Actions

Casey's June beetle was not previously determined to be a candidate species nor does it currently have Federal regulatory status.

#### Species Information

##### *Description and Taxonomy*

Casey's June beetle belongs to the scarab family (Scarabidae). The genus *Dinacoma* includes two described species, *D. caseyi* and *D. marginata* (Blaisdell 1930). Delbert La Rue, a researcher experienced with the genus *Dinacoma* and a taxonomic expert stated, "*Dinacoma caseyi* is a distinct species morphologically and comprises its own species group—the *caseyi* complex—the other [species group] being the *marginata* complex which includes the bulk/remainder of the genus" (La Rue 2006). The Casey's June beetle was first collected in 1916 and later described by Blaisdell (1930) based on male specimens. This species measures 0.55 to 0.71 inches (in) (1.4 to 1.8 centimeters (cm)) long, with dusty brown or whitish coloring, and brown and cream longitudinal stripes on the elytra (wing covers and back).

Little is conclusively known about the Casey's June beetle and its life history. Based on surveys conducted to assess the species' presence, both male and female Casey's June beetles emerge from underground burrows sometime between late March through early June, with abundance peaks generally occurring in April and May (Duff 1990; Barrows 1998). During the active flight season, males emerge from the ground and begin flying near dusk (Hovore 1997). Males are reported to fly back and forth or crawl on the ground where a female beetle has been detected (Duff 1990). Cornett (2003) theorized that after emergence, females remain on the ground and release pheromones to attract flying males. After mating, females return to their burrows or dig a new burrow and deposit eggs. Excavations of adult emergence burrows revealed pupal exuviae (casings) at depths ranging from approximately 4 to 6 in (10 to 16 cm) (Frank Hovore and Associates 1995). The larval cycle for the species is likely 1 year, based on the absence of larvae (grubs) in burrows

during the adult flight season (Frank Hovore and Associates 1995; LaRue 2004). What Casey's June beetle larvae feed on while underground is unknown, but other species of June beetle are known to eat "plant roots or plant detritus and associated decay organisms" (LaRue 2004). La Rue (2006) stated, "[Casey's June beetle] exhibits no specific host preferences, and larvae likely consume any available organic resources—including stratified detritus—encountered within the alluvial habitat." Although specific host plant associations for Casey's June beetle are not known, visual surveys of the species using non-confining, light-collecting methods have detected females near emergence burrows in the vicinity (within 1 meter) of *Hymenoclea salsola* (cheesebush) (Frank Hovore and Associates 1995).

Recently, entomologists have found two new species or subspecies of *Dinacoma*, collected respectively from near the city of Hemet, California, and in the northwest portion of Joshua Tree National Park at Covington Flats (La Rue 2006). The specimens collected from Hemet are paler than Casey's June beetle specimens and possess morphologically different genitalia (Anderson 2006). To date, these specimens of *Dinacoma* have not been formally described in the scientific literature, but expert evaluation places them in the other *Dinacoma* species group (*marginata* complex) (La Rue 2006). La Rue (2006) states, "\* \* \* from my research, *Dinacoma caseyi* is the most divergent and distinct species in the genus \* \* \* the Little San Bernardino Mountains geographically isolate [the Joshua Tree population] from all other known [*Dinacoma*] species."

##### *Habitat*

The Casey's June beetle is most commonly associated with Carsitas series soil (CdC), described by the United States Department of Agriculture's Soil Conservation Service (1980) as gravelly sand on 0 to 9 percent slopes. This soil series is associated with alluvial fans, rather than areas of aeolian or windblown sand deposits. The Casey's June beetle also occurs in a portion of Palm Canyon Wash on soils characterized as "fine sands and alluvial soils without crypto-biotic crusts" (McGill 2003). According to Hovore (2003), these soils "show light braiding and some organic deposition, but generally do not receive scouring surface flows." Although the Casey's June beetle has primarily been found on CdC soils, it is also apparently associated with Riverwash (RA) and, possibly, Carsitas cobbly sand (ChC)

soils in the Palm Canyon Wash area (Anderson and Love 2006). Its burrowing habit would suggest the species needs soils that are not too rocky or compacted to complete portions of its lifecycle. La Rue (2006) states that all *Dinacoma* populations are ecologically associated with alluvial sediments. Alluvial sediments occurring in or contiguous with subcoastal scrub, submontane chaparral, and desert dry washes (ephemeral watercourses) are indicative of the *marginata* complex; bases of desert alluvial fans, and the broad, gently sloping, depositional surfaces formed at the base of mountain ranges in a dry region by the coalescing of individual alluvial fans (bajada) are indicative of the *caseyi* complex (La Rue 2006).

##### *Range and Distribution*

Early collection records identify "Palm Desert," "Indian Wells," and "Palm Canyon," all in Riverside County, California, as locations where the Casey's June beetle occurred; however, these early records lack specific locality information (Duff 1990). The species has been most commonly collected at the "Bogert Trail" and Smoke Tree Ranch localities adjacent to Palm Canyon Wash, which are commonly used as reference sites when collecting at other locations (Hovore 1997; Cornett 2000; Cornett 2003; Cornett 2004). Hovore (1995) stated the Casey's June beetle was collected by University of California-Long Beach students "within the past 20 years" in Dead Indian Canyon (near Indian Wells); however, Hovore (2006b) subsequently explained the reliability of this information is questionable and incomplete due to incomplete specimen label information. The historical range of the Casey's June beetle cannot be determined with any certainty given the lack of specific locality information for some of the collection records and the absence of rangewide survey data. Frank Hovore and Associates (1995) describe the possible extent of the species' historical range as "somewhere around Chino Canyon floodplain (or at most northwest to the Snow Creek drainage), south to around Indian Wells." Within these general geographic areas, the species is assumed to have occurred on the alluvial fan bases flowing from the Santa Rosa Mountains, at or near the level contour line, where finer silts and sand are deposited. However, this purported range is "based on inference and fragmentary data" (Frank Hovore and Associates 1995).

Given the lack of collection records, efforts have been made to ascertain the presence of the Casey's June beetle in its purported historical range. Barrows and

Fisher (2000) conducted trapping on two separate evenings in Dead Indian Canyon in Palm Desert, but the species was not detected. The University of California—Riverside conducted more than 10 years of year-round surveys for a variety of species, including Casey's June beetle, at the Boyd Deep Canyon Preserve in Palm Desert, California, southeast of Palm Springs (also near Indian Wells, and including portions of Dead Indian Canyon). No Casey's June beetles were found during any of the surveys (Anderson 2006). A single night survey conducted in 2003 (Powell) near Snow Creek, northwest of Palm Springs, failed to find the species, although the beetle was confirmed to be active at Smoke Tree Ranch in Palm Springs.

La Rue (2006) has collected and worked extensively with *Dinacoma* spp. in southern California since the 1980s, and has not collected Casey's June beetle outside of its current known range in the City of Palm Springs. La Rue (2006) states:

"Many collectors, researchers, ecologists, and others \* \* \* have surveyed for *D. caseyi* throughout the Coachella Valley for years without finding additional populations other than those still extant in and around Palm Springs. There are several factors that contribute to this isolation, a few being: (1) topographically, the Palm Springs area is protected from high wind events (desiccation [sic] of necessary substrate) [by] the precipitous San Jacinto Mtns; (2) the area where *D. caseyi* occurs in the Palm Springs area receives a higher amount of annual precipitation because of its proximity to the base of the San Jacinto/Santa Rosa Mtns. Orographic lift will deplete most moisture from winter storms originating from the Pacific, what little remains falls in the Palm Springs area and rarely further into the Coachella Valley. Summer monsoonal patterns are insignificant. (3) As mentioned above, *Dinacoma* are restricted to alluvial sediments. Re: *D. caseyi*; these conditions only occur at the base of steep narrow canyons of the San Jacinto/Santa Rosa Mtns."

Cornett (2004) sampled more than 60 locations in Palm Springs to determine the current range of Casey's June beetle. Light traps were used to attract flying males and placed in relatively undisturbed flatlands likely to have supported Casey's June beetle. Traps were opened by 6:30 p.m. and remained open until at least 10 p.m. on 26 nights, for a total of 756 trap-hours. Eight traps were opened each evening, and each trapping station was used at least two times. To gauge trapping success, at least one trap was opened at Smoke Tree Ranch each trapping session. Based on the survey results, Cornett (2004) concluded that Casey's June beetle is restricted to an area of southern Palm Springs north of Acanto Way, east of

South Palm Canyon Drive, and south of State Route 111, west of Palm Canyon Wash (Cornett 2004) and includes portions of the Agua Caliente Tribal Reservation. Cornett (2004) estimated the area occupied by Casey's June beetle to cover approximately 800 acres (ac) (324 hectares (ha)). Non-historic (1990s or later) collection locations of Casey's June beetle include sites near South Palm Canyon Drive, Bogert Trail, Smoke Tree Ranch, and portions of Palm Canyon Wash (Hovore 2003; McGill 2003; Powell 2003; Cornett 2004). However, not all the currently known range is occupied. For example, the species does not occur in residential areas where soils have been graded and covered with structures, nor is it found in areas with ornamental landscaping, such as lawns and other landscaping (Cornett 2004).

The above studies present compelling evidence for a localized distribution of Casey's June beetle in the southern Palm Springs area. The localized distribution of Casey's June beetle described by Cornett (2004) is typical for species of June beetles (superfamily Scarabaeoidea) with flightlessness in one or both sexes (Hovore 2006a). Experts agree with La Rue's (2006) hypothesis that the Palm Springs area east of Mount San Jacinto has a number of unique environmental characteristics, such as slightly higher precipitation and lighter winds, which are significant, positive factors contributing to the presence of the Casey's June beetle.

#### Threats Analysis

Section 4 of the Act and its implementing regulations (50 CFR part 424) set forth procedures for adding species to the Federal Lists of Endangered and Threatened Wildlife and Plants. A species may be determined to be endangered or threatened due to one or more of the following five factors as described in section 4(a)(1) of the Act: (A) Present or threatened destruction, modification, or curtailment of habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence. In making this 90-day finding, we evaluated the petition and its supporting information to determine whether substantial scientific or commercial information was presented that indicated that listing the Casey's June beetle may be warranted. The Act identifies the five factors to be considered, either singly or in combination, to determine whether a

species may be threatened or endangered. Our evaluation of these threats, based on information provided in the petition and readily available in our files, is presented below.

#### A. Present or Threatened Destruction, Modification, or Curtailment of the Species' Habitat or Range

The petitioners claimed that the Casey's June beetle is threatened by the cumulative loss and degradation of habitat from development. The petitioners stated that, within "the south Palm Springs, California area," approximately 600 ac (243 ha) of potential CdC soils in nine remnant fragments "in the Palm Springs topographic quadrangle south of San Rafael Drive" remained undeveloped when the petition was submitted in 2004, and this area was decreasing due to continued urban development. The petitioners claimed that loss of habitat threatens the continued existence of two populations of the Casey's June beetle.

Petitioners stated that approximately 600 ac (243 ha) of potential CdC soils in nine remnant fragments in the south Palm Springs area remained undeveloped. To evaluate the information provided in the petition about the range of Casey's June beetle in Palm Springs, we used data already in our geographic information system (GIS) to overlay 2003 soil data (CdC and RA soil series) obtained from the U.S. Department of Agriculture (USDA)'s Natural Resources Conservation Service, 2006 aerial photography from the USDA's Farm Service Agency Aerial Photography Field Office, and species survey and distribution data from Powell (2003) (cited in the petition) and Cornett (2004) (available to us shortly after we received the petition).

Information provided by the petitioners (Barrows and Fisher 2000; Noss *et al.* 2001; Hovore 2003; McGill 2003; Powell 2003; La Rue 2006) is corroborated by information in our files (Hovore 2003; Cornett 2004), and GIS information available at the time of petition review (2003 soil data and 2006 aerial photography). Thus, we believe petitioners have provided substantial scientific information that only one population of the Casey's June beetle exists and is limited to the southern portion of the City of Palm Springs, California. Although the petition states there are two populations, no population distribution mapping or population dynamics studies have been conducted. Because all known occupied habitat is connected by Palm Canyon Wash, we consider all occupied areas to be within a single population distribution. That the majority of the

CdC soils tend to occur along the base of the mountains in "areas most extensively used for agriculture and urban development, so that very little potential habitat may still exist" (Coachella Valley Association of Governments 2001) supports the possibility of a larger historical distribution. However, we examined 2006 aerial photography overlaying potentially suitable soils from Palm Springs to Indian Wells and determined that the majority of these soils have been developed. In Palm Springs, the bulk of remaining undeveloped CdC soils are north of the city center, an area lacking in records of the species (Cornett 2004).

Within southern Palm Springs, the petitioners cited at least five projects that had been formally proposed that would remove additional occupied habitat in Palm Springs: (1) The 30-ac (12-ha) Monte Sereno project north of Bogart Trail; (2) the 34-ac (14-ha) El Portal project east of South Palm Drive; (3) the 10-ac (4-ha) Canyon Ranch project west of South Palm Canyon Drive; (4) a 3-ac (1.2-ha) condominium project at Baristo; and (5) the 1.5- to 2-ac (0.6- to 0.81-ha) Desert Water Agency wells and pipeline project in the Smoke Tree Ranch development. The petition states that these five projects would remove over 11 percent of the remaining 600 ac of habitat. While these five projects were considered the most imminent projects, the petition also lists several properties that were being actively advertised for lease and development and other projects in various stages of development south of San Rafael Drive: (1) 18 ac (7 ha) on Smoke Tree Ranch actively advertised for lease and development; (2) a roughly 25-ac (10-ha) project north of Acanto Drive and west of Palm Canyon Wash; (3) a 0.3-ac (0.1-ha) communications site at Smoke Tree Ranch; and (4) a 25-ac (10-ha) "Casitas" development at Smoke Tree Ranch. These projects, if approved and implemented, could result in the additional removal or modification of approximately 68-ac (27.5-ha) of Casey's June beetle habitat south of San Rafael Drive. The petition also lists a 3-ac (1-ha) South Ridge Cove project and a 306-ac (124-ha) "McComic" project proposed in CdC soils south of Whitewater Wash. However, it appears that these proposed development projects south of Whitewater Wash are north of Palm Springs, outside of the current known range of the Casey's June beetle as identified by Cornett (2004).

Based on our GIS mapping of Cornett's (2004) distribution map, the estimated Casey's June beetle range is

approximately 707 ac (286 ha) as opposed to the approximately 800 ac (324 ha) estimated by Cornett (2004). To this we add another 51 ac (21 ha) of north Palm Canyon Wash between East Palm Canyon Drive and South Gene Autry Trail based on collection of more than 70 individuals by Powell (2003), resulting in an approximately 758-ac (307-ha) range for Casey's June beetle in the Palm Springs area. While this estimated current range of 758 ac (307 ha) is greater than the 600 ac (243 ha) of potential CdC soils presented in the petition, past development likely greatly reduced the habitat for Casey's June beetle in Palm Springs. As stated in the petition, historical records of the Casey's June beetle from elsewhere in Palm Springs and nearby communities are from areas that have been thoroughly developed or otherwise altered and no longer have the appropriate habitat (Noss *et al.* 2001). Also, according to 2006 aerial photography, it appears that construction has been at least initiated for some of the proposed or pending development projects listed in the petition (such as the 30-ac Monte Sereno project) and that other development projects may have been initiated within Palm Springs since the 2004 petition was submitted.

Based on information provided in the petition, it appears that pending or proposed development projects could result in the destruction or modification of approximately 147 ac (59 ha) of Casey's June beetle habitat in Palm Springs. This constitutes about 19 percent of the remaining 758 ac (307 ha), based on our determination of the species' current range. Since it appears that past development has removed most of the historical Casey's June beetle habitat, resulting in a range restricted to the southern Palm Springs area, and future development projects threaten to continue removing Casey's June beetle habitat, we find that the petition, supporting information, and information readily available to the Service presents substantial information indicating that listing Casey's June beetle may be warranted.

#### *B. Overutilization for Commercial, Recreational, Scientific, or Educational Purposes*

The petitioners stated that they do not have information on trade of the species, citing the difficulty of tracking these activities. We are not aware of any information regarding the overutilization of Casey's June beetle for commercial, recreational, scientific, or educational purposes.

#### *C. Disease or Predation*

The petitioners stated that they are unaware of impacts from disease or predation on Casey's June beetle. We are not aware of any information regarding the threats of disease or predation to the Casey's June beetle.

#### *D. Inadequacy of Existing Regulatory Mechanisms*

The petitioners maintained that Casey's June beetle occurs primarily on private lands and, to an unknown extent, occurs on a portion of the Agua Caliente Tribal Reservation. They also asserted that regulatory mechanisms currently available do not protect the Casey's June beetle. According to the petitioners, some protection for Casey's June beetle can potentially be provided under the California Environmental Quality Act (CEQA); however, the petition cited six projects that considered the species under CEQA (but proceeded with impacts) and another list of 12 projects in the City of Palm Springs that impacted potentially suitable soils for the species that may not have considered the species in their respective environmental reviews.

CEQA requires public agencies to disclose environmental impacts of a project on native species and natural communities during the land use planning process and to identify mitigation measures and project alternatives. This allows public comments to influence the planning process. The petition cites an example of the inadequacy of CEQA as a regulatory mechanism to provide for conservation of the Casey's June beetle. The Monte Sereno project impacted approximately 30 ac (12 ha) of occupied habitat. Impacts to the Casey's June beetle were expected to be mitigated by payment of \$600 per acre (total of \$24,780) to the City of Palm Springs or a habitat conservation entity designated by the city for 41.3 ac (16.7 ha) of "potential" Casey's June beetle habitat (Dudek and Associates 2001). No specific use of the funds for mitigation was specified (Dudek and Associates 2001).

The petitioners claimed that, while development on Tribal lands is subject to the National Environmental Policy Act (NEPA)(42 U.S.C. 4321-4347), potential impacts to Casey's June beetle may not always be considered during the NEPA process. The petitioners cited two instances of projects on Tribal lands that did not review impacts to the Casey's June beetle. In a 2004 Environmental Assessment (EA) for a brush clearing project on the Agua Caliente Tribal Reservation, CdC soils

were confirmed in a portion of the proposed project site. These soils were described in the EA as being compacted, and it was stated that the distance from this area to known locations of the Casey's June beetle, coupled with the amount of nonnative vegetation onsite, made it unlikely for the species to occur on the project site (Agua Caliente Band of Cahuilla Indians (Tribe 2004). Although the Tribe indicated that the two projects were not likely to impact Casey's June beetle habitat, we have no information indicating whether surveys were conducted for the species within the project's footprint.

Although Casey's June beetle was initially considered for coverage under the Coachella Valley Multiple Species Habitat Conservation Plan (MSHCP), the April 2006 release of the final MSHCP, final EIR, and final implementing agreement did not include Casey's June beetle as a covered species. Given the non-inclusion of Casey's June beetle in the final Coachella Valley MSHCP and draft Agua Caliente Tribal HCP, the Service has been working with Smoke Tree Ranch to develop a Candidate Conservation Agreement with Assurances (CCAA) addressing species' conservation. As indicated in reports (Hovore 2003; Cornett 2004), Smoke Tree Ranch supports a substantial portion of known occupied Casey's June beetle habitat, including a portion of the property currently identified in Smoke Tree Ranch Codes, Covenants, and Restrictions as "open space." The Service expects to continue working cooperatively with Smoke Tree Ranch to complete and implement a CCAA for the Casey's June beetle. The use of a CCAA can be an effective tool to conserve species in the absence of listing them as threatened or endangered under the Act. However, until such time as a CCAA is completed, current regulatory mechanisms likely are inadequate to ensure conservation of the species.

Removal of occupied habitat by projects in the Bogert Trail area after submission of the petition in 2004, and other recent and proposed development in potentially occupied habitat, demonstrates existing regulatory mechanisms are not sufficient to protect remaining occupied Casey's June beetle habitat from destruction. We find the petition and supporting information, as well as information readily available to the Service, present substantial information indicating that the petitioned action may be warranted.

#### *E. Other Natural or Manmade Factors Affecting the Species' Continued Existence*

The petitioners asserted male Casey's June beetles are readily attracted to artificial lights (Frank Hovore and Associates 1995; Hovore 1997), and such lights pose a significant threat to the species. They further stated that lighted swimming pools attract males and cause substantial mortality (Barrows and Fisher 2000; Cornett 2000). The extent that artificial lights and lighted swimming pools pose a threat to the Casey's June beetle is speculative. Hovore (2003) noted the presence of the Casey's June beetle on a portion of Smoke Tree Ranch with limited natural open space adjacent to "numerous attractive light sources." He concluded that while males would likely be attracted to these light sources during the flight season, such losses of straying males would not put the overall population at risk because males typically outnumber females and males are likely to complete multiple matings. While drowning in swimming pools or flying into lights causes mortality, we have no substantial information that would lead us to conclude that these factors singularly pose a significant threat to the species.

In addition, the petitioners claimed the species may be killed or injured by vehicles in the springtime at dusk. However, the petitioners provide no data regarding the possible number of beetles killed by vehicles. Additionally, the petitioners asserted that Casey's June beetle may be particularly sensitive to chemicals that interfere with neural or chemosensory functions during the flight season when males are seeking females. However, the petitioners did not provide any citations or documented evidence for this. We have no substantial information that would lead us to conclude that pesticides or toxins pose a significant threat to the species.

The petitioners claimed loss and fragmentation of habitat compromises the ability of the species to disperse and establish new, or augment declining, populations, especially because females have not been observed to fly and males alone cannot establish new populations. Because female Casey's June beetle do not appear to fly, Frank Hovore and Associates (1995) assumed subpopulations of the species "tend to be localized." Hovore (2003) indicated that population movement would be "slow and indirect," and suggested the population structure for Casey's June beetle in any given area is for multiple mini-colonies or "clusters of individuals

around areas of repeated female emergence." This would, in Hovore's (2003) assessment, make the species susceptible to extirpation by land use changes that would remove or alter surface features. In their report on the draft Coachella Valley MSHCP, Noss et al. (2001) also expressed concern about the species' ability to adjust its range in response to environmental changes.

The petitioners asserted that having only two population locations and restricted habitat makes Casey's June beetle susceptible to extinction or extirpation from all or a significant portion of its range due to chance events such as fire, flood, drought, or disease (Shaffer 1981, 1987; Primack 1998). The petitioners noted that Palm Canyon Wash is likely ephemeral habitat for the Casey's June beetle and that periodic flooding of the wash would eliminate the species from this site. Between 1978 and 2001, streamflows in Palm Canyon Wash exceeded 1,000 cubic feet (28 cubic meters) per second on four occasions (U.S. Geological Survey 2003). Streamflows of high magnitude could temporarily eliminate the species from portions of the wash (Hovore 2003; Cornett 2004). Furthermore, the petitioners assert that recolonization of the wash would most likely be accomplished by species from the extant habitat on upland terraces, making the upland habitat areas essential for the species' long-term survival (Wright 2003). It is also possible that periodic flooding in Palm Canyon Wash could have a positive impact by depositing detritus downstream that could be used by the species as it recolonizes the area following flood events (Wright 2003). However, conclusive information on such habitat use is not available.

While periodic flooding of Palm Canyon Wash may result in temporary elimination of that portion of the population, the overall impact of periodic flooding on the continued existence of the species is not known. However, given the ephemeral characteristic of habitat in Palm Canyon Wash, the conservation of upland habitat is likely required to maintain the species long term.

The petitioners claimed low numbers of Casey's June beetles make it vulnerable to risks experienced by small, restricted populations, including (1) chance demographic effects (such as skewed sex ratios, high death rates, or low birth rates); (2) the effects of genetic drift and inbreeding; and (3) deterioration in environmental quality (such as increased artificial lighting, swimming pools, or wash channelization). No analyses have been undertaken to estimate a minimum

viable population size for Casey's June beetle, nor is there any substantial information concerning the population dynamics of the species. No information was provided in the petition, and we are not aware of any information regarding any genetic analyses of the species to determine the presence of skewed sex ratios or inbreeding. Therefore, we find the petition, supporting information, and information readily available to the Service does not present substantial information for this factor indicating that the petitioned action may be warranted.

### Finding

The petition focused on three of the five listing factors: (A) The Present or Threatened Destruction, Modification, or Curtailment of the Species' Habitat or Range; (B) the Inadequacy of Existing Regulatory Mechanisms; and (C) Other Natural or Manmade Factors Affecting the Species' Continued Existence. Specifically, under Factor A, the petition indicates the range of the Casey's June beetle has been greatly reduced and is threatened by habitat removal from continued urban development. This is corroborated by information in the Service's files. The petition also presents information under Factor D suggesting that the existing regulatory mechanisms, such as CEQA and NEPA, are inadequate to protect the Casey's June beetle and its habitat. Additionally, while the Casey's June beetle was initially a covered species under the Coachella Valley MSHCP, the finalized version of that plan does not cover the species. The petition also presents information regarding additional threats under Factor E, such as drowning in lighted swimming pools, direct mortality by vehicles, and reduced genetic exchange due to a reduced population size. We are not aware, however, of any substantial information to suggest that any of the threats described under Factor E would threaten the existence of the Casey's June beetle.

According to the petition, five "imminent" projects would destroy over 11 percent of Casey's June beetle habitat in Palm Springs. As cited in the petition, two of the five projects (Monte Sereno and El Portal) considered imminent had been approved by the City Council at the time we received the petition in 2004.

After this review and evaluation, we find the petition presents substantial scientific or commercial information indicating that listing of Casey's June beetle may be warranted. Therefore, we are initiating a status review to determine if listing is warranted. To

ensure the status review is comprehensive, we are soliciting scientific and commercial information regarding this species. Under the terms of a settlement agreement, we are required to make a 12-month finding determining whether listing the Casey's June beetle is warranted on or before June 30, 2007.

The petitioners also requested critical habitat be designated for this species. We consider the need for critical habitat designation when listing species. If we determine in our 12-month finding that listing of Casey's June beetle is warranted, we will address the designation of critical habitat in a subsequent proposed rule.

### References Cited

A complete list of all references cited herein is available, upon request, from the Carlsbad Fish and Wildlife Office (see **ADDRESSES**).

### Author

The primary author of this document is the staff of the Carlsbad Fish and Wildlife Office (see **ADDRESSES**).

### Authority

The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: July 28, 2006.

### Kenneth Stansell,

*Acting Director, U.S. Fish and Wildlife Service.*

[FR Doc. E6-12579 Filed 8-7-06; 8:45 am]

**BILLING CODE 4310-55-P**

## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

#### 50 CFR Part 17

### Endangered and Threatened Wildlife and Plants; 90-Day Finding on a Petition to List the Hermes Copper Butterfly as Endangered

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice of 90-day petition finding.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), announce a 90-day finding on a petition to list the Hermes copper butterfly (*Hermelycaena [Lycaena] hermes*) as an endangered species under the Endangered Species Act of 1973, as amended. We find the petition does not present substantial scientific or commercial information indicating that listing the Hermes copper butterfly may be warranted.

Therefore, are not initiating a status review in response to this petition. We ask the public to submit to us any new information that becomes available concerning the status of the species or threats to it.

**DATES:** The finding announced in this document was made on August 8, 2006.

**ADDRESSES:** The complete file for this finding is available for public inspection, by appointment, during normal business hours at the Carlsbad Fish and Wildlife Office, U.S. Fish and Wildlife Service, 6010 Hidden Valley Road, Carlsbad, CA 92011. New information, materials, comments, or questions concerning this species may be submitted to us at any time at the above address.

**FOR FURTHER INFORMATION CONTACT:** Jim Bartel, Field Supervisor, Carlsbad Fish and Wildlife Office (see **ADDRESSES** section above), by telephone at 760-431-9440, or by facsimile to 760-431-9624. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 800-877-8339, 24 hours a day, 7 days a week.

### SUPPLEMENTARY INFORMATION:

#### Background

Section 4(b)(3)(A) of the Endangered Species Act of 1973, as amended (Act) (16 U.S.C. 1531 *et seq.*) requires that we make a finding on whether a petition to list, delist, or reclassify a species presents substantial information to indicate that the petitioned action may be warranted. To the maximum extent practicable, this finding is to be made within 90 days of receipt of the petition, and the finding is to be published in the **Federal Register**.

This finding summarizes information included in the petition and information available to us at the time of the petition review. A 90-day finding under section 4(b)(3)(A) of the Act and § 424.14(b) of our regulations is limited to a determination of whether the information in the petition meets the "substantial information" threshold. Substantial information is "that amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted" (50 CFR 424.14(b)).

#### Previous Federal Action

The Hermes copper butterfly was included as a Category 2 candidate species in our November 21, 1991 (56 FR 58804), and November 15, 1994 (59 FR 58982), Candidate Notices of Review (CNOR). Category 2 included taxa for which information in the Service's possession indicated that a proposed

listing rule was possibly appropriate, but for which sufficient data on biological vulnerability and threats were not available to support a proposed rule. In the CNOR published on February 28, 1996 (61 FR 7595), the Service announced a revised list of plant and animal taxa that were regarded as candidates for possible addition to the Lists of Endangered and Threatened Wildlife and Plants. The revised candidate list included only former Category 1 species. All former Category 2 species were dropped from the list in order to reduce confusion about the conservation status of these species, and to clarify that the Service no longer regarded these species as candidates for listing. Since the Hermes copper butterfly was a Category 2 species, it was no longer recognized as a candidate species as of the February 28, 1996, CNOR.

On June 4, 1991, the Service received a petition dated May 27, 1991, from David Hogan of the San Diego Biodiversity Project to list the Hermes copper butterfly, Laguna Mountains skipper (*Pyrgus ruralis lagunae*), Harbison's dun skipper (*Euphyes vestries harbisoni*), and Thorne's hairstreak butterfly (*Callophrys [Mitoura] grynea thornei*) as endangered under the Act. In a **Federal Register** notice dated July 19, 1993 (58 FR 38549), the Service announced its finding on the petition. We found that the petition presented substantial information for the Laguna Mountains skipper, but not for the other three butterflies. However, the finding also concluded that other substantial information existed to support a decision that listing may be warranted for Hermes copper butterfly, Harbison's dun skipper, and Thorne's hairstreak butterfly, and we announced our intention to continue a formal status review of these three species. In a proposed rule for the Laguna Mountain skipper and Quino checkerspot butterflies published on August 4, 1994 (59 FR 39868), we clarified that the negative 90-day finding on the Hermes copper butterfly and the other two butterflies "was made because sufficient information was not available regarding the threats to and biological vulnerability of these" butterflies (59 FR 39869). Though we have continued, and will continue, to collect available data on the Hermes copper butterfly and the other two butterflies, we did not complete a formal status review of Hermes copper butterfly under section 4(b)(3)(A) of the Act.

On October 25, 2004, the Service received an updated petition to list the Hermes copper and Thorne's hairstreak

butterflies as endangered from David Hogan of the Center for Biological Diversity. The petitioner also sought emergency listing protection for Thorne's hairstreak and designation of critical habitat for both butterfly species concurrent with listing, if warranted. Included in the petition was information regarding the species' taxonomy, biology, ecology, historical and current distribution, present status, and potential causes of decline and imminent threats. In a letter dated May 9, 2005, the Service determined that despite apparent threats to the Thorne's hairstreak butterfly, such threats did not appear to be of a magnitude and severity to warrant emergency listing. In our response, we also advised the petitioner that we had insufficient funds to respond to the petition at that time. On March 15, 2005, we received a 60-day notice of intent to sue filed by the Center for Biological Diversity for lack of response to the Hermes copper and Thorne's hairstreak butterfly petition. On October 18, 2005, the Center for Biological Diversity filed a complaint for declaratory and injunctive relief challenging our failure to make the required 90-day findings for these two taxa. The Service agreed to submit 90-day petition findings for Hermes copper and Thorne's hairstreak butterflies to the **Federal Register** by August 1, 2006, and if the 90-day findings was substantial, to submit 12-month findings to the **Federal Register** by June 1, 2007. This notice constitutes our 90-day finding on the petition to list the Hermes copper butterfly; the 90-day finding on the petition to list the Thorne's hairstreak butterfly will be published separately in the **Federal Register**.

In completing this 90-day finding, the Service has reviewed not only the information submitted in the petition but also information in our files. This includes all of the data we had obtained prior to the July 19, 1993, not substantial finding that would have been considered in an internal status review (had one been completed), as well as all of the information we have collected on this species to date. Further, based on all new information and our analysis below, we have determined that the petition does not present substantial information indicating that listing the Hermes copper butterfly may be warranted or that a status review should be conducted.

## Species Information

### Taxonomy

The Hermes copper butterfly was first described as *Chrysophanus hermes* by Edwards in 1870 (cited in Thorne 1963). Comstock placed the species in the genus *Tharsalea* in 1927 (cited in Thorne 1963). According to Faulkner and Klein (2005), Hoffman moved it to the genus *Lycaena* in 1940. In a subsequent study of American copper butterflies, Miller and Brown (1979) placed the species in the monotypic genus *Hermelycaena* on the basis of anatomical features that resemble two butterfly genera and other unique morphological characters. The authors concluded the Hermes copper butterfly was "perhaps \* \* \* our most evolved Copper." In an allozyme phylogenetic study of North American copper butterflies, Pratt and Wright (2002) suggested that the Hermes copper butterfly "could belong to a separate genus or subgenus." *Lycaena hermes* is the name predominantly used in recent literature (North American Butterfly Association 2001; Opler and Warren 2003; Faulkner and Klein 2005), and we recognize it as such for the purposes of this finding.

### Description

The Hermes copper butterfly is a small, brightly-colored butterfly approximately 1 to 1.25 inches (2.5 to 3.2 centimeters) in length, with one tail on the hindwing. On the upperside, the forewing is brown with a yellow or orange area enclosing several black spots, and the hindwing has orange spots that may be merged into a band along the margin. On the underside, the forewing is yellow with 4 to 6 black spots, and the hindwing is bright yellow with 3 to 6 black spots (USGS 2006). Emmel and Emmel (1973) provide a description of the early stages of the species (eggs, larvae, and pupae).

The Hermes copper butterfly has a single flight period per year (univoltine), and spends about two thirds of its life in the egg stage (Thorne 1963). The adult flight period is from mid-May through early July, depending on elevation. Its peak flight period is typically around June 10 for males and June 20 for females. Recent observations indicate that some diapausing (low metabolic rate resting stage) Hermes copper butterfly eggs may remain in that state for multiple years as a drought adaptation (Faulkner and Klein 2005). Eggs are laid singly on stems of its larval host plant, spiny redberry (*Rhamnus crocea*) (Faulkner and Klein 2005). Pupation also occurs on spiny redberry.

Males are territorial and perch on plants along the edge of trails (Thorne 1963). Hermes copper butterflies are rarely seen far from their host or nectar plants, and form geographically small but locally abundant “colonies” that probably number in the hundreds. These “colonies” are hypothesized to be relatively independent from each other, even when in close proximity; inter-colony dispersal, which helps maintain the gene pool, may be limited to occasional males (Thorne 1963; Faulkner and Klein 2005). Mark-release-recapture data recorded a maximum movement of 92 yards (84 meters) (Marschalek 2004).

#### Habitat

The Hermes copper butterfly is restricted to areas that contain its larval host plant, spiny redberry (Thorne 1963; Emmel and Emmel 1973). This plant is a low-growing, spreading shrub with a widespread range that includes the coastal ranges of northern California, along the foothills of the Sierra Nevada, on the Channel Islands (including the Mexican islands), the Mojave Desert in southwestern Arizona, and south into Baja California Norte and Sonora, Mexico (Thorne 1963; Sawyer 1993; Flesch and Hahn 2005; Christie et al. 2006). Spiny redberry commonly grows in coastal-sage scrub, chaparral, and woodlands in California (Sawyer 1993).

Faulkner and Brown (1993) described the habitat of the Hermes copper butterfly's habitat as coastal sage scrub and open southern mixed chaparral communities in which spiny redberry “is a common component.” The authors further noted that “these habitat types range from near sea level along the coast to 1250 m [4,100 feet] at the western edge of the Laguna Mountains.” Habitat consists of continuous stands of mixed chaparral/sage scrub in well-drained soil, usually found in canyon bottoms or on hillsides with a northern exposure. Host and nectar plants need to be in close proximity to one another (Faulkner and Klein 2005). Adult butterflies are typically observed feeding on nectar from flat-topped buckwheat (*Eriogonum fasciculatum*) (Marschalek 2004), but have also been observed nectaring on chamise (*Adenostoma fasciculatum*), golden yarrow (*Eriophyllum confertiflorum*), slender sunflower (*Helianthus gracilentus*), other species in the sunflower family (*Asteraceae*), and short-podded mustard (*Hirshfeldia incana*) (Faulkner and Klein 2005). Klein and Faulkner (2003) hypothesized host plants must be mature to support Hermes copper butterflies, although the

petitioner acknowledged such evidence is anecdotal.

#### Historical Range/Distribution

Faulkner and Brown (1993) described the known range of the Hermes copper butterfly as from near Fallbrook in San Diego County, California, to 18 miles (mi) (29 kilometer (km)) south of Santo Tomas in Baja California Norte, Mexico (a north-south distance of approximately 155 mi (250 km)), and from near the immediate coast inland to Pine Valley in San Diego County (an east-west distance of about 40 mi (65 km)). Thorne's (1963) map had 33 unnamed “known” colony locations, all within San Diego County in the United States.

According to the petition, Hermes copper butterflies have been reported approximately 100 mi (160 km) south of the U.S.-Mexico border, yet only three populations have been identified (Brown et al. 1992). The petitioner asserts the lack of Baja California populations may reflect both a dearth of suitable habitat and survey efforts and cites surveys conducted east of Tecate that yielded negative results despite extensive stands of high quality habitat (D. Faulkner, pers. comm.) [document not submitted with petition].

#### Current Range/Distribution

According to the petition, the current species' distribution has been reduced to approximately 18 known populations following years of continuing urban development and the huge wildfires of 2003. The petition included “Table 1: Hermes Copper Populations and Status,” which outlines the site location, estimated population at each site, current land manager, and years the species has been observed at each site. According to information in Table 1, Hermes copper butterflies have been observed, or specimens collected from, 48 sites in San Diego County and 4 sites in Baja, Mexico, since the early 1900s. This table also highlights 22 sites “presumed lost to fire,” 6 sites “presumed lost to urban development,” 2 sites that have “unknown specific locations and unknown status,” and 8 sites “identified during environmental review of development projects,” leaving the 18 sites with known populations referred to above. The petitioner also stated that, while the status of the Baja populations is unknown, they are presumed to be extant for the purposes of the petition.

Based on information available to us, Hermes copper butterfly has been recorded from at least 29 different sites in San Diego County (Engelhard 2004a, 2004b). Of these, 2 sites or areas have

not been resurveyed since the 1930s (Fallbrook and Pala), 3 sites have incomplete survey information (surveyor name and/or date) (Scripps Gateway, East Elliott Ranch, Flinn Springs County Park), 3 sites were proposed for residential development or have been developed (the Crosby property, Scripps Gateway, Presky/Gonya property), and 5 sites were burned in the 2003 fires (Mission Trails Regional Park, Crestridge Ecological Reserve, Sycamore Canyon Open Space Preserve, Rancho Jamul Ecological Reserve, and portions of Miramar [Marine Corp Air Station]). However, as indicated in Engelhard's (2004a, 2004b) assessment, much of the information about the status of the site relative to development, extent of development (e.g., area impacted), and fire was not determined at that time. Therefore, this assessment did not constitute a complete review of the species' status at that time.

Some of the sites identified as being historically or currently occupied in the petition are likely the same sites identified by Engelhard (2004a, 2004b), and both references likely utilized the same sources of information. However, information used to create Table 1 in the petition was not provided by the petitioner; therefore it was not possible for us to compare location information available to us to that provided in the petition. Therefore, it appears that between 18 (according to the petition) and 21 (Engelhard 2004a, 2004b) sites were considered occupied by Hermes copper butterflies in 2004.

#### Population Estimates/Status

According to the petition, the Crestridge Ecological Reserve supports the largest known population of the species, and field surveys of the reserve between 1999 and 2001 revealed population fluctuations ranging from 1,000 butterflies in 2001, to one single butterfly in 2002 (M. Klein pers. comm.) [document not submitted with petition], to 400 butterflies in 2003. The petitioner asserted these fluctuations may be due to variations in rainfall in San Diego County. Other occupied sites have not been systematically surveyed, as illustrated in Table 1 in the petition and in Engelhard (2004a, 2004b). Therefore, no quantitative data exist on the total population size of Hermes copper butterfly.

#### Threats Analysis

Section 4 of the Act and its implementing regulations (50 CFR 424) set forth the procedures for adding species to the Federal List of Endangered and Threatened Wildlife

and Plants. A species may be determined to be an endangered or threatened species due to one or more of the five factors described in section 4(a)(1) of the Act: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; and (E) other natural or manmade factors affecting its continued existence. In making this finding, we evaluated whether threats to the Hermes copper butterfly presented in the petition and other information readily available to us may pose a concern with respect to the species' survival such that listing under the Act may be warranted. Our evaluation of these threats is presented below.

#### *A. The Present or Threatened Destruction, Modification, or Curtailment of Habitat or Range*

The petition, its appendices, and referenced documents discuss the following threats that we have grouped under Factor A: Urban development, wildfire, and prescribed fire.

##### Urban Development

*Information provided by the petitioner.* The petitioner asserts the "Hermes copper [butterfly] is highly vulnerable to extinction due to loss of populations and dispersal habitat to expanding urban development in San Diego County and northern Baja California," and "the threat of urban development is compounded by the additional threat of wildfire." The petitioner cited two publications (Comstock 1927; Wright 1930) that predict probable extinction if rapid expansion of development were to continue within San Diego County. The petitioner cited Brown (1991), "[b]ecause continued development in the San Diego County threatens to eliminate additional colonies of this insect [Hermes copper butterfly], it is considered highly sensitive and vulnerable to extirpation."

The petitioner stated many populations recorded from El Cajon, Fairmont Canyon, Kearny Mesa, Scripps Gateway, and numerous sites near the urban core of the city of San Diego have been lost to urban development and cites Murphy (1991) [document not submitted with petition] as stating, "[Hermes copper butterfly] has been virtually extirpated in nearly all of its best known historical localities around [the] City of San Diego." The petitioner also stated that loss of populations and dispersal habitat to urban development

is a significant threat to the species in the unincorporated portion of the San Diego County foothills west of the Cleveland National Forest, especially unburned areas near Jamul and northern portions of San Diego County. The petitioner further stated that ongoing urban development in Harbison Canyon, Marine Air Corps Station Miramar, San Marcos Creek, and Santee reduces likelihood of recolonization by the species. The petition also stated that Hermes copper butterfly populations identified in several locations by recent development project biological surveys may not persist following construction, especially considering resulting habitat fragmentation and increased risk of fire with an expanded, proximate human population.

*Analysis of information provided in the petition.* Rapid urban development is occurring within the current known range of the Hermes copper butterfly. Coastal and interior San Diego County is projected to grow about 44 percent by the year 2020 (San Diego Association of Governments 1999). While we acknowledge development has likely reduced the amount of occupied habitat for Hermes copper butterfly, the extent to which the reduction of habitat has impacted the species has not been quantitatively estimated.

The petition stated many populations recorded from El Cajon, Fairmont Canyon, Kearny Mesa, Scripps Gateway, and numerous sites near the urban core of the city of San Diego have been lost to urban development. While not explicitly stated in the petition, we assumed for the purposes of our review that the above statements were based on information in Table 1 in the petition. According to Table 1, six sites/areas appear to correspond to these areas and are referred to as "presumed lost to urban development": El Cajon ("3 miles south of El Cajon" and "El Cajon"), Fairmont Canyon ("Fairmont Canyon"), Kerny Mesa ("Kerny Mesa"), Scripps Gateway ("Scripps Gateway"), and numerous sites in San Diego (collectively referred to as "San Diego"). However, no information was provided with the petition documenting site development, site location, the extent of the development (e.g., area developed), or the extent of habitat loss due to development.

The petition also stated several populations have been identified during recent development project biological surveys and asserts these populations may not persist following construction. Table 1 identifies eight such sites. However, no information was provided documenting proposed or ongoing development at these sites, site location,

the extent of development (e.g., area developed), or extent of habitat loss due to development.

The status of Hermes copper butterfly distribution compiled by Engelhard (2004a, 2004b) lists 21 occupied locations known as of 2004; Table 1 in the petition lists 18 sites. As discussed above, information used to create Table 1 in the petition was not provided; therefore it was not possible for us to compare location information available to us (i.e., in Engelhard (2004a, 2004b)) to information provided in the petition. While Engelhard's (2004a, 2004b) assessment included total area and development status for some sites, such information for most sites was not determined at that time. Without complete and specific information about butterfly locations or past and proposed development projects and their associated impacts to habitat, we were unable to determine the extent to which urban development has reduced the known range of the Hermes copper butterfly. Further, according to Thorne (1963), urbanization is not as great a threat as commonly assumed:

"There is rather general belief that [the Hermes copper butterfly] is in a last ditch struggle for survival in San Diego County. This isn't true! Colonies have survived in areas that have been overrun with houses for many years; in areas being grazed by livestock; in areas being farmed (avocado orchards); and in areas that have been burned over with some frequency. The map \* \* \* shows the wide distribution of known colonies which should ensure survival for the foreseeable future."

Thorne's (1963) map had 33 unnamed "known" colony locations, all within San Diego County in the United States. Although some colonies near urban centers referred to by Thorne (1963) have been destroyed by development, many recent discoveries (i.e., post-1993) of extant colonies within the known species' range have also been reported, and the range of the species remains relatively widely distributed. Examples of colonies that have been reported since 1993 include Black Mountain, and multiple colonies on both the California Department of Fish and Game (CDFG) Crestridge Ecological Reserve and San Diego National Wildlife Refuge (Engelhard 2004b). In addition, the biology of the species has not changed; therefore Thorne's (1963) assessment of individual colony resilience with regard to development and fire should still be considered valid.

In addition, much uncertainty exists regarding the distribution of the species because the range of its host plant, spiny redberry, extends well beyond the known range of the butterfly, and

surveys have not been conducted throughout the host plant's range (especially inland San Diego County and northwestern Baja California Norte). Even the survey information for sites historically or currently occupied by the species is limited. The information in Table 1 of the petition and in Engelhard (2004a, 2004b) illustrates the fact that most occupied sites have only been surveyed on one or two occasions and many have not been surveyed since the 1950s or 1960s. Therefore, it is difficult to assess the species' current status in the absence of more current information.

In conclusion, we agree with the petitioner that urban development has likely reduced and fragmented habitat for Hermes copper butterfly in San Diego County. However, the habitat loss and fragmentation has not been quantitatively estimated, and the species remains relatively widely distributed. Therefore, we have determined that information in the petition and available to us does not substantiate the claim that urban development has significantly reduced the amount of available Hermes copper butterfly habitat to the point at which the butterfly may become threatened or endangered in the foreseeable future.

#### Wildfire

*Information provided by the petitioner.* The petitioner asserted Hermes copper butterfly is highly vulnerable to extinction due to the threat of fire as a result of direct mortality of individuals and indirect mortality due to loss of the species' larval host plant, spiny redberry. The petitioner further asserts, "Excessive, human induced fire poses a significant threat to the survival of the species, even on lands otherwise protected from development." The threat of fire as it relates to direct mortality of individual butterflies is also discussed here.

Table 1 of the petition identifies areas "presumed to be burned" during the October 2003 fires in San Diego County, which are estimated to have burned 39 percent of Hermes copper butterfly habitat (Betzler et al. 2003). According to the petition, the largest concentration of the species ever documented was lost when the 2003 fire burned nearly all of the California Department of Fish and Game's Crestridge Ecological Reserve. The petition further stated 2001 surveys at Crestridge identified approximately 52 Hermes copper butterfly colonies with a total estimated population of 1,000 butterflies (CDFG 2001), of which all appear to have been destroyed by the 2003 fires (M. Klein pers. comm.) [document not submitted with petition].

The petition stated that fires in 2003 also impacted the second largest concentration of Hermes copper butterfly when they burned through 4 populations in the City of San Diego's Mission Trails Regional Park (Mission Grove, Mission Dam, Oak Creek, and Spring Canyon) and at least 15 populations (although only 14 were listed) throughout San Diego County: (1) Anderson Road (Viejas Mountain), (2) Boulder Creek Road, (3) Descanso, (4) El Monte County Park, (5) Flinn Springs, (6) Gooden Ranch reserve, (7) Harbison Canyon, (8) Little Cedar Canyon, (9) Miramar, (10) Old Viejas Grade Road, (11) Otay-Foothill area, (12) Rancho Jamul, (13) Santee (Fanita Ranch area), and (14) Sycamore Canyon reserve. The petition also stated at least three Hermes copper butterfly populations were likely lost to past fires on Bernardo Mountain near Escondido, Dictionary Hill in Spring Valley, and San Marcos Creek.

According to the petition, increased human population density and utilization of wildlands correlates with increased southern California wildfire frequency (Keeley et al. 1999; Keeley 2001 [document not submitted with petition]; Keeley and Fotheringham 2003; Wells et al. 2004). The petitioner asserted close proximity to large human populations increases vulnerability of the Hermes copper butterfly and its host plant, the spiny redberry populations to "excessive" fire.

The petitioner cited two references, Brooks et al. (2002 [correct citation 2004]) and Keeley and Fotheringham (2003), that provide examples of excessive fire harming chaparral ecosystems and dependent species in a number of ways. The petition quoted Keeley and Fotheringham (2003), " \* \* \* ecosystem health of shrublands is threatened not by lack of fire but by high fire frequencies that exceed the resilience of many species."

The petitioner stated excessive fire may prevent chaparral and coastal sage scrub plant species, like spiny redberry, from reaching maturity, thereby reducing or eliminating reproduction and recruitment of replacement chaparral plants. An example cited by the petitioner of an exotic species type conversion within an area occupied by Hermes copper butterflies was Bernardo Mountain. The petition stated that in 2002, Michael Klein visited the known occupied area burned in 1986, and found it dominated by weedy exotic forbs and grasses, with no spiny redberry plants or Hermes copper butterflies (M. Klein pers. comm.) [document not submitted with petition].

According to a supplemental letter and map provided by the petitioner, 44

fires had burned through known Hermes copper butterfly habitat, and 788 fires have burned through "modeled" habitat between 1900 and 2003 (CBD 2005). The letter stated, "This rate of fire return appears to exceed natural fire frequency in coastal sage scrub and chaparral ecosystems." The letter further stated that the combined effects of limited dispersal behavior, urban development, and excessive fires have reduced available habitat, limited recolonization, and increased vulnerability of remaining Hermes copper butterfly populations, greatly increasing likelihood of the species' extinction.

According to the petition, Hermes copper butterfly biology appears to reduce the likelihood of escape from fire, because adults, eggs, larvae, and pupae are likely killed when fire burns spiny redberry plants and other coastal sage scrub or chaparral vegetation. Also, excessive fires over the last several decades have reduced patches of mature spiny redberry used by Hermes copper butterfly, thereby reducing butterfly populations and disrupting metapopulation dynamics and stability. Due to the amount of past and potential future fires, any butterfly that escapes a fire is unlikely to locate other suitable habitat.

Also according to the petition, Hermes copper butterfly recovery following a fire is confounded by very slow recovery of its host plant (Zedler et al. 1983) and very slow recolonization by the butterfly. The petition cited Brown (1991): "Even after recovery of the host, the sedentary behavior of the butterfly may make natural colonization a very slow process, especially where sources of potential colonists previously have been extirpated."

*Analysis of information provided in the petition.* The petition claimed Hermes copper butterfly is highly vulnerable due to the threat of fire, citing a 39 percent loss of the species' habitat burned in the 2003 fires. The petitioner also claimed that the 2003 fires destroyed or impacted two of the largest concentrations of the species and at least 15 other populations throughout San Diego County.

As cited in the petition, 39 percent of Hermes copper butterfly habitat is believed to have burned during the 2003 fires, a reduction from 317,451 ac (128,468 ha) to 192,924 ac (78,074 ha) (Betzler et al. 2003). However, this 39 percent reduction is an estimate based on vegetation mortality for areas occupied by the species (Betzler et al. 2003). Since this estimate is not based on actual post-fire surveys, it is not possible to determine the actual amount

of occupied Hermes copper habitat that burned in the 2003 fire.

Table 1 of the petition highlights 22 sites that were “presumed lost to fire.” However, neither the petition nor the supplemental map provided by the petitioners had information on location of sites “presumed lost to fire” or extent of habitat lost due to fire (i.e., area burned). While Engelhard (2004a, 2004b) attempted to compile information on specific sites known to be occupied by the species, the total acres of the site and the fire status (i.e., burned in 2003 fires) for most of the sites was not determined at that time and is still unknown. Regardless, as discussed above, extant colonies continue to be discovered, and the species appears to have maintained a relatively wide range.

The petitioner also claimed the largest known concentration of the species ever documented was lost in the 2003 fire that burned nearly all of the Crestridge Ecological Reserve, further asserting a total estimated population of 1,000 butterflies (per 2001 surveys) was lost. However, as discussed in the “Population Estimate/Status” section of this finding, the petitioner stated that surveys conducted between 1999 and 2001 documented fluctuations in individual abundance ranging from 1,000 butterflies in 2001, to a single butterfly in 2002 (M. Klein pers. comm.) [document not submitted with petition] to 400 butterflies in 2003 (pre-fire). The petition asserted that these fluctuations may be due to variations in rainfall in San Diego County. It is also not clear how good an index survey counts are of population size. While it is clear that the 2003 fire impacted the Hermes copper butterfly habitat at Crestridge, and presumably the butterfly itself, it is unclear how resilient this population is since wide fluctuations in the species’ abundance had been documented prior to the fire. Also, while a few historically occupied territories burned in the 2003 fires were visited in 2004 (Faulkner and Klein 2005), we are unaware of any systematic post-fire monitoring conducted to document the extent of the impact of the fires on Hermes copper butterfly.

The petitioner also claimed that the 2003 fires impacted a large concentration of Hermes copper butterflies at Mission Trails Regional Park and at least 15 other populations throughout San Diego County. However, the petitioner did not provide any information on the extent of the area impacted by fire (e.g., area burned) or on post-fire surveys done at these sites; additional monitoring is needed at these sites to determine their status,

particularly as it relates to the impact of fire on butterfly populations and habitat.

While it is unlikely that immature Hermes copper butterflies (larvae, pupae, and adults) can survive the burning of occupied habitat, it appears that adult butterflies will recolonize burned habitat over time. In an example of fire recovery, Brown (1991) noted that a 1982 fire apparently eliminated large stands of spiny redberry and a colony of Hermes copper butterfly in Mission Gorge (in Mission Trails Regional Park). Although the species was not observed again during annual surveys following the fire until 2000 (Klein and Faulkner 2003), the host plant and butterfly did eventually return 18 years later. During limited post-fire monitoring at Crestridge, one adult male Hermes copper was observed in 2005 on three different dates by two observers (Klein 2006), indicating that the population had not been extirpated as hypothesized in Klein and Williams (2003). We are not aware of any additional surveys conducted at Crestridge in 2005. While Faulkner and Klein (2005) state that no butterflies were observed during 2004 visits to only a few of the historically occupied territories burned in the 2003 fires, we are unaware of any systematic post-fire monitoring conducted to document the extent of the impact of the fires to Hermes copper butterfly and its habitat or to document recolonization rates. Additional monitoring is needed to determine the survival and recolonization rate of immature and adult butterflies following a fire.

The petition claimed increased human populations and utilization of wildlands correlates with increased southern California wildfire frequency. The petition also asserted that, between 1900 and 2003, from 44 to 788 fires had burned through known and “modeled” habitat, respectively, and this rate of fire return appears to exceed natural fire frequency in coastal sage scrub and chaparral ecosystems.

In a GIS modeling study, Wells et al. (2004) largely concurred with Keeley et al. (1999) (cited in the petition) that increasing human population (especially at lower elevations) has resulted in a greater number of fires and an increase in area burned overall in southern California. However, looking at fire frequency for coastal sage scrub and chaparral in San Diego County specifically, Wells et al. (2004) concluded that for “coastal sage scrub habitats, there has been an increase in burning over the course of the past century” but that the “trend in burning in chaparral is virtually flat over the past century, and if the years following

1950 are considered, there has been a marked decrease in area burned since then.” Contrary to the interpretation of the petitioner, Keeley et al. (1999) actually reported that fire rotation intervals (i.e., the time needed to burn an equivalent area of shrubland) actually increased in San Diego County after 1950.

The supplemental letter and map provided by the petitioner (stating that between 1900 and 2003, 44 fires had burned through known Hermes copper butterfly habitat, and 788 fires have burned through “modeled” habitat) does not provide sufficient information to allow us to verify the extent of the impact caused by these historic and more recent fires. In an attempt to outline fire frequency in Hermes copper butterfly habitat, the map overlays “approximate location of past and current Hermes copper colonies” and “modeled” Hermes copper habitat with a data layer indicating areas where from one to nine fires had occurred. “Modeled” habitat is defined on the map as being “based on very broad vegetation, soil, elevation and other categories and therefore includ[ing] many unsuitable habitat areas.” No information about the Hermes copper butterfly location data or the data on which the fire layer is based were provided by the petitioner. The petitioner did not explain how information on the map was used to determine that 44 fires had burned through known Hermes copper butterfly habitat or 788 fires have burned through “modeled” habitat. Also, the petitioner did not indicate where fires that burned between 1900 and 2003 overlapped or calculate a fire frequency/rate of return for any particular geographic area. Therefore, it is not clear how the petitioner determined that “This rate of fire return appears to exceed natural fire frequency in coastal sage scrub and chaparral ecosystems.” Without specific information on the extent of the impact caused by historic and current fires, including the 2003 fires, it does not appear the Hermes copper butterfly is currently threatened with extinction due to fire.

The petition also stated “excessive” fires prevent chaparral and coastal sage scrub species (like spiny redberry, the Hermes copper butterfly’s host plant) from reaching maturity, thereby reducing or eliminating reproduction and recruitment of replacement chaparral, and allowing for the invasion of nonnative species.

Spiny redberry plants, like other large-seeded shrubs, are “obligate resprouters” after fires (Keeley 1998). Because such taxa resprout from a deep

root system or lignotuber and establish few seedlings immediately following fire, obligate resprouters “successfully recruit in the long-term absence of fire” (Keeley 1998). Post-fire seedling establishment of obligate resprouters is always quite limited, although seedling recruitment has been reported as “abundant” in older unburned chaparral stands (Keeley 1992a and 1992b). In the absence of fire, “obligate resprouting species often gain dominance over obligate seeding species,” but *Rhamnus* species and other obligate resprouters are also “quite resilient to frequent burning” (Keeley 1986). Moreover, Keeley (1986) stated obligate resprouters “have a marked competitive advantage during the first decade after fire,” which is within the current regrowth timeframe of butterfly-occupied spiny redberry stands burned in 2003. In a post-fire recovery and succession study of chaparral and sage scrub in southern California, Keeley et al. (2005) “showed that all vegetation types exhibited a high proportion of structural similarity between pre- and postfire communities” after 5 years. Though Keeley and Fotheringham (2003) concluded that, with continued disturbance like fire, nonnative invasives may replace an entire ecosystem and type convert shrublands to alien grasslands, Keeley (2004) noted that invasive alien plants typically will not displace obligate resprouting species in mesic shrublands that burn once a decade “because rapid resprout growth recaptures the site and replenishes vitality of roots and lignotubers.” Therefore, based on the species’ biology, it appears that spiny redberry should recover in these burned areas.

Though recent fires may have temporarily reduced the extent of Hermes copper butterfly habitat (i.e., spiny redberry and associated chaparral/coastal sage scrub plants), information in the petition and available to us does not substantiate a permanent loss of or a downward trend in the extent of the species’ habitat as a result of increased fire frequency and associated alien plant invasion.

The petitioner did not provide information or data to substantiate the claim that excessive fires over the last several decades have reduced Hermes copper butterfly population numbers and disrupted metapopulation dynamics and stability. As stated in the “Population Estimates/Status” section of this finding, no quantitative data on population size exists nor do we have any information on the dispersal or movement behavior of this species. Without this information, it is not possible to determine the species’

population structure (e.g., metapopulation or panmictic) and, subsequently, the impact of fire on population numbers and structure.

#### Prescribed Fire

*Information provided by the petition.* The petitioner, citing Schlicht and Orwig (1999) [document not submitted with petition], claimed prescribed fire is likely to harm vulnerable Hermes copper butterfly populations by further contributing to excessive fire, and controlled burns often differ from natural fires in frequency, intensity, timing, and patchiness. These aforementioned factors could reduce the likelihood of the butterfly’s survival through prescribed fire. The petitioners also maintained that the Cleveland National Forest has aggressively prescribed fire as a vegetation management tool in an attempt to benefit native wildlife. In addition, they asserted the County of San Diego “has generally rejected effective fire safety techniques of limiting poorly planned rural [development] and retrofitting existing structures with fire resistant materials. The County has instead focused on \* \* \* excessive brush clearing around homes and communities, and has pushed for expanded prescribed fire on both National Forest and private land.”

*Analysis of information provided in the petition.* The petitioner asserted that a number of Hermes copper butterfly populations located under the jurisdiction of the Cleveland National Forest and San Diego County are being impacted by prescribed burning practices and policies undertaken by these entities. However, the petition does not provide documentation of instances where prescribed burning is being conducted in occupied Hermes copper butterfly habitat.

Review of San Diego County fire management regulations and recommendations (San Diego County 2004, 2006a; California Fire Safety Council 2006) contradicts the petitioner’s claim that San Diego County rejected effective fire safety techniques and has pushed for expanded prescribed fire. San Diego County does recommend clearing within 100 feet (30.5 m) of structures (San Diego County 2006), and places emphasis on replacement of flammable roofing material with fire-resistant shingles, planting of fire-resistant landscape vegetation, use of fire-resistant native plant species, avoidance of invasive exotic species in landscaping, and other effective conservation-oriented fire management techniques (San Diego County 2006; California Fire Safety Council 2006). No

readily available documents support a rejection of conservation-oriented rural planning in favor of fire-safe planning, or a recent push for prescribed fire. Koelander and Bowman (2004), in a report designed to identify how San Diego County (and the City of San Diego) could better prepare and respond to fire hazards, concluded, “Adoption of new building codes will only resolve the problem for the new structures \* \* \* For existing structures, the removal of highly flammable vegetation within 100-feet of structures and the replacement of combustible roofing will provide a heightened level of wildland fire protection.”

Regarding the U.S. Forest Service, of the U.S. Department of Agriculture, the agency stated in its final environmental impact statement (Volume 1) that the Hermes copper butterfly “[c]ould be affected by prescribed fire or fuel reduction projects in habitat that affect [its] host plant, *Rhamnus crocea*,” but that Vegetation Management Standard 37 addressed this threat (USDA Forest Service 2005a). However, according to the Forest Service’s Land Management Plan (2005b), Standard 37 requires the Forest Service when implementing fire management activities to “[d]esign and manage fuel treatments to minimize the risk that treated areas will be used by unauthorized motorized and mechanized vehicles [and to m]itigate impacts where such use does occur.” It is not clear how Standard 37 (USDA Forest Service 2005a) addresses the threat of prescribed fire to the species. In the Cleveland National Forest’s Land Management Plan (USDA Forest Service 2005c), the Forest Service’s primary strategy for threatened, endangered, proposed, candidate, and sensitive species management is to “[m]anage habitat to move listed species toward recovery and delisting” and “[p]revent listing of proposed and sensitive species” by implementing the priority conservation strategies in Table 529. According to this table (USDA Forest Service 2005c), a priority conservation strategy task over the next 3 to 5 years is to protect Hermes copper butterfly habitat by preventing and suppressing fires.

Though the above guidance is general in nature, we could find no support for the claim that the Cleveland National Forest has aggressively prescribed fire as a vegetation management tool in an attempt to benefit other native wildlife at the expense of the Hermes copper butterfly. Based on the above discussion, we have determined that the petition does not substantiate the claim that prescribed burning impacts

occupied Hermes copper butterfly habitat.

We have determined that information in the petition does not substantiate the claim that urban development, wildfire, and prescribed fire has significantly reduced the amount of available Hermes copper butterfly habitat. While we acknowledge that urban development and fire has likely reduced and fragmented habitat for Hermes copper butterfly in San Diego County, the extent of impact to the species and its habitat has not been quantitatively estimated, and the species appears to have multiple colonies within a relatively wide geographic range. Thus, we do not believe the petition has presented substantial information to suggest the butterfly is likely to become endangered in the foreseeable future.

#### *B. Overutilization for Commercial, Recreational, Scientific or Educational Purposes*

##### Commercial Harvest

*Information provided in the petition.* The petitioner stated the Hermes copper butterfly may be endangered by overutilization for commercial purposes and identifies one commercial enterprise that may contribute to the imperiled status of the butterfly. A company, "Morningstar Flower and Vibrational Essences," markets a "Hermes copper butterfly essence" over the Internet. These essences are available in 2-ounce and 4-ounce sizes by special order.

The petitioner claimed that over-collection is another potential threat to the Hermes copper butterfly because of their value to butterfly collectors. They cite an example, in 1986, where a female Hermes copper butterfly was worth \$20.00.

*Analysis of information provided in the petition.* No evidence exists to support the use of Hermes copper butterfly in developing butterfly essences. According to Morning Star Essences (2006), no butterfly parts are used in "essences" production. While there are a number of other businesses that advertise sale of "butterfly essences," no information exists to support the claim that this activity threatens the species.

Some collection of Hermes copper butterflies may occur given their value to collectors. As the number of colonies is reduced, lepidopterists may increasingly collect individuals to include rare species in their collections, or obtain surplus specimens for exchange or sale. On June, 26, 2004, two different advertisements on the Internet offered specimens of *Lycaena hermes*

for sale. Both were priced at 125 Euros (= approximately \$152.00) (Martin 2004b). Nonetheless, no substantial data exist to substantiate such trade still exists or, if any trade continues, the extent to which it impacts the Hermes copper butterfly population. As a result, we conclude trade or collection probably does not pose a significant threat to the species at this time.

#### *C. Disease or Predation*

The petitioner did not provide any information with respect to disease on Hermes copper butterfly.

##### Predation

*Information provided by the petition.* The petitioner stated the Hermes copper butterfly may be endangered by predation. The petition claimed experts suspect birds, predatory insects, parasitic insects, and spiders prey upon Hermes copper butterfly, and that the harmful effects of otherwise normal predation or parasitism might be exacerbated by population reduction from urban development and excessive fires.

*Analysis of information provided in the petition.* The petitioner did not provide specific information validating the claim that the Hermes copper butterfly may be endangered by predation. We are not aware of any documentation that suggests that predation poses a significant threat to the species, and, therefore, we are unable to validate whether predation may endanger the Hermes copper butterfly.

#### *D. The Inadequacy of Existing Regulatory Mechanisms*

*Information provided by the petition.* The petition, its appendices, and referenced documents discuss five regulatory mechanisms that provide some potential for Hermes copper butterfly conservation, but the petition claimed none of these mechanisms have proven effective in reducing the primary threats to the butterfly from urban development, fire, and related habitat degradation. The five regulatory mechanisms include: (1) California Environmental Quality Act; (2) National Environmental Policy Act; (3) Forest Service Management; (4) San Diego Multiple Species Conservation Plan or "San Diego MSCP"; and (5) County of San Diego Resource Protection Ordinance.

##### California Environmental Quality and National Environmental Policy Act

The petitioner claimed the Service has previously provided extensive discussion of the inadequacy of the

California Environmental Quality Act (CEQA) to protect imperiled species, identifying several listings in the **Federal Register** (62 FR 2318, January 16, 1997; 62 FR 4935, February 3, 1997; 61 FR 25829, May 23, 1996; 69 FR 47236, August 4, 2004). The petitioner implies the Service's previous conclusions are fully applicable in consideration of protections under CEQA for the Hermes copper butterfly.

*Analysis of information provided in the petition.* California Department of Fish and Game can only designate "native species or subspecies of a bird, mammal, fish, amphibian, or plant" as either endangered or threatened under the California Endangered Species Act (Fish and Game Code, Sections 2062 and 2067). However, the California Environmental Quality Act or CEQA (Public Resources Code, Sections 21000–21178, and Title 14 CCR, Section 753, and Sections 15000–15387) has and should continue to require proposed project effects to Hermes copper butterflies be evaluated under the provisions of this State environmental statute, although CEQA does not require any species to be protected. CEQA requires public agencies to disclose environmental impacts of a project on native species and natural communities during the land use planning process and to identify mitigation measures and project alternatives. This allows public comments to influence the planning process. The National Environmental Policy Act (NEPA) (42 U.S.C. 4321–4347) requires the Federal Government to disclose adverse impacts of a proposed action that cannot be avoided, but NEPA does not require any species to be protected. Although these statutes provide limited protection for the Hermes copper butterfly, we are not aware of any documentation that suggests that implementation of these laws, especially land use development projects under CEQA, pose a significant threat to the species. Also, as discussed under Factor A above, information in the petition and available to us does not substantiate the claim that urban development subject to these laws has significantly reduced the amount of available Hermes copper butterfly habitat.

##### Forest Service Management

*Information provided in the petition.* The petitioner claimed Forest Service regulations and management activities appear to provide few protections to the Hermes copper butterfly. The petitioner states that aside from monitoring survey results by others, there is no indication that the Cleveland National Forest is engaged in the conservation of the

Hermes copper butterfly. In addition, the petitioner states the Hermes copper butterfly is not formally recognized as a "sensitive species" by the Forest Service, and recognition of Hermes copper butterfly as a sensitive species would still be unlikely to generate any important, pro-active conservation activities necessary to improve the status of the species.

*Analysis of information provided in the petition.* The Hermes copper butterfly was included in the table of "Animal Species Evaluated for Viability Concerns (Species of Concern)" by the Forest Service (USDA 2005a); therefore, the petitioners claim the Hermes copper butterfly is not formally recognized as a "sensitive species" by the Forest Service is not currently accurate.

In describing proposed management standards to address threats facing designated "Animal Species-At-Risk," the Forest Service stated the Hermes copper butterfly "[c]ould be affected by prescribed fire or fuel reduction projects in habitat that affect [its] host plant, *Rhamnus crocea*; wildfire risk" and that Vegetation Management Standard 37 addressed this threat (USDA 2005a). As discussed above, Standard 37 of the Forest Service's Land Management Plan (USDA 2005b), requires the Forest Service to "[d]esign and manage fuel treatments to minimize the risk that treated areas will be used by unauthorized motorized and mechanized vehicles [and to m]itigate impacts where such use does occur." However, it is not clear how this standard protects the butterfly from prescribed fire, nor is any other protection apparently provided by this standard because vehicle impacts are not considered a threat to the species.

In the Cleveland National Forest's (USDA 2005c) Land Management Plan, the Forest Service's primary strategy for threatened, endangered, proposed, candidate, and sensitive species management is to "[m]anage habitat to move listed species toward recovery and delisting" and "[p]revent listing of proposed and sensitive species" by implementing the priority conservation strategies in Table 529. According to this table (USDA 2005c), the priority tasks for the next 3 to 5 years in conservation strategy emphasis are to monitor/study "[s]pecies recovery after wildfire (burned area monitoring)" and protect its habitat by preventing and suppressing fires. Although the above guidance is general in nature, the Cleveland National Forest should be engaged to some degree in the conservation of the Hermes copper butterfly; however, no documentation of conservation activities was available.

We acknowledge that Forest Service regulations provide limited protection of the Hermes copper butterfly. However, as discussed in Factor A and Factor E, information in the petition does not substantiate the claim that wildfire or prescribed fire pose a threat to the species or that there is a need to improve the species' status.

San Diego Multiple Species Conservation Plan

*Information provided in the petition.* The petition stated: (1) The Hermes copper butterfly is not recognized as a "covered species" under the San Diego Multiple Species Conservation Plan (MSCP) (MSCP 1998); (2) the MSCP cannot provide the necessary management to benefit the species because none is planned, described, or required by the Plan; and (3) the MSCP can benefit the Hermes copper butterfly only in the event of collaterally beneficial conservation activities for other species and habitats. The petitioner claimed the informal treatment of Hermes copper butterfly by the MSCP provides few conservation benefits. The petitioner also stated the MSCP identifies only three sites where the butterfly occurs in one area, the Metro-Lakeside-Jamul Segment, despite the additional occupied sites at the time of Plan approval in the Metro-Lakeside-Jamul and South County segments.

*Analysis of information provided in the petition.* It is true this species is not specifically covered under the San Diego Multiple Species Conservation Plan; however, the San Diego MSCP appears to have already benefited the Hermes copper butterfly where it overlaps with conservation activities for other species (e.g., management of Crestridge Ecological Reserve and the San Diego National Wildlife Refuge). Also, not all potential habitat within the planned MSCP preserve has been fully surveyed yet, and the full distribution of the species within areas protected or managed by the MSCP is unknown.

Land use restrictions within the MSCP County of San Diego Subarea plan will be implemented through the Biological Mitigation Ordinance (BMO). The BMO implements preserve design criteria for urban development and conservation of remaining private land, based on preserve design criteria that establish mitigation ratios and conditions. Mitigation may be required for the species recognized as "sensitive species" as defined by CEQA on land identified as Biological Resource Core Area, and therefore should provide some protection for the species. However, Hermes copper butterfly populations, habitat, and dispersal

corridors will not be protected outside of the Biological Resource Core Area. The BMO within the Biological Core Area requires the County to impose design criteria that could minimize additional losses of populations and habitat, but would not require avoidance of Hermes copper butterfly populations, habitat, or dispersal corridors.

City of San Diego and County Open Space Parks

*Information provided in the petition.* The petition stated that remaining Hermes copper butterfly populations are not necessarily protected by nature of their location on the following open space park lands managed by the City or County of San Diego: Black Mountain, McGinty Mountain, and Mission Trails Regional Park. Lacking formal coverage, the Hermes copper butterfly cannot directly benefit from these open spaces.

*Analysis of the information provided in the petition.* The Hermes copper butterfly is now known to occur on approximately 25 different properties in San Diego County, California. Of these, seven properties are under City or County of San Diego ownership. Many of these lands are "designed" open space areas and County parks, which include various types of trails, ball fields, picnic areas, restroom facilities and/or parking lots. Although the impact of recreation on the butterfly is unknown, it is unlikely that limited recreational development and foot and bicycle traffic will destroy significant numbers of host plant shrubs in existing designated open space parklands.

County of San Diego Resource Protection Ordinance

*Information provided in the petition.* The petition claimed the County of San Diego's Resource Protection Ordinance (RPO) (County of San Diego 1991) imposes control on development of wetlands, floodplains, steep slopes, sensitive biological habitats, and prehistoric and historic sites. The petition stated RPO provisions address biological resources outside of the boundaries of the County's Subarea Plan under the San Diego MSCP. The RPO does not directly protect species or impose any species-specific management efforts, but rather attempts to minimize the impacts of urban development on habitat. The petition stated that the Hermes copper butterfly would be only inadvertently protected by the County RPO through the land protection ordinance, which would not require measures necessary to prevent extinction of the species, such as a requirement that new urban

development avoid remaining Hermes copper butterfly populations and dispersal corridors. The petition also stated the RPO does not provide measures that could improve the status of the species, such as special conservation management of the Hermes copper butterfly populations, habitat, and dispersal corridors.

*Analysis of the information provided in the petition.* The RPO (County of San Diego 1991) imposes controls on development of wetlands, floodplains, steep slopes, sensitive biological habitat, and prehistoric and historic sites. The RPO requires the Resource Protection Study for certain discretionary projects in order to identify a number of objectives, including identification of environmentally sensitive lands. The County may require conditions to protect sensitive lands including habitats that may protect the Hermes copper butterfly.

Based on the information and analysis provided above, we find that the petition does not present substantial information that the species is threatened at this time by the inadequacy of existing regulatory mechanisms across all or a significant portion of its range.

#### *E. Other Natural or Manmade Factors Affecting Continued Existence*

The petition, its appendices, and referenced documents discuss the following threats that we have grouped under Factor E: Vulnerability of small and isolated populations, and global climate change.

#### Vulnerability of Small and Isolated Populations

*Information provided in the petition.* The petitioner asserts that endemic species, such as the Hermes copper butterfly, are generally considered more prone to extinction than widespread species due to their restricted geographic range. The petitioner claims that the common factors that increase the vulnerability of a small and isolated population to extinction are demographic fluctuations, environmental stochasticity, and reduced genetic diversity.

*Analysis of the information provided in the petition.* Although annual observations of the largest known pre-fire population (Crestridge Ecological Reserve) suggest that numbers of adult butterflies may fluctuate approximately two orders of magnitude from one year to the next, and may be correlated with rainfall (Klein and Faulkner 2003), it is not clear how these observations correlate with population densities of all individuals including immature

diapausing (quiescent) stages. Also, much uncertainty exists regarding the distribution of the species because the range of its host plant, spiny redberry, extends well beyond the known range of the butterfly, and surveys have not been conducted throughout the host plant range (especially inland San Diego County and northwestern Baja California Norte). While it is possible that "small" populations and isolation could subject the butterfly to genetic drift and restricted gene flow that may decrease genetic variability over time and could adversely affect the species' viability, we do not have sufficient information about the species' distribution or population structure to determine that isolation and small population size pose a threat to the species.

#### Global Climate Change

*Information provided in the petition.* The petitioner asserted butterflies are particularly sensitive to small changes in microclimates, such as fluctuations in moisture, temperature, or sunlight. Studies of Edith's checkerspot (*Euphydryas chalceona edithi*) have documented that whole ecosystems may move northward or upward in elevation as the Earth's climate warms.

*Analysis of the information provided in the petition.* The petitioner did not provide specific information validating the claim that the Hermes copper butterfly may be endangered by global climate change. We recognize recent evaluations (e.g., Parmesan and Galbraith 2004) that whole ecosystems are seemingly being shifted northward. We are not aware of any documentation available or provided by the petitioner directly linking global warming as a threat to the Hermes copper butterfly, or explaining how global warming specifically affects this species.

We do not have sufficient information about the species' distribution or population structure to determine that isolation and small population size pose a threat to the species or that global warming poses a threat to the Hermes copper butterfly. Therefore, we have determined that information in the petition and available to us does not substantiate the claim that vulnerability of small and isolated populations and global climate change have significantly impacted Hermes copper butterfly.

#### Finding

We evaluated each of the five listing factors individually, and because the threats to Hermes butterfly are not mutually exclusive, we also evaluated the collective effect of these threats. The petition focused primarily on three

listing factors: Factor A (the Present or Threatened Destruction, Modification, or Curtailment of the Species' Habitat or Range), Factor D (Inadequacy of Existing Regulatory Mechanisms), and Factor E (Other Natural or Manmade Factors Affecting Its Continued Existence). More specifically, information in the petition suggests that urban development and fire pose the primary threats to Hermes copper butterfly habitat and populations because the species' range occurs on lands susceptible to both types of impacts.

While it is likely that recent fires have temporarily reduced the extent of Hermes copper butterfly habitat (*i.e.*, spiny redberry and associated chaparral/coastal sage scrub plants), information in the petition and available to us does not substantiate a permanent loss of, or a downward trend in, the extent of the species' habitat as a result of increased fire frequency. Also, within areas that have burned, the species appears able to re-colonize over time.

We also acknowledge that urbanization and fire have further fragmented the species' habitat, but current information indicates development does not currently threaten the species with extinction. Also, much uncertainty exists regarding the distribution of the species because the range of its host plant, spiny redberry, extends well beyond the known range of the butterfly, and surveys have not been conducted throughout the host plant's range.

We have determined that the petition and other information in our files does not present substantial information that the species is threatened at this time by the inadequacy of existing regulatory mechanisms across all or a significant portion of the species' range and that Federal listing would not necessarily provide additional benefits to the species. We will continue to work with the appropriate Federal, State, and local entities to avoid and minimize impacts to this species on their lands.

We have reviewed the petition and literature cited in the petition and evaluated that information in relation to information available to us. After this review and evaluation, we find the petition does not present substantial scientific or commercial information to indicate listing the Hermes copper butterfly may be warranted at this time. Although we are not commencing a status review in response to this petition, we will continue to monitor potential threats and ongoing management actions that might be important with regard to the conservation of the Hermes copper butterfly across its range. We encourage

interested parties to continue to gather data that will assist with the conservation of the species. Information regarding the Hermes copper butterfly may be submitted to the Field Supervisor, Carlsbad Fish and Wildlife Office (see **ADDRESSES** section above) at any time.

#### References Cited

A complete list of all references cited herein is available, upon request, from the Carlsbad Fish and Wildlife Office (see **ADDRESSES** section above).

#### Author

The primary authors of this notice are staff of the Carlsbad Fish and Wildlife Office (see **ADDRESSES** section above).

#### Authority

The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: August 1, 2006.

#### H. Dale Hall,

Director, U.S. Fish and Wildlife Service.

[FR Doc. E6-12744 Filed 8-7-06; 8:45 am]

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## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

#### 50 CFR Part 17

RIN 1018-AU46

#### Endangered and Threatened Wildlife and Plants; Revised Designation of Critical Habitat for the Endangered Alabama Beach Mouse

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Revised proposed rule; reopening of comment period, notice of availability of draft economic analysis, acreage corrections, and notice of public hearing.

**SUMMARY:** We, the U.S. Fish and Wildlife Service, announce the reopening of the public comment period, a public hearing on the proposed revision of critical habitat for the Alabama beach mouse (*Peromyscus polionotus ammobates*) (ABM), and the availability of the draft economic analysis of the proposed designation of critical habitat under the Endangered Species Act of 1973, as amended (Act). We are also using this comment period to correct minor acreage calculation errors in the February 1, 2006, proposed rule (71 FR 5516), announce the inclusion of an additional 6 acres (distributed among proposed critical habitat units 1, 2, and 3), and solicit

further comments on the proposed rule. The draft economic analysis forecasts that costs associated with conservation activities for the ABM would range from \$18.3 million to \$51.8 million in undiscounted dollars over the next 20 years. Adjusted for possible inflation, the costs would range from \$16.1 million to \$46.8 million over 20 years, or \$1.1 million to \$3.1 million annually using a 3 percent discount; or \$14.2 million to \$41.7 million over 20 years, or \$1.3 million to \$3.9 million annually using a 7 percent discount. We are reopening the public comment period to allow all interested parties an opportunity to comment simultaneously on the proposed rule and the associated draft economic analysis. Comments previously submitted need not be resubmitted as they will be incorporated into the public record and fully considered in preparation of the final rule.

**DATES:** We will accept public comments until September 7, 2006. See Public Hearings, under **SUPPLEMENTARY INFORMATION**, for further details.

**ADDRESSES:** If you wish to comment, you may submit your comments and information concerning this proposal, identified by "Attn: Alabama Beach Mouse Critical Habitat," by any one of several methods:

(1) Mail or hand-deliver to: Field Supervisor, U.S. Fish and Wildlife Service, Daphne Fish and Wildlife Office, 1208-B Main Street, Daphne, Alabama 36526.

(2) Send by electronic mail (e-mail) to [abmcriticalhabitat@fws.gov](mailto:abmcriticalhabitat@fws.gov). Please see the Public Comments Solicited section below for file format and other information about electronic filing.

(3) Provide oral or written comments at the public hearing.

(4) Fax your comments to: 251-441-6222.

5. Submit comments on Federal eRulemaking portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

#### Public Hearings

We have scheduled a public hearing on the proposed critical habitat revision and the draft economic analysis. The hearing will take place from 7 to 9 p.m. on August 24, 2006, at the Adult Activity Center located at 260 Clubhouse Drive, Gulf Shores, Alabama 36542. This will be preceded by a public information session from 6 to 7 p.m. at the same location. Maps of the proposal and other materials will be available for public review.

Comments and materials received, as well as supporting documentation used

in the preparation of this proposed rule, will be available for public inspection by appointment during normal business hours at the Daphne Fish and Wildlife Field Office at the above address.

**FOR FURTHER INFORMATION CONTACT:** Field Supervisor, U.S. Fish and Wildlife Service, Daphne, Alabama (telephone 251-441-5181; facsimile 251-441-6222).

#### SUPPLEMENTARY INFORMATION:

##### Public Comments Solicited

We intend that any final action resulting from this proposal will be as accurate and as effective as possible. Therefore, comments or suggestions from the public, other concerned governmental agencies, the scientific community, industry, or any other interested party concerning this proposed rule are hereby solicited. Comments particularly are sought concerning:

(1) The reasons any habitat should or should not be determined to be critical habitat as provided by section 4 of the Act, including whether the benefit of designation will outweigh any adverse impacts to the species due to designation;

(2) Specific information on the presence of Alabama beach mouse habitat, particularly what areas should be included in the designations that were occupied at the time of listing that contain features that are essential for the conservation of the species and why; and what areas that were not occupied at listing are essential to the conservation of the species and why;

(3) Land use designations and current or planned activities in the subject areas and their possible impacts on proposed critical habitat;

(4) Any foreseeable economic, national security, or other potential impacts resulting from the proposed designation and, in particular, any impacts on small entities;

(5) Whether the draft economic analysis identifies all State and local costs attributable to the proposed critical habitat designation, and information on any costs that have been inadvertently overlooked;

(6) Whether the draft economic analysis makes appropriate assumptions regarding current practices and likely regulatory changes imposed as a result of the designation of critical habitat;

(7) Whether the draft economic analysis correctly assesses the effect on regional costs associated with any land use controls that may derive from the designation of critical habitat;

(8) Whether the draft economic analysis appropriately identifies all

costs and benefits that could result from the designation; and

(9) Whether our approach to critical habitat designation could be improved or modified in any way to provide for greater public participation and understanding, or to assist us in accommodating public concern and comments.

If you wish to comment, you may submit your comments and materials concerning this proposal by any one of several methods (see **ADDRESSES** section). Please note that comments merely stating support or opposition to the actions under consideration without providing supporting information, although noted, will not be considered in making a determination, as section 4(b)(1)(A) directs that determinations to be made "solely on the basis of the best scientific and commercial data available." Please submit comments electronically to [abmcriticalhabitat@fws.gov](mailto:abmcriticalhabitat@fws.gov) in ASCII file format and avoid the use of special characters or any form of encryption. Please also include "Attn: Alabama Beach Mouse Critical Habitat" in your e-mail subject header and your name and return address in the body of your message. If you do not receive a confirmation from the system that we have received your electronic message, contact us directly by calling the Daphne Fish and Wildlife Office at phone number 251-441-5181. Please note that the e-mail address [abmcriticalhabitat@fws.gov](mailto:abmcriticalhabitat@fws.gov) will be closed out at the termination of the public comment period.

Our practice is to make comments, including names and home addresses of respondents, available for public review during regular business hours. We will not consider anonymous comments and we will make all comments available for public inspection in their entirety. Comments and materials received will be available for public inspection, by appointment, during normal business hours at the U.S. Fish and Wildlife Service Office at the above address.

Copies of the draft economic analysis and the proposed rule for critical habitat designation are available on the Internet at <http://www.fws.gov/daphne> or from the Daphne Fish and Wildlife Office at the address and contact numbers above.

Our final designation of critical habitat will take into consideration all comments and any additional information we received during both comment periods. Previous comments and information submitted during the initial comment period on the February 1, 2006, proposed rule (71 FR 5516) need not be resubmitted. On the basis of information received during the public

comment period, we may during the development of our final critical habitat determination find that areas proposed are not essential, are appropriate for exclusion under section 4(b)(2) of the Act, or are not appropriate for exclusion. An area may be excluded from critical habitat if it is determined that the benefits of such exclusion outweigh the benefits of including a particular area as critical habitat, unless the failure to designate such area as critical habitat will result in the extinction of the species. We may exclude an area from designated critical habitat based on economic impacts, national security, or any other relevant impact.

### Background

On February 1, 2006, we published a proposed rule to designate critical habitat for the ABM (71 FR 5516), revising the original designation for the subspecies (50 FR 23872; June 6, 1985). The proposed revision outlined five coastal dune areas (units), totaling approximately 1,298 total acres (ac) (525 hectares (ha)) in southern Baldwin County, Alabama, as critical habitat for the ABM. These five units consist of a mix of primary, secondary, and scrub sand dunes and interdunal swales and generally include an inland expansion of 1985 designated units to include more scrub dune habitat. Also in our February 2006 rule, we proposed exclusion of approximately 1,229 ac (497 ha) that, following our analysis under sections 4(b)(2) and 3(5)(A) of the Act, did not warrant designation of critical habitat because they are either protected by existing habitat conservation plans or do not require special management considerations or protection. The five proposed revised units, combined with these areas proposed for exclusion, constitute our best assessment of those areas essential to the conservation of the subspecies. As a result of revisions and corrections outlined in this revised proposed rule, these five units now total 1,326 ac (537 ha). We are also proposing inclusion of six residential lots to critical habitat (see Acreage Corrections). Other than the changes just described, the proposed rule of February 1, 2006, remains intact. We will submit for publication in the **Federal Register** a final revised critical habitat designation for ABM on or before January 15, 2007.

Critical habitat is defined in section 3 of the Act as the specific areas within the geographic area occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features essential to the conservation of

the species and that may require special management considerations or protection, and specific areas outside the geographic area occupied by a species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. If the proposed rule is made final, section 7 of the Act will prohibit destruction or adverse modification of critical habitat by any activity funded, authorized, or carried out by any Federal agency. Federal agencies proposing actions affecting areas designated as critical habitat must consult with us on the effects of their proposed actions, pursuant to section 7(a)(2) of the Act.

### Economic Analysis

Section 4(b)(2) of the Act requires that we designate or revise critical habitat based upon the best scientific and commercial data available, after taking into consideration the economic or any other relevant impact of specifying any particular area as critical habitat. We have prepared a draft economic analysis based on the February 1, 2006, proposed rule (71 FR 5516) that revises the currently designated critical habitat for the ABM; subsequent corrections are included.

The draft economic analysis estimates the foreseeable economic impacts of ABM conservation measures within the proposed critical habitat designation on government agencies and private businesses and individuals. The analysis measures lost economic efficiency associated with residential and commercial development, and public projects and activities, such as economic impacts on transportation projects, the energy industry, and State and Federal lands. It is difficult to separate costs attributed to the listing of a species from costs associated solely with a critical habitat designation. Therefore, the draft economic analysis considers the potential economic effects of all actions relating to the conservation of the ABM, including costs associated with sections 4, 7, and 10 of the Act, and those attributable to designating critical habitat. This may result in an overestimate of the potential economic impacts of the designation.

The draft economic analysis forecasts that costs associated with conservation activities for the ABM would range from \$18.3 million to \$51.8 million in undiscounted dollars over the next 20 years. Adjusted for possible inflation, the costs would range from \$16.1 million to \$46.8 million over 20 years, or \$1.1 million to \$3.1 million annually using a 3 percent discount; or \$14.2 million to \$41.7 million over 20 years,

or \$1.3 million to \$3.9 million annually, using a 7 percent discount. Overall, the residential and commercial development industry is calculated to experience the highest estimated costs (99 percent).

The draft economic analysis considers the potential economic effects of all actions relating to the conservation of the ABM, including costs coextensive with listing. It further considers the economic effects of protective measures taken as a result of other Federal, State, and local laws that aid habitat conservation for the ABM in proposed critical habitat areas. The draft analysis considers both economic efficiency and distributional effects. In the case of habitat conservation, efficiency effects generally reflect lost economic opportunities associated with restrictions on land use (opportunity costs). This analysis also addresses how potential economic impacts are likely to be distributed, including an assessment of any local or regional impacts of habitat conservation and the potential effects of conservation activities on

small entities and the energy industry. This information can be used by decision makers to assess whether the effects of the designation might unduly burden a particular group or economic sector. Finally, this draft analysis looks retrospectively at costs that have been incurred since the date the subspecies was listed as endangered and considers those costs that may occur in the 20 years following revision of critical habitat.

As stated earlier, we solicit data and comments from the public on this draft economic analysis, as well as on all aspects of the proposal. We may revise the proposal, or its supporting documents, to incorporate or address new information received during the comment period.

**Acreage Corrections**

By this notice, we are also advising the public of two changes to the February 1, 2006, proposed rule (71 FR 5516). First, we regret that an error was inadvertently made in the proposed rule concerning the 49 single-family homes proposed for exclusion under section

4(b)(2) of the Act based upon habitat conservation plans (HCPs). Owners of six lots that were proposed for exclusion do not have approved HCPs. Undeveloped portions of these lots, totaling approximately 6 ac (2 ha) and distributed between Units 1 (3.3 ac), 2 (2.3 ac), and 3 (0.5 ac), contain both the habitat known to be occupied at the time of listing and the physical and biological characteristics essential to the conservation of the subspecies. Therefore, they are now proposed for inclusion in the revised designation.

Second, there were also slight acreage discrepancies in the proposed rule due to an inadvertent calculation error. An 18-acre discrepancy in Unit 1 was identified and accounted for in the draft economic analysis. Table 1 contains the corrected acreage values, including the six additional acres proposed for inclusion discussed above. These acreage differences do not change the legal description published in the February 1, 2006, proposed rule, which are a true representation of the updated acreage identified in Table 1 below.

**TABLE 1.—AREAS PROPOSED AS CRITICAL HABITAT FOR THE ALABAMA BEACH MOUSE**  
[Totals may not sum due to rounding]

Critical Habitat Units—Alabama beach mouse	Federal acres (hectares)	State acres (hectares)	Local and private acres (hectares)	Total acres (hectares)
1. Fort Morgan .....	44 (18)	337 (136)	66 (27)	446 (180)
2. Little Point Clear .....	16 (6)	82 (33)	170 (69)	268 (108)
3. Gulf Highlands .....	11 (4)	48 (19)	331 (134)	390 (158)
4. Pine Beach .....	11 (4)	0	20 (8)	31 (13)
5. Gulf State Park .....	0	190 (77)	0	190 (77)
<b>Total .....</b>	<b>82 (32)</b>	<b>657 (265)</b>	<b>587 (238)</b>	<b>1326 (537)</b>

**Required Determinations—Amended**

*Regulatory Planning and Review*

In accordance with Executive Order 12866, this document is a significant rule because it may raise novel legal and policy issues. However, it is not anticipated to have an annual effect on the economy of \$100 million or more or affect the economy in a material way. Due to the timeline for publication in the **Federal Register**, the Office of Management and Budget (OMB) did not formally review the proposed rule.

Further, Executive Order 12866 directs Federal Agencies promulgating regulations to evaluate regulatory alternatives (Office of Management and Budget, Circular A-4, September 17, 2003). Pursuant to Circular A-4, once it has been determined that the Federal regulatory action is appropriate, the agency will need to consider alternative

regulatory approaches. Since the determination of critical habitat is a statutory requirement pursuant to the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*), we must then evaluate alternative regulatory approaches, where feasible, when promulgating a designation of critical habitat.

In developing our designations of critical habitat, we consider economic impacts, impacts to national security, and other relevant impacts pursuant to section 4(b)(2) of the Act. Based on the discretion allowable under this provision, we may exclude any particular area from the designation of critical habitat providing that the benefits of such exclusion outweighs the benefits of specifying the area as critical habitat and that such exclusion would not result in the extinction of the species. We believe that the evaluation

of the inclusion or exclusion of particular areas, or combination thereof, in a designation constitutes our regulatory alternative analysis.

*Regulatory Flexibility Act (5 U.S.C. 601 et seq.)*

Under 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 (small businesses, small organizations, and small government jurisdictions). However, 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. In our proposed rule, we withheld our determination of whether this designation would result in a significant effect as defined under SBREFA until we completed our draft economic analysis of the proposed designation so that we would have the factual basis for our determination.

According to the Small Business Administration, small entities include small organizations, such as independent nonprofit organizations, and small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents, as well as small businesses (13 CFR 121.201). Small businesses include manufacturing and mining concerns with fewer than 500 employees, wholesale trade entities with fewer than 100 employees, retail and service businesses with less than \$5 million in annual sales, general and heavy construction businesses with less than \$27.5 million in annual business, special trade contractors doing less than \$11.5 million in annual business, and agricultural businesses with annual sales less than \$750,000. To determine if potential economic impacts to these small entities are significant, we considered the types of activities that might trigger regulatory impacts under this designation as well as types of project modifications that may result. In general, the term significant economic impact is meant to apply to a typical small business firm's business operations.

To determine if the proposed ABM critical habitat designation would affect a substantial number of small entities, we considered the number of small entities affected within particular types of economic activities (such as residential and commercial development). We considered each industry or category individually to determine if certification is appropriate. In estimating the numbers of small entities potentially affected, we also considered whether their activities have any Federal involvement; some kinds of activities are unlikely to have any Federal involvement and so will not be affected by the designation of critical habitat. Designation of critical habitat only affects activities conducted, funded, permitted, or authorized by Federal agencies.

In our draft economic analysis, we evaluated the potential economic effects on small business entities resulting from conservation actions related to the listing of ABM and proposed designation of their critical habitat. This analysis estimated prospective economic impacts due to the

implementation of beach mouse conservation efforts in five categories: Private development activities; recreation; tropical storms and hurricanes; species management and habitat protection activities; and road construction. We determined from our analysis that in four of these five categories, impacts of ABM conservation efforts are not anticipated to impact small business. The only category of small business entities that may be affected is private development firms. Costs associated with residential-commercial development comprise 99 percent of the total quantified future impacts. Total costs of conservation efforts related to development activities are estimated to be \$18.1 million to \$51.2 million in undiscounted dollars over the next 20 years, on approximately 587 acres of developable private lands. Adjusted for possible inflation, the costs would range from \$16.1 million to \$46.8 million over 20 years, or \$1.1 million to \$3.1 million annually using a 3 percent discount; or \$14.2 million to \$41.7 million over 20 years, or \$1.3 million to \$3.9 million annually, using a 7 percent discount. Conservation effort costs include land preservation (set asides), monitoring, and predator control that may be required of new development activity on private land. Assuming each parcel of land is owned by a unique landowner, approximately 137 landowners could be impacted by the ABM conservation efforts. This analysis assumes that, in general, landowners are private citizens and not developers. Thus, although 137 landowners may be affected by this designation, few are anticipated to be small entities. Therefore, we do not believe that the designation of critical habitat for the ABM will result in a disproportionate effect to small business entities.

Please refer to our draft economic analysis of the proposed critical habitat designation for a more detailed discussion of potential economic impacts.

#### *Executive Order 13211*

On May 18, 2001, the President issued Executive Order (E.O.) 13211 on regulations that significantly affect energy supply, distribution, and use. E.O. 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. This proposed rule is considered a significant regulatory action under E.O. 12866 because it raises novel legal and policy issues, but it is not expected to significantly affect energy supplies, distribution, or use. Therefore, this

action is not a significant action, and no Statement of Energy Effects is required.

#### *Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)*

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501), the Service makes the following findings:

(a) This rule will not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an enforceable duty upon State, local, or tribal governments, or the private sector, and includes both "Federal intergovernmental mandates" and "Federal private sector mandates." These terms are defined in 2 U.S.C. 658(5)-(7). "Federal intergovernmental mandate" includes a regulation that "would impose an enforceable duty upon State, local, or tribal governments," with two exceptions. It excludes "a condition of Federal assistance." It also excludes "a duty arising from participation in a voluntary Federal program," unless the regulation "relates to a then-existing Federal program under which \$500,000,000 or more is provided annually to State, local, and tribal governments under entitlement authority," if the provision would "increase the stringency of conditions of assistance" or "place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding" and the State, local, or tribal governments "lack authority" to adjust accordingly. At the time of enactment, these entitlement programs were: Medicaid; Aid to Families with Dependent Children work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement. "Federal private sector mandate" includes a regulation that "would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance; or (ii) a duty arising from participation in a voluntary Federal program."

The designation of critical habitat does not impose a legally binding duty on non-Federal government entities or private parties. Under the Act, the only regulatory effect is that Federal agencies must ensure that their actions do not destroy or adversely modify critical habitat under section 7. Non-Federal entities that receive Federal funding, assistance, permits, or otherwise require approval or authorization from a Federal agency for an action may be indirectly impacted by the designation of critical

habitat. However, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. Furthermore, to the extent that non-Federal entities are indirectly impacted because they receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandates Reform Act would not apply; nor would critical habitat shift the costs of the large entitlement programs listed above on to State governments.

(b) As discussed in the draft economic analysis of the proposed designation of critical habitat for the ABM, the impacts on nonprofits and small governments are expected to be negligible. It is likely that small governments involved with developments and infrastructure projects will be interested parties or involved with projects involving section 7 consultations for the ABM within their jurisdictional areas. Any costs associated with this activity are likely to represent a small portion of a local government's budget. Consequently, we do not believe that the designation of critical habitat for this subspecies will significantly or uniquely affect these small governmental entities. As such, a Small Government Agency Plan is not required.

#### Takings

In accordance with E.O. 12630 ("Government Actions and Interference with Constitutionally Protected Private Property Rights"), we have analyzed the potential takings implications of proposing critical habitat for the ABM. Critical habitat designation does not affect landowner actions that do not require Federal funding or permits, nor does it preclude development of habitat conservation programs or issuance of incidental take permits to permit actions that do require Federal funding or permits to go forward. In conclusion, the designation of critical habitat for this subspecies does not pose significant takings implications.

#### Author

The primary author of this notice is Rob Tawes of the Daphne Fish and Wildlife Office (see **ADDRESSES** section).

The authority for this action is the Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*).

Dated: July 17, 2006.

#### Matt Hogan,

Acting Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. E6-12317 Filed 8-7-06; 8:45 am]

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## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

#### 50 CFR Part 17

#### Endangered and Threatened Wildlife and Plants; 90-Day Finding on a Petition To List the Thorne's Hairstreak Butterfly as Threatened or Endangered

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice of 90-day petition finding.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), announce a 90-day finding on a petition to list the Thorne's hairstreak butterfly (*Callophrys [Mitoura] grynea thornei* or *Callophrys [Mitoura] thornei*) as an endangered species under the Endangered Species Act of 1973, as amended. We find the petition does not provide substantial scientific or commercial information indicating the requested action is warranted. Therefore, we will not initiate a further status review in response to this petition. We ask the public to submit to us any new information that becomes available concerning the status of the Thorne's hairstreak butterfly or threats to it.

**DATES:** The finding announced in this document was made on August 8, 2006.

**ADDRESSES:** The complete file for this finding is available for public inspection, by appointment, during normal business hours at the Carlsbad Fish and Wildlife Office, U.S. Fish and Wildlife Service, 6010 Hidden Valley Road, Carlsbad, CA 92011. New information, materials, comments, or questions concerning the Thorne's hairstreak butterfly may be submitted to us at any time at the above address.

**FOR FURTHER INFORMATION CONTACT:** Jim Bartel, Field Supervisor, Carlsbad Fish and Wildlife Office (see **ADDRESSES** section above), by telephone at 760-431-9440, or by facsimile to 760-431-9624. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 800-877-8339, 24 hours a day, 7 days a week.

#### SUPPLEMENTARY INFORMATION:

##### Background

Section 4(b)(3)(A) of the Endangered Species Act (Act) (16 U.S.C. 1531 *et seq.*) requires that we make a finding on whether a petition to list, delist, or reclassify a species presents substantial information to indicate that the petitioned action may be warranted. To the maximum extent practicable, this

finding is to be made within 90 days of receipt of the petition, and the finding is to be published in the **Federal Register**.

This finding summarizes information included in the petition and information available to us at the time of the petition review. A 90-day finding under section 4(b)(3)(A) of the Act and § 424.14(b) of our regulations is limited to a determination of whether the information in the petition meets the "substantial information" threshold. Substantial information is "that amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted" (50 CFR 424.14(b)).

#### Previous Federal Action

The Thorne's hairstreak butterfly was included as a Category 2 candidate species in our November 21, 1991 (56 FR 58804), and November 15, 1994 (59 FR 58982), Candidate Notices of Review (CNOR). Category 2 included taxa for which information in the Service's possession indicated that a proposed listing rule was possibly appropriate, but for which sufficient data on biological vulnerability and threats were not available to support a proposed rule. In the CNOR published on February 28, 1996, the Service announced a revised list of plant and animal taxa that were regarded as candidates for possible addition to the List of Threatened and Endangered Species (61 FR 7595). The revised candidate list included only former Category 1 species. All former Category 2 species were dropped from the list in order to reduce confusion about the conservation status of these species, and to clarify that the Service no longer regarded these species as candidates for listing. Since the Thorne's hairstreak butterfly was a Category 2 species, it was no longer recognized as a candidate species as of the February 28, 1996, CNOR.

On June 4, 1991, the Service received a petition dated May 27, 1991, from David Hogan of the San Diego Biodiversity Project to list the Thorne's hairstreak butterfly, Hermes copper butterfly (*Hermelycaena [Lycaena] hermes*), Laguna Mountains skipper (*Pyrgus ruralis lagunae*), and Harbison's dun skipper (*Euphyes vestries harbisoni*) as endangered under the Act. In a **Federal Register** notice dated July 19, 1993 (58 FR 38549), the Service announced its finding on the petition. We found that the petition presented substantial information for the Laguna Mountains skipper, but not for the other three butterflies. However, the finding also concluded that other substantial information existed to support a

decision that listing may be warranted for the other three butterflies, including the Thorne's hairstreak butterfly, and announced our intention to continue the formal status review of these species. In a proposed rule for the Laguna Mountain skipper and Quino checkerspot butterflies published on August 4, 1994 (59 FR 39869), the Service clarified that the negative 90-day finding on the Thorne's hairstreak butterfly and the other two butterflies "was made because sufficient information was not available regarding the threats to and biological vulnerability of these" butterflies. Though we have continued and will continue to collect available data on the Thorne's hairstreak butterfly and the other two butterflies, we did not complete the status review of Thorne's hairstreak butterfly pursuant to section 4(b)(3)(A) of the Act.

On October 25, 2004, the Service received an updated petition to list the Thorne's hairstreak and Hermes copper butterflies as endangered from David Hogan of the Center for Biological Diversity. Petitioners also sought emergency listing protection for Thorne's hairstreak and designation of critical habitat for both butterfly taxa concurrent with listing, if warranted. Included in the petition was information regarding the subspecies's taxonomy, biology, ecology, historical and current distribution, present status, and potential causes of decline and imminent threats. In a letter dated May 9, 2005, the Service determined that despite apparent threats to Thorne's hairstreak butterfly, such threats did not appear to be of a magnitude and severity to warrant emergency listing. In our response, we also advised the petitioners that we had insufficient funds to respond to the petitions at that time. On March 15, 2005, we received a 60-day notice of intent to sue filed by the Center for Biological Diversity for lack of response to the Thorne's hairstreak and Hermes copper butterfly petitions. On October 18, 2005, the Center for Biological Diversity filed a complaint for declaratory and injunctive relief challenging our failure to make the required 90-day findings on these two petitions. The Service agreed to submit 90-day petition findings on Thorne's hairstreak and Hermes copper butterflies to the **Federal Register** by August 1, 2006, and if the 90-day findings determined that listing may be warranted, to submit 12-month findings to the **Federal Register** by June 1, 2007. This notice constitutes our 90-day finding on the petition to list the Thorne's hairstreak butterfly. The 90-

day finding on the petition to list the Hermes copper butterfly will be published in the **Federal Register** separately.

In completing this 90-day finding, the Service has reviewed not only the information submitted in the petition, but also information in our files. This includes all of the data we had obtained prior to the July 19, 1993, not substantial finding that would have been considered in any internal status reviews had one been completed, as well as all of the information we have continued to collect on this species to date. Based on all new information and our analysis below, we have determined that the petition does not present substantial scientific or commercial information indicating that listing the Thorne's hairstreak butterfly may be warranted or that a status review or status assessment should be conducted.

#### Taxonomy

Thorne's hairstreak butterfly (*Mitoura thornei*) was originally described by John Brown (1983) based on a specimen collected by Fred Thorne in 1972, near Lower Otay Lake, which is generally west of Otay Mountain. Brown distinguished *M. thornei* from its closest relative *M. loki* on the basis of host preference (cypress (*Cupressus*) versus juniper (*Juniperus*)), the color of the ventral hindwing surface (green versus purple), and geographical isolation.

Brown (1983) described Thorne's hairstreak butterfly at the species rank, which has been accepted by many subsequent authors (Garth and Tilden 1986; Ballmer and Pratt 1988; Emmel et al. 1998; Opler and Warren 2004). However, some authors disagree with this classification. Shields (1984) considers Thorne's hairstreak butterfly a subspecies of *M. loki*, and Scott (1986) lists it as a subspecies of the Cedar hairstreak (*Callophrys gryneus*). The issue of the taxonomic ranking and placement of Thorne's hairstreak butterfly was considered by the Committee on Scientific Names of North American Butterflies in 1999. The committee adopted the recommendation made by Dr. Robert K. Robbins, an expert on Lycaenidae (Research Entomologist with U.S. Department of Agriculture's Systematic Entomology Laboratory at the National Museum of Natural History, Smithsonian Institution), that both *M. loki* and *M. thornei* should be treated as belonging to the superspecies, *C. gryneus* (Faulkner and Klein 2005). Currently, the committee's Checklist of North American Butterflies (North American Butterfly Association (NABA) 2004) includes *M. thornei* and *M. loki* as

*Callophrys gryneus thornei* and *Callophrys gryneus loki*, respectively.

The petitioner deferred to other experts regarding the appropriate classification, taxonomic rank, of Thorne's hairstreak butterfly (i.e., species or subspecies). In 2004, the Service contracted with Dr. Richard W. Van Buskirk (Pacific University in Forest Grove, Oregon) to review the taxonomic status of Thorne's hairstreak butterfly. Following Van Buskirk's recommendation (Van Buskirk 2004), the Service recognizes Thorne's hairstreak butterfly as the subspecies *Callophrys gryneus thornei*.

#### Description

Adult Thorne's hairstreak butterflies are approximately 1.0 to 1.2 inches in wingspan (25.4 to 30.5 millimeters) (Brown 1983). The forewings and hindwings are rich reddish brown with dark brown shading on the margin. The ventral surface forewing is mahogany brown with traces of lavender overscaling. The males bear well-developed scent pads on the forewings, and the hindwings are tailed. Eggs are round (echinoid), light green, and laid singly on the food plant. Garth and Tilden (1986) provide a description of the butterfly's early stages.

The Thorne's hairstreak butterfly is bivoltine (has two flight periods per year) and overwinters in the pupal stage. The pupation time for first generation is about 10 to 15 days, with emergence occurring in late February through March or possibly early April, depending on rainfall. The second generation emerges in June. A third brood may take place in September if summer rains occur (Faulkner and Klein 2005).

Eggs incubate in 7 to 14 days. The first instar larvae initially bore into the young stems of the host plant, Tecate cypress (*Cupressus forbesii*), but later become external feeders. Pupation is in the duff and leaf litter at the base of the host plant, and larvae feed on young cypress stems. Mature larvae are vivid green with two irregular white crescents on each segment, forming a longitudinal white stripe along each side of the larvae (Faulkner and Klein 2005).

Conifer-eating larvae within family Lycaenidae are an unusual occurrence. Within San Diego County, its congeners *Callophrys gryneus loki* (juniper hairstreak) and *Callophrys nelsoni* (*Nelson's hairstreak*) have only been found in association with California juniper (*Juniperus californica*) and incense cedar (*Calocedrus decurrens*) host plants, respectively (Faulkner and Klein 2005).

### Habitat

According to Brown (1983), Thorne's hairstreak butterfly is restricted to its larval host plant, Tecate cypress. Associated with chaparral ecosystems in southern California and northern Baja California, Tecate cypress occurs primarily on north-facing slopes from near sea level to over 4,200 feet (ft) (1,300 meters (m)) in elevation (Dunn 1986). Although some experts hypothesized that larvae eat only mature Tecate cypress at least 25 to 30 years old (Klein and Williams 2003; Faulkner and Klein 2005), recent post-fire observations of adults in three stands of cypress trees less than 9 years old within a 1996 fire footprint (Faulkner and Klein 2005) do not support that hypothesis. Thus, the best available information indicates Thorne's hairstreak butterflies can use host plants as young as 9 years of age.

Adult Thorne's hairstreak butterflies are known to nectar on *Eriogonum fasciculatum* (California buckwheat), *Ceanothus tomentosus* (Ramona lilac), and *Lotus scoparius* (deerweed), in the vicinity of Tecate cypress stands (Faulkner and Klein 2005).

Thorne's hairstreak butterfly dispersal behavior is not well known. An individual was observed nectaring on deerweed plants 0.25 miles (mi) (0.4 kilometer (km)) away from the nearest Tecate cypress (Faulkner and Klein 2005). Adults have been observed nectaring on California buckwheat as much as 197 ft (60 m) away from Tecate cypress trees (Faulkner and Klein 2005). Mattoni (1998) gave estimated relative movement values for three species of *Callophrys* butterflies in the greater Los Angeles area. Two species were estimated to move between 330–3300 ft (100–1000 m), and one from 3300 ft to 30 mi (1–50 km). Among butterflies, the genus *Callophrys* appears to be relatively sedentary.

### Historical and Current Range/ Distribution

Thorne's hairstreak butterfly is known only from the vicinity of Otay Mountain in southern San Diego County, California, in association with its larval host plant, Tecate cypress. Though not common within the limits of its range, Tecate cypress occurs in widely scattered and isolated "floristic islands" in the chaparral of southern California and Baja California Norte (Griffin and Critchfield 1972; Dunn 1986; Minnich 1987). In California, Tecate cypress is found on Guatay Mountain, Otay Mountain, and Tecate Peak in San Diego County; and on Sierra Peak and in Coal Canyon in Orange County (Dunn 1986).

Historically, the Thorne's hairstreak butterfly has been reported on Otay Mountain in San Diego County, primarily in Little Cedar Canyon and Cedar Canyon (Klein and Williams 2003). An unconfirmed historic observation of the subspecies in Orange County on private land has been reported (R. Stanford pers. comm. in Faulkner and Klein 2005). Multiple, consecutive surveys over 10 years within areas containing Tecate cypress on Tecate Peak and Guatay Mountain in San Diego County and some stands in Baja California, Mexico, conducted annually during the late 1980s and early 1990s, did not yield any Thorne's hairstreak butterflies (Anderson 2003). However, we do not have documentation of these surveys and are unable to determine what proportion of the Tecate cypress stands on Tecate Peak and Guatay Mountain in San Diego County were surveyed. Therefore, it is unclear whether these surveys efforts constitute comprehensive surveys of the Tecate cypress stands in these areas. Limited sampling in the Sierra Peak-Coal Canyon area in Orange County did not yield any Thorne's hairstreak butterfly observations (Brown 1983).

More than 20 groves of Tecate cypress are documented by botanical collections or aerial imagery from Baja California Norte, Mexico, indicating potential distribution of the Thorne's hairstreak butterfly in Mexico. Minnich (1987) described the northernmost stands of Tecate cypress in Mexico as extensions of U.S. populations at the border. As stated above, some surveys have been conducted in Tecate cypress stands in Baja California, Mexico for Thorne's hairstreak butterflies during the late 1980's and early 1990's. However, since we do not have documentation of these surveys, it is unclear what proportion of the Tecate cypress stands in Baja were surveyed. Therefore, more investigation is required to determine the possible extent of undiscovered populations of Thorne's hairstreak butterfly in Tecate cypress stands in Mexico.

### Population Estimates/Status

No specific data on Thorne's hairstreak butterfly abundance or population dynamics and distribution exists, although a number of apparently discrete occupied locations have been identified. The petition states that fewer than 10 historically occupied locations have been identified on Otay Mountain (Klein and Williams 2003) primarily within designated wilderness administered by the Bureau of Land Management (BLM). The status of Thorne's hairstreak butterfly and its habitat (areas dominated by Tecate

cypress over 6 ft (2 m) tall) was evaluated as part of a post-2003 Otay/Mine fire reassessment of species covered by the section 10(a)(1)(B) permit associated with the San Diego Multiple Species Conservation Plan (MSCP). Surveys of Tecate cypress stands conducted in 2004 revealed the presence of 4 to 5 areas occupied by the subspecies (Martin 2004; Klein 2006). However, Martin (2004) and Klein (2006) acknowledge that not all cypress stands were surveyed due to accessibility. No quantitative data on population size exist.

### Threats Analysis

In the following discussion, we respond to each of the major assertions made in the petition, organized by the Act's listing factors. Section 4 of the Act and its implementing regulations (50 CFR 424) set forth the procedures for adding species to the Federal list of endangered and threatened species. A species may be determined to be endangered or threatened due to one or more of the five factors described in section 4(a)(1) of the Act. The five listing factors are: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; and (E) other natural or manmade factors affecting its continued existence.

This 90-day finding is not a status assessment and does not constitute a status review under the Act. A brief discussion of how each of the five listing factors applies to the Thorne's hairstreak butterfly follows.

#### A. The Present or Threatened Destruction, Modification, or Curtailment of Habitat or Range

The petition, its appendices, and referenced documents discuss the following threats that we have grouped under Factor A: wildfire, prescribed fire, grazing, and vehicle access and recreation.

#### Wildfire

*Information provided by the petitioner.* The petitioner asserts that Thorne's hairstreak butterfly is highly and immediately vulnerable to extinction due to the threat of wildfire as a result of direct mortality of individuals and indirect mortality due to loss of the subspecies' larval host plant, Tecate cypress. (The threat of wildfire as it relates to direct mortality of individual butterflies is discussed under Factor E.) They assert that one

single new fire could cause the extinction of this butterfly. The 2003 Otay/Mine fire served as an example of the threat of fire to the butterfly when it burned 68 percent of the Thorne's hairstreak butterfly habitat (Betzler et al. 2003). The petitioner claims the number of fires greatly exceeds natural fire frequencies in southern California's chaparral ecosystems, and the excessive fires have reduced stands of mature Tecate cypress utilized by Thorne's hairstreak butterflies.

The petitioner provided a map illustrating multiple fires that have burned through and near Thorne's hairstreak butterfly locations within the last century. According to the petition, increased human populations and utilization of wildlands correlates with increased southern California wildfire frequency (Keeley et al. 1999; Keeley 2001 [document not submitted with petition]; Keeley and Fotheringham 2003; Wells et al. 2004).

The petitioner cited two references, Brooks et al. (2002 [correct citation 2004]) and Keeley and Fotheringham (2003), which provide examples where excessive fire harms chaparral ecosystems and dependent species in a number of ways. The petition quoted Keeley and Fotheringham (2003), "\* \* \* ecosystem health of shrublands is threatened not by lack of fire but by high fire frequencies that exceed the resilience of many species." The petitioner claims that excessive fire contributes to expansion of highly flammable, invasive, alien grasses (D'Antonio and Vitousek 1992) and forbs, contributing in turn to an even greater fire frequency. Excessively frequent fire (more than once a decade) may prevent nonsprouting chaparral shrubs from reaching maturity, thereby eliminating these species entirely from the system (Keeley and Fotheringham 2003).

According to the petitioners, frequent fire also leads to type conversion and replacement of chaparral ecosystems with alien plant species (Keeley 2001; Keeley and Fotheringham 2003). The petitioner asserted that fire-induced conversion of Tecate cypress and surrounding chaparral to vegetation dominated by invasive plant species reduces Thorne's hairstreak butterfly habitat through loss of host and nectar plants. Moreover, the petitioner reported that Zedler et al. (1983) documented vegetation conversion in the San Ysidro Mountains within 1 mi of Thorne's hairstreak butterfly populations. Based on a personal communication with Michael Klein, a Thorne's hairstreak butterfly expert, the petitioner also refers to anecdotal

observations that exotic grasses and forbs appear to be increasing in former Tecate cypress habitat following the 2003 fire.

*Analysis of the information provided in the petition and available to us at the time of petition review.* Though cypress trees do not survive fire, fire is integral to initiating cone opening and seed dispersal and is, therefore, critical for successful regeneration of Tecate cypress stands (Zedler 1977; Dunn 1986). Cone production begins as early as 5 to 7 years of age, but is sporadic until the trees reach about 30 years of age, and maximum cone production may not be achieved until 50 years or later (Zedler 1981; Dunn 1986). For cypress population levels to be maintained, the interval between fires must be long enough to permit enough trees to produce sufficient cones and seeds to replace the trees consumed in the fire. Zedler (1981) noted that if [all] stands of Tecate cypress were burned every 33 years, his "data suggest that near extinction would result after three or four fires. Cone and seed production depend on factors other than age alone and a large variation in average tree size and hence cone production exists within stands."

Faulkner and Klein (2005) agreed with Brown (1993) who stated that, "[c]haparral fires probably represent the greatest threat to \* \* \* [Tecate cypress] and its associated insect fauna, including Thorne's hairstreak butterfly." Though human-induced ignitions have been a part of the California landscape for more than 10,000 years, humans "likely have had a greater influence in the twentieth century due to the near exponential rise in population density and fire frequency in the southern part of the state" (Keeley and Fotheringham 2003). The frequency of smaller fires proximal to the Mexican Border may have increased on Otay Mountain, and, as the petitioner claims, this may be due to increasing ignition by illegal immigrants and associated border patrol activities since the 1990s (Jacob 1999, California Department of Forestry and Fire prevention (CDF) 2006). For example, in 2004, over 100 fires were reported on Otay Mountain (Woychak 2006). However, the majority of these fires were relatively small and localized (Porter 2006) and only affected small percentages of areas likely to be Thorne's hairstreak habitat patches associated with Tecate cypress.

The majority of the studies examining the impacts of fire frequency on California plant communities have focused primarily on overall impacts to dominant vegetative types, such as coastal sage scrub, chaparral, hardwood

conifer forest, conifer forest, shrublands, and desert shrublands (Zedler 1981; Zedler et al. 1983; Keeley et al. 1999; Keeley and Fotheringham 2003; Wells et al. 2004). In a GIS modeling study, Wells et al. (2004) largely concurred with Keeley et al. (1999) that increasing human population (especially at lower elevations) has resulted in a greater number of fires and an increase in area burned overall in Southern California. However, looking at fire frequency for chaparral in San Diego County specifically, Wells et al. (2004) concluded that the "trend in burning in chaparral is virtually flat over the past century, and if the years following 1950 are considered, there has been a marked decrease in area burned since then."

Few studies have examined the association between fire frequency and population dynamics of Tecate cypress specifically. Dunn (1985, 1986) concluded at the time of his work in the 1980s that the Tecate cypress population on Otay Mountain, the largest population in California (about 5,900 acres (2,400 hectares)), was "in no immediate danger" and that "a fire would do little damage" because the majority of the trees were over 40 years old and the threat of fire associated with the human interface was relatively low. In fact, Dunn (1984) had concluded in his Master's thesis that, at that time, no need existed for strict fire exclusion on Otay Mountain. As stated above, increasing human population has resulted in a greater number of fires in California. However, while portions of the Tecate cypress stands on Otay Mountain were burned in 1996 and again in the 2003, no recent data exist documenting the actual extent of impact to Tecate cypress specifically. Although Zedler and others (1983) documented a decline in native shrub abundance with the introduction of annual ryegrass (*Lolium multiflorum*) following two fires in 1979 and 1980 on Otay Mountain (i.e., the petitioner's claim of type conversion in the San Ysidro Mountains within 1 mi of Thorne's hairstreak butterfly populations), this work did not involve Tecate cypress and is not applicable to the species. Moreover, in a recent study of the fire frequency and population trend in four Tecate cypress populations in California, cited on page 9 of the petition (cited as "Ansary *in print*"), de Govenain and Ansary (*in press*) reported that the Otay Mountain, Tecate Peak, and Guatay populations "appeared to be stable or potentially increasing" (i.e., the rate of population increase or  $\lambda > 1$ ), while only the Coal Canyon/Sierra Peak population in Orange County "appeared to be

declining” due to a shorter fire interval at that site.

We used GIS data in our files to overlay Tecate cypress distribution on the petition map illustrating multiple fires that have burned through and near Thorne’s hairstreak butterfly locations within the last century, and determined the majority of Tecate cypress was within one or two fire footprints during the 93 year period from 1910 to 2003. Therefore, information in our files does not support the claim that the fire frequency is high relative to Tecate cypress reproductive maturity.

As cited in the petition, 68 percent of the Thorne’s hairstreak butterfly habitat (Tecate cypress) burned during the 2003 Otay/Mine fire, a reduction from 5,577 ac (2,257 ha) to 1,778 ac (720 ha) according to preliminary estimates by Betzler et al. (2003). Nonetheless, butterfly occupation was documented after the 2003 fire in 2004 and 2005, mostly on the southwest slope of the mountain within the 1996 burn area that did not burn in 2003 (Martin 2004; Faulkner and Klein 2005; Klein 2006). While the fire footprint was estimated by Betzler et al. (2003) to have covered 68 percent of the Tecate cypress habitat on Otay Mountain, the amount of Tecate cypress that actually burned is likely less. The source cited by Betzler et al. (2003) was a report prepared by the Interagency Burned Area Emergency Response Team (IBAERT 2003), which gives vegetation mortality estimates in categories of 0 to 25 percent, 26 to 75 percent, and greater than 76 percent. It is not clear how Betzler et al. (2003) calculated the 68 percent burned habitat area, however it could have been based on the percent of mapped Tecate cypress distribution within those burn categories given by IBAERT (2003); therefore, Betzler et al. (2003) may not have known how much Tecate cypress within the fire footprint was actually killed.

Limited post-fire monitoring in 2004 revealed the presence of at least five unburned stands of mature Tecate cypress (defined for the survey as a patch of at least 50 trees greater than 2 meters tall), four of which were determined to be occupied by adult Thorne’s hairstreak butterflies at the time of the survey (Martin 2004). Two areas adjacent to or within canyons known to contain Tecate cypress were not surveyed in 2004. At least one area, the lower portion of O’Neal Canyon may contain a significant stand since the upper portion supports the largest stand of extant cypress (Martin 2004). According to Martin (2004), these five stands constituted approximately 166 ac (36 ha). However, since he was not able

to survey all potential habitat areas and his analysis was limited to stands of at least 50 mature trees, additional stands and stands of less than 50 mature and immature trees may have persisted after the fire.

Also, de Gouvenain and Ansary (*in press*) hypothesize that the steep north-facing slopes and rocky outcrops where Tecate cypress is found may function as refugia for Tecate cypress during fire events in the surrounding chaparral habitat. A comprehensive survey of Tecate cypress on Otay Mountain is needed in order to accurately determine the extent of the impact caused by the 2003 fire and to what extent the Thorne’s hairstreak butterfly is utilizing the remaining Tecate cypress habitat (at least 3,799 ac (1,537 ha)).

With regard to curtailment of habitat and range by fire, it is important to consider that Thorne’s hairstreak habitat distribution on Otay Mountain is slightly greater than that of its larval host plant (Tecate cypress), and must be based on adult resource use and movement between and on the periphery of host plant stands. Given the evolutionary relationship of Thorne’s hairstreak and Tecate cypress with fire, it is likely burned areas devoid of woody vegetation and reduced butterfly population density after fire facilitate movement between unburned host plant patches. For example, in a mark-recapture study of *Parnassius smintheus* (Papilionidae) butterflies, Roland et al. (2000) concluded “butterflies move readily through open meadow but that forests are twice as resistant to butterfly movement. Butterflies also tended to stay at sites with high numbers of butterflies, but readily emigrate from sites with small populations.” Roland et al.’s (2000) results are a good example of how differences in habitat structure and population density can affect butterfly movement. Differences in population densities and habitat structure are known to commonly affect movement patterns of butterflies (Ries and Debinski 2001; Service 2003).

Along with the direct loss of Tecate cypress, the Thorne’s hairstreak butterfly’s host plant, the petitioners claim that increased fire frequency results in the conversion of Tecate cypress and surrounding chaparral to vegetation dominated by invasive plant species, further reducing the amount of host and nectar plants. As discussed above, it appears that Tecate cypress populations on Otay Mountain are stable and potentially increasing overall and that frequency of fire in chaparral communities in San Diego County over the past century is stable or potentially

decreasing overall. Also, although Zedler et al. (1983) documented a decline in native shrub abundance following two fires in 1979 and 1980 on Otay Mountain, they state that changes to the vegetative community following the 1979 fire alone are similar to those commonly seen in chaparral fires. Their study was not conducted in an area occupied by Tecate cypress. The common pattern after chaparral fires is for native and introduced annual herbs to dominate for the 1st year and then gradually decline as the cover of shrub and subshrubs increases (Zedler et al. (1983). They reported drastic reductions in several chaparral species, particularly those with limited dispersal and specialized germination requirements, after the same area that burned in 1979 burned again in 1980. However, they state that over time, it is likely that coastal sage scrub species, particularly those that are vigorous invaders of man-made and natural disturbance, including *Eriogonum fasciculatum*, a nectar source for Thorne’s hairstreak butterfly, are likely to reoccupy the area. Therefore, it is likely that while the vegetative community may undergo short-term conversion, over time, native, fire adapted species will reestablish.

In sum, information in the petition and available to us does not substantiate a recent decline or downward trend in the extent of Tecate cypress on Otay Mountain, the host plant of the Thorne’s hairstreak butterfly, as a result of increased fire frequency and associated alien plant invasion.

#### Prescribed Fire

*Information provided in the petition.* The petitioner states that while prescribed fire does not appear to be planned for the San Ysidro Mountains, it could compound the threat of excessive fire to Thorne’s hairstreak butterflies and Tecate cypress if implemented in the future.

*Analysis of information provided in the petition and available to us at the time of petition review.* No evidence exists to support the petitioner’s claim that prescribed burning would be allowed within the Otay Mountain Wilderness. The current BLM policy is 100 percent fire suppression on Otay Mountain (Woychak 2006).

#### Grazing

*Information provided in the petition.* The petitioner stated that BLM authorizes grazing on Otay Mountain in an area occupied by Thorne’s hairstreak butterfly prior to the 2003 Otay/Mine fire and near the “last five known remaining populations.” The allotment is now vacant according to agency staff,

but BLM is actively considering renewal of this grazing lease, according to a Notice of Proposed Action dated May 26, 2004.

The petitioner claimed that renewal of the Otay Mountain grazing allotment lease would result in significant direct and indirect effects similar to those identified by the Service for the Quino checkerspot butterfly (January 16, 1997; 62 FR 2313). The Quino checkerspot butterfly recovery plan (Service 2003) noted that grazing may harm the butterfly through destruction of larval host plants, soil compaction, degradation of cryptogamic soil crusts, and trampling of eggs and larvae. The invasion of alien plants may be facilitated by degradation of soil crusts. The recovery plan recommends phasing out of commercial grazing in Quino checkerspot butterfly's habitat.

The petitioner also stated that grazing on the Otay Mountain allotment could harm the Thorne's hairstreak butterfly and Tecate cypress even if grazing is excluded around existing populations of these species because grazing could lead to the introduction of invasive alien plants. These plants could increase fire frequency, resulting in the loss of populations of sensitive species and habitat degradation, and may result in subsequent further expansion of alien plants through additional disturbance from fire.

*Analysis of information provided in the petition and available to us at the time of petition review.* We confirmed that an active 5,522 acre (2,235 ha) BLM grazing allotment exists on Otay Mountain (Doran 2006) that overlaps occupied Thorne's hairstreak butterfly habitat. Approximately one-third of Tecate cypress woodland on the mountain (2,026 acres (820 ha)) occurs within the Otay Mountain Grazing Allotment on the north side of the mountain (Anderson and Love 2006). Approximately half (20 acres (8 ha)) of a patch of occupied mature Tecate cypress trees was confirmed to be within the southern grazing allotment boundary in 2004 (Anderson and Love 2006). However, the grazing allotment is in a non-use status, which means that the allottee does not intend to graze in the near term, and grazing is not allowed in the Cedar Canyon Area of Critical Environmental Concern (Doran 2006). Also, Tecate cypress woodland would not often be very accessible to cattle within the allotment, because of the extremely steep, thickly vegetated terrain associated with Tecate cypress stands.

We were unable to confirm the petitioner's assertion that the renewal of the grazing allotment lease will likely

result in significant direct and indirect harm to Thorne's hairstreak butterflies and Tecate cypress populations. The petitioner failed to provide specific examples of negative impacts from grazing on Thorne's hairstreak butterflies and Tecate cypress. Comparison to Quino checkerspot butterfly grazing threats is not appropriate because host plants for that subspecies, unlike Tecate cypress, are herbaceous annuals directly affected by grazing and type-conversion of open-canopy vegetation.

#### Vehicle Access and Recreation

*Information provided by the petitioner.* The petitioner claims BLM's emphasis on recreation in the San Ysidro Mountains, and maintenance of vehicle access likely increases the risk of new fires. BLM lands occupied by the subspecies are located within the agency's designated Otay Mountain Wilderness. Roads grandfathered into the wilderness designation generally allow unrestricted public access in close proximity to Thorne's hairstreak butterfly populations except during special closures.

*Analysis of information provided in the petition and available to us at the time of petition review.* Although public access is allowed, the Otay Mountain Wilderness is remote, and few people visit the wilderness area. Because of the proximity of the wilderness area to the United States-Mexico international border, border operations (e.g., surveillance and patrolling) are common throughout the wilderness. Traffic is concentrated on few main roads adjacent to occupied Thorne's hairstreak butterfly habitat. Border patrol vehicles and vehicles accessing the wilderness may increase the risk of new fires; however, fires that are potentially started by the border patrol would be reported immediately. Since access by the public is rare, and border patrol vehicle ignitions would be reported, we believe vehicle access and recreation is not a significant threat to the subspecies. The petitioner neglected to provide specific examples of vehicle access and recreation increasing the risk of new fires to Thorne's hairstreak butterfly habitat (i.e., Tecate cypress stands), and we are unaware of any documentation that directly links vehicles and recreation as a threat to this subspecies.

Because there is no clear threat of fire to Tecate cypress or Thorne's hairstreak butterfly, and grazing and recreation impacts appear negligible, we conclude that the petition and other available information does not constitute substantial scientific information

indicating listing Thorne's hairstreak butterfly may be warranted due to Factor A (destruction, modification, or curtailment of habitat or range).

#### B. The Overutilization for Commercial, Sporting, Scientific, or Education Purposes

The petitioner did not provide information with respect to Factor B. We have no information regarding the overutilization for commercial, sporting, scientific, or education purposes for Thorne's hairstreak butterfly.

#### C. Disease or Predation

The petitioner did not provide any information with respect to disease nor do we have any information regarding impacts of disease on Thorne's hairstreak butterfly.

#### Predation

*Information provided in the petition.* The petitioner stated that experts suspect birds, predatory insects, parasitic insects, and spiders prey upon the Thorne's hairstreak butterfly. Birds may prey on either larvae or adults. The harmful effects of otherwise normal predation or parasitism might be exacerbated by population reduction from excessive fires.

*Analysis of information provided in the petition and available to us at the time of petition review.* The petitioner did not provide specific information, nor was there any information available in our files, documenting that the Thorne's hairstreak butterfly may be endangered by predation.

#### D. The Inadequacy of Existing Regulatory Mechanisms

The petition and referenced documents discuss three regulatory mechanisms that may provide some Thorne's hairstreak butterfly conservation, including (1) the Wilderness Act, (2) BLM activities, and (3) the San Diego Multiple Species Conservation Plan (MSCP).

#### Wilderness Act and BLM Activities

*Information provided by the petitioner.* While the petition acknowledged BLM lands occupied by the subspecies are protected from urban development and mining by the nature of the location within the Otay Mountain Wilderness Area (designated under the Wilderness Act), the petitioner asserted this area is not intensely managed, and BLM does not implement proactive conservation measures for either the Thorne's hairstreak butterfly or Tecate cypress. In addition, the petitioner maintained that BLM does not recognize the Thorne's hairstreak butterfly as a "sensitive

[sub]species.” The petitioner further claims Thorne’s hairstreak butterfly populations face an additional, unique risk of excessive fire as U.S. border enforcement has inadvertently directed illegal Mexican immigrant crossings away from coastal urban areas toward wildland areas east of Otay Mesa. The petitioner contends that fire and land management agencies often identify illegal immigrant’s campfires and arson as the cause of border-area wildfires.

*Analysis of information provided in the petition and available to us at the time of petition review.* Congress formally designated BLM lands on Otay Mountain as the Otay Mountain Wilderness in 1999 (Otay Mountain Wilderness Act, December 11, 1999). The inclusion of these occupied habitats within a designated Wilderness provided additional significant protection for this area and complemented BLM’s objective to manage these public lands to provide protection and enhancement for biological values. The Wilderness Act of 1964 (16 U.S.C. 1131) restricts vehicles, new developments, chainsaws, mountain bikes, leasing, and mining from the wilderness area.

As cited in the petition, BLM’s South Coast Resource Management Plan guides management and protection on sensitive species and their habitat. At the time of the petition, BLM did not recognize Thorne’s hairstreak as a “sensitive” subspecies; however, the subspecies was recently officially designated as “sensitive,” elevating it to a higher management priority level (Schlachter 2006).

As stated in the petition, no formal plans to specifically manage or monitor for Thorne’s hairstreak butterfly currently exist. Thorne’s hairstreak butterfly populations may face an additional, unique risk of excessive fire due to activities related to illegal Mexican immigrant crossings east of Otay Mesa (Jacob 1999, CDF 2006). However, since at this time it appears the primary source of the wildfire threat to the subspecies is accidental wildfire caused by illegal immigrants, and border security is currently greater than before to prevent illegal immigration, fire prevention is indirectly maximized by border patrol activities. Fire prevention measures include formation of the Border Agency Fire Council, (BAFC) a multi-agency council formed due to the wildfire threat to human life and the environment (Jacob 1999). The goals of the BAFC are to make people in the border area aware of the dangers of wildfire and encourage them to be careful with fire; preferably not to start any campfires, but if they do, to

understand the fire must be completely out before they abandon it (CDF 2006). BAFC member agencies represent a collaborative effort to prepare the area for fire fighting purposes, including establishment of three helispots and construction of spur roads (BAFC 2006). Signs in Spanish posted across the mountain warn of the danger of starting campfires and advise against it. Also, BLM’s current policy is 100 percent fire suppression on Otay Mountain (Woychak 2006). Therefore, while a formal management plan would benefit the subspecies to guide long-term monitoring and other types of conservation actions, it would not necessarily change current fire prevention and suppression policies and activities.

#### San Diego MSCP

*Information in the petition.* The petitioner stated that the Thorne’s hairstreak butterfly is recognized as a “covered species” under the MSCP and some conservation activities in the San Ysidro Mountains occur, but these activities do not appear to have reduced the primary threats to the subspecies, especially from excessive wildfire.

*Analysis of information provided in the petition and available to us at the time of petition review.* Thorne’s hairstreak butterfly is covered under the MSCP, and the MSCP recognizes that “a fire management program would be needed for prevention of catastrophic fires and long term viability of its host plant.” No fire management plan has been written to date, nor has BLM developed a long-term management or monitoring plan for the butterfly (J. Schlachter 2006). However, the current BLM policy is 100 percent fire suppression on Otay Mountain; BLM has received allocations to complete a wilderness management plan; and a fire management plan is expected to be completed after the wilderness plan and will focus on complete fuel suppression (Woychak 2006).

The Service considers the current BLM activities and policies, and the MSCP adequate for protection of the subspecies. If the MSCP or referenced activities and policies are modified in the future, the adequacy of these measures to protect the Thorne’s hairstreak butterfly should be evaluated at that time. The Service does not believe the absence of the cited plans poses a substantial threat such that the Thorne’s hairstreak butterfly requires additional regulatory mechanisms to be developed. Therefore, the petition and other information in our files does not present substantial information that the subspecies is threatened at this time by

the inadequacy of existing regulatory mechanisms across all or a significant portion of its range.

#### *E. Other Natural or Manmade Factors Affecting the Continued Existence*

The petition, its appendices, and referenced documents discuss the following threats that we have grouped under Factor E: wildfire, habitat fragmentation, vulnerability of small and isolated populations, and global climate change.

#### Wildfire

*Information provided in the petition.* The petitioner stated the Thorne’s hairstreak butterfly cannot escape fire. Pupae and larvae are likely killed when fire burns Tecate cypress stands and nearby chaparral. Adults are also likely killed by fire, due to their habit of remaining close to their host plant, and the likelihood of their escape being outpaced by an approaching fire. The petition claims excessive fires over the last several decades have reduced Thorne’s hairstreak butterfly population numbers and disrupted metapopulation dynamics and stability.

*Analysis of information provided in the petition and available to us at the time of petition review.* The persistence of the Thorne’s hairstreak butterfly was considered questionable after the 2003 Otay/Mine fire, since the fire footprint appeared to cover all areas known to be occupied by the subspecies (Anderson 2003; Klein and Williams 2003). However, adult Thorne’s hairstreak butterflies were documented from four Tecate cypress stands after the 2003 fire on the southwest slope of the mountain (Martin 2004; Faulkner and Klein 2005; Klein). Therefore, as discussed under Factor A, it appears that some Tecate cypress habitat did not burn during that fire and that the actual extent of occupied habitat on Otay Mountain has not yet been determined. The petition included a map delineating large fire footprints from 1910 to 2003. We used GIS data in our files to overlay all known occupancy records on the fire map and determined that 9 out of the 12 Thorne’s hairstreak butterfly observations (point data) and the majority of Tecate cypress distribution are within one or two fire footprints during the 93 year period from 1910 to 2003. The apparent ability of Thorne’s hairstreak butterflies to recolonize immature Tecate cypress stands less than 9 years post-fire (Martin 2004; Faulkner and Klein 2005; Klein), compared to the relatively low large-fire frequency indicated by the petition map of less than 2 fires per 93 years, contradicts petition claims of a direct

mortality extinction threat due to high fire frequency on Otay Mountain. Also, as discussed under Factor A, the steep canyons where Tecate cypress is found may provide refugia during a fire.

While immature Thorne's hairstreak butterflies have not been reported from younger stands surveyed after fire, this may be attributed to the fact that they are small and cryptic, making them difficult to detect, and spend most of their larval stage (early instars) within the tissue of the Tecate cypress or buried as pupae in the leaf litter on the ground. Also, post-fire monitoring has been limited. We are only aware of post-fire monitoring being conducted in 2004. Therefore, additional monitoring would be needed to determine the survival and recolonization rate of immature and adult butterflies following a fire.

The petitioner did not provide information or data to substantiate the claim that excessive fires over the last several decades have reduced Thorne's hairstreak butterfly population numbers and disrupted metapopulation dynamics and stability. As stated in the "Population Estimates/Status" section of this finding, no quantitative data on population size exists nor do we have any information on the dispersal or movement behavior of this subspecies. Without this information, it is not possible to determine the subspecies' population structure (e.g., metapopulation or panmictic) and subsequently, the impact of fire on population numbers and structure.

#### Habitat Fragmentation

*Information provided in the petition.* The petitioner claimed fragmentation of Thorne's hairstreak butterfly populations, through fire, type conversion, and roads, poses a significant threat to the subspecies. The petitioner noted that habitat fragmentation reduces the area of Thorne's hairstreak butterfly habitat and isolates populations from one another. In addition, the petitioner claimed that fragmentation expands edge habitat, resulting in further stress on fragmented or small populations.

*Analysis of information provided in the petition and available to us at the time of petition review.* Neither the petition nor information available support the claim that fragmentation threatens the subspecies existence within its known distribution on Otay Mountain. The best available information indicates Thorne's hairstreak butterfly is capable of recolonizing immature Tecate cypress stands in recently burned areas. For example, as stated above, re-

colonization of immature stands after a 1996 fire has been documented (Faulkner and Klein 2005). Also, as discussed above, surveys of potentially occupied habitat on Otay Mountain are incomplete, and, as discussed under Factor A, habitat patch distribution as defined by adult movement has not been determined.

#### Vulnerability of Small and Isolated Populations

*Information provided in the petition.* The petitioner asserted that endemic taxa such as the Thorne's hairstreak butterfly are generally considered more prone to extinction than widespread species due to their restricted geographic range. According to the petition, the common factors that increase the vulnerability of small and isolated populations to extinction are demographic fluctuations, environmental stochasticity (i.e., random events), and reduced genetic diversity.

*Analysis of information provided in the petition and available to us at the time of petition review.* Populations of Thorne's hairstreak butterfly are likely subject to population fluctuations. If occupied habitat is temporarily fragmented by fire, fluctuation in numbers could render small populations more vulnerable to stochastic extirpation. Small populations and isolation could subject the butterfly to genetic drift and restricted gene flow that may decrease genetic variability over time and could adversely affect the subspecies' viability. However, we lack the genetic or demographic evidence to support such claims in the petition, and potential isolation of small populations by fire appears to be short-term. Furthermore, surveys of potentially occupied habitat on Otay Mountain are incomplete and estimates of population status/size do not currently exist. Therefore, information in our files does not indicate small population size is a threat to this subspecies.

#### Global Climate Change

*Information provided in the petition.* The petitioner asserted that butterflies are particularly sensitive to small changes in microclimates, such as fluctuations in moisture, temperature, or sunlight. According to the petition, studies of Edith's checkerspot (*Euphydryas chalceona edithi*) have verified speculation that whole ecosystems may move northward or shift in elevation as the Earth's climate warms (Parmesan and Galbraith 2004).

*Analysis of the information provided in the petition and available to us at the*

*time of petition review.* The petitioner did not provide specific information validating the claim that the Thorne's hairstreak butterfly may be endangered by global climate change. We recognize recent evaluations by Parmesan and Galbraith (2004) that whole ecosystems are seemingly being shifted northward. However, neither the petition nor our files provides anything more than speculation on the type, magnitude, or temporal effects of ecosystem changes that may be brought about by regional climate change. We are not aware of any documentation available or provided by the petitioner that directly links global warming as a threat to the subspecies, or how global warming specifically affects the subspecies. Therefore, we find that the petition does not contain substantial information suggesting that global climate change may be a factor that threatens the Thorne's hairstreak butterfly.

#### Finding

We evaluated each of the five listing factors individually, and because the threats to Thorne's hairstreak butterfly are not mutually exclusive, we also evaluated the collective effect of these threats. The petition focused primarily on three listing factors: Factor A (the Present or Threatened Destruction, Modification, or Curtailment of the Species' Habitat or Range), Factor D (Inadequacy of Existing Regulatory Mechanisms), and Factor E (Other Natural or Manmade Factors Affecting the Continued Existence). More specifically, information in the petition suggests that fire poses the primary threat to Thorne's hairstreak butterfly habitat and populations because the subspecies' range occurs on lands susceptible to wildfires. However, it appears that frequency of fire in occupied habitat over the past century is not high enough on average to threaten the subspecies, and Tecate cypress populations on Otay Mountain are stable and potentially increasing overall. Within areas that have burned, the subspecies appears able to recolonize over time.

Also, we have determined that Federal regulations and activities (Wilderness Act, BLM fire suppression policy, Border Patrol enforcement activities, and MSCP) provide a significant level of protection for the Thorne's hairstreak butterfly and/or its habitat on Federal lands that include the subspecies entire known range. We will continue to work with the City and County of San Diego and the BLM to avoid and minimize impacts to the Thorne's hairstreak butterfly on their lands.

We have reviewed the petition and literature cited in the petition and evaluated that information in relation to information available to us. After this review and evaluation, we find the petition does not present substantial scientific information to indicate listing the Thorne's hairstreak butterfly may be warranted at this time. Although we will not be commencing a status review in response to this petition, we will continue to monitor potential threats and ongoing management actions that might be important with regard to the conservation of the Thorne's hairstreak butterfly across its range. We encourage interested parties to continue to gather data that will assist with the conservation of the subspecies.

#### References Cited

A complete list of all references cited herein is available, upon request, from our Carlsbad Fish and Wildlife Office (see **ADDRESSES** section above).

#### Author

The primary authors of this notice are staff from the Carlsbad Fish and Wildlife Office (see **ADDRESSES** section above).

#### Authority

The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: August 1, 2006.

#### H. Dale Hall,

Director, Fish and Wildlife Service.

[FR Doc. E6-12743 Filed 8-7-06; 8:45 am]

BILLING CODE 4310-55-P

## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

#### 50 CFR Part 17

#### Endangered and Threatened Wildlife and Plants; 90-Day Finding on a Petition to List the Sand Mountain Blue Butterfly as Threatened or Endangered with Critical Habitat

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice of 90-day petition finding and initiation of status review.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), announce a 90-day finding on a petition to list the Sand Mountain blue butterfly (*Euphilotes palleascens arenamontana*) as threatened or endangered under the Endangered Species Act of 1973, as amended (Act). We find that the petition presents substantial information

indicating that listing the Sand Mountain blue butterfly may be warranted. Therefore, with the publication of this notice, we are initiating a status review of the species, and we will issue a 12-month finding to determine if the petitioned action is warranted. To ensure that the status review of the Sand Mountain blue butterfly is comprehensive, we are soliciting scientific and commercial data regarding this species. A determination on critical habitat will be made if and when a listing action is initiated for this species.

**DATES:** The finding announced in this document was made August 8, 2006. To be considered in the 12-month finding for this petition, comments and information should be submitted to us by October 10, 2006.

**ADDRESSES:** Data, information, comments, or questions concerning this petition and our finding should be submitted to the Field Supervisor, Nevada Fish and Wildlife Office, U.S. Fish and Wildlife Service, 1340 Financial Boulevard, Suite 234, Reno, NV 89502 or via electronic mail at [sandmtblue@fws.gov](mailto:sandmtblue@fws.gov). The petition is available at [http://www.fws.gov/nevada/nv\\_species/sand\\_blue.html](http://www.fws.gov/nevada/nv_species/sand_blue.html). The petition, supporting data, and comments will be available for public inspection, by appointment, during normal business hours at the above address.

#### FOR FURTHER INFORMATION CONTACT:

Robert D. Williams, Field Supervisor, Nevada Fish and Wildlife Office (see **ADDRESSES**) (telephone 775/861-6300; facsimile 775/861-6301).

#### SUPPLEMENTARY INFORMATION:

##### Public Information Solicited

When we make a finding that substantial information is presented to indicate that listing a species may be warranted, we are required to promptly commence a review of the status of the species. To ensure that the status review is complete and based on the best available scientific and commercial information, we are soliciting information on the Sand Mountain blue butterfly. We request any additional information, comments, and suggestions from the public, other concerned governmental agencies, Tribes, the scientific community, industry, or any other interested parties concerning the status of the Sand Mountain blue butterfly. We are seeking information regarding the species' historical and current status and distribution, its biology and ecology, ongoing conservation measures for the species and its habitat, and threats to the species and its habitat.

If we determine that listing the Sand Mountain blue butterfly is warranted, it is our intent to propose critical habitat to the maximum extent prudent and determinable at the time we would propose to list the species. Therefore, we also request data and information on what may constitute physical or biological features essential to the conservation of the species, where these features are currently found, whether any of these areas are in need of special management, and whether there are areas not containing these features, which of themselves, might be essential to the conservation of the species. Please provide specific comments as to what, if any, critical habitat should be proposed for designation, if the species is proposed for listing, and why that proposed habitat meets the requirements of the Act.

If you wish to comment or provide information, you may submit your comments and materials concerning this finding to the Field Supervisor (see **ADDRESSES**).

Our practice is to make comments and materials provided, including names and home addresses of respondents, available for public review during regular business hours. We will not consider anonymous comments and we will make all comments available for public inspection in their entirety. Comments and materials received will be available for public inspection, by appointment, during normal business hours at the address listed in the **ADDRESSES** section.

#### Background

Section 4(b)(3)(A) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*), requires that we make a finding on whether a petition to list, delist, or reclassify a species presents substantial scientific or commercial information to indicate that the petitioned action may be warranted. We base this finding on information provided in the petition and information otherwise available in our files at the time of petition review. To the maximum extent practicable, we make this finding within 90 days of our receipt of the petition, and publish our notice of this finding promptly in the **Federal Register**.

Substantial information, as defined by 50 CFR 424.14(b), is "that amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted" (50 CFR 424.14(b)). If we find that substantial information was presented, we are required to promptly commence a review of the status of the species, if one has not already been

initiated under our internal candidate assessment process.

In making this finding, we relied on information provided by the petitioners and information otherwise available in our files at the time of petition review and evaluated that information in accordance with 50 CFR 424.14(b). Our process in making this 90-day finding under section 4(b)(3)(A) of the Act and section 424.14(b) of our regulations is limited to a determination of whether the information in the petition meets the "substantial information" threshold.

#### Petition

On April 23, 2004, we received a formal petition, dated April 23, 2004, from the Center for Biological Diversity, Xerces Society, Public Employees for Environmental Responsibility, and the Nevada Outdoor Recreation Association requesting that the Sand Mountain blue butterfly (*Euphilotes pallelescens arenamontana*) known only from Sand Mountain, Nevada, be listed as threatened or endangered in accordance with section 4 of the Act, and that critical habitat be designated for the species concurrent with the listing. The petition is available at [http://www.fws.gov/nevada/nv\\_species/sand\\_blue.html](http://www.fws.gov/nevada/nv_species/sand_blue.html).

Action on this petition was precluded by court orders and settlement agreements for other listing actions that required nearly all of our listing funds for fiscal years 2004 and 2005. On September 26, 2005, we received a 60-day notice of intent to sue, and on January 5, 2006, we received a complaint regarding our failure to carry out the 90-day finding on the petition to list the Sand Mountain blue butterfly. On April 20, 2006, we reached an agreement with the plaintiffs to submit to the **Federal Register** a completed 90-day finding by July 28, 2006, and to complete, if applicable, a 12-month finding by April 26, 2007 (*Center for Biological Diversity et al. v. Norton, and U.S. Fish and Wildlife Service*, (CV-00023-LKK-GGH) (E.D. Cal)).

#### Species Information

The Sand Mountain blue butterfly was first described as *Euphilotes pallelescens* subspecies *arenamontana* by Austin in 1998 (1998, pp. 556–557). Prior to the 1998 publication, it had been considered an undescribed subspecies of *Euphilotes rita*, the name under which it was previously assigned a Federal category 2 candidate status (see Previous Federal Action section).

The Sand Mountain blue butterfly is a small, pale-blue butterfly in the family Lycaenidae. Males have a wingspan that ranges from 10.0 to 11.8 millimeters

(mm) (0.39 to 0.46 inches (in)) and averages 11.1 mm (0.44 in). The dorsum is pale bluish-violet, often whitish distally, with a narrow (0.5 mm (0.002 in)) black outer margin. There is usually a series of dots on the hindwing, but sometimes no more than a terminal line on the forewing. There is usually an indistinct pinkish to pale orange aurora of moderate width on the posterior hindwing. At the vein tips on the posterior of both wings, there are fringes of white with indistinct grey checkering. The bottom surface of the male abdomen is chalky white. Macules (patches of different coloration) are small, often nearly obsolete on the hindwing. Females have a wingspan that ranges from 10.0 to 11.9 mm (0.39 to 0.46 in) with an average of 10.9 mm (0.43 in). The female dorsum is brown to tan, and usually pale bluish-gray basally on both wings. The forewing has a faint brown cell-end bar, while the hindwing has marginal dots. The forewing apex is usually whitish. The hindwing aurora is pale orange to pale pink usually grading to nearly white distally and not strongly contrasting. The female venter and fringes are similar to those of the male (Austin 1998, p. 556).

The Sand Mountain blue butterfly is the palest of all *Euphilotes*. The ground color of both sexes is considerably paler than that of *E. pallelescens* ssp. *pallelescens*. The pinkish aurora is unlike any other *Euphilotes*. The pale bluish-gray wing bases of the female do not contrast with the distal area of the wing as they do on *E. pallelescens* ssp. *pallelescens*. The black macules of *E. pallelescens* ssp. *arenamontana* tend to be smaller than those of *E. pallelescens* ssp. *pallelescens* (Austin 1998, p. 557).

The Sand Mountain blue butterfly is known only from Sand Mountain, Churchill County, Nevada, where it is dependent on its host plant, Kearney buckwheat (*Eriogonum nummularre*) (Austin 1998, p. 557), a long-lived, perennial shrub with numerous branches (Reveal 2002, p. 1), that occurs in scattered locations in several western States (Welsh et al. 1987, p. 547). Kearney buckwheat typically occurs at Sand Mountain as a dominant or co-dominant with other shrubs on less active, smaller dunes around the periphery of the main dune (The Nature Conservancy 2002, p. 1). Because of the small size of the Sand Mountain blue butterfly and the frequent high winds typical of the Sand Mountain area, it is likely that adult butterflies spend most of their life sheltered within the canopy of Kearney buckwheat plants (Murphy 2006). Kearney buckwheat is the sole food source for the larvae and an

important nectar source for adults during their flight period. The butterfly has one brood from mid-July to mid-September (Austin 1998, p. 557), a period that coincides with the peak flowering period of the Kearney buckwheat (Reveal 2002, p. 2).

#### Previous Federal Action

We added the Sand Mountain blue butterfly as *Euphilotes rita* ssp. to our list of candidate species as a category 2 candidate species on November 21, 1991 (56 FR 58829). A category 2 candidate species was a species for which we had information indicating that a proposal to list it as threatened or endangered under the Act may be appropriate, but for which additional information was needed to support the preparation of a proposed rule. It remained a category 2 candidate as *Euphilotes rita* ssp. in our 1994 Candidate Notice of Review (November 15, 1994; 59 FR 59020). In the 1996 Candidate Notice of Review (February 28, 1996; 61 FR 7596), we discontinued the use of category 2 candidates. The Sand Mountain blue butterfly has no Federal regulatory status under the Act.

#### Threats Analysis

Pursuant to section 4 of the Act, we may list a species, subspecies, or distinct population segment of invertebrate taxa on the basis of any of the following five factors: (A) Present or threatened destruction, modification, or curtailment of habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence. In making this finding, we evaluated whether threats to the Sand Mountain blue butterfly presented in the petition may pose a concern with respect to its survival. The Act identifies the five factors to be considered, either singly or in combination, to determine whether a species may be threatened or endangered. Our evaluation of these threats, based on information provided in the petition, is presented below.

##### *A. Present or Threatened Destruction, Modification, or Curtailment of the Species' Habitat or Range*

The petition states that the Sand Mountain blue butterfly is known only from Sand Mountain in Churchill County, Nevada, where it is dependent on its larval host plant, Kearney buckwheat (*Eriogonum nummularre*) (Austin 1998). The petitioners note that while the Kearney buckwheat is widespread in Nevada and also occurs

in Utah, Arizona, and California, several reconnaissance surveys have been conducted of sand dunes within 62.5 mile (mi) (100 kilometer (km)) radius of Sand Mountain in search of populations of Kearney buckwheat large enough to support a population of the butterfly. No Kearney buckwheat plants have been observed on any of these surveys, and the surveyors concluded that if the plant were present, its population is so small that it would not provide suitable habitat for the Sand Mountain blue butterfly. The petition relies on communication from a species expert, Claudia Funari of the U.S. Bureau of Land Management (BLM) to further state that no other habitat exists within the flight range of the butterfly. In our files we have an electronic message which corroborates this claim (Funari 2004). Furthermore, information from our files indicates that butterflies of the family Lycaenidae are known to have limited dispersal distances (Arnold 1983, Peterson 1994 as cited in Peterson 1996). While in some cases they may employ a stepping-stone method of hopping to habitat patches, increasing the likelihood of dispersing further and expanding their range, the petitioners have provided substantial survey information indicating no populations of the host plant or the Sand Mountain blue butterfly occur within a 62.5 mi (100 km) radius of Sand Mountain. Thus, it is unlikely given their life history, ecology, and dispersal capabilities that the Sand Mountain blue butterfly would be found beyond this distance.

The petition claims that the Sand Mountain blue butterfly occurs only within the Sand Mountain Recreation Area (SMRA), a BLM designation that encompasses 4,795 acres (ac) (1,940 hectares (ha)), and, according to the petitioners, is about 1.0 mi (1.6 km) wide and 3.5 mi (5.6 km) long. It notes, however, that Kearney buckwheat, the larval host plant on which the butterfly depends, has a patchy distribution and much of the area is open sand. The petition includes a map as Figure 4 that shows dune shrub habitat extending onto BLM lands adjacent to the designated boundary of the SMRA (BLM 2003). The petitioners claim that the Sand Mountain blue butterfly is dependent on 1,000 ac (405 ha) of Kearney buckwheat habitat is supported by a report referenced in the petition that states that between 1,000 ac (405 ha) and 1,600 ac (647 ha) of dune shrub habitat occur inside and outside the SMRA (BLM 2004). This dune shrub habitat is comprised of 13 shrub species,

one of which is the Kearney buckwheat (BLM 2004).

The petitioners present data in Figure 9, provided to them by BLM, that documents an increase in annual visitor use at the SMRA from about 16,000 persons in 1981 to over 40,000 persons in 2003 (BLM 2003). The petition notes that as early as 1985, motorized recreation by motorcycles, four wheel drive vehicles, three wheelers, and dune buggies accounted for over 90 percent of the total visits to the SMRA (BLM 1985). The 2003 BLM data provided by the petitioners also show an increase in route proliferation from about 20 mi (32 km) of off-road vehicle trails in 1981 to about 200 mi (320 km) in 2003. The petition includes four figures (maps) that document the proliferation of the route system based on a BLM analysis of satellite imagery from 1978, 1994, 1999, and 2002 (BLM 2003). In addition to the overall proliferation of off-road vehicle routes documented by the imagery, the maps clearly show an increase in the amount of habitat fragmentation and an expansion of the off-road vehicle route system from the more accessible southern end of the main dune into shrub habitat toward the north and northeast that had been relatively undisturbed as recently as 1994. Thus, while about 1,000 ac (405 ha) of potential butterfly habitat may remain, an estimated reduction in habitat of about 50 percent based on our visual comparison of 1978 and 2002 satellite imagery, much of this remaining habitat is highly fragmented by the extensive trail system that has been created. Furthermore, the off-road vehicle use that has led to this reduction in and fragmentation of habitat continues to this day and poses an ongoing threat to the viability of the Sand Mountain blue butterfly.

The petition also cites observations over the past 25 years noting the effects of off-road vehicles on the Sand Mountain dune shrub habitat and, in particular, on the Kearney buckwheat. These include: (1) A letter documenting the extirpation of all plant life from an area 150 ft (46 m) wide along the edge of the main dune over a period of several years (Giuliani 1977); (2) a memorandum reporting that up to half of 58 individual Kearney buckwheat plants inspected on the south side of the mountain had been crushed and broken off at the ground surface and were either dead or in the process of resprouting from the rootstocks (USFWS 1994); (3) a report to the Service from a research scientist at the University of Nevada, Reno (Brussard 1995 (cited incorrectly as Brussard 1996 in the petition)) stating that a continued decline of the Kearney

buckwheat in the overall area could call into question the continued existence of the butterfly; and (4) an assessment by The Nature Conservancy (2002) that determined the condition of the dunes to be heavily impaired due to loss of vegetative cover from recreational use and abuse. The petition notes that in this assessment, The Nature Conservancy found that running vehicles at high speeds over large perennial plants, in particular, was a significant source of stress to the Sand Mountain dune system. The petitioners note that Kearney buckwheat plants are intentionally targeted because they accumulate sand at their base, thereby forming natural jumps. We have determined that the report to the Service cited as Brussard (1995) actually states "as long as the foodplant remains as abundant as it is now in the overall dune area, we saw no particular threat to the continued existence of the butterfly." However, despite the inaccurate characterization of this letter in the petition, the statement does imply that should the abundance of Kearney buckwheat decline, a circumstance for which the petitioners have provided significant evidence, the loss of this critical foodplant would be a threat to the continued existence of the butterfly.

The petition also provides numerous citations from scientific literature that document the effects of off-road vehicles on terrestrial habitats in arid environments, including sand dunes. The effects include the elimination of a tiger beetle that was once widespread and abundant along beaches (Black and Vaughn 2003); significant reductions in the number, density, and cover of plants, including shrubby perennials (Bury and Luckenbach 1983); and direct impacts on desert vegetation (Stebbins 1995; Lathrop 1983; Lathrop and Rowlands 1983). Documentation also indicates that natural recovery rates of perennial vegetative cover damaged by off-road vehicles in arid environments can take decades and, in some cases, may require centuries (Lathrop and Rowlands 1983; Kockelman 1983; Webb and Wilshire 1983).

None of these citations provides specific evidence of a direct significant threat to the Sand Mountain blue butterfly. The papers by Bury and Luckenbach (1983, pp. 211–213), Lathrop (1983, pp. 157–164), Lathrop and Rowlands (1983, pp. 138–141, 144–146), and Stebbins (1995, pp. 471–472), however, do provide documentation that off-road vehicles can damage and destroy plants, and result in significant decreases in plant numbers, density, and cover of plants, including shrubby

perennials at various sites in the western North American deserts.

The papers by Lathrop and Rowlands (1983, p. 143) and Kockelman (1983, p. 3) also provide a timeframe for understanding natural recovery rates of habitats damaged by off-road vehicle use in arid environments. Recovery of damaged vegetation is a process of critical importance to the Sand Mountain blue butterfly because it depends on the presence of its host plant, the Kearney buckwheat, on an annual basis in order to reproduce. Based on the data provided by the petitioners (BLM 2003, 2004), we estimate that the habitat on which the Sand Mountain blue butterfly depends has been reduced by as much as 50 percent over the past 25 years and that, at most, 1,000 ac (405 ha) of potential, but highly fragmented, habitat remains. These studies provide reliable documentation that even if off-road vehicle use were to be eliminated from Sand Mountain, natural recovery of the Kearney buckwheat habitat may take decades, a time frame that poses an indirect threat to the long-term viability of a species that must reproduce annually.

The petition also claims that off-road vehicles alter the hydrology of dune systems by exposing clay layers that create an impermeable barrier to the percolation of precipitation into the soil. Further vehicle impacts break the clay layer and precipitation percolates to depths where it is beyond the reach of seedlings attempting to establish (Tonenna no date). No data are provided to support this claim; therefore, we consider it speculative. The petition also claims that constant disruption of the soil surface makes it difficult or impossible for seeds to germinate. We agree the germination process would be made difficult or impossible under frequent disturbance by vehicles. The petition claims that this could be the primary reason for a reported skew in Kearney buckwheat populations at Sand Mountain toward older shrubs. The petition provides no documentation to support this claim. The persistence of some plant species may depend on episodic years of strong recruitment (Brigham and Thomson 2003, p. 154). Episodic regeneration was not found to be characteristic of several plants studied in the cold deserts of the Great Basin in which Sand Mountain is located (West *et al.* 1979, pp. 384–385). The same researchers, however, also found no correlation between plant size and plant age, and that plants that appear even-aged because of their similar size are often uneven-aged (West *et al.* 1979, pp. 386). The petitioners do

not indicate whether this critical aspect of population structure was considered.

We conclude that the petition provides substantial information to support the claim that off-road vehicle use at Sand Mountain presents direct and indirect threats to the dune shrub habitat with Kearney buckwheat on which the Sand Mountain blue butterfly depends. In particular, data provided to the petitioners by the BLM (2003) reliably documents that within the past 25 years a progressive loss of dune shrub habitat, continuing fragmentation of dune shrub habitat, and an ongoing expansion of the route system into dune shrub habitat previously considered secure for the butterfly has occurred. The data presented in the petition document that annual visitor use has more than doubled and the route system has expanded from 20 miles (32 km) to over 200 miles (320 km) over this time period. The petition presents an estimate, based on a personal communication from the BLM (Tonenna, no date), that a maximum of about 1,000 ac (405 ha) of dune shrub habitat remain, and notes that the Kearney buckwheat, on which the Sand Mountain blue butterfly depends, has a patchy distribution within the remaining, highly fragmented habitat. The petitioners also reference a report that provides reliable information indicating that at the time of the petition, an estimated 1,000 to 1,600 ac (405 to 647 ha) of dune shrub habitat remained in which Kearney buckwheat is a component (BLM 2004, p. 4). We estimate, based on the data presented in the petition (BLM 2003, 2004), about 50 percent of the dune shrub habitat may have been destroyed or altered over this 25-year time span. The off-road vehicle use that has led to this reduction in and fragmentation of habitat continues to this day and poses a significant and ongoing threat to the continued viability of the Sand Mountain blue butterfly.

#### *B. Overutilization for Commercial, Recreational, Scientific, or Educational Purposes*

The petition claims collection by overzealous lepidopterists is a potential threat because of the rarity of the Sand Mountain blue butterfly. While we have accepted the claim that the Sand Mountain blue butterfly occurs only at Sand Mountain, the petition does not provide any data to substantiate the claim that the species is threatened by collection.

#### *C. Disease or Predation*

The petitioners claim that diseases affecting larval host plants and butterflies, and predation by native and

introduced wildlife have affected other butterfly species with small population sizes, but provide no data to support these claims, and note that no information on the potential impacts of disease or predation to the Sand Mountain blue butterfly is available.

#### *D. Inadequacy of Existing Regulatory Mechanisms*

The petition claims that the BLM has failed to protect habitat for the Sand Mountain blue butterfly from excessive off-road vehicle use over the past 25 years, and cites a public comment letter on the 1978 draft SMRA which states concern over the potential impacts to the invertebrate fauna of the dune system and notes that the management plan fails to adequately take into account biological considerations (Hardy 1978).

The petition also cites a mid-1990s effort by the BLM, the Service, and others to assess the status of the Sand Mountain blue butterfly in response to a complaint that off-road vehicles were posing a threat to its existence by impacting its host plant (Austin 1990). The initial outcome of this effort was a determination that no emergency action was necessary because, during the course of the assessment, the Kearney buckwheat was found to be much more common than previously believed, particularly in the northeastern portion of the dune system. Instead, the BLM and Service decided to institute a monitoring plan in order to avoid an emergency situation in the future (BLM 1995, p. 1). The monitoring plan consisted only of establishing permanent photographic points. Due to personnel changes in both agencies, monitoring was discontinued after a few years. In recent years, the photographic points have been revisited and found to reliably document the ongoing alteration and destruction of shrub habitat (Tonenna 2006).

The petition notes that in the Spring of 2002, BLM staff recommended that some areas of Sand Mountain be closed to protect the Sand Mountain blue butterfly. As a result, a group comprised of BLM and Service staff, representatives from conservation and off-road vehicles groups, and representatives of the Fallon-Paiute Shoshone Tribe, who consider Sand Mountain sacred, proposed that 1,000 ac (405 ha) be closed to off-road vehicles while keeping the more popular off-road riding areas open. No action was taken on this proposal.

The petitioners claim that in 2003, the BLM implemented an emergency action to protect and restore the sand dune ecosystem that included the following

six main actions: (1) Continue to manage the SMRA under the existing off-road vehicle designation; (2) develop programs and practices that encourage off-road vehicle users to prevent disturbance of Kearney buckwheat habitat within and outside of the SMRA; (3) begin efforts to restore and rehabilitate disturbed Kearney buckwheat habitat within and outside of the SMRA; (4) identify existing disturbed travel routes through the Kearney buckwheat habitat to connect off-road vehicle use areas within and outside the SMRA and discontinue off-road vehicle use in habitat outside these travel routes; (5) continue scientific investigations into the Sand Mountain ecosystem, including studies of the natural history of the plants and animals, restoration techniques, and monitoring technology; and (6) initiate a revised management plan for the Sand Mountain landscape to update the current Recreation Area Management Plan, reflecting the increasing amount and variety of uses and demands of the area.

The primary claim that the petitioners make regarding this strategy is that compliance with the encouraged off-road vehicle route system is voluntary and unenforceable, and therefore ineffective in preventing further habitat decline. They cite data from a 2004 BLM report that documents noncompliance occurring throughout the area with all routes continuing to be used based on 15 weeks of compliance monitoring. Impacts to shrub vegetation continued with multiple vehicles riding through vegetation despite alternative existing routes nearby that avoid vegetation. The petitioners note that Kearney buckwheat plants are intentionally targeted because sand accumulates around the base forming natural jumps. The report states that educational efforts and increased signage are routinely ignored, and, although there does seem to have been some level of compliance as a result of the management changes, "there is still significant noncompliance that will likely continue the trend of vegetation loss and prevent the rehabilitation of the area" (BLM 2004).

We have reviewed all of the sources cited in the petition and have concluded that they provide substantial information that existing regulatory mechanisms may be inadequate to prevent the progressive decline of the habitat on which the Sand Mountain blue butterfly depends.

#### *E. Other Natural or Manmade Factors Affecting the Species' Continued Existence*

The petition claims that invasive plants, and particularly Russian thistle (*Salsola kali*), pose a threat to the Sand Mountain blue butterfly because the fuel load it produces when dry increases the potential for wildfire. The petitioners also claim that Kearney buckwheat is not adapted to resist fire, and fire could kill or seriously damage plants since wildfires have not occurred historically at Sand Mountain. An increase in Russian thistle, therefore, would increase the risk that a fire may occur and habitat for the Sand Mountain blue butterfly would be destroyed (Tonnena no date).

Russian thistle is known to occur at Sand Mountain and, when dried, is highly combustible. However, the petition provides no data to support the claim that it is so widespread as to constitute a significant threat to either the Kearney buckwheat or the Sand Mountain blue butterfly. Nor does the petition provide documentation for the claim that Kearney buckwheat is not adapted to resist fire. Elsewhere in the petition, the petitioners note that Kearney buckwheat has an extensive branching caudex from a deep, woody taproot (Reveal 2002). It is at least possible that this taproot, buried beneath sand, would survive and resprout after fire, as it has been observed to do after damage to the above-ground shoots (USFWS 1994). We do not, therefore, find the petition to provide substantial information to support the claim that invasive plants and/or fire currently pose a significant threat to the Sand Mountain blue butterfly.

In addition, the petition notes that most insect populations normally experience large fluctuations in size (Ehrlich 1992; Schultz 1998), and that weather, predation, and disease may cause annual changes of an order of magnitude or more. The petition claims that these normal population fluctuations, in combination with habitat alteration or loss, can result in population extirpations (Hanski *et al.* 1995) and that, because of its extremely limited geographic area, the butterfly is extremely vulnerable to extinction.

We acknowledge that insect populations may experience normal large population fluctuation, although the petition provides no data specific to the Sand Mountain blue butterfly. We have previously, under Factor C, noted that there is no evidence to support the claim that disease or predation are threats to the butterfly. Nor is there any

evidence presented that the Sand Mountain blue butterfly population fluctuates in response to weather. We acknowledge that habitat alteration may exacerbate normal population fluctuations, and that this may make the Sand Mountain blue butterfly, a species likely to experience large population fluctuations (Murphy 2006), more susceptible to extinction. There is no evidence provided, however, that this has occurred, or is occurring, and therefore we do not find this threat to be substantial.

#### **Finding**

We have reviewed the petition and literature cited in the petition, and evaluated that information. On the basis of this review and evaluation, we find that the petition does present substantial information to indicate that listing the Sand Mountain blue butterfly may be warranted. The Sand Mountain butterfly is known only from Sand Mountain, Nevada, where it is closely associated with its host shrub, the Kearney buckwheat. Adult butterflies, which survive only a few weeks, deposit their eggs on the Kearney buckwheat, which is the only food for the larvae (caterpillars) that hatch the following spring. Larvae likely pass through several stages of molting, emerging larger each time, with each stage dependent on the availability of the food resource. The final molt results in a pupa which attaches to a twig or other surface and from which the adult emerges resource (Scott 1986, p. 21). The annual continuance of the butterfly population larvae, therefore, depends entirely upon this food.

An estimated 1,000 ac (405 ha) of dune shrub habitat remained in 2003, an estimated reduction of about 50 percent over the past 25 years. Moreover, much of this remaining habitat has been highly fragmented by over 200 miles (320 km) of off-road vehicle routes. This reduction and fragmentation of habitat correlates with a significant increase in off-road vehicle recreational use of the area over the same time period. Recreational use continues to increase, and all areas of the Kearney buckwheat habitat upon which the Sand Mountain blue butterfly depends remain open to off-road vehicle use as a result of inadequate regulatory mechanisms. The reduction and fragmentation of Kearney buckwheat habitat, therefore, represents a direct reduction in the food critical to the survival of the larvae and their subsequent emergence as reproductive adults. As the food supply diminishes, fewer larvae survive and fewer adults are produced, which in turn is likely to result in fewer eggs being deposited.

Over time this will result in smaller and smaller population levels as habitat destruction continues. Thus, there is substantial information presented in the petition that the reduction in available habitat is leading to a decrease in population that will continue over time, thus increasing the risk of extinction. Therefore we conclude that the petition has presented substantial information that listing may be warranted for this species. We will initiate a status review to determine whether listing is warranted.

The petitioners also requested that critical habitat be designated for this species. We always consider the need

for critical habitat designation when listing species. If we determine in our 12-month finding that listing the Sand Mountain blue butterfly is warranted, we will address the designation of critical habitat at the time of the proposed rulemaking.

#### References Cited

A complete list of all references cited herein is available, upon request, from the Nevada Fish and Wildlife Office (see **ADDRESSES**).

#### Author

The primary author of this notice is the Nevada Fish and Wildlife Office (see **ADDRESSES**).

#### Authority

The authority for this action is section 4 of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: July 28, 2006.

#### Kenneth Stansell,

*Acting Director, U.S. Fish and Wildlife Service.*

[FR Doc. E6-12577 Filed 8-7-06; 8:45 am]

**BILLING CODE 4310-55-P**

# Notices

Federal Register

Vol. 71, No. 152

Tuesday, August 8, 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.

## ADVISORY COUNCIL ON HISTORIC PRESERVATION

### Notice of Meeting

**AGENCY:** Advisory Council on Historic Preservation.

**SUMMARY:** Notice is hereby given that the Advisory Council on Historic Preservation (ACHP) will meet on Friday, August 18, 2006. The meeting will be held in Salon B at the Cuartel de Ballaja, Calle Norzagaray Final, San Juan, Puerto Rico at 9:30 a.m.

The ACHP was established by the national Historic Preservation Act of 1966 (16 U.S.C. 470 *et seq.*) to advise the President and Congress on national historic preservation policy and to comment upon Federal, federally assisted, and federally licensed undertakings having an effect upon properties listed in or eligible for inclusion in the National Register of Historic Places. The ACHP's members are the Architect of the Capitol; the Secretaries of the Interior, Agriculture, Defense, and Transportation; the Administrators of the Environmental Protection Agency and General Services Administration; the chairman of the National Trust for Historic Preservation; the president of the National Conference of State Historic Preservation Officers; a Governor; a Mayor; a Native American; and eight non-Federal members appointed by the President.

The agenda for the meeting includes the following:

- I. Chairman's Welcome.
- II. ACHP Award for Federal *Preserve America* Achievement and Chairman's Award Presentation.
- III. *Preserve America* Program Status Report.
  - A. "The *Preserve America* Executive Order Report to the President"—Next Steps.
  - B. *Preserve America* Summit.
- IV. ACHP Strategic Plan Discussion.
- V. Report of the Preservation Initiatives Committee.
  - A. Heritage Tourism Issues.
  - B. Legislation.
- VI. Report of the Federal Agency Programs

- Committee.
  - A. Update on Gulf Coast Recovery Efforts.
  - B. Agency Program Issues.
  - C. Section 106 Performance Measures.
- VII. Report of the Communications, Education, and Outreach Committee.
  - A. Newspapers in Education Update.
  - B. 2007 *Preserve America* Presidential Award Initiative.
- VIII. Report of the Native American Advisory Group.
- IX. Report of the Affordable Housing and Historic Preservation Task Force.
- X. Report of the Base Realignment and Closure Task Force.
- XI. Chairman's Report.
  - A. ACHP Alumni Foundation.
  - B. Legislative Issues.
    1. ACHP Reauthorization Legislation.
    2. ACHP Appropriation.
- XII. Executive Director's Report.
- XIII. New Business.
- XIV. Adjourn.

**Note:** The meetings of the ACHP are open to the public. If you need special accommodations due to a disability, please contact the Advisory Council on Historic Preservation, 1100 Pennsylvania Avenue, NW., Room 809, Washington, DC 202-606-8503, at least seven (7) days prior to the meeting.

### FOR FURTHER INFORMATION CONTACT:

Additional information concerning the meeting is available from the Executive Director, Advisory Council on Historic Preservation, 1100 Pennsylvania Avenue, NW., #809, Washington, DC 20004.

Dated: August 2, 2006.

**John M. Fowler,**

*Executive Director.*

[FR Doc. 06-6747 Filed 8-7-06; 8:45am]

**BILLING CODE 4310-K6-M**

## DEPARTMENT OF AGRICULTURE

### Forest Service

#### Notice of Sanders County Resource Advisory Committee Meeting

**AGENCY:** Forest Service, USDA.

**ACTION:** Notice of meeting.

**SUMMARY:** Pursuant to the authorities in the Federal Advisory Committee Act (Pub. L. 92-463) and under the Secure Rural Schools and Community Self-Determination Act of 2000 (Pub. L. 106-393) the Lolo and Kootenai National Forests' Sanders County Resource Advisory Committee will meet on August 10 at 7 p.m. in Thompson Falls,

Montana for a business meeting. The meeting is open to the public.

**DATES:** August 10, 2006.

**ADDRESSES:** The meeting will be held at the Thompson Falls Courthouse, 1111 Main Street, Thompson Falls, MT 59873.

### FOR FURTHER INFORMATION CONTACT:

Randy Hojem, Designated Federal Official (DFO), District Ranger, Plains Ranger District, Lolo National Forest at (406) 826-3821.

**SUPPLEMENTARY INFORMATION:** Agenda topics include voting on new RAC project proposals and receiving public comment. If the meeting location is changed, notice will be posted in the local newspapers, including the Clark Fork Valley Press, and Sanders County Ledger.

Dated: July 28, 2006.

**Randy Hojem,**

*DFO, Plains Ranger District, Lolo National Forest.*

[FR Doc. 06-6749 Filed 8-7-06; 8:45 am]

**BILLING CODE 3410-11-M**

## DEPARTMENT OF AGRICULTURE

### Forest Service

#### Siskiyou County Resource Advisory Committee

**AGENCY:** Forest Service, USDA.

**ACTION:** Notice of meeting.

**SUMMARY:** The Siskiyou County Resource Advisory Committee (RAC) will meet in Yreka, California, August 21, 2006. The meeting will include routine business, and discussion and recommendation of project submissions for RAC funding.

**DATES:** The meeting will be held August 21, 2006, from 4 p.m. to 6 p.m.

**ADDRESSES:** The meeting will be held at the Yreka High School Library, Preece Way, Yreka, California.

**FOR FURTHER INFORMATION CONTACT:** Bob Talley, Forest RAC coordinator, Klamath National Forest, (530) 841-4423 or electronically at [rtalley@fs.fed.us](mailto:rtalley@fs.fed.us).

**SUPPLEMENTARY INFORMATION:** The meeting is open to the public. Public comment opportunity will be provided and individuals will have the opportunity to address the Committee at that time.

Dated: August 2, 2006.

**Margaret J. Boland,**

*Designated Federal Official.*

[FR Doc. 06-6750 Filed 8-7-06; 8:45 am]

**BILLING CODE 3410-11-M**

## DEPARTMENT OF AGRICULTURE

### Forest Service

#### Notice of Tri-County Advisory Committee Meeting

**AGENCY:** Forest Service, USDA.

**ACTION:** Notice of meeting.

**SUMMARY:** Pursuant to the authorities in the Federal Advisory Committee Act (Pub. L. 92-463) and under the Secure Rural Schools and Community Self-Determination Act of 2000 (Pub. L. 106-393) the Beaverhead-Deerlodge National Forest's Tri-County Resource Advisory Committee will meet on Thursday, September 7, 2006, from 4 p.m. to 8 p.m., in Deer Lodge, Montana, for a business meeting. The meeting is open to the public.

**DATES:** Thursday, September 7, 2006.

**ADDRESSES:** The meeting will be held at the USDA Service Center, 1002 Hollenback Road, Deer Lodge, Montana.

**FOR FURTHER INFORMATION CONTACT:**

Bruce Ramsey, Designated Forest Official (DFO), Forest Supervisor, Beaverhead-Deerlodge National Forest, at (406) 683-3973.

**SUPPLEMENTARY INFORMATION:** Agenda topics for this meeting include a review of projects proposed for funding as authorized under Title II of Pub. L. 106-393, and public comment. If the meeting location is changed, notice will be posted in local newspaper, including *The Montana Standard*.

Dated: August 2, 2006.

**Bruce Ramsey,**

*Designated Federal Official, Forest Supervisor.*

[FR Doc. 06-6751 Filed 8-7-06; 8:45 am]

**BILLING CODE 3410-11-M**

## DEPARTMENT OF AGRICULTURE

### Forest Service

**RIN 0596-AC22**

#### Notice of Extension of Public Comment Period for Predator Damage Management in Wilderness Areas

**AGENCY:** Forest Service, USDA.

**ACTION:** Notice of extension of public comment period.

**SUMMARY:** The Forest Service is extending the public comment period

an additional 30 days for the notice of proposed directives published in the **Federal Register** of June 7, 2006 (FR Doc. E6-8839, on pages 32915-32918) concerning predator damage management in wilderness areas. Guidance to Forest officers in the management of predator damage in wilderness areas is contained in the Forest Service Manual (FSM) Title 2300, Recreation, Wilderness, and Related Resources Management and FSM 2600, Wildlife, Fish, and Sensitive Plant Habitat Management. These proposed directives would conform agency direction regarding predator damage with provisions in an interdepartmental Memorandum of Understanding (MOU) between the USDA Animal and Plant Health Inspection Service, Wildlife Services Division and the USDA Forest Service. The MOU, first entered into in 1993, was renewed in 1998, and again in 2004, with minor revisions. Comments received in response to this notice will be considered in development of the final directives for predator damage management on National Forest System lands, including wilderness.

**DATES:** The comment period has been extended from August 7, 2006, to September 7, 2006.

**ADDRESSES:** Send written comments to Forest Service, USDA, Attn: Director, Wilderness and Wild and Scenic Rivers Resources, 201 14th Street SW., Washington, DC 20250; by electronic mail to [PDM@fs.fed.us](mailto:PDM@fs.fed.us); or by fax to (202) 205-1145. Comments may also be submitted by following the instructions at the Federal e-Rulemaking portal, <http://www.regulations.gov>. If comments are sent by electronic mail or by fax, the public is requested not to send duplicate written comments via regular mail. Please confine written comments to issues pertinent to the proposed directives; explain the reasons for any recommended changes; and, where possible, reference the specific section or paragraph being addressed. The Forest Service may not include in the administrative record for the proposed directives those comments it receives after the comment period closes (see **DATES**) or comments delivered to an address other than those listed in this **ADDRESSES** section.

All comments, including names and addresses when provided, are placed in the record and are available for public inspection and copying. The public may inspect comments received on these proposed directives in the Office of the Director, Wilderness and Wild and Scenic Rivers Staff, Forest Service, USDA, 4th Floor-Central, Sidney R.

Yates Federal Building, 1400 Independence Avenue, SW., Washington, DC, between the hours of 8:30 a.m. and 4 p.m. on business days. Those wishing to inspect comments are encouraged to call ahead to (202) 205-1706 to facilitate entry into the building.

**FOR FURTHER INFORMATION CONTACT:** Don Fisher, Wilderness Program, (202) 205-1414, Forest Service, USDA.

**SUPPLEMENTARY INFORMATION:** The Forest Service published a document in the **Federal Register** of June 7, 2006, in FR Doc. E6-8839, on pages 32915-32918, concerning predator damage management in wilderness areas for a 60-day comment period. This notice announces a 30-day extension of the comment period. This extension is necessary to provide the public with an opportunity to review and comment on the notice of proposed directives.

Dated: August 3, 2006.

**Gloria Manning,**

*Associate Deputy Chief, National Forest System.*

[FR Doc. 06-6784 Filed 8-3-06; 5:07 pm]

**BILLING CODE 3410-11-P**

## COMMISSION ON CIVIL RIGHTS

### Agenda and Notice of Public Meeting of the North Carolina Advisory Committee

Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights, that a meeting of the North Carolina Advisory Committee will convene at 10 a.m. and adjourn at 3 p.m., on Tuesday, September 26, 2006, at the offices of Womble, Carlyle, Sandridge, and Rice located at 150 Fayetteville Street, Suite 2100, Raleigh, North Carolina 27601. The purpose of the meeting is an orientation of Committee members, a discussion of the Committee's report on Title I funding, a briefing on the Committee's school desegregation project, and a discussion of a project for 2007.

Persons desiring additional information, or planning a presentation to the Committee should contact Peter Minarik, Ph.D., Regional Director, the Southern Regional Office, (404) 562-7000 (TDD 404-562-7004). Hearing impaired persons who will attend the meeting and require the services of a sign language interpreter should contact the Regional Office at least ten (10) working days before the scheduled date of the meeting.

The meeting will be conducted pursuant to the provisions of the rules and regulations of the Commission.

Dated at Washington, DC, August 3, 2006.

Ivy L. Davis,

*Acting Chief, Regional Programs  
Coordination Unit.*

[FR Doc. E6-12873 Filed 8-7-06; 8:45 am]

BILLING CODE 6335-01-P

## DEPARTMENT OF COMMERCE

### Foreign-Trade Zones Board

Order No. 1466

#### Termination Of Foreign-Trade Subzones 133B and 133C, (Maytag Corporation), Herrin, Illinois and Newton, Iowa

Pursuant to the authority granted in the Foreign-Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a-81u), and the Foreign-Trade Zones Board Regulations (15 CFR Part 400), the Foreign-Trade Zones Board has adopted the following order:

Whereas, on November 1, 1989, the Foreign-Trade Zones Board issued a grant of authority to the Quad-City Foreign-Trade Zone, Inc. (Quad-City) authorizing the establishment of Foreign-Trade Subzones 133B and 133C at the Maytag Corporation facilities in Herrin, Illinois and Newton, Iowa (Board Order 448, 54 FR 47246, 11/13/89);

Whereas, Quad-City advised the Board on August 9, 2005 (FTZ Docket 19-2006), that zone procedures were no longer needed at the facilities and requested voluntary termination of Subzones 133B and 133C;

Whereas, the request has been reviewed by the FTZ Staff and Customs and Border Protection officials, and approval has been recommended;

Now, therefore, the Foreign-Trade Zones Board terminates the subzone status of Subzones 133B and 133C, effective this date.

Signed at Washington, DC, this 26th day of July 2006.

David M. Spooner,

*Assistant Secretary of Commerce for Import Administration, Alternate Chairman, Foreign-Trade Zones Board.*

Attest:

Andrew McGilvray,

*Acting Executive Secretary.*

[FR Doc. E6-12816 Filed 8-7-06; 8:45 am]

Billing Code: 3510-DS-S

## DEPARTMENT OF COMMERCE

### Foreign-Trade Zones Board

Order No. 1467

#### Expansion of Foreign-Trade Zone 163, Ponce, Puerto Rico

Pursuant to its authority under the Foreign-Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a-81u), the Foreign-Trade Zones Board (the Board) adopts the following Order:

Whereas, CODEZOL, C.D., grantee of Foreign-Trade Zone 163, submitted an application to the Board for authority to expand FTZ 163 to include a site in Guaynabo, Puerto Rico, adjacent to the San Juan Customs and Border Protection port of entry (FTZ Docket 67-2005, filed 12/22/2005);

Whereas, notice inviting public comment has been given in the **Federal Register** (70 FR 77376-77377, 12/30/2005); and,

Whereas, the Board adopts the findings and recommendations of the examiner's report, and finds that the requirements of the FTZ Act and Board's regulations are satisfied, and that approval of the application is in the public interest;

Now, therefore, the Board hereby orders:

The application to expand FTZ 163 is approved, subject to the FTZ Act and the Board's regulations, including Section 400.28.

Signed at Washington, DC, this 26th day of July 2006.

David M. Spooner,

*Assistant Secretary of Commerce for Import Administration, Alternate Chairman, Foreign-Trade Zones Board.*

Attest:

Andrew McGilvray,

*Acting Executive Secretary.*

[FR Doc. E6-12810 Filed 8-7-06; 8:45 am]

Billing Code: 3510-DS-S

## DEPARTMENT OF COMMERCE

### International Trade Administration

(A-351-809, A-201-805, A-580-809, A-533-502, A-549-502, A-489-501, C-489-502)

#### Continuation of Antidumping Duty Orders on Circular Welded Non-Alloy Pipes and Tubes from Brazil, Mexico, Republic of Korea, Antidumping Duty Orders on Welded Carbon Steel Pipe from India, Thailand and Turkey, and Countervailing Duty Order on Welded Carbon Steel Standard Pipe from Turkey

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**SUMMARY:** As a result of the determinations by the Department of Commerce (the Department) and the International Trade Commission (ITC) that revocation of the antidumping duty orders on circular welded non-alloy pipe and tube from Brazil, Mexico, and Republic of Korea (Korea), and antidumping duty orders on welded carbon steel pipe from India, Thailand and Turkey, and countervailing duty order on welded carbon steel standard pipe from Turkey, would likely lead to continuation or recurrence of dumping and countervailable subsidies, and material injury to an industry in the United States, the Department is publishing notice of continuation of these antidumping and countervailing duty orders.

**EFFECTIVE DATE:** August 8, 2006.

**CONTACT INFORMATION:** Martha Douthit or Dana Mermelstein, AD/CVD Operations, Office 6, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone:(202) 482-5050 or (202) 482-1391, respectively.

#### **SUPPLEMENTARY INFORMATION:**

##### **Scope of the Orders**

*Certain Circular Welded Non-Alloy Pipe and Tube from Brazil, Mexico and Korea - (A-351-809)(A-201-805)(A-580-809)*

The products covered by these orders are circular welded non-alloy steel pipes and tubes, of circular cross-section, not more than 406.4 millimeters (16 inches) in outside diameter, regardless of wall thickness, surface finish (black, galvanized, or painted), or end finish (plain end, beveled end, threaded, or threaded and coupled). These pipes and tubes are generally known as standard pipes and tubes and are intended for the low pressure

conveyance of water, steam, natural gas, and other liquids and gases in plumbing and heating systems, air conditioning units, automatic sprinkler systems, and other related uses, and generally meet ASTM A-53 specifications. Standard pipe may also be used for light load-bearing applications, such as for fence tubing, and as structural pipe tubing used for framing and support members for reconstruction or load-bearing purposes in the construction, shipbuilding, trucking, farm equipment, and related industries. Unfinished conduit pipe is also included in these orders.

All carbon steel pipes and tubes within the physical description outlined above are included within the scope of these orders, except line pipe, oil country tubular goods, boiler tubing, mechanical tubing, pipe and tube hollows for redraws, finished scaffolding, and finished conduit.

Standard pipe that is dual or triple certified/stenciled that enters the United States as line pipe of a kind used for oil or gas pipelines is also not included in this order. Imports of the products covered by these orders are currently classifiable under the following Harmonized Tariff Schedule of the United States (HTSUS) subheadings: 7306.30.10.00, 7306.30.50.25, 7306.30.50.32, 7306.30.50.40, 7306.30.50.55, 7306.30.50.85, and 7306.30.50.90.

Although the HTSUS subheadings are provided for convenience and customs purposes, our written description of the scope of these proceedings is dispositive.

*Certain Welded Carbon Steel Standard Pipe and Tube from India, Thailand and Turkey - (A-533-502)(A-549-502)(A-489-501)*

The products covered by these orders include circular welded non-alloy steel pipes and tubes, of circular cross-section, not more than 406.4 millimeters (16 inches) in outside diameter, regardless of wall thickness, surface finish (black, or galvanized, painted), or end finish (plain end, beveled end, threaded and coupled). Those pipes and tubes are generally known as standard pipe, though they may also be called structural or mechanical tubing in certain applications. Standard pipes and tubes are intended for the low pressure conveyance of water, steam, natural gas, air, and other liquids and gases in plumbing and heating systems, air conditioner units, automatic sprinkler systems, and other related uses. Standard pipe may also be used for light load-bearing and mechanical applications, such as for fence tubing,

and for protection of electrical wiring, such as conduit shells. The scope is not limited to standard pipe and fence tubing, or those types of mechanical and structural pipe that are used in standard pipe applications. All carbon steel pipes and tubes within the physical description outlined above are included in the scope of these orders, except for line pipe, oil country tubular goods, boiler tubing, cold-drawn or cold-rolled mechanical tubing, pipe and tube hollows for redraws, finished scaffolding, and finished rigid conduit. Imports of these products are currently classifiable under the following HTSUS subheadings: 7306.30.10.00, 7306.30.50.25, 7306.30.50.32, 7306.30.50.40, 7306.30.50.55, 7306.30.50.85, and 7306.30.50.90. Although the HTSUS subheadings are provided for convenience and customs purposes, our written description of the scope of these proceedings are dispositive.

*Certain Welded Carbon Steel Pipe and Tube from Turkey - (C-489-502)*

The merchandise subject to this countervailing duty order is 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"). These products are currently provided for under the 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 subject to this order is dispositive.

### Background

On July 5, 2005, the Department initiated and the ITC instituted sunset reviews of the antidumping duty orders on circular welded non-alloy pipe and tube from Brazil, Mexico, and Korea, antidumping duty orders on welded carbon steel pipe from India, Thailand and Turkey, and countervailing duty order on welded carbon steel standard pipe from Turkey, pursuant to section 751(c) of the Tariff Act of 1930, as amended ("the Act"). See *Initiation of Five-Year ("Sunset") Reviews*; 70 FR 38101 (July 1, 2005), and ITC notice of institution on *Certain Pipe and Tube From Argentina, Brazil, India, Korea, Mexico, Taiwan, Thailand, and Turkey*; 70 FR 38204 (July 1, 2005)

As a result of its review, the Department found that revocation of the antidumping and countervailing duty orders would likely lead to continuation or recurrence of dumping and countervailable subsidies, and notified the ITC of the magnitude of the margins

and the net countervailable subsidies likely to prevail were the orders to be revoked. See *Certain Circular Welded Carbon Steel Pipes and Tubes from India, Taiwan, Thailand, and Turkey, and Circular Welded Non-Alloy Steel Pipe from Brazil, Republic of Korea, Mexico, and Taiwan; Notice of Final Results of Expedited Five-Year ("Sunset") Reviews of Antidumping Duty Orders*; 70 FR 67662 (November 8, 2005), and *Final Results of Expedited Sunset Review: Welded Carbon Steel Standard Pipe from Turkey*; 70 FR 62097 (October 28, 2005).

On July 25, 2006, the ITC determined, pursuant to section 751(c) of the Act, that revocation of the antidumping duty orders on circular welded non-alloy pipe and tube from Brazil, Mexico, Korea, the antidumping duty orders on welded carbon steel pipe from India, Thailand and Turkey, and the countervailing duty order on welded carbon steel standard pipe from Turkey, would likely lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time. See *Certain Pipe and Tube from Argentina, Brazil, India, Korea, Mexico, Taiwan, Thailand, and Turkey*; 71 FR 42118 (July 25, 2006), and USITC Publication 3867 (July 2006), (Inv. Nos. 701-TA-253 and 731-TA-132, 252, 271, 409-410, 532-534, and 536) (Second Review)).

As a result of the determinations by the Department and the ITC that revocation of these antidumping and countervailing duty orders would likely lead to continuation or recurrence of dumping and countervailable subsidies, and material injury to an industry in the United States, pursuant to section 751(d)(2) of the Act, the Department hereby orders the continuation of the antidumping duty orders on circular welded non-alloy pipes and tubes from Brazil, Mexico, and Korea, the antidumping duty orders on welded carbon steel pipes from India, Thailand and Turkey, and the countervailing duty order on welded carbon steels standard pipes from Turkey.

U.S. Customs and Border Protection (CBP) will continue to collect antidumping and countervailing duty cash deposits at the rates in effect at the time of entry for all imports of subject merchandise.

The effective date of continuation of these orders will be the date of publication in the **Federal Register** of this Notice of Continuation. Pursuant to sections 751(c)(2) and 751(c)(6)(A) of the Act, the Department intends to initiate the next five-year reviews of these orders not later than July 2011.

These five-year (sunset) reviews and notice are in accordance with section 751(c) of the Act and published pursuant to section 777(i)(1) of the Act.

Dated: July 31, 2006.

**David M. Spooner,**

*Assistant Secretary for Import Administration.*

[FR Doc. E6-12794 Filed 8-7-06; 8:45 am]

**BILLING CODE 3510-DS-S**

**DEPARTMENT OF COMMERCE**

**International Trade Administration  
(A-570-827)**

**Notice of Amended Final Results of Antidumping Duty Administrative Review: Certain Cased Pencils from the People's Republic of China**

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.  
**SUMMARY:** The Department of Commerce (the Department) published the final results and partial rescission of the administrative review of the antidumping duty order on certain cased pencils from the People's Republic of China covering the period of review (POR) December 1, 2003, through November 30, 2004, on July 6, 2006. *See Certain Cased Pencils From the People's Republic of China; Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 71 FR 38366 (July 6, 2006) (*Final Results*). We are amending our final results to correct a ministerial error alleged by China First Pencil Co., Ltd./ Shanghai Three Star Stationery Industry Corp. (CFP/Three Star) pursuant to section 751(h) of the Tariff Act of 1930, as amended (the Act).

**EFFECTIVE DATE:** August 8, 2006.

**FOR FURTHER INFORMATION CONTACT:** Paul Stolz or Charles Riggle, 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) 482-4474 and (202) 482-0650, respectively.

**SUPPLEMENTARY INFORMATION:**

**Scope of the Order**

Imports covered by this order are shipments of certain cased pencils of any shape or dimension (except as noted below) which are writing and/or drawing instruments that feature cores of graphite or other materials, encased in wood and/or man-made materials, whether or not decorated and whether or not tipped (*e.g.*, with erasers, etc.) in any fashion, and either sharpened or unsharpened. The pencils subject to the order are currently classifiable under subheading 9609.10.00 of the Harmonized Tariff Schedule of the United States (HTSUS). Specifically excluded from the scope of the order are mechanical pencils, cosmetic pencils, pens, non-cased crayons (wax), pastels, charcoals, chalks, and pencils produced under U.S. patent number 6,217,242, from paper infused with scents by the means covered in the above-referenced patent, thereby having odors distinct from those that may emanate from pencils lacking the scent infusion. Also excluded from the scope of the order are pencils with all of the following physical characteristics: 1) length: 13.5 or more inches; 2) sheath diameter: not less than one-and-one quarter inches at any point (before sharpening); and 3) core length: not more than 15 percent of the length of the pencil.

In addition, pencils with all of the following physical characteristics are excluded from the scope of the order: novelty jumbo pencils that are octagonal in shape, approximately ten inches long, one inch in diameter before sharpening, and three-and-one eighth inches in circumference, composed of turned

wood encasing one-and-one half inches of sharpened lead on one end and a rubber eraser on the other end.

Although the HTSUS subheading is provided for convenience and customs purposes, our written description of the scope of the order is dispositive.

**Amended Final Results**

In accordance with section 751(a) the Act, on July 6, 2006, the Department published its final results and partial rescission of the administrative review of certain cased pencils from the People's Republic of China. *See Final Results.*

On July 10, 2006, CFP/Three Star submitted a ministerial error allegation with respect to the final results of administrative review. No other interested party submitted ministerial error allegations. No party submitted comments on the ministerial error allegation submitted by CFP/Three Star. In accordance with section 751(h) of the Act, we have determined that a ministerial error was made in the calculation of the final margin for CFP/Three Star. *See Memorandum from Charles Riggle, Program Manager, AD/CVD Operations, Office 8, to Wendy J. Frankel, Director, AD/CVD Operations, Office 8: Antidumping Duty Administrative Review of Certain Cased Pencils from the People's Republic of China, Allegation of Ministerial Error (July 28, 2006).* Pursuant to section 751(h) of the Act, we have corrected the error and are amending the final results of review accordingly. *See Memorandum from Paul Stolz, Case Analyst through Charles Riggle, Program Manager, to the File, Analysis Memorandum for Amended Final Results for China First Pencil Co., Ltd./ Shanghai Three Star Stationery Industry Corp. (July 28, 2006).* The revised final weighted-average dumping margin is as follows:

Exporter/Manufacturer	Original Weighted-Average Margin Percentage	Amended Weighted-Average Margin Percentage
China First Pencil Co., Ltd./Shanghai Three Star Stationery Industry Corp. ....	26.62	2.76

The Department shall determine, and CBP shall assess, antidumping duties on all appropriate entries based on the amended final results. For details on the assessment of antidumping duties on all appropriate entries, *see Final Results*. This notice is published pursuant to section 777(i) of the Act and 19 CFR 351.224(e).

July 28, 2006.

**David M. Spooner,**

*Assistant Secretary for Import Administration.*

[FR Doc. E6-12818 Filed 8-7-06; 8:45 am]

**BILLING CODE 3510-DS-S**

**DEPARTMENT OF COMMERCE**

**International Trade Administration  
(A-821-807)**

**Final Results of Expedited Sunset Review: Ferrovandium and Nitrided Vanadium from Russia**

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**SUMMARY:** On May 1, 2006, the Department of Commerce (“the Department”) initiated a sunset review of the antidumping duty order on ferrovanadium and nitrided vanadium from Russia pursuant to section 751(c) of the Tariff Act of 1930, as amended (“the Act”). The Department conducted an expedited (120-day) sunset review of this order. As a result of this sunset review, the Department finds that revocation of the antidumping duty order would be likely to lead to continuation or recurrence of dumping. The dumping margins are identified in the *Final Results of Review* section of this notice.

**EFFECTIVE DATE:** August 8, 2006.

**FOR FURTHER INFORMATION:** David Goldberger or Brandon Farlander, AD/CVD Operations, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street & Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482-4136 or (202) 482-0182, respectively.

**SUPPLEMENTARY INFORMATION:**

**Background:**

On May 1, 2006, the Department published the notice of initiation of the second sunset review of the antidumping duty order on ferrovanadium and nitrided vanadium from Russia pursuant to section 751(c) of the Act. *See Initiation of Five-year (“Sunset”) Reviews*, 71 FR 25568 (May 1, 2006). The Department received the Notice of Intent to Participate from the Vanadium Producers and Reclaimers Association (VPRRA) and its members: Gulf Chemical and Metallurgical Corporation and its wholly owned subsidiary, Bear Metallurgical Corporation; and Metallurgical Vanadium

Corporation (collectively “the domestic interested parties”), within the deadline specified in 19 CFR 351.218(d)(1)(i). The domestic interested parties claimed interested party status under section 771(9)(C) and (E) of the Act, as manufacturers of a domestic-like product in the United States, and a trade or business association of a majority of whose members manufacture, produce, or wholesale a domestic like product in the United States. We received complete substantive responses from the domestic interested parties within the 30-day deadline specified in 19 CFR 351.218(d)(3)(i). We received no responses from any respondent interested parties. As a result, pursuant to section 751(c)(4)(A) of the Act and 19 CFR 351.218(e)(1)(ii)(C)(2), the Department conducted an expedited (120-day) sunset review of the order.

**Scope of the Order**

The products covered by the order are ferrovanadium and nitrided vanadium, regardless of grade, chemistry, form or size, unless expressly excluded from the scope of this order. Ferrovanadium includes alloys containing ferrovanadium as the predominant element by weight (*i.e.*, more weight than any other element, except iron in some instances) and at least 4 percent by weight of iron. Nitrided vanadium includes compounds containing vanadium as the predominant element, by weight, and at least 5 percent, by weight, of nitrogen.

Excluded from the scope of the order are vanadium additives other than ferrovanadium and nitrided vanadium, such as vanadium-aluminum master alloys, vanadium chemicals, vanadium waste and scrap, vanadium-bearing raw materials, such as slag, boiler residues, fly ash, and vanadium oxides.

The products subject to this order are currently classifiable under subheadings 2850.00.20, 7202.92.00, 7202.99.5040, 8112.40.3000, and 8112.40.6000 of the Harmonized Tariff Schedule of the United States (“HTSUS”). Although the HTSUS subheadings are provided for convenience and customs purposes, our written description of the scope is dispositive.

**Analysis of Comments Received**

All issues raised in this review are addressed in the “Issues and Decision Memorandum for the Final Results Expedited Sunset Review of the Antidumping Duty Order on Ferrovanadium and Nitrided Vanadium from Russia” (“Decision Memo”), which is hereby adopted by this notice. The issues discussed in the Decision Memo include the likelihood of continuation or recurrence of dumping and the magnitude of the margins likely to prevail if the orders were to be revoked. Parties can find a complete discussion of all issues raised in these reviews and the corresponding recommendations in this public memorandum which is on file in the Central Records Unit, room B-099 of the main Commerce building.

In addition, a complete version of the Decision Memo can be accessed directly on the Web at <http://ia.ita.doc.gov/frn/index.html>. The paper copy and electronic version of the Decision Memo are identical in content.

**Final Results of Review**

We determine that revocation of the antidumping duty order on ferrovanadium and nitrided vanadium from Russia would be likely to lead to continuation or recurrence of dumping at the following weighted-average percentage margins:

Manufacturers/Exporters/Producers	Weighted Average Margin (percent)
Galt Alloys, Inc .....	3.75
Gesellschaft für Elektrometallurgie m.b.H. (and its related companies Shieldalloy Metallurgical Corporation and Metallurg, Inc.) .....	11.72
Odermet .....	10.10
All Other Russian Manufacturers and Exporters* .....	108.00

\* Prior to Russia’s graduation to market-economy status, this rate was referred to as the Russia-wide rate.

This notice also serves as the only reminder to parties subject to administrative protective orders (“APO”) of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305. Timely notification of the return or destruction of APO materials or conversion to judicial protective orders is hereby requested. Failure to

comply with the regulations and terms of an APO is a violation which is subject to sanction.

We are issuing and publishing the results and notice in accordance with sections 751(c), 752, and 777(i)(1) of the Act.

Dated: August 1, 2006.  
**David M. Spooner,**  
*Assistant Secretary for Import Administration.*  
 [FR Doc. E6-12812 Filed 8-7-06; 8:45 am]  
**BILLING CODE 3510-DS-S**

**DEPARTMENT OF COMMERCE****International Trade Administration**

A-337-806

**Notice of Preliminary Results of Antidumping Duty Administrative Review, Notice of Intent to Revoke in Part: Individually Quick Frozen Red Raspberries from Chile**

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**SUMMARY:** The Department of Commerce is conducting an administrative review of the antidumping duty order on individually quick frozen ("IQF") red raspberries from Chile. The period of review ("POR") is July 1, 2004, through June 30, 2005. This review covers sales of IQF red raspberries by seven producers/exporters. We preliminarily find that, during the POR, sales of IQF red raspberries were made below normal value. Also, we intend to revoke the antidumping duty order with respect to Santiago Comercio Exterior Exportaciones Sociedad Anonima ("SANCO"). Interested parties are invited to comment on these preliminary results. We will issue the final results not later than 120 days from the date of publication of this notice.

**EFFECTIVE DATE:** August 8, 2006.

**FOR FURTHER INFORMATION CONTACT:** Devta Ohri (Olmue, Valle Frio), Andrew McAllister (Vitafoods), Scott Holland (VBM), Yasmin Bordas (SANCO, Valles Andinos), Steve Williams (Arlavan), or Brandon Farlander, AD/CVD Operations, Office 1, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington DC 20230; telephone (202) 482-3853, (202) 482-1174, (202) 482-1279, (202) 482-3813, (202) 482-4619, or (202) 482-0182, respectively.

**SUPPLEMENTARY INFORMATION:****Background**

On July 9, 2002, the Department of Commerce ("Department") published an antidumping duty order on IQF red raspberries from Chile. See *Notice of Antidumping Duty Order: IQF Red Raspberries From Chile*, 67 FR 45460 (July 9, 2002). On July 1, 2005, the Department published a notice of opportunity to request administrative review of this order. See *Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review*, 70 FR 38099 (July 1, 2005).

On July 29, 2005, we received a request for review of 57 companies from the Pacific Northwest Berry Association, Lynden, Washington, and each of its individual members, Curt Maberry Farm; Enfield Farms, Inc.; Maberry Packing; and Rader Farms, Inc. (collectively, "the petitioners"). On July 29, 2005, we also received requests for review from Fruticola Olmue S.A. ("Olmue"), Alimentos Naturales Vitafoods S.A. ("Vitafoods"), Vital Berry Marketing S.A. ("VBM"), SANCO,<sup>1</sup> and Valles Andinos S.A. ("Valles Andinos").<sup>2</sup> On August 19, 2005, the petitioners requested that Sociedad Agroindustrial Valle Frio Ltda. ("Valle Frio") and Arlavan S.A. ("Arlavan") be mandatory respondents. On August 29, 2005, we initiated an administrative review of all 57 companies. See *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part*, 70 FR 51009 (August 29, 2005).

On September 23, 2005, the petitioners withdrew their request for review for 50 of the 57 companies for which they had originally requested an administrative review. On October 14, 2005, Valles Andinos withdrew its request for review. In accordance with 19 CFR 351.213(d)(1), on December 28, 2005, we partially rescinded this administrative review with respect to the 50 companies included in the petitioners' withdrawal request. We did not rescind the review with respect to Valles Andinos because the petitioners' July 29, 2005, request for review included a request for Valles Andinos. See *Individually Quick Frozen Red Raspberries from Chile: Notice of Partial Rescission of Antidumping Duty Administrative Review*, 70 FR 76771

<sup>1</sup> On July 6, 2004, the Chilean tax authority approved a name change for Santiago Comercio Exterior Exportaciones Limitada ("SANCO Ltda.") to Santiago Comercio Exterior Exportaciones Sociedad Anonima ("SANCO S.A."). SANCO stated that it underwent this restructuring because, under Chilean law, share companies (S.A.) can more easily add new partners. As part of the restructuring, SANCO created a separate limited liability company, Inversiones L.M. Ltda., that does not participate in the production, processing, sales process, or any other operations for SANCO's raspberry business. SANCO commenced exporting the merchandise under review as SANCO S.A. to the United States on July 30, 2004, after the beginning of the period of review. We reviewed SANCO's questionnaire responses and supporting documentation to confirm that the activities related to SANCO's name change are limited to those described above. For further information, see *SANCO's December 29, 2005, section A supplemental questionnaire response ("SQR")*, at pages 1 through 6. Based on the information submitted, we preliminarily determine that SANCO S.A. is the successor-in-interest to SANCO Ltda.

<sup>2</sup> These five companies were also included in the petitioners' July 29, 2005, request for review of 57 companies.

(December 28, 2005). Thus, the seven companies in this review are: Arlavan, Vitafoods, Olmue, SANCO, Valle Frio, Valles Andinos, and VBM (collectively, "the respondents").

On September 26, 2005, the Department issued antidumping questionnaires to the respondents. The respondents submitted their initial responses to the antidumping questionnaire from October 2005 through May 2006. After analyzing these responses, we issued supplemental questionnaires to the respondents to clarify or correct the initial questionnaire responses. We received timely responses to these questionnaires. On March 22, 2006, we requested that Valle Frio respond to the constructed value ("CV") portion of the Department's questionnaire.

On March 7, 2006, and May 26, 2006, the Department published in the **Federal Register** extensions of the time limit for the completion of the preliminary results of this review until no later than June 13, 2006, and July 31, 2006, respectively, in accordance with section 751(a)(3)(A) of the Tariff Act of 1930, as amended ("the Act"), and 19 CFR 351.213(h)(2). See *Certain Individually Quick Frozen Red Raspberries From Chile: Notice of Extension of Time Limit for 2004-2005 Administration Review*, 71 FR 11386 (March 7, 2006); *Certain Individually Quick Frozen Red Raspberries From Chile: Notice of Extension of Time Limit for 2004-2005 Administrative Review*, 71 FR 30378 (May 26, 2006).

**Scope of the Order**

The products covered by this order are imports of IQF whole or broken red raspberries from Chile, with or without the addition of sugar or syrup, regardless of variety, grade, size or horticulture method (e.g., organic or not), the size of the container in which packed, or the method of packing. The scope of the order excludes fresh red raspberries and block frozen red raspberries (i.e., puree, straight pack, juice stock, and juice concentrate).

The merchandise subject to this order is currently classifiable under subheading 0811.20.2020 of the Harmonized Tariff Schedule of the United States ("HTSUS"). Although the HTSUS subheading is provided for convenience and customs purposes, the written description of the merchandise under the order is dispositive.

**Verification**

As provided in section 782(i) of the Act, during March to April 2006, we verified the information provided by Olmue and SANCO in Chile using

standard verification procedures, including examination of relevant sales and financial records, and selection of original documentation containing relevant information. The Department reported its findings on July 5, July 6, and July 27, 2006. See Memorandum to the File, “*Verification of the Sales Response of Santiago Comercio Exterior S.A. in the 2004–2005 Antidumping Duty Administrative Review of Individually Quick Frozen Red Raspberries from Chile*,” dated July 5, 2006 (“*Sales Verification Report – SANCO*”); Memorandum to the File, “*Verification of the Cost Response of Santiago Comercio Exterior S.A. in the Antidumping Review of Individually Quick Frozen Red Raspberries from Chile*,” dated July 6, 2006 (“*Cost Verification Report – SANCO*”); Memorandum to the File, “*Verification of the Sales and Cost of Production Responses of Fruticola Olmué S.A. in the 2004–2005 Antidumping Duty Administrative Review of Individually Quick Frozen Red Raspberries from Chile*,” dated July 27, 2006 (“*Verification Report – Olmue*”). These reports are on file in the Central Records Unit (“CRU”) in room B–099 of the main Department building.

#### Intent To Revoke In Part

The Department “may revoke, in whole or part” an antidumping order upon completion of a review under section 751 of the Act. While 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 described in 19 CFR 351.222(b)(2). In determining whether to revoke an antidumping duty order in part, the Secretary will consider: (A) whether one or more exporters or producers covered by the order have sold the merchandise at not less than normal value (“NV”) for a period of at least three consecutive years; (B) whether, for any exporter or producer that the Secretary previously has determined to have sold the subject merchandise at less than NV, the exporter or producer agrees in writing to its immediate reinstatement in the order, as long as any exporter or producer is subject to the order, if the Secretary concludes that the exporter or producer, subsequent to the revocation, sold the subject merchandise at less than NV; and (C) whether the continued application of the antidumping duty order is otherwise necessary to offset dumping.

The Department’s regulations require, *inter alia*, that a company requesting revocation submit the following: (1) a certification that the company has sold

the subject merchandise at not less than NV in the current review period and that the company will not sell at less than NV in the future; (2) a certification that the company sold the subject merchandise in commercial quantities in each of the three years forming the basis of the receipt of such a request; and (3) an agreement that the order will be reinstated if the company is subsequently found to be selling the subject merchandise at less than fair value. 19 CFR 351.222(e)(1)(i)-(iii). See, e.g., *Notice of Final Results of Antidumping Duty Administrative Review and Determination Not to Revoke the Antidumping Duty Order: Brass Sheet and Strip From the Netherlands*, 65 FR 742, 743 (January 6, 2000). On July 29, 2005, SANCO submitted a certification to the effect that for a consecutive three-year period, including the current review period, it sold the subject merchandise in commercial quantities at not less than NV and that it would continue to do so in the future. Therefore, because we have determined that this respondent satisfies the requirements of 19 CFR 351.222(b), we preliminarily determine to revoke in part the antidumping order with respect to SANCO. See Memorandum to Stephen J. Claeys, Deputy Assistant Secretary, “*Preliminary Determination to Revoke in Part the Antidumping Duty Order*,” dated July 31, 2006. This memorandum is on file in room B–099 of the CRU.

#### Collapsing Determination

The Department’s regulations provide that affiliated producers will be treated as a single entity where: (1) those producers have production facilities for similar or identical products that would not require substantial retooling of either facility in order to restructure manufacturing priorities; and (2) the Department concludes that there is a significant potential for the manipulation of price or production. 19 CFR 351.401(f)(1). In identifying a significant potential for the manipulation of price or production, the Department may consider such factors as: (i) the level of common ownership; (ii) the extent to which managerial employees or board members of one firm sit on the board of directors of an affiliated firm; and (iii) whether operations are intertwined, such as through the sharing of sales information, involvement in production and pricing decisions, the sharing of facilities or employees, or significant transactions between the affiliated producers. See 19 CFR 351.401(f)(2). These factors are illustrative, and not exhaustive.

In its questionnaire responses, Valle Frio indicated that it had an affiliated producer, Agrícola Framparque (“Framparque”), during the POR. Upon review of Valle Frio’s questionnaire responses, we preliminarily determine that Framparque should be collapsed with Valle Frio for the purposes of this review. See Memorandum to Susan Kuhbach, Director, “*Collapsing of Sociedad Agroindustrial Valle Frio Ltda.*,” dated July 31, 2006.

#### Fair Value Comparisons

To determine whether sales of IQF red raspberries from Chile to the United States were made at less than NV, we compared export price (“EP”) to NV, as described in the “Export Price” and “Normal Value” sections of this notice.

In accordance with section 771(16) of the Act, we considered all products sold by the respondents in the comparison market covered by the description in the “Scope of the Order” section, above, to be foreign-like products for purposes of determining appropriate product comparisons to U.S. sales. In accordance with section 773(a)(1)(C)(ii) of the Act, in order to determine whether there was a sufficient volume of sales in the home market to serve as a viable basis for calculating NV, we compared the respondents’ volume of home market sales of the foreign-like product to the volumes of their U.S. sales of the subject merchandise. See the “Normal Value” section, below, for further details.

We compared U.S. sales to monthly weighted-average prices of contemporaneous sales made in the comparison market. Where there were no sales of identical merchandise in the comparison market made in the ordinary course of trade, we compared U.S. sales to sales of the most similar foreign like product made in the ordinary course of trade. Where there were no sales of identical or similar merchandise made in the ordinary course of trade in the comparison market, we compared U.S. sales to CV. In making product comparisons, consistent with our determination in the original investigation, we matched foreign like products based on the physical characteristics reported by the respondent in the following order: grade, variety, form, cultivation method, and additives. See *Notice of Preliminary Determination of Sales at Less than Fair Value and Postponement of Final Determination: IQF Red Raspberries from Chile*, 66 FR 67510, 67511 (December 31, 2001).

Because the respondents’ merchandise is always shipped on or before the date of invoice, we are using the date of shipment (*i.e.*, *guia de*

despacho/dispatch note date) as the date of sale. See *Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products From Korea: Final Results of Antidumping Duty Administrative Reviews*, 63 FR 13170, 13172-73 (March 18, 1998).

#### Export Price

For sales to the United States, we calculated EP, in accordance with section 772 of the Act. Section 772(a) of the Act defines EP as the price at which the subject merchandise is first sold before the date of importation by the exporter or producer outside the United States to an unaffiliated purchaser in the United States, or to an unaffiliated purchaser for exportation to the United States.

We made company-specific adjustments as follows.

##### (A) Vitafoods

We calculated EP because the merchandise was sold prior to importation by the exporter or producer outside the United States to the first unaffiliated purchaser in the United States, and because constructed export price methodology was not otherwise warranted. We based EP on the packed, delivered duty paid ("DDP") or cost, insurance, and freight ("CIF") price to unaffiliated purchasers in the United States. We made deductions for movement expenses in accordance with section 772(c)(2)(A) of the Act. These deductions included, where appropriate, freight incurred in transporting merchandise to the Chilean port, domestic brokerage and handling, international freight, marine insurance, U.S. brokerage and handling, and U.S. customs duties. See Memorandum to the File, "*Preliminary Results Calculation Memorandum for Alimentos Naturales Vitafoods S.A.*," dated July 31, 2006 ("*Vitafoods Preliminary Calculation Memorandum*").

We have preliminarily excluded two sales reported, at the Department's request, in Vitafoods' U.S. sales database. We note that these sales were made to an unaffiliated U.S. entity for delivery to Canada. See *Vitafoods' October 26, 2005, section A response*, at Exhibit A-5; see also *Vitafoods' July 3, 2006, SQR* at page 2 and Exhibits 3S-4 and 3S-5. The unaffiliated U.S. entity subsequently trucked the merchandise from Canada to the United States. See *Vitafoods' July 28, 2006, SQR* at pages 1-3 and Exhibits 1-2. Certain documentation indicates that, at the time of sale, the sales might have been destined for either Canada or the United States. Vitafoods has stated that it considered these sales as Canadian rather than U.S. because the only

destination known to Vitafoods was Canada. As we do not have conclusive evidence that Vitafoods knew, or should have known, at the time of sale, that the ultimate destination of the merchandise was the United States, the Department is preliminarily treating these sales as Vitafoods' sales to Canada.

##### (B) Arlavan

We calculated EP because the merchandise was sold prior to importation by the exporter or producer outside the United States to the first unaffiliated purchaser in the United States, and because constructed export price methodology was not otherwise warranted. We based EP on the packed, free on board ("FOB") price to unaffiliated purchasers in the United States.

We adjusted the reported gross unit price, where applicable, for billing adjustments. We made deductions from the starting price for movement expenses in accordance with section 772(c)(2)(A) of the Act. These deductions included, where appropriate, freight incurred in transporting merchandise to the warehouse and/or to the port, domestic brokerage and handling, international freight, U.S. port charges, agriculture certificates, and U.S. brokerage and handling.

We did not include in our calculation certain sales listed in the U.S. sales database because we had reason to believe the supplier knew, or should have known, that the ultimate destination of the merchandise was the United States. For further discussion, see Memorandum to the File, "*Preliminary Results Calculation Memorandum for Arlavan, S.A.*" dated July 31, 2006 ("*Arlavan Preliminary Calculation Memorandum*"), which is on file in the CRU.

Because Arlavan is a reseller, and not a producer, of merchandise, we classified the expenses that were reported by Arlavan as general and administrative ("G&A") expenses and financial expenses as indirect selling expenses. See *Arlavan Preliminary Calculation Memorandum*.

##### (C) Olmue

We calculated EP because the merchandise was sold prior to importation by the exporter or producer outside the United States to the first unaffiliated purchaser in the United States, and because constructed export price methodology was not otherwise warranted. We based EP on the packed, cost and freight ("C&F") price to unaffiliated purchasers in the United States.

We adjusted the reported gross unit price, where applicable, for billing

adjustments and interest revenue. We made deductions from the starting price for movement expenses in accordance with section 772(c)(2)(A) of the Act. These included, where appropriate, inland freight incurred in transporting merchandise to the Chilean port, brokerage and handling, and international freight.

We have reclassified certain commissions paid by Olmue as indirect selling expenses. These commissions were not sale-specific payments to a selling agent working on behalf of Olmue. Rather, these expenses related to general selling services (*i.e.*, not directly facilitating sales) performed by another company. Therefore, certain reported commissions are properly classified as indirect selling expenses. See *Verification Report - Olmue* at section III.A. (Corporate Structure and Organization), section XI.C.1. (Commissions), and section XI.D.1. (Indirect Selling Expenses); see also Memorandum to the File, "*Preliminary Results Calculation Memorandum for Fruticola Olmue S.A.*," dated July 31, 2006 ("*Olmue Preliminary Calculation Memorandum*"), which is on file in the CRU.

As a result of verification findings, we revised the following fields in Olmue's U.S. sales listing: quantity, inland freight, commissions, indirect selling expenses, selling agent, date of payment, credit expenses, and billing adjustments. See *Olmue Preliminary Calculation Memorandum*; see also *Verification Report - Olmue*.

##### (D) SANCO

We calculated EP because the merchandise was sold prior to importation by the exporter or producer outside the United States to the first unaffiliated purchaser in the United States, and because constructed export price methodology was not otherwise warranted. We based EP on the packed, FOB or FOB plus duty paid price to unaffiliated purchasers in the United States.

We adjusted the reported gross unit price, where applicable, for billing adjustments. We made deductions from the starting price for movement expenses in accordance with section 772(c)(2)(A) of the Act. These included freight incurred in transporting merchandise to the warehouse or to the Chilean port, warehousing, domestic brokerage and handling, U.S. brokerage and handling, and U.S. customs duties.

For its U.S. sales, SANCO reported the bill of lading date as the shipment date. As a result of verification findings, we have revised the shipment date to match the issuance date of the dispatch note, because that is when the

merchandise under review was shipped from the plant or warehouse to the Chilean port. We also recalculated U.S. imputed credit expenses using the revised date of shipment. For further discussion, see Memorandum to the File, "Preliminary Results Calculation Memorandum for SANCO, S.A." dated July 31, 2006 ("SANCO Preliminary Calculation Memorandum"), which is on file in the CRU. See also *Sales Verification Report – SANCO*.

As a result of verification findings, we have revised the direct selling expenses, indirect selling expenses, warehousing expenses, inland freight expenses incurred in Chile, brokerage and handling expenses incurred in Chile, and U.S. customs duties for certain U.S. sales. See *SANCO Preliminary Calculation Memorandum*. See also *Sales Verification Report – SANCO*.

#### (E) Valle Frio

We calculated EP because the merchandise was sold prior to importation by the exporter or producer outside the United States to the first unaffiliated purchaser in the United States, and because constructed export price methodology was not otherwise warranted. We based EP on the packed, FOB price to unaffiliated purchasers in the United States.

We made deductions from the starting price for movement expenses in accordance with section 772(c)(2)(A) of the Act. These included, where appropriate, inland freight incurred in transporting merchandise to the Chilean port, domestic brokerage and handling expenses, and thermograph expenses.

#### (F) Valles Andinos

We calculated EP because the merchandise was sold prior to importation by the exporter or producer outside the United States to the first unaffiliated purchaser in the United States, and because constructed export price methodology was not otherwise warranted. We based EP on the packed, FOB or C&F price to unaffiliated purchasers in the United States.

We adjusted the reported gross unit price, where applicable, for billing adjustments. We made deductions from the starting price for movement expenses in accordance with section 772(c)(2)(A) of the Act. These included freight incurred in transporting merchandise from the plant to the Chilean port and domestic brokerage and handling.

For its U.S. market sales, Valles Andinos reported the bill of lading date as the shipment date. We have revised the shipment date to match the issuance date of the dispatch note, because that is when the merchandise under review was shipped from the plant or

warehouse to the Chilean port. We also recalculated U.S. imputed credit expenses using the revised date of shipment. For further discussion, see Memorandum to the File, "Preliminary Results Calculation Memorandum for Valles Andinos, S.A.," dated July 31, 2006 ("Valles Andinos Preliminary Calculation Memorandum"), which is on file in the CRU.

Because Valles Andinos is principally a reseller, we classified the expenses that were reported by Valles Andinos as general and administrative expenses and financial expenses as indirect selling expenses. See *Valles Andinos Preliminary Calculation Memorandum*.

#### (G) VBM

We calculated EP because the merchandise was sold prior to importation by the exporter or producer outside the United States to the first unaffiliated purchaser in the United States, and because constructed export price methodology was not otherwise warranted. We based EP on the DDP price to unaffiliated purchasers in the United States. We made deductions from the starting price for movement expenses in accordance with section 772(c)(2)(A) of the Act. These deductions included, where appropriate, domestic inland freight, domestic brokerage and handling, pre-sale warehousing expenses, international freight, and U.S. customs duties. We adjusted the reported gross unit price, where applicable, for billing adjustments.

### Normal Value

#### A. Home Market Viability

Section 773(a)(1) of the Act directs that NV be based on the price at which the foreign like product is sold in the home market, provided that the merchandise is sold in sufficient quantities (or value, if quantity is inappropriate) and that there is no particular market situation that prevents a proper comparison with the EP. The Act contemplates that quantities (or value) will normally be considered insufficient if they are less than five percent of the aggregate quantity (or value) of sales of the subject merchandise to the United States.

In order to determine whether there was a sufficient volume of sales in the home market to serve as a viable basis for calculating NV, we compared each respondent's volume of home market sales of the foreign like product to its volume of U.S. sales of the subject merchandise, in accordance with section 773(a)(1)(C) of the Act.

Arlavan, Olmue, SANCO, Valle Frio, and Valles Andinos reported that their

home market sales of IQF red raspberries during the POR were less than five percent of their sales of IQF red raspberries to the United States. Therefore, these five respondents did not have viable home markets for purposes of calculating NV. As its largest third country market, Arlavan reported Germany, Olmue and Valle Frio reported France, SANCO reported the United Kingdom, and Valles Andinos reported Canada. In all instances, sales to the third countries exceed five percent of sales to the United States. Accordingly, for purposes of calculating NV, Arlavan reported its sales to Germany, Olmue and Valle Frio reported their sales to France, SANCO reported its sales to the United Kingdom, and Valles Andinos reported its sales to Canada. In future administrative reviews, the Department will consider re-examining the selection of France as Valle Frio's comparison market. In particular, the Department will evaluate the comparability of foreign-like product to the subject merchandise.

VBM and Vitafoods reported that their home market sales of IQF red raspberries during the POR were more than five percent of their sales of IQF red raspberries to the United States. Therefore, VBM's and Vitafoods' home markets were viable for purposes of calculating NV. Accordingly, VBM and Vitafoods reported their home market sales.

To derive NV for all respondents, we made the adjustments detailed in the "Calculation of Normal Value Based on Comparison Market Prices" and "Calculation of Normal Value Based on Constructed Value" sections, below.

#### B. Cost of Production Analysis

In the most recently completed segment of the proceeding at the time of initiation (*i.e.*, the first administrative review), the Department found that SANCO and Olmue made sales in the comparison market at prices below the cost of producing the merchandise and excluded such sales from the calculation of NV. Therefore, the Department determined that there were reasonable grounds to believe or suspect that IQF red raspberry sales were made in the comparison market at prices below the cost of production ("COP") in this administrative review for SANCO and Olmue. See section 773(b)(2)(A)(ii) of the Act. As a result, the Department initiated a COP inquiry for these two respondents.

The petitioners made an allegation of sales below the COP with respect to Arlavan (December 12, 2005), Valles Andinos (December 21, 2005), Vitafoods

(December 21, 2005), VBM (December 21, 2005), and Valle Frio (March 20, 2006, supplemented on March 29, 2006). We found that the petitioners' allegations provided the Department with a reasonable basis to believe or suspect that sales in the comparison market by Arlavan, Valles Andinos, Vitafoods, and VBM were made at prices below the COP. Accordingly, for these companies, we initiated an investigation to determine whether their comparison market sales of IQF red raspberries were made at prices below the COP during the POR. See Memoranda to Susan H. Kuhbach, Director, on the following dates: January 12, 2006 (Arlavan), January 17, 2006 (Valles Andinos), January 24, 2006 (Vitafoods), and January 20, 2006 (VBM).

For Valle Frio, we found that the petitioners' allegation did not provide the Department with a reasonable basis to believe or suspect that sales in the comparison market were made at prices below the COP. Therefore, we did not initiate an investigation to determine whether Valle Frio's comparison market sales of IQF red raspberries were made at prices below the COP during the POR. See Memorandum to Susan H. Kuhbach, Director, "*Petitioners' Allegation of Sales Below the Cost of Production by Sociedad Agroindustrial Valle Frio, Ltda.*," dated April 19, 2006.

Because Valles Andinos and Arlavan are trading companies, we sent cost questionnaires to Valles Andinos' and Arlavan's suppliers. We chose the two largest suppliers for each respondent. For Valles Andinos, we received complete questionnaire responses from both suppliers. For Arlavan, we received a complete questionnaire from one supplier (Agricola San Antonio Limitada ("San Antonio")); however, as explained below, we have not received complete, useable information from the other supplier (DICAF Exportaciones Limitada ("DICAF")).

The questionnaires we sent to the Partner and General Manager of DICAF were returned as undeliverable. See Memorandum to File, "*Attempts to Deliver Section D Questionnaire in the Antidumping Administrative Review of Individually Quick Frozen Red Raspberries from Chile*," dated April 21, 2006. In its *May 15, 2006, SQR* at 1, Arlavan indicated that DICAF was bankrupt, and Arlavan provided contact information for Agroindustrial del Maule ("Agromaule"), which although separately incorporated has, effectively, the same familial ownership as DICAF. The Department, therefore, sent a cost questionnaire to Agromaule in early April 2006 and received a response from

Agromaule's "legal representative" on May 1, 2006, which was mostly incomplete and unusable to the Department. The Department did, however, receive from Arlavan and Agromaule several supplemental responses that assisted the Department in further understanding the nature of the DICAF-Agromaule relationship. According to these responses, by August 2004, DICAF was unable to purchase its own raw materials because the Chilean tax authorities prohibited the company from doing so due to the fact that it was in arrears on taxes owed. See *Agromaule's May 1, 2006, section D response* at 1. According to Arlavan and Agromaule, the familial owners of DICAF formed Agromaule in September 2004 to make a "fresh startup" as DICAF was preparing for bankruptcy. See *id.* at 1 and *Agromaule's May 1, 2006, section D response* at 1. Agromaule purchased raw materials and then paid DICAF to process them. Although DICAF and Agromaule are legally two separate entities, the products, services, and personnel, as well as contact information, were the same. See *Arlavan's May 15, 2006, SQR* at 1.

According to Arlavan, beginning with the 2004-05 growing season, the contacts at DICAF began having Arlavan contract for product purchases using Agromaule forms and making payments to Agromaule. Arlavan thus began working with Agromaule, receiving the same service and products it had received from DICAF - and working with the same people until the end of the 2004-2005 growing season, at which time Arlavan was informed that Agromaule would no longer be operating and would no longer be able to supply Arlavan with products. See *id.* at 1.

Despite the Department's issuance of several supplemental questionnaires, Agromaule failed to provide the cost information required by the Department for these preliminary results. As a result, the Department has applied adverse facts available to calculate a COP for DICAF/Agromaule. See "Individual Company Adjustments" and "Use of Facts Otherwise Available" sections, below.

#### 1. Calculation of COP

In accordance with section 773(b)(3) of the Act, we calculated the COP based on the sum of the cost of materials and fabrication for the foreign like product, plus amounts for G&A expenses, financial expenses, and comparison market packing costs, where appropriate.

We note that several respondents reported a blended cost for purchases of raw raspberries, *i.e.*, they reported a

single price for purchases of whole and broken berries rather than different prices for the whole and broken berries. The Department is considering whether, in such instances, it is appropriate to compute these companies' berry costs using an alternative methodology and we intend to solicit additional information from these parties after the preliminary results.

#### 2. Individual Company Adjustments

We relied on the COP data submitted by each respondent in its cost questionnaire responses except in specific instances where, based on our review of the submissions and our verification findings, we believe that an adjustment is required, as discussed below.

##### (A) Vitafoods

We are continuing to analyze Vitafoods' *July 24, 2006, SQR*, and may have further modifications to its cost data for the final results.

1) We have revised Vitafoods' G&A expenses to include certain proprietary non-operating expenses. See *Vitafoods Preliminary Calculation Memorandum*.

2) We have revised Vitafoods' financial expenses to include a loss in currency transactions. Because these expenses relate to currency swap and other similar agreements, they are properly classified as financial expenses. See *Vitafoods Preliminary Calculation Memorandum*.

##### (B) Arlavan

We calculated a weighted-average COP using the COP of Arlavan's one responding supplier (San Antonio) for purchases from San Antonio and all other suppliers from whom information was not requested. As explained above, we used adverse facts available for the COP of the non-responsive supplier (DICAF/Agromaule). See "Use of Facts Otherwise Available" section, below. Specifically, we calculated the simple average of the three highest COPs of all respondents' suppliers and used this as the DICAF/Agromaule COP. The suppliers' COPs were weighted by the quantities of subject merchandise purchased from them by Arlavan.

##### (C) Olmue

For one non-organic meeker control number for which Olmue did not report costs, as facts available, we assigned the reported costs of other non-organic meeker control numbers to the above-mentioned control number. See "Facts Otherwise Available" section, below; see also *Olmue Calculation Memorandum*.

##### (D) SANCO

1) SANCO valued whole quality raspberries bagged as non-whole frozen raspberry product at the average purchase price of non-whole quality

fresh raspberries rather than the average purchase price of whole quality fresh raspberries. We revalued whole quality raspberries bagged as non-whole frozen raspberry product at the average purchase price of whole quality raspberries. In addition, a portion of SANCO's freight relating to the transportation of fresh raspberries was omitted from the reported costs. Therefore, we added this portion of freight to the purchase price of fresh raspberries. Finally, we incorporated the two minor corrections to the raw material cost SANCO presented at verification (*i.e.*, transcription errors made in the preparation of the purchase list and overstatement of the amount purchased).

2) SANCO reported the G&A and financial expenses of its affiliated frozen fruit processor, Agroindustria Sagrada Familia Ltda. ("ASF"), based on the POR and included these expenses in the variable overhead cost. To adjust for this, we first removed the G&A and financial expenses from variable overhead. We then calculated G&A and financial expense ratios based on ASF's 2004 financial statements and applied the ratios to SANCO's conversion costs (*i.e.*, direct labor, variable overhead, fixed overhead).

3) We adjusted SANCO's G&A expense ratio to include certain depreciation expenses in the numerator and exclude these same depreciation expenses from the denominator. We also included in the numerator of the G&A expense ratio a loss on sales of fixed assets. See Memorandum from Frederick W. Mines to Neal Halper, Director Office of Accounting, "Cost of Production and Constructed Value Adjustments for the Preliminary Results," dated July 31, 2006.

(E) *Valles Andinos*

We made the following adjustments to the suppliers' reported COP data for non-organic frozen raspberry products:

1) For one supplier, we recalculated direct labor expenses. For further discussion, see *Valles Andinos Preliminary Calculation Memorandum*.

2) For the same supplier, we revised the allocation percentage applied to packing materials, variable overhead, and fixed overhead. *Id.*

3) We calculated each supplier's COP based on the total cost of manufacture ("COM") of the subject merchandise, general and administrative expenses, and financial expenses. The suppliers' COPs were weighted by the quantities of subject merchandise purchased from them by Valles Andinos. We weight-averaged the suppliers' calculated COPs on the basis of Valles Andinos's finished product purchases by quantity.

*Id.*; see also *Valles Andinos's February 9, 2006, SQR*, at pages 1–2.

We made the following adjustment to Valles Andinos's reported COP data for organic frozen raspberry products:

For the small amount of organic frozen raspberry products that Valles Andinos produced pursuant to a tolling arrangement, we based the COM on Valles Andinos's reported direct materials and processing costs. See *Valles Andinos's July 12, 2006, SQR* at page 1; see also *Valles Andinos Preliminary Calculation Memorandum*.

(F) *VBM*

We did not make any changes.

We compared the adjusted weighted-average COP for each respondent to its comparison market sales of the foreign like product, as required under section 773(b) of the Act, to determine whether these sales were made at prices below the COP within an extended period of time (*i.e.*, a period of one year) in substantial quantities and whether such prices were sufficient to permit the recovery of all costs within a reasonable period of time. On a model-specific basis, we compared the revised COP to the comparison market prices. The prices were exclusive of any applicable billing adjustments, movement expenses, direct selling expenses, commissions, indirect selling expenses, and packing expenses.

3. Results of the COP Test

Pursuant to section 773(b)(2)(C) of the Act, where less than 20 percent of a respondent's sales of a given product were at prices less than the COP, we did not disregard any below-cost sales of that product because we determined that the below-cost sales were not made in substantial quantities.

Where 20 percent or more of a respondent's sales of a given product during the POR were at prices less than the COP, we determined such sales to have been made in substantial quantities within an extended period of time in accordance with section 773(b)(2)(B) of the Act. Because we compared prices to the POR average COP, we also determined that such sales were not made at prices which would permit recovery of all costs within a reasonable period of time, in accordance with section 773(b)(2)(D) of the Act. Therefore, we disregarded the below-cost sales.

For Olmue, Valles Andinos, VBM, and Vitafoods, we found that more than 20 percent of the comparison market sales of IQF red raspberries within an extended period of time were made at prices less than the COP. Further, the prices at which the merchandise under review was sold did not provide for the recovery of costs within a reasonable

period of time. Therefore, we disregarded these below-cost sales and used the remaining sales as the basis for determining NV, in accordance with section 773(b)(1) of the Act. For those U.S. sales of IQF red raspberries for which there were no useable comparison market sales in the ordinary course of trade, we compared EPs to the CV in accordance with section 773(a)(4) of the Act. See "Calculation of Normal Value Based on Constructed Value" section, below.

C. *Calculation of Normal Value Based on Comparison Market Prices*

We determined price-based NVs for each company as follows. For all respondents, we made adjustments for differences in packing in accordance with sections 773(a)(6)(A) and 773(a)(6)(B)(i) of the Act, and we deducted movement expenses consistent with section 773(a)(6)(B)(ii) of the Act. In addition, where applicable, we made adjustments for differences in cost attributable to differences in physical characteristics of the merchandise pursuant to section 773(a)(6)(C)(ii) of the Act, as well as for differences in circumstances of sale ("COS") in accordance with section 773(a)(6)(C)(iii) of the Act and 19 CFR 351.410. We also made adjustments, in accordance with 19 CFR 351.410(e), for indirect selling expenses incurred on comparison market or U.S. sales where commissions were granted on sales in one market but not in the other (the "commission offset"). Specifically, where commissions were granted in the U.S. market but not in the comparison market, we made a downward adjustment to NV for the lesser of (1) the amount of the commission paid in the U.S. market, or (2) the amount of indirect selling expenses incurred in the comparison market. If commissions were granted in the comparison market but not in the U.S. market, we made an upward adjustment to NV following the same methodology. Company-specific adjustments are described below.

(A) *Vitafoods*

We based comparison market prices on the packed prices to unaffiliated purchasers in Chile. We adjusted the starting price by the amount of billing adjustments and movement expenses, including inland freight expenses from the plant to the distribution warehouse, warehousing, and inland freight expenses from distribution warehouse to the customer. We made COS adjustments by deducting direct selling expenses incurred for home market sales (*i.e.*, credit expenses and direct selling expenses) and adding U.S. direct selling expenses (*i.e.*, credit expenses).

*See Vitafoods Preliminary Calculation Memorandum.*

Because the denominator used in calculating Vitafoods' indirect selling expenses ratio is net of billing adjustments, we have applied the calculated indirect selling expenses ratio to Vitafoods' gross unit price net of billing adjustments. *See Vitafoods' July 3, 2006, supplemental questionnaire response* at page 4.

(B) *Arlavan*

We based comparison market prices on the packed prices to unaffiliated purchasers in Germany. We adjusted the starting price, where applicable, by the amount of movement expenses, including inland freight to the warehouse, warehousing, inland freight from distribution center to the Chilean port, Chilean brokerage and customs fees, agriculture certificates, temperature control recorders during transit, port charges, and international freight. We made COS adjustments by deducting direct selling expenses incurred for comparison market sales (e.g., commissions, external quality control/biological testing, courier charges, and credit expenses) and adding U.S. direct selling expenses (e.g., commissions, external quality control/microbiological testing, courier charges, and credit expenses). *See Arlavan Preliminary Calculation Memorandum.*

Because Arlavan is a reseller, and not a producer, of merchandise, we classified the expenses that were reported by Arlavan as G&A expenses and financial expenses as indirect selling expenses. *See Arlavan Preliminary Calculation Memorandum.*

(C) *Olmue*

We based comparison market prices on the packed, C&F price to unaffiliated purchasers in France. We adjusted the reported gross unit price, where applicable, for billing adjustments. We adjusted the starting price by the amount of movement expenses, including inland freight to the Chilean port, international freight, and brokerage and handling. We made COS adjustments by deducting direct selling expenses incurred for comparison market sales (e.g., microbiological/pesticide testing, commissions, credit expenses) and adding U.S. direct selling expenses (e.g., microbiological/pesticide testing, commissions, credit expenses). *See Olmue Preliminary Calculation Memorandum.*

We have reclassified certain commissions paid by Olmue as indirect selling expenses. These commissions were not sale-specific payments to a selling agent working on behalf of Olmue. Rather, these expenses related to general selling services (i.e., not directly

facilitating sales) performed by another company. Therefore, certain reported commissions are properly classified as indirect selling expenses. *See Verification Report – Olmue* at section III.A. (Corporate Structure and Organization), section XI.C.1. (Commissions), and section XI.D.1. (Indirect Selling Expenses); *see also Olmue Preliminary Calculation Memorandum.*

As a result of verification findings, we revised the following fields in Olmue's French sales listing: inland freight, commissions, indirect selling expenses, selling agent, date of payment, credit expenses, billing adjustments, and date of shipment. *See Olmue Preliminary Calculation Memorandum; see also Verification Report – Olmue.*

(D) *SANCO*

We based comparison market prices on the packed prices to unaffiliated purchasers in the United Kingdom. We adjusted the starting price by the amount of billing adjustments and movement expenses, including inland freight to the warehouse, warehousing, inland freight to the Chilean port, domestic brokerage and handling, and international freight. We made COS adjustments by deducting direct selling expenses incurred for comparison market sales (e.g., credit expenses, microbiological testing) and adding U.S. direct selling expenses (e.g., credit expenses, microbiological testing).

For its comparison market sales, SANCO reported the bill of lading date as the shipment date. As a result of verification findings, we have revised the shipment date to match the issuance date of the dispatch note, because that is when the foreign-like product was shipped from the plant or warehouse to the Chilean port. We also recalculated comparison market imputed credit expenses using the revised date of shipment. *See SANCO Preliminary Calculation Memorandum; see also Sales Verification Report – SANCO.*

As a result of verification findings, we have revised the sale dates, payment dates, direct selling expenses, indirect selling expenses, warehousing expenses, and brokerage and handling expenses incurred in Chile for certain comparison market sales. *See SANCO Preliminary Calculation Memorandum; see also Sales Verification Report – SANCO.*

(E) *Valle Frio*

We based comparison market prices on the packed prices to unaffiliated purchasers in France or sold to an unaffiliated purchaser for exportation to France. We adjusted the starting price by the amount of movement expenses, including, where appropriate, inland freight from the plant to the port,

international freight, container handling/brokerage charges, and thermograph expenses. We made COS adjustments by deducting direct selling expenses incurred for comparison market sales (e.g., credit expenses, commissions, microbiological/pesticide testing, label expenses) and adding U.S. direct selling expenses (e.g., credit expenses, microbiological/pesticide testing, label expenses). *See Memorandum to the File, "Preliminary Results Calculation Memorandum for Sociedad Agroindustrial Valle Frio Ltda.,"* dated July 31, 2006 ("Valle Frio Preliminary Calculation Memorandum"), which is on file in the CRU.

(F) *Valles Andinos*

We based comparison market prices on the packed prices to unaffiliated purchasers in Canada. We adjusted the starting price by the amount of movement expenses, including inland freight from the plant to the Chilean port, domestic brokerage and handling, and international freight. We made COS adjustments by deducting direct selling expenses incurred for comparison market sales (e.g., credit expenses, bank fees, and courier fees) and adding U.S. direct selling expenses (e.g., credit expenses, bank fees, and courier fees). *See Valles Andinos Preliminary Calculation Memorandum.*

For its comparison market sales, Valles Andinos reported the bill of lading date as the shipment date. We have revised the shipment date to match the issuance date of the dispatch note, because that is when the foreign-like product was shipped from the plant or warehouse to the Chilean port. We also recalculated comparison market imputed credit expenses using the revised date of shipment. *See Valles Andinos Preliminary Calculation Memorandum.*

Because Valles Andinos is principally a reseller, we classified the expenses that were reported by Valles Andinos as general and administrative expenses and financial expenses as indirect selling expenses. *See Valles Andinos Preliminary Calculation Memorandum.*

(G) *VBM*

We based comparison market prices on the packed prices to unaffiliated purchasers in VBM's home market. We adjusted the starting price by the amount of movement expenses, including inland freight to the warehouse and warehousing. We made COS adjustments by deducting direct selling expenses incurred for comparison market sales (e.g., credit expenses) and adding U.S. direct selling expenses (e.g., credit expenses, bank fees, stack reservations, postage and

handling charges, and microbiological testing expenses). See *VBM Preliminary Calculation Memorandum*.

#### *D. Calculation of Normal Value Based on Constructed Value*

Section 773(a)(4) of the Act provides that where NV cannot be based on comparison-market sales, NV may be based on CV. Accordingly, for IQF red raspberries for which we could not determine the NV based on comparison market sales, either because there were no useable sales of a comparable product or all sales of the comparable products failed the COP test, we based NV on the CV.

Section 773(e) of the Act provides that the CV shall be based on the sum of the cost of materials and fabrication for the imported merchandise, plus amounts for selling, general and administrative (“SG&A”) expenses, profit, and U.S. packing costs. For Arlavan, Olmue, SANCO, and Valles Andinos, we calculated the cost of materials and fabrication based on the methodology described in the “Cost of Production Analysis” section, above.

For Valle Frio, we calculated CV based on the sum of the cost of materials and fabrication plus an amount for G&A, and financial expenses in accordance with section 773(e) of the Act. We relied on the costs reported by Valle Frio and Framparque, except that we reclassified Framparque’s G&A and financial expenses from overhead as they reported them, to G&A and financial expenses. See Memorandum from Angela Strom to Neal Halper, Director Office of Accounting, “*Constructed Value Calculation Adjustments for the Preliminary Results – Sociedad Agroindustrial Valle Frio Ltda.*,” dated July 31, 2006.

We based SG&A expenses and profit for the above-mentioned respondents on the actual amounts incurred and realized by the respondents in connection with the production and sale of the foreign like product in the ordinary course of trade for consumption in the comparison market, in accordance with section 773(e)(2)(A) of the Act. We used U.S. packing costs as described in the “Export Price” section, above.

We made adjustments to CV for differences in COS in accordance with section 773(a)(8) of the Act and 19 CFR 351.410. For comparisons to EP, we made COS adjustments by deducting direct selling expenses incurred on comparison market sales from, and adding U.S. direct selling expenses to, CV.

#### *E. Use of Facts Otherwise Available*

Section 776(a)(2) of the Act provides that, if an interested party or any other person (A) withholds information that has been requested by the administering authority; (B) fails to provide such information by the deadlines for the submission of the information or in the form and manner requested, subject to subsections (c)(1) and (e) of section 782 of the Act; (C) significantly impedes a proceeding under this title; or (D) provides such information but the information cannot be verified as provided in section 782(i) of the Act, the Department shall, subject to section 782(d) of the Act, use the facts otherwise available in reaching the applicable determination under this title. In applying facts otherwise available, section 776(b) of the Act provides that the Department may use an inference adverse to the interests of a party that has failed to cooperate by not acting to the best of its ability to comply with the Department’s requests for information. See, e.g., *Notice of Final Determination of Sales at Less Than Fair Value and Final Negative Critical Circumstances: Carbon and Certain Alloy Steel Wire Rod from Brazil*, 67 FR 55792, 55794–96 (August 30, 2002). Adverse inferences are appropriate “to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully.” See Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Rep. No. 103–316, (1994) (“SAA”) at 870. Furthermore, “affirmative evidence of bad faith on the part of a respondent is not required before the Department may make an adverse inference.” See *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1377 (Fed. Cir. 2003); *Antidumping Countervailing Duties: Final Rule*, 62 FR 27296, 27340 (May 19, 1997). In this case, we have found that an adverse inference is appropriate for DICAFAgromaule, a supplier of Arlavan, because DICAFAgromaule did not act to the best of its ability to report the data requested by the Department. See *Notice of Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review: Individually Quick Frozen Red Raspberries from Chile*, 69 FR 47869 (Aug. 6, 2004) (unchanged in final); cf. *Shandong Huarong Mach. Co., Ltd. v. United States*, Slip Op. 06–88 (CIT June 9, 2006) (“court agrees . . . that Company C, as a foreign manufacturer of subject merchandise, is an interested party under § 1677(9)(A)”).

The Department acknowledges record evidence that Chilean courts declared

DICAFA bankrupt in August 2005, and that Agromaule ceased operations in 2005. See August 27, 2005, Official Gazette of bankruptcy declaration decision and Taxpayer Situation Information Statement in *Arlavan’s May 15, 2005, SQR* at Exhibit SD–2. See also Agromaule’s current Taxpayer Situation Information Statement at Exhibit SD–1 showing no tax authority stamps since 2005. However, the Department finds that statements submitted by Arlavan and Agromaule regarding the requested cost information do not reconcile and make the use of adverse facts available appropriate.

First, Arlavan submitted a letter to the Department indicating that Agromaule’s legal representative was willing to cooperate with the Department’s review, but did not have the requisite information needed to respond to the Department’s questionnaire. See *Arlavan’s May 1, 2006, Letter in Reference to Agroindustrial del Maule’s section D response*. According to Arlavan, Agromaule’s records were taken from the company by Agromaule’s accounting consultant, who also ran Agromaule’s daily operations. He left the company in May 2005. See *Agromaule’s May 1, 2006, section D response* at 2. This same accounting consultant had also been the General Manager and part owner of DICAFA. We note, however, that there are close familial relationships between Agromaule and DICAFA. See *Agromaule’s May 15, 2006, section D questionnaire response* at 3 and *Agromaule’s June 5, 2006, supplemental section D questionnaire* at 2.

Arlavan’s Assistant General Manager also contacted Agromaule’s former accounting consultant directly. Contrary to the assertions of Agromaule’s legal representative, the consultant maintained that he had no corporate records or documents of either Agromaule or DICAFA. The consultant refused to put this in writing and would not respond to an email request by Arlavan. See *May 1, 2006, Letter from Arlavan in reference to Agroindustrial del Maule’s section D response*.

These conflicting stories are difficult to reconcile, given the close relationship between DICAFA and Agromaule. As noted above, the familial owners of DICAFA formed Agromaule as DICAFA was preparing to enter bankruptcy.

Given the close relationship between DICAFA and Agromaule, including the direct relationship between the accounting consultant/GM/Partner of DICAFA and the President of Agromaule, and the inconsistencies regarding the whereabouts of the corporate records, the Department preliminarily

determines that DICAF/Agromaule did not act to the best of its ability and adverse inference is warranted.

Therefore, we have applied adverse facts available pursuant to section 776(a)(2)(D) of the Act.

The Department is requesting further documentation from Agromaule regarding the location of the books and records and Agromaule's ability to respond to the Department's questionnaire.

The Department is applying neutral facts available to one of Olmue's reported control numbers for which it did not provide costs. Olmue noted that it did not have cost data for this control number because it was not produced during the POR. See *Olmue's February 21, 2006, supplemental questionnaire response* at page 18. Accordingly, we have applied facts available for the costs of this control number. Olmue's reported costs demonstrate that variety and cultivation type are the only product characteristics affecting Olmue's cost. Because the control number without reported costs is a non-organic meeker product, we have assigned the reported costs of other non-organic meeker control numbers to the above-mentioned control number. See *id.*; see also *Olmue Calculation Memorandum*.

#### F. Level of Trade

Section 773(a)(1)(B)(i) of the Act states that, to the extent practicable, the Department will calculate NV based on sales at the same level of trade ("LOT") as the EP. Sales are made at different LOTs if they are made at different marketing stages (or their equivalent). See 19 CFR 351.412(c)(2). Substantial differences in selling activities are a necessary, but not sufficient, condition for determining that there is a difference in the stages of marketing. *Id.*; see also *Notice of Final Determination of Sales at Less Than Fair Value: Certain Cut-to-Length Carbon Steel Plate From South Africa*, 62 FR 61731, 61732 (November 19, 1997). In order to determine whether the comparison sales were at different stages in the marketing process than the U.S. sales, we reviewed the distribution system in each market (*i.e.*, the "chain of distribution"),<sup>3</sup> including selling functions,<sup>4</sup> class of customer ("customer

category"), and the level of selling expenses for each type of sale.

Pursuant to section 773(a)(1)(B)(i) of the Act, in identifying levels of trade for EP and comparison market sales (*i.e.*, NV based on either comparison market or third country prices<sup>5</sup>), we consider the starting prices before any adjustments. When the Department is unable to match U.S. sales to sales of the foreign like product in the comparison market at the same LOT as the EP, the Department may compare the U.S. sale to sales at a different LOT in the comparison market. In comparing EP sales at a different LOT in the comparison market, where available data make it practicable, we make a LOT adjustment under section 773(a)(7)(A) of the Act.

In this review, we determined the following, with respect to the LOT, for each respondent.

##### (A) Vitafoods

Vitafoods reported a single LOT in each market, and claimed that the LOT in each of these markets was the same. Therefore, Vitafoods did not request an LOT adjustment.

We examined the information reported by Vitafoods regarding its marketing processes for its U.S. and home market sales, including customer categories and the type and level of selling activities performed. Vitafoods has reported one channel of distribution for sales to the United States. In this channel of distribution, Vitafoods arranges to get the subject merchandise to the port for export. For certain sales in this channel, Vitafoods is also the importer of record. For other sales in this channel, Vitafoods' customer is the importer of record. Because Vitafoods has reported no significant variation in the selling activities for these sales, we preliminarily find that there is a single LOT for Vitafoods' U.S. sales.

Vitafoods has reported two channels of distribution for its home market sales. In the first channel of distribution (channel 1), merchandise is transported from the processing plant to the cold storage warehouse, and then delivered to the customer's facility. In the second channel of distribution (channel 2), merchandise is transported from the processing plant to the cold storage warehouse, and then transported to the

distribution center where it is delivered to the customer. Because Vitafoods has not reported substantial differences in the selling activities for these two channels, we preliminarily find that there is a single LOT for Vitafoods' home market sales.

Comparing sales in Vitafoods' two markets, there is no indication that there were significantly different selling activities or sales process activities. Although Vitafoods did make billing adjustments (*i.e.*, discounts) on home market sales, these discounts are granted to each category of customers and do not significantly increase the level of selling activities performed by Vitafoods. Vitafoods did not provide technical services or post-sale warehousing, or incur advertise for either U.S. or home market sales.

Therefore, we preliminarily find that a single LOT exists in both the U.S. and home markets, and that Vitafoods' U.S. and home market sales were made at the same LOT.

##### (B) Arlavan

Arlavan reported a single LOT in each market, and claimed that the LOT in each of these markets was the same. Therefore, Arlavan did not request an LOT adjustment.

We examined the information reported by Arlavan regarding its marketing processes for its comparison market and U.S. sales, including customer categories and the type and level of selling activities performed. Arlavan reported two channels of distribution in the third country market and in the United States. In the first channel of distribution (channel 1), merchandise purchased by Arlavan is transported directly from the supplier facility to the port for shipment. In the second channel of distribution (channel 2), merchandise is purchased from a supplier and transported to cold storage. Then, the merchandise is sold and shipped by Arlavan to the port of exit. In channels 1 and 2, Arlavan is responsible for arranging transportation to the port in Chile. For sales to the third country, Arlavan is responsible for arranging international freight. For sales to the United States, Arlavan is responsible for arranging international freight in a limited number of sales. Arlavan sells to the same customer types in channels 1 and 2. Based on this, we preliminarily find that a single LOT exists in both the U.S. and third country markets.

Comparing sales in Arlavan's two markets, there is no indication that there were significantly different selling activities or sales process activities. Although, due to clerical errors, Arlavan did make billing adjustments for U.S.

<sup>3</sup> The marketing process in the United States and comparison market begins with the producer and extends to the sale to the final user or customer. The chain of distribution between the two may have many or few links, and the respondents' sales occur somewhere along this chain. In performing this evaluation, we considered each respondent's narrative response to properly determine where in the chain of distribution the sale occurs.

<sup>4</sup> Selling functions associated with a particular chain of distribution help us to evaluate the level(s)

of trade in a particular market. For purposes of these preliminary results, we have organized the common selling functions into four major categories: sales process and marketing support, freight and delivery, inventory and warehousing, and quality assurance/warranty services.

<sup>5</sup> Where NV is based on CV, we determine the NV LOT based on the LOT of the sales from which we derive selling expenses, G&A and profit for CV, where possible.

sales, these adjustments do not significantly increase the level of selling activities performed by Arlavan. Arlavan did not grant discounts or rebates, provide technical services, or post-sale warehousing, or advertise on either U.S. or comparison market sales.

Therefore, we preliminarily find that a single LOT exists in both the U.S. and comparison markets, and that Arlavan's sales to the U.S. and third country markets were made at the same LOT.

(C) *Olmue*

Olmue reported a single channel of distribution and a single LOT in the third country and U.S. markets, and claimed that its sales in both markets were at the same LOT. Therefore, Olmue did not request an LOT adjustment.

We examined the information reported by Olmue regarding its sales processes for its third country and U.S. sales, including customer categories and the type and level of selling activities performed. Olmue reported that it sold to similar categories of customer in France and the United States. In both markets, Olmue reported similar selling activities regardless of the customer category. Sales in both markets were direct shipments from the plant to the customer. Therefore, there were no differences in the channels of distribution between the two markets. Also, Olmue did not grant rebates or discounts, provide technical services or post-sale warehousing, or advertise on sales to the U.S. or third country markets.

Therefore, we preliminarily find that a single LOT exists in both the U.S. and third country markets, and that Olmue's sales to the U.S. and third country markets were made at the same LOT.

(D) *SANCO*

SANCO reported one channel of distribution in the third country market. In this channel of distribution, sales are made directly to the customer through short-term purchase orders. SANCO's customer is the importer of record. SANCO is responsible for arranging inland freight to the Chilean port and international freight. Accordingly, we preliminarily determine that the third country sales in this channel of distribution constitute a single LOT.

In the U.S. market, SANCO reported two channels of distribution. In both channels of distribution, sales are made directly to the customer through short-term purchase orders. In the first channel of distribution (channel 1), the customer is the importer of record. In the second channel of distribution (channel 2), SANCO is the importer of record. For sales in channels 1 and 2, SANCO is responsible for arranging inland freight from the plant to the

Chilean port and, on certain sales, international freight. Because the sales processes in these channel of distribution were similar, we preliminarily determine that there is a single LOT in the United States.

Comparing sales in SANCO's two markets, there is no indication that there were significantly different selling activities or sales process activities. SANCO also did not grant rebates or discounts, provide technical services or post-sale warehousing, or advertise on either U.S. or third country sales.

Therefore, we preliminarily find that a single LOT exists in both the U.S. and third country markets, and that SANCO's sales to the U.S. and third country markets were made at the same LOT.

(E) *Valle Frio*

Valle Frio reported two channels of distribution in the third country market and a single channel of distribution in the United States. Valle Frio indicated that its sales to the United States and third country markets were made at the same level of trade and it did not request a level of trade adjustment.

In the single channel of distribution for U.S. sales, merchandise is shipped directly to the customer on an FOB (Chilean port) basis. For third country sales in the first channel of distribution (channel 1), Valle Frio shipped the merchandise directly to the third country market. In the second channel of distribution (channel 2), merchandise is sold to a Chilean customer who re-sold the product to the third country. For both markets, Valle Frio sold to wholesalers and distributors, and Valle Frio's prices did not vary based on channel of distribution or customer category.

We examined the information reported by Valle Frio regarding its marketing processes for its third country and U.S. sales, including customer categories and the type and level of selling activities performed. For sales to the third country and United States, Valle Frio's selling activities were limited to receiving and processing orders, and, depending on the terms of sale, arranging for delivery to the third country. Valle Frio offered no technical assistance, inventory maintenance services, or advertising in either market for IQF red raspberries, regardless of channel of distribution. Valle Frio indicated that all export sales require that a microbiological analysis be conducted in order to ensure compliance with phytosanitary requirements. According to Valle Frio, all selling activities were performed in Chile.

Therefore, we preliminarily find that a single LOT exists in both the U.S. and third country markets, and that Valle Frio's U.S. and third country sales were made at the same LOT.

(F) *Valles Andinos*

Valles Andinos reported one channel of distribution in the comparison market. In this channel, sales are made directly to the customer. All sales are shipped from Valles Andinos's supplier's cold storage facilities in Chile to the port, and are delivered by sea freight to the comparison market customer. Accordingly, we preliminarily determine that comparison market sales are made at a single LOT.

In the U.S. market, Valles Andinos reported one channel of distribution. In this channel, sales are made directly to the customer. All sales are shipped from Valles Andinos's supplier's cold storage facilities in Chile to the port, and are delivered by sea freight to the U.S. customer. Accordingly, we preliminarily determine that the sales are made at a single LOT in the United States.

Comparing sales in Valles Andinos's two markets, there is no indication that there were significantly different selling activities or sales process activities. Valles Andinos did not grant rebates or discounts, provide technical services or post-sale warehousing, or advertise on either U.S. or third country sales.

Therefore, we preliminarily find that a single LOT exists in both the U.S. and comparison markets, and that Valles Andinos's sales in the U.S. and comparison market were made at the same LOT.

(G) *VBM*

VBM reported two channels of distribution to the United States, and two channels of distribution in the home market. VBM claimed that the LOT in each of these markets was the same, and therefore, it did not request an LOT adjustment.

We examined the information reported by VBM regarding its marketing processes for its home market and U.S. sales, including customer categories and the types and levels of selling activities performed. For U.S. sales in the first channel of distribution (channel 1), merchandise is transported from the processing plant to the cold storage warehouse before being transported to the port of shipment. For U.S. sales in the second channel of distribution (channel 2), merchandise is transported directly from the processing plant to the port for shipment. VBM reports that there are no pricing differences between these channels of distribution. In both channels of

distribution, VBM is responsible for arranging inland freight to the port in Chile. VBM is also the importer of record. VBM sells to the same types of customer in both channels of distribution. Except for small differences regarding transportation of the product from the processing plant to the cold storage warehouse, there are no differences in the selling activities for these two channels of distribution. Therefore, we preliminarily find that there is a single LOT in the U.S. market.

VBM has also reported two channels of distribution for its home market sales. For home market sales in the first channel of distribution (channel 1),

merchandise is transported from the processing plant to the cold storage warehouse, and is picked up directly from the warehouse by the customer. For home market sales in the second channel of distribution (channel 2), merchandise is picked up by the customer at the processing plant. Because VBM has not reported substantial differences in the selling activities for these two channels, we preliminarily find that there is a single LOT in VBM's home market.

Comparing sales in VBM's two markets, there is no indication that there were significantly different selling activities or sales process activities.

Therefore, we preliminarily find that a single LOT exists in both the U.S. and home markets, and that VBM's sales in the U.S. and home markets were made at the same LOT.

**Currency Conversion**

We made currency conversions in accordance with section 773A(a) of the Act based on the exchange rates in effect on the date of the U.S. sale as reported by the Federal Reserve Bank.

**Preliminary Results of Review**

We preliminarily find the following weighted-average dumping margins:

Exporter/manufacturer	Weighted-average margin percentage
Alimentos Naturales Vitafoods S.A. ....	0.00
Arlavan S.A. ....	3.03
Fruticola Olmue S.A. ....	4.98
Santiago Comercio Exterior Exportaciones S.A. ....	0.13 ( <i>de minimis</i> )
Sociedad Agroindustrial Valle Frio Ltda./Agricola Framparque ....	0.36 ( <i>de minimis</i> )
Valles Andinos S.A. ....	6.42
Vital Berry Marketing, S.A. ....	4.48

**Public Comment**

Any interested party may request a hearing within 30 days of publication of this notice. Any hearing, if requested, will be held 42 days after the publication of this notice, or the first workday thereafter. Issues raised in the hearing will be limited to those raised in the case and rebuttal briefs. Interested parties may submit case briefs within 30 days of the date of publication of this notice. Rebuttal briefs, which must be limited to issues raised in the case briefs, may be filed not later than 35 days after the date of publication of this notice. Parties who submit case briefs or rebuttal briefs in this proceeding 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.

The Department will issue the final results of this administrative review, including the results of its analysis of issues raised in any such written briefs or hearing, within 120 days of publication of these preliminary results.

**Assessment Rates**

Upon completion of the administrative review, the Department shall determine, and CBP shall assess, antidumping duties on all appropriate entries.

Pursuant to 19 CFR 351.212(b)(1), for all sales made by respondents for which they have reported the importer of record and the entered value of the U.S. sales, we have calculated importer-specific assessment rates based on the

ratio of the total amount of antidumping duties calculated for the examined sales to the total entered value of those sales.

Where the respondents did not report the entered value for U.S. sales, we have calculated importer-specific assessment rates for the merchandise in question by aggregating the dumping margins calculated for all U.S. sales to each importer and dividing this amount by the total quantity of those sales. To determine whether the duty assessment rates were *de minimis*, in accordance with the requirement set forth in 19 CFR 351.106(c)(2), we calculated importer-specific *ad valorem* rates based on the estimated entered value. Where the assessment rate is above *de minimis*, we will instruct CBP to assess duties on all entries of subject merchandise by that importer. Pursuant to 19 CFR 351.106(c)(2), we will instruct CBP to liquidate without regard to antidumping duties any entries for which the assessment rate is *de minimis* (*i.e.*, less than 0.50 percent). The Department will issue appraisal instructions directly to CBP.

The Department clarified its "automatic assessment" regulation on May 6, 2003. See *Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties*, 68 FR 23954 (May 6, 2003). This clarification will apply to entries of subject merchandise during the POR produced by the respondent for which it did not know its merchandise was destined for the United States. In such instances, we will instruct CBP to

liquidate unreviewed entries at the all-others rate if there is no rate for the intermediate company(ies) involved in the transaction. For a full discussion of this clarification, see *Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties*, 68 FR 23954 (May 6, 2003).

**Cash Deposit Requirements**

If the final results remain unchanged from these preliminary results, no future cash deposits will be required for the subject merchandise with respect to SANCO. For all other exporters/manufacturers, the following deposit requirements will be effective upon completion of the final results of this administrative review for shipments of IQF red raspberries from Chile entered, or withdrawn from warehouse, for consumption on or after the publication date of the final results of this administrative review, as provided by section 751(a)(1) of the Act: (1) the cash deposit rate for the reviewed companies will be the rates established in the final results of this administrative review (except no cash deposit will be required if its weighted-average margin is *de minimis*, *i.e.*, less than 0.5 percent); (2) for merchandise exported by manufacturers or exporters not covered in this review but covered in the original less-than-fair-value investigation or a previous review, the cash deposit rate will continue to be the most recent rate published in the final determination or final results for which the manufacturer or exporter received

an individual rate; (3) if the exporter is not a firm covered in this review, a previous review, or the original investigation, but the manufacturer is, the cash deposit rate will be the rate established for the most recent period for the manufacturer of the merchandise; and (4) if neither the exporter nor the manufacturer is a firm covered in this or any previous review will be 6.33 percent, the "all others" rate established in *Notice of Amended Final Determination of Sales at Less than Fair Value: IQF Red Raspberries from Chile*, 67 FR 40270 (June 12, 2002).

#### Notification to Importers

This notice also serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

We are issuing and publishing these results in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: July 31, 2006.

**David M. Spooner,**

*Assistant Secretary for Import Administration.*

[FR Doc. E6-12815 Filed 8-7-06; 8:45 am]

BILLING CODE 3510-DS-S

## DEPARTMENT OF COMMERCE

### International Trade Administration

(A-357-802)

#### Light-Walled Welded Rectangular Carbon Steel Tubing from Argentina: Revocation of Antidumping Duty Order

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**SUMMARY:** On July 1, 2005, the Department of Commerce initiated and the International Trade Commission instituted the sunset review of the antidumping duty order on light-walled welded rectangular carbon steel tubing from Argentina. The International Trade Commission determined that revocation of this antidumping duty order would not be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time. Therefore, the Department of Commerce is revoking the antidumping duty order on

light-walled welded rectangular carbon steel tubing from Argentina.

**EFFECTIVE DATE:** August 22, 2005.

**FOR FURTHER INFORMATION CONTACT:** Edythe Artman or Minoo Hatten, Office 5, AD/CVD Operations, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street & Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482-3931 and (202) 482-1690, respectively.

#### SUPPLEMENTARY INFORMATION:

##### Scope of the Order

The product covered by this order is light-walled welded carbon steel pipes and tubes of rectangular (including square) cross-section having a wall thickness of less than 0.156 inch. This merchandise is classified under item number 7306.60.50.00 of the Harmonized Tariff Schedule of the United States. It was formerly classified under item number 610.4928 of the Tariff Schedules of the United States.

##### Background

On August 22, 2000, the Department of Commerce (the Department) published the continuation of the antidumping duty order on light-walled welded rectangular carbon steel tubing from Argentina resulting from the first sunset review of this order. See *Continuation of Antidumping Duty Orders: Light-Walled Rectangular Welded Carbon Steel Pipe and Tube from Argentina and Taiwan; Circular Welded Non-Alloy Steel Pipe and Tube from Brazil, Korea, Mexico, and Taiwan; Welded Carbon Steel Pipe and Tube From India, Thailand, and Turkey; and Small Diameter Standard and Rectangular Steel Pipe and Tube from Taiwan*, 65 FR 50955 (August 22, 2000). Pursuant to section 751(c) of the Tariff Act of 1930, as amended (the Act), and 19 CFR 351.218, the Department initiated and the International Trade Commission (ITC) instituted the second sunset review of this order on July 1, 2005. See *Initiation of Five-year ("Sunset") Reviews*, 70 FR 38101 (July 1, 2005); *Institution of Five-year Reviews concerning the Countervailing Duty Order on Welded Carbon Steel Pipe and Tube from Turkey and the Antidumping Duty Orders on Certain Pipe and Tube from Argentina, Brazil, India, Korea, Mexico, Taiwan, Thailand, and Turkey*, 70 FR 38204 (July 1, 2005). As a result of its review, the Department found that revocation of the antidumping duty order would likely lead to continuation or recurrence of dumping and notified the ITC of the magnitude of the margin likely to prevail were the order to be

revoked. See *Light-Walled Welded Rectangular Carbon Steel Tubing from Argentina and Taiwan; Final Results of the Expedited Sunset Reviews of the Antidumping Duty Orders*, 70 FR 67432 (November 7, 2005). On June 29, 2006, the ITC determined pursuant to section 751(c) of the Act that revocation of the antidumping duty order on light-walled welded rectangular carbon steel tubing from Argentina would not be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time. See *Certain Pipe and Tube from Argentina, Brazil, India, Korea, Mexico, Taiwan, Thailand, and Turkey*, 71 FR 42118 (July 25, 2006) and ITC Publication 3867 (July 2006), entitled *Certain Pipe and Tube from Argentina, Brazil, India, Korea, Mexico, Taiwan, Thailand, and Turkey: Investigation Nos. 701-TA-253 and 731-TA-132, 252, 271, 409, 410, 532-534, and 536 (Second Review)*.

##### Determination to Revoke

As a result of the determination by the ITC that revocation of this antidumping duty order is not likely to lead to continuation or recurrence of material injury to an industry in the United States, the Department is revoking the order on light-walled welded rectangular carbon steel tubing from Argentina, pursuant to section 751(d) of the Act. Pursuant to section 751(d)(2) of the Act and 19 CFR 351.222(i)(2)(i), the effective date of revocation is August 22, 2005 (*i.e.*, the fifth anniversary of the date of publication in the **Federal Register** of the notice of continuation of the antidumping duty order). The Department will notify U.S. Customs and Border Protection to discontinue suspension of liquidation and collection of cash deposits on entries of the subject merchandise entered or withdrawn from warehouse on or after August 22, 2005, the effective date of revocation of the antidumping duty order. The Department will complete any pending administrative reviews of this order and will conduct administrative reviews of subject merchandise entered prior to the effective date of revocation in response to appropriately filed requests for review.

This five-year sunset review and notice are in accordance with section 751(d)(2) and published pursuant to section 777(i)(1) of the Act.

Dated: August 1, 2006.

**David M. Spooner,**

*Assistant Secretary for Import Administration.*

[FR Doc. E6-12866 Filed 8-7-06; 8:45 am]

BILLING CODE 3510-DS-S

**DEPARTMENT OF COMMERCE****International Trade Administration**

(A-533-843)

**Notice of Final Determination of Sales at Less Than Fair Value, and Negative Determination of Critical Circumstances: Certain Lined Paper Products from India**

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**EFFECTIVE DATE:** August 8, 2006.

**SUMMARY:** We determine that imports of certain lined paper products ("CLPP") are being, or are likely to be, sold in the United States at less than fair value ("LTFV"), as provided in section 735 of the Tariff Act of 1930, as amended ("the Act"). The estimated margins of sales at LTFV are shown in the "Final Determination" section of this notice. Moreover, we determine that critical circumstances do not exist with regard to exports of CLPP from India. See the "Critical Circumstances" section below.

**FOR FURTHER INFORMATION CONTACT:**

Christopher Hargett, or Joy Zhang, AD/CVD Operations, Office 3, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482-4161 or (202) 482-1168, respectively.

**SUPPLEMENTARY INFORMATION:****Background**

On April 17, 2006, the Department of Commerce ("the Department") published the preliminary determination of sales at LTFV in the antidumping investigation of CLPP from India. See *Notice of Preliminary Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Affirmative Preliminary Determination of Critical Circumstances in Part: Certain Lined Paper Products from India*, 71 FR 19706 (April 17, 2006) ("*Preliminary Determination*"). From May 19 through May 26, 2006, we verified the sales and cost questionnaire responses of Kejriwal Paper Ltd. ("Kejriwal"). We requested that parties comment on the *Preliminary Determination*.

We received comments from petitioner<sup>1</sup> and each of the respondents, Aero Exports ("Aero"), Kejriwal, and Navneet Publications (India) Ltd.

<sup>1</sup> The petitioner in this investigation is the Association of American School Paper Suppliers and its individual members (MeadWestvaco Corporation, Norcom, Inc., and Top Flight, Inc.) ("petitioner").

("Navneet"). On May 17, 2006, respondents, Aero, Kejriwal, and Navneet, requested a hearing to discuss issues addressed by the interested parties in their case or rebuttal briefs. The Department held the hearing on July 6, 2006. We did not receive any comments regarding the scope of the investigation.

**Period of Investigation**

The period of investigation is July 1, 2004, through June 30, 2005.

**Analysis of Comments Received**

All issues raised in the case and rebuttal briefs by parties to this investigation are addressed in the "Issues and Decision Memorandum" from Stephen J. Claeys, Deputy Assistant Secretary for Import Administration, to David M. Spooner, Assistant Secretary for Import Administration, dated July 31, 2006 ("Issues and Decision Memorandum"), which is adopted by this notice. A list of issues that parties have raised and to which we have responded, all of which are in the Decision Memorandum, is attached to this notice as Appendix II. Parties can find a complete discussion of all issues raised in this investigation and the corresponding recommendations in this public memorandum, which is on file in the Central Records Unit ("CRU"), room B-099 of the main Commerce building. In addition, a complete version of the Issues and Decision Memorandum can be accessed directly on the world wide web at <http://ia.ita.doc.gov/frn>. The paper copy and electronic version of the Decision Memorandum are identical in content.

**Scope of Investigation**

For scope information, see Appendix I.

**Changes Since the Preliminary Determination**

Based on our analysis of the comments received and our findings at verification, we have made certain changes to the margin calculations for the only company for which we are calculating a margin, Kejriwal. For a discussion of these changes, see the "Analysis Memorandum for Kejriwal Paper" from Christopher Hargett, International Trade Compliance Analyst, to James Terpstra, Program Manager, Office of AD/CVD Operations, Office 3, dated July 31, 2006.

**Verification**

As provided in section 782(i) of the Act, we verified the sales and cost information submitted by Kejriwal for

use in our final determination from May 19 through May 26, 2006. We used standard verification procedures including an examination of relevant accounting and production records, and original source documents provided by the respondent.

**Calculation of Normal Value Based on Constructed Value**

In accordance with section 773(a)(4) of the Act, we continue to base Kejriwal's normal value ("NV") on constructed value ("CV"). In accordance with section 773(e) of the Act, we calculated CV based on the sum of Kejriwal's cost of materials and fabrication for the foreign like product, plus amounts for selling, general, and administrative expenses ("SG&A"), profit, and packing costs for exportation to the United States. For changes made to Kejriwal's CV since the preliminary determination, see the "Constructed Value Calculation Adjustments for the Final Determination - Kejriwal Paper Limited" memorandum from Laurens van Houten, Senior Accountant, through Peter S. Scholl, Lead Accountant, to Neal M. Halper, Director, Office of Accounting, dated July 31, 2006.

**Adverse Facts Available**

Section 776(a)(2) of the Act provides that, if an interested party withholds information requested by the administering authority, fails to provide such information by the deadlines for submission of the information and in the form or manner requested, subject to subsections (c)(1) and (e) of section 782 of the Act, significantly impedes a proceeding under this title, or provides such information but the information cannot be verified as provided in section 782(i), the administering authority shall use, subject to section 782(d) of the Act, facts otherwise available in reaching the applicable determination. Section 782(d) of the Act provides that, if the administering authority determines that a response to a request for information does not comply with the request, the administering authority shall promptly inform the responding party and provide an opportunity to remedy the deficient submission. Section 782(e) of the Act further states that the Department shall not decline to consider submitted information if all of the following requirements are met: (1) the information is submitted by the established deadline; (2) the information can be verified; (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination; (4) the interested party has demonstrated that it

acted to the best of its ability; and (5) the information can be used without undue difficulties.

As discussed in the *Preliminary Determination*, the cost of production (“COP”) questionnaire responses submitted by Aero and Navneet were not useable for purposes of calculating accurate LTFV margins. Since the issuance of the initial questionnaire to Aero and Navneet, the Department granted both parties numerous extensions up to and including the submission of the third supplemental questionnaire responses, which were received on March 29, 2006. Over a five-month period, the Department carefully and repeatedly identified the numerous significant deficiencies and errors where we needed more complete information in order to understand the reported information. Throughout this process, there was a consistent pattern of non-responsiveness and confusing, incomplete, and inconsistent information provided by Aero and Navneet.

As discussed in the *Preliminary Determination*, the Department provided several opportunities for Aero to submit information critical to the Department’s analysis, and the Department extended deadlines to allow Aero the time to respond completely to the Department’s questionnaire and supplemental questionnaires. The Department issued three sets of supplemental questionnaires, repeatedly asking the same detailed questions that remained unanswered from the previous supplemental questionnaire. After the issuance of the three supplemental questionnaires, the Department is left with critical information absent from the record. In addition, questions still remain unanswered as to the accuracy and reliability of the reported cost information. Because Aero withheld requested information, failed to provide such information by the deadlines in the form and manner required, impeded this investigation, and reported information that could not be verified, the Department may resort to facts otherwise available, in reaching its final determination, pursuant to sections 776(a)(2)(A),(B),(C) and (D) of the Act. Due to the fact that most of the reasons regarding the use of facts available for Aero are considered business proprietary information, please see the Memorandum from Sheikh M. Hannan to Neal Halper entitled “Use of Adverse Facts Available for the Final Determination – Aero Exports,” dated July 31, 2006, on file in the CRU.

As discussed in the *Preliminary Determination*, Navneet failed to provide: 1) various reconciliation

schedules (*i.e.*, the overall cost reconciliation, the overall quantity reconciliation, and the overall purchased paper reconciliation) and explanations of reconciling amounts; 2) a consistent explanation for its product cost calculation methodology that demonstrates the link between its reported costs and its normal books and records; and 3) complete supporting documentation for the matching product control number (“CONNUM”) cost build-up schedules. Without this information, the Department is unable to determine whether Navneet accounted for all its production costs relating to the merchandise under investigation. Therefore, the Department was unable to rely on Navneet’s submitted costs. Moreover, based on the statements made by Navneet and the exhibits provided in its questionnaire responses, it is apparent that Navneet departed from the product costs recorded in its normal books and records when calculating its reported product costs to the Department. Thus, the costs the Department should be using, the per-unit costs from its normal books and records, are not on the record of this proceeding. Section 773(f)(1)(A) of the Act requires that companies normally use their normal books and records in reporting costs for an antidumping investigation. Finally, we note that Navneet failed to provide the POI job order worksheet reconciliation, which the Department requested to determine whether Navneet relied on its normal books and records and whether its reported costs reconciled to those records. See the Issues and Decisions Memorandum, at Comment 14.

As a result of the numerous, serious deficiencies, we were unable to adequately determine whether the cost information contained in Aero and Navneet’s responses reasonably and accurately reflects the costs incurred by these companies to produce the subject merchandise. Without this information, we cannot accurately calculate LTFV margins for these companies.

Therefore we continue to find that, by failing to provide the required information in the manner requested, Aero and Navneet did not act to the best of their ability. Consequently, the Department has determined that, in selecting from among the facts otherwise available, an adverse inference is warranted. Thus, the Department finds that the use of adverse facts available (“AFA”) is warranted under section 776(a)(2) of the Act.

#### Corroboration of Information

Section 776(c) of the Act requires the Department to corroborate, to the extent

practicable, secondary information used as facts available. Secondary information is defined as “information derived from the petition that gave rise to the investigation or review, the final determination concerning the subject merchandise, or any previous review under section 751 concerning the subject merchandise.” See 19 CFR 351.308(c) and (d); see also the Statement of Administrative Action (SAA) at 870.

The SAA clarifies that “corroborate” means that the Department will satisfy itself that the secondary information to be used has probative value. See the SAA at 870. The SAA also states that independent sources used to corroborate such evidence may include, for example, published price lists, official import statistics and customs data, and information obtained from interested parties during the particular investigation. *Id.* To corroborate secondary information, the Department will, to the extent practicable, examine the reliability and relevance of the information used. In order to determine the probative value of the margins in the petition for use as AFA for purposes of this final determination, we relied on our analysis from the preliminary determination. See *Preliminary Determination*, 71 FR at 19710. See also, “Preliminary Determination in the Antidumping Duty Investigation of Certain Lined Paper Products (“CLPP”) from India: Selection of Total Adverse Facts–Available Rate” from the Team to James Terpstra, Program Manager Office III, dated April 7, 2006. Based on this analysis, we determined that the price and cost information contained in the petition do not have probative value. Therefore, we have relied on the information reported by Kejriwal which has probative value, as confirmed by verification. Accordingly, we find that the second highest individual margin calculated in this proceeding based on the data reported by a respondent, Kejriwal, in this investigation, 23.17 percent, is corroborated within the meaning of section 776(c) of the Act. See Issues and Decision Memorandum, at Comment 15.

#### All Others Rate

Section 735(c)(5)(A) of the Act provides that, the estimated “All Others” rate shall be an amount equal to the weighted average of the estimated weighted-average dumping margins established for exporters and producers individually investigated, excluding any zero and *de minimis* margins, and any margins determined entirely under section 776 of the Act. Kejriwal is the only respondent in this investigation for

which the Department has calculated a company-specific rate. Therefore, for purposes of determining the “All Others” rate and pursuant to section 735(c)(5)(A) of the Act, we are using the dumping margin calculated for Kejriwal, as referenced in the “Final Determination” section below.

**Critical Circumstances**

In our *Preliminary Determination*, we found that critical circumstances did not exist for Kejriwal or any company subject to the “All Others” rate. See *Preliminary Determination*, 71 FR at 19712. However, we found that critical circumstances did exist for Aero and Navneet. *Id.* We received no comments on our critical circumstances determination. Considering the changes made to Kejriwal’s margin calculation, we continue to find that critical circumstances do not exist for imports of subject merchandise for Kejriwal or any company subject to the “All Others” rate, as there is no evidence that importers knew, or should have known, that the exporter was selling subject merchandise at LTFV. See 735(a)(3)(A)(ii) of the Act.

To determine whether the person by whom, or for whose account, the merchandise was imported knew or should have known that the exporter was selling the subject merchandise at less than its fair value, in accordance with section 733(e)(1)(A)(ii) of the Act, the Department normally considers margins of 25 percent or more for export price sales, or 15 percent or more for constructed export price transactions, sufficient to impute knowledge of dumping. We find that critical circumstances does not exist for Kejriwal or any company subject to the “All Others” rate. In addition, we find that critical circumstances does not exist for both Aero and Navneet, because the assigned AFA rate of 23.17 percent is less than the 25 percent sufficient to impute knowledge of dumping. See *Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Certain Color Television Receivers From the People’s Republic of China*, 69 FR 20594 (April 16, 2004).

**Continuation of Suspension of Liquidation**

In accordance with section 735(c)(1)(B) of the Act, we are directing U.S. Customs and Border Protection (“CBP”) to continue to suspend liquidation of all imports of subject merchandise that are entered, or withdrawn from warehouse, for consumption on or after April 17, 2006,

the date of publication of the preliminary determination in the **Federal Register**. Because we did not find critical circumstances in this final determination, we will instruct CBP to terminate suspension of liquidation, and release any cash deposits or bonds, on imports during the 90 day period prior to the date of publication of the *Preliminary Determination*. We will instruct CBP to continue to require a cash deposit or the posting of a bond for all companies based on the estimated weighted-average dumping margins shown below. The suspension of liquidation instructions will remain in effect until further notice.

**Final Determination**

We determine that the following weighted-average dumping margins exist for the period July 1, 2004, through June 30, 2005:

Manufacturer/Exporter	Weighted Average Margin (percent)
Aero Exports .....	23.17
Kejriwal Paper Limited ..	3.91
Navneet Publications (India) Ltd. ....	23.17
All Others .....	3.91

In accordance with section 735(c)(5)(A) of the Act, we have based the “All Others” rate on the weighted average of the dumping margins calculated for the exporter/manufacturer investigated in this proceeding. The “All Others” rate is calculated exclusive of all de minimis margins and margins based entirely on AFA.

**ITC Notification**

In accordance with section 735(d) of the Act, we have notified the ITC of our final determination. As our final determination is affirmative, the ITC will determine within 45 days whether these imports are causing material injury, or threat of material injury, to an industry in the United States. If the ITC determines that material injury or threat of injury does not exist, the proceeding will be terminated and all securities posted will be refunded or canceled. If the ITC determines that such injury does exist, the Department will issue an antidumping duty order directing CBP to assess antidumping duties on all imports of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the effective date of the suspension of liquidation.

**Return or Destruction of Proprietary Information**

In the event that the ITC issues a final negative injury determination, this notice will serve as the only reminder

to parties subject to administrative protective order (“APO”) of their responsibility concerning the destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of return/ destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

We are issuing and publishing this determination and notice in accordance with sections 735(d) and 777(i) of the Act.

Dated: July 31, 2006.

**David M. Spooner,**  
*Assistant Secretary for Import Administration.*

**Appendix I**

**Scope of the Investigation**

The scope of this investigation includes certain lined paper products, typically school supplies (for purposes of this scope definition, the actual use of or labeling these products as school supplies or non-school supplies is not a defining characteristic) composed of or including paper that incorporates straight horizontal and/or vertical lines on ten or more paper sheets (there shall be no minimum page requirement for looseleaf filler paper) including but not limited to such products as single- and multi-subject notebooks, composition books, wireless notebooks, looseleaf or glued filler paper, graph paper, and laboratory notebooks, and with the smaller dimension of the paper measuring 6 inches to 15 inches (inclusive) and the larger dimension of the paper measuring 8-3/4 inches to 15 inches (inclusive). Page dimensions are measured size (not advertised, stated, or “tear-out” size), and are measured as they appear in the product (*i.e.*, stitched and folded pages in a notebook are measured by the size of the page as it appears in the notebook page, not the size of the unfolded paper). However, for measurement purposes, pages with tapered or rounded edges shall be measured at their longest and widest points. Subject lined paper products may be loose, packaged or bound using any binding method (other than case bound through the inclusion of binders board, a spine strip, and cover wrap). Subject merchandise may or may not contain any combination of a front cover, a rear cover, and/or backing of any composition, regardless of the inclusion of images or graphics on the cover, backing, or paper. Subject merchandise is within the scope of this investigation whether or not the lined

paper and/or cover are hole punched, drilled, perforated, and/or reinforced. Subject merchandise may contain accessory or informational items including but not limited to pockets, tabs, dividers, closure devices, index cards, stencils, protractors, writing implements, reference materials such as mathematical tables, or printed items such as sticker sheets or miniature calendars, if such items are physically incorporated, included with, or attached to the product, cover and/or backing thereto.

Specifically excluded from the scope of this investigation are:

- unlined copy machine paper;
- writing pads with a backing (including but not limited to products commonly known as “tablets,” “note pads,” “legal pads,” and “quadrille pads”), provided that they do not have a front cover (whether permanent or removable). This exclusion does not apply to such writing pads if they consist of hole-punched or drilled filler paper;
- three-ring or multiple-ring binders, or notebook organizers incorporating such a ring binder provided that they do not include subject paper;
- index cards;
- printed books and other books that are case bound through the inclusion of binders board, a spine strip, and cover wrap;
- newspapers;
- pictures and photographs;
- desk and wall calendars and organizers (including but not limited to such products generally known as “office planners,” “time books,” and “appointment books”);
- telephone logs;
- address books;
- columnar pads & tablets, with or without covers, primarily suited for the recording of written numerical business data;
- lined business or office forms, including but not limited to: pre-printed business forms, lined invoice pads and paper, mailing and address labels, manifests, and shipping log books;
- lined continuous computer paper;
- boxed or packaged writing stationary (including but not limited to products commonly known as “fine business paper,” “parchment paper,” and “letterhead”), whether or not containing a lined header or decorative lines;
- Stenographic pads (“steno pads”), Gregg ruled (“Gregg ruling” consists of a single- or double-margin vertical ruling line down the center of the page. For a six-inch by nine-inch stenographic pad, the ruling would be located approximately three inches from the left of the book.), measuring 6 inches by 9 inches;

Also excluded from the scope of this investigation are the following trademarked products:

- Fly™ lined paper products: A notebook, notebook organizer, loose or glued note paper, with papers that are printed with infrared reflective inks and readable only by a Fly™ pen-top computer. The product must bear the valid trademark Fly™ (products found to be bearing an invalidly licensed or used trademark are not excluded from the scope).
- Zwipes™: A notebook or notebook organizer made with a blended polyolefin writing surface as the cover and pocket surfaces of the notebook, suitable for writing using a specially-developed permanent marker and erase system (known as a Zwipes™ pen). This system allows the marker portion to mark the writing surface with a permanent ink. The eraser portion of the marker dispenses a solvent capable of solubilizing the permanent ink allowing the ink to be removed. The product must bear the valid trademark Zwipes™ (products found to be bearing an invalidly licensed or used trademark are not excluded from the scope).
- FiveStar®Advance™: A notebook or notebook organizer bound by a continuous spiral, or helical, wire and with plastic front and rear covers made of a blended polyolefin plastic material joined by 300 denier polyester, coated on the backside with PVC (poly vinyl chloride) coating, and extending the entire length of the spiral or helical wire. The polyolefin plastic covers are of specific thickness; front cover is 0.019 inches (within normal manufacturing tolerances) and rear cover is 0.028 inches (within normal manufacturing tolerances). Integral with the stitching that attaches the polyester spine covering, is captured both ends of a 1” wide elastic fabric band. This band is located 2–3/8” from the top of the front plastic cover and provides pen or pencil storage. Both ends of the spiral wire are cut and then bent backwards to overlap with the previous coil but specifically outside the coil diameter but inside the polyester covering. During construction, the polyester covering is sewn to the front and rear covers face to face (outside to outside) so that when the book is closed, the stitching is concealed from the outside. Both free ends (the ends not sewn to the cover and back) are stitched with a turned edge construction. The flexible polyester material forms a covering over the spiral wire to protect it and provide a comfortable grip on the product. The product must bear the valid trademarks FiveStar®Advance™ (products found to be bearing an invalidly licensed or

used trademark are not excluded from the scope).

- FiveStar Flex™: A notebook, a notebook organizer, or binder with plastic polyolefin front and rear covers joined by 300 denier polyester spine cover extending the entire length of the spine and bound by a 3-ring plastic fixture. The polyolefin plastic covers are of a specific thickness; front cover is 0.019 inches (within normal manufacturing tolerances) and rear cover is 0.028 inches (within normal manufacturing tolerances). During construction, the polyester covering is sewn to the front cover face to face (outside to outside) so that when the book is closed, the stitching is concealed from the outside. During construction, the polyester cover is sewn to the back cover with the outside of the polyester spine cover to the inside back cover. Both free ends (the ends not sewn to the cover and back) are stitched with a turned edge construction. Each ring within the fixture is comprised of a flexible strap portion that snaps into a stationary post which forms a closed binding ring. The ring fixture is riveted with six metal rivets and sewn to the back plastic cover and is specifically positioned on the outside back cover. The product must bear the valid trademark FiveStar Flex™ (products found to be bearing an invalidly licensed or used trademark are not excluded from the scope). Merchandise subject to this investigation is typically imported under headings 4820.10.2050, 4810.22.5044, 4811.90.9090, 4820.10.2010, 4820.10.2020 of the Harmonized Tariff Schedule of the United States (“HTSUS”). During the investigation additional HTS codes may be identified. The tariff classifications are provided for convenience and customs purposes; however, the written description of the scope of the investigation is dispositive.

## Appendix II –

### Issues and Decision Memorandum

- Comment 1: Calculation of CVD offset to the AD Cash Deposit Rate
- Comment 2: Financial Expense Ratio
- Comment 3: General and Administrative Expense Ratio
- Comment 4: Scrap Offset
- Comment 5: Depreciation Expense
- Comment 6: Kejriwal’s “Flexi Com Books” and “Personal Note Books”:
- Scope Issue
- Comment 7: Excise Tax Rebated and Duty Free Replenishment Certificates (“DFRC”)
- Comment 8: Kejriwal’s Packing Ministerial Error in Preliminary Determination

Comment 9: Kejriwal's Imputed U.S. Credit Expense  
 Comment 10: Kejriwal's Minor Correction Regarding USDUTYU Field  
 Comment 11: Decision not to Verify the Sales and Critical Circumstances Responses of Aero and Navneet  
 Comment 12: Decision not to Fully Extend the Final Determination  
 Comment 13: Whether the Cost Investigation was Unlawful and Not Based on Substantial Evidence  
 Comment 14: Whether Adverse Inferences were Warranted for Aero and Navneet  
 Comment 15: Legality of Methodology and Adverse Rates Applied to Aero and Navneet  
 Comment 16: Treatment of Negative Margins  
 [FR Doc. E6-12811 Filed 8-7-06; 8:45 am]  
 BILLING CODE 3510-DS-S

## DEPARTMENT OF COMMERCE

### International Trade Administration

A-570-881

#### Malleable Iron Pipe Fittings From the People's Republic of China: Amended Final Results of Antidumping Duty Administrative Review

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**SUMMARY:** On June 29, 2006, the Department of Commerce ("Department") published *Malleable Iron Pipe Fittings From the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 71 FR 37051 (June 29, 2006) ("*Final Results*"), covering the period of review ("POR") December 2, 2003, through November 30, 2004. We are amending the *Final Results* to correct two ministerial errors made in the calculation of the dumping margin for LDR Industries Inc. and Beijing Sai Lin Ke Hardware Co., Ltd. (collectively "SLK"), pursuant to section 751(h) of the Tariff Act of 1930, as amended ("the Act").

**EFFECTIVE DATE:** August 8, 2006.

**FOR FURTHER INFORMATION CONTACT:** Jennifer Moats or Juanita H. Chen, AD/CVD Operations, Office 8, Import Administration, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue, NW., Washington, DC 20230; telephone: 202-482-5047 or 202-482-1904, respectively.

**SUPPLEMENTARY INFORMATION:**

#### Period of Review

The POR is December 2, 2003, through November 30, 2004.

#### Scope of the Order

For purposes of this order, the products covered are certain malleable iron pipe fittings, cast, other than grooved fittings, from the People's Republic of China ("PRC"). The merchandise is currently classifiable under item numbers 7307.19.90.30, 7307.19.90.60 and 7307.19.90.80 of the Harmonized Tariff Schedule of the United States ("HTSUS"). Excluded from the scope of this order are metal compression couplings, which are imported under HTSUS number 7307.19.90.80. A metal compression coupling consists of a coupling body, two gaskets, and two compression nuts. These products range in diameter from ½ inch to 2 inches and are carried only in galvanized finish. Although HTSUS subheadings are provided for convenience and customs purposes, the Department's written description of the scope of this proceeding is dispositive.

#### Background

On June 29, 2006, the Department published the *Final Results* in the **Federal Register**. On June 28, 2006, and July 3, 2006, we received ministerial error allegations from SLK and Chengde Malleable Iron General Factory ("Chengde"). On July 24, 2006, the Department rejected a second submission filed by Chengde as untimely. A ministerial error is defined in section 751(h) of the Act and further clarified in 19 CFR 351.224(f) as "an error in addition, subtraction, or other arithmetic function, clerical error resulting from inaccurate copying, duplication, or the like, and any other similar type of unintentional error which the Secretary considers ministerial." After analyzing SLK's comments, we agree that the Department made two ministerial errors in SLK's margin calculation program for the *Final Results*. After analyzing Chengde's comments, we disagree with its allegations that the Department made ministerial errors in Chengde's margin calculation program for the *Final Results*. See the July 31, 2006, Memorandum from Juanita H. Chen to Wendy J. Frankel regarding the 2003-2004 Malleable Cast Iron Pipe Fittings from the People's Republic of China: Analysis of Ministerial Error Allegations. As a result, we are amending the *Final Results* only to revise the antidumping margin for SLK, in accordance with 19 CFR 351.224(e).

#### Analysis of Ministerial Error Allegations

**SLK Allegation: Calculation Error for Weight Conversion**

SLK argues that the Department erred when it converted SLK's U.S. expenses and packing factors from a per-piece basis to a per-kilogram basis by using an incorrectly calculated average weight of all the reported producer-specific weights (*i.e.*, WEIGHT4 in the margin calculation program). Specifically, SLK argues that the error resulted from the use of the "ID" statement in the SAS calculation program when weight averaging all of the reported weights of each fitting, thereby resulting in the Department's unintentional selection of the highest reported producer-specific weight rather than the weighted-average weight. SLK claims that the Department then applied the highest per-unit weight as reported by SLK's suppliers in its factors of production ("FOP") databases to convert the U.S. expenses and its packing expenses to a per-kilogram basis. SLK suggests that the Department correct this ministerial error by eliminating the "ID" statement and adding WEIGHT4 to the VAR statement, which calculates a weighted average of the reported producer-specific weights instead of the highest of the reported producer-specific weights.

**Department's Position:**

We agree with SLK that we inadvertently selected the highest reported weight by using the "ID" statement in the margin calculation. For these final results, we have eliminated the "ID" statement and added WEIGHT4 to the VAR statement. As a result, the revised margin calculation program applies the weighted-average of the reported producer-specific weights. Thus, we have revised SLK's margin accordingly.

**SLK Allegation: Currency Conversion Error for Packing Expenses**

SLK argues that the Department erroneously used Indian rupee-denominated freight values, instead of U.S. dollar-denominated freight values in calculating packing expenses. Specifically, SLK claims that the Department converted all the freight expenses related to SLK's packing FOPs from Indian rupees to U.S. dollars, but when calculating the total packing expenses, the Department added Indian rupee-denominated freight values to U.S. dollar-denominated surrogate values for the packing inputs. SLK suggests that the Department should correct this mistake by replacing the Indian rupee-denominated freight

values with U.S. dollar-denominated freight values in the margin calculation for packing expenses.

Department's Position:

We agree with SLK that we erroneously used Indian rupee-denominated freight values instead of U.S. dollar-denominated freight values

in its margin calculation for packing expenses. For these amended final results, we corrected this ministerial error and used freight values that were converted to U.S. dollars before adding these values to the U.S. dollar-denominated surrogate values for the packing inputs in SLK's margin calculation program.

Amended Final Results

As a result of the correction of ministerial errors and amended margin calculation, the following weighted-average margin exists for SLK, for the period of December 2, 2003, through November 30, 2004.

Producer/Exporter	Original Weighted-average percentage margin	Amended Weighted-average percentage margin
LDR Industries Inc. and Beijing Sai Lin Ke Hardware Co., Ltd. ....	14.69	9.24

The Department will disclose calculations performed for the amended final results to the parties within five days of the date of publication of this notice in accordance with 19 CFR 351.224(b).

Assessment Rates

The Department will determine, and U.S. Customs and Border Protection ("CBP") shall assess, antidumping duties on all appropriate entries based on the amended final results. For details on the assessment of antidumping duties on all appropriate entries, see Final Results, 71 FR 37051, 37056.

These amended final results are published in accordance with sections 751(h) and 777(i)(1) of the Act.

Dated: July 31, 2006.

David M. Spooner,

Assistant Secretary for Import Administration.

[FR Doc. E6-12817 Filed 8-7-06; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration (A-475-818)

Notice of Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review: Ninth Administrative Review of the Antidumping Duty Order on Certain Pasta from Italy

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: In response to requests by interested parties, the Department of Commerce ("the Department") is conducting an administrative review of the antidumping duty order on certain pasta ("pasta") from Italy for the period of review ("POR") July 1, 2004, through June 30, 2005.

We preliminarily determine that during the POR, both Corticella Molini e Pastifici S.p.A. and its affiliate Pasta

Combattenti S.p.A. (collectively, "Corticella/Combattenti") and Atar, S.r.L. ("Atar") sold subject merchandise at less than normal value ("NV"). If these preliminary results are adopted in the final results of this administrative review, we will instruct U.S. Customs and Border Protection ("CBP") to assess antidumping duties equal to the difference between the export price and normal value ("EP").

Further, requests for review of the antidumping duty order for the following companies were withdrawn: Barilla G.e.R. Fratelli, S.p.A./Barilla Alimentare, S.p.A. ("Barilla"), Moline e Pastificio Tomasello S.r.L. ("Tomasello"), and Pastificio Laporta S.a.s ("Laporta"). Because the withdrawal requests were timely and there were no other requests for review of these companies, we are rescinding the review for these companies. See 19 CFR 351.213(d)(1).

Furthermore, we are preliminarily rescinding the review with respect to Italpasta/Pasta Berruto S.p.A. ("Italpasta")<sup>1</sup> because Italpasta submitted a letter stating that it had no shipments of subject merchandise during the POR. See 19 CFR 351.213(d)(3). As discussed in the Partial Rescission section below, customs data did not contradict Italpasta's claim that it did not have shipments of subject merchandise during the POR.

Finally, we are rescinding the review with respect to Pastificio Antonio Pallante S.r.L./Industrie Alimentari Molisane, S.r.L./Vitelli Foods, LLC ("Pallante") because, since the initiation of the current review, the Department has revoked the order in part, with respect to Pallante, effective July 1, 2004. See Notice of Final Results of the Eighth Administrative Review of the

<sup>1</sup> In its September 20, 2005 letter, counsel for Italpasta S.p.A. informed the Department that it merged with its affiliate, Arrighi S.p.A. into a new company Pasta Berruto S.p.A.. See Letter to the Department from Italpasta, Re: Pasta from Italy; Response to Questionnaire (September 20, 2005).

Antidumping Order on Certain Pasta From Italy and Determination to Revoke in Part, 70 FR 71464 (November 29, 2005) ("Pasta Eighth Review Final Results").

Interested parties are invited to comment on these preliminary results and partial rescission. Parties who submit comments in this segment of the proceeding should also submit with them: (1) a statement of the issues and (2) a brief summary of the comments. Further, parties submitting written comments are requested to provide the Department with an electronic version of the public version of any such comments on diskette.

EFFECTIVE DATE: August 8, 2006.

FOR FURTHER INFORMATION CONTACT: Dennis McClure, Maura Jeffords or Preeti Tolani, AD/CVD Operations, Office 3, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482-5973, (202) 482-3146 or (202) 482-0395, respectively.

SUPPLEMENTARY INFORMATION:

Background

On July 24, 1996, the Department published in the Federal Register the antidumping duty order on pasta from Italy. See Notice of Antidumping Duty Order and Amended Final Determination of Sales at Less Than Fair Value: Certain Pasta From Italy, 61 FR 38547 (July 24, 1996).

On July 1, 2005, the Department published a notice of opportunity to request an administrative review of the antidumping duty order on certain pasta from Italy. See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation: Opportunity to Request Administrative Review, 70 FR 38099 (July 1, 2005). We received

requests for review from petitioners<sup>2</sup> and from individual Italian exporters/producers of pasta, in accordance with 19 CFR 351.213(b)(1)&(2). On August 29, 2005, the Department published the notice of initiation of this antidumping duty administrative review covering the period July 1, 2004, through June 30, 2005, listing these seven companies as respondents: Barilla, Atar, Italpasta, Tomasello, Laporta, Corticella/Combattenti, and Pallante. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part*, 70 FR 51009 (August 29, 2005) (“*Initiation Notice*”).

On October 13, 2005, Laporta timely withdrew its request for an administrative review of certain pasta from Italy. On November 9, 2005, Barilla timely withdrew its request for an administrative review of certain pasta from Italy. On November 14, 2005, Tomasello timely withdrew its request for an administrative review of certain pasta from Italy. No other party requested a review of these three entities.

Between October 2005 and July 2006, the Department issued its initial questionnaire and supplemental questionnaires to each respondent, as applicable. In the initial questionnaire to Corticella/Combattenti, the Department requested that Corticella/Combattenti submit its cost of production information because during the Department’s most recently completed review, we disregarded sales made by Corticella/Combattenti at less than cost of production. *See* sections 773 (b)(1) and (2)(A)(ii) of the Tariff Act of 1930, as amended (“the Act”); *Pasta Eighth Review Final Results*, 70 FR 71464 (November 29, 2005). We received responses to the Department’s initial and supplemental questionnaires on October 31, 2005, February 2, March 15, June 27, June 30 and July 18, 2006 from Atar. Corticella/Combattenti provided responses to the Department’s initial and supplemental questionnaires on February 6, February 16, and March 30, 2006. On November 21, 2005, January 4, and May 1, 2006, the petitioners filed comments on Atar’s response. Atar filed rebuttal comments on December 1, 2005, February 6, and May 8, 2006. On March 10, 2005, the Department extended the due date for the preliminary results of review from April 3, to May 18, 2006. *See Certain Pasta from Italy: Extension of Time Limits for the Preliminary Results of*

*Antidumping Duty Administrative Review*, 71 FR 13584 (March 16, 2006). On May 17, 2006, we fully extended the due date for the preliminary results of review from May 18, to July 31, 2006. *See Certain Pasta from Italy: Extension of Time Limits for the Preliminary Results of Antidumping Duty Administrative Review*, 71 FR 29615 (May 23, 2006). We issued additional supplemental questionnaires to Atar between May 31 and July 7, 2006.

#### Affiliation and Collapsing

During the seventh administrative review in this proceeding, the Department collapsed Corticella/Combattenti and its affiliated toll producer, CLC. The Department found, among other things, that Corticella/Combattenti and CLC had common ownership, common control and management, and significant potential for manipulation of price and production; therefore, the Department collapsed the companies for purposes of that review. *See Notice of Final Results of the Seventh Administrative Review of the Antidumping Duty Order on Certain Pasta From Italy and Determination to Revoke in Part*, 70 FR 6832, 6833 (February 9, 2005) (*Pasta Seventh Review Final Results*) (citing the February 2, 2005, memorandum from the Team to Melissa G. Skinner, Director, AD/CVD Operations, Office 3, entitled, “The relationship of Coopertive Lomellina Cerealicoltori S.r.l. (CLC) with Corticella Molini e Pastifici S.p.A. (Corticella) and its affiliate Pasta Combattenti S.p.A. (Combattenti, collectively Corticella/Combattenti),” a proprietary document, the public version of which is available in the Central Records Unit (“CRU”), room B-099 of the main Department building.) This memo has been placed on the record of this review. *See* Memo to File, dated July 31, 2006. The Department also found Corticella/Combattenti and CLC to be a single entity for the purposes of the eighth administrative review. *See Pasta Eighth Review Final Results*, 70 FR 6832, 6833. As the facts are the same for this POR as they were for both the *Pasta Seventh Review Final Results* and the *Pasta Eighth Review Final Results*, we continue to find that there is significant potential for manipulation of price and production between these affiliated parties, and therefore, we have treated Corticella/Combattenti and CLC as a single entity for this review.

#### Scope of the Order

Imports covered by this 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 this 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 Istituto Mediterraneo Di Certificazione, by Bioagricoop Scrl, by QC&I International Services, by Ecocert Italia, by Consorzio per il Controllo dei Prodotti Biologici, or by Associazione Italiana per l’Agricoltura Biologica.

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 Istituto per la Certificazione Etica e Ambientale (“ICEA”) are also excluded from this order. *See* Memorandum from Audrey Twyman to Susan Kubbach, dated February 28, 2006, entitled “Recognition of Istituto 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 CRU.

The merchandise subject to this order is currently classifiable under item 1902.19.20 of the *Harmonized Tariff Schedule of the United States* (“”). Although the *HTSUS* subheading is provided for convenience and customs purposes, the written description of the merchandise subject to the order is dispositive.

#### Partial Rescission

Between October 13 and November 14, 2005, Laporta, Barilla, and Tomasello timely withdrew their requests for administrative review of the antidumping order. Because their withdrawal requests were filed within 90 days of publication of the *Initiation Notice*, and because there were no other requests for review of the above-mentioned companies, we are rescinding the review with respect to Laporta, Barilla, and Tomasello in accordance with 19 CFR 351.213(d)(1).

On November 29, 2005, the order was revoked, in part with respect to Pallante. *See Pasta Eighth Review Final Results*,

<sup>2</sup>New World Pasta Company; Dakota Growers Pasta Company; and American Italian Pasta Company.

70 FR 71464 (November 29, 2005). Consequently, we are rescinding the administrative review with respect to Pallante.

On September 20, 2005, Italpasta submitted a letter stating that it had no shipments of subject merchandise during the period of review. We confirmed this information through customs data. See Memorandum to the File from the Team regarding Customs Query dated May 18, 2006, the public version of which is on file in the CRU. In accordance with 19 CFR 351.213(d)(3), we are preliminarily rescinding the review in part as to Italpasta because it made no sales or shipments of subject merchandise during the review period.

### Product Comparisons

In accordance with section 771(16) of the Act, we first attempted to match contemporaneous sales of products sold in the United States and comparison markets that were identical with respect to the following characteristics: (1) pasta shape; (2) type of wheat; (3) additives; and (4) enrichment. When there were no sales of identical merchandise in the comparison market to compare with U.S. sales, we compared U.S. sales with the most similar product based on the characteristics listed above, in descending order of priority. When there were no appropriate comparison market sales of comparable merchandise, we compared the merchandise sold in the United States to constructed value ("CV"), in accordance with section 773(a)(4) of the Act.

For purposes of the preliminary results, where appropriate, we have calculated the adjustment for differences in merchandise based on the difference in the variable cost of manufacturing ("VCOM") between each U.S. model and the most similar home market model selected for comparison.

### Comparisons to Normal Value

To determine whether sales of certain pasta from Italy were made in the United States at less than NV, we compared the EP to the NV, as described in the "Export Price" and "Normal Value" sections of this notice. In accordance with section 777A(d)(2) of the Act, we calculated monthly weighted-average prices for NV for Corticella/Combattenti and CV for Atar and compared these to individual U.S. transactions. See the company-specific calculation memoranda, available in the CRU.

### Export Price

For both Corticella/Combattenti and Atar, for the price to the United States,

we used, as appropriate, EP, in accordance with section 772(a) of the Act. We calculated EP when the merchandise was sold by the producer or exporter outside of the United States directly to the first unaffiliated purchaser in the United States prior to importation. We based EP on the packed cost-insurance-freight ("CIF"), ex-factory, free-on-board ("FOB"), or delivered prices to the first unaffiliated customer in, or for exportation to, the United States. When appropriate, we made adjustments to these prices to reflect billing adjustments, discounts, rebates, and freight revenue.

In accordance with section 772(c)(2) of the Act, we made deductions, where appropriate, for movement expenses including inland freight from the plant to the distribution warehouse, from plant or warehouse to port of exportation, brokerage, handling and loading charges, export duties, international freight, marine insurance, U.S. inland freight expenses, warehousing, and U.S. duties. In addition, when appropriate, we increased EP, by an amount equal to the countervailing duty rate attributed to export subsidies in the most recently completed administrative review of the countervailing duty order applicable to the POR, in accordance with section 772(c)(1)(C) of the Act. Corticella/Combattenti reported resales to the United States of subject merchandise purchased in Italy from unaffiliated producers. In those situations in which an unaffiliated producer of the subject pasta knew at the time of the sale that the merchandise was destined for the United States, the relevant basis for the EP would be the price between that producer and the respondent. See *Dynamic Random Access Memory Semiconductors of One Megabit or Above From the Republic of Korea: Final Results of Antidumping Duty Administrative Review, Partial Rescission of Administrative Review and Notice of Determination Not to Revoke Order*, 63 FR 50867, 50876 (September 23, 1998). Because we determined in prior reviews that virtually all enriched pasta is sold to the United States, we preliminarily determine, as we did in prior reviews, that the unaffiliated producers knew or had reason to know at the time of sale that the ultimate destination of the merchandise was the United States. See, e.g., *Notice of Preliminary Results, Partial Rescission of Antidumping Duty Administrative Review and Revocation of the Antidumping Duty Order in Part: Eighth Administrative Review of the Antidumping Duty Order on Certain*

*Pasta from Italy*, 70 FR 42303, 42306 ("Pasta Eighth Review Prelim"); *Notice of Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review and Intent Not to Revoke in Part: For the Sixth Administrative Review of the Antidumping Duty Order on Certain Pasta from Italy*, 68 FR 47020, 47028; *Notice of Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review: Certain Pasta from Italy*, 63 FR 42368, 42370 (August 7, 1998). Accordingly, consistent with our methodology in prior reviews, when a respondent purchased pasta from other producers and we were able to identify resales of this merchandise to the United States, we excluded these sales of the purchased pasta from the margin calculation for that respondent. See, e.g., *Pasta Eighth Review Prelim*, 70 FR 42303, 42306 (July 22, 2005); *Pasta Eighth Review Final Results*, 70 FR 71464 (November 29, 2005).

### Normal Value

#### A. Selection of Comparison Markets

Pursuant to sections 773(a)(1)(B) and (C) of the Act, to determine whether there was a sufficient volume of sales in the home market to serve as a viable basis for calculating NV, we compared each respondent's volume of home market sales of the foreign like product to the volume of its U.S. sales of the subject merchandise. Where a respondent had an aggregate volume of home market sales of the foreign like product that was greater than five percent of its aggregate volume of U.S. sales of the subject merchandise, we determined that the home market was viable. Based on the data Corticella/Combattenti reported for its home market sales, we determined that its home market was a viable basis for calculating NV. Atar's home market sales were less than five percent of its aggregate sales to the United States; therefore, Atar's home market sales are not viable for calculating NV.

When sales in the home market are not suitable to serve as the basis for NV, section 773(a)(1)(B)(ii) of the Act provides that sales to a third-country market may be utilized if the prices in such market are representative; the aggregate quantity or, if the quantity is not appropriate, the value of the foreign like product sold by the producer or exporter in the third-country market is five percent or more of the aggregate quantity of the subject merchandise sold in or to the United States; and the Department does not determine that a particular market situation in the third-

country market prevents a proper comparison with the U.S. price.

Atar reported Angola as its largest and only third-country market during the POR, in terms of volume of sales (and the aggregate quantity of such sales is five percent or more of sales to the United States). While the volume of Atar's third-country market sales exceeded five percent, the Department preliminarily determines that a particular market situation exists which prevents proper comparison between Atar's third-country market sales and its U.S. sales. See Memorandum to Stephen J. Claeys, Deputy Assistant Secretary for Import Administration, from Melissa G. Skinner, Director, AD/CVD Operations, Office 3: Particular Market Situation, July 31, 2006 (a public version is on file in the CRU). Therefore, consistent with section 773(a)(1)(B)(4) of the Act, we are calculating NV based on CV. We calculated NV as noted in the "Calculation of Normal Value Based on Constructed Value" section of this notice.

#### B. Arm's-Length Test

Corticella/Combattenti reported sales of the foreign like product to affiliated end-users and affiliated resellers.<sup>3</sup> The Department calculates NV based on a sale to an affiliated party only if it is satisfied that the price to the affiliated party is comparable to the price at which sales are made to parties not affiliated with the producer or exporter, *i.e.*, sales at arm's length. See 19 CFR 351.403(c). To test whether these sales were made at arm's length, we compared the starting prices of sales to affiliated and unaffiliated customers net of all movement charges, direct selling expenses, discounts and packing. In accordance with the Department's current practice, if the prices charged to an affiliated party were, on average, between 98 and 102 percent of the prices charged to unaffiliated parties for merchandise identical or most similar to that sold to the affiliated party, we consider the sales to be at arm's-length prices and included such sales in the calculation of NV. See *Stainless Steel Bar from Germany: Preliminary Results of Antidumping Duty Administrative Review*, 69 FR 70651, 70652 (December 7, 2004); *Preliminary Results of Antidumping Duty Administrative Review: Stainless Steel Sheet and Strip in Coils from Italy*, 69 FR 48205, 48208 (August 9, 2004); see also 19 CFR

351.403(c). Conversely, where all sales to the affiliated party did not pass the arm's-length test, all sales to that affiliated party were excluded from the NV calculation. See *Antidumping Proceedings: Affiliated Party Sales in the Ordinary Course of Trade*, 67 FR 69186, 69187 (Nov. 15, 2002).

#### C. Cost of Production Analysis

##### 1. Calculation of Cost of Production (COP)

We conducted a COP analysis of Corticella/Combattenti pursuant to section 773(b) of the Act, to determine whether the respondents' comparison market sales were made below the COP. We calculated the COP based on the sum of the cost of materials and fabrication for the foreign like product, plus amounts for selling, general, and administrative ("SG&A") expenses and packing, in accordance with section 773(b)(3) of the Act. We relied on home market sales and COP information provided by Corticella/Combattenti in its questionnaire responses, except where noted below:

Molini Certosa, a semolina producer affiliated with Corticella and Combattenti, sold Corticella/Combattenti semolina, a major input to the production of pasta. Section 773(f)(3) of the Act, the "major input rule", states that "if, in the case of a transaction between affiliated persons involving the production by one of such persons of a major input to the merchandise, the administering authority has reasonable grounds to believe or suspect that an amount represented as the value of such input is less than the cost of production of such input, then the administering authority may determine the value of the major input on the basis of the information available regarding such cost of production, if such cost is greater than the amount that would be determined for such input under paragraph (2)." Section 773(f)(2), the "transactions disregarded rule," states that transactions between affiliated persons "may be disregarded if, in the case of any element of value required to be considered, the amount representing that element does not fairly reflect the amount usually reflected in sales of merchandise under consideration in the market under consideration." We evaluated the transfer prices between Molini Certosa and Corticella and Combattenti accordingly. The Department normally determines the market price of a particular input by looking at the average price of any transactions made between the respondent and unaffiliated suppliers.

See Section D at question II. A. 8. c. in the Department's September 7, 2005, questionnaire. Such transactions were available in this case, and we determined the market price of the semolina input by determining the weighted-average price of all such transactions between Corticella/Combattenti and their unaffiliated suppliers, as applicable, in this POR.

In its February 16, 2006, response to the section D supplemental questionnaire, Corticella claimed that transactions between Combattenti and a certain unaffiliated supplier are not reflective of a market price, and therefore the Department should not use prices between Combattenti and this supplier in determining the market price for the purposes of applying the major input rule. Corticella also claimed, in its March 30, 2006, response to the section D supplemental questionnaire, that transactions between Combattenti and this unaffiliated company are functionally a "tolling" arrangement, even though Combattenti takes ownership of the semolina. Corticella claims that Combattenti recovers the semolina price through a conversion fee charged to the customer/supplier.

We disagree with Corticella that we should exclude the purchases of semolina from the supplier in question. First, the supplier is not affiliated with Combattenti. Second, even Corticella concedes that the supplier is not a toller. See also 19 CFR 351.401(h). Indeed, Combattenti acquires ownership and controls the relevant sale through its contractual agreement; therefore, Combattenti is the producer of pasta, not a subcontractor or toller. See *Notice of Final Results of New Shipper Review of the Antidumping Duty Order on Certain Pasta from Italy*, 69 FR 18869 (April 9, 2004). Furthermore, Corticella failed to provide any evidence that these purchases were not at arm's length or anything other than market transactions. Therefore, we have included them in our calculation of market price used to test Corticella's affiliated purchases of semolina.

Because the market price was higher than the transfer prices between Molini Certosa and both Corticella and Combattenti and higher than Molina Certosa's COP, consistent with section 773(f)(3) of the Act, we increased the reported direct material cost to reflect the market price. For further details regarding these adjustments, see the Department's "Cost of Production and Constructed Value Calculation Adjustments for Preliminary Results - Corticella" (COP Memorandum) (July 31, 2006).

<sup>3</sup> We note that sales from Corticella/Combattenti to each affiliated customer constitute less than 5 percent of Corticella/Combattenti's total sales in the foreign market and we did not require it to report the sales from its affiliated resellers to the unaffiliated customers. See 19 CFR 351.403(d).

## 2. Test of Comparison Market Prices

As required under section 773(b)(1) of the Act, for Corticella/Combattenti we compared the weighted-average COP to the per-unit price of the comparison market sales of the foreign like product to determine whether these sales had been made at prices below the COP within an extended period of time in substantial quantities, and whether such prices were sufficient to permit the recovery of all costs within a reasonable period of time. We determined the net comparison market prices for the sales-below-cost test by subtracting from the gross unit price any applicable movement charges, discounts, rebates, direct and indirect selling expenses (also excluded from the COP), and packing expenses.

## 3. Results of COP Test

Pursuant to sections 773(b)(1) and 773(b)(2)(C)(i) of the Act, where less than 20 percent of sales of a given product were at prices less than the COP, we did not disregard any below-cost sales of that product because we determined that the below-cost sales were not made in "substantial quantities." In contrast, where 20 percent or more of a respondent's sales of a given product during the POR were at prices less than the COP, we determined such sales to have been made in "substantial quantities." See section 773(b)(2)(C) of the Act. The sales were made within an extended period of time in accordance with section 773(b)(2)(B) of the Act, because they were made over the course of the POR. In such cases, because we compared prices to POR-average costs, we also determined that such sales were not made at prices which would permit recovery of all costs within a reasonable period of time, in accordance with section 773(b)(2)(D) of the Act. Based on this methodology, for Corticella/Combattenti, for purposes of this administrative review, we disregarded certain below-cost sales and used the remaining sales as the basis for determining NV, in accordance with section 773(b)(1) of the Act. See the company-specific calculation memoranda on file in the CRU, for our calculation methodology and results.

## D. Calculation of Normal Value Based on Comparison Market Prices

For Corticella/Combattenti, we calculated NV based on ex-works, FOB or delivered prices to comparison market customers. When appropriate, we made adjustments to these prices to reflect billing adjustments, discounts, and rebates. We made deductions from

the starting price, when appropriate, for handling, loading, inland freight, international freight, and warehousing. In accordance with sections 773(a)(6)(A) and (B) of the Act, we added U.S. packing costs and deducted comparison market packing, respectively. In addition, we made circumstance-of-sale ("COS") adjustments for direct expenses, including imputed credit expenses, advertising, warranty expenses, commissions, and bank charges, in accordance with section 773(a)(6)(C)(iii) of the Act.

We also made adjustments, in accordance with 19 CFR 351.410(e), for indirect selling expenses incurred in the home market or United States where commissions were granted on sales in one market but not in the other, the "commission offset." Specifically, where commissions are incurred in one market, but not in the other, we will limit the amount of such adjustment to the amount of either the selling expenses incurred in the one market or the commissions allowed in the other market, whichever is less.

When comparing U.S. sales with comparison market sales of similar, but not identical, merchandise, we also made adjustments for physical differences in the merchandise, in accordance with section 773(a)(6)(C)(ii) of the Act and 19 CFR 351.411. We based this adjustment on the difference in the VCOM for the foreign like product and subject merchandise, using POR-average costs.

Sales of pasta purchased by the respondents from unaffiliated producers and resold in the comparison market were treated in the same manner described above in the "Export Price" section of this notice.

## E. Calculation of Normal Value Based on Constructed Value

For Atar, we calculated CV in accordance with section 773(e) of the Act, which states that CV shall be based on the sum of a respondent's cost of materials and fabrication for the subject merchandise, plus amounts for SG&A expenses, profit, and U.S. packing costs. We relied on Atar's submitted materials and fabrication costs, G&A expenses and U.S. packing costs. We adjusted Atar's reported total cost of manufacture to account for an unreconciled difference between its reported costs and its financial accounting records. Further, we calculated selling expenses and profit, in accordance with section 773(e)(2)(B)(iii) of the Act, as detailed in the Memorandum to Neal Halper from LaVonne Clark, Cost of Production and Constructed Value Calculation Adjustments for the Preliminary Results

(July 31, 2006) ("Preliminary Results Cost Calculation Memo").

Because the Department has determined for purposes of these preliminary results that Atar does not have a viable comparison market, we could not determine selling expenses and profit under section 773(e)(2)(A) of the Act. Therefore, we relied on section 773(e)(2)(B) of the Act to determine these selling expenses and profit. Specifically, we used the weighted-average selling expenses and profit rate derived from the comparison market data of the respondents in the previous administrative review. See *Pasta Eighth Review Final Results*. See Memo to the File from LaVonne Clark through Taija Slaughter, Final Results Calculations from the Eighth Administrative Review (July 31, 2006) (placing selling expense and profit data submitted by respondents in the Eighth Administrative Review on the record of the Ninth Administrative Review). The statute does not establish a hierarchy for selecting among the alternative methodologies provided in section 773(e)(2)(B) of the Act for determining selling expenses and profit. See Statement of Administrative Action Accompanying the URAA, H.R. Rep. No. 103-316, vol. 1, at 840 (1994). Nonetheless, we examined each alternative in searching for an appropriate method.

Alternative (i) of section 773(e)(2)(B) of the Act specifies that selling expenses and profit may be calculated based on "actual amounts incurred by the specific exporter or producer...on merchandise in the same general category" as subject merchandise. The Department could not rely on this alternative because Atar does not produce any products other than the subject merchandise. Alternative (ii) of section 773(e)(2)(B) of the Act provides that selling expenses and profit may be calculated based on "the weighted average of the actual amounts incurred and realized by [other] exporters or producers that are subject to the investigation or review." We could not calculate selling expenses and profit based on this alternative because there is only one other respondent in this case and relying on that respondent's indirect selling expenses and profit would reveal the business-proprietary information. Therefore, we calculated Atar's CV selling expenses and profit based on alternative (iii) of section 773(e)(2)(B) of the Act, which is any other reasonable method.

We calculated Atar's CV selling expense and profit ratios using the comparison market selling expense and profit ratios calculated for the

respondents in the *Pasta Eighth Review Final Results* in this administrative proceeding (i.e., Barilla, Corticella/Combattenti, Industrie Alimentare Colavita, S.p.A., Pastificio F.lli Pagani S.p.A., Pallante, and Pastificio Riscossa F.lli Mastromauro, S.r.l.). We computed weighted-average ratios and applied the selling expense ratios to the sum of the cost of materials and fabrication to determine CV selling expenses, and applied the profit ratio to the sum of the cost of materials, fabrication, and general expenses to calculate an amount for profit.

Pursuant to alternative (iii), the Department has the option of using any other reasonable method, as long as the result is not greater than the amount realized by exporters or producers "in connection with the sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise" (i.e., the "profit cap"). In the instant case, we are using the weighted-average profit rate derived from the comparison market data of the respondents in the immediately preceding administrative review. Accordingly, this weighted-average profit rate represents an amount normally realized by exporters or producers in connection with the sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise. As such, in accordance with section 773(e)(2)(B)(iii) of the Act, the weighted-average profit rate of the respondents in the *Pasta Eighth Review Final Results* establishes a profit cap. Thus, the reasonable method used by the Department to calculate profit does not exceed the profit cap.

Atar submitted to the Department the financial statements of four Italian companies, which Atar claims are "leading pasta manufacturers," and calculated profit ratios of those companies based on the companies' profits realized during fiscal year 2004. Although these four companies are producers of the same general category of products as the subject merchandise, the financial statements do not provide information that would allow the Department to determine if or the extent to which the companies' sales were made in the comparison market.

Further, to determine the most appropriate profit rate under alternative (iii), we weighed several factors. Among them are: (1) The similarity of the potential surrogate companies' business operations and products to those of respondent; (2) the extent to which the financial data of the surrogate

companies reflect sales in the United States as well as the home market; (3) the contemporaneity of the surrogate data with the POR; and (4) the similarity of the customer base. The greater the similarity in business operations, products, and customer base, the more likely that there is a greater correlation between the profit experience of the companies in question. Because the Department typically compares U.S. sales to an NV based on sales in the home market or third country, the Department does not normally construct an NV based on financial data derived from exclusively or predominantly U.S. sales. Finally, contemporaneity is a concern because markets change over time and the more current the data, the more reflective it will be of the market in which the respondent is operating. See *Notice of Final Determination of Sales at Less Than Fair Value: Pure Magnesium from Israel*, 66 FR 49349 (September 27, 2001), and accompanying Issues and Decision Memorandum at Comment 8, and *Notice of Final Determination of Sales at Not Less Than Fair Value: Certain Color Television Receivers from Malaysia*, 69 FR 20592 (April 16, 2004), and accompanying Issues and Decision Memorandum at Comment 26). We determined that the use of the weighted-average profit rate of the respondents in the *Pasta Eighth Review Final Results* is a reasonable method. First, the products sold by the other respondents in the comparison market are substantially similar to those sold by Atar. Second, the CV profit rate for the respondents in the *Pasta Eighth Review Final Results* excludes sales to the United States. Third, the respondents in the *Pasta Eighth Review Final Results* sold to distributor/wholesalers similar to Atar's U.S. customers (i.e., they had the same type of customer base). We note that the weighted-average CV profit rate calculated for the respondents in the *Pasta Eighth Review Final Results* covers a time frame that is not contemporaneous with the POR. The *Pasta Eighth Review Final Results* period was July 1, 2003 through June 30, 2004, while the instant POR is July 1, 2004, through June 30, 2005. However, we note that the profit rate experience from the *Pasta Eighth Review Final Results* period reflects the time immediately prior to the instant review. In addition, there is no information on the record to suggest that the profit rate experience from that period is so different from the instant period to render those profit rates distortive.

For price-to-CV comparisons, we made adjustments to CV for COS

differences, in accordance with section 773(a)(8) of the Act and 19 CFR 351.410. We made COS adjustments by deducting the weighted-average direct selling expenses incurred or realized by the respondents in the *Pasta Eighth Review Final Results*, and adding Atar's U.S. direct selling expenses. See Preliminary Results Cost Calculation Memo.

#### F. Level of Trade

Pursuant to 19 CFR 351.412, to determine whether comparison market sales are at a different level of trade ("LOT"), we examine stages in the marketing process and selling functions along the chain of distribution between the producer and the unaffiliated (or arm's-length) customers. If the comparison market sales are at a different LOT and the differences affect price comparability, as manifested in a pattern of consistent price differences between the sales on which NV is based and comparison market sales at the LOT of the export transaction, we will make an LOT adjustment under section 773(a)(7)(A) of the Act.

In the home market, Corticella reported three different LOTs corresponding to two differing channels of distribution and five selling activities. Combattenti reported two LOTs and one channel of distribution and five selling activities. The Department has determined that differing channels of distribution, alone, are not sufficient evidence for finding separate LOTs in the home market, when selling functions performed for each customer class are sufficiently similar. See 19 CFR 351.412(c)(2). Based on our overall analysis, we found that the three home market distribution channels reported by respondents were not distinct enough to constitute more than one LOT. Therefore, we found only one LOT in the home market.

For a detailed description of our LOT methodology and a summary of company-specific LOT findings for these preliminary results, see calculation memoranda for Corticella/Combattenti, on file in the CRU.

#### Currency Conversion

For purposes of these preliminary results, we made currency conversions in accordance with section 773A(a) of the Act, based on the official exchange rates published by the Federal Reserve Bank.

#### Preliminary Results of Review

As a result of our review, we preliminarily determine that the following weighted-average percentage

margins exist for the period July 1, 2004, through June 30, 2005:

Manufacturer/exporter	Margin (percent)
Atar .....	18.48
Corticella/Combattenti ..	3.32

The Department will disclose calculations performed within five days of the date of publication of this notice to the parties of this proceeding, in accordance with 19 CFR 351.224(b). An interested party may request a hearing within 30 days of publication of these preliminary results. See 19 CFR 351.310(c). Any hearing, if requested, will be held 44 days after the date of publication, or the first working day thereafter. Interested parties may submit case briefs no later than 30 days after the date of publication of these preliminary results of review. Rebuttal briefs, limited to issues raised in case briefs, may be filed no later than five days after the time limit for filing the case briefs, unless the Department alters this time limit. See 19 CFR 351.309(d). Parties who submit arguments are requested to submit with the argument (1) a statement of the issue, and (2) a brief summary of the argument. Further, parties submitting written comments are requested to provide the Department with an additional copy of the public version of any such comments on diskette. Pursuant to 19 CFR 351.213(h), the Department intends to issue the final results of this administrative review, which will include the results of its analysis of issues raised in any such comments, or at a hearing, if requested, within 120 days of publication of these preliminary results.

#### Assessment Rate

Pursuant to 19 CFR 351.212(b), the Department calculated an assessment rate for each importer of the subject merchandise. Upon issuance of the final results of this administrative review, if any importer-specific assessment rates calculated in the final results are above *de minimis* (i.e., at or above 0.5 percent), the Department will issue appraisal instructions directly to CBP to assess antidumping duties on appropriate entries by applying the assessment rate to the entered value of the merchandise. For assessment purposes, we calculated importer-specific assessment rates for the subject merchandise by aggregating the dumping margins for all U.S. sales to each importer and dividing the amount by the total entered value of the sales to that importer. Where appropriate, to calculate the entered value, we subtracted international

movement expenses (e.g., international freight) from the gross sales value.

The Department clarified its "automatic assessment" regulation on May 6, 2003 (68 FR 23954). This clarification will apply to entries of subject merchandise during the period of review produced by companies included in these preliminary results of review for which the reviewed companies did not know their merchandise was destined for the United States. In such instances, we will instruct CBP to liquidate unreviewed entries at the All-Others rate if there is no rate for the intermediate company(ies) involved in the transaction. For a full discussion of this clarification, see *Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties*, 68 FR 23954 (May 6, 2003).

#### Cash Deposit Requirements

To calculate the cash deposit rate for each producer and/or exporter included in this administrative review, we divided the total dumping margins for each company by the total net value for that company's sales during the review period.

The following deposit rates will be effective upon publication of the final results of this administrative review for all shipments of pasta from Italy entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided by section 751(a)(2)(C) of the Act: (1) The cash deposit rates for the companies listed above will be the rates established in the final results of this review, except if the rate is less than 0.5 percent and, therefore, *de minimis*, the cash deposit will be zero; (2) for previously reviewed or investigated companies not listed above, the cash deposit rate will continue to be the company-specific rate published for the most recent final results in which that manufacturer or exporter participated; (3) if the exporter is not a firm covered in this review, a prior review, or the original less-than-fair-value ("LTFV") investigation, but the manufacturer is, the cash deposit rate will be the rate established for the most recent final results for the manufacturer of the merchandise; and (4) if neither the exporter nor the manufacturer is a firm covered in this or any previous review conducted by the Department, the cash deposit rate will be 11.26 percent, the All Others rate established in the LTFV investigation. See *Notice of Antidumping Duty Order and Amended Final Determination of Sales at Less Than Fair Value: Certain Pasta from Italy*, 61 FR 38547 (July 24, 1996).

These cash deposit requirements, when imposed, shall remain in effect until publication of the final results of the next administrative review.

#### Notification to Importers

This notice serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and increase the subsequent assessment of the antidumping duties by the amount of antidumping duties reimbursed.

These preliminary results of this administrative review are issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act and 19 CFR 351.221(b)(4).

Dated: July 31, 2006.

**David M. Spooner,**

*Assistant Secretary for Import Administration.*

[FR Doc. E6-12796 Filed 8-7-06; 8:45 am]

BILLING CODE 3510-DS-S

## DEPARTMENT OF COMMERCE

### International Trade Administration

[A-533-808]

#### Continuation of Antidumping Duty Order: Stainless Steel Wire Rods From India

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**SUMMARY:** As a result of the determinations by the Department of Commerce (the Department) and the International Trade Commission (ITC) that revocation of the antidumping duty order on stainless steel wire rods from India would likely lead to continuation or recurrence of dumping and material injury to an industry in the United States, the Department is publishing notice of continuation of this antidumping duty order.

**EFFECTIVE DATE:** August 8, 2006.

**FOR FURTHER INFORMATION CONTACT:** Jacqueline Arrowsmith or Dana Mermelstein, AD/CVD Operations, Office 6, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street & Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482-5255 and (202) 482-1391, respectively.

**SUPPLEMENTARY INFORMATION:****Background**

On July 1, 2005, the Department initiated and the ITC instituted a sunset review of the antidumping duty order on stainless steel wire rods from India pursuant to section 751(c) of the Tariff Act of 1930, as amended (the Act). See *Initiation of Five-Year (Sunset) Reviews*, 70 FR 38101 (July 1, 2005) and *Stainless Steel Wire Rod from Brazil, France and India*, Investigation Nos. 731-TA-636, 731-TA-637, and 731-TA-638 (Second Review), 70 FR 38207 (July 1, 2005).

As a result of its review, the Department found that revocation of the antidumping duty order would likely lead to continuation or recurrence of dumping, and notified the ITC of the magnitude of the margins likely to prevail were the order to be revoked. See *Stainless Steel Wire Rods from Brazil, France and India: Notice of Final Results of Five-year (Sunset) Reviews of Antidumping Duty Orders*, 70 FR 67447 (November 7, 2005). The ITC determined, pursuant to section 751(c) of the Act, that revocation of the antidumping duty order on stainless steel wire rods from India would likely lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time. See USITC Publication 3866 *Stainless Steel Wire Rod from Brazil, France and India, Investigations Nos. 731-TA-636-638 (Second Review)* (July 2006) and *Stainless Steel Wire Rod From Brazil, France, and India* (Inv. Nos. 731-TA-636-638) 71 FR 42118 (July 25, 2006).

**Scope of the Order**

Imports covered by this order are certain stainless steel wire rods (SSWR) from India. SSWR are products which are hot-rolled or hot-rolled annealed and/or pickled rounds, squares, octagons, hexagons, or other shapes, in coils. SSWR are made of alloy steels containing, by weight 1.2 percent or less of carbon and 10.5 percent of chromium, with or without other elements. These products are only manufactured by hot-rolling and normally sold in coiled form, and are solid cross-section. The majority of SSWR sold in the United States are round in cross-section shape, annealed and pickled. The most common size is 5.5 millimeters in diameter.

The merchandise subject to this order is currently classifiable under subheadings 7221.00.0005, 7221.00.0015, 7221.00.0030, 7221.00.0045, 7221.00.0075 of the Harmonized Tariff Schedule of the

United States (HTSUS).<sup>1</sup> The HTSUS subheadings are provided for convenience and customs purposes. The written description remains dispositive.

**Determination**

As a result of the determinations by the Department and the ITC that revocation of this antidumping duty order would likely lead to continuation or recurrence of dumping and material injury to an industry in the United States, pursuant to section 751(d)(2) of the Act, the Department hereby orders the continuation of the antidumping duty order on stainless steel wire rods from India. U.S. Customs and Border Protection will continue to collect antidumping duty cash deposits at the rates in effect at the time of entry for all imports of subject merchandise.

The effective date of continuation of this order will be the date of publication in the **Federal Register** of this Notice of Continuation. Pursuant to sections 751(c)(2) and 751(c)(6)(A) of the Act, the Department intends to initiate the next five-year review of this order not later than June 2011.

This five-year (sunset) review and this notice are in accordance with section 751(c) of the Act.

Dated: August 1, 2006.

**David M. Spooner,**

*Assistant Secretary for Import Administration.*

[FR Doc. E6-12860 Filed 8-7-06; 8:45 am]

**BILLING CODE 3510-DS-P**

**DEPARTMENT OF COMMERCE****International Trade Administration**

**(A-428-825)**

**Stainless Steel Sheet and Strip in Coils From Germany; Notice of Preliminary Results of Antidumping Duty Administrative Review**

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**SUMMARY:** In response to requests from Allegheny Ludlum, North American Stainless, United Auto Workers Local 3303, United Steelworkers, and Zanesville Armco Independent Organization, Inc. (collectively, petitioners) and the collapsed

<sup>1</sup> The merchandise subject to the scope of these orders was originally classifiable under all of the following HTS subheadings: 7221.00.0005, 7221.00.0015, 7221.00.0020, 7221.00.0030, 7221.00.0040, 7221.00.0045, 7221.00.0060, 7221.00.0075, and 7221.00.0080. HTSUS subheadings 7221.00.0020, 7221.00.0040, 7221.00.0060, 7221.00.0080 are no longer contained in the HTSUS.

respondents ThyssenKrupp Nirosta GmbH (ThyssenKrupp Nirosta), ThyssenKrupp VDM GmbH (TKVDM), and ThyssenKrupp Nirosta Prazisionsband GmbH (TKNP) (collectively, TKN), the Department of Commerce (the Department) is conducting an administrative review of the antidumping duty order on stainless steel sheet and strip in coils (S4) from Germany. The review covers exports of the subject merchandise to the United States produced by TKN. The period of review (POR) is July 1, 2004, through June 30, 2005.

We preliminarily find that TKN made sales at less than normal value during the POR. If these preliminary results are adopted in our final results of this review, we will instruct U.S. Customs and Border Protection (CBP) to assess antidumping duties based on the difference between the constructed export price (CEP) and normal value (NV).

Interested parties are invited to comment on these preliminary results. Parties who submit arguments in this proceeding are requested to submit with the arguments: (1) a statement of the issues, (2) a brief summary of the arguments (no longer than five pages, including footnotes) and (3) a table of authorities.

**EFFECTIVE DATE:** August 8, 2006.

**FOR FURTHER INFORMATION CONTACT:**

Deborah Scott, Tyler Weinhold, 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) 482-2657, (202) 482-1121 or (202) 482-0649, respectively.

**SUPPLEMENTARY INFORMATION:****Background**

The Department published an antidumping duty order on S4 from Germany on July 27, 1999. See *Notice of Amended Final Determination of Sales at Less than Fair Value and Antidumping Duty Order; Stainless Steel Sheet and Strip in Coils from Germany*, 64 FR 40557 (July 27, 1999). On July 1, 2005, the Department published the notice of opportunity to request administrative review of S4 from Germany for the period July 1, 2004, through June 30, 2005. See *Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review*, 70 FR 38099 (July 1, 2005).

On July 29, 2005, petitioners and TKN both requested an administrative review

of TKN's sales for the period July 1, 2004, through June 30, 2005. On August 29, 2005, the Department published in the **Federal Register** a notice of initiation of this antidumping duty administrative review. See *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part*, 70 FR 51009 (August 29, 2005).

On September 7, 2005, the Department issued an antidumping duty questionnaire to TKN. TKN submitted its response to section A of the questionnaire on September 28, 2005, and its response to sections B through D of the questionnaire on November 7, 2005. On February 27, 2006, the Department issued a supplemental questionnaire requesting additional information regarding TKN's response to section D of the questionnaire. On March 20, 2006, the Department issued a supplemental questionnaire for sections A and B, to which TKN responded on April 21, 2006. On March 28, 2006, the Department issued a supplemental questionnaire for section C, to which TKN responded on May 2, 2006. On May 24, 2006, the Department issued another supplemental questionnaire, to which TKN responded on June 12, 2006.

Because it was not practicable to complete this review within the normal time frame, on March 10, 2006, we published in the **Federal Register** a notice of the extension for this review. See *Stainless Steel Sheet and Strip in Coils From Germany: Extension of Time Limit for Preliminary Results of Antidumping Duty Administrative Review*, 71 FR 12342 (March 10, 2006). This extension established the deadline for these preliminary results as July 31, 2006.

### Scope of the Order

The products covered by this order are certain stainless steel sheet and strip in coils. Stainless steel is an alloy steel containing, by weight, 1.2 percent or less of carbon and 10.5 percent or more of chromium, with or without other elements. The subject sheet and strip is a flat-rolled product in coils that is greater than 9.5 mm in width and less than 4.75 mm in thickness, and that is annealed or otherwise heat treated and pickled or otherwise descaled. The subject sheet and strip may also be further processed (e.g., cold-rolled, polished, aluminized, coated, etc.) provided that it maintains the specific dimensions of sheet and strip following such processing. The merchandise subject to this order is currently classifiable in the Harmonized Tariff Schedule of the United States (HTS) at

subheadings: 7219.13.0031, 7219.13.0051, 7219.13.0071, 7219.1300.81<sup>1</sup>, 7219.14.0030, 7219.14.0065, 7219.14.0090, 7219.32.0005, 7219.32.0020, 7219.32.0025, 7219.32.0035, 7219.32.0036, 7219.32.0038, 7219.32.0042, 7219.32.0044, 7219.33.0005, 7219.33.0020, 7219.33.0025, 7219.33.0035, 7219.33.0036, 7219.33.0038, 7219.33.0042, 7219.33.0044, 7219.34.0005, 7219.34.0020, 7219.34.0025, 7219.34.0030, 7219.34.0035, 7219.35.0005, 7219.35.0015, 7219.35.0030, 7219.35.0035, 7219.90.0010, 7219.90.0020, 7219.90.0025, 7219.90.0060, 7219.90.0080, 7220.12.1000, 7220.12.5000, 7220.20.1010, 7220.20.1015, 7220.20.1060, 7220.20.1080, 7220.20.6005, 7220.20.6010, 7220.20.6015, 7220.20.6060, 7220.20.6080, 7220.20.7005, 7220.20.7010, 7220.20.7015, 7220.20.7060, 7220.20.7080, 7220.20.8000, 7220.20.9030, 7220.20.9060, 7220.90.0010, 7220.90.0015, 7220.90.0060, and 7220.90.0080. Although the HTS subheadings are provided for convenience and customs purposes, the Department's written description of the merchandise under this order is dispositive.

Excluded from the scope of the order are the following: (1) Sheet and strip that is not annealed or otherwise heat treated and pickled or otherwise descaled, (2) sheet and strip that is cut to length, (3) plate (i.e., flat-rolled stainless steel products of a thickness of 4.75 mm or more), (4) flat wire (i.e., cold-rolled sections, with a prepared edge, rectangular in shape, of a width of not more than 9.5 mm), and (5) razor blade steel. Razor blade steel is a flat-rolled product of stainless steel, not further worked than cold-rolled (cold-reduced), in coils, of a width of not more than 23 mm and a thickness of 0.266 mm or less, containing, by weight, 12.5 to 14.5 percent chromium, and certified at the time of entry to be used in the manufacture of razor blades. See chapter 72 of the HTS, "Additional U.S. Note" 1(d).

Flapper valve steel is also excluded from the scope of the order. This product is defined as stainless steel strip in coils containing, by weight, between 0.37 and 0.43 percent carbon, between 1.15 and 1.35 percent molybdenum, and

between 0.20 and 0.80 percent manganese. This steel also contains, by weight, phosphorus of 0.025 percent or less, silicon of between 0.20 and 0.50 percent, and sulfur of 0.020 percent or less. The product is manufactured by means of vacuum arc remelting, with inclusion controls for sulphide of no more than 0.04 percent and for oxide of no more than 0.05 percent. Flapper valve steel has a tensile strength of between 210 and 300 ksi, yield strength of between 170 and 270 ksi, plus or minus 8 ksi, and a hardness (Hv) of between 460 and 590. Flapper valve steel is most commonly used to produce specialty flapper valves in compressors.

Also excluded is a product referred to as suspension foil, a specialty steel product used in the manufacture of suspension assemblies for computer disk drives. Suspension foil is described as 302/304 grade or 202 grade stainless steel of a thickness between 14 and 127 microns, with a thickness tolerance of plus-or-minus 2.01 microns, and surface glossiness of 200 to 700 percent Gs. Suspension foil must be supplied in coil widths of not more than 407 mm, and with a mass of 225 kg or less. Roll marks may only be visible on one side, with no scratches of measurable depth. The material must exhibit residual stresses of 2 mm maximum deflection, and flatness of 1.6 mm over 685 mm length.

Certain stainless steel foil for automotive catalytic converters is also excluded from the scope of this order. This stainless steel strip in coils is a specialty foil with a thickness of between 20 and 110 microns used to produce a metallic substrate with a honeycomb structure for use in automotive catalytic converters. The steel contains, by weight, carbon of no more than 0.030 percent, silicon of no more than 1.0 percent, manganese of no more than 1.0 percent, chromium of between 19 and 22 percent, aluminum of no less than 5.0 percent, phosphorus of no more than 0.045 percent, sulfur of no more than 0.03 percent, lanthanum of less than 0.002 or greater than 0.05 percent, and total rare earth elements of more than 0.06 percent, with the balance iron.

Permanent magnet iron-chromium-cobalt alloy stainless steel strip is also excluded from the scope of this order. This ductile stainless steel strip contains, by weight, 26 to 30 percent chromium, and 7 to 10 percent cobalt, with the remainder of iron, in widths 228.6 mm or less, and a thickness between 0.127 and 1.270 mm. It exhibits magnetic remanence between 9,000 and 12,000 gauss, and a coercivity of between 50 and 300 oersteds. This

<sup>1</sup> Due to changes to the HTS numbers in 2001, 7219.13.0030, 7219.13.0050, 7219.13.0070, and 7219.13.0080 are now 7219.13.0031, 7219.13.0051, 7219.13.0071, and 7219.13.0081, respectively.

product is most commonly used in electronic sensors and is currently available under proprietary trade names such as "Arnokrome III."<sup>2</sup>

Certain electrical resistance alloy steel is also excluded from the scope of this order. This product is defined as a non-magnetic stainless steel manufactured to American Society of Testing and Materials (ASTM) specification B344 and containing, by weight, 36 percent nickel, 18 percent chromium, and 46 percent iron, and is most notable for its resistance to high temperature corrosion. It has a melting point of 1390 degrees Celsius and displays a creep rupture limit of 4 kilograms per square millimeter at 1000 degrees Celsius. This steel is most commonly used in the production of heating ribbons for circuit breakers and industrial furnaces, and in rheostats for railway locomotives. The product is currently available under proprietary trade names such as "Gilphy 36."<sup>3</sup>

Certain martensitic precipitation-hardenable stainless steel is also excluded from the scope of this order. This high-strength, ductile stainless steel product is designated under the Unified Numbering System (UNS) as S45500-grade steel, and contains, by weight, 11 to 13 percent chromium, and 7 to 10 percent nickel. Carbon, manganese, silicon and molybdenum each comprise, by weight, 0.05 percent or less, with phosphorus and sulfur each comprising, by weight, 0.03 percent or less. This steel has copper, niobium, and titanium added to achieve aging, and will exhibit yield strengths as high as 1700 Mpa and ultimate tensile strengths as high as 1750 Mpa after aging, with elongation percentages of 3 percent or less in 50 mm. It is generally provided in thicknesses between 0.635 and 0.787 mm, and in widths of 25.4 mm. This product is most commonly used in the manufacture of television tubes and is currently available under proprietary trade names such as "Durphynox 17."<sup>4</sup>

Finally, three specialty stainless steels typically used in certain industrial blades and surgical and medical instruments are also excluded from the scope of this order. These include stainless steel strip in coils used in the production of textile cutting tools (e.g., carpet knives).<sup>5</sup> This steel is similar to AISI grade 420 but containing, by weight, 0.5 to 0.7 percent of

molybdenum. The steel also contains, by weight, carbon of between 1.0 and 1.1 percent, sulfur of 0.020 percent or less, and includes between 0.20 and 0.30 percent copper and between 0.20 and 0.50 percent cobalt. This steel is sold under proprietary names such as "GIN4 Mo." The second excluded stainless steel strip in coils is similar to AISI 420-J2 and contains, by weight, carbon of between 0.62 and 0.70 percent, silicon of between 0.20 and 0.50 percent, manganese of between 0.45 and 0.80 percent, phosphorus of no more than 0.025 percent and sulfur of no more than 0.020 percent. This steel has a carbide density on average of 100 carbide particles per 100 square microns. An example of this product is "GIN5" steel. The third specialty steel has a chemical composition similar to AISI 420 F, with carbon of between 0.37 and 0.43 percent, molybdenum of between 1.15 and 1.35 percent, but lower manganese of between 0.20 and 0.80 percent, phosphorus of no more than 0.025 percent, silicon of between 0.20 and 0.50 percent, and sulfur of no more than 0.020 percent. This product is supplied with a hardness of more than Hv 500 guaranteed after customer processing, and is supplied as, for example, "GIN6."<sup>6</sup>

#### Affiliation/Collapsing

Section 351.401(f)(1) of the Department's regulations provides that certain persons found to be affiliated in accordance with section 771(33) of the Tariff Act of 1930, as amended (the Tariff Act), may be treated as a single entity (collapsed), if certain circumstances exist. In the July 1, 2003, to June 30, 2004, administrative review of S4 from Germany, the Department treated ThyssenKrupp Nirosta, TKNP, and TKVDM as a single entity (i.e., collapsed them) because the three companies were affiliated, would not need to engage in major retooling to shift production of S4 from one company to another and were found capable through their sales and production operations of manipulating prices or affecting production decisions. See *Stainless Steel Sheet and Strip in Coils From Germany; Notice of Preliminary Results of Antidumping Duty Administrative Review*, 70 FR 45682, 45684-45685 (August 8, 2005) (unchanged in Final Results, 70 FR 73729 (December 13, 2005)).

As in the previous administrative review, the record establishes that ThyssenKrupp Nirosta and TKVDM are affiliated based on their common

control by ThyssenKrupp Stainless GmbH (TK Stainless), another entity within the ThyssenKrupp group of companies. Section 771(33)(F) of the Tariff Act provides that two or more persons directly or indirectly controlling, controlled by, or under common control of another entity are affiliated. A "person" may be an individual, corporation, or group. Further, as provided by section 771(33) of the Tariff Act, "a person shall be considered to control another person if the person is legally or operationally in a position to exercise restraint or direction over the other person." The Department has analyzed the information on the record of this administrative review regarding the affiliation of ThyssenKrupp Nirosta and TKVDM and has determined preliminarily that ThyssenKrupp Nirosta and TKVDM should be considered affiliated under section 771(33)(F) of the Tariff Act. See Memorandum to Richard Weible, Director, Office 7, AD/CVD Operations, "Antidumping Duty Administrative Review of Stainless Steel Sheet and Strip in Coils from Germany: Affiliation and Collapsing of ThyssenKrupp Nirosta GmbH, ThyssenKrupp Nirosta Präzisionsband GmbH and ThyssenKrupp VDM GmbH," dated June 30, 2006 (Collapsing Memorandum).

Moreover, as in the previous administrative review, the Department has determined preliminarily that ThyssenKrupp Nirosta and TKVDM should be treated as a single entity or "collapsed" for the purpose of calculating an antidumping duty margin. As explained in the Collapsing Memorandum, ThyssenKrupp Nirosta and TKVDM have production facilities to produce similar or identical merchandise without substantial retooling and should be treated as a single entity in accordance with 19 CFR 351.401(f)(1). Additionally, in determining whether there is a significant potential for manipulation of price or production, as contemplated by 19 CFR 351.401(f)(2), the Department considers the totality of the circumstances of the situation and may place more reliance on some factors than others. The totality of the circumstances here shows there is a significant potential for the manipulation of price or production.

In addition to ThyssenKrupp Nirosta and TKVDM, the record also establishes that ThyssenKrupp Nirosta and TKNP are affiliated based on ThyssenKrupp Nirosta's 100 percent ownership of TKNP. Section 771(33)(E) of the Tariff Act provides that "any person directly or indirectly owning, controlling, or

<sup>2</sup> "Arnokrome III" is a trademark of the Arnold Engineering Company.

<sup>3</sup> "Gilphy 36" is a trademark of Imphy, S.A.

<sup>4</sup> "Durphynox 17" is a trademark of Imphy, S.A.

<sup>5</sup> This list of uses is illustrative and provided for descriptive purposes only.

<sup>6</sup> "GIN4 Mo," "GIN5" and "GIN6" are the proprietary grades of Hitachi Metals America, Ltd.

holding with power to vote, 5 percent or more of the outstanding voting stock or shares of any organization and such organization" shall be considered to be affiliated. Further, as provided by section 771(33) of the Tariff Act, "a person shall be considered to control another person if the person is legally or operationally in a position to exercise restraint or direction over the other person." The Department has analyzed the information on the record of this administrative review regarding the affiliation of ThyssenKrupp Nirosta and TKNP and, as in the previous administrative review, has determined preliminarily that the two entities should be considered affiliated under section 771(33)(E) of the Tariff Act. See the Collapsing Memorandum at page 8.

Furthermore, as in the previous administrative review, the Department has also determined preliminarily that ThyssenKrupp Nirosta and TKNP should be treated as a single entity or "collapsed" for the purpose of calculating an antidumping duty margin. As explained in the Collapsing Memorandum, ThyssenKrupp Nirosta and TKNP also have production facilities to produce similar or identical merchandise without substantial retooling and should be treated as a single entity in accordance with 19 CFR 351.401(f)(1). Additionally, information on the record demonstrates there is a significant potential for manipulation of price or production, within the meaning of 19 CFR 351.401(f)(2).

In summary, we find that: (1) ThyssenKrupp Nirosta is affiliated with both TKNP and TKVDM under section 771(33) of the Tariff Act; (2) a shift in production between ThyssenKrupp Nirosta and TKVDM or between ThyssenKrupp Nirosta and TKNP would not require substantial retooling of the facilities of these companies; and (3) there is a significant potential for price and production manipulation between ThyssenKrupp Nirosta and TKVDM and also between ThyssenKrupp Nirosta and TKNP. Therefore, the Department preliminarily finds that ThyssenKrupp Nirosta is affiliated with both TKNP and TKVDM and should be treated as a single entity or "collapsed" for the purpose of calculating an antidumping duty margin for this administrative review.

#### Fair Value Comparisons

To determine whether sales of S4 in the United States were made at less than fair value, we compared U.S. price to normal value (NV), as described in the "Constructed Export Price" and "Normal Value" sections of this notice. In accordance with section 777A(d)(2)

of the Tariff Act, we calculated monthly weighted-average NVs and compared these to individual U.S. transactions. Because TKN made no "export price" transactions during the POR, we used only CEP sales in our comparisons.

#### Product Comparisons

In accordance with section 771(16) of the Tariff Act, we considered all products produced by TKN covered by the description in the "Scope of the Order" section, above, and sold in the home market during the POR, to be foreign like products for purposes of determining appropriate product comparisons to U.S. sales. We relied on nine characteristics to match U.S. sales of subject merchandise to comparison sales of the foreign like product (listed in order of priority): 1) grade; 2) cold/hot rolled; 3) gauge; 4) surface finish; 5) metallic coating; 6) non-metallic coating; 7) width; 8) temper; and 9) edge trim. Where there were no sales of identical merchandise in the home market to compare to U.S. sales, we compared U.S. sales to the next most similar foreign like product on the basis of the product characteristics and reporting instructions listed in the Department's September 7, 2005, questionnaire. Because there were sales of identical or similar merchandise in the home market suitable for comparison to each U.S. sale, we did not compare any U.S. sales to constructed value (CV).

#### Constructed Export Price (CEP)

In accordance with section 772(b) of the Tariff Act, CEP is the price at which the subject merchandise is first sold (or agreed to be sold) in the United States before or after the date of importation by or for the account of the producer or exporter of such merchandise, or by a seller affiliated with the producer or exporter, to a purchaser not affiliated with the producer or exporter, as adjusted under sections 772(c) and (d) of the Tariff Act. In accordance with section 772(b) of the Tariff Act, we used CEP for all of TKN's U.S. sales because TKN sold merchandise to affiliated companies in the United States which, in turn, sold subject merchandise to unaffiliated U.S. customers. TKN reported that sales made through its affiliated importers ThyssenKrupp Nirosta North America, Inc. (TKNNA), Mexinox USA, Inc. (MXXUSA), and ThyssenKrupp VDM USA, Inc. (TKVDMUSA) consisted of two channels of distribution: back-to-back sales and inventory sales. See ThyssenKrupp Nirosta's November 7, 2005, questionnaire response at C-15 and C-16 and TKVDM's November 7,

2005, questionnaire response at C-15 and C-16. We have preliminarily found that TKN's U.S. sales are properly classified as CEP sales because these sales occurred in the United States and were made through TKN's U.S. affiliates to unaffiliated U.S. customers.

We based CEP on the packed, delivered duty paid or FOB warehouse prices to unaffiliated purchasers in the United States. We made adjustments for price or billing errors and early payment discounts, where applicable. We also made deductions for movement expenses in accordance with section 772(c)(2)(A) of the Tariff Act, which included, where appropriate, foreign inland freight, foreign brokerage and handling, international freight, marine insurance, war risk insurance, customs duties, U.S. brokerage, U.S. inland freight, and U.S. warehousing expenses. In accordance with section 772(d)(1) of the Tariff Act, we deducted those selling expenses associated with economic activities occurring in the United States, including direct selling expenses (credit costs, warranty expenses, and commissions), inventory carrying costs, and indirect selling expenses. We also made an adjustment for profit in accordance with section 772(d)(3) of the Tariff Act. Finally, for those sales in which merchandise was sent to an unaffiliated U.S. processor to be further processed, we made an adjustment based on the transaction-specific further processing amounts reported by TKN; for sales through MXXUSA that were further processed in Mexico prior to importation into the United States, we made an adjustment to account for these expenses.

#### Normal Value

##### A. Selection of Comparison Market

In order to determine whether there was a sufficient volume of sales in the home market to serve as a viable basis for calculating NV (*i.e.*, the aggregate volume of home market sales of the foreign like product was equal to or greater than five percent of the aggregate volume of U.S. sales), we compared the respondent's volume of home market sales of the foreign like product to the volume of U.S. sales of the subject merchandise, in accordance with section 773(a)(1) of the Tariff Act. As TKN's aggregate volume of home market sales of the foreign like product was greater than five percent of its aggregate volume of U.S. sales of the subject merchandise, we determined the home market was viable. Therefore, we have based NV on home market sales in the usual commercial quantities and in the ordinary course of trade.

### B. *Affiliated-Party Transactions and Arm's-Length Test*

Sales to affiliated customers in the home market not made at arm's-length prices were excluded from our analysis because we considered them to be outside the ordinary course of trade. *See* 19 CFR 351.102. If sales were not made at arm's-length, then the Department used the sale from the affiliated party to the first unaffiliated party. To test whether sales to affiliates were made at arm's-length prices, we compared on a model-specific basis the starting prices of sales to affiliated and unaffiliated customers net of all billing adjustments, early payment discounts, rebates, movement charges, commissions, direct selling expenses, imputed credit expense, and packing. Where, for the tested models of subject merchandise, prices to the affiliated party were, on average, between 98 and 102 percent of the price of identical or comparable merchandise to the unaffiliated parties, we determined that sales made to the affiliated party were at arm's length. *See* 19 CFR 351.403(c). In instances where no price ratio could be calculated for an affiliated customer because identical or similar merchandise was not sold to unaffiliated customers, we were unable to determine whether these sales were made at arm's-length prices. Therefore, we excluded any such sales from our analysis.

### C. *Cost of Production Analysis*

In the segment of this proceeding most recently completed at the time of our initiation of this review, the Department disregarded certain sales made by TKN in the home market because these sales were made at prices less than the cost of production (COP). *See Stainless Steel Sheet and Strip in Coils from Germany; Notice of Preliminary Results of Antidumping Duty Administrative Review*, 69 FR 47900, 47903 (August 6, 2004); *Stainless Steel Sheet and Strip in Coils from Germany; Notice of Final Results of Antidumping Duty Administrative Review*, 69 FR 75930 (December 20, 2004). Thus, in accordance with section 773(b)(2)(A)(ii) of the Tariff Act, there are reasonable grounds to believe or suspect that TKN's sales of the foreign like product in the home market were made at prices below their COP in the current review period. Accordingly, pursuant to section 773(b)(1) of the Tariff Act, we initiated a cost investigation to determine whether TKN's sales made during the POR were at prices below their respective COP.

### D. *Calculation of Cost of Production*

In accordance with section 773(b)(3) of the Tariff Act, we calculated COP based on the sum of the cost of materials and fabrication for the foreign like product, plus an amount for home market selling, general and administrative (SG&A) expenses and interest expenses. We relied on the COP data submitted by TKN, except for the changes noted below.

In accordance with section 773(f)(2) of the Tariff Act, where TKN's reported transfer prices for purchases of nickel from an affiliated party were not at arm's-length, we increased these prices to reflect the prevailing market prices. *See* Memorandum to Neal Halper, "Cost of Production and Constructed Value Adjustments for the Preliminary Results," dated July 31, 2006 (COP/CV Adjustment Memorandum). We also revised the interest expense ratio for ThyssenKrupp Nirosta, TKVDM, and TKNP to exclude packing costs from the denominator of the financial expense calculation. *See id.* Finally, we revised TKVDM's general and administrative expense rate to include other operating incomes and expenses. *See id.*

### E. *Test of Home Market Prices*

We compared the weighted-average COP of TKN's home market sales to home market sales prices (net of billing adjustments, early payment discounts, rebates, any applicable movement expenses, direct and indirect selling expenses, commissions, and packing) of the foreign like product as required under section 773(b) of the Tariff Act in order to determine whether these sales had been made at prices below the COP. In determining whether to disregard home market sales made at prices below the COP, we examined, in accordance with sections 773(b)(1)(A) and (B) of the Tariff Act, whether such sales were made in substantial quantities within an extended period of time, and whether such sales were made at prices which would permit recovery of all costs within a reasonable period of time.

### F. *Results of the Cost Test*

Pursuant to section 773(b)(2)(C) of the Tariff Act, where less than 20 percent of TKN's sales of a given model were at prices less than the COP, we did not disregard any below-cost sales of that model because these below-cost sales were not made in substantial quantities. Where 20 percent or more of TKN's home market sales of a given model were at prices less than the COP, we disregarded the below-cost sales because such sales were made: (1) in substantial quantities within the POR

(*i.e.*, within an extended period of time) in accordance with section 773(b)(2)(B) of the Tariff Act, and (2) at prices which would not permit recovery of all costs within a reasonable period of time, in accordance with section 773(b)(2)(D) of the Tariff Act (*i.e.*, the sales were made at prices below the weighted-average per-unit COP for the POR). We used the remaining sales as the basis for determining NV, if such sales existed, in accordance with section 773(b)(1) of the Tariff Act. In this review, we have found sales below the COP and have, as described above, disregarded such sales from our margin calculations.

### G. *Price-to-Price Comparisons*

We calculated NV based on prices to unaffiliated customers or prices to affiliated customers that we determined to be at arm's length. We made adjustments for billing adjustments, early payment discounts, and rebates, where appropriate. We made deductions, where appropriate, for foreign inland freight and warehousing, pursuant to section 773(a)(6)(B) of the Tariff Act. In addition, when comparing sales of similar merchandise, we made adjustments for differences in cost attributable to differences in physical characteristics of the merchandise (*i.e.*, DIFMER) pursuant to section 773(a)(6)(C)(ii) of the Tariff Act and 19 CFR 351.411. We also made adjustments for differences in circumstances of sale (COS) in accordance with section 773(a)(6)(C)(iii) of the Tariff Act and 19 CFR 351.410. We made COS adjustments for commissions, imputed credit expenses and warranty expenses; we offset imputed credit expenses by interest revenue. We also made an adjustment, where appropriate, for the CEP offset in accordance with section 773(a)(7)(B) of the Tariff Act. *See* "Level of Trade and CEP Offset" section below. In accordance with 19 CFR 351.410(e), we made an adjustment (*i.e.*, the commission offset) to account for commissions paid in one market but not the other. Finally, we deducted home market packing costs and added U.S. packing costs in accordance with sections 773(a)(6)(A) and (B) of the Tariff Act.

### H. *Constructed Value (CV)*

In accordance with section 773(a)(4) of the Tariff Act, we base NV on CV if we are unable to find a contemporaneous comparison market match of such or similar merchandise for the U.S. sale. Section 773(e) of the Tariff Act provides that CV shall be based on the sum of the cost of materials and fabrication employed in making the subject merchandise, SG&A expenses,

profit, and U.S. packing costs. We calculate the cost of materials and fabrication for TKN based on the methodology described in the COP section of this notice. In accordance with section 773(e)(2)(A) of the Tariff Act, we base SG&A expenses and profit on the amounts incurred and realized by the respondent in connection with the production and sale of the foreign like product in the ordinary course of trade, for consumption in the foreign country. However, for these preliminary results, we did not base NV on CV in any instances.

#### Level of Trade and CEP Offset

In accordance with section 773(a)(1)(B)(i) of the Tariff Act, to the extent practicable, we determine NV based on sales in the comparison market at the same level of trade (LOT) as the CEP transaction. The NV LOT is based on the starting price of sales in the comparison market or, when NV is based on CV, that of the sales from which we derive SG&A expenses and profit. For CEP, it is the level of the constructed sale from the exporter to the affiliated importer after the deductions required under section 772(d) of the Tariff Act.

To determine whether NV sales are at a different LOT than CEP sales, we examine stages in the marketing process and selling functions along the chain of distribution between the producer and the unaffiliated customer. *See, e.g., Final Determination of Sales at less Than Fair Value: Greenhouse Tomatoes From Canada*, 67 FR 8781 (February 26, 2002) and the accompanying Issues and Decisions Memorandum at Comment 8. If the comparison market sales are at a different LOT, and the difference affects price comparability, as manifested in a pattern of consistent price differences between the sales on which NV is based and comparison market sales at the LOT of the export transaction, we make a LOT adjustment under section 773(a)(7)(A) of the Tariff Act. If the NV level is more remote from the factory than the CEP level and there is no basis for determining whether the differences in the levels between NV and CEP affect price comparability, we adjust NV under section 773(a)(7)(B) of the Tariff Act (the CEP offset provision). *See e.g., Certain Hot-Rolled Flat-Rolled Carbon Quality Steel Products From Brazil; Preliminary Results of Antidumping Duty Administrative Review*, 70 FR 17406, 17410 (April 6, 2005) (unchanged in Final Results, 70 FR 58683 (October 7, 2005)); *Certain Stainless Steel Butt-Weld Pipe Fittings from Taiwan: Final Results and Final Rescission in Part of Antidumping Duty*

*Administrative Review*, 67 FR 78417 (December 24, 2002).

In implementing these principles in this review, we asked TKN to identify the specific differences and similarities in selling functions and support services between all phases of marketing in the home market and the United States. TKN reported home market sales made through four channels of distribution: (1) mill direct sales, (2) mill inventory sales, (3) service center inventory sales, and (4) service center processed sales. *See ThyssenKrupp Nirosta's November 7, 2005, questionnaire response at B-20, TKVDM's November 7, 2005, questionnaire response at B-21, and TKNP's November 7, 2005, questionnaire response at B-16 to B-17.* For all channels, TKN performs similar selling functions such as negotiating prices with customers, setting credit terms and collecting payment, arranging freight to the customer, conducting sales calls and visits, providing technical service, and processing customer orders. *See, e.g., TKN's September 28, 2005, questionnaire response at Exhibit 3.* The remaining selling activities did not differ significantly by channel of distribution. Because channels of distribution do not qualify as separate LOTs when the selling functions performed for each customer class or channel are sufficiently similar, we determined that one LOT exists for TKN's home market sales.

In the U.S. market, TKN made sales of subject merchandise through TKNNA, MXXUSA, and TKVDMUSA. As stated above, TKN reported that sales made through these affiliated importers consisted of two channels of distribution, back-to-back sales and inventory sales. *See ThyssenKrupp Nirosta's November 7, 2005, questionnaire response at C-15 to C-16 and TKVDM's November 7, 2005, questionnaire response at C-15 to C-16.* All U.S. sales were CEP transactions and TKN performed the same selling functions in its sale to the affiliated importer in each instance. *See, e.g., TKN's September 28, 2005, questionnaire response at A-23 to A-25 and Exhibit 3.* Therefore, the U.S. market has one LOT.

When we compared CEP sales (after deductions made pursuant to section 772(d) of the Tariff Act) to home market sales, we determined that for CEP sales TKN performed fewer customer sales contacts, technical services, delivery services, and warranty services. In addition, the differences in selling functions performed for home market and CEP transactions indicate home market sales involved a more advanced stage of distribution than CEP sales. In

the home market TKN provides marketing further down the chain of distribution by providing certain downstream selling functions that are normally performed by the affiliated resellers in the U.S. market (*e.g., technical advice, sales calls and visits*).

Based on our analysis, we determined that CEP and the starting price of home market sales represent different stages in the marketing process, and are thus at different LOTs. Therefore, when we compared CEP sales to comparison market sales, we examined whether a LOT adjustment may be appropriate. In this case, because TKN sold at one LOT in the home market, there is no basis upon which to determine whether there is a pattern of consistent price differences between LOTs. Further, we do not have the information which would allow us to examine pricing patterns of TKN's sales of other similar products, and there is no other record evidence upon which such an analysis could be based.

Because the data available do not provide an appropriate basis for making a LOT adjustment and the LOT of TKN's home market sales is at a more advanced stage than the LOT of CEP sales, a CEP offset is appropriate in accordance with section 773(a)(7)(B) of the Tariff Act, as claimed by TKN. We based the amount of the CEP offset on home market indirect selling expenses, and limited the deduction for home market indirect selling expenses to the amount of indirect selling expenses deducted from CEP in accordance with section 772(d)(1)(D) of the Tariff Act. We applied the CEP offset to NV, whether based on home market prices or CV.

#### Currency Conversions

In accordance with section 773A(a) of the Tariff Act, we made Euro-U.S. Dollar currency conversions based on the exchange rates in effect on the dates of the U.S. sales, as certified by the Federal Reserve Board. For certain U.S. sales made by MXXUSA, we converted adjustments denominated in Mexican pesos to U.S. dollars based on the exchange rates in effect on the dates of the U.S. sales, as certified by the Federal Reserve Board. Finally, for certain U.S. sales denominated in Canadian dollars, we made currency conversions based on the exchange rates in effect on the dates of the U.S. sales, as certified by the Federal Reserve Board.

#### Preliminary Results of Review

As a result of our review, we preliminarily find the following weighted-average dumping margin

exists for the period July 1, 2004, through June 30, 2005:

Manufacturer/Exporter	Weighted Average Margin (percentage)
TKN .....	2.51%

The Department will disclose calculations performed within five days of the date of publication of this notice in accordance with 19 CFR 351.224(b). An interested party may request a hearing within thirty days of publication. See 19 CFR 351.310(c). Any hearing, if requested, will be held 37 days after the date of publication, or the first business day thereafter, unless the Department alters the date pursuant to 19 CFR 351.310(d). Interested parties may submit case briefs no later than 30 days after the date of publication of these preliminary results of review. Rebuttal briefs, limited to issues raised in the case briefs, may be filed no later than 35 days after the date of publication of this notice. Parties who submit arguments in these proceedings are requested to submit with the argument: 1) A statement of the issue; 2) a brief summary of the argument; and 3) a table of authorities. Further, parties submitting written comments should provide the Department with an additional copy of the public version of any such comments on diskette. The Department will issue final results of this administrative review, including the results of our analysis of the issues in any such written comments or at a hearing, within 120 days of publication of these preliminary results.

The Department shall determine, and CBP shall assess, antidumping duties on all appropriate entries. Upon completion of this administrative review, pursuant to 19 CFR 351.212(b), the Department will calculate an assessment rate on all appropriate entries. TKN has reported entered values for all of its sales of subject merchandise to the U.S. during the POR. Therefore, in accordance with 19 CFR 351.212(b)(1), we will calculate importer-specific duty assessment rates on the basis of the ratio of the total amount of antidumping duties calculated for the examined sales to the total entered value of the examined sales of that importer. These rates will be assessed uniformly on all entries the respective importers made during the POR if these preliminary results are adopted in the final results of review. Where the assessment rate is above *de minimis*, we will instruct CBP to assess duties on all entries of subject merchandise by that importer. The Department will issue appropriate

appraisement instructions directly to CBP within fifteen days of publication of the final results of review.

Furthermore, the following deposit requirements will be effective upon completion of the final results of this administrative review for all shipments of S4 from Germany entered, or withdrawn from warehouse, for consumption on or after the publication date of the final results of this administrative review, as provided by section 751(a)(1) of the Tariff Act:

- 1) The cash deposit rate for TKN will be the rate established in the final results of review;
- 2) If the exporter is not a firm covered in this review or the less-than-fair-value (LTFV) investigation, but the manufacturer is, the cash deposit rate will be the rate established for the most recent period for the manufacturer of the merchandise; and
- 3) If neither the exporter nor the manufacturer is a firm covered in this or any previous review conducted by the Department, the cash deposit rate will be the "all others" rate of 13.48 percent from the LTFV investigation. See Stainless Steel Sheet and Strip in Coils from Germany: Amended Final Determination of Antidumping Duty Investigation, 67 FR 15178 (March 29, 2002).

This notice also serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

We are issuing and publishing this notice in accordance with sections 751(a)(1) and 777(i)(1) of the Tariff Act.

Dated: July 31, 2006.  
**David M. Spooner**,  
*Assistant Secretary for Import Administration.*  
 [FR Doc. E6-12798 Filed 8-7-06; 8:45 am]  
**BILLING CODE 3510-DS-S**

**DEPARTMENT OF COMMERCE**

**International Trade Administration**

[A-A-351-819, A-427-811]

**Stainless Steel Wire Rods From Brazil and France: Revocation of Antidumping Duty Order**

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**SUMMARY:** On July 1, 2005, the Department of Commerce (the Department) initiated sunset reviews of the antidumping duty (AD) orders on stainless steel wire rods from Brazil, France, and India, pursuant to section. Pursuant to section 751(c) of the Tariff Act of 1930, as amended (the Act), the International Trade Commission (the ITC) determined that revocation of these orders would not be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time. Therefore, pursuant to section 751(d)(2) of the Act and 19 CFR 351.222(i)(1)(iii), the Department is revoking the AD orders on stainless steel wire rods from Brazil and France.

**EFFECTIVE DATE:** August 2, 2005.

**FOR FURTHER INFORMATION CONTACT:** Jacqueline Arrowsmith or Dana Mermelstein, AD/CVD Operations, Office 6, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street & Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482-5255 and (202) 482-1391, respectively.

**SUPPLEMENTARY INFORMATION:**

**Scope of the Orders**

Imports covered by these orders are certain stainless steel wire rods (SSWR) from Brazil and France. SSWR are products which are hot-rolled or hot-rolled annealed and/or pickled rounds, squares, octagons, hexagons, or other shapes, in coils. SSWR are made of alloy steels containing, by weight 1.2 percent or less of carbon and 10.5 percent of chromium, with or without other elements. These products are only manufactured by hot-rolling and normally sold in coiled form, and are solid cross-section. The majority of SSWR sold in the United States are round in cross-section shape, annealed and pickled. The most common size is 5.5 millimeters in diameter.

The merchandise subject to these orders is currently classifiable under subheadings 7221.00.0005, 7221.00.0015, 7221.00.0030, 7221.00.0045, 7221.00.0075 of the

Harmonized Tariff Schedule of the United States (HTSUS).<sup>1</sup> The HTSUS subheadings are provided for convenience and customs purposes. The written description remains dispositive.

### Background

On January 28, 1994, the Department published *Antidumping Duty Order: Certain Stainless Steel Wire Rods from Brazil*, 59 FR 4021 and the *Amended Final Determination and Antidumping Duty Order: Certain Stainless Steel Wire Rods from France*, 59 FR 4022. On August 2, 2000, the Department published the *Continuation of Antidumping Duty Orders: Stainless Steel Wire Rod from Brazil, France, and India*, 65 FR 47403.

On July 1, 2005, the Department initiated, and the ITC instituted, sunset reviews of the AD orders on stainless steel wire rods from Brazil and France. See *Initiation of Five-Year (Sunset) Reviews*, 70 FR 38101 (July 1, 2005).

As a result of its sunset reviews of these orders, the Department found that revocation of these orders would be likely to lead to continuation or recurrence of dumping. See *Stainless Steel Wire Rods from Brazil, France, and India; Notice of Final Results of Five-year (Sunset) Reviews of the Antidumping Duty Orders*, 70 FR 67447 (November 7, 2005). The Department notified the ITC of the magnitude of the margins likely to prevail were the AD orders to be revoked.

On June 29, 2006, the ITC determined, pursuant to section 751(c) of the Act, that revocation of these orders would not be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time. See *Stainless Steel Wire Rod from Brazil, France and India*, Investigations Nos. 731-TA-636, 731-TA-637, and 731-TA-638 (Second Review), 70 FR 38207 (July 1, 2005).

### Determination

As a result of the determination by the ITC that revocation of these orders is not likely to lead to the continuation or recurrence of material injury to an industry in the United States, the Department, pursuant to section 751(d) of the Act is revoking the AD orders on SSWR from Brazil and France. Pursuant to section 751(d)(2) of the Act and 19

<sup>1</sup> The merchandise subject to the scope of these orders was originally classifiable under all of the following HTS subheadings: 7221.00.0005, 7221.00.0015, 7221.00.0020, 7221.00.0030, 7221.00.0040, 7221.00.0045, 7221.00.0060, 7221.00.0075, and 7221.00.0080. HTSUS subheadings 7221.00.0020, 7221.00.0040, 7221.00.0060, 7221.00.0080 are no longer contained in the HTSUS.

CFR 351.222(i)(2)(i), the effective date of the revocation is August 2, 2005 (*i.e.*, the fifth anniversary of the date of publication in the **Federal Register** of the notices of continuation of these AD orders.) The Department will notify U.S. Customs and Border protection to discontinue suspension of liquidation and collection of cash deposits on entries of subject merchandise entered or withdrawn from warehouse on or after August 2, 2005, the effective date of revocation of these orders. The Department will complete any administrative reviews of these orders and will conduct administrative reviews of subject merchandise entered prior to the effective date of revocation in response to appropriately filed requests for review.

These five-year (sunset) reviews and this notice are in accordance with section 751(d)(2) and published pursuant to section 777(i)(1) of the Act.

Dated: August 1, 2006.

**David M. Spooner,**

*Assistant Secretary, for Import Administration.*

[FR Doc. E6-12861 Filed 8-7-06; 8:45 am]

**BILLING CODE 3510-DS-P**

## DEPARTMENT OF COMMERCE

### International Trade Administration (A-449-804)

#### Notice of Preliminary Results of Antidumping Duty Administrative Review: Steel Concrete Reinforcing Bars from Latvia

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**FOR FURTHER INFORMATION CONTACT:** Shane Subler or Constance Handley at (202) 482-0189 or (202) 482-0631, respectively; AD/CVD Operations, Office 1, Import Administration, International Trade Administration, U.S. Department of Commerce, 14<sup>th</sup> Street & Constitution Avenue, NW, Washington, DC 20230.

**SUMMARY:** The Department of Commerce (the Department) is conducting an administrative review of the antidumping duty order on steel concrete reinforcing bars (rebar) from Latvia. We preliminarily determine that sales of subject merchandise by Joint Stock Company Liepajas Metalurgs (LM) have been made below normal value (NV). If these preliminary results are adopted in our final results, we will instruct U.S. Customs and Border Protection (CBP) to assess antidumping duties on appropriate entries based on

the difference between the export price (EP) and the NV. Interested parties are invited to comment on these preliminary results.

**EFFECTIVE DATE:** August 8, 2006.

### SUPPLEMENTARY INFORMATION:

#### Background

On September 7, 2001, the Department issued an antidumping duty order on rebar from Latvia. See *Antidumping Duty Order: Steel Concrete Reinforcing Bars From Belarus, Indonesia, Latvia, Moldova, People's Republic of China, Poland, Republic of Korea and Ukraine*, 66 FR 46777 (September 7, 2001). On September 1, 2005, the Department issued a notice of opportunity to request the fourth administrative review of this order. See *Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review*, 70 FR 52072 (September 1, 2005). On September 27, 2005, in accordance with 19 CFR 351.213(b), LM requested an administrative review. On September 30, 2005, also in accordance with 19 CFR 351.213(b), the Rebar Trade Action Coalition (RTAC),<sup>1</sup> the petitioner in this proceeding, requested an administrative review of LM. On October 25, 2005, the Department published the notice of initiation of this antidumping duty administrative review, covering the period September 1, 2004, through August 31, 2005 (the period of review, or POR). See *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 70 FR 61601 (October 25, 2005).

On November 22, 2005, the Department issued its antidumping questionnaire to LM, specifying that the responses to Section A and Sections B-D would be due on December 13, 2005, and, December 29, 2005, respectively.<sup>2</sup> The Department received timely responses to Sections A-D of the initial antidumping questionnaire and associated supplemental questionnaires.

<sup>1</sup> RTAC comprises Nucor Corporation, Gerdau Ameristeel Corporation, and Commercial Metals Company.

<sup>2</sup> Section A of the questionnaire requests general information concerning a company's corporate structure and business practices, the merchandise under review that it sells, and the manner in which it sells that merchandise in all of its markets. Section B requests a complete listing of all home market sales, or, if the home market is not viable, of sales in the most appropriate third-country market (this section is not applicable to respondents in non-market economy cases). Section C requests a complete listing of U.S. sales. Section D requests information on the cost of production of the foreign like product and the constructed value of the merchandise under review. Section E requests information on further manufacturing.

On May 4, 2006, the Department published a notice of a sixty-day extension of the time limit for the preliminary results of this administrative review. *See Steel Concrete Reinforcing Bars from Latvia: Extension of the Time Limit for the Preliminary Results of Antidumping Duty Administrative Review*, 71 FR 26335 (May 4, 2006). This notice extended the deadline for the preliminary results to August 1, 2006.

### Scope of the Order

The product covered by this order is all steel concrete reinforcing bars sold in straight lengths, currently classifiable in the Harmonized Tariff Schedule of the United States (HTSUS) under item numbers 7214.20.00, 7228.30.8050, 7222.11.0050, 7222.30.0000, 7228.60.6000, 7228.20.1000, or any other tariff item number. Specifically excluded are plain rounds (*i.e.*, non-deformed or smooth bars) and rebar that has been further processed through bending or coating. HTSUS subheadings are provided for convenience and customs purposes. The written description of the scope of the order is dispositive.

### Fair Value Comparisons

We compared the EP to the NV, as described in the *Export Price* and *Normal Value* sections of this notice. We first attempted to compare contemporaneous sales of products sold in the United States and comparison market that are identical with respect to the matching characteristics. Pursuant to section 771(16) of the Tariff Act of 1930, as amended (the Act), all products produced by the respondent that fit the definition of the scope of the order and were sold in the comparison market during the POR fall within the definition of the foreign like product. We have relied on three criteria to match U.S. sales of subject merchandise to comparison market sales of the foreign like product: type of steel, yield strength, and size. Where there were no sales of identical merchandise in the comparison market, we compared U.S. sales to sales of the next most similar foreign like product on the basis of the characteristics listed above.

### U.S. Market Date of Sale

LM reported the commercial invoice date as the date of sale in the U.S. market. In order to determine whether the invoice date is the appropriate date of sale, we requested that LM submit complete sales documentation (*i.e.*, purchase contracts, contract addenda, pro-forma invoices, appendices to the purchase contracts, amendments to the

contract addenda, commercial invoices, and mate's receipts) for all U.S. sales during the POR. LM provided this information in its April 17, 2006, supplemental questionnaire response.

We have preliminarily used the date of the final purchase contract amendment that modified the material terms of sale (*i.e.*, price, quantity within a specified tolerance, and actual products sold) as the U.S. market date of sale because these amendments best reflect the firm establishment of the material terms of sale. The facts of the current segment of the proceeding are consistent with the facts of the third administrative review, in which we also found the date of final amendment to each individual purchase contract to be the date of sale.<sup>3</sup> Because information in LM's sales documentation is business proprietary, we have explained the date of sale methodology in detail in the calculation analysis memorandum. *See Memorandum from Shane Subler, International Trade Compliance Analyst, to Constance Handley, Program Manager, Re: Analysis Memorandum for Joint Stock Company Liepajas Metalurgs*, dated August 1, 2006 (*Analysis Memorandum*), for further explanation of the selected U.S. market date of sale. For all home market sales, we have preliminarily used the invoice date as the date of sale based on information on the record.

### Sales Transshipped to Third Countries Through the United States

Upon reviewing Exhibit 11 of LM's April 17, 2006, supplemental response, we found documentation of mate's receipts indicating that certain rebar reported in LM's U.S. sales database was transshipped through the United States to the British Virgin Islands and the French West Indies. We confirmed that a portion of the rebar covered by these mate's receipts did not enter U.S. customs territory. Therefore, for sales observations that included the transshipped rebar, we removed the quantity of transshipped rebar from the total quantity in the sales observation. *See the Analysis Memorandum* for additional details.

### Export Price

We calculated an EP for all of LM's U.S. sales because the merchandise was sold directly by LM to the first

unaffiliated purchaser for delivery to the United States, and because constructed export price (CEP) was not otherwise warranted based on the facts of record. We made deductions from the starting price for movement expenses in accordance with section 772(c)(2)(A) of the Act. Movement expenses included inland freight, domestic brokerage and handling expenses, and dunnage expenses.

### Normal Value

#### A. Selection of Comparison Market

Section 773(a)(1) of the Act directs that NV be based on the price at which the foreign like product is sold in the home market, provided that the merchandise is sold in sufficient quantities (or value, if quantity is inappropriate); that the time of the sales reasonably corresponds to the time of the sale used to determine EP; and that there is no particular market situation that prevents a proper comparison with the EP. The statute contemplates that quantities (or value) will normally be considered insufficient if they are less than five percent of the aggregate quantity (or value) of sales of the subject merchandise to the United States.

We found that LM had a viable home market for rebar. As such, LM submitted home market sales data for purposes of the calculation of NV.

In deriving NV, we made adjustments as detailed in the *Calculation of Normal Value Based on Comparison Market Prices* section below.

#### B. Cost of Production Analysis

Because we disregarded below-cost sales in the final results of the third administrative review, we had reasonable grounds to believe or suspect that home market sales of the foreign like product by LM have been made at prices below the cost of production (COP) during the fourth POR. As a result, the Department initiated a COP inquiry for LM for the fourth POR.

##### 1. Calculation of Cost of Production

In accordance with section 773(b)(3) of the Act, we calculated the weighted-average COP, by model, based on the sum of materials, fabrication, and general and administrative (G&A) expenses. We relied on LM's submitted average COP calculations for the POR except that we have preliminarily excluded the value of LM's reported income offset to G&A expenses. We preliminarily find that the record does not include sufficient information on the nature of these offsets or their corresponding costs to warrant including them in the G&A calculation. *See the Analysis Memorandum.*

<sup>3</sup> We note that the terminology used for LM's sales documentation varies by customer. As shown in Exhibit 11 of LM's April 17, 2006, supplemental response, a purchase contract is equivalent to a contract addendum, and an appendix is equivalent to an amendment to the addendum. *See the Analysis Memorandum* for a discussion on how the material terms of sale are established by each of these documents.

## 2. Test of Comparison Market Sales Prices

We compared the weighted-average COPs for LM to its home-market sales prices of the foreign like product, as required under section 773(b) of the Act, to determine whether these sales had been made at prices below the COP within an extended period of time (*i.e.*, a period of one year) in substantial quantities and whether such prices were sufficient to permit the recovery of all costs within a reasonable period of time.

On a model-specific basis, we compared the COP to the home market prices, less any applicable movement charges and direct and indirect selling expenses.

### 3. Results of the COP Test

We disregarded below-cost sales where (1) 20 percent or more of LM's sales of a given product during the POR were made at prices below the COP, because such sales were made within an extended period of time in substantial quantities in accordance with sections 773(b)(2)(B) and (C) of the Act; and (2) based on comparisons of price to weighted-average COPs for the POR, we determined that the below-cost sales of the product were at prices which would not permit recovery of all costs within a reasonable time period, in accordance with section 773(b)(2)(D) of the Act. We found that LM made sales below cost, and we disregarded such sales where appropriate.

### C. Calculation of Normal Value Based on Comparison Market Prices

We determined NV for LM as follows. We made adjustments for any differences in packing and deducted home market movement expenses pursuant to sections 773(a)(6)(A) and 773(a)(6)(B)(ii) of the Act. In addition, we made adjustments for differences in circumstances of sale (COS) pursuant to section 773(a)(6)(C)(iii) of the Act. We made COS adjustments for LM's EP transactions by deducting direct selling expenses incurred for home market sales (credit expenses) and adding U.S. imputed credit expenses. In LM's case, the calculation of imputed credit expenses results in a negative number because LM's U.S. sales are prepaid. Therefore, the adjustment for U.S. imputed credit reduces NV.

### D. Level of Trade Adjustment

In accordance with section 773(a)(1)(B) of the Act, to the extent practicable, we determine NV based on sales in the comparison market at the same level of trade as the EP transaction. The NV level of trade is that of the starting-price sales in the comparison market. For EP sales, the

U.S. level of trade is also the level of the starting-price sale, which is usually from exporter to importer.

To determine whether NV sales are at a different level of trade than EP transactions, we examine stages in the marketing process and selling functions along the chain of distribution between the producer and the unaffiliated customer. If the comparison-market sales are at a different level of trade and the difference affects price comparability, as manifested in a pattern of consistent price differences between the sales on which NV is based and comparison-market sales at the level of trade of the export transaction, we make a level-of-trade adjustment under section 773(a)(7)(A) of the Act.

In conducting our level-of-trade analysis, we examine the types of customers, the channels of distribution, and the selling practices of the respondent. Generally, if the reported levels of trade are the same, the functions and activities of the seller should be similar. Conversely, if a party reports levels of trade that are different for different categories of sales, the functions and activities should be dissimilar. We found the following.

For both the home market and U.S. market, LM reported one channel of distribution: direct sales. The company reported three customer categories in the home market: (1) Traders; (2) end users; and (3) service centers. For all three customer categories, LM performed the following selling activities: negotiations with customers, order processing, packing, and delivery services. Accordingly, we preliminarily determine that LM's home market sales to these three customer categories constitute a single LOT.

LM reported one customer category in the U.S. market - traders. In comparing the company's U.S. sales to its home market sales, we found that the selling functions performed by LM were very similar in the U.S. and Latvian markets. For U.S. sales, LM conducts negotiations with the traders, processes orders, packs the merchandise, and arranges delivery to the port. Therefore, we preliminarily determine that U.S. sales and home market sales were made at the same level of trade.

### Currency Conversion

We made currency conversions into U.S. dollars in accordance with section 773A of the Act, based on exchange rates in effect on the date of the U.S. sale, as certified by the Federal Reserve Bank.

### Preliminary Results of Review

As a result of this review, we preliminarily determine that the following weighted-average margin exists for the period September 1, 2004, through August 31, 2005:

Producer	Weighted-Average Margin (Percentage)
Joint Stock Company Liepajas Metalurgs ..	6.03

The Department will disclose calculations performed in accordance with 19 CFR 351.224(b). An interested party may request a hearing within 30 days of publication of these preliminary results. See 19 CFR 351.310(c). Any hearing, if requested, will be held 44 days after the date of publication, or the first working day thereafter. Interested parties may submit case briefs and/or written comments no later than 30 days after the date of publication of these preliminary results. Rebuttal briefs and rebuttals to written comments, limited to issues raised in such briefs or comments, may be filed no later than 37 days after the date of publication. Parties who submit arguments are requested to submit with the argument (1) A statement of the issue, (2) a brief summary of the argument, and (3) a table of authorities. Further, the parties submitting written comments should provide the Department with an additional copy of the public version of any such comments on diskette.

The Department will issue the final results of this administrative review, which will include the results of its analysis of issues raised in any such comments, within 120 days of publication of these preliminary results.

### Assessment

Upon completion of this administrative review, pursuant to 19 CFR 351.212(b), the Department will calculate an assessment rate on all appropriate entries. We will calculate importer-specific duty assessment rates on the basis of the ratio of the total amount of antidumping duties calculated for the examined sales to the total quantity of the sales for that importer. Where the assessment rate is above *de minimis*, we will instruct CBP to assess duties on all entries of subject merchandise by that importer.

The Department clarified its "automatic assessment" regulation on May 6, 2003 (68 FR 23954). This clarification will apply to entries of subject merchandise during the POR produced by companies included in these preliminary results of review for which the reviewed companies did not

know their merchandise was destined for the United States. In such instances, the Department will instruct CBP to liquidate unreviewed entries at the all-others rate if there is no rate for the intermediate company(ies) involved in the transaction. For a full discussion of this clarification, see *Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties*, 68 FR 23954 (May 6, 2003).

### Cash Deposit Requirements

The following deposit rates will be effective upon publication of the final results of this administrative review for all shipments of rebar from Latvia entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided by section 751(a)(1) of the Act: (1) The cash deposit rate listed above for LM will be the rate established in the final results of this review, except if a rate is less than 0.5 percent, and therefore *de minimis*, the cash deposit will be zero; (2) for previously reviewed or investigated companies not listed above, the cash deposit rate will continue to be the company-specific rate published for the most recent period; (3) if the exporter is not a firm covered in this review, a prior review, or the less-than-fair-value (LTFV) investigation, but the manufacturer is, the cash deposit rate will be the rate established for the most recent period for the manufacturer of the merchandise; and (4) if neither the exporter nor the manufacturer is a firm covered in this or any previous review conducted by the Department, the cash deposit rate will be 17.21 percent, the "All Others" rate established in the LTFV investigation. These cash deposit requirements, when imposed, shall remain in effect until publication of the final results of the next administrative review.

This notice serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entities during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

This determination is issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: August 1, 2006.

**David M. Spooner,**

*Assistant Secretary for Import Administration.*

[FR Doc. E6-12865 Filed 8-7-06; 8:45 am]

**BILLING CODE 3510-DS-S**

## DEPARTMENT OF COMMERCE

### International Trade Administration

(C-533-844)

#### Notice of Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination: Certain Lined Paper Products from India

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**SUMMARY:** We determine that countervailable subsidies are being provided to producers and exporters of certain lined paper products from India. For information on the estimated subsidy rates, see the "Suspension of Liquidation" section of this notice. Moreover, we determine that critical circumstances do not exist with regard to exports of CLPP from India. See the "Critical Circumstances" section below.

**EFFECTIVE DATE:** August 8, 2006.

#### FOR FURTHER INFORMATION CONTACT:

Robert Copyak, AC/CVD Operations, Office 3, Import Administration, International Trade Administration, U.S. Department of Commerce, Room 4012, 14<sup>th</sup> Street and Constitution Avenue, N.W., Washington, D.C. 20230; Telephone: 202-482-2209.

#### SUPPLEMENTARY INFORMATION:

##### Background

This investigation covers 12 programs and the following manufacturer/exporters: Aero Exports (Aero), Kejriwal Exports, a division of Kejriwal Paper Limited (Kejriwal), and Navneet Publications India Ltd. (Navneet).

On February 15, 2006, the Department of Commerce (the Department) published in the **Federal Register** its preliminary affirmative determination in the countervailing duty investigation of certain lined paper products from India. See *Notice of Preliminary Affirmative Countervailing Duty Determination and Preliminary Negative Critical Circumstances Determination: Certain Lined Paper Products from India*, 71 FR 7196 (February 15, 2006) (*Preliminary Determination*).

We invited interested parties to comment on the *Preliminary Determination*. On June 14, 2006, we received comments from petitioners and

respondents.<sup>1</sup> On June 19, 2006, we received rebuttal comments from petitioners and respondents.

#### Period of Investigation

The period of investigation (POI) is April 1, 2004, through March 31, 2005.

#### Critical Circumstances

As explained in the *Preliminary Determination*, petitioners requested that, pursuant to 19 CFR 351.206, the Department make an expedited finding that critical circumstances exist with respect to imports of lined paper products from India. In the *Preliminary Determination*, we determined that critical circumstances did not exist. See *Preliminary Determination*, 71 FR at 7917. For purposes of this final determination, we continue to find that critical circumstances do not exist as petitioners' allegation does not provide a sufficient factual basis for making an affirmative finding. See Memorandum to Stephen J. Claeys, Deputy Assistant Secretary for Import Administration, from: Melissa G. Skinner, Director, Operations, Office 3: Final Negative Critical Circumstances Determination, (July 31, 2006) (publicly on file in the Central Records Unit (CRU), Room B-099 of the main building of the Commerce Department).

#### Scope of the Investigation

For scope information, see Appendix I.

#### Analysis of Comments Received

All issues raised in the case and rebuttal briefs by parties to this investigation are addressed in the "Issues and Decision Memorandum" (Decision Memorandum) dated July 31, 2006, which is hereby adopted by this notice. A list of issues that parties have raised and to which we have responded, all of which are in the Decision Memorandum, is attached to this notice as Appendix II. Parties can find a complete discussion of all issues raised in this investigation and the corresponding recommendations in this public memorandum, which is on file in the CRU. In addition, a complete version of the Decision Memorandum can be accessed directly on the World Wide Web at <http://ia.ita.doc.gov/frn>. The paper copy and electronic version of the Decision Memorandum are identical in content.

#### Suspension of Liquidation

In accordance with section 705(c)(1)(B)(i)(I) of the Tariff Act of 1930

<sup>1</sup> Petitioners are the Association of American School Paper Suppliers.

(as amended) (the Act), we have calculated individual rates for the companies under investigation. For the

period April 1, 2004, through March 31, 2005, we determine the net subsidy

rates for the investigated companies are as follows:

Producer/Exporter	Net Subsidy Rate
Aero Exports (Aero) .....	7.05 percent <i>ad valorem</i>
Kejriwal Exports, a division of Kejriwal Paper Limited (Kejriwal) .....	<i>de minimis</i>
Navneet Publications India Ltd. (Navneet) .....	10.24 percent <i>ad valorem</i>
All Others Rate .....	9.42 percent <i>ad valorem</i>

To calculate the "All Others" rate, we weight averaged the individual rates of Aero, Kejriwal, and Navneet by each company's respective sales of subject merchandise made to the United States during the POI, pursuant to section 705(c)(5)(A) of the Act.

In accordance with our preliminary affirmative determination, we instructed U.S. Customs and Border Protection (CBP) to suspend liquidation of all entries of certain lined paper products from India, which were entered or withdrawn from warehouse, for consumption on or after February 15, 2006, the date of the publication of our *Preliminary Determination* in the **Federal Register**. In accordance with section 703(d) of the Act, we instructed the CBP to discontinue the suspension of liquidation for merchandise entered on or after June 15, 2006, but to continue the suspension of liquidation of entries made between February 15, 2006, and June 14, 2006.

With the exception of Kejriwal, we will reinstate suspension of liquidation under section 706(a) of the Act for all entries if the International Trade Commission (ITC) issues a final affirmative injury determination and will require a cash deposit of estimated countervailing duties for such entries of merchandise in the amounts indicated above. Because we have determined that Kejriwal's net subsidy rate is *de minimis*, we will direct CBP to terminate the suspension of liquidation for Kejriwal's shipments of subject merchandise entered, or withdrawn from warehouse, for consumption on or after February 15, 2006, the publication date of the *Preliminary Determination*, and to release any bond or other security, and refund any cash deposit.

If the ITC determines that material injury, or threat of material injury, does not exist, this proceeding will be terminated and all estimated duties deposited or securities posted as a result of the suspension of liquidation will be refunded or canceled.

#### ITC Notification

In accordance with section 705(d) of the Act, we will notify the ITC of our determination. In addition, we are

making available to the ITC all non-privileged and non-proprietary information related to this investigation. We will allow the ITC access to all privileged and business proprietary information in our files, provided that the ITC confirms that it will not disclose such information, either publicly or under an administrative protective order (APO), without the written consent of the Assistant Secretary for Import Administration.

If the ITC determines that material injury, or threat of material injury, does not exist, these proceedings will be terminated. If however, the ITC determines that such injury does exist, we will issue a countervailing duty order.

#### Return or Destruction of Proprietary Information

In the event that the ITC issues a final negative injury determination, this notice will serve as the only reminder to parties subject to APO of their responsibility concerning the destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Failure to comply is a violation of the APO.

This determination is published pursuant to sections 705(d) and 777(i) of the Act.

Dated: July 31, 2006.

**David M. Spooner,**

*Assistant Secretary for Import Administration.*

#### Appendix I

##### Scope of the Investigation

The scope of this investigation includes certain lined paper products, typically school supplies (for purposes of this scope definition, the actual use of or labeling these products as school supplies or non-school supplies is not a defining characteristic) composed of or including paper that incorporates straight horizontal and/or vertical lines on ten or more paper sheets (there shall be no minimum page requirement for looseleaf filler paper) including but not limited to such products as single- and multi-subject notebooks, composition books, wireless notebooks, looseleaf or

glued filler paper, graph paper, and laboratory notebooks, and with the smaller dimension of the paper measuring 6 inches to 15 inches (inclusive) and the larger dimension of the paper measuring 8-3/4 inches to 15 inches (inclusive). Page dimensions are measured size (not advertised, stated, or "tear-out" size), and are measured as they appear in the product (*i.e.*, stitched and folded pages in a notebook are measured by the size of the page as it appears in the notebook page, not the size of the unfolded paper). However, for measurement purposes, pages with tapered or rounded edges shall be measured at their longest and widest points. Subject lined paper products may be loose, packaged or bound using any binding method (other than case bound through the inclusion of binders board, a spine strip, and cover wrap). Subject merchandise may or may not contain any combination of a front cover, a rear cover, and/or backing of any composition, regardless of the inclusion of images or graphics on the cover, backing, or paper. Subject merchandise is within the scope of this investigation whether or not the lined paper and/or cover are hole punched, drilled, perforated, and/or reinforced. Subject merchandise may contain accessory or informational items including but not limited to pockets, tabs, dividers, closure devices, index cards, stencils, protractors, writing implements, reference materials such as mathematical tables, or printed items such as sticker sheets or miniature calendars, if such items are physically incorporated, included with, or attached to the product, cover and/or backing thereto.

Specifically excluded from the scope of this investigation are:

- unlined copy machine paper;
- writing pads with a backing (including but not limited to products commonly known as "tablets," "note pads," "legal pads," and "quadrille pads"), provided that they do not have a front cover (whether permanent or removable). This exclusion does not apply to such writing pads if they consist of hole-punched or drilled filler paper;

- three-ring or multiple-ring binders, or notebook organizers incorporating such a ring binder provided that they do not include subject paper;
- index cards;
- printed books and other books that are case bound through the inclusion of binders board, a spine strip, and cover wrap;
- newspapers;
- pictures and photographs;
- desk and wall calendars and organizers (including but not limited to such products generally known as "office planners," "time books," and "appointment books");
- telephone logs;
- address books;
- columnar pads & tablets, with or without covers, primarily suited for the recording of written numerical business data;
- lined business or office forms, including but not limited to: pre-printed business forms, lined invoice pads and paper, mailing and address labels, manifests, and shipping log books;
- lined continuous computer paper;
- boxed or packaged writing stationary (including but not limited to products commonly known as "fine business paper," "parchment paper," and "letterhead"), whether or not containing a lined header or decorative lines;
- Stenographic pads ("steno pads"), Gregg ruled ("Gregg ruling" consists of a single- or double-margin vertical ruling line down the center of the page. For a six-inch by nine-inch stenographic pad, the ruling would be located approximately three inches from the left of the book.), measuring 6 inches by 9 inches;

Also excluded from the scope of this investigation are the following trademarked products:

- Fly™ lined paper products: A notebook, notebook organizer, loose or glued note paper, with papers that are printed with infrared reflective inks and readable only by a Fly™ pen-top computer. The product must bear the valid trademark Fly™ (products found to be bearing an invalidly licensed or used trademark are not excluded from the scope).
- Zwipes™: A notebook or notebook organizer made with a blended polyolefin writing surface as the cover and pocket surfaces of the notebook, suitable for writing using a specially-developed permanent marker and erase system (known as a Zwipes™ pen). This system allows the marker portion to mark the writing surface with a permanent ink. The eraser portion of the marker dispenses a solvent capable of solubilizing the permanent ink allowing

the ink to be removed. The product must bear the valid trademark Zwipes™ (products found to be bearing an invalidly licensed or used trademark are not excluded from the scope).

- FiveStar® Advance™: A notebook or notebook organizer bound by a continuous spiral, or helical, wire and with plastic front and rear covers made of a blended polyolefin plastic material joined by 300 denier polyester, coated on the backside with PVC (poly vinyl chloride) coating, and extending the entire length of the spiral or helical wire. The polyolefin plastic covers are of specific thickness; front cover is 0.019 inches (within normal manufacturing tolerances) and rear cover is 0.028 inches (within normal manufacturing tolerances). Integral with the stitching that attaches the polyester spine covering, is captured both ends of a 1" wide elastic fabric band. This band is located 2-3/8" from the top of the front plastic cover and provides pen or pencil storage. Both ends of the spiral wire are cut and then bent backwards to overlap with the previous coil but specifically outside the coil diameter but inside the polyester covering. During construction, the polyester covering is sewn to the front and rear covers face to face (outside to outside) so that when the book is closed, the stitching is concealed from the outside. Both free ends (the ends not sewn to the cover and back) are stitched with a turned edge construction. The flexible polyester material forms a covering over the spiral wire to protect it and provide a comfortable grip on the product. The product must bear the valid trademarks FiveStar® Advance™ (products found to be bearing an invalidly licensed or used trademark are not excluded from the scope).

- FiveStar Flex™: A notebook, a notebook organizer, or binder with plastic polyolefin front and rear covers joined by 300 denier polyester spine cover extending the entire length of the spine and bound by a 3-ring plastic fixture. The polyolefin plastic covers are of a specific thickness; front cover is 0.019 inches (within normal manufacturing tolerances) and rear cover is 0.028 inches (within normal manufacturing tolerances). During construction, the polyester covering is sewn to the front cover face to face (outside to outside) so that when the book is closed, the stitching is concealed from the outside. During construction, the polyester cover is sewn to the back cover with the outside of the polyester spine cover to the inside back cover. Both free ends (the ends not sewn to the cover and back) are stitched with a turned edge construction. Each

ring within the fixture is comprised of a flexible strap portion that snaps into a stationary post which forms a closed binding ring. The ring fixture is riveted with six metal rivets and sewn to the back plastic cover and is specifically positioned on the outside back cover. The product must bear the valid trademark FiveStar Flex™ (products found to be bearing an invalidly licensed or used trademark are not excluded from the scope). Merchandise subject to this investigation is typically imported under headings 4820.10.2050, 4810.22.5044, 4811.90.9090, 4820.10.2010, 4820.10.2020 of the Harmonized Tariff Schedule of the United States ("HTSUS"). During the investigation additional HTS codes may be identified. The tariff classifications are provided for convenience and customs purposes; however, the written description of the scope of the investigation is dispositive.

## Appendix II – Issues and Decision Memorandum

### I. Summary

#### A. General Comments

Comment 1: Treatment of Contingent Liability Benefits Under the Export Promotion Capital Goods Scheme (EPCGS)

Comment 2: Valuation of DEPS Benefits

#### B. Navneet

Comment 3: Benchmark Used Under the EPCGS Program

Comment 4: Benchmark Used for Navneet Under the Pre-Shipment Export Financing Program

Comment 5: Navneet's Use of the 80 HHC Income Tax Exemption

Comment 6: Denominator Used to Calculate Navneet's Net Subsidy Rate Under the Pre-Shipment Export Financing Program

Comment 7: Denominator Used to Calculate Navneet's Net Subsidy Rate Under the Duty-Free Replenishment Certificate (DFRC) Scheme

#### C. Kejriwal

Comment 8: Benchmark Used to Calculate Countervailable Benefits Received by Kejriwal under the Post-Shipment Export Financing Program

Comment 9: Fulfillment of Export Obligation Under the EPCGS

#### D. Aero

Comment 10: Countervailability of the Advance License Program (ALP)

Comment 11: Program-Wide Changes With Respect to the ALP

Comment 12: Attribution of Subsidies Aero Received under the Post-Shipment Export Financing Program

## II. Subsidies Valuation Information

- A. Benchmark for Short-Term Loans
- B. Benchmark for Long-Term Loans Issued

## III. Critical Circumstances

## IV. Analysis Of Programs

### A. Programs Determined to Confer Subsidies

1. *Pre- and Post-Shipment Export Financing*
  2. *Export Promotion Capital Goods Scheme (EPCGS)*
  3. *Duty Entitlement Passbook Scheme (DEPS)*
  4. *Duty Free Replenishment Certificate (DFRC) Scheme*
  5. *Advance License Program (ALP)*
  6. *Income Tax Exemption Scheme under 80HHC (80HHC)*
- ### B. Programs Determined Not to be Used
1. Export Processing Zones (EPZ) and Export Oriented Units (EOU)
  2. Income Tax Exemption Scheme (Sections 10A and 10B)
  3. Market Development Assistance (MDA)
  4. Status Certificate Program
  5. Market Access Initiative
  6. State of Gujarat Sales Tax Incentives
  7. State of Maharashtra Sales Tax Incentives

## V. Total Ad Valorem Rates

## VI. Analysis Of Comments

[FR Doc. E6-12809 Filed 8-7-06; 8:45 am]

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## DEPARTMENT OF COMMERCE

### International Trade Administration

(C-533-825)

#### Notice of Preliminary Results and Rescission, in Part, of Countervailing Duty Administrative Review: Polyethylene Terephthalate Film, Sheet, and Strip from India

**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 order on polyethylene terephthalate (PET) film from India for the period January 1,

2004 through December 31, 2004. We preliminarily determine that subsidies are being provided on the production and export of PET film from India. See the "Preliminary Results of Administrative Review" section, below. 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. Interested parties are invited to comment on the preliminary results of this administrative review. See the "Public Comment" section of this notice. In addition, we are rescinding this review with respect to Garware Polyester Limited (Garware). See the "Partial Rescission of Review" section, below.

**EFFECTIVE DATE:** August 8, 2006

**FOR FURTHER INFORMATION CONTACT:** Elfi Blum, Nicholas Czajkowski, or Toni Page, AD/CVD Operations, Office 6, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482-0197, (202) 482-1395, or (202) 482-1398, respectively.

#### SUPPLEMENTARY INFORMATION:

##### Background

On July 1, 2002, the Department published in the **Federal Register** the countervailing duty (CVD) order on PET film from India. See *Countervailing Duty Order: Polyethylene Terephthalate Film, Sheet and Strip (PET Film) from India*, 67 FR 44179 (July 1, 2002) (PET Film Order). On July 1, 2005, the Department published in the **Federal Register** a notice of opportunity to request an administrative review of this order. See *Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review*, 70 FR 38099 (July 1, 2005). On July 27, 2005, MTZ Polyfilms, Ltd. (MTZ), and on July 29, 2005, Jindal Poly Films Limited of India (Jindal), formerly named Jindal Polyester Limited, Indian producers and exporters of subject merchandise, requested that the Department conduct an administrative review of the CVD order on PET film from India with respect to their exports to the United States. On July 29, 2005, Dupont Teijin Films, Mitsubishi Polyester Film of America, and Toray Plastics (America), (collectively, petitioners), requested that the Department conduct an administrative review of the CVD order on PET film from India with respect to Jindal and Polyplex Corporation Ltd. (Polyplex) (collectively, respondents). Also, on

August 1, 2005, Garware requested that the Department conduct an administrative review of the CVD order on PET film from India with respect to its exports to the United States.

On August 19, 2005, MTZ withdrew its request for review of the CVD order of PET film from India. See Memorandum to File through Howard Smith from Drew Jackson: "Withdrawal of Countervailing Duty Administrative Review Request" (August 23, 2005) (on file in the Central Records Unit (CRU), room B-099 of the main Commerce building). Since this company was the sole requestor for an administrative review, and since its withdrawal occurred prior to the date of initiation, we did not include this company in the initiation of the administrative review. On August 29, 2005, the Department initiated an administrative review of the CVD order on PET film from India covering Jindal, Garware, and Polyplex, for the period January 1, 2004 through December 31, 2004. See *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part*, 70 FR 51009 (August 29, 2005).

The Department issued questionnaires to the Government of India (GOI) and all three respondents. On September 14, 2005, pursuant to 19 CFR § 351.213(d)(1), Garware timely withdrew its request for an administrative review of the CVD order on PET film from India. Because no other party requested an administrative review of this respondent, the Department is rescinding its review with respect to Garware. See the "Partial Rescission of Review" section below.

On September 29, 2005, the GOI submitted its questionnaire response. Jindal and Polyplex submitted their questionnaire responses on October 3, 2005 and October 4, 2005, respectively. The Department issued its first supplemental questionnaires to Jindal and Polyplex on November 4, 2005 and November 7, 2005, respectively. On November 28, 2005, both Jindal and Polyplex submitted their first supplemental responses. On February 21, 2006, the Department extended the preliminary results until July 31, 2006. See *Extension of Time Limit for the Preliminary Results of Administrative Review: Polyethylene Terephthalate (PET) Film from India*, 71 FR 8840 (February 21, 2006). On April 14, 2006, the Department issued a second supplemental questionnaire to Jindal and Polyplex, and its first supplemental questionnaire to the GOI. The GOI submitted its response to the supplemental questionnaire on April 28, 2006, and Jindal and Polyplex

responded on May 8, 2006. On June 20, 2006, the Department issued a second supplemental questionnaire to the GOI, and third supplemental questionnaires to Jindal and Polyplex. The GOI submitted its response on June 27, 2006, and Jindal and Polyplex responded on July 5, 2006. Also, on July 5, 2006, the Department issued its third supplemental questionnaire to the GOI, to which the GOI submitted its response on July 12, 2006.

#### Verification

As provided in section 782(i)(3) of the Tariff Act of 1930, as amended (the Act), we intend to conduct verification of the GOI, Jindal, and Polyplex questionnaire responses following the issuance of the preliminary results.

#### Scope of the Order

For purposes of the order, the products covered are all gauges of raw, pretreated, or primed Polyethylene Terephthalate Film, Sheet and Strip, whether extruded or coextruded. Excluded are metallized films and other finished films that have had at least one of their surfaces modified by the application of a performance-enhancing resinous or inorganic layer of more than 0.00001 inches thick. Imports of PET film are classifiable in the Harmonized Tariff Schedule of the United States (HTSUS) under item number 3920.62.00. HTSUS subheadings are provided for convenience and customs purposes. The written description of the scope of this proceeding is dispositive.

#### Partial Rescission of Review

As provided in 19 CFR § 351.213(d)(1), "the Secretary will rescind an administrative review under this section, in whole or in part, if a party that requested a review withdraws the request within 90 days of the date of publication of notice of initiation of the requested review." Garware withdrew its review request within 90 days of the date of publication of the notice of initiation of the instant administrative review. Because no other interested parties requested an administrative review of Garware, the Department is rescinding the instant administrative review of this company.

#### Subsidies Valuation Information

##### Allocation Period

Under 19 CFR § 351.524(d)(2)(i), we will presume the allocation period for non-recurring subsidies to be the average useful life (AUL) prescribed by the Internal Revenue Service (IRS) for renewable physical assets of the industry under consideration (as listed in the IRS's 1977 Class Life Asset

Depreciation Range System, and as updated by the Department of the Treasury). This presumption will apply unless a party claims and establishes that these tables do not reasonably reflect the AUL of the renewable physical assets of the company or industry under investigation. Specifically, the party must establish that the difference between the AUL from the tables and the company-specific AUL or country-wide AUL for the industry under investigation is significant, pursuant to 19 CFR § 351.524(d)(2)(ii). For assets used to manufacture plastic film, such as PET film, the IRS tables prescribe an AUL of 9.5 years.

In the investigative segment of this proceeding, the Department determined that Polyplex had rebutted the presumption and applied a company-specific AUL of 18 years for Polyplex. See *Final Affirmative Countervailing Duty Determination: Polyethylene Terephthalate Film, Sheet, and Strip (PET Film)*, 67 FR 34905 (May 16, 2002) (*PET Film Final Determination*). In the previous review, the Department determined that Jindal had rebutted the presumption and applied a company-specific AUL of 17 years for Jindal. See *Final Results of Countervailing Duty Administrative Review: Polyethylene Terephthalate Film, Sheet, and Strip from India*, 69 FR 51063 (August 17, 2004) (*First PET Film Review - Final Results*). Because there is no new evidence on the record that would cause the Department to reconsider this decision in this review, the Department has preliminarily determined to continue to use an AUL of 17 years for Jindal and 18 years for Polyplex in allocating non-recurring subsidies.

#### Benchmark Interest Rates and Discount Rates

For programs requiring the application of a benchmark interest rate, 19 CFR § 351.505(a)(1) states a preference for using an interest rate that the company could have obtained on a comparable loan in the commercial market. Also, 19 CFR § 351.505(a)(3)(i) stipulates that when selecting a comparable commercial loan that the recipient "could actually obtain on the market" the Department will normally rely on actual short-term and long-term loans obtained by the firm. However, when there are no comparable commercial loans, the Department may use a national average interest rate, pursuant to 19 CFR § 351.505(a)(3)(ii).

In addition, 19 CFR § 351.505(a)(2)(ii) states that the Department will not consider a loan provided by a government-owned special purpose

bank for purposes of calculating benchmark rates. The Department has previously determined that the Industrial Development Bank of India (IDBI) is a government-owned special purpose bank. See *First PET Film Review - Final Results* and the accompanying *Issues and Decision Memorandum (Issues Memorandum - First Review)*, at 15-16. As such, the Department did not use loans from the IDBI reported by Jindal and Polyplex in its 2004 benchmark calculations.

Pursuant to 19 CFR § 351.505(a)(2)(iv), if a program under review is a government-provided, short-term loan, the preference would be to use an annual average of the interest rates on comparable commercial loans during the year in which the government-provided loan was taken out, weighted by the principal amount of each loan. For this review, the Department required both dollar-denominated and rupee-denominated short-term loan benchmark rates to determine benefits received under the Pre-Shipment Export Financing and Post-Shipment Export Financing programs.

Both Jindal and Polyplex have provided information on rupee-denominated short-term commercial loans outstanding during the period of review (POR). Jindal provided the following rupee-denominated short-term commercial loans: Inland Bill Discounting (IBD); Working Capital Development Loans (WC DL); Cash Credit (CC); and Other Short-Term Loans. Polyplex provided the following rupee-denominated short-term commercial loans: IBD; WC DL; CC; Commercial Paper Loans; and Other Short-Term Loans.

In previous reviews of this case, the Department has determined that IBD loans are more comparable to pre-shipment and post-shipment export financing loans than other types of rupee-denominated short-term loans. See *Preliminary Results and Rescission in Part of Countervailing Duty Administrative Review: Polyethylene Terephthalate Film, Sheet, and Strip from India*, 70 FR 46483, 46485 (August 10, 2005) (*Second PET Film Review - Preliminary Results*) (unchanged in the final results); and *Issues Memorandum - First Review* at 10. There is no new information or evidence of changed circumstances which would warrant reconsidering this finding. Therefore, for these preliminary results, we continue to use IBD loans as the basis for the short-term rupee-denominated benchmark for all applicable programs for both Jindal and Polyplex.

Polyplex provided information on US dollar-denominated WCDL received during the POR to use as the basis for US dollar-denominated short-term benchmark rates. The Department, therefore, has calculated Polyplex's US dollar-denominated short-term benchmark rates based on its US dollar-denominated WCDLs.

Jindal did not have any US dollar-denominated short-term loans during the POR. Therefore, in accordance with 19 CFR § 351.505(a)(3)(ii), the Department used a national average dollar-denominated short-term interest rate, as reported in the International Monetary Fund's publication International Financial Statistics (IMF Statistics) for Jindal.

For those programs requiring a rupee-denominated discount rate or the application of a rupee-denominated long-term benchmark rate, we used, where available, company-specific, weighted-average interest rates on comparable commercial long-term, rupee-denominated loans. For this review, the Department required benchmarks to determine benefits received under the Export Promotion Capital Goods Scheme (EPCGS) and Export Oriented Units (EOU) programs. Respondents did not have comparable commercial long-term rupee-denominated loans for all required years; therefore, for those years for which we did not have company-specific information, we relied on comparable long-term rupee-denominated benchmark interest rates from the immediately preceding year as directed by 19 CFR § 351.505(a)(2)(iii). When there were no comparable long-term, rupee-denominated loans from commercial banks during either the year under consideration or the preceding year, we used national average interest rates, pursuant to 19 CFR § 351.505(a)(3)(ii), from the IMF Statistics.

### Programs Preliminarily Determined to be Countervailable

#### 1. Pre-Shipment and Post-Shipment Export Financing

The Reserve Bank of India (RBI), through commercial banks, provides short-term pre-shipment financing, or "packing credits," to exporters. Upon presentation of a confirmed export order or letter of credit to a bank, companies may receive pre-shipment loans for working capital purposes (*i.e.*, purchasing raw materials, warehousing, packing, transportation, etc.) for merchandise destined for exportation. Companies may also establish pre-shipment credit lines upon which they

draw as needed. Limits on credit lines are established by commercial banks and are based on a company's creditworthiness and past export performance. Credit lines may be denominated either in Indian rupees or in a foreign currency. Commercial banks extending export credit to Indian companies must, by law, charge interest at rates determined by the RBI.

Post-shipment export financing consists of loans in the form of discounted trade bills or advances by commercial banks. Exporters qualify for this program by presenting their export documents to the lending bank. The credit covers the period from the date of shipment of the goods to the date of realization of the proceeds from the sale to the overseas customer. Under the Foreign Exchange Management Act of 1999, exporters are required to realize proceeds from their export sales within 180 days of shipment. Post-shipment financing is, therefore, a working capital program used to finance export receivables. In general, post-shipment loans are granted for a period of no more than 180 days.

In the investigation, the Department determined that the pre-shipment and post-shipment export financing programs conferred countervailable subsidies on the subject merchandise because: (1) The provision of the export financing constitutes a financial contribution pursuant to section 771(5)(D)(i) of the Act as a direct transfer of funds in the form of loans; (2) the provision of the export financing confers benefits on the respondents under section 771(5)(E)(ii) of the Act in as much as the interest rates given under these programs are lower than commercially available interest rates; and (3) these programs are specific under section 771(5A)(B) of the Act because they are contingent upon export performance. *See Final Affirmative Countervailing Duty Determination: Polyethylene Terephthalate Film, Sheet, and Strip (PET Film)*, 67 FR 34905 (May 16, 2002) (*PET Film Final Determination*) and accompanying Issues and Decision Memorandum, at "Pre-Shipment and Post-Shipment Financing" (*PET Film Final Determination - Decision Memorandum*). There is no new information or evidence of changed circumstances which would warrant reconsidering this finding. Therefore, for these preliminary results, we continue to find this program countervailable.

The benefit conferred by the pre-shipment and post-shipment loans is the difference between the amount of interest the company paid on the

government loan and the amount of interest it would have paid on a comparable commercial loan (*i.e.*, the short-term benchmark). Because pre-shipment loans are tied to a company's exports rather than exports of subject merchandise, we calculated the subsidy rate for these loans by dividing the total benefit by the value of each respondent's total exports during the POR. Because post-shipment loans are tied to specific shipments of a particular product to a particular country, we divided the total benefit from post-shipment loans tied to exports of subject merchandise to the United States by the value of total exports of subject merchandise to the United States during the POR. *See* 19 CFR § 351.525(b)(4). On this basis, we preliminarily determine the net countervailable subsidy from pre-shipment export financing to be 0.02 percent *ad valorem* for Jindal, and 0.30 percent *ad valorem* for Polyplex. We also preliminarily determine the net countervailable subsidy provided to Jindal from post-shipment export financing to be 0.05 percent *ad valorem*. Polyplex did not receive any benefits under the post-shipment export financing program during the POR.

#### 2. Advance License Program (ALP)

Under the ALP, exporters may import, duty free, specified quantities of materials required to manufacture products that are subsequently exported. The exporting companies, however, remain contingently liable for the unpaid duties until they have fulfilled their export requirement. The quantities of imported materials and exported finished products are linked through standard input-output norms (SIONs) established by the GOI. During the POR, Jindal and Polyplex used advance licenses to import certain materials duty free.

The Department previously found the 1997-2003 Export/Import Guidelines underlying the ALP to be not countervailable. *See PET Film Final Determination*. However, in the last administrative review, the Department examined the 2002-2007 Export/Import Policy Guidelines underlying the ALP and found the program to be countervailable because the GOI does not have in place and does not apply a system that is reasonable and effective for the purposes intended, in accordance with 19 CFR § 351.519(a)(4). *See Final Results of Countervailing Duty Administrative Review: Polyethylene Terephthalate Film, Sheet, and Strip from India*, 71 FR 7534 (February 13, 2006) (*Second PET Film Review - Final Results*), and accompanying *Issues and Decision Memorandum (Issues*

*Memorandum - Second Review*). In that review, the Department found that the ALP confers a countervailable subsidy because: (1) A financial contribution, as defined under section 771(5)(D)(ii) of the Act, is provided under the program, as the GOI provides the respondents with an exemption of import duties; (2) the GOI does not have in place and does not apply a system that is reasonable and effective for the purposes intended in accordance with 19 CFR § 351.519(a)(4), to confirm which inputs, and in what amounts, are consumed in the production of the exported products; thus, the entire amount of import duty exemption earned by the respondent constitutes a benefit under section 771(5)(E) of the Act; and (3) this program is contingent upon exportation and, therefore, is specific under section 771(5A)(B) of the Act. *See Issues Memorandum - Second Review*, at 3–5. There is no new information or evidence of changed circumstances which would warrant reconsidering this finding. Therefore, for these preliminary results, we continue to find this program countervailable.

Pursuant to 19 CFR § 351.524(c), exemptions of import duties on imports consumed in production normally provide a recurring benefit. Under this program, for 2004, Jindal and Polyplex did not have to pay certain import duties for inputs that were used in the production of merchandise. Thus, we treated the benefit provided under the ALP as a recurring benefit. To calculate the subsidy, we first determined the total value of duties exempted during the POR for each company. From this amount, we subtracted the required application fees paid for each license during the POR as an allowable offset to the actual amount in accordance with section 771(6) of the Act (in order to receive the benefits of the ALP, companies must pay application fees). We then divided the resulting net benefit by the company's value of total export sales. We did not include either respondents' "deemed exports" sales (*i.e.*, sales of goods which do not leave the country) as part of their total value of export sales for this or any program. We will examine the issue of "deemed exports" further at verification and invite parties to comment on this issue in their briefs. On this basis, we preliminarily determine the net countervailable subsidy provided under the ALP to be 5.33 *ad valorem* for Jindal and 2.07 percent *ad valorem* for Polyplex.

### 3. Export Promotion Capital Goods Scheme (EPCGS)

The EPCGS provides for a reduction or exemption of customs duties and excise taxes on imports of capital goods used in the production of exported products. Under this program, producers pay reduced duty rates on imported capital equipment by committing to earn convertible foreign currency equal to four to five times the value of the capital goods within a period of eight years. Once a company has met its export obligation, the GOI will formally waive the duties on the imported goods. If a company fails to meet the export obligation, the company is subject to payment of all or part of the duty reduction, depending on the extent of the export shortfall, plus penalty interest.

In the investigation, the Department determined that import duty reductions provided under the EPCGS are a countervailable export subsidy because the scheme: (1) Provides a financial contribution pursuant to section 771(5)(D)(ii) of the Act in the form of revenue foregone; and (2) provides a benefit under section 771(5)(E) of the Act in the amount of the revenue foregone. Because this program is contingent upon export performance, it is specific under section 771(5A)(B) of the Act. *See PET Film Final Determination - Decision Memorandum*, at 7–8. There is no new information or evidence of changed circumstances which would warrant reconsidering this finding. Therefore, for these preliminary results, we continue to find this program countervailable.

These import duty exemptions were provided for the purchase of capital equipment. The preamble to our regulations states that if a government provides an import duty exemption tied to major equipment purchases, "it may be reasonable to conclude that, because these duty exemptions are tied to capital assets, the benefits from such duty exemptions should be considered non-recurring." *See Countervailing Duties; Final Rule*, 63 FR 65348, 65393 (November 25, 1998). Accordingly, we are treating these exemptions as non-recurring benefits in accordance with 19 CFR 351.524(c)(2)(iii).

Jindal and Polyplex reported that they imported capital goods under the EPCGS in the years prior to and during the POR. Jindal received various EPCGS licenses, which were for the production of: (1) Both subject merchandise and non-subject merchandise; or (2) non-subject merchandise. Polyplex received EPCGS licenses which indicated that it was allowed to import capital goods for

the production of: (1) subject merchandise; (2) both subject merchandise and non-subject merchandise; or (3) non-subject merchandise. Based on the information and documentation submitted by Jindal and Polyplex, we cannot determine that their respective EPCGS licenses are tied to the production of a particular product within the meaning of 19 CFR § 351.525(b)(5). As such, we find that each company's respective EPCGS licenses benefit all of the company's exports.

Polyplex met the export requirements for certain EPCGS licenses prior to December 31, 2004 and the GOI has formally waived the relevant import duties. For some of its licenses, however, Polyplex has not yet met its export obligation as required under the program. Jindal has not yet met its export obligation for any of its imports of capital goods under the program. Therefore, although Jindal and Polyplex have received a deferral from paying import duties when the capital goods were imported, the final waiver on the obligation to pay the duties has not yet been granted for many of these imports.

For Polyplex's imports for which the GOI has formally waived the duties, we treat the full amount of the waived duty as a grant received in the year in which the GOI officially granted the waiver. To calculate the benefit received from the GOI's formal waiver of import duties on Polyplex's capital equipment imports where its export obligation was met prior to December 31, 2004, we considered the total amount of duties waived (net of required application fees) to be the benefit. Further, consistent with the approach followed in the investigation, we determine the year of receipt of the benefit to be the year in which the GOI formally waived Polyplex's outstanding import duties. *See PET Film Final Determination - Decision Memorandum*, at *Comment 5*. Next, we performed the "0.5 percent test," as prescribed under 19 CFR § 351.524(b)(2), for each year in which the GOI granted Polyplex an import duty waiver. Those waivers with values in excess of 0.5 percent of Polyplex's total export sales in the year in which the waivers were granted were allocated using Polyplex's company-specific AUL, while waivers with values less than 0.5 percent of Polyplex's total export sales were expensed in the year of receipt. *See "Allocation Period" section, above.*

As noted above, import duty reductions that Jindal and Polyplex received on the imports of capital equipment for which they have not yet met export obligations may have to be

repaid to the GOI if the obligations under the licenses are not met. Consistent with our practice and prior determinations, we will treat the unpaid import duty liability as an interest-free loan. See 19 CFR § 351.505(d)(1); and *PET Film Final Determination–Decision Memorandum*, at “EPCGS”; see also *Final Affirmative Countervailing Duty Determination: Bottle–Grade Polyethylene Terephthalate (PET) Resin From India*, 70 FR 13460 (March 21, 2005) (*Final - Indian PET Resin*).

The amount of the unpaid duty liabilities to be treated as an interest-free loan is the amount of the import duty reduction or exemption for which the respondent applied, but, as of the end of the POR, had not been finally waived by the GOI. Accordingly, we find the benefit to be the interest that Jindal and Polyplex would have paid during the POR had they borrowed the full amount of the duty reduction or exemption at the time of importation. See *Second PET Film Review - Preliminary Results*, 70 FR at 46488 (unchanged in the final results); see also (*Final - Indian PET Resin*).

As stated above, under the EPCGS program, the time period for fulfilling the export commitment expires eight years after importation of the capital good. Consequently, the date of expiration of the time period to fulfill the export commitment occurs at a point in time more than one year after the date of importation of the capital goods. Pursuant to 19 CFR § 351.505(d)(1), the benchmark for measuring the benefit is a long-term interest rate because the event upon which repayment of the duties depends (*i.e.*, the date of expiration of the time period to fulfill the export commitment) occurs at a point in time that is more than one year after the date of importation of the capital goods (*i.e.*, under the EPCGS program, the time period for fulfilling the export commitment is more than one year after importation of the capital good). As the benchmark interest rate, we used the weighted-average interest rate from all comparable commercial long-term, rupee-denominated loans for the year in which the capital good was imported. See the “Benchmarks for Loans and Discount Rate” section above for a discussion of the applicable benchmark.

The benefit received under the EPCGS is the total amount of: (1) the benefit attributable to the POR from the formally waived duties for imports of capital equipment for which respondents met export requirements by December 31, 2004, and/or (2) interest due on the contingent liability loans for imports of capital equipment that have

not met export requirements. To calculate the benefit from the waived duties for Polyplex, we took the total amount of the waived duties in each year and treated each year's waived amount as a non-recurring grant. We applied the grant methodology set forth in 19 CFR § 351.524(d), using the discount rates discussed in the “Benchmark Interest Rates and Discount Rates” section above to determine the benefit amounts attributable to the POR.

To calculate the benefit from the contingent liability loans for both Jindal and Polyplex, we multiplied the total amount of unpaid duties under each license by the long-term benchmark interest rate for the year in which the license was approved. We then summed these amounts to determine the total benefit for each company.

For Jindal, we divided the benefit from the contingent liability loans under the EPCGS by Jindal's total exports to determine a subsidy of 2.85 percent *ad valorem*. For Polyplex, we summed the benefits attributable to the POR from the duty waivers under the EPCGS with the benefits from the contingent liability loans and divided that total by Polyplex's total exports to determine a subsidy of 4.29 percent *ad valorem*.

#### 4. Income Tax Exemption Scheme 80HHC (80HHC)

Under section 80HHC of the Income Tax Act, the GOI allows exporters to exclude profits derived from export sales from their taxable income. In prior proceedings, the Department found this program to be a countervailable export subsidy, because it is contingent upon export performance and, therefore, specific in accordance with section 771(5A)(B) of the Act. Pursuant to section 771(5)(D)(ii) of the Act, the GOI provides a financial contribution in the form of tax revenue not collected. Finally, a benefit is conferred in the amount of the tax savings in accordance with section 771(5)(E) of the Act. See *Second PET Film Review - Preliminary Results*, 46488 (unchanged in the final results).

To calculate the benefit under this program, we first calculated the total amount of income tax each company would have paid during the POR had it not claimed a tax deduction under section 80HHC and subtracted from this amount the income taxes actually paid during the POR. We then divided this benefit by each company's total export sales consistent with 19 CFR § 351.525(b)(2). On this basis, we preliminarily determine the net countervailable subsidy under section 80HHC to be 0.28 percent *ad valorem*

for Jindal and 1.60 percent *ad valorem* for Polyplex.

The GOI, Jindal, and Polyplex have argued that the 80HHC exemption was phased out effective March 31, 2004, and have provided documentation to support their claim. See *Government of India's Questionnaire Response*, at Exhibit 10 (September 29, 2005); Jindal's Questionnaire Response, at Exhibit 24a (October 3, 2005); and Polyplex's Questionnaire Response, at Exhibit 23 (October 3, 2005). According to these submissions, the 80HHC program ended March 31, 2004. As a result, Jindal and Polyplex only claimed deductions of profits derived from exported goods through March 31, 2004 in computing their total taxable income during the POR. Due to the phase out of the 80HHC program, both Jindal and Polyplex have requested that the Department determine that the elimination of this deduction constitutes a program-wide change under 19 CFR § 351.526. In the Finance Act of 2000, the GOI amended the Income Tax Act of 1961, stating that the 80HHC exemption would be phased out on April 1, 2004. In addition, Jindal and Polyplex submitted their October 31, 2005 tax returns (which cover the tax year April 1, 2004 through March 31, 2005) in which neither company claimed an 80HHC exemption. After analyzing the documentation on the record, the Department preliminarily determines that there has been a program-wide change with respect to the 80HHC Tax Exemption Scheme. If we find in the final results of review that this program was terminated in accordance with the provisions of 19 CFR § 351.526, we will include these subsidies in the assessment rate but exclude them from the cash deposit rate.

#### 5. Capital Subsidy

Polyplex received a capital infusion in 1989 from the GOI. This subsidy was discovered at verification during the investigation. See *PET Film Final Determination–Decision Memorandum*, at “Capital Subsidy.” The Department determined at that time that there was insufficient time to establish whether the program was specific under section 771(5A)(D) of the Act. Thus, the Department stated its intention to re-examine the program in a future administrative review pursuant to 19 CFR § 351.311(c)(2). *Id.* Based on the information obtained during the verification in the investigation, the Department determined that a financial contribution was provided by the GOI, pursuant to section 771(5)(D)(i) of the Act, and a benefit, in the amount of the capital subsidy, was received by

Polyplex under section 771(5)(E) of the Act.

In all previous administrative reviews, the Department has sent questionnaires to the GOI, and Polyplex, seeking information that would allow it to determine whether the capital subsidy program is specific under section 771(5A) of the Act. Neither the GOI nor Polyplex was able to provide any information regarding the subsidy. As facts available, the Department determined that the subsidy was specific. See *Second PET Film Review - Preliminary Results*, at 46489 (unchanged in the final results).

In the current review, the Department again sent questionnaires to the GOI and Polyplex, seeking information that would allow it to determine whether the program is specific under section 771(5A) of the Act. As in the previous reviews, Polyplex and the GOI reported that they were unable to provide any information regarding the specificity of this program due to the considerable amount of time that has elapsed since the provision of the subsidy. There is no new information or evidence of changed circumstances which would warrant reconsidering this finding. Therefore, for these preliminary results, we continue to find, as facts available, that the subsidy is specific under section 771(5A)(A) of the Act.

Because the benefit was provided through a capital grant, pursuant to 19 CFR § 351.524(c), the Department finds it to be non-recurring. Thus, in calculating the subsidy for this program, we performed the "0.5 percent test," as prescribed under 19 CFR § 351.524(b)(2). Because the grant exceeded 0.5 percent of Polyplex's total sales in 1989, the year in which the capital grant was received, the benefits were allocated over 18 years, the company-specific AUL. In allocating this capital grant, we used the Department's standard allocation methodology for non-recurring subsidies under 19 CFR § 351.524(d). To calculate the net subsidy to Polyplex from this capital subsidy, we divided the benefit attributable to the POR by the company's total sales during the same period. On this basis, we preliminarily determine the net countervailable subsidy provided to Polyplex under this program to be 0.01 percent *ad valorem*.

#### 6. Export Oriented Units (EOU)

Companies that are designated as an EOU are eligible to receive various forms of assistance in exchange for committing to export all of the products they produce, excluding rejects and certain domestic sales, for five years.

Companies designated as EOUs may receive the following benefits: (1) duty-free importation of capital goods and raw materials; (2) reimbursement of central sales taxes (CST) paid on materials procured within India; (3) purchase of materials and other inputs free of central excise duty; and (4) receipt of duty drawback on furnace oil procured from domestic oil companies.

Consistent with the previous review, Jindal reported that it had been designated as an EOU. See *Second PET Film Review - Preliminary Results*, at 46489 (unchanged in the final results). Specifically, Jindal reported receiving the following benefits: (1) The duty-free importation of capital goods; (2) the reimbursement of CST paid on raw materials and capital goods procured domestically; and (3) the purchase of materials and other inputs free of central excise duty. For the other two types of benefits received by Jindal, the Department previously determined that the purchase of materials and/or inputs free of central excise duty is not countervailable. See *Final - Indian PET Resin*. The Department determined that the EOU program was specific, within the meaning of section 771(5A)(B) of the Act, since the receipt of benefits under this program was contingent upon export performance. See *Preliminary Affirmative Countervailing Duty Determination and Alignment with Final Antidumping Duty Determination: Bottle-Grade Polyethylene Terephthalate (PET) Resin From India*, 69 FR 52866, 52870 (August 30, 2004) (unchanged in final determination) (*PET Resin from India - Preliminary Determination*). There is no new information or evidence of changed circumstances which would warrant reconsidering this finding. Therefore, for these preliminary results, we continue to find this program countervailable.

##### a. Duty-Free Importation of Capital Goods and Raw Materials

Under this program, an EOU is entitled to import, duty-free, capital goods and raw materials for the production of exported goods in exchange for committing to export all of the products it produces, with the exception of sales in the Domestic Tariff Area over five years. The Department previously determined that the duty-free importation of capital goods provides a financial contribution and confers benefits equal to the amount of exemptions and reimbursements of customs duties and certain sales taxes. See sections 771(5)(D)(ii) and (E) of the Act. See also *PET Resin from India - Preliminary Determination*, at 52870 (unchanged in final determination).

However, according to the GOI and Jindal, until an EOU demonstrates that it has fully met its export requirements, the company retains a contingent liability to repay the import duty exemptions. Jindal has not yet met its export contingency and will owe the unpaid duties if the export requirements are not met. Upon Jindal meeting its export requirement, the Department will treat the unpaid duties as a grant. In the meantime, consistent with 19 CFR § 351.505(d)(1), until the contingent liability for the unpaid duties is officially waived by the GOI, we consider the unpaid duties to be an interest-free loan made to Jindal at the time of importation. We determine the benefit to be the interest that Jindal would have paid during the POR had it borrowed the full amount of the duty reduction or exemption at the time of importation. Pursuant to 19 CFR § 351.505(d)(1), the benchmark for measuring the benefit is a long-term interest rate because the event upon which repayment of the duties depends (*i.e.*, the date of expiration of the time period to fulfill the export commitment) occurs at a point in time that is more than one year after the date of importation of the capital goods (*i.e.*, under the EOU program, the time period for fulfilling the export commitment is more than one year after importation of the capital good). We used the long-term, rupee-denominated benchmark interest rate discussed in the "Benchmark for Loans and Discount Rate" section above for each year in which capital goods were imported as the benchmark.

The benefit for each year is the total amount of interest that would have been paid if the firm had received a loan to pay the duties. To calculate the subsidy, we divided the total amount of benefits under the program during the POR by Jindal's total value of export sales. We preliminarily determine the net countervailable subsidy provided to Jindal through the duty-free importation of capital goods under the EOU program to be 3.53 percent *ad valorem*.

##### b. Reimbursement of CST Paid on Materials Procured Domestically

Jindal was reimbursed for the CST it paid on raw materials and capital goods procured domestically. The benefit associated with domestically purchased materials is the amount of reimbursed CST received by Jindal during the POR. The Department previously determined that the reimbursement of CST paid on materials procured domestically provides a financial contribution and confers benefits equal to the amount of exemptions and reimbursements of sales

taxes pursuant to sections 771(5)(D)(ii) and (E) of the Act. *See, e.g., Second Pet Film Review - Final Results*, at 46490. Normally, tax reimbursements, such as the CST, are considered to be recurring benefits. However, a portion of the benefit of this program is tied to a company's capital assets. As such, we would treat reimbursements which are tied to capital goods as a non-recurring benefit pursuant to 19 CFR § 351.524(c)(2)(iii). However, we performed the "0.5 percent test," as prescribed under 19 CFR § 351.524(b)(2) and find that the amount of CST reimbursements tied to capital goods received during the POR was less than 0.5 percent of total export sales for 2004. Therefore, the benefit is the amount of CST reimbursements received during the POR. *See* 19 CFR § 351.524(b)(2).

To calculate the benefit for Jindal, we first summed the total amount of CST reimbursements for capital goods and raw materials received during the POR. We divided this amount by the total value of export sales during the POR. On this basis, we preliminarily determine the countervailable subsidy provided to Jindal through the reimbursement of CST under the EOU program to be 0.07 percent *ad valorem*.

#### 7. State Sales Tax Incentive Programs

According to the GOI, various state governments in India grant exemptions to, or deferrals from, sales taxes in order to encourage regional development. *See Government of India's Questionnaire Response*, at 45 (September 29, 2005). These incentives allow privately-owned (*i.e.*, not 100 percent owned by the GOI) manufacturers, that are in selected industries and which are located in the designated regions, to sell goods without charging or collecting state sales taxes. As a result of these programs, the respondents did not pay sales taxes on their purchases from suppliers located in certain states. The states from which Jindal and Polyplex made purchases but did not pay sales taxes during the POR are the states of: Uttaranchal/Uttar Pradesh (SOU/SUP), Maharashtra (SOM), West Bengal, Gujarat, Himachal Pradesh, Daman, Union Territory of Dadra & Nagarhaveli, Karnataka, Delhi, Chattisgarh, Tamilnadu, Rajasthan, and Punjab. In the previous review, we determined that the operation of these types of state sales tax programs confers a countervailable subsidy. *See Second PET Film Review - Final Results*, at 46490. The financial contribution is the tax revenue foregone by the respective state governments and the benefit equals the amount of sales taxes not paid by Jindal and Polyplex. Pursuant to section

771(5A)(D)(iv) of the Act, these programs are also *de jure* specific because they are limited to certain regions within the respective states administering the programs. There is no new information or evidence of changed circumstances which would warrant reconsidering this finding. Therefore, for these preliminary results, we continue to find this program countervailable.

To calculate the benefit, we first calculated the total sales tax reduction or exemption the respondents received during the POR by subtracting taxes paid from the amount that would have been paid on their purchases during the POR absent these programs. We then divided these amounts by each respondent's total sales during the POR to calculate a net countervailable subsidy of 1.02 percent *ad valorem* for Jindal and 4.90 percent *ad valorem* for Polyplex.

#### 8. Duty Free Replenishment Certificate (DFRC)

The DFRC scheme was introduced by the GOI in 2001 and is administered by the Director-General for Foreign Trade (DGFT). The DFRC is a duty replenishment scheme that is available to exporters for the subsequent import of inputs used in the manufacture of goods without payment of basic customs duty. In order to receive a license, which entitles the recipient to subsequently import, duty free, certain inputs used in the production of the exported product, as identified in SION, within the following 24 months, a company must: (1) export manufactured products listed in the GOI's export policy book and against which there is a SION for inputs required in the manufacture of the export product based on quantity; and (2) have realized the payment of export proceeds in the form of convertible foreign currency. *See* the Ministry of Commerce and Industry Directorate General of Foreign Trade Policy 2004–2009, sect. 4.2 fact. *See also* page 13 of the Government of India's Supplemental Questionnaire Response dated April 28, 2006. The application must be filed within six months of the realization of the profits. DFRC licenses are transferrable, yet the transferee is limited to importing only those products and in the quantities specified on the license.

Although 19 CFR § 351.519(b)(2) provides that the Secretary will normally consider any benefit from a duty drawback or exemption program as having been received as of the date of exportation, we preliminarily find that an exception to this normal practice is warranted here in view of the unique

manner in which this program operates. Specifically, a company may not submit an application for a DFRC license until the proceeds of the sale are realized. The license, once granted, specifies the quantity of the particular inputs that the bearer may subsequently import duty free. In the case of the DFRC, the company does not know at the time of export the value of the duty exemption that it will ultimately receive. It only knows the quantity of the inputs it will likely be able to import duty free if its application for a DFRC license is granted. Under the DFRC, the respondent will only know the total value of the duty exemption when it subsequently imports the specified products duty free with the license, or sells it. Therefore, we preliminarily determine that the date of receipt is linked to when the company imports an input duty free with the certificate. *See Notice of Preliminary Results of Countervailing Duty Administrative Review: Certain Hot-Rolled Carbon Steel Flat Products from India*, 71 FR 1512 (January 10, 2006) (unchanged in the final results). In the case in which the company sells the certificate, the date of sale is when the benefit occurs. *See Certain Iron-Metal Castings From India; Final Results of Countervailing Duty Administrative Review* 62 FR 32297 (June 13, 1997) (1994 Indian Castings Final Results).

Neither Jindal nor Polyplex reported imports using a DFRC license or exports against a DFRC license during the POR. However, Polyplex reported selling part of its rights under the DFRC Scheme. The Department has previously determined that the sale of import licenses confers a countervailable export subsidy. *See e.g., 1994 Indian Castings Final Results*. Therefore, in accordance with section 771(5A)(B) of the Act, we determine that Polyplex's partial sale of its rights under the DFRC Scheme is an export subsidy and that a financial contribution is provided, under section 771(5)(D)(ii) of the Act, in the form of the revenue foregone. We further find that the sale conferred a benefit under section 771(5)(E) of the Act in the amount of the revenue from the sale. There is no new information or evidence of changed circumstances which would warrant reconsidering this finding. Therefore, for these preliminary results, we continue to find this program countervailable.

To calculate the benefit to Polyplex on the partial sale of its rights under the DFRC Scheme, we identified the proceeds it realized from the sale during the POR (net of required application fees). We then calculated the subsidy by dividing the total benefit by the total

value of Polyplex's export sales during the POR. On this basis, we determine the net countervailable subsidy for this program to be 0.03 percent *ad valorem* for Polyplex.

#### Programs Preliminarily Determined to be Not Used

We preliminarily determine that the producers/exporters of PET film products did not apply for or receive benefits during the POR under the programs listed below:

1. *Duty Entitlement Passbook Scheme (DEPS)*
2. *Electricity Duty Exemption Scheme - State of Maharashtra*

#### Preliminary Results of Administrative Review

In accordance with 19 CFR § 351.221(b)(4)(i), we have calculated individual subsidy for Jindal and Polyplex for the POR. We preliminarily determine the total estimated net countervailable subsidy to be 13.15 percent *ad valorem* for Jindal and 13.19 percent *ad valorem* for Polyplex.

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, to liquidate shipments of PET film from India entered, or withdrawn from warehouse, for consumption on or after January 1, 2004 through December 31, 2004 at 13.15 percent *ad valorem* for Jindal and at 13.20 percent *ad valorem* for Polyplex.

We will instruct CBP to collect cash deposits for Jindal and Polyplex at the rates indicated above. As discussed above, if we determine in the final results that the Section 80HHC program has been terminated, we will remove the rate for that program from the cash deposit rate for each company. In addition, we will instruct CBP to continue to collect cash deposit rates for non-reviewed companies at the most recent rate applicable to the company.

#### 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 instructed by the Department, case briefs must be submitted within 30 days after the date of publication of this notice, pursuant to 19 CFR § 351.309(c)(ii). 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, pursuant to 19 CFR § 351.309(d). 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 their arguments. 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(c), within 30 days of the date of publication of this notice, interested parties may request a public hearing on arguments to be raised in the case and rebuttal briefs. Unless the Secretary specifies otherwise, the hearing, if requested, will be held two days after the date for submission of rebuttal briefs.

Representatives of parties to the proceeding may request disclosure of proprietary information under administrative protective order no later than 10 days after the representative's client or employer becomes a party to the proceeding, but in no event later than the date the case briefs, under 19 CFR § 351.309(c)(ii), are due. 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 sections 751(a)(1) and 777(i)(1) of the Act, and 19 CFR § 351.221(b)(4).

Dated: July 31, 2006.

**David M. Spooner,**

*Assistant Secretary for Import Administration.*

[FR Doc. E6-12813 Filed 8-7-06; 8:45 am]

**BILLING CODE 3510-DS-S**

#### DEPARTMENT OF COMMERCE

##### National Oceanic and Atmospheric Administration

##### Availability of Seats for the Hawaiian Islands Humpback Whale National Marine Sanctuary Advisory Council

**AGENCY:** National Marine Sanctuary Program (NMSP), National Ocean Service (NOS), National Oceanic and Atmospheric Administration, Department of Commerce (DOC).

**ACTION:** Notice and request for applications.

**SUMMARY:** The Hawaiian Islands Humpback Whale National Marine

Sanctuary (HIHWNMS or Sanctuary) is seeking applicants for both primary and alternate members of the following seats on its Sanctuary Advisory Council (Council): Business/Commerce, Citizen-At-Large, Commercial Shipping, Conservation, Ocean Recreation, Tourism, and Whale Watching. Applicants are chosen based upon their particular expertise and experience in relation to the seat for which they are applying; community and professional affiliations; philosophy regarding the protection and management of marine resources; and possibly the length of residence in the area affected by the Sanctuary. Applicants who are chosen as members should expect to serve 2-year terms, pursuant to the Council's Charter.

**DATES:** Applications are due by August 31, 2006.

**ADDRESSES:** Application kits may be obtained from Mary Grady, 6600 Kalaniana'ole Hwy., Suite 301, Honolulu, HI 96825 or [Mary.Grady@noaa.gov](mailto:Mary.Grady@noaa.gov). Completed applications should be sent to the same address. Applications are also available online at <http://hawaiihumpbackwhale.noaa.gov>.

**FOR FURTHER INFORMATION CONTACT:** Naomi McIntosh, 6600 Kalaniana'ole Hwy., Suite 301, Honolulu, HI 96825 or [Naomi.McIntosh@noaa.gov](mailto:Naomi.McIntosh@noaa.gov) or 808.397.2651.

**SUPPLEMENTARY INFORMATION:** The HIHWNMS Advisory Council was established in March 1996 to assure continued public participation in the management of the Sanctuary. Since its establishment, the Council has played a vital role in the decisions affecting the Sanctuary surrounding the main Hawaiian Islands.

The Council's twenty-four voting members represent a variety of local user groups, as well as the general public, plus ten local, state and federal governmental jurisdictions.

The Council is supported by three committees: A Research Committee chaired by the Research Representative, and Education Committee chaired by the Education Representative, and a Conservation Committee chaired by the Conservation Representative, each respectively dealing with matters concerning research, education and resource protection.

The Council represents the coordination link between the Sanctuary and the state and federal management agencies, user groups, researchers, educators, policy makers, and other various groups that help to focus efforts and attention on the

humpback whale and its habitat around the main Hawaiian Islands.

The Council functions in an advisory capacity to the Sanctuary Manager and is instrumental in helping to develop policies and program goals, and to identify education, outreach, research, long-term monitoring, resource protection and revenue enhancement priorities. The Council works in concert with the Sanctuary Manager by keeping him or her informed about issues of concern throughout the Sanctuary, offering recommendations on specific issues, and aiding the Manager in achieving the goals of the Sanctuary program within the context of Hawaii's marine programs and policies.

**Authority:** 16 U.S.C. Sections 1431, *et seq.* (Federal Domestic Assistance Catalog Number 11.429 Marine Sanctuary Program)

Dated: July 28, 2006.

**Daniel J. Basta,**

*Director, National Marine Sanctuary Program, National Oceanic and Atmospheric Administration.*

[FR Doc. 06-6742 Filed 8-7-06; 8:45 am]

**BILLING CODE 3510-NK-M**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

[Docket No. 030602141-6143-38; I.D. 051906D]

RIN 0648-ZB55

#### Availability of Grant Funds for Fiscal Year 2007; Correction

**AGENCY:** National Oceanic and Atmospheric Administration (NOAA), Department of Commerce (DOC).

**ACTION:** Notice; availability of grant funds; correction.

**SUMMARY:** The National Oceanic and Atmospheric Administration publishes this notice to correct errors contained in a previously published notice of availability of funds (June 12, 2006) for the NMFS-Sea Grant Fellowship Program in Marine Resource Economics, the NMFS-Sea Grant Fellowship Program in Population Dynamics, and the Ballast Water Technology Demonstration Grants Program (Research, Development, Testing and Evaluation Facility). This notice corrects errors concerning the amount of funds available for fellowships, the amount of cost sharing required for those fellowships, and the deadlines for application for those fellowships and grants competitions.

**DATES:** Final proposals for the Ballast Water Technology Demonstration

Program (Research, Development, Testing and Evaluation Facility) must be received by 5 p.m. EST on Tuesday, December 19, 2006.

**SUPPLEMENTARY INFORMATION:** In the notice of funding availability published in the **Federal Register** on June 12, 2006 (71 FR 33898) NOAA announced the availability of funding for several grant or cooperative agreement programs. That notice, however, contained several inadvertent errors in the entries for the NMFS-Sea Grant Fellowship Program in Marine Resource Economics, the NMFS-Sea Grant Fellowship Program in Population Dynamics, and the Ballast Water Technology Demonstration Grants Program (Research, Development, Testing and Evaluation Facility). This notice announces the correct information for those programs.

#### NMFS-Sea Grant Joint Graduate Fellowship Program in Marine Resource Economics and NMFS-Sea Grant Fellowship Program in Population Dynamics

In the June 12, 2006 notice, the entries for the NMFS-Sea Grant Joint Graduate Fellowship Program in Marine Resource Economics, 71 FR 33927, June 12, 2006, and the NMFS-Sea Grant Joint Graduate Fellowship Program in Population Dynamics, 71 FR 33927, June 12, 2006, listed incorrectly the cooperative agreement award amount as \$40,000 per year, and the cost share requirement as \$6,667 per year. These amounts were inaccurately listed due to a typographical error. For both of these fellowships, the correct cooperative agreement award amount is \$38,500 per year, and the correct cost share requirement is \$6,417 per year.

Both of these fellowship announcements also suggested that local Sea Grant programs consider setting an internal deadline one week prior to the application deadline. This statement was in error. The Sea Grant programs do not have a specific time interval and none was intended. The correct suggestion to the local Sea Grant programs is that they consider setting an internal deadline prior to the application deadline for these fellowships.

#### Ballast Water Technology Demonstration Grants Program (Research, Development, Testing and Evaluation Facility)

The June 12, 2006 notice of funding availability also contained an error in the entry for the Ballast Water Technology Demonstration Grants Program (Research, Development, Testing and Evaluation Facility). The June 12, 2006 notice incorrectly listed

the full proposal deadline as December 19, 2007 (71 FR 33920, June 12, 2006). The correct full proposal deadline is December 19, 2006.

All other requirements and provisions listed in the June 12, 2006 notice for these programs remain unchanged.

#### Classification

##### *Pre-Award Notification Requirements for Grants and Cooperative Agreements*

The Department of Commerce Pre-Award Notification Requirements for Grants and Cooperative Agreements contained in the **Federal Register** notice of December 30, 2004 (69 FR 78389), are applicable to this solicitation.

##### *Paperwork Reduction Act*

This document contains collection-of-information requirements subject to the Paperwork Reduction Act (PRA). The use of Standard Forms 424, 424A, 424B, SF-LLL, and CD-346 has been approved by the Office of Management and Budget (OMB) under the respective control numbers 0348-0043, 0348-0044, 0348-0040, 0348-0046, and 0605-0001. Notwithstanding any other provision of law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA unless that collection of information displays a currently valid OMB control number.

##### *Executive Order 12866*

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

##### *Executive Order 13132 (Federalism)*

It has been determined that this notice does not contain policies with Federalism implications as that term is defined in Executive Order 13132.

##### *Administrative Procedure Act/Regulatory Flexibility Act*

Prior notice and an opportunity for public comment are not required by the Administrative Procedure Act or any other law for rules concerning public property, loans, grants, benefits, and contracts (5 U.S.C. 553(a)(2)).

Because notice and opportunity for comment are not required pursuant to 5 U.S.C. 553 or any other law, the analytical requirements of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) are inapplicable. Therefore, a regulatory flexibility analysis has not been prepared.

Dated: July 26, 2006.

**Mark E. Brown,**

*Chief Financial Officer, Office of Oceanic and Atmospheric Research, National Oceanic and Atmospheric Administration.*

[FR Doc. E6-12285 Filed 8-7-06; 8:45 am]

**BILLING CODE 3510-12-P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

[I.D. 080106D]

#### Pacific Fishery Management Council; Public Meeting

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

**ACTION:** Notice of a public meeting.

**SUMMARY:** The Pacific Fishery Management Council's (Council) Habitat Committee (HC) will hold a meeting, which is open to the public, on Monday, August 28, 2006. The HC will discuss items on the Council's September meeting agenda, plan for future work on ecosystem management and Klamath River habitat issues, and discuss other issues related to fish habitat.

**DATES:** The Council's HC will meet on Monday, August 28, 2006, from 8:30 a.m. until business for the day is completed.

**ADDRESSES:** All meetings will be held at the Pacific Fishery Management Council, 7700 NE. Ambassador Place, Suite 101, Portland, OR 97220; telephone: (503) 820-2280.

*Council address:* Pacific Fishery Management Council, 7700 NE. Ambassador Place, Suite 101, Portland, OR 97220-1384.

**FOR FURTHER INFORMATION CONTACT:** Ms. Jennifer Gilden, Pacific Fishery Management Council, telephone: (503) 820-2280.

**SUPPLEMENTARY INFORMATION:** The HC will develop recommendations for Council consideration at its September 2006 meeting in Foster City, CA, and address other issues relating to fish habitat. No management actions will be decided by the HC.

Although non-emergency issues not contained in the meeting agendas may be discussed, those issues may not be the subject of formal action during these meetings. Advisory body action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under Section 305(c) of the Magnuson-Stevens

Fishery Conservation and Management Act, provided the public has been notified of the 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 Ms. Carolyn Porter at (503) 820-2280, at least 5 days prior to the meeting date.

Dated: August 2, 2006.

**James P. Burgess,**

*Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.*

[FR Doc. E6-12823 Filed 8-7-06; 8:45 am]

**BILLING CODE 3510-22-S**

## DEPARTMENT OF EDUCATION

### Submission for OMB Review; Comment Request

**AGENCY:** Department of Education.

**SUMMARY:** The Leader, Information Policy and Standards Team, Office of Management invites comments on the submission for OMB review as required by the Paperwork Reduction Act of 1995.

**DATES:** Interested persons are invited to submit comments on or before September 7, 2006.

**ADDRESSES:** Written comments should be addressed to the Office of Information and Regulatory Affairs, Attention: Rachel Potter, Desk Officer, Department of Education, Office of Management and Budget, 725 17th Street, NW., Room 10222, New Executive Office Building, Washington, DC 20503 or faxed to (202) 395-6974.

**SUPPLEMENTARY INFORMATION:** Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The Leader, Information Policy and Standards Team, Regulatory Information Management Services, Office of Management, publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by

office, contains the following: (1) Type of review requested, e.g. new, revision, extension, existing or reinstatement; (2) Title; (3) Summary of the collection; (4) Description of the need for, and proposed use of, the information; (5) Respondents and frequency of collection; and (6) Reporting and/or Recordkeeping burden. OMB invites public comment.

Dated: August 2, 2006.

**Leo J. Eiden,**

*Leader, Information Policy and Standards Team, Regulatory Information Management Services, Office of Management.*

### Institute of Education Sciences

*Type of Review:* Extension.

*Title:* Quick Information Survey System (QRIS).

*Frequency:* One time.

*Affected Public:* State, Local, or Tribal Gov't, SEAs or LEAs.

*Reporting and Recordkeeping Hour Burden:*

*Responses:* 9,591.

*Burden Hours:* 7,193.

*Abstract:* The Quick Response Information System consists of two survey system components—Fast Response Survey System for public and private teachers, schools, districts, libraries and the Postsecondary Education Quick Information System (PEQIS) for postsecondary institutions. Surveys covered under QRIS are intended to be short, one-time, policy-relevant surveys collecting information that is not available from other sources.

Requests for copies of the information collection submission for OMB review may be accessed from <http://edicsweb.ed.gov>, by selecting the "Browse Pending Collections" link and by clicking on link number 3130. When you access the information collection, click on "Download Attachments" to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue, SW., Potomac Center, 9th Floor, Washington, DC 20202-4700. Requests may also be electronically mailed to [ICDocketMgr@ed.gov](mailto:ICDocketMgr@ed.gov) or faxed to 202-245-6623. Please specify the complete title of the information collection when making your request.

Comments regarding burden and/or the collection activity requirements should be electronically mailed to [ICDocketMgr@ed.gov](mailto:ICDocketMgr@ed.gov). Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1-800-877-8339.

[FR Doc. E6-12850 Filed 8-7-06; 8:45 am]

**BILLING CODE 4000-01-P**

**DEPARTMENT OF ENERGY****National Electric Transmission Congestion Study**

**AGENCY:** Office of Electricity Delivery and Energy Reliability (OE), Department of Energy.

**ACTION:** Notice of Availability of the National Electric Transmission Congestion Study and Request for Comments.

**SUMMARY:** The Department of Energy (the "Department") gives notice that it has issued a National Electric Transmission Congestion Study (the "Congestion Study") and is seeking comments on the study and on the possible designation of national interest electric transmission corridors (National Corridors). The Congestion Study, including request for comments, is available at <http://www.oe.energy.gov>.

**DATES:** Written comments may be filed electronically in MS Word and PDF formats. Comments regarding the Congestion Study should be e-mailed to [congestionstudy.comments@hq.doe.gov](mailto:congestionstudy.comments@hq.doe.gov). Comments regarding the designations should be e-mailed to [EPACT1221@hq.doe.gov](mailto:EPACT1221@hq.doe.gov). Comments should be received no later than 5 p.m. EDT October 10, 2006. Also, comments can be filed by mail at the address listed below.

**ADDRESSES:** Written comments via mail should be submitted to: Office of Electricity Delivery and Energy Reliability, OE-10, Attention: 1221 Comments, U.S. Department of Energy, Forrestal Building, Room 6H050, 1000 Independence Avenue, SW., Washington, DC 20585.

**Note:** U.S. Postal Service mail sent to the Department continues to be delayed by several weeks due to security screening. Electronic submission is therefore encouraged. Copies of written comments received and other relevant documents and information may be reviewed at <http://www.oe.energy.gov>.

**FOR FURTHER INFORMATION CONTACT:** Ms. Poonum Agrawal, Office Electricity Delivery and Energy Reliability, OE-10, U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 586-1411, [poonum.agrawal@hq.doe.gov](mailto:poonum.agrawal@hq.doe.gov), or Lot Cooke, Office of General Counsel, GC-76, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 586-0503, [lot.cooke@hq.doe.gov](mailto:lot.cooke@hq.doe.gov).

**SUPPLEMENTARY INFORMATION:** Section 1221(a) of the Energy Policy Act of 2005 directed the Secretary of Energy to conduct a nationwide study of electric transmission congestion. The

Congestion Study was to be completed within one year of enactment of the Energy Policy Act and subsequently updated every three years. Based upon the Congestion Study, the Secretary may designate any geographic area experiencing electric energy transmission capacity constraints or congestion that adversely affects consumers as a National Corridor.

The first Congestion Study has been completed and issued by the Secretary of Energy. The study is available for review at the website listed above. Based on the study, the Department found three classes of congestion areas that merit further federal attention: Critical Congestion Areas, Congestion Areas of Concern, and Conditional Congestion Areas. These areas are identified and discussed in Section 5 of the study. The Department is considering designating National Corridors in the areas identified as Critical Congestion Areas.

The Department is seeking comments from interested persons on the National Electric Transmission Congestion Study, on future steps for identifying and addressing electric transmission congestion, and on the possible designation of National Corridors in Critical Congestion Areas. Section 6 of the study details the comments the Department is seeking.

Issued in Washington, DC on August 2, 2006.

**Kevin Kolevar,**

*Director, Office of Electricity Delivery, and Energy Reliability.*

[FR Doc. E6-12852 Filed 8-7-06; 8:45 am]

**BILLING CODE 6450-01-P**

**DEPARTMENT OF ENERGY****Office of Energy Efficiency and Renewable Energy**

[Case No. CAC-012]

**Energy Conservation Program for Consumer Products: Notice of Correction of Petition for Waiver and Interim Waiver of Mitsubishi Electric From the DOE Residential and Commercial Package Air Conditioner and Heat Pump Test Procedures, and Modification of Interim Waiver**

**AGENCY:** Office of Energy Efficiency and Renewable Energy, Department of Energy.

**ACTION:** Notice of correction of interim waiver.

**SUMMARY:** Today's notice corrects five minor errors in the list of model numbers for which Mitsubishi Electric & Electronics USA, Inc. ("MEUS")

requested a waiver and interim waiver of the test procedures applicable to residential and commercial package air conditioners and heat pumps.

**FOR FURTHER INFORMATION CONTACT:** Dr. Michael G. Raymond, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Program, Mail Stop EE-2J, Forrestal Building, 1000 Independence Avenue, SW., Washington, DC 20585-0121, (202) 586-9611; e-mail: [Michael.Raymond.ee.doe.gov](mailto:Michael.Raymond.ee.doe.gov); or Francine Pinto, Esq., U.S. Department of Energy, Office of General Counsel, Mail Stop GC-72, Forrestal Building, 1000 Independence Avenue, SW., Washington, DC 20585-0121, (202) 586-9507; e-mail: [Francine.Pinto@hq.doe.gov](mailto:Francine.Pinto@hq.doe.gov).

**SUPPLEMENTARY INFORMATION:**

- I. Background and Authority
- II. Corrected Petition for Waiver of Test Procedure and Application for Interim Waiver
- III. Discussion

**I. Background and Authority**

Title III of the Energy Policy and Conservation Act (EPCA) sets forth a variety of provisions concerning energy efficiency. Part B of Title III (42 U.S.C. 6291-6309) provides for the "Energy Conservation Program for Consumer Products other than Automobiles." Part C of Title III (42 U.S.C. 6311-6317) provides for an energy efficiency program entitled "Certain Industrial Equipment," which is similar to the program in part B, and which includes commercial air-conditioning equipment, packaged boilers, water heaters, and other types of commercial equipment.

Both parts specifically provide for definitions, test procedures, labeling provisions, energy conservation standards, and the authority to require information and reports from manufacturers. With respect to test procedures, both parts generally authorize the Secretary of Energy to prescribe test procedures that are reasonably designed to produce results which reflect energy efficiency, energy use and estimated operating costs, and that are not unduly burdensome to conduct. (42 U.S.C. 6293(b)(3), 6314(a)(2)) EPCA provides that the Secretary of Energy may amend test procedures for consumer products if the Secretary determines that amended test procedures would more accurately reflect energy efficiency, energy use and estimated operating costs, and are not unduly burdensome to conduct. (42 U.S.C. 6293(b))

The Department's regulations contain provisions allowing a person to seek a

waiver from the test procedure requirements for covered consumer products (10 CFR 430.27). The waiver provisions allow the Assistant Secretary for Energy Efficiency and Renewable Energy (hereafter "Assistant Secretary") to temporarily waive test procedures for a particular basic model when a petitioner shows that the basic model contains one or more design characteristics that prevent testing according to the prescribed test procedures, or when the prescribed test procedures may evaluate the basic model in a manner so unrepresentative of its true energy consumption as to provide materially inaccurate comparative data. (10 CFR 430.27 (a)(1)) The Assistant Secretary may grant the waiver subject to conditions, including adherence to alternate test procedures. Petitioners are to include in their petition any alternate test procedures known to evaluate the basic model in a manner representative of its energy consumption. (10 CFR 430.27(b)(1)(iii)) Waivers generally remain in effect until final test procedure amendments become effective, thereby resolving the problem that is the subject of the waiver.

The waiver process also allows the Assistant Secretary to grant an Interim Waiver from test procedure requirements to manufacturers that have petitioned the Department for a waiver of such prescribed test procedures. (10 CFR 430.27(a)(2)) An Interim Waiver remains in effect for a period of 180 days or until the Department issues its determination on the Petition for Waiver, whichever is sooner, and may be extended for an additional 180 days, if necessary. (10 CFR 430.27(h))

On November 7, 2005, MEUS filed an Application for Interim Waiver and Petition for Waiver ("Initial Petition") from the test procedures applicable to its R410A models of the CITY MULTI Variable Refrigerant Flow Zoning ("VRFZ") line of residential and commercial package air conditioning and heating equipment. The applicable test procedures for residential air-conditioning and heating equipment are found in 10 CFR part 430, subpart B, Appendix M; EPCA requires DOE to base its test procedures for similar commercial equipment on industry test standards. See 42 U.S.C. 6314(a)(4)(A). In particular, MEUS requested a waiver from the residential test procedures contained in 10 CFR part 430, subpart B, Appendix M, and a waiver from the commercial test procedures contained in Air-Conditioning and Refrigeration Institute (ARI) Standard 210/240-2003 and in ARI Standard 340/360-2000. MEUS seeks a waiver from the

applicable test procedures because, MEUS asserts, the design characteristics of the R410A systems prevent testing according to the currently prescribed test procedures.

On March 24, 2006, the Department of Energy (hereafter "Department" or "DOE") published MEUS's Petition for Waiver and granted the Application for Interim Waiver.<sup>1</sup> On April 11, 2006, MEUS submitted a Corrected Petition for Waiver of Test Procedure and Application for Interim Waiver ("Corrected Petition") to DOE. The Corrected Petition noted five minor errors in the list of model numbers for which the waiver and the interim waiver had been requested. MEUS requested that the interim waiver granted apply to the corrected list of model numbers, and that DOE use the corrected list of model numbers in any future actions regarding the Petition for Test Procedure Waiver.

## II. Corrected Petition for Waiver of Test Procedure and Application for Interim Waiver

In the Corrected Petition, MEUS states that four of the corrections relate to typographical errors in the initial filing. In the list of models provided in MEUS's Initial Petition, MEUS inadvertently listed the PFFY Series Floor Standing model numbers as "PEFY" instead of "PFFY," and inadvertently listed the PLFY and PMFY series model numbers as "PEFY" instead of "PLFY" and "PMFY." MEUS requests that on page 4 of the Initial Petition, four model numbers should be revised as follows:

- The "PFFY Series—Floor Standing (Concealed)—PEFY-P06/08/12/15/18/24\*\*\*-\*" listing should be revised to read, "PFFY Series—Floor Standing (Concealed)—PFFY-P06/08/12/15/18/24\*\*\*-\*";
- The "PFFY Series—Floor Standing (Exposed)—PEFY-P06/08/12/15/18/24\*\*\*-\*" listing should be revised to read, "PFFY Series—Floor Standing (Exposed)—PFFY-P06/08/12/15/18/24\*\*\*-\*";
- The "PLFY Series—4-Way Airflow Ceiling Cassette—PEFY-P12/18/24/30/36\*\*\*-\*" listing should be revised to read, "PLFY Series—4-Way Airflow Ceiling Cassette—PLFY-P12/18/24/30/36\*\*\*-\*, " and
- The "PMFY Series—1-Way Airflow Ceiling Cassette—PEFY-P06/08/12/

15\*\*\*-\*" listing should be revised to read, "PMFY Series—1-Way Airflow Ceiling Cassette—PMFY-P06/08/12/15\*\*\*-\*."

According to MEUS, the fifth correction reflects an updated model number designation. At the time MEUS submitted its Initial Petition, MEUS anticipated that the model number for the CITY MULTI Variable Refrigerant Flow Zoning System S-Series Outdoor Equipment would be PUMY-P48TGMU-\*. The actual model number designation for its S-Series products was, however, PUMY-P48NHMU-\*. MEUS states that this change in designation does not reflect any physical or technical changes in the S-Series; the update is purely notational. Thus, MEUS requests that the model number for the S-Series on page 4 of the Initial Petition be changed from "PUMY-P48TGMU-\*, 48,000 Btu/h, 208/230-1-60 split-system variable-speed heat pump" to "PUMY-P48NHMU-\*, 48,000 Btu/h, 208/230-1-60 split-system variable-speed heat pump."

MEUS asserts that the corrections do not reflect any physical or technical changes in the models listed in MEUS's Initial Petition. The corrections simply address four typographical errors and update a notation in model designation. Therefore, MEUS requests that the interim waiver granted on March 24, 2006, should be interpreted to apply to the models listed in the Corrected Petition. In addition, MEUS requests that DOE use the corrected list of model numbers in any future action on the Petition for Test Procedure Waiver.

## III. Discussion

The Department has reviewed MEUS's Initial Petition and its request to correct five minor errors in the list of model numbers for which MEUS requested the waiver and interim waiver. The requested corrections do not reflect any physical or technical changes in the models listed in MEUS's Initial Petition. The corrections simply address four typographical errors and update a notation in model designation. Given that the corrections do not represent a request for coverage of additional or different products, and do not change in any way the basis for granting the interim waiver, DOE finds that it is appropriate that the interim waiver granted on March 24, 2006, apply to the models listed in the Corrected Petition. DOE thus clarifies that the March 24, 2006, interim waiver applies to the models listed in the Corrected Petition, and DOE will use the corrected list of model numbers in any

<sup>1</sup>Energy Conservation Program for Consumer Products: Publication of the Petition for Waiver and Granting of the Application for Interim Waiver of Mitsubishi Electric From the DOE Residential and Commercial Package Air Conditioner and Heat Pump Test Procedures (Case No. CAC-012), 71 Fed. Reg. 14858 (Mar. 24, 2006) (hereinafter, Publication).

future action on the pending Petition for Test Procedure Waiver.

Issued in Washington, DC, on July 31, 2006.

**Alexander A. Karsner,**

*Assistant Secretary, Energy Efficiency and Renewable Energy.*

[FR Doc. E6-12851 Filed 8-7-06; 8:45 am]

BILLING CODE 6450-01-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 August 23, 2006.

**A. Federal Reserve Bank of Richmond** (A. Linwood Gill, III, Vice President) 701 East Byrd Street, Richmond, Virginia 23261-4528:

1. *Robert Milam, Jr.*, to individually retain voting shares of, and Robert Milam, Jr.; Robert Milam; Melissa Milam; Jada Milam; Kevin Milam; Lloyd Jarrell; and other members of the Milam family, as a group acting in concert, to retain voting shares of Big Coal River Bancorp, Inc., Whitesville, West Virginia, and thereby indirectly retain voting shares of Whitesville State Bank, Whitesville, West Virginia.

**B. Federal Reserve Bank of Chicago** (Patrick M. Wilder, Assistant Vice President) 230 South LaSalle Street, Chicago, Illinois 60690-1414:

1. *Ida R. Noll*, Springfield, Illinois; to acquire additional voting shares of Midland Bancshares, Inc., Kincaid, Illinois, and thereby indirectly acquire additional voting shares of Midland Community Bank, Kincaid, Illinois.

Board of Governors of the Federal Reserve System, August 3, 2006.

**Jennifer J. Johnson,**

*Secretary of the Board.*

[FR Doc. E6-12874 Filed 8-7-06; 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 Web site at [www.ffiec.gov/nic/](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 September 1, 2006.

**A. Federal Reserve Bank of St. Louis** (Glenda Wilson, Community Affairs Officer) 411 Locust Street, St. Louis, Missouri 63166-2034:

1. *Exchange Bancshares, Inc.*, Mayfield, Kentucky; to acquire 100 percent of the voting shares of Purchase Area Bancorp, Inc., Bardwell, Kentucky, and thereby indirectly acquire voting shares of Bardwell Deposit Bank, Bardwell, Kentucky.

**B. Federal Reserve Bank of Dallas** (W. Arthur Tribble, Vice President) 2200 North Pearl Street, Dallas, Texas 75201-2272:

1. *VB Texas, Inc.*, Houston, Texas; to become a bank holding company by acquiring 100 percent of the voting shares of Community State Bank, Boling, Texas.

Board of Governors of the Federal Reserve System, August 3, 2006.

**Jennifer J. Johnson,**

*Secretary of the Board.*

[FR Doc. E6-12875 Filed 8-7-06; 8:45 am]

BILLING CODE 6210-01-S

## FEDERAL RESERVE SYSTEM

### Notice of Proposals to Engage in Permissible Nonbanking Activities or to Acquire Companies that are Engaged in Permissible Nonbanking Activities

The companies listed in this notice have given notice under section 4 of the Bank Holding Company Act (12 U.S.C. 1843) (BHC Act) and Regulation Y (12 CFR Part 225) to engage *de novo*, or to acquire or control voting securities or assets of a company, including the companies listed below, that engages either directly or through a subsidiary or other company, in a nonbanking activity that is listed in § 225.28 of Regulation Y (12 CFR 225.28) or that the Board has determined by Order to be closely related to banking and permissible for bank holding companies. Unless otherwise noted, these activities will be conducted throughout the United States.

Each notice is available for inspection at the Federal Reserve Bank indicated. The notice also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether the proposal complies with the standards of section 4 of the BHC Act. Additional information on all bank holding companies may be obtained from the National Information Center Web site at [www.ffiec.gov/nic/](http://www.ffiec.gov/nic/).

Unless otherwise noted, comments regarding the applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than August 23, 2006.

**A. Federal Reserve Bank of New York** (Anne McEwen, Financial Specialist) 33 Liberty Street, New York, New York 10045-0001:

1. *Westpac Banking Corporation*, Sydney, Australia; to engage *de novo* through its subsidiary, Hastings Funds Management (US), Inc., New York, New York, in providing investment and financial advice, pursuant to section 225.28(b)(6) of Regulation Y.

**B. Federal Reserve Bank of San Francisco** (Tracy Basinger, Director, Regional and Community Bank Group) 101 Market Street, San Francisco, California 94105-1579:

1. *Belvedere Capital Fund II L.P.* and *Belvedere Capital Partners II LLC*, both of San Francisco, California; to acquire

Hometown Commercial Capital, LLC, Burlingame, California, and thereby engage in funding commercial real estate loans through established warehouse lines and subsequently securitizing pools through major Wall Street firms, pursuant to sections 225.28(b)(1) and (b)(2)(ii) of Regulation Y.

Board of Governors of the Federal Reserve System, August 3, 2006.

**Jennifer J. Johnson,**

*Secretary of the Board.*

[FR Doc. E6-12876 Filed 8-7-06; 8:45 am]

**BILLING CODE 6210-01-S**

## GENERAL SERVICES ADMINISTRATION

[PBS-N01]

### Notice of Availability to Distribute a Draft Environmental Impact Statement for the Construction of a New Border Station Facility in Madawaska, Maine

**AGENCY:** Public Buildings Service, GSA.

**ACTION:** Notice of Availability

**SUMMARY:** The General Services Administration (GSA) announces its intent to distribute a Draft Environmental Impact Statement (Draft EIS) under the National Environmental Policy Act (NEPA) of 1969, as amended, 42 U.S.C. 4321 - 4347 (NEPA) to assess the potential impacts of the construction of a New Border Station Facility in Madawaska, Maine (the "Proposed Action"). At the request of Customs and Border Protection (CBP), the GSA is proposing to construct a new border station facility which meets their needs, and the design requirements of the GSA.

The existing facilities are undersized and obsolete, and consequently incapable of providing the level of security now required. The Proposed Action has been defined and will likely include: (a) Identification of land requirements, including acquisition of adjoining land; (b) demolition of existing government structures at the border station; (c) construction of a main administration building and ancillary support buildings; and (d) consequent potential alterations to secondary roads.

Alternatives to be studied will identify alternative locations for the components of the border station including the main administration and ancillary support buildings, the associated roadway network and parking. A No Action alternative will also be studied that will evaluate the consequences of not constructing the new border station facility. This

alternative is included to provide a basis for comparison to the action alternatives described above as required by NEPA regulations (40 CFR 1002.14(d)).

GSA invites individuals, organizations and agencies to submit comments concerning the scope of the Draft EIS. The public scoping period starts with the publication of this notice in the **Federal Register** and will continue for forty five (45) days from the date of this notice. GSA will consider all comments received or postmarked by that date in defining the scope of the EIS. GSA expects to issue a Final EIS by September 2006 at which time its availability will be announced in the **Federal Register** and local media. A public comment period will commence upon publication of the Notice of Availability. The GSA will consider and respond to comments received on the Draft EIS in preparing the Final EIS.

**COMMENTS:** Written comments or suggestions concerning the scope of the EIS should be sent to David M. Drevinsky P.E., PMP, Regional Environmental Quality Advocate (REQA), U.S. General Services Administration, 10 Causeway Street, Room 975, Boston, MA 02222; Fax (617) 565-5967.

#### FOR FURTHER INFORMATION CONTACT

David M. Drevinsky by phone at (617) 565-6596 or by e-mail at [david.drevinsky@gsa.gov](mailto:david.drevinsky@gsa.gov).

#### SUPPLEMENTARY INFORMATION:

##### Public Comment / Distribution:

A public comment period is intended to provide the public with an opportunity to present comments, ask questions, and discuss concerns regarding the scope of the EIS for the Proposed Action. GSA will distribute ten reading copies of the Draft EIS at both the Middle / High School Library located on 135 Seventh Avenue in Madawaska and the Madawaska Library located on 393 Main Street on July 21, 2006. A Public Scoping workshop will be held on August 17, 2006 from 6pm to 8pm at the Middle / High School Library. All are welcome to attend and talk with the GSA Officials.

Dated: July 25, 2006.

**Dennis R. Smith,**

*Regional Administrator, New England Region.*

[FR Doc. E6-12824 Filed 8-7-06; 8:45 am]

**BILLING CODE 6820-A8-S**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Announcement of Availability of Funds for Cooperative Agreement With the Arkansas Center for Health Improvement (ACHI) for a Project Entitled, "From BMI to Student Body Mass Improvement: Healthy Achievement Through Awareness and Action—a Detailed Evaluation of the Arkansas School BMI Project."

**AGENCY:** Office of Disease Prevention and Health Promotion, Office of Public Health and Science, Office of the Secretary, DHHS.

*Announcement Type:* Cooperative Agreement—FY 2006 Initial Announcement. Single Source.

*Catalog of Federal Domestic Assistance:* 93.018.

**DATES:** *Application availability:* August 8, 2006. Applications are due by 5 p.m. Eastern Time on September 7, 2006.

**SUMMARY:** The Office of Disease Prevention and Health Promotion (ODPHP)/Office of Public Health and Science (OPHS), announces that up to \$250,000 in fiscal year (FY) 2006 funds is available for a cooperative agreement with the Arkansas Center for Health Improvement (ACHI) for a project entitled, "From BMI to Student Body Mass Improvement: Healthy Achievement Through Awareness and Action—a Detailed Evaluation of the Arkansas School BMI Project." Working in collaboration with the ACHI, administratively housed unit in the University of Arkansas for Medical Sciences (501C3 organization) and serves as the primary health policy development source for the Arkansas Department of Health and Human Services, the initiative seeks to gain information about programs that have established school based-body mass index assessments of school age children. The goals of this evaluation project are to identify key elements for the translation of BMI information as a public health intervention for positive behavioral change among families, children and adolescents to improve nutrition and increase physical activity. The project will design and pilot test a detailed evaluation protocol to assess the specific benefits and effectiveness of the Arkansas School BMI Assessment Project, building on the findings from the ACHI Report—*The 2005 Arkansas Assessment of Childhood and Adolescent Obesity*; and *The Year Two Evaluation of Arkansas Act 1220* conducted by the University of Arkansas for Medical Sciences' College of Public Health with support from The Robert Wood Johnson Foundation. The

evaluation protocol will specially address:

- The effectiveness and acceptability of the BMI assessment by teachers, students, families, and physicians;
- The essential information and care systems to support follow-up and follow-through for prevention and interventions;
- The students, families, and schools knowledge, attitudes, and adoption of healthier nutrition and physical activity choices; and,
- The changes in the individual BMI and the childhood population overweight and obesity rates.

The purpose of this project is to assess the principles and outcomes of a statewide community-based intervention program incorporating various scientific methods and behavioral approaches. At a time when overweight and obesity are dramatically increasing, initiatives like the Arkansas School Body Mass Index (BMI) Assessment Project will evaluate the diverse populations that are at higher than average risk of developing excessive weight, especially children in urban/rural areas with a high prevalence of minority individuals. This program promotes several focus areas of the Healthy People 2010 including: Maternal, Infant, and Child Health; Nutrition and Overweight; Physical Activity and Educational and Community-Based Programs Health Communication. The project will be approved for up to a one-year period for a total of \$250,000 (including indirect costs). Funding for the cooperative agreement is contingent upon the availability of funds.

### I. Funding Opportunity Description

Under the authority of Section 301, Title III of the U.S. Public Health Service Act—General Powers and Duties of the Public Health Service, 42 U.S.C. Section 301, ODPHP/OPHS, of the Department of Health and Human Services (HHS), announces that up to \$250,000 in fiscal year (FY) 2006 funds is available for a cooperative agreement with the Arkansas Center for Health Improvement (ACHI) for a project entitled, “From BMI to Student Body Mass Improvement: Healthy Achievement Through Awareness and Action—a Detailed Evaluation of the Arkansas School BMI Project.” Activities to be addressed through the cooperative agreement will relate to the following topic areas: Access to Care; Diabetes; Maternal, Infant and Child Health; and, Nutrition and Obesity. Funding will be provided by ODPHP from evaluation resources to the awardee.

The goals of this evaluation project are to identify key elements for the translation of BMI information as a public health intervention for positive behavioral change among families, children and adolescents to improve nutrition and increase physical activity.

*Background:* The obesity epidemic has reached alarming proportions in children. The number of overweight (defined as sex- and age-specific BMI above the 95th percentile) children has doubled in the last 2 decades. This increase in incidence and prevalence spans across cultures, genders, ethnicities, and educational backgrounds.

Although the development of overweight and obesity is multifactorial, excess calories and inadequate physical activity are two main factors that increase the risk of becoming overweight and/or obese. Overweight children are at risk for developing non-insulin dependent diabetes, cardiovascular disease, poor bone development, and hypertension; which are three major leading causes of disability and death in the U.S. Multiple studies confirm demographic and ethnic differences in physical activity levels and overweight prevalence. For example, African American and Latino children are at greater risk for becoming overweight than Caucasian children. Some studies also suggest higher rates of overweight and obesity among urban children. Furthermore, overweight children not only suffer from physical effects of their weight status but also suffer from low self-esteem, depression, and social discrimination. Therefore, preventing overweight and obesity is essential, especially at a time when overweight and obesity is dramatically increasing in the U.S. population.

On April 11, 2003, Arkansas Act 1220 became the first law in the Nation to provide comprehensive, multifaceted approaches that bring families, schools, and communities together to combat the epidemic of obesity. One mandate of the act is to conduct body mass index assessments of the State’s public school children.

ACHI devised a method to measure students’ BMI confidentially and uniformly and to create an annual BMI assessment for parents. ACHI developed a measurement protocol and worked with community health nurses, school nurses, and local clinical resources to obtain height/weight assessments for school-age children across the state. BMI calculations were conducted, and a child health report generated for parents and guardians of each child assessed. The reports explain what the BMI is and how it is used, show the child’s BMI

and how it relates to other Arkansas children, and include suggestions for helping the child to lower his or her BMI if appropriate. In addition to parent reports, ACHI delivered a state report that provided comprehensive data by grade, gender, age, ethnicity, and geographic region to school district superintendents and state legislators.

During the first year of the program (2003 to 2004), 93 percent of the state’s schools reported height/weight assessments. By year two, 98 percent of the schools participated, reaching 444,612 children. Data from both years revealed that roughly 39 percent of school-age children were overweight or at risk for becoming overweight, 8 percentage points higher than the national estimates.

As a result of this program, the state of Arkansas can accurately detail the obesity epidemic and track long-range changes in child and adolescent obesity. By identifying the depth and breadth of the obesity epidemic among the state’s children, an infrastructure is in place to combat this problem through health promotion and disease prevention and risk reduction efforts. A baseline has been established to enable the state to evaluate progress in combating the child obesity epidemic and establish an evidence-based national model.

*Purpose:* The purpose of this project is to evaluate and assess the effectiveness and benefits of translating science into practice and behavioral change among children and adolescents. This project will assess the principles and test the merit, feasibility and outcome of targeted health-messages and intervention programs that are statewide, using a multiplicity of methods and approaches. The evaluation of the effectiveness of such a program on nutrition and physical activity knowledge, attitudes, and behavior will help build the research base for health promotion and health policy that can be utilized in decision-making now and in the future.

The project will design and pilot test a detailed evaluation protocol to assess the specific benefits and effectiveness of the Arkansas School BMI Assessment Project, building on the findings from the ACHI Report,—*The 2005 Arkansas Assessment of Childhood and Adolescent Obesity; and The Year Two Evaluation of Arkansas Act 1220* conducted by the University of Arkansas for Medical Sciences’ College of Public Health with support from The Robert Wood Johnson Foundation. The evaluation protocol will specially address measurable outcomes of the program in alignment with one (or

more) of the following performance goals:

- Improve health and reduce disparities;
- Improve disease prevention and health education;
- Improve public health infrastructure; and
- Improve outreach to the community.

*Activities:* Awardee activities for this program include:

- State supported efforts targeted toward prevention and reduction of pediatric overweight and obesity.
- Community collaboration and input regarding the approaches to preventing and reducing pediatric overweight and obesity.
- Key community stakeholders including schools, parents, teachers, providers, students/children, and youth organizations.
- Detailed BMI assessment of school-age and/or adolescent children within schools, including Medicaid recipients or eligible children, and minorities.
- Data collection, linkage, analysis, and evaluation integral to the program objectives.
- Detailed subgroup analysis including, small area variations, economic gradients, and subgroup analyses by race and ethnicity.
- Parental education regarding the use of BMI, nutrition, and physical activity.
- Effective interventions and follow-up for children who are found to have a high BMI.

## II. Award Information

The administrative and funding instrument to be used for this program will be the cooperative agreement in which substantial ODPHP/HHS scientific and/or programmatic involvement is anticipated during the performance of the project. Under the cooperative agreement, ODPHP/HHS will support and/or stimulate awardee activities by working with them in a non-directive partnership role. This will include: review of existing information; formulation of workplan; participating in community stakeholders meetings; data analysis; evaluation design; protocol development; and communications with the community.

Approximately \$250,000 in FY 2006 funds is available to support the agreement. The anticipated start date is October 1, 2006. There will only be one single award made from this announcement. The program and budget period for this agreement is for 12 months, with extensions possible up to approximately three years.

Although this program is provided for in the financial plans of the ODPHP, the

award pursuant to this RFA is contingent upon the availability of funds for this purpose.

## III. Eligibility Information

### 1. Eligible Applicant

This is a single eligibility cooperative agreement offered to ACHI as the recognized health policy development unit for the State of Arkansas. ACHI has established a unique opportunity to study, evaluate, and make recommendations to prevent and remediate the childhood overweight and obesity epidemic.

Founded in 1997, ACHI is an administratively housed unit in the University of Arkansas for Medical Sciences (a 501c3 organization) that serves as the primary source for executive and legislative branch support of health policy development. In addition to UAMS, ACHI is supported by the Arkansas Department of Health and Human Services.

ACHI has established a unique ability to contribute to the State and national policy dialogue on childhood obesity because of two critical pieces of Arkansas statute:

*Arkansas Health Data Initiative:* passed by the 84th Arkansas General Assembly in 2003 as Act 1035—authorizes ACHI to have access to any data the State owns or contracts for to advance health policy initiatives within the State.

*Arkansas Childhood Obesity Initiative:* passed by the 84th Arkansas General Assembly in 2003 as Act 1220—establishes a comprehensive statewide strategy to combat childhood obesity including annual assessment of body mass indices.

From these two legislative initiatives, ACHI has established a population-based longitudinal dataset (currently 3 years) of all Arkansas public school children. Using the authority under the Health Data Initiative, ACHI has linked data from the Arkansas Department of Education, over 300 independent school districts, and the Arkansas Medicaid program to establish a longitudinal dataset tracking over 450,000 school children in grades kindergarten through 12th grade. The dataset includes demographic information, family income, clinical information, as well as height, weight, and body mass information. The longitudinal nature of the dataset will enable evaluation of existing growth curves, sub-analyses for racial and ethnic subgroups unavailable from existing datasets, quantification of the educational and clinical impact of obesity on children and adolescents, and evaluation of policy and healthcare

financing strategies in combating the epidemic of child and adolescent obesity. Currently with 3 years of data incorporated, incorporation of future year's data will rapidly enhance the power of this dataset to inform and guide policy development for the nation.

Establishment of a cooperative agreement between ACHI (UAMS) and HHS is warranted because of the unique empirical information available through the Health Data Initiative of the State of Arkansas.

### 2. Cost Sharing or Matching

Cost sharing, matching funds, and cost participation is not a requirement of this agreement.

## IV. Application and Submission Information

### 1. Address To Request Application Package

Application kits may be requested by calling (240) 453-8822 or writing to: Office of Grants Management, Office of Public Health Science (OPHS), 1101 Wootton Parkway, Suite 550, Rockville, MD 20852. Applications must be prepared using Form OPHS-1. The applicant may fax a written request to the OPHS Office of Grants Management to obtain a hard copy of the application kit at (240) 453-8823.

### 2. Content and Form of Application Submission

All applications must be accompanied by a Project Abstract submitted on 3.5 inch floppy disk. The abstract must be typed, single-spaced, and not exceed 2 pages. Reviewers and staff will refer frequently to the information contained in the abstract, and therefore it should contain substantive information about the proposed projects in summary form. A list of suggested keywords and a format sheet for your use in preparing the abstract will be included in the application packet.

All grant applications must be accompanied by a Project Narrative. In addition to the instructions provided in OPHS-1 (Rev 8/2004) for project narrative, the specific guidelines for the project narrative are provided in the program guidelines. Format requirements are the same as for the Project Abstract Section; margins should be 1 inch at the top and 1 inch at the bottom and both sides; and typeset must be no smaller than 12 cpi and not reduced. Biographical sketches should be either typed on the appropriate form or plain paper and should not exceed two pages, with publications listed being limited only to those that are directly relevant to this project.

### Application Format Requirements

If applying on paper, the entire application may not exceed 80 pages in length, including the abstract, project and budget narratives, face page, attachments, any appendices and letters of commitment and support. Pages must be numbered consecutively. Applications submitted electronically that exceed 80 pages when printed will be deemed non-compliant. All non-compliant applications will be returned to the applicant without further consideration.

a. *Number of Copies:* Please submit one (1) original and two (2) unbound copies of the application. Please do not bind or staple the application. Application must be single sided.

b. *Font:* Please use an easily readable serif typeface, such as Times Roman, Courier, or CG Times. The text and table portions of the application must be submitted in not less than 12 point and 1.0 line spacing. Applications not adhering to 12 point font requirements may be returned.

c. *Paper Size and Margins:* For scanning purposes, please submit the application on 8½" x 11" white paper. Margins must be at least one (1) inch at the top, bottom, left and right of the paper. Please left-align text.

d. *Numbering:* Please number the pages of the application sequentially from page 1 (face page) to the end of the application, including charts, figures, tables, and appendices.

e. *Names:* Please include the name of the applicant on each page.

f. *Section Headings:* Please put all section headings flush left in bold type.

### Application Format

Applications for funding must consist of the following documents in the following order:

i. *Application Face Page:* Public Health Service (PHS) Application Form OPHS-1, provided with the application package. Prepare this page according to instructions provided in the form itself.

### DUNS Number

All applicant organizations are required to have a Data Universal Numbering System (DUNS) number in order to apply for a grant from the Federal Government. The DUNS number is a unique nine-character identification number provided by the commercial company, Dun and Bradstreet. There is no charge to obtain a DUNS number. Information about obtaining a DUNS number can be found at <https://www.dnb.com/product/eupdate/requestoptions.html> or call 1-866-705-5711. Please include the

DUNS number next to the OMB Approval Number on the application face page.

Additionally, the applicant organization will be required to register with the Federal Government's Central Contractor Registry (CCR) in order to do electronic business with the Federal Government. Information about registering with the CCR can be found at <http://www.hrsa.gov/grants/dunsscr.html>.

Finally, if the applicant applies electronically through Grants.gov the applicant is required to register with the Credential Provider for Grants.gov. Information about this requirement is available at <http://www.grants.gov/CredentialProvider>.

Similarly, if the applicant applies electronically through the OPHS E-Grants System the applicant is required to register with the provider. Information about this requirement is available at <https://egrants.osophs.dhhs.gov>.

ii. *Program Narrative:* This section provides a comprehensive framework and description of all aspects of the proposed program. It should be succinct, self-explanatory, and well organized so that reviewers can understand the proposed project.

Use the following section headers for the Narrative:

- Executive Summary.

This section should briefly describe the proposed project and supporting initiatives as well as summarize goals that the program intends to achieve through the project initiatives.

- Work Plan.

Describe the current and proposed activities or steps that will be used to achieve the stated goals and objectives. Describe expected outcomes resulting from activities as well as any evaluation mechanisms that will be used to measure the success of the initiatives.

- Mechanism for Administration.

Describe how resources and funds will be administered with regards to the proposed projects.

- In-Kind Support/Resources.

Describe any in-kind support from other sources, if any, that will be used to support the proposed initiatives and activities.

iii. *Appendices:* Please provide the additional relevant information (including tables, charts, and other relevant documents) to complete the content of the application. Please note that these are supplementary in nature, and are not intended to be a continuation of the project narrative. Be sure each appendix is clearly labeled.

### 3. Submission Dates and Times

*Submission Mechanisms:* OPHS provides multiple mechanisms for the submission of applications, as described in the following sections. The applicant will receive notification via mail from the OPHS Office of Grants Management confirming the receipt of applications submitted using any of these mechanisms. Applications submitted to the OPHS Office of Grants Management after the deadlines described below will not be accepted for review. Applications which do not conform to the requirements of the grant announcement will not be accepted for review and will be returned to the applicant.

Applications may only be submitted electronically via the electronic submission mechanisms specified below. Any applications submitted via any other means of electronic communication, including facsimile or electronic mail, will not be accepted for review. While applications are accepted in hard copy, the use of the electronic application submission capabilities provided by the OPHS eGrants system or the Grants.gov Web site Portal is encouraged.

Electronic grant application submissions must be submitted no later than 5 p.m. Eastern Time on the deadline date specified in the **DATES** section of the announcement using one of the electronic submission mechanisms specified below. All required hardcopy original signatures and mail-in items must be received by the OPHS Office of Grants Management no later than 5 p.m. Eastern Time on the next business day after the deadline date specified in the **DATES** section of the announcement.

Applications will not be considered valid until all electronic application components, hardcopy original signatures, and mail-in items are received by the OPHS Office of Grants Management according to the deadlines specified above. Application submissions that do not adhere to the due date requirements will be considered late and will be deemed ineligible.

The applicant is encouraged to initiate electronic applications early in the application development process, and to submit early on the due date or before. This will aid in addressing any problems with submissions prior to the application deadline.

*Electronic Submissions via the Grants.gov Web site Portal:* The Grants.gov Web site Portal provides organizations with the ability to submit applications for OPHS grant opportunities. Organizations must

successfully complete the necessary registration processes in order to submit an application. Information about this system is available on the Grants.gov Web site, <http://www.grants.gov>.

In addition to electronically submitted materials, the applicant may be required to submit hard copy signatures for certain Program related forms, or original materials as required by the announcement. It is imperative that the applicant review both the grant announcement, as well as the application guidance provided within the Grants.gov application package, to determine such requirements. Any required hard copy materials, or documents that require a signature, must be submitted separately via mail to the OPHS Office of Grants Management and, if required, must contain the original signature of an individual authorized to act for the applicant agency and the obligations imposed by the terms and conditions of the grant award.

Electronic applications submitted via the Grants.gov Web site Portal must contain all completed online forms required by the application kit, the Program Narrative, Budget Narrative and any appendices or exhibits. All required mail-in items must be received by the due date requirements specified above. Mail-in items may only include publications, resumes, or organizational documentation.

Upon completion of a successful electronic application submission via the Grants.gov Web site Portal, the applicant will be provided with a confirmation page from Grants.gov indicating the date and time (Eastern Time) of the electronic application submission, as well as the Grants.gov Receipt Number. It is critical that the applicant print and retain this confirmation for their records, as well as a copy of the entire application package.

All applications submitted via the Grants.gov Web site Portal will be validated by Grants.gov. Any applications deemed "Invalid" by the Grants.gov Web site Portal will not be transferred to the OPHS eGrants system, and OPHS has no responsibility for any application that is not validated and transferred to OPHS from the Grants.gov Web site Portal. Grants.gov will notify the applicant regarding the application validation status. Once the application is successfully validated by the Grants.gov Web site Portal, the applicant should immediately mail all required hard copy materials to the OPHS Office of Grants Management to be received by the deadlines specified above. It is critical that the applicant clearly identify the Organization name

and Grants.gov Application Receipt Number on all hard copy materials.

Once the application is validated by Grants.gov, it will be electronically transferred to the OPHS eGrants system for processing. Upon receipt of both the electronic application from the Grants.gov Web site Portal, and the required hardcopy mail-in items, the applicant will receive notification via mail from the OPHS Office of Grants Management confirming the receipt of the application submitted using the Grants.gov Web site Portal.

The applicant should contact Grants.gov with any questions or concerns regarding the electronic application process conducted through the Grants.gov Web site Portal.

*Electronic Submissions via the OPHS eGrants System:* The OPHS electronic grants management system, eGrants, provides for applications to be submitted electronically. Information about this system is available on the OPHS eGrants Web site, <https://egrants.osophs.dhhs.gov>, or may be requested from the OPHS Office of Grants Management at (240) 453-8822.

When submitting applications via the OPHS eGrants system, the applicant is required to submit a hard copy of the application face page (Standard Form 424) with the original signature of an individual authorized to act for the applicant agency and assume the obligations imposed by the terms and conditions of the grant award. If required, the applicant will also need to submit a hard copy of the Standard Form LLL and/or certain Program related forms (e.g., Program Certifications) with the original signature of an individual authorized to act for the applicant agency.

Electronic applications submitted via the OPHS eGrants system must contain all completed online forms required by the application kit, the Program Narrative, Budget Narrative and any appendices or exhibits. The applicant may identify specific mail-in items to be sent to the Office of Grants Management separate from the electronic submission; however these mail-in items must be entered on the eGrants Application Checklist at the time of electronic submission, and must be received by the due date requirements specified above. Mail-in items may only include publications, resumes, or organizational documentation.

Upon completion of a successful electronic application submission, the OPHS eGrants system will provide the applicant with a confirmation page indicating the date and time (Eastern Time) of the electronic application submission. This confirmation page will

also provide a listing of all items that constitute the final application submission including all electronic application components, required hardcopy original signatures, and mail-in items, as well as the mailing address of the OPHS Office of Grants Management where all required hard copy materials must be submitted.

As items are received by the OPHS Office of Grants Management, the electronic application status will be updated to reflect the receipt of mail-in items. It is recommended that the applicant monitor the status of their application in the OPHS eGrants system to ensure that all signatures and mail-in items are received.

*Mailed or Hand-Delivered Hard Copy Applications:* The applicant who submits an application in hard copy (via mail or hand-delivered) are required to submit an original and two copies of the application. The original application must be signed by an individual authorized to act for the applicant agency or organization and to assume for the organization the obligations imposed by the terms and conditions of the grant award.

Mailed or hand-delivered applications will be considered as meeting the deadline if they are received by the OPHS Office of Grant Management on or before 5 p.m. Eastern Time on the deadline date specified in the **DATES** section of the announcement. The application deadline date requirement specified in this announcement supersedes the instructions in the OPHS-1. Applications that do not meet the deadline will be returned to the applicant unread.

#### 4. Intergovernmental Review

This program is subject to the Public Health Systems Reporting Requirements. Under these requirements, a community-based non-governmental applicant must prepare and submit a Public Health System Impact Statement (PHSIS). The Applicant shall submit a copy of the application face page (SF-424) and a one page summary of the project, called the Public Health System Impact Statement. The PHSIS is intended to provide information to State and local health officials to keep them apprised on proposed health services grant applications submitted by community-based, non-governmental organizations within their jurisdictions.

Community-based, non-governmental applicants are required to submit, no later than the Federal due date for receipt of the application, the following information to the head of the appropriate State and local health

agencies in the area(s) to be impacted: (a) a copy of the face page of the application (SF 424), (b) a summary of the project (PHSIS), not to exceed one page, which provides: (1) A description of the population to be served, (2) a summary of the services to be provided, and (3) a description of the coordination planned with the appropriate State or local health agencies. Copies of the letters forwarding the PHSIS to these authorities must be contained in the application materials submitted to the ODPHP/HHS.

This program is also subject to the requirements of Executive Order 12372 that allows States the option of setting up a system for reviewing applications from within their States for assistance under certain Federal programs. The application kit to be made available under this notice will contain a listing of States that have chosen to set up a review system and will include a State Single Point of Contact (SPOC) in the State for review. Applicants (other than federally recognized Indian tribes) should contact their SPOCs as early as possible to alert them to the prospective applications and receive any necessary instructions on the State process. For proposed projects serving more than one State, the applicant is advised to contact the SPOC in each affected State. A complete list of SPOCs may be found at the following Web site: [www.whitehouse.gov/omb/grants/spoc.html](http://www.whitehouse.gov/omb/grants/spoc.html). The due date for State process recommendations is 60 days after the application deadline. The ODPHP/HHS does not guarantee that it will accommodate or explain its responses to State process recommendations received after that date. (See "Intergovernmental Review of Federal Programs," Executive Order 12372, and 45 CFR Part 100 for a description of the review process and requirements.)

#### 5. Funding Restrictions

Funds may not be used for construction, building alterations, equipment purchase, medical treatment, renovations, or to purchase food. Allowability, allocability, reasonableness, and necessity of direct and indirect costs that may be charged are outlined in the following documents: OMB-21 (Institutes of Higher Education); OMB Circular A-122 (Nonprofit Organizations) and 45 CFR part 74, Appendix E (Hospitals). Copies of these circulars can be found on the Internet at: <http://www.whitehouse.gov/omb>.

## V. Application Review Information

### 1. Criteria

Applications will be screened by ODPHP staff for completeness and for responsiveness to the program guidance. The Applicant should pay strict attention addressing these criteria, as they are the basis upon which applications will be judged. Those applications judged to be non-responsive or incomplete will be returned to the applicant without review.

Applications that are complete and responsive to the guidance will be evaluated for scientific and technical merit by an appropriate peer review group specifically convened for this solicitation and in accordance with HHS policies and procedures. As part of the initial merit review, all applications will receive a written critique. All applications recommended for approval will be discussed fully by the ad hoc peer review group and assigned a priority score for funding. Eligible applications will be assessed according to the following criteria:

#### (1) Technical Approach (45 Points)

- The applicant's presentation of a sound and practical technical approach for executing the requirements with adequate explanation, substantiation and justification for methods for handling the project.
- The successful applicant must demonstrate a clear understanding of the scope and objectives of the cooperative agreement, recognition of potential difficulties that may arise in performing the work required, presentation of adequate solutions, and understanding of the close coordination necessary between the essential parties in Arkansas, including the health department, payors, schools, practitioners, families, and students.

#### (2) Experience and Capabilities of the Organization (45 Points)

- The Applicant should submit documented relevant experience of the organization in managing projects of similar complexity and scope of the activities.
- Clarity and appropriateness of lines of communication and authority for coordination and management of the project. Adequacy and feasibility of plans to ensure successful coordination of a multiple-partner collaboration.

#### (3) Facilities and Resources (10 Points)

- Documented availability and adequacy of facilities, equipment and resources necessary to carry out the activities.

### 2. Review and Selection Process

Applications will be reviewed in competition with other submitted applications, by a panel of peer reviewers. Each of the above criteria will be addressed and considered by the reviewers in assigning the overall score. Final award will be made by September 15, 2006, on the basis of score, program relevance and, availability of funds.

## VI. Award Administration Information

### 1. Award Notices

ODPHP/HHS does not release information about individual applications during the review process until final funding decisions have been made. When these decisions have been made, the applicant will be notified by letter regarding the outcome of their applications. The official document notifying an applicant that an application has been approved and funded is the Notice of Grant Award signed by the Grants Management Officer, which specifies to the awardee the amount of money awarded, the purpose of the agreement, the terms and conditions of the agreement, and the amount of funding, if any, to be contributed by the awardee to the project costs.

### 2. Administrative and National Policy Requirements

The regulations set out at 45 CFR parts 74 and 92 are the Department of Health and Human Services (HHS) rules and requirements that govern the administration of grants. Part 74 is applicable to all recipients except those covered by part 92, which governs awards to State and local governments. The applicant funded under this announcement must be aware of and comply with these regulations. The CFR volume that includes parts 74 and 92 may be downloaded from: [http://www.access.gpo.gov/nara/cfr/waisidx\\_05/45cfrv1\\_05.html](http://www.access.gpo.gov/nara/cfr/waisidx_05/45cfrv1_05.html).

The HHS Appropriations Act requires that when issuing statements, press releases, requests for proposals, bid solicitation, and other documents describing projects or programs funded in whole or in part with Federal money, grantees shall clearly state the percentage and dollar amount of the total cost of the program or project which will be financed with Federal money and the percentage and dollar amount of the total costs of the project or program that will be financed by non-governmental sources.

### 3. Reporting

All projects are required to have an evaluation plan, consistent with the

scope of the proposed project and funding level that conforms to the project's stated goals and objectives. The evaluation plan should include both a process evaluation to track the implementation of project activities and an outcome evaluation to measure changes in knowledge and skills that can be attributed to the project. Project funds may be used to support evaluation activities. In addition to conducting their own evaluation of projects, the successful applicant must be prepared to participate in an external evaluation, to be supported by ODPHP/HHS and conducted by an independent entity, to assess efficiency and effectiveness for the project funded under this announcement.

Within 30 days following the end of each of quarter, a performance report no more than ten pages in length must be submitted to ODPHP/HHS. A sample monthly performance report will be provided at the time of notification of award. At a minimum, monthly performance reports should include:

- Concise summary of the most significant achievements and problems encountered during the reporting period, e.g. number of training courses held and number of trainees.
- A comparison of work progress with objectives established for the quarter using the grantee's implementation schedule, and where such objectives were not met, a statement of why they were not met.
- Specific action(s) that the grantee would like the ODPHP/HHS to undertake to alleviate a problem.
- Other pertinent information that will permit monitoring and overview of project operations.
- A quarterly financial report describing the current financial status of the funds used under this award. The awardee and ODPHP will agree at the time of award for the format of this portion of the report.

Within 90 days following the end of the project period a final report containing information and data of interest to HHS must be submitted to ODPHP/HHS. The specifics as to the format and content of the final report and the summary will be sent to the successful applicant. At minimum, the report should contain:

- A summary of the major activities supported under the agreement and the major accomplishments resulting from activities with the potential for improving the health of children in Arkansas and its potential for generalizability to other States and communities.
- An analysis of the project based on the problem(s) described in the

application and needs assessments, performed prior to or during the project period, including a description of the specific objectives stated in the grant application and the accomplishments and failures resulting from activities during the grant period.

*Quarterly performance reports and the final report may be submitted to:* Office of Disease Prevention and Health Promotion, Office of Public Health and Science, Office of the Secretary Department of Health and Human Services, 1101 Wootton Parkway, Suite LL100, Rockville, Maryland 20852.

A Financial Status Report (FSR) SF-269 is due 90 days after the close of each 12-month budget period and submitted to the OPHS-Office of Grants Management.

#### VII. Agency Contacts

*For programmatic requirements, please contact:* Woodie Kessel, MD, MPH; Cecilia Penn, MD, MPH; Kathryn McMurry, MS, Office of Disease Prevention and Health Promotion, Department of Health and Human Services, 1101 Wootton Parkway, Suite LL100, Rockville, Maryland 20852, telephone: (240) 453-8256.

*For administrative requirements, please contact:* Office of Grants Management, Office of Public Health and Science, Department of Health and Human Services, 1101 Wootton Parkway, Suite 550, Rockville, Maryland 20852, telephone: (240) 453-8822.

#### VIII. Tips for Writing a Strong Application

*Include DUNS Number.* You must include a DUNS Number to have your application reviewed. To obtain a DUNS number, access [www.dunandbradstreet.com](http://www.dunandbradstreet.com) or call 1-866-705-5711. Please include the DUNS number next to the OMB Approval Number on the application face page.

*Keep your audience in mind.* Reviewers will use only the information contained in the application to assess the application. Be sure the application and responses to the program requirements and expectations are complete and clearly written. Do not assume that reviewers are familiar with the applicant organization. Keep the review criteria in mind when writing the application.

*Start preparing the application early.* Allow plenty of time to gather required information from various sources.

*Follow the instructions in this guidance carefully.* Place all information in the order requested in the guidance. If the information is not placed in the

requested order, you may receive a lower score.

*Be brief, concise, and clear.* Make your points understandable. Provide accurate and honest information, including candid accounts of problems and realistic plans to address them. If any required information or data is omitted, explain why. Make sure the information provided in each table, chart, attachment, etc., is consistent with the proposal narrative and information in other tables.

*Be organized and logical.* Many applications fail to receive a high score because the reviewers cannot follow the thought process of the applicant or because parts of the application do not fit together.

*Be careful in the use of appendices.* Do not use the appendices for information that is required in the body of the application. Be sure to cross-reference all tables and attachments located in the appendices to the appropriate text in the application.

*Carefully proofread the application.* Misspellings and grammatical errors will impede reviewers in understanding the application. Be sure pages are numbered (including appendices) and that page limits are followed. Limit the use of abbreviations and acronyms, and define each one at its first use and periodically throughout application.

Dated: July 31, 2006.

#### Woodie Kessel,

*Deputy Director for Medicine and Health Science, Office of Disease Prevention and Health Promotion.*

[FR Doc. E6-12819 Filed 8-7-06; 8:45 am]

BILLING CODE 4150-32-P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Office of the Secretary

#### Findings of Misconduct in Science

**AGENCY:** Office of the Secretary, HHS.

**ACTION:** Notice.

**SUMMARY:** Notice is hereby given that the Office of Research Integrity (ORI) and the Assistant Secretary for Health have taken final action in the following case:

*Ms. Sylvia Okoro, University of Maryland at Baltimore:* Based on the University of Maryland at Baltimore (UMAB) investigation committee report and additional analysis and information obtained by ORI during its oversight review, the U.S. Public Health Service (PHS) found that Ms. Okoro, former Research Assistant, UMAB, engaged in misconduct in science by fabricating

and falsifying patient data in research supported by National Institute on Aging (NIA), National Institutes of Health (NIH), grant R01 AG18461.

Specifically, Ms. Okoro intentionally and knowingly fabricated and falsified data for six visit dates on one patient data form and falsified and fabricated patient condition information on two additional study subjects by failing to note that each patient had experienced a fall as documented in their medical charts.

ORI has implemented the following administrative actions for a period of three (3) years, beginning July 17, 2006:

(1) Ms. Okoro is prohibited from serving in any advisory capacity to PHS, including but not limited to service on any PHS advisory committee, board, and/or peer review committee, or as a consultant; and

(2) Any institution that submits an application for PHS support for a research project on which Ms. Okoro's participation is proposed or which uses her services in any capacity on PHS supported research must concurrently submit a plan for supervision of her duties. The supervisory plan must be designed to ensure the scientific integrity of Ms. Okoro's research contribution and must be submitted to ORI by the institution.

**FOR FURTHER INFORMATION CONTACT:**

Director, Division of Investigative Oversight, Office of Research Integrity, 1101 Wootton Parkway, Suite 750, Rockville, MD 20852, (240) 453-8800.

**Chris B. Pascal, J.D.,**

*Director, Office of Research Integrity.*

[FR Doc. E6-12857 Filed 8-7-06; 8:45 am]

BILLING CODE 4150-31-P

**DEPARTMENT OF HEALTH AND HUMAN SERVICES**

**Food and Drug Administration**

**Science Advisory Board to the National Center for Toxicological Research; Notice of Meeting**

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice.

This notice announces a forthcoming meeting of a public advisory committee of the Food and Drug Administration (FDA). At least one portion of the meeting will be closed to the public.

*Name of Committee:* Science Advisory Board (SAB) to the National Center for Toxicological Research (NCTR).

*General Function of the Committee:* The Board advises the Director, NCTR,

in establishing, implementing, and evaluating the research programs that assist the Commissioner of Food and Drugs in fulfilling his regulatory responsibilities. The Board provides an extra-agency review in ensuring that the research programs at NCTR are scientifically sound and pertinent.

*Date and Time:* The meeting will be held on August 29, 2006 from 8:30 a.m. to 4:30 p.m. and on August 30, 2006, from 8 a.m. to 12 noon.

*Location:* August 29, 2006: NCTR SAB Conference Room B-12, 3900 NCTR Dr., Jefferson, AR 72079. August 30, 2006: University of Arkansas for Medical Sciences, Stephens Spine Center, Hamlin Board Room, 501 Jack Stephens Dr., Little Rock, AR 72205.

*Contact Person:* Leonard Schechtman, Executive Secretary, National Center for Toxicological Research, Food and Drug Administration, 5600 Fishers Lane, rm. 16-85, Rockville, MD 20857, 301-827-6696, or FDA Advisory Committee Information Line, 1-800-741-8138 (301-443-0572 in the Washington, DC area), code 3014512559. Please call the Information Line for up-to-date information on this meeting.

*Agenda:* On August 29, 2006, the SAB will hear presentations from the NCTR Divisions that will update them on ongoing research activities. The SAB will be presented with a response to the evaluation of the Division of Neurotoxicology. The evaluation was the product of a site visit team that conducted an on-site review of the Division in January 2004. The response will address the issues raised and recommendations made by the site visit team. On August 30, 2006, the NCTR Director will provide a Center-wide update on scientific endeavors and will discuss the NCTR realignment and strategic focus.

*Procedure:* On August 29, 2006, from 8:30 a.m. to 4:30 p.m., and August 30, 2006, from 8 a.m. to 10:30 a.m., the meeting is open to the public. Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Written submissions may be made to the contact person on or before August 14, 2006. Oral presentations from the public will be scheduled on August 29, 2006, between approximately 12:30 p.m. to 1:30 p.m. Time allotted for each presentation may be limited. Those desiring to make formal oral presentations should likewise notify the contact person and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time

requested to make their presentation on or before August 14, 2006.

*Closed Committee Deliberations:* On August 29, 2006, from approximately 11 a.m. to 12:30 p.m., the meeting will be closed to permit discussion where disclosure would constitute a clearly unwarranted invasion of personal privacy (5 U.S.C. 552b(c)(6)). This portion of the meeting will be closed to permit discussion of information concerning individuals associated with the research programs at NCTR.

Persons attending FDA's advisory committee meetings are advised that the agency is not responsible for providing access to electrical outlets.

FDA welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact the office of the Executive Secretary at least 7 days in advance of the meeting.

Notice of this meeting is given under the Federal Advisory Committee Act (5 U.S.C. app. 2).

Dated: August 2, 2006.

**Jeffrey Shuren,**

*Assistant Commissioner for Policy.*

[FR Doc. E6-12863 Filed 8-7-06; 8:45 am]

BILLING CODE 4160-01-S

**DEPARTMENT OF HEALTH AND HUMAN SERVICES**

**Food and Drug Administration**

[Docket No. 1992S-0251] (formerly 92S-0251)

**Food and Drug Administration Electronic Submissions Gateway**

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA) is announcing the availability of the FDA Electronic Submissions Gateway (ESG) for the receipt and processing of electronic submissions provided so that the Center for Biologics Evaluation and Research (CBER), the Center for Drug Evaluation and Research (CDER), and the Center for Devices and Radiological Health (CDRH) can receive regulatory submissions electronically. The FDA ESG enables applicants to send applications and other submissions for review using the Internet, provides a single point of entry for these submissions, and fulfills goals identified in the Prescription Drug User Fee Act (PDUFA III).

**FOR FURTHER INFORMATION CONTACT:**

Michael B. Fauntleroy, CBER (HFM-25), Food and Drug Administration, 11400 Rockville Pike, RKWL rm. 4119, Rockville, MD 20857, 301-827-5132, e-mail: [michael.fauntleroy@fda.hhs.gov](mailto:michael.fauntleroy@fda.hhs.gov) or William H. Taylor, Office of the Commissioner (HFA-83), Food and Drug Administration, 5600 Fishers Lane, rm. 16B-45, Rockville, MD 20857, 301-255-6734, e-mail: [william.taylor@fda.hhs.gov](mailto:william.taylor@fda.hhs.gov).

**SUPPLEMENTARY INFORMATION:**

FDA receives a variety of electronic submissions under 21 CFR 11.2(b), including biological license applications (BLAs), new drug applications (NDAs), drug master files (DMFs), investigational new drug applications (INDs), and investigational device exemptions (IDEs), as well as their associated correspondence and other types of regulatory submissions. The FDA ESG supports the receipt and processing of electronic submissions through the use of a single point of entry.

The increasing number of electronic submissions highlights a critical need to automate and standardize the receipt of these submissions and their delivery to the appropriate centers. The FDA ESG automates the receipt, acknowledgment (to the applicant/sponsor), routing, and notification (to a receiving center) of electronic submissions via the Internet and meets the standards for the electronic exchange of information adopted by the American National Standards Institute (ANSI) and the National Institute of Standards and Technology (NIST).

The FDA ESG offers two secure communication options for applicants that have established gateway systems. One utilizes simple mail transfer protocol (SMTP) with secure multi-purpose internet mail extensions (S/MIME) to provide secure e-mail communication and the other supports faster information exchange and utilizes hypertext transfer protocol secure (HTTPS) to provide real-time Internet communication. The FDA ESG also offers a secure WebTrader submission option for applicants who do not have gateway systems. The WebTrader is a no-cost applet which can be downloaded from FDA and requires only a standard security certificate to provide the applicants with a secure Internet connection to FDA. The WebTrader addresses the need to expand participation in electronic submissions without costly expenditures for infrastructure upgrades and gateway systems.

Use of the FDA ESG is voluntary. Electronic format submissions may be

made through the gateway or may continue to be made on physical media. Information on the FDA ESG is available on the following Web site: <http://www.fda.gov/esg/>. Except where FDA has promulgated regulations requiring submission in electronic format, applicants/sponsors may also continue to make regulatory submissions on paper.

If you wish to use the FDA ESG, you should send an e-mail to [esgprep@fda.gov](mailto:esgprep@fda.gov) to begin the registration process. Include your name, phone number, and the name of the company you represent. Please state whether you are using the WebTrader, SMTP, or HTTPS for submissions.

Dated: July 31, 2006.

**Jeffrey Shuren,**

*Assistant Commissioner for Policy.*

[FR Doc. E6-12808 Filed 8-7-06; 8:45 am]

**BILLING CODE 4160-01-S**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

[Docket No. 2006D-0296]

#### **International Conference on Harmonisation; Draft Guidance on Q4B Regulatory Acceptance of Analytical Procedures and/or Acceptance Criteria; Annex on Residue on Ignition/Sulphated Ash General Chapter; Availability**

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA) is announcing the availability of a draft guidance entitled "Q4B Regulatory Acceptance of Analytical Procedures and/or Acceptance Criteria; Annex 1: Residue on Ignition/Sulphated Ash General." The draft guidance was prepared under the auspices of the International Conference on Harmonisation of Technical Requirements for Registration of Pharmaceuticals for Human Use (ICH). The draft guidance provides the outcome of the ICH Q4B evaluation of the Residue on Ignition/Sulphated Ash General Chapter harmonized text from each of the three pharmacopoeias (United States, European, and Japanese) represented by the Pharmacopoeial Discussion Group (PDG). The draft guidance conveys acceptance of the three pharmacopoeial methods by the three ICH regulatory regions and provides specific information regarding the acceptance. The draft guidance is

intended to recognize the interchangeability between the local regional pharmacopoeias, thus avoiding redundant testing and different acceptance criteria in favor of a common testing strategy in each regulatory region. Elsewhere in this issue of the *Federal Register*, FDA is announcing the availability of a draft guidance entitled "Q4B Regulatory Acceptance of Analytical Procedures and/or Acceptance Criteria."

**DATES:** Submit written or electronic comments on the draft guidance by October 10, 2006.

**ADDRESSES:** Submit written requests for single copies of the draft guidance to the Division of Drug Information (HFD-240), Center for Drug Evaluation and Research, Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857; or the Office of Communication, Training and Manufacturers Assistance (HFM-40), Center for Biologics Evaluation and Research (CBER), Food and Drug Administration, 1401 Rockville Pike, Rockville, MD 20852-1448. The guidance may also be obtained by mail by calling CBER at 1-800-835-4709 or 301-827-1800. Send two self-addressed adhesive labels to assist the office in processing your requests. Submit written comments on the 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>. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the draft guidance document.

**FOR FURTHER INFORMATION CONTACT:**

*Regarding the guidance:* Robert H. King, Sr., Center for Drug Evaluation and Research (HFD-003), Food and Drug Administration, 10993 New Hampshire Ave., Bldg. 21, rm. 3542, Silver Spring, MD 20993-0002, 301-796-1242; or

Christopher Joneckis, Center for Biologics Evaluation and Research (HFM-20), Food and Drug Administration, 1401 Rockville Pike, Rockville, MD 20852, 301-435-5681.

*Regarding the ICH:* Michelle Limoli, Office of International Programs (HFG-1), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301-827-4480.

**SUPPLEMENTARY INFORMATION:**

## I. Background

In recent years, many important initiatives have been undertaken by regulatory authorities and industry associations to promote international harmonization of regulatory requirements. FDA has participated in many meetings designed to enhance harmonization and is committed to seeking scientifically based harmonized technical procedures for pharmaceutical development. One of the goals of harmonization is to identify and then reduce differences in technical requirements for drug development among regulatory agencies.

ICH was organized to provide an opportunity for tripartite harmonization initiatives to be developed with input from both regulatory and industry representatives. FDA also seeks input from consumer representatives and others. ICH is concerned with harmonization of technical requirements for the registration of pharmaceutical products among three regions: The European Union, Japan, and the United States. The six ICH sponsors are the European Commission, the European Federation of Pharmaceutical Industries Associations, the Japanese Ministry of Health, Labour, and Welfare, the Japanese Pharmaceutical Manufacturers Association, the Centers for Drug Evaluation and Research and Biologics Evaluation and Research, FDA, and the Pharmaceutical Research and Manufacturers of America. The ICH Secretariat, which coordinates the preparation of documentation, is provided by the International Federation of Pharmaceutical Manufacturers Associations (IFPMA).

The ICH Steering Committee includes representatives from each of the ICH sponsors and the IFPMA, as well as observers from the World Health Organization, Health Canada, and the European Free Trade Area.

In June 2006, the ICH Steering Committee agreed that a draft guidance entitled "Q4B Regulatory Acceptance of Analytical Procedures and/or Acceptance Criteria; Annex 1: Residue on Ignition/Sulfated Ash General Chapter" should be made available for public comment. The draft guidance is the product of the Q4B Quality Expert Working Group of the ICH. Comments about this draft will be considered by FDA and the Q4B Quality Expert Working Group.

The draft guidance provides the specific evaluation outcome from the ICH Q4B process for the Residue on Ignition/Sulphated Ash General Chapter harmonization proposal originating

from the three-party PDG. This draft guidance is in the form of an annex to the core ICH Q4B guidance. Once finalized, the annex will provide guidance to assist industry and regulators in the implementation of the specific topic evaluated by the ICH Q4B process.

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 this topic. 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 statutes and regulations.

## II. Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) written or electronic comments on the draft guidance. Submit a single copy of electronic comments or two paper copies of any mailed comments, except that individuals may submit one paper copy. Comments are to be identified with the docket number found in brackets in the heading of this document. The draft guidance and received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

## III. Electronic Access

Persons with access to the Internet may obtain the document at <http://www.fda.gov/ohrms/dockets/default.htm>, <http://www.fda.gov/cder/guidance/index.htm>, or <http://www.fda.gov/cber/publications.htm>.

Dated: July 31, 2006.

**Jeffrey Shuren,**

*Assistant Commissioner for Policy.*

[FR Doc. E6-12806 Filed 8-7-06; 8:45 am]

**BILLING CODE 4160-01-S**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

[Docket No. 2006D-0297]

#### **International Conference on Harmonisation; Draft Guidance on Q4B Regulatory Acceptance of Analytical Procedures and/or Acceptance Criteria; Availability**

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA) is announcing the availability of a draft guidance entitled "Q4B Regulatory Acceptance of Analytical Procedures and/or Acceptance Criteria." The draft guidance was prepared under the auspices of the International Conference on Harmonisation of Technical Requirements for Registration of Pharmaceuticals for Human Use (ICH). The draft guidance describes a procedure to facilitate acceptance by regulatory authorities of pharmacopoeial test methods (referred to in the draft guidance as analytical procedures and/or acceptance criteria (APAC)) for use in the three ICH regions. The draft guidance is intended to facilitate regulatory acceptance of these proposed test methods and their interchangeability with test methods contained in the local regional pharmacopoeias, thus avoiding redundant testing and different acceptance criteria in favor of a common testing strategy in each ICH regulatory region. Elsewhere in this issue of the **Federal Register**, FDA is announcing the availability of a draft guidance entitled "Q4B Regulatory Acceptance of Analytical Procedures and/or Acceptance Criteria; Annex 1: Residue on Ignition/Sulphated Ash General."

**DATES:** Submit written or electronic comments on the draft guidance by October 10, 2006.

**ADDRESSES:** Submit written comments on the 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>. Submit written requests for single copies of the draft guidance to the Division of Drug Information (HFD-240), Center for Drug Evaluation and Research, Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857; or the Office of Communication, Training and Manufacturers Assistance (HFM-40), Center for Biologics Evaluation and Research (CBER), Food and Drug Administration, 1401 Rockville Pike, Rockville, MD 20852-1448. The guidance may also be obtained by mail by calling CBER at 1-800-835-4709 or 301-827-1800. Send two self-addressed adhesive labels to assist the office in processing your requests. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the draft guidance document.

**FOR FURTHER INFORMATION CONTACT:**  
*Regarding the guidance:* Robert H. King, Sr., Center for Drug

Evaluation and Research (HFD-003), Food and Drug Administration, 10993 New Hampshire Ave., Bldg. 21, rm. 3542, Silver Spring, MD 20993-0002, 301-796-1242; or

Christopher Joneckis, Center for Biologics Evaluation and Research (HFM-20), Food and Drug Administration, 1401 Rockville Pike, Rockville, MD 20852, 301-435-5681.

*Regarding the ICH:* Michelle Limoli, Office of International Programs (HFG-1), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301-827-4480.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

In recent years, many important initiatives have been undertaken by regulatory authorities and industry associations to promote international harmonization of regulatory requirements. FDA has participated in many meetings designed to enhance harmonization and is committed to seeking scientifically based harmonized technical procedures for pharmaceutical development. One of the goals of harmonization is to identify and then reduce differences in technical requirements for drug development among regulatory agencies.

ICH was organized to provide an opportunity for tripartite harmonization initiatives to be developed with input from both regulatory and industry representatives. FDA also seeks input from consumer representatives and others. ICH is concerned with harmonization of technical requirements for the registration of pharmaceutical products among three regions: The European Union, Japan, and the United States. The six ICH sponsors are the European Commission; the European Federation of Pharmaceutical Industries Associations; the Japanese Ministry of Health, Labour, and Welfare; the Japanese Pharmaceutical Manufacturers Association; the Centers for Drug Evaluation and Research and Biologics Evaluation and Research; FDA; and the Pharmaceutical Research and Manufacturers of America. The ICH Secretariat, which coordinates the preparation of documentation, is provided by the International Federation of Pharmaceutical Manufacturers Associations (IFPMA).

The ICH Steering Committee includes representatives from each of the ICH sponsors and the IFPMA, as well as observers from the World Health

Organization, Health Canada, and the European Free Trade Area.

In June 2006, the ICH Steering Committee agreed that a draft guidance entitled "Q4B Regulatory Acceptance of Analytical Procedures and/or Acceptance Criteria" should be made available for public comment. The draft guidance is the product of the Q4B Quality Expert Working Group of the ICH. Comments about this draft will be considered by FDA and the Q4B Quality Expert Working Group.

The draft guidance provides information on a Q4B process for evaluating harmonization proposals for specific APAC topics originating principally from the three-party Pharmacopoeial Discussion Group (PDG). The PDG consists of representatives from the European Directorate for the Quality of Medicines in the Council of Europe; the Japanese Ministry of Health, Labour and Welfare, and the United States Pharmacopoeial Convention, Inc. Once finalized, the Q4B guidance will describe the process for formally conveying the evaluation outcomes as topic-specific annexes to the core Q4B guidance. Each annex will be issued separately following the ICH step process, providing guidance to assist industry and regulators in the implementation of the specific topic evaluated by the ICH Q4B process.

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 this topic. 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 statutes and regulations.

##### II. Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) written or electronic comments on the draft guidance. Submit a single copy of electronic comments or two paper copies of any mailed comments, except that individuals may submit one paper copy. Comments are to be identified with the docket number found in brackets in the heading of this document. The draft guidance and received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

##### III. Electronic Access

Persons with access to the Internet may obtain the document at <http://www.fda.gov/ohrms/dockets/>

[default.htm](http://www.fda.gov/cder/guidance/index.htm), <http://www.fda.gov/cder/guidance/index.htm>, or <http://www.fda.gov/cber/publications.htm>.

Dated: July 31, 2006.

**Jeffrey Shuren,**

*Assistant Commissioner for Policy.*

[FR Doc. E6-12807 Filed 8-7-06; 8:45 am]

BILLING CODE 4160-01-S

## DEPARTMENT OF HOMELAND SECURITY

### Coast Guard

[USCG-2006-25528]

### Chemical Transportation Advisory Committee

**AGENCY:** Coast Guard, DHS.

**ACTION:** Notice of meeting.

**SUMMARY:** The Chemical Transportation Advisory Committee (CTAC), its Subcommittee on Hazardous Cargo Transportation Security (HCTS), as well as its Working Groups on MARPOL Annex II, Barge Hazard Communication and Vapor Control Systems (VCS) will meet to discuss various issues relating to the marine transportation of hazardous materials in bulk. These meetings will be open to the public.

**DATES:** The Working Group on MARPOL Annex II will meet on Tuesday, August 22, 2006, from 8:30 a.m. to 12 p.m. and the HCTS Subcommittee will meet on Tuesday, August 22, 2006 from 12:30 p.m. to 5 p.m. The Working Group on VCS will meet on Wednesday, August 23, 2006 from 8:30 a.m. to 12 p.m. and the Working Group on Barge Hazard Communication will meet on Wednesday, August 23, 2006, from 12:30 p.m. to 5 p.m. CTAC will meet on Thursday, August 24, 2006, from 9 a.m. to 3:30 p.m. These meetings may close early if all business is finished. Written material and requests to make oral presentations should reach the Coast Guard on or before August 18, 2006. Requests to have a copy of your material distributed to each member of the Committee should reach the Coast Guard on or before August 18, 2006.

**ADDRESSES:** The HCTS Subcommittee and the Working Groups on MARPOL Annex II, VCS, and Barge Hazard Communication will be held at American Commercial Barge Lines LLC, 1701 East Market Street, Jeffersonville, IN 47130. The CTAC meeting will be held at The Ramada Inn Jeffersonville, 700 W. Riverside Drive, Jeffersonville, IN 47130. Send written material and requests to make oral presentations to Commander Richard Raksnis, Executive Director of CTAC, Commandant (G-

PSO-3), U.S. Coast Guard Headquarters, 2100 Second Street S.W., Washington, DC 20593-0001 or e-mail: [CTAC@comdt.uscg.mil](mailto:CTAC@comdt.uscg.mil). This notice is available on the Internet at <http://dms.dot.gov>.

**FOR FURTHER INFORMATION CONTACT:** Commander Richard Raksnis, Executive Director of CTAC, or Ms. Sara Ju, Assistant to the Executive Director, telephone (202) 372-1425, fax (202) 372-1926.

**SUPPLEMENTARY INFORMATION:** Notice of these meetings is given under the Federal Advisory Committee Act, 5 U.S.C. App. 2.

**Agenda of Working Group on MARPOL Annex II Meeting on Tuesday, August 22, 2006**

(1) Introduce Working Group members and attendees.

(2) Finalize guidance document for the U.S. implementation of revisions to MARPOL Annex II and the International Code for the Construction and Equipment of Ships Carrying Dangerous Chemicals in Bulk (IBC Code).

**Agenda of HCTS Subcommittee Meeting on Tuesday, August 22, 2006**

(1) Introduce Subcommittee members and attendees.

(2) Finalize document on recommendations to change definition of certain dangerous cargo (CDC) residues.

(3) Continue Notice of Arrival regulation discussions.

**Agenda of Working Group on VCS Meeting on Wednesday, August 23, 2006**

(1) Introduce Working Group members and attendees.

(2) Develop recommendations for revising the Coast Guard VCS regulations on vapor balancing operations during cargo unloading.

**Agenda of Working Group on Barge Hazard Communication Meeting on Wednesday, August 23, 2006**

(1) Introduce Working Group members and attendees.

(2) Continue discussion on assisting first responders to identify cargoes on inland barges.

(3) Develop guidance document to implement emergency phone numbers on inland barges.

**Agenda of CTAC Meeting on Thursday, August 24, 2006**

(1) Introduce Committee members and attendees.

(2) Status report presentation from the CTAC HCTS Subcommittee to include discussion and vote on

recommendations to the Coast Guard to change the definition of certain dangerous cargo (CDC) residues.

(3) Status report presentation from the CTAC Outreach Subcommittee.

(4) Status report presentation from the CTAC MARPOL Annex II Working Group to include discussion and vote on guidance document to be submitted to the Coast Guard on proposed implementation of revisions to MARPOL Annex II and the IBC Code in the U.S.

(5) Status report presentation from the CTAC Barge Emission and Barge Hazard Communication Working Group.

(6) Status report presentation from the VCS Working Group to include discussion and vote on recommendations to the Coast Guard for revising the Coast Guard VCS regulations on vapor balancing operations while unloading cargo.

(7) Update on Coast Guard regulatory projects.

**Procedural**

These meetings are open to the public. Please note that the meetings may close early if all business is finished. At the discretion of the Chair, members of the public may make oral presentations during the meetings generally limited to 5 minutes. If you would like to make an oral presentation at a meeting, please notify the Executive Director and submit written material on or before August 18, 2006. If you would like a copy of your material distributed to each member of the Committee in advance of a meeting, please submit 25 copies to the Executive Director (see **ADDRESSES**) no later than August 18, 2006.

**Information on Services for Individuals With Disabilities**

For information on facilities or services for individuals with disabilities, or to request special assistance at the meeting, telephone the Executive Director as soon as possible.

Dated: August 2, 2006.

**J.G. Lantz,**

*Director of National and International Standards, Assistant Commandant for Prevention.*

[FR Doc. E6-12791 Filed 8-7-06; 8:45 am]

**BILLING CODE 4910-15-P**

**DEPARTMENT OF HOMELAND SECURITY**

**Bureau of Customs and Border Protection**

**Updated List of the Ports-of-Entry Designated for Departure of Nonimmigrant Aliens Who Are Subject to Special Registration**

**AGENCY:** Bureau of Customs and Border Protection, Department of Homeland Security.

**ACTION:** Notice.

**SUMMARY:** This notice provides the public with an updated list of ports through which nonimmigrant aliens who have been specially registered may depart from the United States. Special registration is required of nonimmigrant aliens whose presence in the United States requires closer monitoring.

**EFFECTIVE DATE:** This Notice is effective August 18, 2006.

**FOR FURTHER INFORMATION CONTACT:** Sophie Galvan, Program Manager, Traveler Security and Facilitation Division, Office of Field Operations, Bureau of Customs and Border Protection, 1300 Pennsylvania Avenue, NW., Room 5.4.D, Washington DC 20229.

**SUPPLEMENTARY INFORMATION:**

**Nonimmigrant Aliens Subject To Special Registration Requirements**

On August 12, 2002, the Attorney General published a final rule in the **Federal Register** at 67 FR 52584 to revise the special registration requirements for nonimmigrant aliens whose presence in the United States requires closer monitoring. The final rule requires that when a nonimmigrant alien subject to special registration departs from the United States, that immigrant must report to an Immigration and Naturalization Service (INS) inspecting officer at any port-of-entry (POE), unless INS has, by publication in the **Federal Register**, specified that POE as a port from which nonimmigrant aliens subject to special registration may not depart. This rule became effective on October 1, 2002.

On September 30, 2002, the INS published a notice in the **Federal Register** at 67 FR 61352 listing POEs through which nonimmigrant aliens who have been specially registered may depart from the United States. The notice set forth an affirmative list of POEs that could be used by specially registered nonimmigrant aliens rather than specifying ports that could not be used.

On February 19, 2003, the INS published a notice in the **Federal Register** at 68 FR 8047 expanding the list of POEs through which nonimmigrant aliens who have been specially registered may depart from the United States. On February 26, 2003, that notice was corrected by a publication in the **Federal Register** at 68 FR 8967.

As a result of the creation of the Department of Homeland Security, the Bureau of Customs and Border Protection (CBP) now has jurisdiction over the inspections functions of the former INS.

This notice lists all of the POEs that may be used for departure by special registrants. It expands the previously published list by adding seventeen (17) newly designated POEs; this notice also, however, removes one (1) POE from the previous list.

**Removal of Port-of-Entry Designated for Final Registration and Departure by Nonimmigrant Aliens Subject to Special Registration**

Effective August 18, 2006, the following POE will no longer be authorized to provide final registration and departure by nonimmigrant aliens subject to special registration: Bell Street Pier 66 (Seattle) Cruise Ship Terminal, Washington.

**Additional Ports-Of-Entry Designated For Final Registration And Departure By Nonimmigrant Aliens Subject To Special Registration**

Effective August 18, 2006, the POEs listed below will also be designated as POEs that are authorized to provide final registration and departure by nonimmigrant aliens subject to special registration:

Cincinnati/Northern Kentucky International Airport, Ohio;  
Cyril E. King Airport, United States Virgin Islands;  
Dunseith POE, North Dakota;  
Frontier POE, Washington;  
Jacksonville Seaport, Florida;  
Lukeville, Arizona;  
Mayaguez Seaport, Puerto Rico;  
Melbourne International Airport, Florida;  
Memphis International Airport;  
New Orleans International Airport and Seaport;  
Ponce Seaport, Puerto Rico;  
Rochester International Airport, Minnesota;  
Rochester-Ferry Terminal, New York;  
Savannah International Airport, Georgia;  
Southwest Florida International Airport, Florida;  
St. Petersburg/Clearwater International Airport, Florida; and  
Sumas POE, Washington.

**Ports-of-Entry Which Are Not Authorized for the Departure of Nonimmigrant Aliens Subject to Special Registration**

Nonimmigrant aliens who are subject to special registration may not depart the United States from any POE, or from any other point-of-embarkation, other than those listed below.

**Ports-of-Entry Designated for Final Registration and Departure by Nonimmigrant Aliens Subject to Special Registration: Updated List**

The below list of POEs includes the 17 POEs added by this notice, which will not be authorized to provide final registration and departure until August 18, 2006. Bell Street Pier 66 (Seattle) Cruise Ship Terminal, Washington (not listed below) is authorized to provide final registration and departure only until August 18, 2006.

Nonimmigrant aliens subject to special registration may be examined by CBP and may depart from the following POEs:

Amistad Dam POE, Texas;  
Alcan POE, Alaska;  
Anchorage International Airport, Alaska;  
Atlanta Hartsfield International Airport, Georgia;  
Baltimore Washington International Airport, Maryland;  
Boeing Field, Seattle, Washington;  
Bridge of the Americas POE, Texas;  
Brownsville/Matamoros POE, Texas;  
Buffalo Peace Bridge POE, New York;  
Cape Vincent POE, New York;  
Calexico POE, California;  
Calais POE, Maine;  
Cape Canaveral Seaport, Florida;  
Chicago Midway Airport, Illinois;  
Chicago O'Hare International Airport, Illinois;  
Champlain POE, New York;  
Charlotte International Airport, North Carolina;  
Chateaugay POE, New York;  
Cincinnati/Northern Kentucky International Airport, Ohio;  
Cleveland International Airport, Ohio;  
Columbus POE, New Mexico;  
Cyril E. King Airport, United States Virgin Islands;  
Dallas/Fort Worth International Airport, Texas;  
Del Rio International Bridge POE, Texas;  
Denver International Airport, Colorado;  
Derby Line POE, Vermont;  
Detroit International (Ambassador) Bridge POE, Michigan;  
Detroit Canada Tunnel, Michigan;  
Detroit Metro Airport, Michigan;  
Douglas POE, Arizona;  
Dunseith POE, North Dakota;  
Eagle Pass POE, Texas;  
Eastport POE, Idaho;  
Fort Covington POE, New York;  
Fort Duncan Bridge POE, Texas;  
Frontier POE, Washington;  
Galveston POE, Texas;

Grand Portage POE, Minnesota;  
Guam International Airport;  
Heart Island POE, New York;  
Hidalgo POE, Texas;  
Highgate Springs POE, Vermont;  
Honolulu International Airport, Hawaii;  
Honolulu Seaport, Hawaii;  
Houlton POE, Maine;  
Houston George Bush Intercontinental Airport, Texas;  
Houston Seaport, Texas;  
International Falls POE, Minnesota;  
Jacksonville Seaport, Florida;  
John F. Kennedy International Airport, New York;  
Ketchikan Seaport, Alaska;  
Kona International Airport and Seaport, Hawaii;  
Gateway to the Americas Bridge POE, Laredo, Texas;  
Las Vegas (McCarran) International Airport, Nevada;  
Lewiston Bridge POE, New York;  
Logan International Airport, Massachusetts;  
Long Beach Seaport, California;  
Los Angeles International Airport, California;  
Lukeville, Arizona;  
Madawaska POE, Maine;  
Mayaguez Seaport, Puerto Rico;  
Melbourne International Airport, Florida;  
Memphis International Airport;  
Miami International Airport, Florida;  
Miami Marine Unit, Florida;  
Minneapolis/St. Paul International Airport, Minnesota;  
Mooers POE, New York;  
New Orleans International Airport and Seaport;  
Niagara Falls, Rainbow Bridge, New York;  
Newark International Airport, New Jersey;  
Nogales POE, Arizona;  
Ogdensburg POE, New York;  
Orlando, Florida;  
Oroville POE, Washington;  
Otay Mesa POE, California;  
Pacific Highway POE, Washington;  
Pembina POE, North Dakota;  
Philadelphia International Airport, Pennsylvania;  
Phoenix (Sky Harbor) International Airport, Arizona;  
Piegan POE, Montana;  
Pittsburgh International Airport, Pennsylvania;  
Point Roberts POE, Washington;  
Ponce Seaport, Puerto Rico;  
Port Everglades Seaport, Florida;  
Port Arthur POE, Texas;  
Port Huron POE, Michigan;  
Portal POE, North Dakota;  
Portland International Airport, Oregon;  
Progreso Bridge POE, Texas;  
Raymond POE, Montana;  
Rochester International Airport, Minnesota;  
Rochester-Ferry Terminal, New York;  
Roosville POE, Montana;  
Rouses Point POE, New York;  
San Antonio International Airport, Texas;  
San Diego (Lindbergh Field) International Airport, California;  
San Diego Seaport, California;  
San Francisco International Airport, California;  
San Juan International Airport and Seaport, Puerto Rico;  
Sanford International Airport, Florida;

Sault Ste. Marie POE, Michigan;  
 Savannah International Airport, Georgia;  
 Seaway International Bridge/Massena POE,  
 New York;  
 Seattle Tacoma International Airport,  
 Washington;  
 Southwest Florida International Airport,  
 Florida;  
 St. Petersburg/Clearwater International  
 Airport, Florida;  
 St. Louis International Airport (Lambert  
 Field), Missouri;  
 St. Thomas Seaport, U.S. Virgin Islands;  
 Sumas POE, Washington;  
 Sweetgrass POE, Montana;  
 Tampa International Airport and Seaport,  
 Florida;  
 Thousand Islands POE, New York;  
 Trout River POE, New York;  
 Washington Dulles International Airport,  
 Virginia; and  
 Ysleta POE, Texas.

### Notice of Where To Report for Final Registration and Departure

The regulations governing the manner in which aliens are registered in the United States are contained in 8 CFR 264.1. Upon registration, whether registered at a POE upon admission to the United States or subsequent to admission, each nonimmigrant alien subject to special registration will be issued an information packet that will list each POE authorized for departure and other instructions on how to comply with 8 CFR 264.1. This packet will also contain specific information regarding hours of operation, directions and contact numbers.

Due to the limited availability of current resources, specifically departure staff and facilities, CBP must limit the POEs authorized for departure registration to effectively capture departure data. As more POEs become available to examine special registrants upon departure, CBP will designate additional POEs by notice in the **Federal Register** and make the list available on the following Web site: <http://www.ice.gov/graphics/specialregistration/WalkawayMaterial.pdf>.

Dated: August 3, 2006.

**Deborah J. Spero,**

*Acting Commissioner, Customs and Border Protection.*

[FR Doc. 06-6774 Filed 8-3-06; 4:17 pm]

**BILLING CODE 9111-14-P**

## DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR-5030-C-31A]

### Notice of HUD's Fiscal Year (FY) 2006 Notice of Funding Availability, Policy Requirements and General Section to SuperNOFA for HUD's Discretionary Grant Programs; Additional Information Regarding Applicant Registration

**AGENCY:** Office of the Secretary, HUD.

**ACTION:** Super Notice of Funding Availability (SuperNOFA) for HUD Discretionary Grant Programs; Additional Information Regarding Applicant Registration.

**SUMMARY:** On January 20, 2006, HUD published its Fiscal Year (FY) 2006, Notice of Funding Availability Policy Requirements and General Section (General Section) to the SuperNOFA for HUD's Discretionary Programs. On March 8, 2006, HUD published its Fiscal Year (FY) 2006, SuperNOFA, for HUD's Discretionary Grant Programs. This notice announces a change made to how the Central Contractor Registry (CCR) will capture and use applicant identification data and extends the due date for the Resident Opportunity and Self-Sufficiency (ROSS) Family-Homeownership NOFA. The change contained in this notice does not affect the application packages on Grants.gov. **DATES:** The application submission dates for the Resident Opportunity and Self-Sufficiency (ROSS) Family-Homeownership has been extended from August 8, 2006 to September 8, 2006.

**FOR FURTHER INFORMATION CONTACT:** Questions regarding the General Section of January 20, 2006, should be directed to the NOFA Information Center between the hours of 10 a.m. and 6:30 p.m. Eastern Time at (800) HUD-8929. Hearing-impaired persons may call 800-HUD-2209. For the programs listed in this notice, please contact the office or individual listed under Section VII of the individual program sections of the SuperNOFA, published on March 8, 2006.

**SUPPLEMENTARY INFORMATION:** On January 20, 2006 (71 FR 3382), HUD published its FY2006 General Section to the SuperNOFA for HUD's Discretionary Programs. Early publication of the General Section was intended to provide prospective applicants with additional time to become familiar with and address those provisions in the General Section that constitute part of almost every application. On March 8, 2006 (71 FR 11712), HUD published its

Notice of HUD's Fiscal Year (FY) 2006, SuperNOFA for HUD's Discretionary Grant Programs. The FY2006 SuperNOFA announced the availability of approximately \$2.2 billion in HUD assistance. This notice published in today's **Federal Register** announces one change that may affect applicants that have not completed their CCR registration. As this change was recently implemented by CCR, HUD is extending the deadline date for the Resident Opportunity and Self-Sufficiency (ROSS) Family-Homeownership NOFA. The due date for this program has been extended 30 days the ROSS Family-Homeownership applications are due on September 8, 2006.

HUD is extending the due date because of a governmentwide policy change that is being implemented by CCR. Effective August 1, 2006, instead of obtaining name and address information directly from the registrant, CCR will obtain the following data fields from Dun and Bradstreet (D&B): Legal Business Name; Doing Business Name (DBA); Physical Address; Postal Code/ZIP+4. Once implemented, CCR registrants will not be able to enter or modify these fields in CCR because they will be pre-populated using D&B Data Universal Numbering System (DUNS) record data. During a new registration or when updating a record, the registrant will have a choice to accept or reject the information provided from D&B.

Under this revised system, if the CCR registrant agrees with the D&B supplied information, the D&B data will be accepted into the CCR registrant record. If the CCR registrant disagrees with the D&B supplied information, the registrant will need to go to the D&B Web site <http://fedgov.dnb.com/webform> to modify the information contained in the D&B record before proceeding with its CCR registration. When D&B confirms the modification has been made, the registrant must then revisit the Web site, [www.ccr.gov](http://www.ccr.gov) and "accept" D&B's changes. Once accepted, the D&B data will be entered into the CCR record. CCR advises that it may take up to two business days for D&B to send the modified data to CCR and that timeframe may be longer in some cases. Registrants may contact D&B Government Helpdesk at: [govt@dnb.com](mailto:govt@dnb.com). For additional information about the CCR policy change, see the "frequently asked questions" at <http://www.ccr.gov/newsdetail.asp?id=55&type=N> or the CCR Assistance Center Web site at <http://www.dlis.dla.mil/cust.asp>.

Applicants with a current registration are not affected. The CCR policy change affects only those applicants that have

not yet registered, have not completed registrations, or applicants updating their registration after July 28, 2006. Applicants that have already submitted their application do not need to resubmit unless they want to revise their application. In such instances, applicants must resubmit the entire application, including any faxes sent using the form HUD-96011 as the cover page to the fax. HUD will review the last application received and validated by Grants.gov by the deadline date and time.

Dated: August 2, 2006.

**Keith Nelson,**

*Assistant Secretary for Administration.*

[FR Doc. 06-6769 Filed 8-3-06; 3:28 pm]

BILLING CODE 4210-67-P

## DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR-4922-N-20]

### Privacy Act of 1974; Notice of Computer Matching Program Between the Department of Housing and Urban Development (HUD) and the Department of Health and Human Services (HHS)—Matching Tenant Data in Assisted Housing Programs

**AGENCY:** Office of the Chief Information Officer, HUD.

**ACTION:** Notice of a computer matching program between HUD and HHS.

**SUMMARY:** Pursuant to the Computer Matching and Privacy Protection Act (CMPPA) of 1988, as amended, HUD is providing notice of a matching program involving comparisons of information provided by applicants or participants in any HUD rental housing assistance program authorized under the statutes cited in the Authority section and independent sources of income information available through the National Directory of New Hires (NDNH) maintained by HHS.

**DATES:** *Effective Date:* Computer matching is expected to begin September 7, 2006 unless comments are received which result in a contrary determination, or 40 days from the date a computer matching agreement is signed, whichever is later.

*Comments Due Date:* September 7, 2006.

**ADDRESSES:** Interested persons are invited to submit comments regarding this notice to the Rules Docket Clerk, Office of General Counsel, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 10276, Washington, DC 20410-0500. Communications should refer to the

above docket number and title. Facsimile (FAX) comments are not acceptable. A copy of each communication submitted will be available for public inspection and copying between 8 a.m. and 5 p.m. weekdays at the above address.

**FOR FURTHER INFORMATION CONTACT:** For Privacy Act: Jeanette Smith, Departmental Privacy Act Officer, Department of Housing and Urban Development, 451 Seventh Street, SW., Room P8001, Washington, DC 20410-3000, telephone number (202) 708-2374. A telecommunications device for hearing- and speech-impaired individuals (TTY) is available at 800-877-8339 (Federal Information Relay Service). For program information: Gail Williamson, Office of Housing, Director of the Housing Assistance Policy Division, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 6138, Washington, DC 20410—telephone number (202) 708-3000 ext. 2473.

**SUPPLEMENTARY INFORMATION:** The matching program will be carried out only to the extent necessary to: (1) verify the employment and income of individuals participating in the above identified programs to correctly determine the amount of their rent and level of rental assistance, and (2) after removal of personal identifiers, to conduct analyses of the employment and income reporting of individuals participating in HUD's rental housing assistance programs. Currently, HUD makes the results of the computer match available to public housing agencies (PHAs) administering HUD rental assistance programs to enable them to verify employment and income and correctly determine the rent and assistance levels for individuals participating in those programs. This information is also being disclosed to the HUD Inspector General (HUD/IG), and the Attorney General in connection with the administration of the above named programs.

Based on (1) an evaluation of the costs and benefits of disclosures made to PHAs, and (2) the adequacy of measures used to safeguard the security and confidentiality of information so disclosed, HUD will disclose employment and income information of tenants to private housing owners and management agents (O/As) and contract administrators (CAs) that administer HUD rental assistance programs under agreements with HUD. HUD and its third party administrators will use this matching authority to reduce or eliminate improper assistance payments in the housing programs listed above.

The Computer Matching and Privacy Protection Act (CMPPA) of 1988, an amendment to the Privacy Act of 1974 (5 U.S.C. Sec. § 552a), OMB's guidance on this statute entitled "Final Guidance Interpreting the Provisions of Public Law 100-503," and OMB Circular No. A-130 requires publication of notices of computer matching programs.

Appendix I to OMB's Revision of Circular No. A-130, "Transmittal Memorandum No. 4, Management of Federal Information Resources," prescribes Federal agency responsibilities for maintaining records about individuals. In accordance with the CMPPA and Appendix I to OMB Circular No. A-130, copies of this notice are being provided to the Committee on Government Reform and Oversight of the House of Representatives, the Committee on Governmental Affairs of the Senate, and OMB's Office of Information and Regulatory Affairs.

### I. Authority

This matching program is being conducted pursuant to sections 3003 and 13403 of the Omnibus Budget Reconciliation Act of 1993 (Pub. L. 103-66, approved August 10, 1993); section 542(b) of the 1998 Appropriations Act (Pub. L. 105-65); section 904 of the Stewart B. McKinney Homeless Assistance Amendments Act of 1988 (42 U.S.C. 3544); section 165 of the Housing and Community Development Act of 1987 (42 U.S.C. 3543); the National Housing Act (12 U.S.C. 1701-1750g); the United States Housing Act of 1937 (42 U.S.C. 1437-1437z); section 101 of the Housing and Community Development Act of 1965 (12 U.S.C. 1701s); the Native American Housing Assistance and Self-Determination Act of 1996 (25 U.S.C. 4101 *et seq.*); and the Quality Housing and Work Responsibility Act of 1998 (42 U.S.C. 1437a(f)).

The Housing and Community Development Act of 1987 authorizes HUD to require applicants and participants in HUD-administered programs involving rental housing assistance to disclose to HUD their social security numbers (SSNs) as a condition of initial or continued eligibility for participation in the programs.

Section 217 of the Consolidated Appropriations Act of 2004 (Pub. L. 108-199) authorizes HUD to provide to HHS information on persons participating in any programs authorized by:

(i) The United States Housing Act of 1937 (42 U.S.C. 1437 *et seq.*);

(ii) Section 202 of the Housing Act of 1959 (12 U.S.C. 1701q);

(iii) Section 221(d)(3), 221(d)(5) or 236 of the National Housing Act (12 U.S.C. 17151(d) and 1715z-1);

(iv) Section 811 of the Cranston-Gonzalez National Affordable Housing Act (42 U.S.C. 8013); or

(v) Section 101 of the Housing and Urban Development Act of 1965 (12 U.S.C. 1701s).

HHS shall then compare this information provided by HUD with data contained in the NDNH and report the results of the data match to HUD. The Act gives HUD the authority to disclose this information to PHAs, O/As, CAs under contract with HUD, the HUD/IG, and the Attorney General for the purpose of verifying the employment and income of individuals receiving benefits in the above programs. HUD shall not seek, use, or disclose information relating to an individual without the prior written consent of the individual, and HUD has the authority to require consent as a condition of participating in these programs.

HHS' disclosure of data from the NDNH is authorized by Section 217 of the Consolidated Appropriations Act of 2004. The disclosures from the HHS system of records, "Location and Collection System of Records," No. 09-90-0074, will be made pursuant to routine use (17) identified in the **Federal Register** on June 3, 2004 (69 FR 31399). This routine use authorizes HHS to "disclose to the Department of Housing and Urban Development information in the NDNH portion of this system for purposes of verifying employment and income of individuals participating in specified programs and, after removal of personal identifiers, to conduct analyses of the employment and income reporting of these individuals."

## II. Objectives To Be Met by the Matching Program

HUD's primary objective in implementing the computer matching program is to verify the employment and income of individuals participating in multifamily housing programs identified in paragraph I above to determine the appropriate level of rental assistance, and to deter and correct abuse in rental housing assistance programs. In meeting these objectives, HUD also is carrying out a responsibility under 42 U.S.C. Sec. 1437f(K) to ensure that income data provided to O/As and CAs by household members is complete and accurate. HUD's various rental housing assistance programs require that applicants meet certain income and other criteria to be eligible for rental assistance. In addition, tenants participating in multifamily housing

programs generally are required to report and recertify the amounts and sources of their income at least annually.

## III. Program Description

In this computer matching program, tenant-provided information included in HUD's automated systems of records known as the Tenant Rental Assistance Certification System (TRACS) (HUD/H-11) will be compared to data from HHS' NDNH database. The notice for this system was published at 62 FR 11909. HUD will only transmit to HHS for computer matching those tenant personal identifiers (*i.e.*, full name, Social Security Number (SSN), and date of birth) that have been validated by the Social Security Administration (SSA). HHS will match the HUD-provided personal identifiers to personal identifiers included in their systems of records known as "Location and Collection System of Records," No. 09-90-0074. HHS will provide income data to HUD only for individuals with matching personal identifiers.

### A. Income Verification

Any match (*i.e.*, a "hit") will be further reviewed by HUD, the program administrator, or the HUD Office of Inspector General (OIG) to determine whether the income reported by tenants to the program administrator is correct and complies with HUD and program administrator requirements. Specifically, current or prior wage information and other data will be sought directly from employers.

### B. Administrative or Legal Actions

Regarding the matching described in this notice, HUD anticipates that program administrators will take appropriate action in consultation with tenants to: (1) resolve income discrepancies between tenant-reported and independent income source data, and (2) use correct income amounts in determining housing rental assistance. Program administrators must compute the rent in full compliance with all applicable occupancy regulations. Program administrators must ensure that they use the correct income and correctly compute the rent.

The program administrator may not suspend, terminate, reduce, or make a final denial of any housing assistance to any tenant as a result of information produced by this matching program until: (a) the tenant has received notice from the program administrator of its findings and informing the tenant of the opportunity to contest such findings and (b) either the notice period provided in applicable regulations of

the program, or 30 days, whichever is later, has expired. In most cases, program administrators will resolve income discrepancies in consultation with tenants.

Additionally, serious violations, which program administrators, HUD Program staff, or HUD/IG verify, should be referred for full investigation and appropriate civil and/or criminal proceedings.

## IV. Records To Be Matched

HHS will conduct the matching of tenant SSNs and additional identifiers (such as surnames and dates of birth) to tenant data that HUD supplies from the Form-50059 module within TRACS.

HHS will match the tenant records included in TRACS (HUD/H-11) to NDNH records contained in HHS's "Location and Collection System of Records," No. 09-90-0074. HUD will place matching data into its system of records known as the Enterprise Income Verification (EIV) system. The tenant records (one record for each family member) include these data elements: full name, SSN, and date of birth.

## V. Period of the Match

The computer matching program will be conducted according to agreements between HUD and HHS. The computer matching agreement for the planned match will terminate either when the purpose of the computer matching program is accomplished, or 18 months from the date the agreement is signed, whichever comes first.

The agreements may be extended for one 12-month period, with the mutual agreement of all involved parties, if the following conditions are met:

(1) Within 3 months of the expiration date, all Data Integrity Boards review the agreement, find that the program will be conducted without change, and find a continued favorable examination of benefit/cost results; and (2) All parties certify that the program has been conducted in compliance with the agreement.

The agreement may be terminated, prior to accomplishment of the computer matching purpose or 18 months from the date the agreement is signed (whichever comes first), by the mutual agreement of all involved parties within 30 days of written notice.

**Authority:** 5 U.S.C. 552a; 88 Stat. 1896; 42 U.S.C. 3535(d).

Dated: August 1, 2006.

**Lisa Schlosser,**

*Chief Information Officer.*

[FR Doc. E6-12800 Filed 8-7-06; 8:45 am]

**BILLING CODE 4210-67-P**

**DEPARTMENT OF HOUSING AND  
URBAN DEVELOPMENT**

[Docket No.FR-4922-N-19]

**Privacy Act of 1974; Amendment to an  
existing System of Records, Enterprise  
Income Verification, HUD/PIH-5**

**AGENCY:** Office of the Chief Information Officer, HUD.

**ACTION:** Notification of an amendment to an existing System of Records, Enterprise Income Verification (EIV), HUD/PIH-5.

**SUMMARY:** HUD is amending HUD/PIH-5 to reflect changes in the following section: Categories of Individuals Covered by the System, Categories of Records in the System, Authority for Maintenance of the System, Purpose of the System and the Routine Uses. These sections are revised to reflect the present status of the information contained in the system. A more detailed description of the present system is contained in the Supplemental Information section.

**DATES:** *Effective Date:* This proposal shall become effective without further notice September 7, 2006 unless comments are received during or before this period which would result in a contrary determination.

*Comments Due Date:* September 7, 2006.

**ADDRESSES:** Interested persons are invited to submit comments regarding this notice to the Rules Docket Clerk, Office of General Counsel, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 10276, Washington, DC 20410-0500. Communications should refer to the above docket number and title. Facsimile (FAX) comments are not acceptable. A copy of each communication submitted will be available for public inspection and copying between 8 a.m. and 5 p.m. weekdays at the above address.

**FOR FURTHER INFORMATION CONTACT:** Jeanette Smith, Departmental Privacy Act Officer, telephone number (202) 708-2374. Regarding records maintained in Washington, DC, for the Office of Public and Indian Housing, contact Nicole Faison, Director of Public Housing and EIV Program Office Project Manager, telephone number (202) 708-0744. For the Office of Housing, contact Gail Williamson, Director of the Housing Assistance Policy Division, telephone number (202) 708-3000 extension 2473. [The above are not toll free numbers.] A telecommunications device for hearing and speech-impaired persons (TTY) is available at 1-800-

877-8339 (Federal Information Relay Services). (This is a toll-free number).

**SUPPLEMENTARY INFORMATION:** Currently supporting public housing agencies (PHAs) that administer public housing and Section 8 tenant-based rental assistance programs, this system of records is being made available to private owners and management agents (O/As) who administer rental assistance programs for the Office of Housing (Housing) and contract administrators (CAs) under contract with HUD. EIV will contain income data for public housing, Section 8, and multifamily housing program participants, enabling program administrators to verify participant-reported income and identify households that may have under reported their household's annual income.

HUD developed the EIV system to reduce subsidy payment errors as a result of tenant under reporting of income to ensure that limited federal resources serve as many eligible families as possible. EIV will facilitate more timely and accurate verification of tenant-reported income at the time of mandatory annual and interim reexamination of household income.

EIV will contain personal identifying information from HUD's Public and Indian Housing Information Center (PIC) and Tenant Rental Assistance Certification System (TRACS), such as Head of Households and household members name, date of birth and Social Security Number (SSN), unit address, program information, and household income details as reported by the participant to the program administrator. These personal identifying data are extracted from PIC and TRACS and imported into EIV. The system also contains household member(s) income details as reported by state and federal agencies. HUD obtains income details through computer matching programs.

*System Security Measures:* The integrity and availability of data in EIV is important. Much of the data needs to be protected from unanticipated or unintentional modification. HUD restricts the use of this information to HUD approved officials, program administrators such as PHAs and O/As, and CAs under contract with HUD; thus, the data is protected accordingly.

Vulnerabilities and corresponding security measures include: (1) only persons with Web Access Subsystem (WASS) User IDs and passwords may access EIV; (2) access to EIV is controlled using EIV's security module, which controls a user's access to particular modules based on the user's

role and security access level; (3) User IDs are used to identify access to sensitive data by users; (4) data corruption/destruction-PHA, O/A and CA users do not have write access to databases. HUD user's write access is limited to user administration by authorized personnel. This will eliminate the risk of data destruction or corruption.

*Data Quality:* O/As enter management, building, unit, and family information into PIC and TRACS. Family information includes the families' names, SSNs, and dates of birth. When a PHA or O/A submits family data to PIC or TRACS, the EIV system will validate each household member's identity. HUD will only transmit to the Department of Health and Human Services (HHS) for computer matching those tenant personal identifiers (i.e., full name, SSN, and date of birth) that have been validated by the Social Security Administration (SSA). If a household member's identity cannot be validated, EIV will (1) flag the household member record; (2) provide an error message to the PHA or O/A, informing the PHA or O/A to verify the household member's SSN, name, and/or date of birth; and (3) request the PHA or O/A to submit a corrected record (Form HUD-50058 or Form HUD-50059) into PIC or TRACS. EIV will remove the unverified household member record from computer matching request files.

This household member identity verification feature was established to help HUD maintain data quality and integrity and to support one of its strategic objectives to prevent fraud and abuse. This identity verification feature will (1) help confirm that those families entitled to benefits receive benefits, (2) assist in limiting the duplication of benefits, and (3) help prevent the false application for benefits, thereby ensuring data quality.

EIV will receive (1) new hires (W-4), wage, and unemployment insurance claim data from HHS' National Directory of New Hires (NDNH) database, (2) wage and unemployment insurance claim data from State Wage Information Collection Agencies (SWICAs), and (3) Social Security (SS) and Supplemental Security Income (SSI) benefits data from the Social Security Administration (SSA). This will allow PHAs and O/As to verify the income of tenants at the time of mandatory annual and/or interim reexaminations.

Pursuant to the Privacy Act of 1974 (5 U.S.C. 552a), as amended, notice is given that HUD proposes to amend an existing Privacy System of Records,

Enterprise Income Verification, HUD/PIH-5.

Title 5 U.S.C 552a(e) (4) and (11) provide that the public be afforded a 30-day period in which to comment on the new record system. The new system report was submitted to the Office of Management and Budget (OMB), the Senate Committee on Governmental Affairs and the House Committee on Government Reform pursuant to paragraph 4c of Appendix I to OMB Circular No. A-130, "Federal Responsibilities for Maintaining Records About Individuals," July 25, 1994 (59 FR 37914).

Accordingly, this notice amends HUD/PIH-5 system of records for the Office of Housing's Multifamily Housing Program administrators and accompanying routine uses to be submitted and accessed in the management of rental assistance housing programs by the Office of Housing.

**Authority:** 5 U.S.C. 552a; 88 Stat. 1896; 42 U.S.C. 3535(d).

Dated: August 1, 2006.

**Lisa Schlosser,**  
Chief Information Officer.

#### HUD/PIH-5

##### SYSTEM NAME:

Enterprise Income Verification (EIV).

##### SYSTEM LOCATIONS:

The files will be maintained at the following location: U.S. Department of Housing and Urban Development, 451 7th Street, SW., Washington, DC 20410. Lockheed Martin Corporation, located at 4701 Forbes Blvd., Lanham, MD 20706, will monitor access of any encrypted files containing social security and rent information (subject to the provisions of 26 U.S.C. 6103).

##### CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Families receiving rental housing assistance via programs administered by the Department of Housing and Urban Development, Tribally Designated Housing Entities participating in the Section 8 program, PHAs and/or O/As and State agencies and PHAs acting as CAs.

##### CATEGORIES OF RECORDS IN THE SYSTEM:

Records consist of unit address (subsidized property address), family composition, and income data obtained from PHAs and O/As. The system of records contains—identification information such as names, dates of birth and SSNs for individuals; addresses; financial data such as tenant-reported income; data obtained from

SWICAs on wages and unemployment claim information; data obtained from SSA on SS and SSI benefit information; data obtained from NDNH on new hire, wages and unemployment claim information; annual income discrepancies as a result of the comparison of tenant reported income to actual income as reported by third party sources such as SWICAs and Federal agencies.

##### AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Pursuant to the Stewart B. McKinney Homeless Assistance Amendments Act of 1988 and Section 303(i) of the Social Security Act, HUD and HUD-funded PHAs may request wage and claim data from SWICAs responsible for administering state unemployment laws. On October 1, 1994, Section 542(a)(1) of HUD's 1998 Appropriation Act, eliminated a sunset provision to Section 303(i) of the Social Security Act, effectively making permanent the authority requiring state agencies to disclose wage and claim information to HUD and PHAs. On January 23, 2004, Section 453(j) of the Social Security Act (42 U.S.C. 653(j)) was amended to allow HUD to obtain income information from the NDNH database and disclose this information to PHAs for the purpose of verifying employment and income of rental housing program participants. HUD may disclose NDNH data to a private owner, management agent, and contract administrator under contract with HUD based on (1) an evaluation of the costs and benefits of disclosures made to PHAs, and (2) the adequacy of measures used to safeguard the security and confidentiality of information so disclosed. Disclosure of NDNH data to O/As and CAs is only as needed for verifying the employment and income of multifamily housing program participants. The Housing and Community Development Act of 1987 authorizes HUD to require applicants for and participants in HUD-administered rental housing assistance programs to disclose to HUD their SSNs as a condition of initial or continued eligibility for participation in these HUD programs. The Omnibus Budget Reconciliation Act of 1993 (Budget Reconciliation Act) authorizes HUD to request from SSA federal tax data, as prescribed in section 6103(l)(7) of title 26 of the United States Code (Internal Revenue Code).

##### PURPOSES:

The primary purpose of EIV is to allow PHAs and O/As to verify tenant reported income, identify unreported income sources and/or amounts received by program participants, and

identify substantial annual income discrepancies amongst households that receive HUD-provided rental assistance through programs administered by PIH and Housing. The first release of EIV was successfully implemented on August 16, 2004. EIV is a simple, Internet-based integrated system, which enables PHA users, HUD personnel and O/As to access a common database of tenant information via their Web browser. EIV will aid HUD and entities that administer HUD's assisted housing programs in: (a) increasing the effective distribution of rental assistance to individuals that meet the requirements of federal rental assistance programs, (b) detecting abuses in assisted housing programs, (c) taking administrative or legal actions to resolve past and current abuses of assisted housing programs, (d) deterring abuses by verifying the income of tenants at the time of annual and interim reexaminations via the use of electronic income data received from SWICAs, NDNH, and SSA, (e) evaluating the effectiveness of income discrepancy resolution actions taken by O/As and PHAs for some of HUD's rental assistance programs, and (f) reducing administrative burden of obtaining written or oral third party verification (when the tenant does not dispute information provided by EIV. EIV is a management information system that contains tools to help: (1) improve the income verification process, (2) monitor incidents of potential tenant under reporting of household income, (3) produce management reports, and (4) conduct risk assessments.

The EIV system serves as a repository for automated information used when comparing family income data reported by recipients of federal rental assistance to income data received from external sources (e.g., NDNH, SWICAs, SSA, etc.). Records in TRACS, PIC, and EIV are subject to use in authorized and approved computer matching programs regulated under the Privacy Act of 1974, as amended.

##### ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND PURPOSES OF SUCH USES:

In addition to the uses cited in the section of this document titled "Purposes", other routine uses may include:

1. To Federal, State, and local agencies (e.g., state agencies administering the state's unemployment compensation laws, state welfare and food stamp agencies, U.S. Office of Personnel Management, U.S. Postal Service, U.S. Department of Defense, U.S. Department of Health and Human

Services, and U.S. Social Security Administration)—to verify the accuracy and completeness of the data provided, to verify eligibility or continued eligibility in HUD's rental assistance programs, and to aid in the identification of tenant errors, fraud, and abuse in assisted housing programs through HUD's tenant income computer matching program;

2. To individuals under contract to HUD or under contract to another agency with funds provided by HUD—for the preparation of studies and statistical reports directly related to the management of HUD's rental assistance programs, to support quality control for tenant eligibility efforts requiring a random sampling of tenant files to determine the extent of administrative errors in making rent calculations, eligibility determinations, etc., and for processing certifications/re-certifications;

3. To PHAs and O/As—to verify the accuracy and completeness of tenant data used in determining eligibility and continued eligibility and the amount of housing assistance received;

4. To PHAs, O/As, and CAs—to identify and resolve discrepancies in tenant data; and

5. To researchers affiliated with academic institutions, with not-for-profit organizations, or with Federal, State or local governments, or to policy researchers—without individual identifiers—name, address, SSN—for the performance of research and statistical activities on housing and community development issues.

**POLICIES FOR STORING, RETRIEVING, AND DISPOSING OF SYSTEM RECORDS STORAGE:**

Records are stored manually in family case files and electronically in office automation equipment. Records are stored on HUD computer servers for field office, PHAs', and O/A' access via the Internet to: (1) obtain SS and SSI data that are not subject to provisions of 26 U.S.C. 6103; (2) obtain wage and unemployment compensation data; and (3) obtain household income discrepancies reports. Software in EIV precludes the transfer of any data subject to 26 U.S.C. 6103 to unencrypted media.

**RETRIEVABILITY:**

Records may be retrieved by computer search of indices by the Head of Household's name, date of birth, and/or SSN of an existing HUD program participant.

**SAFEGUARDS:**

Records are maintained at the U.S. Department of Housing and Urban

Development in Washington, DC with limited access to those persons whose official duties require the use of such records. Computer files and printed listings are maintained in locked cabinets. Printed listings include masked dates of birth and SSNs. Computer terminals are secured in controlled areas, which are locked when unoccupied. Access to automated records is limited to authorized personnel who must use a password system to gain access. HUD will safeguard the SSN, income, and personal identifying information obtained pursuant to 26 U.S.C. 6103(l)(7)(A) and (B) in accordance with 26 U.S.C. 6103(p)(4) and the IRS's "Tax Information Security Guidelines for Federal, State and Local Agencies," Publication 1075 (REV 6/2000).

**RETENTION AND DISPOSAL:**

Computerized family records are maintained in a password-protected environment. If information is needed for evidentiary purposes, documentation will be referred to the HUD Office of Inspector General (OIG) in Washington, DC or other appropriate Federal, State or local agencies charged with the responsibility of investigating or prosecuting violators of Federal law. Documents referred to HUD's OIG will become part of OIG's Investigative Files. Records will be retained and disposed of in accordance with the General Records Schedule included in HUD Handbook 2228.2, appendix 14, item 25.

**SYSTEM MANAGERS AND ADDRESSES:**

David Sandler, PIH Project Manager of the EIV system, U.S. Department of Housing and Urban Development, 550 12th Street SW., First Floor—Desk 1304, Washington, DC 20410. Lanier Hylton, Housing Project Manager of the EIV system, U.S. Department of Housing and Urban Development, 451 7th Street, SW., Room 6140, Washington, DC 20410.

**NOTIFICATION AND RECORD ACCESS PROCEDURES:**

Individuals seeking to determine whether this system of records contains information about them, or those seeking access to such records, should address inquiries to the Director of the Office of Public and Indian Housing, Office of Public Housing and Voucher Programs or the Director of the Office of Housing, Office of Housing Assistance Contract Administration Oversight, U.S. Department of Housing and Urban Development, 451 7th Street SW., Washington, DC 20410. Written requests must include the full name, SSN, date of birth, current address, and telephone

number of the individual making the request.

**CONTESTING RECORD PROCEDURES:**

Procedures for the amendment or correction of records, and for applicants wanting to appeal initial agency determinations based on data in EIV, appear in 24 CFR part 16.

**RECORD SOURCE CATEGORIES:**

PIH and Housing may receive data from HUD field office staff, Federal Government agencies, State and local agencies, private data sources, owners and management agents, PHAs, and contract administrators. PHAs and O/As routinely collect personal and income data from participants in and applicants for HUD's public and assisted housing programs. The data collected by PHAs and O/As is entered into the PIC and TRACS system, respectively, on-line via the system itself, via PHA or O/A-owned software, or via HUD's Family Reporting Software (FRS). Data from PIC and TRACS is imported into EIV and used to create request files for computer matching programs.

**EXEMPTIONS FROM CERTAIN PROVISIONS OF THE ACT:**

None.

[FR Doc. E6-12802 Filed 8-7-06; 8:45 am]

BILLING CODE 4210-67-P

**DEPARTMENT OF THE INTERIOR**

**Office of the Secretary**

**Notice of Proposed Information Collection**

**AGENCY:** Office of the Secretary, Take Pride in America Program.

**ACTION:** Notice and request for comments.

**SUMMARY:** In compliance with section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Office of the Secretary of the Department of the Interior announces the proposed extension of a public information collection required by the Take Pride in America Program Act, 16 U.S.C. 4601-4608, "Take Pride in America National Awards Application/Nomination Process," OMB Control No. 1093-0004, and that it is seeking comments on its provisions. After public review, the Office of the Secretary will submit the information collection to the Office of Management and Budget for review and approval.

**DATES:** Consideration will be given to all comments received by October 10, 2006.

**ADDRESSES:** Written comments and recommendations on the proposed

information collection should be sent to the Office of the Secretary Information Collection Budget Officer, Sue Ellen Sloca, 1951 Constitution Avenue, NW., MS 120 SIB, Washington, DC 20240. Individuals providing comments should reference OMB control number 1093-0004, "Take Pride in America National Awards Application/Nomination Process."

**FOR FURTHER INFORMATION CONTACT:** To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instrument, please write to the above address, or call Sue Ellen Sloca, on 202-208-6045, or e-mail her on [sue\\_ellen\\_sloca@nbc.gov](mailto:sue_ellen_sloca@nbc.gov). A copy of the collection instrument is also available at the Take Pride in America Web site, at <http://www.takepride.gov>.

**SUPPLEMENTARY INFORMATION:**

**I. Abstract**

Office of Management and Budget (OMB) regulations at 5 CFR 1320, which implement the Paperwork Reduction Act of 1995 (Pub. L. 104-13), require that interested members of the public and affected agencies have an opportunity to comment on information collection and recordkeeping activities (see 5 CFR 1320.8 (d)). This notice identifies an information collection activity that the Office of the Secretary will submit to OMB for extension or re-approval.

Under the Take Pride in America Program Act (the ACT), 16 U.S.C. Sec 4601-4608, the Secretary of the Interior is to: (1) "Conduct a national awards program to honor those individuals and entities which, in the opinion of the Secretary \* \* \* have distinguished themselves in activities" under the purposes of the Act; and also to (2) "establish and maintain a public awareness campaign in cooperation with public and private organizations and individuals—(A) to install in the public the importance of the appropriate use of, and appreciation for Federal, State and local lands, facilities, and natural and cultural resources; (B) to encourage an attitude of stewardship and responsibility towards these lands, facilities, and resources; and (C) to promote participation by individuals, organizations, and communities of a conservation ethic in caring for these lands, facilities, and resources." The Act states that "[t]he Secretary is authorized \* \* \* generally to do any and all lawful acts necessary or appropriate to further the purposes of the TPIA Program."

If this information were not collected from the public, Take Pride in America (TPIA) awards would be limited to

individuals and organizations nominated by Federal agencies based on projects within their sphere of influence. This would effectively block many worthy individuals and organizations from being considered for these awards. The TPIA was launched in April of 2003 with the stated intent of honoring the best in the nation, without restriction. It would reflect poorly on the Department and on the President if only volunteers to Federal agencies could be honored for their service to America.

**II. Data**

(1) *Title:* Take Pride in America National Awards Application/Nomination Process.

*OMB Control Number:* 1093-0004.

*Current Expiration Date:* 01/31/2007.

*Type of Review:* Information Collection: Renewal.

*Affected Entities:* Individuals or households, businesses and other for-profit institutions, not-for-profit institutions, State, Local, and Tribal Governments.

*Estimated annual number of respondents:* 500.

*Frequency of response:* annual.

(2) Annual reporting and recordkeeping burden.

*Estimated number of responses annually:* 500.

*Estimated burden per response:* 1 hour.

*Total annual reporting:* 500 hours.

(3) *Description of the need and use of the information:* The statutorily-required information is needed to provide the Office of the Secretary with a vehicle to collect the information needed to include individuals and organizations nominated by the public in applicant pools for TPIA National Awards and to recognize them for the valuable contributions that they make in support of the stewardship of America's lands, facilities, and cultural and natural resources.

**III. Request for Comments**

The Department of the Interior invites comments on:

(a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(b) The accuracy of the agency's estimate of the burden of the collection and the validity of the methodology and assumptions used;

(c) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(d) Ways to minimize the burden of the collection of information on those

who are to respond, including through the use of appropriate automated, electronic, mechanical, or other collection techniques or other forms of information technology.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, disclose or provide information to or for a federal agency. This includes the time needed to review instructions; to develop, acquire, install and utilize technology and systems for the purpose of collecting, validating and verifying information, processing and maintaining information, and disclosing and providing information; to train personnel and to be able to respond to a collection of information, to search data sources, to complete and review the collection of information; and to 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 Office of Management and Budget control number.

Dated: August 2, 2006.

**Michelle Cangelosi,**

*Executive Director, Take Pride in America Program.*

[FR Doc. E6-12821 Filed 8-7-06; 8:45 am]

**BILLING CODE 4310-RK-P**

**DEPARTMENT OF THE INTERIOR**

**Bureau of Land Management**

[MT-020-1020-PK]

**Notice of Public Meeting, Eastern Montana Resource Advisory Council Meeting**

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Notice of Public Meeting.

**SUMMARY:** In accordance with the Federal Land Policy and Management Act (FLPMA) and the Federal Advisory Committee Act of 1972 (FACA), the U.S. Department of the Interior, Bureau of Land Management (BLM), Eastern Montana Resource Advisory Council will meet as indicated below.

**DATES:** A meeting will be held August 29, 2006, at the Bureau of Land Management Montana State Office, 5501 Southgate Drive, Billings, Montana, 59101, beginning at 7 a.m. The public comment period will begin at 11:30 a.m.

**SUPPLEMENTARY INFORMATION:** The 15-member Council advises the Secretary of the Interior, through the Bureau of Land Management, on a variety of

planning and management issues associated with public land management in eastern Montana. All meetings are open to the public. The public may present written comments to the Council. Each formal Council meeting will also have time allocated for hearing public comments. Depending on the number of persons wishing to comment and time available, the time for individual oral comments may be limited. Individuals who plan to attend and need special assistance, such as sign language interpretation, or other reasonable accommodations, should contact the BLM as provided below. The Council will hear updates on the Miles City Resource Management Plan and the coal bed natural gas SEIS, Yellowstone River island ownership, and tour the Pompeys Pillar National Monument interpretive center.

**FOR FURTHER INFORMATION CONTACT:** Mary Apple, Resource Advisory Council Coordinator, Montana State Office, 5001 Southgate Drive, Billings, Montana, 59101, telephone 406-896-5258 or Sandra S. Brooks, Field Manager, Billings Field Office, telephone 406-896-5013.

Dated: August 2, 2006.

**Sandra S. Brooks,**

*Billings Field Manager.*

[FR Doc. E6-12830 Filed 8-7-06; 8:45 am]

**BILLING CODE 4310--SS-P**

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

[CA-680-1430-ES; CA-46857]

#### Notice of Realty Action; Recreation and Public Purposes Act Classification; California

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Notice of Realty Action.

**SUMMARY:** The Bureau of Land Management (BLM) has examined and found suitable for classification for lease and subsequent conveyance under the provisions of the Recreation and Public Purposes Act (R&PP), as amended (43 U.S.C. 869 et seq.), approximately 2.5 acres of public land in Inyo County, California. The Southern Inyo County Fire Protection District proposes to use the land for a fire station and related facilities to include a water well with storage tanks, a helipad, two shade structures, two storage buildings, and a septic system enclosed within a chain link fence, as specified in the County's development plan (henceforth, fire station).

**DATES:** For a period until September 22, 2006, interested parties may submit comments to the Field Manager, BLM Barstow Field Office, at the address below.

**ADDRESSES:** Bureau of Land Management, Barstow Field Office, 2601 Barstow Road, Barstow, California 92311.

**FOR FURTHER INFORMATION CONTACT:** Richard Rotte, Realty Specialist, BLM Barstow Field Office, (760) 252-6026.

**SUPPLEMENTARY INFORMATION:** The Southern Inyo County Fire Protection District filed an R&PP application for the classification, lease, and subsequent conveyance of the following described 2.5 acres of public land to be developed for a fire station:

**San Bernardino Meridian, California**

T. 20 N., R. 7 E.,

Sec. 11, SE $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ .

The area described contains 2.5 acres, more or less, in Inyo County.

Leasing and subsequent conveyance of the land to the Southern Inyo County Fire Protection District is consistent with current Bureau planning for this area and would be in the public interest. The land is not needed for any Federal purpose. The lease would be issued for an initial term of 10 years to allow sufficient time to develop the planned facilities. The land would be conveyed after substantial development has occurred on the land. The lease and subsequent patent, if issued, will be subject to the provisions of the R&PP Act and applicable regulations of the Secretary of the Interior, and will be subject to the following terms, conditions, and reservations:

1. A right-of-way thereon for ditches or canals constructed by the authority of the United States pursuant to the Act of August 30, 1890 (43 U.S.C. 945).

2. All minerals shall be reserved to the United States, together with the right to prospect for, mine, and remove the minerals under applicable laws and regulations established by the Secretary of the Interior.

3. Those rights for a power transmission line granted by right-of-way R 01247 to Southern California Edison Company.

4. All valid existing rights.

5. Provisions of the R&PP Act and all applicable regulations of the Secretary of the Interior.

6. The lessee/patentee, its successors or assigns, by accepting a lease/patent, agrees to indemnify, defend, and hold the United States, its officers, agents, representatives, and employees (hereinafter "United States") harmless from any costs, damages, claims, causes

of action, penalties, fines, liabilities, and judgments of any kind or nature arising out of or in connection with the lessee's/patentee's use, occupancy, or operations on the leased/patented real property. This indemnification and hold harmless agreement includes, but is not limited to, acts or omissions of the lessee/patentee and its employees, agents, contractors, lessees, or any third-party arising out of or in connection with the lessee's/patentee's use, occupancy, or operations on the leased/patented real property which cause or give rise to, in whole or in part: (1) Violations of Federal, state, and local laws and regulations that are now, or may in future become, applicable to the real property and/or applicable to the use, occupancy, and/or operations thereon; (2) Judgments, claims, or demands of any kind assessed against the United States; (3) Costs, expenses, or damages of any kind incurred by the United States; (4) Releases or threatened releases of solid or hazardous waste(s) and/or hazardous substance(s), pollutant(s), or contaminant(s), and/or petroleum product or derivative of a petroleum product, as defined by Federal and state environmental laws, off, on, into, or under land, property, and other interests of the United States; (5) other activities by which solid or hazardous substance(s) or waste(s), pollutant(s), or contaminant(s), or petroleum product or derivative of a petroleum product as defined by Federal and state environmental laws, are generated, stored, used, or otherwise disposed of on the leased/patented real property, and any cleanup response, remedial action, or other actions related in any manner to the said solid or hazardous substance(s) or waste(s), pollutant(s), or contaminant(s), or petroleum product or derivative of a petroleum product; (6) Natural resource damages as defined by Federal and state laws. Lessee/Patentee shall stipulate that it will be solely responsible for compliance with all applicable Federal, state, and local environmental laws and regulatory provisions throughout the life of the facility, including any closure and/or post-closure requirements that may be imposed with respect to any physical plant and/or facility upon the real property under any Federal, state, or local environmental laws or regulatory provisions. In the case of a patent being issued, this covenant shall be construed as running with the patented real property and may be enforced by the United States in a court of competent jurisdiction.

Upon publication of this notice in the **Federal Register**, the public lands

described above are segregated from all forms of appropriation under the public land laws, including the general mining laws and leasing under the mineral leasing laws, except for lease/conveyance under the Recreation and Public Purposes Act. Interested parties may submit comments regarding the proposed lease/conveyance or classification of the lands until September 22, 2006.

*Classification Comments:* Interested parties may submit comments involving the suitability of the land for a fire station. Comments on the classification are restricted to whether the land is physically suited for the proposal or any other issues that would be pertinent to the environmental (National Environmental Policy Act of 1969) analysis for this action, whether the use will maximize the future use or uses of the land, whether the use is consistent with local planning and zoning, or if the use is consistent with State and Federal programs.

*Application Comments:* Interested parties may submit comments regarding the specific use proposed in the application and plan of development, whether the BLM followed proper administrative procedures in reaching its classification decision, or any other factor not directly related to the suitability of the land for R&PP use as a fire station.

All submissions from organizations or businesses will be made available for public inspection in their entirety. Individuals may request confidentiality with respect to their name, address, and phone number. If you wish to have your name or street address withheld from public review, or from disclosure under the Freedom of Information Act, the first line of the comment should start with the words "Confidentiality Request" in uppercase letters in order for BLM to comply with your request. Such requests will be honored to the extent allowed by law. Comment contents will not be kept confidential.

Any adverse comments will be reviewed by the State Director, who may sustain, vacate, or modify this realty action. In the absence of any adverse comments, the classification of the land described in this notice will become effective on October 10, 2006. The lands will not be available for lease/conveyance until after the classification becomes effective.

(Authority: 43 CFR 2741.5)

Dated: July 19, 2006.

**Roxie C. Trost,**

*Field Manager, Barstow Field Office.*

[FR Doc. E6-12795 Filed 8-7-06; 8:45 am]

**BILLING CODE 4310-40-P**

## DEPARTMENT OF THE INTERIOR

### National Park Service

#### Boston Harbor Islands Advisory Council; Notice of Meeting

Notice is hereby given in accordance with the Federal Advisory Committee Act (Pub. L. 92-463) that the Boston Harbor Islands Advisory Council will meet on Wednesday, September 6, 2006. The meeting will convene at 6 p.m. at Northeastern University, Shillman Hall, Room 220, Boston, MA.

The Advisory Council was appointed by the Director of National Park Service pursuant to Public Law 104-333. The 28 members represent business, educational/cultural, community and environmental entities; municipalities surrounding Boston Harbor; Boston Harbor advocates; and Native American interests. The purpose of the Council is to advise and make recommendations to the Boston Harbor Islands Partnership with respect to the development and implementation of a management plan and the operations of the Boston Harbor Islands national park area.

*The Agenda for this meeting is as follows:*

1. Call to Order, Introductions of Advisory Council members present.
2. Review and approval of minutes of the June meeting.
3. Summer Review.
4. Report from the NPS.
5. Public Comment.
6. Next Meetings.
7. Adjourn.

The meeting is open to the public. Further information concerning Council meetings may be obtained from the Superintendent, Boston Harbor Islands. Interested persons may make oral/written presentations to the Council or file written statements. Such requests should be made at least seven days prior to the meeting to: Superintendent, Boston Harbor Islands NRA, 408 Atlantic Avenue, Boston, MA 02110, telephone (617) 223-8667.

Dated: July 24, 2006.

**Bruce Jacobson,**

*Superintendent, Boston Harbor Islands NRA.*

[FR Doc. 06-6752 Filed 8-7-06; 8:45 am]

**BILLING CODE 4310-8G-M**

## DEPARTMENT OF THE INTERIOR

### National Park Service

#### Kaloko-Honokohau National Historical Park Advisory Commission; Notice of Meeting

Notice is hereby given in accordance with the Federal Advisory Committee

Act that a meeting of the Na Hoapili O Kaloko Honokohau, Kaloko-Honokohau National Historical Park Advisory Commission will be held at 9 a.m., September 1, 2006 at the Kona Outdoor Circle.

The agenda will include discussions on the Extension of Commission, Follow Up on April 28 Agenda Items, Live-In Cultural/Education Center, and the Park Project Update.

The meeting is open to the public. Persons requiring special assistance should contact the Superintendent at (808) 329-6881 ext. 7, 7 days prior to the meeting.

Minutes will be recorded for documentation and transcribed for dissemination. Minutes of the meeting will be available to the public after approval of the full Advisory Commission. Transcripts will be available after 30 days of the meeting.

For copies of the minutes, contact Kaloko-Honokohau National Historical Park at (808) 329-6881.

Dated: July 6, 2006.

**Geraldine K. Bell,**

*Superintendent, Kaloko-Honokohau National Historical Park.*

[FR Doc. 06-6753 Filed 8-7-06; 8:45 am]

**BILLING CODE 4312-GH-M**

## DEPARTMENT OF THE INTERIOR

### National Park Service

#### National Register of Historic Places; Notification of Pending Nominations and Related Actions

Nominations for the following properties being considered for listing or related actions in the National Register were received by the National Park Service before July 29, 2006. Pursuant to section 60.13 of 36 CFR part 60 written comments concerning the significance of these properties under the National Register criteria for evaluation may be forwarded by United States Postal Service, to the National Register of Historic Places, National Park Service, 1849 C St., NW., 2280, Washington, DC 20240; by all other carriers, National Register of Historic Places, National Park Service, 1201 Eye St., NW., 8th floor, Washington DC 20005; or by fax, 202-371-6447. Written

or faxed comments should be submitted by August 23, 2006.

**John W. Roberts,**

*Acting Chief, National Register/National Historic Landmarks Program.*

**ARIZONA**

*Maricopa County*

59th Avenue Residential Historic District, West side 59th Ave. bet. Orangewood Ave. and Frier Dr., Glendale, 06000767  
McNair, Jonas, House, 5919 W. Myrtle Ave., Glendale, 06000768

**ILLINOIS**

*Champaign County*

Urbana—Lincoln Hotel—Lincoln Square Mall, 300 S. Broadway Ave., Urbana, 06000778

**IOWA**

*Lucas County*

Caviness, Carl L., Post 102, American Legion, (Architectural Career of William L. Perkins in Iowa:1917–1957 MPS) 201 S. Main St., Chariton, 06000773

Chariton City Hall and Fire Station, (Architectural Career of William L. Perkins in Iowa:1917–1957 MPS) 115 S. Main St., Chariton, 06000775

Chariton Herald—Patriot Building, (Architectural Career of William L. Perkins in Iowa:1917–1957 MPS) 815 Braden Ave., Chariton, 06000776

Chariton Masonic Temple, (Architectural Career of William L. Perkins in Iowa:1917–1957 MPS) 821 Armory Ave., Chariton, 06000777

Hotel Charitone, (Architectural Career of William L. Perkins in Iowa:1917–1957 MPS) 831 Braden Ave., Chariton, 06000774

**KANSAS**

*Cherokee County*

Niles, Rial A., House, 605 E. 12th St., Baxter Springs, 06000772

*Crawford County*

Cato District No. 4 School, (Public Schools of Kansas MPS) Jct. of 200th St. and 720th Ave., Cato, 06000771

*Greenwood County*

Greenwood Hotel, 300 N. Main, Eureka, 06000769

*Nemaha County*

Seneca Main Street Historic District, 301–607 Main, 304–612 Main, 25 N. 6th, 26 N. 4th, Seneca, 06000770

**LOUISIANA**

*Catahoula Parish*

Moss Grove Plantation House, 509 Black River Rd., Jonesville, 06000779

**MARYLAND**

*Baltimore Independent City*

Lion Brothers Company Building, 875 Hollins St., Baltimore (Independent City), 06000781

*Somerset County*

Deal Island Historic District, Deal Is. Rd. from Upper Thorofare to Ballard Rd. and intersecting Sts., Deal Island, 06000780

**MASSACHUSETTS**

*Dukes County*

Vanderhoop, Edwin DeVries, Homestead, 35 South Rd., 06000784

*Middlesex County*

Glen Road Historic District, 233–317 Glen Rd., Weston, 06000783

*Norfolk County*

Dedham Village Historic District, Roughly bounded by High, Court, Washington, School Sts., Village Ave., and Chestnut St., Dedham, 06000785

*Plymouth County*

Pembroke Friends Meetinghouse, Washington St. and Schoosett St., Pembroke, 06000786

**MISSOURI**

*St. Louis Independent City*

West Locust and Olive Street Commercial and Industrial District, Roughly bounded by Theresa, Olive, Locust and Leonard, St. Louis (Independent City), 06000787

**NEW JERSEY**

*Hunterdon County*

Bartles House, 159 Oldwick Rd., Tewksbury Township, 06000763

*Morris County*

Morristown and Erie Railroad Whippany Water Tank, 1 RR Plaza, NJ 10 W and Whippany Rd., Hanover Township, 06000762

*Somerset County*

St. Bernard's Church and Parish House, 88 Claremont Rd., Bernardsville, 06000761

**NORTH CAROLINA**

*Wake County*

Davis—Adcock Store, (Wake County MPS) 2013 Piney Grove-Wilbon Rd., E side of Piney Grove-Wilbon Rd., 0.2 mi. N of jct. of Wilbon Rd., Wilbon, 06000788

Pine Hall, (Wake County MPS) 5300 Castlebrook Dr., Raleigh, 06000789

Raleigh Bonded Warehouse, 1505 Capital Blvd., Raleigh, 06000790

**OHIO**

*Delaware County*

Baker, John, Tavern, 4151 OH 203, Radnor, 06000766

*Fayette County*

Washington Cemetery Historic District, 1741 Washington Ave., Washington Court House, 06000765

*Washington County*

Vaugh—Stacy—Evans Farm Historic District, 7700 OH 60, Lowell, 06000764

**OKLAHOMA**

*Cherokee County*

American Legion Hut, Tehlequah City Park, jct. of E Shawnee St. and N. Brookside Ave., Oklahoma, 06000798

Frankline, M.E., House, 415 N. College Ave., Tahlequah, 06000791

Rosamund, 527 Seminary Ave., Tahlequah, 06000793

*Creek County*

Tank Farm Loop Route 66 Roadbed, (Route 66 and Associated Resources in Oklahoma AD MPS) Jct. of OK 66 and Old Hwy. 66, 0.6 mi. W of I–44 overpass, Bristow, 06000797

*Kay County*

Chilocco Indian Agricultural School, US 77 and E0018 Rd., Newkirk, 06000792

Darr School of Aeronautics Hangar No. 3, SW of jct of Darr Park Dr. and Lindsey Rd., Ponca City, 06000794

*Oklahoma County*

Cartmill Farm House, 21751 N. Macarthur Blvd., Edmond, 06000795

*Rogers County*

Pryor Creek Bridge, (Route 66 and Associated Resources in Oklahoma AD MPS) Carries First St. over Pryor Creek, SW of jct with OK 66, Chelsea, 06000796

**PENNSYLVANIA**

*Philadelphia County*

United States Post Office—Main Branch, 2970 Market St., Philadelphia, 06000782

**TENNESSEE**

*Giles County*

Hallehurst, 106 Little Dry Creek Rd., Pulaski, 06000799

**VIRGINIA**

*Amherst County*

Oak Lawn, 155 Winridge Dr., Madison Heights, 06000802

*Frederick County*

Crumley—Lynn—Lodge House, 3641 Apple Pie Ridge Rd., Winchester, 06000806

*Martinsville Independent City*

West Church Street—Starling Avenue Historic District, Brown St., E. Church St., Cleveland Ave., Letcher Court, Market St. E, Scuffle Hill, Starling Ave., Martinsville (Independent City), 06000805

*Montgomery County*

Kentland Farm Historic and Archeological District (Boundary Increase), W terminus Whitethorne Rd., Blacksburg, 06000801

*Powhatan County*

Somerset, 2310 Ballsville Rd., Powhatan, 06000804

*Rappahannock County*

Meadow Grove Farm, 21 Meadow Grove Ln., Amissville, 06000803

**WISCONSIN***Milwaukee County*

Milwaukee Hospital, 2200 W. Kilbourn Ave.,  
Milwaukee, 06000800

A request for Removal has been made for the following resource:

**OKLAHOMA***Lincoln County*

Bank of Agra 400 Grant Ave., Agra, 90000122  
[FR Doc. E6-12822 Filed 8-7-06; 8:45 am]

**BILLING CODE 4312-51-P**

**INTERNATIONAL TRADE COMMISSION**

[Investigation No. 731-TA-706 (Second Review)]

**Canned Pineapple Fruit From Thailand**

**AGENCY:** United States International Trade Commission.

**ACTION:** Scheduling of a full five-year review concerning the antidumping duty order on canned pineapple fruit from Thailand.

**SUMMARY:** The Commission hereby gives notice of the scheduling of a full review pursuant to section 751(c)(5) of the Tariff Act of 1930 (19 U.S.C. 1675(c)(5)) (the Act) to determine whether revocation of the antidumping duty on canned pineapple fruit from Thailand would be likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time. The Commission has determined to exercise its authority to extend the review period by up to 90 days pursuant to 19 U.S.C. 1675(c)(5)(B). For further information concerning the conduct of this review and rules of general application, consult the Commission's Rules of Practice and Procedure, part 201, subparts A through E (19 CFR part 201), and part 207, subparts A, D, E, and F (19 CFR part 207).

**DATES:** *Effective Date:*  
August 2, 2006.

**FOR FURTHER INFORMATION CONTACT:** Dana Lofgren (202-205-3185), Office of Investigations, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202-205-1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202-205-2000. General information concerning the Commission may also be obtained by accessing its internet server ([http://](http://www.usitc.gov)

[www.usitc.gov](http://www.usitc.gov)). The public record for this review may be viewed on the Commission's electronic docket (EDIS) at <http://edis.usitc.gov>.

**SUPPLEMENTARY INFORMATION:**

**Background.**—On July 7, 2006, the Commission determined that both the domestic interested party group response and the respondent group response to its notice of institution (71 FR 16585, April 3, 2006) of the subject five-year review were adequate. Accordingly, the Commission determined that it would conduct a full review pursuant to section 751(c)(5) of the Act. A record of the Commissioners' votes, the Commission's statement on adequacy, and any individual Commissioner's statements are available from the Office of the Secretary and at the Commission's web site.

**Participation in the review and public service list.**—Persons, including industrial users of the subject merchandise and, if the merchandise is sold at the retail level, representative consumer organizations, wishing to participate in this review as parties must file an entry of appearance with the Secretary to the Commission, as provided in section 201.11 of the Commission's rules, by 45 days after publication of this notice. A party that filed a notice of appearance following publication of the Commission's notice of institution of the review need not file an additional notice of appearance. The Secretary will maintain a public service list containing the names and addresses of all persons, or their representatives, who are parties to the review.

**Limited disclosure of business proprietary information (BPI) under an administrative protective order (APO) and BPI service list.**—Pursuant to section 207.7(a) of the Commission's rules, the Secretary will make BPI gathered in this review available to authorized applicants under the APO issued in the review, provided that the application is made by 45 days after publication of this notice. Authorized applicants must represent interested parties, as defined by 19 U.S.C. 1677(9), who are parties to the review. A party granted access to BPI following publication of the Commission's notice of institution of the review need not reapply for such access. A separate service list will be maintained by the Secretary for those parties authorized to receive BPI under the APO.

**Staff report.**—The prehearing staff report in the review will be placed in the nonpublic record on December 14, 2006, and a public version will be issued thereafter, pursuant to section 207.64 of the Commission's rules.

**Hearing.**—The Commission will hold a hearing in connection with the review beginning at 9:30 a.m. on January 18, 2007, at the U.S. International Trade Commission Building. Requests to appear at the hearing should be filed in writing with the Secretary to the Commission on or before January 8, 2007. A nonparty who has testimony that may aid the Commission's deliberations may request permission to present a short statement at the hearing. All parties and nonparties desiring to appear at the hearing and make oral presentations should attend a prehearing conference to be held at 9:30 a.m. on January 11, 2007, at the U.S. International Trade Commission Building. Oral testimony and written materials to be submitted at the public hearing are governed by sections 201.6(b)(2), 201.13(f), 207.24, and 207.66 of the Commission's rules. Parties must submit any request to present a portion of their hearing testimony *in camera* no later than 7 business days prior to the date of the hearing.

**Written submissions.**—Each party to the review may submit a prehearing brief to the Commission. Prehearing briefs must conform with the provisions of section 207.65 of the Commission's rules; the deadline for filing is January 4, 2007. Parties may also file written testimony in connection with their presentation at the hearing, as provided in section 207.24 of the Commission's rules, and posthearing briefs, which must conform with the provisions of section 207.67 of the Commission's rules. The deadline for filing posthearing briefs is January 29, 2007; witness testimony must be filed no later than three days before the hearing. In addition, any person who has not entered an appearance as a party to the review may submit a written statement of information pertinent to the subject of the review on or before January 29, 2007. On March 6, 2007, the Commission will make available to parties all information on which they have not had an opportunity to comment. Parties may submit final comments on this information on or before March 8, 2007, but such final comments must not contain new factual information and must otherwise comply with section 207.68 of the Commission's rules. All written submissions must conform with the provisions of section 201.8 of the Commission's rules; any submissions that contain BPI must also conform with the requirements of sections 201.6, 207.3, and 207.7 of the Commission's rules. The Commission's rules do not authorize filing of

submissions with the Secretary by facsimile or electronic means, except to the extent permitted by section 201.8 of the Commission's rules, as amended, 67 FR 68036 (November 8, 2002). Even where electronic filing of a document is permitted, certain documents must also be filed in paper form, as specified in II (C) of the Commission's Handbook on Electronic Filing Procedures, 67 FR 68168, 68173 (November 8, 2002).

Additional written submissions to the Commission, including requests pursuant to section 201.12 of the Commission's rules, shall not be accepted unless good cause is shown for accepting such submissions, or unless the submission is pursuant to a specific request by a Commissioner or Commission staff.

In accordance with sections 201.16(c) and 207.3 of the Commission's rules, each document filed by a party to the review must be served on all other parties to the review (as identified by either the public or BPI service list), and a certificate of service must be timely filed. The Secretary will not accept a document for filing without a certificate of service.

**Authority:** This review is being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to section 207.62 of the Commission's rules.

Issued: August 2, 2006.

By order of the Commission.

**Marilyn R. Abbott,**

*Secretary to the Commission.*

[FR Doc. E6-12868 Filed 8-7-06; 8:45 am]

BILLING CODE 7020-02-P

## INTERNATIONAL TRADE COMMISSION

[Investigation No. 731-Ta-1094 (Final)]

### Metal Calendar Slides from Japan

#### Determination

On the basis of the record<sup>1</sup> developed in the subject investigation, the United States International Trade Commission (Commission) determines, pursuant to section 735(b) of the Tariff Act of 1930 (19 U.S.C. 1673d(b)) (the Act), that an industry in the United States is not materially injured or threatened with material injury, and the establishment of an industry in the United States is not materially retarded, by reason of imports from Japan of metal calendar slides, provided for in subheading 7326.90.10 of the Harmonized Tariff Schedule of the United States, that have

been found by the Department of Commerce (Commerce) to be sold in the United States at less than fair value (LTFV).

#### Background

The Commission instituted this investigation effective June 29, 2005 (70 FR 39788, July 11, 2005), following receipt of a petition filed with the Commission and Commerce by Stuebing Automatic Machine Co., Cincinnati, OH. The final phase of the investigation was scheduled by the Commission following notification of a preliminary determination by Commerce that imports of metal calendar slides from Japan were being sold at LTFV within the meaning of section 733(b) of the Act (19 U.S.C. 1673b(b)). Notice of the scheduling of the final phase of the Commission's investigation and of a public hearing to be held in connection therewith was given by posting copies of the notice in the Office of the Secretary, U.S. International Trade Commission, Washington, DC, and by publishing the notice in the **Federal Register** of February 13, 2006 (71 FR 7574). The hearing was held in Washington, DC, on June 22, 2006, and all persons who requested the opportunity were permitted to appear in person or by counsel.

Issued: August 3, 2006.

By order of the Commission.

**Marilyn R. Abbott,**

*Secretary to the Commission.*

[FR Doc. E6-12869 Filed 8-7-06; 8:45 am]

BILLING CODE 7020-02-P

## INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 731-TA-865-867 (Review)]

### Stainless Steel Butt-Weld Pipe Fittings From Italy, Malaysia, and the Philippines

**AGENCY:** United States International Trade Commission.

**ACTION:** Revised schedule for the subject full five-year reviews.

**EFFECTIVE DATE:** August 8, 2006.

**FOR FURTHER INFORMATION CONTACT:** Nathanael Comly (202-205-3174), Office of Investigations, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202-205-1810. Persons with mobility impairments who will need special assistance in gaining access to the

Commission should contact the Office of the Secretary at 202-205-2000. General information concerning the Commission may also be obtained by accessing its internet server (<http://www.usitc.gov>). The public record for these reviews may be viewed on the Commission's electronic docket (EDIS) at <http://edis.usitc.gov>.

**SUPPLEMENTARY INFORMATION:** On May 5, 2006, the Commission established a schedule for the conduct of the final phase of the subject reviews (71 FR 30695, May 30, 2006). The Commission is revising its schedule.

The Commission's new schedule for the reviews is as follows: requests to appear at the hearing must be filed with the Secretary to the Commission not later than September 7, 2006; the prehearing conference will be held at the U.S. International Trade Commission Building at 9:30 a.m. on September 12, 2006; the hearing will be held at the U.S. International Trade Commission Building at 9:30 a.m. on September 14, 2006; the deadline for filing posthearing briefs is September 25, 2006; the Commission will make its final release of information on October 19, 2006; and final party comments are due on October 23, 2006.

For further information concerning these reviews see the Commission's notice cited above and the Commission's Rules of Practice and Procedure, part 201, subparts A through E (19 CFR part 201), and part 207, subparts A, D, E and F (19 CFR part 207).

**Authority:** These reviews are being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to section 207.62 of the Commission's rules.

By order of the Commission.

Issued: August 2, 2006.

**Marilyn R. Abbott,**

*Secretary to the Commission.*

[FR Doc. E6-12867 Filed 8-7-06; 8:45 am]

BILLING CODE 7020-02-P

## DEPARTMENT OF JUSTICE

### Drug Enforcement Administration

#### Manufacturer of Controlled Substances; Notice of Application; Correction

By Notice dated June 1, 2006, and published in the **Federal Register** on June 8, 2006, (71 FR 33315), the listing of controlled substances Marijuana (7360), and Noroxymorphone (9668), were inadvertently omitted, for Mallinckrodt Inc., 3600 North Second

<sup>1</sup> The record is defined in sec. 207.2(f) of the Commission's Rules of Practice and Procedure (19 CFR § 207.2(f)).

Street, St. Louis, Missouri 63147. The Notice of Application should be corrected to include Marihuana (7360) and Noroxymorphone (9668).

Dated: July 27, 2006.

**Joseph T. Rannazzisi,**

*Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.*

[FR Doc. E6-12837 Filed 8-7-06; 8:45 am]

**BILLING CODE 4410-09-P**

## DEPARTMENT OF LABOR

### Bureau of International Labor Affairs; Office of Trade Agreement Implementation; National Advisory Committee for Labor Provisions of U.S. Free Trade Agreements; Notice of Open Meeting

**AGENCY:** Office of the Secretary, Labor.

**ACTION:** Notice of Open Meeting  
September 15, 2006.

**SUMMARY:** Pursuant to the Federal Advisory Committee Act (Pub. L. 92-463), the Office of Trade Agreement Implementation (OTAI) gives notice of a meeting of the National Advisory Committee for Labor Provisions of U.S. Free Trade Agreements ("Committee"), which was established by the Secretary of Labor.

The Committee was established to provide advice to the U.S. Department of Labor on matters pertaining to the implementation of the North American Agreement on Labor Cooperation (NAALC)—the labor side accord to the North American Free Trade Agreement (NAFTA)—and the labor chapters of free trade agreements. The Committee is authorized under NAALC and the free trade agreements.

The Committee consists of twelve independent representatives drawn from among labor organizations, business and industry, educational institutions, and the general public.

**DATES:** The Committee will meet on September 15, 2006 from 1:30 p.m. to 4:30 p.m.

**ADDRESSES:** U.S. Department of Labor, 200 Constitution Avenue, NW., Center Conference Rooms C 5515, Conference Room No. 3, Washington, DC 20210. The meeting is open to the public on a first-come, first-served basis, as seating is limited.

**FOR FURTHER INFORMATION CONTACT:** Dr. Peter Accolla, designated Federal Officer, Office of Trade Agreement Implementation, Bureau of International Labor Affairs, U.S. Department of Labor, 200 Constitution Avenue, NW., Room S-5205, Washington, DC 20210.

Telephone 202-693-4900 (this is not a toll free number).

**SUPPLEMENTARY INFORMATION:** Please refer to the notice published in the **Federal Register** on December 23, 2004 (69 FR 77127-131) for supplementary information.

Signed at Washington, DC on August 2, 2006.

**Peter Accolla,**

*Acting Director, Office of Trade Agreement Implementation.*

[FR Doc. E6-12858 Filed 8-3-06; 4:17 pm]

**BILLING CODE 4510-28-P**

## DEPARTMENT OF LABOR

### Occupational Safety and Health Administration

#### Maritime Advisory Committee on Safety and Health (MACOSH)

**AGENCY:** Occupational Safety and Health Administration (OSHA), Labor.

**ACTION:** Membership announcement of the re-established Maritime Advisory Committee on Safety and Health (MACOSH).

**SUMMARY:** The Secretary of Labor has reestablished the charter of the Maritime Advisory Committee for Occupational Safety and Health (MACOSH), which expired on April 1, 2005. The purpose of MACOSH is to obtain advice for the Assistant Secretary of Labor for Occupational Safety and Health (Assistant Secretary) from a broad range of representatives from the maritime industry on all matters relevant to the safety and health of employees in that sector. The Assistant Secretary will seek the advice of this committee on activities in the maritime industry related to the priorities set for the Agency, including: Strong, fair and effective enforcement; expanded compliance assistance, guidance and outreach; expanded partnerships and voluntary programs; leadership in the national dialogue on occupational safety and health; and regulatory matters affecting the maritime industry, as appropriate.

The committee is diverse and balanced, both in terms of segments of the maritime industry represented (e.g., shipyard and longshoring industries), and in the views or interests represented by the members. The Maritime Advisory Committee for Occupational Safety and Health has been reestablished and chartered for a two year term.

**FOR FURTHER INFORMATION CONTACT:** Jim Maddux, Director, Office of Maritime, OSHA, U.S. Department of Labor, Room N-3609, 200 Constitution Avenue,

N.W., Washington, DC 20210. Phone: (202) 693-2086; Fax: (202) 693-1663.

**SUPPLEMENTARY INFORMATION:**

#### I. Background

On June 26, 2006, the Secretary of Labor announced her intention to reestablish a Maritime Advisory Committee on Safety and Health (71 FR 32374). The maritime industry has historically had a high incidence of illnesses and injuries. The types of work performed can be quite different in various parts of the industry, ranging from manufacturing type work in shipyards to longshoring operations. OSHA has targeted this industry for special attention because of the incidence of illnesses and injuries, and the specialized nature of some of the work. This targeting has included development of guidance or outreach materials specific to the industry, as well as rulemaking to update requirements, and other activities to help focus attention on the industry and reduce the occurrence of illnesses and injuries. This committee will be used to advise OSHA on these ongoing activities and in new areas where the Agency chooses to pursue or expand its programs and projects to further address these specific needs. The advice of the committee will help the Agency in terms of substantive input on conditions in the industry, recommendations that could be implemented to reduce illnesses and injuries, and feedback on Agency initiatives in the maritime industry.

#### II. Establishment

The committee will function solely as an advisory body, and in compliance with the provisions of Section 7(b) of the OSHA Act (29 U.S.C. 656), the Federal Advisory Committee Act (5 U.S.C. App. 20), and 41 CFR part 102-3.

#### III. Appointment of Committee Members

Over forty nominations of highly qualified individuals were received in response to the Agency's request for nominations. Maritime safety and health involves a wide range of complex issues. For that reason, the Secretary has selected to serve on the committee the following individuals who have broad experience relevant to the issues to be examined by the Committee. The MACOSH members are:

Stewart Adams, U.S. Department of the Navy, Naval Sea Systems Command (NAVSEA).  
James D. Burgin, Cooper/T. Smith Corporation.

John Castanho, International Longshore & Warehouse Union.

Warren Fairley, International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers.

Michael J. Flynn, International Association of Machinists and Aerospace Workers.

Robert E. Gleason, International Longshoremen's Association.

Stephen D. Hudock, National Institute for Occupational Safety and Health.

Charles R. Leon, Washington State Department of Labor and Industries.

Marc MacDonald, Pacific Maritime Association.

Captain Teresa Preston, Atlantic Marine Holding Company.

Donald V. Raffo, General Dynamics.

Captain Lorne W. Thomas, United States Coast Guard.

James R. Thornton, Northrop Grumman Newport News Shipyard.

David J. Tubman, Jr., Marine Engineers' Beneficial Association.

Ernest D. Whelan, International Union of Operating Engineers-Local 25, Marine Division.

#### IV. Future Meetings

As specified in the MACOSH charter, OSHA will convene up to three MACOSH committee meetings per year. OSHA expects to convene the first meeting in September or October of this year. As soon as meeting arrangements are completed, OSHA will announce the specific date and location of the meeting, along with a list of topics to be discussed, in the **Federal Register**. OSHA encourages the public to attend all MACOSH meetings.

#### V. Authority

This notice was prepared under the direction of Edwin G. Foulke, Jr., Assistant Secretary for Occupational Safety and Health. It is issued under the authority of Sections 6(b)(1) and 7(b) of the Act of 1970 (29 U.S.C. 655, 656), 29 CFR part 1912 and the Federal Advisory Committee Act (FACA) (5 U.S.C. App. 2).

Signed at Washington, DC, this 31st day of July, 2006.

**Edwin G. Foulke, Jr.,**

*Assistant Secretary of Labor.*

[FR Doc. 06-6746 Filed 8-7-06; 8:45 am]

BILLING CODE 4510-26-M

## NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice Date 06-049]

### Notice of Intent To Grant Exclusive License

**AGENCY:** National Aeronautics and Space Administration.

**ACTION:** Notice of Intent to Grant Exclusive License.

**SUMMARY:** This notice is issued in accordance with 35 U.S.C. 209(c)(1) and 37 CFR 404.7(a)(1)(i). NASA hereby gives notice of its intent to grant an exclusive, worldwide license to practice the invention described in Invention Disclosure KSC-12983 entitled "Mercury Emission Control System" to Phoenix Systems International, having its principal place of business in Pine Brook, New Jersey. The patent rights in this invention will be assigned to the United States of America as represented by the Administrator of the National Aeronautics and Space Administration. The prospective exclusive license will comply with the terms and conditions of 35 U.S.C. 209 and 37 CFR 404.7.

**DATES:** The prospective exclusive license may be granted unless, within fifteen (15) days from the date of this published notice, NASA receives written objections including evidence and argument that establish that the grant of the license would not be consistent with the requirements of 35 U.S.C. 209 and 37 CFR 404.7. Competing applications completed and received by NASA within fifteen (15) days of the date of this published notice will also be treated as objections to the grant of the contemplated exclusive license. Objections submitted in response to this notice will not be made available to the public for inspection and, to the extent permitted by law, will not be released under the Freedom of Information Act, 5 U.S.C. 552.

**ADDRESSES:** Objections relating to the prospective license may be submitted to Patent Counsel, Office of the Chief Counsel, Mail Code CC-A, NASA John F. Kennedy Space Center, Kennedy Space Center, FL 32899. Telephone: 321-867-7214; Facsimile: 321-867-1817.

**FOR FURTHER INFORMATION CONTACT:** Randall M. Heald, Patent Counsel, Office of the Chief Counsel, Mail Code CC-A, NASA John F. Kennedy Space Center, Kennedy Space Center, FL 32899. Telephone: 321-867-7214; Facsimile: 321-867-1817. Information about other NASA inventions available for licensing can be found online at <http://techtracs.nasa.gov/>.

Dated: July 31, 2006.

**Keith T. Sefton,**

*Deputy General Counsel, Administration and Management.*

[FR Doc. E6-12820 Filed 8-7-06; 8:45 am]

BILLING CODE 7510-13-P

## NATIONAL SCIENCE FOUNDATION

### Comment Request: National Science Foundation Proposal and Award Information—NSF Proposal and Award Policies & Procedures Manual

**AGENCY:** National Science Foundation.

**ACTION:** Notice.

**SUMMARY:** The National Science Foundation (NSF) is announcing plans to request renewed clearance of this collection. In accordance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, we are providing opportunity for public comment on this action.

After obtaining and considering public comment, NSF will prepare the submission requesting OMB clearance of this collection for no longer than 3 years.

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information shall have practical utility; (b) the accuracy of the Agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information on respondents, including through the use of automated collection techniques or other forms of information technology; 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.

**DATES:** Written comments should be received by October 10, 2006 to be assured of consideration. Comments received after that date will be considered to the extent practicable.

**ADDRESSES:** Written comments regarding the information collection and requests for copies of the proposed information collection request should be addressed to Suzanne Plimpton, Reports Clearance Officer, National Science Foundation, 4201 Wilson Blvd., Rm. 295, Arlington, VA 22230, or by e-mail to [splimpto@nsf.gov](mailto:splimpto@nsf.gov).

**FOR FURTHER INFORMATION CONTACT:** Suzanne Plimpton on (703) 292-7556 or send e-mail to [splimpto@nsf.gov](mailto:splimpto@nsf.gov). Individuals who use a telecommunications device for the deaf

(TDD) may call the Federal Information Relay Service (FIRS) at 1-800-877-8339 between 8 a.m. and 8 p.m., Eastern time, Monday through Friday.

**SUPPLEMENTARY INFORMATION:**

*Title of Collection:* "National Science Foundation Proposal and Award Information—NSF Proposal and Award Policies & Procedures Manual.

*OMB Approval Number:* 3145-0058.

*Expiration Date of Approval:* July 31, 2007.

*Type of Request:* Intent to seek approval to extend with revision an information collection for three years.

*Proposed Project:* The National Science Foundation (NSF) is seeking to revise its existing mechanism for issuance of proposal and award policies and procedures. Previously, these policies and procedures were contained in two separate issuances; the *Grant Proposal Guide* and the *Grant Policy Manual*. These documents were each separately maintained and issued with different effective dates and significant redundancies between the two documents. We have now collapsed these two documents into a new policy framework: the *NSF Proposal and Award Policies and Procedures Manual*.

Part I of this document will include *NSF Proposal Preparation and Submission Guidelines, i.e., the Grant Proposal Guide (GPG)*, and Part II will include the *NSF Award & Administration Manual* (previously known as the GPM). This initial issuance of the *NSF Proposal and Award Policies and Procedures Manual* will be effective January, 2007. Future issuances of this Manual will be supplemented with additional documents, such as the NSF Grants.gov Application Guide.

We believe that this new policy framework will assist both NSF customers as well as NSF staff by:

1. Improving both awareness and knowledge of the complete set of NSF policies and procedural documents;
2. Increasing ease of access to the policies and procedures that govern the entire grant lifecycle; and
3. Eliminating redundancies between coverage in the documents.

This streamlining process also will combine the Grant Proposal Guide (OMB Clearance No. 3145-0058) with the Proposal Review Process (3145-0060) to streamline the proposal and award management processes for applicants and awardees. This will allow NSF to better manage amendments between the two collections due to administrative changes. Following OMB approval, this information will be available to the community via the Internet.

The National Science Foundation (NSF) is an independent Federal agency created by the National Science Foundation Act of 1950, as amended (42 U.S.C. 1861-75). The Act states the purpose of the NSF is "to promote the progress of science; [and] to advance the national health, prosperity, and welfare by supporting research and education in all fields of science and engineering." The Act authorized and directed NSF to initiate and support:

- Basic scientific research and research fundamental to the engineering process;
- Programs to strengthen scientific and engineering research potential;
- Science and engineering education programs at all levels and in all the various fields of science and engineering;
- Programs that provide a source of information for policy formulation; and
- Other activities to promote these ends.

From those first days, NSF has had a unique place in the Federal Government: It is responsible for the overall health of science and engineering across all disciplines. In contrast, other Federal agencies support research focused on specific missions such as health or defense. The Foundation also is committed to ensuring the nation's supply of scientists, engineers, and science and engineering educators.

The Foundation fulfills this responsibility by initiating and supporting merit-selected research and education projects in all the scientific and engineering disciplines. It does this through grants and cooperative agreements to more than 2,000 colleges, universities, K-12 school systems, businesses, informal science organizations and other research institutions throughout the U.S. The Foundation accounts for about one-fourth of Federal support to academic institutions for basic research.

Over the years, NSF's statutory authority has been modified in a number of significant ways. In 1968, authority to support applied research was added to the Organic Act. In 1980, The Science and Engineering Equal Opportunities Act gave NSF standing authority to support activities to improve the participation of women and minorities in science and engineering.

Another major change occurred in 1986, when engineering was accorded equal status with science in the Organic Act. NSF has always dedicated itself to providing the leadership and vision needed to keep the words and ideas embedded in its mission statement fresh and up-to-date. Even in today's rapidly

changing environment, NSF's core purpose resonates clearly in everything it does: Promoting achievement and progress in science and engineering and enhancing the potential for research and education to contribute to the Nation. While NSF's vision of the future and the mechanisms it uses to carry out this charges have evolved significantly over the last four decades, its ultimate mission remains the same.

*Use of the Information:* The regular submission of proposals to the Foundation is part of the collection of information and is used to help NSF fulfill this responsibility by initiating and supporting merit-selected research and education projects in all the scientific and engineering disciplines. NSF receives more than 40,000 proposals annually for new projects, and makes approximately 10,500 new awards.

Support is made primarily through grants, contracts, and other agreements awarded to more than 2,000 colleges, universities, academic consortia, nonprofit institutions, and small businesses. The awards are based mainly on evaluations of proposal merit submitted to the Foundation (proposal review is cleared under OMB Control No. 3145-0060).

The Foundation has a continuing commitment to monitor the operations of its information collection to identify and address excessive reporting burdens as well as to identify any real or apparent inequities based on gender, race, ethnicity, or disability of the proposed principal investigator(s)/ project director(s) or the co-principal investigator(s)/co-project director(s).

**Proposal Evaluation Process**

The Foundation relies heavily on the advice and assistance of external advisory committees, ad-hoc proposal reviewers, and to other experts to ensure that the Foundation is able to reach fair and knowledgeable judgments. These scientists and educators come from colleges and universities, nonprofit research and education organizations, industry, and other Government agencies.

In making its decisions on proposals the counsel of these merit reviewers has proven invaluable to the Foundation both in the identification of meritorious projects and in providing sound basis for project restructuring.

Review of proposals may involve large panel sessions, small groups, or use of a mail-review system. Proposals are reviewed carefully by scientists or engineers who are expert in the particular field represented by the proposal. About 50% are reviewed

exclusively by panels of reviewers who gather, usually in Arlington, VA, to discuss their advice as well as to deliver it. About 35% are reviewed first by mail reviewers expert in the particular field, then by panels, usually of persons with more diverse expertise, who help the NSF decide among proposals from multiple fields or sub-fields. Finally, about 15% are reviewed exclusively by mail.

#### Use of the Information

The information collected is used to support grant programs of the Foundation. The information collected on the proposal evaluation forms is used by the foundation to determine the following criteria when awarding or declining proposals submitted to the Agency: (1) What is the intellectual merit of the proposed activity? (2) What are the broader impacts of the proposed activity?

The information collected on reviewer background questionnaire (NSF 428A) is used by managers to maintain an automated database of reviewers for the many disciplines represented by the proposals submitted to the Foundation. Information collected on gender, race, and ethnicity is used in meeting NSF needs for data to permit response to Congressional and other queries into equity issues. These data also are used in the design, implementation, and monitoring of NSF efforts to increase the participation of various groups in science, engineering, and education.

#### Confidentiality

When a decision has been made (whether an award or a declination), verbatim copies of reviews, excluding the names of the reviewers, and summaries of review panel deliberations, if any, are provided to the PI. A proposer also may request and obtain any other releasable material in NSF's file on their proposal. Everything in the file except information that directly identifies either reviewers or other pending or declined proposals is usually releasable to the proposer.

While listings of panelists' names are released, the names of individual reviewers, associated with individual proposals, are not released to anyone.

Because the Foundation is committed to monitoring and identifying any real or apparent inequities based on gender, race, ethnicity, or disability of the proposed principal investigator(s)/ project director(s) or the co-principal investigator(s)/co-project director(s), the Foundation also collects information regarding race, ethnicity, disability, and gender. This information also is protected by the Privacy Act.

*Burden on the Public:* For the Grant Proposal Guide, NSF estimates that an average of 120 hours is expended for each proposal submitted. An estimated 40,000 proposals are during the course of one year for a total of 4,800,000 public burden hours annually.

For the proposal review process, NSF estimates that anywhere from one hour to twenty hours may be required to review a proposal. It is estimated that approximately five hours are required to review an average proposal. Each proposal receives an average of 6.3 reviews, with a minimum requirement of three reviews for an estimated total of 600,000 hours. The estimated burden for the Reviewer Background Information (NSF 428A) is estimated at 5 minutes per respondent with up to 10,000 potential new reviewers for a total of 83 hours. The estimated total is 600,083 for the reviewer process and the reviewer background information.

The estimated aggregated total for both the Grant Proposal Guide and the proposal review process is 5,400,083 hours.

Dated: August 3, 2006.

**Suzanne H. Plimpton,**

*Reports Clearance Officer, National Science Foundation.*

[FR Doc. 06-6761 Filed 8-7-06; 8:45 am]

**BILLING CODE 7555-01-M**

## NUCLEAR REGULATORY COMMISSION

### Sunshine Act; Federal Register Notice

**DATE:** Weeks of August 7, 14, 21, 28; September 4, 11, 2006.

**PLACE:** Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

**STATUS:** Public and Closed.

**MATTERS TO BE CONSIDERED:**

#### Week of August 7, 2006

There are no meetings scheduled for the Week of August 7, 2006.

#### Week of August 14, 2006—Tentative

*Thursday, August 17, 2006*

10 a.m.—Affirmation Session (Public Meeting) (Tentative).

a. Louisiana Energy Services, LP (National Enrichment Facility) Docket No. 70-3103-ML, Petitions for Review of LBP-06-15. (Tentative).

b. Pacific Gas & Elec. Co. (Diablo Canyon ISFSI), Docket No. 72-26-ISFSI "Motion by San Luis Obispo Mothers for Peace, Sierra Club, and Peg Pinard for Declaratory and

Injunctive Relief with respect to Diablo Canyon ISFSI" (Tentative).

c. AmerGen Energy Company, LLC (License Renewal for Oyster Creek Nuclear Generating Station) Docket No. 50-0219, Legal challenges to LBP-06-07 and LBP-06-11 (Tentative).

#### Week of August 21, 2006—Tentative

There are no meetings scheduled for the Week of August 21, 2006.

#### Week of August 28, 2006—Tentative

There are no meetings scheduled for the Week of August 28, 2006.

#### Week of September 4, 2006—Tentative

There are no meetings scheduled for the Week of September 4, 2006.

#### Week of September 11, 2006—Tentative

*Monday, September 11, 2006*

9:30 a.m.—Discussion of Security Issues (Closed—Ex. 1).

1:30 p.m.—Discussion of Security Issues (Closed—Ex. 1 & 3).

*Tuesday, September 12, 2006*

9:30 a.m.—Meeting with Organization of Agreement States (OAS) and Conference of Radiation Control Program Directors (CRCPD) (Public Meeting) (Contact: Shawn Smith, (301) 414-2620).

This meeting will be webcast live at the Web address—<http://www.nrc.gov>.

1 p.m.—Discussion of Security Issues (Closed—Ex. 1).

\*The schedule for Commission meetings is subject to change on short notice. To verify the status of meetings call (recording)—(301) 415-1292.

Contact person for more information: Michelle Schroll, (301) 415-1662.

The NRC Commission Meeting Schedule can be found on the Internet at: <http://www.nrc.gov/what-we-do/policy-making/schedule.html>.

The NRC provides reasonable accommodation to individuals with disabilities where appropriate. If you need a reasonable accommodation to participate in these public meetings, or need this meeting notice or the transcript or other information from the public meetings in another format (e.g., braille, large print), please notify the NRC's Disability Program Coordinator, Deborah Chan, at (301) 415-7041, TDD: (301) 415-2100, or by e-mail at [DLC@nrc.gov](mailto:DLC@nrc.gov). Determinations on requests for reasonable accommodation will be made on a case-by-case basis.

This notice is distributed by mail to several hundred subscribers; if you no longer wish to receive it, or would like to be added to the distribution, please

contact the Office of the Secretary, Washington, DC 20555 (301-415-1969). In addition, distribution of this meeting notice over the Internet system is available. If you are interested in receiving this Commission meeting schedule electronically, please send an electronic message to [dkw@nrc.gov](mailto:dkw@nrc.gov).

Dated: August 3, 2006.

**R. Michelle Schroll,**

*Office of the Secretary.*

[FR Doc. 06-6786 Filed 8-4-06; 8:45 am]

BILLING CODE 7590-01-M

## OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

### Generalized System of Preferences (GSP): Initiation of Reviews and Request for Public Comments

**AGENCY:** Office of the United States Trade Representative.

**ACTION:** Initiation of Reviews and Request for Comments on the Eligibility of Certain GSP Beneficiaries and Existing Competitive Need Limitation (CNL) Waivers.

**SUMMARY:** Legislation authorizing the Generalized System of Preferences (GSP) program expires on December 31, 2006. In connection with Congress' consideration of reauthorization of the program, the Trade Policy Staff Committee (TPSC) requested public comments on October 6, 2005, relating to whether the Administration's operation of the program should be changed so that benefits are not focused on trade from a few countries and that developing countries that traditionally have not been major traders under the program receive benefits. Based on information obtained thus far, the TPSC has decided to initiate a further review and request additional comments to determine whether major beneficiaries of the program have expanded exports or have progressed in their economic development within the meaning of the statute to the extent that their eligibility should be limited, suspended, or withdrawn, pursuant to section 502(d) of the Trade Act of 1974 (19 U.S.C. 2462(d)). For the purpose of identifying beneficiary countries that are subject to this review and on which we are seeking comments, the TPSC looked at a country's total volume of trade under the GSP program, the World Bank's classification of the country's level of income, and the country's share of world goods exports. The TPSC is also conducting a review of existing competitive need limitation (CNL) waivers and requesting comments on

whether any waivers should be terminated, pursuant to section 503(d)(5) of the Act (19 U.S.C. 2463(d)(5)), because they are no longer warranted due to changed circumstances. All public comments must be received by September 5, 2006.

**ADDRESSES:** Submit comments by electronic mail (e-mail) to: [FR0052@USTR.EOP.GOV](mailto:FR0052@USTR.EOP.GOV). For assistance or if unable to submit comments by e-mail, contact the GSP Subcommittee, Office of the United States Trade Representative; USTR Annex, Room F-220; 1724 F Street, NW., Washington, DC 20508 (Tel. 202-395-6971).

#### FOR FURTHER INFORMATION CONTACT:

Contact the GSP Subcommittee, Office of the United States Trade Representative; USTR Annex, Room F-220; 1724 F Street, NW., Washington, DC 20508 (Telephone: 202-395-6971, Facsimile: 202-395-9481).

**SUPPLEMENTARY INFORMATION:** The GSP Subcommittee is seeking written comments on whether to limit, suspend, or withdraw the eligibility of those GSP beneficiary countries for which the total value of U.S. imports under GSP exceeded \$100 million in 2005, and (a) which the World Bank classified as an upper-middle-income economy in 2005; or (b) that accounted for more than 0.25 percent of world goods exports in 2005, as reported by the World Trade Organization. Thus, the TPSC is seeking comments on the eligibility status of the following GSP beneficiary developing countries: Argentina, Brazil, Croatia, India, Indonesia, Kazakhstan, Philippines, Romania, Russia, South Africa, Thailand, Turkey, and Venezuela. The TPSC is also seeking comments on whether any of the 83 existing competitive need limitation (CNL) waivers are no longer warranted due to changed circumstances.

#### Country Eligibility Review

The GSP statute authorizes the President to withdraw, suspend, or limit the application of duty-free treatment with respect to any country based on statutory eligibility criteria. See section 502(d) of the Act (19 U.S.C. 2462(d)). These criteria include: (1) The effect such action will have on furthering the economic development of developing countries through the expansion of their exports; (2) the extent of the beneficiary developing country's competitiveness with respect to eligible articles; and (3) a country's level of economic development, including its per capita gross national product, the living standards of its inhabitants, and any other economic factors which the

President deems appropriate. The GSP Subcommittee is seeking comments on whether the eligibility of any of these beneficiaries should be limited, suspended, or withdrawn based on the statutory eligibility criteria enumerated in sections 501(1) and (4) and section 502(c)(2) of the Act.

#### CNL Waiver Review

Section 503(c)(2)(A) of the Act sets out the two competitive need limitations (CNLs) applicable to eligible articles from beneficiary developing countries (other than sub-Saharan African and least-developed beneficiaries). When the President determines that a beneficiary developing country exported to the United States during a calendar year either (1) A quantity of a GSP-eligible article having a value in excess of the applicable amount for that year (\$120 million for 2005), or (2) a quantity of a GSP-eligible article having a value equal to or greater than 50 percent of the value of total U.S. imports of the article from all countries (the "50 percent CNL"), the President must terminate GSP duty-free treatment for that article from that beneficiary developing country by no later than July 1 of the next calendar year.

Under section 503(d) of the 1974 Act, the President may waive the application of section 503(c)(2) if the President (1) Receives the advice of the International Trade Commission (ITC) on whether any industry in the United States is likely to be adversely affected by such waiver; (2) determines, based on the considerations in section 501 and 502(c) of the Act and the advice of the ITC that such waiver is in the national economic interest of the United States; and (3) publishes the determination in the **Federal Register**. CNL waivers were first authorized by Congress in 1984. Nineteen GSP beneficiaries currently benefit from 83 CNL waivers. Under section 503(d)(5) of the Act, a waiver may be terminated if the President determines that it is no longer warranted due to changed circumstances. The GSP Subcommittee is seeking comments on whether any of the 83 existing waivers should be terminated pursuant to this provision of the statute. For a list of existing CNL waivers, see "CNL Waivers", [http://www.ustr.gov/Trade\\_Development/Preference\\_Programs/GSP/Section\\_Index.html](http://www.ustr.gov/Trade_Development/Preference_Programs/GSP/Section_Index.html).

#### Requirements for Submission

In order to facilitate prompt processing of submissions, USTR strongly urges and prefers electronic e-mail submissions only in response to

this notice. Hand-delivered submissions will not be accepted. These submissions should be single-copy transmissions in English with the total submission, including attachments, not to exceed 30 single-spaced standard letter-size pages using 12-point font. E-mail submissions should use the following subject line: "2006 GSP Eligibility and CNL Waiver Review". Comments on CNL waivers should include the 8-digit tariff number of the Harmonized Tariff Schedule of the United States (HTSUS). Documents must be submitted in English in one of the following formats: MSWord (.DOC), WordPerfect (.WPD), or text (.TXT) files. Documents may not be submitted as electronic image files or contain imbedded images (for example, ".JPG", ".TIF", ".PDF", ".BMP", or ".GIF"). Supporting documentation submitted as spreadsheets are acceptable as Excel files, formatted for printing on 8½ × 11 inch paper. To the extent possible, any data attachments to the submission should be included in the same file as the submission itself, and not as separate files.

If the submission contains business confidential information, a non-confidential version of the submission must also be submitted that indicates where confidential information was redacted by inserting asterisks where material was deleted. In addition, the confidential submission must be clearly marked "Business Confidential" at the top and bottom of each page of the document. The non-confidential version must also be clearly marked at the top and bottom of each page (either "Public Version" or "Non-Confidential"). Documents that are submitted without any marking will be considered public documents. For any document containing business confidential information submitted as an electronic attached file to an e-mail transmission, the file name of the business confidential version should begin with the characters "BC-", and the file name of the public version should begin with the characters "P-". The "P-" or "BC-" should be followed by the name of the party (government, company, union, association, etc.) making the submission.

E-mail submissions should not include separate cover letters or messages in the message area of the e-mail; information that might appear in any cover letter should be included directly in the attached file containing the submission itself, including the sender's e-mail address and other identifying information.

The e-mail address for these submissions is [FR0052@USTR.EOP.GOV](mailto:FR0052@USTR.EOP.GOV). Documents

not submitted in accordance with these instructions might not be considered in this review. If unable to provide submissions by e-mail, please contact the GSP Subcommittee to arrange for an alternative method of transmission.

Public versions of all documents relating to this review will be available for review approximately two weeks after the due date by appointment in the USTR public reading room, 1724 F Street, NW., Washington, DC. Appointments may be made from 9:30 a.m. to noon and 1 p.m. to 4 p.m., Monday through Friday, by calling (202) 395-6186.

**Marideth J. Sandler,**

*Executive Director for the GSP Program,  
Chairman, GSP Subcommittee of the Trade  
Policy Staff Committee.*

[FR Doc. E6-12870 Filed 8-7-06; 8:45 am]

**BILLING CODE 3190-W6-P**

## OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

### Generalized System of Preferences (GSP): Request for Public Comments on the Possible Withdrawal or Suspension of GSP Benefits With Respect to Romania

**AGENCY:** Office of the United States  
Trade Representative.

**ACTION:** Notice and solicitation of public  
comment.

**SUMMARY:** As part of an ongoing country practice review, the GSP Subcommittee of the Trade Policy Staff Committee (TPSC) is considering whether to recommend that duty-free treatment accorded to imports from Romania under the U.S. GSP program be withdrawn or suspended on the grounds that Romania affords preferential treatment to the products of a developed country, other than the United States, which has, or is likely to have, a significant adverse effect on United States commerce. In addition, Romania adopted Veterinary Order 95 which includes requirements that: (1) Individual U.S. poultry plants must be approved for export to the EU; and (2) U.S. poultry producers must abide by EU welfare rules for slaughter. There are no EU-approved poultry facilities in the United States.

The GSP Subcommittee is seeking public comments on whether, in view of the information provided in the petition, implementation of this new measure, and any additional information pertaining to the eligibility criteria set forth in the statute, Romania no longer meets one or more statutory criteria for GSP eligibility. All public

comments must be received by  
Thursday, September 7, 2006.

**ADDRESSES:** Submit comments by electronic mail (e-mail) to: [FR0618@ustr.eop.gov](mailto:FR0618@ustr.eop.gov). For assistance or if unable to submit comments by e-mail, contact the GSP Subcommittee, Office of the United States Trade Representative; USTR Annex, Room F-220; 1724 F Street, NW., Washington, DC 20508 (Tel. 202-395-6971).

**FOR FURTHER INFORMATION CONTACT:** Contact the GSP Subcommittee, Office of the United States Trade Representative; USTR Annex, Room F-220; 1724 F Street, NW.; Washington, DC 20508 (Telephone: 202-395-6971, Facsimile: 202-395-9481).

**SUPPLEMENTARY INFORMATION:** The GSP program is authorized pursuant to Title V of the Trade Act of 1974, as amended ("the Trade Act") (19 U.S.C. 2461 *et seq.*). The GSP program grants duty-free treatment to designated eligible articles that are imported from designated beneficiary developing countries. Once granted, GSP benefits may be withdrawn, suspended, or limited by the President with respect to any country. (19 U.S.C. 2462(d)(1)). Romania is a designated beneficiary developing country under the GSP program.

### Possible Withdrawal or Suspension of GSP Benefits for Romania

In 2002, the GSP Subcommittee received a petition from the Distilled Spirits Council of the United States and the Pharmaceutical Research and Manufacturers of America (PhRMA) requesting that Romania's eligibility for GSP benefits be terminated because Romania granted tariff preferences to EU distilled spirits and certain pharmaceuticals which have, or are likely to have, a significant adverse effect on United States commerce. These petitions were accepted for review in the 2005 Annual Review. On June 2, 2006, Romania adopted Veterinary Order 95. This Order affects all poultry meat shipments loaded for shipment to Romania after June 7, 2006, and includes requirements that: (1) Individual U.S. poultry plants must be approved for export to the EU; and (2) U.S. poultry producers must abide by EU welfare rules for slaughter. Romania will allow poultry certified under previous regulations until August 5, 2006.

### Requirements for Submissions

All submissions must conform to the GSP regulations set forth at 15 CFR Part 2007, except as modified below. Comments must be submitted, in English, to the Chairman of the GSP

Subcommittee of the Trade Policy Staff Committee (TPSC) as soon as possible, but not later than 5 p.m., September 7, 2006.

In order to facilitate prompt consideration of submissions, USTR strongly prefers electronic e-mail submissions in response to this notice. Hand-delivered submissions will not be accepted. E-mail submissions should be single-copy transmissions in English with the total submission, including attachments, not to exceed 30 single-spaced standard letter-size pages using 12-point type. The e-mail transmission should use the following subject line: "Romania GSP Eligibility Review".

Documents must be submitted as MSWord (".doc"), WordPerfect (".wpd"), or text (".txt") files. Documents submitted as electronic image files or containing imbedded images (for example, ".jpg", ".pdf", ".bmp", ".tif", or ".gif") will not be accepted. Spreadsheets submitted as supporting documentation are acceptable as Excel files, pre-formatted for printing only on 8 1/2 x 11 inch paper. To the extent possible, any data attachments to the submission should be included in the same file as the submission itself, and not as separate files.

Submissions in response to this notice will be subject to public inspection by appointment with the staff of the USTR Public Reading Room except for information granted "business confidential" status pursuant to 15 CFR 2003.6.

If the submission contains business confidential information, a non-confidential version of the submission must also be submitted that indicates where confidential information was redacted by inserting asterisks where material was deleted. In addition, the confidential version must be clearly marked "BUSINESS CONFIDENTIAL" at the top and bottom of each page of the document. The non-confidential version must be clearly marked "PUBLIC" or "NON-CONFIDENTIAL" at the top and bottom of each page. Documents that are submitted without any marking might not be accepted or will be considered public documents.

For any document containing business confidential information submitted as an electronic attached file to an e-mail transmission, the file name of the business confidential version should begin with the characters "BC-", and the file name of the public version should begin with the character "P-". The "BC-" or "P-" should be followed by the name of the party (government, company, union, association, etc.) which is submitting the comments.

E-mail submissions should not include separate cover letters or messages in the message area of the e-mail; information that might appear in any cover letter should be included directly in the attached file containing the submission itself, including the sender's identifying information with telephone number, fax number, and e-mail address. The e-mail address for these submissions is [FR0618@ustr.eop.gov](mailto:FR0618@ustr.eop.gov). Documents not submitted in accordance with these instructions might not be considered in this review. If unable to provide submissions by e-mail, please contact the GSP Subcommittee to arrange for an alternative method of transmission.

Public versions of all documents relating to this review will be available for public review approximately three weeks after the due date by appointment in the USTR Public Reading Room, 1724 F Street, NW, Washington, DC. Availability of documents may be ascertained, and appointments may be made from 9:30 a.m. to noon and 1 p.m. to 4 p.m., Monday through Friday, by calling 202-395-6186.

**Marideth J. Sandler,**

*Executive Director for the GSP Program,  
Chairman, GSP Subcommittee of the Trade  
Policy Staff Committee.*

[FR Doc. E6-12833 Filed 8-7-06; 8:45 am]

**BILLING CODE 3190-W6-P**

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-54261; File No. SR-Amex-2006-69]

### Self-Regulatory Organizations; American Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change and Amendment No. 1 Thereto Relating to an Extension of a Pilot Program for the Fee Cap Program for Certain Options Spread Trades

August 1, 2006.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on July 20, 2006, the American Stock Exchange LLC ("Amex" 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 substantially prepared by Amex. Amex has designated the proposed rule change as one establishing or changing a due,

fee, or other charge, pursuant to Section 19(b)(3)(A)(ii) of the Act<sup>3</sup> and Rule 19b-4(f)(2) thereunder,<sup>4</sup> which renders the proposal effective upon filing with the Commission. On July 28, 2006, the Exchange filed Amendment No. 1 to the proposed rule change.<sup>5</sup> 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 proposes to extend its fee cap program for dividend spreads, merger spreads and short stock interest spreads (the "Pilot Program") for an additional six months through February 1, 2007.

The text of the proposed rule change is available on Amex's Web site at <http://www.amex.com>, at the Office of the Secretary at Amex, 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, as amended, and discussed any comments it received on the proposal. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

##### A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

###### 1. Purpose

The Pilot Program was established in February 2006.<sup>6</sup> The Exchange believes that the Pilot Program has operated, as designed, to allow the Exchange to become more competitive with fee cap programs in place at other options exchanges. Accordingly, the Exchange believes that a six-month extension is reasonable and consistent with the intent of the Pilot Program.

The Pilot Program amended the Exchange's fee cap program that limits per trade the transaction, comparison

<sup>3</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

<sup>4</sup> 17 CFR 240.19b-4(f)(2).

<sup>5</sup> In Amendment No. 1, Amex modified the statutory basis of the proposal from being Section 6(b)(5) of the Act to be Section 6(b)(4) of the Act.

<sup>6</sup> See Securities Exchange Act Release No. 53415 (March 3, 2006), 71 FR 12745 (March 13, 2006).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

and floor brokerage fees (hereinafter referred to collectively as “transaction-based fees”) charged to specialists, registered options traders, non-member market makers, member firms, broker dealers and non-member broker dealers (referred to hereinafter as “non-customer market participants”) for accommodation and spread trades.<sup>7</sup> The Pilot Program was put in place specifically for option transactions that are part of dividend spreads,<sup>8</sup> merger spreads,<sup>9</sup> and short stock interest spreads<sup>10</sup> and it amended the fee cap for such option transactions in the following manner: First, the Exchange proposed to convert the cap on transaction-based fees from a per trade cap to a cap on all transactions executed as part of these spreads on the same trading day in the same option class and to reduce the amount of fees charged before the cap is applied to \$1,000 per day. Secondly, the Exchange proposed to add a monthly fee cap of \$50,000 on transaction-based fees per initiating firm for transactions in dividend spreads, merger spreads and short stock interest spreads. The Exchange proposed to make these revisions to its fee cap program to match similar fee cap programs at other exchanges.<sup>11</sup> The Exchange implemented these two changes for option transactions that are part of dividend spreads, merger spreads, and short stock interest spreads on a pilot basis until August 1, 2006.

To date, the Exchange believes that the Pilot Program has been beneficial to the Exchange because it has brought more business to the Exchange. In this manner, non-customer market participants are encouraged to bring

<sup>7</sup> Accommodation trades (also known as cabinet trades) are transactions to close out positions in worthless or nearly worthless out-of-the-money option contracts. Spread trades include: (i) Reversals and conversions, (ii) dividend spreads, (iii) box spreads, (iv) butterfly spreads, (v) merger spreads, and (vi) short stock interest spreads.

<sup>8</sup> A dividend spread transaction is defined as any trade done to achieve a dividend arbitrage between any two deep-in-the-money options.

<sup>9</sup> A merger spread transaction is defined as a transaction executed pursuant to a merger spread strategy involving the simultaneous purchase and sale of options of the same option class and expiration date, but different strike prices followed by the exercise of the resulting long option position. Merger spreads are executed prior to the date that shareholders of record in a stock subject to a merger are required to elect their respective form of consideration (*i.e.*, cash or stock).

<sup>10</sup> A short stock interest spread is defined as a spread that uses two deep in-the-money put options followed by the exercise of the resulting long position of the same class in order to establish a short stock interest arbitrage position. This strategy is used to capture short stock interest.

<sup>11</sup> See PCX Options Fee Schedule and Securities Exchange Act Release No. 53171 (January 24, 2006), 71 FR 5090 (January 31, 2006) (SR-CBOE 2005-117).

more order flow to the Exchange increasing competition among all option exchanges. Accordingly, the Exchange believes that an extension of the Pilot Program for six months through February 1, 2007 is warranted.

## 2. Statutory Basis

The Exchange believes that the proposed rule change, as amended, is consistent with Section 6(b) of the Act,<sup>12</sup> in general, and furthers the objectives of Section 6(b)(4),<sup>13</sup> in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities. Specifically, the Exchange is proposing to implement revisions to a fee cap program that is competitive with similar programs at other options exchanges.

### *B. Self-Regulatory Organization's Statement on Burden on Competition*

The Exchange believes that proposed rule change will not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

### *C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

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

The foregoing rule change, as amended, has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act<sup>14</sup> and subparagraph (f)(2) of Rule 19b-4 thereunder<sup>15</sup> because it establishes or changes a due, fee, or other charge. At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.<sup>16</sup>

<sup>12</sup> 15 U.S.C. 78f(b).

<sup>13</sup> 15 U.S.C. 78f(b)(4).

<sup>14</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

<sup>15</sup> 17 CFR 240.19b-4(f)(2).

<sup>16</sup> The effective date of the original proposed rule change is July 20, 2006, the date of the original filing, and the effective date of Amendment No.1 is July 28, 2006, the filing date of the amendment. For purposes of calculating the 60-day abrogation period within which the Commission may summarily abrogate the proposed rule change, as amended, under Section 19(b)(3)(C) of the Act, the Commission considers the period to commence on

## 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](mailto:rule-comments@sec.gov). Please include File Number SR-Amex-2006-69 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-Amex-2006-69. 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 Amex. 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-Amex-2006-69 and should be submitted on or before August 29, 2006.

July 28, 2006, the date on which the Exchange submitted Amendment No. 1. See 15 U.S.C. 78s(b)(3)(C).

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>17</sup>

Nancy M. Morris,  
Secretary.

[FR Doc. E6-12839 Filed 8-7-06; 8:45 am]

BILLING CODE 8010-01-P

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-54262; File No. SR-Amex-2006-64]

### Self-Regulatory Organizations; American Stock Exchange LLC; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto Relating to a Retroactive Suspension of Transaction Charges for Specialist Orders in the Nasdaq-100 Tracking Stock® (QQQQ)

August 1, 2006.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on July 7, 2006, the American Stock Exchange LLC (“Amex” or “Exchange”) submitted to 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 Amex. On July 27, 2006, the Exchange submitted Amendment No. 1 to the proposed rule change.<sup>3</sup> 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 proposes to retroactively apply a suspension of transaction charges for specialist orders in connection with the trading of the Nasdaq-100 Index Tracking Stock® (Symbol: QQQQ) from July 1, 2006 through July 12, 2006.

The text of the proposed rule change is available on Amex’s Web site (<http://www.amex.com>), at Amex’s principal office, and at the Commission’s Public Reference Room.

#### II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements

concerning the purpose of, and basis for, the proposed rule change, as amended, and discussed any comments it received on the proposal. The text of these statements may be examined at the places specified in Item IV below, and is set forth in Sections A, B, and C below. Amex 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 the Statutory Basis for, the Proposed Rule Change

##### 1. Purpose

The Exchange proposes to retroactively apply a suspension of transaction charges for specialist orders in the QQQQ from July 1, 2006 through July 12, 2006. The Exchange previously extended the suspension of the QQQQ from March 1, 2006 through June 30, 2006.<sup>4</sup> The Exchange, in a companion filing, also proposed the adoption of a suspension of transaction charges for specialist orders in the Nasdaq-100 Tracking Stock (QQQQ) from July 13, 2006 through August 31, 2006.<sup>5</sup> In order to waive transaction fees for specialist orders in the QQQQ from July 1, 2006 through August 31, 2006, the Exchange has proposed to retroactively suspend transaction fees for specialist transactions from July 1, 2006 through July 12, 2006.

Specialist orders currently are charged \$0.0034 (\$0.34 per 100 shares), capped at \$300 per trade (88,235 shares). Effective December 1, 2004, the Nasdaq-100 Index Tracking Stock® (formerly “QQQ”) transferred its listing from Amex to The Nasdaq Stock Market, Inc (“Nasdaq”). It now trades on Nasdaq under the symbol QQQQ. After the transfer, Amex began trading QQQQ on an unlisted trading privileges basis.

The Exchange believes that the retroactive suspension of transaction charges for specialist transactions in the QQQQ from July 1, 2006 through July 12, 2006 is consistent with the adoption of the proposal to suspend transaction charges for specialist orders generally in the QQQQ through August 31, 2006.

The Exchange further believes that a retroactive suspension of transaction fees on specialist orders in the QQQQ is appropriate to enhance the competitiveness of executions on Amex. The Exchange proposes to amend the Amex Fee Schedule to indicate that transaction charges for specialist orders in the QQQQ have been suspended from July 1, 2006 through August 31, 2006.

As provided in the companion filing, the Exchange submits that a suspension of transaction fees for specialist orders in connection with the QQQQ is consistent with Section 6(b)(4) of the Act.<sup>6</sup> Specifically, the Exchange believes that suspending transaction charges for QQQQ specialist orders is an equitable allocation of reasonable fees among Exchange members. The Exchange believes that the fact that specialists have greater obligations than other members and are also subject to other Exchange fees, in addition to transaction fees, supports this proposal to retroactively apply the fee suspension.

The Exchange notes that specialists are subject to a variety of Exchange fees other than transaction charges, such as a floor clerk fee, a floor facility fee, a post fee, and a registration fee.<sup>7</sup> In addition, specialists and other floor members of the Exchange are subject to technology and membership fees.<sup>8</sup> Certain market participants, such as customers, non-member broker-dealers and market-makers, and member broker-dealers, are not subject to the majority of these fees. In addition, a specialist unit, in order to adequately “make a market” in assigned securities, must be sufficiently staffed<sup>9</sup> and have adequate technology resources to handle the volume of orders (especially in the QQQQ) that are sent to the Exchange. The Exchange believes that these operational costs borne by specialists further support the proposal to temporarily suspend QQQQ transaction fees on specialist orders.

<sup>6</sup> Section 6(b)(4) states that the rules of a national securities exchange must provide for an equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities. 15 U.S.C. 78f(b)(4).

<sup>7</sup> The floor clerk, floor facility, post, and registration fees, on an annual basis, are \$900, \$2,400, \$1,000, and \$800, respectively.

<sup>8</sup> A technology fee of \$6,000 per year is assessed on all specialists and other floor participants at the Exchange. Annual membership dues of \$1,500 must be paid by all members while annual membership fees are payable depending on the type of membership and circumstances. Non-members are not subject to these fees.

<sup>9</sup> See Securities Exchange Act Release No. 53386 (February 28, 2006), 71 FR 11250 (March 6, 2006) (requiring specialists to employ an adequate number of clerks).

<sup>4</sup> See, e.g., Securities Exchange Act Release Nos. 53871 (May 25, 2006), 71 FR 31236 (June 1, 2006) and 54094 (July 3, 2006), 71 FR 39135 (July 11, 2006) (SR-Amex-2006-42) (retroactively applying a suspension of transaction charges for specialist orders in connection with the trading of the QQQQ from March 1, 2006, through April 5, 2006). See also Securities Exchange Act Release No. 53701 (April 21, 2006), 71 FR 25253 (April 28, 2006) (SR-Amex-2006-30) (suspending specialist transaction charges in connection with the QQQQ from April 6, 2006, through June 30, 2006).

<sup>5</sup> See Securities Exchange Act Release No. 54227 (July 27, 2006).

<sup>17</sup> 17 CFR 200.30-3(a)(12).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> Amendment No. 1 replaced and superseded the original filing in its entirety.

Specialists have certain obligations under Exchange rules, as well as the Act, that do not exist for other market participants. For example, pursuant to Amex Rule 170, a specialist is required to maintain a fair and orderly market in his or her assigned securities. Other members of the Exchange, as well as non-member market participants, do not have this obligation. As a result, the Exchange believes that the proposed retroactive suspension of transaction charges for specialist orders in the QQQQ is reasonable and equitable, given the obligations that specialists must adhere to in making markets. The Exchange further submits that the fee suspension will provide greater incentive to specialists to continue to provide market liquidity, rendering the Exchange an attractive venue for market participants to execute orders.

## 2. Statutory Basis

The Exchange believes that the proposed rule change, as amended, is consistent with Section 6(b) of the Act,<sup>10</sup> in general, and furthers the objectives of Section 6(b)(4) of the Act,<sup>11</sup> in particular, and is an equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities.

### B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange believes that the proposed rule change does not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the 1934 Act.

### C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were solicited or received with respect to the proposed rule change.

## III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission will:

(A) By order approve such proposed rule change, as amended, 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, 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](mailto:rule-comments@sec.gov). Please include File Number SR-Amex-2006-64 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-Amex-2006-64. 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 Amex. 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-Amex-2006-64 and should be submitted on or before August 29, 2006.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>12</sup>

Nancy M. Morris,  
Secretary.

[FR Doc. E6-12842 Filed 8-7-06; 8:45 am]

BILLING CODE 8010-01-P

## SECURITIES AND EXCHANGE COMMISSION /

[Release No. 34-54260; File No. SR-NASDAQ-2006-024]

### Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Regarding Technical and Conforming Changes to Nasdaq's 7000 Series Rules

August 1, 2006.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on July 31, 2006, The NASDAQ Stock Market LLC ("Nasdaq") 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 Nasdaq. Nasdaq has filed the proposed rule change as a "non-controversial" rule change pursuant to Section 19(b)(3)(A) of the Act<sup>3</sup> and Rule 19b-4(f)(6) thereunder,<sup>4</sup> which renders it 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

Nasdaq proposes to conform the Rule 7000 Series of Nasdaq's rules to certain changes made to the Rule 7000 Series of the rules of the National Association of Securities Dealers, Inc. ("NASD") since approval of Nasdaq's rules by the Commission in January 2006 and to correct certain errors in the approved rules. Nasdaq proposes to implement the proposed rule change on August 1, 2006. The text of the proposed rule change is available on Nasdaq's Web site at <http://www.nasdaq.com>, at the principal office of Nasdaq, and at the Commission's Public Reference Room.

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>4</sup> 17 CFR 240.19b-4(f)(6).

<sup>10</sup> 15 U.S.C. 78f(b).

<sup>11</sup> 15 U.S.C. 78f(b)(4).

<sup>12</sup> 17 CFR 200.30-3(a)(12).

## II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, Nasdaq included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. Nasdaq has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

### A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

#### 1. Purpose

Nasdaq is modifying its 7000 Series Rules to reflect certain changes made to the Rule 7000 Series of the rules of NASD since approval of Nasdaq's rules by the Commission in January 2006 and to correct certain errors in the approved rules. Specifically, Nasdaq is:

- Amending Nasdaq Rule 7015 to reflect changes to NASD Rule 7010(f) by SR-NASD-2006-026, SR-NASD-2006-027, and SR-NASD-2006-043.<sup>5</sup> The amendments to Nasdaq Rule 7015 also reflect prior Commission approvals for the application of NASD Rule 7010(f) to non-members, such as service bureaus, that obtain access services from Nasdaq.
- Amending Nasdaq Rule 7017 to restore a pilot program for NQDS fees for non-professional users that had lapsed at the time of the approval of Nasdaq's exchange registration application but that was restored under NASD rules in SR-NASD-2006-009.<sup>6</sup>
- Amending Nasdaq Rule 7021 to reflect changes to NASD Rule 7010(n) made by SR-NASD-2006-072.<sup>7</sup>
- Adding NASDAQ Rule 7034 to reflect the addition of Inet connectivity fees to NASD Rule 7010(w) in SR-NASD-2005-147 and SR-NASD-2005-148<sup>8</sup> and subsequent amendments to the Rule by SR-NASD-2006-013, SR-

NASD-2006-031 and SR-NASD-2006-032.<sup>9</sup>

- Adding Nasdaq Rule 7035 to reflect the addition of NASD Rule 7010(x) in SR-NASD-2006-030.<sup>10</sup>
- Adding Nasdaq Rule 7036 to reflect the addition of NASD Rule 7010(y) in SR-NASD-2006-056.<sup>11</sup>
- Amending Nasdaq Rules 7011, 7025, 7028, and 7033 to correct typographical errors.

#### 2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,<sup>12</sup> in general, and with Sections 6(b)(4) and (5) of the Act,<sup>13</sup> in particular, in that the proposal provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system which Nasdaq operates or controls, and is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Nasdaq believes the proposed rule change conforms the Rule 7000 Series of Nasdaq's rules to certain changes made to the Rule 7000 Series of NASD rules since approval of Nasdaq's rules by the Commission in January 2006 and corrects certain errors in the approved rules.

### B. Self-Regulatory Organization's Statement on Burden on Competition

Nasdaq does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

### C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

## III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the forgoing rule change does not: (1) Significantly affect the protection of investors or the public interest; (2) impose any significant burden on competition; and (3) become operative for 30 days after the date of this filing, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>14</sup> and Rule 19b-4(f)(6) thereunder.<sup>15</sup>

A proposed rule change filed under 19b-4(f)(6) normally may not become operative prior to 30 days after the date of filing.<sup>16</sup> However, Rule 19b-4(f)(6)(iii)<sup>17</sup> permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. Nasdaq provided the Commission with written notice of its intent to file this proposed rule change at least five business days prior to the date of filing the proposed rule change. In addition, Nasdaq has requested that the Commission waive the 30-day pre-operative delay, and the Commission hereby grants that request.<sup>18</sup> The Commission believes that waiving the 30-day pre-operative delay is consistent with the protection of investors and in the public interest because it will allow Nasdaq to implement the rule changes, which have either recently been made effective as changes to NASD rules or are technical in nature, at the time when Nasdaq begins to operate as a national securities exchange.

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 Act.

## IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and

<sup>5</sup> Securities Exchange Act Release Nos. 53536 (March 21, 2006), 71 FR 15784 (March 29, 2006) (SR-NASD-2006-026); 53535 (March 21, 2006), 71 FR 15788 (March 29, 2006) (SR-NASD-2006-027); and 53617 (April 7, 2006), 71 FR 19597 (April 14, 2006) (SR-NASD-2006-043).

<sup>6</sup> Securities Exchange Act Release No. 53255 (February 8, 2006), 71 FR 8016 (February 15, 2006) (SR-NASD-2006-009).

<sup>7</sup> Securities Exchange Act Release No. 54002 (June 16, 2006), 71 FR 36143 (June 23, 2006) (SR-NASD-2006-072).

<sup>8</sup> Securities Exchange Act Release Nos. 53005 (December 22, 2005), 70 FR 77215 (December 29, 2005) (SR-NASD-2005-147); and 53006 (December 22, 2005), 70 FR 77220 (March 29, 2006) (SR-NASD-2005-148).

<sup>9</sup> Securities Exchange Act Release Nos. 53256 (February 8, 2006), 71 FR 8020 (February 15, 2006) (SR-NASD-2006-013); 53504 (March 16, 2006), 71 FR 14760 (March 23, 2006) (SR-NASD-2006-031); and 53505 (March 16, 2006), 71 FR 14758 (March 23, 2006) (SR-NASD-2006-032).

<sup>10</sup> Securities Exchange Act Release No. 54005 (June 16, 2006), 71 FR 36145 (June 23, 2006) (SR-NASD-2006-030).

<sup>11</sup> Securities Exchange Act Release No. 54003 (June 16, 2006), 71 FR 36141 (June 23, 2006) (SR-NASD-2006-056).

<sup>12</sup> 15 U.S.C. 78f.

<sup>13</sup> 15 U.S.C. 78f(b)(4) and (5).

<sup>14</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>15</sup> 17 CFR 240.19b4(f)(6).

<sup>16</sup> 17 CFR 240.19b-4(f)(6)(iii).

<sup>17</sup> *Id.*

<sup>18</sup> For the purposes only of waiving the 30-day pre-operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

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](mailto:rule-comments@sec.gov). Please include File No. SR-NASDAQ-2006-024 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 No. SR-NASDAQ-2006-024. 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 will also be available for inspection and copying at the principal office of Nasdaq. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR-NASDAQ-2006-024 and should be submitted on or before August 29, 2006.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>19</sup>

**Nancy M. Morris,**

*Secretary.*

[FR Doc. E6-12840 Filed 8-7-06; 8:45 am]

**BILLING CODE 8010-01-P**

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-54255; File No. SR-NYSE-2005-03]

### Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Proposed Rule Change and Amendments Nos. 1 and 2 To Amend Exchange Rule 325 (Capital Requirements for Member Organizations), Rule 326 (Growth Capital Requirement, Business Reduction Capital Requirement, Unsecured Loans and Advances), and Rule 431 (Margin Requirement)

July 31, 2006.

Pursuant to Section 19(b)(1)<sup>1</sup> of the Securities Exchange Act of 1934 (the "Exchange Act"),<sup>2</sup> and Rule 19b-4 thereunder,<sup>3</sup> notice is hereby given that on January 5, 2005, the New York Stock Exchange LLC ("NYSE" or the "Exchange") filed with the Securities and Exchange Commission ("SEC" or the "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange.<sup>4</sup> The NYSE filed Amendment No. 1 to the proposed rule change on February 13, 2006.<sup>5</sup> The NYSE filed Amendment No. 2 to the proposed rule change on March 17, 2006.<sup>6</sup> The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 15 U.S.C. 78a *et seq.*

<sup>3</sup> 17 CFR 240.19b-4.

<sup>4</sup> Pursuant to discussions with the Commission staff, the Exchange clarified the application of proposed amendments to NYSE Rules 325, 326 and 431 to reflect the Exchange's March 7, 2006 merger with Archipelago Holdings, Inc. ("Archipelago"), adjustments to capital levels in Rule 326 and other general editorial changes. Telephone conversations between William Jannace, Director, Exchange, William Wollman, Vice President, Exchange and E. David Hwa, Special Counsel, Division of Market Regulation, Commission, on May 11, 2006, June 8, 2006, July 19, 2006 and email dated July 19, 2006.

<sup>5</sup> In Amendment No. 1, the Exchange clarified the application of proposed amendments to NYSE Rule 431(e)(9) solely to OTC derivatives transactions and expanded upon elements of the written risk analysis provided by the proposed rule for member organizations utilizing the alternative method of computing net capital.

<sup>6</sup> In Amendment No. 2, the Exchange clarified the application of proposed amendments to NYSE Rule 326 to make explicit the ability of the Exchange to restrict the growth or business of a member organization, respectively, when its tentative net capital declines below the early warning notification amount required by the Exchange Act Rule 15c3-1(a)(7)(ii).

### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is proposing to amend Rule 325, Rule 326, and Rule 431 to reflect recent SEC rule amendments under the Exchange Act, including amendments to Exchange Act Rule 15c3-1 that established an alternative method of computing net capital for broker-dealers.

### 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

##### Background

Exchange Act Rule 15c3-1 (the "net capital rule") contains basic financial responsibility standards for broker-dealers. The rule is intended to protect customers and other market participants from broker-dealer failures, and to enable those firms that fall below the minimum net capital requirements to liquidate in an orderly fashion without the need for a formal proceeding or financial assistance from the Securities Investor Protection Corporation. To help insure that broker-dealers maintain sufficient liquid assets to satisfy promptly the claims of customers and cover potential market and credit risks, the net capital rule requires broker-dealers to maintain different minimum levels of capital based upon the nature of their business and whether they handle customer funds or securities.

On August 20, 2004, the SEC adopted rule amendments under the Exchange Act, including amendments to Exchange Act Rule 15c3-1, that establish a voluntary, alternative method of computing net capital for certain large broker-dealers that are part of consolidated supervised groups referred to as consolidated supervised entities ("CSEs"). Under the SEC amendments, a broker-dealer may use this

<sup>19</sup> 17 CFR 200.30-3(a)(12).

“alternative/CSE” method only if its ultimate holding company agrees to compute group-wide allowable capital and allowances for market, credit, and operational risk in accordance with the standards adopted by the Basel Committee on Banking Supervision, and consents to group-wide SEC supervision. The alternative method of computing net capital permits a broker-dealer to use models, such as “value-at-risk” (“VAR”) models and scenario analysis,<sup>7</sup> that are already part of its internal risk management control system to calculate the market risk and derivatives-related credit risk components of its net capital requirement. The deduction for market risk calculated using internal models replaces the traditional “haircut” approach to calculating net capital.<sup>8</sup>

When the Membership allow their net capital to decline below certain levels, they risk non-compliance with the net capital and financial responsibility requirements of Exchange Act Rule 15c3-1. NYSE Rules 325 and 326 are designed to alert the Exchange before such problems occur, and to enable the Exchange to prevent Membership non-compliance by restricting the business activities of any member organization whose net capital falls below certain defined levels.

#### **Proposed Amendment to NYSE Rule 325**

NYSE Rule 325, the Exchange’s primary net capital rule, requires the Membership to comply with Exchange Act Rule 15c3-1 and imposes additional prophylactic requirements to ensure such compliance. Rule 325(b) requires a member organization to notify the Exchange if its net capital falls below certain percentages. The proposed amendment adds Rule 325(b)(3), which would require a member organization to provide concurrently to the Exchange a copy of any report or notification made to the SEC pursuant to Exchange Act Rule 17a-11<sup>9</sup> or Commodities Exchange Act (“CEA”) Regulation 1.12.<sup>11</sup>

This new requirement is necessary to help ensure that the Exchange continues to receive timely notification of potential violations of Exchange Act Rule 15c3-1, including the rule’s new

CSE provisions. For example, as noted above, Exchange Act Rule 15c3-1, in conjunction with Exchange Act Rule 17a-11, now requires a broker-dealer that elects to use the alternative method of computing net capital to report to the SEC whenever its tentative net capital declines below \$5 billion. Proposed Rule 325(b)(3) would require a member organization to provide the Exchange with copies of every such report.

Language in Rule 325(b) regarding notification to the Exchange relating to CEA minimum capital requirements for members or member organizations acting as futures commission merchants was rendered obsolete by amendments to CEA Regulation 1.17<sup>12</sup> on September 30, 2004<sup>13</sup> and, therefore, has been removed from the amended Rule 325(b). The proposed new provisions of Rule 325(b)(3), however, would require a member organization to provide the Exchange with copies of any reports or notifications it provides to the Commodity Futures Trading Commission (“CFTC”) under CEA Regulation 1.12. Therefore, because CEA Regulation 1.12 requires notification by any futures commission merchant that experiences a decline in net capital below the CEA’s early warning levels, the Exchange will continue to receive notification if a member organization acting as futures commission merchant is in danger of violating CEA minimum capital requirements.

The Exchange’s merger with Archipelago rendered the Exchange’s constitution obsolete so paragraphs (5) and (6) of Rule 325(e) and all references to the constitution were removed.

Other grammatical changes have been made throughout Rule 325 for purposes of clarity and stylistic consistency.

#### **Proposed Amendment to NYSE Rule 326**

NYSE Rule 326, which enables the Exchange to restrict a member organization’s business activities if its net capital falls below certain defined levels, uses a two-step approach to preventing Membership non-compliance with Exchange Act Rule 15c3-1. First, Rule 326(a) allows the Exchange to prohibit a member organization from expanding its business if its net capital falls below specified levels. Second, if a member organization’s net capital falls below lower, specified levels, Rule 326(b) allows the Exchange to compel it to reduce its existing business. To enable

the Exchange to regulate its Membership proactively (that is, to act if a member or member organization is in danger of violating Exchange Act Rule 15c3-1, rather than waiting until Exchange Act Rule 15c3-1 has been violated), the levels specified in NYSE Rule 326 are higher than those contained in Exchange Act Rule 15c3-1.

The proposed amendments would add Rule 326(a)(4) to provide minimum tentative net capital<sup>14</sup> and net capital levels for the Exchange to use when prohibiting, under Rule 326(a), the expansion of business by a member organization using the alternative method computing net capital under the CSE rules. The levels proposed in Rule 326(a)(1)(d) (50 percent of the tentative net capital level that triggers SEC notification or the net capital level is less than \$1.25 billion) will not unduly restrict a member organization’s business, but will allow the Exchange, after evaluating a member organization’s financial condition, to use the disincentive of restricted business expansion to encourage a member organization whose net capital has fallen to levels that risk violation of Exchange Act Rule 15c3-1 to take necessary corrective action.

Language in Rule 326(a) regarding limiting a member organization’s expansion of business due to CEA minimum capital requirements for a member organization acting as futures commission merchant was rendered obsolete by the aforementioned amendments to CEA Regulation 1.17, and, therefore, has been removed from the amended Rule 326(a).

The proposed amendment would add Rule 326(b)(1)(d) to provide minimum tentative net capital and net capital levels for the Exchange to use in requiring a member organization that uses the alternative method of computing net capital to reduce its business pursuant to Rule 326(b). The levels proposed in Rule 326(b)(1)(d) (40 percent of the tentative net capital level that triggers SEC notification or net capital less than \$1 billion) would not unduly restrict a member organization’s business, but would allow the Exchange, after evaluating a member organization’s financial condition, to use the disincentive of mandatory business reduction to encourage necessary corrective action by a member organization whose net capital has fallen to levels that risk violation of Exchange Act Rule 15c3-1.

<sup>14</sup> The term “tentative net capital,” as it pertains to the new regulations regarding broker-dealers using the “alternative/CSE” method, is defined in Exchange Act Rule 15c3-1(c)(15), part of the SEC’s new CSE regulations.

<sup>7</sup> Value-at risk models assess market risk based on the probability distribution for a portfolio’s market value. Scenario analysis is a method of assessing market risk by testing various possible scenarios.

<sup>8</sup> The “haircut” approach to computing net capital involves reducing the value of firms’ proprietary securities by pre-determined percentages to allow for potential reductions in market value.

<sup>9</sup> 17 CFR 240.17a-11.

<sup>10</sup> 7 U.S.C. 1 *et seq.*

<sup>11</sup> 17 CFR 1.12.

<sup>12</sup> 17 CFR 1.17.

<sup>13</sup> The CEA amendments eliminated capital requirement calculations based on the concept of “segregated funds.”

Language in Rule 326(b) regarding the reduction of a member organization's business due to CEA minimum capital requirements for a member organization acting as futures commission merchant was rendered obsolete by the aforementioned amendments to CEA Regulation 1.17, and, therefore, has been removed from the amended Rule 326(b). The proposed new provisions of Rule 326(b)(1)(e), however, would require a member organization to reduce its business if its net capital falls below 110 percent of the minimum capital requirements of CEA Regulation 1.17 (the same level that triggers notification to the CFTC under CEA Regulation 1.12). Therefore, the Exchange will retain the ability to compel a member organization to reduce its business if its net capital falls to levels that may violate CEA minimum capital requirements.

Other grammatical changes have been made throughout Rule 326 for purposes of accuracy, clarity, and stylistic consistency.

#### *Proposed Amendment to NYSE Rule 431*

Section 7(a)<sup>15</sup> of the Exchange Act empowers the Board of Governors of the Federal Reserve System to prescribe the rules and regulations regarding the credit that may be extended by broker-dealers on securities (Regulation T<sup>16</sup>). NYSE Rule 431 prescribes specific margin requirements that must be maintained in all of a member organization's customer accounts, based on the type of securities products held in such accounts.

Exchange Act Rule 15c3-1e(c),<sup>17</sup> one of the recent SEC amendments related to the alternative method of computing net capital for CSE broker-dealers, prescribes deductions to net capital for credit risk on transactions in certain derivative instruments for broker-dealers using the alternative method (for example, VAR models), provided the broker-dealers have in place comprehensive internal risk management procedures that address market, credit, liquidity, legal, and operational risk at the firm.

The proposed amendment to Rule 431 would add Rule 431(e)(9). This new paragraph would exempt a member organization using the alternative method of computing net capital from Rule 431 for certain exposures arising from transactions in over-the-counter

("OTC") derivative instruments<sup>18</sup> for which the member organization may compute a deduction to net capital for credit risk using the methods contained in Rule 15c3-1e(c).

A member organization that applies Rule 431(e)(9) must maintain a written risk analysis methodology for assessing the amount of credit that may be extended with respect to OTC derivatives transactions and the methodology must include at least those procedures and guidelines enumerated in paragraph (e)(9). The procedures and guidelines relate to reviewing customer account documentation and financial information; establishing credit limits for customers; monitoring the member organization's credit risk exposure to its customers; management reporting on credit extension exposure; managing the impact of credit extension on the member organization's overall risk exposure; the appropriate management response to violations of credit extension limits; stress testing customer accounts individually and in the aggregate; and determining whether to collect margin from a particular customer. The member organization must establish a method for period review of these procedures by an independent unit of the organization, such as internal audit or risk management. Management also must review periodically the member organization's credit extension activities for consistency with the guidelines.

#### 2. Statutory Basis

The proposed amendments to NYSE Rules 325, 326, and 431 are consistent with the requirements of Section 6(b)(5)<sup>19</sup> of the Exchange Act, which requires that the rules of the Exchange 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 in that they incorporate into the Exchange's rules recent SEC amendments to Exchange Act Rule 15c3-1 regarding the alternative method of computing net capital for broker-dealers that are part of a CSE.

#### *B. Self-Regulatory Organization's Statement on Burden on Competition*

The Exchange believes that the proposal does not 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*

Written comments were neither solicited nor received.

#### **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, as amended, 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](mailto:rule-comments@sec.gov). Please include File Number SR-NYSE-2005-03 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-2005-03. 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

<sup>15</sup> 15 U.S.C. 78g(a).

<sup>16</sup> 12 CFR 220 *et seq.*

<sup>17</sup> 17 CFR 240.15c3-1e(c).

<sup>18</sup> These instruments are described in Exchange Act Rule 15c3-1e(c)(vi)(E), 17 CFR 240.15c3-1e(c)(vi)(E).

<sup>19</sup> 15 U.S.C. 78f(b)(5).

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 will also 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 submissions should refer to File number SR-NYSE-2005-03 and should be submitted on or before August 29, 2006.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>20</sup>

**Nancy M. Morris,**  
Secretary.

[FR Doc. E6-12841 Filed 8-7-06; 8:45 am]

BILLING CODE 8010-01-P

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-54257; File No. SR-Phlx-2006-46]

### Self-Regulatory Organizations; Philadelphia Stock Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Extending the Specialist Option Transaction Charge Credit Pilot Program

August 1, 2006.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on July 21, 2006, the Philadelphia Stock Exchange, Inc. ("Phlx" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II and III below, which Items have been prepared by the Exchange. The Exchange has designated this proposal as one establishing or changing a due, fee, or other charge imposed by a self-regulatory organization pursuant to Section 19(b)(3)(A)(ii) of the Act<sup>3</sup> and Rule 19b-4(f)(2) thereunder,<sup>4</sup> which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to

solicit comments on the proposed rule change from interested persons.

#### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to extend for a one-year period, until July 31, 2007, its current pilot program that provides for an option transaction charge credit of \$0.21 per contract for Exchange options specialist units<sup>5</sup> that incur Phlx option transaction charges when a customer order is delivered to the limit order book via the Exchange's Options Floor Broker Management System ("FBMS")<sup>6</sup> and is then sent to an away market and executed via the Intermarket Option Linkage ("Linkage") under the Plan for the Purpose of Creating and Operating an Intermarket Option Linkage ("Plan")<sup>7</sup> as a Principal Acting as Agent Order ("P/A Order").<sup>8</sup>

The pilot program in effect is currently scheduled to expire on July 31, 2006.<sup>9</sup> The text of the proposed rule change is available at the Commission's Public Reference Room, at the Office of the Secretary of the Exchange, and on the Exchange's Web site at <http://www.Phlx.com>.

#### 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

<sup>5</sup> The terms "specialist" and "specialist unit" are used interchangeably.

<sup>6</sup> The FBMS is a component of the Exchange's Automated Options Market (AUTOM) System designed to enable Floor Brokers and/or their employees to enter, route and report transactions stemming from options orders received on the Exchange. The FBMS also is designed to establish an electronic audit trail for options orders represented and executed by Floor Brokers on the Exchange, such that the audit trail provides an accurate, time-sequenced record of electronic and other orders, quotations and transactions on the Exchange, beginning with the receipt of an order by the Exchange, and further documenting the life of the order through the process of execution, partial execution, or cancellation of that order. See Phlx Rule 1080, Commentary .06.

<sup>7</sup> See Securities Exchange Act Release Nos. 43086 (July 28, 2000), 65 FR 48023 (August 4, 2000); and 43573 (November 16, 2000), 65 FR 70851 (November 28, 2000) (order approving Phlx as a participant in the Plan).

<sup>8</sup> A P/A order is an order for the principal account of a specialist (or equivalent entity on another participant exchange that is authorized to represent public customer orders), reflecting the terms of a related unexecuted public customer order for which the specialist is acting as agent. See Phlx Rule 1083(k)(i).

<sup>9</sup> See Securities Exchange Act Release No. 53761 (May 5, 2006), 71 FR 27768 (May 12, 2006) (SR-Phlx-2006-20). This proposal is scheduled to be in effect for the same time period as fees for Linkage Principal Orders ("P Orders") and P/A Orders. See Securities Exchange Act Release No. 54233 (July 27, 2006) (SR-Phlx-2006-44).

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

Currently, the Exchange provides an option transaction charge credit of \$0.21 per contract for Exchange options specialist units that incur Phlx option transaction charges when a customer order is delivered to the limit order book via FBMS and is then sent to an away market and executed via Linkage under the Plan as a P/A Order.

The purpose of this proposal is to continue to alleviate the potential economic burden of multiple transaction charges imposed on Exchange specialist units by establishing a credit for Exchange option transaction charges incurred by an Exchange specialist unit when a customer limit order placed on the limit order book by a Floor Broker<sup>10</sup> results in an execution of a P/A Order that is sent to another exchange via Linkage. The Exchange believes that continuing to give an options transaction charge credit of \$0.21 per contract should encourage the use of Linkage and should allow the Exchange to remain competitive with other exchanges with respect to the assessment of Linkage-related fees.<sup>11</sup>

This proposal is to remain in effect as a pilot program until July 31, 2007.<sup>12</sup>

<sup>10</sup> A Floor Broker who wishes to place a limit order on the limit order book must submit such a limit order electronically through the FBMS. See Phlx Rule 1063, Commentary .01. See also Phlx Rule 1080, Commentary .02(b).

<sup>11</sup> See Securities Exchange Act Release Nos. 53372 (February 24, 2006), 71 FR 11003 (March 3, 2006) (SR-CBOE-2006-10) (rebate of certain transaction fees to Designated Primary Market Makers related to the execution of outbound P/A orders) and 53526 (March 21, 2006), 71 FR 15794 (March 29, 2006) (SR-PCX-2006-19) (creating a credit associated with the fees a Market Maker is charged for executions that result from P/A Orders sent to and executed at away market centers). See also Securities Exchange Act Release No. 54064 (June 28, 2006), 71 FR 38438 (July 6, 2006) (SR-CBOE-2006-59).

<sup>12</sup> This proposal is in connection with an existing pilot program for Linkage P and P/A Orders and is in effect for the same time period as the pilot program for Linkage P and P/A Orders. The Exchange filed a separate proposed rule change to extend the fees for Linkage P and P/A orders for a

Continued

<sup>20</sup> 17 CFR 200.30-3(a)(12).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

<sup>4</sup> 17 CFR 240.19b-4(f)(2).

## 2. Statutory Basis

The Exchange believes that its proposal to amend its schedule of fees is consistent with Section 6(b) of the Act<sup>13</sup> in general, and furthers the objectives of Section 6(b)(4) of the Act<sup>14</sup> in particular, in that it is an equitable allocation of reasonable fees and other charges among Exchange members.

### B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

### C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

## III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing proposed rule change establishes or changes a due, fee, or other charge applicable only to a member pursuant to Section 19(b)(3)(A)(ii) of the Act<sup>15</sup> and Rule 19b-4(f)(2) thereunder.<sup>16</sup> Accordingly, the proposal took effect upon filing with the Commission.

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.<sup>17</sup>

## 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

one-year period until July 31, 2007. See Securities Exchange Act Release No. 54233, *supra* at note 9. See also Securities Exchange Act Release Nos. 53650 (April 13, 2006), 71 FR 20430 (April 20, 2006) (SR-Phlx-2006-22) and 53761 (May 5, 2006), 71 FR 27768 (May 12, 2006) (SR-Phlx-2006-20).

<sup>13</sup> 15 U.S.C. 78f(b).

<sup>14</sup> 15 U.S.C. 78f(b)(4).

<sup>15</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

<sup>16</sup> 17 CFR 240.19b-4(f)(2).

<sup>17</sup> See Section 19(b)(3)(C), 15 U.S.C. 78s(b)(3)(C).

- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-Phlx-2006-46 on the subject line.

### Paper Comments

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-1090.

All submissions should refer to File Number SR-Phlx-2006-46. 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-Phlx-2006-46 and should be submitted on or before August 29, 2006.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>18</sup>

**Nancy M. Morris,**

*Secretary.*

[FR Doc. E6-12838 Filed 8-7-06; 8:45 am]

**BILLING CODE 8010-01-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

<sup>18</sup> 17 CFR 200.30-3(a)(12).

Pub. L. 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 and revisions to 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 collection listed below is 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 instrument by calling the SSA Reports Clearance Officer at 410-965-0454 or by writing to the address listed above.

1. Vendor List Registration Form—0960-NEW. The Social Security Administration (SSA) maintains an Employer Wage Reporting and Instructions Vendor Web site. On this site, relevant vendors are allowed to list their products and services free of charge. Vendors wishing to list their information on the site can submit these requests via a written registration form, and will soon be able to use a new electronic means of submitting the information through the Web site itself. The respondents are vendors dealing with vendors who offer employer wage reporting services and want SSA to list their information on its Web site.

*Type of Request:* New information collection.

*Number of Respondents:* 500.

*Frequency of Response:* 1.

*Average Burden Per Response:* 8 minutes.

*Estimated Annual Burden:* 67 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. **Function Report—Adult—20 CFR 404.1512 and 419.912—0960-0681.** Form SSA-3373 is used to collect information about a disability applicant's impairment-related limitations and ability to function. It documents the types of information specified in SSA regulations and provides disability interviewers with a convenient means to record information about how the claimant's condition affects his or her ability to function. This information, together with medical evidence, forms the evidentiary basis upon which the initial disability process is founded. The respondents are Title II and Title XVI benefits applicants.

*Type of Request:* Revision to an OMB-approved information collection.

*Number of Respondents:* 4,005,367.

*Frequency of Response:* 1.

*Average Burden Per Response:* 60 minutes.

*Estimated Annual Burden:* 4,005,367 hours.

2. **Certificate of Incapacity—5 CFR 890.302(d)—0960-NEW.** Rules governing the Federal Employee Health Benefits (FEHB) plan state that for federal employees' children ages 22 or over to retain health benefits, they must be incapable of self-support due to a disability that (1) pre-dated the child's 22nd birthday, (2) is very serious, and (3) can be expected to last at least one year. Form SSA-604, the Certificate of Incapacity, is used by physicians to document and certify such a disability for their patients who are children of federal employees.

The respondents are physicians of federal employees' children ages 22 or over who are seeking to retain health benefits under their parent's FEHB coverage.

*Type of Request:* New information collection.

*Number of Respondents:* 38.

*Frequency of Response:* 1.

*Average Burden Per Response:* 45 minutes.

*Estimated Annual Burden:* 29 hours.

3. **SSA Survey of Ticket to Work Beneficiaries—0960-NEW.** The Social Security Administration (SSA) plans to survey two groups of Social Security beneficiaries who qualified for the Ticket to Work program. The first group consists of those beneficiaries who did choose to enter the program, while those in the second group did not. The information gathered by the survey will

be used to assess and contrast the social and media interaction preferences of these beneficiaries, both on a general level and specifically in relation to media preferences for the Ticket to Work program. SSA will use this information to determine what role, if any, the type of media outlet SSA used played in a beneficiary's decision to join the Ticket to Work program and to improve interactions with potential Ticket to Work program participants. The respondents are Social Security beneficiaries who qualified for the Ticket to Work program.

*Type of Request:* New information collection.

*Number of Respondents:* 800.

*Frequency of Response:* 1.

*Average Burden Per Response:* 15 minutes.

*Estimated Annual Burden:* 200 hours.

Dated: August 2, 2006.

**Elizabeth A. Davidson,**

*Reports Clearance Officer, Social Security Administration.*

[FR Doc. E6-12803 Filed 8-7-06; 8:45 am]

**BILLING CODE 4191-02-P**

## DEPARTMENT OF STATE

[Public Notice 5485]

### Culturally Significant Objects Imported for Exhibition Determinations: "Louis Comfort Tiffany and Laurelton Hall—An Artist's Country Estate"

**SUMMARY:** Notice is hereby given of the following determinations: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.*; 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, Delegation of Authority No. 236 of October 19, 1999, as amended, and Delegation of Authority No. 257 of April 15, 2003 [68 FR 19875], I hereby determine that the objects to be included in the exhibition "Louis Comfort Tiffany and Laurelton Hall—An Artist's Country Estate," imported from abroad for temporary exhibition within the United States, are of cultural significance. The objects are imported pursuant to loan agreements with the foreign owners or custodians. I also determine that the exhibition or display of the exhibit objects at The Metropolitan Museum of Art, New York, New York, from on or about November 20, 2006, until on or about May 20, 2007, and at possible additional venues yet to be determined, is in the national interest. Public Notice of these

Determinations is ordered to be published in the **Federal Register**.

**FOR FURTHER INFORMATION CONTACT:** For further information, including a list of the exhibit objects, contact Wolodymyr Sulzysky, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State (telephone: 202/453-8050). The address is U.S. Department of State, SA-44, 301 4th Street, SW., Room 700, Washington, DC 20547-0001.

Dated: July 21, 2006.

**C. Miller Crouch,**

*Principal Deputy Assistant Secretary for Educational and Cultural Affairs, Department of State.*

[FR Doc. E6-12871 Filed 8-7-06; 8:45 am]

**BILLING CODE 4710-05-P**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### Notice of Intent To Request Revision From the Office of Management and Budget of a Currently Approved Information Collection Activity, Request for Comments; Notice and Approval of Airport Noise and Access Restrictions

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

**ACTION:** Notice and request for comments.

**SUMMARY:** The FAA invites public comments about our intention to request the Office of Management and Budget (OMB) to approve a current information collection. Respondents are airport operators proposing voluntary agreement and/or mandatory restrictions on Stage 2 and Stage 3 aircraft operations, and aircraft operators that request reevaluation of a restriction.

**DATES:** Please submit comments by October 10, 2006.

**FOR FURTHER INFORMATION CONTACT:** Carla Mauney on (202) 267-9895, or by e-mail at: [Carla.Mauney@faa.gov](mailto:Carla.Mauney@faa.gov).

#### SUPPLEMENTARY INFORMATION:

#### Federal Aviation Administration (FAA)

*Title:* Notice and Approval of Airport Noise and Access Restrictions.

*Type of Request:* Revision of an approved collection.

*OMB Control Number:* 2120-0563.

*Forms(s):* There are no FAA forms associated with this collection.

*Affected Public:* A total of 8 Respondents.

*Frequency:* The information is collected on occasion.

*Estimated Average Burden Per Response:* Approximately 3750 hours per response.

*Estimated Annual Burden Hours:* An estimated 30,000 hours annually.

*Abstract:* The Airport Noise and Capacity Act of 1990 mandates the formulation of a national noise policy. One part of that mandate is the development of a national program to review noise and access restrictions on the operation of stage 2 and 3 aircraft. 14 CFR Part 161 is the principal means. Respondents are airport operators proposing voluntary agreement and/or mandatory restrictions on Stage 2 and Stage 3 aircraft operations, and aircraft operators that request reevaluation of a restriction.

**ADDRESSES:** Send comments to the FAA at the following address: Ms. Carla Mauney, Room 1033, Federal Aviation Administration, Information Systems and Technology Services Staff, ABA-20, 800 Independence Ave., SW., Washington, DC 20591.

*Comments are invited on:* Whether the proposed collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; the accuracy of the Department's estimates of the burden of the proposed information collection; ways to enhance the quality, utility and clarity of the information to be collected; and 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.

Issued in Washington, DC, on August 1, 2006.

**Carla Mauney,**

*FAA Information Collection Clearance Officer, Information Systems and Technology Services Staff, ABA-20.*

[FR Doc. 06-6763 Filed 8-7-06; 8:45 am]

**BILLING CODE 4910-13-M**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### Notice of Intent To Request Revision From the Office of Management and Budget of a Currently Approved Information Collection Activity, Request for Comments; Application for Employment With the Federal Aviation Administration

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

**ACTION:** Notice and request for comments.

**SUMMARY:** The FAA invites public comments about our intention to request the Office of Management and Budget (OMB) to approve a current information collection. The collection of information is necessary for gathering data concerning potential new hires for the FAA. The information will be used to evaluate the qualifications of applicants for a variety of positions.

**DATES:** Please submit comments by October 10, 2006.

**FOR FURTHER INFORMATION CONTACT:**

Carla Mauney on (202) 267-9895, or by e-mail at: [Carla.Mauney@faa.gov](mailto:Carla.Mauney@faa.gov).

**SUPPLEMENTARY INFORMATION:**

**Federal Aviation Administration (FAA)**

*Title:* Application for Employment with the Federal Aviation Administration.

*Type of Request:* Revision of an approved collection.

*OMB Control Number:* 2120-0597.

*Form(s):* FAA-27152.

*Affected Public:* A total of 50,000 Respondents.

*Frequency:* The information is collected on occasion.

*Estimated Average Burden Per Response:* Approximately 1.5 hours per response.

*Estimated Annual Burden Hours:* An estimated 75,000 hours annually.

*Abstract:* The collection of information is necessary for gathering data concerning potential new hires for the FAA. The information will be used to evaluate the qualifications of applicants for a variety of positions. Without this information there would be no reliable means to accurately evaluate applicants skills knowledge and abilities to perform the duties of these positions.

**ADDRESSES:** Send comments to the FAA at the following address: Ms. Carla Mauney, Room 1033, Federal Aviation Administration, Information Systems and Technology Services Staff, ABA-20, 800 Independence Ave., SW., Washington, DC 20591.

*Comments are invited on:* Whether the proposed collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; the accuracy of the Department's estimates of the burden of the proposed information collection; ways to enhance the quality, utility and clarity of the information to be collected; and 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.

Issued in Washington, DC, on August 2, 2006.

**Carla Mauney,**

*FAA Information Collection Clearance Officer, Information Systems and Technology Services Staff, ABA-20.*

[FR Doc. 06-6764 Filed 8-7-06; 8:45 am]

**BILLING CODE 4910-13-M**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### Notice of Intent To Request Revision From the Office of Management and Budget of a Currently Approved Information Collection Activity, Request for Comments; Service Difficulty Report

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

**ACTION:** Notice and request for comments.

**SUMMARY:** The FAA invites public comments about our intention to request the Office of Management and Budget (OMB) to approve a current information collection. The Administrator has determined based on evaluation of previous accidents and other incidents, that certain events involving malfunctions and defects may be precursors to the recurrence of these accidents. As a result, operators and repair stations are required to report any malfunctions and defects to the Administrator.

**DATES:** Please submit comments by October 10, 2006.

**FOR FURTHER INFORMATION CONTACT:**

Carla Mauney on (202) 267-9895, or by e-mail at: [Carla.Mauney@faa.gov](mailto:Carla.Mauney@faa.gov).

**SUPPLEMENTARY INFORMATION:**

**Federal Aviation Administration (FAA)**

*Title:* Service Difficulty Report.

*Type of Request:* Revision of an approved collection.

*OMB Control Number:* 2120-0663.

*Form(s):* 8070-1.

*Affected Public:* A total of 7,695 Respondents.

*Frequency:* The information is collected on occasion.

*Estimated Average Burden Per Response:* Approximately .15 hours per response.

*Estimated Annual Burden Hours:* As estimated 6,107 hours annually.

*Abstract:* The Administrator has determined based on evaluation of previous accidents and other incidents, that certain events involving malfunctions and defects may be precursors to the recurrence of these accidents. As a result, operators and

repair stations are required to report any malfunctions and defects to the Administrator.

**ADDRESSES:** Send comments to the FAA at the following address: Ms. Carla Mauney, Room 1033, Federal Aviation Administration, Information Systems and Technology Services Staff, ABA-20, 800 Independence Ave., SW., Washington, DC 20591.

*Comments are invited on:* Whether the proposed collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; the accuracy of the Department's estimates of the burden of the proposed information collection; ways to enhance the quality, utility and clarity of the information to be collected; and 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.

Issued in Washington, DC, on August 2, 2006.

**Carla Mauney,**

*FAA Information Collection Clearance Officer, Information Systems and Technology Services Staff, ABA-20.*

[FR Doc. 06-6765 Filed 8-7-06; 8:45 am]

**BILLING CODE 4910-13-M**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### Agency Information Collection Activity Under OMB Review

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

**ACTION:** Notice.

**SUMMARY:** The FAA invites public comments about our intention to request the Office of Management and Budget's (OMB) revision of a current information collection. The **Federal Register** Notice with a 60-day comment period soliciting comments on the following collection of information was published on March 15, 2006, Vol. 71, No. 50, page 13446. Wildlife strike data are collected to develop standards and monitor hazards to aviation. Data identify wildlife strike control requirements and provide in service data on aircraft component failure.

**DATES:** Please submit comments by September 7, 2006.

**FOR FURTHER INFORMATION CONTACT:** Carla Mauney at [Carla.Mauney@faa.gov](mailto:Carla.Mauney@faa.gov).

#### SUPPLEMENTARY INFORMATION:

#### Federal Aviation Administration (FAA)

*Title:* Bird/Other Wildlife Strike.

*Type of Request:* Revision of a currently approved collection.  
*OMB Control Number:* 2120-0045.  
*Forms(s):* AC Form 5200-7.  
*Affected Public:* An estimated 7,133 Respondents.

*Abstract:* Wildlife strike data are collected to develop standards and monitor hazards to aviation. Data identify wildlife strike control requirements and provide in service data on aircraft component failure. The FAA form 5200-7, Bird/Other Wildlife Strike Report, is most often completed by the pilot in charge of an aircraft involved in wildlife collision or by Air Traffic Control Tower personnel, or other airline or airport personnel who have knowledge of the incident.

*Estimated Annual Burden Hours:* An estimated 592 hours annually.

**ADDRESSES:** Send comments to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street, NW., Washington, DC 20503, Attention: FAA Desk Officer.

Comments are invited on: Whether the proposed collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; the accuracy of the Department's estimates of the burden of the proposed information collection; ways to enhance the quality, utility, and clarity of the information to be collected; and 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.

Issued in Washington, DC, on August 2, 2006.

**Carla Mauney,**

*FAA Information Collection Clearance Officer, Information Systems and Technology Services Staff, ABA-20.*

[FR Doc. 06-6766 Filed 8-7-06; 8:45 am]

**BILLING CODE 4910-13-M**

## DEPARTMENT OF TRANSPORTATION

### Federal Highway Administration

[Docket No. FHWA-2006-25524]

#### Agency Information Collection Activities: Request for Comments for New Information Collection

**AGENCY:** Federal Highway Administration (FHWA), DOT.

**ACTION:** Notice and request for comments.

**SUMMARY:** The FHWA has forwarded the information collection request described in this notice to the Office of

Management and Budget (OMB) to renew an information collection. We published a **Federal Register** Notice with a 60-day public comment period on this information collection on May 18, 2006. We are required to publish this notice in the **Federal Register** by the Paperwork Reduction Act of 1995.

**DATES:** Please submit comments by September 7, 2006.

**ADDRESSES:** You may send comments within 30 days to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street, NW., Washington, DC 20503, Attention DOT Desk Officer. You are asked to comment on any aspect of this information collection, including: (1) Whether the proposed collection is necessary for the FHWA's performance; (2) the accuracy of the estimated burden; (3) ways for the FHWA to enhance the quality, usefulness, and clarity of the collected information; and (4) ways that the burden could be minimized, including the use of electronic technology, without reducing the quality of the collected information. All comments should include the Docket number FHWA-2006-25524.

**FOR FURTHER INFORMATION CONTACT:** For questions concerning the National Historic Covered Bridge Program, please contact Dr. Edgar P. Small, Office of Bridge Technology, HIBT-30, at (202) 366-4622, FAX (202) 366-3077, or e-mail [edgar.small@dot.gov](mailto:edgar.small@dot.gov); and Mr. Everett Mattias, Office of Bridge Technology, HIBT-30, at (202) 366-6712, FAX (202) 366-3077, or e-mail [everett.mattias@dot.gov](mailto:everett.mattias@dot.gov). For legal questions, please contact Mr. Robert Black, Office of the Chief Counsel, (202) 366-1359, [robert.black@fhwa.dot.gov](mailto:robert.black@fhwa.dot.gov); Federal Highway Administration, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590. Office hours are from 7:45 a.m. to 4:15 p.m., e.t. Monday through Friday, except Federal holidays.

#### SUPPLEMENTARY INFORMATION:

*Title:* National Historic Covered Bridge Preservation Program.

*OMB Control Number:* 2125-0609.

*Frequency:* Annual.

*Respondents:* The 50 State DOTs, Puerto Rico and the District of Columbia.

#### Background

Covered bridges are unique structures embodying character, functionality and historical prominence. The National Historic Covered Bridge Preservation Program has been established to find comprehensive and proven means of maintaining the ability of these vestiges of our bridge-building heritage to

continue to serve current and future generations. The program was originally established under section 1224 of TEA-21 and continued under Section 1804 of SAFETEA-LU. The legislation authorizes \$10 million annually to be appropriated for each fiscal year between FY 2006 and FY 2009. The program is established to provide grants to States for rehabilitation, repair and preservation of historic covered bridges and to enable the Secretary of Transportation to perform research and initiate education programs on historic covered bridges.

Projects eligible for grants include rehabilitation and repair together with preservation through: Installation of fire protection systems, including a fireproofing or fire detection system and sprinklers, installation of a system to prevent vandalism and arson, or relocation of a bridge to a preservation site. The statute requires that, to the maximum extent practicable, grant projects are carried out in the most historically appropriate manner, preserve the existing structure of the historic covered bridge, and provide for the replacement of wooden components with wooden components, unless the use of wood is impracticable for safety reasons.

Research and education activities include the collection and dissemination of information on historic covered bridges; conducting educational programs relating to the history and construction techniques of historic covered bridges; conducting research on the history of historic covered bridges; and conducting research on, and study techniques for, protecting historic covered bridges from rot, fire, natural disasters, or weight-related damage.

#### Guidelines and Administration

To administer this program for fiscal years 2006 through 2009, the FHWA will collect information necessary to evaluate and rank projects. The information collection was developed considering public input<sup>1</sup> and is intended to only address the project funding allotted through the program. Research funding will be administered separately through the FHWA Office of Infrastructure Research and Development (R&D) at the Turner Fairbank Highway Research Center, who will also administer the research and education activities. The FHWA Office of Bridge Technology will administer the grant program to assist the States in their efforts to rehabilitate, repair or

preserve the Nation's historic covered bridges, which are listed or eligible for listing on the National Register of Historic Places. The FHWA will award grants based on applications received and funds available through accompanying appropriations legislation.

#### Information Proposed for Collection

Information recommended under TEA-21 and proposed for the current program includes the following:

- State's Priority Ranking;
- National Bridge Inventory (NBI) Structure Number;
- Bridge Name;
- Description of Location;
- Congressional District and Representative;
- Year Built;
- Whether the structure is on or eligible for listing on the National Register of Historic Places and description of the qualities that qualify the bridge for the National Register;
  - Structure description (e.g., number of spans, length, width, design type, description of decking, beams/stringers, sides and roof, wood species, wood preservation system in use, builder, traffic carried, etc.);
  - General plan and elevation;
  - Description of previous repair work (description, year, etc.);
  - Description of proposed work including wood preservative system, fire protection, vandalism and arson prevention systems to be used;
  - Indication of whether the State has a historic bridge inventory/management plan accepted by the State Historic Preservation Officer (SHPO). A programmatic agreement for historic bridges with the SHPO, FHWA and the Advisory Council on Historic Preservation (ACHP) may substitute;
  - Description of whether the SHPO has reviewed and certified this project is warranted in accordance with the SHPO's statewide historic preservation plan; how it benefits statewide preservation efforts; how it enhances cultural tourism or enhances the history/economic development of the community; and other benefits upon successful completion of this project;
  - Amount of State or local government matching funds or other resources (donated materials or labor may qualify);
  - A statement addressing when the project is complete, will the bridge meet the current State or AASHTO standards for the roadway classification that it carries;
  - Plan for documentation of the bridge and the work performed;

- Scheduled start and completion date for the project (month and year); and

- Contact information for the State DOT, Local Agency (if applicable), FHWA Division Office, and State Historic Preservation Officer.

As indicated above, the FHWA has developed a template for the application and the application may be made based on this template provided by the FHWA including this information. This template is available through the FHWA Division Offices and through the FHWA Office of Bridge Technology and is available at the following URL: <http://www.fhwa.dot.gov/bridge>. The template is not required but rather is provided for convenience of the applicants.

#### Burden Hours for Information Collection

Burden hour's estimates and discussions are provided for each item presented and required within the application submittal process.

- State's Priority Ranking; 30 minutes
  - The priority ranking will be performed by the submitting agency. Given that a small number of applications will be submitted by an individual State, the prioritization process will be limited and 30 minutes is conservatively assumed to include any potential discussion
- NBI Structure Number 5 minutes
  - Projects submitted must be legally defined as a 'bridge' and must be located on a public road. With this constraint, each structure will already have an NBI Structure Number assigned
- Bridge Name; 5 minutes
  - A description of the bridge may be included in the NBI database; however, this may or may not be the commonly referenced name used locally. A burden of 5 minutes is assumed to permit the applicant to review the NBI record and any additional documentation to isolate the common bridge name
- Description of Location 10 minutes
  - The location is already included in the NBI database. A burden of 10 minutes is provided assuming that the applicant will elaborate on the location information
- Congressional District and Representative; 5 minutes
  - The location of the bridge will be known from the information in the NBI database. A 5-minute burden is specified assuming that the applicant will have to cross reference the location with Congressional district maps. This time would be negligible if the State

<sup>1</sup>Implementation Guidance for the National Historic Covered Bridge Preservation Program, August 23, 2000; 65 FR 51401.

- has employed a GIS system including the infrastructure information and the political boundaries
- Year Built 5 minutes
    - The year built is already recorded in the National Bridge Inventory
  - Whether the structure is on or eligible for listing on the National Register of Historic Places and description of the qualities that qualify the bridge for the National Register. 15 minutes
    - The NBI record indicated whether the structure is located on or eligible for the National Register of Historic Places. The 15-minute burden is assumed to allow the applicant to describe the qualities that qualify the bridge for the National Register
  - Structure description (e.g., number of spans, length, width, design type, description of decking, beams/stringers, sides and roof, wood species, wood preservation system in use, builder, traffic carried, etc.) 15 minutes
    - Most of this information will be included within the NBI database or on the inspection reports. 15 minutes is assumed for the applicant to synthesize information
  - General plan and elevation—5 minutes
    - This information is available for structures that have been placed on the National Register of Historic Places or for those, which are eligible and have applications complete. This information is also available for projects that have completed conceptual and preliminary engineering and design
  - Description of previous repair work (description, year, etc.); 15 minutes
    - This information is available from bridge inspection reports and bridge files located within the State Transportation Agency. Time estimated is intended for synthesis of information from other sources
  - Description of proposed work including wood preservative system, fire protection, vandalism and arson prevention systems to be used; 15 minutes
    - This information will be established by the need when identified and the details will be identified through the conceptual and preliminary engineering process, which is done independently. A 15-minute burden is assumed to synthesize the existing information
  - Indication of whether the State has a historic bridge inventory/management plan accepted by the State Historic Preservation Officer (SHPO). A programmatic agreement for historic bridges with the SHPO, FHWA and the Advisory Counsel on Historic Preservation (ACHP) may substitute; 5 minutes
    - This item is readily obtained through contact with the State Historic Preservation Officer
  - Description of whether the SHPO has reviewed and certified this project is warranted in accordance with the SHPO's statewide historic preservation plan; how it benefits statewide preservation efforts; how it enhances cultural tourism or enhances the history/economic development of the community; and other benefits upon successful completion of this project; 45 minutes
    - This information is readily obtained through contact with the State Historic Preservation Officer. A total of 45 minutes includes time for the State Historic Preservation Officer to review the project, in relation to the statewide preservation efforts, to articulate the benefits, and to document the findings
  - Amount of State or local government matching funds or other resources (donated materials or labor may qualify); 5 minutes
    - A nominal amount of time is required to document the matching funds and amounts
  - When the project is complete, will the bridge meet the current State or AASHTO standards for the roadway classification that it carries; 5 minutes
    - A nominal amount of time is required to ascertain and identify whether the bridge will meet the standards for the roadway classification as any exception to the standard will be identified through the preliminary engineering process and already documented
  - Plan for documentation of the bridge and the work performed. 15 minutes
    - A plan for documentation is encouraged. Typically, each State Transportation Agency will already have a process in place to document work performed. Applicants are encouraged to identify any additional requirements warranted for these historical structures and to articulate the overall plan within the application
  - Scheduled start and completion date for the project (month and year)—5 minutes
    - This will be determined through other processes that are performed independent of this program, including preliminary engineering and the STIP process. The available information must be synthesized on the application, which takes a nominal amount of time
  - Contact information for the State DOT, Local Agency (if applicable), FHWA Division Office, and State Historic Preservation Officer: 5 minutes
    - This requires providing a list of contacts and involves a nominal amount of time
- The total amount of time estimated to complete the application is 3½ hours. It is estimated that FHWA will receive 30 reports giving us a total of 105 burden hours.
- Electronic Access:* Internet users may access all comments received by the U.S. DOT Dockets, Room PL-401, by using the universal resource locator (URL): <http://dms.dot.gov>, 24 hours each day, 365 days each year. Please follow the instructions online for more information and help.
- Authority :** The Paperwork Reduction Act of 1995; 44 U.S.C. Chapter 35, as amended; and 49 CFR 1.48.
- Issued on: August 1, 2006.
- James R. Kabel,**  
Chief, Management Programs and Analysis Division.  
[FR Doc. E6-12793 Filed 8-7-06; 8:45 am]  
BILLING CODE 4910-22-P
- 
- DEPARTMENT OF TRANSPORTATION**
- Federal Motor Carrier Safety Administration**
- [Docket No. FMCSA-2006-24932]
- Commercial Driver's License Standards; Application for Exemption; Volvo Trucks North America, Inc.**
- AGENCY:** Federal Motor Carrier Safety Administration (FMCSA), DOT.
- ACTION:** Notice of application for exemption; request for comments.
- 
- SUMMARY:** FMCSA announces that Volvo Trucks North America, Inc. (Volvo) has applied for an exemption from the Federal requirement for drivers of commercial motor vehicles (CMVs) to hold a commercial driver's license (CDL). Volvo requests that the exemption cover seven Swedish engineers and technicians who will test-drive CMVs for Volvo within the United States. All seven Volvo employees hold a valid Swedish CDL. Volvo states the exemption is needed to support a Volvo field test to meet future air quality

standards, and to test-drive Volvo prototype vehicles to verify results in "real world" environments. Volvo believes the knowledge and skills tests and training program that Swedish drivers undergo to obtain a Swedish CDL ensures the exemption would provide a level of safety that is equivalent to, or greater than, the level of safety obtained by complying with the U.S. requirements for a CDL.

**DATES:** Comments must be received on or before September 7, 2006.

**ADDRESSES:** Your comments may be submitted by any of the following methods:

- *Docket Management System (DMS) Web site* at <http://dmses.dot.gov/submit>, under the last 5 digits of the Docket No. FMCSA-2006-24932, and following the online instructions for submitting comments;

- *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, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays;

- *Federal eRulemaking Portal* at <http://www.regulations.gov> following the online instructions for submitting comments; or

*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 per year. If you want to be notified that we received your comments by mail or hand delivery, please include a self-addressed, stamped envelope or postcard, or you can print an acknowledgement page if submitting comments online.

*Privacy Act:* Anyone may view or download comments submitted in any of DOT's dockets by the name of the commenter or name of the person signing the comment (if submitted on behalf of an association, business, labor union, or other entity). You may view DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000, at 65 FR 19477. It is also available at <http://dms.dot.gov>.

**FOR FURTHER INFORMATION CONTACT:** Mr. Thomas Yager, Chief, Driver and Carrier Operations Division, Office of Bus and Truck Standards and Operations, MC-

PSD, Federal Motor Carrier Safety Administration, DOT, 400 Seventh Street, SW., Washington, DC 20590; Telephone: 202-366-4009; e-mail: [MCPSD@fmcsa.dot.gov](mailto:MCPSD@fmcsa.dot.gov). Office hours are from 7:45 a.m. to 4:15 p.m. e.t., Monday through Friday, except Federal holidays.

**SUPPLEMENTARY INFORMATION:**

**Background**

Section 4007 of the Transportation Equity Act for the 21st Century (TEA-21), Pub. L. 105-178, 112 Stat. 107 (June 9, 1998), which amended 49 U.S.C. 31315 and 31136(e), authorizes the Agency to grant exemptions from the Federal Motor Carrier Safety Regulations (FMCSRs). In accordance with the implementing regulations under 49 CFR 381.315(a), FMCSA must publish a notice of each exemption request in the **Federal Register**. We must provide the public an opportunity to inspect the information relevant to the application, including any safety analyses that have been conducted. We must also provide an opportunity for public comment on the request.

We will review the safety analyses and the public comments and determine whether granting the exemption would likely achieve a level of safety equivalent to, or greater than, the level that would be achieved by the current regulation (49 CFR 381.305). We must publish the Agency's decision in the **Federal Register** (49 CFR 381.315(b)). If the Agency denies the request, we must state the reason for doing so. If the Agency grants the exemption, we must publish a notice to specify the person or class of persons receiving the exemption; the regulatory provision or provisions from which exemption is being granted; the effective period of the exemption (up to 2 years); and the terms and conditions of the exemption. The exemption may be renewed (49 CFR 381.300(b)).

On February 9, 2006, FMCSA published in the **Federal Register** notice of a similar request from Volvo Trucks North America, Inc. (Volvo) for an exemption for different drivers than those listed on this request (71 FR 6822). On May 12, 2006, FMCSA published in the **Federal Register** (71 FR 27780) a notice granting that exemption. This, however, is a notice of application by Volvo for exemption of additional drivers and, we are requesting comment on this notice.

**Volvo Trucks North America, Inc.'s Application for an Exemption**

Volvo has applied for an exemption from the commercial driver's license (CDL) rules, specifically 49 CFR 383.23, which prescribes licensing requirements

for drivers operating commercial motor vehicles (CMVs) in interstate or intrastate commerce. Volvo requests the exemption because its driver-employees are citizens and residents of Sweden, and because they cannot apply for a CDL in any of the United States. A copy of the application is in Docket No. FMCSA-2006-24932.

The exemption would allow seven drivers to operate CMVs in interstate commerce as part of a team of drivers who will support a Volvo field test to meet future air quality standards, and to test-drive Volvo prototype vehicles at its test site and in the vicinity of Phoenix, Arizona, to verify vehicle results in "real world" environments. The drivers are: Freddy Blixt, Goran Alsen, Kjell Jansson, Johnny Adolfsson, Lars Svensson, Peter Hofsten, and Thorbjorn Ohlund.

Each driver holds a valid Swedish CDL, and according to Volvo, drivers applying for a Swedish-issued CDL must undergo a training program and pass knowledge and skills tests. Volvo believes the knowledge and skills tests and training program that Swedish drivers undergo to obtain a Swedish CDL ensure the exemption would provide a level of safety that is equivalent to, or greater than, the level of safety obtained by complying with the U.S. requirement for a CDL.

After a Swedish driver is granted a Swedish CDL, he or she is allowed to drive any CMV currently allowed on Swedish roads. There are no limits to types or weights of vehicles that may be operated by the drivers.

FMCSA has previously determined the process for obtaining a Swedish-issued CDL is comparable to, or as effective as the Federal requirements under Part 383, and adequately assesses a driver's ability to operate CMVs in the United States.

**Request for Comments**

FMCSA requests public comment from all interested persons on Volvo's application for an exemption from the CDL requirements of 49 CFR 383.23. See 49 U.S.C. 31315(b)(4) and 31136(e). The Agency will consider all comments received by close of business September 7, 2006. Comments will be available for examination in the docket. We will consider comments received after the comment closing date to the extent practicable.

Issued on: August 2, 2006.

**David H. Hugel,**  
*Acting Administrator.*

[FR Doc. E6-12849 Filed 8-7-06; 8:45 am]

**BILLING CODE 4910-EX-P**

**DEPARTMENT OF TRANSPORTATION****Federal Motor Carrier Safety Administration**

[FMCSA Docket No. FMCSA-2005-24210]

**Qualification of Drivers; Exemption Applications; Diabetes****AGENCY:** Federal Motor Carrier Safety Administration (FMCSA), DOT.**ACTION:** Notice of final disposition.

**SUMMARY:** FMCSA announces its decision to exempt forty-seven individuals from its rule prohibiting persons with insulin-treated diabetes mellitus (ITDM) from operating commercial motor vehicles (CMVs) in interstate commerce. The exemptions will enable these individuals to operate CMVs in interstate commerce.

**DATES:** The exemptions are effective August 8, 2006. The exemptions expire on August 8, 2008.

**FOR FURTHER INFORMATION CONTACT:** Dr. Mary D. Gunnels, Chief, Physical Qualifications Division, (202) 366-4001, [maggi.gunnels@dot.gov](mailto:maggi.gunnels@dot.gov), FMCSA, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590-0001. Office hours are from 8:30 a.m. to 5 p.m., Monday through Friday, except Federal holidays.

**SUPPLEMENTARY INFORMATION:****Electronic Access**

You may see all the comments online through the Document Management System (DMS) at: <http://dmses.dot.gov>.

**Docket:** For access to the docket to read background documents or comments received, go to <http://dms.dot.gov> and/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.

**Privacy Act:** Anyone may search the electronic form of all comments received into any of DOT's 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, or other entity). You may review DOT's complete Privacy Act Statement in the **Federal Register** (65 FR 19477, Apr. 11, 2000). This statement is also available at <http://dms.dot.gov>.

**Background**

On June 2, 2006, FMCSA published a Notice of receipt of Federal diabetes exemption applications from forty-seven individuals, and requested comments from the public (71 FR 32177). The public comment period closed on July 3,

2006. One comment was received, and fully considered by FMCSA in reaching the final decision to grant the exemptions.

FMCSA has evaluated the eligibility of the forty-seven applicants and determined that granting the exemptions to these individuals would achieve a level of safety equivalent to, or greater than, the level that would be achieved by complying with the current regulation 49 CFR 391.41(b)(3).

**Diabetes Mellitus and Driving Experience of the Applicants**

The Agency established the current standard for diabetes in 1970 because several risk studies indicated that diabetic drivers had a higher rate of crash involvement than the general population. The diabetes rule provides that "A person is physically qualified to drive a commercial motor vehicle if that person has no established medical history or clinical diagnosis of diabetes mellitus currently requiring insulin for control" (49 CFR 391.41(b)(3)).

FMCSA established its diabetes exemption program, based on the Agency's July 2000 study entitled "A Report to Congress on the Feasibility of a Program to Qualify Individuals with Insulin-Treated Diabetes Mellitus to Operate in Interstate Commerce as Directed by the Transportation Act for the 21st Century." The report concluded that a safe and practicable protocol to allow some drivers with Insulin-Treated Diabetes Mellitus (ITDM) to operate CMVs is feasible. The 2003 Notice in conjunction with the November 8, 2005 (70 FR 67777) **Federal Register** Notice provides the current protocol for allowing such drivers to operate CMVs in interstate commerce.

These forty-seven applicants have had ITDM over a range of 1 to 33 years. These applicants report no hypoglycemic reaction that resulted in loss of consciousness or seizure, that required the assistance of another person, or resulted in impaired cognitive function without warning symptoms in the past 5 years (with one year of stability following any such episode). In each case, an endocrinologist has verified that the driver has demonstrated willingness to properly monitor and manage their diabetes, received education related to diabetes management, and is on a stable insulin regimen. These drivers report no other disqualifying conditions, including diabetes-related complications. Each meets the vision standard at 49 CFR 391.41(b)(10).

The qualifications and medical condition of each applicant were stated and discussed in detail in the June 2,

2006, **Federal Register** Notice (71 FR 32177). Because there were no docket comments on the specific merits or qualifications of any applicant, we have not repeated the individual profiles here.

**Basis for Exemption Determination**

Under 49 U.S.C. 31136(e) and 31315, FMCSA may grant an exemption from the diabetes standard in 49 CFR 391.41(b)(3) if the exemption is likely to achieve an equivalent or greater level of safety than would be achieved without the exemption. The exemption allows the applicants to operate CMVs in interstate commerce.

To evaluate the effect of these exemptions on safety, FMCSA considered medical reports about the applicants' ITDM and vision, and reviewed the treating endocrinologist's medical opinion related to the ability of the driver to safely operate a CMV while using insulin.

Consequently, FMCSA finds that exempting these applicants from the diabetes standard in 49 CFR 391.41(b)(3) is likely to achieve a level of safety equal to that existing without the exemption.

**Conditions and Requirements**

The terms and conditions of the exemption will be provided to the applicants in the exemption document and they include the following: (1) That each individual submit a quarterly monitoring checklist completed by the treating endocrinologist as well as an annual checklist with a comprehensive medical evaluation; (2) that each individual reports within 2 business days of occurrence, all episodes of severe hypoglycemia, significant complications, or inability to manage diabetes; also, any involvement in an accident or any other adverse event in a CMV or personal vehicle, whether or not they are related to an episode of hypoglycemia; (3) that each individual provide a copy of the ophthalmologist's or optometrist's report to the medical examiner at the time of the annual medical examination; and (4) that each individual provide a copy of the annual medical certification to the employer for retention in the driver's qualification file, or keep a copy in his/her driver's qualification file if he/she is self-employed. The driver must also have a copy of the certification when driving, for presentation to a duly authorized Federal, State, or local enforcement official.

### Discussion of Comments

FMCSA received one comment in this proceeding. The comment is considered and is discussed below.

One letter of recommendation was received in favor of granting the Federal diabetes exemption to one of the applicants. It was concerning Arthur Webber and it was written by W.J. Williams, who is a manager of the oil department at Meenan Oil in Upper Darby, PA. He said that Mr. Webber is one of his best oil delivery men and one of the safest drivers.

### Conclusion

After considering the comments to the docket and based upon its evaluation of the forty-seven exemption applications, FMCSA exempts Charles A. Adams, Jr., Scott R. Anderson, Richard Bechtel, Robert R. Chase, Dale J. Cleaver, Jeffrey W. Cotner, Todd A. Dean, Dale R. Gansz, Neal J. Gifford, Donald W. Havourd, Sr., Peter D. Jacobs, David A. Kelley, Jeffrey M. King, Milton A. Klise, Jeffrey Knight, Edward V. Kruse, Lee P. Lembke, Dominick T. Mastroni, Ronald S. Mavilla, Derril W. Nunnally, Ronald D. Olson, Robert L. Olson, Terrence V. Parker, Robert L. Pflugler, Jr., William E. Pruett, Jr., Ronald B. Purdum, William C. Rasely, Jr., Maurice E. Ratliff, Sr., Duane C. Rieger, Gregory A. Rigg, Scott L. Shreffler, Henry E. Sisler, Vernon L. Small, Sandra L. Smith, John J. Steigauf, Walter D. Stowman, Thomas C. Torbett, Derrick Underhill, Sr., Paul M. Violette, Antonino S. Vita, Henry B. Walker-Waltz, III, Arthur C. Webber, Scott A. Wertz, Larry D. Williams, Danny R. Wood, and Jeffrey E. Zaniewski from the ITDM standard in 49 CFR 391.41(b)(3), subject to the conditions listed under "Conditions and Requirements" above.

In accordance with 49 U.S.C. 31136(e) and 31315 each exemption will be valid for two years unless revoked earlier by FMCSA. The exemption will be revoked if: (1) the person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained before it was granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315. If the exemption is still effective at the end of the 2-year period, the person may apply to FMCSA for a renewal under procedures in effect at that time.

Issued on: July 31, 2006.

**Rose A. McMurray,**

*Associate Administrator, Policy and Program Development.*

[FR Doc. E6-12848 Filed 8-7-06; 8:45 am]

BILLING CODE 4910-EX-P

## DEPARTMENT OF TRANSPORTATION

### Federal Railroad Administration

#### Petition for Waiver of Compliance

In accordance with Part 211 of Title 49 Code of Federal Regulations (CFR), notice is hereby given that the Federal Railroad Administration (FRA) received a request for a waiver of compliance with certain requirements of its safety standards. The individual petition is described below, including the party seeking relief, the regulatory provisions involved, the nature of the relief being requested, and the petitioner's arguments in favor of relief.

#### Capital Metropolitan Transportation Authority

[Docket Number FRA-2006-25040]

Capital Metropolitan Transportation Authority (CMTA), located in Austin, TX, seeks a permanent waiver of compliance from Title 49 of the CFR for operation of a new planned Commuter Rail Service (CRS), partially sharing trackage with the Austin Area Terminal Railroad (AUAR), a common carrier freight railroad. The operation will feature temporal separation of CRS and AUAR operations. CMTA has selected a light rail style, non-FRA compliant Diesel-Multiple Unit (DMU), in order to offer a "one-seat ride" operation on both the shared and light rail-exclusive city street running portions of the system. *See Statement of Agency Policy Concerning Jurisdiction Over the Safety of Railroad Passenger Operations and Waivers Related to Shared Use of the Tracks of the General Railroad System by Light Rail and Conventional Equipment, 65 FR 42529 (July 10, 2000); see also Joint Statement of Agency Policy Concerning Shared Use of the Tracks of the General Railroad System by Conventional Railroads and Light Rail Transit Systems, 65 FR 42626 (July 10, 2000).*

CMTA is constructing a 32-mile CRS, (27 miles shared, 5 miles light rail-exclusive) linking the City of Leander, TX, with downtown Austin, TX. CMTA owns the railroad right-of-way, referred to as the Central Sub-division of the AUAR, between MP 55.19DT (Austin) and MP 88.0 (Leander), and will utilize temporal separation of freight and passenger operations on this shared trackage. AUAR provides freight service to on-line customers, as well as interchanges with Union Pacific (UPRR) and BNSF Railway at MP 71.45.

Based on the foregoing, CMTA is seeking waiver of compliance from the provisions of the *Federal Railroad Locomotive Safety Standards*, 49 CFR:

Part 219 Drug and Alcohol; Part 221 Rear End Marking Devices; Part 223 Safety Glazing Standards; Part 225 Accident and Incident Reporting; Part 229 Railroad Locomotive Safety Standards; Part 231 Railroad Safety Appliance Standards; Part 238 Passenger Equipment Safety Standards; Part 239 Passenger Train Emergency Preparedness; Part 240 Qualification and Certification of Locomotive Engineers.

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested party desires an opportunity for oral comment, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communication concerning these proceedings should identify the appropriate docket number (e.g., Waiver Petition Docket Number FRA-2006-25040) and must be submitted to the Docket Clerk, DOT Docket Management Facility, Room PL-401 (Plaza Level), 400 7th Street, SW., Washington, DC 20590. Communications received within 30 days of the date of this notice will be considered by FRA before final action is taken. Comments received after that date will be considered as far as practicable. All written communications concerning these proceedings are available for examination during regular business hours (9 a.m.-5 p.m.) at the above facility. All documents in the public docket are also available for inspection and copying on the Internet at the docket facility's Web site at <http://dms.dot.gov>.

Issued in Washington, DC, on August 1, 2006.

**Grady C. Cothen, Jr.,**

*Deputy Associate Administrator for Safety Standards and Program Development.*

[FR Doc. E6-12799 Filed 8-7-06; 8:45 am]

BILLING CODE 4910-06-P

## DEPARTMENT OF TRANSPORTATION

### Federal Railroad Administration

#### Notice of Application for Approval of Discontinuance or Modification of a Railroad Signal System or Relief From the Requirements of Title 49 Code of Federal Regulations Part 236

Pursuant to Title 49 Code of Federal Regulations (CFR) Part 235 and 49 U.S.C. 20502(a), the following railroads have petitioned the Federal Railroad

Administration (FRA) seeking approval for the discontinuance or modification of the signal system or relief from the requirements of 49 CFR Part 236 as detailed below.

**Docket Number FRA-2006-25266**

*Applicant:* Union Pacific Railroad Company, Mr. W. E. VanTrump, Assistant Vice President Engineering Maintenance, 1400 Douglas Street, Mail Stop 0910, Omaha, Nebraska 68179.

The Union Pacific Railroad Company (UP) seeks approval of the proposed discontinuance and removal of the traffic control system on UP's Tennessee Pass Subdivision between milepost 341.9, near Dotsero, Colorado (not including Dotsero) and milepost 296.4, near West Belden, Colorado. The project is in connection with a limited reopening of the inactive trackage between MP 334.6 and MP 296.6. The proposed changes consist of the following:

1. Discontinue the use of a total of 46 signals on the Dotsero to West Belden line segment. The heads of the discontinued signals will be turned and bagged, and the signals ultimately removed.

2. The home signal at Dotsero, located on the Tennessee Pass Subdivision at the junction with the Glenwood Springs Subdivision, will remain in service with an operative distant signal installed in accordance with 49 CFR Part 236. Signage stating "End Of CTC" and "Beginning of CTC" will be installed at appropriate locations near Dotsero.

3. Existing power-operated switches within the project limits will be converted to hand-throw switches with reflectorized targets.

4. The existing slide detector fences at mileposts 341.1, 319.1 and 303.7 will be restored to service, and converted to radio talking devices.

5. Train and other movements will be authorized and controlled by Track Warrant Control in accordance with established operating procedures, subject to a maximum operating speed of 25 mph.

6. The four signalized rail/highway grade crossings within the project limits will not be adversely affected by the proposed changes. The grade crossing warning systems on the two rail/highway crossings on the out-of-service portion of the line at Wolcott (S. H. 131), milepost 318.9, and Mintum (YMCA Road), milepost 301.6, will be made operational and compliant with Part 234 before train service is restored on this portion of the line.

The reason given for the proposed changes is that, due to significant changes in traffic and operations, a

signal system is no longer required. Additionally, the signal system on the line segment east of MP 334.6 is not operational, and the system would likely have to be replaced to make it operational.

Any interested party desiring to protest the granting of an application shall set forth specifically the grounds upon which the protest is made, and contain a concise statement of the interest of the party in the proceeding. Additionally, one copy of the protest shall be furnished to the applicant at the address listed above.

All communications concerning this proceeding should be identified by the docket number and must be submitted to the Docket Clerk, DOT Central Docket Management Facility, Room PL-401 (Plaza Level), 400 7th Street, SW., Washington, DC 20590-0001.

Communications received within 45 days of the date of this notice will be considered by the FRA before final action is taken. Comments received after that date will be considered as far as practicable. All written communications concerning these proceedings are available for examination during regular business hours (9 a.m.-5 p.m.) at the above facility. All documents in the public docket are also available for inspection and copying on the internet at the docket facility's Web site at <http://dms.dot.gov>.

FRA wishes to inform all potential commenters that anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477-78) or you may visit <http://dms.dot.gov>.

FRA expects to be able to determine these matters without an oral hearing. However, if a specific request for an oral hearing is accompanied by a showing that the party is unable to adequately present his or her position by written statements, an application may be set for public hearing.

Issued in Washington, DC on August 1, 2006.

**Grady C. Cothen, Jr.,**

*Deputy Associate Administrator for Safety, Standards and Program Development.*

[FR Doc. E6-12801 Filed 8-7-06; 8:45 am]

**BILLING CODE 4910-06-P**

**DEPARTMENT OF TRANSPORTATION**

**Federal Railroad Administration**

**Notice of Application for Approval of Discontinuance or Modification of a Railroad Signal System or Relief From Requirements**

Pursuant to Title 49 Code of Federal Regulations (CFR) part 235 and 49 U.S.C. 20502(a), the following railroad has petitioned the Federal Railroad Administration (FRA) seeking approval for the discontinuance or modification of the signal system or relief from the requirements of 49 CFR part 236 as detailed below.

*Docket Number:* FRA-2006-25083.

*Applicant:* Union Pacific Railroad, Mr. John C. Estes, Jr., Superintendent Locomotive, 1400 Douglas Stop 1050, Omaha, Nebraska 68179.

The Union Pacific Railroad Company (UP) seeks relief from the requirements of the Rules, Standards and Instructions, Title 49 CFR, part 236, Section 236.588, Periodic test. Specifically, UP is seeking to change the requirement as defined in the Technical Manual for Signal and Train Control Rules which requires disassembly of the receiver bar junction box during periodic inspection.

Applicant's justification for relief: Harmon, the manufacturer of UP's Ultra Cab II equipment does not recommend the removal of the junction box cover, except for replacement of the cab signal discriminators (receiver bars). Electrical qualification and integrity tests are conducted from the LCU ( Logic Control Unit) located in the locomotive cab area. Harmon and UP believe that removing the junction box cover during periodic inspections will, over time, degrade the integrity of the junction box and reduce overall reliability of the Harmon Ultra Cab II equipment.

Any interested party desiring to protest the granting of an application shall set forth specifically the grounds upon which the protest is made, and include a concise statement of the interest of the party in the proceeding. Additionally, one copy of the protest shall be furnished to the applicant at the address listed above.

All communications concerning this proceeding should be identified by the docket number and must be submitted to the Docket Clerk, DOT Central Docket Management Facility, Room PI-401, 400 7th Street, SW., Washington, DC 20590-0001. Communications received within 45 days of the date of this notice will be considered by the FRA before final action is taken. Comments received after that date will be considered as far as practicable. All written communications

concerning these proceedings are available for examination during regular business hours (9 a.m.–5 p.m.) at the above facility. All documents in the public docket are also available for inspection and copying on the internet at the docket facility's Web site at <http://dms.dot.gov>.

FRA wishes to inform all potential commenters that anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78) or you may visit <http://dms.dot.gov>.

FRA expects to be able to determine these matters without an oral hearing. However, if a specific request for an oral hearing is accompanied by a showing that the party is unable to adequately present his or her position by written statements, an application may be set for public hearing.

Issued in Washington, DC on August 1, 2006.

**Grady C. Cothen, Jr.,**

*Deputy Associate Administrator for Safety Standards and Program Development.*

[FR Doc. E6–12805 Filed 8–7–06; 8:45 am]

BILLING CODE 4910–06–P

## DEPARTMENT OF TRANSPORTATION

### Federal Railroad Administration

#### Notice of Application for Approval of Discontinuance or Modification of a Railroad Signal System or Relief From the Requirements of Title 49 Code of Federal Regulations Part 236

Pursuant to Title 49 Code of Federal Regulations (CFR) Part 235 and 49 U.S.C. 20502(a), the following railroads have petitioned the Federal Railroad Administration (FRA) seeking approval for the discontinuance or modification of the signal system or relief from the requirements of 49 CFR Part 236 as detailed below.

#### Docket Number FRA–2006–25265

*Applicant:* Union Pacific Railroad Company, Mr. W. E. Wimmer, Vice President—Engineering, 1400 Douglas Street, Mail Stop 0910, Omaha, Nebraska 68179.

The Union Pacific Railroad Company (UP) seeks approval of the proposed temporary discontinuance of the block signal system, at UP's Grant Tower in Salt Lake City, Utah. The temporary

discontinuance will be for a period of no more than 120 consecutive days, within a time period starting after November 1, 2006 and ending before August 1, 2007. The limits of the temporary discontinuance are as follows:

Lynndyl Subdivision from milepost

780.5 to milepost 782.9.

Provo Subdivision from milepost 744.4 to milepost 745.2.

Salt Lake Subdivision Tracks 1 and 2 CP784, milepost 782.9.

Salt Lake Subdivision Track 3, from milepost 782.9 to milepost 783.4.

The reason given for the proposed changes is to support the installation of new track and new signal system. At the end of the temporary discontinuance, the affected area will have a new signal system fully complying with Federal Regulations.

Any interested party desiring to protest the granting of an application shall set forth specifically the grounds upon which the protest is made, and contain a concise statement of the interest of the party in the proceeding. Additionally, one copy of the protest shall be furnished to the applicant at the address listed above.

All communications concerning this proceeding should be identified by the docket number and must be submitted to the Docket Clerk, DOT Central Docket Management Facility, Room PL–401 (Plaza Level), 400 7th Street, SW., Washington, DC 20590–0001.

Communications received within 45 days of the date of this notice will be considered by the FRA before final action is taken. Comments received after that date will be considered as far as practicable. All written communications concerning these proceedings are available for examination during regular business hours (9 a.m.–5 p.m.) at the above facility. All documents in the public docket are also available for inspection and copying on the internet at the docket facility's Web site at <http://dms.dot.gov>.

FRA wishes to inform all potential commenters that anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78) or you may visit <http://dms.dot.gov>.

FRA expects to be able to determine these matters without an oral hearing. However, if a specific request for an oral

hearing is accompanied by a showing that the party is unable to adequately present his or her position by written statements, an application may be set for public hearing.

Issued in Washington, DC on August 1, 2006.

**Grady C. Cothen, Jr.,**

*Deputy Associate Administrator for Safety, Standards and Program Development.*

[FR Doc. E6–12814 Filed 8–7–06; 8:45 am]

BILLING CODE 4910–06–P

## DEPARTMENT OF TRANSPORTATION

### Federal Transit Administration

[Docket Number: FTA–2006–24947]

#### Notice of Availability of Interim Guidance and Instructions for Small Starts

**AGENCY:** Federal Transit Administration (FTA), DOT.

**ACTION:** Notice of availability.

**SUMMARY:** This notice announces the availability of the Federal Transit Administration's (FTA) Final Interim Guidance and Instructions for Small Starts which was initially issued for comment on June 6, 2006. This Guidance describes the eligibility, evaluation, and project development procedures for projects seeking Small Starts funding, as well as the information required from project sponsors to evaluate and rate a project for the purpose of project advancement or a funding recommendation. FTA is in the process of broader rulemaking on its major capital investments program, but the Interim Guidance and Instructions will allow projects into project development. The document will also enable FTA to evaluate and rate projects as part of the Annual New Starts Report and make funding recommendations prior to completion of the broader rulemaking process. For a Small Starts project to be included in the FY2008 Annual New Starts Report and considered for a funding recommendation, project information must be received by FTA by September 15, 2006 and any response to FTA comments on the submittal must be completed by October 15, 2006.

**EFFECTIVE DATE:** These policies and procedures will take effect on August 8, 2006.

**FOR FURTHER INFORMATION CONTACT:** Ron Fisher, Office of Planning and Environment, telephone (202) 366–4033, Federal Transit Administration, U.S. Department of Transportation, 400

Seventh Street, SW., Washington, DC 20590 or [Ronald.Fisher@dot.gov](mailto:Ronald.Fisher@dot.gov).

**SUPPLEMENTARY INFORMATION:**

**1. Availability of the Final Guidance and Comments**

A copy of the Proposed and Final Interim Guidance and Instructions for Small Starts, comments received on the Proposed Interim Guidance, and FTA's response to comments received from the public are part of docket FTA-2006-24947 and are available for inspection or copying at the Docket Management Facility, U.S. Department of Transportation, 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. You may retrieve the guidance and comments online through the Document Management System (DMS) at: <http://dms.dot.gov>. Enter docket number 24947 in the search field. The DMS is available 24 hours each day, 365 days each year. Electronic submission and retrieval help and guidelines are available under the help section of the Web site. An electronic copy of this document may also be downloaded by using a computer, modem and suitable communications software from the Government Printing Office's Electronic Bulletin Board Service at (202) 512-1661. Internet users may also reach the Office of the Federal Register's home page at: <http://www.nara.gov/fedreg> and the Government Printing Office's Web page at: <http://www.gpoaccess.gov/fr/index.html>.

**2. Background**

On August 10, 2005, President Bush signed the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU). Section 3011 of SAFETEA-LU made a number of changes to 49 U.S.C. 5309, which authorizes the Federal Transit Administration's (FTA's) capital investment program known as "New Starts." In addition to the changes made to the New Starts program, 49 U.S.C. 5309 has been amended with the addition of a new subsection (e) containing a new capital investment program category for projects requesting less than \$75,000,000 in Section 5309 capital investment funds with a total project cost of less than \$250,000,000. That new capital investment program, which will be referred to as the "Small Starts" program, is the subject of this Interim Guidance and Instructions. FTA, through its rulemaking authority, plans to propose regulations that would (1) implement changes to the existing New Starts program made by section

3011 of SAFETEA-LU and (2) formalize the requirements for the Small Starts program.

On June 6, 2006, FTA published a Notice of Availability of the Proposed Interim Guidance and Instructions for Small Starts for Comments in the **Federal Register** (71 FR 33503, Jun. 9, 2006). FTA requested—and received—comments on the Guidance in the June notice. This Final Interim Guidance and Instructions for Small Starts reflects FTA's consideration of these comments. FTA finds that there is good cause to make this guidance effective upon publication of this notice because sponsors of projects seeking Small Starts funding must have adequate time to prepare information that FTA will use to evaluate projects for inclusion in the President's FY2008 budget request to Congress. As noted above, the deadline to submit these materials to the FTA is September 15, 2006. This notice announces the availability of FTA's final Interim Guidance and Instructions for Small Starts. This document is available on the docket, which can be accessed by going to <http://dms.dot.gov>, or on FTA's Web site for New Starts Planning and Project Development at <http://www.fta.dot.gov>.

**3. Response to Comments**

Comments were received from 26 parties. These include transit agencies, trade organizations, Members of Congress, and private consulting firms. This section highlights the key issues identified in the comments on the Proposed Interim Guidance and Instructions for Small Starts, as well as FTA's response.

*More Emphasis Needed on Economic Development Criterion*

*Comments:* A total of eight comments were received. Respondents noted the need for a greater role in the evaluation of economic development. In addition, it was suggested that a separate evaluation criterion be created instead of including economic development in the "other factors" category as was proposed.

*FTA Response:* The underlying premise for this interim guidance is not to impose any significant changes in the process until the rulemaking process has been completed. Further, there is a significant challenge involved in properly evaluating a project's positive effect on local economic development and establishing a system that can be applied nationally, as well as the informational burden on project sponsors that this would entail. Accordingly, FTA has determined that the best way to allow for the

consideration of economic development at this stage is to give project sponsors the opportunity to provide evidence of the project's impact on development under "other factors." Thus, no change was made from the approach offered in the Proposed Interim Guidance. The approach allows project sponsors to cite well-reasoned, strongly-justified, and verifiable qualitative and quantitative explanations of the expected economic development outcomes of the proposed Small Starts project. This could include developer agreements or any other commitments of development related to the project that would not occur if the project was not constructed.

*Streetcars Excluded From Very Small Starts*

*Comments:* A total of 14 comments were received. Respondents indicated concern over several provisions in the Proposed Interim Guidance and Instructions for Small Starts that they believe would establish a process that would make it difficult to fund streetcar projects through the Small Starts program. Respondents claimed that the explicit exclusion of "fixed guideway" projects—and thus rail modes such as urban streetcar—from Very Small Starts eligibility, as well as the performance measures indicated in the Small Starts program, would create a bias against this mode of transit.

*FTA Response:* FTA established the eligibility criteria for Very Small Starts with the intent that the very nature of the performance of these projects assured a cost-effective project. On reviewing the comments, FTA agrees that the exclusion of a new fixed guideway from the definition of Very Small Starts is unnecessary, as the effectiveness and cost-effectiveness of a fixed guideway project can be assured by these measures. Therefore, FTA will allow the construction of fixed guideway projects to be eligible for Very Small Starts funding if they meet the other criteria established for this category.

Specifically, to be eligible for the Very Small Starts category, the project should (1) Have substantial transit stations; (2) use traffic signal priority/pre-emption, to the extent, if any, that traffic signals exist in the corridor; (3) have low-floor vehicles or level boarding; (4) use a clear brand identity for the proposed service; (5) operate 10 minute peak/15 minute off peak headways or better and operate at least 14 hours per weekday (not required for commuter rail or ferries); (6) be in corridors with at least 3,000 average weekday existing riders who will benefit from the proposed project; and (7) have a total capital cost

less than \$50 million (including all project elements) and less than \$3 million per mile, exclusive of rolling stock.

*Majority of Funds Will Go to Very Small Starts Projects Due to the Ease of Evaluation and Implementation*

*Comments:* A total of 11 comments were received. Respondents noted concern that since Very Small Starts projects would have an easier time being rated, that the majority of Small Starts funding would be allocated to Very Small Starts projects. This would mean that very little funding would be available for larger Small Starts, such as fixed guideway rail projects.

*FTA Response:* The comments are not based on any requirement in the Proposed Interim Guidance, but rather reflect speculation on how FTA will make funding recommendations. The Proposed Interim Guidance did not address how FTA would make its funding decisions, nor did it address the division of funding between Small Starts and Very Small Starts. As with all projects in the Section 5309 capital investment grant program, the evaluation and rating process for Small Starts is separate and distinct from FTA's decision to recommend a project for funding. That decision is driven by a number of factors, including the "readiness" of projects for capital funding, geographic equity, the amount of available funds versus the number and size of the projects in New Starts the pipeline, and the project's overall rating. The Interim Guidance and Instructions have been revised to add a section that clearly states that funding decisions are not covered by the rating process.

*Requirement for 1,000 Riders at Endpoints Is Too High for Very Small Starts*

*Comments:* A total of 11 comments were received. Respondents representing both large and small transit agencies, as well as trade organizations, noted that this metric would be difficult to meet. Most respondents noted that this requirement could be met at one end or at points along a route, but achieving 1,000 riders at each endpoint is not likely.

*FTA Response:* In light of the projected variety of project candidates for Very Small Starts funding, this minimum ridership requirement has been eliminated in the Interim Guidance and Instructions. However, as with any proposed New Start project, FTA will review the scope and cost of the project to insure that significant

costs are not being incurred for unproductive lengths.

*Request for Simpler Processes*

*Comments:* A total of 12 comments were received. Respondents noted that the application process for Small Starts funding was too cumbersome in relation to the program's goals and expected project size. Several comments cited similarities between the application process for New Starts and Small Starts. Respondents noted the number of long, involved, and often costly steps in New Starts projects, and hoped to avoid these in the Small Starts program.

*FTA Response:* FTA believes that significant simplification has been achieved, consistent with the underlying premise of the Proposed Interim Guidance not to make major changes in the process until the rulemaking has been completed. Nevertheless, FTA believes that further simplification may be possible. The rulemaking process underway for New Starts and Small Starts will provide an opportunity to consider additional simplification. The requirements for an alternatives analysis and the information necessary for local financial commitment have been simplified. For Very Small Starts, evidence of eligibility, which is information project sponsors usually develop for a project regardless of funding source, is all that is required for project justification. The timeframe for travel forecasts and financial plans has been reduced to the date of opening, significantly reducing highway and transit network development as well as other information needed for forecasts. Simplified methods for travel forecasts are also possible. The planning and evaluation process has been limited to the factors in the law and the amount of supporting information has been minimized as much as possible without compromising evaluation of project justification and local financial commitment. In addition, in response to the comments, the information required for the rating of land use has been further simplified and included in the Appendix.

Issued in Washington, DC this 2nd day of August 2006.

**Sandra K. Bushue,**

*Deputy Administrator.*

[FR Doc. E6-12847 Filed 8-7-06; 8:45 am]

**BILLING CODE 4910-57-P**

**DEPARTMENT OF TRANSPORTATION**

**Maritime Administration**

**Reports, Forms and Recordkeeping Requirements; Agency Information Collection Activity Under OMB Review**

**AGENCY:** Maritime Administration, DOT.

**ACTION:** Notice and request for comments.

**SUMMARY:** In compliance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), this notice announces that the Information Collection abstracted below has been forwarded to the Office of Management and Budget (OMB) for review and approval. The nature of the information collection is described as well as its expected burden. The **Federal Register** Notice with a 60-day comment period soliciting comments on the following collection of information was published on May 16, 2006. No comments were received.

**DATES:** Comments must be submitted on or before September 7, 2006.

**FOR FURTHER INFORMATION CONTACT:** James Zok, Maritime Administration (MAR-500), 400 Seventh St., SW., Washington, DC 20590. Telephone: 202-366-0364; FAX: 202-366-9580, or e-mail: [jim.zok@dot.gov](mailto:jim.zok@dot.gov).

Copies of this collection also can be obtained from that office.

**SUPPLEMENTARY INFORMATION:** Maritime Administration (MARAD).

*Title of Collection:* Customer Service Survey.

*OMB Control Number:* 2133-0528.

*Type of Request:* Extension of currently approved collection.

*Affected Public:* Individuals receiving goods and services from the Maritime Administration.

*Forms:* MA-1016, MA-1017, MA-1021 and MA-1038.

*Abstract:* Executive Order 12862 requires agencies to survey customers to determine the kind and quality of services they want and the level of satisfaction with existing services. This collection provides the instruments used to collect the information regarding MARAD programs and services.

*Annual Estimated Burden Hours:* 256 hours.

*Addresses:* Send comments to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street, NW., Washington, DC 20503, Attention: MARAD Desk Officer.

*Comments Are Invited On:* (A) Whether the proposed collection of information is necessary for the proper

performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed information collection; (c) ways to enhance the quality, utility and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

A comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication.

Issued in Washington, DC on August 2, 2006.

Joel C. Richard,

Secretary, Maritime Administration.

[FR Doc. E6-12844 Filed 8-7-06; 8:45 am]

BILLING CODE 4910-81-P

## DEPARTMENT OF TRANSPORTATION

### National Highway Traffic Safety Administration

[Docket No. NHTSA-2006-25515]

#### Notice of Receipt of Petition for Decision That Nonconforming 2004 Mercedes Benz Maybach Passenger Cars Are Eligible for Importation

**AGENCY:** National Highway Traffic Safety Administration, DOT.

**ACTION:** Notice of receipt of petition for decision that nonconforming 2004 Mercedes Benz Maybach passenger cars are eligible for importation.

**SUMMARY:** This document announces receipt by the National Highway Traffic Safety Administration (NHTSA) of a petition for a decision that 2004 Mercedes Benz Maybach passenger cars that were not originally manufactured to comply with all applicable Federal motor vehicle safety standards are eligible for importation into the United States because (1) they are substantially similar to vehicles that were originally manufactured for importation into and sale in the United States and that were certified by their manufacturer as complying with the safety standards, and (2) they are capable of being readily altered to conform to the standards.

**DATES:** The closing date for comments on the petition is September 7, 2006.

**ADDRESSES:** Comments should refer to the docket number and notice number, and be submitted to: Docket Management, Room PL-401, 400 Seventh St., SW., Washington, DC 20590. [Docket hours are from 9 a.m. to 5 p.m.] 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>.

**FOR FURTHER INFORMATION CONTACT:** Coleman Sachs, Office of Vehicle Safety Compliance, NHTSA (202-366-3151).

#### SUPPLEMENTARY INFORMATION:

##### Background

Under 49 U.S.C. 30141(a)(1)(A), a motor vehicle that was not originally manufactured to conform to all applicable Federal motor vehicle safety standards shall be refused admission into the United States unless NHTSA has decided that the motor vehicle is substantially similar to a motor vehicle originally manufactured for importation into and sale in the United States, certified under 49 U.S.C. 30115, and of the same model year as the model of the motor vehicle to be compared, and is capable of being readily altered to conform to all applicable Federal motor vehicle safety standards.

Petitions for eligibility decisions may be submitted by either manufacturers or importers who have registered with NHTSA pursuant to 49 CFR Part 592. As specified in 49 CFR 593.7, NHTSA publishes notice in the **Federal Register** of each petition that it receives, and affords interested persons an opportunity to comment on the petition. At the close of the comment period, NHTSA decides, on the basis of the petition and any comments that it has received, whether the vehicle is eligible for importation. The agency then publishes this decision in the **Federal Register**.

J.K. Technologies, LLC, of Baltimore, Maryland ("J.K.") (Registered Importer 90-006) has petitioned NHTSA to decide whether nonconforming 2004 Mercedes Benz Maybach passenger cars are eligible for importation into the United States. The vehicles which J.K. believes are substantially similar are 2004 Mercedes Benz Maybach passenger cars that were manufactured for importation into, and sale in, the United States and certified by their manufacturer as conforming to all applicable Federal motor vehicle safety standards.

The petitioner claims that it carefully compared non-U.S. certified 2004 Mercedes Benz Maybach passenger cars to their U.S.-certified counterparts, and

found the vehicles to be substantially similar with respect to compliance with most Federal motor vehicle safety standards.

J.K. submitted information with its petition intended to demonstrate that non-U.S. certified 2004 Mercedes Benz Maybach passenger cars, as originally manufactured, conform to many Federal motor vehicle safety standards in the same manner as their U.S. certified counterparts, or are capable of being readily altered to conform to those standards.

Specifically, the petitioner claims that non-U.S. certified 2004 Mercedes Benz Maybach passenger cars are identical to their U.S. certified counterparts with respect to compliance with Standard Nos. 102 *Transmission Shift Lever Sequence, Starter Interlock, and Transmission Braking Effect*, 103 *Windshield Defrosting and Defogging Systems*, 104 *Windshield Wiping and Washing Systems*, 106 *Brake Hoses*, 109 *New Pneumatic Tires*, 113 *Hood Latch System*, 116 *Motor Vehicle Brake Fluids*, 124 *Accelerator Control Systems*, 135 *Passenger Car Brake Systems*, 201 *Occupant Protection in Interior Impact*, 202 *Head Restraints*, 204 *Steering Control Rearward Displacement*, 205 *Glazing Materials*, 206 *Door Locks and Door Retention Components*, 207 *Seating Systems*, Standard No. 209 *Seat Belt Assemblies*, 210 *Seat Belt Assembly Anchorages*, 212 *Windshield Mounting*, 214 *Side Impact Protection*, 216 *Roof Crush Resistance*, 219 *Windshield Zone Intrusion*, 225 *Child Restraint Anchorage Systems*, 301 *Fuel System Integrity*, 302 *Flammability of Interior Materials*, and 401 *Interior Trunk Release*.

In addition, the petitioner claims that the vehicles comply with the Bumper Standard found in 49 CFR Part 581.

The petitioner also contends that the vehicles are capable of being readily altered to meet the following standards, in the manner indicated:

Standard No. 101 *Controls and Displays*: Installation of a U.S.-model instrument cluster.

Standard No. 108 *Lamps, Reflective Devices and Associated Equipment*: (a) Installation of U.S.-model front sidemarker lamps; (b) installation of U.S.-model headlamps; and (c) installation of U.S.-model taillamp assemblies which incorporate rear U.S.-model sidemarker lamps.

Standard No. 110 *Tire Selection and Rims*: Installation of a tire information placard.

Standard No. 111 *Rearview Mirrors*: Installation of a U.S.-model passenger side rearview mirror, or inscription of

the required warning statement on the face of that mirror.

Standard No. 114 *Theft Protection*: Installation of U.S. version software to meet the requirements of this standard.

Standard No. 118 *Power-Operated Window, Partition, and Roof Panel Systems*: Installation of U.S. version software to meet the requirements of this standard.

Standard No. 208 *Occupant Crash Protection*: Reprogramming the vehicle computer to the U.S.-mode to ensure compliance with the standard.

The petitioner states that the occupant restraints used in these vehicles consist of dual front airbags and combination lap and shoulder belts at the front and rear outboard seating positions. These manual systems are automatic, self-tensioning, and are released by means of a single red push-button.

The petitioner additionally states that a vehicle identification plate must be affixed to the vehicles near the left windshield post to meet the requirements of 49 CFR part 565.

Interested persons are invited to submit comments on the petition described above. Comments should refer to the docket number and be submitted to: Docket Management, Room PL-401, 400 Seventh St., SW., Washington, DC 20590. [Docket hours are from 9 a.m. to 5 p.m.] It is requested but not required that 10 copies be submitted.

All comments received before the close of business on the closing date indicated above will be considered, and will be available for examination in the docket at the above address both before and after that date. To the extent possible, comments filed after the closing date will also be considered. Notice of final action on the petition will be published in the **Federal Register** pursuant to the authority indicated below.

**Authority:** 49 U.S.C. 30141(a)(1)(A) and (b)(1); 49 CFR 593.8; delegations of authority at 49 CFR 1.50 and 501.8.

Issued on: August 2, 2006.

**Claude H. Harris,**

*Director, Office of Vehicle Safety Compliance.*  
[FR Doc. E6-12845 Filed 8-7-06; 8:45 am]

**BILLING CODE 4910-59-P**

## DEPARTMENT OF TRANSPORTATION

### National Highway Traffic Safety Administration

[Docket No. NHTSA-2006-25516]

#### Notice of Receipt of Petition for Decision That Nonconforming 1998 Bentley Azure (Left-Hand and Right-Hand Drive) Passenger Cars Are Eligible for Importation

**AGENCY:** National Highway Traffic Safety Administration, DOT.

**ACTION:** Notice of receipt of petition for decision that nonconforming 1998 Bentley Azure (left-hand and right-hand drive) passenger cars are eligible for importation.

**SUMMARY:** This document announces receipt by the National Highway Traffic Safety Administration (NHTSA) of a petition for a decision that 1998 Bentley Azure (left-hand and right-hand drive) passenger cars that were not originally manufactured to comply with all applicable Federal motor vehicle safety standards are eligible for importation into the United States because (1) they are substantially similar to vehicles that were originally manufactured for importation into and sale in the United States and that were certified by their manufacturer as complying with the safety standards, and (2) they are capable of being readily altered to conform to the standards.

**DATES:** The closing date for comments on the petition is September 7, 2006.

**ADDRESSES:** Comments should refer to the docket number and notice number, and be submitted to: Docket Management, Room PL-401, 400 Seventh St., SW., Washington, DC 20590. [Docket hours are from 9 am to 5 pm]. 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>.

**FOR FURTHER INFORMATION CONTACT:** Coleman Sachs, Office of Vehicle Safety Compliance, NHTSA (202-366-3151).

#### SUPPLEMENTARY INFORMATION:

##### Background

Under 49 U.S.C. 30141(a)(1)(A), a motor vehicle that was not originally manufactured to conform to all applicable Federal motor vehicle safety

standards shall be refused admission into the United States unless NHTSA has decided that the motor vehicle is substantially similar to a motor vehicle originally manufactured for importation into and sale in the United States, certified under 49 U.S.C. 30115, and of the same model year as the model of the motor vehicle to be compared, and is capable of being readily altered to conform to all applicable Federal motor vehicle safety standards.

Petitions for eligibility decisions may be submitted by either manufacturers or importers who have registered with NHTSA pursuant to 49 CFR part 592. As specified in 49 CFR 593.7, NHTSA publishes notice in the **Federal Register** of each petition that it receives, and affords interested persons an opportunity to comment on the petition. At the close of the comment period, NHTSA decides, on the basis of the petition and any comments that it has received, whether the vehicle is eligible for importation. The agency then publishes this decision in the **Federal Register**.

J.K. Technologies, LLC, of Baltimore, Maryland ("J.K.") (Registered Importer 90-006) has petitioned NHTSA to decide whether nonconforming 1998 Bentley Azure (left-hand and right-hand drive) passenger cars are eligible for importation into the United States. The vehicles which J.K. believes are substantially similar are 1998 Bentley Azure (left-hand drive) passenger cars that were manufactured for importation into, and sale in, the United States and certified by their manufacturer as conforming to all applicable Federal motor vehicle safety standards.

The petitioner claims that it carefully compared non-U.S. certified 1998 Bentley Azure (left-hand and right-hand drive) passenger cars to their U.S.-certified counterparts, and found the vehicles to be substantially similar with respect to compliance with most Federal motor vehicle safety standards.

J.K. submitted information with its petition intended to demonstrate that non-U.S. certified 1998 Bentley Azure (left-hand and right-hand drive) passenger cars, as originally manufactured, conform to many Federal motor vehicle safety standards in the same manner as their U.S. certified right-hand drive counterparts, or are capable of being readily altered to conform to those standards.

Specifically, the petitioner claims that non-U.S. certified 1998 Bentley Azure (left-hand and right-hand drive) passenger cars are identical to their U.S. certified counterparts with respect to compliance with Standard Nos. 102 *Transmission Shift Lever Sequence*,

*Starter Interlock, and Transmission Braking Effect, 103 Windshield Defrosting and Defogging Systems, 104 Windshield Wiping and Washing Systems, 106 Brake Hoses, 109 New Pneumatic Tires, 113 Hood Latch System, 116 Motor Vehicle Brake Fluids, 124 Accelerator Control Systems, 135 Passenger Car Brake Systems, 201 Occupant Protection in Interior Impact, 202 Head Restraints, 205 Glazing Materials, 206 Door Locks and Door Retention Components, 207 Seating Systems, 210 Seat Belt Assembly Anchorages, 212 Windshield Mounting, 214 Side Impact Protection, 216 Roof Crush Resistance, 219 Windshield Zone Intrusion, 301 Fuel System Integrity, and 302 Flammability of Interior Materials.*

The petitioner also contends that the vehicles are capable of being readily altered to meet the following standards, in the manner indicated:

Standard No. 101 *Controls and Displays*: replacement of the instrument cluster with a U.S.-model component and reprogramming of the replacement unit to meet the requirements of this standard.

Standard No. 108 *Lamps, Reflective Devices and Associated Equipment*: (a) installation of U.S.-model front sidemarker lamps; (b) installation of U.S.-model headlamps; and (c) installation of U.S.-model taillamp assemblies that incorporate rear sidemarker lamps.

Standard No. 110 *Tire Selection and Rims*: installation of a tire information placard.

Standard No. 111 *Rearview Mirrors*: installation of a U.S.-model passenger side rearview mirror, or inscription of the required warning statement on the face of that mirror.

Standard No. 114 *Theft Protection*: installation of U.S. version software to meet the requirements of this standard.

Standard No. 118 *Power-Operated Window, Partition, and Roof Panel Systems*: installation of U.S. version software to meet the requirements of the standard.

Standard No. 204 *Steering Control Rearward Displacement*: installation of a U.S.-model steering shaft support mount.

Standard No. 208 *Occupant Crash Protection*: (a) inspection of all vehicles and replacement of any non U.S.-model seat belts, air bag control units, air bags, sensors, and knee bolsters with U.S.-model components on vehicles that are not already so equipped, and (b) reprogramming the vehicle computer to the U.S.-mode to ensure compliance with the standard.

The petitioner states that the occupant restraints used in these vehicles consist

of dual front airbags and combination lap and shoulder belts at the front and rear outboard seating positions. The seat belt systems are self-tensioning and are released by means of a single red push-button.

Standard No. 209 *Seat Belt Assemblies*: replacement of rear seatbelts with U.S.-model components.

The petitioner also states that the bumpers must be modified to meet the requirements of the Bumper Standard found in 49 CFR part 581.

The petitioner additionally states that a vehicle identification plate must be affixed to the vehicles near the left windshield post to meet the requirements of 49 CFR part 565.

Interested persons are invited to submit comments on the petition described above. Comments should refer to the docket number and be submitted to: Docket Management, Room PL-401, 400 Seventh St., SW., Washington, DC 20590. [Docket hours are from 9 am to 5 pm]. It is requested but not required that 10 copies be submitted.

All comments received before the close of business on the closing date indicated above will be considered, and will be available for examination in the docket at the above address both before and after that date. To the extent possible, comments filed after the closing date will also be considered. Notice of final action on the petition will be published in the **Federal Register** pursuant to the authority indicated below.

**Authority:** 49 U.S.C. 30141(a)(1)(A) and (b)(1); 49 CFR 593.8; delegations of authority at 49 CFR 1.50 and 501.8.

Issued on: August 2, 2006.

**Claude H. Harris,**  
*Director, Office of Vehicle, Safety Compliance.*

[FR Doc. E6-12846 Filed 8-7-06; 8:45 am]

**BILLING CODE 4910-59-P**

## DEPARTMENT OF TRANSPORTATION

### National Highway Traffic Safety Administration

[Docket No. NHTSA-2006-25555; Notice 1]

#### Foreign Tire Sales, Inc., Receipt of Petition for Decision of Inconsequential Noncompliance

Foreign Tire Sales, Inc. (FTS) has determined that certain tires that it imported in 2005 and 2006 do not comply with S6.5(d) of 49 CFR 571.119, Federal Motor Vehicle Safety Standard (FMVSS) No. 119, "New pneumatic tires for vehicles other than passenger cars." FTS has filed an appropriate report

pursuant to 49 CFR part 573, "Defect and Noncompliance Reports."

Pursuant to 49 U.S.C. 30118(d) and 30120(h), FTS has petitioned for an exemption from the notification and remedy requirements of 49 U.S.C. Chapter 301 on the basis that this noncompliance is inconsequential to motor vehicle safety.

This notice of receipt of FTS's petition is published under 49 U.S.C. 30118 and 30120 and does not represent any agency decision or other exercise of judgment concerning the merits of the petition.

Affected are a total of approximately 18,900 Danzig and Direction size 10.00-20 bias ply container chassis tires manufactured by Wendeng Sanfeng Tyre Co., Ltd. of Wendeng City, China, and imported between August 2005 and April 2006. S6.5(d) of FMVSS No. 119 requires that each tire shall be marked on each sidewall with "[t]he maximum load rating and corresponding inflation pressure of the tire \* \* \* ." The subject tires are not market with the maximum load rating and corresponding inflation values for single tire use. FTS has corrected the problem that caused these errors so that they will not be repeated in future production.

FTS believes that the noncompliance is inconsequential to motor vehicle safety and that no corrective action is warranted. FTS states that there is no safety issue relating to single use because the tires are clearly labeled "dual use only" and "trailer service only," and because FTS's "customers understand that said tires are to be used on container chassis only."

Interested persons are invited to submit written data, views, and arguments on this petition. Comments must refer to the docket and notice number cited at the beginning of this notice and be submitted by any of the following methods. Mail: Docket Management Facility, U.S. Department of Transportation, Nassif Building, Room PL-401, 400 Seventh Street, SW., Washington, DC 20590-0001. Hand Delivery: Room PL-401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC. It is requested, but not required, that two copies of the comments be provided. The Docket Section is open on weekdays from 10 a.m. to 5 p.m. except Federal Holidays. Comments may be submitted electronically by logging onto the Docket Management System Web site at <http://dms.dot.gov>. Click on "Help" to obtain instructions for filing the document electronically. Comments may be faxed to 1-202-493-2251, or may be submitted to the Federal eRulemaking Portal: go to <http://>

[www.regulations.gov](http://www.regulations.gov). Follow the online instructions for submitting comments.

The petition, supporting materials, and all comments received before the close of business on the closing date indicated below will be filed and will be considered. All comments and supporting materials received after the closing date will also be filed and will be considered to the extent possible. When the petition is granted or denied, notice of the decision will be published in the **Federal Register** pursuant to the authority indicated below.

*Comment closing date:* September 7, 2006.

**Authority:** (49 U.S.C. 30118, 30120; delegations of authority at CFR 1.50 and 501.8).

Issued on: August 3, 2006.

**Claude H. Harris,**

*Director, Office of Vehicle Safety Compliance.*  
[FR Doc. E6-12879 Filed 8-7-06; 8:45 am]

**BILLING CODE 4910-59-P**

## DEPARTMENT OF TRANSPORTATION

### National Highway Traffic Safety Administration

[Docket No. NHTSA-2006-25525; Notice 1]

#### Fulmer Helmets, Inc., Receipt of Petition for Decision of Inconsequential Noncompliance

Fulmer Helmets, Inc. (Fulmer) has determined that certain helmets it produced in 2001 through 2006 do not comply with S5.2 of 49 CFR 571.218, Federal Motor Vehicle Safety Standard (FMVSS) No. 218, "Motorcycle Helmets." Fulmer has filed an appropriate report pursuant to 49 CFR part 573, "Defect and Noncompliance Reports."

Pursuant to 49 U.S.C. 30118(d) and 30120(h), Fulmer has petitioned for an exemption from the notification and remedy requirements of 49 U.S.C. Chapter 301 on the basis that this noncompliance is inconsequential to motor vehicle safety.

This notice of receipt of Fulmer's petition is published under 49 U.S.C. 30118 and 30120 and does not represent any agency decision or other exercise of judgment concerning the merits of the petition.

Affected are a total of approximately 32,052 helmets which Fulmer certified as complying with FMVSS No. 218. These consist of approximately 26,762 Modular Motorcycle Helmets AF-M produced between January 2002 and April 2006, and approximately 5,290 Modular Snowmobile Helmets SN-M produced between November 2001 and

November 2005. S5.2 of FMVSS No. 218, penetration, requires that "when a penetration test is conducted in accordance with S7.2, the striker shall not contact the surface of the test headform." When this test was conducted on the subject helmets, the striker contacted the surface of the test headform. Fulmer has corrected the problem that caused these errors so that they will not be repeated in future production.

Fulmer believes that the noncompliance is inconsequential to motor vehicle safety and that no corrective action is warranted. Fulmer states that it asked Harry Hurt, "a leading expert in helmet testing and motorcycle accident research \* \* \* [whose] experience is more than 50 years," to review the test results. Fulmer further states,

[Harry Hurt's] opinion is that the noncompliance on the penetration test is inconsequential because the helmets performed exceptionally well on all impact attenuation tests. In his experience, there has never been any correlation between the penetration test and accident performance, and damage like the penetration test is never seen in crash involved motorcycle helmets.

Mr. Hurt's full statement is available in the docket.

Interested persons are invited to submit written data, views, and arguments on this petition. Comments must refer to the docket and notice number cited at the beginning of this notice and be submitted by any of the following methods. Mail: Docket Management Facility, U.S. Department of Transportation, Nassif Building, Room PL-401, 400 Seventh Street, SW., Washington, DC 20590-0001. Hand Delivery: Room PL-401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC. It is requested, but not required, that two copies of the comments be provided. The Docket Section is open on weekdays from 10 a.m. to 5 p.m. except Federal Holidays. Comments may be submitted electronically by logging onto the Docket Management System Web site at <http://dms.dot.gov>. Click on "Help" to obtain instructions for filing the document electronically. Comments may be faxed to 1-202-493-2251, or may be submitted to the Federal eRulemaking Portal: go to <http://www.regulations.gov>. Follow the online instructions for submitting comments.

The petition, supporting materials, and all comments received before the close of business on the closing date indicated below will be filed and will be considered. All comments and supporting materials received after the closing date will also be filed and will

be considered to the extent possible. When the petition is granted or denied, notice of the decision will be published in the **Federal Register** pursuant to the authority indicated below.

*Comment closing date:* September 7, 2006.

**Authority:** (49 U.S.C. 30118, 30120; delegations of authority at CFR 1.50 and 501.8).

Issued on: August 3, 2006.

**Claude H. Harris,**

*Director, Office of Vehicle Safety Compliance.*  
[FR Doc. E6-12878 Filed 8-7-06; 8:45 am]

**BILLING CODE 4910-59-P**

## DEPARTMENT OF TRANSPORTATION

### Pipeline and Hazardous Materials Safety Administration, Office of Hazardous Materials Safety

#### Notice of Delays in Processing of Special Permit Applications

**AGENCY:** Pipeline and Hazardous Safety Administration, DOT.

**ACTION:** List of applications delayed more than 180 days.

**SUMMARY:** In accordance with the requirements of 49 U.S.C. 5117(c), PHMSA is publishing the following list of special permit applications that have been in process for 180 days or more. The reason(s) for delay and the expected completion date for action on each application is provided in association with each identified application.

**FOR FURTHER INFORMATION CONTACT:** Ann Mazzullo, Office of Hazardous Materials Special Permits and Approvals, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590-0001, (202) 366-4535.

#### Key to "Reason for Delay"

1. Awaiting additional information from applicant.
2. Extensive public comment under review.
3. Application is technically complex and is of significant impact or precedent-setting and requires extensive analysis.
4. Staff review delayed by other priority issues or volume of special permit applications.

#### Meaning of Application Number Suffixes

- N—new applications.
- M—Modification request.
- X—Renewal.
- PM—Party to application with modification request.

Issued in Washington, DC, on August 1, 2006.

**Delmer Billings,**

Director, Office of Hazardous Materials  
Safety, Special Permits & Approvals.

**MODIFICATION TO EXEMPTIONS**

Application No.	Applicant	Reason for delay	Estimated date of completion
11903-M .....	Comptank Corporation, Bothwell, ON .....	4	08-31-2006
13583-M .....	Structural Composites Industries, Pomona, CA .....	3, 4	08-31-2006
12677-M .....	Austin Powder Illinois Company, Cleveland, OH .....	1	08-31-2006
10945-M .....	Structural Composites Industries, Pomona, CA .....	4	09-30-2006

**NEW EXEMPTION APPLICATIONS**

Application No.	Applicant	Reason for delay	Estimated date of completion
13563-N .....	Applied Companies, Valencia, CA .....	1	08-31-2006
14229-N .....	Senex Explosives, Inc., Cuddy, PA .....	4	08-31-2006
14232-N .....	Luxfer Gas Cylinders—Composite Cylinder Division, Riverside, CA.	4	08-31-2006
14285-N .....	INO Therapeutics LLC, Port Allen, LA .....	4	08-31-2006
14298-N .....	Air Products and Chemicals, Inc., Allentown, PA .....	4	08-31-2006
14318-N .....	Lockheed Martin Technical Operations, Vandenberg AFB, CA.	4	08-31-2006
14310-N .....	Praxair, Danbury, CT .....	4	09-30-2006
14314-N .....	North American Automotive Hazmat Action Committee.	4	08-31-2006
14316-N .....	VOTG North America, Inc., West Chester, PA .....	4	08-31-2006
14301-N .....	Triple S Gas Tanks (PTY) Ltd dba GasCon, Elsiesriver, South Africa.	4	09-30-2006
14289-N .....	City Machine & Welding, Inc., Amarillo, TX .....	4	08-31-2006
14277-N .....	Ascus Technologies, Ltd., Cleveland, OH .....	3, 4	08-31-2006
14266-N .....	NCF Industries, Inc., Santa Maria, CA .....	3	08-31-2006
14239-N .....	Marlin Gas Transport, Inc., Odessa, FL .....	1	08-31-2006
14237-N .....	Advanced Technology Materials, Inc. (ATMI), Danbury, CT.	1	08-31-2006
14257-N .....	Origin Energy American Samoa, Inc., Pago Pago, AS	4	08-31-2006

[FR Doc. 06-6744 Filed 8-7-06; 8:45 am]

**BILLING CODE 4910-60-M**

**DEPARTMENT OF THE TREASURY**

**Submission for OMB Review;  
Comment Request**

**July 31, 2006.**

The Department of Treasury has submitted the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104-13. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, Room 11000, 1750 Pennsylvania Avenue, NW., Washington, DC 20220.

**DATES:** Written comments should be received on or before September 7, 2006 to be assured of consideration.

**Alcohol and Tobacco Tax and Trade Bureau (TTB)**

*OMB Number:* 1513-0100.

*Type of Review:* Extension.

*Title:* Applications, Notices, and Relative to Importation and Exportation of Distilled Spirits, Wine and Beer, Including Puerto Rico and Virgin Islands.

*Description:* Beverage alcohol, industrial alcohol, beer and wine are taxed when imported. The taxes on these commodities coming from the Virgin Islands and Puerto Rico are largely returned to these insular possessions. Exports are mainly tax-free. These documents ensure that proper taxes are collected and returned according to law.

*Respondents:* Business or other for-profit.

*Estimated Total Burden Hours:* 180 hours.

*OMB Number:* 1513-0097.

*Type of Review:* Extension.

*Title:* Notices Relating to Payment of Firearms and Ammunition Excise Tax.

*Description:* Excise taxes are collected on the sale or use of firearms and ammunition by firearms or ammunition manufacturers, importers or producers. Taxpayers who elect to pay excise taxes by electronic fund transfer must furnish a written notice upon election and discontinuance. Tax revenue will be protected.

*Respondents:* Business or other for-profit.

*Estimated Total Burden Hours:* 1 hour.

*Clearance Officer:* Frank Foote, Alcohol and Tobacco Tax and Trade Bureau, Room 200 East, 1310 G. Street, NW., Washington, DC 20005. (202) 927-9347.

*OMB Reviewer:* Alexander T. Hunt, Office of Management and Budget, Room 10235, New Executive Office

Building, Washington, DC 20503, (202)  
395-7316.

**Robert Dahl,**

*Treasury PRA Clearance Officer.*

[FR Doc. 06-6745 Filed 8-7-06; 8:45 am]

**BILLING CODE 4810-31-P**



# Federal Register

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**Tuesday,  
August 8, 2006**

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## **Part II**

# **Department of Health and Human Services**

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**Office of Inspector General**

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**42 CFR Part 1001**

**Medicare and State Health Care Programs:  
Fraud and Abuse; Safe Harbors for  
Certain Electronic Prescribing and  
Electronic Health Records Arrangements  
Under the Anti-Kickback Statute; Final  
Rule**

**DEPARTMENT OF HEALTH AND HUMAN SERVICES**

**Office of Inspector General**

**42 CFR Part 1001**

RIN 0991-AB39

**Medicare and State Health Care Programs: Fraud and Abuse; Safe Harbors for Certain Electronic Prescribing and Electronic Health Records Arrangements Under the Anti-Kickback Statute**

**AGENCY:** Office of Inspector General (OIG), HHS.

**ACTION:** Final rule.

**SUMMARY:** As required by the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA), Public Law 108-173, this final rule establishes a new safe harbor under the Federal anti-kickback statute for certain arrangements involving the provision of electronic prescribing technology. Specifically, the safe harbor would protect certain arrangements involving hospitals, group practices, and prescription drug plan (PDP) sponsors and Medicare Advantage (MA) organizations that provide to specified recipients certain nonmonetary remuneration in the form of hardware, software, or information technology and training services necessary and used solely to receive and transmit electronic prescription information. In addition, in accordance with section 1128B(b)(3)(E) of the Social Security Act (the Act), this final rule creates a separate new safe harbor for certain arrangements involving the provision of nonmonetary remuneration in the form of electronic health records software or information technology and training services necessary and used predominantly to create, maintain, transmit, or receive electronic health records.

**DATES:** *Effective Date:* These regulations are effective October 10, 2006.

**FOR FURTHER INFORMATION CONTACT:** Catherine Martin, Office of Counsel to the Inspector General, (202) 619-0335.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

*Overview—Establishing New Safe Harbors for Arrangements Involving Electronic Prescribing and Electronic Health Records Technology*

This final rule establishes safe harbor protection for certain arrangements involving the donation of electronic prescribing and electronic health records technology. Section I contains a brief background discussion addressing

the anti-kickback statute and safe harbors; a summary of the relevant MMA provisions; a summary of the proposed safe harbors; and a summary of the final safe harbors. Section II contains a summary of the public comments and our responses.

**A. The Anti-Kickback Statute and Safe Harbors**

Section 1128B(b) of the Act (42 U.S.C. 1320a-7b(b)), the “anti-kickback statute”) provides criminal penalties for individuals or entities that knowingly and willfully offer, pay, solicit, or receive remuneration in order to induce or reward the referral of business reimbursable under any of the Federal health care programs, as defined in section 1128B(f) of the Act. The offense is classified as a felony and is punishable by fines of up to \$25,000 and imprisonment for up to five years. Violations of the anti-kickback statute may also result in the imposition of civil money penalties (CMPs) under section 1128A(a)(7) of the Act (42 U.S.C. 1320a-7a(a)(7)), program exclusion under section 1128(b)(7) of the Act (42 U.S.C. 1320a-7(b)(7)), and liability under the False Claims Act, (31 U.S.C. 3729-33).

The types of remuneration prohibited specifically include, without limitation, kickbacks, bribes, and rebates, whether made directly or indirectly, overtly or covertly, in cash or in kind. Prohibited conduct includes not only the payment of remuneration intended to induce or reward referrals of patients, but also the payment of remuneration intended to induce or reward the purchasing, leasing, or ordering of, or arranging for or recommending the purchasing, leasing, or ordering of, any good, facility, service, or item reimbursable by any Federal health care program.

Because of the broad reach of the statute, concern was expressed that some relatively innocuous commercial arrangements were covered by the statute and, therefore, potentially subject to criminal prosecution. In response, Congress enacted section 14 of the Medicare and Medicaid Patient and Program Protection Act of 1987, Public Law 100-93 (section 1128B(b)(3)(E) of the Act), which specifically required the development and promulgation of regulations, the so-called “safe harbor” provisions, which would specify various payment and business practices that would not be treated as criminal offenses under the anti-kickback statute, even though they may potentially be capable of inducing referrals of business under the Federal health care programs. Since July 29, 1991, we have published in the **Federal Register** a series of final regulations establishing “safe harbors”

in various areas.<sup>1</sup> These OIG safe harbor provisions have been developed “to limit the reach of the statute somewhat by permitting certain non-abusive arrangements, while encouraging beneficial or innocuous arrangements.” (56 FR 35952, 35958; July 21, 1991).

Health care providers and others may voluntarily seek to comply with safe harbors so that they have the assurance that their business practices will not be subject to liability under the anti-kickback statute, the CMP provision for anti-kickback violations, or the program exclusion authority related to kickbacks. In giving the Department of Health and Human Services the authority to protect certain arrangements and payment practices from penalties under the anti-kickback statute, Congress intended the safe harbor regulations to be evolving rules that would be updated periodically to reflect changing business practices and technologies in the health care industry.

**B. Section 101 of MMA**

Section 101 of the MMA added a new section 1860D to the Act, establishing a Part D prescription drug benefit in the Medicare program. As part of the new statutory provision, Congress, through section 1860D-4(e) of the Act, directed the Secretary to create standards for electronic prescribing in connection with the new prescription drug benefit, with the objective of improving patient safety, quality of care, and efficiency in the delivery of care.<sup>2</sup> Section 1860D-4(e)(6) of the Act directs the Secretary, in consultation with the Attorney General, to create a safe harbor to the anti-kickback statute that would protect certain arrangements involving the provision of nonmonetary remuneration (consisting of items and services in the form of hardware, software, or information technology and training services) that is necessary and used solely to receive and transmit electronic prescription information in accordance with electronic prescribing standards promulgated by the Secretary under section 1860D-4(e)(4) of the Act. Specifically, the safe harbor would set forth conditions under which the provision of such technology by hospitals, group practices, and PDP sponsors and MA organizations to certain prescribing health care professionals, pharmacies, and pharmacists would be protected.

<sup>1</sup> 56 FR 35952 (July 29, 1991); 61 FR 2122 (January 25, 1996); 64 FR 63518 (November 19, 1999); 64 FR 63504 (November 19, 1999); and 66 FR 62979 (December 4, 2001).

<sup>2</sup> See H.R. Rep. No. 108-391 at 495 (2003) (Conf. Rep.).

We do not believe Congress, in enacting section 1860D–4(e)(6) of the Act, intended to suggest that a new safe harbor is needed for all or even most arrangements involving the provision of electronic prescribing items and services. In general, fair market value arrangements that are arm’s-length and do not take into account in any manner the volume or value of Federal health care program business, or arrangements that do not have as one purpose the generation of business payable by a Federal health care program, should not raise concerns under the anti-kickback statute. In addition, many arrangements can be structured to fit in existing safe harbors, including the safe harbors for discounts (42 CFR 1001.952(h)) and for remuneration offered to employees (42 CFR 1001.952(i)). Finally, parties may use the OIG advisory opinion process (42 CFR part 1008; <http://oig.hhs.gov/fraud/advisoryopinions.html>) to determine whether their particular arrangements would be subject to OIG sanctions.

In addition to the new safe harbor under the anti-kickback statute, section 1860D–4(e)(6) of the Act directs the Secretary to create a corresponding exception to section 1877 of the Act, commonly known as the physician self-referral law. That exception is being promulgated through a separate rulemaking by the Centers for Medicare & Medicaid Services (CMS), the agency that administers the physician self-referral law. We have endeavored to ensure as much consistency as possible between our final safe harbor and the corresponding final physician self-referral exception, given the differences in the respective underlying statutes. One significant difference in the statutory schemes is that fitting in an exception under section 1877 is mandatory, whereas complying with a safe harbor under the anti-kickback statute is voluntary. In other words, arrangements that do not comply with the electronic prescribing safe harbor at 42 CFR 1001.952(x) will not necessarily be illegal under the anti-kickback statute. Rather, they will be subject to

the customary case-by-case review under the statute to determine the parties’ intent. (The same holds true for electronic health records technology arrangements that do not fit in the new safe harbor at 42 CFR 1001.952(y).) Another difference is that section 1877 applies only to referrals from physicians, while the anti-kickback statute applies more broadly.

C. Summary of the Proposed Rulemaking

On October 11, 2005, we published a notice of proposed rulemaking to promulgate three safe harbors under the anti-kickback statute (70 FR 59015; October 11, 2005). The first proposed safe harbor addressed arrangements involving electronic prescribing technology, as required by section 101 of the MMA. Many industry and government stakeholders had expressed concerns that the MMA provision was not sufficiently useful or practical, and would not adequately advance the goal of achieving improved health care quality and efficiency through widespread adoption of interoperable electronic health records systems. Accordingly, we proposed two additional safe harbors to address donations of certain electronic health records software and directly related training services, using our authority at section 1128B(b)(3)(E) of the Act. One proposed safe harbor would have protected certain arrangements involving nonmonetary remuneration in the form of interoperable electronic health records software certified in accordance with criteria adopted by the Secretary (and directly related training services). The second proposed safe harbor would have protected certain arrangements involving donations of electronic health records software before adoption of certification criteria.

D. Summary of the Final Rulemaking

In this final rulemaking, we are adding two new safe harbors to the existing regulations at 42 CFR 1001.952: One protecting certain arrangements involving electronic prescribing

technology (new 42 CFR 1001.952(x)) and one protecting certain arrangements involving interoperable electronic health records software or information technology and training services (new 42 CFR 1001.952(y)). (For purposes of this rulemaking referred to, respectively, as the “electronic prescribing safe harbor” and the “electronic health records safe harbor.”) For the reasons explained below in Section II, we are abandoning the proposal to have separate pre- and post-interoperability safe harbors for electronic health records arrangements.

OIG has a longstanding concern about the provision of free or reduced price goods or services to an existing or potential referral source. There is a substantial risk that free or reduced price goods or services may be used as a vehicle to disguise or confer an unlawful payment for referrals of Federal health care program business. Financial incentives offered, paid, solicited, or received to induce or in exchange for generating Federal health care business increase the risks of, among other problems: (i) Overutilization of health care items or services; (ii) increased Federal program costs; (iii) corruption of medical decision making; and (iv) unfair competition. Thus, consistent with the structure and purpose of the anti-kickback statute and the regulatory authority at section 1128B(b)(3)(E) of the Act, we believe any safe harbor for electronic health records arrangements should protect beneficial arrangements that would eliminate perceived barriers to the adoption of electronic health records without creating undue risk that the arrangements might be used to induce or reward the generation of Federal health care program business.

For the convenience of the public, we are providing the following chart that lays out schematically the overall structure and approach of the final safe harbors, details of which are provided below in sections II. B. and II. C. Readers are cautioned that the final safe harbors contain additional conditions and information not summarized here.

	MMA-mandated electronic prescribing safe harbor	Electronic health records arrangements safe harbor
Authority for Final Safe Harbor .....	Section 101 of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003.	Section 1128B(b)(3)(E) of the Social Security Act.

	MMA-mandated electronic prescribing safe harbor	Electronic health records arrangements safe harbor
Covered Technology .....	Items and services that are necessary and used solely to transmit and receive electronic prescription information. Includes hardware, software, internet connectivity, and training and support services.	Software necessary and used predominantly to create, maintain, transmit, or receive electronic health records. Software <i>must</i> include an electronic prescribing component. (Software packages may also include functions related to patient administration, for example, scheduling, billing, and clinical support.) Information technology and training services, which could include, for example, internet connectivity and help desk support services. Does not include hardware.
Standards with Which Donated Technology Must Comply.	Final standards for electronic prescribing as adopted by the Secretary.	Electronic health records software that is interoperable. Certified software may be deemed interoperable under certain circumstances. Electronic prescribing capability must comply with final standards for electronic prescribing adopted by the Secretary.
Donors and Recipients .....	As required by statute, protected donors and recipients are hospitals to members of their medical staffs, group practices to physician members, PDP sponsors and MA organizations to network pharmacists and pharmacies, and to prescribing health care professionals.	Protected donors are (i) individuals and entities that provide covered services and submit claims or requests for payment, either directly or through reassignment, to any Federal health care program and (ii) health plans. Protected recipients are individuals and entities engaged in the delivery of health care.
Selection of Recipients .....	Donors may not select recipients using any method that takes into account the volume or value of referrals from the recipient or other business generated between the parties.	Donors may not select recipients using any method that takes into account <i>directly</i> the volume or value of referrals from the recipient or other business generated between the parties.
Value of Protected Technology .....	No limit on the value of donations of electronic prescribing technology.	Recipients must pay 15% of the donor's cost for the donated technology. The donor (or any affiliate) must not finance the recipient's payment or loan funds to the recipient for use by the recipient to pay for the technology.
Expiration of the Safe Harbor .....	None .....	Safe harbor sunsets on December 31, 2013.

**II. Summary of Public Comments and OIG Responses**

OIG received a total of 71 timely filed comments from entities and individuals. The majority of the comments came from hospitals and health systems, trade associations, and vendors. OIG also received comments from information technology organizations, health plans, nonprofit organizations, pharmaceutical manufacturers, pharmacies, and physician organizations. In addition, OIG participated in an Open Door Forum organized by CMS on November 9, 2005, at which various stakeholders addressed a wide array of issues.

Overall, the commenters welcomed the establishment of safe harbors for electronic prescribing and electronic health records technology arrangements. However, we received many specific comments about various aspects of the proposed rules. We have divided the summaries of the public comments and our responses into four parts: (1) General comments for all of the proposed safe harbors; (2) comments

specific to the electronic prescribing safe harbor; (3) comments specific to the electronic health records safe harbor; and (4) comments specific to community-wide health information systems.

*A. General Comments*

*Comment:* Most commenters supported the promulgation of safe harbors for electronic prescribing and electronic health records arrangements. Commenters observed that both Congress and the Administration have recognized the compelling need for rapid and widespread adoption of electronic prescribing and electronic health records technology. Several commenters urged that fraud and abuse concerns not impede the adoption of health information technology. In this regard, some commenters suggested that the final regulations should better balance the goal of preventing fraud and abuse in the short-term with the goal of creating incentives for health information technology arrangements that result in greater fraud reduction,

increased quality and efficiency, and better patient care. One commenter asserted that investments in health information technology and the desire to provide an incentive to participate in health information technology systems do not raise typical fraud and abuse concerns present with other financial arrangements. However, another commenter noted that the proposed rule generally struck an appropriate balance between the needs of physicians who may require assistance to develop health information technology systems and the underlying purposes of the Federal fraud and abuse laws.

*Response:* We disagree with the commenter that suggested that financial arrangements involving incentives in the form of health information technology do not pose the same fraud and abuse concerns as other financial arrangements between parties in a potential referral relationship. Indeed, our enforcement experience demonstrates that improper remuneration for Federal health care program business may take many forms,

including free computers, facsimile machines, software, and other goods and services. However, we recognize that certain transfers of health information technology between parties with actual or potential referral relationships may further the important national policy of promoting widespread adoption of health information technology to improve patient safety, quality of care, and efficiency in the delivery of health care. We believe the final rule strikes the appropriate balance between promoting the adoption of health information technology and protecting against fraud and abuse.

*Comment:* Several commenters urged that Congress and the Administration need to do more to offer meaningful financial incentives for practitioners to accept the increased cost and workflow burdens associated with the implementation of health information technology, for example, by providing modest add-on payments to physicians who employ health information technology as part of overall quality improvement measures. Some commenters observed that the proposed regulations would remove a minor impediment to the adoption of health information technology, but that the Department must play a larger role in providing capital for the technologies that assist physicians in providing quality care and avoiding medical errors.

*Response:* These comments address matters outside the scope of this rulemaking. The Administration supports the adoption of health information technology as a normal cost of doing business. The 2007 Budget states that “[t]he Administration supports the adoption of health information technology (IT) as a normal cost of doing business to ensure patients receive high quality care.”

*Comment:* Some commenters complained that the proposed safe harbors were too narrow and vague. These commenters urged that the final safe harbors should be easy to understand, interpret, and enforce so that donors and recipients can readily distinguish permissible activities from those that violate the statute. Some commenters believed that the proposed rules were too complex and might have the unintended effect of discouraging participation in health information technology arrangements.

*Response:* As described elsewhere in this preamble, we have adopted a number of modifications and changes that address the commenters’ concerns. While the final safe harbor at § 1001.952(x) addresses only electronic

prescribing arrangements, the final safe harbor at § 1001.952(y) protects a broad scope of arrangements involving electronic health records technology. We have made a number of changes that clarify and simplify the final rules. We have endeavored to create bright line provisions to the extent possible. We reiterate that compliance with a safe harbor does not necessarily distinguish between lawful and unlawful activities under the Federal anti-kickback statute. Compliance with a safe harbor is voluntary; arrangements that do not comply are not *per se* illegal. As we explained in the preamble to the 1991 final safe harbors regulations:

\* \* \* If a person participates in an arrangement that fully complies with a given [safe harbor] provision, he or she will be assured of not being prosecuted criminally or civilly for the arrangement that is the subject of that provision \* \* \* This [safe harbor] regulation does not expand the scope of activities that the statute prohibits. The statute itself describes the scope of illegal activities. The legality of a particular business arrangement must be determined by comparing the particular facts to the proscriptions of the statute.

The failure to comply with a safe harbor can mean one of three things. First \* \* \* it may mean that the arrangement does not fall within the ambit of the statute. In other words, the arrangement is not intended to induce the referral of business reimbursable under Medicare or Medicaid; so there is no reason to comply with the safe harbor standards, and no risk of prosecution.

Second, at the other end of the spectrum, the arrangement could be a clear statutory violation and also not qualify for safe harbor protection. In that case, assuming the arrangement is obviously abusive, prosecution would be very likely.

Third, the arrangement may violate the statute in a less serious manner, although not be in compliance with a safe harbor provision. Here, there is no way to predict the degree of risk. Rather, the degree of risk depends on an evaluation of the many factors which are part of the decision-making process regarding case selection for investigation and prosecution \* \* \*. (56 FR 35952, 35954; July 29, 1991).

We do not believe Congress, in enacting section 1860D–4(e)(6) of the Act, intended to suggest that a new safe harbor is needed for all or even most arrangements involving the provision of electronic prescribing items and services. Nor do we believe a safe harbor is needed for all electronic health records arrangements. In general, fair market value arrangements that are arm’s-length and do not take into account in any manner the volume or value of Federal health care program business, or arrangements that do not have as one purpose the generation of business payable by a Federal health care program, should not raise concerns

under the anti-kickback statute. In addition, many arrangements can be structured to fit in existing safe harbors.

*Comment:* Some commenters observed that in describing the nonmonetary remuneration that would be included in the proposed safe harbors, the proposed safe harbors did not reflect the many existing combinations and varieties of electronic prescribing, electronic health records, and similar technology.

*Response:* As discussed more fully below, we believe that the final safe harbors are sufficiently broad to accommodate the most essential current and evolving electronic prescribing and electronic health records technology. We started this rulemaking process by looking to the guidance from the Congress in section 101 of the MMA with respect to electronic prescribing technology. Using our regulatory authority, we have added a separate safe harbor for arrangements involving electronic health records software or information technology and training services. We believe that we have appropriately balanced the goal of promoting widespread adoption of health information technology against the significant fraud and abuse concerns that stem from the provision of free or reduced cost goods or services to actual or potential referral sources.

*Comment:* A commenter suggested that the final regulations should include provisions that allow CMS to evaluate and ensure that the regulatory requirements, once enacted, have not negatively impacted key stakeholders or business segments within the healthcare industry.

*Response:* It would be inappropriate for a safe harbor under the anti-kickback statute to include a provision for ongoing CMS evaluation. Like all regulatory safe harbors, OIG may in future rulemaking propose modifications or clarifications to the safe harbor conditions, as appropriate. OIG annually solicits suggestions from the industry for new and modified safe harbors in accordance with section 205 of the Health Insurance Portability and Accountability Act of 1996.

*Comment:* We solicited comments on whether and, if so, how, to take into account recipient access to publicly available software at free or reduced prices. One commenter urged that the availability of free public software should not impact the design of the final safe harbors. In addition, the commenter urged that physicians and hospitals be granted substantial latitude in selecting interoperable technology that best meets their needs.

*Response:* Upon further consideration, we have concluded that it is not necessary to take the availability of publicly available software into account in developing the final safe harbors. Hospitals, physicians, and other donors and recipients will have great latitude in selecting technology that will qualify for safe harbor protection. Nothing in this rule limits the choice of health information technology, although certain transfers of technology, such as non-interoperable electronic health records software (as discussed below), would not qualify for safe harbor protection, because it would not meet all safe harbor conditions. As noted elsewhere, arrangements that fall outside a safe harbor must be evaluated under the anti-kickback statute on a case-by-case basis.

*Comment:* Some commenters suggested that the safe harbors under the anti-kickback statute should mirror the exceptions under the physician self-referral law in all respects in order to promote the rapid and widespread adoption of electronic prescribing and electronic health records technology. A few commenters suggested that we not adopt anti-kickback statute safe harbors or that any safe harbors should be stricter than any corresponding exceptions to the physician self-referral law.

*Response:* We believe consistency between these safe harbors and the corresponding exceptions under the physician self-referral law is preferable. We have attempted to ensure as much consistency between the two sets of regulations as possible given the underlying differences in the two statutory schemes.

*Comment:* Some commenters wanted the final safe harbors to preempt any State laws or regulations that conflict with the requirements of the safe harbors.

*Response:* The MMA specifically dictated that the Part D electronic prescribing standards would preempt any State law or regulation that (1) is contrary to the adopted final Part D electronic prescribing standards or that restricts the Department's ability to carry out Part D of Title XVIII and (2) pertains to the electronic transmission of medication history and information on eligibility, benefits, and prescriptions with respect to covered Part D drugs under Part D. However, no similar mandate was provided with respect to the anti-kickback safe harbor for the donation of electronic prescribing technology. Moreover, the legal authority for the electronic health records safe harbor in this rule is derived from section 1128B(b)(3)(E) of

the Act, which similarly does not provide authority to preempt State anti-kickback laws.

*Comment:* Some commenters inquired whether the electronic information that is transmitted via electronic prescribing or electronic health records systems would be considered remuneration for purposes of the anti-kickback statute.

*Response:* Whether a particular item or service constitutes remuneration for purposes of the anti-kickback statute depends on the particular facts and circumstances. Typically, information about a particular patient's health status, medical condition, or treatment exchanged between or among the patient's health care providers and suppliers for the purpose of diagnosing or treating the patient would not constitute remuneration to the recipient of the information. In this regard, the electronic exchange of patient health care information is comparable to the exchange of such information by mail, courier, or telephone conversation. Thus, when related to the care of individual patients, information such as test results, diagnosis codes, descriptions of symptoms, medical history, and prescription information are part of the delivery of the health care services and would not have independent value to the recipient. However, in other situations, information may be a commodity with value that could be conferred to induce or reward referrals. For example, data related to research or marketing purposes, or information otherwise obtained through a subscription or for a fee, could constitute remuneration for purposes of the anti-kickback statute.

#### *B. Electronic Prescribing Safe Harbor Required Under Section 101 of the MMA (42 CFR 1001.952(x))*

##### Summary of the Proposed Rule

On October 11, 2005, as mandated in the MMA, we proposed adding a new paragraph (x) to the existing safe harbor regulations at 42 CFR 1001.952 for certain electronic prescribing arrangements. Specifically, we proposed:

- Protecting certain arrangements involving the provision of nonmonetary remuneration—in the form of hardware, software, or information technology or training services—necessary and used solely to receive and transmit electronic drug prescription information. We construed this language broadly to include internet connectivity services (of all types, including broadband or wireless), and upgrades of equipment and software that significantly enhanced functionality.

- Requiring that the donated technology must be part of, or used to access, a prescription drug program that meets applicable standards under Medicare Part D.

- Protecting technology provided by a hospital to its medical staff; by a medical group practice to its members; and by a PDP sponsor or MA organization to prescribing health care professionals, as well as to pharmacies and pharmacists in the plan's network, so long as all of the safe harbor conditions were satisfied.

- Prohibiting a recipient from making donation of technology a condition of doing business with a donor.

- Requiring that protected arrangements be fully and completely documented.

- Excluding donations of technology that replicate technology the recipient already possesses. To ensure compliance with this provision, we proposed requiring recipients to certify that they did not already possess equivalent technology. Moreover, we proposed that donors would not be protected if they knew or should have known that the recipients already possessed equivalent technology.

- Requiring that neither a recipient's eligibility for donated technology, nor the amount or nature of the technology, could be determined in any manner that directly or indirectly takes into account the volume or value of referrals or other business generated between the parties.

- Requiring that the parties not take any action to impede the compatibility or interoperability of the technology.

- Requiring that the donor not restrict the ability of the recipient to use the technology for any patient, regardless of payor.

- Limiting the value of donated technology that could be protected by the safe harbor.

- In deference to the limitations imposed by the "used solely" standard set forth in the MMA, promulgating a separate safe harbor for multi-functional items and services used for electronic prescribing (e.g., connectivity services and multi-use hand held devices or computers).

##### Summary of the Final Rule

The final safe harbor at 42 CFR 1001.952(x) adopts the proposed safe harbor, with the following key clarifications:

- The final rule protects technology necessary and used solely to receive and transmit *any* prescription information, whether related to drugs or to other items or services normally ordered by prescription (e.g., laboratory tests and durable medical equipment orders).

- Donations may be in an unlimited amount.
- We have abandoned our proposal to require that recipients provide a written certification that the donated technology is not technically or functionally equivalent to the technology the recipient already possessed or had obtained. We have added language that permits arrangements to be memorialized through cross-referencing incorporation of prior agreements between the parties.
- We are not finalizing a separate safe harbor for multi-functional electronic prescribing technology.

#### General Comments

*Comment:* Many commenters stated that the proposed electronic prescribing safe harbor was too narrow to be useful and should be merged into an electronic health records safe harbor, noting that physicians would likely resist adopting stand-alone electronic prescribing systems. One commenter observed that the proposed rule was generally in accordance with congressional intent underlying section 101 of the MMA.

*Response:* We agree that the proposed safe harbor was consistent with congressional intent. As we are not free to ignore a congressional mandate, we must promulgate the electronic prescribing safe harbor described in section 101 of the MMA. However, we are also promulgating a separate safe harbor for electronic health records arrangements that also incorporate an electronic prescribing component. This new safe harbor should address the commenters' concerns.

#### 1. Protected Nonmonetary Remuneration

##### a. Necessary and Used Solely

In the proposed rule, we proposed protecting items and services that are necessary and used solely to transmit and receive electronic prescription drug information. We stated that the safe harbor would not protect arrangements in which donors provided items or services that were technically or functionally equivalent to items that the recipient already possessed or services that the recipient had already obtained. We proposed requiring the recipient to certify that the items and services provided were not technically or functionally equivalent to those that the recipient already possessed or had already obtained. We also proposed that arrangements would not be protected if the donor knowingly provided technology that duplicated the recipient's existing technology. We indicated that upgrades of equipment or

software that significantly enhanced the functionality of the item or service would be considered "necessary" for purposes of the safe harbor.

Because the term "necessary" appeared in our proposed rulemaking in the discussions of all three proposed safe harbors, many commenters chose to address this requirement primarily in the context of the proposed safe harbors for electronic health records arrangements. Thus, there is a detailed discussion of our interpretation of the term "necessary" in section II.C.1.b of this preamble, which addresses the new electronic health records safe harbor. We intend to interpret the term "necessary" uniformly for both new safe harbors. We are addressing here only those comments received on the proposed electronic prescribing safe harbor requirement that transferred technology be "necessary and used solely" to receive and transmit electronic prescription information.

*Comment:* One commenter observed that the "necessary and used solely" requirement ensures that items and services will be used to encourage electronic prescribing activities. This commenter suggested including an additional requirement that the items or services be clearly intended to promote interoperability of health information and the improvement of quality in a clinical setting.

*Response:* We agree that it was the intent of Congress to encourage electronic prescribing activities, in part, through the development of a safe harbor for transfers of certain items and services necessary and used solely for electronic prescribing transactions. However, the intent-based additional standard suggested by the commenter, while reflecting laudable goals, is not sufficiently "bright line" for purposes of this safe harbor. We have included a requirement at § 1001.952(x)(2) intended to ensure that protected technology meets Part D electronic prescribing standards applicable at the time of the donation, including any standards relating to interoperability.

*Comment:* Some commenters expressed concern that OIG has taken an unnecessarily narrow interpretation of the statutory language "necessary and used solely to receive and transmit electronic prescription information in accordance with the standards promulgated under this subsection [section 101 of the MMA] \* \* \*." One commenter explained its view that the phrase "necessary and used solely" should be read so that the word "necessary" modifies the phrase "to receive and transmit electronic prescription information" and the

phrase "used solely" modifies the phrase "in accordance with the standards promulgated under this subsection." In other words, in this commenter's view the protected hardware, software and services must be "necessary" to perform electronic prescribing transactions "solely" in accordance with CMS established data interchange standards. This commenter explained that this interpretation would be consistent with the purpose of the safe harbor and the practical realities of computers and electronic transactions.

*Response:* We appreciate the comment; however, we do not believe the commenter's proposed interpretation is the best or most logical reading of the statutory language. We believe the better and less strained reading is that Congress intended for all donated technology to be necessary for the receipt and transmission of electronic prescription information and to be used solely for that purpose. The requirement that the items and services be "necessary and used solely" for transmitting and receiving electronic prescribing information helps minimize the potential for abuse. Limiting the safe harbor to necessary items and services helps ensure the safe harbor does not become a means of conveying valuable items and services that do not further the underlying policy goals and that might, in reality, constitute disguised referral payments.

As we noted in the preamble to the proposed rulemaking, we believe Congress included the "used solely" requirement to safeguard against abusive arrangements in which the donated technology might constitute a payment for referrals because it might have additional value attributable to uses other than electronic prescribing. See 70 FR at 59018. For example, a computer that a physician can use to conduct office or personal business might have value to the physician apart from its electronic prescribing purpose; if this value is transferred to the physician in connection with referrals, the statute would be implicated.<sup>3</sup> Accordingly, consistent with section 101 of the MMA, the final safe harbor requires that the protected items and services be "necessary and used solely" to transmit or receive electronic prescribing information.

We note that software that bundles general office management, billing, scheduling, electronic health records, or other functions with the electronic

<sup>3</sup> See, e.g., 56 FR 35952, 35978 (July 29, 1991) (noting that a computer that has independent value to a physician may constitute an illegal inducement).

prescribing features would not meet the “used solely” requirement and would not be protected by the final electronic prescribing safe harbor. In some cases, the provision of such bundled software may be eligible for protection under the new safe harbor for electronic health records arrangements at § 1001.952(y).

*Comment:* A commenter suggested that multi-functional technology be considered “necessary” so long as it includes all components required for a physician to prescribe electronically, even if the technology has other functions (e.g., a handheld device that can be used for more than electronic prescribing).

*Response:* The commenter’s suggestion, as we understand it, is not consistent with the MMA statutory language.

*Comment:* Many commenters requested that we eliminate the proposed requirement that recipients provide written certification that the donated technology is not technically or functionally equivalent to technology the recipient already possesses, expressing concern about the possible difficulty of making this determination, the lack of technical expertise on the part of some recipients, and the increased cost that could arise by having an outside expert provide a determination of technical or functional equivalence. One commenter supported OIG’s interpretation of the term “necessary” as permitting upgrades of equipment or software that significantly enhance the functionality of an item or service. Another commenter suggested that we should not require that the upgrades “significantly” enhance the functionality of the item or service. Rather, the commenter believed that we should allow the marketplace to determine whether an upgrade constitutes a beneficial improvement.

*Response:* For the reasons noted in detail below in section II.C.1.b.i, with respect to the electronic health records safe harbor, we are not adopting the proposed requirement that recipients provide written certification that the donated technology is not technically or functionally equivalent to technology the recipient already possesses. However, while we are eliminating the certification requirement, we do not believe items and services are “necessary” for electronic prescribing if the recipient already possesses equivalent items or services. The provision of equivalent items and services poses a heightened risk of abuse, since such arrangements potentially confer independent value on the recipient (i.e., the value of the existing items and services that might be

put to other uses) unrelated to the need for electronic prescribing technology. Thus, if a donor knows that the recipient already possesses the equivalent items or services, or acts in deliberate ignorance or reckless disregard of that fact, the donor will not be protected by the safe harbor. Thus, prudent donors may want to make reasonable inquiries of potential recipients and document the communications. We do not believe this requirement necessitates the hiring of technical experts by either the donor or the recipient. Further, with respect to upgrades of equipment or software, we agree with the commenter that distinguishing “significant” enhancements from other beneficial improvements introduces unnecessary complexity. Under the final safe harbor, any upgrade that is necessary and used solely to transmit and receive electronic prescribing information will be protected (so long as all other safe harbor conditions are satisfied).

*Comment:* Many commenters noted that it would be impractical to require physicians to acquire or use software and hardware solely for electronic prescribing. Several commenters noted that, in most cases, single-use technology is of limited value to a physician, and could result in inefficiencies. Another commenter expressed concern that the “used solely” standard would preclude the use of robust electronic clinical support tools, such as tools to identify drug-to-drug interactions, or to conduct drug-to-laboratory or prescription data analysis. This commenter urged that any exceptions from the fraud and abuse laws for health information technology arrangements promote access to all information needed by physicians to evaluate alternative drug therapies, identify potential drug-to-drug interactions, and to improve safety, quality, and efficiency of patient care.

*Response:* The “used solely” condition derives directly from the MMA language. We believe that many of the arrangements of interest to the commenters are best addressed by the electronic health records safe harbor, which is not restricted to technology used solely for electronic prescribing.

The MMA-mandated electronic prescribing safe harbor is reasonably interpreted to encompass electronic tools that provide information necessary to formulate, transmit, or receive a medically appropriate prescription for a patient. These would include electronic clinical support tools identifying alternative drug therapies, drug-to-drug interactions, or a payor’s formulary information. The nature of the

“prescription data analysis” tools referenced by the commenter is not clear. We believe the appropriate inquiry would be whether the tool is used to formulate and transmit or receive a medically appropriate prescription for a patient. To the extent the data analysis tool (or any other electronic item or service) is used to transmit or receive data unrelated to a medically appropriate prescription for a patient (e.g., data collected for marketing purposes), the tool would not be necessary for electronic prescribing and would not come within the safe harbor.

#### b. Covered Technology

In our proposed rule, we proposed protecting hardware, software, or information technology and training services that met the various safe harbor conditions. We interpreted our proposed language to include broadband or wireless internet connectivity, training, information technology support services, and other items and services used in connection with the transmission or receipt of electronic prescribing information.

*Comment:* Various commenters suggested that the scope of covered technology should be expanded to include: Billing, scheduling, and other administrative functions; implementation and maintenance of the system; “upgrades;” and licenses, rights of use, or intellectual property. Commenters also urged that any safe harbor cover educational sessions and consulting assistance related to the electronic prescribing technology. Commenters generally agreed that the provision of equipment for personal, non-medical purposes should not be protected. One commenter suggested that it would not be possible to develop a comprehensive list of protected technology transfers that would sufficiently reflect all possible electronic prescribing items and services. The commenter recommended that OIG periodically review the scope of protected items and services, and expand it as needed.

*Response:* We agree that it would be difficult to provide a comprehensive list of specific items and services covered by the safe harbor. While a specific list would provide a “bright line” rule, in this case it would also impede the ability of the safe harbor to accommodate novel or rapidly evolving technologies in the marketplace. For these reasons, we are not promulgating a specific list of protected items and services.

Consistent with the MMA mandate, covered items and services under

§ 1001.952(x) include “hardware, software, and information technology and training services” that are necessary and used solely for electronic prescribing and that meet all other safe harbor conditions. We believe that licenses, rights of use, intellectual property, upgrades, and educational and support services (including, for example, help desk and maintenance services) are items and services that can potentially fit in the safe harbor, if all safe harbor conditions are met. Billing, scheduling, administrative, and other general office software cannot.

Operating software that is necessary for the hardware to operate can qualify for safe harbor protection because it is integral to the hardware. Moreover, operating software is distinct from other software applications that are not necessary to transmit or receive electronic prescribing information. Patches designed to link the donor’s existing electronic prescribing system to the recipient’s existing electronic prescribing system can qualify for protection. The provision of technology for personal, non-medical purposes is not protected, nor is the provision of office staff.

*Comment:* We solicited comments on whether the safe harbor should protect electronic prescribing technology that is used for the transmission of prescription information for items and services that are not drugs (e.g., durable medical equipment or laboratory tests). Several commenters suggested that the safe harbor should support the use of electronic prescribing technology for all the functions currently accomplished through written prescriptions, in order to encourage provider utilization of electronic prescribing technology to increase safety, cost-effectiveness, and efficiency. The commenters suggested including electronic prescribing technology used for prescribing medical supplies and durable medical equipment, physical therapy, dialysis testing, laboratory tests, and other non-drug prescriptions. A commenter from the clinical laboratory industry supported a broad reach, but only if clinical laboratories were included as permissible donors under the safe harbor.

*Response:* We agree generally with the first set of commenters. We have reviewed further the language in section 101 of the MMA. The MMA-mandated safe harbor language requires that the donated technology be capable of receiving and transmitting “electronic prescription information” in accordance with the electronic prescribing standards promulgated for purposes of the MMA electronic prescription drug

programs. We believe that the specific term “electronic prescription information” as commonly used and as used in the MMA-mandated safe harbor provision retains a broad meaning, to include information about prescriptions for any items or services that would normally be accomplished with a written prescription. In contrast, the information to be transmitted under an electronic prescription drug program established under the MMA is clearly limited to drug information for Part D eligible individuals. Moreover, we do not think that the statutory language is intended to be construed to prohibit the use of the donated technology for the transmission and receipt of orders or prescriptions for other items and services or to require the use of separate systems depending on the item or service to be prescribed or ordered. We believe this approach is consistent with the objectives of the electronic prescribing standards and the patient safety, quality, and efficiency goals underlying the mandated exception. Accordingly, we are defining “prescription information” for purposes of the safe harbor to mean information about prescriptions for drugs or any other item or service normally accomplished through a written prescription.

With respect to the clinical laboratory commenter, consistent with the MMA language, we are not including clinical laboratories as permissible donors under the safe harbor. However, we have expanded the new safe harbor for electronic health records arrangements to include clinical laboratories.

## 2. Final Standards for Electronic Prescribing

The MMA required that donated electronic prescribing technology comply with the final standards for electronic prescribing as adopted by the Secretary. The first set of these standards (the “foundation standards”) was finalized by the Department on November 7, 2005. See 70 FR 67568. We received no comments on this issue. The final safe harbor at § 1001.952(x)(2) requires that the donated technology comply with the applicable standards for electronic prescribing as adopted by the Secretary.

## 3. Donors and Recipients Protected by the Safe Harbor

We proposed protecting the same categories of donors and recipients listed in section 101 of the MMA. Because most commenters commented on this issue jointly with the proposed electronic health records arrangements safe harbors, we have included a

detailed description of these comments in our discussion of the electronic health records safe harbor below at section II.C.3. of this preamble.

*Comment:* We received numerous comments requesting that we expand the list of protected donors and recipients to include a variety of providers, practitioners, suppliers, and their affiliates.

*Response:* We are finalizing the safe harbor consistent with the MMA mandated donors and recipients. We are not persuaded that additional donors or recipients are necessary to achieve the purpose of this safe harbor for electronic prescribing. The enumerated categories of donors and recipients reflect individuals and entities centrally involved in the ordering, processing, filing, or reimbursing of prescriptions. Accordingly, protected donors and recipients under § 1001.953(x) are: hospitals to members of their medical staffs; group practices to their physician members; and PDP sponsors and MA organizations to network pharmacists and pharmacies, and to prescribing health care professionals. For the reasons set forth in the preamble to the proposed rulemaking, and in the absence of any comments to the contrary, we are adopting our proposed definitions of *group practice*, *member of the group practice*, *prescribing health care professional*, *PDP sponsor* and *MA organization*. *Group practice* shall have the meaning set forth at § 411.352; *member of the group practice* shall mean all persons covered by the definition of “member of the group or member of a group practice” at § 411.351, as well as other *prescribing health care professionals* who are owners or employees of the group practice; *prescribing health care professional* shall mean a physician or other health care professional licensed to prescribe drugs in the State in which the drugs are dispensed; *PDP sponsor* or *MA organization* shall have the meanings set forth at §§ 423.4 and 422.2, respectively.

We have revisited the issue of protected donors and recipients in the context of the electronic health records arrangements safe harbor at § 1001.952(y), as discussed in the preamble below at section II.C.3.

## 4. Additional Conditions on the Provision of Qualifying Electronic Prescribing Technology

### Promoting Compatibility and Interoperability

Most commenters addressed the issue of the compatibility and interoperability of the donated technology with respect

to all three proposed safe harbors. We have included a discussion of these comments in the section of this preamble addressing the electronic health records safe harbor at § 1001.952(y). For the reasons set forth there, we have adopted, with clarifying modifications, our proposed restriction on disabling the compatibility and interoperability of donated technology under the electronic prescribing safe harbor at § 1001.952(x)(3). For clarity, we have included in § 1001.952(x) the same definition of “electronic health record” found in § 1001.952(y).

#### Limit on Value of Technology

In our proposed rule, we solicited public comments on various means by which we might limit the value of protected technology under the electronic prescribing safe harbor. We indicated that we were considering a limit on the value of protected technology as a further safeguard against fraud and abuse, since, in our experience, the risk of fraud and abuse generally (although not always) increases with the value of the remuneration offered. We received a large number of comments on this topic, the majority of which opposed any limit on the value of donated technology. Because these commenters typically commented jointly on this issue for all three proposed safe harbors (and each commenter typically had the same concerns under all three proposed safe harbors), an extensive description of these comments is found in section II.C.6. of this preamble. Having considered the comments, we are persuaded not to limit the value of the donated technology under the new safe harbor for electronic prescribing arrangements at § 1001.952(x). We believe the final conditions of the safe harbor, including the “necessary and used solely” requirement, should be sufficient to minimize the potential for abuse. Although we are not limiting the value of donated technology, it is not our expectation that donors will necessarily want or be in a position to donate unlimited amounts of electronic prescribing technology.

#### Selection of Recipients of Donated Technology

We proposed additional conditions in proposed §§ 1001.952(x)(5) and (x)(6) related to how donors select recipients of the electronic prescribing technology. These proposed conditions were designed to minimize the risk that donors would select recipients for the improper purpose of inducing or rewarding the generation of Federal health care program business. Proposed

§ 1001.952(x)(5) would require that the recipients (including their groups, employees, or staff) refrain from making the donation of qualifying electronic prescribing technology a condition of doing business with the donor. Proposed § 1001.952(x)(6) would preclude safe harbor protection if the eligibility of a recipient to receive items and services from a donor, or the amount or nature of the items or services received, is determined in any manner that takes into account the volume or value of the recipient’s referrals or other business generated between the parties. We observed that this requirement would not preclude selecting a recipient based upon the total number of prescriptions written by the recipient, but would preclude selecting the recipient based upon the number or value of prescriptions written by the recipient that are dispensed or paid by the donor (as well as on any other criteria based on any other business generated between the parties). (70 FR at 59021).

*Comment:* Commenters requested that we confirm that donors can select recipients of electronic prescribing technology based upon the total number of prescriptions written by the recipient, but cannot select them based upon the number or value of prescriptions written by the recipient that are dispensed or paid by the donor (or on any other criteria based on any other business generated between the parties). A commenter supported excluding from safe harbor protection donations that take into account directly the volume or value of referrals or other business generated between the parties. This commenter expressed concern that donors would employ such selection criteria to disadvantage small practices and practices in rural or underserved areas. To counter this potential disadvantage, the commenter suggested that the final rule include incentives to promote donations to small practices, especially in rural and underserved areas. Other commenters suggested that donors, such as PDP sponsors, MA organizations, and pharmacy benefits managers, should be permitted to consider the volume and value of prescriptions written by the recipient, particularly for a donor’s patient or plan population.

*Response:* To safeguard against the use of donated technology to disguise referral payments, we are adopting our proposal that neither the eligibility of a recipient to receive items and services, nor the amount or nature of the items or services received, may be determined in a manner that takes into account, directly or indirectly, the volume or

value of the recipient’s referrals or other business generated between the parties. Notwithstanding, in the instant case, we believe that prohibiting the selection of recipients based on total number of prescriptions written by the recipient would be inconsistent with the MMA mandate and congressional intent to promote the use of electronic prescribing. Accordingly, we confirm our interpretation, for purposes of the safe harbor at § 1001.952(x), that donors may select recipients of electronic prescribing technology based upon the total number of prescriptions written by the recipient, but cannot select them based upon the number or value of prescriptions written by the recipient that are dispensed or paid by the donor (or on any other criteria based on any other business generated between the parties). Donors also may not select recipients based on the overall value of prescriptions written by the recipient or on the volume or value of prescriptions written by the recipient that are reimbursable by any Federal health care program.

We are not persuaded that PDP sponsors or MA organizations should be permitted to offer technology selectively based on the volume or value of business generated for the plan by the recipient, especially in the context of Part D, which includes some reimbursement based on the plan’s costs, rather than capitated payments. The final safe harbor does not include pharmacy benefit managers.

The safe harbor would not protect arrangements that seek to induce a recipient to change loyalties from other providers or plans to the donor (e.g., a hospital using an electronic prescribing technology arrangement to induce a physician who is on the medical staff of another hospital to join the donor hospital’s medical staff), because such arrangements take into account business generated for the donor.

We understand the commenter’s concern about donors excluding rural and underserved area physicians from their health information technology arrangements. Some donors may favor large or urban practices over small or rural ones. However, we can discern no “incentives” that could be included appropriately in a safe harbor to address this concern, nor has the commenter proposed any with respect to assisting rural or solo practitioners. We note that our decision, explained elsewhere, not to limit the value of technology that can qualify under the safe harbor may assist rural and solo practices insofar as donors may want to provide them with greater resources in recognition of their

greater need for assistance in adopting electronic prescribing technology.

*Comment:* Some commenters supported our proposal to exclude from safe harbor protection donations that are a condition of doing business with the donor.

*Response:* We are retaining the proposed requirement that recipients (or any affiliated group, employee, or staff member) cannot make the receipt of items or services a condition of doing business with the donor. We have clarified that the condition applies with respect to all individuals and entities affiliated with the recipient.

#### Documentation

We proposed at § 1001.952(x)(7) a requirement that the arrangement for the donation of electronic prescribing technology be in writing, be signed by the parties, identify with specificity the items or services being provided and their values, and include a certification that the donated items and services not be technically or functionally equivalent to items and services the recipient already has. We stated that to permit effective oversight of protected arrangements, the writing must cover all qualifying electronic prescribing technology provided by the donor (or affiliated parties) to the recipient. For example, if a donor provides a piece of hardware under one arrangement and subsequently provides a software program, the agreement regarding the software would have to include a description of the previously donated hardware (including its nature and value).

*Comment:* Some commenters supported the requirement that any transfers of technology and services be memorialized in a written agreement. One commenter objected to including a written agreement requirement in the safe harbor, arguing that the requirement would cause an unnecessary delay and increase paperwork. Another commenter suggested that the safe harbor permit the arrangement between the donor and recipient to be captured through a combination of agreements between the recipient, donor, and service provider, rather than one agreement. Commenters also urged OIG to remove the technical and functional equivalency certification requirement from the safe harbor.

*Response:* We have adopted the documentation requirement in the final safe harbor at § 1001.952(x)(7) with several modifications. With respect to the condition requiring that the documentation cover all of the electronic prescribing items and services to be provided by the donor (or

affiliated parties) to the recipient, we have added language to the final safe harbor clarifying that the written documentation requirement can be satisfied by incorporating by reference other agreements between the parties or by the use of cross references to a master list of agreements between the parties that is maintained and updated centrally, is available for review by the Secretary upon request, and preserves the historical record of agreements. We have eliminated the certification of technical and functional non-equivalency. Also, given our decision not to limit the value of protected donations, we have eliminated the requirement that the agreement specify the value of the donated technology. However, in the interests of transparency and accountability, we are requiring that the parties document the donor's costs for the technology. We have retained the remaining documentation requirements, as proposed, at § 1001.952 (x)(7). Finally, nothing in this safe harbor requires that agreements between donors and recipients also be signed by third-party vendors; however, such documentation may be a prudent business practice.

#### All Payors Requirement

*Comment:* We proposed that, where possible, recipients must be able to use the protected technology for all patients without regard to payor status. Commenters that addressed the issue universally supported this requirement.

*Response:* We agree and have included this requirement in the final safe harbor at § 1001.952(x)(4).

#### Commercial and Other Messaging

*Comment:* A commenter requested clear and specific rules prohibiting inappropriate commercial messaging through electronic prescribing technology, including electronic detailing messages from a manufacturer promoting a particular brand or brand-name drug. This commenter explained that such messaging may inappropriately influence clinical decision-making. The commenter gave the following as examples of inappropriate messaging: Messages disguised as "clinical alerts" based upon biased research not published in the public domain and alerts purporting to save a patient money when in reality the out-of-pocket expense for the drug to the patient is higher. Another commenter suggested that OIG prohibit commercial messaging and require that donated technologies present information in a neutral and transparent manner so as not to influence clinical decision-making improperly. Similarly,

another commenter noted that pop-up messaging could inappropriately influence prescribing patterns. The commenter provided the example of making the procedure for prescribing certain formulary drugs very easy and straightforward, while attempts to prescribe other formulary drugs trigger multiple pop-up notices or require a series of additional steps.

*Response:* Technology used for marketing purposes would not meet the "necessary and used solely" standard required by the MMA for the electronic prescribing safe harbor, because marketing information is not the type of clinical support that is integral to prescribing accurate and appropriate items and services for patients.

We do not believe it would be feasible or appropriate to regulate the content of commercial messaging or formulary compliance activities through these safe harbors to the anti-kickback statute. The regulation of speech is outside the scope of this rulemaking. Nor, in any event, would a condition in these safe harbors related to the accuracy or objectivity of the content of messages or formulary activities be sufficiently "bright line" to be practical or readily enforceable. That said, the commenter raises important concerns about messaging and formulary activities. Nothing in this rulemaking (either for the electronic prescribing safe harbor at § 1001.952(x) or for the electronic health records safe harbor at § 1001.952(y)) should be construed to approve of or authorize any commercial messaging or formulary compliance activity (or any other conduct) that is prohibited by any Federal, State, or local law or regulation. Nothing in this rulemaking protects parties from liability for improper messaging or formulary activities, including, without limitation, liability for the promotion of adulterated, misbranded, or unapproved drug or devices, off-label marketing, consumer fraud, inappropriate formulary activities, and the like.

#### 5. Multi-Functional Technology

We proposed using our regulatory authority under section 1128B(b)(3)(E) of the Act to create an additional safe harbor to protect the provision by donors to recipients of some limited hardware (including necessary operating system software) and connectivity services used for more than one function, so long as a substantial use of the item or service is to receive or transmit electronic prescription information.

*Comment:* Most commenters supported a safe harbor that would extend protection to technology beyond

that which is “necessary and used solely” for electronic prescribing. Many commenters expressed the hope that multi-functional technology would ultimately be captured in an electronic health records safe harbor.

*Response:* We have decided not to create a separate safe harbor for multi-functional hardware and connectivity. Instead, we are creating a new safe harbor for the protection of certain arrangements involving electronic health records software and services (including connectivity services) that will more directly further the overall goal of widespread adoption of interoperable electronic health records technology without some of the fraud and abuse risks inherent in gifts of multi-functional hardware. The public comments support this approach, as more fully described in the next section. As set forth below at § 1001.952(y), we have finalized a single safe harbor for certain electronic health records software or information technology and training services.

### C. Electronic Health Records Arrangements Safe Harbor (42 CFR 1001.952(y))

#### Summary of the Proposed Rule

Prior to publication of the proposed rulemaking, many in the hospital industry, among others, raised the issue of the need for safe harbor protection for arrangements involving technology other than technology used for electronic prescribing. To encourage the adoption of electronic health records technology consistent with the ultimate goal of achieving fully interoperable electronic health records for all patients, we proposed using our legal authority at section 1128B(b)(3)(E) of the Act to promulgate two safe harbors related to electronic health records software and directly related training services that are necessary and used solely to receive, transmit, or maintain electronic health records of the donor’s or recipient’s patients. We did not propose protecting hardware in either safe harbor, because we believed electronic health records software and training services were the components of electronic health records systems most likely to be needed by recipients, and because gifts of valuable, multi-functional hardware (such as computers and servers) would inherently pose a higher risk of constituting a disguised payment for referrals.

The first proposed safe harbor would have applied to donations made before adoption by the Secretary of product certification criteria, including criteria for interoperability, functionality, and

privacy and security of electronic health records technology (“product certification criteria”). (We referred to this proposed safe harbor as the “pre-interoperability” safe harbor.) See 70 FR at 59022–23. Among other provisions, we proposed:

- That the electronic health records software would have to be essential to and used solely for the transmission, receipt, and maintenance of patients’ electronic health records and prescription drug information.
- That the software would have to include an electronic prescribing component in accordance with the final standards established by the Secretary under the Part D electronic prescription drug program.
- That the pre-interoperability safe harbor would not protect the provision of other types of technology (e.g., billing, scheduling, or general office management software) or any software used by the recipient to conduct business or engage in activities unrelated to the recipient’s medical practice. We also proposed to exclude from the safe harbor the provision of staff to the recipient or its office.
- That we would define the term “electronic health records.”
- That the safe harbor would include documentation provisions comparable to those proposed for the electronic prescribing safe harbor.
- That the safe harbor would preclude protection for any arrangement in which the donor or its agents disable the interoperability of any component of the software or otherwise imposed barriers to compatibility.
- That the safe harbor might limit the aggregate value of protected technology that a donor could provide to a recipient under the pre-interoperability safe harbor or in combination with the other proposed safe harbors. We noted that we were considering the same alternatives we proposed for setting a value for the electronic prescribing safe harbor. These could include an aggregate dollar cap; a limitation that would require cost sharing by the recipient; or another methodology, including a reduction in the amount of any cap over time.
- That the safe harbor would prohibit donors from shifting the costs of the donated technology to the Federal health care programs or beneficiaries.
- That the safe harbor would include the same categories of donors and recipients that we proposed for the electronic prescribing arrangements safe harbor.
- That the safe harbor would include other requirements drawn from the proposed electronic prescribing safe harbor, including the restriction on

arrangements tied to the volume or value of referrals or other business generated (proposed § 1001.952(x)(6)); the anti-solicitation provision (proposed § 1001.952(x)(5)); and the proposed all payors condition (proposed § 1001.952(x)(4)).

- That the pre-interoperability safe harbor might sunset once interoperability standards were finalized.

Recognizing that once standards and product certification criteria were developed and adopted by the Secretary for electronic health records (including standards for interoperability), some enhanced flexibility in the conditions applicable under a safe harbor for electronic health records arrangements might be appropriate, we proposed a second safe harbor, which we referred to as the “post-interoperability” safe harbor. We noted that adoption of uniform interoperability standards, as well as product certification standards to ensure that products meet those standards, would help prevent certified technology from being used by unscrupulous parties to lock in streams of referrals or other business. While interoperability does not eliminate the risk of improper referral payments (parties might still use the offer or grant of interoperable technology as a vehicle to induce referrals), it potentially mitigates the risk sufficiently to warrant different or modified safe harbor conditions.

In summary, for the post-interoperability safe harbor, we proposed:

- Requiring protected technology to be certified in accordance with product certification criteria adopted by the Secretary, and to include an electronic prescribing component that complies with the electronic prescribing standards established by the Secretary for the Part D program, to the extent those standards are not incorporated into the product certification criteria; and
- Including the same conditions proposed for the pre-interoperability safe harbor, with the following differences: (1) Some additional software applications might be included, so long as electronic health records and electronic prescribing remained core functions; (2) additional categories of donors and recipients might be included; (3) specific selection criteria might be included to identify acceptable methods for selecting recipients; and (4) there might be a potentially larger limit on the value of protected technology.

When we issued the proposed rulemaking, we indicated that, given the

number of important variables and the inherent risk of fraud and abuse typically posed by gifts of items and services to potential referral sources, we did not have sufficient information to draft safe harbor regulatory language. We proposed and solicited extensive public comment on the scope and conditions for the electronic health records arrangements safe harbors.

#### Summary of the Final Rule

Consistent with the majority of public comments, we have finalized one safe harbor for arrangements involving electronic health records that, effectively, combines the pre- and post-interoperability proposals. Separate safe harbors are no longer necessary, in part, because criteria for product certification are available. The final safe harbor protects arrangements involving electronic health records software or information technology and training services necessary and used predominantly to create, maintain, transmit, or receive electronic health records. In many respects, the provision of electronic health records technology to physicians and others poses greater risk of fraud or abuse than the provision of electronic prescribing technology; electronic health records technology is inherently more valuable to physicians and other recipients in terms of actual cost, avoided overhead, and administrative expenses of an office practice. The final safe harbor conditions, in combination, should promote the important national policy goal of open, interconnected, interoperable electronic health records systems that improve the quality of patient care and efficiency in the delivery of health care to patients, without protecting arrangements that pose an undue risk of fraud and abuse.

In summary, the final safe harbor includes the following conditions:

- The safe harbor protects transfers of electronic health records software or information technology and training services necessary and used predominantly to create, maintain, transmit, or receive electronic health records (provided all safe harbor conditions are satisfied). We have not included hardware. We have clarified that the safe harbor covers “information technology services,” which we interpret as including, for example, connectivity and maintenance services. We interpret “training services” to include help desk and other similar support. We have eliminated the language that required the training services to be “directly related” because it was superfluous in light of the language requiring the training services

to be “necessary and used” for electronic health records purposes.

- We have not adopted the proposal that the protected technology be used solely for electronic health records purposes. Instead, we have included a condition making clear that electronic health records purposes must be predominant. Thus, depending on the circumstances, some software that relates to patient administration, scheduling functions, and billing and clinical support can be included. We have expressly excluded the provision of any technology used primarily to conduct personal business or business unrelated to the recipient’s clinical practice or clinical operations, as well as the provision of staff to the recipient or the recipient’s office.

- In order to qualify for protection, at the time of donation the software must be interoperable. Products that are certified by a certifying body recognized by the Secretary will be deemed interoperable under circumstances set forth in the regulation. Software must contain an electronic prescribing capability, either through an electronic prescribing component or the ability to interface with the recipient’s existing electronic prescribing system which complies with the foundation standards set forth in 70 FR 67568 (November 7, 2005) and other final electronic prescribing standards, when adopted. Moreover, the donor (or any agent) must not take any steps to disable the interoperability of any technology or otherwise impose barriers to compatibility of the donated technology with other technology.

- The final safe harbor protects arrangements involving donors that are (i) health plans or (ii) individuals or entities that provide covered services and submit claims or requests for payment to a Federal health care program, and recipients that are individuals or entities engaged in the delivery of health care.

- The final rule clarifies that donors cannot select recipients in a manner that directly takes into account the volume or value of referrals or other business generated between the parties. However, donors may select recipients of donated electronic health records technology using means that do not *directly* take into account the volume or value of referrals from the recipient or other business generated between the parties. The final rule sets forth examples of specific criteria that will be deemed to meet this condition.

- The final rule does not limit the aggregate value of technology that may qualify for safe harbor protection. It does contain a requirement that the

recipient pay 15 percent of the donor’s costs. No portion of this contribution may be funded by the donor (or any affiliate of the donor).

- The final safe harbor adopts the proposed documentation requirements and includes a requirement that the donor’s costs and recipient’s contribution be documented in the written agreement between the parties. The final safe harbor does not require that recipients certify that they do not already possess equivalent technology. The final safe harbor precludes protection if the donor knows that the recipient already has equivalent technology or acts in deliberate ignorance or reckless disregard of that fact. The final safe harbor permits documentation through cross-referencing or incorporation of other agreements between the parties.

- The final safe harbor adopts the proposed conditions related to use of the technology by all payors; non-solicitation by recipients; and the bar on cost shifting to Federal programs.

- The final safe harbor sunsets on December 31, 2013.

#### General Comments

*Comment:* Several commenters urged that OIG set out specific regulatory language for an electronic health records safe harbor. Some commenters believed that the lack of specific proposed safe harbor regulatory text meant that we had not proposed safe harbors.

*Response:* These commenters misconstrued our proposed rulemaking. Nothing in the Administrative Procedure Act governing notice and comment rulemaking requires an agency to propose specific regulatory text; rather, the notice shall include “either the terms or substance of the proposed rule or a description of the subjects and issues involved.” 55 U.S.C. 553(b)(3). We proposed safe harbors for electronic health records technology, as described in detail in the preamble to our proposed rulemaking. Virtually all commenters responded to these proposals. The final regulations set forth specific regulatory language for a new safe harbor at § 1001.952(y).

*Comment:* Most commenters expressed concern with the pre- and post-interoperability bifurcated approach to the safe harbors, asserting that a bifurcated process was not necessary, too confusing, and contrary to the goal of achieving widespread adoption of health information technology. These commenters urged OIG to abandon the bifurcated approach and publish one final safe harbor for remuneration in the form of electronic health records technology. Commenters

urged OIG and CMS to adopt similar approaches to a post-interoperability safe harbor under the anti-kickback statute and exception under the physician self-referral law. However, the commenters believed that the product certification provision should be omitted at this time and added if necessary when all of the product certification standards have been developed.

*Response:* We have finalized one safe harbor for arrangements involving electronic health records software or information technology and training services. We have coordinated with CMS to ensure as much consistency between the two sets of regulations as possible, given the underlying differences in the two statutory schemes.

*Comment:* Some commenters suggested that the general concept of interoperability should be incorporated into the pre-interoperability safe harbor, even if product certification is not required. Many commenters stated that encouraging electronic health records arrangements before interoperability standards would be bad public policy. Some commenters believed that a product certification process that would include interoperability standards is already underway and within the timeframe for this rulemaking. Others expressed that OIG should either not wait until certification standards are adopted before finalizing the post-interoperability safe harbor or should not finalize either of the safe harbors until the certification standards are adopted. One commenter expressed that since timetables for the safe harbor rulemaking and for the certification standards were not known, OIG should consider writing the regulation from the pre-interoperability perspective and should address the post-interoperability era in the future.

*Response:* We agree with the commenters that a bifurcated approach is not necessary. We are not promulgating separate safe harbors. The industry has made considerable progress in developing certification criteria for electronic health records products within a very short time. One certification organization has already completed an initial set of certification criteria for ambulatory electronic health records. In some cases, there may be products for which no certification standards are available. To address this situation and to ensure interoperability to the extent possible, the final safe harbor requires that donated software be interoperable and bars donors or their agents from taking any actions to disable or limit interoperability. This latter

condition also protects against donors who may improperly attempt to create closed or limited electronic health records systems by offering technology that functionally or practically locks in business for the donor.

*Comment:* Some commenters suggested that early adopters of electronic health records technology should be offered incentives or rewards, because otherwise physicians or other recipients might delay investing their own funds in electronic health records systems while waiting for a donor to offer them free technology. The commenters stated that this delay would have a detrimental effect on the adoption of electronic health records technology.

*Response:* It is unclear what types of incentives or rewards the commenters are requesting. We note that the safe harbor does not provide incentives or rewards for early adopters, nor would it be appropriate for a safe harbor to do so; rather, the safe harbor protects the transfer of certain electronic health records technology when all conditions of the safe harbor are satisfied. The safe harbor would not protect any cash reimbursement paid to recipients for costs they incurred in adopting technology.

*Comment:* One commenter requested that OIG and CMS coordinate with the Internal Revenue Service (IRS) to provide guidance through an IRS revenue ruling publication to alleviate tax exemption concerns.

*Response:* This comment addresses a matter outside the scope of this rulemaking.

#### 1. Protected Nonmonetary Remuneration

##### a. "Electronic Health Record"

*Comment:* We requested comments on how to define "electronic health record." One commenter suggested that electronic health record be defined as electronically originated and/or maintained clinical health information, that may incorporate data derived from multiple sources and that replaces the paper record as the primary source of patient information. Another commenter suggested that OIG protect any interoperable component or module of an electronic health record. A third commenter suggested that "electronic health records" be defined for safe harbor purposes to accomplish two objectives: (1) To promote a connected system of electronic healthcare information available to all doctors and patients whenever and wherever possible and (2) to promote the collection of quality and outcome

measures to facilitate pay-for-performance payment methodologies. This commenter pointed to the Medicare Payment Advisory Commission (MedPAC) description of electronic health record clinical information technology and suggested that we define "electronic health record" to include applications that permit the following functions: Tracking patients' care over time; allowing physicians to order medications, laboratory work, and other tests electronically and access test results; providing alerts and reminders for physicians; and producing and transmitting prescriptions electronically. See MedPAC Report to the Congress Medicare Payment Policy at 206 (2005) (available at [http://www.medpac.gov/publications/congressional\\_reports/Mar05\\_EntireReport.pdf](http://www.medpac.gov/publications/congressional_reports/Mar05_EntireReport.pdf).) A commenter requested that "electronic health records" be defined broadly enough to include applications that capture clinical trial data. Another commenter did not think it was in the best interest of the industry for OIG to propose such a definition at this time.

*Response:* For the purpose of this rulemaking, we are adopting a broad definition of "electronic health record." An electronic health record will be defined as: "A repository of consumer health status information in computer processable form used for clinical diagnosis and treatment for a broad array of clinical conditions." We are adopting a broad definition consistent with our goal of encouraging widespread adoption of electronic health records technology.

*Comment:* A commenter stated that the term "electronic health record," as used in the proposed rule, is inconsistent with the same terminology when used within the information technology industry, and is therefore confusing. The commenter suggested that we might have meant to use the term "electronic medical record." According to the commenter, an "electronic health record" is commonly used to describe the broad concept of the total health care data that exists regarding an individual within an electronic universe (including, for example, the patient's personal health record, medication history stored by an insurance plan, electronic imaging results stored at a hospital, etc.), whereas an "electronic medical record" typically refers to patient-centric, electronically maintained information about an individual's health status and care that focuses on tasks and events related to patient care, is optimized for

use by a physician, and relates to care within a single clinical delivery system.

*Response:* We recognize that there are several ways in which information technology terms are used, including the terminology “electronic health record” and “electronic medical record.” For purposes of this safe harbor, we have opted to use the term “electronic health record,” and we have included a definition of “electronic health record” in this final rule.

#### b. Necessary

##### i. Technical and Functional Equivalency

We proposed requiring the recipient to certify that the items and services to be provided are not technically or functionally equivalent to items or services the recipient already possesses or has obtained. The certification would have needed to be updated prior to the provision of any necessary upgrades or items and services not reflected in the original certifications. We expressed our concern that the certification process would be ineffective as a safeguard against fraud and abuse if it were a mere formality or if recipients simply executed a form certification provided by a donor. Therefore, we proposed that the donor must not have actual knowledge of, and not act in reckless disregard or deliberate ignorance of, the fact that the recipient possessed or had obtained items and services that were technically or functionally equivalent to those donated by the donor and that the recipient would be protected only if the certification were truthful.

*Comment:* Several commenters requested further clarification regarding the meaning of “technically or functionally equivalent” and the meaning of “significantly enhance the functionality” as those terms were used in the proposed rulemaking. Other commenters expressed concerns about the requirement, asserting that it would deter recipients who are not technology experts from adopting health information technology, and might result in recipients hiring costly technology consultants to evaluate their existing systems. A commenter expressed concern that the safe harbor not hinder the goals of widespread adoption of electronic health records by, for example, excluding from protection technology that would standardize the technology used by all recipients, or updated, user-friendly technology that would replace outdated, outmoded, or unusable technology. For these reasons, several commenters argued that technical and functional equivalency was not an appropriate or workable standard for assessing whether donated

items and services are necessary and that, accordingly, the requirement should not be adopted.

Other commenters suggested modifications to the proposed regulations. One commenter suggested that hospitals should incorporate inquiries regarding the technological items and services physicians possess into the surveys physicians must complete to acquire and maintain physician privileges. Another suggested that any costs associated with the certification process should be included as part of the services offered by the donor. A few commenters suggested that the Government should provide financial assistance in evaluating the existing technology, while another commenter proposed that CMS publish guidelines for technological equivalence upon which all donors and recipients could rely. Some commenters urged that the certification requirement incorporate a “good faith” standard for compliance, while other commenters expressed concern that donors would not be in a position to evaluate the technology already possessed by potential recipients and, therefore, that safe harbor protection for donors should not hinge on the recipient’s certification.

Another commenter requested that OIG provide “templates” for the written certification to ensure a simple and transparent certification process. One commenter expressed concern that a requirement for ongoing certification to account for upgrades or new software, hardware, or services would create an unnecessary burden. Another commenter proposed that there should be one certification required once final interoperability standards for all health information technology components are finalized.

*Response:* Having reviewed the public comments, we have concluded that our proposal to require recipients to certify in writing that they do not possess equivalent technology might become unnecessarily burdensome. We are not requiring a written certification. The final safe harbor requires that protected donations be limited to electronic health records software or information technology and training services that are necessary and used predominantly to create, maintain, transmit, or receive electronic health records. We do not believe software and services are “necessary” if the recipient already possesses the equivalent software or services. The provision of equivalent items and services poses a heightened risk of abuse, since such arrangements potentially confer independent value on the recipient (*i.e.*, the value of the

existing items and services that might be put to other uses) unrelated to the need for electronic health records technology. Thus, if a donor knows that the recipient already possesses the equivalent items or services, or acts in deliberate ignorance or reckless disregard of that fact, the donor will not be protected by the safe harbor. Prudent donors may want to make reasonable inquiries to potential recipients and document the communications. We do not believe this requirement necessitates the hiring of technical experts by either the donor or recipient. The “necessary” requirement in the final safe harbor would not preclude upgrades of items or services that enhance the functionality of the items or services, including, for example, upgrades that make software more user-friendly or current. Nor would it preclude items and services that result in standardization of systems among donors and recipients, provided that the standardization enhances the functionality of the electronic health records system (and any software is interoperable).

*Comment:* A commenter suggested that, instead of including a recipient certification, as we proposed, the written agreement between the donor and recipient could affirm their intent to comply with the anti-kickback statute and relevant regulations, and the parties could sign a statement that their business transactions do not take into account the volume or value of referrals or business generated between the parties.

*Response:* We are not adopting the commenter’s suggestion. While the suggested affirmation and statements may be useful to the parties, they are necessarily self-serving and offer little, if any, protection against fraud and abuse. We note that the critical inquiry under the anti-kickback statute is not what terms appear on the face of an agreement but how the arrangement is actually conducted. It is not sufficient for safe harbor purposes for documentation to contain facially the correct terms; the underlying arrangement itself must meet all the safe harbor conditions.

*Comment:* Many commenters requested further clarification of OIG’s concern about the risk of recipients intentionally divesting themselves of technically or functionally equivalent technology that they already possess or have obtained in order to shift costs to the donor. See 70 FR 59018. These commenters expressed the opinion that recipients would not intentionally divest themselves of health information technology given the low adoption rate of health information technology and

the time and resource commitment necessary to implement and maintain a health information technology system.

*Response:* When a party that desires referrals assumes costs that are otherwise the obligation of a party in a position to generate referrals, the party assuming the costs offers something of value to the party with the referrals. This cost shifting can occur in many ways, including, without limitation, shifting the costs of staff, office space, or equipment. In the context of electronic health records technology, this cost-shifting might occur in connection with, by way of example, ongoing maintenance and help desk support for previously purchased electronic health records systems. Likewise, a recipient might shift costs by moving previously purchased technology to other uses and replacing it with equivalent new technology obtained from a donor. We solicited comments on how we might address this risk.

Having reviewed the public comments, we are not persuaded that this risk is particularly reduced in the context of electronic health records technology. Nonetheless, we believe that the totality of final safe harbor conditions, including, for example, the cost sharing requirement and the sunset provision, should adequately address our concerns. We are not including any separate condition specifically addressing divestiture of technology.

*Comment:* One commenter requested that OIG clarify that the term “necessary” would not preclude the provision of outpatient-focused (also referred to as “ambulatory-focused”) electronic health records software to recipients that may already have access through the internet or otherwise to an inpatient-focused electronic health records systems.

*Response:* The final rule does not preclude the provision of outpatient or ambulatory electronic health records software to recipients that already have access to inpatient-focused systems.

## ii. Covered Technology

We proposed to protect software and directly related training services that are necessary and used solely to receive, transmit, and maintain electronic health records of the donor’s or recipient’s patients, provided that the software includes an electronic prescribing component. Importantly, we stated our intention to protect systems that improve patient care rather than systems comprised solely or primarily of technology that is incidental to the core functions of electronic prescribing and electronic health records.

*Comment:* Some commenters asked whether our proposal to protect certain technology necessary and used to “receive, transmit, and maintain” electronic health records would include technology used to develop, implement, operate, facilitate, produce, and supplement electronic health records.

*Response:* We intended that the final rule would encompass the types of uses described by the commenters. To make this intent clear, we have clarified the final rule to provide that the protected technology must be necessary and used predominantly to “create, maintain, transmit, or receive” electronic health records.

*Comment:* Most commenters believed that the proposed scope of the protected donation was too narrow. Commenters variously suggested that the safe harbor should also protect transfers of hardware, operating software, connectivity items, support services, secure messaging, storage devices, clinical decision support technology, services related to training and ongoing maintenance, rights, licenses, and intellectual property, as well as interfaces and translation software to allow recipient offices to exchange data with hospital systems, all of which the commenters considered necessary for a fully functioning electronic health records system.

Some commenters encouraged OIG to exclude from protection hardware and broadband wireless Internet connectivity and to tailor the safe harbor protection narrowly to cover software, training, and information technology support services. One commenter opined that ongoing support, such as help desk support, could pose a risk of abuse, because the recipient would become dependent on the donor for the help desk support, and might feel obligated to refer to the donor to ensure continuation of that support. This commenter suggested that we protect initial, start-up support services, but not long-term, ongoing system support. A few commenters suggested that the scope of support services, training, and other items and services should be a defined contribution not to exceed 365 person-days.

Several commenters urged OIG to protect arrangements involving the donation of billing software and other software for administrative functions, such as registration and patient scheduling, because much of the “return on investment” (*i.e.*, value) for physicians who incorporate electronic health records systems into their practices is the integration of clinical and administrative systems. Commenters noted that the scope of the

safe harbor should account for the fact that the products on the market increasingly integrate administrative functions with the clinical electronic health records functions. One commenter suggested that the safe harbor should at least prohibit the donation of technology that is unrelated to the actual electronic health records software, such as technology related to office administration. The commenter requested that the safe harbor protect integrated bundles of applications that include an electronic health records component, provided that the recipient pays for the technology that is unrelated to the electronic health records software. Another commenter suggested that the safe harbor should not protect clearly separable administrative software (*e.g.*, billing, coding, and practice management software), but should protect those elements of an electronic health records system that incidentally facilitate administrative functions, such as software that links to diagnosis codes for billing purposes. The commenter suggested that dual functions that support patient care and administrative functions are valuable to the physician and a driving force behind adoption of electronic health records systems.

*Response:* We have carefully considered the comments in light of our intention to promote the adoption of electronic health records without undue risk of fraud and abuse. The final rule protects electronic health records software or information technology and training services necessary and used predominantly to create, maintain, transmit, or receive electronic health records.

To ensure that the safe harbor is only available for software, information technology and training services that are closely related to electronic health records, the safe harbor provides that electronic health records functions must be predominant. The core functionality of the technology must be the creation, maintenance, transmission, or receipt of individual patients’ electronic health records. There must be an electronic prescribing component. While electronic health records purposes must be predominant, the safe harbor protects arrangements involving software packages that include other functionality related to the care and treatment of individual patients (*e.g.*, patient administration, scheduling functions, billing, and clinical support). This condition reflects the fact that it is common for electronic health records software to be integrated with other features.

Further, we interpret “software, information technology and training services necessary and used predominantly” for electronic health records purposes to include the following, by way of example: Interface and translation software; rights, licenses, and intellectual property related to electronic health records software; connectivity services, including broadband and wireless internet services; clinical support and information services related to patient care (but not separate research or marketing support services); maintenance services; secure messaging (e.g., permitting physicians to communicate with patients through electronic messaging); and training and support services (such as access to help desk services).

We interpret the scope of covered electronic health records technology to exclude: Hardware (and operating software that makes the hardware function); storage devices; software with core functionality other than electronic health records (e.g., human resources or payroll software or software packages focused primarily on practice management or billing); or items or services used by a recipient primarily to conduct personal business or business unrelated to the recipient’s clinical practice or clinical operations. Further, the safe harbor does not protect the provision of staff to recipients or their offices. For example, the provision of staff to transfer paper records to the electronic format would not be protected.

While we share the concerns of those commenters worried that ongoing help desk or other assistance could create long-term ties between referral seekers and referral sources, we believe the cost sharing, interoperability, and sunset provisions, among others, should address these concerns. We do not believe it would be feasible to set specific temporal limits on such services or specific aspects of such services. (We note that, in the context of the electronic prescribing safe harbor at § 1001.952(x), the risks associated with long-term transfers of remuneration are mitigated by the narrower scope of the covered technology and the “used solely” restriction.)

*Comment:* With respect to Internet connectivity services, some commenters suggested that donations for connectivity should be limited to any necessary devices for connectivity and technical support for selecting and installing the appropriate connectivity services, but should not include connectivity fees, which should be an ongoing expense of the recipient. Other

commenters suggested that covered technology should include “T1” lines or other enhanced broadband connectivity (including connectivity needed to transfer medical images and EKGs (especially in rural areas)), routers to speed download times, secure connections and messaging, ongoing maintenance and support, and interfaces.

*Response:* The final safe harbor protects the donation of all forms of connectivity services. We believe the choice of appropriate connectivity services is an individual determination best made by the donors and recipients given their specific circumstances. We note that the cost sharing requirement of § 1001.952(y)(11) will apply to these services, including connectivity fees. Because hardware is not protected remuneration under the safe harbor, routers or modems necessary to access or enhance connectivity would not be protected.

*Comment:* A commenter asked for further clarification on whether the donation of an electronic health records system operating within an “Application Service Provider” model (a business model that provides computer-based services over a network) would be covered by the safe harbors.

*Response:* Subject to the cost sharing requirement and other conditions of the final safe harbor, the donation of an electronic health records system operating within an “Application Service Provider” model would be considered covered technology.

*Comment:* A few commenters requested that the final rule require donors to provide data-migration services to a recipient if the recipient chooses to abandon the donated electronic health record system and purchase its own electronic health record system.

*Response:* We do not believe it would be appropriate to require donors to provide data migration or any other specific service to recipients that choose to switch electronic health records systems. Donors may provide services if they wish, so long as the arrangement fits in the safe harbor or otherwise complies with the anti-kickback statute. We note that, to the extent the data migration services involve the provision of staff to the recipient’s office in order to transfer the data, the services would not be protected.

*Comment:* A commenter recommended that the safe harbor specifically protect the provision of patient portal software that enables patients to maintain on-line personal

medical records, including scheduling functions.

*Response:* Nothing in this final safe harbor precludes protection for patient portal software if it meets all safe harbor conditions.

*Comment:* Some commenters urged us to remove the proposed requirement that an electronic health records system include an electronic prescribing component, because such a requirement may stifle investment in electronic health records technology in situations where electronic prescribing is not considered a significant need. These commenters suggested that patients would most benefit if donors are permitted to first adopt electronic health records technology and then add electronic prescribing. Other commenters supported making an electronic prescribing component a mandatory part of the donated electronic health record.

*Response:* Nothing in this safe harbor rule prevents parties from adopting any particular form of technology. However, to qualify for safe harbor protection for arrangements in which the donor provides electronic health records technology to actual or potential referral sources, we are requiring that the donated electronic health records system include an electronic prescribing capability, either through an electronic prescribing component or the ability to interface with the recipient’s existing electronic prescribing system that meets the final standards adopted by the Secretary. We are including this requirement, in part, because of the critical importance of electronic prescribing in producing the overall benefits of health information technology, as evidenced by section 101 of the MMA. It is our understanding that most electronic health records systems already include an electronic prescribing component.

*Comment:* We solicited comments on whether the safe harbors should require that electronic health records software include a computerized physician order entry (CPOE) component. Many commenters said that, without either agreed upon standards or product criteria, a CPOE component should not be required. These commenters noted that CPOE and electronic prescribing functionalities can be quite similar and may be redundant. These commenters were concerned that mandating implementation of CPOE technology along with electronic health records software could deter development of either system. Another commenter noted that most of the off-the-shelf generic CPOE programs have proven ineffective to date. Some commenters

supported permitting CPOE as part of the electronic health record software, so long as it is not a particular type of CPOE.

*Response:* We are persuaded not to require that safe harbored transfers of electronic health records technology include a CPOE component. We note that nothing in this safe harbor mandates the implementation of any particular technology or functions.

*Comment:* Most commenters opposed our proposal to require that electronic health record software be compatible with Public Health Information Network preparedness standards or BioSense standards in order to qualify for safe harbor protection. These commenters pointed out that there is currently no industry consensus on preparedness standards, nor are there product criteria established for these programs. These commenters were concerned that clinicians and patients might be alarmed by the idea of clinician systems being linked to Government systems for Biosurveillance purposes.

*Response:* We have not included this requirement in the final safe harbor.

## 2. Interoperability

We proposed two types of conditions that would make compatibility and interoperability of donated technology key features of protected arrangements. These features would encourage the adoption of open, interconnected, interoperable systems and thereby reduce the risk of fraud and abuse. First, we proposed that once interoperability criteria had been recognized, electronic health records technology would need to be certified in accordance with standards adopted by the Secretary. Second, we proposed that donors (or their agents) not limit or restrict the use of the technology with other electronic prescription or health records systems, or otherwise impose barriers to compatibility.

*Comment:* Many commenters supported OIG's proposal to require all donations to meet approved functionality, interoperability, and security certification criteria. Some commenters supported the standards of the Certification Commission for Healthcare Information Technology (CCHIT). One commenter suggested that we measure interoperability based on accepted, consensus-driven standards that are already in place, such as the Electronic Health Record-Lab Interoperability and Connectivity Standards or other interoperability standards adopted by the Federal Government as part of the Consolidated Health Informatics (CHI) initiative. See [www.hhs.gov/healthit/chi](http://www.hhs.gov/healthit/chi).

Some commenters expressed concern that clinicians who adopt health information technology prior to the existence of final certification standards would be unfairly penalized. These commenters were also concerned that some early adoption arrangements might be chilled where certification standards are not yet available. These commenters requested that we consider "grandfathering" clinicians whose existing health information technology systems are not compliant with the certification standards by permitting them a one-time opportunity to upgrade their systems to be compliant. As an alternative, a few commenters recommended that we condition the ongoing use of the safe harbor on the donated software being capable of exchanging health care information in compliance with applicable standards once adopted by the Secretary and on no action being taken that would pose a barrier to the information exchange.

*Response:* Having considered the options, and consistent with Department policy, we have concluded that software will qualify for safe harbor protection if it is interoperable as defined in this final rule (discussed further below). Software will be deemed to be interoperable if it is certified by a certifying body recognized by the Secretary. Nothing in the final rule precludes donors from providing recipients with upgrades to software that meet the definition of "interoperable" in § 1001.952(y) or would make the software comply with then-existing certification standards. As noted below, we are including a provision requiring that donors refrain from impeding interoperability.

*Comment:* We indicated in the proposed rulemaking that we were considering defining the term "interoperable" for purposes of the safe harbor to mean "the ability of different operating and software systems, applications, and networks to communicate and exchange data in an accurate, secure, effective, useful, and consistent manner." See 44 U.S.C. 3601(6) (pertaining to the management and promotion of electronic Government services). One commenter agreed with this proposed definition. Another commenter suggested that we incorporate the definition of interoperability that has been promulgated by CCHIT. Another commenter suggested that we adopt the definition developed by the National Alliance for Health Information Technology: "The ability of different information technology systems and software applications to communicate, to exchange data accurately, effectively,

and consistently, and to use the information that has been exchanged." One commenter suggested that the definition of interoperability be flexible to adapt to evolving industry standards. Several commenters suggested defining interoperability as "the uniform and efficient movement of electronic healthcare data from one system to another, such that the clinical or operational purpose and meaning of the data is preserved and unaltered." One commenter opposed any definition of interoperability that would require a donor to support electronic transmissions from technology supplied by other vendors or to host applications accessible by software supplied by other vendors.

*Response:* Having reviewed the public comments and upon further consideration, we have crafted a definition of "interoperable" for purposes of the safe harbor that combines elements of our original proposal and the suggestions of the commenters. Under the final safe harbor, "interoperable" is defined to mean that, at the time of the donation, the software is able to (i) communicate and exchange data accurately, effectively, securely, and consistently with different information technology systems, software applications, and networks, in various settings, and (ii) exchange data such that the clinical or operational purpose and meaning of the data are preserved and unaltered. This interoperability must apply in various settings, meaning that the software must be capable of being interoperable with respect to systems, applications, and networks that are both internal and external to the donor's or recipient's systems, applications, and networks. In other words, software will not be considered interoperable if it is capable of communicating or exchanging data only within a limited health care system or community.

We believe this definition reflects our intent to protect only those arrangements that will foster open, interconnected, interoperable electronic health records systems that help improve the quality of patient care and efficiency in the delivery of health care to patients, without undue risk that donors might use arrangements to lock in referrals from recipients.

We are mindful that the ability of software to be interoperable is evolving as technology develops. In assessing whether software is interoperable, we believe the appropriate inquiry is whether the software is as interoperable as feasible given the prevailing state of technology at the time the items or services are provided to the recipient.

Parties should have a reasonable basis for determining that software is interoperable. We believe it would be appropriate—and indeed advisable—for parties to consult any standards and criteria related to interoperability recognized by the Department. Compliance with these standards and criteria will provide greater certainty to donors and recipients that products meet the interoperability requirement and may be relevant in any enforcement activities. We note further that parties wishing to avoid any uncertainty can avail themselves of the “deeming” provision, which provides that software that is certified by a body recognized by the Secretary will be deemed interoperable for purposes of the safe harbor. In order to ensure interoperability, products must have an up-to-date certification at the time of donation, and we are requiring that, to meet the deeming provision, the software must have been certified within 12 months prior to the date of the donation.

We are including a condition that the donor (or any person on the donor’s behalf) must not take any actions to limit or restrict the use, compatibility, or interoperability of the items and services with other electronic prescribing or electronic health records technology. We believe this language clearly reflects our intent that donors should not limit or restrict the use, compatibility, or interoperability of donated technology. We note that compliance with this condition in § 1001.952(y)(3) is a separate requirement from compliance with § 1001.952(y)(2), which requires that products must be interoperable and will be deemed interoperable if a certifying body recognized by the Secretary has certified the software within no more than 12 months prior to the date it is provided to the recipient.

If a donor takes actions that would cause a certified product to fall out of compliance with the interoperability standards that apply to the certified product, we would consider that to be an action to limit or restrict the use, compatibility, or interoperability of the items or services for purposes of § 1001.952(y)(3). We are not persuaded to protect arrangements where use, compatibility, or interoperability is limited to the products of specific vendors; to the contrary, we believe that inherent in the concept of interoperability is that technology can communicate with products of other vendors.

*Comment:* Many commenters supported the proposed prohibition against donors or their agents taking any

actions to disable or limit interoperability or otherwise impose barriers to compatibility of the donated technology with other technology, including technology owned or operated by competing providers and suppliers.

*Response:* As explained above, we have included this requirement in the final safe harbor at § 1001.952(y)(3). We believe this condition will help ensure that transfers of health information technology will further the policy goal of fully interoperable health information systems and will not be misused to steer business to the donor.

### 3. Protected Donors

We proposed to limit the scope of protected donors under § 1001.952(y) to hospitals, group practices, PDP sponsors, and MA organizations, consistent with the MMA-mandated donors for the electronic prescribing safe harbor.

*Comment:* Most commenters said that the proposed scope of potential donors was too limited. Commenters variously suggested that the protected donors include some or all of the following categories: Nursing facilities; assisted living and residential care facilities; intermediate care facilities for persons with mental retardation; mental health facilities; organizations providing population health management services (such as disease and care management programs and services); all components of an Integrated Delivery System (IDS) (including network providers or other entities that operate, support or manage network providers); clinical laboratories; pharmaceutical manufacturers; durable medical equipment suppliers; radiation oncology centers; community health centers; Federally Qualified Health Centers (FQHCs), physician-hospital organizations; health plans; Regional Health Information Organizations (RHIOs); dialysis facilities; and other entities that, from the commenters’ perspective, enhance the overall health of a community.

One commenter, representing dialysis facilities, suggested that the safe harbor should protect nonmonetary donations by all providers that maintain medical staffs to members of the medical staff. Another commenter suggested that a clinical data exchange (or community-wide health information system) should be included as a protected donor, because individual stakeholders in health information technology projects are unlikely to develop, purchase, or donate items necessary to implement and maintain a true community-wide clinical data exchange.

A few commenters asserted that health plans and pharmacy benefits managers (PBMs) should be protected donors, since, according to the commenters, these entities develop health information technology and are engaged with physicians on a direct level to increase the utilization of electronic prescribing and health records technology. These commenters urged that the fraud and abuse risks are reduced because health plans and PBMs have business incentives to limit utilization of prescriptions. A commenter recommended permitting all entities that bill Medicare to donate electronic health records technology. A few commenters suggested that any entity that has an interest in donating health information technology should be permitted to do so.

*Response:* Mindful that broad safe harbor protection may significantly further the important public policy goal of promoting electronic health records, and after carefully considering the recommendations of the commenters, we have concluded that the safe harbor should protect any donor that is an individual or entity that provides patients with health care items or services covered by a Federal health care program and submits claims or requests for payment for those items or services (directly or pursuant to reassignment) to Medicare, Medicaid, or other Federal health care programs (and otherwise meets the safe harbor conditions). This approach incorporates a bright line test focused on those individuals and entities that participate directly in the provision of health care to patients and are therefore in the best position to advance the implementation of electronic health records adoption through participation in interoperable electronic health records systems. In other words, the test focuses on those individuals and entities with a substantial and central stake in patients’ electronic health records. Individuals and entities that can satisfy this definition include, for example, hospitals, group practices, physicians, nursing and other facilities, pharmacies, laboratories, oncology centers, community health centers, FQHCs, and dialysis facilities.

In addition, we are persuaded that health plans, which generally arrange for the provision of health care items and services rather than providing them directly, should be protected donors. We originally proposed including only PDP sponsors and MA organizations. However, in the final rule, we are including any health plan that meets the definition of “health plan” set forth at § 1001.952(l)(2), an existing safe harbor

under the anti-kickback statute for certain managed care arrangements. This definition includes a broad array of health plans that may cover Federal health care program beneficiaries, including, but not limited to, PDP sponsors, MA organizations, and Medicaid managed care plans. We note that our decision to include health plans as protected donors does not reflect our endorsement of the proposition that health plans necessarily present a lower risk of fraud and abuse because they have economic incentives to limit utilization. Rather, our decision reflects the direction provided by Congress with respect to PDP sponsors and MA organizations, as well as the important and central role health plans play in the adoption and use of electronic prescribing and health records systems.

In the preamble to the proposed rule, we noted our concern that providers and suppliers of ancillary services would not have a comparable stake in advancing the goal of interoperable electronic health records for patients, as well as our concern about instances of abusive referral payments by ancillary services providers, such as laboratories. Having reviewed the public comments, we are persuaded that ancillary services providers and suppliers have a stake in the development of interoperable electronic health records sufficient to warrant safe harbor protection. We remain concerned about the potential for abuse by laboratories, durable medical equipment suppliers, and others, but believe that the safe harbor conditions in the final rule and the fact that the safe harbor is temporary should adequately address our concerns. We intend to monitor the situation. If abuses occur, we may revisit our determination. Among other things, we will be alert to patterns of increased utilization correlated with transfers of nonmonetary remuneration in the form of electronic health records technology. While increased utilization would not necessarily indicate fraud or abuse (and might, in some circumstances, reflect improved quality of care), the determination must be made on a case-by-case basis. We note that, notwithstanding the safe harbor, parties remain liable under various Federal and State laws for billing abuses, including over-billing and billing for items and services that are not medically necessary.

We have not included as protected donors pharmaceutical, device, or durable medical equipment manufacturers, or other manufacturers or vendors that indirectly furnish items and services used in the care of patients. These entities do not provide health

care items or services to patients or submit claims for those services. Our enforcement experience demonstrates that unscrupulous manufacturers have offered remuneration in the form of free goods and services to induce referrals of their products. Given this enforcement history, and the lack of a direct and central patient care role that justifies safe harbor protection for the provision of electronic health records technology, we are not including manufacturers as protected donors. We believe there is a substantial risk that, in many cases, manufacturers' primary interest in offering technology to potential referral sources would be to market their products.

Nothing in this preamble discussion should be construed to suggest that only parties that provide covered services or have the ability to bill Federal programs are in a position to make unlawful payments for referrals. To the contrary, under the anti-kickback statute, the party offering or paying the illegal remuneration need not be a party that provides a covered service or a party in a position to bill a Federal health care program. Rather, in this final regulation we have focused on parties that provide covered services and bill the programs as a bright line way to identify those individuals and entities with direct, frontline patient care responsibilities and, therefore, a substantial stake in promoting interoperable electronic health records systems.

With respect to categories of individuals and entities that are not included in the safe harbor, depending on the facts and circumstances, safe harbor protection might not be needed or safe harbor protection may be available under other safe harbors. The anti-kickback statute is implicated by remunerative arrangements that might induce or reward the generation of Federally payable health care business. Arrangements between parties where there is no potential or actual Federal program business of any kind generally should not raise concerns under the anti-kickback statute. Moreover, even where the statute is implicated, arrangements that do not qualify for safe harbor protection are not necessarily illegal. Thus, the fact that an entity is not included as a protected donor does not mean that a transfer of electronic health records technology by that entity necessarily would violate the anti-kickback statute. Rather, a determination would depend on the facts and circumstances, including the intent of the parties. Parties seeking assurance that their arrangement does not violate the anti-kickback statute may have the arrangement evaluated through

the OIG's voluntary advisory opinion process.

*Comment:* A commenter requested that the list of protected donors be expanded to include research and manufacturing entities and suggested that blind trusts could be established utilizing funds from several pharmaceutical companies to reduce the risk of fraud and abuse. Another commenter requested that we include entities in the research-based biopharmaceutical industry as permissible donors, noting that the widespread adoption of health information technology could reduce the need for proprietary systems used solely for purposes of clinical trial programs.

*Response:* As noted in the preceding response, we are not including research and manufacturing entities, or entities in the research-based biopharmaceutical industry, as protected donors for purposes of this final safe harbor. These entities do not provide covered services to beneficiaries and do not submit claims to a Federal health care program. Arrangements involving remuneration in the form of electronic health records technology provided by these entities would need to be evaluated on a case-by-case basis under the anti-kickback statute. We believe the "blind trust" proposal offered by the commenter is also more appropriately addressed case-by-case under the anti-kickback statute based on the totality of facts and circumstances of the particular arrangement.

*Comment:* One commenter strongly urged OIG to expand the list of protected donors to give physicians the opportunity to choose between different software offerings. Other commenters suggested that the safe harbor require an open, transparent Request for Proposal (RFP) process whereby the donating entity would be required to offer technology from a minimum of three vendors for the recipient to select. These commenters expressed the view that a multi-vendor, open RFP process would ensure competitive market pricing and would allow recipients to participate in the selection process to ensure that services meet the needs of their clinical practices, while also protecting against the recipient being locked-in by the donating entity. Another commenter requested that the rulemaking clearly state that physicians should be free to choose their own electronic health records systems or should be offered a choice by entities providing subsidies or assistance for purchasing these systems.

*Response:* Physicians and other recipients remain free to choose any electronic health technology that suits

their needs. Nothing in the safe harbor is to the contrary. However, we are not requiring donors to facilitate that choice for purposes of the safe harbor. Donors must offer interoperable products and must not impede the interoperability of any technology they decide to offer. We decline to require the type of RFP process requested by the commenter, as it would be unnecessarily burdensome and impractical and would potentially impose substantial transaction costs on donors. In addition, nothing in this safe harbor requires donors to give any particular level, scope, or combination of items and services. Some donors may choose to offer comprehensive packages, while others may elect to offer only individual components of an electronic health records system.

*Comment:* Commenters from the laboratory industry strongly urged OIG to include laboratories as protected donors. They argued that reducing duplicative laboratory testing is a potential benefit to the implementation of interoperable electronic health records. These commenters stated that clinical laboratories should be included in the safe harbor to achieve a level playing field and the goal of widespread adoption of technology. They also objected to OIG's characterization of the industry with respect to historical and current fraud and abuse concerns.

*Response:* We are including clinical laboratories as protected donors for the reasons noted above. However, in our experience, laboratories and others have used free or deeply discounted goods, such as computers and fax machines, to influence referrals improperly, and we remain concerned about potentially abusive kickback schemes involving free or deeply discounted goods. However, we believe the potential public benefit from interoperable electronic health records is so significant that some additional safe harbor protection is warranted for the limited purposes of this safe harbor. In this rule, it is our expectation that the combination of conditions in the safe harbor, including the sunset provision, will protect the programs from abuse during a limited period of time for the purpose of spurring widespread adoption of interoperable electronic health records technology. We intend to monitor the situation; if we discover instances of abuse, we may revisit our determination to include clinical laboratories (or any other category of potential donor).

*Comment:* A commenter requested that health information technology vendors be included as protected donors.

*Response:* We decline to include health information technology vendors

as protected donors. In many cases, no safe harbor protection will be needed. Moreover, we are concerned that if vendors are included as protected donors, entities that are not included in the safe harbor will expand their lines of business to become vendors to circumvent the safe harbor limitations.

*Comment:* Some commenters suggested that the safe harbor should protect nonmonetary donations offered by partnerships or consortia of otherwise permissible donors, so that parties could work together and share the cost of expanding needed health information technology in the community.

*Response:* Because consortia and partnerships can be structured in various ways, it is difficult for us to conclude with confidence that in all circumstances they would not pose an undue risk of abuse. We believe the better approach to the issue of consortia and partnerships is a case-by-case approach.

#### 4. Protected Recipients

*Comment:* Most commenters expressed the view that the categories of protected recipients were too limited and urged OIG to be more expansive. Commenters suggested that all or some of the following should be included: Non-staff physicians; physicians who are network providers; physicians who have contracted with an IDS; physicians and other licensed health care professionals whose patients regularly receive inpatient and/or outpatient care at the donor hospital or health system; hospitalists; intensivists; physician assistants; nurse practitioners; audiologists; and independent contractors of group practices. Commenters noted that many non-physician providers would greatly benefit from safe harbor protection, given the fact that non-physician providers generally have limited resources available to fund office technology. A commenter suggested including all non-physician providers that furnish Medicare or Medicaid covered services and might benefit from the adoption of electronic health records systems.

Many commenters suggested that the categories of permissible recipients be expanded to include the following providers and suppliers and their staffs: nursing facilities, assisted living and residential care facilities, intermediate care facilities for persons with mental retardation, mental health facilities, clinical laboratories, durable medical equipment providers, pharmacies (including long-term care pharmacies), community health centers, network

providers or other entities that operate, support or manage network providers, physician-hospital organizations, health plans, RHIOs, and other entities designed to enhance the overall health of the community. Commenters also requested that FQHCs, as defined in the Medicaid statute and Medicare regulations, be included as permissible recipients.

*Response:* We agree with the commenters that additional protection would further the goal, and achieve the benefits, of widespread adoption of electronic health records technology and, given the overall design of the safe harbor, can be accomplished without undue risk of fraud and abuse. The final rule permits donation of protected remuneration to any individual or entity engaged in the delivery of health care, without regard to whether the recipient is on a medical staff, is a member of a group practice, or is in network of a PDP sponsor or MA organization. Protected recipients would include practitioners, providers, and suppliers that furnish services directly to Federal health care program beneficiaries, as well as those that furnish services to health plan enrollees. Protected recipients can include, among others, physicians, group practices, physician assistants, nurse practitioners, nurses, therapists, audiologists, pharmacists, nursing and other facilities, FQHCs and community health centers, laboratories and other suppliers, and pharmacies.

*Comment:* Many commenters requested that protected donors be permitted to donate technology to all members of a group practice, or to the group practice as a whole, even if all members do not routinely provide services to the donor. Some commenters suggested that group practices should be permitted to donate to other group practices. One commenter asked for clarification as to whether the proposed safe harbor would apply only to the specific physician recipient of the donated technology or whether, for example, all members of a group practice could use the technology that was donated to the physician.

*Response:* The final rule contains no limitation on the recipient's membership on a donor's medical staff. Further, the safe harbor protects the donation of the technology to a physician or group practice. As such, donors are permitted to provide technology to the group practice as a whole, which should address the concerns raised by the commenters.

*Comment:* Some commenters stated that hospital donors may not want to donate the full value of an electronic health records system to physicians

outside of their medical staff. These commenters suggest permitting outside physicians to have access to the information in the hospital's electronic health records system by allowing the outside physicians to use or sublicense the hospital's electronic health records system at the hospital's cost. These commenters also suggested allowing outside physicians to take advantage of the pricing obtained by the hospitals for electronic health records technology and related services.

*Response:* The final safe harbor has been expanded to include all physicians as recipients, regardless of whether the physician is a member of the donor's medical staff. Nothing in the safe harbor requires hospitals or other donors to offer recipients a full electronic health records system. We interpret the commenters' suggestion that community physicians be permitted to access electronic data at the hospital's cost to be a comment seeking clarification that any aggregate dollar limit on donated technology be calculated based on the donor's costs rather than retail value to the recipient. In this regard, the final safe harbor incorporates a cost sharing requirement based on the donor's costs. It does not incorporate an aggregate dollar limit.

##### 5. Selection of Recipients

In light of the enhanced protection against some types of fraud and abuse offered by certified, interoperable systems, the final rule permits donors to use selective criteria for choosing recipients, provided that neither the eligibility of a recipient, nor the amount or nature of the items or services, is determined in a manner that directly takes into account the volume or value of referrals or other business generated between the parties. We have enumerated several selection criteria which, if met, are deemed not to be directly related to the volume or value of referrals or other business generated between the parties (*for example*, a determination based on the total number of hours that the recipient practices medicine or a determination based on the size of the recipient's medical practice). Selection criteria that are based upon the total number of prescriptions written by a recipient are not prohibited, but the final regulation does prohibit criteria based upon the number or value of prescriptions written by the recipient that are dispensed or paid by the donor, as well as any criteria directly based on any other business generated between the parties. The final safe harbor would not protect arrangements that seek to induce a

recipient to change loyalties from other providers or plans to the donor.

We expect that this approach will ensure that donated technology can be targeted at recipients who use it the most in order to promote a public policy favoring adoption of electronic health records, while discouraging especially problematic direct correlations with Federal health care program referrals. This approach is a deliberate departure from other safe harbors under the anti-kickback statute based on the unique public policy considerations surrounding electronic health records and the Department's goal of encouraging widespread adoption of interoperable electronic health records. We caution, however, that outside of the context of electronic health records, as specifically addressed in this final rule, both direct and indirect correlations between the provision of free or deeply discounted goods or services and the volume or value of referrals or other business generated between the parties are highly suspect under the anti-kickback statute (and may evidence outright violations) and do not meet the requirements of other safe harbors under the statute or § 1001.952.

*Comment:* Several commenters commended OIG for its efforts to prevent fraud and abuse by prohibiting efforts to increase referrals or other changes in practice patterns. Some commenters noted that donors should not be allowed to choose physicians selectively based upon the volume of their prescribing, size of practice, or whether they would be likely to adopt the technology, and stated that donors should give technology to all of their physicians. One commenter suggested eliminating the criteria permitting donors to select recipients based on any reasonable and verifiable manner that is not directly related to the volume or value of referrals or other business generated between the parties. The commenter stated that this criteria is too open-ended and subjective and could become a major loophole.

Other commenters supported the use of such criteria and expressed the view that the use of selection criteria to select recipients will improve quality of care and ensure successful adoption of health technology by physicians. These commenters offered suggestions on the standards for selection criteria. Some commenters suggested that OIG consider broad criteria for selection of recipients, and that donors should be permitted to make this decision based upon their own financial model. One commenter requested that OIG confirm that donations based on total number of

prescriptions are allowed under all of the proposed safe harbors.

One commenter recommended that selection criteria related to the volume or value of referrals should be permitted, as long as the criteria are linked to achieving greater improvement in quality of patient care or greater success in adoption of health information technology. The commenter provided the following examples: Participation in hospital quality improvement activities; participation in medical staff meetings and activities; specialty; department (if information technology is rolled out by department); readiness to use health information technology; consistent use of hospital based information technology systems; acting as a "physician champion" of hospital based information technology systems; willingness to serve as a trainer for other physicians; size of medical practice; or willingness to contribute some resources to the information technology project. Another commenter requested that any list of criteria included in the regulation be inclusive, rather than exclusive, and that we provide further guidance on how to interpret the criteria.

*Response:* Some of the commenters' suggestions are too subjective, impractical, and insufficiently bright line to be "deeming" provisions for purposes of this rulemaking. Although we believe it is important to provide some guidance with respect to selection criteria, we do not think it is possible to enumerate a comprehensive list. Therefore, we are providing several bright line criteria in the final rule, along with a general provision that permits other reasonable and verifiable selection criteria that do not relate directly to the volume or value of referrals or other business generated between the parties. Specifically, we are including the following criteria:

- The determination is based on the total number of prescriptions written by the recipient (but not the volume or value of prescriptions dispensed or paid by the donor or billed to a Federal health care program);
- The determination is based on the size of the recipient's medical practice (*for example*, total patients, total patient encounters, or total relative value units);
- The determination is based on the total number of hours that the recipient practices medicine;
- The determination is based on the recipient's overall use of automated technology in his or her medical practice (without specific reference to the use of technology in connection with referrals made to the donor);

- The determination is based on whether the physician is a member of the donor's medical staff, if the donor is a hospital or other entity with a formal medical staff;

- The determination is based on the level of uncompensated care provided by the recipient; or

- The determination is made in any reasonable and verifiable manner that does not directly take into account the volume or value of referrals or other business generated between the parties.

*Comment:* Some commenters inquired whether it would be permissible under the safe harbor for a donor to offer a staggered roll-out of electronic health records technology, so that the technology could be provided on a selective basis, either by specialty, hospital department, or otherwise. These commenters suggested that the safe harbor should not enumerate specific examples of when a staggered offering is deemed "not directly related to" referrals or other business, but rather should allow donors to offer information technology, as appropriate for each hospital's individual financial situation.

*Response:* The final rule prohibits the selection of recipients using any method that takes into account directly the volume or value of referrals from the recipient or other business generated between the parties. The final rule provides some examples of acceptable criteria and also permits any other determination that is reasonable and verifiable. Given the potential variation in arrangements, it is not entirely clear to us how the commenters would implement their "staggered roll-out." Such arrangements should be evaluated for compliance with the safe harbor on a case-by-case basis. We note that nothing in the safe harbor requires that technology be provided to all potential recipients contemporaneously.

*Comment:* One commenter recommended that OIG reaffirm that physicians who receive donated technology remain free to choose what health information may or may not be shared with the hospital or entity providing the technology, consistent with current law and the wishes of patients and physicians.

*Response:* Nothing in this final rule regulates the sharing of health information. Nothing in this final rule permits donors to influence the medical decision-making of recipients or requires recipients to act in a manner that would violate any law or ethical obligation to patients.

*Comment:* A commenter requested that OIG prohibit donors from selecting recipients in a manner that punishes or

rewards past prescribing practices or influences future prescribing practices. Another commenter recommended that any incidental increase in the volume of referrals that results from increased quality and patient care be expressly permitted.

*Response:* Any selection criteria directly related to past, present, or future volume of prescriptions dispensed or paid by the donor or billed to a Federal health care program, or to any other business generated between the parties are strictly prohibited. Any selection criteria that punish or reward past prescribing practices or influence future prescribing practices would give rise to an inference that the selection criteria are tied directly to the volume or value of referrals. We are not adopting the commenter's suggestion that we expressly permit increases in the volume or value of referrals attributable to increased quality and patient care. Whether an increase in the volume of referrals between a donor and recipient is attributable to increased quality and patient care, rather than an impermissible incentive, requires an evaluation of the particular facts and circumstances.

*Comment:* A commenter requested that PDP sponsors and MA organizations be permitted to determine eligibility, or the amount or nature of the items and services, in a manner that takes into account the volume and value of prescriptions written by the recipient that are paid by the PDP sponsor or MA organization. This commenter believed that PDP sponsors and MA organizations have the financial incentive to control drug utilization costs to compete effectively in the Medicare Part D marketplace.

*Response:* We are not persuaded. The fact that PDP sponsors and MA organizations have some incentives to control costs is not sufficient to warrant different safe harbor treatment. Neither eligibility for, nor the amount or nature of the items or services, may be determined by taking into account the volume or value of prescriptions written by the recipient for enrollees of the MA organization or PDP sponsor. Nothing in the safe harbor precludes PDP sponsors and MA organizations from offering protected items and services to health care professionals with whom they have network agreements.

*Comment:* One commenter requested that we protect donations when provided to a physician or clinic that provides a certain level of uncompensated charity care or combination of charity care and volume of Medicaid patients.

*Response:* The provision of uncompensated care would be an acceptable selection criterion (e.g., a hospital can elect to provide technology only to rural and solo practitioners that provide high levels of uncompensated care when selecting among eligible recipients). We have included a criterion in the final regulations at § 1001.952(y)(5) that expressly permits selection of recipients based on the level of uncompensated care provided by the recipient. We do not believe it would be appropriate for us to establish a particular level of uncompensated care necessary to qualify for safe harbor protection. Donors should have flexibility to respond to the particular needs of their communities by selecting recipients based on levels of uncompensated care that reflect those needs. The total number of Medicaid patients served by the practice could also be acceptable, so long as there is no direct correlation with Medicaid patients referred between the donor and recipient.

*Comment:* We proposed including a requirement that the prescribing health care professional, practitioner, pharmacy, or pharmacist (or any affiliated group, employee, or staff member) does not make the receipt of items or services a condition of doing business with the donor. Those commenters that commented on this condition favored it. A commenter noted that, as proposed by CMS for the proposed exception under the physician self-referral law, the anti-solicitation provision would be a core protection against fraud and abuse. The commenter suggested that our final rule should mirror the language proposed by CMS, which barred making the receipt, as well as the amount or nature, of items or services a condition of doing business with the donor. See 70 FR 59182, 59187 (October 11, 2005).

*Response:* We agree that a provision barring recipients from conditioning their business on donations of technology can safeguard against fraud and abuse and should be included in the final safe harbor. We further agree that, in this regard, the safe harbor under the anti-kickback statute should be consistent with the exception under the physician self-referral law. Accordingly, we are including a provision that mirrors the provision proposed by CMS, with modifications appropriate to the different nature of recipients addressed by the two rules. For consistency, we are making the same modifications to the comparable condition in the electronic prescribing arrangements safe harbor.

## 6. Value of Technology

We proposed, as a further safeguard against fraud and abuse, to limit the aggregate value of the qualifying electronic prescribing technology that a donor could provide to a recipient. We solicited public comment on the applicable amount and methodology for limiting the aggregate value of donated technology.

We also indicated that we were considering setting an initial cap, for both the electronic prescribing and electronic health records safe harbors, which would be lowered after a certain period of time sufficient to promote the initial adoption of the technology. This approach would have the effect of encouraging investments in the desired technology while also ensuring that, once the technology has been widely adopted and, as often occurs with technology, costs decrease as technology becomes more widely adopted, the safe harbor cannot be abused to disguise payments for referrals.

*Comment:* We solicited public comments that address the retail and nonretail costs (*i.e.*, the costs of purchasing from manufacturers, distributors, or other nonretail sources). Only a few commenters provided concrete information on the cost of health information technology, while most commenters simply noted the cost was high, that financial incentives were imperative, and that adoption was not equally affordable by all sectors of the health care field.

*Response:* We appreciate commenters providing this information, and we have taken the information into consideration in finalizing the safe harbor. The Administration supports the adoption of health information technology as a normal cost of doing business to ensure patients receive high quality care.

*Comment:* Most commenters shared the opinion that there should not be a cap on the value of donated technology, stating that there is not a consistent or appropriate way to determine fair market value or establish a monetary cap that would accommodate all situations and account for the rapid advancement in technology. Some commenters believed that the attempt to ascertain the value of donations for the purpose of fraud protection would become a barrier to adoption of electronic health records, unnecessarily discourage potential donors from providing technology, or would result in a reduction on the "return on investment" for electronic prescribing and electronic health records. Other commenters expressed concern that a low cap might discourage the

implementation of electronic health records technology, while a high cap may serve to pressure hospitals to provide the maximum allowable amount.

However, a few commenters shared the concern of OIG that allowing donors to provide items or services without limiting the value of such support could provide a potential for fraud and abuse. One commenter asserted that the value of donations will be self-limiting, because donors are unlikely to spend more than is necessary, thereby eliminating the need for a cap. Another commenter argued that a cap is not necessary so long as the donation is made without limiting or restricting the use of the electronic prescribing or electronic health records technology to services provided by the donating entity, and so long as the donation does not take into account the volume or value of referrals. Another commenter recommended that OIG limit the design or utility of the protected donated technology by requiring that it not have more than incidental value to the recipient, beyond the function for which it is intended.

*Response:* We agree with the commenters that determining the value of donated technology poses certain difficulties, and we are not including a cap on the amount of protected donations in the final safe harbor. While gifts of valuable items and services to existing or potential referral sources typically pose a high risk of fraud and abuse, we believe that the combination of safe harbor conditions in the final safe harbor, including the sunset provision, should adequately safeguard against abusive electronic health records arrangements.

*Comment:* Many commenters, while opposing the imposition of a cap, offered other suggestions for limiting the value of protected nonmonetary remuneration. Several commenters suggested a limit on the value of protected nonmonetary remuneration in the form of a percentage contribution from the recipient, *i.e.*, cost sharing by the recipient. These commenters suggested requiring either a set percentage contribution by the recipient or a scaled percentage contribution by the recipient that would lower the required percentage contribution once a pre-determined threshold amount was reached. Some commenters also suggested that we consider a cost sharing method that would be based on set amounts that would be donated, with the recipient paying any remaining costs. The amounts could be revised over time to account for the fluctuating expense of technology and other

changes that may arise. One commenter noted that studies have shown that individuals value services more when a portion of the cost is shared. This commenter suggested that recipients should, at a minimum, be required to contribute towards the purchase of wireless internet access.

*Response:* We agree that cost sharing is an appropriate method to address some of the fraud and abuse risks inherent in unlimited donations of technology. Accordingly, the safe harbor establishes a percentage contribution that must be incurred by the recipient of the electronic health records technology. Specifically, the final rule offers safe harbor protection only if the recipient pays 15 percent of the donor's cost of the technology. We believe the 15 percent cost sharing requirement is high enough to encourage prudent and robust electronic health records arrangements, without imposing a prohibitive financial burden on recipients. Requiring financial participation by a recipient should result in selection of technology appropriate for the recipient's practice and increase the likelihood that the recipient will actually use the technology. Moreover, this approach requires recipients to contribute toward the benefits they may experience from the adoption of interoperable electronic health records (*for example*, a decrease in practice expenses or access to incentive payments related to the adoption of health information technology). We note that, depending on the circumstances, a differential in the amount of cost sharing imposed by a donor on different recipients could give rise to an inference that an arrangement is directly related to the volume or value of referrals or other business generated between the parties, thus rendering the arrangement ineligible for safe harbor protection. In this regard, the reason and basis for the differential should be closely scrutinized.

We note that all donated software and health information technology and training services would be subject to the cost sharing requirements. It is our understanding that many updates and upgrades are included in the initial purchase price of the technology and would not trigger additional cost sharing responsibility on the part of the recipient at the time the update or upgrade is provided to the recipient. Any updates, upgrades, or modifications to the donated electronic health records system that were not covered under the initial purchase price for the donated technology would be subject to separate cost sharing obligations by the recipient (to the extent that the donor incurs

additional costs). To ensure that recipients incur the requisite 15 percent of the costs, donors (and their affiliates) are prohibited from providing financing or making loans to recipients to fund the recipient's payment for the technology.

With respect to calculation of the costs for internally-developed ("homegrown") software (that is, software that is not purchased from an outside vendor), and internally-developed add-on modules and components (that is, software purchased from an outside vendor and internally customized to ensure operational functionality), parties should use a reasonable and verifiable method for allocating costs and are strongly encouraged to maintain contemporaneous and accurate documentation. Methods of cost allocation will be scrutinized to ensure that they do not inappropriately shift costs in a manner that provides an excess benefit to the recipient or results in the recipient effectively paying less than 15 percent of the donor's true cost of the technology.

*Comment:* One commenter suggested that the entire electronic health records safe harbor sunset no later than five years from the date of publication of the final rulemaking, with the possibility for the sunset to be delayed upon an administrative finding by the Secretary that there is still a need for the safe harbor. The commenter observed that, in the future, electronic health records technology will be a standard and necessary part of a medical practice, and there will no longer be a need for third parties to donate it to physicians to spur adoption of the technology. Moreover, the commenter observed that incompatibility across a network of providers will cease to be an issue once interoperability of technology becomes the norm. For these reasons, the commenter concluded that the rationale for establishing a safe harbor to the anti-kickback statute will decrease over time.

*Response:* We agree with this commenter that the need for a safe harbor for donations of electronic health records technology should diminish substantially over time as the use of such technology becomes a standard and expected part of medical practice. Over time, physicians and others who receive donated technology from third parties may begin to realize the economic benefits from increased efficiencies and quality of care, at which point they may be expected to shoulder the costs associated with producing those benefits. As we indicated earlier in this rulemaking, we are promulgating an anti-kickback safe harbor for donations of valuable technology to

promote its use in the interests of quality of care, patient safety, and health care efficiency, notwithstanding the substantial risk of fraud and abuse normally associated with gifts of valuable goods and services to referral sources. Our goal is to promote the beneficial uses of technology without undue risk of fraud and abuse. As the technology becomes widely used and an accepted part of medical practice, the balance between promoting health information technology and preventing fraud and abuse changes.

A sunset provision would also address some of our concerns about gifts of unlimited amounts of valuable technology. As noted above, we have concluded that we cannot readily develop an appropriate cap on the amount of protected technology. A sunset provision, in effect, would cap the amount of protected technology that could be donated by third parties in a different way, thereby safeguarding against fraud and abuse in the long run. All arrangements occurring after the sunset date would be subject to case-by-case evaluation under the anti-kickback statute.

We solicited comments on our overall approach to crafting a set of safe harbor conditions and how we might ensure that the conditions, taken as a whole, provide sufficient protection against fraud and abuse. Given the difficulties inherent in limiting the value of donated technology and our relaxing of the ordinary principle that remuneration cannot be linked in any manner to the volume or value of referrals, we believe the sunset provision suggested by the commenter will provide appropriate additional protection.

For all of these reasons, we are adopting the suggestion of the commenter, with modifications. We are sunsetting the safe harbor on December 31, 2013. This date is consistent with the President's goal of adoption of electronic health records technology by 2014. See President George W. Bush's Health Information Technology Plan announced April 26, 2004; [http://www.whitehouse.gov/infocus/technology/economic\\_policy200404/chap3.html](http://www.whitehouse.gov/infocus/technology/economic_policy200404/chap3.html). Under § 1001.952(y)(13), all transfers of items and services must occur, and all conditions of the safe harbor must have been satisfied, on or before December 31, 2013. Nothing in the safe harbor would preclude the Secretary from extending the time period in accordance with notice-and-comment rulemaking. However, we do not believe it would be appropriate to have a condition in a regulation that is

contingent on an administrative determination.

We observe that the sunset provision is also consistent with the language in the preamble to the proposed rule that stated:

"We are considering setting an initial cap, which would be lowered after a certain period of time sufficient to promote the initial adoption of the technology. This would have the effect of encouraging investments in the desired technology while also ensuring that, once the technology has been widely adopted and its costs have come down, the safe harbor cannot be abused to disguise payments for referrals." 70 FR at 59020.

(We note that we are not similarly sunsetting the electronic prescribing safe harbor at § 1001.952(x), as that safe harbor is mandated by statute, and we do not have authority to limit its duration. Moreover, the risk of fraud and abuse is substantially greater with respect to donations of electronic health records technology than it is for donations of technology necessary and used solely for electronic prescribing under § 1001.952(x).)

*Comment:* A few commenters suggested that we not sunset the pre-interoperability safe harbor once the post-interoperability safe harbor was finalized, as we had proposed.

*Response:* We are not finalizing a separate pre-interoperability safe harbor.

*Comment:* One commenter stated that CMS should study the issue of a cap since health information technology capabilities and costs are rapidly evolving.

*Response:* This comment addresses matters outside the scope of this rulemaking.

*Comment:* A few commenters suggested that the final rule should allow the donors to reimburse recipients for previously implemented electronic health records systems in an amount equal to the lesser of the fair market value of the donated technology or the donated value cap, should a cap be adopted. These commenters also requested that recipients be given assurance by the donor that any technology previously purchased that is equivalent to donated technology and meets the applicable interoperability standards would be integrated into the donor's system.

*Response:* We are not adopting these suggestions. The commenters' suggestions go beyond the scope of the safe harbor and appear to be a request for the safe harbor to provide retroactive protection for previously purchased technology. The safe harbor protects the donation of technology that meets all of the conditions of the safe harbor.

Reimbursement for previously incurred expenses is not protected and poses a substantial risk of fraud and abuse.

*Comment:* We solicited comment in the proposed rulemaking about our proposal to prohibit donors from shifting the financial burden of providing electronic health records technology to the Federal health care programs or beneficiaries. Some commenters suggested that a cap on the value of donated technology would address our concern. One commenter suggested that the Department mandate savings that must be realized over a particular period of time. This commenter believed that pay for performance incentives should eventually mitigate the risk of cost shifting.

*Response:* For the reasons noted above, we are not including a cap on the value of donated technology. Moreover, we do not believe it is feasible for us to mandate particular levels of savings as a condition of safe harbor protection or to rely on the future implementation of pay for performance incentives. We continue to believe that our proposed condition is prudent and the best way to prevent cost shifting to the Federal programs and their beneficiaries. We have included the condition in the final safe harbor at § 1001.952(y)(12).

#### 7. Documentation

*Comment:* One commenter suggested omitting any requirement that the written agreement documenting the arrangement specify the covered items and services and their values. Another commenter requested clarification as to whether all parties to a three-tier technology arrangement (*i.e.*, the donor-distributor of the technology, the vendor of the technology, and the recipient of the technology) would be required to sign the written agreement required by the safe harbor.

*Response:* In light of the cost sharing condition of the final safe harbor, we are requiring documentation of the cost to the donor of the donated technology, and the recipient's expected contribution thereto. Moreover, we are requiring that the cost sharing contribution be made and documented before the items and services can qualify for safe harbor protection. The documentation must be specific as to the items and services donated, the actual cost to the donor, and the amount of the recipient's cost sharing obligation. The documentation must cover all of the electronic health records items and services to be provided by the donor (or affiliated parties) to the recipient. With respect to this requirement, we have added language to the final safe harbor

clarifying that the written documentation requirement can be satisfied by incorporating by reference the agreements between the parties or by the use of cross references to a master list of agreements between the parties that is maintained and updated centrally, is available for review by the Secretary upon request, and preserves the historical record of agreements. Nothing in the safe harbor requires that agreements between donors and recipients also be signed by third-party vendors; however, such documentation may be a prudent business practice.

#### D. Community-Wide Health Information Systems

*Comment:* Some commenters responded to our request for public comments on the need for, and the conditions that should pertain to, a safe harbor for community-wide health information systems. These commenters supported the creation of a safe harbor and suggested the safe harbor mirror the community-wide health information systems exception under section 1877 of the Act, with certain suggested revisions, including, for example, that the safe harbor should protect all types of providers, not just physicians. Another commenter offered suggestions on revisions to the section 1877 exception.

*Response:* We are not addressing a safe harbor for community-wide health information systems at this time; however, we will take into consideration the comments received should we develop a proposal for such a safe harbor. Comments on the section 1877 exception should be addressed to CMS.

### III. Regulatory Impact Statement

We have examined the impact of this rule as required by Executive Order 12866, the Unfunded Mandates Reform Act of 1995, the Regulatory Flexibility Act (RFA) of 1980, and Executive Order 13132.

#### Executive Order 12866

Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). A regulatory impact analysis must be prepared for major rules with economically significant effects (*i.e.*, \$100 million or more in any given year).

This is not a major rule, as defined at 5 U.S.C. 804(2), and it is not

economically significant, since it will not have a significant effect on program expenditures, and there are no additional substantive costs to implement the resulting provisions. This final rule will create new safe harbors under the anti-kickback statute for certain entities to provide technology-related items and services to certain parties for electronic prescribing and health records purposes in doing so, this rulemaking imposes no requirements on any party. Parties may voluntarily seek to comply with this provision so that they have assurance that their actions will not subject them to any enforcement actions under the anti-kickback statute.

The safe harbors should facilitate the adoption of electronic prescribing and health records technology by filling a gap rather than creating the primary means by which physicians or other recipients will adopt these technologies. In other words, donors will not fund all of the health information technology used by recipients. However, since we cannot predict which entities will offer these items and services, we cannot determine with certainty the aggregate economic impact of this final rulemaking. We do not believe, however, that the impact of this electronic prescribing safe harbor rule would approach \$100 million annually. Therefore, this final rule is not a major rule. We note that this final rule will remove a perceived obstacle to the provision of qualifying electronic prescribing technology and electronic health records software or information technology and training services (for purposes of this Regulatory Impact Statement, herein referred to as "qualifying health information technology") by certain entities, which effort advances the goal of the adoption of interoperable information technology. Although this final rule applies to donations of qualifying health information technology by hospitals, group practitioners, PDP sponsors, MA plans, and other donors, we do not expect that all entities would use these final safe harbors (in some cases, existing safe harbors may also be available or parties may use the OIG's advisory opinion process).

Our analysis under Executive Order 12866 of the expenditures that entities may choose to make under this final rule is restricted by potential effects of outside factors, such as technological progress and other market forces, future certification standards, and the companion final physician self-referral exceptions. Furthermore, both the costs and potential savings of electronic prescribing, electronic health records,

and other functional components vary to the extent to which each element operates as a stand alone system or as part of an integrated system.

As noted in the proposed electronic prescribing standards rule, which was published on February 4, 2005 (70 FR 6256, 6268–6273), donors may experience net savings with electronic prescribing in place and patients would experience significant, positive health effects. We have not repeated that analysis in this final rule. Moreover, we have not replicated the extensive analysis of costs, benefits, and potential impact on patient care contained in the companion physician self-referral final rule. We believe the analysis set forth there may be similarly relevant to the potential impact of the final safe harbors. As also noted there, we assume that qualifying health information technology costs and benefits will be realized eventually. Even without government intervention, there is a lively market today, and as consensus standards evolve, that market will grow. The question as to the regulatory impact of this final rule is: to what extent would the use of these final anti-kickback safe harbors accelerate adoption of electronic prescribing and electronic health records, taking into account available policy instruments, notably the development of interoperability criteria? The baseline information is uncertain. As described in more detail in the physician self-referral final rule, there are numerous estimates of adoption of electronic prescribing by health plans, hospitals, physicians, and (for prescribing of drugs only) pharmacies. As noted there, these estimates are highly sensitive to assumptions. For example, the costs may be higher or lower depending on the nature of, and information technology needs of, donors and recipients. The rate of adoption might be higher or lower than estimated. We believe the substantial majority of recipients will be physicians. The proportion receiving remuneration could be lower or higher than estimated, depending on willingness of hospitals, group practices, MA organizations, and PDP sponsors and other donors to subsidize investments in health information technology.

The Office of Management and Budget (OMB) has reviewed this rule in accordance with Executive Order 12866.

#### *Unfunded Mandates Reform Act*

Section 202 of the Unfunded Mandates Reform Act of 1995 requires that agencies assess the anticipated costs and benefits of Federal mandates before issuing any rule that may result

in the mandated expenditure by State, local, or tribal Governments, in the aggregate, or by the private sector, of \$100 million in 1995 dollars (a threshold adjusted annually for inflation and now approximately \$120 million). This final rule would impose no mandates. Any actions taken under this rule would be voluntary. Any expenditures would be undertaken by Government-owned hospitals in their business capacity, without any necessary impact on State, local, or tribal Governments, or their expenditure budgets, as such.

#### *Regulatory Flexibility Act*

The Regulatory Flexibility Act (RFA) and the Small Business Regulatory Enforcement and Fairness Act of 1996, which amended the RFA, require agencies to analyze options for regulatory relief of small businesses. For purposes of the RFA, small entities include small businesses, nonprofit organizations, and Government agencies. Most hospitals and most other providers and suppliers are small entities, either by nonprofit status or by having revenues of \$6 million to \$29 million in any one year. Individuals and States are not included in the definition of a small entity. We are not preparing an analysis for the RFA because we have determined that this final rule will not have a significant impact on small businesses. We base our decision on the fact that we expect the rulemaking on electronic prescribing and health records to be beneficial to the affected entities because it will allow them to better reap the benefits of increased use of electronic prescribing and health records technology, including reduction of medical errors and increased operational efficiencies.

In addition, section 1102(b) of the Act requires us to prepare a regulatory impact analysis if a rule may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 603 of the RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital that is located outside of a Metropolitan Statistical Area and has fewer than 100 beds. We are not preparing an analysis for section 1102(b) of the Act because we have determined that this rule will not have a substantial negative impact on the operations of a substantial number of small rural hospitals. If this rule has any impact, it would be a substantial positive impact in reducing medical errors and increasing operational efficiencies through the use of technology.

#### *Executive Order 13132*

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a final rule that imposes substantial direct requirement costs on State and local Governments, preempts State law, or otherwise has Federalism implications. Since this regulation does not impose any costs on State or local Governments, preempt State or local law, or otherwise have Federalism implications, the requirements of Executive Order 13132 are not applicable.

#### **IV. Paperwork Reduction Act**

In accordance with section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, we are required to solicit public comments, and receive final OMB approval, on any information collection requirements set forth in rulemaking. The safe harbors promulgated in this final rule impose some minimal information collection requirements. Specifically, for an arrangement to fall within the final safe harbors it would have to fulfill the following documentation requirements: (1) There must be a writing signed by the parties; (2) the written agreement must identify the items or services being provided and their cost; and (3) the written agreement must incorporate or cross-reference prior relevant agreements.

Compliance with a safe harbor under the Federal anti-kickback statute is voluntary, and no party is ever required to comply with a safe harbor. Instead, safe harbors merely offer an optional framework for structuring business arrangements to ensure compliance with the anti-kickback statute. All parties remain free to enter into arrangements without regard to a safe harbor, so long as the arrangements do not involve unlawful payments for referrals under the anti-kickback statute. Thus, we believe that the documentation requirements necessary to enjoy safe harbor protection do not qualify as an added paperwork burden in accordance with 5 CFR 1320.3(b)(2), because the requirements are consistent with usual and customary business practices and because the time, effort, and financial resources necessary to comply with the requirements would largely be incurred in the normal course of business activities.

#### **List of Subjects in 42 CFR Part 1001**

Administrative practice and procedure, Fraud, Health facilities, Health professionals, Medicare.

■ Accordingly, 42 CFR part 1001 is amended as follows:

**PART 1001—[AMENDED]**

■ 1. The authority citation for part 1001 is revised to read as follows:

**Authority:** 42 U.S.C. 1302, 1320a–7, 1320a–7b, 1395u(j), 1395u(k), 1395w–104(e)(6), 1395y(d), 1395y(e), 1395cc(b)(2)(D), (E) and (F), and 1395hh; and sec. 2455, Pub. L. 103–355, 108 Stat. 3327 (31 U.S.C. 6101 note).

■ 2. Section 1001.952 is amended by republishing the introductory text, by adding and reserving paragraph (w), and by adding new paragraphs (x) and (y) to read as follows:

**§ 1001.952 Exceptions.**

The following payment practices shall not be treated as a criminal offense under section 1128B of the Act and shall not serve as the basis for an exclusion:

\* \* \* \* \*

(x) *Electronic prescribing items and services.* As used in section 1128B of the Act, “remuneration” does not include nonmonetary remuneration (consisting of items and services in the form of hardware, software, or information technology and training services) necessary and used solely to receive and transmit electronic prescription information, if all of the following conditions are met:

(1) The items and services are provided by a—

(i) Hospital to a physician who is a member of its medical staff;

(ii) Group practice to a prescribing health care professional who is a member of the group practice; and

(iii) A PDP sponsor or MA organization to pharmacists and pharmacies participating in the network of such sponsor or organization and to prescribing health care professionals.

(2) The items and services are provided as part of, or are used to access, an electronic prescription drug program that meets the applicable standards under Medicare Part D at the time the items and services are provided.

(3) The donor (or any person on the donor’s behalf) does not take any action to limit or restrict the use or compatibility of the items or services with other electronic prescribing or electronic health records systems.

(4) For items or services that are of the type that can be used for any patient without regard to payor status, the donor does not restrict, or take any action to limit, the recipient’s right or ability to use the items or services for any patient.

(5) Neither the recipient nor the recipient’s practice (or any affiliated individual or entity) makes the receipt

of items or services, or the amount or nature of the items or services, a condition of doing business with the donor.

(6) Neither the eligibility of a recipient for the items or services, nor the amount or nature of the items or services, is determined in a manner that takes into account the volume or value of referrals or other business generated between the parties.

(7) The arrangement is set forth in a written agreement that—

(i) Is signed by the parties;

(ii) Specifies the items and services being provided and the donor’s cost of the items and services; and

(iii) Covers all of the electronic prescribing items and services to be provided by the donor (or affiliated parties). This requirement will be met if all separate agreements between the donor (and affiliated parties) and the recipient incorporate each other by reference or if they cross-reference a master list of agreements that is maintained and updated centrally and is available for review by the Secretary upon request. The master list should be maintained in a manner that preserves the historical record of agreements.

(8) The donor does not have actual knowledge of, and does not act in reckless disregard or deliberate ignorance of, the fact that the recipient possesses or has obtained items or services equivalent to those provided by the donor.

**Note to paragraph (x):** For purposes of paragraph (x) of this section, *group practice* shall have the meaning set forth at 42 CFR 411.352; *member of the group practice* shall mean all persons covered by the definition of “member of the group or member of a group practice” at 42 CFR 411.351, as well as other prescribing health care professionals who are owners or employees of the group practice; *prescribing health care professional* shall mean a physician or other health care professional licensed to prescribe drugs in the State in which the drugs are dispensed; *PDP sponsor or MA organization* shall have the meanings set forth at 42 CFR 423.4 and 422.2, respectively; *prescription information* shall mean information about prescriptions for drugs or for any other item or service normally accomplished through a written prescription; and *electronic health record* shall mean a repository of consumer health status information in computer processable form used for clinical diagnosis and treatment for a broad array of clinical conditions.

(y) *Electronic health records items and services.* As used in section 1128B of the Act, “remuneration” does not include nonmonetary remuneration (consisting of items and services in the form of software or information technology and training services)

necessary and used predominantly to create, maintain, transmit, or receive electronic health records, if all of the following conditions are met:

(1) The items and services are provided to an individual or entity engaged in the delivery of health care by—

(i) An individual or entity that provides services covered by a Federal health care program and submits claims or requests for payment, either directly or through reassignment, to the Federal health care program; or

(ii) A health plan.

(2) The software is interoperable at the time it is provided to the recipient. For purposes of this subparagraph, software is deemed to be interoperable if a certifying body recognized by the Secretary has certified the software within no more than 12 months prior to the date it is provided to the recipient.

(3) The donor (or any person on the donor’s behalf) does not take any action to limit or restrict the use, compatibility, or interoperability of the items or services with other electronic prescribing or electronic health records systems.

(4) Neither the recipient nor the recipient’s practice (or any affiliated individual or entity) makes the receipt of items or services, or the amount or nature of the items or services, a condition of doing business with the donor.

(5) Neither the eligibility of a recipient for the items or services, nor the amount or nature of the items or services, is determined in a manner that directly takes into account the volume or value of referrals or other business generated between the parties. For the purposes of this paragraph (y)(5), the determination is deemed not to directly take into account the volume or value of referrals or other business generated between the parties if any one of the following conditions is met:

(i) The determination is based on the total number of prescriptions written by the recipient (but not the volume or value of prescriptions dispensed or paid by the donor or billed to a Federal health care program);

(ii) The determination is based on the size of the recipient’s medical practice (for example, total patients, total patient encounters, or total relative value units);

(iii) The determination is based on the total number of hours that the recipient practices medicine;

(iv) The determination is based on the recipient’s overall use of automated technology in his or her medical practice (without specific reference to the use of technology in connection with referrals made to the donor);

(v) The determination is based on whether the recipient is a member of the donor's medical staff, if the donor has a formal medical staff;

(vi) The determination is based on the level of uncompensated care provided by the recipient; or

(vii) The determination is made in any reasonable and verifiable manner that does not directly take into account the volume or value of referrals or other business generated between the parties.

(6) The arrangement is set forth in a written agreement that —

(i) Is signed by the parties;

(ii) Specifies the items and services being provided, the donor's cost of those items and services, and the amount of the recipient's contribution; and

(iii) Covers all of the electronic health records items and services to be provided by the donor (or any affiliate). This requirement will be met if all separate agreements between the donor (and affiliated parties) and the recipient incorporate each other by reference or if they cross-reference a master list of agreements that is maintained and updated centrally and is available for review by the Secretary upon request. The master list should be maintained in a manner that preserves the historical record of agreements.

(7) The donor does not have actual knowledge of, and does not act in

reckless disregard or deliberate ignorance of, the fact that the recipient possesses or has obtained items or services equivalent to those provided by the donor.

(8) For items or services that are of the type that can be used for any patient without regard to payor status, the donor does not restrict, or take any action to limit, the recipient's right or ability to use the items or services for any patient.

(9) The items and services do not include staffing of the recipient's office and are not used primarily to conduct personal business or business unrelated to the recipient's clinical practice or clinical operations.

(10) The electronic health records software contains electronic prescribing capability, either through an electronic prescribing component or the ability to interface with the recipient's existing electronic prescribing system, that meets the applicable standards under Medicare Part D at the time the items and services are provided.

(11) Before receipt of the items and services, the recipient pays 15 percent of the donor's cost for the items and services. The donor (or any affiliated individual or entity) does not finance the recipient's payment or loan funds to

be used by the recipient to pay for the items and services.

(12) The donor does not shift the costs of the items or services to any Federal health care program.

(13) The transfer of the items and services occurs, and all conditions in this paragraph (y) have been satisfied, on or before December 31, 2013.

**Note to paragraph (y):** For purposes of paragraph (y) of this section, *health plan* shall have the meaning set forth at § 1001.952(l)(2); *interoperable* shall mean able to communicate and exchange data accurately, effectively, securely, and consistently with different information technology systems, software applications, and networks, in various settings, and exchange data such that the clinical or operational purpose and meaning of the data are preserved and unaltered; and *electronic health record* shall mean a repository of consumer health status information in computer processable form used for clinical diagnosis and treatment for a broad array of clinical conditions.

Dated: June 15, 2006.

**Daniel R. Levinson,**

*Inspector General.*

Approved: July 14, 2006.

**Michael O. Leavitt,**

*Secretary.*

[FR Doc. 06-6666 Filed 8-1-06; 8:45 am]

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# Federal Register

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**Tuesday,  
August 8, 2006**

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## **Part III**

# **Department of Health and Human Services**

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**Centers for Medicare & Medicaid Services**

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**42 CFR Part 411**

**Medicare Program; Physicians' Referrals  
to Health Care Entities With Which They  
Have Financial Relationships; Exceptions  
for Certain Electronic Prescribing and  
Electronic Health Records Arrangements;  
Final Rule**

**DEPARTMENT OF HEALTH AND HUMAN SERVICES**
**Centers for Medicare & Medicaid Services**
**42 CFR Part 411**
**[CMS-1303-F]**
**RIN 0938-AN69**
**Medicare Program; Physicians Referrals to Health Care Entities With Which They Have Financial Relationships; Exceptions for Certain Electronic Prescribing and Electronic Health Records Arrangements**
**AGENCY:** Centers for Medicare & Medicaid Services (CMS), HHS.

**ACTION:** Final rule.

**SUMMARY:** As required by section 101 of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA), this final rule creates an exception to the physician self-referral prohibition in section 1877 of the Social Security Act (the Act) for certain arrangements in which a physician receives compensation in the form of items or services (not including cash or cash equivalents) ("nonmonetary remuneration") that is necessary and used solely to receive and transmit electronic prescription information. In addition, using our separate legal authority under section 1877(b)(4) of the Act, this rule creates a separate regulatory exception for certain arrangements involving the provision of nonmonetary remuneration in the form of electronic health records software or information technology and training services necessary and used predominantly to create, maintain, transmit, or receive electronic health records. These exceptions are consistent with the President's goal of achieving widespread adoption of interoperable electronic health records to improve the quality and efficiency of health care while maintaining the levels of security and privacy that consumers expect.

**DATES:** *Effective date:* These regulations are effective on October 10, 2006.

**FOR FURTHER INFORMATION CONTACT:** Lisa Ohrin, (410) 786-4565, or Linda Howard, (410) 786-5255.

**SUPPLEMENTARY INFORMATION:**
**I. Background**

This final rule establishes exceptions to the physician self-referral law for certain arrangements involving the donation of electronic prescribing and electronic health records technology and training services. Set forth below is

a brief background discussion addressing:

- The physician self-referral law and its exceptions;
- A summary of the relevant provisions of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA), (Pub. L. 108-173);
- The Secretary's authority to implement exceptions under section 1877(b)(4) of the Social Security Act (the Act); and
- The November 9, 2005 Open Door Forum on electronic prescribing and electronic health records.

**A. The Physician Self-Referral Law and Exceptions**

Section 1877 of the Act, also known as the physician self-referral law: (1) Prohibits a physician from making referrals for certain designated health services (DHS) payable by Medicare to an entity with which he or she (or an immediate family member) has a financial relationship (ownership interest or compensation arrangement), unless an exception applies; and (2) prohibits the entity from submitting claims to Medicare or billing the beneficiary or third party payor for those referred services, unless an exception applies. The statute establishes a number of exceptions and grants the Secretary the authority to create additional regulatory exceptions for financial relationships that do not pose a risk of program or patient abuse.

**B. Section 101 of the MMA**

Section 101 of the MMA added a new section 1860D to the Act establishing a prescription drug benefit in the Medicare program. As part of the new statutory provision, in section 1860D-4(e)(4) of the Act, the Congress directed the Secretary to adopt standards for electronic prescribing in connection with the new prescription drug benefit with the objective of improving patient safety, quality of care, and efficiency in the delivery of care. (See H.R. Conf. Rep. No. 108-391, at 455, 456 (2003)). Section 1860D-4(e)(6) of the Act directs the Secretary, in consultation with the Attorney General, to create an exception to the physician self-referral prohibition that would protect certain arrangements involving the provision of compensation in the form of nonmonetary remuneration (consisting of items and services in the form of hardware, software, or information technology and training services) that is necessary and used solely to receive and transmit electronic prescription information in accordance with electronic prescribing standards published by the Secretary under section 1860D-4(e)(4) of the Act.

Specifically, this new exception sets forth conditions under which the provision of such remuneration by hospitals, group practices, and prescription drug plan (PDP) sponsors and Medicare Advantage (MA) organizations (collectively, for purposes of this preamble discussion, donors) to prescribing physicians (collectively, for purposes of this preamble discussion, physician recipients) would be protected. As we noted in the preamble to the October 11, 2005 proposed rule, depending on the circumstances, provisions in the existing physician self-referral regulations may also provide protection for the donation of these items and services to physicians.

In addition to mandating the new exception to the physician self-referral prohibition, section 1860D-4(e)(6) of the Act directs the Secretary to create a corresponding safe harbor under the anti-kickback statute (section 1128B(b) of the Act, 42 U.S.C. 1320a-7b(b)). The Health and Human Services Office of Inspector General (OIG), the agency that enforces the anti-kickback statute, is promulgating that safe harbor through a separate rulemaking. We have attempted to ensure as much consistency as possible between our final electronic prescribing exception and the corresponding final safe harbor, given the differences in the respective underlying statutes. One significant difference in the statutory schemes is that complying with a safe harbor under the anti-kickback statute is voluntary, whereas fitting in an exception under section 1877 of the Act is mandatory. In other words, arrangements that do not comply with a safe harbor may not necessarily violate the anti-kickback statute. Rather, such arrangements are subject to the customary case-by-case review under the statute. If an arrangement fails to meet all requirements of a physician self-referral exception, however, it violates section 1877 of the Act. Another difference is that section 1877 of the Act applies only to referrals from physicians, while the anti-kickback statute applies more broadly.

**C. Section 1877(b)(4) Authority**

Section 1877(b)(4) of the Act authorizes the Secretary to create regulatory exceptions for financial relationships that he determines do not pose a risk of program or patient abuse. Using this authority, this final rule also sets forth terms and conditions for a separate exception to the physician self-referral prohibition for certain arrangements involving the donation of electronic health records software or information technology and training

services. Information technology, and electronic health records in particular, supports treatment choices for consumers and enables better and more efficient care, while maintaining the levels of security and privacy that consumers expect. We seek to encourage the adoption of such technology through this final rulemaking. We believe that electronic health records systems that are secure and interoperable may mitigate many of our concerns regarding the potential anticompetitive effects of stand-alone electronic health records systems.

*D. Open Door Forum*

We held an Open Door Forum early in the comment period for the proposed rule, on November 9, 2005, to discuss the benefits and risks of donating electronic prescribing and electronic health records technology. The OIG also participated in this Open Door Forum. This Open Door Forum was in addition to, and not in lieu of, the public comment process. During this Open Door Forum, panelists representing the health care industry (for example, the American Hospital Association and the American College of Physicians), the health information technology industry, and members of the public contributed to the discussion. Panelists described the types of technology they believe are necessary to have a useful, workable, interoperable electronic health records system, including software, training, connectivity, upgrades, and a help desk function. The following topics were also included in the discussion:

- The cost of the technology to the donor versus the value to the physician and a cap on the value of the technology;
- Safeguards necessary to protect against program or patient abuse, including permissible donors and recipients and donation selection criteria;

- Staged implementation;
- Standards for the certification of the technology;
- Physician certification of technical and functional equivalence; and
- The limitations of electronic prescribing functionality alone as opposed to electronic prescribing functionality integrated into electronic health records software.

**II. Provisions of the October 11, 2005 Proposed Rule**

On October 11, 2005, we published a proposed rule to issue three exceptions under the physician self-referral statute (70 FR 59182). The first proposed exception addressed arrangements involving electronic prescribing technology as required by section 101 of the MMA. Many industry and government stakeholders had expressed concerns that the MMA provision was not sufficiently useful or practical, and would not adequately advance the goal of achieving improved health care quality and efficiency through widespread adoption of interoperable electronic health records systems. Accordingly, we proposed two additional exceptions to address donations of certain electronic health records software and directly related training services, using our authority at section 1877(b)(4) of the Act. One proposed exception would have protected certain arrangements involving nonmonetary remuneration in the form of interoperable electronic health records software certified in accordance with criteria adopted by the Secretary (and directly related training services). The second proposed exception would have protected certain arrangements involving donations of electronic health records technology made before the adoption of certification criteria. The proposed rule for safe harbors under the anti-kickback

statute, issued the same day, contained comparable proposals.

In response to our proposed rule, we received 74 timely filed comment letters. The majority of the comments came from hospitals and health systems, trade associations, and vendors. We also received comments from information technology organizations, health plans, and providers.

The OIG received 71 timely filed comment letters. The majority of the comments came from the same types of entities from which CMS received its comments. However, the OIG also received comments from pharmaceutical manufacturers and pharmacies.

Overall, the commenters welcomed the establishment of exceptions and safe harbors for electronic prescribing and electronic health records technology arrangements. However, we received many specific comments about various aspects of the proposed rule.

After considering these public comments, we are finalizing two exceptions:

- An exception that protects certain arrangements involving electronic prescribing technology (new § 411.357(v)); and
- An exception that protects certain arrangements involving interoperable electronic health records software or information technology and training services (new § 411.357(w)).

These final exceptions create separate and independent grounds for protection under the physician self-referral law. For the convenience of the public, we are providing Chart 1 that lays out schematically the overall structure and approach of the final exceptions, details of which we are providing in sections III and IV of this preamble. Readers are cautioned that the final exceptions contain additional conditions and information not summarized in Chart 1.

CHART 1.

	MMA-mandated electronic prescribing exception § 411.357(v)	Electronic health records exception § 411.357(w)
Authority for Exception .....	Section 101 of the MMA .....	Section 1877(b)(4) of the Social Security Act.
Covered Technology .....	Items and services that are necessary and used solely to transmit and receive electronic prescription information.	Software necessary and used predominantly to create, maintain, transmit, or receive electronic health records. Software packages may include functions related to patient administration, for example, scheduling functions, billing, and clinical support.
	Includes hardware, software, internet connectivity, and training and support services.	Software must include electronic prescribing capability.

CHART 1.—Continued

	MMA-mandated electronic prescribing exception § 411.357(v)	Electronic health records exception § 411.357(w)
Standards with Which Donated Technology Must Comply.	Applicable standards for electronic prescribing under Part D (currently, the first set of these standards is codified at § 423.160).	Information technology and training services, which would include, for example, internet connectivity and help desk support services. Electronic prescribing capability must comply with the applicable standards for electronic prescribing under Part D (currently, the first set of these standards is codified at § 423.160). Electronic health records software must be interoperable. Software may be deemed interoperable under certain circumstances.
Donors and Recipients .....	As required by statute, protected donors and recipients are hospitals to members of their medical staffs; group practices to physician members; PDP sponsors and MA organizations to prescribing physicians.	Entities that furnish designated health services (DHS) to any physician.
Selection of Recipients .....	Donors may not take into account directly or indirectly the volume or value of referrals from the recipient or other business generated between the parties.	Donors may use selection criteria that are not directly related to the volume or value of referrals from the recipient or other business generated between the parties.
Value of Protected Technology .....	No limit on the value of donations of electronic prescribing technology.	Physician recipients must pay 15 percent of the donor's cost for the donated technology and training services. The donor may not finance the physician recipient's payment or loan funds to the physician recipient for use by the physician recipient to pay for the items and services.
Expiration of the Exception .....	None .....	Exception sunsets on December 31, 2013.

*General Comments and Responses to the Proposed Rule*

*Comment:* Most commenters supported the promulgation of exceptions for electronic prescribing and electronic health records arrangements. Commenters observed that both the Congress and the Administration have recognized the compelling need for rapid and widespread adoption of electronic prescribing and electronic health records technology. Several commenters suggested that fraud and abuse concerns should not impede the adoption of health information technology. In this regard, commenters suggested that the final rule should better balance the goal of preventing fraud and abuse with the goal of creating incentives for health information technology arrangements that reduce fraud and abuse, increase quality and efficiency, and improve patient care. One commenter asserted that investments in health information technology and the desire to provide an incentive to participate in health information technology systems do not raise typical fraud and abuse concerns present with other financial arrangements. However, another commenter noted that the proposed rule generally struck an appropriate balance between the needs of physicians who

may require assistance to develop health information technology systems and the underlying purpose of Federal fraud and abuse laws to promote the professional independence of the physicians receiving the support.

*Response:* We disagree with the commenter that suggested that financial arrangements involving incentives in the form of health information technology do not pose the same fraud and abuse concerns as other financial arrangements between parties in a potential referral relationship. Indeed, our enforcement experience demonstrates that improper remuneration for Medicare referrals may take many forms, including free computers, facsimile machines, software, and other goods and services. However, we recognize that certain arrangements for the transfer of health information technology between parties with actual or potential referral relationships may further the important national policy of promoting widespread adoption of health information technology to improve patient safety, quality of care, and efficiency in the delivery of health care. We believe the final rule strikes the appropriate balance between promoting the adoption of health information

technology and protecting against program or patient abuse.

*Comment:* Several commenters stated that the Congress and the Administration need to offer meaningful financial incentives for practitioners to accept the increased cost and workflow burdens associated with the implementation of health information technology. For example, the government could provide modest add-on payments to physicians who employ health information technology as part of overall quality improvement measures. Some commenters observed that the proposed rule would remove a minor impediment to the adoption of health information technology, but suggested that we must play a larger role in providing capital for the technologies that assist physicians in providing quality care and avoiding medical errors.

*Response:* These comments address matters outside the scope of this rulemaking. However, we note that the Administration supports the adoption of health information technology as a normal cost of doing business. Specifically, the 2007 Budget states that “[t]he Administration supports the adoption of health information technology (IT) as a normal cost of

doing business to ensure patients receive high quality care.”

*Comment:* Some commenters complained that the proposed exceptions were too narrow and vague. These commenters urged that the final exceptions should be easy to understand, interpret, and enforce so that donors and physicians readily can distinguish permissible activities from those that violate the statute. Some commenters believe that the proposed rule was too complex and might have the unintended effect of discouraging participation in health information technology arrangements.

*Response:* As described in this preamble, we have adopted a number of modifications and changes that address the commenters' concerns. Although the final exception at § 411.357(v) addresses only electronic prescribing arrangements, the final exception at § 411.357(w) protects a broad scope of arrangements involving electronic health records technology. We have made a number of changes that clarify and simplify the final rules. We have endeavored to create bright line provisions to the extent possible. Moreover, we do not believe that the Congress, in enacting section 1860D-4(e)(6) of the Act, intended to suggest that a new exception is needed for all arrangements involving the provision of electronic prescribing items and services, nor do we believe that an exception is needed for all electronic health records arrangements. Many arrangements can be structured to fit in existing exceptions.

*Comment:* Some commenters observed that the description of the nonmonetary remuneration that would be included in the exceptions as proposed did not reflect the many existing combinations and varieties of electronic prescribing, electronic health records, and similar technology.

*Response:* As discussed in greater detail, we believe that the final exceptions are sufficiently broad to accommodate the most essential current and evolving electronic prescribing and electronic health records technology. We began this rulemaking process by looking to the guidance from the Congress in section 101 of the MMA with respect to electronic prescribing technology. Using our regulatory authority, we have added a separate exception for arrangements involving electronic health records software or information technology and training services. We believe that we have appropriately balanced the goal of promoting widespread adoption of health information technology against the significant fraud and abuse concerns

that stem from the provision of free or reduced cost goods or services to actual or potential referral sources.

*Comment:* A commenter suggested that the final rule should include provisions that allow us to evaluate and ensure that the regulatory requirements, once enacted, have not negatively impacted key stakeholders or business segments within the health care industry.

*Response:* Nothing in this rulemaking prevents us from reviewing the impact of the regulations on stakeholders in the health care industry. As with all regulatory exceptions, we may, in future rulemaking, propose modifications or clarifications to the exception as appropriate.

*Comment:* We solicited comments on whether and, if so, how to take into account physician access to publicly available software at free or reduced prices. One commenter urged that the availability of free public software should not impact the design of the final exceptions. In addition, the commenter stated that we should grant physicians and hospitals substantial latitude in selecting interoperable technology that best meets their needs.

*Response:* After further consideration, we concluded that it was not necessary to take the availability of publicly available software into account in developing the final exceptions. Hospitals, physicians, and other donors will have great flexibility in selecting technology that will qualify for protection under the exceptions. Nothing in this rule limits the choice of health information technology, although certain technology, such as non-interoperable electronic health records software (as discussed in section IV), would not qualify for protection because it would not meet all of the conditions of the exception.

*Comment:* Some commenters suggested that the exceptions under the physician self-referral law should mirror the safe harbors under the anti-kickback statute in all respects in order to promote the rapid and widespread adoption of electronic prescribing and electronic health records technology. A few commenters suggested that OIG not adopt anti-kickback statute safe harbors or that any safe harbors should be stricter than any corresponding exceptions to the physician self-referral law.

*Response:* We believe consistency between these exceptions and the corresponding safe harbors under the anti-kickback statute is preferable. We have attempted to ensure as much consistency between the two sets of regulations as possible given the

underlying differences in the two statutory schemes.

*Comment:* A few commenters requested that the Federal physician self-referral exception preempt State laws that prohibit physician self-referrals relating to health information technology. One commenter wanted the physician self-referral exceptions, once finalized, to preempt any State laws or regulations that conflict with the provisions of the exceptions.

*Response:* The MMA specifically dictated that the Part D electronic prescribing standards would preempt any State law or regulation that—(1) Is contrary to the adopted final Part D electronic prescribing standards or that restricts the Secretary's ability to carry out Part D of title XVIII; and (2) pertains to the electronic transmission of medication history and of information on eligibility benefits, and prescriptions with respect to covered Part D drugs under Part D. No similar authority was provided with respect to the physician self-referral exception for the donation of electronic prescribing technology. Moreover, the legal authority for the electronic health records exception in this rule is derived from section 1877(b)(4) of the Act, which similarly does not provide authority to preempt State physician self-referral laws. Existing Federal physician self-referral law permits States to regulate physician self-referrals concurrently.

*Comment:* Some commenters inquired whether the electronic information that is transmitted via electronic prescribing or electronic health records systems would be considered remuneration for purposes of the physician self-referral law.

*Response:* Whether a particular item or service constitutes remuneration for purposes of the physician self-referral law depends on the particular facts and circumstances. Typically, information about a particular patient's health status, medical condition, or treatment exchanged between or among the patient's health care providers and suppliers for the purpose of diagnosing or treating the patient would not constitute remuneration to the recipient of the information. In this regard, the electronic exchange of patient health care information is comparable to the exchange of such information by mail, courier, or phone conversation. Thus, when related to the care of individual patients, information such as test results, diagnosis codes, descriptions of symptoms, medical history, and prescription information are part of the delivery of the health care services and would not have independent value to the recipient. However, in other

situations, information may be a commodity with value that could be conferred to induce or reward referrals. For example, data related to research or marketing purposes, or information otherwise obtained through a subscription or for a fee, could constitute remuneration for purposes of the physician self-referral law.

### III. Response to Comments and Final Rule Provisions Regarding Electronic Prescribing Exception Required Under Section 101 of the MMA (proposed § 411.357(v))

#### A. Summary of the Proposed Provisions Related to § 411.357(v)

On October 11, 2005, as mandated in the MMA, we proposed adding a new paragraph (v) to the existing regulations at § 411.357 for certain electronic prescribing arrangements. We proposed the following:

- That the exception would protect certain arrangements involving the provision of nonmonetary remuneration (in the form of hardware, software, or information technology and training services) necessary and used solely to receive and transmit electronic prescription information. We construed this language broadly to include internet connectivity services (of all types, including broadband or wireless), and upgrades of equipment and software that significantly enhance functionality.
- That the donated technology must be part of, or used to access, a prescription drug program that meets applicable standards under Medicare Part D.
- That the technology must be donated by a hospital to members of its medical staff, by a group practice to its members, or by a PDP sponsor or MA organization to prescribing physicians, as long as all of the exception conditions are satisfied.
- That the physician could not make the receipt of donated technology a condition of doing business with a donor.
- That protected arrangements must be fully and completely documented.
- That the exception would not protect donations of technology that replicate technology the physician already possessed. To ensure compliance with this provision, we proposed requiring physicians to certify that they did not already possess equivalent technology. Moreover, we proposed that donors would not be protected if they knew or should have known that the physicians already possessed equivalent technology.
- That neither a physician's eligibility for donated technology, nor the amount

or nature of the technology, could be determined in any manner that takes into account the volume or value of referrals or other business generated between the parties.

- That the parties could not take any action to impede the compatibility or interoperability of the technology.
- That the donor could not restrict the ability of the physician to use the technology for any patient, regardless of payor.
- Limiting the value of donated technology that could be protected by the exception.
- A separate exception for multifunctional items and services used for electronic prescribing (for example, multi-use hand-held devices) because we recognized the limitations imposed by the "used solely" standard set forth in the MMA.

#### B. General Comments

*Comment:* Many commenters stated that the proposed electronic prescribing exception was too narrow to be useful and should be merged into an electronic health records exception, noting that physicians would likely resist adopting stand-alone electronic prescribing systems. One commenter observed that the proposed rule was generally in accordance with the congressional intent underlying section 101 of the MMA.

*Response:* We agree that the proposed exception was consistent with congressional intent. As we are not free to ignore a congressional mandate, we must promulgate the electronic prescribing exception described in section 101 of the MMA. However, we are also promulgating a separate exception for electronic health records arrangements that incorporate an electronic prescribing component. This new exception should address the commenters' concerns.

#### C. Specific Comments

##### 1. Protected Compensation in the Form of Items and Services (Nonmonetary Remuneration)

The proposed rule clarified the items and services that would qualify for the new exception (for purposes of this preamble, "qualifying electronic prescribing technology") that the Congress authorized only for the provision of items and services that are "necessary and used solely" to transmit and receive electronic prescription drug information.

##### a. Covered Technology

In our proposed exception, we proposed protecting hardware, software,

or information technology and training services that met the various exception conditions. We interpreted the statutory language to include the donation of broadband or wireless internet connectivity, training, information technology support services, and other items and services used in connection with the transmission or receipt of electronic prescribing information.

*Comment:* Various commenters suggested that the scope of covered technology should be expanded to include: billing, scheduling, and other administrative functions; implementation and maintenance of the system; upgrades; and licenses, rights of use, or intellectual property. Commenters also urged that any exception cover educational sessions and consulting assistance related to the electronic prescribing technology. Commenters generally agreed that the provision of equipment for personal, non-medical purposes should not be protected. One commenter suggested that it would not be possible to develop a comprehensive list of protected remuneration that would sufficiently reflect all possible electronic prescribing items and services. The commenter recommended that we periodically review the scope of protected items and services, and expand it as needed.

*Response:* We agree that it would be difficult to provide a comprehensive list of items and services covered by the exception. Although a specific list would provide a "bright line" rule, in this case, it would also impede the ability of the exception to accommodate novel or rapidly evolving technologies in the marketplace. For these reasons, we are not promulgating a specific list of protected items and services.

Consistent with the MMA mandate, covered items and services under § 411.357(v) include "hardware, software, and information technology and training services" that are necessary and used solely for electronic prescribing and that meet the other conditions of the exception. We believe that licenses, rights of use, intellectual property, upgrades, and educational and support services (including, for example, help desk and maintenance services) are items and services that potentially can fit in the exception if all conditions of the exception are met. Billing, scheduling, administrative, and other general office software cannot. Operating software that is necessary for the hardware to function can qualify for protection under the exception because it is integral to the hardware and distinct from other software applications that are not necessary to transmit and receive electronic

prescribing information. Interfaces designed to link the donor's existing electronic prescribing system to the physician's existing electronic prescribing system can qualify for protection. The exception does not protect the provision of technology for personal, nonmedical purposes, nor does the exception protect the provision of office staff.

*Comment:* We solicited comments on whether the exception should protect electronic prescribing technology that is used for the transmission of prescription information for items and services that are not drugs (for example, durable medical equipment (DME) or laboratory tests). Several commenters suggested that the exception should support the use of electronic prescribing technology for all the functions currently accomplished through written prescriptions, in order to encourage provider utilization of electronic prescribing technology to increase safety, cost-effectiveness, and efficiency. The commenters suggested including the use of electronic prescribing technology used for prescribing medical supplies and durable medical equipment, physical therapy, dialysis testing, laboratory tests, and other nondrug prescriptions. A commenter from the clinical laboratory industry supported a broad reach, but only if clinical laboratories were included as permissible donors under the exception.

*Response:* We agree generally with the first set of commenters. We have reviewed further the language in section 101 of the MMA. The exception mandated by section 1860D-4(e)(6) of the Act requires that the donated technology be capable of receiving and transmitting "electronic prescription information" in accordance with the electronic prescribing standards promulgated for purposes of the MMA electronic prescription drug programs described in section 1860D-4(e)(1) through (3) of the Act. We believe that the specific term electronic "prescription information" as commonly used and as used in section 1860D-4(e)(6) of the Act retains a broad meaning, to include information about prescriptions for any items that would normally be conducted with a written prescription. In contrast, the information to be transmitted under an electronic prescription drug program established under section 1860D-4(e)(2) of the Act is clearly limited to drug information for Part D eligible individuals. Moreover, we do not believe that the statutory language is intended to be construed to prohibit the use of the donated technology for the transmission and receipt of orders or

prescriptions for other items and services or to require the use of separate systems depending on the payor or the item or service to be prescribed or ordered. We believe this approach is consistent with the broad applicability of the physician self-referral law, the objectives of the electronic prescribing standards, and the patient safety, quality, and efficiency goals underlying the mandated exception. Accordingly, we are defining "prescription information" for purposes of the exception to mean information about prescriptions for drugs or any other item or service normally accomplished through a written prescription. With respect to the clinical laboratory commenter, consistent with the MMA language, we are not including clinical laboratories as permissible donors under the exception. However, we have expanded the new exception for electronic health records arrangements to include clinical laboratories.

#### b. "Necessary and Used Solely"

In the proposed rule, we proposed protecting items and services that are necessary and used solely to transmit and receive electronic prescription information. We stated that the exception would not protect arrangements in which donors provide items or services that are technically or functionally equivalent to items that the receiving physician already possessed or services that the physician had already obtained. We proposed requiring the physician to certify that the items and services provided were not technically or functionally equivalent to those that the physician already possessed or had already obtained. We also proposed that arrangements would not be protected if the donor knowingly provided technology that duplicated the physician's existing technology. We indicated that we would consider "necessary," for purposes of the exception, upgrades of equipment or software that significantly enhance the functionality of the item or service.

Because the term "necessary" appeared in our proposed rule in the discussions of all three proposed exceptions, many commenters chose to address comments on the meaning of the term "necessary" in the context of the proposed exceptions for electronic health records arrangements. We intend to interpret the term "necessary" uniformly for both new exceptions. Thus, there is a detailed discussion of our interpretation of the term "necessary" in section IV.C of this preamble, which addresses the new electronic health records exception. We

are addressing here only the comments received on the "necessary and used solely" requirement that are specific to the proposed electronic prescribing exception.

*Comment:* One commenter observed that the "necessary and used solely" requirement ensures that items and services will be used to encourage electronic prescribing activities. This commenter suggested including an additional requirement that the items or services clearly be intended to promote the interoperability of health information technology and the improvement of quality in a clinical setting.

*Response:* We agree that it was the intent of the Congress to encourage electronic prescribing activities, in part, through the development of an exception for donations of certain items and services necessary and used solely for electronic prescribing transactions. However, the additional standards suggested by the commenter, while reflecting laudable goals, are not sufficiently "bright line" for purposes of this exception. We have included a requirement at § 411.357(v)(3) intended to ensure that protected technology meets Part D electronic prescribing standards applicable at the time of the donation, including any standards relating to interoperability.

*Comment:* Some commenters expressed concern that we have taken an unnecessarily narrow interpretation of the statutory language "necessary and used solely to receive and transmit electronic prescription information in accordance with the standards promulgated under [section 101 of the MMA]." One commenter explained its view that the phrase "necessary and used solely" should be read such that the word "necessary" modifies the phrase "in accordance with the standards issued under this subsection." In other words, in this commenter's view, the protected hardware, software, and services must be "necessary" to perform electronic prescribing transactions "solely" in accordance with CMS-established data interchange standards. The commenter explained that this interpretation would be consistent with the purpose of the exception and the practical realities of computers and electronic transactions.

*Response:* We appreciate the comment; however, we do not believe that the commenter's proposed interpretation is the best or most logical reading of the statutory language. We believe the better and less strained reading is that the Congress intended for all donated technology to be necessary for the receipt and transmission of

electronic prescription information and to be used solely for that purpose. Limiting the exception to necessary items and services helps ensure that the exception does not become a means of conveying valuable items and services that do not further the underlying policy goals and that might, in reality, constitute disguised payments for referrals. As we noted in the preamble to the proposed rule, we believe that the Congress included the “used solely” requirement to safeguard against abusive arrangements in which the donated technology might constitute a payment for referrals because it might have additional value attributable to uses other than electronic prescribing. For example, a computer that a physician can use to conduct office or personal business might have value to the physician apart from its electronic prescribing purpose. Accordingly, consistent with section 101 of the MMA, the final exception requires that the protected items and services be necessary and used solely to receive and transmit electronic prescribing information.

We note that software that bundles general office management, billing, scheduling, electronic health records, or other functions with the electronic prescribing features does not meet the “used solely” requirement and is not protected by the final electronic prescribing exception. In some cases, the provision of such bundled software may be eligible for protection under the new exception for electronic health records arrangements at § 411.357(w).

*Comment:* One commenter suggested that the definition of “necessary” include all components required for a physician to be enabled to prescribe electronically whether or not other functionality is available or incorporated into the electronic prescribing technology.

*Response:* We believe that the commenter is referring to technology that is beyond the scope of the MMA-mandated exception. We have elected not to finalize a multifunctional electronic prescribing exception. The final exception for arrangements involving the donation of electronic health records technology may address the commenter’s concerns.

*Comment:* Many commenters requested that we eliminate the proposed requirement that physicians provide written certification that the donated technology is not technically or functionally equivalent to the technology that the physician already possesses. Several commenters expressed concern about the potential difficulty of making this determination,

the potential lack of expertise on the part of some physicians, and the potential increased cost that could arise by having an outside expert provide a determination of technical or functional equivalence.

*Response:* For the reasons noted in section IV of this preamble with respect to the electronic health records exception, we are not adopting the proposed requirement that physicians provide written certification that the donated technology is not technically or functionally equivalent to technology the physician already possesses. Although we have eliminated the certification requirement, we retained the requirement for written documentation regarding the specifics of the arrangement in the final exception at § 411.357(v)(7).

We do not believe that items and services are “necessary” if the physician already possesses equivalent items and services. The provision of duplicative items and services poses a heightened risk of abuse, since such arrangements would confer independent value on the physician (that is, the value of the existing items and services that may be put to other uses) unrelated to the need for electronic prescribing technology. Thus, if a donor knows that the physician already possesses equivalent items or services, or acts in deliberate ignorance or reckless disregard of that fact, the exception will not protect the donation. Therefore, prudent donors may want to make any reasonable inquiries to potential physician recipients and document the communications. We do not believe this requirement necessitates the hiring of technical experts by either the donor or the physician recipient.

*Comment:* One commenter supported our interpretation of the term “necessary” as permitting upgrades of equipment or software that significantly enhance the functionality of an item or service. Another commenter suggested that we should not require that the upgrades “significantly” enhance the functionality of the item or service. Rather, the commenter believes that we should allow the marketplace to determine whether an upgrade constitutes a beneficial improvement.

*Response:* Although we continue to believe that the term “necessary” does not preclude upgrades of equipment or software that significantly enhance the functionality of the item or service, we agree with the commenter that distinguishing “significant” enhancements from other beneficial improvements introduces unnecessary complexity. Under the final exception, any upgrade that is necessary and used

solely to transmit and receive electronic prescribing information is protected (as long as all other conditions of the exception are satisfied).

*Comment:* Many commenters noted that it would be impractical to require physicians to acquire or use software and hardware solely for electronic prescribing. Several commenters noted that, in most cases, single-use technology is of limited value to a physician, and could result in inefficiencies. Another commenter expressed concern that the “used solely” standard would preclude the use of robust electronic clinical support tools, such as tools to identify drug-to-drug interactions or to conduct drug-to-lab or prescription data analysis. This commenter urged that any exceptions from the physician self-referral prohibition for health information technology arrangements promote access to all information needed by physicians to evaluate alternative drug therapies, identify potential drug-to-drug interactions, and to improve safety, quality, and efficiency of patient care.

*Response:* The “used solely” condition derives directly from the MMA language. We believe that many of the arrangements of interest to the commenters are addressed best by the electronic health records exception, which is not restricted to technology used solely for electronic prescribing. The MMA-mandated electronic prescribing exception reasonably is interpreted to encompass electronic tools that provide information necessary to formulate, transmit and receive a medically appropriate prescription for a patient. These tools would include electronic clinical support tools identifying alternative drug therapies, drug-to-drug interactions, or a payor’s formulary information.

The nature of the “prescription data analysis” tools referenced by the commenter is not clear. We believe the appropriate inquiry would be whether the tool is used to formulate, transmit and receive a medically appropriate prescription for a patient. To the extent the data analysis tool (or any other electronic item or service) is used to transmit and receive data unrelated to formulating a medically appropriate prescription for a patient (for example, data collected for marketing purposes), the tool would not be necessary for electronic prescribing and would not be protected under the exception.

#### c. Standards

The MMA required that donated electronic prescribing technology must comply with the standards for electronic prescribing under Medicare Part D at the

time the items and services are donated. In the November 7, 2005 **Federal Register** (70 FR 67568), we finalized the first set of these standards (the "foundation standards"). We proposed in § 411.357(v)(2) a requirement that the items and services be provided as part of, or be used to access, an electronic prescription drug program that complies with the applicable standards under Medicare Part D at the time the items and services are donated.

We received no comments on this issue. The final exception requires that the donated technology must comply with the applicable standards under Medicare Part D at the time the items and services are donated.

## 2. Permissible Donors and Physician Recipients

We proposed protecting the same categories of donors and physician recipients listed in section 101 of the MMA.

*Comment:* We received numerous comments requesting that we expand the list of permissible donors and physician recipients.

*Response:* Because most commenters commented on this issue jointly with the proposed electronic health records exception, we included a detailed discussion of these comments in our discussion of the electronic health records exception in section IV.D. of this preamble.

We are finalizing the exception consistent with the MMA-mandated donors and physician recipients set forth by the Congress. We are not persuaded that additional donors or physicians are necessary to achieve the purpose of this exception for electronic prescribing. The enumerated categories of donors and physicians reflect individuals and entities centrally involved in the ordering, processing, filling, or reimbursing of prescriptions. Accordingly, protected donors and physicians under § 411.357(v) are hospitals to members of their medical staffs, group practices to their physician members, and PDP sponsors and MA organizations to prescribing physicians. For the convenience of the reader, we note the following:

- *Group practice* is defined as specified in § 411.352;
- *Members of a group practice* is defined as all persons covered by the definition of "member of a group practice" at § 411.351;
- *PDP sponsor* or *MA organization* is defined as specified in § 423.4 and § 422.2, respectively.

## 3. Selection of Physician Recipients

We proposed additional conditions in proposed §§ 411.357(v)(5) and (v)(6) related to how donors select recipients of the electronic prescribing technology. These proposed conditions were designed to minimize the risk that donors would select recipients for the improper purpose of inducing or rewarding the generation of Medicare business. Proposed § 411.357(v)(5) would require that the recipients (including their groups, employees, or staff) refrain from making the donation of qualifying electronic prescribing technology a condition of doing business with the donor. Proposed § 411.357(v)(6) would preclude protection if the eligibility of a physician to receive items and services from a donor, or the amount or nature of the items or services received, is determined in any manner that takes into account the volume or value of the physician's referrals or other business generated between the parties. We observed that this requirement would not preclude selecting a recipient based upon the total number of prescriptions written by the recipient, but would preclude selecting the recipient based upon the number or value of prescriptions written by the recipient that are dispensed or paid by the donor (as well as on any other criteria based on any other business generated between the parties). (see October 11, 2005 proposed rule, (70 FR at 59187)).

*Comment:* Commenters requested that we confirm that donors can select physician recipients of electronic prescribing technology based upon the total number of prescriptions written by the physician, but cannot select them based upon the number or value of prescriptions written by the physician recipient that are dispensed or paid by the donor (or on any other criteria based on any other business generated between the parties). A commenter supported excluding from the protection of the exception donations that take into account *directly* the volume or value of referrals or other business generated between the parties. This commenter expressed concern that donors would employ such selection criteria to disadvantage small practices and practices in rural or underserved areas. To counter this potential disadvantage, the commenter suggested that the final rule include incentives to promote donations to small practices, especially in rural and underserved areas. Other commenters suggested that donors, such as PDP sponsors and MA organizations should be permitted to consider the volume and value of prescriptions

written by the physician recipient, particularly for a donor's patient or plan population.

*Response:* To safeguard against the use of donated technology to disguise referral payments, we are adopting our proposal that neither the eligibility of a physician to receive items and services, nor the amount or nature of the items or services received, may be determined in a manner that takes into account, directly or indirectly, the volume or value of the physician's referrals or other business generated between the parties. Notwithstanding, in the instant case, we believe that prohibiting the selection of recipients based on total number of prescriptions written by the recipient would be inconsistent with the MMA mandate and congressional intent to promote the use of electronic prescribing. Accordingly, we confirm our interpretation, for purposes of the exception at § 411.357(v), that donors may select physician recipients of electronic prescribing technology based upon the total number of prescriptions written by the physician, but cannot select them based upon the number or value of prescriptions written by the physician that are dispensed or paid by the donor (or on any other criteria based on any other business generated between the parties). They also may not select physician recipients based on the overall value of prescriptions written by the physician or on the volume or value of prescriptions written by the physician that are reimbursable by the Medicare program.

We are not persuaded that PDP sponsors or MA organizations should be permitted to offer technology selectively based on the volume or value of business generated for the plan by the recipient, especially in the context of Part D, which includes some reimbursement based on the plan's costs, rather than capitated payments.

The exception would not protect arrangements that seek to induce a physician to change loyalties from other providers or plans to the donor (for example, a hospital using an electronic prescribing technology arrangement to induce a physician who is on the medical staff of another hospital to join the donor hospital's medical staff), because such arrangements take into account business generated for the donor. We understand the commenter's concern about donors excluding rural and underserved area physicians from their health information technology arrangements. Some donors may favor large or urban practices over small or rural ones. However, we can discern no "incentives" that could be included appropriately in an exception to address

this concern, nor has the commenter proposed any with respect to assisting rural or solo practitioners. We note that our decision not to limit the value of technology that can qualify under the exception may assist rural and solo practices insofar as donors may want to provide them with greater resources in recognition of their greater need for assistance in adopting electronic prescribing technology.

*Comment:* Some commenters supported our proposal to exclude from the protection of the exception donations that are a condition of doing business with the donor.

*Response:* We are retaining the proposed requirement that recipients (or any affiliated group, employee, or staff member) cannot make the receipt of items or services a condition of doing business with the donor. We have clarified that the condition applies with respect to all individuals and entities affiliated with the recipient.

#### 4. Value of Technology: Cap

In our proposed rule, we solicited public comments on various means by which we might limit the value of protected technology under the electronic prescribing exception. We indicated that we were considering a limit on the value of protected technology as a further safeguard against program or patient abuse. We received a large number of comments on this topic, the majority of which opposed any limit on the value of donated technology. Because these commenters typically commented jointly on this issue for all three proposed exceptions (and each commenter typically had the same concerns under all three proposed exceptions), an extensive description of these comments is found in section IV of this preamble. Having considered the comments, we are persuaded not to limit the value of the donated technology under the new exception for electronic prescribing arrangements at § 411.357(v). We believe the final conditions of the exception, including the “necessary and used solely” requirement and the conditions related to how donors select physician recipients, should be sufficient to guard against program and patient abuse. Although we are not limiting the value of donated technology, it is not our expectation that donors will necessarily want, or be in a position, to donate unlimited amounts of electronic prescribing technology.

#### 5. Additional Conditions on the Provision of Qualifying Electronic Prescribing Technology

##### a. All Payors Requirement

In proposed § 411.357(v)(4), we stated that we would require that, where possible, physicians must be able to use the protected technology for all patients without regard to payor status.

*Comment:* Commenters universally supported the requirement that, where possible, physicians must be able to use the donated technology for all patients regardless of payor source.

*Response:* We agree, and we have included this requirement in the final exception.

##### b. Documentation

We proposed at § 411.357(v)(7) a requirement that the arrangement for the donation of electronic prescribing technology be in writing, be signed by the parties, identify with specificity the items or services being provided and their values, and include a certification that the donated items and services are not technically or functionally equivalent to items and services the physician recipient already has. We stated that, to permit effective oversight of protected arrangements, the writing must cover all qualifying electronic prescribing technology provided by the donor to the physician. For example, if a donor provides a piece of hardware under one arrangement and subsequently provides a software program, the agreement regarding the software would have to include a description of the previously donated hardware (including its nature and value).

*Comment:* Some commenters supported the requirement that any transfers of technology and services be memorialized in a written agreement. One commenter objected to including a written agreement requirement in the exception, arguing that the requirement would cause an unnecessary delay and increase paperwork. Another commenter suggested that the exception permit the arrangement between the donor and physician recipient to be captured through a combination of agreements between the recipient, donor, and service provider, rather than one agreement. Commenters also urged us to remove the technical and functional equivalence certification requirement from the exception.

*Response:* We have adopted a documentation requirement in the exception at § 411.357(v)(7) with several modifications. With respect to the condition requiring that the documentation cover all of the

electronic prescribing items and services provided by the donor to the physician recipient, we have added language to the final exception clarifying that the written documentation requirement can be satisfied by incorporating by reference other agreements between the parties or by the use of cross references to a master list of agreements between the parties that is maintained and updated centrally, is available for review by the Secretary upon request, and preserves the historical record of agreements. We have eliminated the certification of technical and functional non-equivalence. In addition, given our decision not to limit the value of protected donations, we have eliminated the requirement that the agreement specify the value of the donated technology. However, in the interests of transparency and accountability, we are requiring that the parties document the donor’s cost for the technology. We have retained the remaining documentation requirements, as proposed, at § 411.357(v)(7).

##### c. Commercial and Other Messaging

*Comment:* A commenter requested clear and specific rules prohibiting inappropriate commercial messaging through electronic prescribing technology, including electronic detailing messages from a manufacturer promoting a particular brand or brand-name drug. This commenter suggested that such messaging may inappropriately influence clinical decision-making. The commenter gave the following as examples of inappropriate messaging: (1) Messages disguised as “clinical alerts” based upon biased research not published in the public domain; and (2) alerts purporting to save a patient money when, in reality, the out-of-pocket expense for the drug to the patient is higher. Another commenter suggested that we should prohibit commercial messaging and require that donated technologies present information in a neutral and transparent manner so as not to influence clinical decision making improperly. Similarly, another commenter noted that pop-up messaging could influence inappropriately prescribing patterns. The commenter provided the example of making the procedure for prescribing certain formulary drugs very easy and straightforward, while attempts to prescribe other formulary drugs trigger multiple pop-up notices or require a series of additional steps.

*Response:* We do not believe it would be feasible or appropriate to regulate the content of commercial messaging or

formulary compliance activities through these exceptions to the physician self-referral law. The regulation of speech is outside the scope of this rulemaking. Nor, in any event, would a condition in these exceptions related to the accuracy or objectivity of the content of messages or formulary activities be sufficiently "bright line" to be practical or readily enforceable. Nothing in this rulemaking should be construed to authorize or approve any commercial messaging, formulary compliance activity (or any other conduct) that is prohibited by any Federal, State, or local law or regulation. Moreover, technology used for marketing purposes would not meet the "necessary and used solely" standard required by the MMA for the electronic prescribing exception because marketing information is not the type of clinical support that is integral to prescribing accurate and appropriate items and services for patients.

#### d. Other Conditions

*Comment:* Many commenters supported the prohibition against donors or their agents taking any actions to disable or limit interoperability or otherwise impose barriers to compatibility.

*Response:* We agree, and we are retaining this requirement in the final exception.

*Comment:* Commenters generally agreed that the provision of equipment for personal, nonmedical purposes should not be protected.

*Response:* The exception does not protect the provision of technology for personal, nonmedical purposes.

#### 6. Multifunctional Technology

We proposed using our regulatory authority under section 1877(b)(4) of the Act to create an additional exception to protect the provision by DHS entities to physician recipients of some limited hardware (including necessary operating system software) and connectivity services that are used for more than one function, as long as a substantial use of the item or service would be to receive or transmit electronic prescription information.

*Comment:* Most commenters supported a single exception that would extend protection to technology beyond what is "necessary and used solely" for electronic prescribing. Many commenters expressed the hope that multifunctional technology ultimately would be captured in an electronic health records technology exception.

*Response:* We have decided not to create a separate exception for multifunctional technology. Instead, we are creating a new exception for the

protection of certain arrangements involving electronic health records software, information technology and training services (including connectivity services) that will serve more directly to further the overall goal of widespread adoption of interoperable electronic health records technology without some of the program or patient abuse risks inherent in gifts of multifunctional hardware. Our review of the totality of the public comments supports this approach, as more fully described in the next section.

#### D. Summary of the Final Provisions Related to § 411.357(v)

This final rule at § 411.357(v) contains one exception for items and services that are necessary and used solely to receive and transmit electronic prescription information. The exception mirrors the MMA language and protects donations of hardware, software, internet connectivity, and training and support services, provided that the technology meets the applicable standards under Medicare Part D at the time the items and services are donated. (See November 7, 2005 final rule (70 FR 67568) for the current, or "foundation," standards.) Further, donations may not take into account, directly or indirectly, the volume or value of referrals from the physician or other business generated between the parties. We have not placed a monetary limit on the value of donations of electronic prescribing technology. We have retained most of the key provisions from the proposed rule; however, the final rule does not include a requirement for physician certification of technical and functional non-equivalence. We emphasize that: (1) The final rule protects technology necessary and used solely to receive and transmit *any* prescription information, whether related to drugs or to other items or services normally ordered by prescription; and (2) donations may be in an unlimited amount.

We are *not* finalizing a separate exception for multifunctional electronic prescribing technology.

#### IV. Response to Comments and Final Rule Provisions Regarding Electronic Health Records Exception (Proposed § 411.357(w))

##### A. Summary of the Proposed Provisions Related to § 411.357(w)

Prior to publication of the proposed rule, many in the hospital industry, among others, raised the issue of the need for protection under an exception for arrangements involving technology other than electronic prescribing. To encourage the adoption of electronic

health records technology consistent with the ultimate goal of achieving fully interoperable electronic health records for all patients, we proposed using our legal authority at section 1877(b)(4) of the Act to issue two exceptions related to electronic health records software and training services that are necessary and used to receive, transmit, and maintain electronic health records of the donor's or physician's patients. We did not propose protecting hardware in either exception, because we believe electronic health records software and training services are the components of electronic health records systems most likely to be needed by physicians, and because donations of valuable, multifunctional hardware (such as computers and servers) would inherently pose a higher risk of constituting a disguised payment for referrals. The first proposed exception would have applied to donations made before the Secretary adopts product certification criteria, including criteria for interoperability, functionality, and privacy and security of electronic health records technology. (In the proposed rule (70 FR 59197), we referred to this proposed exception as the "pre-interoperability" exception.) We proposed the following:

- That the electronic health records software must be necessary and used solely for the transmission, receipt, and maintenance of patients' electronic health records and prescription drug information.
- Defining "necessary" consistent with the definition of the term in the proposed exception for electronic prescribing arrangements.
- That the software would have to include an electronic prescribing component that meets the applicable standards under Medicare Part D at the time the software is donated.
- That the pre-interoperability exception would not protect the provision of other types of technology (for example, billing, scheduling, or general office management software) or any software or staff used by the physician to conduct business or engage in activities unrelated to the physician's medical practice. We also proposed that the exception would not protect the provision of staff to the physician or the physician's office.
- Defining the term "electronic health records" and we solicited comments on an appropriate definition.
- Including documentation provisions comparable to those proposed for the electronic prescribing exception.
- Prohibiting protection for any arrangement in which the donor (or any

person on the donor's behalf) disabled the interoperability of any component of the software or otherwise imposed barriers to compatibility.

- Limiting the aggregate value of protected technology that a donor could provide to a physician under the pre-interoperability exception or in combination with the other proposed exceptions. We noted that we were considering the same alternatives for setting a value limit that were proposed for the electronic prescribing exception. These could include: An aggregate dollar cap; a limitation that would require cost sharing by the physician; or another methodology, for example, a reduction in the amount of any cap over time.

- Including the same categories of donors and physician recipients that we proposed for the electronic prescribing exception.

- Including other requirements drawn from the proposed electronic prescribing exception, for example, the restriction on arrangements tied to the volume or value of referrals or other business generated between the donor and recipient (proposed § 411.357(x)(4)); a prohibition on conditioning business on the receipt of technology (proposed § 411.357(x)(3)); and an all payors condition (proposed § 411.357(x)(7)).

- Sunsetting the pre-interoperability exception once product certification criteria were finalized.

Recognizing that some enhanced flexibility in the conditions applicable under an exception for electronic health records arrangements might be appropriate once standards and product certification criteria were developed for electronic health records (including standards for interoperability) and adopted by the Secretary, we proposed a second exception that we referred to as the "post-interoperability" exception. We noted that adoption of uniform interoperability standards, as well as product certification criteria to ensure that products meet those standards, would help prevent technology from being used by unscrupulous parties to lock in streams of referrals or other business. In summary, we proposed the following for the post-interoperability exception:

- That protected technology must be certified in accordance with product certification criteria adopted by the Secretary, and must include an electronic prescribing component that complies with applicable electronic prescribing standards established by the Secretary for the Part D program, to the extent that those standards are not incorporated into the product certification criteria.

- That the same conditions proposed for the pre-interoperability exception would apply, with the following exceptions: (1) We proposed including some additional software applications as long as electronic health records and electronic prescribing remain core functions; (2) we proposed including additional categories of donors and physician recipients; (3) we proposed including specific selection criteria to identify acceptable methods for selecting physician recipients; and (4) we proposed a potentially larger limit on the value of protected technology.

We also proposed and solicited public comment on the scope and conditions for the electronic health records exceptions.

As noted previously in this preamble and in the proposed rule, our decision to propose these exceptions did not reflect a view that all electronic health records arrangements would require protection under an exception to the physician self-referral law. Moreover, in many cases, such arrangements may qualify for such protection under existing exceptions or may not implicate the physician self-referral law.

#### B. General Comments

*Comment:* Most commenters expressed concern with the pre- and post-interoperability bifurcated approach to the exceptions, asserting that a bifurcated approach was not necessary, too confusing, and/or contrary to the goal of achieving widespread adoption of health information technology. These commenters urged us to abandon the bifurcated approach and to publish one final exception for remuneration in the form of electronic health records technology. Commenters urged us and the OIG to adopt similar approaches to a post-interoperability exception under the physician self-referral law and a post-interoperability safe harbor under the anti-kickback statute.

*Response:* We have finalized one exception for arrangements involving the donation of electronic health records software or information technology and training services at § 411.357(w).

*Comment:* Some commenters suggested that we incorporate the general concept of interoperability into the pre-interoperability exception, even if we do not require product certification. Many commenters stated that encouraging electronic health records arrangements before interoperability standards are available would be undesirable public policy. Some commenters believe that a product certification process that would include interoperability standards is

already underway and within the timeframe for this rulemaking. Others expressed that we should either not wait until certification standards are adopted before finalizing the post-interoperability exception, or not finalize either of the exceptions until the certification standards are adopted. One commenter expressed that, since timetables for the rulemaking and for the certification standards are not known, we should consider promulgating the regulation from the pre-interoperability perspective and address the post-interoperability era in the future.

*Response:* We agree with the commenters that a bifurcated approach is not necessary. We are not promulgating separate exceptions for pre- and post-interoperability as we had proposed in the October 11, 2005 proposed rule. The industry has made considerable progress in developing certification criteria for electronic health records products within a very short time. In fact, one certification organization has already completed an initial set of certification criteria for ambulatory electronic health records. In some cases, there may be products for which no certification criteria are available. To address this situation, and to ensure interoperability to the extent possible, the final exception requires that donated software be interoperable at the time of the donation (regardless of whether the product is actually certified), and bars a donor or any entity on its behalf from taking any actions to disable or limit interoperability. This latter condition also protects against donors that improperly may attempt to create closed or limited electronic health records systems by offering technology that functionally or practically locks in business for the donor.

*Comment:* Many commenters supported the proposed prohibition against donors or their agents taking any actions to disable or limit interoperability or otherwise impose barriers to compatibility of the donated technology with other technology, including technology owned or operated by competing providers and suppliers.

*Response:* We have included this requirement in the final exception. We believe this condition helps ensure that remunerative arrangements involving health information technology will further the policy goal of fully interoperable health information systems and will not be misused to steer Medicare referrals to the donor.

*Comment:* Some commenters suggested that early adopters of electronic health records technology

should be offered incentives or rewards because, otherwise, physicians might delay investing their own funds in electronic health records systems while waiting for a donor to offer them free technology. The commenters continued that this delay would have a detrimental effect on the adoption of electronic health records technology.

*Response:* It is unclear what types of incentives or rewards the commenters are requesting. We note that the exception does not provide incentives or rewards, nor would it be appropriate for an exception to do so; rather, the exception protects the donation of certain electronic health records technology when all conditions of the exception are satisfied. The exception would not protect any cash reimbursement paid to physician recipients for costs they incurred in adopting technology.

*Comment:* One commenter requested that we and the OIG coordinate with the Internal Revenue Service (“IRS”) to provide guidance through an IRS revenue ruling publication to alleviate concerns related to tax exemption.

*Response:* The commenter should contact the IRS directly with its concerns.

### C. Specific Comments

#### 1. Protected Compensation in the Form of Items or Services (Nonmonetary Remuneration)

##### a. Covered Technology

We proposed protecting the donation of electronic health records software and directly related training services that are necessary to receive, transmit, and maintain electronic health records of the entity’s or physician’s patients, provided that the software includes an electronic prescribing component. Importantly, we stated our intention to protect donations of systems that improve patient care rather than of systems comprised solely or primarily of technology that is incidental to the core functions of electronic prescribing and electronic health records.

*Comment:* Some commenters asked whether our proposal to protect certain technology necessary and used to “receive, transmit, and maintain” electronic health records would include technology used to develop, implement, operate, facilitate, produce, and supplement electronic health records.

*Response:* We intended that the final rule would encompass the types of uses described by the commenters. To make this intent clear, we have clarified the final rule to provide that the protected technology must be necessary and used predominantly to “create, maintain,

transmit, or receive” electronic health records.

*Comment:* Most commenters believe that the proposed scope of protected remuneration was too narrow. A few commenters suggested that we limit the scope of the protected technology.

Commenters variously suggested that the exception should also protect remuneration in the form of hardware, operating software, connectivity items, support services, secure messaging, storage devices, clinical decision support technology, services related to training and ongoing maintenance, rights, licenses, and intellectual property, as well as interfaces and translation software to allow physician offices to exchange data with hospital systems, all of which the commenters considered necessary for a fully-functioning electronic health records system.

Some commenters encouraged us to exclude from protection hardware and broadband wireless internet connectivity and to tailor the protection of this exception narrowly to cover software, training, and information technology support services. One commenter opined that ongoing support, such as help desk support, could pose a risk of abuse, because the physician would become dependent on the donor for the help desk support, and might feel obligated to refer to the donor to ensure continuation of that support. This commenter suggested that we protect initial, start-up support services, but not long-term, ongoing system support. A few commenters suggested that the scope of support services, training, and other items and services should be a defined contribution not to exceed 365 person-days.

*Response:* We have carefully considered the comments in light of our intention to promote the adoption of electronic health records without risk of program or patient abuse. The final rule protects electronic health records software or information technology and training services necessary and used predominantly to create, maintain, transmit, or receive electronic health records.

To ensure that the exception is only available for software, information technology and training services that are closely related to electronic health records, the exception provides that electronic health records functions must predominate. The core functionality of the technology must be the creation, maintenance, transmission, or receipt of individual patients’ electronic health records. In addition, the donated software must have electronic prescribing capability, either through an

electronic prescribing component or the ability to interface with the physician’s existing electronic prescribing system, that meets the applicable standards under Medicare Part D at the time the items and services are provided. Although electronic health records purposes must predominate, protected software packages may also include other software and functionality directly related to the care and treatment of individual patients (for example, patient administration, scheduling functions, billing, clinical support software, etc.). This condition recognizes that it is common for electronic health records software to be integrated with other features.

We interpret “software, information technology and training services necessary and used predominantly” to include, by way of example, the following:

- Interface and translation software;
- Rights, licenses, and intellectual property related to electronic health records software;
- Connectivity services, including broadband and wireless internet services;
- Clinical support and information services related to patient care (but not separate research or marketing support services);
- Maintenance services;
- Secure messaging (for example, permitting physicians to communicate with patients through electronic messaging); and
- Training and support services (such as access to help desk services).

We interpret the scope of covered electronic health records technology to exclude—

- Hardware (and operating software that makes the hardware function);
- Storage devices;
- Software with core functionality other than electronic health records (for example, human resources or payroll software); and
- Items or services used by a physician primarily to conduct personal business or business unrelated to the physician’s practice.

Further, training and support services do not include the provision of staff to physicians or their offices. For example, the exception would not protect the provision of staff to transfer paper records to the electronic format. We believe that most physicians already possess the hardware necessary to operate electronic health records systems. Moreover, hardware represents a much lower cost to the physician when compared to electronic health records software. Requiring investment by a physician recipient in the hardware

portion of the electronic health records system safeguards further against program abuse.

Finally, consistent with our discussion in the proposed rule and our goal of widespread adoption of electronic health records, we are not protecting systems comprised solely or primarily of technology that is incidental to electronic prescribing and electronic health records. As previously discussed, we intend that this exception protect electronic health records technology arrangements in which the electronic health records component predominates.

Although we share the concerns of those commenters that ongoing remuneration, such as maintenance and help desk support, creates long-term remunerative ties between donors and recipients, we believe that requiring donated electronic health records to be interoperable protects against the "tying" of referral sources (physicians) to donor entities seeking referrals. Further, the cost sharing requirement and sunset provision in the final electronic health records exception should also address this concern.

*Comment:* With respect to internet connectivity services, some commenters suggested that donations for connectivity should be limited to any necessary devices for connectivity and technical support for selecting and installing the appropriate connectivity services, but should not include connectivity fees, which should be an ongoing expense of the physician. Other commenters suggested that covered technology should include "T1" lines or other enhanced broadband connectivity (including connectivity needed to transfer medical images and EKGs (especially in rural areas)), routers to speed download times, secure connections and messaging, and ongoing maintenance and support and interfaces.

*Response:* The final exception protects the donation of all forms of connectivity services. We believe the choice of appropriate connectivity services is an individual determination best made by the donors and physician recipients given their specific circumstances. We note that the cost sharing requirement of § 411.357(w)(4) will apply to these services, including connectivity fees. The exception does not protect routers or modems necessary to access or enhance connectivity because hardware is not protected remuneration under the exception. As noted in the preceding response, concerns about ongoing donations of connectivity services are also addressed by the sunset provision.

*Comment:* Several commenters urged us to protect arrangements involving the donation of billing software and other software for administrative functions, such as registration and patient scheduling, because much of the "return on investment" (that is, value) for physicians who incorporate an electronic health records system into their practices is the integration of clinical and administrative systems. Commenters noted that the scope of the exception should account for the fact that the products on the market increasingly integrate administrative functions with the clinical electronic health records functions. One commenter suggested that the exception should at least prohibit the donation of technology that is unrelated to the actual electronic health records software, such as technology related to office administration. The commenter requested that the exception protect integrated bundles of applications that include an electronic health records component, provided the physician pays for the technology that is unrelated to the electronic health records software. Another commenter suggested that the exception should not protect clearly separable administrative software (for example, billing, coding, and practice management software), but protect those elements of an electronic health records system that incidentally facilitate administrative functions, such as software that links to diagnosis codes for billing purposes. The commenter suggested that these functions that dually support patient care and practice administration are valuable to the physician and a driving force behind adoption of electronic health records systems.

*Response:* As previously noted, the final exception protects the donation of electronic health records software packages that include core functionality of electronic prescribing and the creation and maintenance of individual patients' electronic health records. Protected software packages may also include other software and functionality directly related to the care and treatment of individual patients (for example, patient administration, scheduling functions, billing, clinical support software, etc.).

*Comment:* A commenter asked for further clarification on whether the exception would cover the donation of an electronic health records system operating within an "Application Service Provider" model.

*Response:* Subject to the cost sharing requirement and other conditions of the final exception, we would consider the donation of an electronic health records

system operating within an "Application Service Provider" model (a business model that provides computer-based services over a network) as covered technology.

*Comment:* A few commenters requested that the final rule require donors to provide data migration services to a physician if the physician chooses to abandon the donated electronic health records system and purchase his or her own electronic health records system.

*Response:* We believe it is not appropriate to require donors to provide data migration or any other specific service to physicians who choose to switch electronic health records systems. Donors may provide services if they wish, as long as the arrangement otherwise complies with the exception. We note that, to the extent the data migration services involve the provision of staff to the physician's office in order to transfer the data, the services would not be protected.

*Comment:* A commenter recommended that the exception specifically protect the provision of patient portal software that enables patients to maintain on-line personal medical records, including scheduling functions.

*Response:* Nothing in this final exception precludes protection for patient portal software if it meets all conditions of the exception.

*Comment:* Some commenters urged us to remove the proposed requirement that an electronic health records system include an electronic prescribing component because such a requirement may stifle investment in electronic health records technology in situations where electronic prescribing is not considered a significant need. These commenters suggested that patients would benefit most if we permit donors to first adopt electronic health records technology and then add electronic prescribing. Other commenters supported making an electronic prescribing component a mandatory part of the donated electronic health records system.

*Response:* Nothing in this exception prevents donors from adopting any particular form of technology. However, to qualify for the protection of this exception for arrangements in which the donor provides electronic health records technology to potential referral sources, we are requiring that the donated electronic health records system include electronic prescribing capacity, either in an electronic prescribing component or the ability to interface with the physician's existing electronic prescribing system that meets the

applicable standards under Medicare Part D at the time the items and services are donated. We are including this requirement, in part, because of the critical importance of electronic prescribing in producing the overall benefits of health information technology, as evidenced by section 101 of the MMA. It is our understanding that most electronic health records systems routinely include an electronic prescribing component.

*Comment:* One commenter urged that the availability of public software, such as VISTA, is not relevant to the requirements of an exception. The commenter explained that hospitals and physicians must be allowed flexibility to determine which software best meets their needs, as long as it also meets the final interoperability standards.

*Response:* We agree that hospitals and physicians should have flexibility to determine which software best meets their needs. We are not adopting any express requirements related to public software. Nothing in this final rule limits physician choice with respect to health information technology. Protection is only available under this exception for technology that meets the conditions of the exception, including interoperability. We expect that physicians would appropriately evaluate any offer of health information technology to ensure that it best meets their needs before accepting the donation.

#### b. Definition of Electronic Health Records

*Comment:* We requested comments on how to define “electronic health record.” One commenter suggested that we should define electronic health record as electronically originated and/or maintained clinical health information, that may incorporate data derived from multiple sources and that replaces the paper record as the primary source of patient information. Another commenter suggested that we protect any interoperable component or module of an electronic health record. Another commenter suggested that “electronic health record” be defined for purposes of this exception to accomplish two objectives: (1) To promote a connected system of electronic health care information available to all doctors and patients whenever and wherever possible; and (2) to promote the collection of quality and outcome measures to facilitate pay-for-performance payment methodologies. This commenter referred to the Medicare Payment Advisory Commission (“MedPAC”) description of electronic health record clinical

information technology and suggested that we define “electronic health record” to include applications that permit the following functions:

- Tracking patients’ care over time;
- Allowing physicians to order medications, laboratory work, and other tests electronically and access test results;
- Providing alerts and reminders for physicians; and
- Producing and transmitting prescriptions electronically.

(See MedPAC “Report to the Congress: Medicare Payment Policy” at 206 (2005) (available at [http://www.medpac.gov/publications/congressional\\_reports/Mar05\\_EntireReport.pdf](http://www.medpac.gov/publications/congressional_reports/Mar05_EntireReport.pdf).) A commenter requested that we define “electronic health record” broadly enough to include applications that capture clinical trial data. Another commenter did not think it was in the best interest of the industry for us to propose such a definition at this time.

*Response:* For the purpose of this regulation, we are adopting a broad definition of “electronic health record” to read as follows: “A repository of consumer health status information in computer processable form used for clinical diagnosis and treatment for a broad array of clinical conditions.” We are adopting a broad definition consistent with our goal of encouraging widespread adoption of electronic health records technology.

*Comment:* A commenter stated that the term “electronic health record,” as used in the proposed rule, is inconsistent with the same terminology when used within the information technology industry, and is therefore confusing. The commenter suggested that we may have meant to use the term “electronic medical record.” According to the commenter, an “electronic health record” is commonly used to describe the broad concept of the total health care data that exists regarding an individual within an electronic universe (including, for example, the patient’s personal health record, medication history stored by an insurance plan, electronic imaging results stored at a hospital, etc.). An “electronic medical record” typically refers to patient-centric, electronically maintained information about an individual’s health status and care that focuses on tasks and events related to patient care, is optimized for use by a physician, and relates to care within a single clinical delivery system.

*Response:* We recognize that there are several ways in which information technology terms are used, including the terminology “electronic health

record” and “electronic medical record.” For purposes of this exception, we have opted to use the term “electronic health record,” and we have included a definition of “electronic health record” in this final rule.

*Comment:* We solicited comments on whether we should require that, in order to qualify for protection under this exception, electronic health records software include a computerized physician order entry (“CPOE”) component. Many commenters stated that, without either agreed upon standards or product criteria, a CPOE component should not be required. These commenters noted that CPOE and electronic prescribing functionalities can be quite similar and may be redundant. These commenters were concerned that mandating implementation of CPOE technology along with electronic health records software could deter development of either system. Another commenter noted that most of the off-the-shelf generic CPOE programs have proven ineffective to date. Some commenters supported permitting CPOE as part of the electronic health records software, as long as it is not a particular type of CPOE.

*Response:* We are not persuaded to require that electronic health records technology include a CPOE component in order to qualify for protection under this exception. We note that nothing in this exception mandates the implementation of any particular technology or functions.

*Comment:* Most commenters opposed our proposal to require that electronic health records software be compatible with Public Health Information Network (“PHIN”) preparedness standards or BioSense standards in order to qualify for the protection of this exception. These commenters pointed out that there is currently no industry consensus on preparedness standards, nor are there product certification criteria established for these programs. These commenters were concerned that clinicians and patients may be alarmed by the idea of clinician systems being linked to government systems for biosurveillance purposes.

*Response:* We are not including this requirement in the final exception.

#### c. “Necessary and Used Solely” and Technical and Functional Equivalence

##### 1. Interpretation of “Necessary”

We proposed interpreting “necessary” in the electronic health records exception consistent with our interpretation of the term in section

II.A.1 of the proposed rule in the exception for electronic prescribing.

*Comment:* Some commenters asked whether our proposal to protect certain technology necessary and used to “receive, transmit, and maintain” electronic health records would include technology used to develop, implement, operate, facilitate, produce, and supplement electronic health records.

*Response:* We intend that the final rule will encompass the types of uses described by the commenters. To make this intent clear, we have clarified the final rule to provide that the protected technology must be necessary and used predominantly to “create, maintain, transmit, or receive” electronic health records.

*Comment:* One commenter requested that we clarify that the term “necessary” would not preclude the provision of outpatient-focused (also referred to as “ambulatory-focused”) electronic health records software to physicians who may already have access through the internet or otherwise to an inpatient-focused electronic health records systems.

*Response:* The final rule does not preclude the provision of outpatient or ambulatory electronic health records software to physicians who already have access to inpatient-focused systems.

## 2. Technical and Functional Equivalence

We proposed requiring the physician recipient of donated electronic health records technology to certify that the items and services to be provided are not technically or functionally equivalent to items or services the physician already possesses or has obtained. The proposed exception would have required that the certification be updated before the provision of any necessary upgrades or items and services not reflected in the original certification. We expressed our concern that the certification process would be ineffective as a safeguard against program or patient abuse if it were a mere formality or if physicians simply executed a form certification provided by a donor. Therefore, we proposed that the donor must not have actual knowledge of, and not act in reckless disregard or deliberate ignorance of, the fact that the physician possessed or had obtained items and services that were technically or functionally equivalent to those donated by the donor and that the exception would protect the physician only if the certification were truthful.

*Comment:* Several commenters requested further clarification regarding the meaning of “technically or functionally equivalent” and the

meaning of “significantly enhance the functionality” as we used those terms in the proposed rule. Other commenters expressed concerns about the requirement, asserting that it would deter physicians who are not technology experts from adopting health information technology, and might result in physicians hiring costly technology consultants to evaluate their existing systems. A commenter expressed concern that the exception not hinder the goals of widespread adoption of electronic health records by, for example, excluding from protection technology that would standardize the technology used by all physician recipients or updated, user-friendly technology that would replace outdated, outmoded, or unusable technology. For these reasons, several commenters stated that technical and functional equivalence was not an appropriate or workable standard for assessing whether donated items and services are necessary and that, accordingly, the requirement should not be adopted.

Other commenters suggested modifications to the proposed rule. One commenter suggested that hospitals should incorporate inquiries regarding the technological items and services physicians possess into the surveys physicians must complete to acquire and maintain physician privileges. Another suggested that any costs associated with the certification process should be included as part of the services offered by the donor. A few commenters suggested that we should provide financial assistance in evaluating the existing technology, while another commenter proposed that we publish guidelines for technological equivalence upon which all donors and physicians could rely. Some commenters urged that the certification requirement incorporate a “good faith” standard for compliance, while other commenters expressed concern that donors would not be in a position to evaluate the technology already possessed by potential physician recipients and, therefore, that protection under this exception for donors should not hinge on the physician’s certification. Another commenter requested that we provide “templates” for the written certification to ensure a simple and transparent certification process. One commenter expressed concern that a requirement for ongoing certification to account for upgrades or new software, hardware, or services would create an unnecessary burden. Another commenter proposed that there should be one certification required once interoperability standards for all

health information technology components are finalized.

*Response:* Having considered the public comments, we have concluded that our proposal to require physicians to certify in writing that they do not possess equivalent technology might become unnecessarily burdensome. We are not requiring a written certification. The final exception requires that protected donations be limited to electronic health records software or information technology and training services that are necessary and used predominantly to create, maintain, transmit, or receive electronic health records. We do not believe software and services are “necessary” if the physician recipient already possesses the equivalent software or services. The provision of equivalent items and services poses a risk of abuse, since such arrangements potentially confer independent value on the recipient (that is, the value of the existing items and services that might be put to other uses) unrelated to the need for electronic health records technology. Thus, if a donor knows that the physician already possesses the equivalent items or services, or acts in deliberate ignorance or reckless disregard of that fact, the donor will not be protected by the exception. Thus, prudent donors may want to make reasonable inquiries to potential physician recipients and document the communications. We do not believe this requirement necessitates the hiring of technical experts by either the donor or physician recipient.

The final exception would not preclude upgrades of items or services that enhance the functionality of the physician’s existing technology, including upgrades that make software more user-friendly or current, nor would it preclude items and services that result in standardization of systems among donors and physicians, provided that the standardization enhances the functionality of the electronic health records system (and any donated software is interoperable).

*Comment:* Many commenters requested further clarification of our concern about the risk of physicians intentionally divesting themselves of technically or functionally equivalent technology that they already possess or have obtained in order to shift costs to the donor. (See October 11, 2005 proposed rule, (70 FR 59188).) These commenters expressed the opinion that physicians would not intentionally divest themselves of health information technology given the low adoption rate of health information technology and the time and resource commitment

necessary to implement and maintain a health information technology system.

*Response:* Although we believe that there is a real potential for a physician to divest intentionally himself or herself of health information technology to shift the costs to a donor, we are not including any specific conditions to address such divestiture. Rather, we believe that the totality of the conditions in the final exception, including, for example, the cost sharing requirement and the sunset provision, should adequately address our concerns. We believe that physicians, acting as prudent buyers, are less likely to divest themselves of technology for which they would have to contribute to the replacement cost.

#### d. Interoperability/Standards

The implementation of electronic health information technology is a national priority that has the potential to improve our health care system. Interoperable electronic health information technology would allow patient information to be portable and to move with consumers from one point of care to another. This would require an infrastructure that can help clinicians gain access to critical health information when treatment decisions are being made, while keeping that information confidential and secure. We believe that the promise of a secure and seamless information exchange that reduces medical errors, improves the quality of patient care, and improves efficiency will be realized only when we have a standardized system that is open, adaptable, interoperable, and predictable.

As discussed in the proposed rule, we believe that interoperable electronic health records technology, once implemented, has the potential to increase health care quality and improve efficiency, which are outcomes consistent with our goals in exploring Pay-for-Performance options. We also believe it is important to promote these open, interconnected, interoperable electronic health records systems that help improve the quality of patient care and efficiency in the delivery of health care to patients, without protecting arrangements that hinder marketplace competition, serve as marketing platforms, or are mechanisms to influence clinical decision-making inappropriately. We proposed two types of conditions that would make compatibility and interoperability of donated technology key features of protected arrangements. These features would encourage the adoption of open, interconnected, interoperable systems, and thereby reduce the risk of fraud and

abuse. First, we proposed that once interoperability and other product criteria have been recognized, electronic health records technology should be certified in accordance with standards adopted by the Secretary. Second, we proposed that a donor (or entity acting on behalf of the donor) not limit or restrict the use of the technology with other electronic prescription or health records systems, or otherwise impose barriers to compatibility.

*Comment:* Many commenters advocated a requirement that all donations meet the Certification Commission for Healthcare Information Technology (CCHIT) approved certification levels of functionality, interoperability, and security. One commenter suggested that we measure interoperability based on accepted, consensus-driven standards that are already in place, such as the Electronic Health Record-Lab Interoperability and Connectivity Standards or other interoperability standards adopted by the Federal government as part of the Consolidated Health Informatics initiative (see <http://www.hhs.gov/healthit/chi.html>). Some commenters expressed concern that clinicians who adopt health information technology before the existence of final certification standards would be unfairly penalized. These commenters were also concerned about the chilling effect on some early adoption arrangements where certification standards are not yet available. These commenters requested that we consider "grandfathering" clinicians whose existing health information technology systems are not compliant with the certification standards by permitting them a one-time opportunity to upgrade their systems to be compliant with CCHIT certification criteria. As an alternative to requiring CCHIT certification, a few commenters recommended that we condition the ongoing use of the exception on the donated software being capable of exchanging health care information in compliance with applicable standards once adopted by the Secretary and on no action being taken that would pose a barrier to the information exchange.

*Response:* Having considered the options, and consistent with Department policy, we have concluded that software will qualify for the protection of the exception if it is interoperable as defined in this final rule. Software will be deemed to be interoperable if it is certified by a certifying body recognized by the Secretary. Nothing in the final rule precludes donors from providing physicians with upgrades to software that meet the definition of

"interoperable" or would make the software comply with then-existing certification standards.

*Comment:* We indicated in the October 11, 2005 proposed rule (70 FR 59186) that we were considering defining the term "interoperable" for purposes of the exception to mean "the ability of different operating and software systems, applications, and networks to communicate and exchange data in an accurate, secure, effective, useful, and consistent manner." One commenter agreed with this proposed definition. Another commenter suggested that we adopt the definition developed by the National Alliance for Health Information Technology (NAHIT): "the ability of different information technology systems and software applications to communicate, to exchange data accurately, effectively, and consistently, and to use the information that has been exchanged." One commenter suggested that the definition of interoperability be flexible enough to adapt to evolving industry standards. A few commenters suggested defining interoperability as "the uniform and efficient movement of electronic healthcare data from one system to another, such that clinical or operational purpose and meaning of the data is preserved and unaltered." One commenter opposed any definition of interoperability that would require a donor to support electronic transmissions from technology supplied by other vendors or to host applications accessible by software supplied by other vendors.

*Response:* Having reviewed the public comments and upon further consideration, we are defining "interoperable" to mean that, at the time of the donation, the software is "able to (1) communicate and exchange data accurately, effectively, securely, and consistently with different information technology systems, software applications, and networks, in various settings, and (2) exchange data such that the clinical or operational purpose and meaning of the data are preserved and unaltered."

Interoperability must apply in various settings, meaning that the software must be interoperable with respect to systems, applications, and networks that are both internal and external to the donor's or physician recipient's systems, applications, and networks. In other words, software will not be considered interoperable if it is capable of communicating or exchanging data only within a limited health care system or community.

We believe this definition reflects our intent to protect only those

arrangements that will foster open, interconnected, interoperable electronic health records systems that help improve the quality of patient care and efficiency in the delivery of health care to patients, without undue risk that donors might use arrangements to lock in referrals from physician recipients.

We are mindful that the ability of software to be interoperable is evolving as technology develops. In assessing whether software is interoperable, we believe the appropriate inquiry is whether the software is as interoperable as feasible given the prevailing state of technology at the time the items or services are provided to the physician recipient. Parties should have a reasonable basis for determining that software is interoperable. We believe it would be appropriate—and, indeed, advisable—for parties to consult any standards and criteria related to interoperability recognized by the Department. Compliance with these standards and criteria will provide greater certainty to donors and recipients that products meet the interoperability requirement, and may be relevant in an enforcement action. We note further that parties wishing to avoid any uncertainty can avail themselves of the “deeming” provision, which provides that software that is certified by a body recognized by the Secretary will be deemed to be interoperable for purposes of the exception. In order to ensure interoperability, products must have an up-to-date certification at the time of donation, and we are requiring that, to meet the deeming provision, the software must have been certified within 12 months prior to the date of the donation.

We are including the condition that the donor (or any person on the donor’s behalf) must not take any actions to limit or restrict the ability of the items or services to be interoperable with other electronic prescription information items or services or electronic health information systems. We believe this condition clearly reflects our intent that donors should not limit or restrict the use, compatibility, or interoperability of donated technology. We note that compliance with the condition in § 411.357(w)(3) is a separate requirement from compliance with § 411.357(w)(2), which requires that products must be interoperable and will be deemed interoperable if a certifying body recognized by the Secretary has certified the software within no more than 12 months prior to the date it is provided to the physician. For example, if a donor takes actions that would

cause a certified product to fall out of compliance with the interoperability standards that apply to the certified product, we would consider that to be an action to limit or restrict the use or compatibility of the items or services for purposes of § 411.357(w)(3). We are not persuaded to protect arrangements where use, compatibility, or interoperability is limited to the products of specific vendors. To the contrary, we believe that inherent in the concept of interoperability is the ability of technology to communicate with products of other vendors.

*Comment:* Many commenters supported the proposed prohibition against donors or their agents taking any actions to disable or limit interoperability or otherwise impose barriers to compatibility of the donated technology with other technology, including technology owned or operated by competing providers and suppliers.

*Response:* We have revised § 411.357(w)(3) to clarify this requirement in the final exception. We believe this condition will help ensure that donations of health information technology will further the policy goal of fully interoperable health information systems and will not be misused to steer business to the donor.

## 2. Permissible Donors and Physician Recipients

### a. Donors

We proposed to limit the scope of protected donors under the electronic health records exception to hospitals, group practices, PDP sponsors, and MA organizations, consistent with the MMA-mandated donors for the electronic prescribing exception. We indicated that we selected these donors because they have a direct and primary patient care relationship and a central role in the health care delivery infrastructure that would justify protection under the exception for the provision of electronic health records technology that would not be appropriate for other types of providers and suppliers, including providers and suppliers of ancillary services.

*Comment:* Most commenters stated that the proposed scope of potential donors was too limited. Commenters variously suggested that the protected donors include some or all of the following categories:

- Nursing facilities;
- Assisted living and residential care facilities;
- Intermediate care facilities for persons with mental retardation;
- Mental health facilities;
- Organizations providing population health management services (such as

disease and care management programs and services);

- All components of an integrated delivery system (“IDS”) (including network providers or other entities that operate, support, or manage network providers);

- Clinical laboratories;
- Pharmaceutical manufacturers;
- Durable medical equipment

suppliers;

- Radiation oncology centers;
- Community health centers;
- Physician-hospital organizations;
- Health plans;
- Regional Health Information

Organizations (“RHIOs”);

- Dialysis facilities; and

- Other entities that, in the

commenters’ views, enhance the overall health of a community.

One commenter representing dialysis facilities suggested that the exception should protect donations of nonmonetary remuneration by all providers that maintain medical staffs pursuant to medical staff bylaws when the donations are made to members of the medical staff. Another commenter suggested that a clinical data exchange (or community-wide health information system) should be included as a protected donor, because individual stakeholders in health information technology projects are unlikely to develop, purchase, or donate items necessary to implement and maintain a true community-wide clinical data exchange. A few commenters stated that health plans and pharmacy benefits managers (PBMs) should be protected donors because, according to the commenters, these entities develop health information technology and are engaged with physicians on a direct level to increase the utilization of electronic prescribing and electronic health records technology. These commenters urged that the risk to the Medicare program and its beneficiaries is reduced because health plans and PBMs have business incentives to limit utilization of prescriptions. A few commenters suggested that we should permit any entity that has an interest in donating health information technology to do so.

*Response:* Recognizing that extending the protection of the exception to a wider group of donors may further facilitate the dissemination of the technology and after carefully considering the recommendations of the commenters, we have expanded the list of protected donors. In an effort to create a bright line rule, protected donors include all entities (as that term is defined at § 411.351) that furnish DHS. DHS entities may donate covered

technology to any physician. To the extent that a PDP sponsor or MA organization is an entity that furnishes DHS, donations of electronic health records software or information technology and services by the PDP sponsor or MA organization would be permissible, provided that all conditions of the exception are met. (When PDP sponsors and MA organizations do not satisfy that definition, the physician self-referral prohibition may not be implicated.) Moreover, PDP sponsors and MA organizations potentially may avail themselves of other existing exceptions.

In identifying the final list of protected donors, we considered the important goal of encouraging the rapid adoption of interoperable electronic health records by physicians and other providers. We believe that, although some types of DHS entities may have a more direct and central role in the provision of care to patients than other DHS entities, the goal of widespread adoption of interoperable electronic health records is sufficiently important to permit all types of DHS entities to donate covered technology. Expanding the list of permissible donors beyond those identified in the proposed rule will expedite adoption of electronic health records. We also believe that our concerns about the potential for increased utilization or anticompetitive behavior that could arise from permitting an expanded list of donors to donate electronic health records technology are addressed through the additional conditions and limitations included in the final rule. Specifically, we believe that the requirements that donated software be interoperable and that physicians contribute 15 percent to the cost of the donated technology, and the limited duration of the exception (it sunsets on December 31, 2013), if met, provide adequate protection against program and patient abuse. We caution that compliance with *each* condition of the exception is mandatory in order for an arrangement to enjoy the protection of the exception. We are not expanding the list of protected donors to include every type of health care entity requested by the commenters as the physician self-referral law does not apply to many of the suggested entities (for example, pharmaceutical manufacturers and RHIOs). In addition, as discussed in this preamble, protection under this exception may not be needed for all arrangements involving the provision of electronic health records items and services.

*Comment:* A commenter requested that Federally qualified health clinics (FQHCs), as defined in the Medicaid

statute and Medicare regulations, should be included as permissible donors.

*Response:* As entities furnishing DHS, FQHCs are protected donors under the final rule.

*Comment:* A commenter requested that we expand the list of permissible donors to include research and manufacturing entities and suggested that blind trusts could be established utilizing funds from several pharmaceutical companies to reduce the risk of program or patient abuse. Another commenter requested that we include entities in the research-based biopharmaceutical industry as permissible donors, noting that the widespread adoption of health information technology could reduce the need for proprietary systems used solely for purposes of clinical trial programs. One commenter requested that health information technology vendors be included as protected donors.

*Response:* We are not including research and manufacturing entities, entities in the research-based biopharmaceutical industry, or health information technology vendors as protected donors for purposes of this final exception because they are not subject to the prohibitions of the physician self-referral law as they are not entities furnishing DHS. With respect to the establishment of blind trusts, such arrangements would be outside the scope of this rulemaking.

*Comment:* One commenter strongly urged us to expand the list of protected donors to give physicians the opportunity to choose between different software offerings. Other commenters suggested that the exception should require an open, transparent Request for Proposal ("RFP") process whereby the donating entity would be required to offer technology from a minimum of three vendors for the physician to select. These commenters expressed the view that a multivendor, open RFP process would ensure competitive market pricing and would allow physicians to participate in the selection process to ensure that services meet the needs of their clinical practices, while also protecting against the physician being locked in by the donating entity. Another commenter requested that the final rule clearly state that physicians should be free to choose their own electronic health records systems or should be offered a choice by entities providing subsidies or assistance for purchasing these systems.

*Response:* Physicians remain free to choose any electronic health information technology that suits their

needs. However, we are not requiring donors to facilitate that choice for purposes of the exception, although donors must offer interoperable products and must not impede the interoperability of any technology they decide to offer. We decline to require the type of RFP process requested by the commenter, as it would be unnecessarily complex, burdensome and impractical, and would increase significantly the transaction costs for donating electronic health records technology. In addition, nothing in this exception requires donors to donate any particular level, scope, or combination of items and services.

*Comment:* Commenters from the laboratory industry strongly urged us to include laboratories as protected donors. They argued that reducing duplicative laboratory testing is a potential benefit to the implementation of interoperable electronic health records. These commenters stated that clinical laboratories should be included in the exception to achieve a level playing field and the goal of widespread adoption of technology.

*Response:* Because clinical laboratories are entities furnishing DHS, we are including them as permissible donors under the final exception.

*Comment:* A commenter suggested that the exception should protect nonmonetary remuneration offered by partnerships or consortia of otherwise permissible donors, so that parties could work together and share the cost of expanding needed health information technology in the community.

*Response:* We discern nothing in the final exception that necessarily would preclude a partnership or consortium of otherwise permissible donors from entering into a protected arrangement, provided the conditions of the exception are satisfied.

#### b. Physician Recipients

*Comment:* Most commenters expressed the view that the categories of protected physician recipients were too limited and urged us to be more expansive. Commenters suggested that some or all of the following should be included as permissible recipients:

- Nonmedical staff physicians;
- Physicians who are network providers;
- Physicians who have contracted with an IDS;
- Physicians and other licensed health care professionals whose patients regularly receive inpatient and/or outpatient care at the donor hospital or health system;
- Hospitalists;
- Intensivists;

- Physician assistants;
- Nurse practitioners;
- Audiologists; and
- Independent contractors of group practices.

Commenters noted that many nonphysician providers would benefit greatly from protection under this exception, given the fact that nonphysician providers generally have limited resources available to fund office technology.

*Response:* We agree with the commenters who suggested expanding the list of protected physician recipients of donated technology to further the goal of, and achieve the benefits of, widespread adoption of electronic health information technology. The final rule permits donation of protected remuneration by an entity that furnishes DHS to any physician. Because the physician self-referral law only applies to donations to physicians, it is unnecessary for us to expand the exception to protect donations to nonphysicians.

*Comment:* Many commenters suggested that the categories of permissible recipients be expanded to include the following providers and suppliers and their staffs:

- Nursing facilities;
- Assisted living and residential care facilities;
- Intermediate care facilities for persons with mental retardation;
- Mental health facilities;
- Clinical laboratories;
- Durable medical equipment providers;
- Pharmacies, including long term care pharmacies;
- Community health centers;
- Network providers or other entities that operate, support or manage network providers;
- Physician-hospital organizations;
- Health plans;
- RHIOs; and
- Other entities designed to enhance the overall health of the community.

Commenters also requested that FQHCs, as defined in the Medicaid statute and Medicare regulations, should be included as permissible recipients.

*Response:* We decline to adopt the commenters' suggestion for permitting donations to these types of entities and their staffs. We note that the physician self-referral law applies only when a physician is a party to the financial (either compensation or ownership) arrangement. Donations to the types of entities suggested by the commenters for inclusion as permissible recipients under the final exception would not implicate the physician self-referral law if made by other nonphysician entities.

*Comment:* Many commenters requested that we permit donors to donate technology to all members of a group practice, or to the group practice as a whole, even if all members do not routinely provide services to the donor. Some commenters suggested that we should permit group practices to donate to other group practices. One commenter asked for clarification as to whether the proposed exception would apply only to the specific physician recipient of the donated technology or whether, for example, all members of a group practice could use the technology that was donated to the physician.

*Response:* The final rule contains no limitation on the physician's membership on a donor hospital's medical staff. The final exception does not protect donations from one group practice to another group practice; however, group practices, because they are entities that furnish DHS, may donate covered technology to any physician.

*Comment:* Some commenters stated that a hospital donor may not want to donate the full value of an electronic health records system to physicians outside of its medical staff. These commenters suggest permitting outside physicians to have access to the information in the hospital's electronic health records system by allowing the outside physicians to use or sublicense the hospital's electronic health records system at the cost to the hospital. These commenters also suggested allowing outside physicians to take advantage of the pricing obtained by the hospitals for electronic health records technology and related services.

*Response:* We have expanded the final exception to include all physicians as recipients when the donor is an entity that furnishes DHS. Nothing in the exception requires hospitals or other donors to offer physicians a full electronic health records system. We interpret the commenters' suggestion that community physicians be permitted to access electronic data at the hospital's cost to be a comment seeking clarification that any aggregate dollar limit on donated technology be calculated based on the donor's costs rather than retail value to the recipient. In this regard, the final exception incorporates a cost sharing requirement based on the donor's costs. It does not incorporate an aggregate dollar limit.

### 3. Selection of Physician Recipients

In light of the enhanced protection against program or patient abuse offered by interoperable electronic health records systems, this final rule permits donors to use selective criteria for

choosing physician recipients, provided that neither the eligibility of a physician, nor the amount or nature of the items or services donated, is determined in a manner that *directly* takes into account the volume or value of referrals or other business generated between the parties. We have enumerated several selection criteria which, if met, are deemed not to be *directly* related to the volume or value of referrals or other business generated between the parties (for example, a determination based on the total number of hours that the physician practices medicine or a determination based on the size of the physician's medical practice). Selection criteria that are based on the total number of prescriptions written by a physician are not prohibited. However, the final rule prohibits criteria based upon the number or value of prescriptions written by the physician that are dispensed or paid by the donor, as well as any criteria directly based on any other business generated between the parties. The final exception does not protect arrangements for which selection criteria are designed to induce a physician to change loyalties from other providers or plans to the donor.

We expect that this approach will ensure that donated technology can be targeted at physicians who use it the most in order to promote a public policy favoring adoption of electronic health records, while discouraging especially problematic direct correlations with Medicare referrals. This approach is a deliberate departure from other exceptions under the physician self-referral law based on the unique public policy considerations surrounding electronic health records and the Department's goal of encouraging widespread adoption of interoperable electronic health records. We caution, however, that outside of the context of electronic health records as specifically addressed in this final rule, and except as permitted in § 411.352(i) (special rules for productivity bonuses and profit shares distributed to group practice physicians), both direct and indirect correlations between the provision of free or deeply discounted goods or services and the volume or value of referrals or other business generated between the parties are prohibited.

*Comment:* Several commenters commended us for our efforts to prevent program or patient abuse by prohibiting efforts to increase referrals or other changes in practice patterns. Some commenters noted that we should not allow donors to choose physicians selectively based upon the volume of their prescribing, size of practice, or

whether they would be likely to adopt the technology, and stated that donors should give technology to all physicians.

One commenter suggested eliminating the criteria permitting donors to select physicians based on any reasonable and verifiable manner that is not directly related to the volume or value of referrals or other business generated between the parties. The commenter stated that this criteria is too open-ended and subjective and could become a major loophole. Other commenters supported the use of such criteria and expressed the view that the use of selection criteria to select physician recipients will improve quality of care and ensure successful adoption of health information technology by physicians. These commenters offered suggestions on the standards for selection criteria. Some commenters suggested that we consider broad criteria for the selection of physicians, and that donors should be permitted to make this decision based upon their own financial model.

A commenter recommended that selection criteria related to the volume or value of referrals should be permitted, as long as the criteria are linked to achieving greater improvement in quality of patient care or greater success in adoption of health information technology. The commenter provided the following examples:

- Participation in hospital quality improvement activities;
- Participation in medical staff meetings and activities;
- Specialty;
- Department (if health information technology is rolled out by department);
- Readiness to use health information technology;
- Consistent use of hospital-based information technology systems;
- Acting as a “physician champion” of hospital-based information technology systems;
- Willingness to serve as a trainer for other physicians;
- Size of medical practice; or
- Willingness to contribute some resources to the health information technology project.

Another commenter requested that any list of criteria included in the rule be inclusive, rather than exclusive, and that we provide further guidance on how to interpret the criteria.

*Response:* Some of the commenters’ suggestions are too subjective, impractical, or not sufficiently bright-line to be “deeming” provisions for purposes of this rulemaking. Accordingly, those suggestions are not appropriate here. Although we believe it

is important to provide some guidance with respect to selection criteria, we do not believe it is possible to enumerate a comprehensive list. Therefore, we are providing several bright-line criteria in the final rule, along with a general provision that permits other reasonable and verifiable selection criteria that do not relate directly to the volume or value of referrals. We are finalizing the criteria enumerated in the proposed rule, in addition to a criterion related to the provision of uncompensated care, specifically—

- The determination is based on the total number of prescriptions written by the physician (but not the volume or value of prescriptions dispensed by the donor);
- The determination is based on the size of the physician’s medical practice (for example, total patients, total patient encounters, or total relative value units);
- The determination is based on the total number of hours that the physician practices medicine;
- The determination is based on the physician’s overall use of automated technology in his or her medical practice (without specific reference to the use of technology in connection with referrals made to the donor);
- The determination is based on whether the physician is a member of the donor’s medical staff, if the donor has a formal medical staff;
- The determination is based on the level of uncompensated care provided by the physician; or
- The determination is made in any reasonable and verifiable manner that does not directly take into account the volume or value of referrals or other business generated between the parties.

*Comment:* Some commenters inquired whether the exception would permit a donor to offer a staggered rollout of electronic health records technology so that the technology could be provided on a selective basis, either by specialty, hospital department, or otherwise. These commenters suggested that the exception should not enumerate specific examples of instances when a staggered offering is deemed “not directly related to” referrals or other business, but rather should allow donors to offer health information technology as appropriate for each hospital’s individual financial situation.

*Response:* The final rule prohibits the selection of recipients using any method that takes into account directly the volume or value of referrals from the recipient or other business generated between the parties. The final rule provides some examples of acceptable criteria and permits any other determination that is reasonable and

verifiable. Given the potential variation in arrangements, it is not entirely clear to us how the commenters would implement their “staggered rollout.” Such arrangements should be evaluated for compliance with the exception on a case-by-case basis. We note that nothing in the exception requires that technology be provided to all potential recipients contemporaneously.

*Comment:* One commenter recommended that we reaffirm that physicians who receive donated technology remain free to choose what health information may or may not be shared with the hospital or entity providing the technology, consistent with current law and the wishes of patients and physicians.

*Response:* Nothing in this final rule regulates the sharing of health information. In addition, nothing in this final rule permits donors to influence the medical decision making of physicians or requires physicians to act in a manner that would violate any legal or ethical obligation to patients.

*Comment:* A commenter requested that we prohibit donors from selecting physicians in a manner that punishes or rewards past prescribing practices or influences their future prescribing practices. Another commenter recommended that we expressly permit any incidental increase to the volume of referrals resulting from increased quality and patient care.

*Response:* Any selection criteria directly related to past, present, or future volume of prescriptions dispensed or paid by the donor or billed to the Medicare program, or directly related to any other business generated between the parties, are strictly prohibited. Any selection criteria that punish or reward past prescribing practices or seeks to influence future prescribing practices would give rise to an inference that the selection criteria are tied directly to the volume or value of referrals. We are not adopting the commenter’s suggestion that we expressly permit increases in the volume of referrals attributable to increased quality in patient care. Whether an increase in the volume of referrals between a donor and physician recipient is attributable to increased quality in patient care, rather than an impermissible incentive, requires an evaluation of the particular facts and circumstances.

*Comment:* A commenter requested that PDP sponsors and MA organizations be permitted to determine eligibility, or the amount or nature of the items and services, in a manner that takes into account the volume and value of prescriptions written by the

physician that are paid by the PDP sponsor or MA organization. This commenter believes that PDP sponsors and MA organizations have the financial incentive to control drug utilization costs to compete effectively in the Medicare Part D marketplace.

*Response:* We are not persuaded by this commenter. Neither eligibility, nor the amount or nature of the items or services, may be determined by taking into account the volume or value of prescriptions written by the physician and paid by the PDP sponsor or MA organization. Nothing in the exception precludes PDP sponsors and MA organizations from offering protected items and services to physicians with whom they have network agreements.

*Comment:* One commenter requested that we protect donations when provided to a physician who provides a certain level of uncompensated care or a combination of uncompensated care and services to a certain number of Medicaid patients.

*Response:* The provision of uncompensated care would be an acceptable selection criterion and we have included it in the list of selection criteria deemed not to be directly related to the volume or value of referrals or other business generated between the donor and physician recipient. For example, a hospital can elect to provide technology only to rural and solo practitioners who provide high levels of uncompensated care when selecting among eligible physicians. The total number of Medicaid patients served by the practice could also be acceptable as long as there is no direct correlation with the number of Medicaid patients referred to the donor (or the value of the services provided). We do not believe it would be appropriate for us to establish a threshold level of uncompensated care necessary to qualify for protection under this exception. Donors should have flexibility to respond to the particular needs of their communities by selecting recipients based on levels of uncompensated care that reflect those needs.

#### 4. Value of Technology: Cap

We proposed, as a further safeguard against program or patient abuse, to limit the aggregate value of the qualifying electronic prescribing technology that a donor could provide to a physician. We solicited public comment on the applicable amount and methodology for limiting the aggregate value of donated technology.

We also indicated that we were considering setting an initial cap, for both the electronic prescribing and

electronic health records exceptions, which could be lowered after a certain period of time sufficient to promote the initial adoption of the technology. This approach would have the effect of encouraging investments in the desired technology while also ensuring that (as often occurs with technology), as costs decrease and technology becomes more widely adopted, the exception cannot be abused to disguise payments for referrals.

*Comment:* We solicited public comments that address the retail and nonretail costs (that is, the costs of purchasing from manufacturers, distributors, or other nonretail sources). Only a few commenters provided concrete information on the cost of health information technology, while most commenters simply noted that the cost was high, financial incentives were imperative, and adoption was not equally affordable by all sectors of the health care industry.

*Response:* We appreciate commenters providing this information, and we have considered this information in finalizing the exception. Again, we note that the Administration supports the adoption of health information technology as a normal cost of doing business to ensure patients receive high quality care.

*Comment:* Most commenters shared the opinion that there should not be a cap on the value of donated technology, stating that there is not a consistent or appropriate way to determine fair market value or establish a monetary cap that would accommodate all situations and account for the rapid advancement in technology. Some commenters believe that the attempt to ascertain the value of donations for the purpose of fraud protection could become a barrier to adoption of electronic health records, unnecessarily discourage potential donors from providing technology, or result in a reduction on the "return on investment" for electronic prescribing and electronic health records technology. Other commenters expressed concern that a low cap might discourage the implementation of electronic health records technology, while a high cap may serve to pressure hospitals to provide the maximum allowable amount. However, a few commenters shared our concern that allowing donors to provide items or services without limiting the value of such support could provide a potential for program or patient abuse.

One commenter asserted that the value of donations will be self-limiting, because donors are unlikely to spend more than is necessary, thereby eliminating the need for a cap. Another

commenter argued that a cap is not necessary as long as the donation is made without limiting or restricting the use of the electronic prescribing or electronic health records technology to services provided by the donating entity, and as long as the donation does not take into account the volume or value of referrals or other business generated between the parties.

*Response:* We agree with the commenters that determining the value of donated technology poses certain difficulties and we are not including a cap on the amount of protected donations in the final exception. While gifts of valuable items and services to existing or potential referral sources typically pose a high risk of program or patient abuse, we believe that the combination of conditions in the final exception should adequately safeguard against abusive electronic health records arrangements.

*Comment:* Most commenters, while opposing the imposition of a cap, offered other suggestions for limiting the value of protected nonmonetary remuneration. Several commenters suggested a limit on the value of protected nonmonetary remuneration in the form of a percentage contribution from the physician, that is, cost sharing by the recipient. These commenters suggested requiring either a set percentage contribution by the physician or a scaled percentage contribution by the physician that would be lowered once a predetermined threshold amount was reached. Some commenters also suggested that we consider a cost sharing method that would be based on set amounts that would be donated, with the physician recipient paying any remaining costs. The amounts could be revised over time to account for the fluctuating expense of technology and other changes that may arise. One commenter noted that studies have shown that individuals value services more when they share a portion of the cost. This commenter suggested that we should require, at a minimum, that physicians contribute towards the purchase of wireless Internet access.

*Response:* We agree that cost sharing is an appropriate method to address some of the risks inherent in unlimited donations of technology. Accordingly, the exception establishes a contribution percentage that the physician must incur. Specifically, the final rule offers protection under this exception only if the physician pays 15 percent of the donor's cost of the technology. With respect to calculation of the costs, particularly for internally-developed ("homegrown") software (that is, software that is not purchased from an

outside vendor) and internally-developed add-on modules and components (that is, software purchased from an outside vendor and internally customized to ensure operational functionality), parties should use a reasonable and verifiable method for allocating costs and are strongly encouraged to maintain contemporaneous and accurate documentation. Methods of cost allocation will be scrutinized to ensure that they do not inappropriately shift costs in a manner that provides an excess benefit to the physician recipient or results in the physician effectively paying less than 15 percent of the donor's true cost of the technology.

We believe the 15 percent cost sharing requirement is high enough to encourage prudent and robust electronic health records arrangements without imposing a prohibitive financial burden on physicians. Requiring financial participation by a physician should result in selection of technology appropriate for the physician's practice and increase the likelihood that the physician will actually use the technology. Moreover, this approach requires physicians to contribute towards the benefits they may experience from the adoption of interoperable electronic health records (for example, a decrease in practice expenses). We note that, depending on the circumstances, a differential in the amount of cost sharing imposed by a donor on different recipients could give rise to an inference that an arrangement is directly related to the volume or value of referrals or other business generated between the parties, thus, rendering the arrangement ineligible for the protection of the exception. In this regard, the basis for the differential should be closely scrutinized.

We also note that *all* donated software and health information technology and training services are subject to the cost sharing requirements. It is our understanding that many updates and upgrades are included in the initial purchase price of the technology and would not trigger additional cost sharing responsibility on the part of the physician at the time of the update or upgrade. Any updates, upgrades, or modifications to the donated electronic health records system that were not covered under the initial purchase agreement for the donated technology are subject to separate cost sharing obligations by the physician (to the extent that the donor incurs additional costs). To ensure that physician recipients incur the requisite 15 percent of the costs, a donor (and any party related to the donor) is prohibited from

providing financing or making loans to the physician to fund the physician's payment for the technology.

*Comment:* One commenter stated that we should study the issue of a cap since health information technology capabilities and costs are rapidly evolving.

*Response:* As noted in the earlier responses, we are not implementing in the final rule a cap on the value of donations of electronic health records technology.

*Comment:* A few commenters suggested that the final rule should allow donors to reimburse physicians for previously implemented electronic health records systems in an amount equal to the lesser of the fair market value of the donated technology or the cap on the value of donations, should a cap be adopted. These commenters also requested that the donor give assurance to physicians that any technology previously purchased that is equivalent to donated technology and meets the applicable interoperability standards would be integrated into the donor's system.

*Response:* We are not adopting these suggestions. The commenters' suggestions go beyond the scope of the exception and appear to be a request for the exception to provide retroactive protection for previously purchased technology. The exception protects donations of technology that meet all of the conditions of the exception. The exception does not protect reimbursement for previously incurred expenses, as this would pose a substantial risk of program and patient abuse.

##### 5. Additional Conditions

The proposed rule also listed additional conditions including a restriction on conditioning business on the receipt of electronic health records technology, a requirement that the donor not have actual knowledge or act in reckless disregard or deliberate ignorance of the fact that the physician possesses or has obtained duplicative items or services, an all-payers requirement, and a requirement that the arrangement not violate the anti-kickback statute or any Federal or State law or regulation governing billing or claims submission.

*Comment:* One commenter suggested omitting any requirement that the written agreement documenting the arrangement specify the covered items and services and their values. Another commenter requested clarification as to whether all parties to a three-tier technology arrangement (that is, the donor-distributor of the technology, the

vendor of the technology, and the physician recipient of the technology) would be required to sign the written agreement required by the exception.

*Response:* In light of the cost sharing condition of the final exception, we are requiring documentation of the cost to the donor of the donated technology, and the physician's contribution to that cost. Moreover, we are requiring that the cost sharing contribution be made and documented *before* the items and services can qualify for protection under the exception. The documentation must be specific as to the items and services donated, the actual cost to the donor, and the amount and confirmation of the physician's cost sharing obligation. The documentation must cover all of the electronic health records items and services to be provided by the donor (or any party related to the donor) to the physician. With respect to this requirement, we have added language to the final exception clarifying that the written documentation requirement can be satisfied by incorporating by reference the agreements between the parties or by the use of cross references to a master list of agreements between the parties that is maintained and updated centrally and is available for review by the Secretary upon request and preserves the historical record of agreements. Nothing in the exception requires that agreements between donors and physicians also be signed by third party vendors; however, such documentation may be a prudent business practice.

*Comment:* A few commenters suggested that we not sunset the pre-interoperability exception once the post-interoperability exception is finalized, as we had proposed.

*Response:* We are not finalizing a separate pre-interoperability exception.

*Comment:* One commenter suggested that the entire electronic health records exception sunset no later than five years from the date of publication of the final rulemaking, with the possibility for the sunset to be delayed upon an administrative finding by the Secretary that there is still a need for the exception. The commenter observed that, in the future, electronic health records technology will be a standard and necessary part of a medical practice, and there will no longer be a need for third parties to donate it to physicians to spur adoption of the technology. Moreover, the commenter observed that incompatibility across a network of providers will cease to be an issue once interoperability of technology becomes the norm. For these reasons, the commenter concluded that the rationale for establishing an exception to the

physician self-referral law will decrease over time.

*Response:* We agree with this commenter that the need for an exception for donations of electronic health records technology should diminish substantially over time as the use of such technology becomes a standard and expected part of medical practice. Over time, physicians and others who receive donated technology from third parties may begin to realize the economic benefits from increased efficiencies and quality of care, at which point they should be expected to shoulder the costs associated with producing any benefits. As we indicated earlier in this rulemaking, we are promulgating a physician self-referral exception for the donation of valuable technology to promote its use in the interests of quality of care, patient safety, and health care efficiency, notwithstanding the risk of fraud and abuse normally associated with gifts of valuable goods and services to referral sources. Our goal is to promote the beneficial uses of technology without undue risk of program or patient abuse. As the technology becomes widely used and an accepted part of medical practice, the balance of competing goals underlying the exception changes.

A sunset provision would also address some of our concerns about gifts of unlimited amounts of valuable technology. As noted previously in this final rule, we have concluded that we cannot develop an appropriate cap on the amount of protected technology. A sunset provision, in effect, would cap the amount of protected technology that could be donated by third parties in a different way, thereby safeguarding against program and patient abuse in the long term.

We solicited comments on our overall approach to crafting a set of conditions for the exception and how we might ensure that the conditions, taken as a whole, provide sufficient protection against program and patient abuse. Given the difficulties inherent in limiting the value of donated technology and our relaxing of the ordinary principle that remuneration cannot be linked in any manner to the volume or value of referrals, we believe that the sunset provision suggested by the commenter will provide appropriate additional protection.

For all of these reasons, we are adopting the suggestion of the commenter, with modifications. We are sunsetting the exception on December 31, 2013. This date is consistent with the President's goal of adoption of electronic health records technology by 2014. (See President George W. Bush's

Health Information Technology Plan announced April 26, 2004; [http://www.whitehouse.gov/infocus/technology/economic\\_policy200404/chap3.html](http://www.whitehouse.gov/infocus/technology/economic_policy200404/chap3.html).) Under § 411.357(w)(13), all donations of items and services must occur, and all conditions of the exception must have been satisfied, on or before December 31, 2013. Nothing in the exception would preclude the Secretary from extending the time period pursuant to notice and comment rulemaking; we do not believe it would be appropriate to have a condition in a regulation that is contingent on an administrative determination.

We note that we are not similarly sunsetting the electronic prescribing exception at § 411.357(v), as that exception is mandated by statute, and we do not have authority to limit its duration.

*Comment:* Many commenters supported the prohibition against donors or their agents taking any actions to disable or limit interoperability or otherwise impose barriers to compatibility.

*Response:* We agree and we are retaining this requirement in the final exception.

#### *D. Summary of the Final Provisions Related to § 411.357(w)*

Consistent with the majority of public comments, we have finalized one exception for arrangements involving electronic health records that effectively combines the pre- and post-interoperability proposals. Separate exceptions are no longer necessary, in part, because criteria for product certification are available. Therefore, we have finalized one exception for arrangements involving electronic health records software or information technology and training services necessary and used predominantly to create, maintain, transmit, or receive electronic health records.

The final conditions for the exception, in combination, should promote the important national policy goal of open, interconnected, interoperable electronic health records systems that improve the quality of patient care and efficiency in the delivery of health care to patients, without protecting arrangements that pose a risk of program or patient abuse.

In summary, the final exception includes the following conditions:

- The exception protects arrangements involving nonmonetary remuneration in the form of software or information technology and training services necessary and used predominantly to create, maintain, transmit, or receive electronic health records (provided all conditions of the

exception are satisfied). We have not included hardware. We have clarified that the exception covers "information technology services," including, for example, connectivity and maintenance services. We interpret "training services" to include help desk and other similar support. We have eliminated the language that required the training services to be "directly related" because that language was superfluous in light of the language requiring the training services to be "necessary and used predominantly" for electronic health records purposes.

- We have not adopted the proposal that the protected technology be used solely for electronic health records purposes. Instead, we have included a condition making clear that electronic health records purposes must predominate. Thus, depending on the circumstances, software that relates to patient administration, scheduling functions, billing, clinical support, etc., can be donated. We have also expressly prohibited the provision of any technology used primarily to conduct personal business or business unrelated to the physician's medical practice, as well as the provision of staff to the physician or the physician's office.

To qualify for protection, at the time of donation, the software must be interoperable as defined at § 411.351. Software will be deemed to be interoperable if a certifying body recognized by the Secretary has certified the software no more than 12 months prior to the date it is provided to the physician. Software must contain electronic prescribing capability (either in an electronic prescribing component or the ability to interface with the physician's existing electronic prescribing system) which complies with the applicable standards under Medicare Part D (the first set of which were promulgated at § 423.160 (see the E-Prescribing and the Prescription Drug Program final rule (70 FR 67568, November 7, 2005)) at the time the items and services are donated. Moreover, the donor (or any agent of the donor) must not take any steps to disable the interoperability of any technology or otherwise impose barriers to the compatibility of the donated technology with other technology.

- The final exception protects broader categories of donors and physician recipients than we proposed. All entities that furnish DHS may make protected donations to *any* physician.

- This final rule clarifies that donors may select physicians for receipt of electronic health records technology using means that do not *directly* take into account the volume or value of

referrals from the physician or other business generated between the parties. The final rule sets forth specific criteria that will be deemed to meet this condition.

- The final rule does not limit the aggregate value of technology that may qualify for protection under this exception. It does contain a requirement that the physician pay 15 percent of the donor's costs. The donor (or any party related to the donor) may not fund any portion of this contribution.
- The final exception adopts the proposed documentation requirements and includes a requirement that the donor's costs be documented in the written agreement between the parties, and permits documentation through incorporation of other agreements between the parties. The final exception does not require that physicians certify that they do not already possess equivalent technology. However, the final exception does preclude protection if the donor knows that the physician already has equivalent technology or acts in deliberate ignorance or reckless disregard of that fact.
- The final exception adopts the proposed conditions related to use of the technology for any patient without regard to payor status and not conditioning business on donations.
- The final exception sunsets on December 31, 2013.

## V. Collection of Information Requirements

Under the Paperwork Reduction Act of 1995, we are required to provide 60-day notice in the **Federal Register** and solicit public comment before a collection of information requirement is submitted to the Office of Management and Budget (OMB) for review and approval. In order to evaluate fairly whether OMB should approve an information collection, section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 (PRA) requires that we solicit comment on the following issues:

- The need for the information collection and its usefulness in carrying out the proper functions of our agency.
- The accuracy of our estimate of the information collection burden.
- The quality, utility, and clarity of the information to be collected.
- Recommendations to minimize the information collection burden on the affected public, including automated collection techniques.

### *Section 411.357 Exceptions to the referral prohibition related to compensation arrangements*

We solicited public comments on the information collection requirements listed under § 411.357(v) and § 411.357(w). Section 411.357(v) sets forth the exception for certain arrangements involving the donation of electronic prescribing items and services. Section 411.357(w) sets forth an exception for certain arrangements involving the donation of interoperable electronic health records software or information technology and training services. Specifically, § 411.357(v) addresses the donation of nonmonetary remuneration (consisting of items and services in the form of hardware, software, or information technology and training services) necessary and used solely to receive and transmit electronic prescription information. Section 411.357(w) addresses the donation of nonmonetary remuneration (consisting of items or services in the form of software or information technology and training services) necessary and used predominantly to create, maintain, transmit, or receive electronic health records. For the purposes of this explanation of burden, the items and services discussed in § 411.357(v) and § 411.357(w) will be collectively referred to as "electronic health information technology."

Both § 411.357(v) and § 411.357(w) contain conditions for their respective exceptions. The conditions for both sections require that arrangements for the items and services provided must be set forth in a written agreement that is signed by the involved parties, specifies the items or services being provided and the cost of those items or services (and, in the case of the electronic health records exception, the amount of the physician's contribution), and covers all of the electronic health information technology to be provided by the donor.

The aforementioned requirements associated with these exceptions are limited to donations made to physicians by entities furnishing DHS (for purposes of this Section V and Section VI, "DHS Entities"). We do not know how many DHS Entities will use the exceptions that apply to electronic health information technology. However, we expect that few group practices will use either exception for donations to their members because existing exceptions will likely apply to permit a group practice to provide its physician members with electronic health information technology. In addition, because the donation of electronic health information technology is

voluntary, we believe that some DHS Entities will not avail themselves of this exception and will therefore not experience any paperwork burden.

We expect that every DHS Entity that chooses to provide electronic health information technology to physicians will likely use a model agreement that lists or describes the items and services to be donated. We expect that State or national organizations representing attorneys, physicians, group practices, and DHS Entities will create model agreements for their constituents. We also expect that attorneys for large DHS Entities (for example, academic medical centers or other entities that include hospitals and possibly skilled nursing facilities or home health agencies) will create one model agreement for use by all of their clients that are donors. In addition, we expect a DHS Entity that donates electronic health information technology to create a single model agreement for use for memorializing donations of electronic prescribing and electronic health records technology, because we believe that virtually no donor entity will need or want an agreement that is limited just to the provision of electronic prescribing technology.

The burden associated with these requirements is the time and effort needed to gather the necessary information for the agreement, to draft the agreement, and to review and sign the written document. For donor entities (or their attorneys), we estimate that it will take 1.5 hours to create a model agreement and another 15 minutes to tailor the model agreement for each physician and sign the personalized agreement. Further, we estimate that, on average, each physician will spend 15 minutes reading and signing an agreement, including time spent listening to an explanation from the group practice manager or other physician representative. We recognize that a physician (and a donating entity) will have to understand the differences between the items and services that the donor is offering and the items and services that the physician already possesses or has obtained.

We expect that no more than 150 State or national organizations or attorneys for large hospital systems (or other DHS Entities) will draft agreements for the hospitals and other DHS Entities. Because we estimate it will take 1.5 hours to prepare a model agreement, and 150 different organizations will prepare these agreements, it could take a maximum of 225 hours to prepare all model agreements.

As of April 2006, 609,562 physicians provided Part B physician services to Medicare beneficiaries. To calculate the maximum number of hours required to complete the agreements, we assume that 60,956 physicians (10 percent of the total number of physicians providing Part B physician services to Medicare beneficiaries) will begin the process of developing or using electronic prescribing and/or electronic health records each year. We believe that one-fifth (or 20 percent) of those physicians will accept donations of and sign agreements for electronic health information technology each year. We assume that each of these 12,191 physicians ( $60,956 \times 0.20$ ) will accept two donations of electronic health information technology, and each donation will require that an agreement be signed by the donor DHS Entity and the physician. Each agreement will require 15 minutes (0.25 hours) of the physician's time. Therefore, the physicians might spend 6,096 hours annually in interacting with two donors (2 agreements (that is, 1 per donation)  $\times 0.25$  hours for each agreement  $\times 12,191$  physicians).

As noted, we expect that a donor entity will spend 15 minutes tailoring and signing each agreement into which it enters. We estimated that 12,191 physicians will enter into 2 agreements each. Therefore, each year, 24,382 agreements will be signed. Each agreement will require 15 minutes (0.25 hours) of the donor entity's time, or 6,096 hours per year ( $24,382 \times 0.25$  hours).

We assume that donating entities will not interact with each individual physician, but instead will spend time with individuals or entities that represent physician recipients of donated technology. On average, these representatives represent approximately 25 physicians each. We estimate that a donor entity will spend approximately 2 hours with each physician representative. We estimate that the average yearly burden for donor entities for the interactions with physician representatives may be 975 hours ( $[12,191 \text{ physicians}/25 \text{ physicians per representative}] \times 2 \text{ hours per interaction}$ ). This is in addition to the time spent tailoring and signing physician-specific agreements discussed above.

Assuming that the average cost for the donors and physician recipients involved in this process is \$75 per hour, the annual paperwork burden for the first year should cost \$1,004,400 ( $\$75 \times [225 \text{ hours preparing master agreements} + 6,096 \text{ physician hours} + 6,096 \text{ donor hours} + (975 \text{ donor hours spent with$

group practice or physician representatives  $\times 2$  agreements per physician)]) with each additional future year costing \$987,525 ( $\$75 \times [6,096 \text{ physician hours} + 6,096 \text{ donor hours} + (975 \text{ donor hours spent with group practice or physician representatives} \times 2 \text{ agreements per physician}])$ ).

An additional requirement for both exceptions will be that of maintaining the written agreements required to comply with § 411.357(v) and § 411.357(w), and, if necessary, making them available to the Secretary upon request. We are requiring entities to maintain information that they already maintain as part of their usual and customary business practices. In addition, the information would only be collected during the conduct of an administrative action, investigation, or audit involving a Federal governmental agency regarding specific individuals or entities.

We believe that the recordkeeping requirements in this section are exempt from the PRA under both 5 CFR 1320.3(a)(2) and 5 CFR 1320.4(a)(2).

These requirements are not effective until they are approved by OMB.

## VI. Regulatory Impact Analysis

### A. Overall Impact

We have examined the impact of this rule as required by Executive Order 12866 (September 1993, Regulatory Planning and Review), the Regulatory Flexibility Act (RFA) (September 19, 1980, Pub. L. 96-354), section 1102(b) of the Social Security Act, the Unfunded Mandates Reform Act of 1995, Pub. L. 104-4), the Congressional Review Act (5 U.S.C. 804(2)), and Executive Order 13132.

Executive Order 12866 (as amended by Executive Order 13258, which merely reassigns responsibilities of duties) 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 effects, distributive impacts, and equity). A regulatory impact analysis (RIA) must be prepared for final rules with economically significant effects (that is, a final rule that will have an annual effect on the economy of \$100 million or more in any one year, or will 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). Because we believe that the economic impact of this final rule

will not exceed \$100 million annually, we have not prepared an RIA. However, we have analyzed alternatives and assessed benefits and costs in order to provide a basis for informed responses that have helped us make final decisions.

This final rule creates two new exceptions to the physician self-referral prohibition. The first exception permits certain entities to provide to physicians hardware, software, or information technology and training services necessary and used solely to receive and transmit electronic prescription information, provided that certain conditions are satisfied. The second exception permits DHS Entities to provide to physicians software and information technology and training services necessary and used predominantly to create, maintain, transmit, or receive electronic health records, provided that certain conditions are satisfied. (Electronic prescribing technology and electronic health records technology are collectively referred to as "electronic health information technology" for purposes of this Section VI.)

The exceptions should facilitate the adoption of electronic prescribing and electronic health records technology by filling a gap rather than creating the primary means by which physicians will adopt these technologies. In other words, we do not believe that donor entities will contribute toward all of the health information technology used by physicians.

Recently, *Modern Healthcare* presented findings from its annual survey (conducted in December 2005 through early January 2006) of 601 health care executives regarding whether respondents (about 80 percent of which were hospitals or health care systems that include hospitals) would be willing to contribute to physician office health information technology if the physician self-referral provisions and the anti-kickback statute did not prohibit such donations. The findings showed that 70.2 percent of respondents would be willing to allocate money to help a referring physician buy and use clinical information technology (up from 59 percent last year). Table 1 shows the breakdown percentages of respondents that would be willing to subsidize varying amounts of the startup costs for computerizing physicians' practices.

TABLE 1

Percentage of all respondents	Percentage of startup costs respondents would be willing to subsidize
29.80 .....	no amount
32.36 .....	20 percent or less
8.77 .....	21–40 percent
15.16 .....	41–60 percent
4.28 .....	61–80 percent
9.69 .....	81–100 percent

This survey indicates that, as of the beginning of calendar year 2006, over 60 percent of the CEOs surveyed did not see their institutions providing more than 20 percent of the costs necessary to initiate the computerization of physician offices for the purpose of clinical information technology. (Conn, Joseph, "Subsidies: Ready to give, but \* \* \*," *Modern Healthcare*, S5, February 13, 2006). Interestingly, this same survey showed that 65.1 percent of the executives indicated that moving toward an electronic health record was one of their top 10 information technology priorities, whereas only 51.6 percent chose "improve patient-care capabilities." (Conn, Joseph, "EHRs: Still in hot pursuit," *Modern Healthcare*, S1, February 13, 2006). However, 42.1 percent of the surveyed executives indicated that they expected their organizations to spend approximately 1.6 percent to 3.0 percent of their total operating budget on information systems. Nearly 21 percent of the executives predicted that their organizations would spend less than 1.6 percent, and 37.3 percent predicted that their organizations would spend more than 3.0 percent of their total operating budget on information systems. (Conn, Joseph, "Budgets: Opening the wallet," *Modern Healthcare*, S2, February 13, 2006).

We believe that health care entities are waiting for the completion of a sizeable number of national standards before committing substantially for electronic health records items and services, first for themselves, and then for physicians and other entities in their communities.

The final rule establishing the first set of standards for electronic prescribing in the Part D program, which was published on November 7, 2005 (70 FR 67568), discusses the expected cost for the hardware, software, training and information technology needed by prescribing practitioners, including physicians. In the preamble to that rule, we presented a Regulatory Impact Analysis covering the expected effects of electronic prescribing and the specific standards. Our analysis showed the possibility of substantial and

economically significant positive health effects on consumers and net positive economic effects on affected entities, such as physicians, pharmacies, and health plans. Our analysis focused on the likelihood that DHS Entities will find it in their interest to pay some or all of the costs of qualifying health information technology to encourage physician adoption of such technology.

This final rule removes a potential obstacle to the provision of qualifying health information technology by certain entities. This final rule applies to donations of qualifying health information technology by DHS Entities, and we expect that many donor entities may not need to use these exceptions, given the existing provisions at § 411.352 for group practices and the exception at § 411.355(c) for managed care services. (See 66 FR 856 and 69 FR 16054.) Of particular importance, managed care services furnished by prepaid health plans or their contractors may fall within a previously codified exception (See § 411.355(c)). We believe that prepaid plans have substantial economic incentives (incentives that are larger than those for most other entities) to encourage the adoption of health information technology by contracting physicians.

Regardless of whether donations are allowed under existing exceptions or those that are included in this final rule, we encouraged commenters to provide information on the costs that likely will be incurred by entities that choose to provide qualifying health information technology to physicians, as well as other related costs that likely will be incurred by both donors and physicians, such as costs incurred for changes in office procedures.

Our analysis under Executive Order 12866 of the expenditures that entities may choose to make under this final rule is restricted by the potential effects of outside factors, such as technological progress and other market forces, future certification standards, and companion final anti-kickback statute safe harbors. Furthermore, both the costs and potential savings of electronic prescribing, electronic health records, and administrative software such as billing and scheduling vary to the extent to which each element operates as a stand-alone system or as part of an integrated system. We solicited comments to help identify both the independent and synergistic effects of these variables.

As discussed in the November 7, 2005 E-Prescribing final rule (70 FR 67584 through 67588), donors may experience net savings with electronic prescribing in place, and patients will experience

significant positive health effects. We have not repeated that analysis in this final rule.

There are numerous studies reporting that electronic health records in the ambulatory setting can result in a substantial improvement in clinical process. The effects of electronic health records include—

- Reducing unnecessary or duplicative lab and radiology test ordering by 9 to 14 percent (Bates, D., et al., "A randomized trial of a computer-based intervention to reduce utilization of redundant laboratory tests," *American Journal Medicine* 106(2), 144–50 (1999)); (Tierney, W., et al., "The effect on test ordering of informing physicians of the charges for outpatient diagnostic tests," *New England Journal of Medicine* 322(21): 1499–504 (1990)); (Tierney, W., et al., "Computerized display of past test results. Effect on outpatient testing," *Annals Internal Medicine* 107(4): 569–74 (1987));

- Lowering ancillary test charges by up to 8 percent (Tierney, W., et al., "Computer predictions of abnormal test results. Effects on outpatient testing," *JAMA* 259: 1194–8 (1988));

- Reducing hospital admissions due to adverse drug events (ADEs), costing an average of \$17,000 each, by 2 to 3 percent (Jha, A., et al., "Identifying hospital admissions due to adverse drug events using a computer-based monitor," *Pharmacoepidemiology and Drug Safety* 10(2), 113–19 (2001)); and

- Reducing excess medication usage by 11 percent (Wang, S., et al., "A cost-benefit analysis of electronic medical records in primary care," *American Journal of Medicine* 114(5): 397–403 (2003)); (Teich, J., et al., "Effects of computerized physician order entry on prescribing practices," *Archives of Internal Medicine* 160(18): 2741–7 (2000)).

There is also evidence that electronic health records can reduce administrative inefficiency and paper handling. (Khoury, A., "Support of quality and business goals by an ambulatory automated medical record system in Kaiser Permanente of Ohio," *Effective Clinical Practice* 1(2): 73–82 (1998)).

These studies show a consistent pattern of reductions in clinical utilization reported to arise from electronic health records use in ambulatory settings. Although financial estimates were not performed in these studies, these reductions in utilization could yield savings that accrue to the Medicare program because of its high volume of payments for ambulatory and inpatient care. Other studies have

estimated that electronic health records in the ambulatory setting will save \$78 billion to \$112 billion annually, across all payors. This estimate includes up to \$34 billion in annual savings from ambulatory computerized provider order entry (Johnston, D., et al., "The Value of Computerized Provider Order Entry in Ambulatory Settings," Center for IT Leadership, Wellesley, MA (2003)) and up to \$78 billion annually from interoperability of electronic health records (Walker, J., et al., "The Value of Health Care Information Exchange and Interoperability," *Health Affairs*, <http://www.healthaffairs.org> (online exclusive) (2005)). At the same time, the costs of electronic health records and other health information technology are substantial.

The range of cost estimates for electronic health records alone is wide. At one extreme, there are software systems under development that may be offered to physician settings free or at the cost of perhaps several thousand dollars, while others may cost \$20,000 to \$30,000. Extrapolated to the universe of health plans, hospitals, and physicians, total investment costs are likely to reach the billions of dollars.

It is unclear how rapidly adoption is now occurring. A recent study indicates "practices are encountering greater-than-expected barriers to adopting an [electronic health records] system, but the adoption rate continues to rise." (Gans, D., et al., "Medical Groups' Adoption of Electronic Health Records and Information Systems," *Health Affairs*, September/October 2005). This study dealt only with group practices, and found greater difficulties in smaller groups. We can infer similar implementation difficulties for individual physician practices. For example, this study found the average initial cost of implementing an electronic health records system to be \$33,000 per physician, with maintenance costs of \$1,500 per physician per month, numbers which "would translate into about a 10 percent reduction in take-home pay each year for most primary care practices" if amortized over 5 years. (See Gans, D.).

HealthLeadersMedia interviewed individuals from 5 medical practices to try to determine reasons (other than money) for the fact that, as of 2005, only 14 percent of physician groups used database-driven electronic health records systems. One sole practitioner put \$70,000 into hardware and software to duplicate the system she had used when in a group practice. Although this physician reduced much of the external paper flood, she has not saved money. She replaced transcription costs with

scanning expenses. This physician is pleased that she can document more detail electronically than by hand, resulting in more appropriate reimbursement. A small rural clinic hired a vendor after a year's search, but then endured multiple delays and missed deadlines. After firing its vendor, it hired another vendor with a similar lack of results. Finally, it hired a vendor that the rural health clinic had interviewed two years earlier after discovering that this vendor had significantly upgraded its clinical documentation system, and the rural health clinic is now satisfied. On the other hand, a physician practice with over 500 physicians reported that, because it spent a lot of time in design, workflow analysis, and early development before employing any system, it is very satisfied with its physician-friendly system. Another physician practice, with five physician members, successfully adopted information technology with its third contractor resulting in financial and clinical benefits, including running the practice much more efficiently which resulted in treating more patients. Finally, a group practice with 13 internists borrowed \$600,000 for hardware and software for an electronic health records system. Annual transcription costs have decreased from \$150,000 to \$30,000 and records are easily shared. (Baldwin, Gary, "Paper Charts No More," <http://www.healthleadersmedia.com> (May 2006)).

Another recent study reviewed a broader range of providers and argued that the economic incentives of most stakeholders do not support health information technology investments. According to that article, "The greater marvel is that any physician, at his or her personal expense, would install a system that \* \* \* saves money for every health care stakeholder except the adopting physician." (Kleinke, J.D., "Dot-Gov: Market Failure and the Creation of a National Health Information Technology System," *Health Affairs*, September/October 2005). This study is also more pessimistic than most about the business case for managed care plans to make health information technology investments, arguing that investments benefit not only the investing firm but also its competitors. Many other studies, discussed in this section, are more optimistic about economic returns to physicians. However, the disparate results illustrate the uncertainty that prevents us from making confident quantitative estimates of rates of

adoption. Even so, a recent survey by the Center for Studying Health System Change indicated that between 2000–2001 and 2004–2005, the proportion of physicians in their own practices reporting access to information technology for treatment guidelines increased from 52.9 percent to 64.8 percent, and the number of electronically prescribing physicians increased from 11.4 percent to 21.9 percent. In addition, the percent of physicians in practices who reported that they had used information technology to exchange clinical data increased from 40.6 percent to 50.1 percent during this time period. (Reed, Marie C. and Grossman, Joy M., "Growing Availability of Clinical Information Technology in Physician Practices," Data Bulletin No. 31, Center for Studying Health System Change, <http://www.hschange.com> (June 2006)).

The major barriers to physician adoption of clinical information technology include start-up and maintenance costs, and the significant effort and costs of changing workflow to use information technology effectively. (Bates, David W., "Physicians and Ambulatory Electronic Records," *Health Affairs*, (September/October 2005)). However, in an interview, Joy Grossman of the Center for Studying Health System Change, cited above, indicated her belief that one reason for the delay in physician adoption of information technology is that physicians want to make sure that the type of technology and software they purchase will not become obsolete and also will be compatible with tools used by hospitals, other physicians, and health plans. (Agovino, Theresa, "Doctor Access to Information Technology Up," the Associated Press, reported by the Houston Chronicle at <http://www.chron.com> (June 6, 2006)).

We assume that health information technology costs and benefits will be realized eventually. Even without government intervention, there is a lively market today, and as consensus standards evolve, that market will grow. The question as to the regulatory impact of this final rule is: taking into account available policy instruments (notably the development of interoperability standards), to what extent does the use of these physician self-referral exceptions accelerate adoption of electronic prescribing and electronic health records technology?

We do not have good baseline information. There are numerous estimates for the adoption rate of electronic prescribing by health plans, hospitals, physicians, and (for prescribing of drugs only) pharmacies.

However, these estimates are clouded by uncertainty. For example, some studies count facsimile transmission of prescriptions as electronic prescribing while others do not. The majority of physician offices now use computers and have high-speed internet access, but less than one in five uses electronic health records. (Goldsmith, J., *et al.*, "Federal Health Information Policy: A Case of Arrested Development," Health Affairs, July/August 2003 (citing 17 percent adoption)). The Gans study found that about 12 percent of medical group practices have a fully implemented electronic health records system, and another 13 percent are in the process of implementation. For smaller group practices, both of these percentages fall to 10 percent. (See Gans, D., *supra.*)

As discussed in this section, we estimate that 2 percent of physicians and an unknown number of DHS Entities will be affected by these exceptions each year. Put another way, only one in five physicians adopting electronic health information technology will utilize these exceptions annually.

As explained in the November 7, 2005 E-Prescribing final rule (70 FR 67585), we believe that between 5 and 18 percent of prescribers, including physicians, are currently participating in some electronic prescribing. In addition, we explained that we believe that the proportion of prescribers using electronic prescribing would increase by about 10 percent annually over the next 5 years. We believe it is likely that about one in five of those prescribers will receive assistance under these exceptions. (Another one in five will receive assistance under the exceptions already in place that apply to managed care plans and group practices.)

These estimates depend primarily on the decisions of DHS Entities as to whether to provide assistance to physicians for electronic health information technology and the decisions of physicians and group practices to implement these systems. We solicited information about the intentions of DHS Entities to make donations of qualifying health information technology to physicians and the willingness of physicians and group practices to implement these systems.

Even if we were able to determine more precisely the number of physicians who are currently engaged in, and the number of physicians who will engage in, electronic prescribing, we cannot estimate with certainty the number of those physicians who will receive donated items and services.

Some entities may be unwilling or unable to donate items or services, and some physicians already have the requisite items and services. In addition, we cannot estimate with certainty the cost of the electronic health information technology that a physician will need from a donor.

Although we do not know the cost of the electronic health information technology, we describe below several studies of the costs and benefits of equipping doctors with such technology. The speed of adoption depends on the extent to which physicians realize net benefits (discussed extensively in the proposed rule) and on the extent to which our exceptions incrementally affect the costs and savings of the technology.

One study of data on the costs associated with an internally-developed electronic health records system for several internal medicine clinics in an integrated delivery system indicated that software development and maintenance would cost about \$1,600 per provider per year. (See Wang, *supra.*) Use of commercially available software may cost twice as much. Financial benefits of electronic health records include not having to "pull" patient charts whenever a patient is to be seen and reduced transcription costs. In addition, electronic clinical decision support has been shown to reduce ADEs and redundant radiology and clinical laboratory tests; the maintenance of up-to-date information about alternative drugs reduces the use of expensive medications. Finally, when a medical record has complete and accurate information about services provided, billing errors are reduced, including failure to bill for a furnished service. The 5-year cost-benefit analysis of the internally-developed electronic health records system discussed above indicated savings per practitioner. (See Wang, *supra.*)

In another article, Dr. Kenneth Adler reported on his 86-physician, multi-specialty group practice's adoption of an electronic health records system beginning in 2003. (Adler, K., "Why It's Time to Purchase an Electronic Health Records System," *American Academy of Family Practitioners*, November/December 2004). This group practice found that its electronic health records system improved communication, access to data, and documentation, which led to better clinical and service quality. The electronic health records system also saved the group practice money, and Dr. Adler expects that other group practices that adopt electronic health records systems will save money

in addition to the other benefits listed above.

In a third study, the Central Utah Multi-Specialty Clinic, a 59-physician, 9-location group practice, installed an electronic health records system in April 2002. (Barlow, S., *et al.*, "The Economic Effect of Implementing an EMR in an Outpatient Clinical Setting," *Journal of Healthcare Information Management*, 18(1): 46-51 (2004)). During its first year of operation, the group practice experienced direct reductions in spending and increases in revenue of more than \$952,000 compared with the prior year, and anticipates savings of more than \$8.2 million over the first 5 years of implementation. Once again, the savings are expected to result from reduced transcription costs, a reduced number of paper charts and related maintenance (including storage), and more appropriate coding because of improved documentation. (This study did not include information about the start-up or annual costs of the electronic health records system. Therefore, caution should be used in drawing conclusions on any cost savings based on the results of this study.)

Finally, we note that the Center for Information Technology Leadership (CITL), in its 2003 report, "The Value of Computerized Provider Order Entry in Ambulatory Settings"<sup>1</sup> found that the average first year total cost of a basic electronic prescribing software system was approximately \$3,000 per physician. This estimate was based on a survey of commercially available software.

The following are our responses to comments to the Regulatory Impact Analysis in the proposed rule:

*Comment:* One commenter asserted that the estimate that we used in the proposed rule for the cost of information technology items and services is too low. Another commenter estimated that electronic health records systems cost between \$700 and \$800 per physician per month during the first 5 years of implementation. A third commenter estimated that the implementation cost for each physician will range from \$15,000 to \$35,000. Another commenter asserted that donors will probably donate approximately \$5,000 per physician and that no donor will provide items and services worth over \$35,000 per physician. One commenter agreed that donations will result in a reduction of the utilization of unneeded

<sup>1</sup> Center for Information Technology (CITL), a research organization chartered in 2002) <http://www.citl.org>, Wellesley, MA (781-416-9200) 2003 report: "The Value of Computerized Provider Order Entry in Ambulatory Care."

health care services. Finally, a commenter agreed that there should not be a significant impact on small businesses.

*Response:* We recognize that the cost of implementing information technology in the physician office setting currently appears to be substantial, with benefits that will be recognized, but not immediately. Recently, Robert Miller and colleagues at the University of California, San Francisco, presented findings from case studies of 14 sole practitioners and small group practices in twelve States. They found that start-up costs average \$44,000 per physician and annual maintenance costs average \$8,400 per physician per year. However, they also found that the physicians recoup their investment costs in 2.5 years, with over half of the financial benefits coming from improved billing services. In addition, physician practice revenues increased by \$17,000 per year and efficiency savings and gains from greater physician productivity averaged \$15,800 per physician per year. (Miller, Robert H., et al., "The Value of Electronic Health Records in Solo or Small Group Practices, *Health Affairs*, September/October 2005.)

We presented information above in this section from a recent *Modern Healthcare* survey that indicated a breakdown of the funding that 501 health care executives anticipated that their institutions will spend to help physician practices with information technology. (Conn, Joseph, "Subsidies: Ready to give, but \* \* \*," *Modern Healthcare*, S5, February 13, 2006). The figures in that article are not considerably different from the commenter's estimates.

*Comment:* One commenter believes that donors will be concerned about the direct impact to their patient populations and the common good.

*Response:* We hope that donors will recognize that physicians need systems that will work for their patients and practices. We believe that the studies we have cited indicate the importance of physicians being able to use the systems they are purchasing and implementing. If a system does not work for a physician, he or she will abandon the system.

We believe that donations protected under this exception will create no net costs to the economy. This rule will permit cost-shifting, allowing DHS Entities to bear financial burdens that otherwise would have been borne by physicians and their patients. We anticipate that electronic prescribing and electronic health records technology ultimately should save donor entities and physicians the costs

and other burdens associated with incorrect drug prescribing or dispensing, and result in reductions in the costs of medical transcribing and other paperwork. Similarly, obtaining accurate health records in a timely manner should benefit patients, physicians, and DHS Entities. The November 7, 2005 E-Prescribing final rule (70 FR 67586) cites an estimate from the CITL that nationwide adoption of electronic prescribing will eliminate nearly 2.1 million ADEs per year. In turn, this reduction of ADEs will prevent nearly 1.3 million provider visits, more than 190,000 hospitalizations, and more than 136,000 life-threatening ADEs. We hope to see a significant reduction in ADEs each year as nationwide adoption of electronic health information technology occurs.

We estimate that 10 percent of the 609,562 physicians who provide Part B services to Medicare beneficiaries (60,956 physicians) will adopt electronic prescribing and electronic health records technology each year. We believe it is likely that DHS Entities will donate software or other items or services to no more than one-fifth (or 20 percent) of these physicians (or to fewer than 12,191 physicians) under these exceptions, and perhaps another one-fifth (or 20 percent) of these physicians (again fewer than 12,191 physicians) will receive donations under the existing exceptions that apply to managed care services and to group practices. We estimate that, at most, each physician will receive a total of \$3,000 worth of donated items and services per donation under the exceptions. Therefore, assuming that 2 percent of physicians (1/5 of the 10 percent of physicians adopting the technology per year) will receive \$3,000 worth of donated electronic health information technology, annual donations approximate \$36 million.

We expect that many physicians already own handheld devices and will have begun to computerize their own medical practices. We also expect that DHS Entities will see immediate benefits from the expanded use of electronic prescribing and electronic health records technology. We anticipate that these savings will be greater than the costs incurred by donor entities using these exceptions, but we cannot quantify the savings at this time.

We note that a significant benefit of electronic health records was recognized in 2005. Patients from the Veterans Administration (VA) Hospital in New Orleans had been evacuated to other VA hospitals throughout the United States because of the effects of Hurricane Katrina. (See <http://www1.va.gov/opa/pressrel/pressrelease.cfm?id=1152>).

Because the VA system makes extensive use of electronic prescribing and electronic health records, complete patient medical information was quickly made available to VA clinicians throughout the country. The Ochsner Clinic in New Orleans had also computerized its patient records prior to Hurricane Katrina and, thus, was able to recover its practice after the hurricane.

The estimates above are highly sensitive to assumptions. The cost to the donor for the donated items and services might be significantly higher or lower than discussed above. The rate of adoption may be higher or lower than estimated. The proportion of physicians receiving remuneration could be higher or lower than estimated, depending on the willingness of DHS Entities to subsidize investment in health information technology.

We also note that, at this time, there are mixed signals about the potential of electronic prescribing and electronic health records to reduce costs. For example, many estimates are based in part on the reduction of medical errors. However, one study has also shown that medical errors, and potentially costs, can increase if software is poorly designed or implemented (Koppel, et al., 2005). Therefore, achieving reliable cost savings requires a more substantial transformation of care delivery that goes beyond simple use of any one kind of health information technology.

This rule likely will have an effect on the actual rate of adoption of electronic prescribing and electronic health records technology. Potential donors may be unlikely to provide assistance unless they believe it will accelerate the adoption of the technology. To the extent adoption is advanced, the costs and benefits of these technologies will be realized sooner. However, we are unable to provide any quantitative estimate of the likely effect of these exceptions, taken alone, in the larger panorama of all health information technology investment decisions, market evolution, standards adoption, and use of existing physician self-referral exceptions.

Finally, we believe it unlikely that annual effects will exceed \$100 million in the 5-year timeframe that we generally use in our economic impact projections. If our estimate of the independent and direct effects of these new exceptions is accurate, and if the resulting acceleration in adoption is relatively small, this final rule is not a major rule. However, we have completed all the elements of a RIA because the uncertainty is so great.

Section 202 of the Unfunded Mandates Reform Act of 1995 requires that agencies assess the anticipated costs and benefits of Federal mandates before issuing any rule that may result in the mandated expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of \$100 million in 1995 dollars (a threshold adjusted annually for inflation and now approximately \$120 million). This final rule imposes no mandates. Any actions taken under this rule are voluntary. Furthermore, such actions are likely to result in net cost savings, not net expenditures. Any expenditure undertaken by government-owned hospitals in their business capacity will not necessarily have an impact on State, local, or tribal governments, or their expenditure budgets, as such.

Executive Order 13132 establishes certain requirements that an agency must meet when it issues a final rule that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has Federalism implications. For the reasons given above, this final rule will not have a substantial effect on State or local governments, nor does it preempt State law or have Federalism implications.

#### B. Impact on Small Businesses

The RFA requires agencies to analyze options for regulatory relief for small entities when a final rule may create a significant impact on a substantial number of small entities. For purposes of the RFA, small entities include small businesses, nonprofit organizations, and small governmental jurisdictions. Most hospitals and physicians are considered small entities, either by nonprofit status or by having revenues of less than \$6 million a year. Almost all physicians in private practice (or all practices of which they are members) are small entities because their annual revenues do not meet the Small Business Administration's \$8.5 million threshold for small physician practices. Individuals and States are not included in the definition of a small entity, and this final rule will not have a financial impact on small governmental entities.

We have determined that this final rule will not have a significant impact on small entities because it does not increase regulatory burden or otherwise meet the RFA standard of "significant impact." While the aggregate impacts may be substantial, it is unlikely that near term effects on individual practitioners will be substantial as a proportion of revenues (for example, neither a \$3,000 donation nor a \$450 cost sharing contribution (15 percent of

\$3,000) is significant compared to typical practice revenues in the hundreds of thousands of dollars). We expect our new exceptions ultimately to be highly beneficial to physicians and DHS Entities (most in both categories are small entities), as well as to affected entities and persons who are not "small entities" as defined in the RFA: PDP sponsors, MA organizations, and our beneficiaries.

Nothing in this final rule meets any of the other thresholds requiring in-depth analysis. Although it affects a substantial number of small rural hospitals, there is no significant economic effect on small rural hospitals (more than 3 to 5 percent of total costs/revenues), it imposes no unfunded mandates or costs on either private or public entities, and it neither preempts State law nor otherwise has Federalism implications.

#### C. Conclusion

We have concluded that this final rule will not have a significant economic effect. Although the final exceptions may shift costs from physicians and patients to permissible donor entities and may lead to faster adoption of health information technology with substantial benefits, it is unclear whether, and we believe unlikely that, these effects will reach the threshold of \$100 million annually in the near term, even though the long-term cumulative costs and benefits are likely to be many times this threshold. This rule will remove a potential obstacle to certain entities providing electronic prescribing and electronic health records technology and services to physicians. The rule will permit cost shifting, allowing DHS Entities to bear financial burdens that otherwise would have been borne by physicians and their patients. We believe that this rule will provide substantial positive health effects on consumers and net positive economic effects on affected entities, including physicians and DHS Entities.

We are not preparing analyses for either the RFA or section 1102(b) of the Act because we have determined, and we certify, that this rule will not have a significant economic impact on a substantial number of small entities or a significant impact on the operations of a substantial number of small rural hospitals.

In accordance with the provisions of Executive Order 12866, this regulation was reviewed by the Office of Management and Budget.

#### List of Subjects in 42 CFR Part 411

Kidney diseases, Medicare, Physician referral, Reporting and recordkeeping requirements.

■ For the reasons set forth in the preamble, the Centers for Medicare & Medicaid Services amends 42 CFR chapter IV part 411 as set forth below:

#### PART 411—EXCLUSIONS FROM MEDICARE AND LIMITATIONS ON MEDICARE PAYMENT

■ 1. The authority citation for part 411 is revised to read as follows:

**Authority:** Secs. 1102, 1860D-4(e)(6), 1871, and 1877(b)(4) and (5) of the Social Security Act (42 U.S.C. 1302, 1395w-104(e)(6), 1395hh, and 1395nn(b)(4) and (5)).

#### Subpart J—Financial Relationships Between Physicians and Entities Furnishing Designated Health Services

■ 2. Section 411.351 is amended by adding the definitions of "electronic health record" and "interoperable" in alphabetical order to read as follows:

##### § 411.351 Definitions.

\* \* \* \* \*

*Electronic health record* means a repository of consumer health status information in computer processable form used for clinical diagnosis and treatment for a broad array of clinical conditions.

\* \* \* \* \*

*Interoperable* means able to communicate and exchange data accurately, effectively, securely, and consistently with different information technology systems, software applications, and networks, in various settings; and exchange data such that the clinical or operational purpose and meaning of the data are preserved and unaltered.

\* \* \* \* \*

■ 3. Section 411.357 is amended by adding paragraphs (v) and (w) to read as follows:

##### § 411.357 Exceptions to the referral prohibition related to compensation arrangements.

\* \* \* \* \*

(v) *Electronic prescribing items and services.* Nonmonetary remuneration (consisting of items and services in the form of hardware, software, or information technology and training services) necessary and used solely to receive and transmit electronic prescription information, if all of the following conditions are met:

(1) The items and services are provided by a—

(i) Hospital to a physician who is a member of its medical staff;

(ii) Group practice (as defined at § 411.352) to a physician who is a member of the group (as defined at § 411.351); or

(iii) PDP sponsor or MA organization to a prescribing physician.

(2) The items and services are provided as part of, or are used to access, an electronic prescription drug program that meets the applicable standards under Medicare Part D at the time the items and services are provided.

(3) The donor (or any person on the donor's behalf) does not take any action to limit or restrict the use or compatibility of the items or services with other electronic prescribing or electronic health records systems.

(4) For items or services that are of the type that can be used for any patient without regard to payor status, the donor does not restrict, or take any action to limit, the physician's right or ability to use the items or services for any patient.

(5) Neither the physician nor the physician's practice (including employees and staff members) makes the receipt of items or services, or the amount or nature of the items or services, a condition of doing business with the donor.

(6) Neither the eligibility of a physician for the items or services, nor the amount or nature of the items or services, is determined in a manner that takes into account the volume or value of referrals or other business generated between the parties.

(7) The arrangement is set forth in a written agreement that—

(i) Is signed by the parties;

(ii) Specifies the items and services being provided and the donor's cost of the items and services; and

(iii) Covers all of the electronic prescribing items and services to be provided by the donor. This requirement will be met if all separate agreements between the donor and the physician (and the donor and any family members of the physician) incorporate each other by reference or if they cross-reference a master list of agreements that is maintained and updated centrally and is available for review by the Secretary upon request. The master list should be maintained in a manner that preserves the historical record of agreements.

(8) The donor does not have actual knowledge of, and does not act in reckless disregard or deliberate ignorance of, the fact that the physician possesses or has obtained items or services equivalent to those provided by the donor.

(w) *Electronic health records items and services.* Nonmonetary remuneration (consisting of items and services in the form of software or information technology and training services) necessary and used predominantly to create, maintain, transmit, or receive electronic health records, if all of the following conditions are met:

(1) The items and services are provided by an entity (as defined at § 411.351) to a physician.

(2) The software is interoperable (as defined at § 411.351) at the time it is provided to the physician. For purposes of this paragraph, software is deemed to be interoperable if a certifying body recognized by the Secretary has certified the software no more than 12 months prior to the date it is provided to the physician.

(3) The donor (or any person on the donor's behalf) does not take any action to limit or restrict the use, compatibility or interoperability of the items or services with other electronic prescribing or electronic health records systems.

(4) Before receipt of the items and services, the physician pays 15 percent of the donor's cost for the items and services. The donor (or any party related to the donor) does not finance the physician's payment or loan funds to be used by the physician to pay for the items and services.

(5) Neither the physician nor the physician's practice (including employees and staff members) makes the receipt of items or services, or the amount or nature of the items or services, a condition of doing business with the donor.

(6) Neither the eligibility of a physician for the items or services, nor the amount or nature of the items or services, is determined in a manner that directly takes into account the volume or value of referrals or other business generated between the parties. For purposes of this paragraph, the determination is deemed not to directly take into account the volume or value of referrals or other business generated between the parties if any one of the following conditions is met:

(i) The determination is based on the total number of prescriptions written by the physician (but not the volume or value of prescriptions dispensed or paid by the donor or billed to the program);

(ii) The determination is based on the size of the physician's medical practice (for example, total patients, total patient encounters, or total relative value units);

(iii) The determination is based on the total number of hours that the physician practices medicine;

(iv) The determination is based on the physician's overall use of automated technology in his or her medical practice (without specific reference to the use of technology in connection with referrals made to the donor);

(v) The determination is based on whether the physician is a member of the donor's medical staff, if the donor has a formal medical staff;

(vi) The determination is based on the level of uncompensated care provided by the physician; or

(vii) The determination is made in any reasonable and verifiable manner that does not directly take into account the volume or value of referrals or other business generated between the parties.

(7) The arrangement is set forth in a written agreement that—

(i) Is signed by the parties;

(ii) Specifies the items and services being provided, the donor's cost of the items and services, and the amount of the physician's contribution; and

(iii) Covers all of the electronic health records items and services to be provided by the donor. This requirement will be met if all separate agreements between the donor and the physician (and the donor and any family members of the physician) incorporate each other by reference or if they cross-reference a master list of agreements that is maintained and updated centrally and is available for review by the Secretary upon request. The master list should be maintained in a manner that preserves the historical record of agreements.

(8) The donor does not have actual knowledge of, and does not act in reckless disregard or deliberate ignorance of, the fact that the physician possesses or has obtained items or services equivalent to those provided by the donor.

(9) For items or services that are of the type that can be used for any patient without regard to payor status, the donor does not restrict, or take any action to limit, the physician's right or ability to use the items or services for any patient.

(10) The items and services do not include staffing of physician offices and are not used primarily to conduct personal business or business unrelated to the physician's medical practice.

(11) The electronic health records software contains electronic prescribing capability, either through an electronic prescribing component or the ability to interface with the physician's existing electronic prescribing system that meets the applicable standards under Medicare Part D at the time the items and services are provided.

(12) The arrangement does not violate the anti-kickback statute (section 1128B(b) of the Act), or any Federal or State law or regulation governing billing or claims submission.

(13) The transfer of the items or services occurs and all conditions in

this paragraph (w) are satisfied on or before December 31, 2013.

(Catalog of Federal Domestic Assistance Program No. 93.773, Medicare-Hospital Insurance; and Program No. 93.774, Medicare-Supplementary Medical Insurance Program)

Dated: June 28, 2006.

**Mark B. McClellan**,  
*Administrator, Centers for Medicare & Medicaid Services.*

Approved: July 14, 2006.

**Michael O. Leavitt**,  
*Secretary.*

[FR Doc. 06-6667 Filed 8-1-06; 8:45 am]

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# Federal Register

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**Tuesday,  
August 8, 2006**

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## **Part IV**

# **Department of the Interior**

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**Bureau of Indian Affairs  
25 CFR Parts 15, 18, 150, et al.  
43 CFR Parts 4 and 30  
Indian Trust Management Reform;  
Proposed Rule**

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

25 CFR Parts 15, 18, 150, 152, and 179

Office of the Secretary

43 CFR Parts 4 and 30

RIN 1076-AE59

Indian Trust Management Reform

AGENCY: Bureau of Indian Affairs, Office of the Secretary, Interior.

ACTION: Proposed rule.

SUMMARY: The Bureau of Indian Affairs (BIA) and the Office of the Secretary propose to amend several of their regulations related to Indian trust management to further fulfill the Secretary's fiduciary responsibilities to federally recognized tribes and individual Indians and to meet the Indian trust management policies articulated by Congress in the Indian Land Consolidation Act (ILCA), as amended by the American Indian Probate Reform Act of 2004 (AIPRA). These amendments address Indian trust management issues in the areas of probate, probate hearings and appeals, tribal probate codes, life estates and future interests in Indian land, the Indian land title of record; and conveyances of trust or restricted land. There is also an "Application for Consolidation by Sale" form that is associated with one of these amendments.

DATES: Please submit your comments by October 10, 2006.

ADDRESSES: You may submit comments, identified by the number 1076-AE59, by any of the following methods:

—Federal rulemaking portal: http://www.regulations.gov. Follow the instructions for submitting comments. —Web site at http://www.doitrustregs.com.

—E-mail: Michele\_F\_Singer@ios.doi.gov. Include the number 1076-AE59 in the subject line of the message.

—Fax: (202) 208-5320. Include the number 1076-AE59 in the subject line of the message.

—Mail: U.S. Department of the Interior, 1849 C Street, NW., Mail Stop 4141, Washington, DC 20240

—Hand delivery: Michele Singer, U.S. Department of the Interior, 1849 C Street, NW., Washington, DC 20240.

Comments on the information collection burdens, including comments on or requests for copies of the "Application for Consolidation by Sale" form, are separate from those on the substance of the rule. Send comments on the information collection burdens to: Interior Desk Officer 1076-AE59, Office of Management and Budget, e-mail: oira\_docket@omb.eop.gov; or 202/395-6566 (fax). Please also send a copy of your comments to BIA at the location specified under the heading ADDRESSES.

FOR FURTHER INFORMATION CONTACT:

Michele Singer, Counselor to the Assistant Secretary—Indian Affairs, Department of the Interior, Bureau of Indian Affairs, 1849 C Street NW., Mail Stop 4141, Washington, DC 20240, telephone (202) 273-4680.

SUPPLEMENTARY INFORMATION:

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J. Government-to-Government Relationships with Tribes (Executive Order 13175)
K. Energy Effects (Executive Order 13211)

I. Statutory Authority

Regulatory amendments to these parts are proposed under the general authority of the Trust Fund Management Reform Act of 1994, 25 U.S.C. 4021 et seq., and the Indian Land Consolidation Act of 2000 (ILCA) as amended by the American Indian Probate Reform Act of 2004 (AIPRA), 25 U.S.C. 2201 et seq. The following table provides additional statutory authority specific to each CFR part.

Table with 2 columns: CFR Part and Statutory Authority. Rows include 25 CFR parts 15, 18, 150, 152, 179 and 43 CFR parts 4, 30, and NEW-Probate Hearing Procedures.

## II. Background

This rulemaking is a result of a collaborative, multi-year undertaking to identify a comprehensive strategy for improving Indian trust management. The Department of the Interior manages Indian trust assets in accordance with its fiduciary trust relationship with tribes and individual Indians. The term “tribes” is used in this preamble to refer to Federally recognized tribes. The purpose of today’s proposed rulemaking is to allow the Department of the Interior to better meet its fiduciary trust responsibilities and to carry out the policies established by Congress to strengthen tribal sovereignty. This rulemaking will provide the Department with the tools to more effectively and consistently manage trust assets and better serve its trust beneficiaries (*i.e.*, Indian tribes and individual Indians).

### A. History of the Rule

The Department of the Interior has been examining ways to better meet its fiduciary trust responsibilities since 1994, when Congress passed the Trust Fund Management Reform Act. Throughout this time, the Department has sought the participation and input of tribal leaders and individual Indian beneficiaries to identify ways in which the Department can better serve its beneficiaries.

In July 2001, the Secretary of the Interior (Secretary) issued Secretarial Orders 3231 and 3232. These orders created the Office of Historical Trust Accounting (OHTA) to perform historical accounting of trust assets and created a temporary Office of the Indian Trust Transition (OITT), which was charged with reorganizing the agency to better meet beneficiaries’ needs. These Secretarial Orders also stated the Secretary’s policy to take a more coordinated approach to ensure the overall success of trust reform.

In accordance with this policy, the Department reevaluated its approach to trust reform and, in January 2002, embarked on an examination and reengineering of its Indian trust management processes. This effort differed from prior trust reform efforts because it took a comprehensive approach to trust reform, linking individual trust reform issues to an overall strategy. To ensure that the strategy fully considered tribal concerns, the Department assembled a Joint Task Force of tribal representatives and representatives from the Department.

From members of this Joint Task Force, a subcommittee of both tribal representatives and Department

representatives was formed. The subcommittee met regularly to review the “As-Is” processes of the way major trust functions were performed at that time. From this “As-Is” model, the subcommittee identified business goals and objectives the Department should meet in fulfilling its trust responsibilities and providing improved services to trust beneficiaries. It then developed the overall strategy to meet those goals and objectives, documented as the Comprehensive Trust Management (CTM) plan.

The CTM laid the groundwork for trust reform by providing strategic direction for development of the “To-Be” model, known as the Fiduciary Trust Model (FTM). The FTM redesigns trust processes into more efficient, consistent, integrated, and fiscally responsible business processes. In developing the FTM, the team incorporated years of Departmental consultation with tribes. The Department adopted the FTM in December 2004 to guide trust reform. Together with Indian affairs policies, the FTM forms the basis of today’s rulemaking.

### B. The Need for This Proposed Rulemaking

Since adopting the FTM, the Department has formed an FTM Implementation Team with tribal representatives. The FTM Implementation Team is leading internal organizational changes for improving performance and accountability in management of the trust. At the beginning of the reengineering process, the Joint Task Force had anticipated that regulatory changes would be necessary to fully implement trust reform. The Team has since determined, and the Secretary has confirmed, that certain regulatory changes are indeed needed to enable the Department to fully implement the FTM. Today’s proposed rule includes many of these necessary regulatory changes.

Additionally, Congress enacted the American Indian Probate Reform Act of 2004. AIPRA amends ILCA to better meet the trust reform goals for land consolidation articulated in ILCA. Regulatory changes authorized by AIPRA are included in this proposed rule.

### C. Development of Proposed Regulatory Language

This proposed rulemaking encompasses tribal and Departmental representatives’ efforts on the Joint Task Force, as well as the efforts of tribal representatives who have provided

comments throughout the trust reform process. These efforts guided in-house teams in drafting the specific regulatory language included in this proposed rulemaking. The in-house teams consisted of Federal personnel from Department headquarters and the field, and included program officers and Department attorneys possessing extensive expertise in probate, land titles and records, acquisition and conveyance, leasing and grazing, and administrative appeals. On December 27, 2005, the Department shared advance copies of the proposed regulatory language (identified as “preliminary drafts” throughout this preamble) with leaders of each Federally recognized tribal government, as well as additional contacts in Indian country, for their input and recommendations. The Department has also presented the preliminary drafts and obtained the input of tribes at two formal consultation meetings: one in Albuquerque, New Mexico on February 14–15, 2006, and one in Portland, Oregon on March 29, 2006. Comments received during these consultations and in the time leading up to this publication have identified several issues that the Department considered in revising the preliminary drafts for publication as a proposed rule. In accordance with the government-to-government relationship with tribes, formal consultations are also being scheduled to take place during the comment period that follows this publication in the **Federal Register** to facilitate an informed final rule. See Section IV, Public Comments, for details on upcoming consultations.

### D. Status of Other Indian Trust Management Reform Regulations

The Department is also developing regulatory amendments to land acquisitions (25 CFR part 151), leasing (25 CFR part 162), and grazing (25 CFR part 166), and developing draft regulatory language addressing trust fund accounting and appeals (new CFR part), unclaimed moneys/whereabouts unknown (new CFR part), and fees for service (new CFR part). Based on input received during the February 14–15, 2006, Albuquerque tribal consultation session, the Department has determined that these regulations require additional work before publication as a proposed rule. The Department plans to promulgate these additional regulations at some point in the future. Together, these regulatory changes will provide the Department with the tools it needs to better serve beneficiaries and will standardize procedures for consistent

execution of fiduciary responsibilities across BIA Regions.

### III. Overview of Proposed Rule

The proposed rule amends various parts of the CFR to further implement Indian trust management reform and meet the policies expressed by Congress in ILCA, as amended by AIPRA. Together, these amendments form an integrated approach to Indian trust management related to probate, land records and title documents, and conveyances that allow the Department to better meet the needs of its beneficiaries.

The Department has revised many of these regulations, in accordance with the Plain Language Initiative (63 FR 31885 (June 10, 1998)) to facilitate ease of use and public comprehension.

In addition to making plain language revisions, amendments revise the regulations to:

- *Incorporate AIPRA changes to probate:* AIPRA created a uniform probate code to standardize intestate succession rules for trust and restricted property. The uniform probate code reinforces tribal sovereignty by eliminating the application of state laws in the probate of trust and restricted assets while deferring to approved tribal probate codes. AIPRA also established new mechanisms for consolidating fractionated interests at probate and through sale of highly fractionated tracts. The proposed amendments to probate regulations would implement AIPRA's provisions by requiring the additional information needed to determine heirs and devisees to be included in the probate file, and by establishing the procedures for directional disclaimers, purchases at probate and consolidation agreements. These regulations continue to refer all probate cases to OHA. The amendments streamline the OHA process by shortening deadlines to more reasonable time periods. Amendments to life estate provisions reflect AIPRA's change in the valuation of a life estate to be "without regard to waste" and base the valuation on the four-year average Single Life Factor used by the U.S. Internal Revenue Service in Table S of the 7520 rate schedule, without regard to gender.

- *Promote consolidation (reduce fractionation) of interests:* Allotments owned by Indians have become increasingly fractionated with the probate of each generation, resulting in the division of the allotment into smaller and smaller interests. These amendments meet the policy expressed by Congress to reduce fractionation (*i.e.*, the exponential increase in the number of ownership interests in a given parcel

of land) of tribal and individual Indian interests in trust and restricted property through the use of several tools. These tools include the opportunities for tribes to establish a tribal land consolidation plan; purchase interests in land within their respective jurisdictions when offered for negotiated sale, gift, or exchange; make a tribal tract purchase (*i.e.*, obtain fractionated interests of non-consenting trust and restricted owners under certain circumstances); and unify ownership and consolidate interests in a tract through partition. The amendments allow both tribes and individual Indians to obtain highly fractionated interests through a new mechanism, created by AIPRA: consolidation by sale (called "partition of highly fractionated lands" in AIPRA). Additionally, the new AIPRA mechanisms being incorporated in probate regulations will offer opportunities to reduce fractionation through the distribution of probate property.

- *Improve service to beneficiaries:* Amendments to the Land Titles and Records Office (LTRO) regulations will update and standardize LTRO title practices and recordation to ensure the Secretary is able to accurately track and record accounting of trust and restricted interest owners, allowing the Secretary to better serve the beneficiaries. Amendments to the probate process are aimed at facilitating the process to reduce the probate backlog and better serve beneficiaries. By clarifying the requirements and processes for probate, approval of tribal probate codes, obtaining LTRO services and products, and conveying trust and restricted property, the Department improves communication and transparency, allowing better service to beneficiaries.

The Department is committed to fully explaining both the purpose and intended effects of these regulations in this preamble. More detailed explanations of each part are provided below, followed by summaries of comments received during tribal consultations on the preliminary drafts of these regulations. The Department welcomes any questions or comments requesting clarification of these parts, as well as additional comments. Additionally, upon finalization of any of these regulations, the Department plans to develop training and other explanatory materials, where appropriate, to facilitate transparency in implementation of these regulations.

### IV. Part-by-Part Analysis

The following sections provide a description of the amendments with respect to each CFR part and provide

distribution tables listing what current CFR sections are proposed for change, the new (*i.e.*, proposed) CFR section, and a description of the proposed changes. Because this proposed rule incorporates changes made to the preliminary drafts, which were distributed to tribes in December 2005, the following part-by-part analysis includes a discussion of major changes made to each preliminary draft of the CFR part in response to comments.

#### A. 25 CFR Part 15

The purpose of this part is to describe the authorities, policies and procedures the BIA (or tribe that has contracted or compacted to fulfill probate functions) uses to prepare a probate file for an Indian decedent's trust estate, except for restricted land derived from allotments made to members of the Five Civilized Tribes (Cherokee, Choctaw, Chickasaw, Creek and Seminole) in Oklahoma.

Amendments to this part revise several subsections to ensure that the probate file delivered to OHA for adjudication is as complete as possible. By requiring a certification by BIA that they have examined certain sources of information and that the file is as complete as possible based on those sources of information, the amendments will prevent multiple transfers of the probate file between BIA and OHA, facilitating the process. Additional changes to the records requirements, such as deleting the requirement for a birth certificate, are also intended to facilitate the probate process.

The amendments ensure that information is included in the probate file to determine whether heirs and devisees meet the AIPRA definition of "Indian." The amendments also incorporate definitions regarding AIPRA's new methods for consolidating interests at probate:

- Consolidation agreements, which are agreements by the decedent's heirs and devisees to consolidate their inherited/devisee interests in trust and restricted land or consolidate their inherited/devisee interests in land with other interests they already own in trust and restricted land; and

- Purchase options at probate, which allow eligible purchasers to purchase or exchange a decedent's interest in trust or restricted land.

Amendments to this part ensure that the probate file contains information necessary for implementation of statutory solutions to fractionation set out in 43 CFR part 4, which addresses OHA probate hearings. Part 15 prescribes what must be included in a probate package and how it will be compiled.

Changes From Preliminary Draft

Several tribal commenters questioned why 25 CFR part 15 and 43 CFR part 4, which both address the probate process, are in separate CFR titles. The Department has determined that because these two parts address different agencies—25 CFR part 15 addresses BIA preparation of the probate file, and 43 CFR part 4 addresses adjudication of the probate file once OHA receives it from BIA—these parts are best kept in their respective titles.

Several commenters suggested that the definitions in both 25 CFR part 15 and 43 CFR part 4 should track the definitions as set out in ILCA, as amended by AIPRA. The Department has reviewed the regulatory definitions, and amended them as appropriate to ensure that they are consistent with AIPRA and with 43 CFR parts 4, 30.

The Department examined and changed terms, as appropriate, to ensure

consistency with definition of terms in 43 CFR parts 4, 30. The Department also amended other terminology as a result of issues raised by tribal commenters: for example, it changed “trust financial assets” and “cash assets” to “trust personalty” to encompass both cash and securities, and it changed “beneficiaries” to “devisees,” which is a more precise term including only those who receive under a will. In section 15.8, the Department clarified what is meant by a “self-proved will.”

In response to tribal comments, the Department also significantly amended section 15.14. In the preliminary draft, this section had provided that, pending probate, the Secretary could take custody and control of the estate and take any action he or she determined to be necessary for the benefit of the estate, including sale of the land. The version of this section being proposed today instead provides limited emergency actions that BIA may take when assets in an estate may be significantly

diminished or destroyed while the probate is pending. Each of the emergency actions require a request to or hearing before OHA, so no unilateral action may be taken to sell land pending probate under this provision.

At least one tribal commenter objected to the last provision in section 15.106 of the preliminary draft, allowing the Secretary to request any additional information in support of the probate file. The Department has deleted the provision allowing the Secretary to require additional information in support of the probate file.

The Department also clarified when claims against an estate may be filed and the deadline for filing such claims in section 15.202.

Distribution Table—25 CFR Part 15

The following distribution table indicates where each of the current regulatory sections in 25 CFR part 15 is located in the proposed 25 CFR part 15.

Current citation	New citation	Title	Remarks
15.1 .....	15.1	What is the purpose of this part?	No change.
15.2 .....	15.2	What terms do I need to know?	Additional definitions.
	15.3	Who can make a will disposing of trust or restricted land or trust personalty?	New section.
	15.4	What are the requirements for my will?	New section.
	15.5	Can I revoke my will?	New section.
	15.6	Can my will be deemed revoked by the operation of the law of any state?	New section.
	15.7	What is a self-proved will?	New section.
	15.8	Can I make my will, codicil, or revocation self-proved?	New section.
	15.9	Do affidavits for my self-proved will, codicil, or revocation have to be in a certain format?	New section.
15.3 .....	15.10	Will the Secretary probate all the land or assets in an estate?	Clarifies that the Secretary will probate only the trust or restricted property in an estate.
15.4 .....	15.11	How does the probate process work?	Administrative changes.
	15.12	What happens if assets in a trust estate may be diminished or destroyed while the probate is pending?	New section.
15.101 .....	15.103	How do I begin the probate process?	Clarifies whom to contact at BIA to inform of a death.
	15.104	Does BIA need a death certificate to prepare a probate file?	Clarifies that a death certificate should be provided and lists information and documents that must be provided if no death certificate is available.
15.102 .....	15.102	Who may notify BIA of a death?	Plain language.
15.103 .....	15.101	When should I notify BIA of a death?	Plain language.
15.104, 15.105 .....	15.105	What other documents does BIA need to prepare a probate file?	Clarifies that certain documents may come from an authority other than a court. Adds requirement for: orders requiring payment of spousal support; identification of person or entity in whose favor an interest is renounced; court judgments regarding creditor claims; and place of enrollment and tribal enrollment or census number of the decedent and potential heirs and beneficiaries. Deletes requirement for birth certificate.
15.106 .....	15.201	Can I get funds from the decedent's IIM account for funeral services?	Plain language.
15.107 .....	15.107	Who prepares a probate file?	Incorporates new “probate staff” definition.
15.108 .....	15.108	If the decedent was not an enrolled member of a tribe or was a member of more than one tribe, who prepares the probate file?	Redesignated. Plain language.

Current citation	New citation	Title	Remarks
	15.106	Can a probate case be opened when an owner of an interest has been absent?	New section.
15.201 .....	15.301	What will BIA do with the documents that I provide?	Clarifies that BIA will also examine other documents and information (beyond those provided) to prepare a complete probate file and will transfer the probate file to OHA.
15.202 .....	15.202	If the decedent owed me money, how do I file a claim against the estate?	Adds requirements to provide certain additional information in support of claim. Changes deadline for filing a claim to the conclusion of the first hearing rather than 60 days of verification of death.
15.203 .....	15.302	What items must BIA include in the probate file?	Clarifies what the certified inventory of trust or restricted real property should contain. Adds requirements for supporting documents.
	15.303	When is a probate file complete?	New section.
15.301 .....	15.401	What happens after BIA prepares the probate file?	Redesignated. Deletes notification to interested parties.
15.302 .....	15.402	What happens after the probate file is referred to OHA?	Adds provisions describing how BIA will handle claims it receives after it refers the probate file to OHA.
15.303 .....	15.403	What happens after the probate decision is made?	Establishes a 30-day time period to file a written request for de novo review, a request for rehearing with the OHA deciding official, or an appeal. Establishes that BIA will not pay claims, transfer title, or distribute assets pending a de novo review, rehearing, or appeal.
15.401 .....	15.501	How can I find out the status of a probate?	Clarifies that interested parties may contact the BIA agency or regional office.
15.402 .....	15.502	Who owns the records associated with this part?	Clarifies that records made by or on behalf of the United States are owned by the United States.
15.403 .....	15.503	How must records associated with this part be preserved?	Redesignated. Plain language.
	15.504	Who may inspect these records?	Redesignated. Plain language.
	15.505	What information must tribes provide BIA to complete the probate file?	Establishes that tribes must provide certain information when necessary to complete a probate file.
	15.506	How does the Paperwork Reduction Act affect this part?	New section.

*B. 25 CFR Part 18 [NEW]—Tribal Probate Codes*

This new CFR part addresses the process for obtaining Secretarial approval of a tribal probate code and lists factors the Secretary will consider in reviewing the tribal probate code for approval. While tribes have had the authority to adopt their own tribal probate codes governing descent and distribution of trust and restricted lands located within the tribes' respective reservations or otherwise subject to the tribes' jurisdiction, part 18 clarifies that a tribe must obtain Secretarial approval of the code. This part lists the factors the Secretary will consider in reviewing a tribal probate code and establishes when an approved code, repeal, or amendment becomes effective. Upon approval, this part requires the tribe to notify tribal members of the tribal probate code.

**Changes From Preliminary Draft**

The Department made several plain language changes to the preliminary draft, which has resulted in combining certain sections and rearranging the

sections to some degree. The Department added a new subsection (b) to section 18.1 to clarify that a tribal probate code may provide for a single heir rule that differs from the one provided in AIPRA.

The Department also clarified section 18.8(b) (section 18.9 in the preliminary draft) to provide that a tribal probate code or amendment will be applied to the estates of decedents who die on or after the effective date, rather than the date of approval, of the tribal probate code or amendment.

Finally, tribal commenters objected to section 18.12 of the preliminary draft, which provided how tribes should notify their members of a tribal probate code or amendment, as an inappropriate incursion into tribal sovereignty. The Department has deleted this section in its entirety.

**Note:** A distribution table is not included here because these provisions are entirely new.

*C. 25 CFR Part 150—Indian Land Record of Title*

The LTRO determines, maintains, and certifies the title status of Indian land and provides various land title products and services to individual Indians, tribes, and other members of the public for land held in trust or restricted status by the United States. Trust status means that title is held by the United States in trust for the benefit of an individual Indian or tribe. Restricted status means ownership of the property is subject to Federal restrictions against alienation and/or encumbrance.

The proposed rule replaces 25 CFR part 150, Land Records and Title Documents, in its entirety, to provide clarification of LTRO's procedures and increase the ability of the LTRO to provide services and products to Indians, tribes, and the public comparable to those provided by state and local land records offices. The changes are described subpart by subpart, below.

Subpart A of the proposed rule, Purpose, Definitions, and Public Information, clarifies that the

Department will provide access to the information in the Indian Land Record of Title to individual Indians, tribes, and the public, except in those instances where access would violate law or policy restricting access to such records. The definition of "Indian land" is clarified to include only lands in trust or restricted status and Federal government-owned land that is under the jurisdiction of the BIA, and not land held in fee by Indians or fee land subject to the rights, occupancy, and use of Indians.

Subpart B of the proposed rule, The Indian Land Record of Title Designation as the Official Record of Indian Land, designates the Indian Land Record of Title as the official record of title instruments affecting Indian land. The proposed rule clarifies that constructive notice of the existence of the title instrument is provided by recording the instrument in the Indian Land Record of Title. Recording instruments with other Federal or state offices does not provide constructive notice with regard to Indian land.

Subpart C of the proposed rule, LTRO Procedures and Requirements to Record Instruments in the Indian Land Record of Title, designates the LTRO as the organization within the Federal government that has the responsibility to maintain the Indian Land Record of Title. This subpart describes the LTRO process for receiving and recording title and the process for correcting an error or omission in an LTRO product or service.

Subpart D of the proposed rule, Services and Products of the LTRO, describes the types of services and products offered by the LTRO. Subpart D also proposes charging fees to certain parties for the services and products provided by LTRO. The proposed fees implement the authority contained in 25 U.S.C. 413 and address a Congressional directive, in 31 U.S.C. 9701, for agencies to begin charging fees that are fair and reasonable based upon the value of the service provided by the Federal office. Under 25 U.S.C. 14b, the Secretary may order that such funds be directed to the appropriation account for the LTRO. A fee schedule will be published as a notice separate from this proposed rule. The proposed rule specifies exceptions to the fee.

These proposed provisions will provide a greater benefit to individual Indians, tribes, and the public through clarification of LTRO procedures and will improve LTRO's ability to serve beneficiaries.

#### Changes From Preliminary Draft

Since distribution of the preliminary draft, the Department made several changes to part 150. For example, the Department added cross-references to 43 CFR part 30 in proposed sections 150.206 and 150.207, relating to corrections of final probate records. The proposed part 150 also moves two sections regarding how to notify the LTRO of an error or omission in a service or product from subpart D to subpart C, for clarity. (See proposed section 150.208). The Department deleted the section in the preliminary draft, "What certified products does the LTRO produce," and added the section, "What services and products may I order from the LTRO." Additional changes and issues are discussed below.

*Terminology:* The Department added language to clarify several definitions, including "interest," "Land Titles and Records Office," "title," and "title instrument." The Department also rewrote the definition for "tribe" to be consistent with existing regulatory definitions for this term.

Throughout the rule, the Department has modified the terminology to clarify that the rights of the individual beneficiary and tribe relate to an interest in trust (see also 25 CFR part 179).

*Effect on Tribes that Compact or Contract LTRO Functions:* Several tribal commenters requested clarification on how this rule affects tribes that perform LTRO functions under a contract or compact. Records maintained by tribes under such a contract or compact are part of the Indian Land Record of Title and must be maintained under the same standards and policies. As such, the regulation includes compact and contract tribes under the definition of the "Land Titles and Records Office" for grammatical and textual convenience purposes. The inclusion of compact and contract tribes under this definition is not intended to reflect a limitation on the sovereignty of these tribes. Certain functions performed by the LTRO are inherently Federal functions and can only be performed by a government agency. The inclusion of the compact and contract tribes in this definition is not intended to authorize any such tribe to perform any inherently Federal function.

*Access to the Indian Land Record of Title:* Several Indian commenters raised the issue of access to LTRO information. Specifically, these commenters pointed out that they are being denied access to LTRO information, sometimes under the auspices of the Privacy Act. The rule clarifies that the Indian Land Record of Title is a public record but that access

is subject to the Privacy Act, Freedom of Information Act, and other law or policy restricting access. In some instances, portions of a copy of the title instruments must be redacted under the Privacy Act to eliminate personal information not otherwise included in the Indian Land Record of Title. Additionally, the Department may restrict access to reports prepared for the Secretary. The LTRO performs functions other than entering information into the Indian Land Record of Title and providing copies of maps and title instruments—the LTRO also takes the information from the record, reviews and examines and draws conclusions about it in preparation of a report. Where the LTRO prepares a report for the benefit of the Secretary, the Secretary has the discretion to restrict access to the report. For example, the public may not obtain a copy of the Probate Inventory Report until OHA opens the probate case. While access to the Indian Land Record of Title may be restricted by the Freedom of Information Act, Privacy Act, or other law or policy, the Department believes that in most cases, neither law or policy will restrict access to these records by individual Indians or tribes. Generally, information included in the Indian Land Record of Title will be available to the public without restriction. The Department has also clarified that owners of an interest in trust or restricted land within the same reservation, the tribe or any person that is leasing, using, or consolidating, or is applying to lease, use, or consolidate, such trust or restricted land or the interest in trust or restricted lands may obtain the following information without regard to the Privacy Act and any exemption contained in the Freedom of Information Act: The names, mailing addresses, information on the location of the parcel, and percentage of the parcel owned by each individual.

*Who Approves Title Instruments:* The Department has deleted as unnecessary the section regarding who the Federal officials are that approve title instruments.

*Fees:* Based on input received on the preliminary drafts, the Department recognizes that there is strong opposition to requiring Indians and tribes to pay for LTRO services and products. Several tribal commenters also expressed a preference for charging fees exclusively to non-Indians because they believe that providing LTRO products and services to non-Indians without charge burdens the LTRO and diverts monies from other Indian and tribal programs. The Department welcomes continued feedback on the

proposal for charging fees for LTRO products and services. The Department will continue to review ways to maximize the efficiency and effectiveness of the products and services provided by the LTRO and consider whether charging fees can assist with this effort. The Department has removed the fee schedule from the text of the regulation and will publish it in a separate notice. This will allow the Department to revise the fees without having to amend the rule.

*LTRO Response Time:* During tribal consultations, several tribal commenters expressed their frustration at what they

characterized as the slowness of the LTRO in responding to requests to provide services and products. The Department is currently undergoing implementation of a technological system that will provide a centralized database of the Indian Land Record of Title. It is the Department's belief that this system will increase the LTRO's ability to respond to requests for products and services in a more timely manner. Several tribal commenters suggested imposing timelines on the LTRO to respond to requests. Due to the complexity and variety of title instruments and reports generated from

the information in the Indian Land Record of Title, the Department is unable to establish a baseline time period. Additionally, the Department believes that establishing time frames within this regulation would limit the flexibility to amend those time frames to reflect changes in processes.

Distribution Table—25 CFR Part 150

The following distribution table indicates where each of the current regulatory sections in 25 CFR part 150 is located in the proposed 25 CFR part 150.

Current citation	New citation	Title	Remarks
150.1 .....	150.1	What is the purpose of this part?	Clarifies purpose by expanding on the services and products LTRO provides.
150.2 .....	150.2	What terms do I need to know?	Adds several definitions for clarification.
	150.4	Do I have to be an Indian or a tribe to obtain products or services from the Lands Titles and Records Office?	New section.
	150.101	Must all title instruments affecting Indian land be recorded in the Indian Land Record of Title?	Designates the Indian Land Record of title as the official record of title instruments affecting Indian land. Clarifies that recording with the Indian Land Record of Title serves as constructive notice that the title instrument exists.
	150.102	Do I have to check with any other governmental office to find title instruments to Indian land?	Clarifies that the Indian Record of Land Title is the source of all recorded instruments.
150.3 .....	150.201	Who maintains the Indian Land Record of Title?	Establishes the LTRO as the office responsible for maintaining the Indian Land Record of Title.
150.4 .....	150.202	Where is the LTRO located?	Indicates that the LTRO has locations throughout the United States, and that Bureau offices maintain contact information.
150.5 .....	.....	.....	Deleted.
150.6 .....	150.203	Who submits the title instruments for recording?	Clarifies that BIA and other government offices may submit title documents for recording. Deletes specific reference to the Administrative Law Judge submitting probate documents.
	150.204	What does the LTRO do with the instruments that it receives?	Restates the steps LTRO takes when it receives documents.
	150.205	What are the minimum requirements for recording a title instrument?	Clarifies requirements for recording.
150.7 .....	150.206	What if the LTRO discovers a defect or error in a document?	Specifies LTRO procedures to address defects or errors discovered after recording.
	150.207	What if a defect or error in a final probate record cannot be corrected?.	Restates requirement for LTRO notification to deciding official for non-clerical errors in probate records. Establishes that the corrected document will be filed in the Indian Land Record of Title. Deletes reference to "Superintendent" and Administrative Law Judges.
	150.208	How do I correct an error or omission in a title instrument or LTRO product or service?	New section.
	150.209	What instruments qualify for recording in with the LTRO?	New section.
	150.210	Does the LTRO maintain the original title instruments?	New section.
	150.211	May I obtain a copy of the title instrument from the LTRO?	New section.
	150.301	What services and products may I order from the LTRO?	New section.
150.8 .....	150.302	How do I order services and products from the LTRO?	Discusses how to order any of LTRO's services and products.
	150.303	Does BIA charge fees for any of the services provided by, or products produced by, the LTRO?	New section.
	150.304	What will the LTRO do if the instrument contains information that is privileged or protected?	New section.

Current citation	New citation	Title	Remarks
	150.305	How does the Paperwork Reduction Act affect this part?	New section.
150.9 .....	.....	.....	Deleted.
150.10 .....	150.212	Is there any benefit of obtaining a certified copy of the title?	Restates that a certified copy can be used in place of an original in court or elsewhere.
150.11 .....	150.3	When can I see land and title information from the Indian Land Record of Title?	Clarifies Department policy to allow public access to the Indian Land Record of Title. Deletes provision regarding nondisclosure of monetary consideration and provision.

#### D. 25 CFR Part 152—Conveyances

This part establishes the authorities, policy, and procedures governing the conveyance of trust or restricted land. Amendments reorganize this part to clarify the different procedures and requirements applicable to each type of conveyance. The reorganized sections incorporate statutory solutions aimed at reducing fractionation of interests. One such solution, consolidation by sale, is newly established by AIPRA.

Consolidation by sale allows one or more eligible bidders to consolidate highly fractionated land by buying the highly fractionated interests at fair market value through a sale conducted by the Secretary. The amendments also:

- Provide instances where consent of the trust or restricted co-owner is not required to convey a fractional interest, making it easier to consolidate interests;
- Allow conveyance of land within a tribe's jurisdiction without tribal consent where the grantor owns 100% of the tract;

- Allow tribes to purchase fractional interests of non-consenting trust and restricted owners at fair market value (tribal tract purchases); and
- Clarify that the Secretary will have a lien on income derived from any interest purchased for a tribe under the Indian Land Consolidation program in the amount of the purchase price, until the lien is satisfied or removed by the Secretary.

The reorganization divides this part into various subparts. Proposed subpart A, General Provisions, provides relevant definitions, describes to whom the Secretary will provide ownership information related to conveyance in this part, and establishes the scope of the regulations.

Subpart B, Sales and Exchanges of Tribal Trust or Restricted Land, addresses sales and exchanges of tribal land pursuant to an approved tribal consolidation plan and certain exchanges of tribal land. This subpart describes what a tribal consolidation plan is, how to obtain approval of such a plan, and how to obtain approval of a sale or exchange in the absence of tribal consolidation plan.

Subpart C, Negotiated Sales, Gifts, and Exchanges of Individually Owned Lands, addresses conveyances of individually owned trust or restricted lands. This subpart provides for a tribal option to purchase any trust or restricted interests proposed for sale, gift, or exchange to unrestricted fee status.

Subpart D, Tribal Parcel Purchase, allows tribes to purchase tracts of trust or restricted lands where the tribe either owns at least 50% of the undivided interests in the tract or has obtained the consent of the co-owners of at least 50% of the undivided interests in the tract, subject to the right of an individual owner in possession of the tract to preempt the purchase.

Subpart E, Consolidation by Sale of Highly Fractionated Parcels, incorporates the new consolidation mechanism authorized by AIPRA. Consolidation by sale allows eligible bidders to consolidate interests in highly fractionated parcels where certain consents are obtained. This subpart also provides the procedures for conducting the sale by public auction or sealed bid. There is an "Application for Consolidation by Sale" form associated with this subpart. To obtain a copy of the information collection request submission to OMB or a copy of the form, send your request to the address related to information collections listed in **ADDRESSES**.

Subpart F, Partitions in Kind, authorizes the Secretary to subdivide trust and restricted land with multiple owners into smaller tracts in which the interests of the owners are unified or consolidated. This subpart allows any owner of a fractionated interest to apply to the Secretary for partition.

Subpart G, Mortgages and Deeds of Trust, allows the Secretary to approve mortgages or deeds of trust encumbering individually owned land under certain circumstances.

Much of the current regulatory language is redesignated into subpart H, Patents in Fee, Certificates of Competency, and Orders Removing Restrictions, and subpart I, Special

Provisions applicable to Osage and the Five Civilized Tribes.

#### Changes From Preliminary Draft

The Department made several changes to the preliminary draft of 25 CFR part 152. Many of the changes are intended to clarify and make terminology consistent.

*Definitions:* The Department deleted the definitions for "competent" and "contiguous" and added definitions for "fair market value," "family farm," and "owner(s)." The Department revised the definition for "Indian."

*Land Consolidation Plans:* The preliminary draft had included a section stating that a tribal land consolidation plan may identify for purchase only lands contiguous to the reservation or otherwise subject to tribal jurisdiction. Several tribal commenters objected to the provision stating that the tribal land consolidation plan may identify for purchase only those lands that are located within or contiguous to the tribe's reservation boundaries, or otherwise subject to tribal jurisdiction. One tribal commenter stated that because it does not have fixed exterior reservation boundaries, this provision would prevent it from acquiring other lands which are in the vicinity of its separate trust parcels, but which are not within or contiguous to that tribe's "reservation boundaries." A few tribal commenters stated that this limitation is substantive and is not contained in ILCA section 2203, and therefore should not be imposed by regulation. Another tribal commenter stated that this severely limits the unrestricted fee lands the tribe can purchase. The Department has deleted this restriction. Additionally, the Department has deleted the definition of "contiguous" since this deleted provision was the only appearance of the term "contiguous" in the regulation.

Several tribal commenters also noted that the tribal land consolidation plan conditions effectively require tribes to pre-identify every transaction to be carried out under the plan—whether for sale, purchase, or exchange. These commenters noted that this requirement

would cause the tribe to submit new plans or plan amendments for every such transaction. These commenters also asserted that this requirement will result in significant price inflation and force tribes to pay more for those targeted tracts than would be the case without the proposed pre-identification requirement. The Department has replaced the requirement for specifically identifying sales, purchases, and exchanges with a requirement that the plan include a description and map of the general area of the sales, purchases, and exchanges.

Several tribal commenters opposed the requirement for approval of a tribal land consolidation plan as an intrusion on tribal sovereignty. Submission of a tribal land consolidation plan is optional and within the tribe's discretion. However, an approved land consolidation plan will allow a tribe to sell parcels of its trust land in connection with an overall plan to consolidate its land holdings and/or decrease fractionation. Pursuant to federal law, sales under an approved consolidation plan may also be at slightly less than fair market value. If the tribe has no plans to sell its trust land, though, there is no need for it to prepare or submit a land consolidation plan for approval.

Finally, the Department clarified the process for sales and exchanges with a land consolidation plan and without a land consolidation plan.

**Sales and Exchanges:** The Department revised section 152.210 (section 152.211 of the preliminary draft) to clarify that a grantor may waive the right to be notified of fair market value only if the grantee is Indian, among the other criteria. The Department also deleted section 152.212 of the preliminary draft, addressing requirements for appraisals to determine fair market value because the proposed draft instead incorporates the requirements into the new definition of "fair market value."

Several tribal commenters questioned the meaning of the provision, "trust or restricted land may only be conveyed to a grantee in unrestricted fee status, where all of the trust or restricted interests in the tract are being conveyed" in section 152.205 (section 152.206 of the preliminary draft). The

Department has deleted this phrase and clarified that the Indian tribe with jurisdiction will receive notice and has the option to purchase.

The preliminary draft provided that tribal consent for conveyance would be required if a law affecting probate and inheritance rights was in effect. The Department revised this section to clarify that tribal consent of a conveyance is required if the tribe enacted a law requiring consent.

The preliminary draft required the tribe to purchase the fractional interest where it fails to promptly consent to the sale. The Department has removed that provision from the regulation.

Several tribal commenters questioned use of the U.S. Department of Justice (DOJ) title standards. The Department deleted this reference and instead refers generally to Department of the Interior boundary standards.

Several tribal commenters objected to the proposed provision allowing the Secretary to liquidate off-reservation interests and allow a tribe to purchase an on-reservation interest where the transfer creates a different pattern of jurisdiction or aggravates existing jurisdictional conflicts. This commenter stated that this is contrary to the Federal policy of Indian self-determination. Another commenter stated that a distinction should be made between trust interests and restricted interests because tribes have a jurisdictional responsibility upon acquisition of the beneficial interest in trust parcels. The Department has deleted this section.

**Tribal Tract Purchases:** Two tribal commenters expressed confusion over the provision stating that tribal tract purchase authority does not extend to "purchases that are limited to any such fractional interests held in unrestricted fee status." The Department has deleted this provision and clarified that tribal tract purchases may include conveyances to the tribe of interests held in fee and that fee interests are included in the calculation to determine whether the tribe owns at least 50% of the tract. With regard to providing notice of a tribal tract purchase to owners whose whereabouts are unknown, the Department has lengthened the time before the closing of the sale that publication in a paper

can occur from 30 days to 90 days. The Department has also clarified what action it will take if it does not approve the appraisal for a tribal tract purchase.

**Consolidation by Sale:** Several tribal representatives commented on the fact that an individual holding the largest ownership interest in the tract, and 20% or greater of the ownership interests in the tract, has a right to match the highest bid. The Department has not made any substantive changes to these provisions because they are prescribed by AIPRA. One tribal commenter stated that the regulation should clarify that both trust and fee interests are subject to consolidation by sale. The Department has clarified this in section 152.402. Another tribal commenter asked whether a fee interest owner would be able to trigger a consolidation by sale. Proposed section 152.403 entitles only "eligible bidders" to submit applications for consolidation by sale. A fee owner may submit an application if he or she meets one of the categories for "eligible bidder." Finally, the Department revised the definition of "bona fide" and made other clarifications.

**Partition in Kind:** The Department simplified section 152.501, establishing what tracts may be partitioned and deleted the provision excluding partitions of restricted land in Alaska. The preliminary draft included a provision at section 152.606(b) stating that the tribe will not have the right of first refusal where encumbered land is purchased as a result of a foreclosure or sale proceeding. Several tribal commenters asserted that the tribe should have the right to purchase interests that are to be foreclosed and are to be taken into unrestricted fee status. The Department has deleted this provision and instead states that title will be taken in accordance with laws applicable to the foreclosure or sale proceeding.

Distribution Table—25 CFR Part 152

The following distribution table indicates where each of the current regulatory sections in 25 CFR part 152 is located in the proposed 25 CFR part 152.

Current citation	New citation	Title	Remarks
152.1 .....	152.1	What does this part do?	New section.
	152.2	What terms do I need to know?	Adds and amends definitions.
	152.3	Will the Secretary provide ownership information?	New section.
	152.4	To whom will the Secretary provide ownership information?	New section.
	152.5	Which subparts do not apply to Alaska?	New section.

Current citation	New citation	Title	Remarks
152.2 .....	152.101	What transactions are covered by this subpart?	Incorporates AIPRA principles by clarifying that the Secretary will only approve sales of tribal land when made in accordance with a consolidation plan.
	152.102	What must a land consolidation plan include?	New section. Lists items that must be included in a tribal land consolidation plan.
	152.103	Are there any restrictions on a land consolidation plan?	New section.
	152.104	How does the Secretary approve a land consolidation plan?	New section.
	152.105	How does a tribe receive approval for a sale or exchange under a land consolidation plan?	New section.
	152.106	How may the tribe use the proceeds of a sale or exchange?	New section.
	152.107	In the absence of an approved land consolidation plan, how does a tribe get approval for an exchange of tribal land?	New section.
	152.108	What criteria will the Secretary use to determine whether to approve an exchange?	New section.
152.3 .....		.....	Deleted.
152.4 .....	152.701	Application for patent in fee .....	Redesignated.
152.5 .....	152.702	Issuance of patent in fee .....	Redesignated.
152.6 .....	152.703	Issuance of patents in fee to non-Indians and Indians with whom a special relationship does not exist.	Redesignated.
152.7 .....	152.704	Application for certificate of competency .....	Redesignated.
152.8 .....	152.705	Issuance of certificate of competency .....	Redesignated.
152.9 .....	152.801	Certificates of competency to certain Osage adults .....	Redesignated.
152.10 .....	152.802	Application for orders removing restrictions, except Five Civilized Tribes.	Redesignated.
152.11 .....	152.803	Issuance of orders removing restrictions, except Five Civilized Tribes.	Redesignated.
152.12 .....	152.804	Removal of restrictions, Five Civilized Tribes, after application under authority other than section 2(a) of the Act of August 11, 1955.	Redesignated.
152.13 .....	152.805	Removal of restrictions, Five Civilized Tribes, after application under authority of section 2(a) of the Act of August 11, 1955.	Redesignated.
152.14 .....	152.806	Removal of restrictions, Five Civilized Tribes, without application.	Redesignated.
152.15 .....	152.807	Judicial review of removal restrictions, Five Civilized Tribes, without application.	Redesignated.
152.16 .....	152.808	Effect of order removing restrictions, Five Civilized Tribes.	Redesignated.
152.17, (152.18).	152.203	Who may convey an interest in trust or restricted land?	Clarifies who may convey interests with Secretarial approval.
152.19 .....		.....	Deleted.
152.20 .....		.....	Deleted.
152.21 .....	152.201	What lands are covered by this subpart?	Clarifies scope of subpart.
	152.202	What transactions are covered by this subpart?	Clarifies scope of subpart.
152.22 .....		.....	Deleted.
	152.204	Who can receive an interest in trust or restricted lands?	New section.
	152.205	What restrictions apply to a conveyance of trust or restricted land to fee status?	New section.
152.23 .....	152.206	How does an owner initiate a negotiated sale, gift, or exchange?	Clarifies what a written request for negotiated sale, gift, or exchange must include.
	152.207	Does a conveyance of a fractional interest require the consent of the co-owner(s)?	New section.
	152.208	Is tribal consent required to convey an interest in trust or restricted land located within the tribe's jurisdiction?	New section.
152.24 .....	152.210	When must fair market value be determined and provided to the grantor?	Establishes circumstances in which grantor may waive right to be provided with information as to the fair market value.
152.25 .....	152.209	Is payment required for a negotiated sale, exchange, or gift?	Removes restrictions for conveyances at less than fair market value because 152.210 entitles the grantor to full information regarding the fair market value.
	152.211	When must the Secretary receive payment for the conveyance of the land?	New section.
	152.212	How does the Secretary decide to approve a negotiated sale, gift, or exchange?	New section.
	152.213	How does the negotiated sale or exchange occur?	New section.
	152.214	When is a negotiated sale, gift, or exchange effective?	New section.
	152.215	How does an Indian Land Consolidation Program lien attach?	New section.

Current citation	New citation	Title	Remarks
	152.216	How is an Indian Land Consolidation Program lien removed?	New section.
	152.217	When can a co-owner acquire an interest previously acquired on behalf of the tribe?	New section.
	152.218	What if there are liens or other encumbrances on the lands to be conveyed?	New section.
	152.301	What lands are covered by this subpart?	New section.
	152.302	What transactions are covered by this subpart?	New section.
	152.303	How does a tribe apply for a parcel purchase?	New section.
	152.304	How and when will owners be notified of an application for tribal parcel purchase?	New section.
	152.305	Can an individual owner preempt and succeed a tribe's right to purchase?	New section.
	152.306	How and when will the Secretary review an application for parcel purchase?	New section.
	152.307	How and when will the conveyance instrument be executed?	New section.
	152.401	What terms do I need to know?	New section.
	152.402	What lands are subject to consolidation by sale?	New section.
	152.403	How do I apply to consolidate a parcel by sale?	New section.
	152.404	What must the Secretary do before acting on an application for consolidation by sale?	New section.
	152.405	What consents are necessary for a consolidation by sale?	New section.
	152.406	How will the Secretary notify owners of the consolidation proceeding?	New section.
	152.407	What action does the Secretary take on comments or objections?	New section.
	152.408	What happens if the Secretary orders a new appraisal?	New section.
	152.409	How can an owner appeal a consolidation by sale proceeding?	Limits discussion of advertising to consolidation by sale.
152.26 .....	152.410	How will the Secretary notify owners of a sale after appeals have been decided?	Limits discussion of advertised sale to consolidation by sale.
152.27 .....	152.411	Who may participate in an auction or sealed bid sale?	New section.
	152.412	How does a tribe reserve its right to match the highest bid?	New section.
152.28 .....	152.413	How will the Secretary determine the successful bidder?	New section.
152.29 .....	152.414	What happens if no bid matches the fair market value?	Deletes provisions allowing the Secretary to reject bids.
152.30 .....		.....	Deleted.
	152.415	When must the highest bidder pay for the purchase?	New section.
	152.416	How will proceeds be distributed?	New section.
	152.417	Is Federal financial assistance available to support a bidder's purchase?	New section.
	152.418	What title is acquired?	New section.
152.31 .....		.....	Deleted.
152.32 .....	152.219	How does a transaction affect collection of construction costs for irrigation projects?	Plain language.
152.33 .....		.....	Deleted. See subpart F.
152.34 .....		.....	Deleted. See subpart G.
152.35 .....		.....	Deleted.

**Subpart F—Partitions in Kind**

	152.501	What lands are covered by this subpart?	New section
	152.502	When does this subpart apply?	New section.
	152.503	How can an owner initiate a partition action?	New section.
	152.504	How will we notify the applicant's co-owners of an application for partition?	New section.
	152.505	How and when will we review an application?	New section.
	152.506	When will we execute the conveyance instruments?	New section.

**Subpart G—Mortgages and Deeds of Trust**

	152.601	What does this subpart do?	New section.
	152.602	How do owners submit an application for approval of a mortgage or deed of trust?	New section.
	152.603	How will the Secretary review the application?	New section.
	152.604	How may the mortgage or deed of trust be enforced?	New section.
	152.605	Does the land remain in trust as a result of foreclosure or sale?	New section.
	152.606	How does the Paperwork Reduction Act affect this part?	New section.

*E. 25 CFR Part 179—Life Estates and Present and Future Interests*

This regulation sets forth the authorities, policy and procedures governing the administration of life estates and future interests in Indian lands by the Secretary of the Interior.

Amendments to this part explicitly identify the rights and responsibilities of the life tenant, and define the life tenant's share of income, contract bonuses, and royalties derived from the use of the land and the extraction of minerals or other resources from the land. AIPRA established that life estates are "without regard to waste," meaning that the life tenant is entitled to all income, contract bonuses, and royalties derived from use of the land and extraction of resources. The amendments to this part incorporate this change, providing that all life estates created after June 20, 2006, will be entitled to all income, contract bonuses, and royalties, in the absence of an order, conveyance document, or written agreement specifying otherwise.

The amendments delete the Single Life Factor table for determining the respective values of a life estate and remainder share and instead refer to Actuarial Table S, Valuation of Annuities, obtained from 26 CFR 20.2031. The amendments also eliminate the distinction between the genders in determining the value of a life estate; the current regulations generally value life estates held by females higher than those held by males.

New sections address several topics that allow the Department to determine the type of estate and interest in which a beneficial interest may be held, to ensure that the holder of a life estate, the measuring life for a life estate, the holder of a future interest, and class members can be ascertained in all cases, including when the conveyance document or probate order includes conditions. The amendments also address the termination and renunciation of life estates, establish why notification to BIA of the death of a life tenant is important, and establish that term estates will be treated in the same manner as life estates for the purposes of distributing income, cash bonus, and principal.

**Changes From Preliminary Draft**

The Department added several new definitions, including "class," "condition," "contingent remainder," "conveyance document," "estate," "executory interest," "extant person," "grantee," "grantor," "holder," "life tenant," "open class," "order," "present

interest," "remainderman," "reversionary interest," "Secretary," "term estate," and "vested." The Department also added several sections and expanded others since it released the preliminary draft of part 179.

*Effect of State Law:* The preliminary draft stated that the Department would look to state law for guidance in the absence of Federal law or Federally approved tribal law. This section has been deleted because the Office of Hearings and Appeals will determine when it is appropriate to look to state law.

*Ascertaining Beneficial Interests and Classes:* The Department has added several provisions that ensure that the Department can determine the type of estate and interest in which a beneficial interest may be held. For example, proposed section 179.3 ensures that the interest in a life estate vests only in specific, living persons, without conditions. Proposed section 179.4 ensures that the "measuring" life for a life estate is a specific person who is living at the time the conveyance document is approved or testator dies. Proposed section 179.5 ensures that the interest in future interest holders vests only in specific, extant persons, and if there are conditions, that those conditions can be satisfied before the Secretary's approval of the conveyance document, if the future interests are created by conveyance document, or by the death of the testator, if the future interests are created by will. This section will, in practice, forbid successive future interest in persons who are non-specific, non-living persons. Likewise, proposed sections 179.6, 179.7 and 179.8 indicate that, where the conveyance or will grants an interest to a class, the class will close and any conditions must be satisfied upon approval of the conveyance document or death of the testator. Proposed section 179.8 also describes the circumstances in which the Secretary may close or open a class. These changes allow the Secretary to know, at the time of approval of conveyance document or death of the testator, who holds the beneficial interests.

*Without Regard to Waste:* During tribal consultations and during the period leading up to the publication of this proposed rule, several tribal commenters expressed concern with the preliminary draft's definition of "without regard to waste" and the phrase's effect on protection of the remainderman's interest from abusive practices of the life tenant. AIPRA states that all life estates created on or after

June 20, 2006, shall be "without regard to waste" and defines this phrase as meaning that the life tenant shall be entitled to all income, including bonuses and royalties, to such land to the exclusion of the remaindermen. The Department has incorporated this concept into the regulations at proposed section 179.12, which provides that, where the order, conveyance document, or written agreement does not specify otherwise, life tenants will be entitled to all income, principal, contract bonuses, and royalties where the life estate was created by a conveyance document after the effective date of this regulation or by an order in a probate case where the testator died on or after June 20, 2006.

The Department has also added sections 179.9, 179.10 and 179.11, which respectively establish the privileges of a life tenant, the responsibilities a life tenant has to the remainderman, and action a remainderman may take to stop a life tenant from damaging and substantially diminishing property. Section 179.10 specifically states that, with respect to life estates created by probate order after June 20, 2006, or by conveyance document after the passage of this regulation, the life tenant may not destroy the estate, commit malicious waste, or fail to reasonably manage the land in a manner consistent with long-term utilization and trust status of the land.

*Sale or Leasing of Interests:* The Department has clarified in proposed section 179.9 that the life tenant may rent or sell the life estate interest to someone else. Additionally, section 179.10 notes that provisions regarding the relationship between a life tenant and remainderman do not restrict or amend the authority of the Secretary to consent on behalf of interest owners to the leasing or transfer of Indian land.

*Value of Current Life Estate and Remainder:* Several tribal commenters identified an issue with placing the Single Life Factor chart directly into the text of the regulation, stating that it will be difficult to update. The Department has addressed this issue by deleting the Single Life Factor chart from the text of the regulation and instead referring to an existing chart that is frequently updated.

**Distribution Table—25 CFR Part 179**

The following distribution table indicates where each of the current regulatory sections in 25 CFR part 179 is located in the proposed 25 CFR part 179.

Current citation	New citation	Title	Remarks
179.1 .....	179.1	What is the purpose of this part?	Clarifies that these regulations do not apply to any Federal statutory rights to purchase.
179.2 .....	179.2	What terms do I need to know?	Adds several definitions.
179.3 .....	.....	.....	Deleted.
	179.3	Who can hold a life estate?	New section.
	179.4	Who can be the measuring life for a life estate?	New section.
	179.5	Who can be designated as a future interest holder?	New section.
	179.6	Who can be members of a class?	New section.
	179.7	How are interest holders determined if the conveyance document or order contains conditions?	New section.
	179.8	How are members to be determined if there is an open class?	New section.
	179.9	What are the privileges of a life tenant?	New section.
	179.10	What is the life tenant's responsibility to the remainderman?	New section.
	179.11	How can a future interest holder stop the life tenant from damaging his/her interest and substantially diminishing its value?	New section.
179.4 .....	179.12	How will the Secretary distribute income and principal between the life tenant and the remainderman?	Incorporates AIPRA provisions for life estates created after AIPRA's effective date, providing that these life tenants are entitled to all income, principal, contract bonuses, and royalties.
179.5 .....	179.13	How will the value of a current life estate and remainder be determined?	Replaces existing life estate value tables with a reference to one table. Deletes gender as factor affecting life estate values.
	179.14	How does a life estate terminate?	New section.
	179.15	What if I do not want an interest in a life estate?	New section.
	179.16	Why do I need to notify the Secretary about the death of a life tenant?	New section.
	179.17	How will term estates be treated?	New section.
179.6 .....	.....	.....	Deleted.

F. 43 CFR Part 4, Subpart D

Currently, subpart D of 43 CFR part 4 addresses how OHA adjudicates the probate file that BIA prepares under 25 CFR part 15. The amendments remove the probate hearing procedures to a new part 30. See the discussion of these changes below.

G. 43 CFR Part 30

The amendments make many administrative changes to the part to better meet plain language requirements and make the OHA probate process as transparent as possible. In addition, the amendments make several substantive changes. Amendments to this part clarify the two types of probate proceedings (summary and formal), simplify the deadline for filing a claim against an estate, and clarify the authority of administrative law judges, Indian probate judges, and attorney decision makers.

Other amendments reduce the impact of fractionation on trust and restricted lands and expand land consolidation options by incorporating administrative procedures to implement AIPRA provisions related to consolidation agreements, renunciations in favor of a designated recipient, and purchase options at probate. Consolidation agreements permit heirs and devisees to exchange interests in trust or restricted

lands for the purpose of consolidating ownership. Renunciations in favor of a designated recipient enable heirs or devisees that would have inherited a trust or restricted interest to renounce that interest in favor of another eligible party. The availability of the option to purchase a decedent's trust or restricted interests has been expanded to allow tribes, eligible family members, and co-owners of trust or restricted interests to exercise the option.

Changes From Preliminary Draft

Because a significant number of issues on 43 CFR part 4 were identified in tribal comments, the following discussion addresses the issues by subheading in the new 43 CFR part 30.

*Overall:* The Department reorganized some sections in this subpart to provide a better logical flow. For example, the Department moved former sections 4.382 and 4.383, related to the omission and improper inclusion of property in an estate, to sections 30.126 and 30.127 under the "Judicial Authority and Duties" subheading. Additionally, former section 4.216, related to what happens when a person dies without a will and has no heirs, has been moved to section 30.254 under the "Miscellaneous" subheading. Section 4.217, related to settlement agreements, has been moved to section 30.150,

under the new subheading "Consolidation and Settlement Agreements" (formerly, this subheading included only consolidation agreements). Provisions related to tribal purchase of interests under special statutes (sections 4.290 through 4.304 of the preliminary draft) have been moved to sections 30.260 through 30.274. The Department also added a few sections under the "Renunciation of Interests" and "Summary Probate Proceedings" subheadings for clarity.

The Department and tribal commenters identified potential confusion regarding references to "allocated market value," "estimated market value," and "appraised market value." The Department has addressed this issue by deleting references to "allocated" and "estimated" market value and replaced them with "appraised" market value.

Several tribal commenters noted that while the preliminary drafts established timelines for filing an appeal, they did not impose any timelines on OHA to act. For example, several tribal commenters suggested placing a deadline on OHA for designating a case as appropriate for summary or formal hearing and assigning a case to a judge 10 days after receiving the file from BIA. Other tribal commenters suggested imposing a timeframe on notifying

potential heirs that a probate case has been assigned to a judge. Another tribal commenter recommended setting time periods for holding the hearing and issuing a final decision in a probate case. The Department has determined that, given the variation in complexity and resources available, establishing set timelines for judges would not be feasible.

**Definitions:** In response to tribal comments, the Department modified the current definition of “interested parties” to ensure that tribes and co-owners with the option to purchase are included in the definition. Several tribal commenters were concerned that the definition in the preliminary draft was too narrow, and would not provide notice to persons with an interest. The revised definition includes tribes and persons with the option to purchase at probate and all co-owners. (See proposed section 30.102).

Additionally, the Department revised several definitions included in the preliminary draft to ensure consistency with AIPRA and 25 CFR part 15. The Department amended the definition of “child” to include adopted children, in response to tribal comments that biological and adopted children should be treated equally in the distribution of property at probate. The Department also amended other terms for precision: for example, it changed “trust financial assets” and “cash assets” to “trust personalty” to encompass both cash and securities; it changed “beneficiaries” to “devisees,” which is a more precise term including only those who receive under a will; it revised the definitions for “per stirpes” and “de novo” for clarity; and it deleted the placeholders for definitions for “residing on” and “pretermitted spouse,” having determined that meanings for these terms are subject to judicial determination based on fact-specific circumstances.

**Commencement of Probate Proceedings:** The Department clarified in section 30.114 that OHA will provide notice of the formal or summary probate proceeding and eliminated the requirement for BIA to notify potential heirs and devisees when it forwards the probate file to OHA for consideration because sufficient notice is provided by OHA upon designation of the case for a formal or summary probate proceeding.

**Judicial Authority:** The Department amended section 4.220 of the preliminary draft, relating to the judge’s general authority. It is now designated as section 30.120. In proposed subsection (f), the Department clarifies that the probate decision and order, not the terms of the sale, determine how the

sale at probate and distribution of interests will occur. The Department also clarifies in proposed subsection (i) that the judge first determines whether the tribe has jurisdiction over the trust or restricted property at issue.

The Department clarified the standard against which a judge may determine a person to be dead based upon an extended unexplained absence. The revisions require credible evidence to establish, by a clear and convincing standard, that the person has had no known contact with any person or entity during the six-year period preceding the hearing. (See proposed section 30.124).

**Claims:** Tribal commenters pointed out that deadlines for filing claims were both unclear and potentially conflicting. The Department significantly amended the provisions related to deadlines for filing claims to simplify the deadline and make consistent with 25 CFR part 15. The deadlines established in the preliminary draft complicated the matter of determining timeliness of claims and introduced both factual and legal issues, including choice of law issues, to determine when the creditor was chargeable with notice. Additionally, the preliminary draft continued the current requirement that the creditor file with BIA rather than OHA. This requirement is no longer appropriate since BIA no longer conducts any probate hearings. For this reason, the Department is allowing filing of claims with BIA while the probate file is being prepared, or with the OHA once the probate file has been transferred to the OHA. The Department has also clarified what must be included in a claim and eliminated the requirement for filing in triplicate. Additionally, the Department deleted the section related to priority and general claims (what had been sections 4.245 and 4.248 in the preliminary draft).

**Settlement and Consolidation Agreements:** The Department placed provisions relating to settlement agreements with those relating to consolidation agreements. Revisions to the sections on consolidation agreements now specify that there are two types of consolidation agreements, one including only property in the estate, and another including both property in the estate and other property already owned by the heirs or devisees. The Department added a section allowing parties to a settlement or consolidation agreement the ability to waive valuation of trust property, given that the parties to the agreement may have non-economic reasons for entering into the agreement.

**Purchase at Probate:** The Department clarified provisions relating to purchase at probate and clarified that, in accordance with AIPRA, an appraisal must be completed to determine market value. The Department also clarified provisions relating to renunciations to clarify who may receive a renounced interest in trust or restricted land, and who may receive a renounced interest in trust personalty. The Department also changed the previous provision that had stated the renunciation would not be valid if the designated recipient of a renounced interest refused to take the interest. Instead, this provision now states that the renounced interest will pass to the heirs of the decedent as if the person renouncing the interest had predeceased the decedent.

**Summary Probate Proceedings:** The Department clarified what summary probate proceedings are and simplified the criteria for when a summary probate proceeding is appropriate (i.e., when the estate is “cash only” and the estate’s value does not exceed \$5,000 on the date of death). The Department deletes references to consolidation agreements and purchases at probate with regard to summary probate proceedings because such agreements would not apply to a cash-only estate.

**Formal Probate Proceedings:** In response to tribal concerns regarding notice of a tribe’s right to purchase, the Department amended section 4.337 of the preliminary draft to require notice to the tribe of probates of estates with trust or restricted land under the tribe’s jurisdiction (see proposed section 30.213).

The Department has deleted the question related to the judge’s authority to require a person to appear at a hearing (section 4.334 of the preliminary draft) because, while the judge does have this authority, the judge’s subpoena authority is broader than the question and answer indicates. The section related to notice of a requirement to appear at a hearing has also been deleted to avoid confusion.

With regard to contests of self-proved wills, the Department has added a provision allowing the judge to order the deposition of a witness at a location reasonably near the witness’s residence, where no attesting witness resides near the place of the hearing.

The Department has also clarified that the official record of the probate case and decisions contain settlement agreements, consolidation agreements, renunciations and acceptances of renounced property, and additional items where interests are sold at probate.

*Miscellaneous:* The section addressing the rights of inheritance of someone who kills the decedent has been revised to comply with AIPRA. The Department also clarifies that a judge may allow fees for attorneys representing interested parties, but not creditors and that a

judge may order the payment of fees to a guardian ad litem.

Distribution Table—43 CFR Part 4, Subpart D

The following distribution table indicates where each of the current

regulatory sections in 43 CFR part 4, subpart D, is located in the proposed 43 CFR part 30 and in proposed revisions to 43 CFR part 4.

Current citation	New citation	Title	Remarks
4.200 .....	30.100	How do I use this subpart?	Adds updated references.
	30.101	Will the Secretary probate all the land or assets in an estate?	New section.
4.201 .....	30.102	What terms do I need to know?	Adds definitions for “BLM,” “consolidation agreement,” “directional disclaimer,” “probate staff,” “purchase option.” Replaces “deciding official” with “judge.” Deletes definition of “solicitor.”
4.210, 4.211 .....	30.110	When does OHA commence a probate case?	Plain language.
	30.111	How does OHA commence a probate case?	Plain language.
	30.112	What must a complete probate file contain?	Plain language.
	30.113	What will OHA do if it receives an incomplete probate file?	Adds that OHA may issue a subpoena for the missing information or proceed with a hearing.
	30.114	What notice of the probate case will OHA send me?	Adds that OHA will provide notice upon receipt of the probate file.
	30.115	Can I review the probate file?	New section.
4.202 .....	30.120	What authority does the judge have in a probate case?	Deletes criteria for when a formal hearing is necessary. Adds new categories of authority.
	30.121	May a judge appoint a master in a probate case?	New section. Allows judge to appoint masters.
	30.122	Is the judge required to accept the master’s recommended decision?	New section.
4.206 .....	30.123	Will the judge determine matters of status and nationality?	Plain language.
4.204, 4.203 .....	30.124	Can a judge find a person to be dead by reason of unexplained absence?	Establishes standard for finding that any person is dead.
4.205 .....	30.154	What happens when a person dies without a will and has no heirs?	Incorporates AIPRA references.
4.242 .....	30.125	May a judge reopen a probate case to correct errors and omissions?	Plain language. Identifies circumstances in which judge may reopen probate case.
	30.130	When must a judge or attorney decision maker (ADM) recuse himself or herself from a probate case?	New section.
	30.131	Where may a judge or ADM seek guidance on recusal?	New section.
	30.132	May an interested party to a probate proceeding excuse a judge from hearing a case?	New section.
	30.133	May an interested party to a probate proceeding request that a judge recuse?	New section.
	30.134	What must the judge consider when deciding whether to recuse?	New section.
	30.135	What action will the judge take after deciding to recuse himself or herself?	New section.
	30.136	How will the case proceed once the judge has recused?	New section.
	30.137	Can I appeal the judge’s recusal decision?	New section.
	30.138	When can I appeal the judge’s recusal decision?	New section.
4.250(a) .....	30.140	When must I file a claim against the probate estate?	Amends deadline for filing claims.
4.250(c) .....	30.141	How must I file a creditor claim against the probate estate?	Eliminates requirement for triplicate filing. Clarifies what must be included in the affidavit and itemized statement.
4.250(b) .....	30.142	Will a judge authorize payment of a claim from the trust estate where the decedent’s non-trust estate may be available?	Plain language.
4.250(d)–(f) .....	30.143	Are there any categories of claims that may not be allowed?	Adds category for claims attributable to payments for general assistance, welfare, or similar assistance.
4.251(a) .....	30.144	May the judge authorize payment of the costs of administering the estate?	Plain language.
4.251(b) .....	.....	What are priority claims the deciding official may authorize payment for?	Deleted.
4.251(c) .....	.....	When may the deciding official authorize payment of general claims?	Deleted.
4.251(d) .....	30.145	When can a judge reduce or disallow a claim?	Plain language.
4.251(e)–(g) .....	30.147	What happens if there is not enough money in the IIM account to pay all the claims?	Plain language.

Current citation	New citation	Title	Remarks
4.251(h) .....	30.148	Will interest or penalties charged against claims after the date of death be paid?	Plain language.
4.252 .....	30.146	What property is subject to claims?	Plain language.
4.207 .....	30.150	If the interested parties agree to settle matters among themselves, what does the judge do?	Plain language. Deletes reference to liability for irrigation construction and operation costs. Deletes provisions regarding preparation, deliverance, and approval of deeds.
	30.151	May the devisees or eligible heirs in a probate proceeding consolidate their interests?	New section. Adds AIPRA provisions allowing for consolidation agreements.
	30.152	May the parties to a settlement agreement or consolidation agreement waive valuation of the trust property?	New section.
	30.153	Is an order approving a consolidation agreement or settlement agreement considered a partition or sale transaction?	New section. Clarifies basis and procedures for approval of consolidation agreements.
	30.160	What can be purchased at probate?	New section. Incorporates provisions for purchase at probate.
	30.161	Who can purchase at probate?	New section. Incorporates definition for eligible purchaser.
	30.162	Does property purchased at probate remain in trust or restricted status?	New section.
	30.163	Is consent required for a purchase at probate?	New section. Adds provisions describing when consent of an heir or devisee is required for a purchase at probate.
	30.164	What must I do to purchase at probate?	New section. Adds provisions describing procedure for requesting a purchase at probate.
	30.165	Who will OHA notify of a request to purchase at probate?	New section. Adds provisions for notification by OHA and required contents of the notice.
	30.166	What will the notice of the request to purchase at probate include?	New section.
	30.167	How does OHA decide whether to grant a request to purchase at probate?	New section.
	30.168	What will the judge consider in determining the market value of an interest?	New section. Clarifies that a judge must base the market value on an appraisal that meets certain standards.
	30.169	If I do not agree with the appraised market value, what can I do?	New section. Establishes process for challenging appraisal.
	30.170	What happens when OHA grants a request to purchase at probate?	New section. Clarifies the procedures for notifying the successful bidder and finalizing the sale.
	30.171	When must the successful bidder pay for the interest purchased?	New section.
	30.172	What happens after the successful bidder submits payment?	New section.
	30.173	What happens to the money from the sale?	New section. Clarifies that the Department will distribute the money from the sale to the appropriate heirs, devisees, and/or spouse.
	30.174	What happens if the successful bidder does not pay within 30 days?	New section. Clarifies that the sale will be cancelled if the successful bidder fails to pay the bid within 30 days.
4.208 .....	30.180	May I give up an inherited interest in trust or restricted property or trust personalty?	Plain language.
	30.181	How do I renounce an inherited interest?	Plain language.
	30.182	Who may receive a renounced interest in trust or restricted land?	New section.
	30.183	Who may receive a renounced interest of less than 5 percent in trust or restricted land?	New section.
	30.184	Who may receive a renounced interest in trust personalty?	New section.
	30.185	Can my designated recipient refuse to accept the interest?	New section.
	30.186	Are renunciations that predate the American Indian Probate Reform Act of 2004 valid?	New section.
4.208(c) .....	30.187	May I revoke my renunciation?	Plain language.
4.208(b) .....	30.188	Does a renounced interest vest in the person who renounced it?	Plain language.
4.212 .....	30.200	What is a summary probate proceeding?	Deletes provision stating that Federal law or tribal code may prevent summary processing.
	30.202	May I request a summary probate proceeding be replaced by a formal proceeding?	Changes time period for filing a request for formal hearing from 60 days to 30 days.
	30.201	What does a notice of a summary probate proceeding contain?	New section.
4.213 .....			Deleted.

Current citation	New citation	Title	Remarks
4.214 .....	30.203	What must a summary probate decision contain?	Adds provisions regarding renunciation. Deletes provisions regarding dower, curtesy, and homestead, and requirement to attach certified inventory of trust or restricted lands. Changes time in which decision will become final from 60 days to 30 days.
4.215(a)–(c) .....	30.204	How do I seek review of a summary probate proceeding?	Changes time period for filing request for de novo review from 60-day period to 30-day period.
4.215(d) .....	.....	.....	Deleted. Provision had allowed persons to request de novo review after expiration of time period for filing request under certain circumstances.
4.215(e) .....	30.205	What happens after I file a request for a de novo review?	Plain language.
4.216 .....	30.206	What happens if nobody files for a de novo review?	New section. Establishes what happens at expiration of 30-day period for filing de novo review.
4.216 .....	30.210	How will I receive notice of the formal probate proceeding?	Adds locations for posting. Deletes provision establishing that interested parties living near posting will be bound by decision.
4.216 .....	30.213	What notice to a tribe is required in a formal probate proceeding?	Expands notice to tribes where there is a statutory option to purchase to provide notice to tribe of every formal probate proceeding involving trust or restricted land over which the tribe has jurisdiction.
4.216 .....	30.211	Will the notice be published in a newspaper?	New section.
4.216 .....	30.212	Can I waive notice of the hearing, the time limits, or form of notice?	New section.
4.217 .....	30.214	What must a notice of hearing contain?	Plain language. Adds provisions regarding consolidation and renunciation.
4.220(a), (c) .....	30.215	How can I obtain documentation related to the probate proceeding?	Plain language. Adds provisions.
4.221(a)–(c) .....	30.216	How does an interested party obtain permission to take depositions?	Plain language.
4.221(d)–(g) .....	30.217	How is a deposition taken?	Plain language.
4.221(h) .....	30.218	How may the transcript of a deposition be used?	Plain language.
4.222 .....	30.219	Who pays for the costs of taking a deposition?	New section.
4.222 .....	30.220	How does an interested party obtain written interrogatories and admission of facts and documents?	Plain language. Deletes provision regarding cross-interrogatories.
4.223 .....	30.221	May the judge limit the time, place, and scope of discovery?	Plain language.
4.224 .....	30.222	What happens if a party fails to comply with discovery?	Provides that the judge may draw inferences adverse to the claims of the party who failed to comply with the discovery request.
4.225 .....	30.223	What is a prehearing conference?	Plain language.
4.230 .....	30.224	Can a judge compel a witness to appear and testify at a hearing?	Establishes procedure for requesting a subpoena.
4.231 .....	30.225	Are probate hearings open to the public?	Clarifies that probate hearings are open to public. Establishes that the judge may seal the record or transcript of sequestered hearings.
4.231 .....	30.226	Must testimony in a probate proceeding be under oath or affirmation?	Plain language.
4.232 .....	30.227	Is a record made of formal probate hearings?	Plain language.
4.233(a)–(b) .....	30.228	What evidence is admissible at a probate hearing?	Clarifies evidentiary admissibility matters.
4.233(a)–(b) .....	30.229	Is testimony required for self-proved wills or codicils?	Moves affidavit language to 25 CFR part 15. Adds that judge may order deposition of available attesting witnesses at location reasonably near residence of witness.
4.233(c) .....	30.230	What if approval of the self-proved will, codicil or revocation is contested?	Plain language.
4.234 .....	30.231	Who pays witnesses' costs?	Plain language.
4.235 .....	30.232	May a judge schedule a supplemental hearing?	Plain language.
4.236(a) .....	30.233	What will the official record of the probate case contain?	Plain language.
4.236(b) .....	30.234	What will the judge do with the original record?	Plain language.
4.236(b) .....	30.235	What happens if a hearing transcript has not been prepared?	Plain language.
4.240(a) .....	30.236	What will the judge's decision in a formal probate hearing contain?	Specifies what decision will contain in intestate case and in testate case. Adds provisions for renunciations, consolidation and settlement agreements, and purchases at probate.
4.240(b) .....	30.237	What notice of the decision will the judge provide?	Changes time period from 60 to 30 days.
4.241(a) .....	30.238	May I file a petition for rehearing if I disagree with the judge's decision in the formal probate hearing?	Changes time period for filing petition from 60 to 30 days. Requires judge to forward copy of petition to affected agencies.

Current citation	New citation	Title	Remarks
4.241(b) .....	30.239	Does any distribution of the estate occur while a petition for rehearing is pending?	Plain language.
4.241(c)–(e) .....	30.240	How will the judge address a petition for rehearing?	Plain language.
4.241(f) .....	30.241	Can I submit another petition for rehearing?	Clarifies that judge's jurisdiction over case ends upon final disposition of petition for rehearing, except for reopening.
4.241(g)–(h) .....	.....	.....	Deleted.
.....	30.242	When does the judge's decision on a petition for rehearing become final?	New section. Establishes that decision does not become final for 30 days.
4.242 .....	30.243	Can a closed probate case be reopened?	Changes time for filing petition and measures from date error was discovered. Clarifies standard for reopening.
.....	30.244	How will the judge address my petition for reopening?	Plain language.
.....	30.245	What happens if the judge reopens the case?	Eliminates 75-day period for not distributing.
4.242(h)–(i) .....	.....	.....	Deleted.
.....	30.246	When will the decision on reopening become final?	New section.
4.261 .....	30.250	When does the anti-lapse provision apply?	Plain language.
4.262 .....	30.251	What happens if an heir or devisee knowingly participates in the willful and unlawful killing of the decedent?	Changed from "feloniously taking a testator's life" to comply with AIPRA language. Expands to apply to intestate succession. Establishes that person will be treated as if predeceased.
4.270 .....	.....	.....	Deleted.
4.271 .....	30.126	What happens if property was omitted from the inventory of the estate?	Plain language.
4.272 .....	30.127	What happens if property was improperly included in the inventory of the estate?	Plain language.
4.273 .....	.....	.....	Deleted.
4.281 .....	30.252	Can a judge allow fees for attorneys representing interested parties?	Plain language. Allows fees for all interested parties, except creditors.
4.282 .....	30.253	How must minors or other legal incompetents be represented?	Plain language.
4.300(a) .....	30.260	What land is subject to a tribal purchase option at probate?	Plain language.
4.300(b)–(d) .....	30.261	What determinations with regard to a tribal purchase option will a judge make?	Plain language.
4.301 .....	30.262	When will BIA furnish a valuation of a decedent's interests?	Plain language.
4.302(a) .....	30.263	When is a final decision issued?	Plain language.
4.302(b) .....	30.264	When may a tribe exercise its statutory option to purchase?	Plain language.
.....	30.265	How does a tribe exercise its statutory option to purchase?	Plain language.
4.303 .....	30.266	May a surviving spouse reserve a life estate when a tribe exercises its statutory option to purchase?	Plain language.
4.304 .....	30.267	What if I disagree with the probate decision regarding tribal purchase option?	Plain language.
4.305(a) .....	30.268	May I demand a hearing regarding the tribal option to purchase decision?	Plain language.
4.305(b) .....	30.269	What notice of the hearing will the judge provide?	Plain language.
4.305(c)–(d) .....	30.270	How will the hearing be conducted?	Plain language.
4.306 .....	30.271	How must the tribe pay for the interests it purchases?	Plain language.
4.307(a) .....	30.272	What are the Superintendent's duties upon payment by the tribe?	Plain language.
4.307(b) .....	30.273	What action will the judge take to record title?	Plain language.
4.308 .....	30.274	What happens to income from land interests during pendency of the probate?	Plain language.
4.320(a) .....	4.320	Who may appeal a judge's order on petition for rehearing or reopening?	Plain language.
4.320 (b)(1)–(3) .....	4.321	How to appeal a judge's order on petition for rehearing or reopening or regarding purchase of interests in a deceased Indian's trust estate.	Plain language.
.....	4.322	What an appeal must contain.	Plain language.
4.320(c) .....	4.323	Service of the notice of appeal.	Plain language.
4.320(d) .....	4.324	Record on appeal.	Plain language.
4.321 .....	4.325	Docketing the appeal.	Plain language.
4.322 .....	4.326	Disposition of the record.	Plain language.

## V. Public Comments

During the period prior to this publication, from December 27, 2005 to March 31, 2006, the Department received correspondence (e-mails, letters, and faxes) from tribes and individual Indians. Of these, the majority addressed at least one of the regulations being proposed today. The remaining addressed only those regulations that were part of the December 27, 2005 package sent to the tribes, but are not part of this proposed rule. The Department has stored these comments so that it can review them when it addresses those remaining regulations.

These comments raised several issues that the Department considered in preparing the drafts for publication as a proposed rule. A summary of those issues that were considered in developing the proposed regulatory language is provided under a subheading "changes to preliminary drafts" under the discussion of each part in the Part-by-Part Analysis. There will also be a 60-day public comment period following this publication. Subsection B provides directions for submitting written comments and information on upcoming tribal consultations addressing this rulemaking.

### A. Comments Received Prior to This Publication

The Department provided tribal leaders with preliminary drafts of this proposed rule in December 2005 and requested comment by the end of March 2006. Additionally, the Department held two pre-publication tribal consultation sessions in February 2006 and March 2006 to obtain input on the preliminary drafts.

As previously mentioned, the Department received an overwhelming number of comments during the Albuquerque tribal consultation regarding the volume of regulatory text and number of preliminary draft regulations. In response to these comments, the Department has decided to first focus on those regulations required for, or closely related to, implementation of AIPRA. These regulations are being published today. These regulations are a priority for the Department because they are necessary to implement AIPRA, which became fully effective on June 20, 2006. The remaining regulations that were distributed as preliminary drafts will be re-examined and consulted on at a future date.

Issues raised during tribal consultations and in the time leading up

to publication of this proposed rule that are specific to one or more regulations or regulatory sections are addressed in the Part-by-Part Analysis, below.

### B. Directions for Submitting Comments

The regulatory amendments proposed in this rulemaking include substantive changes streamlining and standardizing Department procedures to better serve beneficiaries and incorporating statutory law. The amendments also include revisions that are simply administrative in nature, including changes to better meet plain language requirements, defining acronyms, and updating personnel and agency titles. Both tribal and non-tribal members of the public are invited to make substantive comment on any of these changes, whether they be with respect to substantive or administrative changes.

Two copies of written comments should be submitted to the address indicated in the **ADDRESSES** section of this notice. Comments may also be telefaxed to (202) 208-5320 or submitted by electronic mail ("email") to *Michele\_F\_Singer@ios.doi.gov*. For comments submitted electronically, please include the number 1076-AE59 in the subject line of the message. All comments received will be available for public inspection at the Department of the Interior, 1849 C Street, NW., Washington, DC 20240. All written comments received by the date indicated in the **DATES** section of this notice and all other relevant information in the record will be carefully assessed and fully considered prior to publication of the final rule. Any information considered to be confidential by the commenter must be so identified and submitted in writing. The Department of the Interior reserves the right to determine the confidential status of the information and to treat it according to our determination (see 10 CFR 1004.11).

The Department has scheduled an additional consultation meeting in Rapid City, South Dakota on July 27, 2006, from 8 a.m. to 5 p.m., at the Best Western Ramkota Hotel and Conference Center. The Department also plans to host two additional consultation meetings in Billings, Montana on August 8, 2006, from 8 a.m. to 5 p.m., at the Sheraton Billings Hotel and in Minneapolis, Minnesota on August 10, 2006, from 8 a.m. to 5 p.m., at the Ramada Mall of America. All tribal and non-tribal persons interested in this rulemaking are encouraged to participate in these consultations.

## VI. Procedural Requirements

### A. Regulatory Planning and Review (Executive Order 12866)

Executive Order 12866 (58 FR 51735, October 4, 1993) requires Federal agencies taking regulatory actions to determine whether that action is "significant." Agencies must submit regulatory actions that qualify as "significant" to the U.S. Office of Management and Budget (OMB) for review, assess the costs and benefits of the regulatory action, and fulfill other requirements of the Executive Order. A "significant regulatory action" is one that is likely to result in a rule that may meet one of the following four criteria:

- (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 the 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.

OMB has determined that the rule is not a significant rule under Executive Order 12866 because it is not likely to result in a rule that will meet any of the four criteria.

(1) *The rule will not have an annual effect on the economy of \$100 million or more or adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities.*

This rule will not have an annual effect on the economy of \$100 million or more, as described below. The following discussion individually addresses each Code of Federal Regulations (CFR) part and significant changes within each part, where appropriate. Within the discussion of each CFR part is a brief statement of the major changes, the baseline (i.e., the current state of affairs), an analysis of the economic effect of the change in comparison to the baseline alternative, and a brief conclusion.

### 25 CFR Part 15

This part governs the processing of probate estates by BIA. Amendments will ensure that the BIA compiles

sufficient information into the probate file so that when BIA passes the probate file on to OHA, OHA can properly administer the probate estate. The baseline for this analysis is the existing part 15, which does not incorporate requirements for certain items of information to be included in the probate file.

The Secretary has sole statutory authority to probate Indian estates. 25 U.S.C. 372; *First Moon v. White Tail & United States*, 270 U.S. 243, 46 S. Ct. 246, 70 L. Ed. 565; *United States v. Bowling*, 256 U.S. 484, 41 S. Ct. 561, 65 L. Ed. 1054; *Lane v. United States*, 241 U.S. 201, 36 S. Ct. 599, 60 L. Ed. 956; *Hallowell v. Commons*, 239 U.S. 506, 36 S. Ct. 202, 60 L. Ed. 409. *Bertrand v. Doyle*, 36 F.2d 351 (10th Cir. 1929). As such, it is imperative that the Secretary have all the information necessary to properly determine the heirs and distribute estate assets. The alternative to these amendments (i.e., the baseline) would deprive OHA of the information it needs to accurately identify what property is part of the estate, who the heirs and devisees are, and how the property should be distributed among the heirs and devisees. The recently enacted AIPRA amendments to ILCA, 25 U.S.C. 2201 *et seq.*, affects the determination of how property should be distributed among the heirs and beneficiaries by allowing certain persons to purchase interests in property at probate and consolidation agreements, and affecting who can inherit a small fractional interest. AIPRA therefore directly affects the determinations that OHA will make and requires additional information to be included in the probate file.

The primary benefit of the amendments is that they ensure that OHA will have the information it needs in the probate file to adjudicate Indian estates. Because this part addresses only internal processes, and does not impose any enforceable obligation on persons outside the BIA, there is no effect to the outside economy. Amendments to this part focus on the BIA's procedures in compiling a complete probate file, and addressing what should be included in that file. No economic impact is associated with these internal processes.

#### 25 CFR Part 150

The revised Part 150 provides clarification of the LTRO's procedures and increases the ability of the LTRO to provide services and products to Indians, tribes, and the public. Specifically, the amendments describe the LTRO process for receiving and recording title instruments, clarify what services and products LTRO provides,

and clarify what documents qualify as title instruments. Currently, the regulations do not clearly define the procedures, products, and services of the LTRO. Finally, the amendments provide a schedule of fees for non-probate LTRO products and services that will be charged.

Those parts of the regulation that describe the processes, services, and products of the LTRO will have no effect on the economy. The amendments that establish fees for LTRO services and products are comparable to those fees charged by local governments for the comparable services and products. These amendments merely redistribute the costs by requiring fees normally paid for by the public at large to be borne by the individuals, other than the excepted categories of individuals, directly benefiting from the service or product. Therefore the effect, if any, on the economy resulting from these amendments is minimal.

For these reasons, the amendments to part 150 will not have an effect on the economy.

#### 25 CFR Part 152

Amendments to this part reorganize subparts and sections within subparts for clarity. Procedures for each of the following conveyances are now clarified:

- Allowing for conveyances at less than fair market value under certain circumstances (see § 152.109);
  - Tribal option to purchase where land is proposed to be conveyed in unrestricted fee (see § 152.206);
  - Conveyances of fractional interests without tribal consent under certain circumstances. Also, tribal options to purchase interests being sold, gifted or exchanged by individual Indians where the tribe has enacted a law that imposes such a requirement (see § 152.209);
  - Tribal tract purchases of fractional interests of non-consenting owners (see Subpart D at § 152.302); and
  - Eligibility for conveying trust and restricted land (see § 152.203).
- Additionally, the amendments implement ILCA policy goals and AIPRA provisions allowing for:
- Conveyances in accordance with tribal land consolidation plans (see subpart B at § 152.101);
  - Consolidation of highly fractionated tracts by purchase of interests at fair market value (see subpart E at § 152.401); and
  - Partition of fractionated lands to unitize interests (see subpart F at § 152.501).
- The amendments also detail eligibility for conveying trust and restricted land, conveying trust and restricted land at

less than fair market value, the attachment and removal of Indian Land Consolidation Program liens, and the procedures for mortgages and deeds of trust.

The baseline for this analysis is the current part 152, which does not incorporate AIPRA's provisions advancing consolidation goals. The current part 152 allows for partition of inherited allotments but does not extend partition to other tracts of trust or restricted land or tracts in which fractional interests are held in unrestricted fee status.

#### a. Tribal Land Consolidation Plans

Amendments to part 152 add provisions regarding tribal land consolidation plans by providing that the Secretary will approve only: (1) Those exchanges and negotiated sales of tribal land that are made pursuant to an approved land consolidation plan and in which the tribe receives at least 90% of the fair market value or greater; and (2) those exchanges made in the absence of a land consolidation plan in which the tribe receives the fair market value or greater. Part 152 restricts the tribe's use of consideration received from negotiated sales and exchanges in accordance with a tribal land consolidation plan to the purchase of other lands as described in the tribal consolidation plan.

These changes from the existing regulation will assist tribes in reducing fractionation and strengthening their land base. A tribal consolidation plan must include the following elements: a description of the land; maps depicting the land to be conveyed and interests to be purchased; an explanation of how the plan will reduce fractionation; and an appropriate tribal authorization. The cost to the tribe of putting together a tribal consolidation plan is estimated to be \$2,500. The Secretary is encouraging all Federally recognized tribes to prepare a tribal land consolidation plan. Thus, the total cost resulting from the plan requirement for each of the 562 tribes will be \$1.4 million. However, tribes will likely prepare and submit the plans over a period of at least ten years, resulting in an annual cost to tribes of \$140,000. This cost is slightly overestimated because some tribes already have a land consolidation plan.

#### b. Tribal Option To Purchase Where Land Is Conveyed in Unrestricted Fee

The amendments grant tribes the opportunity to purchase trust or restricted lands being proposed for transfer out of trust or to unrestricted status. The benefit of this provision is that it strengthens tribal land holdings.

There are no apparent costs related to this option, as the grantor will receive consideration for the interest being conveyed. Additionally, an exception is provided for those instances where the interest is part of a family farm.

#### c. Consent for Conveyances

The amendments provide that an owner may convey his or her fractional interest without the consent of co-owners and that owners of 100% of the interests in a tract do not need the consent of the tribe. These provisions grant individuals the right to control conveyances of their interests. The benefit of these provisions includes strengthening individual Indians' abilities to convey and consolidate fractional interests. The co-owners share in this benefit. Additionally, marketability of the land interests is increased with removal of the consent requirement. There is no cost to these provisions because the land remains in trust status.

These amendments also require tribal consent for conveyance of a fractional interest where the tribe has an approved tribal probate code restricting the inheritance rights of the grantee. This provision strengthens tribal control over land within its jurisdiction. No apparent costs are associated with this provision.

#### d. Tribal Tract Purchases

The tribal tract purchase amendments implement provisions of AIPRA authorizing the Secretary to convey the fractional interests of any non-consenting trust and restricted owners to a tribe, where the tribe owns at least 50% of the trust or restricted interests in the tract or has obtained the consent of the owners of at least 50% of such interests.

These provisions increase tribes' ability to obtain and consolidate fractional interests. Ultimately, this will grant the tribes more economic power through land holdings. Additionally, individual interests held in trust and restricted status are subject to restrictions on transfer. The cost of restricting free transfer without the approval of the Secretary or tribe affects the value of the interest. The value of land is not affected by the percentage of consent required, except to the degree that the time in which transfer occurs may be lessened by reducing the percentage required, thus increasing marketability.

#### e. Consolidation by Sale of Highly Fractionated Tracts

Consolidation by sale applies to trust and restricted lands, on or off reservation, that are highly fractionated

parcels. In order to consolidate by sale, an eligible applicant must obtain certain consents including consent of the owners of at least 50% of the undivided interests in the parcel. Consolidation of highly fractionated parcels by sale will increase individual Indians' and tribal land holdings, providing them with greater economic power and use of land. As stated above, individual interests held in trust and restricted status are subject to restrictions on transfer. The cost of restricting free transfer without the approval of the Secretary or tribe affects the value of the interest. The value of land is not affected by the percentage of consent required, except to the degree that the time in which transfer occurs may be lessened by reducing the percentage required, thus increasing marketability.

Allowing consolidation by sale is expected to reduce the proportion of highly fractionated interests. The cumulative transfers of property achieved via consolidation by sale is not expected to impact the economy. However, economic benefits are expected to accrue by allowing owners greater economic power and control of the use of their land.

#### f. Partition in Kind

This subpart authorizes the Secretary to subdivide trust and restricted land with multiple owners into smaller tracts in which the interests of the owners are unified or consolidated, where the owners have been unable to accomplish such a partition in kind by exchange of deeds. Any owner of a fractional interest may apply to the Secretary for a partition. This new subpart will provide owners with greater control over their land; there is no apparent effect on the economy.

#### g. Eligibility for Conveying and Receiving Individually Owned Interests in Trust or Restricted Status

The amendments clarify that individual Indians (or their guardians, etc.) may convey lands and that only tribes, individual Indians, and other co-owners in trust or restricted status may acquire individually owned trust or restricted land. This clarification is made to ensure that individual Indians without a tribal land base are permitted to convey and receive interests in trust or restricted status. This provision will have no economic effect.

#### h. Conveyance of Individually Owned Interests at Less than Fair Market Value

The amendments remove restrictions on conveying individually owned interests at less than fair market value, as long as the grantor is provided with

information regarding the fair market value. This will increase the ability of individuals to sell their land as they choose. Additionally, these amendments make land interests more marketable by reducing the restrictions on transfer. The cost of obtaining information on fair market value was already required, so the amendments add no new costs.

#### i. Attachment and Removal of Indian Land Consolidation Program Liens

These amendments implement AIPRA provisions regarding the Indian Land Consolidation program liens, in which a lien in the amount of the purchase price attaches to income derived from any interest purchased through the Indian Land Consolidation Program. This provision has no apparent costs as the lien is removed upon satisfaction.

#### j. Mortgages and Deeds of Trust

These amendments detail existing procedures by which the Secretary approves mortgages or deeds of trust encumbering individually owned land, where all of the trust or restricted interests in a tract are being encumbered and made subject to foreclosure or sale in the event of a default on the loan being secured by the approved document. There is no quantifiable effect on the economy because the title remains in trust even if foreclosure occurs.

Cumulatively, part 152 will not have a significant or quantifiable effect on the economy.

#### 25 CFR Part 179

Amendments to part 179 make two primary changes with potential to affect the economy:

- Incorporates AIPRA's requirement that life estates after June 20, 2006, will be "without regard to waste," meaning that the life tenant is now entitled to receipt of all income—including rents and profits, such as contract bonuses and royalties, and the interest on invested principal—from the land. However, the testator can still specify in the conveyance document distributions to the life tenant and remaindermen different from those established by AIPRA.

- Changes the discount rate to make it consistent with the Internal Revenue Service's valuations of life estate, which will generally provide the remaindermen with more value than under the current 6% discount rate.

The existing part 179 provides that the life tenant will have the rights to all rents and profit, as income, from the estate, but did not provide that such rights were "without regard to waste."

Therefore, the existing part 179 required the life tenant to ensure that it did not diminish the estates of the remainderman in its pursuit of rents and profits. Additionally, the existing part 179 required contract bonuses to be split one-half each to the life tenant and remainderman, whereas now the life tenant is entitled to the full amount of the contract bonus.

The first primary change to part 179 is necessary to reflect the AIPRA section establishing that life estates will be determined "without regard to waste," meaning that the life estate holder is entitled to the receipt of all income, including bonuses and royalties, from such land, to the exclusion of remaindermen. See 25 U.S.C. 2201(10), 2205(a)(3), 2206(a)(2). These amendments comply with the provisions of AIPRA with respect to life estates after June 20, 2006. The testator can still specify in the conveyance document distributions to the life tenant and remaindermen different from those established by AIPRA. There is no change with respect to life estates created before June 20, 2006.

Amendments to the discount rate make the rate consistent with the Internal Revenue Service's valuations of life estate, which will generally provide the remaindermen with more value than under the current 6% discount rate.

The cost of amendments incorporating "without regard to waste" provisions could be a deferred value of the remaindermen's estate. However, amendments to the discount rate will generally provide remaindermen with more value. These amendments may affect the timing of the distribution of the value of the land between life tenants and remaindermen, but will not affect the economy as a whole.

For these reasons, part 179 will not have a measurable effect on the economy.

#### 43 CFR Parts 4 and 30

Most amendments to 43 CFR part 4 (including those incorporated in the new part 30) are amendments to the existing 43 CFR 4 subpart D, relating to the administration of probate estates. The amendments add provisions to establish procedures for renouncing an interest, consolidating interests by agreement, requesting and conducting a purchase at probate, determining fair market value, requesting disqualification of a judge, and standardizing the time periods for filing requests for de novo review and rehearing to 30, rather than 60, days.

The existing 43 CFR part 4 does not contain any of the methods for acquiring interests at probate that have recently

been established by AIPRA.

Additionally, the current time period for filing requests for de novo review and rehearing is 60 days.

Neither the existing part 4 nor the amendments to part 4 affect the economy. Because these provisions relate to the adjudication of probate estates and will not affect the amount of money and property within each estate that is distributed, nor the number of estates that must be probated, they have no effect on the economy. For these reasons, amendments to 43 CFR part 4, subpart D, and the new 43 CFR part 30 will not affect the economy.

#### New 25 CFR Part 18 (Tribal Probate Codes)

The new CFR part addressing tribal probate codes implements provisions of ILCA that allow any tribe to adopt a tribal probate code to govern descent and distribution of trust and restricted lands within its reservation or otherwise subject to its jurisdiction. 25 U.S.C. 2005(a). ILCA provides that the tribe must submit the tribal probate code to the Secretary for review and that the Secretary may not approve tribal probate codes that contain certain provisions.

The baseline is the absence of regulations governing tribal probate codes. While the ILCA statute had established requirements for a tribal probate code and the basics of the submission and approval process since 1983, there have been no implementing regulations. With AIPRA, a new uniform probate code will govern descent and distribution of trust and restricted property. This may prompt some tribes to prepare one and may prompt tribes that already have a tribal probate code to amend it in light of AIPRA.

AIPRA will govern the descent and distribution of trust and restricted property owned by a deceased Indian in the absence of a will. In the alternative, approved tribal probate codes will also govern the distribution of trust property, but will not directly affect the economy. These regulations, which implement statutory provisions for Secretarial approval of tribal probate codes, do not affect the economy because tribes were already authorized to establish tribal probate codes and statutorily required to submit such codes to the Secretary for approval.

For these reasons, the proposed new CFR part, 25 CFR part 18, will not affect the economy.

*(2) This rule will not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency.*

Implementation of this rule will not create any serious inconsistencies or otherwise interfere with an action taken or planned by another agency because the Department is the only agency with authority for handling Indian trust management issues. Additionally, this rule will standardize processes within the Department, to guard against internal inconsistencies.

*(3) This rule will not materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of the recipients thereof.*

(a) The revisions 25 CFR part 15 address what must be included in a probate package and describe how to file a claim against an estate, but do not address entitlements, grants, user fees, or loan programs. Therefore, revisions to part 15 have no budgetary effects and do not affect the rights or obligations of any recipients.

(b) The revisions to 43 CFR part 4 (including those incorporated into the new 43 CFR part 30) address the procedures for adjudicating a probate case and the rights of individual Indians with respect to a given probate case. The revisions do not address entitlements, grants, user fees, or loan programs.

(c) In 25 CFR part 150, the rule establishes user fees for services and products provided by LTRO. The Secretary had the right to charge fees under the prior regulation, but the revised part 150 describes the Secretary's intent to begin charging fees to persons who are not excepted. Under 25 U.S.C. 14b, the Secretary may order that such funds be directed to the appropriation account for LTRO. Because the categories of persons who are exempt from the fees is so large, the budgetary impact of the revised part 150 will be minimal.

(d) In 25 CFR part 152, the rule implements AIPRA provisions to allow for consolidation of highly fractionated lands, purchase of interests at fair market value, and consolidation agreements. These provisions broaden tribes' rights to acquire interests through tribal tract purchases. Where interests are acquired at the fair market value, the Secretary may contribute money from the Acquisition Fund. ILCA established the Acquisition Fund, authorizing the Secretary to disburse appropriations to acquire fractional interests at fair market value and to collect all revenues from the lease, permit, or sale of resources from acquired interests or paid by Indian landowners. By broadening tribes' rights to acquire interests into trust, revisions to part 152 may increase use of Acquisition Funds.

Additionally, subpart K of part 152 allows for the partition of lands into smaller parcels where the interests are unified. Under ILCA, grants are available to successful bidders for partitions; however, the amendments do not affect the grants. Because conveyance of trust and restricted interests is generally voluntary, these amendments do not involve entitlements, grants, user fees, or loan programs, and therefore do not affect the budget of the Department or the rights and obligations of recipients.

(e) In 25 CFR part 179, the respective rights of a life estate tenant and remaindermen are changed, as of June 20, 2006. This change entitles the life tenant to receipt of all income—including rents and profits, such as contract bonuses and royalties—from the land. However, the testator can still specify in the conveyance document distributions to the life tenant and remaindermen different from those established by AIPRA. The Department anticipates that this change in rights will not impact the budget.

(f) The new regulation addressing tribal probate codes will not materially alter the Department's budget because the regulation merely implements the existing statutory requirement for Departmental review of tribal probate codes; nor does the regulation affect the rights and obligations of recipients, as tribes' probate codes were already subject to Departmental review.

*(4) This rule does not raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.*

Most of the regulatory changes directly implement statutory provisions and court orders that require certain action to meet Indian trust management responsibilities. Specifically, the rule implements requirements of AIPRA, the Trust Fund Management Reform Act of 1994 and court orders. The legal and policy issues related with this rulemaking have been the subject of legislation, judicial action, and consultations with tribes. They have been thoroughly discussed through the process of developing and implementing the Fiduciary Trust Model, discussed in the "History of the Rule" section of the preamble.

Thus, the impact of the rule is confined to the Federal Government, individual Indians, and tribes and does not impose a compliance burden on the economy generally. Accordingly, this rule is not a "significant regulatory action" from an economic standpoint, nor does it otherwise create any

inconsistencies or budgetary impacts to any other agency or Federal program.

#### *B. The Regulatory Flexibility Act*

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), requires Federal agencies to conduct a regulatory flexibility analysis when publishing a notice of rulemaking for any proposed or final rule. The regulatory flexibility analysis determines whether the rule will have a significant economic effect on a substantial number of small entities (i.e., small businesses, small organizations, and small governmental jurisdictions). Indian tribes are not considered to be small entities for the purposes of the Act and, consequently, no regulatory flexibility analysis has been done to address the effects on Indian tribes.

Because the proposed rule is limited to probated estates, land, and assets within the United States and within tribal communities, it will not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of the U.S.-based enterprises to compete with foreign-based enterprises. Accordingly, this proposed rule will not have an economic impact on a substantial number of small entities and requires no regulatory flexibility analysis.

#### *C. Small Business Regulatory Enforcement Fairness Act of 1996*

The Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), 5 U.S.C. 804(2), sets criteria for determining whether a rule is "major." A rule is "major" if OMB finds that the rule will result in: (1) An annual effect on the economy of \$100 million or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, state, or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

The proposed rule is not "major" within the meaning of SBREFA because it is exclusively confined to the Federal Government, individual Indians, and tribes, but the proposed rule may require some limited additional expenditures by tribes, as discussed in subsection (h) of the procedural requirements (Paperwork Reduction Act) of this preamble.

However, the proposed rule will not result in the expenditure by State, local, or tribal governments, in the aggregate,

or by the private sector of \$100 million or more in any one year.

Because the proposed rule is limited to probated estates, land, and assets within the United States and within tribal communities, it will not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of the U.S.-based enterprises to compete with foreign-based enterprises. Accordingly, this proposed rule will not have an economic impact on a substantial number of small entities and requires no regulatory flexibility analysis.

#### *D. Unfunded Mandates Reform Act of 1995*

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104-4, requires Federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments and the private sector. If the Federal agency promulgates a proposed or final rule with "Federal" mandates that may result in expenditures by state, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year, the Federal agency must prepare a written statement, including a cost-benefit analysis of the rule, under section 202 of the UMRA. The term "Federal mandate" means any provision in statute or regulation or any Federal court ruling that imposes "an enforceable duty" upon state, local, or tribal governments, and includes any condition of Federal assistance or a duty arising from participation in a voluntary Federal program that imposes such a duty.

The Department has determined that the rule does not contain a Federal mandate that may result in expenditures of \$100 million or more for state, local, and tribal governments in the aggregate, or by the private sector in any one year. The following discussion addresses each CFR part individually to identify Federal mandates.

#### 25 CFR Part 15

Most amendments to part 15 address the internal processes of the BIA (or tribe that has compacted or contracted to fulfill probate functions) in compiling probate files.

- Part 15 contains a mandate for tribal governments to provide information when necessary to complete a probate file. This provision is aimed at requiring tribes to provide information that is already readily available to them, such as family history data.

- Part 15 also contains a mandate for the public, presumably someone closely

associated with the decedent, to provide either a death certificate or other information regarding the death.

Subsection (h) of the procedural requirements (Paperwork Reduction Act) of this preamble states the expected increase in cost burden on tribal governments of these mandates, which is minimal. The opportunity for tribes to adopt their own tribal probate codes is voluntary and does not qualify as a Federal mandate.

#### 25 CFR Part 150

The revised part 150 clarifies LTRO processes, services, and products. This part requires persons requesting LTRO services and products to provide certain information to allow the LTRO to identify the property for which the service or product is being requested. There is no mandate to obtain LTRO products or services, so the requirement to provide information in support of a request for products and services is not a Federal mandate.

#### 25 CFR Part 152

Amendments to part 152 provide tribes and individual Indians with opportunities to convey and consolidate their interests in trust or restricted land. The opportunities to convey land interests are essentially a voluntary Federal program. Therefore, the requirement does not equate to a Federal mandate.

Part 152 requires applicants to include certain information in applications for acquisitions and conveyances that are available from the LTRO. Items required under part 152 that may be available from the LTRO include:

- Maps.
- Legal description of the land.
- Title status of other interests.
- Location of roads and rights of way.
- Location of the land with respect to other lands in which the applicant has a trust interest.

However, these items are available from sources other than LTRO, so these requirements do not require applicants to obtain products from the LTRO, and therefore do not translate into Federal mandates.

#### 25 CFR Part 179

Amendments to part 179 do not impose any duties on persons outside the Department of the Interior.

#### 43 CFR Parts 4 and 30

Amendments to 43 CFR part 4 (including those incorporated into the new 43 CFR part 30), related to adjudication of probate estates, clarify the process for renouncing an interest

and allow consolidation agreements and purchases at probate. These opportunities are voluntary. The remainder of the amendments address OHA adjudication of probate estates and appeals. These amendments do not impose any Federal mandates on individual Indians, tribes, or others outside the Department of the Interior.

#### New 25 CFR Part 18 (Tribal Probate Codes)

The new CFR part addressing tribal probate codes implements statutory authority for preparing a tribal probate code and statutory requirements for Secretarial approval of tribal probate codes. Preparation of a tribal probate code is voluntary; therefore, this regulation does not impose any Federal mandates on tribes.

Section 205 of the UMRA requires the agency to identify and consider a reasonable number of regulatory alternatives to the rule and adopt the least costly, most cost-effective, or least burdensome alternative that achieves the objectives of the rule. The Department has determined that alternatives to this regulation are limited by practicality and feasibility, among other concerns, given that this regulation is the result of negotiated working group recommendations working within the confines of statutory and judicial mandates. For this reason, the primary alternative the Department examined was the baseline (i.e., the current CFR part or the absence of regulatory provisions, as appropriate). With respect to each proposed CFR part, the Department determined that the proposed language meets the objectives of the proposed rule.

Section 203 of the UMRA requires the agency to develop a small government agency plan before establishing any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments. The small government agency plan must include procedures for notifying potentially affected small governments, providing officials of affected small governments with the opportunity for 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. The Department has been operating under tribal consultation procedures that equate to a small government agency plan. The Department has developed these regulations in accordance with consultation procedures for notifying tribes, providing tribes with the

opportunity for meaningful and timely input on the development of the regulation, and continues to inform, educate, and advise tribes on the contents of the regulation.

#### *E. Governmental Actions and Interference With Constitutionally Protected Property Rights (Executive Order 12630)*

This proposed rule does not have significant "takings" implications. A taking occurs when private property is taken for public use without just compensation or without due process of law. The proposed rule includes a few instances where property may be considered "taken;" however, just compensation is granted in each case. For example, 25 CFR part 152 allows a tribe to acquire land into trust status with the consent of only 50% of landowners, but must compensate all owners for their interests. Additionally, individual owners may preempt the tribe's right to purchase under certain circumstances. Additionally, for a consolidation by sale, the Secretary will seek only the consent of the tribe and of those owners who maintained a bona fide residence on the parcel or operated a bona fide farm, ranch or other business on the parcel for the preceding three years. Additional consent is required where any individual owner's undivided interest is worth more than \$1,500 (i.e., consent of owners of at least 50% of the undivided ownership interest in the parcel). In each of these cases, even if an owner does not consent, the owner is provided with just compensation. The only other provisions of the proposed rule that may raise a question as to takings are those related to procedures for dealing with heirs or landowners whose whereabouts are unknown. However, in each of these cases, the proposed rule establishes the procedure to ensure that each individual whose whereabouts are unknown is afforded due process of law before being deprived of any specific real property interest.

#### *F. Federalism (Executive Order 13132)*

Executive Order 13132, entitled "Federalism" (64 FR 43255, August 10, 1999), establishes certain requirements for Federal agencies issuing regulations, among other agency documents, that have "Federal implications." A regulation has "Federal implications" when it has "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." Section 6 of the Executive Order prohibits any

agency from issuing a regulation that has Federal implications, imposes substantial direct compliance costs on state and local governments, and is not required by statute. Such a regulation may be issued only if the Federal Government provides the funds necessary to pay the direct compliance costs incurred by state and local governments, or the agency consults with state and local officials early in the process of developing the proposed regulation. Further, a Federal agency may issue a regulation that has federalism implications and preempts state law only if the agency consults with state and local officials early in the process of developing the proposed regulation.

This proposed rule does not have federalism implications because it pertains solely to Federal-tribal relations and will not interfere with the roles, rights, and responsibilities of the States. The proposed rule primarily provides means for improving the trust relationship between the Department and individual Indians by allowing the Department to better serve beneficiaries' interests. Additionally, the Federal government and the tribes have a government-to-government relationship that is independent of and does not affect the Federal government's relationship to the states or the balance of power and responsibilities among various levels of government. Therefore, in accordance with Executive Order 13132, it is determined that this proposed rule will not have sufficient federalism implications to warrant the preparation of a federalism assessment.

#### G. Civil Justice Reform (Executive Order 12988)

Executive Order 12988 (61 FR 4729, February 7, 1996), section 3(a), requires Federal agencies to adhere to the following requirements: (1) Eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; (3) provide a clear legal standard for effective conduct rather than a general standard and promote simplification and burden reduction. Section 3(b) specifically requires that executive agencies make every reasonable effort to ensure that the regulations: (1) Clearly specify any preemptive effect; (2) clearly specify any effect on existing Federal law or regulation; (3) provide a clear legal standard for affecting conduct while promoting simplification and burden reduction; (4) specify the retroactive effect, if any; (5) adequately define key terms; and (6) address other important issues clearly affecting clarity and general draftsmanship under any guidelines issued by the Attorney

General. Section 3(c) of the Executive Order 12988 requires agencies to review regulations in light of the applicable standards in sections 3(a) and 3(b) to determine whether they are met or whether it is unreasonable to meet one or more of them.

The Department has determined that this proposed rule will not unduly burden the judicial system. Significant portions of the proposed rule will ensure that the judicial system is not overly burdened through the establishment of an administrative appeal process. For example, amendments to 43 CFR part 4, which describes administrative processes for challenging the outcome of a probate proceeding, will streamline the probate adjudication process. Additionally, the Department has determined that the proposed rule meets the applicable standards provided in sections 3(a) and 3(b) of Executive Order 12988. The Department has incorporated "plain language" approaches, as described in OMB's Writing User-Friendly Topics referred to in the **Federal Register Document Drafting Handbook**. Department attorneys provided input throughout the development and drafting of these regulations to provide clear legal standards, specify preemptive effects, specify the effect on existing Federal laws and regulations, and otherwise minimize the likelihood that litigation will result from an ambiguity in the regulations.

#### H. Paperwork Reduction Act

The Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*, prohibits a Federal agency from conducting or sponsoring a collection of information that requires OMB approval, unless such approval has been obtained and the collection request displays a currently valid OMB control number. Nor is any person required to respond to an information collection request that has not complied with the PRA. In accordance with 44 U.S.C. 3507(d), BIA has submitted the information collection and recordkeeping requirements of this proposed rule to OMB for review and approval. Four CFR parts being proposed today contain information collection requests: 25 CFR parts 15, 18, 150 and 152. The following tables, by part, describe the information collection requirements in each section of the proposed rule and any changes from the current rule.

#### 25 CFR Part 15

*Title:* Probate of Indian Estates, Except for Members of the Five Civilized Tribes.

*OMB Control Number:* 1076-NEW.

*Requested Expiration Date:* Three years from the approval date.

*Summary:* This part contains the procedures that the Secretary of the Interior follows to initiate the probate of the trust estate of a deceased person for whom the Secretary holds an interest as trust or restricted property. The Secretary must perform the information collection requests in this part to obtain the information necessary to compile an accurate and complete probate file. This file will be forwarded to the Office of Hearings and Appeals (OHA) for disposition. Responses to these information collection requests are required to obtain benefits (e.g., make a claim against a probated estate) in accordance with the Secretary's sole statutory authority to probate estates (*see* 25 U.S.C. 372).

*Bureau Form Number:* None.

*Frequency of Collection:* One per probate.

*Description of Respondents:* Indians, businesses, and tribal authorities.

*Total Annual Responses:* 76,655.

*Total Annual Burden Hours:* 1,037,433.

The following is an explanation of the information collection requirements for 25 CFR part 15.

Section 15.4 What are the requirements for my will?

The proposed rule adds a requirement for a testator and witnesses self-proving a will, codicil, or revocation to file affidavits. The Department has estimated that approximately 1,000 testators will choose to "self-prove" their wills each year and that it will take approximately 0.5 hours to make the affidavit before an official authorized to administer oaths and to attach the affidavit to the will = 500 burden hours. This represents an increase of 500 burden hours due to program change with no annualized startup, or operations and maintenance costs.

Likewise, given that approximately 1,000 testators will choose to "self-prove" their wills each year, approximately 2,000 witnesses will be required to file supporting affidavits at 0.5 hours each = 1,000 burden hours. This represents an increase of 1,000 burden hours due to program change with no annualized startup, or operations and maintenance costs.

Section 15.104 Does BIA need a death certificate to prepare a probate file?

The proposed rule adds a requirement for persons unable to provide a death certificate to provide as much as they know about the deceased, including: The state, city, reservation, location, date, and cause of death, the last known

address of the deceased, and names and addresses of others who may have information about the deceased. If no death certificate exists, they must provide this information in an affidavit. This information will ensure that BIA has the information it needs regarding the identity of the deceased to collect documents for the probate file. The requirement already existed to provide a death certificate or, when unable to provide a death certificate because none existed, newspaper articles, obituary, or death notices and a church or court record.

The Department estimates that preparing the affidavit in lieu of providing a death certificate will impose an additional 1 hour burden per response to comply with this section. The existing estimated burden for locating and providing the death certificate is 4 hours per response. Assuming a respondent provides an affidavit in lieu of a death certificate only after spending the 4 hours searching unsuccessfully for the death certificate, 5 total burden hours per response are required to comply with this section. Assuming approximately 5,850 probates per year, the total burden will be 5,850 responses  $\times$  5 hours per response = 29,250 burden hours. This represents an increase of 5,850 hours due to a programmatic change, with no annualized startup, or operations and maintenance costs.

**Section 15.105** What other documents does BIA need to prepare a probate file?

This section lists the items that BIA needs to prepare a probate file. The decedent's family and other knowledgeable members of the public are the most likely respondents for this information. The proposed rule adds several items of information that must be included in the probate file. These additional items are: (1) Adoption and guardianship papers concerning decedent's potential heirs or beneficiaries; (2) orders requiring payment of spousal support; (3) identification of person or entity to whom an interest is renounced; (4) court judgments regarding creditor claims; and (5) place of enrollment and tribal enrollment or census number of the

decedent and potential heirs and beneficiaries.

The Department estimates that providing these documents will add approximately 1.25 hours to each response. Assuming 21,235 respondents annually  $\times$  45.5 hours to complete this section = 966,192.5 burden hours. This is an increase of approximately 26,543.75 hours due to a program change, with no annualized startup, or operations and maintenance costs.

**Section 15.201** Can I get funds from the decedent's IIM account for funeral services?

There has been no change to the information collection requirements in this section. The Department estimates that there will be one request for funeral expenses per each of the estimated 5,850 probates per year, at an estimated 2 hours per response = 11,700 burden hours, with no annualized startup, or operations and maintenance costs.

**Section 15.202** If the decedent owed me money, how do I file a claim against the estate?

The proposed rule adds a requirement that creditors provide information on their claims. Specifically, the rule requires creditors to file with the Secretary an affidavit and an itemized statement of the debt, including copies of any documents (such as signed notes, mortgages, account records, billing records, and journal entries) necessary to prove the indebtedness.

The Department estimates that, on average, approximately 6 creditor claims per probate estate will be filed and that it will take creditors approximately 0.5 hours to provide this information. The most recent Paperwork Reduction Act submission purported to assume that 6 claims per probate estate would be filed, but at 5,850 probates per year, the previous assumption of 127,410 respondents appears to be erroneous. Assuming 35,100 responses (6 claims per probate estate  $\times$  5,850 probate estates), the Department estimates the burden hours = 35,100 responses  $\times$  0.5 = 17,550 burden hours. This is a decrease of approximately 46,155 hours due to a program change, with no annualized startup, or operations and maintenance costs.

The proposed rule also adds a requirement for the person filing a claim against the estate to file an affidavit. The Department has determined that this does not qualify as "information" under 5 CFR 1320.3(h)(1) because it entails no burden other than that necessary to identify the claimant, the date, the claimant's address, and the nature of the instrument as a claim against the estate.

**Section 15.403** What happens after the probate decision is made?

This section provides that a request for de novo review may be filed within 30 days of a probate decision. The information collection requirements that had been included in this section have been moved to 43 CFR 4, but are exempt under 5 CFR 1320.4(a)(2) because they relate to the conduct of administrative actions against specific individuals. Additionally, all that is required is the filing of a notice of appeal. This represents a decrease of 53,088 hours due to a program change.

**Section 15.505** What information must tribes provide BIA to complete the probate file?

This new section requires tribes to provide any information the Secretary requires to complete the probate file, such as enrollment or family data. The information required by the Secretary will include documents that the tribe should have readily available. We assumed that, of the 5,850 probate cases, at least one decedent would come from each of the 562 Federally recognized tribes. On average, a tribe will have to provide information for approximately 10 of the 5,850 probate cases per year. We estimate that each tribe will require 2 hours to assist in completing the probate file  $\times$  10 responses annually  $\times$  562 Federal recognized tribes = 11,240 hours to ensure completion of probate files. This is a new requirement, which incorporates 11,240 hours as a program change, with no annualized startup, or operations and maintenance costs.

**Note:** The "Old CFR Section" numbers in the table below are those as of the last Paperwork Reduction Act submission for 25 CFR part 15 in December 2003.

Old CFR section	New CFR section	Description of info collection requirement	No. of resps per yr	Hours per resp	Total hours requested (Annual)*	Currently approved hours	Explanation of difference
	15.4	File affidavit to self-prove will, codicil, or revocation.	1,000	0.5	500	0	New section requires testator affidavit to self-prove will.
	15.4	File supporting affidavit to self-prove will, codicil, or revocation.	2,000	0.5	1,000	0	New section requires witness affidavits to self-prove will.

Old CFR section	New CFR section	Description of info collection requirement	No. of resps per yr	Hours per resp	Total hours requested (Annual)*	Currently approved hours	Explanation of difference
15.101 .....	15.104	Reporting req.-death certificate.	5,850	5	29,250	23,400	New section requires additional information where a death certificate is not provided. 3
15.106 .....	15.201	Reporting funeral expenses.	5,850	2	11,700	11,700	No change.
15.104 .....	15.105	Provide probate documents.	21,235	45.5	966,193	939,649	Amendments delete requirement for birth certificate, but add other requirements.
15.109 .....		Provide disclaimer info (1/4).	0	0	0	7,887	Section deleted.
15.303 .....	15.202	File claim against estate (affidavit).	N/A	N/A	N/A	.....	
15.203 .....	N/A	Provide response to transmittal.	0	0	0	2,972	This requirement has been deleted.
15.303 .....	15.202	Provide info on creditor claim (6 per probate).	35,100	0.5	17,550	63,705	Decrease to reflect 6 claims per probate.
15.402 .....	15.403	Provide info for filing appeal.	0	0	0	53,088	Now only have to file a notice of appeal; info collection requirements moved to 43 part CFR 4.
	15.505	Provide tribal information for probate file. <sup>2</sup> .	5,620	2	11,240	0	New requirement for tribes to provide enrollment information, upon request.
Total .....	.....	.....	76,655	.....	1,037,433	1,094,514	

25 CFR Part 18

*Title:* Tribal Probate Codes.  
*OMB Control Number:* 1076-NEW.  
*Requested Expiration Date:* Three years from the approval date.  
*Summary:* This part contains the procedures that the Secretary of the Interior follows to review and approve tribal probate codes and amendments to tribal probate codes. This part also explains the procedure the tribe must follow to begin the approval process for a tribal probate code or amendment to the code, as well as dates on when the tribal probate code becomes effective.

*Bureau Form Number:* None.  
*Frequency of Collection:* On occasion.  
*Description of Respondents:* Tribal authorities.  
*Total Annual Responses:* 100.  
*Total Annual Burden Hours:* 50.  
 The following is an explanation of the information collection requirements for 25 CFR part 18.  
 Section 18.4 How does a tribe request approval for a probate code?  
 The proposed rule adds a requirement for a tribe enacting a new tribal probate code or amending an existing tribal

probate code to submit the code or amendment to the Secretary or approval. The Department has estimated that, on average, approximately 100 tribes will submit new codes or amend their existing codes each year, and that it will take approximately 0.5 hours to submit the code or amendment to the Secretary = 50 burden hours. This represents an increase of 50 burden hours due to program change with no annualized startup, or operations and maintenance costs.

New CFR section	Description of info collection requirement	No. of resps per yr	Hours per resp	Total hours requested (annual)*	Currently approved hours	Explanation of difference
18.4 .....	Submit tribal probate code or amendment.	100	0.5	50	0	New section requires submission of tribal probate code or amendment for approval.
Total .....	.....	100	.....	50	0	

25 CFR Part 150

*Title:* Indian Land Record of Title.  
*OMB Control Number:* 1076-NEW.  
*Summary:* This part establishes the Land Title and Records Office (LTRO) as the official record of land records and title instruments affecting Indian land. The LTRO protects ownership interests in trust and restricted Indian land by recording and maintaining title

documents and providing services and products to Indians, tribes, and individuals. The proposed part 150 replaces the existing part in its entirety to provide clarification of LTRO's procedures and increase the ability of the LTRO to provide services and products to Indians, tribes, and the public. The LTRO provides access to information in the Indian Land Record

of Title to members of the public, except in those instances where access would violate law or policy restricting access to such records.

*Bureau Form Number:* N/A.  
*Frequency of Collection:* One per Indian, tribal authority, business or other non-profit, Federal government, or other member of the public.

*Description of Respondents:* Indians, tribal authorities, businesses or other non-profits, Federal government, and other members of the public.

*Total Annual Responses:* 12,686.

*Total Annual Burden Hours:* 12,696.

The following is an explanation of the information collection requirements for 25 CFR part 150 and any changes from the current rule.

*Total Non-Hour Burden:* \$907,795.

**Section 150.208** How do I correct an error or omission in a title instrument or LTRO product or service?

Section 150.208 requires persons who discover an error or omission in an LTRO record to provide the LTRO with: (1) a written description of the error or omission; and (2) any supporting documentation.

The Department estimates that a minimal number of persons and entities requesting services and products from LTRO each year will identify an error or omission in an LTRO record. Most errors and omissions are identified through an in-house quality assurance process wherein the agency filing the document with the LTRO reviews the document to identify and address errors and omissions. The Department also estimates that it will take approximately 2 hours to write a statement describing the error or omission and research, copy, and provide either via mail or in person any documentation supporting the claim that an error or omission exists.

Burden hours = 10 persons and entities identifying errors or omissions per year  $\times$  2 hours = 20 burden hours. The total burden costs based on a \$18.52/hour cost estimate multiplied by the total hourly burden per year = \$370.40. This represents an adjustment to account for a previously unidentified information collection request burden, with no annualized startup, or operations and maintenance costs.

**Section 150.302(b)** How do I order services and products from the LTRO?

The proposed revisions to part 150 provided in subsection (b) of this section include a requirement for persons requesting a product or service from the LTRO to identify the property in which they are interested by providing one of the following: (1) A legal description of the property; (2) an identification number for the tract; or (3) the identification number of the owner of the tract. The provision does not

require that this information be provided in any specific form. The anticipated respondents include individuals, tribes, governmental agencies, and oil, gas, and title abstract companies.

Each of the LTRO's products and services is provided with respect to a specific tract or tracts or property. In nearly all cases, the Bureau of Indian Affairs or the tribal agency requests a service or product from the LTRO on behalf of the individual or entity. These estimates include agency requests on behalf of the member of the public.

The Department estimates that 6,338 persons or entities request services and products from LTRO approximately 2 times each year, for a total of 12,686 requests. Persons who own an interest in the land for which they are requesting a service or product will usually have a legal description or identification number readily available. For example, most new heirs will have a legal description of the property in which they are interested from the inventory of the probated estate. If the person received the property by deed, then the agency would have provided the person with a deed. However, for persons who are not co-owners in the property, this information may be more difficult to obtain; therefore, the Department estimates that the person or entity will be unable to provide this information for approximately half of the total requests for LTRO products or services each year. (See section 150.302(c), which provides applicants with the option of providing alternate information). For this reason, the Department estimates that 3,169 persons or entities (one half of the total 6,338 respondents) will request services and products from LTRO approximately 2 times per year and provide the information requested in this section, rather than provide the alternate information permitted by section 150.302(b), for a total of 6,338 responses. The Department is using 1 hour as an average baseline estimate for the time it will take to obtain information necessary to identify the tract of property for which they are requesting the product or service and provide that information to the LTRO either by mail or in person. This average incorporates the longer time (generally 4–8 hours) to survey to obtain an initial legal description, as well as the shorter time (0.5 hours) it takes to obtain the identification number or other

identifying information for instruments that have already been recorded.

Burden hours therefore equal 6,338 requests (3,169 persons or entities requesting products or services 2 times a year)  $\times$  1 hour per request = 6,338 burden hours. The total burden costs based on a \$18.52/hour cost estimate multiplied by the total hourly burden per year = \$117,380. This represents an adjustment to account for a previously unidentified information collection request burden, with no annualized startup costs. Operations and maintenance costs in the form of fees are estimated to be \$453,897.50 (one half of the total fees \$907,795).

**Section 150.302(c)** How do I order services and products from the LTRO?

The proposed revisions to part 150 provided in subsection (c) of this section include a requirement for persons requesting LTRO products or services to provide alternate information to identify the property if they are unable to provide the information listed in section 150.302(b). Section 150.302(c) allows the applicant to submit any other information that the LTRO may use to identify an owner of the tract of land, including but not limited to: name and tribal affiliation of an owner, the recording number of the instrument, or an allotment number.

Because this information is alternate information, the Department estimates that of the estimated 6,338 persons and entities requesting services and products from the LTRO 2 times each year, 3,169 will be unable to provide the information required by section 150.302(b), and therefore submit the information in section 150.302(c). The Department also estimates that it will take approximately 1 hour to obtain and provide information necessary to identify the tract of property for which they are requesting the product or service. Burden hours = 3,169 requests (3,169 persons and entities  $\times$  2 times per year)  $\times$  1 hour = 6,338 burden hours. The total burden costs based on a \$18.52/hour cost estimate multiplied by the total hourly burden per year = \$117,380. This represents an adjustment to account for a previously unidentified information collection request burden, with no annualized startup costs. Operations and maintenance costs in the form of fees are estimated to be \$453,897.50 (one half of the total fees \$907,795).

New CFR section	Description of info collection requirement	No. of respondents (annual)	Responses per respondent (annual)	Hourly burden per response	Total hourly burden (annual)*	Explanation of difference
150.208 .....	Provide written description and supporting documentation of error or omission.	10	1	2	20	Adjustment to account for previously unidentified burden.
150.302(b) .....	Provide information to identify property when requesting product or service.	3,169	2	1	6,338	Adjustment to account for previously unidentified burden.
150.302(c) .....	Provide other information if information in 150.302(b) is not available.	3,169	2	1	6,338	Adjustment to account for previously unidentified burden.
Responses .....	.....	12,686	.....	.....	12,696	

25 CFR Part 152

*Title:* Conveyances of Trust or Restricted Land; Removal of Trust or Restricted Status.

*OMB Control Number:* 1076-NEW.

*Summary:* This part contains the procedures that the Secretary of the Interior follows to review and approve of conveyances of Indian trust and restricted land and removal of trust and restricted status from Indian land. The Secretary must perform the information collection requests in this part to obtain the information necessary to complete the requested transaction. An "Application for Consolidation by Sale" form must be submitted to apply for consolidations by sale. Responses to these information collection requests are required to obtain benefits (e.g., complete the requested transaction).

*Bureau Form Number:* There is a form, but no number.

*Frequency of Collection:* Occasional.

*Description of Respondents:* Indians and tribal authorities.

*Total Annual Responses:* 1,250.

*Total Annual Burden Hours:* 2,103.

The following is an explanation of the information collection requirements for 25 CFR part 152 and any changes from the current rule.

Section 152.3 Will the Secretary provide ownership information?

This section provides that certain persons, listed in section 152.4, may request the Land Title and Records Office (LTRO) to provide the names and mailing addresses of owners of a parcel of trust or restricted lands, the location of the parcel, and the percentage of undivided interest owned by each individual by providing a written request containing:

- A legal description or other information allowing the parcel to be identified; and
- A description of how the applicant meets the requirements of 152.4 (i.e., that the applicant is an owner of a parcel of trust or restricted land on the

same reservation, the tribe that exercises jurisdiction over the parcel, a person eligible for membership in the tribe that exercises jurisdiction over the parcel, or a person or entity that is leasing, using, consolidating—or applying to lease, use, or consolidate trust or consolidated lands on that reservation).

The Department estimates that 200 persons and tribes each year will request the above LTRO information and that it will take approximately 0.5 hours to compile and provide the information and draft and provide the written request.

Burden hours = 200 persons and tribes requesting LTRO information × 0.5 hours = 100 total burden hours, at \$15/hour for a cost to the public of \$1,500. This represents a program change, with no annualized startup, or operations and maintenance costs.

Section 152.102 What must a land consolidation plan include?

A tribal consolidation plan is a plan for eliminating fractionation and/or consolidating tribal land holdings, that specifies what land or interests are to be conveyed and what land or interests are to be purchased with the proceeds of the sale. Under section 152.105, in order for the Secretary to take action on the plan, the tribe must submit the plan to the Secretary for approval. The Department estimates that 50 tribes will prepare a consolidation plan each year, and that it will take 5 hours for each tribe to prepare the plan.

Burden hours = 50 tribes × 5 hours = 250 total burden hours, at \$15/hour for a cost to the public of \$3,750. This represents a program change, with no annualized startup, or operations and maintenance costs.

Section 152.105 How does a tribe receive approval for a sale or exchange under a land consolidation plan?

This section requires a tribe requesting a sale or exchange pursuant to an approved tribal land consolidation

plan to submit a tribal resolution to the Secretary. Tribes prepare tribal resolutions as a usual and customary business practice. However, the following estimates capture how long it would take the tribe to copy and provide the resolution to the Department. The Department estimates that, each year, 50 tribes with consolidation plans will request an average of 2 sales or exchanges, and that it will take 0.60 hours to provide a tribal resolution in support of each sale or exchange.

Burden hours = 50 tribes × 2 sales and exchanges × 0.60 hours = 60 total burden hours, at \$15/hour for a cost to the public of \$900. This represents a program change, with no annualized startup, or operations and maintenance costs.

Section 152.107 In the absence of an approved land consolidation plan, how does a tribe get approval for an exchange of tribal land?

This section requires a tribe requesting a sale or exchange in the absence of an approved tribal land consolidation plan to submit a tribal resolution to the Secretary. The Department estimates that, each year, 100 tribes without consolidation plans will request an average of 1 sale or exchange, and that it will take 0.60 hours to provide a tribal resolution in support of each sale or exchange.

Burden hours = 100 tribes × 1 sale or exchange × 0.60 hours = 60 total burden hours, at \$15/hour for a cost to the public of \$900. This represents a program change, with no annualized startup, or operations and maintenance costs.

Section 152.206 How does an owner initiate a negotiated sale, gift, or exchange?

This section requires an owner to submit to the Secretary a written request for negotiated sale, gift, or exchange containing various items of information,

including: a description of the land, the grantee and his or her tribal affiliation, any limitations known by the grantor of the right to convey, any intention to reserve rights to the land, whether the owner waives his right to fair market value, and the terms of the sale, gift, or exchange. The Department estimates that 200 tribal and individual Indian owners will request a negotiated sale, gift, or exchange each year, at an average of one request per person, and that it will take 4.2 hours to make a request in compliance with this section.

Burden hours = 200 tribes/individual Indian owners  $\times$  average of 1 request per person  $\times$  4.2 hours = 840 total burden hours, at \$15/hour for a cost to the public of \$12,600. This represents a program change, with no annualized startup, or operations and maintenance costs.

Section 152.217 When can a co-owner acquire an interest previously acquired on behalf of a tribe?

Subsection (b) of this section provides that a co-owner may request notification when a tribe initially acquires interest in a given tract under the Indian Land Consolidation Program. The response to this request will facilitate the owner's ability to exercise the purchase option. The Department estimates that 50 owners will request notification each year and that it will take 0.25 hours to provide the request and contact information to allow the Department to notify the co-owner when appropriate.

Burden hours = 50 co-owners who will request notification  $\times$  1 request per co-owner  $\times$  0.25 hours = 12.5 total burden hours, at \$15/hour for a cost to the public of \$188 (rounded up from \$187.5). This represents a program change, with no annualized startup, or operations and maintenance costs.

Section 152.219 How does a transaction affect collection of construction costs for irrigation projects?

Subsection (b) of this section provides that if land is conveyed in fee, the person acquiring the land in fee must enter into an agreement to pay the pro rata share of the construction project chargeable to the land, all construction costs that accrue in the future, and all future charges assessable to the land based on the annual cost of operations and maintenance of the irrigation system. The Department estimates that 200 persons will acquire trust or restricted land in fee and that it will take 1 hour to enter into the required agreement.

Burden hours = 200 persons acquiring land in fee status  $\times$  1 request per person

$\times$  1 hour = 200 total burden hours, at \$15/hour for a cost to the public of \$3,000. This represents a program change, with no annualized startup, or operations and maintenance costs.

Section 152.303 How does a tribe apply for a parcel purchase?

This section requires tribes who want to initiate a tribal parcel purchase to submit an application including various items of information, including: an appraisal which establishes the fair market value of the parcel as of the date the application is filed; a certified title report and/or consent forms from the owners, reflecting that the applicant has either acquired at least 50% of the trust or restricted interests in the parcel or obtained the consent of the owners of at least 50% of such interests; and a deposit of the purchase funds needed to compensate the owners of all of the outstanding trust or restricted interests in the parcel, based on the applicant's appraisal. The Department estimates that 50 tribes each year will apply for a tribal parcel purchase and that it will take, on average, approximately 2 hours for each to provide the necessary applicant and tract information. The remaining components of the application are provided by either the Bureau of Indian Affairs or the Office of the Special Trustee for American Indians.

Burden hours = 50 tribes  $\times$  1 application per tribe  $\times$  2 hours = 100 total burden hours, at \$15/hour for a cost to the public of \$1,500. This represents a program change, with no annualized startup, or operations and maintenance costs.

Section 152.403 How do I apply to consolidate a parcel by sale?

This section allows eligible bidders to apply to the Secretary for approval on the Bureau form, "Application for Consolidation by Sale," to consolidate interests in a highly fractionated parcel by selling interests to one owner. The Department estimates that 100 eligible bidders will apply for a consolidation by sale each year, at an average of one application per eligible bidder, and that it will take 0.5 hours to prepare the application for consolidation by sale.

Burden hours = 100 eligible bidders  $\times$  1 application per eligible bidder  $\times$  0.5 hours = 50 total burden hours, at \$15/hour for a cost to the public of \$750. This represents a program change, with no annualized startup, or operations and maintenance costs.

Section 152.412 How does a tribe reserve its right to match the highest bid?

This section allows tribes to match the highest bid from a non-member of the tribe by submitting a copy of the tribal law or resolution to the Secretary. The Department estimates that 50 tribes will request the opportunity to match the highest bid to buy property, at an average of one request per tribe, each year, and that it will take 0.60 hours to prepare the resolution in support of the request.

Burden hours = 50 tribes  $\times$  1 request per tribe  $\times$  0.6 hours = 30 total burden hours, at \$15/hour for a cost to the public of \$450. This represents a program change, with no annualized startup, or operations and maintenance costs.

Section 152.503 How can an owner initiate a partition action?

This section allows owners of fractional interests in a parcel to apply to the Secretary for partition of the parcel in order to consolidate interests in a smaller parcel. The application for partition must contain the legal descriptions, appraisals, and ownerships of the tract to be partitioned with smaller resulting tracts. The Department estimates that 50 owners each year will submit an application for partition, at an average of one application per owner, and that, on average, it takes approximately 2 hours to provide the necessary applicant and tract information. The Bureau of Indian Affairs provides the remaining information necessary for the transaction, including the legal description and the owners of the tract, while the Office of Appraisal Services provides the appraisal.

Burden hours = 50 tribes  $\times$  1 application per tribe  $\times$  2 hours = 100 total burden hours, at \$15/hour for a cost to the public of \$1,500. This represents a program change, with no annualized startup, or operations and maintenance costs.

Section 152.602 How do owners submit an application for approval of a mortgage or deed of trust?

This section allows the owner of the proposed mortgagee or beneficiary to submit an application for approval of a mortgage or deed of trust containing the executed mortgage or deed of trust, the promissory note, other documents regarding remedy in the case of default, an appraisal, the loan application, a credit report, title reports, and any necessary environmental or historic preservation documentation. The

Department estimates that 100 owners will request a mortgage or deed of trust, at an average of one request per owner,

and that it will take approximately 3 hours to complete the application.  
 Burden hours = 100 owners × 1 application per owner × 3 hours = 300 total burden hours, at \$15/hour for a

cost to the public of \$4,500. This represents a program change, with no annualized startup, or operations and maintenance costs.

New CFR section	Description of info collection requirement	No. of resps per yr	Hours per resp	Total hours requested (Annual)*	Currently approved hours	Explanation of difference
152.3	Request for information on parcel owners.	200	0.5	100	0	Program change.
152.102	Tribal land consolidation plan	50	5	250	0	Program change.
152.105	Tribal resolution requesting sale or exchange.	100	0.0160	60	0	Program change.
152.107	Tribal resolution in absence of land consolidation plan.	100	0.60	60	0	Program change.
152.206	Negotiated sale, gift, or exchange.	200	4.2	840	0	Program change.
152.217(b)	Request for notice of tribal acquisition.	50	0.25	12.5	0	Program change.
152.219(b)	Agreement for payments with fee conveyance.	200	1	200	0	Program change.
152.303	Tribal parcel purchase	50	2	100	0	Program change.
152.403	Consolidation by sale application.	100	0.5	50	0	Program change.
152.412	Copy of tribal law or resolution stating intent to match high bid.	50	0.60	30	0	Program change.
152.503	Partition	50	2	100	0	Program change.
152.602	Mortgage or Deed of Trust	100	3	300	0	Program change.
Total		Responses = 1,250.		2,103	0	

The Department invites comments on the information collection requirements of this proposed rule. You may submit comments to the Desk Officer for the Department of Interior by e-mail at *OIRA\_DOCKET@omb.eop.gov* or by facsimile at (202) 365-6566. Please also send a copy of your comments to BIA at the location specified under the heading **ADDRESSES**.

You can receive a copy of BIA's submission to OMB, including a copy of the form related to 25 CFR section 152.403, by contacting the person listed in the **FOR FURTHER INFORMATION CONTACT** section, or by requesting the information from the BIA Information Collection Clearance Officer, 625 Herndon Parkway, Herndon, VA 20970.

Comments should address: (1) Whether the collection of information is necessary for the proper performance of the Program, including the practical utility of the information to the BIA; (2) the accuracy of the BIA's burden estimates; (3) ways to enhance the quality, utility, and clarity of the information collected; and (4) ways to minimize the burden of collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

Organizations and individuals who submit comments on the information collection requirements should be aware that the Department keeps such

comments available for public inspection during regular business hours. If you wish to have your name and address withheld from public inspection, you must state this prominently at the beginning of any comments you make. The Department will honor your request to the extent allowable by law. We may withhold the information for other reasons.

*I. National Environmental Policy Act (NEPA)*

The National Environmental Policy Act of 1969 (NEPA) requires Federal agencies to perform an environmental assessment or environmental impact statement for all "major Federal actions." This rule does not constitute a major Federal action significantly affecting the quality of the human environment. An environmental assessment is not required because any environmental effects of this rule are too broad, speculative, or conjectural to lend themselves to meaningful analysis. Further, the Federal actions under the proposed rule (e.g. approval or disapproval of leases of Indian lands), where they qualify as "major Federal actions," will be subject to the NEPA process at the time of the action itself, either collectively or case-by-case.

*J. Government-to-Government Relationships With Tribes (Executive Order 13175)*

In accordance with the President's memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments," Executive Order 13175 (59 FR 22951, November 6, 2000) and 512 DM2, we have evaluated the potential effects on Federally recognized Indian tribes and Indian trust assets and have identified potential effects. The Department has engaged tribal government representatives in developing the Fiduciary Trust Model, which served as the basis for this rulemaking, has provided tribal government representatives with advance copies of this proposed rule, and provides additional notice to tribal government through this **Federal Register** notice. Subsequently, the Department will follow Departmental protocols for consulting with tribal governments on this proposed rule. Specifically, the Department is planning an additional three consultation meetings to exchange information with tribes on the proposed rule and potential impacts, and plans to carefully review comments received by tribal government officials. These actions enable tribal officials and the affected tribal constituency throughout Indian country to have meaningful and timely

input in the development of the final rule, while reinforcing positive intergovernmental relations with tribal governments.

*K. Energy Effects (Executive Order 13211)*

Executive Order 13211 addresses regulations that significantly affect energy supply, distribution, and use. The Executive Order requires agencies to prepare Statements of Energy Effects when undertaking certain actions. In accordance with this Executive Order, this rule does not have a significant effect on the nation's energy supply, distribution, or use. The proposed rule is restricted to addressing assets held in trust or restricted status for individual Indians or tribes.

**List of Subjects**

*25 CFR Part 15*

Estates, Indians—law.

*25 CFR Part 18*

Estates, Indians—lands.

*25 CFR Part 150*

Indians, Indians—lands.

*25 CFR Part 152*

Indians, Indians—lands.

*25 CFR Part 179*

Estates, Indians—lands.

*43 CFR Part 4*

Administrative practice and procedure, Claims.

*43 CFR Part 30*

Administrative practice and procedure, Claims, Equal access to justice, Estates, Indians, Lawyers.

For the reasons given in the preamble, the Department of the Interior proposes to amend chapter I of title 25 and part 4 of title 43 for the Code of Federal Regulations as set forth below.

**Title 25—Indians**

Chapter I—Bureau of Indian Affairs, Department of the Interior

1. Revise part 15 to read as follows:

**PART 15—PROBATE OF INDIAN ESTATES, EXCEPT FOR MEMBERS OF THE FIVE CIVILIZED TRIBES**

Sec.

**Subpart A—Introduction**

- 15.1 What is the purpose of this part?  
 15.2 What terms do I need to know?  
 15.3 Who can make a will disposing of trust or restricted land or trust personalty?  
 15.4 What are the requirements for my will?  
 15.5 Can I revoke my will?  
 15.6 Can my will be deemed revoked by the operation of the law of any state?

- 15.7 What is a self-proved will?  
 15.8 Can I make my will, codicil, or revocation self-proved?  
 15.9 Do affidavits for my self-proved will, codicil, or revocation have to be in a certain format?  
 15.10 Will the Secretary probate all the land or assets in an estate?  
 15.11 How does the probate process work?  
 15.12 What happens if assets in a trust estate may be diminished or destroyed while the probate is pending?

**Subpart B—Starting the Probate Process**

- 15.101 When should I notify BIA of a death?  
 15.102 Who may notify BIA of a death?  
 15.103 How do I begin the probate process?  
 15.104 Does BIA need a death certificate to prepare a probate file?  
 15.105 What other documents does BIA need to prepare a probate file?  
 15.106 Can a probate case be opened when an owner of an interest has been absent?  
 15.107 Who prepares a probate file?  
 15.108 If the decedent was not an enrolled member of a tribe or was a member of more than one tribe, who prepares the probate file?

**Subpart C—Obtaining Emergency Assistance and Filing Claims**

- 15.201 Can I get funds from the decedent's IIM account for funeral services?  
 15.202 If the decedent owed me money, how do I file a claim against the estate?

**Subpart D—Preparing the Probate File**

- 15.301 What will BIA do with the documents that I provide?  
 15.302 What items must BIA include in the probate file?  
 15.303 When is a probate file complete?

**Subpart E—Probate Processing and Distributions**

- 15.401 What happens after BIA prepares the probate file?  
 15.402 What happens after the probate file is referred to OHA?  
 15.403 What happens after the probate decision is made?

**Subpart F—Information and Records**

- 15.501 How can I find out the status of a probate?  
 15.502 Who owns the records associated with this part?  
 15.503 How must records associated with this part be preserved?  
 15.504 Who may inspect these records?  
 15.505 What information must tribes provide BIA to complete the probate file?  
 15.506 How does the Paperwork Reduction Act affect this part?

**Authority:** 5 U.S.C. 301; 25 U.S.C. 2, 9, 372–74, 410; 44 U.S.C. 3101 *et seq.*

**Cross Reference:** For special rules applying to proceedings in Indian Probate (Determination of Heirs and Approval of Wills, Except for Members of the Five Civilized Tribes and Osage Indians), including hearings and appeals within the jurisdiction of the Office of Hearings and Appeals, see title 43, Code of Federal Regulations, part 4, subpart D; Funds of

deceased Indians other than the Five Civilized Tribes, see title 25 Code of Federal Regulations, part 115.

**Subpart A—Introduction**

**§ 15.1 What is the purpose of this part?**

This part contains the procedures that we follow to initiate the probate of the trust estate of a deceased person for whom we hold an interest as trust or restricted land or trust personalty. This part tells you how to file the necessary documents to probate the trust estate. This part also describes how probates will be processed by BIA, and how probates will be sent to the Office of Hearings and Appeals (OHA) for disposition.

**§ 15.2 What terms do I need to know?**

As used in this part:  
*Act* means the Indian Land Consolidation Act and its amendments, including Public Law 108–374, the American Indian Probate Reform Act of 2004 (AIPRA).

*Administrative law judge (ALJ)* means an administrative law judge with OHA appointed under the Administrative Procedure Act, 5 U.S.C. 3105.

*Agency* means:

(1) The Bureau of Indian Affairs (BIA) agency office, or any other designated office in BIA, having jurisdiction over trust or restricted land and trust financial assets; and

(2) Any office of a tribe that has entered into a contract or compact to fulfill the probate function under 25 U.S.C. 450f or 458cc.

*Attorney Decision Maker (ADM)* means a licensed attorney with OHA who conducts a summary probate proceeding and renders a decision that is subject to de novo review by an administrative law judge or Indian probate judge.

*BIA* means the Bureau of Indian Affairs within the Department of the Interior.

*Child* includes any adopted child.

*Codicil* means a supplement or addition to a will, executed with the same formalities as a will. It may explain, modify, add to, or revoke provisions in an existing will.

*Consolidation agreement* means a written agreement under the provisions of 25 U.S.C. 2206(e) or 2206(j)(9), by which a decedent's heirs and devisees consolidate interests in trust or restricted land, entered during the probate process, approved by the judge, and implemented by the probate order.

*Creditor* means any individual or entity that has a claim for payment from a decedent's estate.

*Day* means a calendar day, unless otherwise stated.

*Decedent* means a person who is deceased.

*Decision or order (or decision and order)* means a written document issued by a judge making determinations as to heirs, wills, devisees, and the claims of creditors, and ordering distribution of trust or restricted land or trust personality. Decision or order also means the decision issued by an attorney decision maker in a summary probate proceeding.

*Department or DOI* means the Department of the Interior.

*Devise* means a gift of property by will. Also, to give a gift of property by will.

*Devisee* means a person or entity that receives property under a will.

*Eligible heir* means for the purposes of the Act, 25 U.S.C. 2206, any of a decedent's children, grandchildren, great grandchildren, full siblings, half siblings by blood, and parents who are:

- (1) Indian;
- (2) Lineal descendants within two degrees of consanguinity of an Indian; or
- (3) Owners of a trust or restricted interest in a parcel of land for purposes of inheriting, by descent, renunciation, or consolidation agreement, another trust or restricted interest in such parcel from the decedent.

*Estate* means the trust or restricted land and trust personality owned by the decedent at the time of death.

*Form OHA-7* means a form (or an automated database equivalent) used by BIA to record data for heirship and family history, including but not limited to information on any wills, trust and restricted land, marriages, births, deaths, adoptions, and names and addresses of all interested parties.

*Formal probate proceeding* means a trial-type proceeding, conducted by a judge, in which evidence is obtained through the testimony of witnesses and the receipt of relevant documents.

*Heir* means any individual or entity eligible to receive trust or restricted land or trust personality from a decedent in an intestate proceeding.

*I* means, in question headings, an heir, a devisee, an owner of trust or restricted land or trust personality, or a creditor.

*Individual Indian Money (IIM) account* means funds held in trust in an individual Indian money (IIM) account by OST or by a tribe performing this function under a contract or compact. These funds also are defined as the "trust personality."

*Indian* means, for the purposes of the Act, 25 U.S.C. 2206:

- (1) Any person who is a member of a federally recognized Indian tribe, is

eligible to become a member of any Indian tribe, or is an owner (as of October 27, 2004) of a trust or restricted interest in land;

(2) Any person meeting the definition of Indian under 25 U.S.C. 479; and

(3) With respect to the inheritance and ownership of trust or restricted land in the State of California under 25 U.S.C. 2206, any person described in paragraph (1) or (2) of this definition or any person who owns a trust or restricted interest in a parcel of such land in that State.

*Indian probate judge (IPJ)* means a licensed attorney, employed by OHA, other than an ALJ, to whom the Secretary has delegated the authority to hear and decide Indian probate cases under 5 U.S.C. 556(b).

*Interested party* means:

- (1) Any potential or actual heir;
- (2) Any devisee under a will;
- (3) Any person or entity asserting a claim against a decedent's estate;
- (4) Any tribe having a statutory option to purchase the trust or restricted property interest of a decedent; or
- (5) A co-owner exercising a purchase option.

*Intestate* means the decedent died without a valid will.

*Judge* means an administrative law judge (ALJ) or Indian probate judge (IPJ).

*LTRO* means the Land Titles and Records Office within BIA.

*OHA* means the Office of Hearings and Appeals within the Department of the Interior.

*OST* means the Office of the Special Trustee for American Indians within the Department of the Interior.

*Probate* means the legal process by which applicable tribal, Federal, or state law that affects the distribution of a decedent's estate is applied to:

- (1) Determine the heirs;
- (2) Determine the validity of wills and determine devisees;
- (3) Determine whether claims against the estate will be paid from trust funds; and
- (4) Order the transfer of any trust or restricted land or trust personality to the heirs, devisees, or other persons or entities entitled by law to receive the funds or land.

*Probate staff* means a DOI or tribal employee who is trained in probate matters and who is responsible for preparing the probate file.

*Purchase option at probate* refers to the process by which eligible purchasers can purchase a decedent's interest during the probate proceeding.

*Restricted property* means real property, the title to which is held by an Indian but which cannot be alienated or encumbered without the Secretary's

consent. For the purpose of probate proceedings, restricted property is treated as if it were trust property. Except as the law may provide otherwise, the term "restricted property" as used in this subpart does not include the restricted lands of the Five Civilized Tribes of Oklahoma or the Osage Nation.

*Secretary* means the Secretary of the Interior or an authorized representative. The authorized representative of the Secretary for the performance of probate functions is BIA. The authorized representative for adjudication of probate is OHA.

*Summary probate proceeding* means the consideration of a probate file without a hearing and on the basis of the probate file received from BIA. A summary probate proceeding may be conducted if the estate involves only trust personality and does not exceed the amount of \$5,000 on the date of the decedent's death.

*Superintendent* means a BIA Superintendent or other BIA official, including a field representative or one holding equivalent authority.

*Testate* means the decedent executed a valid will.

*Trust personality* means all funds and securities of any kind which are held in trust in an IIM account or otherwise supervised by the Secretary.

*Trust property* means real or personal property, or an interest therein, for which the United States holds the title to the property in trust for the benefit of an individual Indian or tribe.

*We or us* means the Secretary, an authorized representative of the Secretary, or the authorized employee or representative of a tribe performing probate functions under a contract or compact approved by the Secretary. The Secretary may change the designation of the authorized representative at any time.

*Will* means a written document executed with the required formalities and intended to pass the testator's property upon death.

*You* means, in regulatory text, an heir or devisee or owner of trust or restricted property or trust personality, unless a specific section defines "you" to have another meaning.

### § 15.3 Who can make a will disposing of trust or restricted land or trust personality?

Any person 18 years of age or over and of testamentary capacity, who has any right, title, or interest in trust or restricted land or trust personality, may dispose of trust or restricted land or trust personality by will.

**§ 15.4 What are the requirements for my will?**

You must date and execute your will in writing and have it attested by two disinterested adult witnesses.

**§ 15.5 Can I revoke my will?**

Yes. You may revoke your will at any time. You may revoke your will by any means authorized by tribal or Federal law, including executing a subsequent will or other writing with the same formalities as are required for execution of a will.

**§ 15.6 Can my will be deemed revoked by operation of the law of any state?**

No will that is subject to the regulations of this subpart will be deemed to be revoked by operation of the law of any State.

**§ 15.7 What is a self-proved will?**

A self-proved will employs an affidavit, attached to the will, signed by the testator and the witnesses before an officer authorized to administer oaths, certifying that they complied with the requirements of execution of the will. Using an affidavit executed at the same time as the will avoids the need for the testimony of the will witnesses at probate to prove the execution of the will.

**§ 15.8 Can I make my will, codicil, or revocation self-proved?**

Yes. A will, codicil, or revocation may be made self-proved as provided in this section.

(a) A will, codicil, or revocation executed as provided in § 15.4 may be made self-proved by the testator and attesting witnesses at the time of its execution.

(b) The testator and the attesting witnesses must make these affidavits before an officer authorized to administer oaths, and the affidavits must be attached to the will.

**§ 15.9 Do affidavits for my self-proved will, codicil, or revocation have to be in a certain format?**

Yes, the affidavits of the testator and attesting witnesses must be in substantially the following form and content.

(a) Format for testator's affidavit:

Tribes of \_\_\_\_\_ or  
State of \_\_\_\_\_  
County of \_\_\_\_\_ ss.  
I, \_\_\_\_\_, being first duly sworn, on oath, depose and say: That I am an \_\_\_\_\_ (enrolled or unenrolled) member of the \_\_\_\_\_ Tribe of Indians in the State of \_\_\_\_\_; that on the \_\_\_ day of \_\_, 20\_\_\_, that I requested \_\_\_\_\_ and \_\_\_\_\_ to act as witnesses thereto; that I declared to said witnesses that said instrument was my last will and testament; that I signed said will in

the presence of both witnesses; that they signed the same as witnesses in my presence and in the presence of each other; that said will was read and explained to me (or read by me), after being prepared and before I signed it, and it clearly and accurately expresses my wishes; and that I willingly made and executed said will as my free and voluntary act and deed for the purposes therein expressed.

Testator

(b) Format for attesting witnesses' affidavit:

We, \_\_\_\_\_ and \_\_\_\_\_, each being first duly sworn, on oath, depose and state: That on the \_\_\_ day of \_\_, 20\_\_\_, a member of the \_\_\_\_\_ Tribe of Indians of the State of \_\_\_\_\_, published and declared the attached instrument to be his/her last will and testament, signed the same in the presence of both of us, and requested both of us to sign the same as witnesses; that we, in compliance with his/her request, signed the same as witnesses in his/her presence and in the presence of each other; that said testator was not acting under duress, menace, fraud, or undue influence of any person, so far as we could ascertain, and in our opinion was mentally capable of disposing of all his/her estate by will.

Witness

Witness

Subscribed and sworn to before me this \_\_\_ day of \_\_, 20\_\_\_, by \_\_\_\_\_ testator, and by \_\_\_\_\_ and \_\_\_\_\_, attesting witnesses.

(Title)

**§ 15.10 Will the Secretary probate all the land or assets in an estate?**

(a) We will probate only the trust or restricted land or trust personalty in an estate.

(b) We will not probate the following property:

(1) Real or personal property other than trust or restricted land or trust personalty in an estate of a decedent;

(2) Restricted land derived from allotments made to members of the Five Civilized Tribes (Cherokee, Choctaw, Chickasaw, Creek and Seminole) in Oklahoma; and

(3) Restricted interests derived from allotments made to Osage Indians in Oklahoma (Osage Nation) and Osage headright interests owned by Osage decedents.

(c) We will probate that part of the estate of a deceased member of the Five Civilized Tribes or Osage Nation who owns a trust interest in land or a restricted interest in land derived from an individual Indian other than the Five Civilized Tribes or Osage Nation.

**§ 15.11 How does the probate process work?**

The basic steps of the probate process are:

(a) We find out about a person's death (see subpart B of this part for details);

(b) We prepare a probate file that includes documents sent to the agency (see subpart C of this part for details);

(c) We refer the completed probate file to OHA for assignment to a judge or ADM (see subpart D of this part for details); and

(d) The judge or ADM decides how to distribute any trust or restricted land and/or trust personalty, and we make the distribution (see subpart D of this part for details).

**§ 15.12 What happens if assets in a trust estate may be diminished or destroyed while the probate is pending?**

(a) This section applies if an interested party or BIA:

(1) Learns of the death of a person entitled to trust or restricted property; and

(2) Determines that an emergency exists and the assets in the trust estate may be significantly diminished or destroyed before the final decision and order of a judge in a probate case.

(b) The interested party or BIA may:

(1) Request the immediate assignment of a judge or ADM for the probate case;

(2) Transmit or request the transfer of a probate file to OHA containing sufficient information on potential interested parties and documentation concerning the emergency alleged for a judge to consider emergency relief in order to preserve estate assets; and

(3) Request an expedited hearing or consideration of ex parte relief to prevent impending or further loss or destruction of trust assets.

(c) The Superintendent or other authorized representative of BIA is granted the standing necessary to request relief under this section.

**Subpart B—Starting the Probate Process****§ 15.101 When should I notify BIA of a death?**

There is no deadline for notifying us of a death.

(a) Notify us as provided in § 15.103 to assure timely distribution of the estate.

(b) If we find out about the death of a person and if the decedent meets the criteria in § 15.3, we will initiate the process to collect the necessary documentation.

**§ 15.102 Who may notify BIA of a death?**

Anyone may notify us of a death.

**§ 15.103 How do I begin the probate process?**

As soon as possible, contact any of the following to inform us of the decedent's death:

- (a) The BIA agency or regional office nearest to where the decedent was enrolled;
- (b) Any BIA agency or regional office;
- (c) The tribe where the decedent was enrolled; or
- (d) The Trust Beneficiary Call Center at (888) 678-6836 ext. 0.

**§ 15.104 Does BIA need a death certificate to prepare a probate file?**

(a) We require a certified copy of the death certificate if a certified copy exists. If necessary, we will make a copy from your certified copy for our use and return your copy.

(b) If a certified copy of the death certificate does not exist, you must provide as much information as you can concerning the deceased, such as:

- (1) The State, city, reservation, location, date, and cause of death;
- (2) The last known address of the deceased; names and addresses of others who may have information about the deceased; and any other information available concerning the deceased, such as newspaper articles, obituary, or death notices or a church or court record.

(c) If no certified copy of a death certificate exists, we require an affidavit stating as much of the information set forth in paragraph (b) of this section as is available, as well as any other information available concerning the decedent.

**§ 15.105 What other documents does BIA need to prepare a probate file?**

In addition to the certified copy of a death certificate or other reliable evidence of death listed in § 15.104, we need the following information and documents:

- (a) Originals or copies of all wills, codicils, and revocations, or other evidence that a will may exist;
- (b) Social Security number of the decedent;
- (c) The place of enrollment and the tribal enrollment or census number of the decedent and potential heirs or devisees;
- (d) Current names and addresses of the decedent's potential heirs and devisees;
- (e) Any sworn statements regarding the decedent's family, including any statements of paternity or maternity;
- (f) Any statements renouncing an interest in the estate including identification of the person or entity in whose favor the interest is renounced, if any;

(g) A list of known claims by creditors of the decedent against the estate and their addresses, including copies of any court judgments; and

(h) Documents, certified if possible, from the appropriate authorities concerning the public record of the decedent, including but not limited to, any:

- (1) Marriage licenses of the decedent,
- (2) Divorce decrees of the decedent,
- (3) Adoption and guardianship records concerning the decedent or the decedent's potential heirs or devisees;
- (4) Use of other names by the decedent, including copies of name changes by court order; and
- (5) Order requiring payment of child support or spousal support.

**§ 15.106 Can a probate case be opened when an owner of an interest has been absent?**

(a) A probate case may be opened when information is provided to us that an owner of an interest in trust or restricted land or trust personalty has been absent without explanation for a period of at least six years.

(b) When we receive that information, we will begin an investigation into the unexplained absence, and will attempt to locate the absent person. We may:

- (1) Search available electronic databases;
- (2) Inquire into other published information sources such as telephone directories and other available directories;
- (3) Examine BIA land title and lease records;
- (4) Examine the IIM account ledger for disbursements from the account; and
- (5) Engage the services of an independent firm to conduct a search for the absent owner.

(c) When we have completed our investigation, if we are unable to locate the absent person, we will open a probate case and prepare a file that will include all the documentation developed in the search.

(d) We may file a claim in the probate case to recover the reasonable costs expended to contract with an independent firm to conduct the search.

**§ 15.107 Who prepares a probate file?**

The probate staff at the agency or tribe where the decedent is an enrolled member will prepare the probate file in consultation with the potential heirs or devisees who can be located, and with other people with information about the decedent or the estate.

**§ 15.108 If the decedent was not an enrolled member of a tribe or was a member of more than one tribe, who prepares the probate file?**

Unless otherwise provided by Federal law, the agency that has jurisdiction over the tribe with the strongest association with the decedent will serve as the home agency and will prepare the probate file if the decedent either:

- (a) Was not an enrolled member of a tribe but owns interests in trust or restricted land or trust personalty; or
- (b) Was a member of more than one tribe.

**Subpart C—Obtaining Emergency Assistance and Filing Claims****§ 15.201 Can I get funds from the decedent's IIM account for funeral services?**

(a) You may ask us for up to \$1,000 from the decedent's IIM account in the following situations:

- (1) You are responsible for making the funeral arrangements on behalf of the family of a decedent who had an IIM account;
- (2) You have an immediate need to pay for funeral arrangements before burial; and
- (3) The decedent's IIM account contains more than \$2,500 on the date of death.

(b) You must apply for assistance under paragraph (a) of this section and submit to us an original itemized estimate of the cost of the service to be rendered and the identification of the service provider.

(c) We may approve reasonable costs up to \$1,000 that are necessary for the burial services, taking into consideration:

- (1) The total amount in the account;
- (2) The number of potential heirs or beneficiaries of whom BIA is aware;
- (3) The amount of any claims against the account of which BIA is aware;
- (4) The availability of non-trust funds; and
- (5) Any other relevant factor.

(d) We will make payments directly to the providers of the services.

**§ 15.202 If the decedent owed me money, how do I file a claim against the estate?**

If a decedent owed you money, you can make a claim against the estate of the decedent before the probate file is transferred to OHA. To do this, you may submit to us an affidavit under oath of the debt alleged and an itemized statement of the debt, including copies of any documents (such as signed notes, mortgages, account records, billing records, and journal entries) necessary to prove the indebtedness. You may also file your claim as a creditor with OHA

after the probate file has been transferred and pending adjudication has not been completed if you comply with 43 CFR 30.140–30.148.

(a) The itemized statement must show the amount of the original debt and the remaining balance on the date of the decedent's death.

(b) The affidavit must state whether you have filed a claim or sought reimbursement against the decedent's non-trust assets and whether you have filed a claim for the same debt in any other judicial or quasi-judicial proceeding.

(c) Secured creditors must first exhaust the security before submitting a claim against trust personalty for any deficiency. Submit a certified copy of a judgment of a court of competent jurisdiction determining the deficiency.

(d) File your claim before the conclusion of the first hearing or, for cases designated as summary probate proceedings, as allowed under 43 CFR 30.202. Claims not filed by then will be barred forever.

#### Subpart D—Preparing the Probate file

##### § 15.301 What will BIA do with the documents that I provide?

After we receive notice of the death of a person owning trust or restricted land or trust personalty, we will examine the documents provided under §§ 15.104 and 15.105, and other documents and information you may provide to prepare a complete probate file. We will consult with you and any other sources to obtain additional information to complete the probate file. Then we will transfer the probate file to OHA.

##### § 15.302 What items must BIA include in the probate file?

BIA must query available sources of information to locate and include the following items in the probate file:

(a) The evidence of death of the decedent as provided by § 15.104;

(b) A completed Form OHA-7, "Data for Heirship Findings and Family History," certified by BIA, with the enrollment or other identifying number shown for each potential heir or devisee, if such number has been assigned;

(c) Information provided by potential heirs, devisees or the tribes on:

(1) Whether the heirs and devisees meet the definition of "Indian" for probate purposes, including enrollment or eligibility for enrollment in a tribe;

(2) Whether the potential heirs or devisees are within two degrees of consanguinity of an "Indian"; and

(3) If an individual only qualifies as an Indian because of ownership of a

trust or restricted interest in land, the date on which the individual became the owner of the trust or restricted interest;

(d) A certified inventory of trust or restricted land, including:

(1) Accurate and adequate descriptions of all land and appurtenances;

(2) All encumbrances on the land, including but not limited to leases, mortgages, and rights of way;

(3) Identification of any interests that represent less than 5% of the undivided interest in a parcel; and

(4) Identification of all income generating activity, such as leases or rights of way and any assignments of such income;

(e) A statement showing the balance of the decedent's IIM account at the date of death;

(f) A statement showing all disbursements from the decedent's IIM account after the date of death;

(g) Originals or copies of all wills, codicils, and revocations;

(h) A copy of any statement or document concerning any wills, codicils or revocations we have returned to the testator;

(i) Any statement renouncing an interest in the estate that has been submitted to us, and the information necessary to identify any person receiving a renounced interest;

(j) Claims of creditors, including documentation required by § 15.202;

(k) Documentation of any payments made on claims filed under the provisions of § 15.201;

(l) All the documents acquired under § 15.105;

(m) The record of each tribal or individual request to purchase a trust or restricted land interest at probate;

(n) The record of any individual request for a consolidation agreement, including a description, such as an Individual/Tribal Interest Report, of any lands not part of the decedent's estate that are proposed for inclusion in the consolidation agreement; and

(o) An affidavit by the probate staff, if applicable, certifying that the Department has complied with 25 U.S.C. 2201 et seq in attempting to locate missing potential heirs and devisees and identifying the steps that were taken.

##### § 15.303 When is a probate file complete?

A probate file is complete for transfer to OHA when a BIA approving official includes a certification that:

(a) States that the probate file includes all information listed in § 15.302 that is available; and

(b) Lists all sources of information BIA queried in an attempt to locate

information listed in § 15.302 that is not available.

#### Subpart E—Probate Processing and Distributions

##### § 15.401 What happens after BIA prepares the probate file?

After we assemble all the documents required by § 15.302, our probate staff will:

(a) Refer the case to OHA for assignment to a judge or ADM; and

(b) Forward a list of fractional interests that represent less than 5 percent of the entire undivided ownership of each parcel of land in the decedent's estate to the Indian Land Consolidation Office and to the tribes with jurisdiction over those interests.

##### § 15.402 What happens after the probate file is referred to OHA?

(a) When OHA receives the probate file from BIA, it will assign the case to a judge or ADM. The judge or ADM will conduct the probate proceeding and issue a written decision and an order, in accordance with 43 CFR part 4, subpart D.

(b) If BIA receives any claims from creditors after the probate file is transmitted to OHA, but before the order is issued, BIA must promptly transmit those claims to OHA.

##### § 15.403 What happens after the probate decision is made?

Once the probate decision is made:

(a) You have 30 days from the decision or order mailing date to file a written request for a de novo review, a request for rehearing or an appeal, in accordance with 43 CFR part 30;

(b) When you file a timely request for de novo review, a request for rehearing, or an appeal, we will not pay claims, transfer title to land, or distribute trust personalty until the request or appeal is resolved; and

(c) If no interested party timely files a request or appeal, we will wait at least 10 days after the 30 day period stated in paragraph (a) of this section before paying claims, transferring title to land, or distributing trust personalty, then:

(1) The LTRO will change its land title records for the trust and restricted land in accordance with the final decision or order; and

(2) We will pay claims and distribute the IIM account in accordance with the final decision or order.

#### Subpart F—Information and Records

##### § 15.501 How can I find out the status of a probate?

You may contact any BIA agency or regional office, an OST fiduciary trust

officer or the Trust Beneficiary Call Center at (888) 678-6836 ext. 0, to get information about the status of an Indian probate.

**§ 15.502 Who owns the records associated with this part?**

(a) The United States owns the records associated with this part if they:

- (1) Are made by or on behalf of the United States;
- (2) Are made or received by a tribe or tribal organization in the conduct of a federal trust function under this part, including the operation of a trust program under Public Law 93-638 as amended; and
- (3) Are evidence of the organization, functions, policies, decisions, procedures, operations, or other activities undertaken in the performance of a federal trust function under this part.

(b) The tribe owns the records associated with this part if they:

- (1) Are not covered by paragraph (a) of this section; and
- (2) Are made or received by a tribe or tribal organization in the conduct of business with the Department of the Interior under this part.

**§ 15.503 How must records associated with this part be preserved?**

(a) Any organization that has records identified in § 15.502(a), including tribes and tribal organizations, must preserve the records in accordance with approved Departmental records retention procedures under the Federal Records Act, 44 U.S.C. chapters 29, 31, and 33; and

(b) A tribe or tribal organization must preserve the records identified in § 15.502(b) for the period authorized by the Archivist of the United States for similar Department of the Interior records under 44 U.S.C. chapter 33.

**§ 15.504 Who may inspect these records?**

The records and records management practices and safeguards required under the Federal Records Act are subject to inspection by BIA and the Archivist of the United States.

**§ 15.505 What information must tribes provide BIA to complete the probate file?**

The tribes must provide any information that we require or request to complete the probate file. This information may include enrollment and family history data or property title documents that pertain to any pending probate matter.

**§ 15.506 How does the Paperwork Reduction Act affect this part?**

The collections of information contained in §§ 15.4, 15.104, 15.105,

15.201, 15.202, 15.403, 15.505 have been approved by the Office of Management and Budget under 44 U.S.C. 3501 *et seq.* and assigned OMB Control Number 1076-xxxx. Response is required to obtain a benefit. A Federal agency may not conduct or sponsor, and you are not required to respond to a collection of information unless the form or regulation requesting the information has a currently valid OMB Control Number.

2. Add part 18 to subchapter C to read as follows:

**PART 18—TRIBAL PROBATE CODES**

Sec.

- 18.1 May a tribe adopt its own probate code?
- 18.2 When does a code require our approval?
- 18.3 What will you consider in the approval process?
- 18.4 How does a tribe request approval for a probate code?
- 18.5 When will you approve or disapprove a probate code or amendment?
- 18.6 What happens if the probate code or amendment is approved?
- 18.7 How is a tribe notified of a disapproval?
- 18.8 When will a tribal probate code become effective?
- 18.9 What will happen if a tribe repeals its probate code?
- 18.10 How does the Paperwork Reduction Act affect this part?

**Authority:** 5 U.S.C. 301; 25 U.S.C. 2, 9, 372-74, 410; 44 U.S.C. 3101 *et seq.*; 25 CFR part 15; 43 CFR part 4.

**§ 18.1 May a tribe adopt its own probate code?**

(a) A tribe may adopt a probate code to govern descent and distribution of trust and restricted lands located within the tribe's reservation or otherwise subject to the tribe's jurisdiction. The code may include:

- (1) Rules of intestate succession; and
- (2) Other provisions consistent with Federal law that promote the policies in § 18.3.

(b) A tribe may adopt a single heir rule for intestate succession specifying a recipient other than the one provided by 25 U.S.C. 2206(a)(2)(D).

**§ 18.2 When does a code require our approval?**

Only those tribal probate codes that govern the descent and distribution of trust and restricted lands require our approval.

**§ 18.3 What will you consider in the approval process?**

We will consider the following in determining whether to approve a tribal probate code:

- (a) The code must promote the policies of the Indian Land

Consolidation Act (ILCA) Amendments of 2000 which are to:

- (1) Prevent further fractionation;
- (2) Consolidate fractional interests into useable parcels;
- (3) Consolidate fractional interests to enhance tribal sovereignty;
- (4) Promote tribal self-sufficiency and self-determination; and
- (5) Reverse the effects of the allotment policy on Indian tribes;

(b) The tribal probate code must allow:

- (1) An Indian lineal descendant of the original allottee to inherit; and
- (2) An Indian who is not a member of the Indian tribe with jurisdiction over the interest in land to inherit; and

(c) A tribe may limit the individuals in paragraphs (b)(1) and (2) of this section if the code:

- (1) Allows those individuals to renounce their interests to eligible devisees in accordance with the tribal code;
- (2) Allows a devisee spouse or lineal descendant of the testator or of the original allottee to reserve a life estate without regard to waste; and
- (3) Allows for the payment of fair market value as determined by us on the date of the decedent's death.

**§ 18.4 How does a tribe request approval for a probate code?**

(a) To begin the approval process for either a tribal probate code or amendment to the code, the tribe must submit to the local Bureau Official as defined in 25 CFR 82.1(h):

- (1) Its probate code or an amendment to an existing code; and
- (2) A duly executed tribal resolution adopting the code or the amendment.

(b) The local Bureau Official will make sure that a complete copy of the code and the resolution is submitted to the Assistant Secretary—Indian Affairs for approval.

**§ 18.5 When will you approve or disapprove a probate code or amendment?**

(a) We have 180 days from submission of a complete package to the local Bureau Official to approve or disapprove a tribal probate code.

(b) We have 60 days from submission of an amendment of the tribal probate code to approve or disapprove the amendment.

(c) If we do not meet the deadlines in paragraphs (a) or (b) of this section, the tribal probate code or the amendment to the code will be deemed approved, but only to the extent that it:

- (1) Is consistent with Federal law; and
- (2) Promotes the policies of the ILCA Amendments of 2000 as listed in § 18.3.

**§ 18.6 What happens if the probate code or amendment is approved?**

Our approval applies only to those sections of the tribal probate code that govern the descent and distribution of trust or restricted land. We will:

(1) Notify the tribe of the approval and forward a copy of the code or amendment to the Office of Hearings and Appeals; and

(2) Publish a notice of the date of the approval in the **Federal Register**.

**§ 18.7 How is a tribe notified of a disapproval?**

If we disapprove a tribal probate code or amendment, we must provide the tribe with a written notification of the disapproval that includes:

(a) An explanation of the reasons for the disapproval; and

(b) Notification that the tribe may appeal the disapproval directly to the Interior Board of Indian Appeals under 25 CFR part 2.

**§ 18.8 When will a tribal probate code become effective?**

(a) A tribal probate code may not become effective sooner than 180 days after the date of approval.

(b) The tribal probate code or amendment will apply only to the estate of a decedent who dies on or after the effective date of the tribal probate code or amendment.

**§ 18.9 What will happen if a tribe repeals its probate code?**

(a) If a tribe repeals its tribal probate code, the repeal:

(1) Will not become effective sooner than 180 days from the date we receive notification from the tribe of its decision to repeal the code; and

(2) Will apply only to the estate of a decedent who dies on or after the effective date of the repeal.

(b) We will:

(1) Forward a copy of the repeal to the Office of Hearings and Appeals; and

(2) Publish a notice of the date of repeal in the **Federal Register**.

**§ 18.10 How does the Paperwork Reduction Act affect this part?**

The collection of information contained in § 18.4 has been approved by the Office of Management and Budget under 44 U.S.C. 3501 *et seq.* and assigned OMB Control Number 1076-xxxx. Response is required to obtain a benefit. A Federal agency may not conduct or sponsor, and you are not required to respond to a collection of information unless the form or regulation requesting the information has a currently valid OMB Control Number.

3. Revise part 150 to read as follows:

**PART 150—INDIAN LAND RECORD OF TITLE****Subpart A—Purpose, Definitions, and Public Information**

Sec.

150.1 What is the purpose of this part?

150.2 What terms do I need to know?

150.3 When can I see land and title information from the Indian Land Record of Title?

150.4 Do I have to be an Indian or a tribe to obtain products or services from the Land Titles and Records Office?

**Subpart B—The Indian Land Record of Title Designation as the Official Record of Indian Land**

150.101 Must all title instruments affecting Indian land be recorded in the Indian Land Record of Title?

150.102 Do I have to check with any other governmental office to find title instruments to Indian land?

**Subpart C—LTRO Procedures and Requirements to Record Instruments in the Indian Land Record of Title**

150.201 Who maintains the Indian Land Record of Title?

150.202 Where is the LTRO located?

150.203 Who submits the title instruments for recording?

150.204 What does the LTRO do with the instruments it receives?

150.205 What are the minimum requirements for recording a title instrument?

150.206 What if the LTRO discovers a defect or error in a document?

150.207 What if a defect or error in a final probate record cannot be corrected?

150.208 How do I correct an error or omission in a title instrument or LTRO product or service?

150.209 What instruments qualify for recording with the LTRO?

150.210 Does the LTRO maintain the original title instruments?

150.211 May I obtain a copy of the title instrument from the LTRO?

150.212 Is there any benefit to obtaining a certified copy of the title?

**Subpart D—Services and Products of the LTRO**

150.301 What services and products may I order from the LTRO?

150.302 How do I order services and products from the LTRO?

150.303 Does BIA charge fees for any of the services provided by, or products produced by, the LTRO?

150.304 What will the LTRO do if the instrument contains information that is privileged or protected?

150.305 How does the Paperwork Reduction Act affect this part?

**Authority:** Act of June 30, 1834 (4 Stat. 738; 25 U.S.C. 9). Act of July 26, 1892 (27 Stat. 272; 25 U.S.C. 5). Reorganization Plan No. 3 of 1950 approved June 20, 1949 (64 Stat. 1262). (Act of April 26, 1906 (34 Stat. 137); Act of May 27, 1908 (35 Stat. 312); Act of August 1, 1914 (38 Stat. 582, 598) deals

specifically with land records of the Five Civilized Tribes. Act of February 14, 1920 (41 Stat. 415) amended March 1, 1933 (47 Stat. 1417; 25 U.S.C. 413); 5 U.S.C. 552a; 25 U.S.C. 14b; and 31 U.S.C. 9701.

*Cross-reference:* For further regulations pertaining to proceedings in Indian probate, see 43 CFR part 4, subpart D, 43 CFR part 30, and 25 CFR part 15.

**Subpart A—Purpose, Definitions and Public Information****§ 150.1 What is the purpose of this part?**

The purpose of this part is to describe the authorities, policies, and procedures used for:

(a) Recording instruments that affect title to Indian land;

(b) Maintaining copies of title instruments;

(c) Maintaining the Indian Land Record of Title;

(d) Certifying title instruments of Indian land;

(f) Examining and determining title status;

(g) Preparing reports on the title of Indian land; and

(h) Designating the Indian Land Record of Title as the official record for instruments that affect title to Indian land.

**§ 150.2 What terms do I need to know?**

As used in this part:

*BIA* means the United States Department of the Interior Bureau of Indian Affairs.

*Constructive notice* means information or knowledge of a fact imputed by law to a person even if such person has no actual knowledge of the fact.

*Federal government* means the government of the United States.

*Government offices* mean the Federal, state, county, and municipal government.

*Indian land* means land held in trust status or restricted status, or certain Federal government land that is under the jurisdiction of BIA.

*Indian Land Record of Title* means the record of title instruments for Indian land under the Act of July 26, 1892, 27 Stat. 272; 25 U.S.C. 5.

*Instrument* means a document in writing, including, but not limited to, a contract, deed, will, bond, judicial or administrative order, lease, or easement, including a map or plat.

*Interest*, when used with respect to Indian land, means a present or future right in trust or restricted land.

*Land* means real estate.

*Land Titles and Records Office (LTRO)* means the office within BIA that

is responsible for maintaining the Indian Land Record of Title by recording, providing custody, and certifying title instruments in its custody, and for examining and determining the completeness and accuracy of the record of interests in Indian land, certifying the findings of examination, and reporting the status of interests in Indian land. The Land Titles and Records Office, as used herein, includes tribes which have compacted or contracted to perform some Land Titles and Records functions.

*Recording* means the entry of the information from an instrument into the Indian Land Record of Title. Recording an instrument in the Indian Land Record of Title gives constructive notice of the instrument's existence.

*Secretary* means the Secretary of the Interior, or an authorized representative.

*Title* means an interest, or evidence of an interest, in Indian land.

*Title examination* means a review and evaluation by the Land Titles and Records Office of the information in the Indian Record of Title for a particular tract of Indian land and a finding that such information is complete, accurate, and current.

*Title instrument* means any instrument that affects an interest in Indian land and that the law and regulations require to be approved or recorded.

*Tribe* means any Indian tribe, nation, band, pueblo, town, community, rancheria, colony, or other group of Indians, which is recognized by the Secretary as eligible for the special programs and services provided by the Bureau of Indian Affairs, and listed in the **Federal Register** under Public Law 103-454, act of Nov. 2, 1994 (108 Stat. 4791; 25 U.S.C. 479a).

*Trust status* means the United States holds title to the property in trust for the benefit of a tribe or individual Indian. Restricted status means a tribe or individual Indian holds title to the property in fee simple subject to Federal restrictions on alienation or encumbrance.

*You/I* means the person reading this regulation.

**§ 150.3 When can I see land and title information from the Indian Land Record of Title?**

(a) You may access, inspect and copy the information in the Indian Land Record of Title except where this information is subject to the Privacy Act, 5 U.S.C. 552a or other law or policy restricting access to records.

(b) Information covered by this section includes information on the location of the land, historical interests,

current interests, and related documents.

(c) Owners of an interest in trust or restricted land within the same reservation, the tribe or any person that is leasing, using, or consolidating, or is applying to lease, use or consolidate, such trust or restricted land or the interest in trust or restricted lands may receive names and mailing addresses, information on the location of the parcel, and the percentage of the parcel owned by each individual, without regard to the Privacy Act and any exemption contained in the Freedom of Information Act, 5 U.S.C. 552.

(d) You do not need to make a request under the Freedom of Information Act to see records covered by this section. You may submit a request for information to any location of the Land Titles and Records Office or BIA as provided in subpart D of this part.

**§ 150.4 Do I have to be an Indian or a tribe to obtain products or services from the Land Titles and Records Office?**

No. Anyone may receive products and services offered by the Land Titles and Records Office (LTRO).

**Subpart B—The Indian Land Record of Title Designation as the Official Record of Indian Land**

**§ 150.101 Must all title instruments affecting Indian land be recorded in the Indian Land Record of Title?**

The Indian Land Record of Title is the official record of title instruments affecting Indian land and all title instruments must be recorded there, except as provided by other Federal statutory authority. When the LTRO records a title instrument in the Indian Land Record of Title, the public receives constructive notice that the title instrument exists. Title instruments affecting Indian land within the jurisdiction of the Five Civilized Tribes and the Osage Nation must be recorded in the county courthouse serving the county within which the land is located.

**§ 150.102 Do I have to check with any other governmental office to find title instruments to Indian land?**

No. The Indian Land Record of Title is the source of all recorded title instruments, except those affecting land of the Five Civilized Tribes and Osage Nation, which are recorded in the county courthouse serving the county within which the land is located.

**Subpart C—LTRO Procedures and Requirements to Record Instruments in the Indian Land Record of Title**

**§ 150.201 Who maintains the Indian Land Record of Title?**

The LTRO is the office within BIA responsible for maintaining the Indian Land Record of Title. It records title instruments affecting Indian land, certifies copies of images of the instruments in the custody of the LTRO, examines the record and certifies the findings of examinations, and provides other services and products based upon the information in the record.

**§ 150.202 Where is the LTRO located?**

The LTRO has locations throughout the United States. You may contact any BIA office for the current contact information.

**§ 150.203 Who submits the title instruments for recording?**

BIA submits most of the title instruments to the LTRO. Tribes, other government offices, and individuals may also submit instruments to the LTRO.

**§ 150.204 What does the LTRO do with the instruments it receives?**

(a) The LTRO reviews the instrument to ensure that it satisfies the minimum requirements for recording. If so, the LTRO:

- (1) Makes a true and correct image of the instrument;
- (2) Enters the information contained in the instrument affecting the status of title into the Indian Land Record of Title; and
- (3) Returns the original instrument.

(b) If the instrument does not satisfy the minimum requirements, the LTRO returns the instrument with an explanation why the instrument was not accepted for recording.

**§ 150.205 What are the minimum requirements for recording a title instrument?**

The minimum requirements for recording an instrument include:

- (a) A legal description of the Indian land;
- (b) The signatures of the parties to the instrument;
- (c) Proper acknowledgment of the signatures of the parties; and
- (d) If required, proper Federal approval, and the approval date and authority of the Federal official.

**§ 150.206 What if the LTRO discovers a defect or error in a document?**

(a) If the LTRO discovers the error after the instrument is recorded, the LTRO will notify the submitting person

of the error and make a notation in the Indian Land Record of Title that an error exists.

(1) Once the interested parties correct the error and the submitting person returns an instrument evidencing the correction to the LTRO, the LTRO will record the instrument in the Indian Land Record of Title.

(2) In any subsequent title examination, the LTRO will rely upon the corrected instrument to determine the title status of the Indian land.

(b) If the LTRO discovers a defect or error in a final probate record after it has been recorded, the LTRO will issue administrative corrections to correct clerical probate errors, or to add omitted property or interest as set forth in 43 CFR 30.126. Other defects or errors will be addressed through the probate process as provided in 43 CFR part 30.

**§ 150.207 What if a defect or error in a final probate record cannot be corrected?**

If a defect or error in a final probate record cannot be corrected, the LTRO will notify the appropriate deciding official, as provided in 43 CFR 30.126 and 30.127, and make a notation in the Indian Land Record of Title that a possible error exists.

(a) Once the deciding official corrects the error and submits an instrument evidencing the correction to the LTRO, the LTRO will record the instrument in the Indian Land Record of Title.

(b) In any subsequent title examination, the LTRO will rely upon the corrected instrument to determine the title status of the Indian land.

**§ 150.208 How do I correct an error or omission in a title instrument or LTRO product or service?**

(a) To correct an error or omission, you may submit a written description of the error or omission with any supporting documentation to the approving official or to the LTRO.

(b) After receiving the description of the error, the LTRO will conduct an investigation. If the LTRO determines that there is an error or omission in the product or service, it will correct the product or service.

(1) If there is an error or omission in the information in the Indian Land Record of Title, it will correct the error or omission based upon the image or original copy of the title instrument from which it obtained the information.

(2) If there is an error or omission in the title instrument, it will follow the procedures set forth in §§ 150.206 through 150.208.

**§ 150.209 What instruments qualify for recording with the LTRO?**

Only title instruments qualify for recording in the Indian Land Record of Title.

**§ 150.210 Does the LTRO maintain the original title instruments?**

No. The LTRO returns the original instrument to the submitter.

**§ 150.211 May I obtain a copy of the title instrument from the LTRO?**

Yes. If the Land Titles and Records Office has recorded the information from the title instrument in the Indian Land Record of Title and has made a copy of the title instrument, you may obtain a copy of the title instrument, subject to the Freedom of Information Act and the Privacy Act considerations as described in § 150.3.

**§ 150.212 Is there any benefit to obtaining a certified copy of the title?**

Yes. If the LTRO certifies a copy of the title instrument, you may use the certified copy in court or elsewhere, the same as the original instrument.

**Subpart D—Services and Products of the LTRO**

**§ 150.301 What services and products may I order from the LTRO?**

You may obtain a list of services and products provided by the LTRO from the LTRO or BIA. Services include:

- (a) Recording title instruments;
- (b) Providing certified and uncertified copies of images of title instruments recorded in the Indian Land Record of Title; and
- (c) Producing reports.

**§ 150.302 How do I order services and products from the LTRO?**

(a) You may submit your written request for services and products to any location of the LTRO or BIA.

(b) You must include either a legal description of the land, the identification number of the tract, or the identification number of an owner of an interest in the tract.

(c) You may submit other information that the LTRO may use to identify an owner of an interest in the tract of land, including but not limited to: name and tribal affiliation of an owner, the recording number of the instrument, or an allotment number.

**§ 150.303 Does BIA charge fees for any of the services provided by, or products produced by, the LTRO?**

(a) BIA charges fees for certain services and products provided by the LTRO. All persons who receive services and products from the LTRO will be assessed a fee, except as provided in

paragraph (b) of this section. You may pay the fee by certified check or money order.

(1) A copy of the fee schedule is available from BIA.

(2) Contact the LTRO for an estimate of the amount of the fee for a service or product.

(3) You must pay the entire fee, or minimum fee if the fee is an hourly rate, when you request the service or the product from the LTRO. When the LTRO delivers the service or the product to you, you must pay any remaining amount according to the hourly rate.

(b) The LTRO may grant an exception under the following circumstances:

(1) If you are an individual Indian and are recording a transaction that reduces the number of owners of undivided interests in a tract of Indian land;

(2) If you are an individual Indian and are recording an instrument to transfer your undivided interest in Indian land to a tribe;

(3) If you are a tribe and recording a transaction that will consolidate the ownership interests of a tract of Indian land; or

(4) You are an agency or office within the Department of the Interior or the Department of Justice.

(c) The LTRO will charge you a minimum fee even if the LTRO is unable to provide the service or the product, unless the LTRO grants an exception under paragraph (b) of this section.

(d) The LTRO will refund your fee for any information that cannot be delivered to you because of the Privacy Act (5 U.S.C. 552a) or other law or policy restricting access to the records.

**§ 150.304 What will the LTRO do if the instrument contains information that is privileged or protected?**

If information is protected under the Privacy Act, or cannot be provided to you because of 5 U.S.C. 552a or another law or policy restricting access, the LTRO will:

- (a) Redact the information; and
- (b) Provide you with the remaining information or an altered copy of the image of the instrument.

**§ 150.305 How does the Paperwork Reduction Act affect this part?**

The collections of information contained in §§ 150.208, 150.302(b), and 150.302(c), have been approved by the Office of Management and Budget under 44 U.S.C. 3501 *et seq.* and assigned OMB Control Number 1076–xxxx. Response is required to obtain a benefit. A Federal agency may not conduct or sponsor, and you are not required to

respond to, a collection of information unless the form or regulation requesting the information has a currently valid OMB Control Number.

#### **PART 152—CONVEYANCES OF TRUST OR RESTRICTED INDIAN LAND; REMOVAL OF TRUST OR RESTRICTED STATUS**

4. The authority citation for part 152 continues to read as follows:

**Authority:** 25 U.S.C. 2201–2204, 2212–2216, Indian Land Consolidation Act, 97 Pub. L. 459, 96 Stat. 2515 (Jan. 12, 1983), as amended; American Indian Probate Reform Act (AIPRA) of 2004, 108 P.L. 374, 118 Stat. 1773 (Oct. 24, 2004); R.S. 161; 5 U.S.C. 301. Interpret or apply sec. 7, 32 Stat. 275, 34 Stat. 1018, sec. 1, 35 Stat. 444, sec. 1 and 2, 36 Stat. 855, as amended, 856, as amended, sec. 17, 39 Stat. 127, 40 Stat. 579, 62 Stat. 236, sec. 2, 40 Stat. 606, 68 Stat. 358, 69 Stat. 666; 25 U.S.C. 378, 379, 405, 404, 372, 373, 483, 355, unless otherwise noted.

4a. The cross references for part 152 are revised to read as follows:

*Cross-references:* For further regulations pertaining to the sale of irrigable lands, see parts 160, and 159 and § 134.4 of this chapter. For Indian money regulations, see parts 115, 111, 116, and 112 of this chapter. For regulations pertaining to the determination of heirs and approval of wills, see part 15 and subpart G of part 11 of this chapter.

5. Revise the heading of part 152 to read as set forth above.

6. Remove §§ 152.1 through 152.3, including the center heading preceding § 152.3.

7. Remove §§ 152.17 through 152.35, including the center headings preceding §§ 152.17, 152.33, and 152.34.

8. Redesignate §§ 152.4 through 152.8 as §§ 152.701 through 152.705.

9. Redesignate §§ 152.9 through 152.16 as §§ 152.801 through 152.808.

#### **Subpart H—Patents in Fee, Certificates of Competency, and Orders Removing Restrictions**

10. Designate §§ 152.701 through 152.705 as subpart H and add a subpart heading to read as set forth above.

#### **Subpart I—Special Provisions Applicable to the Osage and Five Civilized Tribes**

11. Designate §§ 152.705 and 152.801 as subpart I and add a subpart heading to read as set forth above.

12. Add subparts A through G to read as set forth below.

#### **Subpart A—General Provisions**

Sec.

152.1 What does this part do?

152.2 What terms do I need to know?

152.3 Will the Secretary provide ownership information?

152.4 To whom will the Secretary provide ownership information?

152.5 Which subparts do not apply to Alaska?

#### **Subpart B—Sales and Exchanges of Tribal Trust or Restricted Land**

152.101 What transactions are covered by this subpart?

#### **Sales and Exchanges Under a Land Consolidation Plan**

152.102 What must a land consolidation plan include?

152.103 Are there any restrictions on a land consolidation plan?

152.104 How does the Secretary approve a land consolidation plan?

152.105 How does a tribe receive approval for a sale or exchange under a land consolidation plan?

152.106 How may the tribe use the proceeds of a sale or exchange?

#### **Exchanges Without a Land Consolidation Plan**

152.107 In the absence of an approved land consolidation plan, how does a tribe get approval for an exchange of tribal land?

152.108 What criteria will the Secretary use to determine whether to approve an exchange?

#### **Subpart C—Negotiated Sales, Gifts, and Exchanges of Individually Owned Lands**

152.201 What lands are covered by this subpart?

152.202 What transactions are covered by this subpart?

152.203 Who may convey an interest in trust or restricted land?

152.204 Who can receive an interest in trust or restricted lands?

152.205 What restrictions apply to a conveyance of trust or restricted land to fee status?

152.206 How does an owner initiate a negotiated sale, gift, or exchange?

152.207 Does a conveyance of a fractional interest require the consent of the co-owner(s)?

152.208 Is tribal consent required to convey an interest in trust or restricted land located within the tribe's jurisdiction?

152.209 Is payment required for a negotiated sale, exchange, or gift?

152.210 When must fair market value be determined and provided to the grantor?

152.211 When must the Secretary receive payment for the conveyance of the land?

152.212 How does the Secretary decide whether to approve a negotiated sale, gift, or exchange?

152.213 How does the negotiated sale or exchange occur?

152.214 When is a negotiated sale, gift or exchange effective?

152.215 How does an Indian Land Consolidation Program lien attach?

152.216 How is an Indian Land Consolidation Program lien removed?

152.217 When can a co-owner acquire an interest previously acquired on behalf of a tribe?

152.218 What if there are liens or other encumbrances on the lands to be conveyed?

152.219 How does a transaction affect collection of construction costs for irrigation projects?

#### **Subpart D—Tribal Parcel Purchase**

152.301 What lands are covered by this subpart?

152.302 What transactions are covered by this subpart?

152.303 How does a tribe apply for a parcel purchase?

152.304 How and when will owners be notified of an application for tribal parcel purchase?

152.305 Can an individual owner preempt and succeed a tribe's right to purchase?

152.306 How and when will the Secretary review an application for parcel purchase?

152.307 How and when will the conveyance instrument be executed?

#### **Subpart E—Consolidation by Sale of Highly Fractionated Parcels**

152.401 What terms do I need to know?

152.402 What lands are subject to consolidation by sale?

152.403 How do I apply to consolidate a parcel by sale?

152.404 What must the Secretary do before acting on an application for consolidation by sale?

152.405 What consents are necessary for a consolidation by sale?

152.406 How will the Secretary notify owners of the consolidation proceeding?

152.407 What action does the Secretary take on comments or objections?

152.408 What happens if the Secretary orders a new appraisal?

152.409 How can an owner appeal a consolidation by sale proceeding?

152.410 How will the Secretary notify owners of a sale after appeals have been decided?

152.411 Who may participate in an auction or sealed bid sale?

152.412 How does a tribe reserve its right to match the highest bid?

152.413 How will the Secretary determine the successful bidder?

152.414 What happens if no bid matches the fair market value?

152.415 When must the highest bidder pay for the purchase?

152.416 How will proceeds be distributed?

152.417 Is Federal financial assistance available to support a bidder's purchase?

152.418 What title is acquired?

#### **Subpart F—Partitions in Kind**

152.501 What lands are covered by this subpart?

152.502 When does this subpart apply?

152.503 How can an owner initiate a partition action?

152.504 How will you notify the applicant's co-owners of an application for partition?

152.505 How and when will you review an application?

152.506 When will you execute the conveyance instruments?

**Subpart G—Mortgages and Deeds of Trust**

- 152.601 What does this subpart do?
- 152.602 How do owners submit an application for approval of a mortgage or deed of trust?
- 152.603 How will the Secretary review the application?
- 152.604 How may the mortgage or deed of trust be enforced?
- 152.605 Does the land remain in trust as a result of foreclosure or sale?
- 152.606 How does the Paperwork Reduction Act affect this part?

**Subpart A—General Provisions****§ 152.1 What does this part do?**

This part explains the policy and procedures for conveying trust or restricted Indian land or removing Indian land from trust or restricted status.

**§ 152.2 What terms do I need to know?**

As used in this part:

*Fair market value* means the value of an interest in land determined in accordance with the Uniform Standards of Professional Appraisal Practice (USPAP), or an alternative system we may utilize for establishing fair market value.

*Family farm* means land used for agricultural production owned and operated by the owner(s) and/or his immediate family. The family farm can include a house or residence.

*Fee land* means land or an interest in land that is not trust or restricted.

*Fee status* means the interest in a parcel of land is held by the owner without restrictions on alienation or encumbrance and not in trust by the United States for that owner.

*Fractional interest* means an undivided interest in Indian land owned in common by Indian or tribal landowners and/or fee owners.

*Indian* means any person who:

- (1) Is a member of any federally recognized tribe or, for purposes of land transactions in Alaska, can demonstrate Alaska Native ancestry;
- (2) Is eligible to become a member of any federally recognized tribe;
- (3) Is a descendent of a member and said descendent was, on June 1, 1934, physically residing on a federally recognized Indian reservation;
- (4) Possesses a total of one-half or more degree Indian blood;
- (5) Is an owner (as of October 27, 2004) of a trust or restricted interest in land; or
- (6) With respect to land in the State of California, is an owner of a trust or restricted interest in land in California.

*Land consolidation plan* means a tribal plan for eliminating fractionation and/or consolidating tribal landholdings.

*Owner(s)* means, except in subpart D of this part, the tribe or individual person or persons who are the beneficiaries of trust land or who hold title to restricted land. In subpart D of this part, owner also includes individuals and entities that hold title in fee status.

*Restricted land* means land or an interest therein the title to which is held by an Indian or a tribe and which can only be alienated or encumbered by the owner with the approval of the Secretary because of limitations in the conveyance instrument under federal law.

*Secretary/we/our/us* means the Secretary of the Interior or an authorized representative.

*Tribal land* means tribal trust land and other tribally owned land that is subject to any general restrictions on alienation imposed by federal law.

*Tribe* means any Indian tribe, nation, band, pueblo, town, community, rancheria, colony, or other group of Indians, which is recognized by the Secretary as eligible for the special programs and services provided by the Bureau of Indian Affairs, and listed in the **Federal Register** under the Act of November 2, 1994 (108 Stat. 4792; 25 U.S.C. 479a–1).

*Trust land* means land or an interest therein that the United States holds in trust for the benefit of an Indian or a tribe.

*You/I* means the reader of this regulation.

**§ 152.3 Will the Secretary provide ownership information?**

Yes. We will provide ownership information under part 150 of this chapter to an individual or tribe interested in conveying or acquiring by negotiated sale, gift, or exchange. We will, through the Land and Title Records Office and the local BIA Agency and local Trust Officer, provide the names and mailing addresses of the owners of a parcel of trust or restricted lands, the location of the parcel, and the percentage of undivided interest owned by each owner. A request for ownership information must be in writing and must include the legal description or other identifier of the parcel and how the applicant meets the requirements of § 152.4.

**§ 152.4 To whom will the Secretary provide ownership information?**

Anyone may receive information under part 150 of this chapter. We will provide ownership information to:

- (a) Owners, including owners holding an interest in fee status, of a parcel of trust or restricted land on the same reservation;

- (b) The tribe that exercises jurisdiction over the parcel;

- (c) A person eligible for membership in that tribe;

- (d) Any person or entity that is leasing, using, consolidating, or applying to lease, use or consolidate trust or restricted lands on that reservation; or

- (e) Anyone authorized by an individual owner to receive the information.

**§ 152.5 Which subparts do not apply to Alaska?**

- (a) Subparts B and D of this part do not apply to Alaska.

- (b) In subparts C and E of this part, the term “tribe” includes the Metlakatla Indian Community but does not include any other Alaska tribe.

- (c) Subparts F, G and H of this part apply in their entirety to individually owned restricted lands in Alaska.

**Subpart B—Sales and Exchanges of Tribal Trust or Restricted Land****§ 152.101 What transactions are covered by this subpart?**

Except as provided in this subpart or as authorized by a specific act of Congress, tribal land may not be sold, exchanged, or otherwise conveyed. This subpart authorizes us to approve:

- (a) Negotiated sales and exchanges of tribal land, where made under a land consolidation plan approved by us under this subpart; and

- (b) Exchanges of tribal land, when the fair market value of the land being received in exchange is substantially equal to or greater than the fair market value of the tribal land being conveyed.

**Sales and Exchanges Under a Land Consolidation Plan****§ 152.102 What must a land consolidation plan include?**

A land consolidation plan must include:

- (a) A description and map of the general area within which are located the tribal lands and interests to be conveyed, and the lands and interests to be acquired through exchange or purchased with the sale proceeds;

- (b) An explanation of how the plan will facilitate the elimination of fractionation and/or the consolidation of tribal landholdings; and

- (c) An appropriate supporting tribal resolution.

**§ 152.103 Are there any restrictions on a land consolidation plan?**

Yes. A land consolidation plan may not authorize land sales or other types of land transactions that are prohibited

by the tribe's constitution or other governing document.

**§ 152.104 How does the Secretary approve a land consolidation plan?**

We may approve the land consolidation plan if it is consistent with the requirements of this subpart. We will take action on the tribe's land consolidation plan (or amended plan) within 120 working days of our receiving a complete plan and supporting tribal resolution.

**§ 152.105 How does a tribe receive approval for a sale or exchange under a land consolidation plan?**

(a) The tribe must request Secretarial approval for each sale or exchange made under an approved land consolidation plan by submitting a tribal resolution that identifies the land(s) involved and requests Secretarial approval for the sale or exchange.

(b) Upon receiving an appropriate authorizing resolution requesting approval for a sale or exchange, we will:

- (1) Prepare a conveyance instrument; and
  - (2) Determine fair market value.
- (c) We will approve the sale or exchange of land if:

- (1) The land being sold or exchanged is identified for conveyance in an approved land consolidation plan; and
- (2) The tribe receives payment equal to at least 90 percent of the fair market value of the land being sold or exchanged. Such payment may include any combination of cash or land equal to or greater than the requisite percentage.

**§ 152.106 How may the tribe use the proceeds of a sale or exchange?**

(a) Any proceeds from any sale or exchange made under an approved tribal land consolidation plan must be:

- (1) Deposited in a segregated, interest-bearing trust account established and maintained by the Secretary; and
- (2) Used only for the purchase of other lands, as identified in the land consolidation plan.

(b) Any fee land purchased with the proceeds derived from any sale or exchange made under an approved land consolidation plan may be placed in trust status upon satisfying any applicable requirements in part 151 of this chapter.

**Exchanges Without a Land Consolidation Plan**

**§ 152.107 In the absence of an approved land consolidation plan, how does a tribe get approval for an exchange of tribal land?**

(a) To obtain approval for an exchange of tribal land, a tribe must submit an appropriate authorizing resolution that

identifies the lands involved and requests our approval for the exchange.

(b) Upon receiving an appropriate authorizing resolution requesting Secretarial approval, we will:

- (1) Prepare a conveyance instrument or approve a conveyance instrument prepared by a tribe; and
- (2) Determine fair market value of the tribal land to be conveyed and of the land to be acquired in the exchange.

**§ 152.108 What criteria will the Secretary use to determine whether to approve an exchange?**

We will approve the exchange of land in the absence of an approved land consolidation plan only if:

- (a) The land the tribe is acquiring has a fair market value equal to or greater than that of the land being conveyed, and
- (b) If the land to be acquired is in fee status, the acquisition meets the requirements set forth in part 151 of this chapter.

**Subpart C—Negotiated Sales, Gifts, and Exchanges of Individually Owned Lands**

**§ 152.201 What lands are covered by this subpart?**

This subpart applies to whole or fractional trust and restricted interests in land owned by an Indian. The land can be located on or off a reservation. This subpart also applies to severed mineral interests.

**§ 152.202 What transactions are covered by this subpart?**

(a) Transactions covered by this part include:

- (1) Negotiated sales, gifts, and exchanges, whereby a conveyance instrument is executed by or on behalf of the trust or restricted owners, subject to Secretarial approval; and
- (2) Partitions accomplished by exchanges of deeds among all of the owners, rather than by application to the Secretary under subpart F of this part.

(b) The following transactions are not covered by this subpart:

- (1) Conveyances made by the Secretary without the consent of all of the owners; and
- (2) Conveyances or purchases made during a probate of trust or restricted land.

**§ 152.203 Who may convey an interest in trust or restricted land?**

(a) Unless otherwise prohibited by law, the following individuals or entities may convey an interest in trust or restricted land with the approval of the Secretary:

(1) Any individual owner 18 years of age or older may convey his or her interest;

(2) Guardians, conservators, or other fiduciaries who are appointed by a court of competent jurisdiction and who have been granted the authority to convey, may convey trust or restricted land belonging to their Indian wards who are minors, non compos mentis, or otherwise under legal disability; and

(3) Parents may convey their children's fractional interests in trust or restricted land only for the purposes of consolidation.

(b) Except where otherwise prohibited, an adult or legal entity who has been given a written power of attorney may convey trust or restricted land. The power of attorney must:

- (1) Meet all of the formal requirements of any applicable tribal or state law;
- (2) Identify the attorney-in-fact and the land to be conveyed; and
- (3) Describe the scope of the power granted and any limits thereon.

**§ 152.204 Who can receive an interest in trust or restricted lands?**

(a) Subject to the conditions in this subpart, trust or restricted land may be conveyed in trust status to:

- (1) The tribe having jurisdiction over the parcel;
- (2) Any Indian, as defined in § 152.1; or

(3) Any trust or restricted co-owner, as identified in our records as of the date on which the grantor's application to convey is filed.

(b) Subject to the restriction in § 152.205, any individual or entity may receive the interest in fee status. In addition, any individual or entity not eligible under paragraph (a) of this section to receive an interest in trust status must receive the interest in fee status.

**§ 152.205 What restrictions apply to a conveyance of trust or restricted land to fee status?**

An owner of trust or restricted land who applies to convey that interest to fee status must notify the tribe with jurisdiction over the parcel and provide us with a copy of the notification.

(a) Except as provided in paragraph (b) of this section, when the tribe with jurisdiction over the parcel receives notice, the tribe:

- (1) Has a maximum of 30 days to notify us of its intent to purchase; and
- (2) Has the opportunity within 30 days after its statement of intent to:
  - (i) If the conveyance is a sale, pay the purchase price;
  - (ii) If the conveyance is a gift, pay the fair market value; or

(iii) If the conveyance is an exchange, pay the total payment received by the grantor.

(b) The tribe may not exercise its rights under paragraph (a) of this section, if the parcel or interest to be conveyed is part of a family farm and is being conveyed to a member of the grantor's family who is residing on, or working, the farm. For purposes of this section, "member of the grantor's family" means:

- (1) A lineal descendant of the grantor;
- (2) A lineal descendant of the grandparents of the grantor; or
- (3) The spouse of the grantor or of a person described in paragraphs (b)(1) or (b)(2) of this section.

(c) Where a conveyance is made to a family member under paragraph (b) of this section, the deed must include a statement that the tribe will have the rights identified in paragraph (a) of this section if the grantee attempts to convey to a non-family member, except if the conveyance is a mortgage or deed of trust or the tribe provides a written waiver of its right to purchase.

**§ 152.206 How does an owner initiate a negotiated sale, gift, or exchange?**

To initiate a negotiated sale, gift, or exchange, the owner must provide us with a written request that includes the following:

- (a) A description of the land;
- (b) The proposed grantee and his or her tribal affiliation, if any;
- (c) Any limitations or encumbrances known by the grantor on his or her right to convey the land;
- (d) Any intention to reserve rights to the land;
- (e) Whether the owner waives his or her right to receive information regarding fair market value for this transaction under § 152.210(b); and
- (f) Terms of the sale, gift, or exchange.

**§ 152.207 Does a conveyance of a fractional interest require the consent of the co-owner(s)?**

No. An Indian may convey a fractional interest without the consent of co-owner(s).

**§ 152.208 Is tribal consent required to convey an interest in trust or restricted land located within the tribe's jurisdiction?**

(a) If the grantor owns 100 percent of the trust and restricted interests in a parcel, tribal consent for conveyance of the interest is not required.

(b) If the grantor owns less than 100 percent of the trust and restricted interests in the parcel, tribal consent to convey the interest is required only if:

- (1) The tribe has jurisdiction over the parcel; and
- (2) Applicable tribal law requires approval before a conveyance can occur.

**§ 152.209 Is payment required for a negotiated sale, exchange, or gift?**

No. A conveyance may be made to any individual or entity at any negotiated price or for no payment. Our approval of the conveyance does not constitute a breach of trust if either:

- (1) We have provided to the grantor an estimate of value; or
- (2) The grantor waives the right to information about fair market value in accordance with § 152.210.

**§ 152.210 When must fair market value be determined and provided to the grantor?**

(a) Except as provided in paragraph (b) of this section, the grantor must be notified of the fair market value of his or interest.

(b) The grantor may waive the right to be provided with fair market value information on the interest being conveyed only if:

- (1) The grantee acquires the interest in trust or restricted status; and
- (2) One of the following criteria is met:

- (i) The grantee is an Indian and is the grantor's spouse, lineal ancestor, lineal descendant, sibling, or blood relative; or
- (ii) The interest being conveyed is a fractional interest of 5 percent or less, as reflected in our records as of the date on which the application is filed, and the grantee is an Indian co-owner or the tribe having jurisdiction over the parcel.

(c) If the interest has been conveyed under paragraph (b) of this section, the interest may not be conveyed out of trust or restricted status for 5 years.

**§ 152.211 When must the Secretary receive payment for the conveyance of the land?**

(a) We must receive any payment, on behalf of the grantor, no later than when the grantor executes the deed, unless:

- (1) The grantor agrees to a deferred payment;
- (2) The purchaser is the Federal Government; or
- (3) The payment is escrowed.

(b) To proceed by a deferred payment under paragraph (a) of this section, we may develop a memorandum of sale, or approve a memorandum of sale developed by the parties to the sale, that includes the following terms:

- (1) A contract for delivery of title upon payment in full of the amount of the agreed payment;
- (2) How revenues will be distributed during the period of the deferred payment;
- (3) Late fees and penalties for failure to comply with the terms of the sale;
- (4) Contract adjustments;
- (5) If the conveyance is to fee status, terms requiring that the purchaser pay

not less than 10 percent of the purchase price in advance and terms for the payment of the remaining amount in installments plus interest acceptable to the Secretary and the Indian owner; and

(6) Provisions for default, including a provision that if the purchaser defaults in the first or subsequent payments, all payments, including interest, previously made will be forfeited to the Indian owner(s).

(c) With a deferred payment under paragraphs (a) and (b) of this section, we will hold the deed executed by the grantor(s). We will approve and deliver the deed only upon full compliance with the terms of sale.

**§ 152.212 How does the Secretary decide whether to approve a negotiated sale, gift, or exchange?**

We will review the application and may approve a negotiated sale, gift, or exchange if:

- (a) It does not increase the number of fractional interests;
- (b) There is no evidence of fraud or undue influence, or criminal inducement;
- (c) There is no reason to believe the grantor lacks the legal capacity to convey; and
- (d) The parcels conveyed and acquired will have access to the parcel as required by law.

**§ 152.213 How does the negotiated sale or exchange occur?**

(a) The purchaser or grantee must deposit with us any proceeds from a negotiated sale or exchange and we shall deposit the proceeds into the grantor's Individual Indian Money account upon our approval.

(b) The grantor will execute the conveyance document, which must:

- (1) Include the date of execution and the land description; and
- (2) Comply with any boundary standards established by the Department of the Interior, if the parcel is conveyed in trust.

(c) We must promptly record the conveyance document at the Land Title Records Office.

**§ 152.214 When is a negotiated sale, gift, or exchange effective?**

(a) A negotiated sale, gift, or exchange is effective when we approve the deed.

(b) If we approve the deed after the grantor dies, the sale, gift, or exchange is effective on the date the grantor signed the deed.

(c) If land is purchased for the tribe under the Indian Land Consolidation Program, title will vest in the tribe on the date the conveyance is approved, subject to the type of lien described in 25 U.S.C. 2213(b).

**§ 152.215 How does an Indian Land Consolidation Program lien attach?**

A lien in the amount of the purchase price will attach to the income derived from any interest purchased for a tribe under the Indian Land Consolidation Program, until the lien has been satisfied or we remove it. Pending such satisfaction or removal, all transaction documents entered into or approved after the date of attachment must provide for the payment of income directly to us, for deposit in the Acquisition Fund for the Indian Land Consolidation Program.

**§ 152.216 How is an Indian Land Consolidation Program lien removed?**

(a) In consultation with a tribe, we may remove a lien on income derived from an acquired interest.

(1) The removal may be based on income derived from any interest conveyed to the tribe under the Indian Land Consolidation Program.

(2) The total of liens that we remove in a year may not exceed the total income deposited in the Acquisition Fund for the tribe during that period.

(b) We may remove at any time a lien on income derived from an acquired interest if we make a finding that:

(1) The costs of administering the interest will exceed the projected income to be derived therefrom; or

(2) The amount secured by the lien will not be recovered within a reasonable period of time.

**§ 152.217 When can a co-owner acquire an interest previously acquired on behalf of a tribe?**

This section applies when a fractional interest has been conveyed to a tribe under the Indian Land Consolidation Program but remains subject to an Indian Land Consolidation Program lien.

(a) Any trust or restricted co-owner of the parcel has an option to purchase the interest upon the payment or pledge to us of the full amount paid for that interest under the following conditions:

(1) The co-owner must purchase all of the acquired interests in the parcel which are subject to a lien;

(2) The co-owner may not remove any interest acquired from trust or restricted status except in carrying out the foreclosure of an approved mortgage in accordance with subpart G of this part; and

(3) The option to purchase will not be available if the tribe already owns any interest in the parcel that is not subject to the lien, unless the tribe consents.

(b) To facilitate exercise of the purchase option, a co-owner may request that we provide notice of any

initial acquisition in a given parcel on behalf of a tribe under the Indian Land Consolidation Program. In addition, we will provide notice of subsequent acquisition to the co-owner so long as he or she has previously purchased an interest offered in the same parcel.

**§ 152.218 What if there are liens or other encumbrances on the lands to be conveyed?**

(a) If there are encumbrances that may transfer with the land, then no further action will be taken.

(b) All financial liens, including collection of construction charges or other restrictions, must be cleared before conveyance.

**§ 152.219 How does a transaction affect collection of construction costs for irrigation projects?**

(a) If the land will remain in trust or restricted status following the sale, gift or exchange, then collection of all construction costs within Indian irrigation projects is deferred as long it remains in trust or restricted status. However, the following conditions apply:

(1) At the time of sale, we will deduct delinquent operation and maintenance charges from the proceeds of the sale unless the seller makes acceptable arrangements to provide for their payment before approval of the sale; and

(2) We will insert a lien clause covering all unpaid irrigation construction costs, past and future, in the instrument of conveyance issued to purchasers of restricted or trust lands that are under an Indian irrigation project.

(b) If the land is conveyed in fee status, then the person acquiring the land must enter into an agreement to pay:

(1) The pro rata share of the construction of the project chargeable to the land;

(2) All construction costs that accrue in the future; and

(3) All future charges assessable to the land which are based on the annual cost of operation and maintenance of the irrigation system.

**Subpart D—Tribal Parcel Purchase****§ 152.301 What lands are covered by this subpart?**

This subpart applies to all parcels of trust and restricted land, including parcels in which fractional interests are held in fee status.

**§ 152.302 What transactions are covered by this subpart?**

(a) This subpart authorizes us to convey the fractional interests of all

non-consenting owners, including those whose interests are held in fee status, to a tribe, if the tribe:

(1) Owns at least 50 percent of the interests in the parcel; or

(2) Has obtained the consents of the owners of at least 50 percent of ownership interests.

(b) The interests of the non-consenting owners may include the interests of any undetermined heirs or devisees of trust or restricted interests and the interests of any owners whose whereabouts are unknown.

(c) An individual owner in authorized possession of the entire parcel may preempt the tribe's application and succeed to the tribe's right to purchase, under certain conditions as described in § 152.305.

(d) Our authority to approve and implement a parcel purchase under this section by executing the necessary conveyance instrument is not affected or diminished by the existence of a tribal land consolidation plan approved under subpart B of this part.

**§ 152.303 How does a tribe apply for a parcel purchase?**

(a) A tribe may apply for a parcel purchase when the tribe has either:

(1) Acquired at least 50 percent of the interests in a parcel; or

(2) Obtained the consent of the owners of at least 50 percent of such interests, including interests already owned by the tribe.

(b) An application for parcel purchase must include:

(1) An appraisal prepared in accordance with Uniform Standards for Professional Appraisal Practice that establishes the fair market value of the parcel as of the date the application is filed;

(2) A certified title report or consent forms from the owners, reflecting that the tribe has met the requirements of paragraph (a) of this section; and

(3) A deposit of the purchase funds needed to compensate the owners of all of the non-consenting and non-tribal consenting interests in the parcel, based on the tribe's appraisal.

(c) This paragraph applies when a tribe has acquired at least 50 percent of the interests in a parcel, but is unable to furnish the deposit required by paragraph (b)(3) of this section. Under certain circumstances, we may provide the funds needed to complete the parcel purchase.

**§ 152.304 How and when will owners be notified of an application for tribal parcel purchase?**

(a) Upon receiving an application for parcel purchase under § 152.303, we

must notify any non-consenting owners of the tribe's intent to purchase their interests under this subpart, even if they have previously refused to consent.

(1) The notice must provide the non-consenting owners with copies of the appraisal and advise that the tribe has offered to purchase their interests at fair market value or better, as reflected by the tribe's appraisal.

(2) If the fair market value is adjusted upon review of the appraisal under § 152.306, we must again provide notice of the offer to purchase under paragraph (a) of this section.

(b) We will conduct a reasonable search for any owners whose whereabouts are unknown. We will give notice to owners whose whereabouts are unknown by publication in at least one newspaper of general circulation in the area of the parcel at least 90 days before closing of the purchase.

(c) Any notice given under this section must:

(1) Instruct the owners to submit objections to the appraisal within 90 days from the date of the notice; and

(2) Advise that any owner who has been in authorized possession of the entire parcel for at least 3 years before the tribe's application can purchase the parcel after notifying us of the intent to purchase as required by § 152.305.

**§ 152.305 Can an individual owner preempt and succeed a tribe's right to purchase?**

(a) An individual owner in actual use and possession of the entire parcel for 3 years before the tribe's purchase application may preempt and succeed to the tribe's right to purchase the interests of other individual owners. To do this, he or she must submit to us a notice of intent to purchase within 90 days of receiving the notice described in § 152.304. The individual owner's notice of intent to purchase must include:

(1) Proof of authorized possession during the requisite 3-year period; and

(2) A deposit of the purchase funds needed to compensate the owners of the remaining or non-purchaser's interests, based on the tribe's appraisal.

(b) We will review the individual owner's notice of intent and determine if the individual owner has been in authorized possession of the entire parcel for the requisite 3-year period.

(1) If the individual owner is found to be qualified, we will refund the deposit made by the tribe and process the application of the owner exercising the option to purchase.

(2) We must then advise the individual owner that:

(3) All of the outstanding individually owned interests in the parcel will be

conveyed without further owner consent, based on tribe's original application; and

(4) Any tribally owned interests in the parcel will be conveyed only with the consent of the tribe.

**§ 152.306 How and when will the Secretary review an application for parcel purchase?**

(a) We will review the appraisal and any objections to it after:

(1) The notice period required by § 152.304(a) ends; and

(2) We determine whether the application is to be processed on behalf of the initiating tribe or any individual owner exercising an option to purchase.

(b) If we do not approve the appraisal, we will establish fair market value and notify the tribe what additional funds are needed to compensate the outstanding owners at fair market value. If we approve the appraisal, we will notify any objecting owner of the right to appeal under Part 2 of this title, before taking any further action on the application.

(c) If it appears that all of the interests in the parcel can be purchased by agreement among the owners, we must withhold action on the application and assist in preparing the conveyance documents needed to affect the parcel purchase by negotiated conveyance. If it appears that some of the interests cannot be purchased by negotiation, we must issue a formal decision on the application and execute the conveyance instrument needed to affect the parcel purchase.

**§ 152.307 How and when will the conveyance instrument be executed?**

(a) No sooner than 30 days after the exhaustion of any appellant's administrative remedies, we must issue a conveyance order transferring the remaining or non-purchaser's interests in the parcel, subject to any existing liens and encumbrances. The order may include any interests owned by the tribe if:

(1) A qualifying owner has exercised his or her option to purchase; and

(2) The tribe has consented to convey its interest by an appropriate authorizing resolution.

(b) When we issue the conveyance order, we must:

(1) Notify all owners whose interests have been conveyed as required by § 152.304; and

(2) Record the conveyance order in the appropriate Land Titles and Records Office as required by part 150 of this chapter, and in the appropriate county office if interests in fee status are involved.

**Subpart E—Consolidation by Sale of Highly Fractionated Parcels**

**§ 152.401 What terms do I need to know?**

As used in this subpart:

*AIPRA* means the American Indian Probate Reform Act of 2004.

*Consolidation by sale* means a procedure by which the ownership of interests in a parcel of highly fractionated land is consolidated by one or more of the eligible bidders' asking the Secretary to sell the parcel.

*Bona fide* means that an owner of an interest in the subject parcel has, in the case of a residence, maintained it continuously for the preceding 3 years with permission or, in the case of a farm, ranch or other business, operated it on the parcel for the preceding 3 years, in each case under:

(1) A lease or other agreement that has been approved by the Secretary;

(2) An owner management lease under AIPRA; or

(3) Other documented permission.

*Eligible bidder* means:

(1) The tribe with jurisdiction over the parcel subject to consolidation by sale;

(2) Any person who is a member or eligible to be a member of the tribe with jurisdiction over the parcel;

(3) Any person who is a member or eligible to be a member of any other tribe if such person already owns an undivided interest in the parcel at the time of the consolidation by sale; or

(4) Any lineal descendant of the original allottee of the parcel who is a member or eligible to be a member of a tribe or, with respect to a parcel located in California that is not within a tribe's reservation or not otherwise subject to a tribe's jurisdiction, who is a member or eligible to be a member of a tribe or who owns a trust or restricted interest in the parcel.

*Highly fractionated land* means trust or restricted land that has either:

(1) From 50 to 99 co-owners of undivided trust or restricted interests, with no single co-owner who owns an undivided trust or restricted interest in the parcel that is more than 10 percent of the entire undivided ownership of the parcel; or

(2) 100 or more co-owners of undivided trust or restricted interests in the parcel.

**§ 152.402 What lands are subject to consolidation by sale?**

(a) Consolidation by sale applies to trust and restricted lands, on or off the reservation, that are highly fractionated parcels.

(b) Consolidation by sale will include:

(1) All of the interests in such a parcel, including interests held in fee status; and

(2) Surface and subsurface estates.  
 (c) If the surface and subsurface estates have been severed, only the surface estate can be consolidated by sale under this subpart. Subsurface estates that have been severed cannot be consolidated by sale under this subpart.

**§ 152.403 How do I apply to consolidate a parcel by sale?**

To apply for consolidating a parcel you must:

- (a) Be an eligible bidder; and
- (b) Submit a completed consolidation by sale application form.

**§ 152.404 What must the Secretary do before acting on an application for consolidation by sale?**

(a) Upon receiving an application, we will decide:

- (1) Whether the parcel is highly fractionated;
- (2) What owner consents are needed and whether they have been obtained;
- (3) Costs of providing the notice;
- (4) If there are owners of interests in the parcel who cannot be identified or located, the procedures for locating owners whose whereabouts are unknown have been followed; and
- (5) The fair market value of the property.

(b) If we determine that a consolidation for sale may proceed, then we will promptly notify the applicant in writing. The notice will include:

- (1) A statement that the application is complete;
- (2) The estimated costs to the applicant for providing notice to the owners of the parcel, including the costs of mailing and publishing the notice, and a statement that the applicant must either pay the costs or furnish a sufficient bond to cover such costs;
- (3) The date by which payment must be made to confirm intent to proceed with the consolidation by sale application; and
- (4) Any other information required to process the application.

(b) If we determine that a consolidation for sale may proceed, then we will promptly notify the applicant in writing. The notice will include:

- (1) A statement that the application is complete;
- (2) The estimated costs to the applicant for providing notice to the owners of the parcel, including the costs of mailing and publishing the notice, and a statement that the applicant must either pay the costs or furnish a sufficient bond to cover such costs;
- (3) The date by which payment must be made to confirm intent to proceed with the consolidation by sale application; and
- (4) Any other information required to process the application.

**§ 152.405 What consents are necessary for a consolidation by sale?**

(a) For all parcels, we will work with the applicant to obtain consents of the following owners of interests in the parcel to be consolidated by sale:

- (1) Consent of the tribe with jurisdiction over the parcel if the tribe owns an undivided interest in the parcel;
- (2) Consent of each owner who has continuously maintained a bona fide residence on the parcel or operated a bona fide farm, ranch, or other business on the parcel for the 3 years before the application.

(b) For a parcel where any individual owner's total undivided interest in the

parcel is worth more than \$1,500, we will seek additional consents. We will work with the applicant to seek the consent of owner(s) of at least 50 percent of the undivided ownership interest in the parcel.

(1) Parents of minor owners and legal guardians of incompetent owners are considered the owners of their minor children's or ward's interests.

(2) The calculation of the undivided interest will not include the interest of the owner requesting the consolidation.

(c) If necessary to obtain consent of at least 50 percent of interests, and after we have completed a search consistent with § 152.409(b) and (c), we may consent on behalf of:

- (1) Heirs of trust or restricted interests who cannot be determined;
- (2) Minor or incompetent owners who have no parent or legal guardian; or
- (3) Missing owners.

**§ 152.406 How will the Secretary notify owners of the consolidation proceeding?**

(a) Once we determine that a consolidation by sale may proceed, we will notify all owners of undivided interests in the parcel and the tribe with jurisdiction over the parcel. The notice will include:

- (1) A statement that the proceeding to consolidate the parcel of land by sale has been started;
- (2) The legal description of the parcel;
- (3) Each owner's ownership interest in the parcel as determined by the BIA based on current records;
- (4) Fair market value and instructions for making a written request for a copy of the appraisal;
- (5) A statement that the owner may submit written comments on or objections to the proposed consolidation by sale or to the appraisal within 90 days of receiving the notice;
- (6) A statement that the owner must, within the 90-day deadline, comment on or object in writing to the consolidation proceeding or the appraisal in order to receive notice of approval of the appraisal and right to appeal;
- (7) The address for requesting copies of the appraisal and the address for submitting comments or objections to the appraisal or to the consolidation sale proceeding;
- (8) The name and telephone number of the person to contact for information regarding the proceeding, including the time and date of auction of the parcel or for submitting sealed bids;
- (9) Notification that the tribe may exercise its right to match the highest bid on the parcel; and
- (10) Notification that co-owners may have a right to purchase the parcel when the highest bidder has been determined.

(b) The notice must be mailed by certified mail, restricted delivery, to all owners of interests in the parcel at addresses found in our current records.

(c) If the notice is returned undelivered, we will attempt to obtain and use a current address for such owner by a reasonable search of records of:

- (1) Departmental records;
- (2) Local, state, and Federal agencies;
- (3) Land records and phonebooks; and
- (4) The tribe with jurisdiction over the parcel or the tribe of which the noticed owner is a member.

(d) If we are unable to find any owner, then we will publish the notice:

(1) At least two times in a newspaper of general circulation in the county or counties in which the parcel is located or, if the tribe with jurisdiction over the parcel publishes a monthly tribal newspaper or newsletter, one time in the tribal newspaper or newsletter and one time in the newspaper of general circulation;

(2) By posting the notice conspicuously in the headquarters or administration building or other tribal building of the tribe with jurisdiction over the parcel in the most appropriate location for such a posting; and

(3) By publishing notice in any other place or by other means we deem appropriate.

**§ 152.407 What action does the Secretary take on comments or objections?**

(a) We will consider all written comments and objections received within 90 days of the notice. We may:

- (1) Accept the appraisal if consistent with the Uniform Standards for Professional Appraisal Practice;
- (2) Order a new appraisal; or
- (3) Terminate the sale and notify by certified mail, restricted delivery, the applicant and all currently known owners of interests in the parcel.

(b) If we receive no comments or objections to the consolidation by sale within 90 days of the notice, we will accept the appraisal and proceed with the sale.

**§ 152.408 What happens if the Secretary orders a new appraisal?**

(a) If we order a new appraisal, where the appraisal results in a lower valuation of the land, we will provide notice of the results of the new appraisal to all owners of interests in the parcel, and where the new appraisal results in a value of the land that is equal to or greater than that of the earlier appraisal, we will provide the results of the new appraisal to the tribe with jurisdiction over the parcel and all persons who submitted written comments on or

objections to the proposed partition or the appraisal, at addresses found in our current records with a notice including the following information:

(1) The results of the new appraisal;

(2) Notification that the owners can submit written comments on or objections to the proposed consolidation by sale and/or objections to the appraisal within 90 days of receiving the notice;

(3) The address for requesting copies of the appraisal and address for submitting comments or objections to the appraisal and/or consolidation sale proceeding; and

(4) The name and telephone number of the person to contact for information regarding the proceeding, including the time and date of auction of the parcel or for submitting sealed bids.

(b) We will send the notice of the new appraisal by certified mail, restricted delivery, to the tribe with jurisdiction over the parcel.

(c) If we accept the appraisal, we will send a notice of acceptance to the tribe with jurisdiction over the parcel and to all persons who submitted written comments on or objections to the proposed consolidation or appraisal. The notice will include:

(1) Results of the appraisal, which will set the minimum bid for the consolidation by sale;

(2) Rights of each interest owner to review a copy of the appraisal;

(3) A statement that the land will not be sold for less than the appraised value;

(4) The time and date set for the auction of the parcel, or for submitting sealed bids; and

(5) The owner's right to appeal, to whom the appeal should be submitted, and the owner's burden to submit evidence in support of the appeal.

**§ 152.409 How can an owner appeal a consolidation by sale proceeding?**

(a) An owner may submit an appeal within 30 days of receiving the notice of a new appraisal under § 152.408. The procedures in part 2 of this chapter do not apply to this process.

(b) Upon receiving the appeal, the deciding official will refer the appraisal issues for a desk review to an appraiser who was not involved in the original appraisal. The appraiser will provide review conclusions to the deciding official within 60 days of the referral. After reviewing the appraiser's review conclusions, the deciding official will decide all appraisal issues in the appeal and also decide issues in the appeal regarding the Secretary's determination to allow a consolidation sale of a particular parcel.

(c) The deciding official decides all issues in an appeal and issues a written decision. A decision issued by the deciding official is final for the Department.

**§ 152.410 How will the Secretary notify owners of a sale after appeals have been decided?**

After all appeals are final, we will set a time and date for a consolidation sale. The sale will be conducted no sooner than 30 days after we have mailed, via certified mail, restricted delivery, a notice of the sale to those owners providing comments or objections to the Notice of Appraisal and Sale or those person(s) requesting notification of sale and the tribe having jurisdiction over the parcel. In addition, we will publish a notice of sale:

(a) In a newspaper of general circulation in the county or counties in which the parcel is located or a tribal newspaper;

(b) By posting the notice conspicuously in the tribal headquarters or administration building; and

(c) In such other locations and manner as we deem necessary.

**§ 152.411 Who may participate in an auction or sealed bid sale?**

We will conduct the sale either by public auction or sealed bid as appropriate.

(a) Only eligible bidders may participate in the auction or sealed bid sale.

(b) To participate in a sealed bid sale, a bidder must submit a deposit of 10 percent of the full amount of the bid for the parcel, including for his own ownership interest in the parcel. The value of the bidder's ownership interest will be deducted when the final payment amount is calculated.

**§ 152.412 How does a tribe reserve its right to match the highest bid?**

Before receiving the notice of sale issued under § 152.415, the tribe must have submitted a copy of the authorizing tribal law or resolution or a letter of a tribal officer authorized by tribal law, stating the tribe's intent to reserve the right to match.

**§ 152.413 How will the Secretary determine the successful bidder?**

(a) The parcel will be sold to the highest bidder unless certain other purchasers listed in paragraph (b) of this section match the highest bid. The sale price must be at least equal to the final appraised fair market value.

(b) We will determine which entities have a right to match the highest bid. The right to match depends on the following criteria:

(1) If the highest bidder is a member of the tribe with jurisdiction over the parcel, then he/she may purchase the parcel, unless one of the restrictions in paragraph (c) of this section applies; and

(2) If the highest bidder is a not a member of the tribe with jurisdiction over the parcel, then the highest bidder may purchase the parcel, unless one of the restrictions in paragraph (d) of this section applies.

(c) A highest bidder who otherwise qualifies under paragraph (b)(1) of this section may not purchase the parcel if either of the following conditions applies:

(1) The owner of the largest interest is a member of the tribe with jurisdiction over the parcel, chooses to purchase the parcel, and meets each of the following requirements:

(i) The owner had submitted a bid on the parcel at sale at least equaling the fair market value;

(ii) At the time immediately before the sale, the owner's undivided interest in the parcel was greater than that of any other owner and equal to or greater than 20 percent of the entire undivided ownership of the parcel; and

(iii) The owner submits to us, within 3 days of the date of auction or date for submitting sealed bids, a written notice of intent to purchase the parcel; or

(2) If no single owner is identified as eligible to buy the parcel under paragraph (c)(1) of this section, and two or more owners who have equal interests, which combined are greater than any other individual interests in the parcel and constitute at least 20 percent of the entire undivided ownership in the parcel, have entered into a written agreement that identifies which of these owners has the right of purchase.

(d) A highest bidder who otherwise qualifies under paragraph (b)(2) of this section may not purchase the parcel if either of the following conditions applies:

(1) The owner of the largest interest in the parcel at the time of the sale is a member of the tribe with jurisdiction over the parcel and meets each of the following requirements:

(i) The owner had submitted a bid on the parcel at sale at least equaling the fair market value;

(ii) At the time immediately before the sale, the owner's undivided interest in the parcel was greater than that of any other owner and equal to or greater than 20 percent of the entire undivided ownership of the parcel;

(iii) The owner submits a written notice of intent to purchase the parcel to us, within 3 days of the date of

auction or the date for submitting sealed bids; and

(iv) The owner tenders the amount of the highest bid within 30 days of the date of auction or submission of sealed bids; or

(2) No single owner is identified under paragraph (d)(1) of this section, then two or more owners who each have identical interests equal to or greater than 20 percent of the interests in the parcel, match the highest bid and have entered into a written agreement that identifies which of these owners has the right to match the highest bid.

(e) If no single owner or group of two or more owners are identified under paragraphs (d)(1) or (d)(2) of this section, and the tribe with jurisdiction has reserved its right under § 152.412 to match the bid of the highest bidder, the tribe may proceed to exercise this right. It may do so by stating its intention to match the bid within 6 business days after the date of auction or for submitting sealed bids.

**§ 152.414 What happens if no bid matches the fair market value?**

(a) If no bid submitted equals or exceeds the final appraised value, we may either:

(1) Purchase the parcel for its appraised fair market value for the tribe; or

(2) Terminate the consolidation by sale process.

(b) We retain the authority to reschedule the date, place, and time of the sale without providing formal prior notice but will seek to notify interested parties. The sale will be rescheduled as promptly as possible, but no later than 15 days from the date of the original sale.

**§ 152.415 When must the highest bidder pay for the purchase?**

The highest bidder or the co-owner or tribe that we determined had a right to match or preempt the highest bid must submit payment within 30 days of the auction or the date for submitting sealed bids. If payment is not tendered in 30 days, then the following process will occur:

(a) The next successful bidder identified in § 152.413 will be notified and provided an opportunity to tender payment in 30 days;

(b) If there is no entity identified in § 152.413 that has exercised its right to match or preempt the highest bid, then we will notify the next highest bidder and provide an opportunity to tender payment in 30 days;

(c) If there are no successful bids higher than fair market value, then the Secretary may purchase the parcel or

may elect to terminate the consolidation proceeding or reschedule the sale (see § 152.414(b)).

**§ 152.416 How will proceeds be distributed?**

We will distribute the proceeds of sale of the parcel to the owners of interests in the parcel in proportion to the ownership interest of each owner. We will hold the following proceeds until owners and heirs can be determined:

(a) Proceeds attributable to the sale of interests of owners whose whereabouts are unknown; and

(b) Proceeds of undetermined heirs, or persons whose ownership interests have not been recorded.

**§ 152.417 Is Federal financial assistance available to support a bidder's purchase?**

We may provide grants and low interest loans to successful bidders at consolidation sales of parcels, but this assistance:

(a) Is limited to 20 percent of the appraised value of the parcel sold; and

(b) Must be applied only toward the purchase price of the parcel sold.

**§ 152.418 What title is acquired?**

(a) The title is acquired as follows:

(1) In trust, free and clear of any and all title or ownership of all persons or entities whose interest were subject to the sale, except the United States; and

(2) Subject to valid existing rights, such as mortgages, easements, or rights-of-way.

(b) We will execute an appropriate transfer document effecting the sale and recorded in the LTRO.

**Subpart F—Partitions in Kind**

**§ 152.501 What lands are covered by this subpart?**

This subpart applies to any parcel of trust or restricted land with more than one owner, irrespective of the number of owners in the parcel. This subpart will not apply to the subsurface interests in a parcel, where those interests have been severed so as to establish separate surface and subsurface ownerships.

**§ 152.502 When does this subpart apply?**

This subpart applies in cases where the owners have been unable to accomplish a partition in kind by exchange of deeds in accordance with subpart C of this part. It authorizes us to partition trust and restricted land with multiple owners into smaller parcels in which the interests of the owners are unified or consolidated.

(a) If a partition which allocates separate parcels to each of the owners is not feasible, we may implement a partial partition, in which a portion of

the parcel remains in multiple ownership.

(b) This subpart does not authorize us to take any other action with respect to land which cannot be partitioned to the benefit of all of the owners.

**§ 152.503 How can an owner initiate a partition action?**

Any owner of a fractional interest may apply to us for a partition by submitting a partition plan that contains the following information:

(a) Legal descriptions of the parcel to be partitioned and the smaller parcels to be created therefrom, with an accompanying survey if the smaller parcels cannot be described by aliquot parts;

(b) Appraisals of the parcel to be partitioned and the smaller parcels to be created from the parcel; and

(c) Identification of ownership of the parcel to be partitioned and the proposed ownership of the smaller parcels to be created therefrom, with an accompanying title report for the whole parcel.

**§ 152.504 How will you notify the applicant's co-owners of an application for partition?**

(a) Upon receiving an application for partition under § 152.503, we must notify the owners of the parcel to be partitioned and provide them with copies of the applicant's partition plan. We will take the following steps to notify all owners:

(1) We will make a reasonable search for any owners whose whereabouts are unknown;

(2) After this search, we will send a written notice of the application to all owners whose whereabouts we could determine; and

(3) To notify owners we could not locate, we will publish a notice in newspapers of general circulation in the area of the parcel to be partitioned.

(b) Our notice will instruct the owners to submit comments or objections or alternative partition plans to us, within 90 days of the date that we mail and publish the notice.

(c) We must treat the submission of an alternative partition plan as a new application requiring additional notice and invitations for comment.

**§ 152.505 How and when will you review an application?**

(a) At the end of the notice period required by § 152.504(c), we must verify the ownership of the parcel to be partitioned, and review the partition plans and any comments.

(1) If it appears that the parcel can be partitioned by agreement among all the owners, we must assist in preparing the

conveyance documents needed to effect a partition by exchange of interests.

(2) If it appears that the parcel cannot be partitioned by agreement, we must issue a formal decision on the application(s).

(b) In evaluating an application to partition, we must determine if the parcel can be partitioned equitably among all of the owners. In making that determination, we will consider whether:

(1) After partition, each owner would hold property equal in value to that held before partition, in proportion to the interests of the other owners;

(2) The smaller parcels created by the partition would be economically usable, based upon characteristics such as size, location, access, etc.;

(3) Any owner has a history of using areas within the parcel to be partitioned, that would justify those areas being equitably partitioned and conveyed to that owner; and

(4) The parcel to be partitioned contains any sites of particular cultural, historical, or other significance to more than one owner, that would make it inequitable to partition those sites and convey them to a single owner.

(c) Upon a determination that a parcel cannot be partitioned in an equitable manner, we must notify the applicant of the right to appeal under part 2 of this chapter. Upon a determination that a parcel can be partitioned in an equitable manner, we must notify any owner that objected or submitted an alternative partition plan of his or her right to appeal under part 2 of this chapter, before taking any further action on the application.

#### **§ 152.506 When will you execute the conveyance instruments?**

(a) No sooner than 30 days after exhausting any appellant has exhausted his or her administrative remedies, if our determination under § 152.505(c) has been affirmed, we must issue a partition order. The order may include reference to any existing liens and encumbrances.

(b) Upon issuance of the order we will notify all of the affected owners, in the same manner as described in § 152.504. We must then record the partition order and any accompanying survey in the appropriate LTRO, in accordance with part 150 of this chapter.

#### **Subpart G—Mortgages and Deeds of Trust**

##### **§ 152.601 What does this subpart do?**

This subpart applies to mortgaging of parcels of trust or restricted land owned by individuals, including parcels in

which fractional interests are held in fee status.

(a) This subpart explains how we can approve mortgages or deeds of trust executed by individual owners in cases where all of the trust or restricted interests in a parcel are:

(1) Encumbered; and

(2) Subject to foreclosure or sale if there is a default.

(b) This subpart does not apply to any of the following:

(1) Mortgages of fractional interests held in fee status;

(2) Other types of encumbrances that may be executed or approved in order to secure a loan, including assignments of income derived from trust or restricted lands; or

(3) Mortgages or deeds of trust of leasehold or other possessory interests.

#### **§ 152.602 How do owners submit an application for approval of a mortgage or deed of trust?**

Only the owner(s) or the proposed mortgagee or beneficiary can submit an application for approval of a mortgage or deed of trust. The application must include:

(a) An executed mortgage or deed of trust to be approved;

(b) The promissory note defining the amount of the loan to be secured and other terms;

(c) Any other documents describing the remedies available to the secured party in the event of a default on the loan;

(d) An appraisal or evaluation furnished by the lender or borrower that establishes the fair market value of the parcel as of the date on which the application for loan was filed;

(e) The loan application and any other description of how the loan proceeds will be used;

(f) Any credit report or credit analysis required, obtained, or prepared by the proposed mortgagee or beneficiary, with a verification of the borrower's income or a description of other means of debt coverage;

(g) Any title reports or title insurance policies required or obtained by the proposed mortgagee or beneficiary; and

(h) Any necessary environmental or historic preservation documentation.

#### **§ 152.603 How will the Secretary review the application?**

(a) Within 30 days of receiving a complete application for approval of a mortgage or deed of trust, we must determine whether:

(1) The land to be encumbered has been adequately described and the loan documents have been properly executed;

(2) The loan-to-value ratio is reasonable, based on the evidence of fair market value in the application and the lender's valuation;

(3) The risk of default on the loan is reasonable, based on the evidence of the ability to repay in the application;

(4) All of the owners of trust and restricted interests in the parcel have executed the mortgage or deed of trust, and any necessary consents have been obtained from other lienholders or encumbrancers; and

(5) The remedies available to the mortgagee or beneficiary in the event of a default on the loan, and any rights or remedies available to the tribe having jurisdiction over the parcel in the event of a foreclosure or sale, are clearly defined in the mortgage, deed of trust, or other loan documents.

(b) If we decide not to approve the mortgage or deed of trust, we will notify the parties of their rights to appeal under part 2 of this chapter.

(c) If we decide to approve the mortgage or deed of trust, we must:

(1) Record the approved document in the Land Titles and Records Office in accordance with part 150 of this chapter; and

(2) Request an updated title status report reflecting the recordation.

(d) A decision to approve a mortgage or deed of trust under this subpart is not appealable under part 2 of this chapter and is not considered to be a breach of trust.

#### **§ 152.604 How may the mortgage or deed of trust be enforced?**

(a) If an owner defaults on a loan secured by an approved mortgage or deed of trust, the encumbered land is subject to foreclosure or sale in accordance with the terms of the approved document and either:

(1) The laws of the tribe having jurisdiction over the parcel; or

(2) If there are no applicable tribal laws, the laws of the state in which the land is located.

(b) If there is a foreclosure or sale to enforce the terms of an approved mortgage or deed of trust, the United States:

(1) Is not a necessary party; and

(2) Is not required to approve any conveyance arising out of the proceeding.

#### **§ 152.605 Does the land remain in trust as a result of foreclosure or sale?**

(a) If the encumbered land is purchased by a tribe or Indian as a result of a foreclosure or sale proceeding, title remains in trust or restricted status.

(b) If the encumbered land is purchased by any other party as a result

of a foreclosure or sale proceeding, title will be taken consistent with the laws applicable to that foreclosure or sale proceeding.

**§ 152.606 How does the Paperwork Reduction Act affect this part?**

The collections of information contained in §§ 152.3, 152.105, 152.107, 152.206, 152.217, 152.219, 152.303, 152.403, 152.412, 152.503, and 152.602 have been approved by the Office of Management and Budget under 44 U.S.C. 3501 *et seq.* and assigned OMB Control Number 1076–xxxx. Response is required to obtain a benefit. A Federal agency may not conduct or sponsor, and you are not required to respond to a collection of information unless the form or regulation requesting the information has a currently valid OMB Control Number.

13. Revise part 179 to read as follows:

**PART 179—LIFE ESTATES AND PRESENT AND FUTURE INTERESTS**

Sec.

- 179.1 What is the purpose of this part?
- 179.2 What terms do I need to know?
- 179.3 Who can hold a life estate?
- 179.4 Who can be the measuring life for a life estate?
- 179.5 Who can be designated as a future interest holder?
- 179.6 Who can be members of a class?
- 179.7 How are interest holders determined if the conveyance document or order contains conditions?
- 179.8 How are members to be determined if there is an open class?
- 179.9 What are the privileges of a life tenant?
- 179.10 What is the life tenant's responsibility to the remainderman?
- 179.11 How can a future interest holder stop the life tenant from damaging his or her interest and substantially diminishing its value?
- 179.12 How will the Secretary distribute income and principal between the life tenant and the remainderman?
- 179.13 How will the value of a current life estate and remainder be determined?
- 179.14 How does a life estate terminate?
- 179.15 What if I do not want an interest in a life estate?
- 179.16 Why do I need to notify the Secretary about the death of a life tenant?
- 179.17 How will term estates be treated?

**Authority:** 86 Stat. 530; 86 Stat. 744; 94 Stat. 537; 96 Stat. 2515; 25 U.S.C. 2, 9, 372, 373, 487, 607, and 2201–11; 25 U.S.C. 2201 Note; Pub. L. 108–374, 118 Stat. 1773.

**Cross-Reference:** For regulations pertaining to income, rents, profits, bonuses and principal from Indian land and the recording of title documents pertaining thereto, see parts 15, Probate; 150, Land Records and Title Documents; 152, Issuance of Patents in Fee, Certificates of Competency, Removal of Restrictions, and Sale of Certain Indian Lands; 162, Leasing and Permitting; 163,

General Forest Regulations; 166, General Grazing Regulations; 169, Rights-of-Way over Indian Lands; 170, Roads of the Bureau of Indian Affairs; 212, Leasing of Allotted Lands for Mining; 213, Leasing of Restricted Lands of Members of the Five Civilized Tribes, Oklahoma, for Mining; 215, Lead and Zinc Mining Operations and Leases, Quapaw Agency; 26 CFR 20.2031–7 Gross Estates, Valuation of Annuities; 43 CFR part 4 subpart D, Rules Applicable in Indian Affairs Hearings and Appeals; 43 CFR part 30, Indian Probate Hearings Procedures; for trespass see 25 CFR part 166.

**§ 179.1 What is the purpose of this part?**

This part sets forth the authorities, policy, and procedures governing the administration of life estates and present and future interests in Indian land by the Secretary of the Interior. These regulations do not apply to any use rights assigned to tribal members by tribes exercising their jurisdiction over tribal lands. This part does not apply to any federal statutory rights to purchase or otherwise acquire an interest in Indian land reserved to an individual or tribe.

**§ 179.2 What terms do I need to know?**

As used in this part:

**Class** means a group of persons who share an interest in an estate.

**Condition** means a qualification or restriction that must be satisfied or occur before an estate or interest commences, enlarges, reduces, or terminates. Condition includes limitations on the estates of grantor and grantee. Condition does not include the natural termination of a life estate or term estate.

**Contingent remainder** means a remainder:

- (1) In an unborn person;
- (2) In a non-specified person; or
- (3) Subject to some other condition.

**Contract bonus** means consideration paid or agreed to be paid as incentive for execution of the contract.

**Conveyance document** means a legal instrument that transfers an interest in an estate. Conveyance document does not include a will.

**Disproportionately high** means the investment expenses exceeds the interest income.

**Estate** means the interest which a person has in Indian land. Estate include a life estate.

**Executory interest** means a future interest which cuts short or springs from a preceding estate or interest that is cut short by a condition.

**Extant person** means a living person or legally recognized existing entity. A living person does not include a child in gestation except when the child in gestation receives the estate or interest

by probate order. If an interest is created in a child in gestation in a probate order, that a child will be treated as a living person only if the child survives at least 120 hours after its birth.

**Future interest** means an interest in an estate with only a future right to possession and enjoyment of the Indian land, such as a remainder, executory interest, or reversionary interest.

**Grantee** means a person who receives an interest in Indian land.

**Grantor** means a person who transfers an interest in Indian land.

**Holder** means a person who owns an estate or interest in Indian land.

**Income** means the rents and profits from Indian land and the interest on invested principal.

**Indian land** means all lands held in trust by the United States for individual Indians or tribes; or all lands, titles to which are held by individual Indians or tribes, subject to Federal restrictions against alienation or encumbrance.

**Life estate** means an estate in Indian land the duration of which is measured by the life of the life tenant or other living person or persons.

**Life tenant** means a person or persons who hold an interest in a life estate.

**Open class** means a class in which membership has not been closed to persons qualifying as members.

**Open Mine Doctrine** means the doctrine which allows a holder of an interest in a life estate to continue the exploration, extraction, and depletion of resources of the land and to receive any rents, royalties, or profits, without the consent of the remainderman, if the activity is in progress or a lease or contract is in effect when the life estate vested. Open Mine Doctrine applies to hard mineral extraction and oil and gas production.

**Order** means a directive issued by the Secretary or a court of competent jurisdiction.

**Person** means a specific, extant person, unless a specific section states otherwise.

**Present interest** means an interest in an estate in Indian land with a right to possession and enjoyment that begins at the moment a conveyance takes effect.

**Principal** means the corpus and capital of an interest in an estate, including any payment received for the sale or diminishment of the corpus.

**Remainder** means a future interest which follows the termination of a life estate or term of years.

**Remainderman** means one or more persons who hold a remainder.

**Reversionary interest** means an interest that is held by the grantor and arises when any preceding estate in a grantee terminates other than by condition.

*Secretary* means the Secretary of the Interior or authorized representative.

*Term estate* means an estate which terminates upon the expiration of a designated time period or surrender of the interest by the interest holder.

*Vested* means having absolute right or title in property.

*We* means the Secretary of the Interior or authorized representative.

**§ 179.3 Who can hold a life estate?**

Any person can hold a life estate subject to the following:

- (a) Any life estate must have no conditions in favor of the grantor or a grantee; and
- (b) If a life estate is granted to, or for the life of, multiple persons, the granting document must establish the share of the estate each person is to receive.

**§ 179.4 Who can be the measuring life for a life estate?**

Any specific person or persons living at the time we approve the conveyance document or upon death of the decedent may be the measuring life for a life estate.

**§ 179.5 Who can be designated as a future interest holder?**

Any person may be a future interest holder. However, no future interest subject to conditions in favor of the grantor or a grantee is valid if the conditions cannot be satisfied before either:

- (a) When we approve the conveyance document; or
- (b) When the decedent dies.

**§ 179.6 Who can be members of a class?**

The members of any class are those persons who can be identified as persons either when we approve the conveyance or upon the death of the decedent.

**§ 179.7 How are interest holders determined if the conveyance document or order contains conditions?**

(a) If we determine that the conveyance document imposes any condition on an interest in Indian land, we will determine whether the condition is satisfied either:

- (1) When we approve the conveyance document; or
  - (2) When the decedent dies.
- (b) If the condition is established by order of some other authority, we will determine whether the condition is satisfied based upon the order.

(c) It may happen that there are no persons when we approve the conveyance document, or at the death of the decedent, or by the terms of the order. In this case, the future interest that would have vested in those persons passes to the grantor or to the estate of the grantor.

**§ 179.8 How are members to be determined if there is an open class?**

(a) If a class is designated as a recipient of an interest in a conveyance document, we will:

- (1) Identify the persons who are members of the class when we approve the conveyance document; and
  - (2) Close the class to any additional persons who might otherwise qualify as members.
- (b) If a class is designated as a recipient of an interest during the

probate process under 43 CFR part 30, we will:

(1) Identify the persons who are members of the class as of the death of the decedent; and

(2) Close the class to any additional person who might otherwise qualify as members of the class.

(c) We may close any class when we:

- (1) Have received monies attributable to the interests held by the class; and
- (2) Have determined that there is at least one person who can receive the monies.

(d) We may close any open class for any purpose that facilitates identification of beneficiaries and assets of the trust. We may then distribute the trust assets to the beneficiaries.

**§ 179.9 What are the privileges of a life tenant?**

(a) A life tenant is granted, for the term of the life estate, the right to:

- (1) Possess and use estate assets;
- (2) Receive a share of the principal and income produced by the estate as set forth in § 179.12; and
- (3) Sell the life estate described in the conveyance document or order.

(b) The rights in paragraph (a) of this section apply only in the absence of specific provisions to the contrary in the conveyance document or order.

**§ 179.10 What is the life tenant's responsibility to the remainderman?**

The provisions of this section apply absent specific provisions to the contrary in the conveyance document or order.

(a) The life tenant has responsibilities to the remainderman as shown on the following table.

If the life estate was created by...	Then...	Except as to...
(1) Probate order before June 20, 2006, and the decedent died before June 20, 2006.	the responsibility of the life tenant to the remainderman is defined by federal law and regulation in effect at the date of the creation of the life estate.	distribution of monies from rents, cash bonus and royalties and valuation of the life estate and remainder as set forth in this part.
(2) Operation of law under 25 U.S.C. 2206 or federally approved tribal probate code approved under 25 U.S.C. 2205.	(i) The life tenant may use the land or structures on the land (including for extraction and production of minerals, oil, gas, and timber) without the remainderman's consent; and (ii) The life tenant must not destroy the estate, commit malicious waste or fail to reasonably manage the land in a manner consistent with long-time use and trust status of the land.	distribution of monies from rents, cash bonuses, and royalties and valuation of the life estate and remainder as set forth in this part.
(3) Conveyance document before the effective date of this part.	the responsibility of the life tenant to the remainderman is defined by federal law and regulation in effect on the date the life estate was created.	distribution of monies from rents, cash bonuses, and royalties and valuation of the life estate and remainder as set forth in this part.
(4) Conveyance document after the effective date of this part	(i) The life tenant may use the land or structures on the land (including for extraction and production of minerals, oil, gas, and timber) without the remainderman's consent; and (ii) The life tenant must not destroy the estate, commit malicious waste, or fail to reasonably manage the land in a manner consistent with long-time use and trust status of the land.	

(b) In order to preserve and protect the trust, we must review and make a final determination on any contract involving trust assets, unless the law provides otherwise.

(c) Our authority to consent to the leasing or transfer of Indian land on behalf of the interest holders is not diminished or modified by this section.

**§ 179.11 How can a future interest holder stop the life tenant from damaging his or her interest and substantially diminishing its value?**

If you are a future interest holder who feels that a life tenant may be damaging the estate, you may ask us to investigate the use of the land. If we find that the life tenant has taken actions not consistent with § 179.10, we may proceed as if the life tenant has trespassed on the property and take action under parts 162 and 212 of this chapter.

**§ 179.12 How will the Secretary distribute income and principal between the life tenant and the remainderman?**

(a) The Secretary must determine whether:

(1) The Secretary ordered the distribution of the interests in the life estate and remainder in the probate of an estate of a decedent who died on or after June 20, 2006 or the Secretary approved the conveyance document of the interests after the effective date of these regulations;

(2) An order or conveyance document specifies a distribution of proceeds;

(3) The vested remainderman and life tenant have entered into a written agreement approved by the Secretary providing for the distribution of proceeds; or

(4) The life tenant is entitled, by any document or agreement or by application of state law, such as the open mine doctrine, to receive the rents, royalties, and profits attributable to the exploration, extraction or depletion of estate resources.

(b) If the Secretary determines that the conveyance is the result of an order distributing the probate estate of a decedent who died on or after June 20, 2006, or the Secretary approved the conveyance document of the interests after the effective date of these regulations and paragraphs (a)(2) and (3) of this section do not provide otherwise, then the Secretary must distribute all income, principal, and contract bonuses and royalties, to the life tenant until the life estate is terminated.

(c) If the Secretary determines that the conveyance is the result of an order distributing the probate estate of a decedent who died before June 20, 2006, or the Secretary approved the

conveyance document before the effective date of this regulation and paragraphs (a)(2), (3), and (4) of this section do not provide otherwise, the Secretary must:

(1) Distribute all rents and profits, as income, to the current life tenant;

(2) Distribute any contract bonus one-half each to the current life tenant and the remainderman;

(3) In the case of mineral contracts, invest the principal, with interest income to be paid the life tenant during the life estate, except in those instances where the administrative cost of investment is disproportionately high, in which case paragraph (e) of this section applies. The principal allocated to the remainderman under this section will be distributed to the remainderman upon termination of the life estate. The life tenant will receive distribution of the principal allocated to the life tenant immediately.

(d) If the Secretary determines that paragraphs (a) (2), (3), or (4) of this section provide otherwise, the Secretary must distribute the income and principal in accordance with those provisions.

(e) In all other instances, the Secretary shall distribute the principal immediately according to the formulas set forth in § 179.13. All proceeds attributable to a contingent remainderman or future interest holder subject to class whose membership is not closed will be invested in an account with disbursement to take place upon determination of the future interest holder or closing of membership of the class. The life tenant will receive distribution of the principal allocated to the life tenant immediately.

**§ 179.13 How will the value of a current life estate and remainder be determined?**

(a) We will refer to the most current version of Actuarial Table S, Valuation of Annuities, obtained from 26 CFR 20.2031 to determine the value of your life estate or remainder and distribute principal under § 179.12(e).

(b) Table S specifies the share attributable to the life estate and remainder's interest, given the age of the life tenant and an established rate of return. We will periodically review and revise the percent rate of return to be used to determine the share attributable to the interests of the life tenant and the remainderman. The life tenant will receive the balance of the distribution after the remainderman's share has been calculated.

(c) Applying Table S, we will use the following formulae to determine the value of the interests of the life tenant and remainderman:

(1) Value of Remainder =  $I * R$ , where I is the total value to be distributed and R is the remainder factor obtained from Table S for a given life tenant's age and rate of return; and

(2) Value of Life Estate =  $I - \text{Value of remainder}$ , where I is the total value to be distributed and the Value of remainder was calculated above.

**§ 179.14 How does a life estate terminate?**

A life estate terminates upon whichever occurs first:

(a) The death of the person or persons used to measure the duration of the life estate;

(b) The transfer by the life tenant of the interest to the remainderman or grantor; or

(c) The acquisition by the life tenant of all future interests.

**§ 179.15 What if I do not want an interest in a life estate?**

You may renounce your interest during the probate process before the order is issued or transfer your interest by conveyance document to another person.

**§ 179.16 Why do I need to notify the Secretary about the death of a life tenant?**

(a) You should notify us of the death of the life tenant or other person used to measure the duration of the life estate to ensure that:

(1) The records properly reflect the present and future interests holders; and

(2) Any proceeds received from these interests are correctly distributed to the holders.

(b) See 25 CFR 15.104 for instructions on how to notify the Secretary of the death.

**§ 179.17 How will term estates be treated?**

For purposes of distribution of income, cash bonuses, and principal, we will treat term estates in the same manner as a life estate.

**Title 43—Public Lands: Interior**

**Subtitle A—Office of the Secretary of the Interior**

**PART 4—DEPARTMENT HEARINGS AND APPEALS PROCEDURES**

14. Revise the authority citation for part 4 to read as follows:

**Authority:** 5 U.S.C. 301; 25 U.S.C. 9, 372–74, 410; 43 U.S.C. 1201, 1457; Pub. L. 99–264, 100 Stat. 61, as amended.

15. Revise the cross reference for part 4, subpart D, to read as follows:

*Cross-reference:* For regulations pertaining to the processing of Indian probate matters within the Bureau of Indian Affairs, see 25 CFR part 15. For regulations pertaining to the probate of Indian trust estates within the

Probate Hearings Division, Office of Hearings and Appeals, see 43 CFR part 30. For regulations pertaining to the authority, jurisdiction, and membership of the Board of Indian Appeals, Office of Hearings and Appeals, see subpart A of this part. For regulations generally applicable to proceedings before the Hearings Divisions and Appeal Boards of the Office of Hearings and Appeals, see subpart B of this part.

16. In subpart D, remove undesignated center heading, “Determination of Heirs and Approval of Wills, Except as to Members of the Five Civilized Tribes and Osage Indians; Tribal Purchases of Interests Under Special Statutes.”  
 17. Revise §§ 4.200 and 4.201 to read as follows:

**§ 4.200 How to use this subpart.**

(a) The following table is a guide to the relevant contents of this part by subject matter.

For provisions relating to . . .	consult . . .
(1) All proceedings in subpart D .....	§§ 4.200 and 4.201.
(2) Appeals to the Board of Indian Appeals generally .....	§§ 4.310 through 4.318.
(3) Appeals to the Board of Indian appeals from decisions of the Probate Hearings Division in Indian probate matters.	§§ 4.320 through 4.326.
(4) Appeals to the Board of Indian Appeals from actions or decisions of BIA.	§§ 4.330 through 4.340.
(5) Determinations under the White Earth Reservation Land Settlement Act of 1985.	§§ 4.350 through 4.357.

(b) Except as limited by the provisions of this part, the regulations in subparts A and B of this part apply to these proceedings.

**§ 4.201 Definitions.**

As used in this subpart:

*Administrative law judge (ALJ)* means an administrative law judge with OHA appointed under the Administrative Procedure Act, 5 U.S.C. 3105.

*Agency* means the Bureau of Indian Affairs (BIA) agency office, or any other designated office in BIA, having jurisdiction over trust or restricted land. This term also means any office of a tribe that has entered into a contract or compact to fulfill the probate function under 25 U.S.C. 450f or 458cc.

*BIA* means the Bureau of Indian Affairs within the Department.

*Board* means the Interior Board of Indian Appeals (IBIA) within OHA, authorized by the Secretary to hear, consider, and determine finally for the Department appeals taken by aggrieved parties from actions by OHA judges on petitions for rehearing or reopening, and allowance of attorney fees, and from actions of BIA officials as provided in § 4.1(b)(2) of this subtitle.

*Day* means a calendar day, unless otherwise stated.

*Decedent* means a person who is deceased.

*Devise* means a gift of property by will. Also, to give a gift of property by will.

*Devisee* means a person or entity that receives property under a will.

*Estate* means the trust or restricted land and trust personalty owned by the decedent at the time of death.

*Heir* means any individual or entity eligible to receive trust or restricted land and trust personalty from a decedent in an intestate proceeding.

*Indian probate judge (IPJ)* means a licensed attorney employed by OHA, other than an ALJ, to whom the Secretary has delegated authority to hear and decide Indian probate cases under 5 U.S.C. 556(b).

*Interested party* means any of the following:

- (1) Any potential or actual heir;
- (2) Any devisee under a will;
- (3) Any person or entity asserting a claim against a deceased Indian's estate;
- (4) Any tribe having a statutory option to purchase the trust or restricted property interest of a decedent; or
- (5) Any co-owner exercising a purchase option.

*Intestate* means the decedent died without a valid will.

*Judge* means an ALJ or IPJ.

*LTR O* means the Land Titles and Records Office within BIA.

*Probate* means the legal process by which applicable tribal, Federal, or state law that affects the distribution of a decedent's estate is applied to:

- (1) Determine the heirs;
- (2) Determine the validity of wills and determine devisees;
- (3) Determine whether claims against the estate will be paid from trust funds; and
- (4) Order the transfer of any trust or restricted land or trust personalty to the heirs, devisees, or other persons or entities entitled by law to receive the funds or land.

*Restricted property* means real property, the title to which is held by an Indian but which cannot be alienated or encumbered without the consent of the Secretary. For the purposes of probate proceedings, restricted property is treated as if it were trust property. Except as the law may provide otherwise, the term “restricted property” as used in this part does not include the restricted lands of the Five

Civilized Tribes of Oklahoma or the Osage Nation.

*Trust property* means real or personal property, or an interest therein, for which the United States holds the title to the property in trust for the benefit of an individual Indian or tribe.

*Will* means a written document executed with the required formalities and intended to pass the testator's property upon death.

18. Remove §§ 4.202 through 4.308, along with their undesignated center headings.

19. Revise § 4.320 to read as follows:

**§ 4.320 Who may appeal a judge's order on petition for rehearing or reopening or regarding purchase of interests in a deceased Indian's trust estate.**

Any interested party who is adversely affected has a right to appeal to the Board from an order of a judge on a petition for rehearing, a petition for reopening, or regarding purchase of interests in a deceased Indian's trust estate under part 30 of this subtitle.

20. Redesignate §§ 4.321 through 4.323 as §§ 4.324 through 4.326 and add new §§ 4.321 through 4.323 to read as follows:

**§ 4.321 How to appeal a judge's order on petition for rehearing or reopening or regarding purchase of interests in a deceased Indian's trust estate.**

(a) Within 30 days after the date of the judge's order, an appellant must file a written notice of appeal signed by the appellant, the appellant's attorney, or other qualified representative as provided in § 1.3 of this subtitle, with the Board of Indian Appeals, Office of Hearings and Appeals, U.S. Department of the Interior, 801 North Quincy Street, Arlington, Virginia 22203.

(b) A notice of appeal not timely filed must be dismissed for lack of jurisdiction.

**§ 4.322 What an appeal must contain.**

(a) The appellant must file a statement of the errors of fact and law upon which the appeal is based. This statement may be included in either the notice of appeal or an opening brief.

(b) The notice of appeal must include the names and addresses of parties served.

**§ 4.323 Service of the notice of appeal.**

(a) The appellant must deliver or mail the original notice of appeal to the Board of Indian Appeals.

(b) A copy must be served on the judge whose decision is being appealed as well as on all interested parties.

(c) The notice of appeal filed with the Board must include a certification that service was made as required by this section.

21. Revise redesignated §§ 4.234 through 4.236 to read as follows:

**§ 4.324 Record on appeal.**

(a) Upon receiving a copy of the notice of appeal, the judge whose decision is being appealed must notify the agency concerned to return the duplicate record filed under subpart J of part 30 of this subtitle to the designated LTRO.

(b) The LTRO must conform the duplicate record to the original. Thereafter, the duplicate record will be available for inspection either at the LTRO or at the agency.

(c) If a transcript of the hearing was not prepared, the judge will have a transcript prepared and forwarded to the Board within 30 days after receiving a copy of the notice of appeal.

(d) The LTRO must forward the original record on appeal to the Board by certified mail.

(e) Any party may file an objection to the record as constituted by the LTRO. The party must file his or her objection with the Board within 15 days after receiving the notice of docketing under § 4.325.

**§ 4.325 Docketing the appeal.**

The Board will docket the appeal upon receiving the administrative record from the LTRO and will provide notice of the docketing to all interested parties as shown by the record on appeal. The docketing notice will specify the time within which briefs may be filed and will cite the procedural regulations governing the appeal.

**§ 4.326 Disposition of the record.**

(a) After the Board makes a decision other than a remand, it must forward to the designated LTRO:

(1) The record filed with the Board under § 4.324(d); and

(2) All documents added during the appeal proceedings, including any transcripts prepared because of the appeal and the Board's decision.

(b) The LTRO must conform the duplicate record retained under § 4.324(b) to the original sent under paragraph (a) of this section and forward the conformed record to the agency concerned.

22. Add part 30 to read as follows:

**PART 30—INDIAN PROBATE HEARINGS PROCEDURES****Subpart A—Scope of Part; Definitions**

Sec.

30.100 How do I use this part?

30.101 Will the Secretary probate all the land or assets in an estate?

30.102 What terms do I need to know?

**Subpart B—Commencement of Probate Proceedings**

30.110 When does OHA commence a probate case?

30.111 How does OHA commence a probate case?

30.112 What must a probate file contain?

30.113 What will OHA do if it receives an incomplete probate file?

30.114 What notice of the probate case will OHA send me?

30.115 Can I review the probate file?

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**Authority:** 5 U.S.C. 301; 25 U.S.C. 9, 372–374, 410, 2201 *et seq.*; 43 U.S.C. 1201, 1457.

*Cross-reference:* For regulations pertaining to the processing of Indian probate matters within the Bureau of Indian Affairs, see 25 CFR part 15. For regulations pertaining to the appeal of decisions of the Probate Hearings Division, Office of Hearings and Appeals, to the Board of Indian Appeals, Office of Hearings and Appeals, see 43 CFR part 4, subpart D. For regulations generally applicable to proceedings before the Hearings Divisions and Appeal Boards of the Office of Hearings and Appeals, see 43 CFR part 4, subpart B.

**Subpart A—Scope of Part; Definitions**

**§ 30.100 How do I use this part?**

(a) The following table is a guide to the relevant contents of this part by subject matter.

For provisions relating to . . .	Consult . . .
(1) All proceedings in part 30 .....	§ § 30.100 through 30.102
(2) Claims against probate estate .....	§§ 30.140 through 30.148.
(3) Commencement of probate .....	§§ 30.110 through 30.115.
(4) Consolidation of interests .....	§§ 30.150 through 30.153.
(5) Formal probate proceedings before an administrative law judge or Indian probate judge.	§§ 30.210 through 30.246.
(6) Probate of trust estates of Indians who die possessed of trust property.	All sections except §§ 30.260 through 30.274.

For provisions relating to . . .	Consult . . .
(7) Purchases at probate .....	§§ 30.160 through 30.177.
(8) Renunciation of interests .....	§§ 30.180 through 30.191.
(9) Summary probate proceedings before an attorney decision maker ..	§§ 30.200 through 30.206.
(10) Tribal purchase of certain property interests of decedents under special laws applicable to particular tribes.	§§ 30.260 through 30.274.

(b) Except as limited by the provisions of this part, the regulations in part 4, subparts A and B of this subtitle apply to these proceedings.

**§ 30.101 Will the Secretary probate all the land or assets in an estate?**

(a) We will probate only the trust or restricted land or trust personalty in an estate.

(b) We will not probate the following property:

- (1) Real or personal property other than trust or restricted land or trust personalty in an estate of a decedent;
- (2) Restricted land derived from allotments in the estates of members of the Five Civilized Tribes (Cherokee, Choctaw, Chickasaw, Creek and Seminole) in Oklahoma; and
- (3) Restricted interests derived from allotments made to Osage Indians in Oklahoma (Osage Nation) and Osage headright interests owned by Osage decedents.

(c) We will probate that part of the estate of a deceased member of the Five Civilized Tribes or Osage Nation who owned a trust interest in land or a restricted interest in land derived from an individual Indian other than a member of the Five Civilized Tribes or Osage Nation.

(d) Except as limited by the provisions in this part, the rules in subparts A and B of part 4 of this subtitle apply to all proceedings covered by this part.

**§ 30.102 What terms do I need to know?**

As used in this part:

*Act* means the Indian Land Consolidation Act and its amendments including Public Law 108-374, the American Indian Probate Reform Act of 2004 (AIPRA).

*Administrative law judge (ALJ)* means an administrative law judge with OHA appointed under the Administrative Procedure Act, 5 U.S.C. 3105.

*Agency* means the Bureau of Indian Affairs (BIA) agency office, or any other designated office in BIA, having jurisdiction over trust or restricted land. This term also means any office of a tribe that has entered into a contract or compact to fulfill the probate function under 25 U.S.C. 450f or 458cc.

*Attorney decision maker (ADM)* means a licensed attorney employed by

OHA who conducts a summary proceeding and renders a decision that is subject to de novo review by an administrative law judge or Indian probate judge.

*BIA* means the Bureau of Indian Affairs within the Department.

*BLM* means the Bureau of Land Management within the Department.

*Board* means the Interior Board of Indian Appeals (IBIA) within OHA, authorized by the Secretary to hear, consider, and determine finally for the Department appeals taken by aggrieved parties from actions by OHA judges on petitions for rehearing or reopening, and allowance of attorney fees, and from actions of BIA officials as provided in § 4.1(b)(2) of this subtitle.

*Chief ALJ* means the Chief Administrative Law Judge, Probate Hearings Division, OHA.

*Child* includes any adopted child.

*Codicil* means a supplement or addition to a will, executed with the same formalities as a will. It may explain, modify, add to, or revoke provisions in an existing will.

*Consolidation agreement* means a written agreement under the provisions of 25 U.S.C. 2206(e) or 25 U.S.C. 2206(j)(9), by which a decedent's heirs and devisees consolidate interests in trust or restricted land, entered during the probate process, approved by the judge, and implemented by the probate order.

*Creditor* means any individual or entity that has a claim for payment from a decedent's estate.

*Day* means a calendar day, unless otherwise stated.

*Decedent* means a person who is deceased.

*Decision or order (or decision and order)* means a written document issued by a judge making determinations as to heirs, wills, devisees, and the claims of creditors, and ordering distribution of trust or restricted land or trust personalty. Decision or order also means the decision issued by an attorney decision maker in a summary probate proceeding.

*De novo review* means a process in which an administrative law judge or Indian probate judge, without regard to the decision previously issued in the case, will:

(1) Review all the relevant facts and issues in a probate case;

(2) Reconsider the evidence introduced at a previous hearing;

(3) Conduct a formal hearing as necessary or appropriate; and

(4) Issue a decision.

*Department or DOI* means the Department of the Interior.

*Devise* means a gift of property by will. Also, to give a gift of property by will.

*Devisee* means a person or entity that receives property under a will.

*Eligible heir* means, for the purposes of the Act, 25 U.S.C. 2206, any of a decedent's children, grandchildren, great grandchildren, full siblings, half siblings by blood, and parents who are:

- (1) Indian;
- (2) Lineal descendants within two degrees of consanguinity of an Indian; or
- (3) Owners of a trust or restricted interest in a parcel of land for purposes of inheriting—by descent, renunciation, or consolidation agreement—another trust or restricted interest in such a parcel from the decedent.

*Estate* means the trust or restricted land and trust personalty owned by the decedent at the time of death.

*Formal probate proceeding* means a trial-type proceeding, conducted by a judge, in which evidence is obtained, through testimony of witnesses and the receipt of relevant documents.

*Heir* means any individual or entity eligible to receive trust or restricted land and trust personalty from a decedent in an intestate proceeding.

*I* means, in question headings, an heir, a devisee, an owner of trust or restricted land or trust personalty, or a creditor.

*IIM account* means funds held in trust in an individual Indian money (IIM) account by OST or by a tribe performing this function under a contract or compact. These funds are also referred to as "trust personalty."

*Indian* means, for the purposes of the Act, 25 U.S.C. 2206:

(1) Any person who is a member of a federally recognized Indian tribe, is eligible to become a member of any Indian tribe, or is an owner (as of October 27, 2004) of a trust or restricted interest in land;

(2) Any person meeting the definition of Indian under 25 U.S.C. 479; and

(3) With respect to the inheritance and ownership of trust or restricted land in the State of California under 25 U.S.C. 2206, any person described in paragraph (1) or (2) of this definition or any person who owns a trust or restricted interest in a parcel of land in that State.

*Indian probate judge* (IPJ) means a licensed attorney employed by OHA, other than an ALJ, to whom the Secretary has delegated authority to hear and decide Indian probate cases under 5 U.S.C. 556(b).

*Interested party* means any of the following:

- (1) Any potential or actual heir;
- (2) Any devisee under a will;
- (3) Any person or entity asserting a claim against a deceased Indian's estate;
- (4) Any tribe having a statutory option to purchase the trust or restricted property interest of a decedent; or
- (5) Any co-owner exercising a purchase option.

*Intestate* means the decedent died without a valid will.

*Judge* means an ALJ or IPJ.

*LTRO* means the Land Titles and Records Office within BIA.

*Minor* means an individual who has not reached the age of majority as defined by the applicable law.

*OHA* means the Office of Hearings and Appeals within the Department.

*OST* means the Office of the Special Trustee for American Indians within the Department.

*Per stirpes* means by right of representation, dividing an estate into equal shares based on the number of decedent's surviving children and predeceased children who left issue and who survive the decedent. The share of a predeceased child of the decedent is divided equally among the predeceased child's surviving children.

*Probate* means the legal process by which applicable tribal, Federal, or State law that affects the distribution of a decedent's estate is applied to:

- (1) Determine the heirs;
- (2) Determine the validity of wills and determine devisees;
- (3) Determine whether claims against the estate will be paid from trust funds; and
- (4) Order the transfer of any trust or restricted land or trust personalty to the heirs, devisees, or other persons or entities entitled by law to receive the funds or land.

*Probate staff* means a DOI or tribal employee who is trained in Indian probate matters and who is responsible for preparing the probate file.

*Purchase option at probate* refers to the process by which eligible purchasers can purchase a decedent's interest during the probate proceeding.

*Restricted property* means real property, the title to which is held by an Indian but which cannot be alienated or encumbered without the consent of the Secretary. For the purposes of probate proceedings, restricted property is treated as if it were trust property. Except as the law may provide otherwise, the term "restricted property" as used in this part does not include the restricted lands of the Five Civilized Tribes of Oklahoma or the Osage Nation.

*Secretary* means the Secretary of the Interior or an authorized representative. The authorized representative of the Secretary for the performance of probate functions is BIA. The authorized representative of the Secretary for adjudication of probate is OHA.

*Summary probate proceeding* means the consideration of a probate file without a hearing and on the basis of the probate file received from the BIA. A summary probate proceeding may be conducted if the estate involves only trust personalty and does not exceed the amount of \$5,000 on the date of the death of the decedent.

*Superintendent* means a BIA Superintendent or other BIA official, including a field representative or one holding equivalent authority.

*Testate* means that the decedent executed a valid will.

*Testator* means a person who has executed a valid will.

*Trust personalty* means all funds and securities of any kind that are held in trust in an IIM account or otherwise supervised by the Secretary.

*Trust property* means real or personal property, or an interest therein, for which the United States holds the title to the property in trust for the benefit of an individual Indian or tribe.

*We* means the Secretary of the Interior or an authorized representative as defined in this section.

*Will* means a written document executed with the required formalities and intended to pass the testator's property upon death.

*You* means, in regulatory text, an heir or devisee or owner of trust or restricted land or trust personalty, unless a specific section defines "you" to have another meaning.

## Subpart B—Commencement of Probate Proceedings

### § 30.110 When does OHA commence a probate case?

OHA commences probate of a trust estate when OHA receives a probate file from BIA.

### § 30.111 How does OHA commence a probate case?

OHA commences a probate case by confirming the case number assigned by BIA, assigning the case to a judge or ADM, and designating the case as a summary probate proceeding or formal probate proceeding.

### § 30.112 What must a probate file contain?

A probate file must contain the documents and information described in 25 CFR 15.302 and any other relevant information.

### § 30.113 What will OHA do if it receives an incomplete probate file?

If OHA determines that the probate file it received from BIA is not complete and the probate file is not accompanied by the certification described in 25 CFR 15.303, OHA may:

- (a) Request the missing information from BIA;
- (b) Dismiss the case and return the probate file to BIA for further processing;
- (c) Issue a subpoena or request for production as appropriate to obtain the missing information; or
- (d) Proceed with a hearing in the case.

### § 30.114 What notice of the probate case will OHA send me?

OHA will send a notice of hearing to potential heirs, devisees, and creditors if the case is designated as a formal probate proceeding. In a case designated as a summary probate proceeding, OHA will send potential heirs and devisees a notice of the designation. OHA also will inform potential heirs and devisees that a formal probate proceeding may be requested instead of the summary process.

### § 30.115 Can I review the probate file?

After OHA receives the case, any interested party may examine the probate file during regular business hours and make copies upon payment of the reasonable cost of copying.

## Subpart C—Judicial Authority and Duties

### § 30.120 What authority does the judge have in probate cases?

A judge has the general authority to:

- (a) Determine the manner, location, and time of hearings conducted under this part, and otherwise to administer the cases assigned to the judge;
- (b) Determine the heirs of any Indian or eligible heir who dies intestate possessed of trust or restricted property;
- (c) Approve or disapprove a will disposing of trust or restricted property;
- (d) Accept or reject any full or partial renunciation of interest in both testate and intestate proceedings;

(e) Approve or disapprove any consolidation agreement;

(f) Conduct sales at probate and provide for the distribution of interests in the probate decision and order;

(g) Allow or disallow claims by creditors;

(h) Order the distribution of trust property to heirs and devisees and determine and reserve the share or shares that any potential heir or devisee who is missing but not found to be deceased by a court of competent jurisdiction is entitled;

(i) Determine whether a tribe has jurisdiction over the trust or restricted property and, if the tribe has jurisdiction, the right of the tribe to take a decedent's trust or restricted property under 25 U.S.C. 2206(a)(2)(B)(v), 2206(a)(2)(D)(iii)(V), or other applicable laws;

(j) Issue subpoenas for the appearance of persons, the testimony of witnesses, and the production of documents at hearings or depositions, under 25 U.S.C. 374, upon the judge's initiative or, within the judge's discretion, upon the request of an interested party;

(k) Administer oaths and affirmations;

(l) Order the taking of depositions and determine the scope and use of deposition testimony;

(m) Order the production of documents and records and determine the scope and use of the documents and records;

(n) Rule on matters involving interrogatories and any other requests for discovery, including admissions;

(o) Grant or deny stays, waivers, and extensions;

(p) Hear, consider, and rule on motions, requests, and objections;

(q) Rule on the admissibility of evidence;

(r) Permit the cross examination of witnesses;

(s) Appoint a guardian ad litem for any interested party who is a minor or found by the judge to be not competent to represent his or her own interests;

(t) Inquire of persons and agencies in order to complete the record in probate proceedings and to protect the integrity of the record;

(u) Hear and consider the claims of creditors against the estate, allowing or dismissing claims based on the evidence and the law;

(v) Provide information to interested parties about the right to appeal and concerning consolidation agreements, renunciations of interest, and purchases at probate as necessary;

(w) Administer the probate case and regulate the course of any hearing and the conduct of witnesses, interested parties, attorneys, and attendees at a hearing;

(x) Determine and impose sanctions and penalties allowed by law; and

(y) Take such action as necessary to preserve the trust assets of an estate.

**§ 30.121 May a judge appoint a master in a probate case?**

(a) In the exercise of any authority under this part, a judge may appoint a master:

(1) To conduct hearings on the record and hear evidence as to all or specific issues in probate cases as assigned by the judge;

(2) To make written reports including findings of fact and conclusions of law; and

(3) To propose recommended decisions to the judge.

(b) Upon filing, the master's report and recommended decision will be mailed or delivered to the interested parties.

**§ 30.122 Is the judge required to accept the master's recommended decision?**

No, the judge is not required to accept the master's recommended decision.

(a) An interested party adversely affected by the report and recommended decision may file objections within 30 days of the mailing or delivery of the report. An objecting party must simultaneously mail or deliver copies of the objections to all other interested parties.

(b) Any other interested party may file responses to the objections within 15 days of the mailing or delivery of the objections. A responding party must simultaneously mail or deliver a copy of his or her responses to the objecting party.

(c) The judge will review the record of the proceedings heard by the master, including any objections and responses filed, and determine whether the master's report and recommended decision is supported by the evidence of record.

(1) If the judge approves the report and finds that the recommended decision is supported by the evidence of record and is consistent with applicable law, the judge will enter an order adopting the recommended decision.

(2) If the judge does not approve the report or finds that the recommended decision is not supported by the evidence of record, the judge may remand the case to the master for further proceedings consistent with instructions in the remand order, or the judge may hear the case de novo and enter a decision.

(3) If the judge finds that the master's findings of fact are supported by the evidence in the record but the conclusions of law or the recommended

decision is not consistent with applicable law, the judge will issue an order adopting the findings of fact, making conclusions of law, and entering a decision.

**§ 30.123 Will the judge determine matters of status and nationality?**

(a) The judge in a probate proceeding will determine:

(1) The status of eligible heirs or devisees as Indians;

(2) The nationality or citizenship of eligible heirs or devisees; and

(3) Whether any of the Indian heirs or devisees with U.S. citizenship are individuals for whom the supervision and trusteeship of the United States is terminated.

(b) A judge may make determinations under this section in a current probate proceeding or in a completed probate case after a reopening without regard to a time limit.

**§ 30.124 Can a judge find a person to be dead by reason of unexplained absence?**

(a) A judge may make a finding that an heir, devisee, or a person for whom a probate case has been opened is dead, by reason of extended unexplained absence, and include the date of death in the finding. The judge will make a finding of death only upon clear and convincing evidence.

(b) In any proceeding to determine whether a person is dead, the following rebuttable presumptions apply:

(1) If credible evidence establishes that the absent person has had contact with any person or entity during the 6-year period preceding the hearing, the absent person will be presumed alive; and

(2) If clear and convincing evidence establishes that none of the persons or entities with whom the absent person was known to have had regular contact previously has had any such contact during the 6-year period preceding the hearing, the absent person will be presumed dead.

**§ 30.125 May a judge reopen a probate case to correct errors and omissions?**

(a) Upon the written request of an interested party, or on the judge's own motion, at any time, a judge has the specific authority to reopen a probate case to:

(1) Determine the correct identity of the original allottee, or any heir or devisee;

(2) Determine whether different persons received the same allotment;

(3) Decide whether trust patents covering allotments of land were issued incorrectly or to a non-existent person;

(4) Determine whether more than one allotment of land had been issued to the

same person under different names and numbers or through other errors in identification; or

(5) Address any other error deemed by the judge sufficient to order the case to be reopened.

(b) The judge will notify interested parties if a probate case is reopened and will refer the case for proceedings in accordance with this part.

**§ 30.126 What happens if property was omitted from the inventory of the estate?**

(a) This section applies when, after issuance of a decision and order in a formal probate proceeding, it is found that trust or restricted property or interest therein belonging to a decedent has not been included in the inventory.

(1) The inventory can be modified to include the omitted property for distribution under the original decision.

(2) Modification to include the omitted property in the decedent's inventory may be made either administratively by BIA or by a modification order by a judge.

(3) Copies of all modifications must be furnished to the agency and to all those persons who share in the estate.

(b) When the property to be included takes a different line of descent from that shown in the original decision, BIA must notify the judge. The judge will:

(1) Conduct a hearing, if necessary, and issue a decision; and

(2) File a record of the proceeding with the designated LTRO.

**§ 30.127 What happens if property was improperly included in the inventory of the estate?**

(a) When, after a decision and order in a formal probate proceeding, it is found that property has been improperly included in the inventory of an estate, the inventory must be modified to eliminate this property. A petition for modification may be filed by the superintendent of the agency where the property is located, or by any interested party.

(b) A judge will review the merits of the petition and record of the title from the LTRO upon which the modification is to be based and enter an appropriate decision. If the decision is entered without a formal hearing, the judge must give notice of the action to all parties whose rights are adversely affected, allowing them 30 days in which to show cause why the decision should not then become final.

(c) Where appropriate, the judge may conduct a formal hearing at any stage of the modification proceeding. The hearing must be scheduled and conducted in accordance with the rules of this part. The judge will enter a final

decision based on his or her findings, modifying or refusing to modify the property inventory. The judge's decision will become final at the end of 30 days from the date it is mailed, unless an aggrieved party files a notice of appeal within that period. Notice of entry of the decision must be given in accordance with this part.

(d) A party aggrieved by the judge's decision may appeal it to the Board.

(e) BIA must lodge the record of all proceedings with the designated LTRO.

**§ 30.128 What happens if an error in BIA's estate inventory is alleged during the probate proceeding?**

(a) This section applies when, during a probate proceeding, an interested party alleges that the estate inventory prepared by BIA is inaccurate and should be corrected. Alleged inaccuracies may include, but are not limited to, the following:

(1) Trust property interests should be removed from the inventory because the decedent executed a gift deed or a gift deed application during the decedent's lifetime, and BIA had not, as of the time of death, determined whether to approve the gift deed or gift deed application;

(2) Trust property interests should be removed from the inventory because a deed through which the decedent acquired the property is invalid;

(3) Trust property interests should be added to the inventory because the decedent attempted to acquire additional trust property interests during the decedent's lifetime, and BIA had not, as of the time of death, determined whether to approve the acquisition; and

(4) Trust property interests included in the inventory are improperly described.

(b) When an error in the estate inventory is alleged, the OHA deciding official will refer the matter to BIA for resolution in accordance with procedures found at 25 CFR parts 150 (Land Records and Title Documents), 151 (Land Acquisitions), and 152 (Issuance of Patents in Fee, Certificates of Competency, Removal of Restrictions, and Sale of Certain Indian Lands), together with the appeal procedures found at 25 CFR part 2 (Appeals from Administrative Actions).

(1) If a final determination resolving the inventory challenge is made before a final decision is issued in the probate proceeding, the probate decision will reflect the inventory determination.

(2) If a final determination resolving the inventory challenge is not made before a final decision is issued in the probate proceeding, the final probate

decision will include a reference to the pending inventory challenge and note that the probate decision is subject to administrative modification once the inventory dispute has been resolved.

**Subpart D—Recusal of a Judge or ADM**

**§ 30.130 When must a judge or attorney decision maker (ADM) recuse himself or herself from a probate case?**

A judge or attorney decision maker (ADM) must recuse himself or herself from a probate case in which the judge or ADM determines:

(a) That the judge or ADM has a conflict of interest; or

(b) That the judge's or ADM's impartiality may reasonably be questioned under recognized canons of judicial ethics.

**§ 30.131 Where may a judge or ADM seek guidance on recusal?**

A judge or ADM may consult and seek guidance for the determinations listed in § 30.130 from:

(a) The code of judicial conduct for any State in which the judge or ADM is a member of the bar; or

(b) The code of judicial conduct for the Federal courts.

**§ 30.132 May an interested party to a probate proceeding excuse a judge or ADM from hearing a case?**

No. No party to a probate proceeding may excuse a judge or ADM from hearing a case.

**§ 30.133 May an interested party to a probate proceeding request that a judge or ADM recuse himself or herself?**

Yes. If you are an interested party to a probate proceeding, you may request that a judge or ADM recuse himself or herself by filing a written motion for recusal.

(a) The motion for consideration of recusal must state, by affidavit or verified motion, the facts and circumstances that you ask the judge or ADM to consider.

(b) You must file a motion for recusal before the judge or ADM files the decision and order in a probate proceeding.

(c) A motion for recusal may not delay proceedings unless you also request, and the judge or ADM grants, an extension of time for the hearing of the motion.

**§ 30.134 What must the judge or ADM consider when deciding whether to recuse himself or herself?**

The grounds for which a judge or ADM must consider recusal include, without limitation:

(a) Personal bias or prejudice concerning an interested party or an interested party's attorney;

(b) Personal knowledge of disputed evidentiary facts obtained before the filing of the probate case or obtained ex parte during the pendency of the probate proceeding;

(c) Prior service as an attorney concerning a matter or for an interested party in the current probate proceeding;

(d) Service as a witness, conservator, guardian, or guardian ad litem in a case involving an interested party; and

(e) Economic interest in the outcome of the case by the judge or ADM, the spouse of the judge or ADM, or a person within the third degree of relationship to the judge or ADM or the judge's or ADM's spouse.

**§ 30.135 What action will the judge or ADM take after deciding to recuse himself or herself?**

If the judge or ADM decides to recuse himself or herself, the judge or ADM must immediately file a certificate of recusal in the file of the affected case and notify the Chief ALJ, all interested parties, any counsel in the case, and the affected BIA agencies. The judge or ADM is not required to state the reason for recusal.

**§ 30.136 How will the case proceed after the judge or ADM's recusal?**

Within 30 days of the filing of the certificate of recusal, the Chief ALJ will appoint another judge or ADM to hear the case, and will notify the parties identified in § 30.135 of the appointment.

**§ 30.137 Can I appeal the judge's or ADM's recusal decision?**

If you have filed a motion seeking recusal of a judge or ADM under § 30.133 and the judge or ADM denies the motion, you may seek immediate review of the denial by filing a request with the Chief ALJ under § 4.27(c)(3) of this subtitle.

**Subpart E—Claims**

**§ 30.140 When may I file a claim against the probate estate?**

(a) A claim by a person or entity as a creditor against the estate of an Indian may be filed with BIA before BIA transfers the probate file to OHA.

(b) Claims by a creditor also may be filed through OHA with the judge assigned to the case.

(1) Claims filed by a creditor through OHA must be filed before the conclusion of the first hearing.

(2) Claims that are not filed by the conclusion of the first hearing will be barred forever.

**§ 30.141 How must I file a creditor claim against the probate estate?**

(a) A creditor must submit an affidavit under oath setting forth the debt alleged and an itemized statement of the debt, including copies of any documents necessary to prove the indebtedness, such as signed contracts, signed notes, mortgages, account records, billing records, and journal entries.

(b) The creditor's affidavit also must state whether:

(1) Parties other than the decedent are responsible for any portion of the debt alleged;

(2) Any known or claimed offsets to the alleged debt exist; and

(3) The creditor or anyone on behalf of the creditor has filed a claim or sought reimbursement against the decedent's non-trust or restricted property in any other judicial or quasi-judicial proceeding.

(c) The itemized statement must include:

(1) The date and amount of the original debt;

(2) The dates, amounts, and identity of the payor for any payments made;

(3) The dates, amounts, product or service, and identity of any person making charges on the account;

(4) The balance remaining on the debt on the date of the decedent's death; and

(5) Any notification by the decedent that the amount claimed was disputed by the decedent.

**§ 30.142 Will a judge authorize payment of a claim from the trust estate where the decedent's non-trust estate may be available?**

No claim will be paid from trust or restricted property if the judge determines that the decedent's non-trust estate may be available to pay the claim.

**§ 30.143 Are there any categories of claims that may not be allowed?**

(a) Claims for care may not be allowed except upon clear and convincing evidence that the care was given on a promise of compensation and that compensation was expected.

(b) A claim cannot be allowed if it is:

(1) Based on a written or oral contract, express or implied; and

(2) The claim has existed for such a period as to be barred by the applicable tribal or state laws at date of decedent's death.

(c) Claims sounding in tort not reduced to judgment in a court of competent jurisdiction, and other unliquidated claims not properly within the jurisdiction of OHA, are barred.

(d) Claims of a State or any of its political subdivisions, are barred if they relate to:

(1) Payments for general assistance, welfare or similar assistance;

(2) Social security; or

(3) Claims for old-age assistance.

**§ 30.144 May the judge authorize payment of the costs of administering the estate?**

Upon motion of the superintendent or an interested party, the judge may authorize payment of the costs of administering the estate as they arise and before the allowance of any claims against the estate.

**§ 30.145 When can a judge reduce or disallow a claim?**

The judge has discretion to decide that part or all of an otherwise valid claim is unreasonable, reduce the claim to a reasonable amount, or disallow the claim in its entirety. If a claim is reduced, the judge will order payment only of the reduced amount.

**§ 30.146 What property is subject to claims?**

(a) Except as prohibited by law, all trust personalty of a decedent on hand or accrued at time of death, including bonds, unpaid judgments, and accounts receivable, may be used for the payment of claims, whether the right, title, or interest that is taken by an heir or devisee remains in trust or passes out of trust.

(b) Trust personalty that accrues after the date of the decedent's death from trust or restricted property is not available for payment of claims against the estate.

**§ 30.147 What happens if there is not enough trust personalty to pay all the claims?**

If, at the date of death, there is not enough trust personalty to pay all claims, the claims may be ordered paid on a pro rata basis or disallowed in their entirety. The unpaid balance of any claims will not be enforceable against the estate after the estate is closed.

**§ 30.148 Will interest or penalties charged against claims after the date of death be paid?**

Interest or penalties charged after the date of death will not be paid.

**Subpart F—Consolidation and Settlement Agreements**

**§ 30.150 If the interested parties agree to settle matters among themselves, what does a judge do?**

(a) A judge may approve a settlement agreement among interested parties resolving any issue in the probate proceeding if the judge finds that:

(1) All parties to the agreement are advised as to all material facts;

(2) All parties to the agreement understand the effect of the agreement on their rights; and

(3) It is in the best interest of the parties to settle.

(b) In considering the proposed settlement agreement, the judge may consider evidence of the respective values of specific items of property and all encumbrances.

(c) If the judge approves the settlement agreement under paragraph (a) of this section, the judge will issue an order approving the settlement agreement and distributing the estate in accordance with the agreement.

**§ 30.151 May the devisees or eligible heirs in a probate proceeding consolidate their interests?**

The devisees or eligible heirs may consolidate interests under 25 U.S.C. 2206(e) in trust property already owned by the heirs and under 25 U.S.C. 2206(j)(9) in property from the inventory of the decedent's estate. This does not include interests in Alaska.

(a) A judge may approve a written agreement among devisees or eligible heirs in a probate case to consolidate the interests of a decedent's devisees or eligible heirs.

(1) To accomplish consolidation, the agreement may include conveyances among decedent's devisees or eligible heirs of:

(i) Interests in trust or restricted land in the decedent's trust inventory; and

(ii) Interests of the devisees or eligible heirs in trust or restricted land which are not part of the decedent's trust inventory.

(2) The parties must offer evidence sufficient to satisfy the judge of the percentage of ownership held and offered by a party. They may offer evidence of the value of each interest in trust or restricted land included in the agreement if the interest is not part of the decedent's estate.

(3) If the decedent's devisees or eligible heirs enter into an agreement, the parties to the agreement are not required to comply with the rules and requirements of the Secretary otherwise applicable to conveyances by deed.

(b) If the judge approves an agreement, the judge will issue an order distributing the estate in accordance with the agreement.

(c) In order to approve an agreement, the judge must find that:

(1) The agreement to consolidate is voluntary;

(2) All parties to the agreement know the material facts;

(3) All parties to the agreement understand the effect of the agreement on their rights; and

(4) The agreement accomplishes consolidation.

(d) An interest included in an approved agreement may not be purchased at probate without consent of the owner of the consolidated interest.

**§ 30.152 May the parties to a settlement agreement or consolidation agreement waive valuation of trust property?**

The parties to a settlement agreement or to a consolidation agreement may waive valuation of trust property otherwise specified by regulation or the Secretary's rules and requirements. If the parties waive valuation, the waiver must be included in the written agreement.

**§ 30.153 Is an order approving a consolidation agreement or settlement agreement considered a partition or sale transaction?**

An order issued by a judge approving a consolidation or settlement agreement will not be interpreted as a partition or sale transaction within the provisions of 25 CFR part 152.

**Subpart G—Purchase at Probate**

**§ 30.160 What can be purchased at probate?**

An eligible purchaser may purchase, during the probate of a trust or restricted estate, all or part of the estate of a person who died after June 20, 2006.

(a) Any interest in trust or restricted property, including a life estate that is part of the estate, may be purchased at probate with the following exceptions:

(1) If an interest is included in an approved consolidation agreement, that interest may not be purchased at probate without consent of the owner; and

(2) An interest that a devisee will receive under a valid will cannot be purchased without the consent of the devisee.

(b) A purchase option must be exercised before an order is entered and be included as part of the order in the estate.

**§ 30.161 Who can purchase at probate?**

An eligible purchaser is:

(a) Any devisee or eligible heir who is taking an interest in the same parcel of land in the probate proceeding;

(b) Any person who owns an undivided trust or restricted interest in the same parcel of land;

(c) The Indian tribe with jurisdiction over the parcel containing the interest; or

(d) The Secretary on behalf of the tribe.

**§ 30.162 Does property purchased at probate remain in trust or restricted status?**

The property interests purchased at probate must remain in trust or restricted status.

**§ 30.163 Is consent required for a purchase at probate?**

(a) The heir's consent is not required if:

(1) The interest the heir will receive in the parcel, subject to the probate proceeding, is less than 5 percent of the entire undivided ownership interest in the parcel; and

(2) The heir was not residing on the parcel on the date of the decedent's death.

(b) The heir's consent is required if:

(1) The interest the heir will receive in the parcel, subject to the probate proceeding, is 5 percent or more of the entire undivided ownership interest in the parcel; or

(2) The interest the heir will receive is less than 5 percent of the entire undivided ownership interest in the parcel and the heir was residing on the parcel on the date of the decedent's death.

**§ 30.164 What must I do to purchase at probate?**

Any eligible purchaser must submit a written request to OHA to purchase at probate before the decision and order issues.

**§ 30.165 Who will OHA notify of a request to purchase at probate?**

OHA will provide notice of a request to purchase at probate to:

(a) The heirs or devisees and the Indian tribe with jurisdiction over the interest, by first class mail;

(b) The BIA agency with jurisdiction over the interest, by first class mail;

(c) All parties who have submitted a written request for purchase, by first class mail; and

(d) All other eligible purchasers, by posting written notice in at least five conspicuous places in the vicinity of the place of hearing and one conspicuous place at the agency with jurisdiction over the parcel.

**§ 30.166 What will the notice of the request to purchase at probate include?**

The notice posted by OHA will include:

(a) The manner of sale;

(b) The date, time, and place of the sale;

(c) A description of the interest to be sold; and

(d) The appraised market value of the parcel obtained from BIA with the probate file containing the interest to be sold and an estimate of the market value allocated to the interest being sold.

**§ 30.167 How does OHA decide whether to grant a request to purchase at probate?**

OHA will sell the interest to the eligible purchaser submitting the highest bid at not less than the market value of the interest.

**§ 30.168 What will the judge consider in determining the market value of an interest?**

(a) An appraisal of the market value of the interest to be sold at probate must be based upon an appraisal which gives appropriate consideration to the fractionated ownership interest in the parcel. The appraisal must meet the standards in the Uniform Standards for Professional Appraisal Practice (USPAP).

(b) The judge will use the appraised market value of the interest being sold and determine the allocation of proceeds of sale among the heirs based upon the fractional ownership interests in the parcel.

(c) In allocating the proceeds of the sale of an interest subject to a life estate, the allocation among the holder of the life estate and the holders of any remainder interests, the judge must use the ratios in 25 CFR part 179.

(d) The judge will order the distribution of the sale proceeds in accordance with the determination made in paragraph (b) of this section.

**§ 30.169 If I do not agree with the appraised market value, what can I do?**

(a) If you are a potential purchaser or the heir whose interest is to be sold and you disagree with the appraised market value, you may:

(1) File a written objection with OHA within 30 days from the mailing of notice provided under § 30.167, stating the reasons for the objection; and

(2) Within 15 days after filing a written objection, submit any supporting documentation showing why the market value should be modified.

(b) The judge will consider any objections, make a determination of the market value and whether to approve the purchase under § 30.169, and notify all interested parties.

**§ 30.170 What may I do if I disagree with the judge's determination to approve a purchase at probate?**

(a) If you are an interested party adversely affected by the judge's determination under § 30.171(b), you may file a written objection with the judge within 15 days after the mailing of the determination under § 30.171(b).

(1) The written objection must state the reasons for the objection and request interlocutory appeal of the determination to the Board.

(2) You must furnish a copy of the written objection to the other interested

parties and the agencies, stating that you have done so in your written objection.

(b) If the objection is timely filed, the judge must forward a certified copy of the complete record in the case to the Board for review of the determination. The judge will not issue the decision in the probate case until the Board has issued its decision on interlocutory review of the determination.

(c) If the objection is not timely filed, the judge will issue an order denying the request for review as untimely and will furnish copies of the order to the interested parties and the agencies. If you disagree with the decision of the judge as to whether your objection was timely filed, you may file a petition for rehearing under § 30.238 after the judge issues a decision under § 30.236.

**§ 30.171 What happens when OHA grants a request to purchase at probate?**

When OHA grants a request to purchase at probate, it will:

(a) Notify the successful bidder by first class mail; and

(b) Notify OST, the agency that prepared the probate file, and the agency having jurisdiction over the interest sold, including the following information:

- (1) The estate involved;
- (2) The parcel and interest sold;
- (3) The identity of the successful bidder; and

(4) The amount of the bid.

**§ 30.172 When must the successful bidder pay for the interest purchased?**

The successful bidder must pay to OST, by cashier's check or money order via the lockbox, or electronic funds transfer, the full amount of the purchase price within 30 days from the mailing of the notice of successful bid.

**§ 30.173 What happens after the successful bidder submits payment?**

(a) When OST receives payment, it will notify OHA, and the judge enters an order approving the sale and directing the LTRO to record the transfer of title to the interest of the successful bidder. The order will state the date of the title transfer, which is the date payment is received.

(b) OST will:

- (1) Deposit the payment in the decedent's estate account; and
- (2) Distribute the money from the sale to the heir, devisee, or spouse whose interest was sold, in accordance with each respective interest.

**§ 30.174 What happens if the successful bidder does not pay within 30 days?**

(a) If the successful bidder fails to pay the full amount of the bid, the sale will be canceled and the interest in the trust or restricted property will be distributed as determined by the judge.

(b) The time for payment may not be extended.

(c) Any partial payment received from the successful bidder will be returned.

**Subpart H—Renunciation of Interest****§ 30.180 May I give up an inherited interest in trust or restricted property or trust personalty?**

If you are 18 years old and not under a legal disability, you may renounce an inherited interest in trust or restricted property, including a life estate, or in trust personalty.

**§ 30.181 How do I renounce an inherited interest?**

You can renounce an inherited interest in trust personalty or restricted property, including an inherited life estate. To do this, you must file with the judge, before the filing of the final order in the probate case, a signed and acknowledged declaration specifying the interest renounced

(a) You may retain a life estate in specific interests in trust or restricted land and renounce the remainder interests by filing the written declaration with the judge.

(b) If you renounce an interest in trust or restricted land under 25 U.S.C. 2206, you may either:

- (1) Designate an eligible person or entity meeting the requirements of § 30.184 as the recipient; or
- (2) Renounce without making a designation.

(c) If you choose to renounce your interests in favor of a designated recipient, the judge must notify the designated recipient.

**§ 30.182 Who may receive a renounced interest in trust or restricted land?**

If the interest renounced is an interest in land, a person may renounce only in favor of:

- (a) An eligible heir of the testator;
- (b) A person eligible to be a devisee of the interest, if the renouncing person is a devisee of the interest under a valid will, and is:
  - (1) A lineal descendant of the testator;
  - (2) A person who owns a preexisting undivided trust or restricted interest in the same parcel;
  - (3) Any Indian; or
  - (4) The tribe with jurisdiction over the interest.

**§ 30.183 Who may receive a renounced interest of less than 5 percent in trust or restricted land?**

An interest in trust or restricted land that is not disposed of by a valid will and that represents less than 5 percent of the entire undivided ownership of a

parcel of land may be renounced in favor of a single heir. The single heir may renounce only in favor of the Indian tribe with jurisdiction over the interest or one person who is:

- (a) Another eligible heir;
- (b) An Indian related to the heir by blood; or
- (c) A co-owner of another trust or restricted interest in the same parcel.

**§ 30.184 Who may receive a renounced interest in trust personality?**

If the interest renounced is an interest in trust personality, a person may renounce in favor of any person or entity.

(a) The Secretary will maintain and continue to manage trust personality transferred by renunciation to a following person or entity:

- (1) A lineal descendant of the testator;
- (2) A person who owns a preexisting undivided trust or restricted interest in the same parcel of land;
- (3) The tribe with jurisdiction over the interest in land; or
- (4) Any Indian.

(b) The Secretary will directly disburse and distribute trust personality transferred by renunciation to a person or entity who is not eligible under § 30.185.

**§ 30.185 Can my designated recipient refuse to accept the interest?**

Yes. The recipient may refuse to accept the interest. The refusal must be made in writing and filed before the judge. If the designated recipient of the renounced interest refuses to accept that interest, then the renounced interest passes to the heirs of the decedent as if the person renouncing the interest had predeceased the decedent.

**§ 30.186 Are renunciations that predate the American Indian Probate Reform Act of 2004 valid?**

Any renunciation filed and implemented in a probate order issued before the effective date of the American Indian Probate Reform Act of 2004 is ratified.

**§ 30.187 May I revoke my renunciation?**

No. A written renunciation is irrevocable after the judge accepts the renunciation and enters the final order in the probate proceeding.

**§ 30.188 Does a renounced interest vest in the person who renounced it?**

No. An interest in trust or restricted property renounced under § 30.181 is not considered to have vested in the renouncing heir or devisee, and the renunciation is not considered a transfer by gift of the property renounced to the renouncing person.

(a) If the renunciation directs the interest to an eligible person or entity, the interest passes directly to that person or entity;

(b) If the renunciation does not direct the interest to an eligible person or entity, the renounced interest passes to the heirs of the decedent as if the person renouncing the interest had predeceased the decedent.

**Subpart I—Summary Probate Proceedings**

**§ 30.200 What is a summary probate proceeding?**

(a) A summary probate proceeding is the consideration of a probate case without a formal hearing on the basis of the probate file received from BIA. A summary probate proceeding may be conducted by a judge, an ADM, or a master, as determined by the supervising judge.

(b) A decedent's estate may be processed summarily if the estate involves only cash and the total value of the estate does not exceed \$5,000 on the date of death.

**§ 30.201 What does a notice of a summary probate proceeding contain?**

The notice of summary probate proceeding will contain the following:

(a) Notice of the right of any interested party to request treatment of the probate case as a formal probate proceeding;

(b) A copy of the OHA-7, a statement of the IIM account balance, and a copy of the death certificate, except to a creditor who is not an eligible heir;

(c) A notice that the only claim of a creditor that will be considered is that of a person defined as an eligible heir under these regulations, or of any person or entity who filed as a creditor with the BIA before the transfer of the probate file to OHA, with a copy of the claim;

(d) A notice that an interested party may renounce or disclaim an interest, in writing, either generally or in favor of a designated person or entity; and

(e) Any other information determined to be relevant by OHA.

**§ 30.202 May I request that a summary probate proceeding be replaced by a formal probate proceeding?**

Yes. Interested parties who are devisees or eligible heirs have 30 days from the mailing of the notice to file a written request for a formal probate hearing, to file a claim as a creditor, or to renounce or disclaim an interest in the estate.

**§ 30.203 What must a summary probate decision contain?**

The written decision in a summary probate proceeding must be in the form of findings of fact and conclusions of law, with a proposed decision and order of distribution.

(a) The decision must contain all of the following elements:

- (1) One of the following:
  - (i) If the decedent left legal heirs or devisees, the names of each heir or devisee with the identifying numbers assigned by BIA, their birth dates, relationships to the decedent, the distribution of shares of each heir or devisee, and the names of the recipients of renounced or disclaimed interests; or
  - (ii) If the decedent did not leave legal heirs or devisees, a statement to that effect;

- (2) Citations to the law of descent and distribution in accordance with which the decision is made;

- (3) A statement allowing or disallowing claims against the estate in accordance with this part, and an order directing the amount of payment of all approved claims;

- (4) A statement approving or disapproving any renunciation;

- (5) A statement of whether the heirs or devisees are Indian, non-Indian, or eligible to hold property in trust status;

- (6) A statement advising all interested parties of their right to seek de novo review in accordance with this part, and that, if they fail to do so, the decision will become final 30 days after the mailing of the written decision; and

- (7) In a testate case only, a statement that:

- (i) Approves or disapproves a will;

- (ii) Interprets provisions of the approved will; and

- (iii) Describe the share each devisee is to receive, subject to any encumbrances.

(b) When the judge or ADM issues a decision, the judge must issue a notice of the decision to all parties who have or claim any interest in the estate, and mail or deliver a copy of the notice, together with a copy of the decision, to each affected agency and to each interested party.

**§ 30.204 How do I seek review of a summary probate proceeding?**

(a) If you are an interested party who is adversely affected by the written decision in a summary probate proceeding, you may seek de novo review of the case by filing a request with the OHA office that issued the decision.

(b) The request for de novo review must be in writing and signed, and must contain the following information:

- (1) The name of the decedent;

(2) A description of the requestor's relationship to the decedent;

(3) An explanation of what errors the requestor alleges were made; and

(4) An explanation of how the requestor is adversely affected by the decision.

(c) You must send or deliver the request to OHA within 30 days after the date the decision is mailed.

**§ 30.205 What happens after I file a request for de novo review?**

(a) Within 10 days of receiving a request for de novo review, OHA will notify the agency that prepared the probate file, all other affected agencies, and all interested parties of the de novo review, and assign the case to a judge.

(b) The judge will review the merits of the case, conduct a hearing as necessary or appropriate under the regulations in this part, and issue a new decision in accordance with this part.

**§ 30.206 What happens if nobody files for de novo review?**

If no interested party requests de novo review within 30 days of the date of the written order, OHA will send:

(a) The final order confirming the written decision to all interested parties with notice of the right to file a petition for rehearing under this part;

(b) The complete original record and the final order to the agency that prepared the probate file; and

(c) A copy of any relevant portions of the record to any other affected agency.

**Subpart J—Formal Probate Proceedings**

**Notice**

**§ 30.210 How will I receive notice of the formal probate proceeding?**

OHA will provide notice of the formal probate proceeding by mail and by posting. A posted and published notice may contain notices for more than one hearing, and need only specify the names of the decedents, the captions of the cases and the dates, times, places and purposes of the hearings.

(a) OHA will send the notice to potential heirs and devisees named in the probate file and other interested parties identified by OHA in the case. The notice must:

(1) Be sent by first class mail during the pendency of the probate proceeding to potential heirs and devisees and other interested parties identified by OHA in the case;

(2) Be sent and posted at least 20 calendar days before the date of hearing, not counting the hearing date; and

(3) Include a certificate of mailing with the date of mailing, signed by the person mailing the notice.

(b) A presumption of actual notice exists with respect to any person to whom OHA sent a notice under paragraph (a) of this section, unless the notice is returned by the postal service unclaimed by the addressee.

(c) OHA must post the notice in each of the following locations:

(1) Five or more conspicuous places in the vicinity of the designated place of hearing;

(2) Each agency office with jurisdiction over each parcel of trust or restricted property in the estate; and

(3) Any other places and on other reservations that the judge deems appropriate.

**§ 30.211 Will the notice be published in a newspaper?**

The judge may cause a notice of hearing to be published in a newspaper of general circulation in the vicinity of the designated place of hearing not fewer than 20 calendar days before the hearing. The cost of publication may be paid from the assets of the estate under § 30.144.

**§ 30.212 Can I waive notice of the hearing, the time limits, or form of notice?**

(a) An interested party may waive notice of hearing, the time limits, and the form of notice by:

(1) Appearing at the hearing and participating in the hearing without objection; or

(2) Filing a written waiver with the judge before the hearing.

(b) The requirements for notice by posting may not be waived.

**§ 30.213 What notice to a tribe is required in a formal probate proceeding?**

In probate cases in which the decedent died on or after June 20, 2006:

(a) The judge must notify any tribe with jurisdiction over the trust or restricted land in the estate of the pendency of a proceeding; and

(b) The certificate of mailing of a notice of probate hearing to the tribe at its record address will be conclusive evidence that the tribe had notice of the decedent's death, of the probate proceedings, and of the right to purchase.

**§ 30.214 What must a notice of hearing contain?**

The notice of hearing must:

(a) State the name of the decedent and caption of the case;

(b) Specify the date, time, and place that the judge will hold a hearing to determine the heirs of the decedent and, if a will is offered for probate, to determine the validity of the will;

(c) Name all potential heirs of the decedent known to OHA, and, if a will

is offered for probate, the devisees under the will, the drafter of the will, and the attesting witnesses to the will;

(d) Cite this part as the authority and jurisdiction for holding the hearing;

(e) Inform all persons who claim to have an interest in the estate of the decedent, including persons having claims against the estate, to be present at the hearing on penalty of losing the right to present evidence at the hearing;

(f) Include notice of the opportunity to consolidate interests at the probate hearing, including that the heirs may propose additional interests for consolidation, and include notice of the opportunity for renunciation either generally or in favor of a designated recipient;

(g) In estates for decedents whose date of death is on or after June 20, 2006, include notice of the possibilities of purchase and sale of trust or restricted property by heirs, co-owners, a tribe, or the Secretary; and

(h) State that the hearing may be continued to another time and place.

**Depositions, Discovery, and Prehearing Conference**

**§ 30.215 How can I obtain documentation related to the probate proceeding?**

(a) An interested party may make a written demand to produce documents for inspection and copying or photographing. This demand:

(1) May be made at any stage of the proceeding before the conclusion of the hearing;

(2) May be made upon any other party to the proceeding or upon a custodian of records concerning interested parties or their trust property;

(3) Must be made in writing, and a copy must be filed with the judge; and

(4) May demand copies of any documents, photographs, or other tangible things that are relevant to the issues, not privileged, and in another party's or custodian's possession, custody, or control.

(b) Custodians of official records will furnish and reproduce documents, or permit their reproduction, in accordance with the rules governing the custody and control of the records.

(c) Documentation may be made available to a member of the public, subject to any law to the contrary, who is not an interested party upon payment of the cost of producing the documents, as determined reasonable by the custodians of the records.

**§ 30.216 How does an interested party obtain permission to take depositions?**

(a) Depositions may be taken upon stipulation of the parties or by order of the judge.

(b) When an interested party files a written application, the judge may order the taking of the sworn testimony of any person by deposition upon oral examination for the purpose of discovery or for use as evidence at a hearing. The application must set forth:

(1) The name and address of the proposed witness;

(2) The reasons why the deposition should be taken;

(3) The name and address of the person, qualified under § 30.217(a) to take depositions; and

(4) The proposed time and place of the examination, which must be at least 20 days after the date of the filing of the application.

(c) The judge may order the taking of a deposition. The order must be served upon all interested parties and must state:

(1) The name of the witness;

(2) The time and place of the examination, which must be at least 15 days after the date of the order; and

(3) The name and address of the officer before whom the examination is to be made.

(d) The officer and the time and place in paragraphs (c)(2) and (c)(3) of this section need not be the same as those requested in the application under paragraph (b) of this section.

#### **§ 30.217 How is a deposition taken?**

(a) The witness must appear before the judge or before an officer authorized to administer oaths by the law of the United States or by the law of the place of the examination.

(b) The witness must be examined under oath or affirmation and subject to cross-examination. The witness's testimony must be recorded by the officer or someone in the officer's presence.

(c) When the testimony is fully transcribed, it must be submitted to the witness for examination and must be read to or by him or her, unless examination and reading are waived.

(1) Any changes in form or substance that the witness desires to make must be entered upon the transcript by the officer, with a statement of the reasons given by the witness for making them.

(2) The transcript must then be signed by the witness, unless the interested parties by stipulation waive the signing, or the witness is unavailable or refuses to sign.

(3) If the transcript is not signed by the witness, the officer must sign it and state on the record the fact of the waiver, the unavailability of the witness, or the refusal to sign together with the reason given, if any. The transcript may then be used as if it were

signed, unless the judge determines that the reason given for refusal to sign requires rejection of the transcript in whole or in part.

(d) The officer must certify on the transcript that the witness was duly sworn by the officer and that the transcript is a true record of the witness's testimony. The officer must then hand deliver or mail the original and two copies of the transcript to the judge.

#### **§ 30.218 How may the transcript of a deposition be used?**

A transcript of a deposition ordered and taken in accordance with the provisions of this part may be offered by any party or the judge in a hearing if the judge finds that the evidence is otherwise admissible and:

(a) The witness is unavailable; or

(b) The interest of fairness is served by allowing the transcript to be used.

#### **§ 30.219 Who pays for the costs of taking a deposition?**

The party who requests the taking of a deposition must make arrangements for payment of any costs incurred. The judge may assign the costs in the order.

#### **§ 30.220 How does an interested party obtain written interrogatories and admission of facts and documents?**

(a) An interested party may serve upon any other interested party written interrogatories and requests for admission of facts and documents. The interested party may do this only if:

(1) The interrogatories and requests are served in sufficient time to permit answers to be filed before the hearing, or as otherwise ordered by the judge; and

(2) Copies of the interrogatories and requests are filed with the judge.

(b) A party receiving interrogatories or requests served under paragraph (a) of this section must:

(1) Serve answers upon the requesting party within 30 days from the date of service of the interrogatories or requests, or within another deadline agreed upon by the parties or prescribed by the judge; and

(2) File a copy of the answers with the judge.

#### **§ 30.221 May the judge limit the time, place, and scope of discovery?**

Yes. The judge may limit the time, place, and scope of discovery:

(a) Upon timely motion by any interested party, if that party also gives proper notice to all interested parties and shows good cause; or

(b) When the judge determines that limits are necessary to prevent delay of the proceeding or prevent undue hardship to a party or witness.

#### **§ 30.222 What happens if a party fails to comply with discovery?**

(a) If a party fails without good cause to comply with discovery under this part or any order issued, the judge may:

(1) Draw inferences with respect to the discovery request adverse to the claims of the party who has failed to comply with discovery or the order, or

(2) Make any other ruling as the judge determines just and proper.

(b) Failure to comply with discovery includes failure to:

(1) Comply with a request for the production of a document;

(2) Appear for examination;

(3) Respond to interrogatories or requests for admissions; or

(4) Comply with an order of the judge.

#### **§ 30.223 What is a prehearing conference?**

Before a hearing, the judge may order the parties to appear for a conference to:

(a) Simplify or clarify the issues;

(b) Obtain stipulations, admissions, agreements on documents, understandings on matters already of record, or similar agreements that will avoid unnecessary proof;

(c) Limit the number of expert or other witnesses to avoid excessively cumulative evidence;

(d) Facilitate agreements disposing of all or any of the issues in dispute; or

(e) Resolve such other matters as may simplify and shorten the hearing.

#### **Hearings**

#### **§ 30.224 Can a judge compel a witness to appear and testify at a hearing?**

(a) The judge can issue a subpoena for a witness to appear and testify at a hearing and to bring documents or other material to the hearing.

(1) An interested party may request that the judge issue a subpoena for the appearance of a witness to testify. The request must state the name, address, and telephone number or other means of contacting the witness, and the reason for the request. The request must be timely. The requesting party must mail the request to all other interested parties and to the witness at the time of filing.

(2) The request must specify the documents or other material sought for production under the subpoena.

(3) The judge will grant or deny the motion or request in writing and mail copies of the order to all the interested parties.

(4) A person subpoenaed may seek to avoid a subpoena by filing a motion to quash with the judge and sending copies to the interested parties.

(b) Anyone whose legal residence is more than 100 miles from the hearing location may ask the judge to excuse his or her attendance under subpoena.

(1) If the judge denies the request, the judge may assign costs for the transportation of the witness to the place of hearing or deposition.

(2) The judge will inform the interested parties of the request and the decision in writing in a timely manner.

(c) A judge may assign the costs of requiring a non-party to appear at a hearing or a deposition.

(d) If a subpoenaed person fails or refuses to appear at a hearing or to testify, the judge may file a petition in United States District Court for issuance of an order requiring the subpoenaed person to appear and testify.

(e) The judge may seek by petition to the appropriate United States District Court the invocation of powers of contempt when necessary and appropriate to ensure due process and orderly prosecution of probate cases under the law.

**§ 30.225 Are probate hearings open to the public?**

The probate hearings conducted under this part are open to public attendance.

(a) In the exercise of discretion, the judge may close the hearing for the testimony of a party or other witness and exclude all persons but the interested parties.

(b) Except as the judge finds necessary to comply with due process or for other good cause shown, and subject to transfer to the IBIA on appeal, the judge may seal the record or transcript of testimony taken during a closed hearing.

**§ 30.226 Must testimony in a probate proceeding be under oath or affirmation?**

Yes. Testimony in a probate proceeding must be under oath or affirmation.

**§ 30.227 Is a record made of formal probate hearings?**

(a) The judge must make a verbatim recording of all formal probate hearings. The judge will order the transcription of recordings of hearings as the judge determines necessary.

(b) If the judge orders the transcription of a hearing, the judge will make the transcript available to interested parties.

**§ 30.228 What evidence is admissible at a probate hearing?**

(a) A judge conducting probate proceedings under this part may admit any written, oral, documentary, or demonstrative evidence that is:

(1) Relevant, reliable, and probate; and

(2) Not privileged under Federal law, or unduly repetitious or cumulative.

(b) The judge may exclude evidence if its probative value is substantially

outweighed by the risk of undue confusion of the issues or delay.

(c) Hearsay evidence is admissible. The judge may consider the fact that evidence is hearsay when determining its probative value.

(d) A judge may admit a copy of a document into evidence or may require the admission of the original document. After examining the original document, the judge may substitute a copy of the original document and return the original.

(e) The Federal Rules of Evidence do not directly apply to the hearing, but may be used as guidance by the judge and the parties in interpreting and applying the provisions of this section.

(f) The judge may take official notice of any public record of the Department and of any matter of which federal courts may take judicial notice.

(g) The judge determines the weight given to any evidence admitted.

(h) Any party objecting to the admission or exclusion of evidence shall concisely state the grounds. A ruling on every objection must appear in the record.

(i) There is no privilege under this part as to any communication between a decedent and any attorney advising the decedent as to any matter relevant to an issue between parties, all of whom claim through that decedent.

**§ 30.229 Is testimony required for self-proved wills, codicils, or revocations?**

The judge may approve a self-proved will, codicil, or revocation, if uncontested, and order distribution with or without the testimony of any attesting witness.

**§ 30.230 What if approval of the self-proved will, codicil, or revocation is contested?**

(a) If the approval of a will, codicil, or revocation is contested, the attesting witnesses who are in the reasonable vicinity of the place of hearing and who are of sound mind must be produced and examined.

(b) If none of the attesting witnesses resides near the place of hearing at the time appointed for proving the will, the judge may:

(1) Order the deposition of any available attesting witnesses at a location reasonably near the residence of the witness;

(2) Admit the testimony of other witnesses to prove the testamentary capacity of the testator and the execution of the will; and

(3) As evidence of the execution, admit proof of the handwriting of the testator and of the attesting witnesses, or of any of them.

**§ 30.231 Who pays witnesses' costs?**

(a) Interested parties who desire a witness to testify at a hearing must make their own financial and other arrangements for the witness.

(b) The judge may order payment of per diem, mileage, and subsistence at a rate not to exceed that allowed to witnesses called in the U.S. District Courts.

(c) In the order for payment, the judge must specify whether such costs are to be allocated and charged against the interest of the party calling the witness or against the estate.

(d) Costs of administration allowed against the estate under paragraphs (b) or (c) of this section will have a priority for payment greater than that for any creditor claims allowed.

**§ 30.232 May a judge schedule a supplemental hearing?**

Yes. A judge may schedule a supplemental hearing if he or she deems it necessary.

**§ 30.233 What will the official record of the probate case contain?**

After the completion of the hearing, the judge will compile the official record. The official record of the probate case will contain:

(a) A copy of the posted public notice of hearing showing the posting certifications;

(b) A copy of each notice served on interested parties with proof of mailing;

(c) The record of the evidence received at the hearing, including any transcript made of the testimony;

(d) Claims filed against the estate;

(e) Any wills, codicils, and revocations;

(f) Inventories and valuations of the estate;

(g) Pleadings and briefs filed;

(h) Special or interim orders;

(i) Copies of all proposed or accepted settlement agreements, consolidation agreements, and renunciations and acceptances of renounced property;

(j) In the case of sale of estate property at probate, copies of notices of sale, appraisals and objections to appraisals, requests for purchases, all bids received, and proof of payment;

(k) The decision, order, and the notices thereof; and

(l) Any other documents or items deemed material by the judge.

**§ 30.234 What will the judge do with the original record?**

(a) The judge must send the original record to the designated LTRO in accordance with 25 CFR part 150.

(b) The judge must send a copy of:

(1) The order to the agency originating the probate, and

(2) The order and inventory to other affected agencies.

**§ 30.235 What happens if a hearing transcript has not been prepared?**

When a hearing transcript has not been prepared, the recording of the hearing must be retained in the office of the judge issuing the decision until the time allowed for rehearing or appeal has expired, and the original record returned to the LTRO must contain a statement indicating that no transcript was prepared.

**Decisions in Formal Proceedings**

**§ 30.236 What will the judge's decision in a formal probate proceeding contain?**

The judge must decide the issues of fact and law involved in any proceedings and issue a written decision.

(a) In all cases, the decision will:

(1) List the names of each heir or devisee with the identifying numbers as assigned by BIA, birth dates, and relationship to the decedent;

(2) Describe the distribution of shares of each of the heirs, in addition to the names of the recipients of renounced or disclaimed interests;

(3) Provide the information necessary to identify the persons and property interests involved in any settlement or consolidation agreement, renunciations of interest, and purchases at probate;

(4) Allow or disallow claims against the estate in accordance with this part, and order the amount of payment for all approved claims;

(5) Approve or disapprove any renunciation, settlement agreement, consolidation agreement, or purchase at probate;

(6) State whether the heirs or devisees are Indian, non-Indian, or eligible to hold property in trust status; and

(7) Include a determination of any rights of dower, curtesy, or homestead that may constitute a burden upon the interest of the heirs.

(b) In a testate case, the decision will also:

(1) Approve or disapprove a will;

(2) Interpret provisions of the approved will; and

(3) Describe the share each devisee is to receive, subject to any encumbrances.

**§ 30.237 What notice of the decision will the judge provide?**

When the judge issues a decision, the judge must issue a notice of the decision to all parties who have or claim any interest in the estate, and mail or deliver a copy of the notice, together with a copy of the decision, to each affected agency and to each interested party. The decision will not become final until the

expiration of the 30 days allowed for the filing of a petition for rehearing by aggrieved parties.

**§ 30.238 May I file a petition for rehearing if I disagree with the judge's decision in the formal probate hearing?**

(a) Any interested party may file with the judge a written petition for rehearing within 30 days after the date on which notice of the decision is mailed.

(b) If the petition is based on newly-discovered evidence, it must:

(1) Be accompanied by affidavits or declarations of witnesses stating fully the content of the new evidence; and

(2) State the reasons for the failure to discover and present that evidence at the hearings held before the issuance of the decision.

(c) A petition for rehearing must state specifically and concisely the grounds on which it is based.

(d) The judge must forward a copy of the petition for rehearing to the affected agencies.

**§ 30.239 Does any distribution of the estate occur while a petition for rehearing is pending?**

The agencies must not initiate payment of claims or distribute any portion of the estate while the petition is pending, unless otherwise directed by the judge.

**§ 30.240 How will the judge address a petition for rehearing?**

(a) If proper grounds are not shown, or if the petition is not timely filed, the judge will issue an order denying the petition for rehearing and setting forth the reasons and furnish copies of the order to the petitioner, the agencies, and the interested parties.

(b) If the petition appears to show merit, the judge must:

(1) Cause copies of the petition and supporting papers to be served on those persons whose interest in the estate might be adversely affected by the granting of the petition;

(2) Allow all persons served a reasonable, specified time in which to submit answers or legal briefs in response to the petition; and

(3) Consider, with or without a hearing, the issues raised in the petition.

(c) The judge may affirm, modify, or vacate the former decision.

(d) Upon entry of a final order, the judge must distribute the order as provided in this part.

**§ 30.241 Can I submit another petition for rehearing?**

No. Successive petitions for rehearing are not permitted. The jurisdiction of the judge terminates upon the issuance of a decision finally disposing of a petition for rehearing, except for:

(a) The issuance of necessary orders nunc pro tunc to correct clerical errors in the decision; and

(b) The reopening of a case under this part.

**§ 30.242 When does the judge's decision on a petition for rehearing become final?**

The decision will become final upon the expiration of the 30 days allowed for the filing of a notice of appeal, as provided in this part.

**§ 30.243 Can a closed probate case be reopened?**

(a) A person claiming an interest in an estate may file a petition for reopening a closed probate case with the OHA office that issued the original decision.

(1) A case may be reopened based upon lack of notice or to prevent manifest injustice only.

(2) All grounds for the reopening must be set forth fully. If based on alleged errors of fact, all such allegations must be under oath and supported by affidavits.

(3) If the petition for reopening is based upon lack of notice of the original proceedings, the petition must be filed within 1 year from the date the petitioner discovered the error.

(b) A judge may reopen a case on the judge's own initiative.

**§ 30.244 How will the judge address my petition for reopening?**

(a) If the judge finds that proper grounds are not shown, the judge will issue an order denying the petition and giving the reasons for the denial. Copies of the judge's decision must be mailed to the petitioner, the agencies, and those persons whose rights would be affected.

(b) If the petition appears to show merit, the judge must cause copies of the petition and all papers filed by the petitioner to be served on those persons whose interest in the estate could be affected by the granting of the petition. These persons may respond to the petition by filing answers, cross-petitions, or briefs. The filings must be made within the time periods set by the judge.

**§ 30.245 What happens if the judge reopens the case?**

Upon reopening, the judge may affirm, modify, or vacate the former decision.

(a) Copies of the judge's decision on reopening must be mailed to the petitioner and to all persons who received copies of the petition.

(b) By order directed to the agency, the judge may suspend further distribution of the estate or income during the reopening proceedings.

(c) The judge must file the record made on a reopening petition with the

designated LTRO and must furnish a duplicate record to the affected agencies.

**§ 30.246 When will the decision on reopening become final?**

The decision on reopening will become final upon the expiration of the 30 days allowed for the filing of a notice of appeal, as provided in this part.

**Subpart K—Miscellaneous Provisions**

**§ 30.250 When does the anti-lapse provision apply?**

(a) The following table illustrates how the anti-lapse provision applies.

If . . .	And . . .	Then . . .
an Indian testator devises trust property to any of his or her grandparents or to the lineal descendant of a grandparent.	the devisee dies before the testator, leaving lineal descendants.	the lineal descendants take the right, title, or interest so given by the will per stirpes

(b) For purposes of this section, relationship by adoption is equivalent to relationship by blood.

**§ 30.251 What happens if an heir or devisee knowingly participates in the willful and unlawful killing of the decedent?**

Any person who knowingly participates, either as a principal or as an accessory before the fact, in the willful and unlawful killing of the decedent, may not take, directly or indirectly, any inheritance or devise under the decedent's will. This person will be treated as if he or she had predeceased the decedent.

**§ 30.252 Can a judge allow fees for attorneys representing interested parties?**

(a) Except for attorneys representing creditors, the judge may allow fees for attorneys representing interested parties.

(1) At the discretion of the judge, these fees may be charged against the interests of the party represented or as a cost of administration.

(2) Petitions for allowance of fees must be filed before the close of the last hearing.

(b) Nothing in this section prevents an attorney from petitioning for additional fees to be considered at the disposition of a petition for rehearing and again after an appeal on the merits. An order allowing attorney fees is subject to a petition for rehearing and to an appeal.

**§ 30.253 How must minors or other legal incompetents be represented?**

Minors and other legal incompetents who are interested parties must be represented at all hearings by legally appointed guardians, or by guardians ad litem appointed by the judge. In appropriate cases, the judge may order the payment of fees to the guardian ad litem from the assets of the estate.

**§ 30.254 What happens when a person dies without a valid will and has no heirs?**

(a) The judge will determine whether a person with trust or restricted

property died intestate and without heirs, and the judge will determine whether 25 U.S.C. 2206(a) applies.

(b) If 25 U.S.C. 2206(a) does not apply, the judge will order the escheat of the property in accordance with:

(1) 25 U.S.C. 373a if the trust or restricted property is not on the public domain; or

(2) 25 U.S.C. 373b if the trust or restricted property is on the public domain.

**Subpart L—Tribal Purchase of Interests Under Special Statutes**

**§ 30.260 What land is subject to a tribal purchase option at probate?**

Sections 30.260 through 30.274 apply to formal proceedings in Indian probate that relate to the tribal purchase of a decedent's interests in the trust and restricted land shown in the following table.

Location of trust or restricted land	Legislation governing purchase
(a) Yakima Reservation or within the area ceded by the Treaty of June 9, 1855 (12 Stat. 1951).	The Act of December 31, 1970 (Pub. L. 91–627; 84 Stat. 1874; 25 U.S.C. 607 (1976)), amending section 7 of the Act of August 9, 1946 (60 Stat. 968).
(b) Warm Springs Reservation or within the area ceded by the Treaty of June 25, 1855 (12 Stat. 37).	The Act of August 10, 1972 (Pub. L. 92–377; 86 Stat. 530).
(c) Nez Perce Indian Reservation or within the area ceded by the Treaty of June 11, 1855 (12 Stat. 957).	The Act of September 29, 1972 (Pub. L. 92–443; 86 Stat. 744).
(d) Devils Lake Sioux Reservation for the Spirit Lake Sioux Tribe .....	The Act of January 12, 1983 (Pub. L. 97–459, Section 108, 96 Stat. 2515).
(e) Standing Rock Sioux Reservation .....	The Act of June 17, 1980 (Pub. L. 96–276, section 4(b), 94 Stat. 537).

**§ 30.261 What determinations with regard to a tribal purchase option will a judge make?**

(a) In the exercise of probate authority, a judge will determine:

(1) The entitlement of a tribe to purchase a decedent's interests in trust or restricted land under the statutes;

(2) The entitlement of a surviving spouse to reserve a life estate in one-half of the surviving spouse's interests that have been purchased by a tribe; and

(3) The fair market value of such interests, as determined by an appraisal,

including the value of any life estate reserved by a surviving spouse.

(b) In making a determination under paragraph (a)(1) of this section, the following issues will be determined by the official tribal roll, which is binding upon the judge:

(1) Enrollment or refusal of the tribe to enroll a specific individual; and  
 (2) Specification of blood quantum, where pertinent.

(c) For good cause shown, the judge may stay the probate proceeding to permit an aggrieved party to pursue an enrollment application, grievance, or

appeal through the established procedures applicable to the tribe.

**§ 30.262 When will BIA furnish a valuation of a decedent's interests?**

In all probates, at the earliest possible stage of the proceeding before issuance of a probate decision, BIA must furnish a valuation of the decedent's interests when the record reveals to the agency:

(a) That the decedent owned interests in land located on one or more of the reservations designated in § 30.260; and

(b) That one or more of the probable heirs or devisees who may receive the interests either:

(1) Is not enrolled in the tribe of the reservation where the land is located; or

(2) Does not have the required blood quantum in the tribe to hold the interests against a claim made by the tribe.

(c) The valuation must be made on the basis of the fair market value of the property, including fixed improvements, as of the date of decedent's death.

(d) If there is a surviving spouse whose interests may be subject to the tribal purchase option, the valuation must include the value of a life estate based on the life of the surviving spouse in one-half of such interests.

(e) BIA must include the valuation report in the probate package submitted to OHA. Interested parties may examine and copy, at their expense, the valuation report at the agency or the office of the judge.

**§ 30.263 When is a final decision issued?**

(a) When a decedent is shown to have owned land interests in any one or more of the reservations designated in § 30.260, the probate proceeding relative to the determination of heirs, approval or disapproval of a will, and the claims of creditors will first be concluded as final for the Department in accordance with this part. This decision is referred to in this section as the "probate decision."

(b) At the formal probate hearing, a finding must be made on the record showing those interests in land, if any, that are subject to the tribal purchase option.

(1) The finding must be included in the probate decision setting forth the apparent rights of the tribe as against affected heirs or devisees and the right of a surviving spouse whose interests are subject to the tribal purchase option to reserve a life estate in one-half of such interests.

(2) If the finding is that there are no interests subject to the tribal purchase option, the decision must so state.

(3) A copy of the probate decision, to which must be attached a copy of the valuation report, must be distributed to all interested parties in accordance with § 30.237.

**§ 30.264 When may a tribe exercise its statutory option to purchase?**

(a) A tribe may purchase all or a part of the available interests specified in the probate decision within 60 days of the probate decision unless a petition for rehearing has been filed under § 30.238 or a demand for hearing has been filed under § 30.268.

(b) If a petition for rehearing or a demand for hearing has been filed, a tribe may purchase all or a part of the available interests specified in the probate decision within 20 days from the date of the decision on rehearing or hearing, whichever is applicable. A tribe may not, however, claim an interest less than the decedent's total interest in any one individual tract.

(c) Upon failure to timely file a notice of purchase, the right to distribution of all unclaimed interests will accrue to the heirs or devisees.

**§ 30.265 How does a tribe exercise its statutory option to purchase?**

To exercise its option to purchase, the tribe must file with the agency a written notice of purchase and resolution or other authorizing document, together with the tribe's certification that copies have been mailed on the same date to the judge and to the affected heirs or devisees.

**§ 30.266 May a surviving spouse reserve a life estate when a tribe exercises its statutory option to purchase?**

Yes. When the heir or devisee whose interests are subject to the tribal purchase option is a surviving spouse, the spouse may reserve a life estate in one-half of the interests.

(a) To reserve a life estate, the spouse must, within 30 days after the tribe has exercised its option to purchase the interest, file with the agency both:

(1) A written notice to reserve a life estate; and

(2) A certification that copies of the notice have been mailed on the same date to the judge and the tribe.

(b) Failure to file the notice on time, as required by paragraph (a)(1) of this section, constitutes a waiver of the option to reserve a life estate.

**§ 30.267 What if I disagree with the probate decision regarding tribal purchase option?**

Any interested party aggrieved by the probate decision may, within 30 days from the date of the probate decision, file with the judge a written petition for rehearing in accordance with this part.

**§ 30.268 May I demand a hearing regarding the tribal purchase option decision?**

Yes. Any interested party aggrieved by the exercise of the tribal purchase option to purchase the interests in question or the valuation of the interests as set forth in the valuation report may file with the judge a written demand for hearing.

(a) The demand for hearing must be filed by whichever of the following deadlines is applicable:

(1) Within 30 days from the date of the probate decision;

(2) Within 30 days from the date of the decision on rehearing; or

(3) Within 20 days from the date the tribe exercises its option to purchase available interests.

(b) The demand for hearing must:

(1) Include a certification that copies of the demand have been mailed on the same date to the agency and to each interested party; and

(2) State specifically and concisely the grounds upon which it is based.

**§ 30.269 What notice of the hearing will the judge provide?**

The judge must, upon receiving a demand for hearing:

(a) Set a time and place for the hearing after expiration of the 30-day period fixed for the filing of the demand for hearing as provided in § 30.268; and

(b) Mail a notice of the hearing to all interested parties not less than 20 days in advance of the hearing.

**§ 30.270 How will the hearing be conducted?**

(a) At the hearing, each party challenging the tribe's claim to purchase the interests in question or the valuation of the interests as set forth in the valuation report will have the burden of proving his or her position.

(b) Upon conclusion of the hearing, the judge will issue a decision that determines all of the issues including, but not limited to:

(1) The fair market value of the interests purchased by the tribe; and

(2) Any adjustment of the fair market value made necessary by the surviving spouse's decision to reserve a life estate in one-half of the interests.

(c) The decision must specify a right of appeal to the Board of Indian Appeals within 30 days from the date of the decision in accordance with §§ 4.320 through 4.326 of this subtitle.

(d) The judge must lodge the complete record relating to the demand for hearing with the LTRO as provided in § 30.234, furnish a duplicate record thereof to the agency, and mail a notice of such action together with a copy of the decision to each interested party.

**§ 30.271 How must the tribe pay for the interests it purchases?**

(a) A tribe must pay the full fair market value of the interests purchased, as set forth in the valuation report or as determined after hearing in accordance with § 30.268, whichever is applicable.

(b) Payment must be made within 2 years from the date of decedent's death or within 1 year from the date of notice of purchase, whichever is later.

**§ 30.272 What are the Superintendent's duties upon payment by the tribe?**

Upon payment by the tribe of the interests purchased, the Superintendent must:

(a) Issue a certificate to the judge that payment has been made; and

(b) File with the certificate all supporting documents required by the judge.

**§ 30.273 What action will the judge take to record title?**

After receiving the certificate and supporting documents, the judge will:

(a) Issue an order that the United States holds title to the interests in trust for the tribe;

(b) File the complete record, including the decision, with the LTRO as provided in § 30.234;

(c) Furnish a duplicate copy of the record to the agency; and

(d) Mail a notice of the action together with a copy of the decision to each interested party.

**§ 30.274 What happens to income from land interests during pendency of the probate?**

During the pendency of the probate and up to the date of transfer of title to

the United States in trust for the tribe in accordance with § 30.273, all income received or accrued from the land interests purchased by the tribe will be credited to the estate and paid to the heirs.

*Cross-reference:* See 25 CFR part 2 for procedures for appeals to Regional Directors and to the Director of the Bureau of Indian Affairs.

Dated: July 26, 2006.

**James E. Cason,**

*Associate Deputy Secretary, Department of the Interior.*

[FR Doc. 06-6622 Filed 8-7-06; 8:45 am]

**BILLING CODE 4310-W7-P**



# Federal Register

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**Tuesday,  
August 8, 2006**

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**Part V**

## **Securities and Exchange Commission**

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**Applications, Hearings, Determinations,  
etc.: Nasdaq Stock Market, Inc. and  
NASDAQ Stock Market LLC; Notices**

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-54240]

### In the Matter of the Application of the Nasdaq Stock Market, Inc. and the NASDAQ Stock Market LLC for Section 12(b) Registration On Behalf of Certain Issuers

July 31, 2006.

#### I. Introduction

On January 13, 2006, the Commission approved the application of the Nasdaq Stock Market, Inc. ("Nasdaq") to register one of its subsidiaries, the NASDAQ Stock Market LLC ("Nasdaq Exchange"), as a national securities exchange.<sup>1</sup> Currently, companies listed on Nasdaq have one or more classes of equity securities registered under Section 12(g)<sup>2</sup> of the Securities Exchange Act of 1934 ("Exchange Act"),<sup>3</sup> registered under Section 12(b) of the Exchange Act<sup>4</sup> for listing on another national securities exchange, or exempt from registration pursuant to Section 12(g)(2)(B) or 12(g)(2)(G) of the Exchange Act<sup>5</sup> or Rule 12g3-2(b) promulgated under the Exchange Act<sup>6</sup> as permitted under NASD Rules 4310 and 4320. Under Section 12(a) of the Exchange Act,<sup>7</sup> brokers and dealers are prohibited from effecting transactions in a security on a national securities exchange unless it has been registered under Section 12(b) of the Exchange Act.

Accordingly, absent relief, Nasdaq's transition to the Nasdaq Exchange would require each of the companies currently listing securities on either the Nasdaq Global Market or Nasdaq Capital Market to individually register their Nasdaq-listed securities under Section 12(b) of the Exchange Act before the Nasdaq Exchange commences operations. This process would require each affected company to file a registration statement with the Commission or other appropriate regulatory agency.<sup>8</sup> The Nasdaq Exchange would then be required to certify to the Commission and other regulators that, with respect to each

registration statement, the company's securities are approved for listing and registration on the Nasdaq Exchange.<sup>9</sup> The registration would become effective 30 days after the Commission's receipt of certification from the Nasdaq Exchange or within such shorter period of time as the Commission may determine.<sup>10</sup>

On behalf of its listed companies, Nasdaq and the Nasdaq Exchange have asked for relief with respect to this registration process, asserting that it would place an unnecessary cost and administrative burden on the listed companies, investors, the agencies that regulate the listed companies, and Nasdaq and the Nasdaq Exchange, and would not be in the public interest. With respect to the vast majority of its listed securities, Nasdaq and the Nasdaq Exchange assert that information that would be elicited by registration has already been required to be publicly disclosed. Since the vast majority of Nasdaq-listed companies already have registered their securities under Section 12 of the Exchange Act<sup>11</sup> or have been required to file detailed public information with the Commission,<sup>12</sup> the resulting duplicative disclosure would not significantly benefit the marketplace or investors.

To ameliorate the cost and administrative burden resulting from the filing of individual Exchange Act registration statements that would otherwise be required, Nasdaq and the Nasdaq Exchange have submitted a letter, dated July 31, 2006, on behalf of certain Nasdaq-listed issuers (the "Issuers") to the Commission requesting that this letter serve as the single application for registration with respect to the listed securities of these Issuers, as well as the Nasdaq Exchange's certification of such application (the

"Nasdaq Application").<sup>13</sup> Nasdaq and the Nasdaq Exchange have made a similar request of the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, and the Office of Thrift Supervision.<sup>14</sup> The Nasdaq Application is provided as an attachment to this Order.

#### II. Statutory Standards

Section 12(a) of the Exchange Act makes it unlawful for an exchange member, broker, or dealer to effect any transaction in any security (other than an exempted security) on a national securities exchange unless a registration is effective with respect to that security on the exchange in accordance with the provisions of Section 12 and the rules and regulations promulgated under Section 12. Exchange Act Section 12(b) and related rules prescribe the form and content of the application that may be used to register a security on a national exchange. However, Section 12(c)<sup>15</sup> permits the Commission to require alternative information in lieu of the informational requirements of Section 12(b) if, in the judgment of the Commission, some or all of the information required under Section 12(b) is "inapplicable to any specified class or classes of issuers" and the substitute information is of comparable character as the Commission may deem applicable to such class of issuers.

Section 12(d) provides that the registration of a security under the Exchange Act becomes effective 30 days after the Commission's receipt of certification from the national securities exchange that the security has been approved for listing and registration on the exchange, or within such shorter period of time as the Commission may determine.

#### III. Discussion of NASD Rule 4130 and Opt-Out Process

To provide notice of its plan to seek the requested relief on behalf of the Issuers and to assure sufficient authority

<sup>13</sup> See Letter from Edward S. Knight to Nancy M. Morris (July 31, 2006). For certain of its listed issuers whose securities are not currently required to be registered under the Exchange Act, Nasdaq and the Nasdaq Exchange have requested additional time for these securities to become registered under Section 12(b). That portion of the request is being addressed in a separate Order by the Commission. See Exchange Act Release No. 34-54241 (July 31, 2006).

<sup>14</sup> We understand these agencies will consider the request for relief with respect to the companies they oversee pursuant to Section 12(i) of the Exchange Act. We further understand that the Comptroller of the Currency does not currently oversee any affected company pursuant to Section 12(i) of the Exchange Act.

<sup>15</sup> 15 U.S.C. 78l(c).

<sup>1</sup> See Release No. 34-53128 (January 13, 2006) [71 FR 3550].

<sup>2</sup> 15 U.S.C. 78l(g).

<sup>3</sup> 15 U.S.C. 78a et seq.

<sup>4</sup> 15 U.S.C. 78l(b).

<sup>5</sup> 15 U.S.C. 78l(g)(2)(B) or 78l(g)(2)(G).

<sup>6</sup> 17 CFR 240.12g3-2(b).

<sup>7</sup> 15 U.S.C. 78l(a).

<sup>8</sup> Section 12(i) of the Exchange Act requires filings relating to certain financial institutions to be made with the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, or the Office of Thrift Supervision. 15 U.S.C. 78l(i).

<sup>9</sup> See Section 12(d) of the Exchange Act [15 U.S.C. 78l(d)].

<sup>10</sup> *Id.*

<sup>11</sup> These companies have filed registration statements pursuant to Section 12(g) or, in a limited number of cases, Section 12(b) of the Exchange Act. A separate Section 12(b) registration statement is required with respect to each national securities exchange on which a particular class of security is listed. Accordingly, a new registration statement on 12(b) will be required by the time the Nasdaq Exchange becomes operational, even as to those Nasdaq-listed companies that have previously filed 12(b) registration statements.

<sup>12</sup> Those Nasdaq-listed companies which have registered under the Investment Company Act of 1940 (the "1940 Act") have filed registration statements with the Commission under the 1940 Act and have been required to make periodic filings under the 1940 Act identical in form to those required of investment companies that have registered their securities under Section 12(b) of the Exchange Act. These investment companies are exempt from registration under Section 12(g)(2)(B) of the Exchange Act.

for Nasdaq and the Nasdaq Exchange to submit the Nasdaq Application to the Commission, the NASD proposed a new rule specifically permitting Nasdaq and the Nasdaq Exchange to take the contemplated action. The Commission approved this rule on April 6, 2006.<sup>16</sup> NASD Rule 4130 explicitly authorizes Nasdaq and the Nasdaq Exchange, in connection with Nasdaq's transition to a national securities exchange, to file an application with the Commission and the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, and the Office of Thrift Supervision to register each Issuer's listed securities under Section 12(b) of the Exchange Act and request any appropriate regulatory relief from the provisions of Section 12, unless the Issuer informs Nasdaq, pursuant to procedures set forth by Nasdaq, that it does not want to be included in this process.<sup>17</sup>

Accordingly, prior to filing the Nasdaq Application, Nasdaq provided notice of its intention to seek the requested relief.<sup>18</sup> In addition to general notice through the proposed rule filing, Nasdaq notified each Issuer, individually, of its plans to submit the request and allowed any Issuer that did not wish its securities to be included in the request to opt-out of the process.<sup>19</sup> At the expiration of the notice period,

no Issuers had elected to opt-out of the requested relief.<sup>20</sup>

#### IV. Findings

Pursuant to Section 12(c) of the Exchange Act, in the judgment of the Commission, based on the Nasdaq Application for Section 12(b) registration and the representations made therein and in light of the recent registration of the Nasdaq Exchange, the Commission will consider the Nasdaq Application in lieu of the information otherwise required under Section 12(b) of the Exchange Act. In reaching its determination, the Commission considered the following:

(i) In recognition of the unique circumstances discussed above in Section I and in the Nasdaq Application, particularly the fact that the information to be elicited by registration under Section 12 of the Exchange Act or, in the case of investment companies registered under the 1940 Act, its substantial equivalent, already has been required to be made public by the Issuers, it is the judgment of the Commission that the Nasdaq Application is sufficient for purposes of registration of the securities listed in Exhibit A to the Nasdaq Application (the "Issuer Securities");<sup>21</sup>

(ii) Nasdaq and the Nasdaq Exchange have represented to the Commission in the Nasdaq Application that, as of the date of this Order:

a. They have conducted the opt-out process as described, particularly with respect to notice of the Nasdaq Application to all Issuers, generally, pursuant to NASD Rule 4130 and a press release and, specifically, to each Issuer through the opt-out option,

b. That authorization has not been withheld by any Issuer with respect to any of the Issuer Securities, and

c. The Issuer Securities listed in Exhibit A to the Nasdaq Application accurately reflect the securities that are to be the subject of its request;

(iii) The Nasdaq Exchange has certified to the Commission in the Nasdaq Application that, as of the date of this Order, all of the Issuer Securities have been approved by the Nasdaq Exchange for listing and registration in accordance with the requirements of Section 12(d) of the Exchange Act; and

(iv) In accordance with Section 12(d) and Rule 12d1-2(a)<sup>22</sup> of the Exchange Act, Nasdaq and the Nasdaq Exchange have requested in writing the acceleration of the effective date of the Nasdaq Application for

Section 12(b) registration of the Issuer Securities on the date of this Order.

#### V. Conclusion

The Commission, having reviewed the Nasdaq Application for Section 12(b) registration of the Issuer Securities and in reliance on the representations and certifications made by Nasdaq and the Nasdaq Exchange in the Nasdaq Application, has concluded that it is appropriate, in the public interest and consistent with the protection of investors, to approve the Nasdaq Application and grant the request by Nasdaq and the Nasdaq Exchange for registration of the Issuer Securities under Section 12(b).

The Commission recognizes that the use of its authority under Section 12(c) of the Exchange Act to consider information other than that prescribed by Section 12(b) for purposes of Section 12 registration is a variation on the customary registration process. As noted, however, the Commission believes the special circumstances of Nasdaq's transition to a national securities exchange and the existing public disclosure requirements applicable to the Issuer Securities constitute a unique situation meriting the application of Section 12(c).

With respect to the findings and conclusions in this Order, it is also to be expressly understood that the Commission has not made, and this Order does not constitute, any determination regarding the Issuers' compliance with the listing standards of the Nasdaq Exchange or of any other exchange, securities association or facility on which the Issuers' securities trade, or any Commission rule or regulation, other than the Section 12(b) registration requirements as they relate to Nasdaq's transition to a national securities exchange. In addition, the Commission has not made, and this Order does not constitute, any determination regarding the regulation or oversight of Nasdaq or the Nasdaq Exchange with respect to the Issuer Securities, other than the Section 12(b) registration requirements as they relate to Nasdaq's transition to a national securities exchange.

Accordingly, *it is ordered* that the Nasdaq Application for Section 12(b) registration of the Issuer Securities, made by Nasdaq and the Nasdaq Exchange on behalf of the Issuers pursuant to NASD Rule 4130, be, and hereby is, granted, effective as of July 31, 2006.

<sup>16</sup> See Release No. 34-53606 (April 6, 2006) [71 FR 18790].

<sup>17</sup> The text of Rule 4130 reads as follows:

In connection with The Nasdaq Exchange commencing operations as a national securities exchange, each issuer authorizes Nasdaq and the Nasdaq Exchange to file an application to register under Section 12(b) of the Exchange Act any class of the issuer's securities that is listed on Nasdaq on the day immediately preceding the day the Nasdaq Exchange commences such operations; provided, however, that this provision shall not be applicable to any security that the issuer informs Nasdaq, pursuant to procedures set forth by Nasdaq, should not be so registered. The application to register under Section 12(b) of the Exchange Act will be filed with the Commission or, for those securities subject to Section 12(i) of the Exchange Act, with the appropriate banking regulator specified in Section 12(i). The authorization in this paragraph includes allowing Nasdaq and the Nasdaq Exchange to request any appropriate regulatory relief from the provisions of Section 12.

<sup>18</sup> See Nasdaq Application at 3 and Release No. 34-53362 (February 24, 2006) [71 FR 10734].

<sup>19</sup> See Nasdaq Application at 3. Notice was provided through a May 15, 2006 bulletin to Issuers and a May 17, 2006 press release requesting Issuers notify Nasdaq by May 30, 2006 if they did not wish to participate. The result of an Issuer choosing to opt-out is that the Issuer's securities will be ineligible to be listed and traded on the Nasdaq Exchange as of its operational date; such Issuer would instead trade on the pink sheets or OTC Bulletin Board unless it files an individual Section 12(b) registration statement on Form 8-A or Form 10, as applicable, in connection with listing on the Nasdaq Exchange or another national securities exchange, and such registration statement subsequently becomes effective.

<sup>20</sup> See Exhibit B to the Nasdaq Application.

<sup>21</sup> According to the Nasdaq Application, the Issuer Securities represent securities: (i) That are listed on Nasdaq immediately preceding the date that the Nasdaq Exchange begins operations; (ii) that are currently either registered under Section 12(b) or 12(g) of the Exchange Act or exempt from Section 12(g) registration pursuant to Section 12(g)(2)(B) or 12(g)(2)(G) of the Exchange Act or Exchange Act Rule 12g3-2(b); and (iii) that have not been requested by the issuer to be opted-out of the Nasdaq Application pursuant to the procedures established by Nasdaq as a result of NASD Rule 4130.

<sup>22</sup> 17 CFR 249.12d1-2(a).

By the Commission (Chairman Cox and Commissioners Glassman, Atkins, Campos and Nazareth).

**Nancy M. Morris,**  
Secretary.

July 31, 2006

Nancy M. Morris, Esq.  
Secretary, US Securities and Exchange  
Commission, 100 F Street, NE,  
Washington, DC 20549

RE: Request for Relief from § 12 of the  
Securities Exchange Act of 1934

Dear Ms. Morris:

On January 13, 2006, the Securities and Exchange Commission (“SEC” or “Commission”) approved the application of The NASDAQ Stock Market LLC (“NASDAQ Exchange”), a subsidiary of The Nasdaq Stock Market, Inc. (“NASDAQ”), to register under Section 6 of the Securities Exchange Act of 1934 (“Act” or “Exchange Act”) as a national securities exchange.<sup>1</sup> Nasdaq’s transition of its listing and trading activities to the Nasdaq Exchange will fulfill Congress’s instruction to promote “fair competition \* \* \* between exchange markets.”<sup>2</sup> Absent the relief requested herein, however, Nasdaq’s transition to a national securities exchange would require approximately 3,200 Nasdaq Global Market<sup>3</sup> and Capital market issuers with securities registered pursuant to the Act, or exempt from registration under Section 12(g) of the Act,<sup>4</sup> to file registration statements<sup>5</sup> to register those securities under Section 12(b) of the Act.<sup>6</sup>

Engaging in what would essentially be a re-registration process for the vast majority of these 3,200 issuers would create a serious disruption in the trading of securities on The Nasdaq Stock Market. As explained below, the confusion and inevitable administrative delay that would accompany such a process for issuers registered with the Commission would achieve no material public benefit and would place an unnecessary burden on issuers, investors, Nasdaq, the Nasdaq Exchange, and the Commission. The

Commission can prevent this potential disruption by granting the relief requested in this letter. Specifically, Nasdaq and the Nasdaq Exchange request that this letter serve as: (1) The registration statement under Section 12(b) for all classes of listed securities of Nasdaq Capital Market and Nasdaq Global Market issuers registered with the Commission under Sections 12(b) and 12(g), as well as those listed securities exempt from registration under Section 12(g)(2)(B) of the Act<sup>7</sup>; and (2) the Nasdaq Exchange’s certification pursuant to Section 12(d) of the Act<sup>8</sup> that these securities are approved for listing and registration concurrent with the start of operations of the Nasdaq Exchange. Nasdaq and the Nasdaq Exchange also request that the Commission issue an exemption from registration applicable to issuers that are now exempt from the registration requirements of Section 12(g) pursuant to Section 12(g)(2)(G) of the Act<sup>9</sup> and Exchange Act Rule 12g3-2(b)<sup>10</sup> to allow these companies three years from the date the Nasdaq Exchange begins operations to become registered under Section 12(b). NASD Rule 4130 specifically permits Nasdaq to act on behalf of its issuers in this regard.<sup>11</sup>

#### I. Background

Nasdaq presently is a facility of the National Association of Securities Dealers, Inc. (“NASD”), a registered securities association, and thus is subject to Section 15A of the Act. On March 15, 2001, Nasdaq filed an application under Section 6 of the Act for registration as a national securities exchange (“Form 1”) with the Commission. On August 15, 2005, and September 23, 2005, Nasdaq submitted Amendments 4 and 5, respectively, to its Form 1. In Amendments 4 and 5 Nasdaq proposed, among other things, a new corporate structure whereby Nasdaq would become a holding company with the Nasdaq Exchange as one of its subsidiaries. The Commission published notice of Amendments 4 and 5 on October 11, 2005.<sup>12</sup> On January 13, 2006, the Nasdaq Exchange submitted Amendment 6 to the Form 1 and the Commission approved the Nasdaq Exchange’s application for registration as a national securities exchange.<sup>13</sup> On June 30, 2006, the Commission modified the approval order so that the Nasdaq Exchange could begin operations in a phased manner, with operations related to trading in Nasdaq-listed securities beginning before operations related

to trading in securities listed on other national securities exchanges.<sup>14</sup> The Nasdaq Exchange has satisfied the conditions expressed in the amended approval order with respect to Nasdaq-listed securities and expects to begin operations as a national securities exchange for those securities on August 1, 2006.

Upon operation of the Nasdaq Exchange, issuers listed and traded on Nasdaq will instead be listed and traded on the Nasdaq Exchange.<sup>15</sup> Under current NASD rules, a security is eligible for listing on Nasdaq if it is registered under the Exchange Act under either Section 12(g) or Section 12(b).<sup>16</sup> In addition, three categories of securities exempt from registration under Section 12(g) are also eligible for listing on Nasdaq. First, a security issued by an investment company registered under the Investment Company Act of 1940 (the “1940 Act”) is exempt from registration under Section 12(g)(2)(B) of the Act, but is eligible for listing on Nasdaq.<sup>17</sup> Second, a security issued by an insurance company and exempt from registration under Section 12(g) pursuant to Section 12(g)(2)(G) is also eligible for listing.<sup>18</sup> Finally, the securities of certain foreign issuers are eligible for inclusion in Nasdaq even though they are exempt from registration pursuant to Rule 12g3-2(b) under the Exchange Act.<sup>19</sup> Once the Nasdaq Exchange begins operations, issuers will need instead to have been registered under Section 12(b) so that brokers and dealers may effect transactions in these securities on the Nasdaq Exchange consistent with Section 12(a) of the Act.<sup>20</sup>

In contemplation of this request, Nasdaq has adopted Rule 4130, which specifically permits Nasdaq to act on behalf of its issuers to request registration of their listed securities under Section 12(b), or seek appropriate regulatory relief from Section 12(b), in connection with the transition to the Nasdaq Exchange.<sup>21</sup> In proposing this rule change, Nasdaq noted that it anticipated making the requests contained herein and the process by which it would provide notice to each issuer and would allow any issuer that does not wish to register under Section 12(b) the ability to opt-out of Nasdaq’s request.<sup>22</sup> Nasdaq provided that notice by issuing a

<sup>14</sup> Securities Exchange Act Release No. 54085 (June 30, 2006), 71 FR 38910 (July 10, 2006).

<sup>15</sup> This includes securities listed on the Nasdaq Capital Market and the Nasdaq Global Market. Note that the NASD has modified its Plan of Allocation and Delegation of Functions by NASD to Subsidiaries and certain NASD rules to reflect NASD’s direct authority for the activities related to the OTC Bulletin Board, rather than the prior delegation of such authority to Nasdaq. As such, this application does not address the OTC Bulletin Board and securities quoted on the OTC Bulletin Board will not be listed on the Nasdaq Exchange.

<sup>16</sup> NASD Rules 4310(a)(1) and (2) and 4320(a).

<sup>17</sup> NASD Rule 4310(a)(4).

<sup>18</sup> NASD Rule 4310(a)(3).

<sup>19</sup> NASD Rule 4320(c).

<sup>20</sup> 15 U.S.C. 78l(a).

<sup>21</sup> Securities Exchange Act Release No. 53606, supra note 11.

<sup>22</sup> Securities Exchange Act Release No. 53262, supra note 11.

<sup>1</sup> Securities Exchange Act Release No. 53128 (January 13, 2006), 71 FR 3550 (January 23, 2006) (the “Exchange Approval Order”).

<sup>2</sup> Exchange Act Section 11A(a)(1)(C)(ii).

<sup>3</sup> Effective July 1, 2006, Nasdaq renamed the Nasdaq National Market as the Nasdaq Global Market and created a new segment within the Global Market called the Global Select Market. References to the Nasdaq Global Market include those securities listed on the Nasdaq Global Market and the Nasdaq Global Select Market. See Securities Exchange Act Release No. 54071 (June 29, 2006), 71 FR 38922 (July 10, 2006) (SR–NASD–2006–068); Securities Exchange Act Release No. 53799 (May 12, 2006), 71 FR 29195 (May 19, 2006) (SR–NASDAQ–2006–007).

<sup>4</sup> 15 U.S.C. 78l(g).

<sup>5</sup> Most of these registration statements would be filed with the Commission. However, Section 12(i) of the Act requires filings relating to certain financial institutions to be made with the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, or the Office of Thrift Supervision (collectively, the “Banking Regulators”). 15 U.S.C. 78l(i). Separate requests have been sent to the Banking Regulators seeking similar relief for the companies registered with them.

<sup>6</sup> 15 U.S.C. 78l(b).

<sup>7</sup> 15 U.S.C. 78l(g)(2)(B).

<sup>8</sup> 15 U.S.C. 78l(d).

<sup>9</sup> 15 U.S.C. 78l(g)(2)(G).

<sup>10</sup> 17 CFR 240.12g3-2(b).

<sup>11</sup> Rule 4130 permits Nasdaq to act on behalf of its issuers to request registration of their listed securities under Section 12(b), or seek appropriate regulatory relief from Section 12(b), in connection with the transition to the Nasdaq Exchange. See Securities Exchange Act Release No. 53606 (April 6, 2006), 71 FR 18790 (April 12, 2006) (approving SR–NASD–2006–28); Securities Exchange Act Release No. 53262 (February 24, 2006), 71 FR 10734 (March 2, 2006) (providing notice of SR–NASD–2006–28).

<sup>12</sup> Securities Exchange Act Release No. 52559 (October 4, 2005), 70 FR 59097 (October 11, 2005).

<sup>13</sup> Exchange Approval Order, supra note 1.

bulletin to issuers<sup>23</sup> on May 15, 2006, and by issuing a press release<sup>24</sup> on May 17, 2006.

As of July 31, 2006, Nasdaq lists 2,776 securities on the Global Market (including 1,254 securities on the Nasdaq Global Select Market) and 580 securities on the Capital Market.<sup>25</sup> These securities can be categorized as follows: 3,257 securities are registered with the Commission under Section 12(g); 40 securities are also listed on a national securities exchange and are registered with the Commission under Section 12(b); 17 investment company issuers' securities are exempt from registration under Section 12(g)(2)(B); four insurance company issuers' securities are exempt from Section 12(g) registration under Section 12(g)(2)(G); nine foreign private issuers' securities are exempt from Section 12(g) registration under Rule 12g3-2(b); and 29 bank and savings association issuers' securities are registered under Section 12(g) with other regulatory agencies pursuant to Section 12(i).<sup>26</sup>

## II. Basis for Relief Sought and Anticipated Benefits

### A. Securities Already Registered Under Section 12(g) and 12(b)

Absent relief, the issuers of approximately 3,297 Nasdaq Global Market and Capital Market securities that are registered with the Commission under Sections 12(g) and 12(b) will be required to file a registration statement to register their securities under Section 12(b) on the Nasdaq Exchange once Nasdaq begins operating as a national securities exchange. Nasdaq believes that under the circumstances, this registration process would be confusing and would place an unnecessary cost and administrative burden on Nasdaq, the Nasdaq Exchange, the Commission, and issuers and would not be in the public interest. Specifically, each of those issuers would be required to file with the Commission and with the Nasdaq Exchange a new Exchange Act registration statement describing the securities to be registered along with all necessary exhibits. The Nasdaq Exchange would then be required to certify to the Commission that each issuer's securities are approved for listing and registration. This process would have to be coordinated to minimize disruptions to trading in issuer securities,

<sup>23</sup> See "Impact of NASDAQ Exchange Registration on Listed Companies" available at: [http://www.nasdaq.com/about/Exchange\\_Bulletin\\_051506.pdf](http://www.nasdaq.com/about/Exchange_Bulletin_051506.pdf).

<sup>24</sup> See "NASDAQ Notifies Listed Companies About Transition To Exchange Status" available at: [http://www.nasdaq.com/newsroom/news/pr2006/nc\\_section06\\_066.stm](http://www.nasdaq.com/newsroom/news/pr2006/nc_section06_066.stm)

<sup>25</sup> Some issuers list more than one security on Nasdaq.

<sup>26</sup> To assist the Commission with this request, we have attached lists of those securities registered with the Commission or exempt from registration. Exhibit A contains a list of those securities already registered with the Commission under Sections 12(b) or 12(g) and those securities exempt from registration under Rule 12(g)(2)(B), that have not opted out from this request as provided for in Rule 4130. Exhibit B contains a list of those securities that have opted out from this request. Exhibit C contains a list of those securities that are exempt from registration under Section 12(g) pursuant to Section 12(g)(2)(G) or Rule 12g3-2(b).

with the real possibility of some securities experiencing trading gaps during the transition. Such a daunting and time-sensitive task—which creates no significant identifiable benefit to the public creates the unnecessary risk of administrative errors by the issuers, the Nasdaq Exchange, or the Commission that could inadvertently delay or otherwise adversely impact the registration and trading of securities on the new exchange. The public interest is served by having exchanges run smoothly and efficiently, and the requested relief would achieve that purpose.

The additional registration process would not result in any significant benefit to the marketplace or investors because they would not receive any additional information regarding the security. Each Nasdaq Global Market and Capital Market issuer in this category has already filed an Exchange Act registration statement with the Commission to register the class of securities under Section 12 of the Act. Those issuers with securities registered under Section 12(g) were required to file a registration statement that contained "such information and documents as the Commission may specify comparable to that which is required in an application to register a security pursuant to [Section 12(b)]."<sup>27</sup>

There are also no relevant differences in the regulatory requirements for securities registered under Sections 12(b) and 12(g) that would negatively impact investors. For example, issuers with securities registered under Section 12(g) must, like issuers with securities registered under Section 12(b), file periodic and other reports with the Commission under Section 13 of the Act, comply with the proxy requirements under Section 14 of the Act, and adhere to the requirements of the Williams Act. Because securities registered under Section 12(b) and Section 12(g) are already treated in a nearly identical fashion, requiring Nasdaq issuers to re-register their securities would not result in any material benefit to the marketplace or investors.

The Commission would be acting well within its authority in granting the relief requested. Congress has provided specific authorization under Section 12(c) of the Act,<sup>28</sup> which allows the submission of different information than that required under Section 12(b).

Accordingly, Nasdaq and the Nasdaq Exchange request that this letter serve as: (i) The registration statement under Section 12(b) for all classes of listed securities of Nasdaq Global Market and Capital Market issuers registered with the Commission under Sections 12(b) and 12(g) and included in Exhibit A; and (ii) the Nasdaq Exchange's certification pursuant to Section 12(d) of the Act that these securities are approved for listing and registration, concurrent with the start of operations of the Nasdaq Exchange. Nasdaq and the Nasdaq Exchange further request that the Commission accelerate the effective date of this application for Section 12(b) registration to July 31, 2006.

This action would be in the public's interest and consistent with the protection of

investors because it would prevent the imposition of a significant administrative burden on issuers, the Commission, and others without weakening any of the protections afforded to investors under the federal securities laws.<sup>29</sup>

### B. Securities Exempt From Registration Under Section 12(g)(2)(B)

Nasdaq currently lists 17 investment companies whose securities are exempted from Section 12(g) registration pursuant to Section 12(g)(2)(B) of the Act. No purpose would be served by requiring these issuers to file registration statements under Section 12(b) because these companies already are and would remain subject to registration and reporting requirements under the 1940 Act rather than Section 13 of the Act.<sup>30</sup> The Commission's rules clearly contemplate that disclosure under the 1940 Act satisfies the disclosure required by the Exchange Act. In particular, each registered investment company has filed a registration statement with the Commission under the 1940 Act and has been required to make periodic filings under the 1940 Act identical in form to those required of investment companies that have registered their securities under Section 12(b) of the Act.<sup>31</sup>

As such, Nasdaq and the Nasdaq Exchange request that these issuers be treated in the same manner as issuers with securities registered under Sections 12(b) or 12(g) of the Act and that this letter serve as: (i) The registration statement under Section 12(b) for all classes of listed securities of Nasdaq Global Market and Capital Market issuers exempt from Section 12(g) registration pursuant to Section 12(g)(2)(B) and included in Exhibit A; and (ii) the Nasdaq Exchange's certification pursuant to Section 12(d) of the Act that these securities are approved for listing and registration, concurrent with the start of operations of the Nasdaq Exchange. Nasdaq and the Nasdaq Exchange further

<sup>29</sup> This reclassification would apply only to those issuers listed on Nasdaq when it becomes a national securities exchange and not to issuers approved for listing on Nasdaq afterwards. Such later-listed issuers would be required to file a registration statement with the Commission to register their securities under Section 12(b) and Nasdaq would be required separately to certify such registration statements. In addition, this reclassification would not apply to the securities of any issuer that has opted-out of such treatment, pursuant to NASD Rule 4130. See SR-NASD-2006-28.

<sup>30</sup> Registered investment companies file annual and semiannual reports on Forms N-CSR and N-SAR, rather than on Forms 10-K and 10-Q, even if registered under the Exchange Act. See General Instruction A. to Form N-CSR, General Instruction A. to Form 10-K, and Exchange Act Rules 13a-11(b) and 13a-13(b). Registered investment companies are also subject to proxy regulation under Rule 20a-1 of the 1940 Act. See also Item 22 of Schedule 14A.

<sup>31</sup> Under Exchange Act Rule 12g-2, the Commission already has made provision for these companies to be deemed registered under the Exchange Act without the need for a filing. That relief is automatic upon the termination of the issuer's registration under the 1940 Act. Given that relief, it would make no sense to impose a filing requirement when the investment company has maintained, rather than terminated, its registration under the 1940 Act.

<sup>27</sup> Section 12(g)(1) of the Act, 15 U.S.C. 78l(g)(1).

<sup>28</sup> 15 U.S.C. 78l(c).

request that the Commission accelerate the effective date of this application for Section 12(b) registration to July 31, 2006.

This action would be in the public's interest and consistent with the protection of investors because it would prevent the imposition of a significant administrative burden on issuers, the Commission, and others without weakening any of the protections afforded to investors under the federal securities laws.<sup>32</sup>

### C. Other Securities Exempt From Registration Under Section 12(g)

As described above, Nasdaq lists 13 securities—out of more than 3,300—that are otherwise exempt from registration under Section 12(g). The Nasdaq Exchange will operate in all relevant, material respects just as Nasdaq operates today.<sup>33</sup> In fact, while as early as 1983 the Commission recognized that “trading on [Nasdaq] is substantially the same as trading on an exchange,”<sup>34</sup> the Commission has nonetheless permitted securities of these exempt issuers to trade on Nasdaq.

Section 36 of the Act<sup>35</sup> grants the Commission broad authority to make exemptions to any part of the Act when “such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.” Granting a temporary continuation of an exemption from registration is “necessary or appropriate in the public interest” and is “consistent with the protection of investors.” This exemption for a transitional period would provide issuers that have traded on Nasdaq without incident for many years with sufficient time to undertake Exchange Act registration requirements and to make an orderly transition to the Nasdaq Exchange and therefore is in the public interest. The Commission has used its authority in the past to resolve administrative hurdles for complex transactions and to relieve unnecessary administrative burdens. Finally, given that these securities have traded on Nasdaq pursuant to an exemption for an extended period of time, the continuation of a similar exemption for a limited time should not raise any new concerns regarding the protection of investors.

Forcing Section 12(g) exempt issuers to immediately register would be inequitable and wholly unrelated to any act or failure to act by these issuers. In the absence of exemptive relief, each of the Section 12(g) exempt issuers would be required to prepare and file a registration statement on Form 10 or 20–F. Foreign issuers would also have to restate or reconcile their financial statements

<sup>32</sup> As noted in footnote 29, supra, this reclassification would apply only to those issuers listed on Nasdaq when it becomes a national securities exchange that have not opted-out of such treatment pursuant to NASD Rule 4130.

<sup>33</sup> The primary difference in market structure that Nasdaq contemplates is the establishment of a holding company structure under which Nasdaq would own the Nasdaq Exchange, which would execute quotes and orders in accordance with a strict price-time priority algorithm.

<sup>34</sup> Securities Act Release No. 6493 (October 14, 1983) (“Rule 12g3–2(b) Amendments”).

<sup>35</sup> 15 U.S.C. 78mm.

to U.S. generally accepted accounting principles (“U.S. GAAP”). But it is Nasdaq's becoming an exchange rather than any affirmative act by these exempt issuers that would trigger the imposition of this registration requirement. Companies that list on the Nasdaq Exchange after it begins operations could be required to meet all the registration requirements applicable to an exchange listing without disrupting an existing market in those securities. But for those companies already listed, requiring immediate registration is potentially disruptive and unfair. The mere fact of Nasdaq's conversion to an exchange should not adversely impact these companies or their investors.

Thus, Nasdaq and the Nasdaq Exchange request that the Commission temporarily continue the exemption from registration for the following classes of Nasdaq-listed issuers. In connection with this request, the Nasdaq Exchange represents that it will continue to monitor these companies in the same manner Nasdaq does, to assure compliance with all applicable listing requirements.

#### 1. Insurance Companies

The Commission need not immediately impose registration requirements on the four insurance companies listed on Nasdaq but exempt from Section 12(g) registration.<sup>36</sup> These issuers have not taken any action on their own to trigger a registration requirement and the additional reporting requirements required by such registration. In fact, if the Commission determines not to temporarily continue these companies' exemptions and they choose to delist rather than register, investors would be harmed by the potential loss of a liquid trading market. As such, Nasdaq requests that the Commission grant an exemption for the securities of these insurance companies (identified on Exhibit C) from the requirements of Sections 12(a) and 12(b) with respect to the trading of these securities on the Nasdaq Exchange for a three-year period from the date the Nasdaq Exchange begins to operate as an exchange, provided these companies continue to comply with the requirements of Section 12(g)(2)(G) of the Act and the applicable requirements for continued listing on the Nasdaq Exchange. This transitional exemption will permit these issuers to complete the registration process without undue burden.

#### 2. Foreign Private Issuers

There are nine foreign issuers that trade on The Nasdaq Capital Market pursuant to the “grandfathering” exemption of Rule 12g3–2(b).<sup>37</sup> This exemption originated in 1983, when the Commission first required foreign private issuers whose securities were trading on Nasdaq to be registered. Prior to that time, a foreign private issuer whose securities were not trading on a national securities exchange

<sup>36</sup> Pursuant to Section 12(g)(2)(G) of the Act, these issuers generally must file an annual statement with the Commissioner of Insurance of their domiciliary state and must be subject to regulation by their domiciliary state of proxies, consents, or authorizations.

<sup>37</sup> These issuers are not eligible for listing on the Nasdaq Global Market, nor are they subject to the Global Market listing requirements.

was exempt from registration where the foreign issuer did not voluntarily enter the United States markets by, for example, conducting a public offering or listing on an exchange. In 1983 the Commission amended Rule 12g3–2(b) to deny the exemption to non-U.S. issuers that voluntarily listed on Nasdaq. In order not to disrupt the trading of these issuers, however, the Commission grandfathered in all non-Canadian foreign issuers, allowing those companies to continue to trade on Nasdaq without registration under the Exchange Act.<sup>38</sup> In doing so, the Commission heeded the concerns of commenters that many foreign issuers would withdraw from Nasdaq, rather than register, leaving the pink sheets as the only source of trading information related to these companies and resulting in increased price spreads, a decrease in information, price quotes not carried in newspapers, less liquid markets and fewer institutions in the market, absence of NASD surveillance, and delays in execution of transfers.<sup>39</sup>

The same considerations that compelled that treatment of foreign issuers in 1983 are relevant to the relief requested today. These issuers have not acted to jeopardize their ability to trade on Nasdaq or Rule 12g3–2(b) exempt status. If forced to immediately register their securities, a significant number of these issuers may delist rather than register, thereby relegating the U.S. investors in those foreign issuers to potentially less liquid and transparent markets.

For these reasons, the Nasdaq Exchange's registration as an exchange should not force these companies to immediately register or delist.<sup>40</sup> Nasdaq and the Nasdaq Exchange therefore request that the Commission grant an exemption for those securities included in Exhibit C that are exempt from Section 12(g) registration under Rule 12g3–2(b) from the requirements of Sections 12(a) and 12(b) with respect to the trading of these securities on the Nasdaq Exchange for a three-year period from the date the Nasdaq Exchange begins to operate as an exchange, provided the issuers continue to comply with the requirements of Rule 12g3–2(b) and the applicable requirements for continued listing on the Nasdaq Exchange. This transitional exemption will permit these issuers to complete the registration process without undue burden.<sup>41</sup>

<sup>38</sup> Exchange Act Rule 12g3–2(b). The exemption is maintained by submitting the issuer's home country reports to the Commission.

<sup>39</sup> Rule 12g3–2(b) Amendments, supra note 34. These factors, according to one estimate, would cause prices to drop 20 percent. *Id.*

<sup>40</sup> One exempt foreign issuer, Nissan Motor Co., Ltd., submitted a comment letter to the Commission in connection with Nasdaq's application to become an exchange, requesting that the Rule 12g3–2(b) grandfathering be allowed to continue indefinitely, or, in the alternative, that a reasonable transition period be allowed. See footnote 208 to the Exchange Approval Order, supra, note 1.

<sup>41</sup> Nasdaq notes that the proposed three-year period is consistent with the time-line the Commission has set forth to eliminate the requirement for foreign private issuers to reconcile financial statements prepared according to International Financial Reporting Standards to US GAAP. See SEC Press Release 2006–17, available at <http://www.sec.gov/news/press/2006-17.htm>.

### III. Conclusion

The relief requested above is in the public interest because it will ensure the continued smooth operation of this market immediately from the time the Nasdaq Exchange begins operations as an exchange and avoid confusion and a number of potentially disruptive administrative hurdles. The relief is necessary and appropriate to avoid the disruption that could occur if members, brokers, and dealers were prohibited from effecting transactions in Nasdaq securities due to the lack of an effective registration once the Nasdaq Exchange begins operating as a registered exchange.

The Commission has specific authority provided by Section 12(c) to effect the relief

requested with respect to those securities already registered under Section 12(b) or 12(g) and those securities exempt from Section 12(g) registration pursuant to Section 12(g)(2)(B). Further, the Commission has general exemptive authority pursuant to Section 36 of the Act and Rule 0-12 thereunder, in pertinent part, to exempt any person, security, or transaction, or any class or classes of persons, securities, or transactions, from any provision or provisions of this title or of any rule or regulation thereunder, to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors. The unique facts surrounding Nasdaq's transition to a national securities exchange provide ample

justification for the Commission to exercise its authority under Section 36 under the circumstances described in this letter.

If you have any questions concerning the foregoing you may contact the undersigned at (301) 978-8480, Arnold Golub at (301) 978-8075 or John Yetter at (301) 978-8497.

Sincerely yours, Edward S. Knight  
Exhibit A: List of securities whose registration will be transferred to Section 12(b)

Exhibit B: List of securities of issuers that have elected to opt-out of requested relief

Exhibit C: List of securities exempt from Section 12(g) registration under Section 12(g)(2)(G) and Rule 12g3-2(b)

**BILLING CODE 8010-01-P**

## Exhibit A: List of Securities whose Registration will be Transferred to Section 12(b)

Issue Symbol	Issue Name	Issue Type	Issue Market Segment	Registration Type	CIK	SEC File #
SWAT	A4S Security, Inc. Common Stock	Common Stock	NCM	12(b)	0001216199	001-32566
SWATW	A4S Security, Inc. Warrant Exp. 7/18/2010	Warrant	NCM	12(b)	0001216199	001-32566
ABLE	Able Energy, Inc. Common Stock	Common Stock	NCM	12(b)	0001065728	001-15035
ACSEF	ACS Motion Control Ltd. Common Stock	Ordinary Shares	NCM	12(b)	0001038144	001-14662
ADST	AdStar, Inc. Common Stock	Common Stock	NCM	12(b)	0001091599	001-15363
AFG	American Financial Group, Inc. Common Stock	Common Stock	NGS	12(b)	0001042046	001-13653
APCC	American Power Conversion Corporation Common Stock	Common Stock	NGS	12(b)	0000835910	001-12432
APA	Apache Corporation Common Stock	Common Stock	NGS	12(b)	0000006769	001-04300
BOSC	B.O.S. Better Online Solutions Common Stock	Ordinary Shares	NGM	12(b)	0001005516	001-14184
BARI	Bancorp Rhode Island, Inc. Common Stock	Common Stock	NGS	12(b)	0001109525	001-16101
BFLY	Bluefly, Inc. Common Stock	Common Stock	NCM	12(b)	0001030896	001-14498
CSPLF	Canada Southern Petroleum Ltd. Common Stock	Common Stock	NCM	12(b)	0000016804	001-03793
CME	Chicago Mercantile Exchange Holdings Cl A	Common Stock	NGS	12(b)	0001156375	001-31553
COHT	Cohesant Technologies Inc. Common Stock	Common Stock	NCM	12(b)	0000928420	001-13484
NYNY	Empire Resorts, Inc. Common Stock	Common Stock	NCM	12(b)	0000906780	001-12522
ENDP	Endo Pharmaceuticals Holdings Inc. Common Stock	Common Stock	NGS	12(b)	0001100962	001-15989
ESCL	Escala Group, Inc. Common Stock	Common Stock	NGS	12(b)	0000895516	001-11988
EWEB	Euroweb International Corp. Common Stock	Common Stock	NCM	12(b)	0000905428	001-12000
GORX	GeoPharma, Inc. Common Stock	Common Stock	NCM	12(b)	0001098315	001-16185
HMY	Harmony Gold Mining Co. Ltd. American Depositary Shares	American Depositary Shares	NGS	12(b)	0001023514	001-31545
HPQ	Hewlett-Packard Company Common Stock	Common Stock	NGS	12(b)	0000047217	001-04423
IDSY	I.D. Systems, Inc. Common Stock	Common Stock	NGM	12(b)	0000049615	001-15087
IDNX	Identix Incorporated Common Stock	Common Stock	NGM	12(b)	0000735780	001-09641
INTG	Intergroup Corporation (The) Common Stock	Common Stock	NGM	12(b)	0000069422	001-10324
IRSN	Irvine Sensors Corporation Common Stock	Common Stock	NCM	12(b)	0000357108	001-08402
IVN	Ivanhoe Mines Ltd Ordinary Shares	Common Stock	NGM	12(b)	0001158041	000-50473
MPET	Magellan Petroleum Corporation Common Stock	Common Stock	NCM	12(b)	0000061398	001-05507
OXPS	optionsXpress Holdings, Inc. Common Stock	Common Stock	NGS	12(b)	0001299688	001-32419
PESI	Perma-Fix Environmental Services, Inc. Common Stock	Common Stock	NCM	12(b)	0000891532	001-11596
POLXF	Polydex Pharmaceuticals Limited Common Stock	Common Stock	NCM	12(b)	0000317158	001-08366

Issue Symbol	Issue Name	Issue Type	Issue Market Segment	Registration Type	CIK	SEC File #
PCIS	Precis Inc. Common Stock	Common Stock	NCM	12(b)	0001017440	001-15667
QNTA	Quanta Capital Holdings Ltd. Common Stock	Common Stock	NGM	12(b)	0001264242	001-32138
SVNT	Savient Pharmaceuticals Inc Common Stock	Common Stock	NGM	12(b)	0000722104	000-15313
SORC	Source Interlink Companies, Inc. Common Stock	Common Stock	NGS	12(b)	0000943605	001-13437
SCFSP	Sovereign Bancorp, Inc. - Seacoast Financial Services Corporation Cumulative Trust Preferred Securities	Other Securities	NGM	12(b)	0000811830	001-16581
SSYS	Stratasys, Inc. Common Stock	Common Stock	NGS	12(b)	0000915735	001-13400
TISA	Top Image Systems, Ltd. Ordinary Shares	Ordinary Shares	NCM	12(b)	0001021991	001-14552
PANL	Universal Display Corporation Common Stock	Common Stock	NGM	12(b)	0001005284	001-12031
WAG	Walgreen Company Common Stock	Common Stock	NGS	12(b)	0000104207	001-00604
WSTM	Workstream Inc. Common Stock	Common Stock	NCM	12(b)	0001095266	001-15503
ARDI	@Road, Inc. Common Stock	Common Stock	NGM	12(g)	0001109537	000-31511
CTAC	1-800 Contacts, Inc. Common Stock	Common Stock	NGM	12(g)	0001050122	000-23633
FLWS	1-800 FLOWERS.COM, Inc. Common Stock	Common Stock	NGS	12(g)	0001084869	000-26841
FCCY	1st Constitution Bancorp (NJ) Common Stock	Common Stock	NGM	12(g)	0001141807	000-32891
FIFG	1st Independence Financial Group, Inc. Common Stock	Common Stock	NGM	12(g)	0000946738	000-26570
SRCEO	1st Source Corporation 1st Source Capital Trust II - Floating Rate Cumulative Trust Preferred Securities	Other Securities	NGS	12(g)	0000034782	000-06233
SRCE	1st Source Corporation Common Stock	Common Stock	NGS	12(g)	0000034782	000-06233
TCHC	21st Century Holding Company Common Stock	Common Stock	NGM	12(g)	0001069996	000-25001
TCHCZ	21st Century Holding Company Redeemable Warrants 09/30/07	Warrant	NGM	12(g)	0001069996	000-25001
TCHCW	21st Century Holding Company Warrants 07/31/2006	Warrant	NGM	12(g)	0001069996	000-25001
TFSM	24/7 Real Media, Inc. Common Stock	Common Stock	NGM	12(g)	0001062195	000-29768
COMS	3Com Corporation Common Stock	Common Stock	NGS	12(g)	0000738076	000-12867
TDSC	3D Systems Corporation Common Stock	Common Stock	NGM	12(g)	0000910638	000-22250
JOBS	51job, Inc. American Depository Shares	American Depository Shares	NGS	12(g)	0001295484	000-50841
EIGHT	8x8 Inc Common Stock	Common Stock	NCM	12(g)	0001023731	000-21783
TACX	A Consulting Team, Inc. (The) Common Stock	Common Stock	NCM	12(g)	0001040792	000-22945
SHLM	A. Schulman, Inc. Common Stock	Common Stock	NGS	12(g)	0000087565	000-07459
ACMR	A.C. Moore Arts & Crafts, Inc. Common Stock	Common Stock	NGS	12(g)	0001042809	000-23157
ADAM	A.D.A.M. Inc. Common Stock	Common Stock	NCM	12(g)	0000863650	000-26962
ASVI	A.S.V., Inc. Common Stock	Common Stock	NGS	12(g)	0000926763	000-25620
AAON	AAON, Inc. Common Stock	Common Stock	NGS	12(g)	0000824142	000-18953

Issue Symbol	Issue Name	Issue Type	Issue Market Segment	Registration Type	CIK	SEC File #
ASTM	Aastron Biosciences, Inc. Common Stock	Common Stock	NCM	12(g)	0000887359	000-22025
VOLV	AB Volvo Class B American Depository Receipts	American Depository Shares	NGS	12(g)	0000753762	000-12828
ABIX	Abatix Corp. Common Stock	Common Stock	NCM	12(g)	0000845779	001-10194
ABAX	ABAXIS, Inc. Common Stock	Common Stock	NGS	12(g)	0000881890	000-19720
ABER	Aber Diamond Corporation Common Stock	Common Stock	NCM	12(g)	0000841071	000-17227
AANB	Abigail Adams National Bancorp, Inc. Common Stock	Common Stock	NGM	12(g)	0000356809	000-10971
ABBC	Abington Community Bancorp, Inc. Common Stock	Common Stock	NGM	12(g)	0001292898	000-51077
ABMD	ABIOMED, Inc. Common Stock	Common Stock	NGM	12(g)	0000815094	000-20584
ABBI	Abraxis BioScience, Inc. Common stock	Common Stock	NGS	12(g)	0001141399	000-33407
ABXA	ABX Air, Inc. Common Stock	Common Stock	NGM	12(g)	0000894081	000-50368
ACTG	Acacia Research Corporation (Acacia Tech) Common Stock	Common Stock	NGM	12(g)	0000934549	000-26068
CBMX	Acacia Research Corporation (CombiMatrix) Common Stock	Common Stock	NGM	12(g)	0000934549	000-26068
ACAD	ACADIA Pharmaceuticals Inc. Common Stock	Common Stock	NGM	12(g)	0001070494	000-50768
ACAM	Acambis plc American Depository Shares	American Depository Shares	NGM	12(g)	0001073965	000-30126
ACCL	Accelrys, Inc. Common Stock	Common Stock	NGM	12(g)	0001002388	000-27188
ABPI	Accentia Biopharmaceuticals, Inc. Common Stock	Common Stock	NGM	12(g)	0001310094	000-51383
AIXD	Access Integrated Technologies, Inc. Class A Common Stock	Common Stock	NGM	12(g)	0001173204	000-51910
ANCX	Access National Corporation Common Stock	Common Stock	NGM	12(g)	0001176316	000-49929
LEND	Accredited Home Lenders Holding Co. Common Stock	Common Stock	NGS	12(g)	0001174735	000-50179
AACE	Ace Cash Express, Inc. Common Stock	Common Stock	NGS	12(g)	0000849116	000-20774
ACEC	ACE*COMM Corporation Common Stock	Common Stock	NCM	12(g)	0001017526	000-21059
ACGY	Acergy S.A. American Depository Shares	American Depository Shares	NGS	12(g)	0000898685	000-21742
ACET	Aceto Corporation Common Stock	Common Stock	NGS	12(g)	0000002034	000-04217
ACME	ACME Communications, Inc. Common Stock	Common Stock	NGM	12(g)	0001092013	000-27105
ACOR	Acorda Therapeutics, Inc. Common Stock	Common Stock	NGM	12(g)	0001008848	000-50513
ACTL	Actel Corporation Common Stock	Common Stock	NGM	12(g)	0000907687	000-21970
APII	Action Products International, Inc. Common Stock	Common Stock	NCM	12(g)	0000747435	000-13118
ACTS	Actions Semiconductor Co., Ltd. American Depository Shares	American Depository Shares	NGM	12(g)	0001342068	000-51604
ACPW	Active Power, Inc. Common Stock	Common Stock	NGM	12(g)	0001044435	000-30939
ACTI	ActivIdentity Corporation Common Stock	Common Stock	NGM	12(g)	0001183941	000-50223
ATVI	Activision, Inc. Common Stock	Common Stock	NGS	12(g)	0000718877	000-12699

Issue Symbol	Issue Name	Issue Type	Issue Market Segment	Registration Type	CIK	SEC File #
ACTU	Actuate Corporation Common Stock	Common Stock	NGM	12(g)	0001062478	000-24607
ACUS	Acusphere, Inc. Common Stock	Common Stock	NGM	12(g)	0001115143	000-50405
ACXM	Axiom Corporation Common Stock	Common Stock	NGS	12(g)	0000733269	000-13163
ADES	ADA-ES, Inc. Common Stock	Common Stock	NCM	12(g)	0001223112	000-50216
ARXT	Adams Respiratory Therapeutics, Inc. Common Stock	Common Stock	NGS	12(g)	0001319439	000-51445
ADPT	Adaptec, Inc. Common Stock	Common Stock	NGM	12(g)	0000709804	000-15071
ADCT	ADC Telecommunications, Inc. Common Stock	Common Stock	NGS	12(g)	0000061478	000-01424
ADEX	ADE Corporation Common Stock	Common Stock	NGM	12(g)	0000884498	000-26714
ADEP	Adept Technology, Inc. Common Stock	Common Stock	NGM	12(g)	0000865415	000-27122
ADZA	Adeza Biomedical Corporation Common Stock	Common Stock	NGS	12(g)	0000902482	000-20703
ADBE	Adobe Systems Incorporated Common Stock	Common Stock	NGS	12(g)	0000796343	000-15175
ADLR	Adolor Corporation Common Stock	Common Stock	NGM	12(g)	0001076167	000-26929
ADTN	ADTRAN, Inc. Common Stock	Common Stock	NGS	12(g)	0000926282	000-24612
AATI	Advanced Analogic Technologies, Incorporated Common Stock	Common Stock	NGS	12(g)	0001104042	000-51349
ADIC	Advanced Digital Information Corporation Common Stock	Common Stock	NGS	12(g)	0000770403	000-21103
AEIS	Advanced Energy Industries, Inc. Common Stock	Common Stock	NGM	12(g)	0000927003	000-26966
AERT	Advanced Environmental Recycling Technologies, Inc. Class A Common Stock	Common Stock	NCM	12(g)	0000849706	001-10367
ADLS	Advanced Life Sciences Holdings, Inc. Common Stock	Common Stock	NGM	12(g)	0001322734	000-51436
AMAG	Advanced Magnetics, Inc. Common Stock	Common Stock	NGM	12(g)	0000792977	000-14732
AVNC	Advancis Pharmaceutical Corporation Common Stock	Common Stock	NGM	12(g)	0001161924	000-50414
ADVNA	ADVANTA Corp. Class A Common Stock	Common Stock	NGS	12(g)	0000096638	000-14120
ADVNB	ADVANTA Corp. Class B Common Non Voting	Common Stock	NGS	12(g)	0000096638	000-14120
ADVS	Advent Software, Inc. Common Stock	Common Stock	NGS	12(g)	0001002225	000-26994
ABCO	Advisory Board Company (The) Common Stock	Common Stock	NGS	12(g)	0001157377	000-33283
AEHR	Aehr Test Systems Common Stock	Common Stock	NGM	12(g)	0001040470	000-22893
AEP1	AEP Industries Inc. Common Stock	Common Stock	NGM	12(g)	0000785787	000-14450
ARXX	Aeroflex Incorporated Common Stock	Common Stock	NGS	12(g)	0000002601	000-02324
AEZS	AEterna Zentaris, Inc. Common Stock	Common Stock	NGM	12(g)	0001113423	000-30752
AETH	Aether Holdings, Inc. Common Stock	Common Stock	NGM	12(g)	0001093434	000-27707
ATRM	Aetrium Incorporated Common Stock	Common Stock	NGM	12(g)	0000908598	000-22166
AFCE	AFC Enterprises, Inc. Common Stock	Common Stock	NGM	12(g)	0001041379	000-32369
AFFM	Affirmative Insurance Holdings, Inc. Common Stock	Common Stock	NGS	12(g)	0001282543	000-50795
AFFX	Affymatrix, Inc. Common Stock	Common Stock	NGS	12(g)	0000913077	000-28218

Issue Symbol	Issue Name	Issue Type	Issue Market Segment	Registration Type	CIK	SEC File #
ATAC	Aftermarket Technology Corp. Common Stock	Common Stock	NGS	12(g)	0000933405	000-21803
AGIL	Agile Software Corporation Common Stock	Common Stock	NGM	12(g)	0001088653	000-27071
AGYS	Agilysys, Inc. Common Stock	Common Stock	NGS	12(g)	0000078749	000-05734
AEMLW	Agnico-Eagle Mines Limited Warrant	Warrant	NGM	12(g)	0000002809	001-13422
GLOV	AHPC Holdings, Inc. Common Stock	Common Stock	NCM	12(g)	0000837038	000-17458
AIRM	Air Methods Corporation Common Stock	Common Stock	NGS	12(g)	0000816159	000-16079
AIRT	Air T, Inc. Common Stock	Common Stock	NCM	12(g)	0000353184	000-11720
AIRN	Airspan Networks Inc. Common Stock	Common Stock	NGM	12(g)	0001105542	000-31031
AIXG	Aixtron Aktiengesellschaft American Depository Shares	American Depository Shares	NCM	12(g)	0001089496	000-51196
AKAM	Akamai Technologies, Inc. Common Stock	Common Stock	NGS	12(g)	0001086222	000-27275
AKSY	Aksys, Ltd. Common Stock	Common Stock	NCM	12(g)	0000902600	000-28290
TRMD	Aktieselskabet Dampskibsselskabet Tor American Depository Shares	American Depository Shares	NGS	12(g)	0001168351	000-49650
AKZOY	Akzo Nobel N.V. American Depository Shares	American Depository Shares	NGS	12(g)	0000003124	000-17444
ALAB	Alabama National Bancorporation Common Stock	Common Stock	NGS	12(g)	0000926966	000-25160
ALDN	Aladdin Knowledge Systems Limited Ordinary Shares	Ordinary Shares	NGM	12(g)	0000911364	000-22456
ALAN	Alanco Technologies Inc. Common Stock	Common Stock	NCM	12(g)	000098618	000-09347
ALSK	Alaska Communications Systems Group, Inc. Common Stock	Common Stock	NGM	12(g)	0001089511	000-28167
AMRI	Albany Molecular Research, Inc. Common Stock	Common Stock	NGM	12(g)	0001065087	000-25323
AWGI	Alderwoods Group Inc Common Stock	Common Stock	NGS	12(g)	0000927914	000-33277
AWGIW	Alderwoods Group Inc Warrant	Warrant	NGS	12(g)	0000927914	000-33277
ALDA	Aldila, Inc. Common Stock	Common Stock	NGM	12(g)	0000902272	000-21872
ALEX	Alexander & Baldwin, Inc. Common Stock	Common Stock	NGS	12(g)	0000003453	000-00565
ALXN	Alexion Pharmaceuticals, Inc. Common Stock	Common Stock	NGM	12(g)	0000899866	000-27756
ALXA	Alexza Pharmaceuticals, Inc. Common Stock	Common Stock	NGM	12(g)	0001344413	000-51820
ALFA	Alfa Corporation Common Stock	Common Stock	NGS	12(g)	0000743532	000-11773
ACEL	Alfacell Corporation Common Stock	Common Stock	NCM	12(g)	0000708717	000-11088
ALCO	Alico, Inc. Common Stock	Common Stock	NGS	12(g)	0000003545	000-00261
ALGN	Align Technology, Inc. Common Stock	Common Stock	NGM	12(g)	0001097149	000-32259
ALKS	Alkermes, Inc. Common Stock	Common Stock	NGS	12(g)	0000874663	001-14131
SEMI	All American Semiconductor, Inc. Common Stock	Common Stock	NGM	12(g)	0000818074	000-16207
ABVA	Alliance Bankshares Corporation Common Stock	Common Stock	NCM	12(g)	0001181001	000-49976
AFOP	Alliance Fiber Optic Products, Inc. Common Stock	Common Stock	NCM	12(g)	0001122342	000-31857

Issue Symbol	Issue Name	Issue Type	Issue Market Segment	Registration Type	CIK	SEC File #
ALNC	Alliance Financial Corporation Common Stock	Common Stock	NGM	12(g)	0000796317	000-15366
AHGP	Alliance Holdings GP, L.P. Common Units Representing Limited Partner Interest	Limited Partnership	NGS	12(g)	0001344980	000-51952
ARLP	Alliance Resource Partners, L.P. Common Units representing Limited Partners Interests	Limited Partnership	NGS	12(g)	0001086600	000-26823
ALSC	Alliance Semiconductor Corporation Common Stock	Common Stock	NGM	12(g)	0000913293	000-22594
AHCI	Allied Healthcare International Inc. Common Stock	Common Stock	NGS	12(g)	0000890634	000-11570
AHPI	Allied Healthcare Products, Inc. Common Stock	Common Stock	NGM	12(g)	0000874710	000-19266
AMOT	Allied Motion Technologies, Inc.	Common Stock	NCM	12(g)	0000046129	000-04041
ALLI	Allion Healthcare, Inc. Common Stock	Common Stock	NGM	12(g)	0000847935	000-17821
ALTH	Allos Therapeutics, Inc. Common Stock	Common Stock	NGM	12(g)	0001097264	000-29815
ALOY	Alloy, Inc. Common Stock	Common Stock	NGM	12(g)	0001080359	000-26023
MDRX	Alscripts Healthcare Solutions Inc Common Stock	Common Stock	NGS	12(g)	0001124804	000-26537
AFAM	Almost Family Inc Common Stock	Common Stock	NCM	12(g)	0000799231	001-09848
ALNY	Alynham Pharmaceuticals, Inc. Common Stock	Common Stock	NGM	12(g)	0001178670	000-50743
ATEC	Alphatec Holdings, Inc. Common Stock	Common Stock	NGM	12(g)	0001350653	000-52024
ALTI	Altair Nanotechnologies, Inc. Common Stock	Common Stock	NCM	12(g)	0001016546	001-12497
ALTR	Altera Corporation Common Stock	Common Stock	NGM	12(g)	0000768251	000-16617
ATGN	AltiGen Communications, Inc. Common Stock	Common Stock	NCM	12(g)	0001003607	000-27427
ATRS	Altiris, Inc. Common Stock	Common Stock	NGS	12(g)	0001139650	000-49793
APSA	Alto Palermo S.A. American Depository Shares	American Depository Shares	NGM	12(g)	0001128173	000-30982
ALTU	Altus Pharmaceuticals Inc. Common Stock	Common Stock	NGM	12(g)	0001340744	000-51711
ALVR	Alvarion Ltd. Ordinary Shares	Ordinary Shares	NGM	12(g)	0001108332	000-30628
AMRN	Amarin Corporation PLC American Depository Shares	American Depository Shares	NCM	12(g)	0000897448	000-21392
AMZN	Amazon.com, Inc. Common Stock	Common Stock	NGS	12(g)	0001018724	000-22513
EPAX	Ambassadors Group, Inc. Common Stock	Common Stock	NGS	12(g)	0001162315	000-33347
AMIE	Ambassadors International, Inc. Common Stock	Common Stock	NGM	12(g)	0000946842	000-26420
AMCP	AmCOMP Incorporated Common Stock	Common Stock	NGM	12(g)	0001009667	000-51767
AMCRP	Amcor Limited 7 1/4% Perpetual Redeemable Income Debt Exchangeable for Stock (PRIDES)	Other Securities	NCM	12(g)	0000869428	000-18893
AMCR	Amcor Limited American Depository Shares	American Depository Shares	NGS	12(g)	0000869428	000-18893
AMFI	Amcore Financial, Inc. Common Stock	Common Stock	NGS	12(g)	0000714756	000-13393

Issue Symbol	Issue Name	Issue Type	Issue Market Segment	Registration Type	CIK	SEC File #
AMED	Amedisys Inc Common Stock	Common Stock	NGS	12(g)	0000896262	000-24260
AMEN	AMEN Properties Inc Common Stock	Common Stock	NCM	12(g)	0001037599	000-22847
UHAL	Amerco Common Stock	Common Stock	NGS	12(g)	0000004457	001-11255
ASBI	Ameriana Bancorp Common Stock	Common Stock	NGM	12(g)	0000855574	000-18392
APRO	America First Apartment Investors, Inc.	Common Stock	NGM	12(g)	0001175167	000-20737
ATAXZ	America First Tax Exempt Investors, L.P. Beneficial Unit Certificates (BUCs) representing Limited Partnership Interests	Limited Partnership	NGM	12(g)	0001059142	000-24843
AMOV	America Movil, S.A. de C.V. Class A American Depository Shares	American Depository Shares	NGS	12(g)	0001129137	005-61257
ASGR	America Service Group Inc. Common Stock	Common Stock	NGS	12(g)	0000877476	000-19673
AATK	American Access Technologies, Inc. Common Stock	Common Stock	NCM	12(g)	0001043186	000-24575
ABNJ	American Bancorp of New Jersey, Inc. Common Stock	Common Stock	NGM	12(g)	0001330039	000-51500
AMBK	American Bank Inc Common Stock	Common Stock	NCM	12(g)	0001163747	000-31246
ABMC	American Bio Medica Corp. Common Stock	Common Stock	NCM	12(g)	0000896747	000-28666
ABMCW	American Bio Medica Corp. warrant	Warrant	NCM	12(g)	0000896747	000-28666
ACAS	American Capital Strategies, Ltd. Common Stock	Common Stock	NGS	12(g)	0000817473	814-00149
AMCE	American Claims Evaluation, Inc. Common Stock	Common Stock	NCM	12(g)	0000774517	000-14807
ACLI	American Commercial Lines Inc Common Stock New	Common Stock	NGS	12(g)	0001324479	000-51562
ACBA	American Community Bancshares Common Stock	Common Stock	NCM	12(g)	0001106980	000-30517
ADPI	American Dental Partners, Inc. Common Stock	Common Stock	NGS	12(g)	0001028087	000-23363
AEOS	American Eagle Outfitters, Inc. Common Stock	Common Stock	NGS	12(g)	0000919012	000-23760
ECOL	American Ecology Corporation Common Stock	Common Stock	NGM	12(g)	0000742126	000-11688
AMIC	American Independence Corp.	Common Stock	NGM	12(g)	0000097196	001-5270
AMAC	American Medical Alert Corp. Common Stock	Common Stock	NCM	12(g)	0000700721	001-08635
AMMD	American Medical Systems Holdings, Inc. Common Stock	Common Stock	NGS	12(g)	0001114200	000-30733
AMGIW	American Mold Guard, Inc. Class A Warrant	Warrant	NCM	12(g)	0001344708	001-32862
AMGIZ	American Mold Guard, Inc. Class B Warrant	Warrant	NCM	12(g)	0001344708	001-32862
AMGI	American Mold Guard, Inc. Common Stock	Common Stock	NCM	12(g)	0001344708	001-32862
AMNB	American National Bankshares, Inc. Common Stock	Common Stock	NGS	12(g)	0000741516	000-12820
APFC	American Pacific Corporation Common Stock	Common Stock	NGM	12(g)	0000350832	000-21046
ACAP	American Physicians Capital, Inc. Common Stock	Common Stock	NGM	12(g)	0001118148	000-32057
AMPH	American Physicians Service Group, Inc. Common Stock	Common Stock	NCM	12(g)	0000724024	000-11453
ARII	American Railcar Industries, Inc. Common Stock	Common Stock	NGS	12(g)	0001344596	000-51728
AMRB	American River Bankshares Common Stock	Common Stock	NGS	12(g)	0001108236	000-31525

Issue Symbol	Issue Name	Issue Type	Issue Market Segment	Registration Type	CIK	SEC File #
ASEI	American Science and Engineering, Inc. Common Stock	Common Stock	NGM	12(g)	0000005768	000-50967
AMSWA	American Software, Inc. Class A Common Stock	Common Stock	NGS	12(g)	0000713425	000-12456
AMSC	American Superconductor Corporation Common Stock	Common Stock	NGM	12(g)	0000880807	000-19672
ATCO	American Technology Corporation Common Stock	Common Stock	NCM	12(g)	0000924383	000-24248
AMWD	American Woodmark Corporation Common Stock	Common Stock	NGS	12(g)	0000794619	000-14798
AWBC	AmericanWest Bancorporation Common Stock	Common Stock	NGS	12(g)	0000726990	000-18561
CRMT	America's Car-Mart Inc Common Stock	Common Stock	NGS	12(g)	0000799850	000-14939
AMAB	AmericasBank Corp. Common Stock	Common Stock	NCM	12(g)	0001040491	000-22925
ARGN	Amerigon Incorporated Common Stock	Common Stock	NCM	12(g)	0000903129	000-21810
ABCB	Ameris Bancorp Common Stock	Common Stock	NGS	12(g)	0000351569	000-16181
AMSF	AMERISAFE, Inc. Common Stock	Common Stock	NGS	12(g)	0001018979	000-51520
ASRVP	AmeriServ Financial Inc. AmeriServ Financial Trust I - 8.45% Beneficial Unsecured Securities, Series A	Other Securities	NGM	12(g)	0000707605	000-11204
ASRV	AmeriServ Financial Inc. Common Stock	Common Stock	NGM	12(g)	0000707605	000-11204
ASCA	Ameristar Casinos, Inc. Common Stock	Common Stock	NGS	12(g)	0000912145	000-22494
AMTCP	Ameritrans Capital Corporation 9.375% Participating Preferred Stock	Preferred Stock	NCM	12(g)	0001064015	000-22153
AMTC	Ameritrans Capital Corporation Common Stock	Common Stock	NCM	12(g)	0001064015	000-22153
AMTCW	Ameritrans Capital Corporation Warrant	Warrant	NCM	12(g)	0001064015	000-22153
AMTY	Amerityre Corporation Common Stock	Common Stock	NCM	12(g)	0000945828	000-50053
ATLO	Ames National Corporation Common Stock	Common Stock	NCM	12(g)	0001132651	000-32637
AMGN	Amgen Inc. Common Stock	Common Stock	NGS	12(g)	0000318154	000-12477
AMCS	AMICAS, Inc. Common Stock	Common Stock	NGM	12(g)	0001028584	001-12799
AMIS	AMIS Holdings, Inc. Common Stock	Common Stock	NGS	12(g)	0001161963	000-50397
AMKR	Amkor Technology, Inc. Common Stock	Common Stock	NGS	12(g)	0001047127	000-29472
AMPL	Ampal-American Israel Corporation Common Stock	Common Stock	NGM	12(g)	0000731859	000-00538
AMPX	Ampex Corporation Class A Common Stock	Common Stock	NGM	12(g)	0000887433	000-20292
AMSG	Amsurg Corp. Common Stock	Common Stock	NGS	12(g)	0000895930	000-22217
ASYS	Amtech Systems, Inc. Common Stock	Common Stock	NGM	12(g)	0000720500	000-11412
AMLN	Amylin Pharmaceuticals, Inc. Common Stock	Common Stock	NGS	12(g)	0000881464	000-19700
ANAD	ANADIGICS, Inc. Common Stock	Common Stock	NGM	12(g)	0000940332	000-25662
ANDS	Anadys Pharmaceuticals, Inc. Common Stock	Common Stock	NGM	12(g)	0001128495	000-50632
ALOG	Analogic Corporation Common Stock	Common Stock	NGS	12(g)	0000006284	000-06715
ANLY	Analysts International Corporation Common Stock	Common Stock	NGM	12(g)	0000006292	000-04090

Issue Symbol	Issue Name	Issue Type	Issue Market Segment	Registration Type	CIK	SEC File #
ANLT	Analytical Surveys, Inc. Common Stock	Common Stock	NCM	12(g)	0000753048	000-13111
ANEN	Anaren Inc.	Common Stock	NGM	12(g)	0000006314	000-06620
ABCW	Anchor Bancorp Wisconsin Inc. Common Stock	Common Stock	NGS	12(g)	0000885322	000-20006
ANDE	Andersons, Inc. (The) Common Stock	Common Stock	NGS	12(g)	0000821026	000-20557
ANDW	Andrew Corporation Common Stock	Common Stock	NGS	12(g)	0000317093	001-14617
ADRX	Andrx Group Common Stock	Common Stock	NGS	12(g)	0001123337	000-31475
ANSV	Anesiva, Inc. Common Stock	Common Stock	NGM	12(g)	0001131517	000-50573
ANGN	Angeion Corporation Common Stock	Common Stock	NCM	12(g)	0000815093	000-17019
ANGO	AngioDynamics, Inc. Common Stock	Common Stock	NGS	12(g)	0001275187	000-50761
ANPI	Angiotech Pharmaceuticals, Inc. Common Shares	Common Stock	NGS	12(g)	0001096481	000-30334
ANIK	Anika Therapeutics Inc. Common Stock	Common Stock	NGS	12(g)	0000898437	000-21326
ANNB	Annapolis Bancorp Inc. Common Stock	Common Stock	NCM	12(g)	0001041429	000-22961
ANST	Ansoft Corporation Common Stock	Common Stock	NGS	12(g)	0000849433	000-27874
ANSW	Answers Corporation Common Stock	Common Stock	NGM	12(g)	0001283073	000-51467
ANSR	answerthink inc. Common Stock	Common Stock	NGM	12(g)	0001057379	000-24343
ANSS	ANSYS, Inc. Common Stock	Common Stock	NGS	12(g)	0001013462	000-20853
AGEN	Antigenics Inc. Common Stock	Common Stock	NGM	12(g)	0001098972	000-29089
APPA	AP Pharma, Inc. Common Stock	Common Stock	NGM	12(g)	0000818033	000-16109
APAT	APA Enterprises, Inc. Common Stock	Common Stock	NGM	12(g)	0000796505	000-16106
APAC	APAC Customer Services, Inc. Common Stock	Common Stock	NGM	12(g)	0000949297	000-26786
APAGF	APCO Argentina Inc. Ordinary Shares	Ordinary Shares	NCM	12(g)	0000311471	000-08933
APOG	Apogee Enterprises, Inc. Common Stock	Common Stock	NGS	12(g)	0000006845	000-06365
APOL	Apollo Group, Inc. Class A Common Stock	Common Stock	NGS	12(g)	0000929887	000-25232
AINV	Apollo Investment Corporation Common Stock	Common Stock	NGS	12(g)	0001278752	000-50578
APAB	Appalachian Bancshares, Inc. (GA) Common Stock	Common Stock	NGM	12(g)	0001019883	000-21383
AAPL	Apple Computer, Inc. Common Stock	Common Stock	NGS	12(g)	0000320193	000-10030
APPB	Applebee's International, Inc. Common Stock	Common Stock	NGS	12(g)	0000853665	000-17962
ARCI	Appliance Recycling Centers of America, Inc. Common Stock	Common Stock	NCM	12(g)	0000862861	000-19621
ADSX	Applied Digital Solutions, Inc. Common Stock	Common Stock	NCM	12(g)	0000924642	000-26020
AINN	Applied Innovation Inc. Common Stock	Common Stock	NGM	12(g)	0000798399	000-21352
AMAT	Applied Materials, Inc. Common Stock	Common Stock	NGS	12(g)	0000006951	000-06920
AMCC	Applied Micro Circuits Corporation Common Stock	Common Stock	NGS	12(g)	0000711065	000-23193
APSG	Applied Signal Technology, Inc. Common Stock	Common Stock	NGS	12(g)	0000741696	000-21236
APLX	Applix, Inc. Common Stock	Common Stock	NCM	12(g)	0000932112	000-25040

Issue Symbol	Issue Name	Issue Type	Issue Market Segment	Registration Type	CIK	SEC File #
APTMM	Aptimus Inc Common Stock	Common Stock	NGM	12(g)	0001087277	000-28968
AQNT	aQuantive Inc. Common Stock	Common Stock	NGS	12(g)	0001071806	000-29361
ARDM	Aradigm Corporation Common Stock	Common Stock	NCM	12(g)	0001013238	000-28402
ARBX	Arbinet-theexchange, Inc. Common Stock	Common Stock	NGM	12(g)	0001136655	000-51063
ARCAF	Arcadis NV New York Registry Shares	American Depository Shares	NGS	12(g)	0000913596	000-22628
ACGL	Arch Capital Group Ltd. Common Stock	Common Stock	NGS	12(g)	0000947484	000-26456
ACAT	Arctic Cat Inc. Common Stock	Common Stock	NGS	12(g)	0000719866	000-18607
ARDNA	Arden Group, Inc. Class A Common Stock	Common Stock	NGM	12(g)	0000225051	000-09904
ARNA	Arena Pharmaceuticals, Inc. Common Stock	Common Stock	NGM	12(g)	0001080709	000-31161
ARCC	Ares Capital Corporation Common Stock	Common Stock	NGS	12(g)	0001287750	000-50697
STST	ARGON ST, Inc. Common Stock	Common Stock	NGS	12(g)	0000026537	000-08193
AGII	Argonaut Group, Inc. Common Stock	Common Stock	NGS	12(g)	0000800082	000-14950
ARIA	ARIAD Pharmaceuticals, Inc. Common Stock	Common Stock	NGM	12(g)	0000884731	000-21696
ARBA	Arba, Inc. Common Stock	Common Stock	NGM	12(g)	0001084755	000-26299
RAMS	Aries Maritime Transport Limited Common Shares	Common Stock	NGM	12(g)	0001322587	000-51339
ARKR	Ark Restaurants Corp. Common Stock	Common Stock	NGM	12(g)	0000779544	000-14030
ABFS	Arkansas Best Corporation Common Stock	Common Stock	NGS	12(g)	0000894405	000-19969
ARMHY	ARM Holdings, plc American Depository Shares	American Depository Shares	NGS	12(g)	0001057997	000-29644
ARTX	Arotech Corporation Common Stock	Common Stock	NGM	12(g)	0000916529	000-23336
ARQL	ArQule, Inc. Common Stock	Common Stock	NGM	12(g)	0001019695	000-21429
ARRY	Array BioPharma Inc. Common Stock	Common Stock	NGM	12(g)	0001100412	000-31979
ARRS	Artis Group Inc Common Stock	Common Stock	NGS	12(g)	0001141107	000-31254
AROW	Arrow Financial Corporation Common Stock	Common Stock	NGS	12(g)	0000717538	000-12507
ARRO	Arrow International, Inc. Common Stock	Common Stock	NGS	12(g)	0000886046	000-20212
ARWR	Arrowhead Research Corporation Common Stock	Common Stock	NCM	12(g)	0000879407	000-21898
ARTG	Art Technology Group, Inc. Common Stock	Common Stock	NGM	12(g)	0001086195	000-26679
ARTNA	Artesian Resources Corporation Class A Common Stock	Common Stock	NGM	12(g)	0000863110	000-18516
ARTC	ArthroCare Corporation Common Stock	Common Stock	NGS	12(g)	0001005010	000-27422
ARTW	Art's-Way Manufacturing Co., Inc. Common Stock	Common Stock	NCM	12(g)	0000007623	000-05131
ASTT	ASAT Holdings Limited American Depository Shares	American Depository Shares	NCM	12(g)	0001102384	000-30842
ASTIU	Ascent Solar Technologies, Inc. Unit	Unit	NCM	12(g)	0001350102	001-32919
ASTSF	ASE Test, Limited Ordinary Shares	Ordinary Shares	NGS	12(g)	0001014838	000-28522

Issue Symbol	Issue Name	Issue Type	Issue Market Segment	Registration Type	CIK	SEC File #
ASHW	Ashworth, Inc. Common Stock	Common Stock	NGM	12(g)	0000820774	000-18553
ASIA	AsiaInfo Holdings, Inc. Common Stock	Common Stock	NGM	12(g)	0001100969	001-15713
ASMI	ASM International N.V. Common Stock	American Depository Shares	NGS	12(g)	0000351483	000-13355
ASML	ASML Holding N.V. New York Registry Shares	American Depository Shares	NGS	12(g)	0000937966	000-25566
ASPM	Aspect Medical Systems, Inc. Common Stock	Common Stock	NGM	12(g)	0000886235	000-24663
AZPN	Aspen Technology, Inc. Common Stock	Common Stock	NGM	12(g)	0000929940	000-24786
ASPV	Aspreva Pharmaceuticals Corporation Common Stock	Common Stock	NGS	12(g)	0001314026	000-51169
AACC	Asset Acceptance Capital Corp. COMMON STOCK	Common Stock	NGS	12(g)	0001264707	000-50552
ASBC	Associated Banc-Corp Common Stock	Common Stock	NGS	12(g)	0000007789	000-05519
ASFI	Asta Funding, Inc. Common Stock	Common Stock	NGS	12(g)	0001001258	000-26906
ATEA	Astea International, Inc. Common Stock	Common Stock	NCM	12(g)	0000945989	000-26330
ASTE	Astec Industries, Inc. Common Stock	Common Stock	NGS	12(g)	0000792987	000-14714
ALOT	Astro-Med, Inc. Common Stock	Common Stock	NGM	12(g)	0000008146	000-13200
ATRO	Astronics Corporation Common Stock	Common Stock	NGM	12(g)	0000008063	000-07087
ASYS	Asyst Technologies, Inc. Common Stock	Common Stock	NGM	12(g)	0000909326	000-22430
ATAR	Atari, Inc. Common Stock	Common Stock	NGM	12(g)	0001002607	000-27338
AGIX	AtheroGenics, Inc. Common Stock	Common Stock	NGM	12(g)	0001107601	000-31261
ATHR	Atheros Communications, Inc. Common Stock	Common Stock	NGS	12(g)	0001140486	000-50534
ATYT	ATI Technologies Inc. Common Stock	Common Stock	NGS	12(g)	0001065331	000-29872
AAME	Atlantic American Corporation Common Stock	Common Stock	NGM	12(g)	0000008177	000-03722
ATBC	Atlantic BancGroup, Inc. Common Stock	Common Stock	NCM	12(g)	0001087790	001-15061
ACFC	Atlantic Coast Federal Corporation Common Stock	Common Stock	NGM	12(g)	0001284077	000-50962
ATNI	Atlantic Tele-Network, Inc. Common Stock	Common Stock	NGM	12(g)	0000879585	000-19551
ATPL	Atlantis Plastics, Inc. Common Stock	Common Stock	NGM	12(g)	0000811828	000-51182
AAWW	Atlas Air Worldwide Holdings NEW Common Stock	Common Stock	NGS	12(g)	0001135185	000-25732
ATLS	Atlas America, Inc. Common Stock	Common Stock	NGS	12(g)	0001279228	001-32169
APCFY	Atlas South Sea Pearl Limited American Depository Shares	American Depository Shares	NCM	12(g)	0001011974	000-28186
ATML	Atmel Corporation Common Stock	Common Stock	NGS	12(g)	0000872448	000-19032
ATMI	ATMI Inc. Common Stock	Common Stock	NGS	12(g)	0001041577	000-30130
ATPG	ATP Oil & Gas Corporation Common Stock	Common Stock	NGS	12(g)	0001123647	000-32261
ATRC	AtrioCure, Inc. Common Stock	Common Stock	NGM	12(g)	0001323885	000-51470
ATRI	ATRION Corporation Common Stock	Common Stock	NGM	12(g)	0000701288	000-10763

Issue Symbol	Issue Name	Issue Type	Issue Market Segment	Registration Type	CIK	SEC File #
ATSI	ATS Medical, Inc. Common Stock	Common Stock	NGM	12(g)	0000824068	000-18602
ATTU	Attunity Ltd. Ordinary Shares	Ordinary Shares	NGM	12(g)	0000893821	000-20892
AUBN	Auburn National Bancorporation, Inc. Common Stock	Common Stock	NCM	12(g)	0000750574	000-26486
ADBL	Audible, Inc. New Common Stock	Common Stock	NGM	12(g)	0001077926	000-26529
AUDC	AudioCodes Ltd. Common Stock	Ordinary Shares	NGM	12(g)	0001086434	000-30070
VOXX	Audiovox Corporation Class A Common Stock	Common Stock	NGM	12(g)	0000807707	000-28839
ADAT	Authentidate Holding Corp. Common Stock	Common Stock	NGM	12(g)	0000885074	000-20190
ABTL	Autobytel Inc. Common Stock	Common Stock	NGM	12(g)	0001023364	000-22239
ADSK	Autodesk, Inc. Common Stock	Common Stock	NGS	12(g)	0000769397	000-14338
AUXL	Auxilium Pharmaceuticals, Inc. Common Stock	Common Stock	NGM	12(g)	0001182129	000-50855
AVFX	Avalon Pharmaceuticals, Inc. Common Stock	Common Stock	NGM	12(g)	0001162192	001-32629
AVNX	Avanex Corporation Common Stock	Common Stock	NGM	12(g)	0001056794	000-29175
AVNR	AVANIR Pharmaceuticals Class A Common Stock	Common Stock	NGM	12(g)	0000858803	001-15803
AVAN	Avant Immunotherapeutics, Inc. Common Stock	Common Stock	NGM	12(g)	0000744218	000-15006
AVTR	Avatar Holdings Inc. Common Stock	Common Stock	NGS	12(g)	0000039677	000-7616
AVII	AVI BioPharma, Inc. Common Stock	Common Stock	NGM	12(g)	0000873303	000-22613
AVCI	Avici Systems Inc. Common Stock	Common Stock	NGM	12(g)	0001094895	000-30865
AVID	Avid Technology, Inc. Common Stock	Common Stock	NGS	12(g)	0000896841	000-21174
AVGN	Avigen, Inc. Common Stock	Common Stock	NGM	12(g)	0000932903	000-28272
AVSR	Avistar Communications Corporation Common Stock	Common Stock	NCM	12(g)	0001111632	000-31121
AVZA	Aviza Technology, Inc. Common Stock	Common Stock	NGM	12(g)	0001311396	000-51642
AVCT	Avocent Corporation Common Stock	Common Stock	NGS	12(g)	0001109808	000-30575
AWRE	Aware, Inc. Common Stock	Common Stock	NGM	12(g)	0001015739	000-21129
AXCA	Axcan Pharma Inc. Common Shares	Common Stock	NGS	12(g)	0001116094	000-30860
ACLS	Axcelis Technologies, Inc. Common Stock	Common Stock	NGM	12(g)	0001113232	000-30941
AXYX	Axonix, Inc. Common Stock	Common Stock	NCM	12(g)	0001070698	000-25571
AXYS	Axsys Technologies, Inc. Common Stock	Common Stock	NGS	12(g)	0000206030	000-16182
AXTI	AXT Inc Common Stock	Common Stock	NGM	12(g)	0001051627	000-24085
POSH	BabyUniverse, Inc. Common Stock	Common Stock	NCM	12(g)	0001325118	000-51850
BYBI	Back Yard Burgers, Inc. Common Stock	Common Stock	NCM	12(g)	0000901495	001-12104
BWEB	BackWeb Technologies Ltd. Ordinary Shares	Ordinary Shares	NCM	12(g)	0001082064	000-26241
BIDU	Baidu.com, Inc. ADS	American Depository Shares	NGM	12(g)	0001329099	000-51469
BKRS	Bakers Footwear Group, Inc. Common Stock	Common Stock	NGM	12(g)	0001171032	000-50563

Issue Symbol	Issue Name	Issue Type	Issue Market Segment	Registration Type	CIK	SEC File #
BWINA	Baldwin & Lyons, Inc. Class A Common Stock	Common Stock	NGM	12(g)	000009346	000-05534
BWINB	Baldwin & Lyons, Inc. Class B Common Stock	Common Stock	NGM	12(g)	000009346	000-05534
BLDP	Ballard Power Systems, Inc. Common Shares	Common Stock	NGM	12(g)	000093377	000-25270
BANFP	BancFirst Corporation - BFC Capital Trust II Cumulative Trust Preferred Securities	Other Securities	NGS	12(g)	0000760498	000-14384
BANF	BancFirst Corporation Common Stock	Common Stock	NGS	12(g)	0000760498	000-14384
BOFL	Bancshares of Florida, Inc. Common Stock	Common Stock	NGM	12(g)	0001082368	000-50091
BTFG	BancTrust Financial Group, Inc. Common Stock	Common Stock	NGS	12(g)	0000783739	000-15423
BKMU	Bank Mutual Corporation Common Stock	Common Stock	NGS	12(g)	0001123270	000-31207
BOCH	Bank of Commerce Holdings (CA) Common Stock	Common Stock	NGM	12(g)	0000702513	000-25135
GRAN	Bank of Granite Corporation Common Stock	Common Stock	NGS	12(g)	0000810689	000-15956
BKSC	Bank of South Carolina Corp. Common Stock	Common Stock	NCM	12(g)	0001007273	000-27702
OZRK	Bank of the Ozarks Common Stock	Common Stock	NGS	12(g)	0001038205	000-22759
BKWW	Bank of Wilmington Corporation (NC) Common Stock	Common Stock	NCM	12(g)	0001334872	000-51513
BBXT	BankAtlantic Bancorp, Inc. BankAtlantic Bancorp, Inc - BBC Capital Trust II 8.50% Trust Preferred Securities	Other Securities	NGM	12(g)	0000921768	001-13133
BFIN	BankFinancial Corporation Common Stock	Common Stock	NGM	12(g)	0001303942	000-51331
RATE	Bankrate Inc Common Stock	Common Stock	NGS	12(g)	0001080866	000-25681
BKUNA	BankUnited Financial Corporation Class A Common Stock	Common Stock	NGS	12(g)	0000894490	000-21850
BANR	Banner Corporation Common Stock	Common Stock	NGS	12(g)	0000946673	000-26584
BBSI	Barrett Business Services, Inc. Common Stock	Common Stock	NGS	12(g)	0000902791	000-21886
BTRX	Barrier Therapeutics, Inc. Common Stock	Common Stock	NGM	12(g)	0001173657	000-50680
BWTR	Basin Water, Inc. Common Stock	Common Stock	NGM	12(g)	0001352045	000-51991
BSET	Bassett Furniture Industries, Incorporated Common Stock	Common Stock	NGS	12(g)	0000010329	000-00209
BAYN	Bay National Corporation Common Stock	Common Stock	NCM	12(g)	0001089787	000-51765
BCBP	BCB Bancorp, Inc. (NJ) Common Stock	Common Stock	NGM	12(g)	0001228454	000-50275
BCSB	BCSB Bancorp, Inc. Common Stock	Common Stock	NGM	12(g)	0001052101	000-24589
BEAV	BE Aerospace, Inc. Common Stock	Common Stock	NGS	12(g)	0000861361	000-18348
BESI	BE Semiconductor Industries NV New York Registry Shares	American Depository Shares	NGM	12(g)	0001003196	000-27298
BEAS	BEA Systems, Inc. Common Stock	Common Stock	NGS	12(g)	0001031798	000-22369
BFNB	Beach First National Bancshares Inc Common Stock	Common Stock	NGM	12(g)	0000949228	000-22503
BCON	Beacon Power Corporation Common Stock	Common Stock	NCM	12(g)	0001103345	000-31973
BECN	Beacon Roofing Supply, Inc. Common Stock	Common Stock	NGS	12(g)	0001124941	000-50924

Issue Symbol	Issue Name	Issue Type	Issue Market Segment	Registration Type	CIK	SEC File #
BBGI	Beasley Broadcast Group, Inc. Class A Common Stock	Common Stock	NGM	12(g)	0001099160	000-29253
BEBE	bebe stores, inc. Common Stock	Common Stock	NGS	12(g)	0001059272	000-24395
BBBY	Bed Bath & Beyond Inc. Common Stock	Common Stock	NGS	12(g)	0000886158	000-20214
BELFA	Bel Fuse Inc. Class A Common Stock	Common Stock	NGS	12(g)	0000729580	000-11676
BELFB	Bel Fuse Inc. Class B Common Stock	Common Stock	NGS	12(g)	0000729580	000-11676
BELM	Bell Microproducts Inc. Common Stock	Common Stock	NGM	12(g)	0000900708	000-21528
BNHNA	Benhana Inc. Class A Common Stock	Common Stock	NGM	12(g)	0000935226	000-26396
BNHN	Benhana Inc. Common Stock	Common Stock	NGM	12(g)	0000935226	000-26396
BFBC	Benjamin Franklin Bancorp, Inc. Common Stock	Common Stock	NGM	12(g)	0001302176	000-51194
BERK	Berkshire Bancorp, Inc. Common Stock	Common Stock	NGM	12(g)	0000759718	000-13649
BHLB	Berkshire Hills Bancorp, Inc. Common Stock	Common Stock	NGS	12(g)	0001108134	000-51584
BHBC	Berkshire Hills Bancorp Inc. Common Stock	Common Stock	NGS	12(g)	0001024321	000-21845
BGFV	Beverly Hills Bancorp Corporation Common Stock	Common Stock	NGS	12(g)	0001156388	000-49850
BDOG	Big 5 Sporting Goods Corporation Common Stock	Common Stock	NGM	12(g)	0001019439	000-22963
BASI	Big Dog Holding, Inc. Common Stock	Common Stock	NGM	12(g)	0000720154	000-23357
BORX	Bioanalytical Systems, Inc. Common Stock	Common Stock	NGM	12(g)	0000882796	000-23186
BDSIW	BioCryst Pharmaceuticals, Inc. Common Stock	Common Stock	NGM	12(g)	0001103021	001-31361
BDSI	BioDelivery Sciences International, Inc. Class A Warrant	Warrant	NCM	12(g)	0001103021	001-31361
BDSI	BioDelivery Sciences International, Inc. Common Stock	Common Stock	NCM	12(g)	0001103021	001-31361
BIVN	BioDelivery Sciences International, Inc. Common Stock	Common Stock	NGM	12(g)	0001028205	000-24875
BIIB	Bioenvision, Inc. Common Stock	Common Stock	NGS	12(g)	0000875045	000-19311
BITI	Biogen Idec Inc Common Stock	Common Stock	NGS	12(g)	0000875045	000-19311
BUCT	Bio-Imaging Technologies, Inc. Common Stock	Common Stock	NGM	12(g)	0000822418	000-50512
BLTI	Bioject Medical Technologies Inc. Common Stock	Common Stock	NCM	12(g)	0000810084	000-15360
BMRN	BioLase Technology, Inc. Common Stock	Common Stock	NGM	12(g)	0000811240	000-19627
BMET	BioMarin Pharmaceutical Inc. Common Stock	Common Stock	NGM	12(g)	0001048477	000-26727
BMTI	Biomet, Inc. Common Stock	Common Stock	NGS	12(g)	0000351346	000-12515
BIOM	BioMimetic Therapeutics, Inc. Common Stock	Common Stock	NGM	12(g)	0001138400	000-51934
BPRG	Biomira Inc. Common Shares	Common Stock	NGM	12(g)	0000877984	000-19451
BPUR	BioProgress plc American Depository Shares representing 10 Ordinary Shares	American Depository Shares	NGM	12(g)	0001210959	000-50994
BRLI	Biopure Corporation Class A Common Stock	Common Stock	NGM	12(g)	0000815508	001-15167
BIO	Bio-Reference Laboratories, Inc. Common Stock	Common Stock	NGS	12(g)	0000792641	000-15266
BSTE	BioScrip, Inc. Common Stock	Common Stock	NGM	12(g)	0001014739	000-28740
BSMD	Biosite, Inc. Common Stock	Common Stock	NGS	12(g)	0000834306	000-21873
BSMD	BioSphere Medical, Inc. Common Stock	Common Stock	NGM	12(g)	0000919015	000-23678

Issue Symbol	Issue Name	Issue Type	Issue Market Segment	Registration Type	CIK	SEC File #
BIOV	BioVeris Corporation Common Stock	Common Stock	NGM	12(g)	0001264899	000-50583
BDMS	Birner Dental Management Services, Inc. Common Stock	Common Stock	NCM	12(g)	0000948072	000-23367
BITS	Bitstream Inc. Common Stock	Common Stock	NCM	12(g)	0000818813	000-21541
BJRI	BJ's Restaurants, Inc. Common Stock	Common Stock	NGS	12(g)	0001013488	000-21423
BBOX	Black Box Corporation Common Stock	Common Stock	NGS	12(g)	0000849547	000-18706
BLKB	Blackbaud, Inc. Common Stock	Common Stock	NGS	12(g)	0001280058	000-50600
BBBB	Blackboard Inc. Common Stock	Common Stock	NGS	12(g)	0001106942	000-50784
BCSI	Blue Coat Systems Inc Common Stock	Common Stock	NGM	12(g)	0001095600	000-28139
BDCO	Blue Dolphin Energy Company Common Stock	Common Stock	NCM	12(g)	0000793306	000-15905
BLUE	Blue Holdings, Inc. Common Stock	Common Stock	NCM	12(g)	0001139683	000-33297
NILE	Blue Nile, Inc. Common Stock	Common Stock	NGS	12(g)	0001091171	000-50763
BRBI	Blue River Bancshares, Inc. Common Stock	Common Stock	NCM	12(g)	0001055870	000-24501
BPHX	BluePhoenix Solutions, Ltd. Ordinary Shares	Ordinary Shares	NGM	12(g)	0001029581	000-29082
BNCN	BNC Bancorp (NC) Common Stock	Common Stock	NCM	12(g)	0001210227	000-50128
BNCC	Brccorp, Inc. Common Stock	Common Stock	NGM	12(g)	0000945434	000-26290
BOBE	Bob Evans Farms, Inc. Common Stock	Common Stock	NGS	12(g)	0000033769	000-01667
BSXT	BOE Financial Services of Virginia Inc. Common Stock	Common Stock	NCM	12(g)	0001109848	000-31711
BOFI	BofI Holding, Inc. Common Stock	Common Stock	NGM	12(g)	0001299709	000-51201
BOKF	BOK Financial Corporation Common Stock	Common Stock	NGS	12(g)	0000875357	000-19341
BNSO	Bonso Electronics International, Inc. Common Stock	Common Stock	NGM	12(g)	0000846546	000-17601
BONT	Bon-Ton Stores, Inc. (The) Common Stock	Common Stock	NGS	12(g)	0000878079	000-19517
BKHM	Bookham Inc Common Stock	Common Stock	NGM	12(g)	0001110647	000-30684
BAMM	Books-A-Million, Inc. Common Stock	Common Stock	NGS	12(g)	0000891919	000-20664
BORL	Borland Software Corporation Common Stock	Common Stock	NGM	12(g)	0000853273	000-16096
BCGI	Boston Communications Group, Inc. Common Stock	Common Stock	NGM	12(g)	0001012887	000-28432
BLSI	Boston Life Sciences, Inc. Common Stock	Common Stock	NCM	12(g)	000094784	000-06533
BPFH	Boston Private Financial Holdings, Inc. Common Stock	Common Stock	NGS	12(g)	0000821127	000-17089
EPAY	Bottomline Technologies, Inc. Common Stock	Common Stock	NGM	12(g)	0001073349	000-25259
BBNK	Bridge Capital Holdings Common Stock	Common Stock	NCM	12(g)	0001304740	000-50974
OCNB	Bridge Street Financial, Inc. Common Stock (par \$.01)	Common Stock	NCM	12(g)	0001182555	000-50105
BRID	Bridgford Foods Corporation Common Stock	Common Stock	NGM	12(g)	0000014177	000-02396
BEXP	Brigham Exploration Company Common Stock	Common Stock	NGS	12(g)	0001034755	000-22433
BFAM	Bright Horizons Family Solutions Inc. Common Stock	Common Stock	NGS	12(g)	0001060559	000-24699
CELL	Brightpoint, Inc. Common Stock	Common Stock	NGS	12(g)	0000918946	000-23494

Issue Symbol	Issue Name	Issue Type	Issue Market Segment	Registration Type	CIK	SEC File #
BSML	Britesmile, Inc. Common Stock	Common Stock	NCM	12(g)	0000866734	001-11064
BKBK	Britton & Koontz Capital Corporation Common Stock	Common Stock	NCM	12(g)	0000707604	000-22606
BRCM	Broadcom Corporation Class A Common Stock	Common Stock	NGS	12(g)	0001054374	000-23993
BYFC	Broadway Financial Corporation Common Stock	Common Stock	NCM	12(g)	0001001171	000-27464
BWNG	Broadwing Corporation Common Stock	Common Stock	NGS	12(g)	0001060490	000-30989
BBCD	Brocade Communications Systems, Inc. Common Stock	Common Stock	NGS	12(g)	0001009626	000-25601
BRNC	Bronco Drilling Company, Inc. Common Stock	Common Stock	NGM	12(g)	0001328650	000-51471
BXXX	Brooke Corporation Common Stock	Common Stock	NGM	12(g)	0000834408	000-31789
BRKL	Brookline Bancorp., Inc. Common Stock	Common Stock	NGS	12(g)	0001049782	000-23695
BFSB	Brooklyn Federal Bancorp., Inc. Common Stock	Common Stock	NGM	12(g)	0001310313	000-51208
BRKS	Brooks Automation, Inc.	Common Stock	NGM	12(g)	0000939974	000-25434
BRKR	Braker BioSciences Corporation Common Stock	Common Stock	NGM	12(g)	0001109354	000-30833
BMTC	Bryn Mawr Bank Corporation Common Stock	Common Stock	NGM	12(g)	0000802681	000-15261
BSQR	BSQUARE Corporation Common Stock	Common Stock	NGM	12(g)	0001054721	000-27687
BTUI	BTU International, Inc. Common Stock	Common Stock	NGM	12(g)	0000840883	000-17297
BUCA	BUCA, Inc. Common Stock	Common Stock	NGM	12(g)	0001046501	000-25721
BUCY	Bucyrus International, Inc. Class A Common Stock	Common Stock	NGS	12(g)	0000740761	000-50858
BWLD	Buffalo Wild Wings, Inc. Common Stock	Common Stock	NGS	12(g)	0001062449	000-24743
BLDR	Builders FirstSource, Inc. Common Stock	Common Stock	NGS	12(g)	0001316835	000-51357
BMHC	Building Materials Holding Corporation Common Stock	Common Stock	NGS	12(g)	0001046356	000-19335
BOBJ	Business Objects S.A. American Depository Shares	American Depository Shares	NGS	12(g)	0000928753	000-24720
BWCF	BWC Financial Corporation Common Stock	Common Stock	NGM	12(g)	0000353650	000-10658
CFFI	C&F Financial Corporation Common Stock	Common Stock	NGS	12(g)	0000913341	000-23423
CHRW	C.H. Robinson Worldwide, Inc. Common Stock	Common Stock	NGS	12(g)	0001043277	000-23189
CCMP	Cabot Microelectronics Corporation Common Stock	Common Stock	NGS	12(g)	0001102934	000-30205
CACH	Cache, Inc. Common Stock	Common Stock	NGS	12(g)	0000350199	000-10345
CDNS	Cadence Design Systems, Inc. Common Stock	Common Stock	NGS	12(g)	0000813672	001-10606
CDZI	CADIZ, Inc. Common Stock	Common Stock	NGM	12(g)	0000727273	000-12114
CDMS	Cadmus Communications Corporation Common Stock	Common Stock	NGM	12(g)	0000745274	000-12954
CLMS	Calamos Asset Management, Inc. Class A Common Stock	Common Stock	NGS	12(g)	0001299033	000-51003
CAMP	CalAmp Corp. Common Stock	Common Stock	NGS	12(g)	0000730255	000-12182
CVGW	Calavo Growers, Inc. Common Stock	Common Stock	NGM	12(g)	0001133470	000-33385
CALC	California Coastal Communities Inc Common Stock	Common Stock	NGM	12(g)	0000840216	000-17189

Issue Symbol	Issue Name	Issue Type	Issue Market Segment	Registration Type	CIK	SEC File #
CFNB	California First National Bancorp Common Stock	Common Stock	NGM	12(g)	0000803016	000-15641
CAMD	California Micro Devices Corporation Common Stock	Common Stock	NGM	12(g)	0000800460	000-15449
CPKI	California Pizza Kitchen, Inc. Common Stock	Common Stock	NGS	12(g)	0000789356	000-31149
CALP	Caliper Life Sciences Inc Common Stock	Common Stock	NGM	12(g)	0001014672	000-28229
CALD	Callidus Software, Inc. Common Stock	Common Stock	NGM	12(g)	0001035748	000-50463
CALL	CallWave, Inc. Common Stock	Common Stock	NGM	12(g)	0001115091	000-50958
CALM	Cal-Maine Foods, Inc. Common Stock	Common Stock	NGM	12(g)	0000016160	000-04892
CLMT	Calumet Specialty Products Partners, L.P. Common Units	Limited Partnership	NGM	12(g)	0001340122	000-51734
CADA	CAM Commerce Solutions, Inc. Common Stock	Common Stock	NGM	12(g)	0000819334	000-16569
OLED	Cambridge Display Technology, Inc. Common Stock	Common Stock	NGM	12(g)	0001297968	000-51079
CAFI	Camco Financial Corporation Common Stock	Common Stock	NGM	12(g)	0000016614	000-25196
CAMT	Camtek Ltd. Ordinary Shares	Ordinary Shares	NGM	12(g)	0001109138	000-30664
CLZR	Candela Corporation Common Stock	Common Stock	NGS	12(g)	0000793279	000-14742
CBKN	Capital Bank Corporation Common Stock	Common Stock	NGS	12(g)	0001071992	000-30062
CCBG	Capital City Bank Group Common Stock	Common Stock	NGS	12(g)	0000726601	000-13358
CCOW	Capital Corp of the West Common Stock	Common Stock	NGS	12(g)	0001004740	000-27384
CCPCP	Capital Crossing Preferred Corporation Series A Non-Cumulative Exchangeable Preferred Stock	Preferred Stock	NGM	12(g)	0001072806	000-25193
CCPCO	Capital Crossing Preferred Corporation Series C Non-Cumulative Exchangeable Preferred Stock	Preferred Stock	NGM	12(g)	0001072806	000-25193
CCPCN	Capital Crossing Preferred Corporation Series D Non-Cumulative Exchangeable Preferred Stock	Preferred Stock	NGM	12(g)	0001072806	000-25193
CSWC	Capital Southwest Corporation Common Stock	Common Stock	NGM	12(g)	0000017313	811-01056
CTGI	Capital Title Group, Inc. Common Stock	Common Stock	NGS	12(g)	0001017158	000-21417
CAPB	CapitalSouth Bancorp Common Stock	Common Stock	NGM	12(g)	0001338977	000-51660
CFFN	Capitol Federal Financial Common Stock	Common Stock	NGS	12(g)	0001074433	000-25391
CPST	Capstone Turbine Corporation Common Stock	Common Stock	NGM	12(g)	0001009759	000-30867
CAPA	Captaris Inc. Common Stock	Common Stock	NGM	12(g)	0000931784	000-25186
CSAR	Caraustar Industries, Inc. Common Stock	Common Stock	NGM	12(g)	0000825692	000-20646
CSCX	Cardiac Science Corporation Common Stock	Common Stock	NGM	12(g)	0001323115	000-51512
CRDC	Cardica, Inc. Common Stock	Common Stock	NGM	12(g)	0001178104	000-51772
CFNL	Cardinal Financial Corporation Common Stock	Common Stock	NGS	12(g)	0001060523	000-24557
CDIC	CardioDynamics International Corporation Common Stock	Common Stock	NGM	12(g)	0000719722	000-11888
CRME	Cardiome Pharma Corporation Ordinary Shares (Canada)	Common Stock	NGM	12(g)	0001036141	000-29338

Issue Symbol	Issue Name	Issue Type	Issue Market Segment	Registration Type	CIK	SEC File #
CECO	Career Education Corporation Common Stock	Common Stock	NGS	12(g)	0001046568	000-23245
CBOU	Caribou Coffee Company, Inc. Common Stock	Common Stock	NGM	12(g)	0001332602	000-51535
CKEC	Carmike Cinemas, Inc. Common Stock	Common Stock	NGM	12(g)	0000799088	000-14993
CLBH	Carolina Bank Holdings Inc. Common Stock	Common Stock	NCM	12(g)	0001127160	000-31877
CNCP	Carolina National Corporation Common Stock	Common Stock	NCM	12(g)	0001157648	000-50257
CANI	Carreker Corporation Common Stock	Common Stock	NGM	12(g)	0001057709	000-24201
CACS	Carrier Access Corporation Common Stock	Common Stock	NGM	12(g)	0001018074	000-24597
CARN	Carrington Laboratories, Inc. Common Stock	Common Stock	NGM	12(g)	0000718007	000-11997
CRZO	Carrizo Oil & Gas, Inc. Common Stock	Common Stock	NGS	12(g)	0001040593	000-22915
CRRB	Carrilton Bancorp Common Stock	Common Stock	NGM	12(g)	0000859222	000-23090
CASM	CAS Medical Systems, Inc. Common Stock	Common Stock	NCM	12(g)	0000764579	000-13839
CACB	Cascade Bancorp Common Stock	Common Stock	NCM	12(g)	0000865911	000-23322
CASB	Cascade Financial Corp. Common Stock	Common Stock	NCM	12(g)	0000928911	000-25286
CSCD	Cascade Microtech, Inc. Common Stock	Common Stock	NCM	12(g)	0000864559	000-51072
CWST	Casella Waste Systems, Inc. Class A Common Stock	Common Stock	NGS	12(g)	0000911177	000-23211
CASY	Casey's General Stores, Inc. Common Stock	Common Stock	NGS	12(g)	0000726958	000-12788
CKNN	Cash Systems Inc Common Stock	Common Stock	NGM	12(g)	0000861050	001-31955
CASS	Cass Information Systems, Inc Common Stock	Common Stock	NGM	12(g)	0000708781	000-20827
CSTL	Castelle Common Stock	Common Stock	NCM	12(g)	0000908605	000-22020
CMRG	Casual Male Retail Group, Inc. Common Stock	Common Stock	NGM	12(g)	0000813298	000-15898
CATS	Catalyst Semiconductor, Inc. Common Stock	Common Stock	NGM	12(g)	0000899636	000-21488
CESI	Catalytica Energy Systems, Inc. Common Stock	Common Stock	NGM	12(g)	0001053361	000-31953
CATT	Catapult Communications Corporation Common Stock	Common Stock	NGS	12(g)	0001063085	000-24701
CATY	Cathay General Bancorp Common Stock	Common Stock	NGS	12(g)	0000861842	000-18630
CTTY	Caturity Inc. Common Stock	Common Stock	NCM	12(g)	0001109740	000-30045
CVCO	Cavco Industries, Inc. Common Stock When Issued	Common Stock	NGS	12(g)	0000278166	000-08822
CBEY	Cbeyond, Inc. Common Stock	Common Stock	NGM	12(g)	0001205727	000-51588
CBIZ	CBIZ, Inc. Common Stock	Common Stock	NGS	12(g)	0000944148	000-25890
CBRL	CBRL Group Inc. Common Stock	Common Stock	NGS	12(g)	0001067294	000-25225
CCFH	CCF Holding Company Common Stock	Common Stock	NCM	12(g)	0000943033	000-25846
CCBL	C-COR Incorporated Common Stock	Common Stock	NGM	12(g)	0000350621	000-10726
CHINA	CDC Corporation Class A Common Shares	Ordinary Shares	NGM	12(g)	0001076770	000-30134
CDWC	CDW Corporation Common Stock	Common Stock	NGS	12(g)	0000899171	000-21796
CECE	CECO Environmental Corp. Common Stock	Common Stock	NCM	12(g)	0000003197	000-07099

Issue Symbol	Issue Name	Issue Type	Issue Market Segment	Registration Type	CIK	SEC File #
CLDN	Celadon Group, Inc. Common Stock	Common Stock	NGS	12(g)	0000865941	000-23192
BDAY	Celebrate Express, Inc. Common Stock	Common Stock	NGM	12(g)	0001100124	000-50973
CELG	Celgene Corporation Common Stock	Common Stock	NGS	12(g)	0000816284	000-16132
CEGE	Cell Genesys, Inc. Common Stock	Common Stock	NGM	12(g)	0000865231	000-19986
CTIC	Cell Therapeutics, Inc. Common Stock	Common Stock	NGM	12(g)	0000891293	000-28386
CBHI	Centennial Bank Holdings, Inc. Common Stock	Common Stock	NGS	12(g)	0001324410	000-51556
CYCL	Centennial Communications Corporation Class A Common Stock	Common Stock	NGS	12(g)	0000879573	000-19603
CNBC	Center Bancorp, Inc. Common Stock	Common Stock	NGS	12(g)	0000712771	000-11486
CLFC	Center Financial Corporation Common Stock	Common Stock	NGS	12(g)	0001174820	000-32589
CSFL	Centerstate Banks of Florida, Inc. Common Stock	Common Stock	NGS	12(g)	0001102266	000-32017
CTLM	Centillum Communications, Inc. Common Stock	Common Stock	NGM	12(g)	0001107194	000-30649
CEBK	Central Bancorp, Inc Common Stock	Common Stock	NGM	12(g)	0001076394	000-25251
CEDC	Central European Distribution Corporation Common Stock	Common Stock	NGS	12(g)	0001046880	000-24341
CETV	Central European Media Enterprises Ltd. Class A Common Stock	Ordinary Shares	NGS	12(g)	0000925645	000-24796
CFBK	Central Federal Corporation Common Stock	Common Stock	NCM	12(g)	0001070680	000-25045
CENF	Central Freight Lines, Inc. Common Stock	Common Stock	NGM	12(g)	0001085636	000-50485
CENT	Central Garden & Pet Company Common Stock	Common Stock	NGS	12(g)	0000887733	000-20242
CJBK	Central Jersey Bancorp Common Stock	Common Stock	NCM	12(g)	0001172353	000-27428
CVCY	Central Valley Community Bancorp Common Stock	Common Stock	NCM	12(g)	0001127371	000-31977
CVBK	Central Virginia Bankshares, Inc. Common Stock	Common Stock	NGM	12(g)	0000804561	000-24002
TRUE	Century Financial Corporation Common Stock	Common Stock	NGM	12(g)	0000891523	000-20804
CENX	Century Aluminum Company Common Stock	Common Stock	NGS	12(g)	0000949157	000-27918
CNBKA	Century BanCorp, Inc. Class A Common Stock	Common Stock	NGM	12(g)	0000812348	000-15752
CNTY	Century Casinos, Inc. Common Stock	Common Stock	NCM	12(g)	0000911147	000-22900
CRLTS	Century Realty Trust Shares of Beneficial Interest	Shares of Beneficial Interest	NCM	12(g)	0000018914	000-07716
CEPH	Cephalon, Inc. Common Stock	Common Stock	NGS	12(g)	0000873364	000-19119
CPHD	CEPHEID Common Stock	Common Stock	NGM	12(g)	0001037760	000-30755
CRDN	Ceradyne, Inc. Common Stock	Common Stock	NGS	12(g)	0000018937	000-13059
CRNT	Ceragon Networks Ltd. Ordinary Shares	Ordinary Shares	NGM	12(g)	0001119769	000-30862
CERG	Ceres Group Inc. Common Stock	Common Stock	NGS	12(g)	0000215403	000-08483
CERN	Cerner Corporation Common Stock	Common Stock	NGS	12(g)	0000804753	000-15386

Issue Symbol	Issue Name	Issue Type	Issue Market Segment	Registration Type	CIK	SEC File #
CERS	Cerus Corporation Common Stock	Common Stock	NGM	12(g)	0001020214	000-21937
CEVA	CEVA, Inc. Common Stock	Common Stock	NGM	12(g)	0001173489	000-49842
CFCI	CFC International, Inc. Common Stock	Common Stock	NGM	12(g)	0000949859	000-27222
CITZ	CFS Bancorp, Inc. Common Stock	Common Stock	NGM	12(g)	0001058438	000-24611
CHMP	Champion Industries, Inc. Common Stock	Common Stock	NGM	12(g)	0000019149	000-21084
CMPP	Champps Entertainment, Inc Common Stock	Common Stock	NGM	12(g)	0001040328	000-22639
CHNL	Channell Commercial Corporation Common Stock	Common Stock	NGM	12(g)	0001013696	000-28582
CHAP	Chaparral Steel Company Common Stock	Common Stock	NGS	12(g)	0001319048	000-51307
CTHR	Charles & Colvard Ltd Common Stock	Common Stock	NGS	12(g)	0001015155	000-23329
SCHW	Charles Schwab Corporation (The) Common Stock	Common Stock	NGS	12(g)	0000316709	001-9700
CHIC	Charlotte Russe Holding, Inc. Common Stock	Common Stock	NGS	12(g)	0001092006	000-27677
CHRS	Charming Shoppes, Inc. Common Stock	Common Stock	NGS	12(g)	0000019353	000-07258
GTLS	Chart Industries, Inc. Common Stock	Common Stock	NGM	12(g)	0000892553	000-50412
CHTR	Charter Communications, Inc. Class A Common Stock	Common Stock	NGM	12(g)	0001091667	000-27927
CHFN	Charter Financial Corp. Common Stock	Common Stock	NGM	12(g)	0001136796	000-33071
CHRT	Chartered Semiconductor Manufacturing Ltd. American Depository Shares	American Depository Shares	NGS	12(g)	0001095270	000-27811
CHTT	Chatterm, Inc. Common Stock	Common Stock	NGS	12(g)	0000019520	000-05905
CHKP	Check Point Software Technologies Ltd. Ordinary Shares	Ordinary Shares	NGS	12(g)	0001015922	000-28584
CKFR	CheckFree Corporation Common Stock	Common Stock	NGS	12(g)	0000949341	000-26802
CAKE	Cheesecake Factory Incorporated (The) Common Stock	Common Stock	NGS	12(g)	0000887596	000-20574
CHTP	Chelsea Therapeutics International, Ltd. Common Stock	Common Stock	NCM	12(g)	0001333763	000-51462
CXSP	ChemGenex Pharmaceuticals Ltd Sponsored ADR (Australia)	American Depository Shares	NCM	12(g)	0001175965	000-51373
CHFC	Chemical Financial Corporation Common Stock	Common Stock	NGS	12(g)	0000019612	000-08185
CHKE	Cherokee Inc. Common Stock	Common Stock	NGS	12(g)	0000844161	000-18640
CHRK	Cherokee International Corporation Common Stock	Common Stock	NGM	12(g)	0001090069	000-50593
CHEV	Cheviot Financial Corp Common Stock	Common Stock	NCM	12(g)	0001248124	000-50529
CBNK	Chicopee Bancorp, Inc. Common Stock	Common Stock	NGM	12(g)	0001355786	000-51996
PLCE	Children's Place Retail Stores, Inc. (The) Common Stock	Common Stock	NGS	12(g)	0001041859	000-23071
CAAS	China Automotive Systems, Inc. Common Stock	Common Stock	NCM	12(g)	0001157762	000-33123
CBAK	China BAK Battery, Inc. Common Stock	Common Stock	NGM	12(g)	0001117171	000-49712
JRJC	China Finance Online Co. Limited American Depository Shares	American Depository Shares	NGM	12(g)	0001297830	000-50975

Issue Symbol	Issue Name	Issue Type	Issue Market Segment	Registration Type	CIK	SEC File #
GRRF	China Greentech Corporation Limited American Depository Shares	American Depository Shares	NGM	12(g)	0001347510	000-51839
CMED	China Medical Technologies, Inc. ADS	American Depository Shares	NGS	12(g)	0001326059	000-51440
CHNR	China Natural Resources, Inc. Common Stock	Common Stock	NCM	12(g)	0000793628	000-26046
CNTF	China TechFaith Wireless Communication Technology Limited American Depository Shares	American Depository Shares	NGM	12(g)	0001316317	000-51242
CTDC	China Technology Development Group Corporation Common Stock	Common Stock	NCM	12(g)	0001027454	000-29008
CHDX	Chindex International, Inc. Common Stock	Common Stock	NCM	12(g)	0000922717	000-24624
IMOS	ChipMOS TECHNOLOGIES (Bermuda) LTD. Common Shares	Common Stock	NGS	12(g)	0001133478	000-31106
CTEC	Cholestech Corporation Common Stock	Common Stock	NGM	12(g)	0000887227	000-20198
CHRD	Chordiant Software, Inc. Common Stock	Common Stock	NGM	12(g)	0001042134	000-29357
CHSCP	GHS Inc. 8% Cumulative Redeemable Preferred Stock	Preferred Stock	NGS	12(g)	0000823277	000-50150
CHDN	Churchill Downs, Incorporated Common Stock	Common Stock	NGS	12(g)	0000020212	000-01469
CIEN	Ciena Corporation Common Stock	Common Stock	NGS	12(g)	0000936395	000-21969
CIMT	Cimatron, Limited Ordinary Shares	Ordinary Shares	NCM	12(g)	0001008595	000-27974
CINF	Cincinnati Financial Corporation Common Stock	Common Stock	NGS	12(g)	0000020286	000-04604
CTAS	Cintas Corporation Common Stock	Common Stock	NGS	12(g)	0000723254	000-11399
CIPH	Ciphergen Biosystems, Inc. Common Stock	Common Stock	NGM	12(g)	0000926617	000-31617
CPCI	Ciprico Inc. Common Stock	Common Stock	NGM	12(g)	0000720145	000-11336
CRUS	Cirrus Logic, Inc. Common Stock	Common Stock	NGS	12(g)	0000772406	000-17795
CSCO	Cisco Systems, Inc. Common Stock	Common Stock	NGS	12(g)	0000858877	000-18225
CTRN	Citi Trends, Inc. Common Stock	Common Stock	NGS	12(g)	0001318484	000-51315
PLJC	Citigroup Funding Inc. Principal-Protected Equity Linked Notes Based Upon the Nasdaq-100 Index	Other Securities	NGM	12(g)	0000831001	001-09924
SFSU	Citigroup Funding Inc. Stock Market Upturn Notes Based Upon the Nasdaq-100 Index	Other Securities	NGM	12(g)	0000831001	001-09924
CZNC	Citizens & Northern Corp Common Stock	Common Stock	NCM	12(g)	0000810958	000-16084
CBCF	Citizens Banking Corporation Common Stock	Common Stock	NGS	12(g)	0000351077	000-10535
CNFL	Citizens Financial Corporation Common Stock	Common Stock	NCM	12(g)	0000887136	000-20148
CTZN	Citizens First Bancorp, Inc. Common Stock	Common Stock	NGS	12(g)	0001127442	000-32041
CSBC	Citizens South Banking Corporation	Common Stock	NGM	12(g)	0001051871	000-23971
CTXS	Citrix Systems, Inc. Common Stock	Common Stock	NGS	12(g)	0000877890	000-27084

Issue Symbol	Issue Name	Issue Type	Issue Market Segment	Registration Type	CIK	SEC File #
CHCO	City Holding Company Common Stock	Common Stock	NGS	12(g)	0000726854	000-11733
CTEL	City Telecom (H.K.) Limited American Depository Shares	American Depository Shares	NGM	12(g)	0001097086	000-30354
CVBG	Civitas BankGroup, Inc. (TN) Common Stock	Common Stock	NGM	12(g)	0001092099	000-27393
CKXE	CKX, Inc. Common Stock	Common Stock	NGS	12(g)	0000793044	000-17436
CLRT	Clariant, Inc. Common Stock	Common Stock	NCM	12(g)	0001038223	000-22677
CLAY	Clayton Holdings, Inc. Common Stock	Common Stock	NGM	12(g)	0001325228	000-51846
CWEI	Clayton Williams Energy, Inc. Common Stock	Common Stock	NGM	12(g)	0000880115	000-20898
CLHB	Clean Harbors, Inc. Common Stock	Common Stock	NGS	12(g)	0000822818	000-16379
CBLI	Cleveland BioLabs, Inc. Common Stock	Common Stock	NCM	12(g)	0001318641	001-13111
CKCM	Click Commerce, Inc. Common Stock	Common Stock	NGM	12(g)	0001107050	000-30881
CKSW	ClickSoftware Technologies Ltd. Ordinary Shares	Ordinary Shares	NCM	12(g)	0001105841	000-30827
CSBK	Clifton Savings Bancorp, Inc. Common Stock	Common Stock	NGS	12(g)	0001240581	000-50358
CLDA	Clinical Data, Inc. Common Stock	Common Stock	NGM	12(g)	0000716646	000-12716
CMGI	CMGI, Inc. Common Stock	Common Stock	NGM	12(g)	0000914712	000-23262
CCNE	CNB Financial Corporation Common Stock	Common Stock	NGS	12(g)	0000736772	000-13396
CNET	CNET Networks, Inc. Common Stock	Common Stock	NGS	12(g)	0001015577	000-20939
CNXS	CNS, Inc. Common Stock	Common Stock	NGS	12(g)	0000814258	000-16612
CMKG	CoActive Marketing Group Inc Common Stock	Common Stock	NCM	12(g)	0000886475	000-20394
CFHI	Coast Financial Holdings, Inc. Common Stock	Common Stock	NGM	12(g)	0001262276	000-50433
CBSAN	Coastal Bancorp Inc. Cumulative Trust Preferred Securities	Other Securities	NGM	12(g)	0000927628	001-13300
CFCP	Coastal Financial Corporation Common Stock	Common Stock	NCM	12(g)	0000935930	000-19684
COBZ	CoBiz, Inc. Common Stock	Common Stock	NGS	12(g)	0001028734	000-24445
COBR	Cobra Electronics Corporation Common Stock	Common Stock	NGM	12(g)	000030828	000-00511
COKE	Coca-Cola Bottling Co. Consolidated Common Stock	Common Stock	NGM	12(g)	0000317540	000-09286
CVLY	Codorus Valley Bancorp, Inc Common Stock	Common Stock	NGM	12(g)	0000806279	000-15536
CCOI	Cogent Communications Group, Inc. Cogent Common Stock	Common Stock	NGM	12(g)	0001158324	000-51829
COGT	Cogent, Inc. Common Stock	Common Stock	NGS	12(g)	0001289434	000-50947
CGNX	Cognex Corporation Common Stock	Common Stock	NGS	12(g)	0000851205	000-17869
CTSH	Cognizant Technology Solutions Corporation Class A Common Stock	Common Stock	NGS	12(g)	0001058290	000-24429
COGN	Cognos Incorporated Common Shares	Common Stock	NGM	12(g)	0000746782	000-16006
COHR	Coherent, Inc. Common Stock	Common Stock	NGS	12(g)	0000021510	000-05255
COHU	Cohu, Inc. Common Stock	Common Stock	NGS	12(g)	0000021535	000-14298

Issue Symbol	Issue Name	Issue Type	Issue Market Segment	Registration Type	CIK	SEC File #
CSTR	Coinstar, Inc. Common Stock	Common Stock	NGS	12(g)	0000941604	000-22555
CWTR	Coldwater Creek, Inc. Common Stock	Common Stock	NGS	12(g)	0001018005	000-21915
COLY	Coley Pharmaceutical Group, Inc. Common Stock	Common Stock	NGM	12(g)	0001319197	000-51472
CGPI	CollaGenex Pharmaceuticals, Inc. Common Stock	Common Stock	NGM	12(g)	0001012270	000-28308
CLCT	Collectors Universe, Inc. New	Common Stock	NGM	12(g)	0001089143	000-27887
COBK	Colonial Bankshares, Inc. Common Stock	Common Stock	NGM	12(g)	0001317019	000-51385
CBAN	Colony Bancorp, Inc. Common Stock	Common Stock	NGM	12(g)	0000711669	000-12436
CLRK	Color Kinetics Incorporated Common Stock	Common Stock	NGM	12(g)	0001048611	000-50798
CBBO	Columbia Bancorp Common Stock	Common Stock	NGS	12(g)	0001010002	000-27938
COLB	Columbia Banking System, Inc. Common Stock	Common Stock	NGS	12(g)	0000887343	000-20288
CBRX	Columbia Laboratories, Inc. Common Stock	Common Stock	NGM	12(g)	0000821995	000-17499
COLM	Columbia Sportswear Company Common Stock	Common Stock	NGS	12(g)	0001050797	000-23939
CMCO	Columbus McKinnon Corporation Common Stock	Common Stock	NGM	12(g)	0001005229	000-27618
CMRO	COMARCO, Inc. Common Stock	Common Stock	NGM	12(g)	0000022252	000-05449
CRXX	CombinatoRx, Incorporated Common Stock	Common Stock	NGM	12(g)	0001135906	000-51171
CMCSA	Comcast Corporation Class A Common Stock	Common Stock	NGS	12(g)	0001166691	000-50093
CMCSK	Comcast Corporation Class A Special Common Stock	Common Stock	NGS	12(g)	0001166691	000-50093
CCBP	Comm Bancorp, Inc. Common Stock	Common Stock	NGM	12(g)	0000730030	000-17455
CBSH	Commerce Bancshares, Inc. Common Stock	Common Stock	NGS	12(g)	0000022356	000-02989
CMFB	COMMERCEFIRST BANCORP INC Common Stock	Common Stock	NCM	12(g)	0001098813	000-51104
CLBK	Commercial Bankshares, Inc. Common Stock	Common Stock	NGM	12(g)	0000354562	000-22246
CCBI	Commercial Capital Bancorp, Inc. Common Stock	Common Stock	NGS	12(g)	0001184818	000-50126
CNAF	Commercial National Financial Corporation Common Stock	Common Stock	NGM	12(g)	0000866054	000-18676
CVGI	Commercial Vehicle Group, Inc. Common Stock	Common Stock	NGS	12(g)	0001290900	000-50890
CWBS	Commonwealth Bankshares, Inc. Common Stock	Common Stock	NGM	12(g)	0000835012	000-17377
CWBSP	Commonwealth Bankshares, Inc. Commonwealth Bankshares Capital Trust I - 8% Convertible Trust Preferred Securities	Other Securities	NGM	12(g)	0000835012	000-17377
CBTE	Commonwealth Biotechnologies, Inc. Common Stock	Common Stock	NCM	12(g)	0001042418	001-13467
CTCO	Commonwealth Telephone Enterprises, Inc. Common Stock	Common Stock	NGS	12(g)	0000310433	000-11053
CTCH	Commtouch Software Ltd. Ordinary Shares	Ordinary Shares	NCM	12(g)	0001084577	000-26495
CBON	Community Bancorp Common Stock	Common Stock	NGM	12(g)	0001304366	000-51044
CMBC	Community Bancorp Inc. Common Stock	Common Stock	NGS	12(g)	0001089503	000-26505
COMB	Community Bancshares, Inc. (DE) Common Stock	Common Stock	NCM	12(g)	0000752195	000-16461
CBIN	Community Bank Shares of Indiana, Inc. Common Stock	Common Stock	NCM	12(g)	0000933590	000-25766

Issue Symbol	Issue Name	Issue Type	Issue Market Segment	Registration Type	CIK	SEC File #
CMTY	Community Banks, Inc. Common Stock (\$5.00 Par Value)	Common Stock	NGS	12(g)	0000714710	000-15786
ALBY	Community Capital Bancshares, Inc. Common Stock	Common Stock	NCM	12(g)	0001074369	000-25345
CPBK	Community Capital Corporation Common Stock	Common Stock	NGM	12(g)	0000832847	000-18460
CCBD	Community Central Bank Corp. Common Stock	Common Stock	NGM	12(g)	0001014133	000-33373
CFFC	Community Financial Corp. Common Stock	Common Stock	NCM	12(g)	0000850606	000-18265
CPBC	Community Partners Bancorp Common Stock	Common Stock	NCM	12(g)	0001343034	000-51889
CSHB	Community Shores Bank Corp. Common Stock	Common Stock	NCM	12(g)	0001070523	000-51166
CTBI	Community Trust Bancorp, Inc. Common Stock	Common Stock	NGS	12(g)	0000350852	000-11129
CTBIP	Community Trust Bancorp, Inc. CTBI Preferred Capital Trust - 9.0% Cumulative Trust Preferred Securities	Other Securities	NGS	12(g)	0000350852	000-11129
CVLL	Community Valley Bancorp (CA)	Common Stock	NCM	12(g)	0001170833	000-51678
CWBC	Community West Bancshares Common Stock	Common Stock	NGM	12(g)	0001051343	000-23575
CBSS	Compass Bancshares, Inc. Common Stock	Common Stock	NGS	12(g)	0000018568	000-06032
CODI	Compass Diversified Trust Shares of Beneficial Interest	Shares of Beneficial Interest	NGS	12(g)	0001345126	000-51937
CCRT	CompuCredit Corporation Common Stock	Common Stock	NGS	12(g)	0001068199	000-25751
CDCY	CompuDyne Corporation Common Stock	Common Stock	NGM	12(g)	0000022912	000-29798
CGEN	Compugen Ltd. Ordinary Shares	Ordinary Shares	NGM	12(g)	0001119774	000-30902
CHRZ	Computer Horizons Corp. Common Stock	Common Stock	NGM	12(g)	0000023019	000-07282
CPSI	Computer Programs and Systems, Inc. Common Stock	Common Stock	NGS	12(g)	0001169445	000-49796
CTGX	Computer Task Group, Inc. Common Stock	Common Stock	NCM	12(g)	0000023111	001-09410
CPWR	Compuware Corporation Common Stock	Common Stock	NGS	12(g)	0000859014	000-20900
CHCI	Comstock Homebuilding Companies, Inc. Class A Common Stock	Common Stock	NGM	12(g)	0001299969	000-51070
CITP	COMSYS IT Partners, Inc. Common Stock	Common Stock	NGM	12(g)	0000948850	000-27792
COGO	Comtech Group, Inc. Common Stock	Common Stock	NGS	12(g)	0000028367	000-02642
CMTL	Comtech Telecommunications Corp. Common Stock	Common Stock	NGS	12(g)	0000023197	000-07928
CMVT	Comverse Technology, Inc. Common Stock	Common Stock	NGM	12(g)	0000803014	000-15502
CPTS	Conceptus, Inc. Common Stock	Common Stock	NGM	12(g)	0000896778	000-27596
LENS	Concord Camera Corp. Common Stock	Common Stock	NGM	12(g)	0000831861	000-17038
CCDC	Concorde Career Colleges, Inc. Common Stock	Common Stock	NCM	12(g)	0000832483	000-16992
CNQR	Concur Technologies, Inc. Common Stock	Common Stock	NGM	12(g)	0001066026	000-25137
CCUR	Concurrent Computer Corporation Common Stock	Common Stock	NGM	12(g)	0000749038	000-13150
CNXT	Conexant Systems, Inc. Common Stock	Common Stock	NGS	12(g)	0001069353	000-24923

Issue Symbol	Issue Name	Issue Type	Issue Market Segment	Registration Type	CIK	SEC File #
CNMD	CONMED Corporation Common Stock	Common Stock	NGS	12(g)	0000816956	000-16093
CTWS	Connecticut Water Service, Inc. Common Stock	Common Stock	NGS	12(g)	0000276209	000-08084
CNCT	Connetics Corporation Common Stock	Common Stock	NGM	12(g)	0001004960	000-27406
CONN	Conn's, Inc. Common Stock	Common Stock	NGS	12(g)	0001223389	000-50421
CNNG	Conolog Corporation Common Stock	Common Stock	NCM	12(g)	0000023503	000-08174
CONR	Conor Medsystems, Inc. Common Stock	Common Stock	NGM	12(g)	0001108271	000-51066
CNSL	Consolidated Communications Holdings, Inc. Common Stock	Common Stock	NGM	12(g)	0001304421	000-51446
CSLMF	Consolidated Mercantile Inc Common Stock	Common Stock	NCM	12(g)	0000784012	000-14009
CWCO	Consolidated Water Co. Ltd. Ordinary Shares	Ordinary Shares	NGS	12(g)	0000928340	000-25248
CNST	Constar International Inc. Common Stock	Common Stock	NGM	12(g)	0000029806	000-16496
CSLR	Consulter Engineering, Inc. Common Stock	Common Stock	NCM	12(g)	0000846718	000-17756
CPSS	Consumer Portfolio Services, Inc. Common Stock	Common Stock	NGM	12(g)	0000889609	000-51027
CNVR	Convera Corporation Class A Common Stock	Common Stock	NGM	12(g)	0001125536	000-09747
COOP	Cooperative Bankshares, Inc. Common Stock	Common Stock	NGM	12(g)	0000923529	000-24626
CPNO	Copano Energy, L.L.C. Common Units Representing Limited Liability Company Interest Units	Units/Benef Int	NGS	12(g)	0001297067	001-32329
CPRT	Copart, Inc. Common Stock	Common Stock	NGS	12(g)	0000900075	000-23254
VEGF	Corautus Genetics Inc. Common Stock	Common Stock	NCM	12(g)	0001003929	000-27264
CORT	Corcept Therapeutics Incorporated Common Stock	Common Stock	NGM	12(g)	0001088856	000-50679
CORE	Core Mark Holding Co Inc Common Stock	Common Stock	NGS	12(g)	0001318084	000-51515
CREL	Corel Corporation Common Stock	Common Stock	NGM	12(g)	0000890640	000-20562
CRGI	Corgi International Limited American Depository Shares	American Depository Shares	NGM	12(g)	0001028637	000-22161
CORI	Corillian Corporation Common Stock	Common Stock	NGS	12(g)	0001041403	000-29291
COCO	Corinthian Colleges, Inc. Common Stock	Common Stock	NGS	12(g)	0001066134	000-25283
EXBD	Corporate Executive Board Company (The) Common Stock	Common Stock	NGS	12(g)	0001066104	000-24799
CORS	CORUS Bankshares, Inc. Common Stock	Common Stock	NGS	12(g)	0000051939	000-06136
CRVL	CorVel Corp. Common Stock	Common Stock	NGS	12(g)	0000874866	000-19291
COSI	Cosi, Inc. Common Stock	Common Stock	NGM	12(g)	0001171014	000-50052
CPWM	Cost Plus, Inc. Common Stock	Common Stock	NGS	12(g)	0000798955	000-14970
CSGP	CoStar Group, Inc. Common Stock	Common Stock	NGS	12(g)	0001057352	000-24531
COST	Costco Wholesale Corporation Common Stock	Common Stock	NGS	12(g)	0000909832	000-20355
CULS	Cost-U-Less, Inc. Common Stock	Common Stock	NCM	12(g)	0000851368	000-24543
CTRX	CoTherix, Inc. Common Stock	Common Stock	NGM	12(g)	0001138812	000-50794

Issue Symbol	Issue Name	Issue Type	Issue Market Segment	Registration Type	CIK	SEC File #
CRRC	Courier Corporation Common Stock	Common Stock	NGS	12(g)	000025212	000-07597
CVGR	Covalent Group, Inc. Common Stock	Common Stock	NCM	12(g)	0000856569	000-21145
CVNS	Covansys Corporation Common Stock	Common Stock	NGS	12(g)	0001028461	000-22141
CVTI	Covenant Transport, Inc. Class A Common Stock	Common Stock	NGS	12(g)	0000928658	000-24960
COWN	Cowen Group, Inc. Common Stock	Common Stock	NGM	12(g)	0001355007	000-52048
CWLZ	Cowlitz Bancorporation Common Stock	Common Stock	NGM	12(g)	0000894267	000-23881
CPAK	CPAC, Inc. Common Stock	Common Stock	NGM	12(g)	0000351717	000-09600
CPII	CPI International, Inc. Common Stock	Common Stock	NGM	12(g)	0001279176	000-51928
CRAI	CRA International, Inc. Common Stock	Common Stock	NGS	12(g)	0001053706	000-24049
CRFT	Craftmade International, Inc. Common Stock	Common Stock	NGM	12(g)	0000856250	000-26667
CRAY	Cray Inc. Common Stock	Common Stock	NGM	12(g)	0000949158	000-26820
CREAF	Creative Technology Ltd. Ordinary Shares	Ordinary Shares	NGS	12(g)	0000888295	000-20281
CMOS	Credence Systems Corporation Common Stock	Common Stock	NGS	12(g)	0000893162	000-22366
CACC	Credit Acceptance Corporation Common Stock	Common Stock	NGM	12(g)	0000885550	000-20202
CRED	Credo Petroleum Corporation Common Stock	Common Stock	NCM	12(g)	0000277924	000-08877
CREE	Cree, Inc. Common Stock	Common Stock	NGS	12(g)	0000895419	000-21154
CSNT	Crescent Banking Company Common Stock	Common Stock	NCM	12(g)	0000883476	000-20251
CRFN	Crescent Financial Corporation Common Stock	Common Stock	NGM	12(g)	0001143921	000-32951
CRESY	Cresud S.A.C.I.F. y A. American Depository Shares	American Depository Shares	NGS	12(g)	0001034957	000-29190
CRTX	Critical Therapeutics, Inc. Common Stock	Common Stock	NGM	12(g)	0001145404	000-50767
CRMH	CRM Holdings, Ltd. Common Shares	Common Stock	NGS	12(g)	0001338949	000-51683
CROX	Cross, Inc. Common Stock	Common Stock	NGS	12(g)	0001334036	000-51754
CRNS	Cronos Group (The) Common Stock	Common Stock	NGM	12(g)	0000919869	000-24484
CCRN	Cross Country Healthcare, Inc. Common Stock \$0.0001 Par Value	Common Stock	NGS	12(g)	0001141103	000-33169
XTXI	Crosstex Energy, Inc. Common Stock	Common Stock	NGS	12(g)	0001209821	000-50536
XTEX	Crosstex Energy, L.P. LIMITED PARTNERSHIP INTEREST	Limited Partnership	NGS	12(g)	0001179060	000-50067
CRWN	Crown Media Holdings, Inc. Class A Common Stock	Common Stock	NGM	12(g)	0001103837	000-30700
CRXL	Crucell NV American Depository Shares	American Depository Shares	NGM	12(g)	0001126136	000-30962
CRYO	CryoCor, Inc. Common Stock	Common Stock	NGM	12(g)	0001125294	000-51410
CRYP	Cryptologic, Inc. Common Stock	Common Stock	NGS	12(g)	0001094036	000-30224
CSGS	CSG Systems International, Inc. Common Stock	Common Stock	NGS	12(g)	0001005757	000-27512
CSPI	CSP Inc. Common Stock	Common Stock	NGM	12(g)	0000356037	000-10843

Issue Symbol	Issue Name	Issue Type	Issue Market Segment	Registration Type	CIK	SEC File #
CTCI	CT Communications, Inc. Common Stock	Common Stock	NGS	12(g)	000023259	000-19179
CTCM	CTC Media, Inc. Common Stock	Common Stock	NGM	12(g)	0001354513	000-52003
CTIB	CTI Industries Corporation Common Stock	Common Stock	NCM	12(g)	0001042187	000-23115
CTRP	Ctrip.com International, Ltd. American Depositary Shares	American Depositary Shares	NGS	12(g)	0001269238	000-50483
CBST	Cubist Pharmaceuticals, Inc. Common Stock	Common Stock	NGS	12(g)	0000912183	000-21379
CMLS	Cumulus Media Inc. Common Stock	Common Stock	NGS	12(g)	0001058623	000-24525
CRGN	CuraGen Corporation Common Stock	Common Stock	NGM	12(g)	0001030653	000-23223
CRIS	Curis, Inc. Common Stock	Common Stock	NGM	12(g)	0001108205	000-30347
CUTR	Cutera, Inc. Common Stock	Common Stock	NGS	12(g)	0001162461	000-50644
CBUK	Cutter & Buck Inc. Common Stock	Common Stock	NGM	12(g)	0000948069	000-26608
CVTX	CV Therapeutics, Inc. Common Stock	Common Stock	NGM	12(g)	0000921506	000-21643
CVBF	CVB Financial Corporation Common Stock	Common Stock	NGS	12(g)	0000354647	000-10140
CYAN	Cyanotech Corporation Common Stock	Common Stock	NCM	12(g)	0000768408	000-14602
CYBX	Cyberonics, Inc. Common Stock	Common Stock	NGM	12(g)	0000864683	000-19806
CYBE	CyberOptics Corporation Common Stock	Common Stock	NGM	12(g)	0000768411	000-16577
CYBS	CyberSource Corporation Common Stock	Common Stock	NGM	12(g)	0000934280	000-26477
CYCCP	Cyclacel Pharmaceuticals, Inc. 6% Convertible Preferred Stock	Preferred Stock	NCM	12(g)	0001130166	000-50626
CYCC	Cyclacel Pharmaceuticals, Inc. Common Stock	Common Stock	NGM	12(g)	0001130166	000-50626
CYDS	Cygn Designs, Inc. Common Stock	Common Stock	NCM	12(g)	0000906782	000-22102
CYMI	Cymer, Inc. Common Stock	Common Stock	NGS	12(g)	0000897067	000-21321
CYNO	Cynosure, Inc. Class A Common Stock	Common Stock	NGM	12(g)	0000885306	000-51623
CYPB	Cypress Bioscience Inc. Common Stock	Common Stock	NGM	12(g)	0000716054	000-12943
CYTO	Cytogen Corporation Common Stock	Common Stock	NGM	12(g)	0000725058	000-14879
CYTK	Cytokinetics, Incorporated Common Stock	Common Stock	NGM	12(g)	0001061983	000-50633
CYTX	Cytori Therapeutics Inc Common Stock (DE)	Common Stock	NGM	12(g)	0001095981	000-32501
CYTR	CyTRx Corporation Common Stock	Common Stock	NCM	12(g)	0000799698	000-15327
CYTC	CYTYC Corporation Common Stock	Common Stock	NGS	12(g)	0000849778	000-27558
DECC	D&E Communications, Inc. Common Stock	Common Stock	NGM	12(g)	0001011737	000-20709
DADE	Dade Behring Holdings, Inc Common Stock	Common Stock	NGS	12(g)	0001183920	000-50010
DAGM	DAG Media, Inc. Common Stock	Common Stock	NCM	12(g)	0001080340	000-25991
DJCO	Daily Journal Corp. (S.C.) Common Stock	Common Stock	NCM	12(g)	0000783412	000-14665
DAKT	Daktronics, Inc. Common Stock	Common Stock	NGS	12(g)	0000915779	000-23246
DANKY	Danka Business Systems PLC American Depositary Shares	American Depositary Shares	NCM	12(g)	0000894010	000-20828

Issue Symbol	Issue Name	Issue Type	Issue Market Segment	Registration Type	CIK	SEC File #
DASTY	Dassault Systemes, S.A. American Depositary Shares	American Depositary Shares	NGS	12(g)	0001016118	000-28578
DAIO	Data I/O Corporation Common Stock	Common Stock	NCM	12(g)	0000351998	000-10394
DTLK	Datalink Corporation Common Stock	Common Stock	NGM	12(g)	0001056923	000-29758
DRAM	Dataram Corporation Common Stock	Common Stock	NGM	12(g)	0000027093	001-8266
DSCP	Datascope Corp. Common Stock	Common Stock	NGS	12(g)	0000027096	000-06516
DATA	DataTrak International, Inc. Common Stock	Common Stock	NCM	12(g)	0000886530	000-20699
DWCH	Datawatch Corporation Common Stock	Common Stock	NCM	12(g)	0000792130	000-19960
DWSN	Dawson Geophysical Company Common Stock	Common Stock	NGM	12(g)	0000351231	000-10144
DSTI	DayStar Technologies, Inc. Common Stock	Common Stock	NCM	12(g)	0001262200	000-50508
DSTIZ	DayStar Technologies, Inc. Warrant B	Warrant	NCM	12(g)	0001262200	000-50508
DCAP	DCAP Group, Inc. Common Stock	Common Stock	NCM	12(g)	0000033992	000-01665
DDIC	DDI Corp Common Stock	Common Stock	NGM	12(g)	0001104252	000-30241
TRAK	DealerTrack Holdings, Inc. Common Stock	Common Stock	NGM	12(g)	0001333513	000-51653
DEAR	Dearborn Bancorp, Inc. Common Stock	Common Stock	NGM	12(g)	0000895541	000-24478
DEBS	Deb Shops, Inc. Common Stock	Common Stock	NGS	12(g)	0000715779	000-12188
DECK	Deckers Outdoor Corporation Common Stock	Common Stock	NGS	12(g)	0000910521	000-22446
DCGN	deCODE genetics, Inc. Common Stock	Common Stock	NGM	12(g)	0001022974	000-30469
DECT	Dectron International, Inc. Common Stock	Common Stock	NCM	12(g)	0001066042	000-24845
DCTH	Delcath Systems, Inc. Common Stock	Common Stock	NCM	12(g)	0000872912	001-16133
DLIA	dELIA's Inc. Common Stock	Common Stock	NGM	12(g)	0001337885	000-51648
DELL	Dell Inc. Common Stock	Common Stock	NGS	12(g)	0000826083	000-17017
DLPX	Delphax Technologies Inc. Common Stock	Common Stock	NGM	12(g)	0000350692	000-10691
DELT	Delta Gaill Industries Ltd. American Depositary Shares	American Depositary Shares	NGM	12(g)	0001081022	000-30020
DGAS	Delta Natural Gas Company, Inc. Common Stock	Common Stock	NGM	12(g)	0000277375	000-08788
DPTR	Delta Petroleum Corporation Common Stock	Common Stock	NGM	12(g)	0000821483	000-16203
DDDC	deltathree Inc Class A Common Stock	Common Stock	NCM	12(g)	0001086740	000-28063
DNDN	Dendreon Corporation Common Stock	Common Stock	NGM	12(g)	0001107332	000-30681
DRTE	Dendrite International, Inc. Common Stock	Common Stock	NGS	12(g)	0000880321	000-26138
DENN	Denny's Corporation Common Stock	Common Stock	NCM	12(g)	0000852772	000-18051
XRAY	DENTSPLY International Inc. Common Stock	Common Stock	NGS	12(g)	0000818479	000-16211
DEPO	Depomed, Inc. Common Stock	Common Stock	NGM	12(g)	0001005201	000-23267
DSGX	Descartes Systems Group Inc. (The) Common Stock	Common Stock	NGM	12(g)	0001050140	000-29970
DWRI	Design Within Reach, Inc. Common Stock	Common Stock	NGM	12(g)	0001116755	000-50807

Issue Symbol	Issue Name	Issue Type	Issue Market Segment	Registration Type	CIK	SEC File #
DSWL	Deswell Industries, Inc. Common Shares	Common Stock	NGM	12(g)	0000946936	000-26448
DEVC	Devcon International Corp. Common Stock	Common Stock	NGM	12(g)	0000028452	000-07152
DXCM	DexCom, Inc. Common Stock	Common Stock	NGM	12(g)	0001093557	000-51222
DGSE	DGSE Companies, Inc. Common Stock	Common Stock	NCM	12(g)	0000701719	001-11048
DLGS	Dialog Semiconductor Plc American Depository Shares	American Depository Shares	NGM	12(g)	0001116581	001-15042
DCAI	Dialysis Corporation of America Common Stock	Common Stock	NCM	12(g)	0000201653	000-08527
DMND	Diamond Foods, Inc. Common Stock	Common Stock	NGS	12(g)	0001320947	000-51439
DHIL	Diamond Hill Investment Group, Inc. Class A Common Stock	Common Stock	NCM	12(g)	0000909108	000-24498
DTP1	DiamondCluster International, Inc. Common Stock	Common Stock	NGM	12(g)	0000924940	000-22125
DDRX	Diedrich Coffee Common Stock	Common Stock	NGM	12(g)	0000947661	000-21203
DIGE	Digene Corporation Common Stock	Common Stock	NGS	12(g)	0001011582	000-28194
DGII	Digi International Inc. Common Stock	Common Stock	NGS	12(g)	0000854775	000-17972
DMRC	Digimarc Corporation Common Stock	Common Stock	NGM	12(g)	0001089443	000-28317
DRAD	Digirad Corporation Common Stock	Common Stock	NGM	12(g)	0000707388	000-50789
DGIT	Digital Generation Systems, Inc. Common Stock	Common Stock	NGM	12(g)	0000934448	000-27644
DGIN	Digital Insight Corporation Common Stock	Common Stock	NGS	12(g)	0001037275	000-27459
DMGI	Digital Music Group, Inc. Common Stock	Common Stock	NGM	12(g)	0001339729	000-51761
TBUS	Digital Recorders, Inc. Common Stock	Common Stock	NCM	12(g)	0000853695	001-13408
DRIV	Digital River, Inc. Common Stock	Common Stock	NGS	12(g)	0001062530	000-24643
DTAS	Digitas, Inc. Common Stock	Common Stock	NGS	12(g)	0001100885	000-29723
DCOM	Dime Community Bancshares, Inc. Common Stock	Common Stock	NGS	12(g)	0001005409	000-27782
DIOD	Diodes Incorporated Common Stock	Common Stock	NGS	12(g)	0000029002	001-5740
DNEX	Dionex Corporation Common Stock	Common Stock	NGS	12(g)	0000708850	000-11250
DRCT	Direct General Corporation Common stock	Common Stock	NGS	12(g)	0001023031	000-50360
DEIX	Directed Electronics, Inc. Common Stock	Common Stock	NGM	12(g)	0001323630	000-51664
DISCA	Discovery Holding Company Series A Common Stock	Common Stock	NGS	12(g)	0001320482	000-51205
DISCB	Discovery Holding Company Series B Common Stock	Common Stock	NGS	12(g)	0001320482	000-51205
DSCO	Discovery Laboratories, Inc. Common Stock	Common Stock	NGM	12(g)	0000946486	000-26422
DPII	Discovery Partners International, Inc. Common Stock	Common Stock	NGM	12(g)	0001113148	000-31141
DESC	Distributed Energy Systems Corporation Common Stock	Common Stock	NGM	12(g)	0001261482	000-31533
DITC	Ditech Networks, Inc. Common Stock	Common Stock	NGM	12(g)	0001080667	000-26209
DVSA	Diversa Corporation Common Stock	Common Stock	NGM	12(g)	0001049210	000-29173
DXYN	Dixie Group, Inc. (The) Common Stock	Common Stock	NGM	12(g)	0000029332	000-02585

Issue Symbol	Issue Name	Issue Type	Issue Market Segment	Registration Type	CIK	SEC File #
DCEL	Dobson Communications Corporation Class A Common Stock	Common Stock	NGS	12(g)	0001035985	000-29225
DOCC	DocuCorp International, Inc. Common Stock	Common Stock	NGM	12(g)	0001033864	000-23929
DOCX	Document Sciences Corporation Common Stock	Common Stock	NCM	12(g)	0001016831	000-20981
DLLR	Dollar Financial Corp. Common Stock	Common Stock	NGS	12(g)	0001271625	000-50866
DLTR	Dollar Tree Stores, Inc. Common Stock	Common Stock	NGS	12(g)	0000935703	000-25464
DHOM	Dominion Homes Inc. Common Stock	Common Stock	NGM	12(g)	0000917857	000-23270
DGICA	Donegal Group, Inc. Class A Common Stock	Common Stock	NGS	12(g)	0000800457	000-15341
DGICB	Donegal Group, Inc. Class B Common Stock	Common Stock	NGS	12(g)	0000800457	000-15341
DMLP	Dorchester Minerals, L.P. Common Units Representing Limited Partnership Interests	Limited Partnership	NGM	12(g)	0001172358	000-50175
DIIB	Dorel Industries, Inc. Class B Subordinate Voting Shares	Common Stock	NGS	12(g)	0000843405	000-29712
DORM	Dorman Products, Inc. Common Stock	Common Stock	NGM	12(g)	0000868780	000-18914
HILL	Dot Hill Systems Corporation Common Stock	Common Stock	NGM	12(g)	0001042783	001-13317
DBLE	Double Eagle Petroleum Company Common Stock	Common Stock	NCM	12(g)	0000029834	000-06529
DOVP	DOV Pharmaceutical, Inc. Common Stock	Common Stock	NGM	12(g)	0001066833	000-49730
DOVR	Dover Saddlery, Inc. Common Stock	Common Stock	NGM	12(g)	0001071625	000-51624
DRAX	Draxis Health Inc. Common Shares	Common Stock	NGS	12(g)	0000845802	000-17434
DROOY	DRDGOLD Limited American Depository Shares	American Depository Shares	NCM	12(g)	0001023512	000-28800
DBRN	Dress Barn, Inc. (The) Common Stock	Common Stock	NGS	12(g)	0000717724	000-11736
DSCM	drugstore.com, inc. Common Stock	Common Stock	NGM	12(g)	0001086467	000-26137
DRYS	DryShips Inc. Common Stock	Common Stock	NGS	12(g)	0001308858	000-51141
DSPG	DSP Group, Inc. Common Stock	Common Stock	NGS	12(g)	0000915778	000-23006
DTSI	DTS, Inc. Common Stock	Common Stock	NGS	12(g)	0001226308	000-50335
DUCK	Duckwall-Alco Stores, Inc. Common Stock	Common Stock	NGM	12(g)	0000030302	000-20269
DRRA	Dura Automotive Systems, Inc. Class A Common Stock	Common Stock	NGM	12(g)	0001016177	000-21139
DRRAP	Dura Automotive Systems, Inc. Dura Automotive Systems Capital Trust - 7.50% Convertible Trust Preferred Securities	Other Securities	NGM	12(g)	0001016177	000-21139
DRRX	Durect Corporation Common Stock	Common Stock	NGM	12(g)	0001082038	000-31615
DUSA	DUSA Pharmaceuticals, Inc. Common Stock	Common Stock	NGM	12(g)	0000879993	000-19777
DXPE	DXP Enterprises, Inc. Common Stock	Common Stock	NCM	12(g)	0001020710	000-21513
DYAX	Dyax Corp. Common Stock	Common Stock	NGM	12(g)	0000907562	000-24537
DYII	Dynacq Healthcare, Inc. Common Stock	Common Stock	NCM	12(g)	0000890908	000-21574
DDMX	Dynamex, Inc. Common Stock	Common Stock	NGS	12(g)	0001015483	000-21057

Issue Symbol	Issue Name	Issue Type	Issue Market Segment	Registration Type	CIK	SEC File #
BOOM	Dynamic Materials Corporation Common Stock	Common Stock	NGS	12(g)	0000034067	001-14775
DRCO	Dynamics Research Corporation Common Stock	Common Stock	NGM	12(g)	0000030822	000-02479
DYNT	Dynatronics Corporation Common Stock	Common Stock	NCM	12(g)	0000720875	000-12697
DVAX	Dynavax Technologies Corporation Common Stock	Common Stock	NGM	12(g)	0001029142	000-50577
ECMV	E Com Ventures, Inc. Common Stock	Common Stock	NCM	12(g)	0000880460	000-19714
EGBN	Eagle Bancorp, Inc. Common Stock	Common Stock	NCM	12(g)	0001050441	000-25923
EGLE	Eagle Bulk Shipping Inc. Common Stock	Common Stock	NGS	12(g)	0001322439	000-51366
EGLT	Eagle Test Systems, Inc. Common Stock	Common Stock	NGM	12(g)	0001290096	000-51828
ELNK	EarthLink, Inc. Common Stock	Common Stock	NGS	12(g)	0001102541	001-15605
EPEN	East Penn Financial Corporation Common Stock	Common Stock	NCM	12(g)	0001220483	000-50330
EWBC	East West Bancorp, Inc. Common Stock	Common Stock	NGS	12(g)	0001069157	000-24939
EIHI	Eastern Insurance Holdings, Inc. Common Stock	Common Stock	NGM	12(g)	0001321268	000-52058
EVBS	Eastern Virginia Bankshares, Inc. Common Stock	Common Stock	NCM	12(g)	0001047170	000-23565
EASY	EasyLink Services Corporation Class A Common Stock	Common Stock	NCM	12(g)	0001081661	000-26371
EBAY	eBay Inc. Common Stock	Common Stock	NGS	12(g)	0001065088	000-24821
EBIX	Ebix Inc Common Stock	Common Stock	NCM	12(g)	0000814549	000-15946
ECBE	ECB Bancorp Inc Common Stock	Common Stock	NGM	12(g)	0001066254	000-24753
ELON	Echelon Corporation Common Stock	Common Stock	NGM	12(g)	0000031347	000-29748
DISH	EchoStar Communications Corporation Class A Common Stock	Common Stock	NGS	12(g)	0001001082	000-26176
ECIL	ECI Telecom Ltd. Ordinary Shares	Ordinary Shares	NGS	12(g)	0000701544	000-12672
ECLP	Eclipsys Corporation Common Stock	Common Stock	NGS	12(g)	0001034088	000-24539
ECLG	eCollege.com Common Stock	Common Stock	NGM	12(g)	0001085653	000-28393
ECTX	ECTel Ltd. Ordinary Shares	Ordinary Shares	NGM	12(g)	0001096197	000-30348
EDAP	EDAP TMS S.A. American Depository Shares	American Depository Shares	NGM	12(g)	0001041934	000-29374
EDEN	EDEN Bioscience Corporation Common Stock	Common Stock	NCM	12(g)	0000930095	000-31499
EDGR	EDGAR Online, Inc. Common Stock	Common Stock	NGM	12(g)	0001080224	000-26071
EPEX	Edge Petroleum Corporation Common Stock	Common Stock	NGS	12(g)	0001021010	000-22149
EDGW	Edgewater Technology, Inc. Common Stock	Common Stock	NGM	12(g)	0001017968	000-20971
DIET	Ediets Com Inc Common Stock	Common Stock	NCM	12(g)	0001094058	000-30559
EEEE	Educate, Inc. Common Stock	Common Stock	NGS	12(g)	0001286862	000-50952
EDUC	Educational Development Corporation Common Stock	Common Stock	NGM	12(g)	0000031667	000-04957
EFJI	EFJ, Inc. Common Stock	Common Stock	NGM	12(g)	0001023516	000-21681
EAGL	EGL, Inc. Common Stock	Common Stock	NGS	12(g)	0001001718	000-27288

Issue Symbol	Issue Name	Issue Type	Issue Market Segment	Registration Type	CIK	SEC File #
EMITF	Elbit Medical Imaging Ltd. Ordinary Shares	Ordinary Shares	NGM	12(g)	0001027662	000-28996
ESLT	Elbit Systems Ltd. Ordinary Shares	Ordinary Shares	NGS	12(g)	0001027664	000-28998
EEEE	Electro Energy Inc. Common Stock	Common Stock	NCM	12(g)	0001175636	000-51083
ELRC	Electro Rent Corporation Common Stock	Common Stock	NGM	12(g)	0000032166	000-09061
ESIO	Electro Scientific Industries, Inc. Common Stock	Common Stock	NGM	12(g)	0000726514	000-12853
EGLS	Electroglas, Inc. Common Stock	Common Stock	NGM	12(g)	0000902281	000-21626
ERTS	Electronic Arts Inc. Common Stock	Common Stock	NGS	12(g)	0000712515	000-17948
ECHO	Electronic Clearing House, Inc. Common Stock	Common Stock	NCM	12(g)	0000721773	000-15245
EFIL	Electronics for Imaging, Inc. Common Stock	Common Stock	NGS	12(g)	0000867374	000-18805
MELA	Electro-Optical Sciences, Inc. Common Stock	Common Stock	NCM	12(g)	0001051514	000-51481
ELSE	Electro-Sensors, Inc. Common Stock	Common Stock	NCM	12(g)	0000351789	000-09587
RDEN	Elizabeth Arden, Inc. Common Stock	Common Stock	NGS	12(g)	0000095052	001-06370
LONG	eLong, Inc. American Depository Shares	American Depository Shares	NGM	12(g)	0001290903	000-50984
ELOY	eLoyalty Corporation Common Stock	Common Stock	NGM	12(g)	0001094348	000-27975
ELRN	Elron Electronic Industries Ltd. Ordinary Shares	Ordinary Shares	NGM	12(g)	0000315126	000-11456
ELTK	Eitek Ltd. Ordinary Shares	Ordinary Shares	NCM	12(g)	0001024672	000-28884
EMAG	Emageon Inc. Common Stock	Common Stock	NGM	12(g)	0001121439	000-51149
EMAK	EMAK Worldwide, Inc. Common Stock	Common Stock	NGM	12(g)	0000911151	000-23346
EMBT	Embarcadero Technologies, Inc. Common Stock	Common Stock	NGS	12(g)	0001107112	000-30293
EMBX	Embrex, Inc. Common Stock	Common Stock	NGM	12(g)	0000878725	000-19495
EMCI	EMC Insurance Group, Inc. Common Stock	Common Stock	NGS	12(g)	0000356130	000-10956
EMKR	EMCORE Corporation Common Stock	Common Stock	NGM	12(g)	0000808326	000-22175
HLTH	Emdeon Corporation Common Stock	Common Stock	NGS	12(g)	0001009575	000-24975
EMRG	eMerge Interactive, Inc. Class A Common Stock	Common Stock	NCM	12(g)	0001092605	000-29037
EMIS	Emisphere Technologies, Inc. Common Stock	Common Stock	NGM	12(g)	0000805326	001-10615
EMMSP	Emmis Communications Corporation 6.25% Series A Cumulative Convertible Preferred Stock	Preferred Stock	NGS	12(g)	0000783005	000-23264
EMMS	Emmis Communications Corporation Class A Common Stock	Common Stock	NGS	12(g)	0000783005	000-23264
ELMG	EMS Technologies, Inc. Common Stock	Common Stock	NGS	12(g)	0000032198	000-06072
ENPT	En Pointe Technologies, Inc. Common Stock	Common Stock	NCM	12(g)	0001010305	000-28052
ECPG	Encore Capital Group Inc Common Stock	Common Stock	NGS	12(g)	0001084961	000-26489
ENMC	Encore Medical Corporation Common Stock	Common Stock	NGM	12(g)	0000944763	000-26538
WIRE	Encore Wire Corporation Common Stock	Common Stock	NGS	12(g)	0000850460	000-20278

Issue Symbol	Issue Name	Issue Type	Issue Market Segment	Registration Type	CIK	SEC File #
ENCY	Encysive Pharmaceuticals Inc Common Stock	Common Stock	NGM	12(g)	0000887023	000-20117
ELGX	Endologix Inc	Common Stock	NGM	12(g)	0001013606	000-28440
ENWV	Endwave Corporation Common Stock	Common Stock	NGM	12(g)	000118941	000-31635
ENER	Energy Conversion Devices, Inc. Common Stock	Common Stock	NGS	12(g)	0000032878	001-08403
EWST	Energy West, Inc. Common Stock	Common Stock	NGM	12(g)	0000043350	000-14183
ENSI	EnergySouth, Inc. Common Stock	Common Stock	NGS	12(g)	0001051286	000-29604
NPTH	Enpath Medical, Inc. Common Stock	Common Stock	NGM	12(g)	0000833140	000-19467
ESGR	Enstar Group Inc Common Stock	Common Stock	NGS	12(g)	0000055820	000-07477
ENTG	Entegris, Inc. Common Stock	Common Stock	NGS	12(g)	0001101302	000-30789
EBTC	Enterprise Bancorp Inc Common Stock	Common Stock	NGM	12(g)	0001018399	000-21021
EFSC	Enterprise Financial Services Corporation Common Stock	Common Stock	NGM	12(g)	0001025835	000-24131
ENMD	EntreMed, Inc. Common Stock	Common Stock	NGM	12(g)	0000895051	000-20713
ENTU	Entrust, Inc. Common Stock	Common Stock	NGM	12(g)	0001031283	000-24733
ECGI	Envoy Communications Group, Inc. Common Stock	Common Stock	NCM	12(g)	0001031516	000-30082
ENZN	Enzon, Inc. Common Stock	Common Stock	NGM	12(g)	0000727510	000-12957
EONC	eOn Communications Corporation Common Stock	Common Stock	NCM	12(g)	0001084752	000-26399
EPMD	EP MedSystems, Inc. Common Stock	Common Stock	NCM	12(g)	0001012394	000-28260
EPIK	Epic Bancorp Common Stock	Common Stock	NCM	12(g)	0001099980	000-50878
EPCT	EpiCept Corporation Common Stock	Common Stock	NGM	12(g)	0001208261	000-51290
EPIC	Epicor Software Corporation Common Stock	Common Stock	NGS	12(g)	0000891178	000-20740
EPIQ	EPIQ Systems, Inc. Common Stock	Common Stock	NGS	12(g)	0001027207	000-22081
EPIX	EPIX Pharmaceuticals, Inc. Common Stock	Common Stock	NGM	12(g)	0001027702	000-21863
PLUS	ePlus Inc. Common Stock	Common Stock	NGM	12(g)	0001022408	000-28926
EPHC	Epoch Holding Corporation Common Stock	Common Stock	NCM	12(g)	0000351903	001-09728
EQIX	Equinix, Inc. Common Stock \$0.001 Par Value	Common Stock	NGS	12(g)	0001101239	000-31293
ERES	eResearch Technology Inc. Common Stock	Common Stock	NGS	12(g)	0001026650	000-29100
ERIE	Erie Indemnity Company Class A Common Stock	Common Stock	NGS	12(g)	0000922621	000-24000
ESBF	ESB Financial Corporation Common Stock	Common Stock	NGS	12(g)	0000872835	000-19345
ESCA	Escalade, Incorporated Common Stock	Common Stock	NGM	12(g)	0000033488	000-06966
ESMC	Escalon Medical Corp. Common Stock	Common Stock	NCM	12(g)	0000862668	000-20127
ESCH	Eschelon Telecom, Inc. Common Stock	Common Stock	NGM	12(g)	0001110507	000-50706
ESPD	eSpeed, Inc. Class A Common Stock	Common Stock	NGM	12(g)	0001094831	000-28191
ESST	ESS Technology, Inc Common Stock	Common Stock	NGM	12(g)	0000907410	000-26660
KEYW	Essex Corp Common Stock	Common Stock	NGS	12(g)	0000355199	001-31703

Issue Symbol	Issue Name	Issue Type	Issue Market Segment	Registration Type	CIK	SEC File #
ETWC	etrials Worldwide, Inc. Common Stock	Common Stock	NGM	12(g)	0001268904	000-50531
ETWCU	etrials Worldwide, Inc. Units	Unit	NGM	12(g)	0001268904	000-50531
ETWCW	etrials Worldwide, Inc. Warrants	Warrant	NGM	12(g)	0001268904	000-50531
CLWT	Euro Tech Holdings Company Limited Common Stock	Common Stock	NCM	12(g)	0001026662	000-22113
EUBK	EuroBancshares, Inc. Common Stock	Common Stock	NGS	12(g)	0001164554	000-50872
EEFT	Euronet Worldwide, Inc. Common Stock	Common Stock	NGS	12(g)	0001029199	000-22167
EURO	EuroTrust A/S American Depository Shares	American Depository Shares	NGM	12(g)	0001041457	000-30690
EVVV	ev3 Inc. Common Stock	Common Stock	NGS	12(g)	0001318310	000-51348
ESCC	Evans & Sutherland Computer Corporation Common Stock	Common Stock	NGM	12(g)	0000276283	000-8771
EVBN	Evans Bancorp, Inc. Common Stock	Common Stock	NGM	12(g)	0000842518	000-18539
EVCJ	EVCJ Career Colleges Holding Corp. Common Stock	Common Stock	NCM	12(g)	0001065591	000-25371
ESLR	Evergreen Solar, Inc. Common Stock	Common Stock	NGM	12(g)	0000947397	000-31687
EVST	Everlast Worldwide Inc. Common Stock	Common Stock	NCM	12(g)	0000934795	000-25918
EVOL	Evolving Systems, Inc. Common Stock	Common Stock	NCM	12(g)	0001052054	000-24081
EXAS	EXACT Sciences Corporation Common Stock	Common Stock	NGM	12(g)	0001124140	000-32179
EXAC	Exactech, Inc. Common Stock	Common Stock	NGM	12(g)	0000913165	000-28240
EXAR	Exar Corporation Common Stock	Common Stock	NGM	12(g)	0000753568	000-14225
XLTC	Excel Technology, Inc. Common Stock	Common Stock	NGS	12(g)	0000873603	000-19306
EXJF	Exchange National Bancshares, Inc. Common Stock	Common Stock	NGM	12(g)	0000939767	000-23636
EXEL	Exelixis, Inc. Common Stock	Common Stock	NGS	12(g)	0000939767	000-30235
EXFO	EXFO Electro-Optical Engineering Subordinate Voting Shares	Common Stock	NGM	12(g)	0001116284	000-30895
XIDE	Exide Technologies New Common Stock	Common Stock	NGM	12(g)	0000813781	000-50745
XIDEW	Exide Technologies New Warrant 2011	Warrant	NGM	12(g)	0000813781	000-50745
EXPE	Expedia, Inc. Common Stock	Common Stock	NGS	12(g)	0001324424	000-51447
EXPEW	Expedia, Inc. Warrant to purchase one half of one share of Expedia Inc Common Stock	Warrant	NGS	12(g)	0001324424	000-51447
EXPEZ	Expedia, Inc. Warrants to purchase .969375 shares of Expedia Inc Common Stock	Warrant	NGS	12(g)	0001324424	000-51447
EXPD	Expeditors International of Washington, Inc. Common Stock	Common Stock	NGS	12(g)	0000746515	000-13468
EXPO	Exponent, Inc. Common Stock	Common Stock	NGS	12(g)	0000851520	000-18665
ESRX	Express Scripts, Inc. Class A Common Stock	Common Stock	NGS	12(g)	0000885721	000-20199
EXTR	Extreme Networks, Inc. Common Stock	Common Stock	NGM	12(g)	0001078271	000-25711
EZPW	EZCORP, Inc. Class A Non-Voting Common Stock	Common Stock	NGS	12(g)	0000876523	000-19424

Issue Symbol	Issue Name	Issue Type	Issue Market Segment	Registration Type	CIK	SEC File #
EZEM	E-Z-EM, Inc. Common Stock	Common Stock	NGS	12(g)	0000727008	001-11479
FFIV	F5 Networks, Inc. Common Stock	Common Stock	NGS	12(g)	0001048695	000-26041
FCPO	Factory Card & Party Outlet Corp.	Common Stock	NGM	12(g)	0001024441	000-21859
FALC	FalconStor Software, Inc. Common Stock	Common Stock	NGM	12(g)	0000922521	000-23970
FMRX	Familymeds Group, Inc. Common Stock	Common Stock	NCM	12(g)	0000921878	001-15445
DAVE	Famous Dave's of America, Inc. Common Stock	Common Stock	NGM	12(g)	0001021270	000-21625
FRGO	Fargo Electronics, Inc. Common Stock	Common Stock	NGS	12(g)	0001098834	000-29029
FARM	Farmer Brothers Company Common Stock	Common Stock	NGM	12(g)	0000034563	000-01375
FFKT	Farmers Capital Bank Corporation Common Stock	Common Stock	NCM	12(g)	0000713095	000-14412
FARO	FARO Technologies, Inc. Common Stock	Common Stock	NGM	12(g)	0000917491	000-23081
FAST	Fastenal Company Common Stock	Common Stock	NGS	12(g)	0000815556	000-16125
FBSS	Fauquier Bankshares, Inc. Common Stock	Common Stock	NCM	12(g)	0001083643	000-25805
FVRL	Favrille, Inc. Common Stock	Common Stock	NGM	12(g)	0001285701	000-51134
FTHR	Featherlite, Inc. Common Stock	Common Stock	NCM	12(g)	0000928064	000-24804
FFCO	FedFirst Financial Corporation Common Stock	Common Stock	NCM	12(g)	0001308017	000-51153
FEIC	FEI Company Common Stock	Common Stock	NGM	12(g)	0000914329	000-22780
FFDF	FFD Financial Corporation Common Stock	Common Stock	NCM	12(g)	0001006177	000-27916
FTGX	FiberNet Telecom Group, Inc. Common Stock	Common Stock	NCM	12(g)	0001001868	000-24661
FBST	Fiberstars, Inc. Common Stock	Common Stock	NGM	12(g)	0000924168	000-24564
FSBI	Fidelity Bancorp, Inc. Common Stock	Common Stock	NGM	12(g)	0000769207	000-22288
FFFL	Fidelity Bankshares, Inc. Common Stock	Common Stock	NGS	12(g)	0001028336	000-29040
LION	Fidelity Southern Corporation New Common Stock	Common Stock	NGS	12(g)	0000822662	000-22374
FICC	Fieldstone Investment Corporation Common Stock	Common Stock	NGS	12(g)	0001271831	000-50938
FITB	Fifth Third Bancorp Common Stock	Common Stock	NGS	12(g)	0000035527	000-08076
FILE	FileNet Corporation Common Stock	Common Stock	NGS	12(g)	0000706015	000-15997
FISI	Financial Institutions, Inc. Common Stock	Common Stock	NGS	12(g)	0000862831	000-26481
FNSR	Finisar Corporation Common Stock	Common Stock	NGS	12(g)	0001094739	000-27999
FINL	Finish Line, Inc. (The) Class A Common Stock	Common Stock	NGS	12(g)	0000886137	000-20184
FNLY	Finlay Enterprises, Inc. Common Stock	Common Stock	NGM	12(g)	0000878731	000-25716
FADV	First Advantage Corporation Common Stock	Common Stock	NGS	12(g)	0001210677	000-50285
FACT	First Albany Companies, Inc. Common Stock	Common Stock	NGM	12(g)	0000782842	000-14140
FRNS	First Avenue Networks, Inc. Common Stock	Common Stock	NGM	12(g)	0001010286	000-21091
FAVS	First Aviation Services, Inc. Common Stock	Common Stock	NCM	12(g)	0001025743	000-21995
FBNC	First Bancorp Common Stock	Common Stock	NGS	12(g)	0000811589	000-15572

Issue Symbol	Issue Name	Issue Type	Issue Market Segment	Registration Type	CIK	SEC File #
FBEI	First Bancorp of Indiana, Inc. Common Stock	Common Stock	NGM	12(g)	0001074543	000-29814
FBMS	First Bancshares, Inc. (The) (MS) Common Stock	Common Stock	NCM	12(g)	0000947559	000-22507
FBSI	First Bancshares, Inc. Common Stock	Common Stock	NGM	12(g)	0000912967	000-22842
FBTC	First Banc Trust Corporation Common Stock	Common Stock	NCM	12(g)	0001129847	000-32535
FBNKM	First Banks, Inc. First Preferred Capital Trust III - 9.00% Cumulative Trust Preferred Securities	Other Securities	NGM	12(g)	0000710507	000-20632
BUSE	First Busey Corporation Class A Common Stock	Common Stock	NGS	12(g)	0000314489	000-15950
FBIZ	First Business Financial Services, Inc. Common Stock	Common Stock	NGM	12(g)	0001305399	000-51028
FCAP	First Capital, Inc. Common Stock	Common Stock	NCM	12(g)	0001070296	000-25023
FCFS	First Cash Financial Services, Inc. Common Stock	Common Stock	NGS	12(g)	0000840489	000-19133
FCTR	First Charter Corporation Common Stock	Common Stock	NGS	12(g)	0000717306	000-15829
FCZA	First Citizens Banc Corp. Common Stock	Common Stock	NCM	12(g)	0000944745	000-25980
FCNCA	First Citizens BancShares, Inc. Class A Common Stock	Common Stock	NGS	12(g)	0000798941	000-16471
FCLF	First Clover Leaf Financial Corp. Common Stock	Common Stock	NCM	12(g)	0001283582	000-50820
FCBP	First Community Bancorp Common Stock	Common Stock	NGS	12(g)	0001102112	000-30747
FCBC	First Community Bancshares, Inc. Common Stock	Common Stock	NGS	12(g)	0000859070	000-19297
FCFL	First Community Bank Corporation of America (FL) Common Stock	Common Stock	NCM	12(g)	0001082564	000-50357
FCCO	First Community Corporation Common Stock	Common Stock	NCM	12(g)	0000932781	000-28344
FOGI	First Consulting Group, Inc. Common Stock	Common Stock	NGM	12(g)	0001049758	000-23651
FDEF	First Defiance Financial Corp. Common Stock	Common Stock	NGS	12(g)	0000946647	000-26850
FFSW	First Federal Banc of the Southwest, Inc. Common Stock	Common Stock	NCM	12(g)	0001060939	000-51243
FFBH	First Federal Bancshares of Arkansas, Inc. Common Stock	Common Stock	NGM	12(g)	0001006424	000-28312
FFBI	First Federal Bancshares, Inc. Common Stock	Common Stock	NGM	12(g)	0001113107	000-30753
FFSX	First Federal Bancshares, Inc. Common Stock	Common Stock	NGM	12(g)	0001075348	000-25509
FFNM	First Federal of Northern Michigan Bancorp, Inc. Common Stock	Common Stock	NGM	12(g)	0001128227	000-31957
FFBC	First Financial Bancorp. Common Stock	Common Stock	NGS	12(g)	0000708955	000-12379
FFIN	First Financial Bankshares, Inc. Common Stock	Common Stock	NGS	12(g)	0000036029	000-07674
THFF	First Financial Corporation Indiana Common Stock	Common Stock	NGS	12(g)	0000714562	000-16759
FFCH	First Financial Holdings, Inc. Common Stock	Common Stock	NGS	12(g)	0000787075	000-17122
FFKY	First Financial Service Corporation Common Stock	Common Stock	NGM	12(g)	0000854395	000-18832
FFHS	First Franklin Corporation Common Stock	Common Stock	NGM	12(g)	0000742161	000-16362
FINB	First Indiana Corporation Common Stock	Common Stock	NGS	12(g)	0000789670	000-14354

Issue Symbol	Issue Name	Issue Type	Issue Market Segment	Registration Type	CIK	SEC File #
FKFS	First Keystone Financial, Inc. Common Stock	Common Stock	NGM	12(g)	0000856751	000-25328
FMFC	First M & F Corporation Common Stock	Common Stock	NGS	12(g)	0000320387	000-09424
FMAR	First Mariner Bancorp Common Stock	Common Stock	NGM	12(g)	0000946090	000-21815
FRME	First Merchants Corporation Common Stock	Common Stock	NGS	12(g)	0000712534	000-17071
FRMEP	First Merchants Corporation First Merchants Capital Trust I - 8.75% Cumulative Trust Preferred Securities	Other Securities	NGS	12(g)	0000712534	000-17071
FMBI	First Midwest Bancorp, Inc. Common Stock	Common Stock	NGS	12(g)	0000702325	000-10967
FMSB	First Mutual Bancshares, Inc. Common Stock	Common Stock	NGM	12(g)	0001098337	000-28261
FNSC	First National Bancshares Inc (SC) Common Stock	Common Stock	NGM	12(g)	0001095274	000-30523
FNLC	First National Lincoln Corporation Common Stock	Common Stock	NGS	12(g)	0000765207	000-26689
FNFG	First Niagara Financial Group Inc. Common Stock	Common Stock	NGS	12(g)	0001051741	000-23975
FNFI	First Niles Financial, Inc. Common Stock	Common Stock	NCM	12(g)	0001065823	000-24849
FOBB	First Oak Brook Bancshares, Inc. Common Stock	Common Stock	NGS	12(g)	0000717837	000-14468
FLIC	First of Long Island Corporation (The) Common Stock	Common Stock	NCM	12(g)	0000740663	000-12220
FPTB	First Pactrust Bancorp, Inc. Common Stock	Common Stock	NGM	12(g)	0001169770	000-49806
FPFC	First Place Financial Corp. Common Stock	Common Stock	NGS	12(g)	0001068912	000-25049
FRGB	First Regional Bancorp Common Stock	Common Stock	NGM	12(g)	0000356708	000-10232
FRCCP	First Republic Preferred Capital Corporation Preferred Stock	Preferred Stock	NGM	12(g)	0001143834	000-33461
FRCCO	First Republic Preferred Capital Corporation Preferred Stock	Preferred Stock	NGM	12(g)	0001143834	000-33461
FSGI	First Security Group, Inc. Common Stock	Common Stock	NGS	12(g)	0001138817	000-49747
FSBK	First South Bancorp Inc Common Stock	Common Stock	NGS	12(g)	0001027183	000-22219
FSNM	First State Bancorporation Common Stock	Common Stock	NGS	12(g)	0000897861	001-12487
FSTF	First State Financial Corporation Common Stock	Common Stock	NGM	12(g)	0001282582	000-50992
FUNC	First United Corporation Common Stock	Common Stock	NGM	12(g)	0000763907	000-14237
FBMI	Firstbank Corporation Common Stock	Common Stock	NGS	12(g)	0000778972	000-14209
FBNW	FirstBank NW Corp. Common Stock	Common Stock	NGM	12(g)	0001035513	000-22435
FCFC	FirstCity Financial Corporation Common Stock	Common Stock	NGS	12(g)	0000828678	033-19694
FMER	FirstMerit Corporation Common Stock	Common Stock	NGS	12(g)	0000354869	000-10161
FSRV	FirstService Corporation Subordinate Voting Shares	Common Stock	NGS	12(g)	0000913353	000-24762
FSTW	Firstwave Technologies Inc. Common Stock	Common Stock	NCM	12(g)	0000897078	000-21202
FISV	Fiserv, Inc. Common Stock	Common Stock	NGS	12(g)	0000798354	000-14948
FSCI	Fisher Communications, Inc. Common Stock	Common Stock	NGM	12(g)	0001034669	000-22439
FLAG	FLAG Financial Corporation Common Stock	Common Stock	NGS	12(g)	0000897509	000-24532
FLML	Flamel Technologies S.A. American Depositary Shares	American Depositary	NGM	12(g)	0001012477	000-28508

Issue Symbol	Issue Name	Issue Type	Issue Market Segment	Registration Type	CIK	SEC File #
		Shares				
FLDR	Flanders Corporation Common Stock	Common Stock	NGS	12(g)	0000799526	000-27958
FLXS	Flexsteel Industries, Inc. Common Stock	Common Stock	NGM	12(g)	0000037472	000-05151
FLEX	Flextronics International Ltd. Ordinary Shares	Ordinary Shares	NGS	12(g)	0000866374	000-23354
FLIR	FLIR Systems, Inc. Common Stock	Common Stock	NGS	12(g)	0000354908	000-21918
FLOW	Flow International Corporation Common Stock	Common Stock	NGM	12(g)	0000713002	000-12448
FFIC	Flushing Financial Corporation Common Stock	Common Stock	NGS	12(g)	0000923139	000-24272
FMCO	FMS Financial Corporation Common Stock	Common Stock	NGM	12(g)	0000839845	000-17353
FNBP	FNB Corporation Common Stock	Common Stock	NGS	12(g)	0001010961	000-24141
FNBF	FNB Financial Services Corporation Common Stock	Common Stock	NGM	12(g)	0000742679	000-13086
FNBN	FNB United Corp. Common Stock	Common Stock	NGS	12(g)	0000764811	000-13823
FCSE	FOCUS Enhancements, Inc. Common Stock	Common Stock	NCM	12(g)	0000884719	001-11860
FMCN	Focus Media Holding Limited Sponsored American Depositary Receipt (Cayman Islands)	American Depositary Shares	NGM	12(g)	0001330017	000-51387
FONR	Fonar Corporation Common Stock	Common Stock	NCM	12(g)	0000355019	000-10248
VIFLD	Food Technology Service, Inc. New Common Stock	Common Stock	NCM	12(g)	0000868267	000-19047
FMTI	Forbes Medi-Tech Inc. Common Share	Common Stock	NGM	12(g)	0001087477	000-30076
FORG	Forgent Networks Inc Common Stock	Common Stock	NGM	12(g)	0000884144	000-20008
FORM	FormFactor, Inc. FormFactor, Inc. Common Stock	Common Stock	NGS	12(g)	0001039399	000-50307
FORTY	Formula Systems (1985) Ltd. American Depositary Shares	American Depositary Shares	NGM	12(g)	0001045986	000-29442
FORR	Forrester Research, Inc. Common Stock	Common Stock	NGS	12(g)	0001023313	000-21433
FNET	FortuNet, Inc. Common Stock	Common Stock	NGM	12(g)	0001337899	000-51703
FWRD	Forward Air Corporation Common Stock	Common Stock	NGS	12(g)	0000912728	000-22490
FORD	Forward Industries, Inc. Common Stock	Common Stock	NCM	12(g)	0000038264	000-06669
FOSL	Fossil, Inc. Common Stock	Common Stock	NGS	12(g)	0000883569	000-19848
FWLT	Foster Wheeler Ltd. (Bermuda)	Common Stock	NGS	12(g)	0001130385	000-50740
FWLTW	Foster Wheeler Ltd. Class A Warrants 9/24/2009 (Bermuda)	Warrant	NGS	12(g)	0001130385	000-50740
FWLTZ	Foster Wheeler Ltd. Warrants B 9/24/2007 (Bermuda)	Warrant	NGS	12(g)	0001130385	000-50740
FDRY	Foundry Networks, Inc. Common Stock	Common Stock	NGS	12(g)	0001090071	000-26689
FOXH	FoxHollow Technologies, Inc. Common Stock	Common Stock	NGS	12(g)	0001217688	000-50998
FPBI	FPB Bancorp, Inc. Common Stock	Common Stock	NCM	12(g)	0001162245	000-33351
FPIC	FPIC Insurance Group, Inc. Common Stock	Common Stock	NGS	12(g)	0001010247	001-11983
FBTX	Franklin Bank Corp. Common Stock	Common Stock	NGS	12(g)	0001207070	000-50518

Issue Symbol	Issue Name	Issue Type	Issue Market Segment	Registration Type	CIK	SEC File #
FCMC	Franklin Credit Management Corp Common Stock	Common Stock	NGM	12(g)	0000831246	000-17771
FELE	Franklin Electric Co., Inc. Common Stock	Common Stock	NGS	12(g)	0000038725	000-00362
FRED	Fred's, Inc. Common Stock	Common Stock	NGS	12(g)	0000724571	000-19288
FREEW	FreeSeas Inc. Warrant W 7/29/2009	Warrant	NCM	12(g)	0001325159	000-51672
FREEZ	FreeSeas Inc. Warrant Z 7/29/2011	Warrant	NCM	12(g)	0001325159	000-51672
FREE	FreeSeas Inc. Common Stock	Common Stock	NCM	12(g)	0001325159	000-51672
RAIL	FreightCar America, Inc. Common Stock	Common Stock	NGS	12(g)	0001320854	000-51237
FRNT	Frontier Airlines Holdings, Inc. Common Stock	Common Stock	NGM	12(g)	0000921929	000-24126
FTBK	Frontier Financial Corporation Common Stock	Common Stock	NGS	12(g)	0000716457	000-15540
FFEX	Frozen Food Express Industries, Inc. Common Stock	Common Stock	NGM	12(g)	0000039273	001-10006
FSII	FSI International, Inc. Common Stock	Common Stock	NGM	12(g)	0000841692	000-17276
FCEL	FuelCellEnergy, Inc. Common Stock	Common Stock	NGM	12(g)	0000886128	001-14204
FTEK	Fuel-Tech, N.V. Common Stock	Common Stock	NGM	12(g)	0000846913	000-21724
FULT	Fulton Financial Corporation Common Stock	Common Stock	NGS	12(g)	0000700564	000-10587
FNDT	Fundtech Ltd. Ordinary Shares	Ordinary Shares	NGM	12(g)	0001054836	000-29634
FMDAY	Futuremedia Public Limited Company American Depository Shares	American Depository Shares	NCM	12(g)	0000906476	000-21978
FXEN	FX Energy, Inc. Common Stock	Common Stock	NGM	12(g)	0000907649	000-25386
GKSR	G&K Services, Inc. Class A Common Stock	Common Stock	NGS	12(g)	0000039648	000-04063
WILC	G. Willi-Food International, Ltd. Ordinary Shares	Ordinary Shares	NCM	12(g)	0001030997	000-29256
GAIA	Gaiam, Inc. Common Stock	Common Stock	NGM	12(g)	0001089872	000-27517
HIST	Gallery of History, Inc. Common Stock	Common Stock	NCM	12(g)	0000763730	000-13757
GMTC	GameTech International, Inc. Common Stock	Common Stock	NGM	12(g)	0001045014	000-23401
GPIC	Gaming Partners International Corporation Common Stock	Common Stock	NGM	12(g)	0000918580	000-23588
GMTN	Gander Mountain Company Common Stock	Common Stock	NGM	12(g)	0001277475	000-50659
GRMN	Garmin Ltd. Common Stock	Common Stock	NGS	12(g)	0001121788	000-31983
GBTS	Gateway Financial Holdings, Inc. Common Stock	Common Stock	NGM	12(g)	0001156953	000-33223
GBTB	GB&T Bancshares Common Stock	Common Stock	NGS	12(g)	0001061068	000-24203
GEHL	Gehl Company Common Stock	Common Stock	NGS	12(g)	0000856386	000-18110
GEMP	Gemplus International S.A. American Depository Shares	American Depository Shares	NGS	12(g)	0001128749	000-31052
GMST	Gemstar-TV Guide International Inc. Common Stock	Common Stock	NGS	12(g)	0000923282	000-24218
GENR	Geniera Corporation Common Stock	Common Stock	NCM	12(g)	0000880431	000-19651
GSTL	Genco Shipping & Trading Limited Common Stock	Common Stock	NGM	12(g)	0001326200	000-51442

Issue Symbol	Issue Name	Issue Type	Issue Market Segment	Registration Type	CIK	SEC File #
GLGC	Gene Logic Inc. Common Stock	Common Stock	NGM	12(g)	0001043914	000-23317
GNLB	Genelabs Technologies, Inc. Common Stock	Common Stock	NCM	12(g)	0000874443	000-19222
GNCMA	General Communication, Inc. Class A Common Stock	Common Stock	NGS	12(g)	0000808461	000-15279
GNBT	Genex Biotechnology Corporation Common Stock	Common Stock	NCM	12(g)	0001059784	000-25169
GHCI	Genesis HealthCare Corporation Common Stock	Common Stock	NGS	12(g)	0001236736	000-50351
GNSS	Genesis Microchip Inc. Common Stock	Common Stock	NGM	12(g)	0001161396	000-33477
GNSY	Genesys S.A. American Depositary Shares	American Depositary Shares	NGM	12(g)	0001125276	000-31134
GENE	Genetic Technologies Ltd Sponsored ADR	American Depositary Shares	NGM	12(g)	0001166272	000-51504
GTOP	Genitope Corporation Common Stock	Common Stock	NGM	12(g)	0001028358	000-50425
GLYT	Genlyte Group Incorporated (The) Common Stock	Common Stock	NGS	12(g)	0000833076	000-16960
GHDX	Genomic Health, Inc. Common Stock	Common Stock	NGM	12(g)	0001131324	000-51541
GPPO	Gen-Probe Incorporated Common Stock	Common Stock	NGS	12(g)	0000820237	001-31279
GNTA	Genta Incorporated Common Stock	Common Stock	NGM	12(g)	0000880643	000-19635
GETI	GenTek Inc. Common Stock	Common Stock	NGS	12(g)	0001077552	000-29163
GNTX	Gentex Corporation Common Stock	Common Stock	NGS	12(g)	0000355811	000-10235
GENT	Gentium SpA Gentium SpA American Depositary Shares ("ADSs")	American Depositary Shares	NGM	12(g)	0001314755	000-51341
GTIV	Genitva Health Services, Inc. Common Stock	Common Stock	NGS	12(g)	0001096142	001-15669
GNVC	GenVec, Inc. Common Stock	Common Stock	NGM	12(g)	0000934473	000-24469
GENZ	Genzyme Corporation Common Stock	Common Stock	NGS	12(g)	0000732485	000-14680
GMET	GeoMet, Inc. Common Stock	Common Stock	NGM	12(g)	0001352302	000-52155
GEOI	GeoResources, Inc. Common Stock	Common Stock	NCM	12(g)	0000041023	000-08041
GABC	German American Bancorp, Inc. Common Stock	Common Stock	NGS	12(g)	0000714395	000-11244
GERN	Geron Corporation Common Stock	Common Stock	NGM	12(g)	0000886744	000-20859
GVHR	Gevity HR, Inc. Common Stock	Common Stock	NGS	12(g)	0001035185	000-22701
GFIG	GFI Group Inc. Common Stock	Common Stock	NGS	12(g)	0001292426	000-51103
ROCK	Gibraltar Industries, Inc. Common Stock	Common Stock	NGS	12(g)	0000912562	000-22462
GGBMZ	Gigabeam Corporation Class Z Warrant 1/28/2011	Warrant	NCM	12(g)	0001279831	000-50985
GGBM	Gigabeam Corporation Common Stock	Common Stock	NCM	12(g)	0001279831	000-50985
GGBMW	Gigabeam Corporation Warrant 10/14/2009	Warrant	NCM	12(g)	0001279831	000-50985
GIGM	GigaMedia Limited Ordinary Shares	Ordinary Shares	NGM	12(g)	0001105101	000-30540
GIGA	Giga-tronics Incorporated Common Stock	Common Stock	NCM	12(g)	0000719274	000-12719
GIII	G-III Apparel Group, LTD. Common Stock	Common Stock	NGM	12(g)	0000821002	000-18183

Issue Symbol	Issue Name	Issue Type	Issue Market Segment	Registration Type	CIK	SEC File #
GILT	Gilat Satellite Networks Ltd. Ordinary Shares	Ordinary Shares	NGM	12(g)	0000897322	000-21218
GILD	Gilead Sciences, Inc. Common Stock	Common Stock	NGS	12(g)	0000882095	000-19731
GIVN	Given Imaging Ltd. Ordinary shares	Ordinary Shares	NGM	12(g)	0001126140	000-33133
GBCI	Glacier Bancorp, Inc. Common Stock	Common Stock	NGS	12(g)	0000868671	000-18911
GLAD	Gladstone Capital Corporation Common Stock	Common Stock	NGS	12(g)	0001143513	000-33117
GOODP	Gladstone Commercial Corporation 7.75% Series A Cumulative Convertible Preferred Stock	Preferred Stock	NGM	12(g)	0001234006	000-106024
GOOD	Gladstone Commercial Corporation Common stock	Common Stock	NGM	12(g)	0001234006	000-106024
GAIN	Gladstone Investment Corporation Common Stock	Common Stock	NGS	12(g)	0001321741	000-51233
GLBZ	Glen Burnie Bancorp Common Stock	Common Stock	NCM	12(g)	0000890066	000-24047
GEMS	Glenayre Technologies, Inc. Common Stock	Common Stock	NGM	12(g)	0000808918	000-15761
GLBC	Global Crossing Ltd. New Common Stock (Bermuda)	Common Stock	NGM	12(g)	0001061322	001-16201
GEPT	Global ePoint, Inc. Common Stock	Common Stock	NCM	12(g)	0000896195	000-21738
GISX	Global Imaging Systems, Inc. Common Stock	Common Stock	NGS	12(g)	0001050167	000-24373
GLBL	Global Industries, Ltd. Common Stock	Common Stock	NGS	12(g)	0000895663	000-21086
GPTX	Global Payment Technologies, Inc. Common Stock	Common Stock	NGM	12(g)	0000933020	000-25148
GSOL	Global Sources Ltd. Common Stock	Common Stock	NGS	12(g)	0001106650	000-30678
GNET	Global Traffic Network, Inc. Common Stock	Common Stock	NGM	12(g)	0001344907	000-51838
GCOM	Globecom Systems Inc. Common Stock	Common Stock	NGM	12(g)	0001031028	000-22839
GMKT	Gmarket Inc. American Depository Shares	American Depository Shares	NGM	12(g)	0001365241	000-52060
GMXR	GMX Resources, Inc. Common Stock	Common Stock	NGM	12(g)	0001127342	000-32325
GOAM	GoAmerica, Inc. New Common Stock	Common Stock	NCM	12(g)	0001101268	000-29359
GLNG	Golar Lng Ltd Golar Lng Ltd	Common Stock	NGS	12(g)	0001207179	000-50113
GKIS	Gold Kist Inc. Common Stock	Common Stock	NGS	12(g)	0001292215	000-50925
GLDC	Golden Enterprises, Inc. Common Stock	Common Stock	NGM	12(g)	0000042228	000-04339
GLDN	Golden Telecom, Inc. Common Stock	Common Stock	NGS	12(g)	0001089874	000-27423
GFSI	Goldleaf Financial Solutions, Inc. Common Stock	Common Stock	NCM	12(g)	0001069469	000-25959
GGXY	Golf Galaxy, Inc. Common Stock	Common Stock	NGS	12(g)	0001327098	000-51460
GOLF	Golfsmith International Holdings, Inc. Common Stock	Common Stock	NGM	12(g)	0001202273	000-52041
GTIM	Good Times Restaurants Inc. Common Stock	Common Stock	NCM	12(g)	0000825324	000-18590
GOOG	Google Inc. Class A Common Stock	Common Stock	NGS	12(g)	0001288776	000-50726
GPCB	Gpc Biotech Ag American Depository Shares	American Depository Shares	NGM	12(g)	0001117629	000-50825
GRIN	Grand Toys International Limited American Depository Shares	American Depository Shares	NCM	12(g)	0001285066	000-22372

Issue Symbol	Issue Name	Issue Type	Issue Market Segment	Registration Type	CIK	SEC File #
		Shares				
GCFB	Granite City Food & Brewery Ltd	Common Stock	NCM	12(g)	0001048620	000-29643
GRVY	GRAVITY Co., Ltd. American Depository Shares	American Depository Shares	NGM	12(g)	0001313310	000-51138
PEDE	Great Pee Dee Bancorp, Inc. Common Stock	Common Stock	NGM	12(g)	0001046587	000-23521
GSBC	Great Southern Bancorp, Inc. Common Stock	Common Stock	NGS	12(g)	0000854560	000-18082
GSBCP	Great Southern Bancorp, Inc. Great Southern Capital Trust I - 9.00% Cumulative Trust Preferred Securities	Other Securities	NGS	12(g)	0000854560	000-18082
WOLF	Great Wolf Resorts, Inc. Common Stock	Common Stock	NGM	12(g)	0001294538	000-51064
GAFB	Greater Atlantic Financial Corp. Common Stock	Common Stock	NGM	12(g)	0001082735	000-26467
GBBK	Greater Bay Bancorp Common Stock	Common Stock	NGS	12(g)	0000775473	000-25034
GBBKO	Greater Bay Bancorp GBB Capital V - 9.00% Cumulative Trust Preferred Securities	Other Securities	NGS	12(g)	0000775473	000-25034
GFLS	Greater Community Bancorp Common Stock	Common Stock	NGM	12(g)	0000773845	000-14294
GFLSO	Greater Community Bancorp Cumulative Trust Preferred Securities	Other Securities	NGM	12(g)	0000773845	000-14294
GMCR	Green Mountain Coffee, Roasters Inc. Common Stock	Common Stock	NGS	12(g)	0000909954	001-12340
GPRE	Green Plains Renewable Energy, Inc. Common Stock	Common Stock	NCM	12(g)	0001309402	000-51677
GCBC	Greene County Bancorp, Inc. Common Stock	Common Stock	NCM	12(g)	0001070524	000-25165
GCBS	Greene County Bancshares Inc Common Stock	Common Stock	NGS	12(g)	0000764402	000-14289
SRVY	Greenfield Online, Inc. Common Stock	Common Stock	NGM	12(g)	0001108906	000-50698
GVBK	Greenville First Bancshares Inc. Common Stock	Common Stock	NGM	12(g)	0001090009	000-27719
GRIF	Griffin Land & Nurseries, Inc. Common Stock	Common Stock	NGM	12(g)	0001037390	000-29288
GRIL	Grill Concepts Inc. Common Stock	Common Stock	NCM	12(g)	0000895041	000-23326
GGAL	Grupo Financiero Galicia S.A. American Depository Shares	American Depository Shares	NCM	12(g)	0001114700	000-30852
GSLA	GS Financial Corp. Common Stock	Common Stock	NGM	12(g)	0001029630	000-22269
GSIC	GSI Commerce, Inc. Common Stock	Common Stock	NGS	12(g)	0000828750	000-16611
GSIG	GSI Group, Inc. Common Stock	Common Stock	NGM	12(g)	0001076930	000-25705
GTCB	GTC Biotherapeutics Inc Common Stock	Common Stock	NGM	12(g)	0000904973	000-21794
GTSI	GTSI Corp. Common Stock	Common Stock	NGM	12(g)	0000850483	000-19394
GTXI	GTX, Inc. Common Stock	Common Stock	NGM	12(g)	0001260990	000-50549
GFED	Guaranty Federal Bancshares, Inc. Common Stock	Common Stock	NGM	12(g)	0001046203	000-23325
GTRC	Guitar Center, Inc. Common Stock	Common Stock	NGS	12(g)	0001021113	000-22207
GIFI	Gulf Island Fabrication, Inc. Common Stock	Common Stock	NGS	12(g)	0001031623	000-22303

Issue Symbol	Issue Name	Issue Type	Issue Market Segment	Registration Type	CIK	SEC File #
GMRK	GulfMark Offshore, Inc. Common Stock	Common Stock	NGS	12(g)	0001030749	000-22853
GPOR	Gulfport Energy Corporation Common Stock	Common Stock	NGS	12(g)	0000874499	000-19514
Gymb	Gymboree Corporation (The) Common Stock	Common Stock	NGS	12(g)	0000786110	000-21250
GYRO	Gyrodynne Company of America, Inc. Common Stock	Common Stock	NCM	12(g)	0000044689	000-01684
HEES	H&E Equipment Services, Inc. Common Stock	Common Stock	NGS	12(g)	0001339605	000-51759
HABC	Habersham Bancorp Common Stock	Common Stock	NGM	12(g)	0000754597	000-13153
HAIN	Hain Celestial Group, Inc. (The) Common Stock	Common Stock	NGS	12(g)	0000910406	000-22818
HAMP	Hampshire Group, Limited Common Stock	Common Stock	NGM	12(g)	0000887150	000-20201
HNAB	Hana Biosciences, Inc. Common Stock	Common Stock	NGM	12(g)	0001140028	000-50782
HANA	hanarotelecom incorporated American Depository Shares	American Depository Shares	NGS	12(g)	0001108838	001-15012
HBHC	Hancock Holding Company Common Stock	Common Stock	NGS	12(g)	0000750577	000-13089
HAFG	Hammi Financial Corporation Common Stock	Common Stock	NGS	12(g)	0001109242	000-30421
HANS	Hansen Natural Corporation Common Stock	Common Stock	NCM	12(g)	0000865752	000-18761
HARB	Harbor Florida Bancshares Inc Common Stock	Common Stock	NGS	12(g)	0001029407	000-22817
HDNG	Hardinge, Inc. Common Stock	Common Stock	NGS	12(g)	0000313716	000-15760
HGIC	Harleysville Group Inc. Common Stock	Common Stock	NGS	12(g)	0000792013	000-14697
HNBC	Harleysville National Corporation Common Stock	Common Stock	NGS	12(g)	0000702902	000-15237
HARL	Harleysville Savings Bank Common Stock	Common Stock	NGM	12(g)	0001107160	000-29709
HLIT	Harmonic Inc. Common Stock	Common Stock	NGM	12(g)	0000851310	000-25826
HWFG	Harrington West Financial Group, Inc. Common Stock	Common Stock	NGM	12(g)	0001063997	000-50066
TINY	Harris & Harris Group, Inc. Common Stock	Common Stock	NGM	12(g)	0000893739	000-11576
HPOL	Harris Interactive, Inc. Common Stock	Common Stock	NGS	12(g)	0001094238	000-27577
HBIO	Harvard Bioscience, Inc. Common Stock	Common Stock	NGM	12(g)	0001123494	000-31923
HRVE	Harvey Electronics, Inc. Common Stock	Common Stock	NCM	12(g)	0000046043	000-14626
HAST	Hastings Entertainment, Inc. Common Stock	Common Stock	NGM	12(g)	0001054579	000-24381
HAUP	Hauppauge Digital, Inc. Common Stock	Common Stock	NGM	12(g)	0000046250	001-13550
HWKN	Hawkins, Inc. Common Stock	Common Stock	NGM	12(g)	0001237941	000-07647
HAYZ	Hayes Lemmerz International, Inc.	Common Stock	NGM	12(g)	0001027915	000-20932
HGRD	Health Grades, Inc. Common Stock	Common Stock	NCM	12(g)	0000768892	000-22019
HAXS	HealthAxis Inc. Common Stock	Common Stock	NCM	12(g)	0000768892	000-13591
HCSG	Healthcare Services Group, Inc. Common Stock	Common Stock	NGS	12(g)	0000731012	000-12015
HCTL	Healthcare Technologies Ltd. Ordinary Shares	Ordinary Shares	NCM	12(g)	0000835688	000-17788
HLEX	HealthExtras, Inc. Common Stock	Common Stock	NGS	12(g)	0001090403	000-31014

Issue Symbol	Issue Name	Issue Type	Issue Market Segment	Registration Type	CIK	SEC File #
HSTM	HealthStream, Inc. Common Stock	Common Stock	NGM	12(g)	0001095565	000-27701
HTRN	HealthTronics, Inc. Common Stock	Common Stock	NGS	12(g)	0001018871	000-30406
HWAY	Healthways, Inc. Common Stock	Common Stock	NGS	12(g)	0000704415	000-19364
HTLD	Heartland Express, Inc. Common Stock	Common Stock	NGS	12(g)	0000799233	000-15087
HTLF	Heartland Financial USA, Inc. Common Stock	Common Stock	NGS	12(g)	0000920112	001-15393
HEII	HEI, Inc. Common Shares	Common Stock	NGM	12(g)	0000351298	000-10078
HSII	Heidrick & Struggles International, Inc. Common Stock	Common Stock	NGS	12(g)	0001066605	000-25687
HELE	Helen of Troy Limited Common Stock	Common Stock	NGS	12(g)	0000916789	000-23312
HSIC	Henry Schein, Inc. Common Stock	Common Stock	NGS	12(g)	0001000228	000-27078
HERO	Hercules Offshore, Inc. Common Stock	Common Stock	NGS	12(g)	0001330849	000-51582
HTGC	Hercules Technology Growth Capital, Inc. Common Stock	Common Stock	NGM	12(g)	0001280784	814-00792
HTBK	Heritage Commerce Corp Common Stock	Common Stock	NGS	12(g)	0001053352	000-23877
HFWA	Heritage Financial Corporation Common Stock	Common Stock	NGS	12(g)	0001046025	000-29480
HBOS	Heritage Financial Group Common Stock	Common Stock	NGM	12(g)	0001320002	000-51305
HEOP	Heritage Oaks Bancorp (CA) Common Stock	Common Stock	NCM	12(g)	0000921547	000-25020
HRLY	Herley Industries, Inc. Common Stock	Common Stock	NGM	12(g)	0000047035	000-05411
MLHR	Herman Miller, Inc. Common Stock	Common Stock	NGS	12(g)	0000066382	001-15141
HSKA	Heska Corporation Common Stock	Common Stock	NCM	12(g)	0001038133	000-22427
HFFC	HF Financial Corp. Common Stock (\$0.01 Par Value)	Common Stock	NGM	12(g)	0000881790	000-19772
HIFN	hi/fn, inc. Common Stock	Common Stock	NGM	12(g)	0001065246	000-24765
HIBB	Hibbett Sporting Goods, Inc. Common Stock	Common Stock	NGS	12(g)	0001017480	000-20969
HTCO	Hickory Tech Corporation Common Stock	Common Stock	NGM	12(g)	0000766561	000-13721
HIHO	Highway Holdings Limited Common Stock	Common Stock	NCM	12(g)	0001026785	000-28990
HLND	Hiland Partners, LP Common Units	Limited Partnership	NGS	12(g)	0001306527	000-51120
HINT	Hill International, Inc. Common Stock	Common Stock	NGM	12(g)	0001287808	000-50781
HINTU	Hill International, Inc. Unit Expires 4/23/2008	Unit	NGM	12(g)	0001287808	000-50781
HINTW	Hill International, Inc. Warrant Expires 4/23/2008	Warrant	NGM	12(g)	0001287808	000-50781
HIMX	Himax Technologies, Inc. American Depositary Shares	American Depositary Shares	NGS	12(g)	0001342338	000-51847
HORT	Hines Horticulture, Inc. Common Stock	Common Stock	NGM	12(g)	0001003515	000-24439
HRSH	Hirsch International Corp. Class A Common Stock	Common Stock	NCM	12(g)	0000915909	000-23434
HITK	Hi-Tech Pharmacal Co., Inc. Common Stock	Common Stock	NGS	12(g)	0000887497	000-20424
HITT	Hittite Microwave Corporation Common Stock	Common Stock	NGS	12(g)	0001130866	000-51448
HMINF	HMIN Financial, Inc. Common Stock	Common Stock	NGM	12(g)	0000921183	000-24100

Issue Symbol	Issue Name	Issue Type	Issue Market Segment	Registration Type	CIK	SEC File #
HMSY	HMS Holdings Corp	Common Stock	NGS	12(g)	0001196501	000-20946
HOKU	Hoku Scientific, Inc. Common Stock	Common Stock	NGM	12(g)	0001178336	000-51458
HEPH	Hollis-Eden Pharmaceuticals, Inc. Common Stock	Common Stock	NGM	12(g)	0000899394	000-24672
HOLL	Hollywood Media Corp. Common Stock	Common Stock	NGM	12(g)	0000912544	000-22908
HOLX	Hologic, Inc. Common Stock	Common Stock	NGS	12(g)	0000859737	000-18281
HOMB	Home BancShares, Inc. Common Stock	Common Stock	NGM	12(g)	0001331520	000-51904
HCFC	Home City Financial Corporation Common Stock	Common Stock	NCM	12(g)	0001022103	000-21809
HOMF	Home Federal Bancorp Common Stock	Common Stock	NGM	12(g)	0000867493	000-18847
HOME	Home Federal Bancorp, Inc. Common Stock	Common Stock	NGM	12(g)	0001283858	000-50901
HSOA	Home Solutions of America, Inc. Common Stock	Common Stock	NGM	12(g)	0000855424	000-22388
HOFT	Hooker Furniture Corporation Common Stock	Common Stock	NCM	12(g)	0001077688	000-25349
HFBC	HopFed Bancorp, Inc. Common Stock	Common Stock	NGM	12(g)	0001041550	000-23667
HBNC	Horizon Bancorp (IN) Common Stock	Common Stock	NCM	12(g)	0000706129	000-10792
HRZB	Horizon Financial Corp. Common Stock	Common Stock	NGS	12(g)	0001002682	000-27062
HORC	Horizon Health Corporation Common Stock	Common Stock	NGS	12(g)	0000935007	001-13626
HOFF	Horizon Offshore, Inc. Common Stock	Common Stock	NGM	12(g)	0001051431	001-16857
HOTT	Hot Topic, Inc. Common Stock	Common Stock	NGS	12(g)	0001017712	000-28784
HOTJ	House of Taylor Jewelry, Inc. Common Stock	Common Stock	NCM	12(g)	0001069249	000-25377
SOLD	HouseValues, Inc. Common Stock	Common Stock	NGS	12(g)	0001298978	000-51032
HWCC	Houston Wire & Cable Company Common Stock	Common Stock	NGM	12(g)	0001356949	000-52046
HOVNP	Hovnanian Enterprises Inc Dep Shr Srs A Pfd	Depository Receipt	NGM	12(g)	0000357294	000-32447
HUBG	Hub Group, Inc. Class A Common Stock	Common Stock	NGS	12(g)	0000940942	000-27754
HCBK	Hudson City Bancorp, Inc. Common Stock	Common Stock	NGS	12(g)	0000921847	000-26001
HHGP	Hudson Highland Group, Inc. COMMON STOCK	Common Stock	NGM	12(g)	0001210708	000-50129
HDSN	Hudson Technologies, Inc. Common Stock	Common Stock	NCM	12(g)	0000925528	000-13412
HGSI	Human Genome Sciences, Inc. Common Stock	Common Stock	NGM	12(g)	0000901219	000-22962
HUMC	Hummingbird Ltd Common Shares	Common Stock	NGM	12(g)	0000919548	000-23464
HBAN	Huntington Bancshares Incorporated Common Stock	Common Stock	NGS	12(g)	0000049196	000-02525
HPCCP	Huntington Preferred Capital, Inc. Class C Preferred Stock	Preferred Stock	NGM	12(g)	0001140657	000-33243
HURC	Hurco Companies, Inc. Common Stock	Common Stock	NGS	12(g)	0000315374	000-09143
HURN	Huron Consulting Group Inc. Common Stock	Common Stock	NGS	12(g)	0001289848	000-50976
HRAY	Hurray! Holding Co., Ltd. American Depository Shares	American Depository Shares	NGM	12(g)	0001294435	000-51116
HTCH	Hutchinson Technology Incorporated Common Stock	Common Stock	NGS	12(g)	0000772897	000-14709

Issue Symbol	Issue Name	Issue Type	Issue Market Segment	Registration Type	CIK	SEC File #
HYDL	Hydri Common Stock	Common Stock	NGS	12(g)	0001116030	000-31579
HYGS	Hydrogenics Corporation Common Shares	Common Stock	NGM	12(g)	0001119985	000-31815
HYSL	Hyperion Solutions Corporation Common Stock	Common Stock	NGS	12(g)	0001001113	000-26934
HYTM	Hythiam, Inc. Common Stock	Common Stock	NGM	12(g)	0001136174	000-51181
ITWO	i2 Technologies, Inc. Common Stock	Common Stock	NGM	12(g)	0001009304	000-28030
IACI	IAC/InterActiveCorp Common Stock	Common Stock	NGS	12(g)	0000891103	000-20570
IACIW	IAC/InterActiveCorp Warrants 2/4/2009	Warrant	NGS	12(g)	0000891103	000-20570
IACIZ	IAC/InterActiveCorp Warrants 2/4/2009	Warrant	NGS	12(g)	0000891103	000-20570
IBAS	iBasis, Inc. Common Stock	Common Stock	NGM	12(g)	0001091756	000-27127
IBKC	IBERIABANK Corporation Common Stock	Common Stock	NGS	12(g)	0000933141	000-25756
IBIS	Ibis Technology Corporation Common Stock	Common Stock	NGM	12(g)	0000855182	000-23150
ICAB	i-CABLE Communications Limited American Depository Shares	American Depository Shares	NGM	12(g)	0001097020	000-30350
ICAD	icad inc. Common Stock	Common Stock	NCM	12(g)	0000749660	001-9341
ICGN	icagen, Inc. Common Stock	Common Stock	NGM	12(g)	0000902622	000-50676
ICOC	ICO, Inc. Common Stock	Common Stock	NGM	12(g)	0000353567	000-10068
ICOCZ	ICO, Inc. Depository Shares	Depository Receipt	NGM	12(g)	0000353567	000-10068
ICLR	ICON plc American Depository Shares	American Depository Shares	NGS	12(g)	0001060955	000-29714
ICON	Iconix Brand Group, Inc. Common Stock	Common Stock	NGM	12(g)	0000857737	000-10593
ICOP	ICOP Digital, Inc. Common Stock	Common Stock	NCM	12(g)	0001094572	000-27321
ICOPW	ICOP Digital, Inc. Warrant	Warrant	NCM	12(g)	0001094572	000-27321
ICOS	ICOS Corporation Common Stock	Common Stock	NGS	12(g)	0000874294	000-19171
IVIS	ICOS Vision Systems Corporation N.V. Common Stock	Common Stock	NGM	12(g)	0001049253	000-29554
ICTG	ICT Group, Inc. Common Stock	Common Stock	NGM	12(g)	0001013149	000-20807
ICTS	ICTS International N.V. Common Shares	Common Stock	NGM	12(g)	0001010134	000-28542
ICUI	ICU Medical, Inc. Common Stock	Common Stock	NGS	12(g)	0000883984	000-19974
IDIX	Idenix Pharmaceuticals, Inc. Common Stock	Common Stock	NGM	12(g)	0001093649	000-49839
IDXX	IDEXX Laboratories, Inc. Common Stock	Common Stock	NGS	12(g)	0000874716	000-19271
IDMI	IDM Pharma, Inc. Common Stock	Common Stock	NGM	12(g)	0000822206	000-19591
IFLO	i-Flow Corporation Common Stock	Common Stock	NGM	12(g)	0000857728	000-18338
IGTE	iGate Corporation Common Stock	Common Stock	NGM	12(g)	0001024732	000-21755
IIVI	II-VI Incorporated Common Stock	Common Stock	NGS	12(g)	0000820318	000-16195
IKAN	Ikanos Communications, Inc. Common Stock	Common Stock	NGM	12(g)	0001219210	000-51532
IKNX	Ikonics Corporation	Common Stock	NCM	12(g)	0001083301	000-25727

Issue Symbol	Issue Name	Issue Type	Issue Market Segment	Registration Type	CIK	SEC File #
ILMN	Ilumina, Inc. Common Stock	Common Stock	NGM	12(g)	0001110803	000-30361
ILOG	ILOG S.A. American Depository Shares	American Depository Shares	NGS	12(g)	0001031140	000-29144
DISK	Image Entertainment, Inc. Common Stock	Common Stock	NGM	12(g)	0000216324	000-11071
ISNS	Image Sensing Systems, Inc. Common Stock	Common Stock	NCM	12(g)	0000943034	000-26056
IMNY	I-many, Inc. Common Stock	Common Stock	NGM	12(g)	0001104017	000-30883
IMAX	Imax Corporation Common Stock	Common Stock	NGM	12(g)	0000921582	000-24216
IMCL	ImClone Systems Incorporated Common Stock	Common Stock	NGS	12(g)	0000765258	000-19612
IMMR	Immersion Corporation Common Stock	Common Stock	NGM	12(g)	0001058811	000-27969
ICCC	ImmuCell Corporation Common Stock	Common Stock	NCM	12(g)	0000811641	000-15507
BLUD	Immucor, Inc. Common Stock	Common Stock	NGS	12(g)	0000736822	000-14820
IMMC	Immunicor Corporation Common Stock	Common Stock	NGM	12(g)	0001083132	000-50677
IMGN	ImmunoGen, Inc. Common Stock	Common Stock	NGM	12(g)	0000855654	000-17999
IMMU	Immunomedics, Inc. Common Stock	Common Stock	NGM	12(g)	0000722830	000-12104
IMCO	IMPICO Technologies, Inc. Common Stock	Common Stock	NGM	12(g)	0000790708	000-16115
IPII	Imperial Industries, Inc. Common Stock	Common Stock	NCM	12(g)	0000049930	001-07190
IPSU	Imperial Sugar Company Common Stock	Common Stock	NGM	12(g)	0000831327	000-16674
IPSUW	Imperial Sugar Company Warrants 01/01/2008	Warrant	NGM	12(g)	0000831327	000-16674
ZOOM	Impreso, Inc. Common Stock	Common Stock	NCM	12(g)	0001108345	000-29883
MAIL	IncrediMail Ltd. Ordinary Shares	Ordinary Shares	NCM	12(g)	0001338940	000-51694
INCY	Incyte Corp. Common Stock	Common Stock	NGM	12(g)	0000879169	001-12400
INDB	Independent Bank Corp. Common Stock	Common Stock	NGS	12(g)	0000776901	000-19264
INDBN	Independent Bank Corp. Independent Capital Trust III - 8.625% Cumulative Trust Preferred Securities	Other Securities	NGS	12(g)	0000776901	000-19264
INDBM	Independent Bank Corp. Independent Capital Trust IV - 8.375% Cumulative Trust Preferred Securities	Other Securities	NGS	12(g)	0000776901	000-19264
IBCP	Independent Bank Corporation Common Stock	Common Stock	NGS	12(g)	000039311	000-07818
IBCP0	Independent Bank Corporation IBC Capital Finance II - % Cumulative Trust Preferred Securities	Other Securities	NGS	12(g)	000039311	000-07818
IDEV	Indevus Pharmaceuticals Inc.	Common Stock	NGM	12(g)	0000854222	000-18728
IINT	Indus International, Inc. Common Stock	Common Stock	NGM	12(g)	0001041333	000-22993
IDGR	Industrial Distribution Group, Inc. Common Stock	Common Stock	NGM	12(g)	0001042351	001-13195
IDSA	Industrial Services of America, Inc. Common Stock	Common Stock	NCM	12(g)	0000004187	000-20979
NRGP	Inergy Holdings, L.P. Common Units	Limited Partnership	NGS	12(g)	0001228068	000-51304

Issue Symbol	Issue Name	Issue Type	Issue Market Segment	Registration Type	CIK	SEC File #
NRGY	Inergy, L.P. Common Units Representing Limited Partnership Interests	Limited Partnership	NGS	12(g)	0001136352	000-32453
IFNY	Infinity Energy Resources, Inc. Common Stock	Common Stock	NGM	12(g)	0000822746	000-17204
IPCC	Infinity Property and Casualty Corporation Common Stock	Common Stock	NGS	12(g)	0001195933	000-50167
IFOX	Infocrossing, Inc. Common Stock	Common Stock	NGS	12(g)	0000993816	000-20824
INFS	InFocus Corporation Common Stock	Common Stock	NGM	12(g)	0000845434	000-18908
INFA	Informatica Corporation Common Stock	Common Stock	NGS	12(g)	0001080099	000-25871
INFT	Inforte Corp. Common Stock	Common Stock	NGM	12(g)	0001099944	000-29239
INSP	InfoSpace, Inc. Common Stock	Common Stock	NGS	12(g)	0001068875	000-25131
INFY	Infosys Technologies Limited American Depository Shares	American Depository Shares	NGS	12(g)	0001067491	000-25383
IUSA	infoUSA, Inc. Common Stock	Common Stock	NGS	12(g)	0000879437	000-19598
IVTA	InfoVista S.A. American Depository Shares	American Depository Shares	NGM	12(g)	0001117064	000-30838
IMKTA	Ingles Markets, Incorporated Class A Common Stock	Common Stock	NGM	12(g)	0000050493	000-14706
INHx	Inhibitex, Inc. Common Stock	Common Stock	NGM	12(g)	0001274913	000-50772
INOD	Innodata isogen Inc Common Stock	Common Stock	NGM	12(g)	0000903651	000-22196
IOSP	Innospec Inc. Common Stock	Common Stock	NGM	12(g)	0001054905	000-51849
INOC	Innotrac Corporation Common Stock	Common Stock	NGM	12(g)	0001051114	000-23741
ISSC	Innovative Solutions and Support, Inc. Common Stock	Common Stock	NGS	12(g)	0000836690	000-31157
INVX	Innovex, Inc. Common Stock	Common Stock	NGM	12(g)	0000050601	000-13143
INNO	Innovo Group, Inc. Common Stock	Common Stock	NCM	12(g)	0000844143	000-18926
INPC	InPhonic, Inc. Common Stock	Common Stock	NGM	12(g)	0001133324	000-51023
NPLA	InPlay Technologies, Inc. Common Stock	Common Stock	NCM	12(g)	0001054070	001-15069
NSIT	Insight Enterprises, Inc. Common Stock	Common Stock	NGS	12(g)	0000932696	000-25092
IFUL	Insightful Corporation Common Stock	Common Stock	NCM	12(g)	0000895095	000-20992
ISIG	Insignia Systems, Inc. Common Stock	Common Stock	NCM	12(g)	0000875355	000-19380
INSU	Insituform Technologies, Inc. Class A Common Stock	Common Stock	NGS	12(g)	0000353020	000-10786
INSM	Insmed, Inc. Common Stock	Common Stock	NGM	12(g)	0001104506	000-30739
ISPH	Inspire Pharmaceuticals, Inc. Common Stock	Common Stock	NGM	12(g)	0001040416	000-31135
IIIN	Insteel Industries, Inc. Common Stock	Common Stock	NGM	12(g)	0000764401	001-09929
QUOT	Insure.com, Inc. Common Stock	Common Stock	NCM	12(g)	0001079996	000-26781
INSW	InsWeb Corporation Common Stock	Common Stock	NCM	12(g)	0001077370	000-26083
INTN	INTAC International Common Stock	Common Stock	NCM	12(g)	0001127439	000-32621
IBNK	Integra Bank Corporation Common Stock	Common Stock	NGM	12(g)	0000764241	000-13585

Issue Symbol	Issue Name	Issue Type	Issue Market Segment	Registration Type	CIK	SEC File #
IART	Integra LifeSciences Holdings Corporation Common Stock	Common Stock	NGS	12(g)	0000917520	000-26224
ISYS	Integral Systems, Inc. Common Stock	Common Stock	NGS	12(g)	0000718130	000-18603
INMD	IntegraMed America, Inc. Common Stock	Common Stock	NGM	12(g)	0000885988	000-20260
IASG	Integrated Alarm Services Group, Inc. Common Stock	Common Stock	NGM	12(g)	0001200022	000-50343
IDTI	Integrated Device Technology, Inc. Common Stock	Common Stock	NGS	12(g)	0000703361	000-12695
IESC	Integrated Electrical Services, Inc. Common Stock	Common Stock	NGM	12(g)	0001048268	001-13783
ISSI	Integrated Silicon Solution, Inc. Common Stock	Common Stock	NGM	12(g)	0000854701	000-23084
INTC	Intel Corporation Common Stock	Common Stock	NGS	12(g)	0000050863	000-06217
IPAR	Inter Parfums, Inc. Common Stock	Common Stock	NGS	12(g)	0000822663	000-16469
ININ	Interactive Intelligence, Inc. Common Stock	Common Stock	NGM	12(g)	0001083318	000-27385
ISWI	Interactive Systems Worldwide Inc. Common Stock	Common Stock	NCM	12(g)	0001025995	000-21831
INCX	Interchange Corporation Common Stock	Common Stock	NCM	12(g)	0001259550	000-50989
IFCJ	Interchange Financial Services Corporation Common Stock	Common Stock	NGS	12(g)	0000755933	001-10518
IDCC	InterDigital Communications Corp. Common Stock	Common Stock	NGS	12(g)	0000354913	001-11152
IFSLA	Interface, Inc. Class A Common Stock	Common Stock	NGM	12(g)	0000715787	000-12016
INGR	Intergraph Corporation Common Stock	Common Stock	NGS	12(g)	0000351145	000-09722
IMGC	Intermagetics General Corporation Common Stock	Common Stock	NGS	12(g)	0000351012	000-09968
ITMN	InterMune, Inc. Common Stock	Common Stock	NGM	12(g)	0001087432	000-29801
IAAC	International Assets Holding Corporation Common Stock	Common Stock	NCM	12(g)	0000913760	000-23554
LFINP	International Bancshares Corporation - Local Financial Capital Trust I - 9.00% Cumulative Trust Preferred Securities	Other Securities	NGS	12(g)	0000315709	000-09439
IBOC	International Bancshares Corporation Common Stock	Common Stock	NGS	12(g)	0000315709	000-09439
IDWK	International DisplayWorks, Inc. Common Stock	Common Stock	NGM	12(g)	0000866415	000-27002
ISCA	International Speedway Corporation Class A Common Stock	Common Stock	NGS	12(g)	0000051548	000-02384
ICGE	Internet Capital Group, Inc. Common Stock	Common Stock	NGM	12(g)	0001085621	000-26929
ICCA	Internet Commerce Corp. Class A Common Stock	Common Stock	NCM	12(g)	0000894738	000-24996
IGLD	Internet Gold Golden Lines Ltd. Ordinary Shares	Ordinary Shares	NGM	12(g)	0001090159	000-30198
IJI	Internet Initiative Japan, Inc. American Depositary Shares	American Depositary Shares	NGM	12(g)	0001090633	000-30204
ISSX	Internet Security Systems Inc Common Stock	Common Stock	NGS	12(g)	0001053148	000-23665
INPH	Interphase Corporation Common Stock	Common Stock	NGM	12(g)	0000728249	000-13071
INTX	Intersections, Inc. Common Stock	Common Stock	NGM	12(g)	0001095277	000-50580
ISIL	Intersil Corporation Class A Common Stock	Common Stock	NGS	12(g)	0001096325	000-29617
INTL	Inter-Tel, Incorporated Series A Common Stock	Common Stock	NGS	12(g)	0000350066	000-10211

Issue Symbol	Issue Name	Issue Type	Issue Market Segment	Registration Type	CIK	SEC File #
IBCA	Intervest Bancshares Corp. Class A Common Stock	Common Stock	NGS	12(g)	0000927807	000-23377
IVIL	Intervideo, Inc. Common Stock	Common Stock	NGM	12(g)	0001114084	000-49809
INTV	InterVoice Inc. Common Stock	Common Stock	NGS	12(g)	0000764244	001-15045
IWOV	Interwoven, Inc. Common Stock	Common Stock	NGM	12(g)	0001042431	000-27389
INTT	inTest Corporation Common Stock	Common Stock	NGM	12(g)	0001036262	000-22529
IVAC	Intevac, Inc. Common Stock	Common Stock	NGM	12(g)	0001001902	000-26946
ILSE	IntraLase Corp. Common Stock	Common Stock	NGM	12(g)	0001163848	000-50939
ITRA	Intraware, Inc. Common Stock	Common Stock	NCM	12(g)	0001025134	000-25249
INGN	Introgen Therapeutics, Inc. Common Stock	Common Stock	NGM	12(g)	0001018710	000-21291
INTZ	Intrusion Inc. New Common Stock	Common Stock	NCM	12(g)	0000736012	000-20191
INTU	Intuit Inc. Common Stock	Common Stock	NGS	12(g)	0000896878	000-21180
ISRG	Intuitive Surgical, Inc. Common Stock	Common Stock	NGS	12(g)	0001035267	000-30713
VTIV	inVentiv Health, Inc. Common Stock	Common Stock	NGS	12(g)	0001089473	000-30318
SNAK	Invecture Group, Inc. (The) Common Stock	Common Stock	NCM	12(g)	0000944508	001-14556
IEDU	INVESTools Inc Common Stock	Common Stock	NGM	12(g)	0001145124	001-31917
ISBC	Investors Bancorp, Inc. Common Stock	Common Stock	NGS	12(g)	0001326807	000-51557
IFIN	Investors Financial Services Corp. Common Stock	Common Stock	NGS	12(g)	0000949589	000-26996
IRETP	Investors Real Estate Trust Series A Cumulative Redeemable Preferred Shares of Beneficial Interest	Preferred Stock	NGS	12(g)	0000798359	000-14851
IRETS	Investors Real Estate Trust Shares of Beneficial Interest	Shares of Beneficial Interest	NGS	12(g)	0000798359	000-14851
ITIC	Investors Title Company Common Stock	Common Stock	NGM	12(g)	0000720858	000-11774
IVGN	Invitrogen Corporation Common Stock	Common Stock	NGS	12(g)	0001073431	000-25317
INXI	INX Inc. Common Stock	Common Stock	NCM	12(g)	0001020017	000-21479
INXIW	INX Inc. Warrants 5/7/2009	Warrant	NCM	12(g)	0001020017	000-21479
IOMI	Iomai Corporation Common Stock	Common Stock	NGM	12(g)	0001125001	000-51709
IONA	IONA Technologies PLC American Depositary Shares	American Depositary Shares	NGM	12(g)	0001032346	000-29154
IOTN	Ionatron, Inc. Common Stock	Common Stock	NGM	12(g)	0000879911	001-14015
IPAS	iPass Inc. Common Stock	Common Stock	NGS	12(g)	0001053374	000-50327
IPCR	IPC Holdings, Limited Common Shares	Common Stock	NGS	12(g)	0000909815	000-27662
IPCS	iPCS, Inc. Common Stock	Common Stock	NCM	12(g)	0001108727	000-51844
IPIX	IPIX Corporation Common Stock	Common Stock	NCM	12(g)	0001088022	000-26363
IRIX	IRIDEX Corporation Common Stock	Common Stock	NGM	12(g)	0001006045	000-27598
IRIS	IRIS International, Inc. Common Stock	Common Stock	NGM	12(g)	0000319240	000-09767

Issue Symbol	Issue Name	Issue Type	Issue Market Segment	Registration Type	CIK	SEC File #
IRBT	iRobot Corporation Common Stock	Common Stock	NGM	12(g)	0001159167	000-51598
ISIS	Isis Pharmaceuticals, Inc. Common Stock	Common Stock	NGM	12(g)	0000874015	000-19125
ISLE	Isle of Capri Casinos, Inc. Common Stock	Common Stock	NGS	12(g)	0000863015	000-20538
ISONL	Isonics Corporation Class B Warrants 12/29/2006	Warrant	NCM	12(g)	0001023966	000-21607
ISONZ	Isonics Corporation Class C Warrants 12/29/2006	Warrant	NCM	12(g)	0001023966	000-21607
ISON	Isonics Corporation Common Stock	Common Stock	NCM	12(g)	0001023966	000-21607
ISRL	Isramco, Inc. Common Stock	Common Stock	NCM	12(g)	0000719209	000-12500
ISTA	ISTA Pharmaceuticals, Inc. Common Stock	Common Stock	NGM	12(g)	0000930553	000-31255
ITLA	ITLA Capital Corporation Common Stock	Common Stock	NGS	12(g)	0001000234	000-26960
ITRI	Itron, Inc. Common Stock	Common Stock	NGS	12(g)	0000780571	000-22418
ITRN	Ituran Location and Control Ltd. Ordinary Shares	Ordinary Shares	NGM	12(g)	0001337117	000-51526
IVAN	Ivanhoe Energy, Inc. Common Shares	Common Stock	NCM	12(g)	0001106935	000-30586
IVOW	IVOW, Inc. Common Stock	Common Stock	NCM	12(g)	0001035181	000-22743
XXIA	Ixia Common Stock	Common Stock	NGS	12(g)	0001120295	000-31523
SYXI	IXYS Corporation Common Stock	Common Stock	NGM	12(g)	0000945699	000-26124
JJSF	J & J Snack Foods Corp. Common Stock	Common Stock	NGS	12(g)	0000785956	000-14616
MAYS	J. W. Mays, Inc. Common Stock	Common Stock	NCM	12(g)	0000054187	001-3647
JBHT	J.B. Hunt Transport Services, Inc. Common Stock	Common Stock	NGS	12(g)	0000728535	000-11757
JCOM	j2 Global Communications Inc Common Stock	Common Stock	NGS	12(g)	0001084048	000-25965
JCDA	Jacada Ltd. Ordinary Shares	Ordinary Shares	NGM	12(g)	0001095747	000-30342
JKHY	Jack Henry & Associates, Inc. Common Stock	Common Stock	NGS	12(g)	0000779152	000-14112
JXSB	Jacksonville Bancorp Common Stock	Common Stock	NCM	12(g)	0001172097	000-49792
JAXB	JACKSONVILLE BANCORP INC (FL) Common Stock	Common Stock	NCM	12(g)	0001071264	000-30248
JACO	Jaco Electronics, Inc. Common Stock	Common Stock	NGM	12(g)	0000052971	000-5896
JAKK	JAKKS Pacific, Inc. Common Stock	Common Stock	NGS	12(g)	0001009829	000-28104
JRCC	James River Coal Company New Common Stock	Common Stock	NGM	12(g)	0001297720	000-51129
JRVR	James River Group, Inc. Common Stock	Common Stock	NGM	12(g)	0001325177	000-51480
JDAS	JDA Software Group, Inc. Common Stock	Common Stock	NGM	12(g)	0001006892	000-27876
JDSU	JDS Uniphase Corporation Common Stock	Common Stock	NGS	12(g)	0000912093	000-22874
JFBI	Jefferson Bancshares, Inc. Common Stock	Common Stock	NGM	12(g)	0001222915	000-50347
JFBC	Jeffersonville Bancorp Common Stock	Common Stock	NCM	12(g)	0000874495	000-19212
JBLU	JetBlue Airways Corporation Common Stock	Common Stock	NGS	12(g)	0001158463	000-49728
JCTCF	Jewett-Cameron Trading Company Common Shares	Common Stock	NCM	12(g)	0000885307	000-19954
JMAR	JMAR Technologies, Inc. Common Stock	Common Stock	NCM	12(g)	0000857953	001-10515

Issue Symbol	Issue Name	Issue Type	Issue Market Segment	Registration Type	CIK	SEC File #
JBSS	John B. Sanfilippo & Son, Inc. Common Stock	Common Stock	NGM	12(g)	0000880117	000-19681
JOUT	Johnson Outdoors Inc. Class A Common Stock	Common Stock	NGM	12(g)	0000788329	000-16255
JSDA	Jones Soda Co. Common Stock	Common Stock	NCM	12(g)	0001083522	000-28820
JOSB	Jos. A. Bank Clothiers, Inc. Common Stock	Common Stock	NGS	12(g)	0000920033	000-23874
JOYG	Joy Global Inc. Common Stock	Common Stock	NGS	12(g)	0000801898	001-9299
JNPR	Juniper Networks, Inc. Common Stock	Common Stock	NGS	12(g)	0001043604	000-26339
JUPM	Jupitermedia Corporation	Common Stock	NGS	12(g)	0001083712	000-26393
KALU	Kaiser Aluminum Corporation Common Stock	Common Stock	NGM	12(g)	0000811596	000-52105
KAMN	Kaman Corporation Common Stock	Common Stock	NGM	12(g)	0000054381	000-1093
KBAY	Kanbay International, Inc. Common Stock	Common Stock	NGS	12(g)	0001125011	000-50849
KRNY	Kearny Financial Common Stock	Common Stock	NGS	12(g)	0001295664	000-51093
KELYA	Kelly Services, Inc. Class A Common Stock	Common Stock	NGS	12(g)	0000055135	000-01088
KELYB	Kelly Services, Inc. Class B Common Stock	Common Stock	NGS	12(g)	0000055135	000-01088
KNDL	Kendle International Inc. Common Stock	Common Stock	NGS	12(g)	0001039151	000-23019
KNXA	Kenexa Corporation Common Stock	Common Stock	NGM	12(g)	0001114714	000-51358
KNSY	Kensey Nash Corporation Common Stock	Common Stock	NGS	12(g)	0001002811	000-27120
KENT	Kent Financial Services, Inc. Common Stock	Common Stock	NCM	12(g)	0000316028	001-7986
KFFB	Kentucky First Federal Bancorp Common Stock	Common Stock	NGM	12(g)	0001297341	000-51176
KERX	Keryx Biopharmaceuticals, Inc. Common Stock	Common Stock	NGM	12(g)	0001114220	000-30929
KEQU	Kewaunee Scientific Corporation Common Stock	Common Stock	NGM	12(g)	0000055529	000-05286
KTEC	Key Technology, Inc. Common Stock	Common Stock	NGM	12(g)	0000906193	000-21820
KTCC	Key Tronic Corporation Common Stock	Common Stock	NGM	12(g)	0000719733	000-11559
KEYN	Keynote Systems, Inc. Common Stock	Common Stock	NGM	12(g)	0001032761	000-27241
KEYS	Keystone Automotive Industries, Inc. Common Stock	Common Stock	NGS	12(g)	0001012393	000-28568
KFED	K-Fed Bancorp Common Stock	Common Stock	NGM	12(g)	0001270985	000-50592
KFRC	Kforce, Inc. Common Stock	Common Stock	NGS	12(g)	0000930420	000-26058
KHDH	KHD Humboldt Wedag International Ltd. Common Stock	Common Stock	NGS	12(g)	0000016859	001-04192
KBALB	Kimball International, Inc. Class B Common Stock	Common Stock	NGS	12(g)	0000055772	000-03279
KNTA	Kintera Inc. Common Stock	Common Stock	NGM	12(g)	0001117119	000-50507
KIRK	Kirkland's, Inc. COMMONSTOCK	Common Stock	NGM	12(g)	0001056285	000-49885
KLAC	KLAC-Tencor Corporation Common Stock	Common Stock	NGS	12(g)	0000319201	000-09992
KMGB	KMG Chemicals, Inc. Common Stock	Common Stock	NGM	12(g)	0001028215	000-29278
KNBT	KNBT Bancorp, Inc. Common Stock	Common Stock	NGM	12(g)	0001236964	000-50426
NITE	Knight Capital Group, Inc. Class A Common Stock	Common Stock	NGS	12(g)	0001060749	001-14223

Issue Symbol	Issue Name	Issue Type	Issue Market Segment	Registration Type	CIK	SEC File #
VLCCF	Knightsbridge Tankers, Limited Common Stock	Common Stock	NGS	12(g)	0001029145	000-29106
KNOL	Knology, Inc. Common Stock	Common Stock	NGM	12(g)	0001096788	000-32647
KNOT	Knot, Inc. (The) Common Stock	Common Stock	NGM	12(g)	0001062292	000-28271
KOMG	Komag, Incorporated Common Stock	Common Stock	NGS	12(g)	0000813347	000-16852
KONA	Kona Grill, Inc. Common Stock	Common Stock	NGM	12(g)	0001265572	000-51491
KONG	KongZhong Corporation American Depository Shares	American Depository Shares	NGM	12(g)	0001285137	000-50826
KOPN	Kopin Corporation Common Stock	Common Stock	NGM	12(g)	0000771266	000-19882
KOSP	Kos Pharmaceuticals, Inc. Common Stock	Common Stock	NGS	12(g)	0001018952	000-22171
KOSN	Kosan Biosciences Incorporated Common Stock	Common Stock	NGM	12(g)	0001110206	000-31633
KOSS	Koss Corporation Common Stock	Common Stock	NGM	12(g)	0000056701	000-03295
KRSL	Kreiser Manufacturing Corporation Common Stock	Common Stock	NCM	12(g)	0000056806	000-04036
KRON	Kronos Incorporated Common Stock	Common Stock	NGS	12(g)	0000886903	000-20109
KSWS	K-Swiss Inc. Class A Common Stock	Common Stock	NGS	12(g)	0000862480	000-18490
KTII	K-Tron International, Inc. Common Stock	Common Stock	NGM	12(g)	0000000020	000-09576
KLIC	Kulicke and Soffa Industries, Inc. Common Stock	Common Stock	NGM	12(g)	0000056978	000-00121
KVHI	KVH Industries, Inc. Common Stock	Common Stock	NGM	12(g)	0001007587	000-28082
KYPH	Kyphon Inc. Common Stock	Common Stock	NGS	12(g)	0001123313	000-49804
FSTR	L.B. Foster Company Common Stock	Common Stock	NGS	12(g)	0000352825	000-10436
LJPC	La Jolla Pharmaceutical Company Common Stock	Common Stock	NGM	12(g)	0000920465	000-24274
DDSS	Labopharm Inc Ordinary Shares	Ordinary Shares	NGM	12(g)	0001284519	000-51933
BOOT	LaCrosse Footwear, Inc. Common Stock	Common Stock	NGM	12(g)	0000919443	000-23800
LDSH	Ladish Co., Inc. Common Stock	Common Stock	NGM	12(g)	0000814250	000-23539
LSBK	Lake Shore Bancorp, Inc. Common Stock	Common Stock	NGM	12(g)	0001341318	000-51821
LBAI	Lakeland Bancorp, Inc. Common Stock	Common Stock	NGS	12(g)	0000846901	000-17820
LKFN	Lakeland Financial Corporation Common Stock	Common Stock	NGS	12(g)	0000721994	000-11487
LAKE	Lakeland Industries, Inc. Common Stock	Common Stock	NGM	12(g)	0000798081	000-15535
LACO	Lakes Entertainment, Inc. Common Stock	Common Stock	NGM	12(g)	0001071255	000-24993
LRCX	Lam Research Corporation Common Stock	Common Stock	NGS	12(g)	0000707549	000-12933
LAMR	Lamar Advertising Company Class A Common Stock	Common Stock	NGS	12(g)	0001090425	000-30242
LANC	Lancaster Colony Corporation Common Stock	Common Stock	NGS	12(g)	0000057515	000-04065
LNCE	Lance, Inc. Common Stock	Common Stock	NGS	12(g)	0000057528	000-00398
LNDC	Landec Corporation Common Stock	Common Stock	NGS	12(g)	0001005286	000-27446
LARK	Landmark Bancorp Inc. Common Stock	Common Stock	NGM	12(g)	0001141688	000-23164

Issue Symbol	Issue Name	Issue Type	Issue Market Segment	Registration Type	CIK	SEC File #
LSTR	Landstar System, Inc. Common Stock	Common Stock	NGS	12(g)	0000853816	000-21238
GAIT	Langer, Inc. Common Stock	Common Stock	NGM	12(g)	0000725460	000-12991
LNOP	LanOptics Ltd. Ordinary Shares	Ordinary Shares	NCM	12(g)	0000892534	000-20860
LTRX	Lantronix, Inc. Common Stock	Common Stock	NCM	12(g)	0001114925	001-16027
LCRD	LaserCard Corporation Common Stock	Common Stock	NGM	12(g)	0000030140	000-06377
LSCC	Lattice Semiconductor Corporation Common Stock	Common Stock	NGM	12(g)	0000855658	000-18032
LAUR	Laureate Education, Inc. Common Stock	Common Stock	NGS	12(g)	0000912766	000-22844
LARL	Laurel Capital Group, Inc. Common Stock	Common Stock	NCM	12(g)	0000892158	000-23010
LAWS	Lawson Products, Inc. Common Stock	Common Stock	NGS	12(g)	0000703604	000-10546
LWSN	Lawson Software, Inc. Common Stock	Common Stock	NGS	12(g)	0001141517	000-33335
LAYN	Layne Christensen Company Common Stock	Common Stock	NGS	12(g)	0000888504	000-20578
LCAV	LCA-Vision Inc. Common Stock	Common Stock	NGS	12(g)	0001003130	000-27610
LCCI	LCC International, Inc. Class A Common Stock	Common Stock	NGM	12(g)	0001016229	000-21213
LBIX	Leading Brands Inc Common Shares	Common Stock	NCM	12(g)	0000884247	000-19884
LDIS	Leadis Technology, Inc. Common Stock	Common Stock	NGM	12(g)	0001130626	000-50770
LEAP	Leap Wireless International, Inc. Common Stock	Common Stock	NGS	12(g)	0001065049	000-29752
LTRE	Learning Tree International, Inc. Common Stock	Common Stock	NGM	12(g)	0001002037	000-27248
XPRT	LECG Corporation Common Stock	Common Stock	NGS	12(g)	0001192305	000-50464
LCRY	LeCroy Corporation Common Stock	Common Stock	NGM	12(g)	0000943580	000-26634
FLPB	Leesport Financial Corp. Common Stock	Common Stock	NGS	12(g)	0000775662	000-14555
LEGC	Legacy Bancorp, Inc. Common Stock	Common Stock	NGM	12(g)	0001332199	000-51525
LSCO	LESCO, Inc. Common Stock	Common Stock	NGM	12(g)	0000745394	000-13147
LVLT	Level 3 Communications, Inc. Common Stock	Common Stock	NGS	12(g)	0000794323	000-15658
LEXG	Lexicon Genetics Incorporated Common Stock	Common Stock	NGM	12(g)	0001062822	000-30111
LHCG	LHC Group Common Stock	Common Stock	NGM	12(g)	0001303313	000-51343
LBCP	Liberty Bancorp, Inc. Common Stock	Common Stock	NCM	12(g)	0001353268	000-51992
LBTYA	Liberty Global, Inc. Class A Common Stock	Common Stock	NGS	12(g)	0001316631	000-51360
LBTYB	Liberty Global, Inc. Class B Common Stock	Common Stock	NGS	12(g)	0001316631	000-51360
LBTYK	Liberty Global, Inc. Series C Common Stock	Common Stock	NGS	12(g)	0001316631	000-51360
LCAPA	Liberty Media Corporation Capital Common Series A	Common Stock	NGS	12(g)	0001355096	000-51990
LCAPB	Liberty Media Corporation Capital Common Series B	Common Stock	NGS	12(g)	0001355096	000-51990
LINTA	Liberty Media Corporation Interactive Common Series A	Common Stock	NGS	12(g)	0001355096	000-51990
LINTB	Liberty Media Corporation Interactive Common Series B	Common Stock	NGS	12(g)	0001355096	000-51990
LPHI	Life Partners Holdings Inc Common Stock	Common Stock	NCM	12(g)	0000049534	000-07900

Issue Symbol	Issue Name	Issue Type	Issue Market Segment	Registration Type	CIK	SEC File #
LIFC	LifeCell Corporation Common Stock	Common Stock	NGS	12(g)	0000849448	000-19890
LCBM	Lifecore Biomedical, Inc. Common Stock	Common Stock	NGM	12(g)	0000028626	000-04136
LPNT	LifePoint Hospitals, Inc. Common Stock	Common Stock	NGS	12(g)	0001301611	000-29818
LCUT	Lifetime Brands, Inc. Common Stock	Common Stock	NGS	12(g)	0000874396	000-19254
LWAY	Lifeway Foods, Inc. Common Stock	Common Stock	NGM	12(g)	0000814586	000-17363
LGND	Ligand Pharmaceuticals Incorporated Common Stock	Common Stock	NGM	12(g)	0000886163	000-20720
LTBG	Lightbridge, Inc. Common Stock	Common Stock	NGM	12(g)	0001017172	000-21319
LPTH	LightPath Technologies, Inc. Class A Common Stock	Common Stock	NCM	12(g)	0000889971	000-27548
LIHY	Lihir Gold Limited Sponsored ADR	American Depository Shares	NGS	12(g)	0001000300	000-26860
LNCR	Lincare Holdings Inc. Common Stock	Common Stock	NGS	12(g)	0000882235	000-19946
LNCB	Lincoln Bancorp Common Stock	Common Stock	NGM	12(g)	0001070259	000-25219
LINC	Lincoln Educational Services Corporation Common Stock	Common Stock	NGM	12(g)	0001286613	000-51371
LECO	Lincoln Electric Holdings, Inc. Common Shares	Common Stock	NGS	12(g)	000059527	000-1402
LLTC	Linear Technology Corporation Common Stock	Common Stock	NGS	12(g)	0000791907	000-14864
LTON	Linktone Ltd. American Depository Shares	American Depository Shares	NGM	12(g)	0001270532	000-50596
LINE	Linn Energy, LLC Common Units Representing Limited Liability Company Interests	Units/Benef Int	NGM	12(g)	0001326428	000-51719
LIOX	Lionbridge Technologies, Inc. Common Stock	Common Stock	NGM	12(g)	0001058299	000-26933
LIPD	Lipid Sciences Incorporated Common Stock No Par Value	Common Stock	NGM	12(g)	0000071478	000-00497
LPMA	Lipman Electronic Engineering Ltd. Ordinary Shares	Ordinary Shares	NGS	12(g)	0001270484	000-50544
LQDT	Liquidity Services, Inc. Common Stock	Common Stock	NGM	12(g)	0001235468	000-51813
LFUS	Littelfuse, Inc. Common Stock	Common Stock	NGS	12(g)	0000889331	000-20388
LPSN	LivePerson, Inc. Common Stock	Common Stock	NCM	12(g)	0001102993	000-30141
JADE	LJ International, Inc. Common Stock	Common Stock	NGM	12(g)	0001046692	000-29620
LKQX	LKQ Corporation Common Stock	Common Stock	NGS	12(g)	0001065696	000-50404
ERICY	LM Ericsson Telephone Company American Depository Shares	American Depository Shares	NGS	12(g)	0000717826	000-12033
LMA	LMI Aerospace, Inc. Common Stock	Common Stock	NGM	12(g)	0001059562	000-24293
LMLP	LML Payment Systems, Inc. Common Stock	Common Stock	NCM	12(g)	0000781891	000-13959
LNBB	LNB Bancorp, Inc. Common Stock	Common Stock	NGM	12(g)	0000737210	000-13203
LNBT	LodgeNet Entertainment Corporation Common Stock	Common Stock	NGM	12(g)	0000911002	000-22334
LOGC	Logic Devices Incorporated Common Stock	Common Stock	NCM	12(g)	0000802851	000-17187
LGVN	LogicVision, Inc. Common Stock	Common Stock	NGM	12(g)	0001041418	000-31773

Issue Symbol	Issue Name	Issue Type	Issue Market Segment	Registration Type	CIK	SEC File #
LGTY	Logility, Inc. Common Stock	Common Stock	NGM	12(g)	0001043915	000-23057
LOGI	Logitech International S.A. American Depositary Shares	American Depositary Shares	NGS	12(g)	0001032975	000-29174
LOJN	LoJack Corporation Common Stock	Common Stock	NGS	12(g)	0000355777	001-8439
STAR	Lone Star Steakhouse & Saloon, Inc. Common Stock	Common Stock	NGS	12(g)	0000883670	000-19907
LOOK	LookSmart, Ltd. Common Stock	Common Stock	NGM	12(g)	0001077866	000-26357
LOOP	LoopNet, Inc. Common Stock	Common Stock	NGM	12(g)	0001353209	000-52026
LORL	Loral Space and Communications, Inc. Common Stock	Common Stock	NGM	12(g)	0001006269	001-14180
LTEC	LOUD Technologies Inc. Common Stock	Common Stock	NCM	12(g)	0000946815	000-26524
LOUD	Loudeye Corporation Common Stock	Common Stock	NCM	12(g)	0001064648	000-29583
LXBK	LSB Bancshares, Inc. Common Stock	Common Stock	NGS	12(g)	0000714530	000-11448
LSBX	LSB Corporation Common Stock	Common Stock	NGM	12(g)	0001143848	000-32955
LSBI	LSB Financial Corp. Common Stock	Common Stock	NGM	12(g)	0000930405	000-25070
LYTS	LSI Industries Inc. Common Stock	Common Stock	NGS	12(g)	0000763532	000-13375
LTXX	LTX Corporation Common Stock	Common Stock	NGM	12(g)	0000357020	000-10761
LUFK	Lufkin Industries, Inc. Common Stock	Common Stock	NGS	12(g)	0000060849	000-02612
LMRA	Lumera Corporation Common Stock	Common Stock	NGM	12(g)	0001137399	000-50862
LMNX	Luminex Corporation Common Stock	Common Stock	NGM	12(g)	0001033905	000-30109
LUNA	Luna Innovations Incorporated Common Stock	Common Stock	NGM	12(g)	0001239818	000-52008
MBTF	M B T Financial Corp Common Stock	Common Stock	NGS	12(g)	0001118237	000-30973
MCBC	Macatawa Bank Corporation Common Stock	Common Stock	NGS	12(g)	0001053584	000-25927
MACC	MACC Private Equities Inc. Common Stock	Common Stock	NCM	12(g)	0000923808	000-24412
MACE	Mace Security International, Inc. Common Stock	Common Stock	NGM	12(g)	0000912607	000-22810
MFNC	Mackinac Financial Corporation Common Stock	Common Stock	NCM	12(g)	0000036506	000-20167
MXICY	Macronix International Co. Ltd American Depositary Shares	American Depositary Shares	NGS	12(g)	0001009680	000-27884
MVSN	Macrovision Corporation Common Stock	Common Stock	NGS	12(g)	0001027443	000-22023
MGEE	Madison Gas and Electric Company Common Stock	Common Stock	NGS	12(g)	0000061339	000-01125
MAFB	MAF Bancorp, Inc. Common Stock	Common Stock	NGS	12(g)	0000854662	000-18121
MAGS	Magal Security Systems Ltd. Ordinary Shares	Ordinary Shares	NGM	12(g)	0000896494	000-21388
MGLN	Magellan Health Services, Inc. Common Stock	Common Stock	NGS	12(g)	0000019411	000-50540
MGIC	Magic Software Enterprises Ltd. Ordinary Shares	Ordinary Shares	NGM	12(g)	0000876779	000-19415
LAVA	Magma Design Automation, Inc. Common Stock	Common Stock	NGM	12(g)	0001065034	000-33213
MECA	Magna Entertainment Corporation Class A Subordinate Voting Stock	Common Stock	NGM	12(g)	0001093273	000-30578

Issue Symbol	Issue Name	Issue Type	Issue Market Segment	Registration Type	CIK	SEC File #
MGYR	Magyar Bancorp, Inc. Common Stock	Common Stock	NGM	12(g)	0001337068	000-51726
MSFG	MainSource Financial Group Inc Common Stock	Common Stock	NGS	12(g)	0000720002	000-12422
MAIR	MAIR Holdings, Inc. Common Stock	Common Stock	NGM	12(g)	0000835768	000-17895
COOL	Majesco Entertainment Company Common Stock	Common Stock	NCM	12(g)	0001076682	000-51128
MMUS	MakeMusic, Inc. Common Stock	Common Stock	NCM	12(g)	0000920707	000-26192
MKTAY	Makita Corp. American Depository Shares	American Depository Shares	NGS	12(g)	0000202467	000-12602
MAMA	Mamma.com Inc Common Stock	Common Stock	NCM	12(g)	0000839435	000-17164
TMNG	Management Network Group, Inc. (The) Common Stock	Common Stock	NGM	12(g)	0001094814	000-27617
MANA	Manatron, Inc. Common Stock	Common Stock	NCM	12(g)	0000798736	000-15264
MANH	Manhattan Associates, Inc. Common Stock	Common Stock	NGS	12(g)	0001056696	000-23999
MTEX	Mannatech, Incorporated Common Stock	Common Stock	NGS	12(g)	0001056358	000-24657
MNKD	MannKind Corporation Common Stock	Common Stock	NGM	12(g)	0000899460	000-50865
MANT	ManTech International Corporation Common Stock \$0.01 Par Value	Common Stock	NGS	12(g)	0000892537	000-49604
MAPS	MapInfo Corporation Common Stock	Common Stock	NGM	12(g)	0000916238	000-23078
MCHX	Marchex, Inc. Class B Common Stock	Common Stock	NGM	12(g)	0001224133	000-50658
MCHXP	Marchex, Inc. Convertible Exchangeable Preferred Stock	Preferred Stock	NGM	12(g)	0001224133	000-50658
MARGO	Margo Caribe Inc. Common Stock	Common Stock	NCM	12(g)	0000808493	000-15336
MARPS	Marine Petroleum Trust Units of Beneficial Interest	Units/Benif Int	NCM	12(g)	0000062362	000-08565
MKTX	MarketAxess Holdings, Inc. Common Stock	Common Stock	NGS	12(g)	0001278021	000-50670
MRLN	Marlin Business Services Corp. Common Stock	Common Stock	NGM	12(g)	0001260968	000-50448
MARSA	Marsh Supermarkets, Inc. Class A Common Stock	Common Stock	NGM	12(g)	0000062737	000-01532
MARSB	Marsh Supermarkets, Inc. Class B Common Stock	Common Stock	NGM	12(g)	0000062737	000-01532
MSHL	Marshall Edwards, Inc. Common Stock	Common Stock	NGM	12(g)	0001262104	000-50484
MSHLW	Marshall Edwards, Inc. Warrants 12/18/2006	Warrant	NGM	12(g)	0001262104	000-50484
MATK	Martek Biosciences Corporation Common Stock	Common Stock	NGS	12(g)	0000892025	000-22354
MRTN	Marten Transport, Ltd. Common Stock	Common Stock	NGS	12(g)	0000799167	000-15010
MMPL	Martin Midstream Partners L.P. Limited Partnership	Limited Partnership	NGS	12(g)	0001176334	000-50056
MRVL	Marvell Technology Group, Ltd. Common Stock	Common Stock	NGS	12(g)	0001058057	000-30877
MSDXP	Mason-Dixon Bancshares, Inc. Mason-Dixon Capital Trust - \$2.5175 Preferred Securities	Other Securities	NGM	12(g)	0000092230	000-27652
MASB	MASSBANK Corp. Common Stock	Common Stock	NGS	12(g)	0000799166	000-15137
MATH	MathStar, Inc. Common Stock	Common Stock	NGM	12(g)	0001118037	000-51560

Issue Symbol	Issue Name	Issue Type	Issue Market Segment	Registration Type	CIK	SEC File #
MATR	Matria Healthcare, Inc. Common Stock	Common Stock	NGS	12(g)	0001007228	000-20619
MTXC	Matrix Bancorp. Inc Common Stock	Common Stock	NGM	12(g)	0000944725	000-21231
MTXCP	Matrix Bancorp. Inc Matrix Bancorp Capital Trust I - 10.0% Trust Preferred Securities	Other Securities	NGM	12(g)	0000944725	000-21231
MTRX	Matrix Service Company Common Stock	Common Stock	NGM	12(g)	0000866273	000-18716
MTXX	Matrixx Initiatives, Inc.	Common Stock	NGS	12(g)	0001006195	000-27646
MATW	Mathews International Corporation Class A Common Stock	Common Stock	NGS	12(g)	0000063296	000-09115
MTSN	Mattson Technology, Inc. Common Stock	Common Stock	NGM	12(g)	0000928421	000-24838
MAXE	Max & Erma's Restaurants, Inc. Common Stock	Common Stock	NGM	12(g)	0000706471	000-11514
MXRE	Max Re Capital Ltd. Common Stock	Common Stock	NGS	12(g)	0001141719	000-33047
MAXC	Maxco, Inc. Common Stock	Common Stock	NCM	12(g)	0000078966	000-02762
MXIM	Maxim Integrated Products, Inc. Common Stock	Common Stock	NGS	12(g)	0000743316	000-16538
MRTI	Maxus Realty Trust Inc Common Stock	Common Stock	NGM	12(g)	0000748580	000-13754
MXWL	Maxwell Technologies, Inc. Common Stock	Common Stock	NGM	12(g)	0000319815	000-10964
MXY	Maxygen, Inc. Common Stock	Common Stock	NGM	12(g)	0001068796	000-28401
MBFI	MB Financial Inc. Common Stock	Common Stock	NGS	12(g)	0001139812	000-24566
MBFIP	MB Financial Inc. MB Financial Capital Trust I - % Cumulative Trust Preferred Securities	Other Securities	NGS	12(g)	0001139812	000-24566
MSSR	McCormick & Schmick's Seafood Restaurants, Inc. Common Stock	Common Stock	NGM	12(g)	0001288741	000-50845
MCDA	McDATA Corporation Class A Common Stock	Common Stock	NGS	12(g)	0000731502	000-31257
MCDB	McDATA Corporation Class B Common Stock	Common Stock	NGS	12(g)	0000731502	000-31257
MCGC	MCG Capital Corporation Common Stock \$0.01 Par Value	Common Stock	NGS	12(g)	0001141299	000-33377
MGRC	McGrath RentCorp Common Stock	Common Stock	NGS	12(g)	0000752714	000-13292
MDCA	MDC Partners Inc. CL A Subordinate Voting Shares	Common Stock	NGS	12(g)	0000876883	000-19382
MDII	MDI, Inc. Common Stock	Common Stock	NCM	12(g)	0000318259	000-09463
MEAD	Meade Instruments Corp. Common Stock	Common Stock	NGM	12(g)	0001032067	000-22183
MVCO	Meadow Valley Corporation Common Stock	Common Stock	NCM	12(g)	0000934749	000-25428
MEAS	Measurement Specialties, Inc. Common Stock	Common Stock	NGM	12(g)	0000778734	000-16085
MKTY	Mechanical Technology Incorporated Common Stock (\$0.01 Par Value)	Common Stock	NGM	12(g)	0000064463	000-06890
TAXI	Medallion Financial Corp. Common Stock	Common Stock	NGS	12(g)	0001000209	000-27812
MEDX	Medarex, Inc. Common Stock	Common Stock	NGM	12(g)	0000874255	000-19312
MDTH	MedCath Corporation Common Stock	Common Stock	NGM	12(g)	0001139463	000-33009

Issue Symbol	Issue Name	Issue Type	Issue Market Segment	Registration Type	CIK	SEC File #
MBAY	MediaBay, Inc. Common Stock	Common Stock	NGM	12(g)	0001040973	001-13469
MCCC	Mediacom Communications Corporation Class A Common Stock	Common Stock	NGS	12(g)	0001098659	000-29227
MDLK	Medialink Worldwide Incorporated Common Stock	Common Stock	NGM	12(g)	0000812890	000-21989
MDCI	Medical Action Industries Inc. Common Stock	Common Stock	NGS	12(g)	0000748270	000-13251
MDCO	Medicines Company (The) Common Stock	Common Stock	NGS	12(g)	0001113481	000-31191
MEDI	MedImmune, Inc. Common Stock	Common Stock	NGS	12(g)	0000873591	000-19131
MDTL	Medis Technologies Ltd. Common Stock	Common Stock	NGM	12(g)	0001090507	000-30391
MEDW	MEDIWARE Information Systems, Inc. Common Stock	Common Stock	NCM	12(g)	0000874733	001-10768
MTOX	Medtox Scientific, Inc. Common Stock	Common Stock	NGM	12(g)	0000739944	000-12971
MDWV	Medwave, Inc. Common Stock	Common Stock	NCM	12(g)	0000876043	000-28010
MEMY	Memory Pharmaceuticals Corp. Common Stock	Common Stock	NGM	12(g)	0001062216	000-50642
MENT	Mentor Graphics Corporation Common Stock	Common Stock	NGS	12(g)	0000701811	000-13442
MTSL	MER Telemanagement Solutions Ltd. Common Shares	Ordinary Shares	NCM	12(g)	0001025561	000-28950
MBWM	Mercantile Bank Corporation Common Stock	Common Stock	NGS	12(g)	0001042729	000-26719
MRBK	Mercantile Bankshares Corporation Common Stock	Common Stock	NGS	12(g)	0000064908	000-05127
MIGP	Mercer Insurance Group, Inc. Common Stock	Common Stock	NGM	12(g)	0001050690	000-25425
MERC	Mercer International Inc. Common Stock	Common Stock	NGM	12(g)	0001333274	000-09409
MBVT	Merchants Bancshares, Inc. Common Stock	Common Stock	NGM	12(g)	0000726517	000-11595
MRCY	Mercury Computer Systems Common Stock	Common Stock	NGS	12(g)	0001049521	000-23599
MERGE	Merge Technologies Inc. Common Stock	Common Stock	NGM	12(g)	0000944765	000-29486
VIVO	Meridian Bioscience Inc. Common Stock	Common Stock	NGS	12(g)	0000794172	000-14902
MMSI	Merit Medical Systems, Inc. Common Stock	Common Stock	NGS	12(g)	0000856982	000-18592
MERX	Merix Corporation Common Stock	Common Stock	NGM	12(g)	0000921365	000-23818
PGEB	Merrill Lynch & Co., Inc. 97% Protected Notes Linked to Global Equity Basket	Other Securities	NGM	12(g)	0000065100	001-07182
PDNT	Merrill Lynch & Co., Inc. 97% Protected Notes linked to the Performance of the Dow Jones Industrial Average	Other Securities	NGM	12(g)	0000065100	001-07182
ARQQ	Merrill Lynch & Co., Inc. Accelerated Return Note Linked to the NASDAQ 100 Index	Other Securities	NGM	12(g)	0000065100	001-07182
DWMT	Merrill Lynch & Co., Inc. Dow Jones Industrial Average MITTS Securities due 12/27/2010	Other Securities	NGM	12(g)	0000065100	001-07182
MTDW	Merrill Lynch & Co., Inc. Dow Jones Industrial Average Market Index Target-Term Securities (MITTS)	Other Securities	NGM	12(g)	0000065100	001-07182

Issue Symbol	Issue Name	Issue Type	Issue Market Segment	Registration Type	CIK	SEC File #
MTDB	Merrill Lynch & Co., Inc. Dow Jones Industrial Average Market Index Target-Term Securities (MITTS) due January 16, 2009	Other Securities	NGM	12(g)	0000065100	001-07182
LNDU	Merrill Lynch & Co., Inc. LIRN linked to the Dow Jones Industrial Average	Other Securities	NGM	12(g)	0000065100	001-07182
LERA	Merrill Lynch & Co., Inc. LIRN Linked to the Nikkei 225 Index	Other Securities	NGM	12(g)	0000065100	001-07182
MTSM	Merrill Lynch & Co., Inc. Merrill Lynch & Co., Inc. S&P 500 Market Index Target-Term Securities	Other Securities	NGM	12(g)	0000065100	001-07182
MTNK	Merrill Lynch & Co., Inc. Nikkei 225 Market Index Target-Term Securities (MITTS) 9/30/2010	Other Securities	NGM	12(g)	0000065100	001-07182
MNNY	Merrill Lynch & Co., Inc. Nikkei 225 Market Index Target-Term Securities (MITTS) due 3/8/2011	Other Securities	NGM	12(g)	0000065100	001-07182
MTTX	Merrill Lynch & Co., Inc. S&P 500 Market Index Target-Term Securities	Other Securities	NGM	12(g)	0000065100	001-07182
MTTT	Merrill Lynch & Co., Inc. S&P 500 Market Index Target-Term Securities	Other Securities	NGM	12(g)	0000065100	001-07182
MITT	Merrill Lynch & Co., Inc. S&P 500 Market Index Target-Term Securities (MITTS)	Other Securities	NGM	12(g)	0000065100	001-07182
MLMT	Merrill Lynch & Co., Inc. S&P 500 Market Index Target-Term Securities (MITTS)	Other Securities	NGM	12(g)	0000065100	001-07182
MTSP	Merrill Lynch & Co., Inc. S&P 500 Market Index Target-Term Securities (MITTS)	Other Securities	NGM	12(g)	0000065100	001-07182
SPPX	Merrill Lynch & Co., Inc. S&P 500 Market Index Target-Term Securities (MITTS)	Other Securities	NGM	12(g)	0000065100	001-07182
MSPX	Merrill Lynch & Co., Inc. S&P 500 Market Index Target-Term Securities (MITTS) due 8/5/2010	Other Securities	NGM	12(g)	0000065100	001-07182
SRDD	Merrill Lynch & Co., Inc. SRNs Linked to the Select Ten Index due May 2009	Other Securities	NGM	12(g)	0000065100	001-07182
DOWT	Merrill Lynch & Co., Inc. Strategic Return Notes Linked to Select Ten due Feb 2009	Other Securities	NGM	12(g)	0000065100	001-07182
SRRR	Merrill Lynch & Co., Inc. Strategic Return Notes Linked to the Industrial 15 Index	Other Securities	NGM	12(g)	0000065100	001-07182
SRIB	Merrill Lynch & Co., Inc. Strategic Return Notes Linked to the Industrial 15 Index	Other Securities	NGM	12(g)	0000065100	001-07182
SRIX	Merrill Lynch & Co., Inc. Strategic Return Notes linked to the Industrial 15 Index 10/31/2008	Other Securities	NGM	12(g)	0000065100	001-07182

Issue Symbol	Issue Name	Issue Type	Issue Market Segment	Registration Type	CIK	SEC File #
DWID	Merrill Lynch & Co., Inc. Strategic Return Notes Linked to the Industrial 15 Index due 8/5/2008	Other Securities	NGM	12(g)	0000065100	001-07182
DWTT	Merrill Lynch & Co., Inc. Strategic Return Notes Linked to the Select 10 Index due September 30, 2008	Other Securities	NGM	12(g)	0000065100	001-07182
DOTN	Merrill Lynch & Co., Inc. Strategic Return Notes Linked to the Select Ten Index due February 2008	Other Securities	NGM	12(g)	0000065100	001-07182
DWTN	Merrill Lynch & Co., Inc. Strategic Return Notes Linked to the Select Ten Index due June 2008	Other Securities	NGM	12(g)	0000065100	001-07182
MERB	Merrill Merchants Bancshares, Inc. Common Stock	Common Stock	NGM	12(g)	0000913072	000-24715
MESA	Mesa Air Group, Inc. Common Stock	Common Stock	NGS	12(g)	0000810332	000-15495
MLAB	Mesa Laboratories, Inc. Common Stock	Common Stock	NGM	12(g)	0000724004	000-11740
CASH	Meta Financial Group, Inc. Common Stock	Common Stock	NGM	12(g)	0000907471	000-22140
MBRX	Metabasis Therapeutics, Inc. common stock	Common Stock	NGM	12(g)	0001053221	000-50785
MTLM	Metal Management, Inc. Common Stock	Common Stock	NGS	12(g)	0000795665	000-14836
MTSX	Metal Storm Limited American Depository Shares	American Depository Shares	NCM	12(g)	0001119775	000-31212
MTLK	Metalink, Ltd. Ordinary Shares	Ordinary Shares	NGM	12(g)	0001098462	000-30394
MSLV	MetaSolv Inc Common Stock	Common Stock	NGM	12(g)	0000916704	000-28129
MEOH	Methanex Corporation Common Stock	Common Stock	NGS	12(g)	0000886977	000-20115
METH	Methode Electronics, Inc. Common Stock	Common Stock	NGS	12(g)	0000065270	000-02816
INFOD	Metro One Telecommunications, Inc. New Common Stock	Common Stock	NCM	12(g)	0000920990	000-27024
MCBI	MetroCorp Bancshares, Inc. Common Stock	Common Stock	NGM	12(g)	0001068300	000-25141
MTLG	Metrologic Instruments, Inc. Common Stock	Common Stock	NGS	12(g)	0000815910	000-24712
CASA	Mexican Restaurants, Inc. Common Stock	Common Stock	NCM	12(g)	0001009244	000-28234
MFBC	MFB Corp. Common Stock	Common Stock	NGM	12(g)	0000916396	000-23374
MFRI	MFRI, Inc. Common Stock	Common Stock	NGM	12(g)	0000914122	000-18370
MOGN	MGI PHARMA, Inc. Common Stock	Common Stock	NGS	12(g)	0000702131	000-10736
MGPI	MGP Ingredients, Inc.	Common Stock	NGS	12(g)	0000835011	000-17196
MCRL	Micrel, Incorporated Common Stock	Common Stock	NGS	12(g)	0000932111	000-25236
MLIN	Micro Linear Corporation Common Stock	Common Stock	NGM	12(g)	0000875359	000-24758
MCHP	Microchip Technology Incorporated Common Stock	Common Stock	NGS	12(g)	0000827054	000-21184
MITI	Micromet, Inc. Common Stock	Common Stock	NGM	12(g)	0001131907	000-50440
NOIZ	Micronetics, Inc. Common Stock	Common Stock	NCM	12(g)	0000820097	000-17966
MCRS	MICROS Systems, Inc. Common Stock	Common Stock	NGS	12(g)	0000320345	000-09993

Issue Symbol	Issue Name	Issue Type	Issue Market Segment	Registration Type	CIK	SEC File #
MSCC	Microsemi Corporation Common Stock	Common Stock	NGS	12(g)	0000310568	000-08866
MSFT	Microsoft Corporation Common Stock	Common Stock	NGS	12(g)	0000789019	000-14278
MSTR	MicroStrategy Incorporated Common Stock	Common Stock	NGS	12(g)	0001050446	000-24435
MSTRW	MicroStrategy Incorporated Warrants to Purchase Class A Common Stock	Warrant	NGS	12(g)	0001050446	000-24435
MTMD	Microtek Medical Holdings Inc Common Stock	Common Stock	NGS	12(g)	0000929299	000-24866
TUNE	Microtune, Inc. Common Stock	Common Stock	NGM	12(g)	0001108058	000-31029
MVIS	Microvision, Inc. Common Stock	Common Stock	NGM	12(g)	0000065770	000-21221
MVISW	Microvision, Inc. Warrants Expiration 5/26/11	Warrant	NGM	12(g)	0000065770	000-21221
MFCO	Microwave Filter Company, Inc. Common Stock	Common Stock	NCM	12(g)	0000716688	000-10976
MEND	Micrus Endovascular Corporation Common Stock	Common Stock	NGM	12(g)	0001028318	000-51323
MBRG	Middleburg Financial Corporation	Common Stock	NCM	12(g)	0000914138	000-24159
MIDD	Middleby Corporation (The) Common Stock	Common Stock	NGS	12(g)	0000769520	001-9973
MSEX	Middlesex Water Company Common Stock	Common Stock	NGS	12(g)	0000066004	000-00422
MLAN	Midland Company (The) Common Stock	Common Stock	NGS	12(g)	0000066025	001-06026
MDST	Mid-State Bancshares Common Stock	Common Stock	NGS	12(g)	0001027324	000-23925
MBHI	Midwest Banc Holdings, Inc. Common Stock	Common Stock	NGM	12(g)	0001051379	000-29598
OSKY	MidWestOne Financial Group Inc Common Stock	Common Stock	NGM	12(g)	0000741390	000-24630
MIKR	Mikron Infrared, Inc. Common Stock	Common Stock	NCM	12(g)	0000787809	000-15486
MLEA	Millea Holdings Inc. ADR American Depositary Shares	American Depositary Shares	NGS	12(g)	0001169486	000-12011
MBVA	Millennium Bankshares Corporation Common Stock	Common Stock	NCM	12(g)	0001158678	000-49611
MCEL	Millennium Cell Inc. Common Stock	Common Stock	NCM	12(g)	0001114872	000-31083
MLNM	Millennium Pharmaceuticals, Inc. Common Stock	Common Stock	NGS	12(g)	0001002637	000-28494
MICC	Millicom International Cellular S.A. Common Stock	Common Stock	NGS	12(g)	0000912958	000-22828
MNDO	MIND C.T.I. Ltd. Ordinary Shares	Ordinary Shares	NGM	12(g)	0001119083	000-31215
MSPD	Mindspeed Technologies, Inc. Common Stock, par value \$0.01	Common Stock	NGM	12(g)	0001224370	000-50499
MIPS	MIPS Technologies, Inc. Common Stock	Common Stock	NGM	12(g)	0001059786	000-24487
MRAE	Mirae Corporation American Depositary Shares	American Depositary Shares	NGM	12(g)	0001099196	000-30376
MSON	MISONIX, Inc. Common Stock	Common Stock	NGM	12(g)	0000880432	001-10986
MIND	Mitcham Industries, Inc. Common Stock	Common Stock	NGM	12(g)	0000926423	000-25142
MITSY	Mitsui & Company, Ltd. American Depositary Shares	American Depositary Shares	NGS	12(g)	0000067099	000-9929
MITY	MITY Enterprises Inc. Common Stock	Common Stock	NGM	12(g)	0000921030	000-23898

Issue Symbol	Issue Name	Issue Type	Issue Market Segment	Registration Type	CIK	SEC File #
MIVA	MIVA, Inc. Common Stock	Common Stock	NGM	12(g)	0001094808	000-30428
MKSI	MKS Instruments, Inc. Common Stock	Common Stock	NGS	12(g)	0001049502	000-23621
MINI	Mobile Mini, Inc. Common Stock	Common Stock	NGS	12(g)	0000911109	001-12804
MOBE	Mobility Electronics, Inc. Common Stock	Common Stock	NGM	12(g)	0001075656	000-30907
MOBI	Mobius Management Systems, Inc. Common Stock	Common Stock	NGM	12(g)	0001025148	000-24077
MOCO	MOCON, Inc. Common Stock	Common Stock	NGM	12(g)	0000067279	000-09273
MPAC	MOD-PAC CORP. Common Stock	Common Stock	NGM	12(g)	0001191857	000-50063
MODT	Modtech Holdings Inc. Common Stock	Common Stock	NGM	12(g)	0001075066	000-25161
MFLO	Moldflow Corporation Common Stock	Common Stock	NGS	12(g)	0001103234	000-30027
MDCC	Molecular Devices Corporation Common Stock	Common Stock	NGS	12(g)	0001003113	000-27316
MOLXA	Molex Incorporated Class A Common Stock	Common Stock	NGS	12(g)	0000067472	000-07491
MOLX	Molex Incorporated Common Stock	Common Stock	NGS	12(g)	0000067472	000-07491
MNTA	Momenta Pharmaceuticals, Inc. Common Stock	Common Stock	NGM	12(g)	0001235010	000-50797
MCRI	Monarch Casino & Resort, Inc. Common Stock	Common Stock	NGS	12(g)	0000907242	000-22088
MCBF	Monarch Community Bancorp, Inc. Common Stock par value .01	Common Stock	NCM	12(g)	0001169769	000-49814
MONIM	Monmouth Capital Corporation Common Stock	Common Stock	NGM	12(g)	0000067618	000-24282
MNRTA	Monmouth Real Estate Investment Corporation Class A Common Stock	Common Stock	NGS	12(g)	0000067625	000-04258
MGRM	Monogram Biosciences, Inc. Common Stock	Common Stock	NGM	12(g)	0001094961	000-30369
MPWR	Monolithic Power Systems, Inc. Common Stock	Common Stock	NGM	12(g)	0001280452	000-51026
MNRO	Monro Muffler Brake, Inc. Common Stock	Common Stock	NGS	12(g)	0000876427	000-19357
MROE	Monroe Bancorp Common Stock	Common Stock	NGM	12(g)	0000745456	000-31951
MNST	Monster Worldwide, Inc. Common Stock	Common Stock	NGS	12(g)	0001020416	000-21571
PSTA	Monterey Gourmet Foods, Inc. Common Stock	Common Stock	NGM	12(g)	0000913032	000-22534
MSNQ	Morgan Stanley Capital Protected Notes Based on the Value of the Nasdaq 100 Index	Other Securities	NGM	12(g)	0000895421	001-11758
NBXH	Morgan Stanley Morgan Stanley 9% Targeted Income Strategic Return Securities	Other Securities	NGM	12(g)	0000895421	001-11758
MNDX	Morgan Stanley MPS with minimum return protection	Other Securities	NGM	12(g)	0000895421	001-11758
NXPL	Morgan Stanley Performance Leveraged Upside Securities Linked to Nasdaq 100 Index	Other Securities	NGM	12(g)	0000895421	001-11758
NDPL	Morgan Stanley Performance Leveraged Upside Securities Linked to Nasdaq 100 Index	Other Securities	NGM	12(g)	0000895421	001-11758

Issue Symbol	Issue Name	Issue Type	Issue Market Segment	Registration Type	CIK	SEC File #
NPLU	Morgan Stanley Performance Leveraged Upside Securities Linked to Nasdaq 100 Index due August 20, 2007	Other Securities	NGM	12(g)	0000895421	001-11758
ESTX	Morgan Stanley PLUS Based on the Value of the Dow Jones EURO STOXX 50 Index	Other Securities	NGM	12(g)	0000895421	001-11758
MHGC	Morgans Hotel Group Co. Common Stock	Common Stock	NGM	12(g)	0001342126	000-51802
MORN	Morningstar, Inc. Common Stock	Common Stock	NGS	12(g)	0001289419	000-51280
MOCC	Moscow CableCom Corp. Common Stock	Common Stock	NGM	12(g)	0000006383	000-01460
MOSS	Mossimo Inc. Common Stock	Common Stock	NCM	12(g)	0001005181	001-14208
MOSY	MoSys, Inc. Common Stock	Common Stock	NGM	12(g)	0000890394	000-32929
MWRK	Mothers Work, Inc. Common Stock	Common Stock	NGM	12(g)	0000896985	000-21196
MOVE	Move Inc. Common Stock	Common Stock	NGS	12(g)	0001085770	000-26659
MOVI	Movie Gallery, Inc. Common Stock	Common Stock	NGM	12(g)	0000925178	000-24548
MPWG	MPW Industrial Services Group, Inc. Common Stock	Common Stock	NGM	12(g)	0001047098	000-23335
MROI	MRO Software, Inc. Common Stock	Common Stock	NGS	12(g)	0000920354	000-23852
MRVC	MRV Communications, Inc. Common Stock	Common Stock	NGM	12(g)	0000887969	000-25678
MSGI	MSGI Security Solutions, Inc. Common Stock	Common Stock	NCM	12(g)	0000014280	000-16730
FLSH	M-Systems Flash Disk Pioneers Ltd. Ordinary Shares	Ordinary Shares	NGS	12(g)	0000895361	000-28694
MTCT	MTC Technologies, Inc. COMMONSTOCK	Common Stock	NGS	12(g)	0001172243	000-49890
MTIC	MTI Technology Corporation Common Stock	Common Stock	NCM	12(g)	0000901696	000-23418
MTMC	MTM Technologies, Inc. Common Stock	Common Stock	NCM	12(g)	0000906282	000-22122
MNTG	MTR Gaming Group, Inc. Common Stock	Common Stock	NGS	12(g)	0000834162	000-20508
MTSC	MTS Systems Corporation Common Stock	Common Stock	NGS	12(g)	0000068709	000-02382
MBND	Multiband Corporation Common Stock	Common Stock	NCM	12(g)	0000732412	000-13529
LABL	Multi-Color Corporation Common Stock	Common Stock	NGM	12(g)	0000819220	000-16148
MFLX	Multi-Fineline Electronix, Inc. Common Stock	Common Stock	NGS	12(g)	0000830916	000-50812
MGAM	Multimedia Games, Inc. Common Stock	Common Stock	NGS	12(g)	0000896400	000-28318
MFSF	MutualFirst Financial Inc. Common Stock	Common Stock	NGM	12(g)	0001094810	000-27905
MWAV	M-WAVE, Inc. Common Stock	Common Stock	NCM	12(g)	0000863842	000-19944
MWIV	MWV Veterinary Supply, Inc. Common Stock	Common Stock	NGS	12(g)	0001323974	000-51468
MYOG	Myogen, Inc. Common Stock	Common Stock	NGM	12(g)	0001101052	000-50438
MYGN	Myriad Genetics, Inc. Common Stock	Common Stock	NGS	12(g)	0000899923	000-26642
NABI	Nabi Biopharmaceuticals Common Stock	Common Stock	NGM	12(g)	0000072444	000-04829
NGEN	Nanogen, Inc. Common Stock	Common Stock	NGM	12(g)	0001030339	000-23541
NANO	Nanometrics Incorporated Common Stock	Common Stock	NGM	12(g)	0000704532	000-13470

Issue Symbol	Issue Name	Issue Type	Issue Market Segment	Registration Type	CIK	SEC File #
NANX	Nanophase Technologies Corporation Common Stock	Common Stock	NGM	12(g)	0000883107	000-22333
NSSC	Napco Security Systems, Inc. Common Stock	Common Stock	NGS	12(g)	0000069633	000-10004
NAPS	Napster, Inc. Common Stock	Common Stock	NGM	12(g)	0001122787	000-32393
NARA	Nara Bancorp, Inc. Common Stock	Common Stock	NGS	12(g)	0001128361	000-50245
NASB	NASB Financial Inc. Common Stock	Common Stock	NCM	12(g)	0001059131	000-24033
NDAQ	Nasdaq Stock Market, Inc. (The) Common Stock	Common Stock	NGS	12(g)	0001120193	000-32651
NAFC	Nash-Finch Company Common Stock	Common Stock	NGS	12(g)	0000069671	000-00785
NSHA	Nashua Corporation Common Stock	Common Stock	NGM	12(g)	0000069680	000-21271
NPSN	Naspers Limited N Shs Sponsored American Depository Receipt Representing Class N Shares (South Africa)	American Depository Shares	NGM	12(g)	0001106051	000-50117
NSTK	Nastech Pharmaceutical Company, Inc. Common Stock	Common Stock	NGM	12(g)	0000737207	000-13789
NATH	Nathan's Famous, Inc. Common Stock	Common Stock	NGM	12(g)	0000069733	000-03189
NAHC	National Atlantic Holdings Corporation Common Stock	Common Stock	NGM	12(g)	0000946492	000-51127
NKSH	National Bankshares, Inc. Common Stock	Common Stock	NCM	12(g)	0000796534	000-15204
ALLEP	National City Corporation - Allegiant Bancorp, Inc. Allegiant Capital Trust II - 9.00% Cumulative Trust Preferred Securities	Other Securities	NGM	12(g)	0000069970	000-07229
NCOC	National Coal Corp. Common Stock	Common Stock	NGM	12(g)	0001089575	000-26509
NADX	National Dentex Corporation Common Stock	Common Stock	NGM	12(g)	0000913616	000-23092
NHHC	National Home Health Care Corp. Common Stock	Common Stock	NGM	12(g)	0000728389	000-12927
EGOV	National Information Consortium, Inc. Common Stock	Common Stock	NGS	12(g)	0001065332	000-26621
NATI	National Instruments Corporation Common Stock	Common Stock	NGS	12(g)	0000935494	000-25426
NATL	National Interstate Corporation Common Stock	Common Stock	NGM	12(g)	0001301106	000-51130
NMHC	National Medical Health Card Systems, Inc. Common Stock	Common Stock	NGM	12(g)	0000813562	000-26749
MBLA	National Mercantile Bancorp Common Stock	Common Stock	NCM	12(g)	0000714801	000-15982
NPBC	National Penn Bancshares, Inc. Common Stock	Common Stock	NGS	12(g)	0000700733	000-10957
NPBCO	National Penn Bancshares, Inc. Cumulative Trust Preferred Securities	Other Securities	NGS	12(g)	0000700733	000-10957
NRCI	National Research Corporation Common Stock	Common Stock	NGM	12(g)	000070487	000-29466
NSEC	National Security Group, Inc. Common Stock	Common Stock	NGM	12(g)	0000865058	000-18649
NTSC	National Technical Systems, Inc. Common Stock	Common Stock	NGM	12(g)	0000110536	000-16438
NHRX	NationsHealth, Inc. Common Stock	Common Stock	NGM	12(g)	0001233426	000-50348
NHRXU	NationsHealth, Inc. Units Expiring 8/24/2007	Unit	NGM	12(g)	0001233426	000-50348
NHRXW	NationsHealth, Inc. Warrants Expiring 8/24/2007	Warrant	NGM	12(g)	0001233426	000-50348
NTOL	Natrol, Inc. Common Stock	Common Stock	NGM	12(g)	0001025573	000-24567

Issue Symbol	Issue Name	Issue Type	Issue Market Segment	Registration Type	CIK	SEC File #
NAII	Natural Alternatives International, Inc. Common Stock	Common Stock	NGM	12(g)	0000787253	000-15701
BHIP	Natural Health Trends Corporation Common Stock	Common Stock	NGM	12(g)	0000912061	000-26272
NRVN	Nature Vision, Inc. Common Stock	Common Stock	NCM	12(g)	0000078311	000-07475
BABY	Natus Medical Incorporated Common Stock	Common Stock	NGM	12(g)	0000878526	000-33001
NVSL	Naugatuck Valley Financial Corporation Common Stock	Common Stock	NGM	12(g)	0001293413	000-50876
NAVR	Navarre Corporation Common Stock	Common Stock	NGM	12(g)	0000911650	000-22982
FLYR	Navigant International, Inc. Common Stock	Common Stock	NGS	12(g)	0001055455	000-24387
NAVJ	Navigators Group, Inc. (The) Common Stock	Common Stock	NGS	12(g)	0000793547	000-15886
BULK	Navios Maritime Holdings Inc. Common Stock	Common Stock	NGM	12(g)	0001333172	000-51047
BULKU	Navios Maritime Holdings Inc. Units 12/9/2008	Unit	NGM	12(g)	0001333172	000-51047
BULKW	Navios Maritime Holdings Inc. Warrants 12/9/2008	Warrant	NGM	12(g)	0001333172	000-51047
NAVI	NaviSite, Inc. Common Stock	Common Stock	NCM	12(g)	0001084750	000-27597
NBTF	NB&T FINANCIAL GROUP INC Common Stock	Common Stock	NCM	12(g)	0000908837	000-23134
NBTB	NBT Bancorp Inc. Common Stock	Common Stock	NGS	12(g)	0000790359	000-14703
NCIT	NCI, Inc. Common Stock	Common Stock	NGM	12(g)	0001334478	000-51579
NCOG	NCO Group, Inc. Common Stock	Common Stock	NGS	12(g)	0001022608	000-21639
NNDS	NDS Group plc. American Depository Shares	American Depository Shares	NGS	12(g)	0001098074	000-30364
NIPNY	NEC Corporation American Depository Shares	American Depository Shares	NGS	12(g)	0000072127	000-12713
NKTR	Nektar Therapeutics Common Stock	Common Stock	NGS	12(g)	0000906709	000-23556
NEOG	Neogen Corporation Common Stock	Common Stock	NGS	12(g)	0000711377	000-17988
NMGC	NeoMagic Corporation Common Stock	Common Stock	NGM	12(g)	0001030485	000-22009
NEOL	NeoPharm, Inc. Common Stock	Common Stock	NGM	12(g)	0000942788	001-12493
NTEC	Neose Technologies, Inc. Common Stock	Common Stock	NGM	12(g)	0000877902	000-27718
NWRE	Neoware, Inc. Common Stock	Common Stock	NGS	12(g)	0000894743	000-21240
NSTC	Ness Technologies, Inc. Common Stock	Common Stock	NGS	12(g)	0001089638	000-50954
NEST	Nestor, Inc. Common Stock	Common Stock	NGM	12(g)	0000720851	000-12965
UEPS	Net 1 UEPS Technologies, Inc. Common Stock	Common Stock	NGS	12(g)	0001041514	000-31203
NETC	NET Servicios de Comunicacao S.A. American Depository Shares	American Depository Shares	NGM	12(g)	0001024446	000-28860
NTBK	Net.B@nk, Inc. Common Stock	Common Stock	NGM	12(g)	0001035826	000-22361
NTES	Netease.com, Inc. American Depository Shares	American Depository Shares	NGS	12(g)	0001110646	000-30666
NFLX	Netflix, Inc. Common Stock	Common Stock	NGS	12(g)	0001065280	000-49802

Issue Symbol	Issue Name	Issue Type	Issue Market Segment	Registration Type	CIK	SEC File #
NTGR	NETGEAR, Inc. Common Stock	Common Stock	NGS	12(g)	0001122904	000-50350
NGRU	netGuru inc Common Stock	Common Stock	NCM	12(g)	0001015920	000-28560
NETL	NetLogic Microsystems, Inc. Common Stock	Common Stock	NGM	12(g)	0001135711	000-50838
NETM	NetManage, Inc. Common Stock	Common Stock	NGM	12(g)	0000909793	000-22158
NTRT	NetRatings, Inc. Common Stock	Common Stock	NGM	12(g)	0001095480	000-27907
NITC	NetScout Systems, Inc. Common Stock	Common Stock	NGM	12(g)	0001078075	000-26251
NTST	Netsmart Technologies, Inc. Common Stock	Common Stock	NCM	12(g)	0001011028	000-21177
NITWK	NetSol Technologies Inc. Common Stock	Common Stock	NCM	12(g)	0001039280	000-22773
NTAP	Network Appliance, Inc. Common Stock	Common Stock	NGS	12(g)	0001002047	000-27130
NENG	Network Engines, Inc. Common Stock	Common Stock	NGM	12(g)	0001110903	000-30863
NTLI	Neurobiological Technologies, Inc. Common Stock	Common Stock	NCM	12(g)	0000918112	000-23280
NRMX	Neurochem Inc Common Shares	Ordinary Shares	NGM	12(g)	0001259942	000-50393
NBIX	Neurocrine Biosciences, Inc. Common Stock	Common Stock	NGS	12(g)	0000914475	000-22705
NRGN	Neurogen Corporation Common Stock	Common Stock	NGM	12(g)	0000849043	000-18311
NURO	NeuroMetrix, Inc. Common Stock, \$0.0001 par value per share	Common Stock	NGM	12(g)	0001289850	000-50856
NCEM	Nevada Chemicals, Inc. Common Stock	Common Stock	NGM	12(g)	0000356342	000-10634
NBSC	New Brunswick Scientific Co., Inc. Common Stock	Common Stock	NGM	12(g)	0000071241	000-06994
NCBC	New Century Bancorp, Inc. (NC) Common Stock	Common Stock	NGM	12(g)	0001263762	000-50400
NEBS	New England Bancshares, Inc. Common Stock	Common Stock	NGM	12(g)	0001338248	000-51589
NOOF	New Frontier Media, Inc. Common Stock	Common Stock	NGM	12(g)	0000847383	000-23697
NHTB	New Hampshire Thrift Bancshares, Inc. Common Stock	Common Stock	NGM	12(g)	0000846931	000-17859
NRPH	New River Pharmaceuticals Inc. Common Stock	Common Stock	NGM	12(g)	0001288379	000-50851
HAVNP	New York Community Bancorp, Inc. Haven Capital Trust II - 10.25% Capital Securities	Other Securities	NGM	12(g)	0000910073	001-31565
NMIL	NewMill Bancorp, Inc. Common Stock	Common Stock	NGS	12(g)	0000807524	000-16455
NFSB	Newport Bancorp, Inc. Common Stock	Common Stock	NGM	12(g)	0001355855	000-51856
NEWP	Newport Corporation Common Stock	Common Stock	NGM	12(g)	0000225263	000-01649
NKBS	Newtek Business Services Inc. Common Stock	Common Stock	NGM	12(g)	0001094019	000-50524
NXTY	Nexity Financial Corporation Common Stock	Common Stock	NGM	12(g)	0001084727	000-51273
NEXM	NexMed, Inc. Common Stock	Common Stock	NGM	12(g)	0001017491	000-22245
NXST	Nexstar Broadcasting Group, Inc. Class A Common Stock	Common Stock	NGM	12(g)	0001142417	000-50478
NEXT	Nextest Systems Corporation Common Stock	Common Stock	NGM	12(g)	0001167896	000-51851
NGAS	NGAS Resources, Inc. Common Stock	Common Stock	NGS	12(g)	0000746834	000-12185
NGPC	NGP Capital Resources Company Common Stock	Common Stock	NGS	12(g)	0001297704	000-50905

Issue Symbol	Issue Name	Issue Type	Issue Market Segment	Registration Type	CIK	SEC File #
NICE	NICE-Systems Limited American Depository Shares	American Depository Shares	NGS	12(g)	0001003935	000-27466
NICK	Nicholas Financial, Inc. Common Stock	Common Stock	NGS	12(g)	0001000045	000-26680
NHWK	Nighthawk Radiology Holdings, Inc. Common Stock	Common Stock	NGM	12(g)	0001292470	000-51786
NIHD	NIH Holdings, Inc Class B Common Stock	Common Stock	NGS	12(g)	0001037016	000-32421
NINE	Ninetowns Digital World Trade Holdings Limited American Depository Shares	American Depository Shares	NGM	12(g)	0001285735	000-51025
NICH	Nitches, Inc. Common Stock	Common Stock	NCM	12(g)	0000772263	000-13851
NTMD	NitroMed, Inc. Common Stock	Common Stock	NGM	12(g)	0000927829	000-50439
NMSS	NMS Communications Corporation Common Stock	Common Stock	NGM	12(g)	0000915866	000-23282
NMTI	NMT Medical Inc. Common Stock	Common Stock	NGM	12(g)	0001017259	000-21001
NNBR	NN, Inc. Common Stock	Common Stock	NGS	12(g)	0000918541	000-23486
NLCI	Nobel Learning Communities, Inc. Common Stock	Common Stock	NGM	12(g)	0000721237	001-10031
NOBH	Nobility Homes, Inc. Common Stock	Common Stock	NGM	12(g)	0000072205	000-06506
NOBL	Noble International, Ltd. Common Stock	Common Stock	NGS	12(g)	0001034258	001-13581
NDSN	Nordson Corporation Common Stock	Common Stock	NGS	12(g)	0000072331	000-07977
NSYS	Nortech Systems Incorporated Common Stock	Common Stock	NCM	12(g)	0000722313	000-13257
NASI	North American Scientific, Inc. Common Stock	Common Stock	NGM	12(g)	0000949876	000-26670
NBAN	North Bay Bancorp Common Stock	Common Stock	NGM	12(g)	0001102595	000-31080
FFFD	North Central Bancshares, Inc. Common Stock	Common Stock	NGM	12(g)	0001005188	000-27672
NPSI	North Pittsburgh Systems, Inc. Common Stock	Common Stock	NGS	12(g)	0000764765	000-13716
NPTE	North Pointe Holdings Corporation Common Stock	Common Stock	NGM	12(g)	0001171218	000-51530
NOVB	North Valley Bancorp Common Stock	Common Stock	NGS	12(g)	0000353191	000-10652
NECB	Northeast Community Bancorp, Inc. Common Stock	Common Stock	NGM	12(g)		000-51852
NREB	Northern Empire Bancshares Common Stock	Common Stock	NGM	12(g)	0000746253	000-51318
NSFC	Northern States Financial Corporation Common Stock	Common Stock	NCM	12(g)	0000744485	000-19300
NTRS	Northern Trust Corporation Common Stock	Common Stock	NGS	12(g)	0000073124	000-05965
NFLD	Northfield Laboratories Inc. Common Stock	Common Stock	NGM	12(g)	0000920947	000-24050
NRIM	Northrim Bancorp Inc Common Stock	Common Stock	NGS	12(g)	0001163370	000-33501
NSTR	Northstar Neuroscience, Inc. Common Stock	Common Stock	NGM	12(g)	0001351509	000-51951
NWFI	Northway Financial Inc. Common Stock	Common Stock	NGM	12(g)	0001041753	000-23129
NWSB	Northwest Bancorp, Inc. Common Stock	Common Stock	NGS	12(g)	0001042064	000-23817
NWSBP	Northwest Bancorp, Inc. Northwest Capital Trust I - 8.75% Cumulative Trust Preferred Securities	Other Securities	NGS	12(g)	0001042064	000-23817

Issue Symbol	Issue Name	Issue Type	Issue Market Segment	Registration Type	CIK	SEC File #
NWPX	Northwest Pipe Company Common Stock	Common Stock	NGS	12(g)	0001001385	000-27140
NWEC	NorthWestern Corporation Common Stock	Common Stock	NGS	12(g)	0000073088	001-10499
NWECW	NorthWestern Corporation Warrants Expiring 11/1/2007	Warrant	NGS	12(g)	0000073088	001-10499
NWFL	Norwood Financial Corp. Common Stock	Common Stock	NGM	12(g)	0001013272	000-28364
NVMI	Nova Measuring Instruments Ltd. Ordinary Shares	Ordinary Shares	NGM	12(g)	0001109345	000-30668
NOVC	Novacea, Inc. Common Stock	Common Stock	NGM	12(g)	0001178711	000-51967
NOVA	NovaMed Inc. Common Stock	Common Stock	NGS	12(g)	0001086939	000-26625
TONS	Novamerican Steel, Inc. Common Stock	Common Stock	NGM	12(g)	0001046687	000-29506
NGPS	NovAtel Inc. Common Shares	Common Stock	NGS	12(g)	0001027539	000-29004
NVTL	Novatel Wireless, Inc. New Common Stock	Common Stock	NGM	12(g)	0001022652	000-31659
NVAX	Novavax, Inc. Common Stock	Common Stock	NGM	12(g)	0001000694	000-26770
NOVL	Novell, Inc. Common Stock	Common Stock	NGS	12(g)	0000758004	000-13351
NVLS	Novellus Systems, Inc. Common Stock	Common Stock	NGS	12(g)	0000836106	000-17157
NOVN	Noven Pharmaceuticals, Inc. Common Stock	Common Stock	NGS	12(g)	0000815838	000-17254
NVGN	Novogen Limited American Depository Shares	American Depository Shares	NGM	12(g)	0001075880	000-29962
NPSP	NPS Pharmaceuticals, Inc. Common Stock	Common Stock	NGM	12(g)	0000890465	000-23272
NTLS	NTELOS Holdings Corp. Common Stock	Common Stock	NGM	12(g)	0001328571	000-51798
NTLI	NTL Incorporated Common Stock	Common Stock	NGS	12(g)	0001270400	000-50886
NTLIW	NTL Incorporated Series A Warrants	Warrant	NGS	12(g)	0001270400	000-50886
NUHC	Nu Horizons Electronics Corp. Common Stock	Common Stock	NGM	12(g)	0000718074	001-08798
NUAN	Nuance Communications, Inc. Common Stock	Common Stock	NGS	12(g)	0001002517	000-27038
NUCO	NuCo2 Inc. Common Stock	Common Stock	NGM	12(g)	0000947577	000-27378
NCST	NUCRYST Pharmaceuticals Corp. Common Shares	Common Stock	NGM	12(g)	0001344674	000-51686
NMRX	Numerex Corp. Class A Common Stock	Common Stock	NGM	12(g)	0000870753	000-22920
NUTR	Nutraceutical International Corporation Common Stock	Common Stock	NGS	12(g)	0001050007	000-23731
NTRI	NutriSystem Inc Common Stock	Common Stock	NGS	12(g)	0001096376	000-28551
NXXI	Nutrition 21 Inc. Common Stock	Common Stock	NCM	12(g)	0000744962	000-14983
NUVA	NuVasive, Inc. Common Stock	Common Stock	NGM	12(g)	0001142596	000-50744
NUVO	Nuvelo, Inc. New Common Stock	Common Stock	NGM	12(g)	0000907654	000-22873
NVEC	NVE Corporation Common Stock	Common Stock	NCM	12(g)	0000724910	000-12196
NVDA	NVIDIA Corporation Common Stock	Common Stock	NGS	12(g)	0001045810	000-23985
NWIR	NWH, Inc. Common Stock	Common Stock	NGM	12(g)	0000915016	000-23598
NXTM	NxStage Medical Inc. Common Stock	Common Stock	NGM	12(g)	0001333170	000-51567

Issue Symbol	Issue Name	Issue Type	Issue Market Segment	Registration Type	CIK	SEC File #
NYER	Nyer Medical Group, Inc. Common Stock	Common Stock	NCM	12(g)	0000884647	000-20175
NYMX	Nymox Pharmaceutical Corporation Common Stock	Common Stock	NCM	12(g)	0001018735	001-12033
OICO	O. I. Corporation Common Stock	Common Stock	NGM	12(g)	0000073773	000-06511
OIIM	O2Micro International Limited American Depository Shares	American Depository Shares	NGS	12(g)	0001095348	000-30910
OAKF	Oak Hill Financial, Inc. Common Stock	Common Stock	NGS	12(g)	0000949953	000-26876
RHEO	OccuLogix, Inc. Common Stock	Common Stock	NGM	12(g)	0001299139	000-51030
OCENY	Oce NV American Depository Shares	American Depository Shares	NGM	12(g)	0000753058	000-13742
OBCI	Ocean Bio-Chem, Inc. Common Stock	Common Stock	NCM	12(g)	0000350737	000-11102
OSHC	Ocean Shore Holding Co. Common Stock	Common Stock	NGM	12(g)	0001298716	000-51000
OCFC	OceanFirst Financial Corp. Common Stock	Common Stock	NGS	12(g)	0001004702	000-27428
CHUX	O'Charley's Inc. Common Stock	Common Stock	NGS	12(g)	0000864233	000-18629
ODMO	Odimo Incorporated Common Stock	Common Stock	NGM	12(g)	0001292026	000-51161
ODSY	Odyssey Healthcare, Inc. Common Stock	Common Stock	NGS	12(g)	0001129623	000-33267
OCAS	Ohio Casualty Corporation Common Stock	Common Stock	NGS	12(g)	0000073952	000-05544
OLCB	Ohio Legacy Corporation Common Stock	Common Stock	NCM	12(g)	0001096654	000-31673
OVBC	Ohio Valley Banc Corp. Common Stock	Common Stock	NGM	12(g)	0000894671	000-20914
OLGR	Oligear Company (The) Common Stock	Common Stock	NCM	12(g)	0000074058	000-00822
ODFL	Old Dominion Freight Line, Inc. Common Stock	Common Stock	NGS	12(g)	0000878927	000-19582
OLBK	Old Line Bancshares, Inc. (MD) Common Stock	Common Stock	NCM	12(g)	0001253317	000-50345
OPOF	Old Point Financial Corporation Common Stock	Common Stock	NCM	12(g)	0000740971	000-12896
OSBC	Old Second Bancorp, Inc. Common Stock	Common Stock	NGS	12(g)	0000357173	000-10537
OSBCP	Old Second Bancorp, Inc. Cumulative Trust Preferred Securities	Other Securities	NGS	12(g)	0000357173	000-10537
ZEUS	Olympic Steel, Inc. Common Stock	Common Stock	NGM	12(g)	0000917470	000-23320
OMEF	Omega Financial Corporation Common Stock	Common Stock	NGS	12(g)	0000705671	000-13599
OFLX	Omega Flex, Inc. Common Stock	Common Stock	NGM	12(g)	0001317945	000-51372
ONAV	Omega Navigation Enterprises, Inc. Class A Common Stock	Common Stock	NGM	12(g)	0001324915	000-51894
OMNI	OMNI Energy Services Corp. Common Stock	Common Stock	NGM	12(g)	0001046212	000-23383
OMCL	Omnicell, Inc. Common Stock (\$0.001 par value)	Common Stock	NGM	12(g)	0000926326	000-33043
OMTR	Omniture, Inc. Common Stock	Common Stock	NGM	12(g)	0001357525	000-52076
OVTI	OmniVision Technologies, Inc. Common Stock	Common Stock	NGS	12(g)	0001106851	000-29939
OMRI	Omrix Biopharmaceuticals, Inc. Common Stock	Common Stock	NGM	12(g)	0001349426	000-51905
OMTL	Omtol, Ltd. Common Stock	Common Stock	NCM	12(g)	0001020579	000-22871
ASGN	On Assignment, Inc. Common Stock	Common Stock	NGM	12(g)	0000890564	000-20540

Issue Symbol	Issue Name	Issue Type	Issue Market Segment	Registration Type	CIK	SEC File #
ONIN	ON Semiconductor Corporation Common Stock	Common Stock	NGS	12(g)	0001097864	000-30419
OTIV	On Track Innovations Ltd Ordinary Shares	Ordinary Shares	NGM	12(g)	0001021604	000-49877
ONCY	Oncolytics Biotech, Inc. Common Shares	Common Stock	NCM	12(g)	0001129928	000-31062
ONFC	Oneida Financial Corp. Common Stock	Common Stock	NCM	12(g)	0001070190	000-25101
ORCC	Online Resources Corporation Common Stock	Common Stock	NGS	12(g)	0000888953	000-26123
ONSM	Onstream Media Corporation Common Stock	Common Stock	NCM	12(g)	0000919130	000-22849
ONVI	Onvia, Inc. Common Stock	Common Stock	NGM	12(g)	0001100917	000-29609
ONXX	ONYX Pharmaceuticals, Inc. Common Stock	Common Stock	NGM	12(g)	0001012140	000-28298
ONXS	ONYX Software Corporation Common Stock	Common Stock	NGM	12(g)	0001014383	000-25361
OPEN	Open Solutions, Inc. Common Stock	Common Stock	NGS	12(g)	0000873538	000-02333
OTEX	Open Text Corporation Common Shares	Common Stock	NGS	12(g)	0001002638	000-27544
OPTV	OpenTV Corp. Class A Ordinary Shares	Ordinary Shares	NGM	12(g)	0001096958	001-15473
OPWV	Openwave Systems Inc Common Stock	Common Stock	NGS	12(g)	0001082506	000-25687
ORCI	Opinion Research Corporation Common Stock	Common Stock	NGM	12(g)	0000911673	000-22554
OPLK	Oplink Communications, Inc. Common Stock	Common Stock	NGM	12(g)	0001022225	000-31581
OPNT	OPNET Technologies Inc. Common Stock	Common Stock	NGS	12(g)	0001108924	000-30931
OPSW	Opware, Inc. Common Stock	Common Stock	NGM	12(g)	0001100813	000-32377
OPTC	Optelecom-NKF, Inc. Common Stock	Common Stock	NCM	12(g)	0000275858	000-08828
OBAS	Optibase Ltd. Ordinary Shares	Ordinary Shares	NGM	12(g)	0001077618	000-29992
OCCF	Optical Cable Corporation Common Stock	Common Stock	NGM	12(g)	0001000230	000-27022
OCPI	Optical Communication Products, Inc. Common Stock	Common Stock	NGM	12(g)	0001122668	000-31861
OPMR	Optimal Group, Inc. Class A Common Stock	Common Stock	NGM	12(g)	0001015923	000-28572
OPHC	OptimumBank Holdings, Inc. Common Stock	Common Stock	NCM	12(g)	0001288855	000-50755
OPTN	OPTION CARE, Inc. Common Stock	Common Stock	NGS	12(g)	0000884064	000-19878
ORCL	Oracle Corporation Common Stock	Common Stock	NGS	12(g)	0001341439	000-14376
OLAB	Oralabs Holding Corporation Common Stock	Common Stock	NCM	12(g)	0001044577	000-23039
ORNG	Orange 21 Inc. Common Stock	Common Stock	NGM	12(g)	0000932372	000-51071
OSUR	OraSure Technologies, Inc. Common Stock	Common Stock	NGM	12(g)	0001116463	000-15337
ORBT	Orbit International Corporation Common Stock	Common Stock	NCM	12(g)	0000074818	000-03936
ORBK	Orbotech Ltd. Ordinary Shares	Ordinary Shares	NGS	12(g)	0000749037	000-12790
ORCH	Orchid Cellmark Inc. Common Stock	Common Stock	NGM	12(g)	0001107216	000-30267
ORCT	Orckit Communications Ltd.	Ordinary Shares	NGM	12(g)	0001021620	000-28724
ORLY	O'Reilly Automotive, Inc. Common Stock	Common Stock	NGS	12(g)	0000898173	000-21318
ORGN	Origen Financial, Inc. Common Stock	Common Stock	NGM	12(g)	0001268039	000-50721

Issue Symbol	Issue Name	Issue Type	Issue Market Segment	Registration Type	CIK	SEC File #
SEED	Origin Agritech Limited Common Stock	Common Stock	NGM	12(g)	0001321851	000-51576
OFIX	Orthofix International N.V. Common Stock	Common Stock	NGS	12(g)	0000884624	000-19961
OLGC	Orthologic Corp. Common Stock	Common Stock	NGM	12(g)	0000887151	000-21214
VITA	Orthovita, Inc. Common Stock	Common Stock	NGM	12(g)	0000913756	000-24517
OSCI	Oscient Pharmaceuticals Corporation Common Stock	Common Stock	NGM	12(g)	0000356830	000-10824
OSIP	OSI Pharmaceuticals Inc. Common Stock	Common Stock	NGS	12(g)	0000729922	000-15190
OSIS	OSI Systems, Inc. Common Stock	Common Stock	NGM	12(g)	0001039065	000-23125
OSTE	Osteotech, Inc. Common Stock	Common Stock	NGM	12(g)	0000874734	000-19278
OTTR	Otter Tail Corporation Common Stock	Common Stock	NGS	12(g)	0000075129	000-00368
OUTD	Outdoor Channel Holdings, Inc. Common Stock	Common Stock	NGM	12(g)	0000760326	000-17287
OVRL	Overland Storage Inc.	Common Stock	NGS	12(g)	0000889930	000-22071
OSTK	Overstock.com, Inc. Common Stock	Common Stock	NGM	12(g)	0001130713	000-49799
OXGN	OXIGENE, Inc. Common Stock	Common Stock	NGM	12(g)	0000908259	000-21990
OYOG	OYO Geospace Corporation Common Stock	Common Stock	NGM	12(g)	0001001115	001-13601
PFIN	P & F Industries, Inc. Class A Common Stock	Common Stock	NGM	12(g)	0000075340	000-15573
PTSI	P.A.M. Transportation Services, Inc. Common Stock	Common Stock	NGM	12(g)	0000798287	000-15057
PFCB	P.F.Chang's China Bistro, Inc. Common Stock	Common Stock	NGS	12(g)	0001039889	000-25123
PABK	PAB Bankshares, Inc. Common Stock	Common Stock	NGS	12(g)	0000705200	000-25422
PCAR	PACCAR Inc. Common Stock	Common Stock	NGS	12(g)	0000075362	001-14817
PACR	Pacer International, Inc. Common stock	Common Stock	NGS	12(g)	0001091735	000-49828
PCBC	Pacific Capital Bancorp Common Stock	Common Stock	NGS	12(g)	0000357264	000-11113
PCBK	Pacific Continental Corporation (Ore) Common Stock	Common Stock	NGM	12(g)	0001084717	000-30106
PEIX	Pacific Ethanol, Inc. Common Stock	Common Stock	NGM	12(g)	0000778164	000-21467
PCNTF	Pacific Internet Limited Ordinary Shares	Ordinary Shares	NGM	12(g)	0001074245	000-29938
PMBC	Pacific Mercantile Bancorp Common Stock	Common Stock	NGS	12(g)	0001109546	000-30777
PPBI	Pacific Premier Bancorp Inc	Common Stock	NGM	12(g)	0001028918	000-22193
PSBC	Pacific State Bancorp (Stockton, CA) Common Stock	Common Stock	NGM	12(g)	0001169424	000-49892
PSUN	Pacific Sunwear of California, Inc. Common Stock	Common Stock	NGS	12(g)	0000874841	000-21296
PACT	PacificNet Inc. Common Stock	Common Stock	NGM	12(g)	0000815017	000-24985
PKTR	Packeteer, Inc. Common Stock	Common Stock	NGS	12(g)	0001011344	000-26785
PACW	Pac-West Telecomm, Inc. Common Stock	Common Stock	NCM	12(g)	0001071598	000-27743
PTIE	Pain Therapeutics Common Stock	Common Stock	NGM	12(g)	0001069530	000-29959
PHHM	Palm Harbor Homes, Inc. Common Stock	Common Stock	NGM	12(g)	0000923473	000-24268
PALM	Palm, Inc. Common Stock	Common Stock	NGS	12(g)	0001100389	000-29597

Issue Symbol	Issue Name	Issue Type	Issue Market Segment	Registration Type	CIK	SEC File #
PMTI	Palomar Medical Technologies, Inc. Common Stock	Common Stock	NGS	12(g)	0000881695	000-22340
PBCI	Pamrabo Bancorp, Inc. Common Stock	Common Stock	NGM	12(g)	0000854071	000-18014
PAAS	Pan American Silver Corp. Common Stock	Common Stock	NGS	12(g)	0000771992	000-13727
PANC	Panacos Pharmaceuticals, Inc. Common Stock	Common Stock	NGM	12(g)	0001040017	000-24241
PNRA	Panera Bread Company Class A Common Stock	Common Stock	NGS	12(g)	0000724606	000-19253
PTRY	Pantry, Inc. (The) Common Stock	Common Stock	NGS	12(g)	0000915862	000-25813
PZZA	Papa John's International, Inc. Common Stock	Common Stock	NGS	12(g)	0000901491	000-21660
PLLL	Parallel Petroleum Corporation Common Stock	Common Stock	NGM	12(g)	0000750561	000-13305
PMTC	Parametric Technology Corporation Common Stock	Common Stock	NGS	12(g)	0000857005	000-18059
PRXL	PAREXEL International Corporation Common Stock	Common Stock	NGS	12(g)	0000799729	000-27058
PFED	Park Bancorp, Inc. Common Stock	Common Stock	NGM	12(g)	0001013554	000-20867
PKBK	Parke Bancorp, Inc. Common Stock	Common Stock	NCM	12(g)	0001315399	000-51338
PRKR	ParkerVision, Inc. Common Stock	Common Stock	NGM	12(g)	0000914139	000-22904
PKOH	Park-Ohio Holdings Corp. Common Stock	Common Stock	NGM	12(g)	0000076282	000-03134
PVSA	Parkvale Financial Corporation Common Stock	Common Stock	NGS	12(g)	0000820907	000-17411
PARL	Parlux Fragrances, Inc. Common Stock	Common Stock	NGS	12(g)	0000802356	000-15491
PDRT	Particle Drilling Technologies, Inc. Common Stock	Common Stock	NCM	12(g)	0000759153	000-30819
PTNR	Partner Communications Company Ltd. American Depository Shares	American Depository Shares	NGS	12(g)	0001096691	001-14968
PRTR	Partners Trust Financial Group, Inc. Common Stock	Common Stock	NGS	12(g)	0001163345	001-31277
PBHC	Pathfinder Bancorp, Inc. Common Stock	Common Stock	NCM	12(g)	0001046188	000-23601
PTMK	Pathmark Stores, Inc. Common Stock	Common Stock	NGM	12(g)	0000995585	001-05287
PTMKW	Pathmark Stores, Inc. Warrant	Warrant	NGM	12(g)	0000995585	001-05287
PATK	Patrick Industries, Inc. Common Stock	Common Stock	NGM	12(g)	0000076605	000-03922
PCAP	Patriot Capital Funding, Inc. Common Stock	Common Stock	NGS	12(g)	0001321560	000-51459
PNBK	Patriot National Bancorp Inc. Common Stock	Common Stock	NCM	12(g)	0001098146	000-29599
PATR	Patriot Transportation Holding, Inc. Common Stock	Common Stock	NGM	12(g)	0000844059	000-17554
PDCO	Patterson Companies, Inc. Common Stock	Common Stock	NGS	12(g)	0000891024	000-20572
PTEN	Patterson-UTI Energy, Inc. Common Stock	Common Stock	NGS	12(g)	0000889900	000-22664
PFCO	PAULA Financial Common Stock	Common Stock	NCM	12(g)	0000929031	000-23181
PLCC	Paulson Capital Corp. Common Stock	Common Stock	NCM	12(g)	0000704159	000-18188
PAYX	Paychex, Inc. Common Stock	Common Stock	NGS	12(g)	0000723531	000-11330
POCC	PC Connection, Inc. Common Stock	Common Stock	NGM	12(g)	0001050377	000-23827
MALL	PC Mall, Inc. Common Stock	Common Stock	NGM	12(g)	0000937941	000-25790

Issue Symbol	Issue Name	Issue Type	Issue Market Segment	Registration Type	CIK	SEC File #
PCTI	PC-Tel, Inc. Common Stock	Common Stock	NGM	12(g)	0001057083	000-271115
PDFS	PDF Solutions, Inc. Common Stock	Common Stock	NGM	12(g)	0001120914	000-31311
PDII	PDI, Inc. Common Stock	Common Stock	NGM	12(g)	0001054102	000-24249
PDLI	PDL BioPharma, Inc. Common Stock	Common Stock	NGS	12(g)	0000882104	000-19756
PEAK	Peak International Limited Common Stock	Common Stock	NGM	12(g)	0001036081	000-29332
PIII	PECO II, Inc. Common Stock	Common Stock	NCM	12(g)	0000845072	000-31283
PSAI	Pediatric Services of America, Inc. Common Stock	Common Stock	NGM	12(g)	0000893430	000-23946
PMFG	Peerless Manufacturing Company Common Stock	Common Stock	NGM	12(g)	0000076954	000-05214
PRLS	Peerless Systems Corporation Common Stock	Common Stock	NCM	12(g)	0000897893	000-21287
PEET	Peet's Coffee & Tea, Inc. Common Stock	Common Stock	NGS	12(g)	0000917968	000-32233
PGWC	Pegasus Wireless Corp. (NV) Common Stock	Common Stock	NGM	12(g)	0001126752	000-32567
PEGA	Pegasystems Inc. Common Stock	Common Stock	NGS	12(g)	0001013857	001-11859
PAGI	Pemco Aviation Group, Inc. Common Stock	Common Stock	NGM	12(g)	0000771729	000-13829
PMTR	Pemstar Inc. Common Stock	Common Stock	NGM	12(g)	0000924829	000-31223
PENX	Penford Corporation Common Stock	Common Stock	NGM	12(g)	0000739608	000-11488
PENN	Penn National Gaming, Inc. Common Stock	Common Stock	NGS	12(g)	0000921738	000-24206
PFSB	PennFed Financial Services, Inc. Common Stock	Common Stock	NGM	12(g)	0000920945	000-24040
PNNW	Pennichuck Corporation Common Stock	Common Stock	NGM	12(g)	0000788885	000-18552
PWOD	Penns Woods Bancorp, Inc. Common Stock	Common Stock	NGM	12(g)	0000716605	000-17077
COBH	Pennsylvania Commerce Bancorp, Inc. Common Stock	Common Stock	NGS	12(g)	0001085706	000-50961
PNSN	Penson Worldwide, Inc. Common Stock	Common Stock	NGM	12(g)	0001123541	000-32095
PPCO	Penwest Pharmaceuticals Co. Common Stock	Common Stock	NGM	12(g)	0001047188	000-23467
PFDC	Peoples Bancorp Common Stock	Common Stock	NGM	12(g)	0000869004	000-18991
PEBO	Peoples Bancorp Inc. Common Stock	Common Stock	NGS	12(g)	0000318300	000-16772
PEBK	Peoples Bancorp of North Carolina, Inc. Common Stock	Common Stock	NGM	12(g)	0001093672	000-27205
PBTC	Peoples Banc Trust Company, Inc. (The) Common Stock	Common Stock	NCM	12(g)	0000762128	000-13653
PCBI	Peoples Community Bancorp, Inc. Common Stock	Common Stock	NGM	12(g)	0001100983	000-29949
PEDH	Peoples Educational Holdings, Inc. Common Stock	Common Stock	NCM	12(g)	0000729156	000-50916
PFBX	Peoples Financial Corporation Common Stock	Common Stock	NCM	12(g)	0000770460	000-30050
PSPT	PeopleSupport, Inc. Common Stock	Common Stock	NGM	12(g)	0001289001	000-50843
PRCP	Perceptron, Inc. Common Stock	Common Stock	NGM	12(g)	0000887226	000-20206
PPHM	Peregrine Pharmaceuticals Inc. Common Stock	Common Stock	NCM	12(g)	0000704562	000-17085
PRFT	Perficient, Inc. Common Stock	Common Stock	NGS	12(g)	0001085869	000-51167
PFGC	Performance Food Group Company Common Stock	Common Stock	NGS	12(g)	0000908254	000-22192

Issue Symbol	Issue Name	Issue Type	Issue Market Segment	Registration Type	CIK	SEC File #
PTIX	Performance Technologies, Incorporated Common Stock	Common Stock	NGM	12(g)	0001003950	000-27460
PSEM	Pericom Semiconductor Corporation Common Stock	Common Stock	NGM	12(g)	0001001426	000-27028
PRGO	Perrigo Company Common Stock	Common Stock	NGS	12(g)	0000820096	000-19725
PERY	Perry Ellis International Inc. Common Stock	Common Stock	NGS	12(g)	0000900349	000-21764
PSTI	Per-Se Technologies, Inc. Common Stock	Common Stock	NGS	12(g)	0000878556	000-19480
PVSW	Pervasive Software Inc. Common Stock	Common Stock	NGM	12(g)	0001042821	000-23043
PETC	PETCO Animal Supplies, Inc. Common Stock	Common Stock	NGS	12(g)	0000888455	000-23574
PETS	PetMed Express, Inc. Common Stock	Common Stock	NGS	12(g)	0001040130	000-28827
HAWK	Petrohawk Energy Corporation Common Stock	Common Stock	NGS	12(g)	0001059324	000-25717
PETD	Petroleum Development Corporation Common Stock	Common Stock	NGS	12(g)	000077877	000-07246
PETM	PETSMART, Inc. Common Stock	Common Stock	NGS	12(g)	0000863157	000-21888
PFSW	PFSweb, Inc. Common Stock	Common Stock	NCM	12(g)	0001095315	000-28275
PGTI	PGT, Inc. Common Stock	Common Stock	NGM	12(g)	0001354327	000-52059
PPDI	Pharmaceutical Product Development, Inc. Common Stock	Common Stock	NGS	12(g)	0001003124	000-27570
PCOP	Pharmacopeia Drug Discovery, Inc. Common Stock	Common Stock	NGM	12(g)	0001273013	000-50523
PCYC	Pharmacyclics, Inc. Common Stock	Common Stock	NGM	12(g)	0000949699	000-27066
PXSL	Pharmaxis Limited ADR	American Depositary Shares	NGM	12(g)	0001301357	000-51505
PHRM	Pharmion Corporation Common Stock	Common Stock	NGM	12(g)	0001203866	000-50447
PARS	Pharmos Corporation Common Stock	Common Stock	NCM	12(g)	0000713275	000-11550
PFWD	Phase Forward Incorporated Common Stock	Common Stock	NGM	12(g)	0001050180	000-50839
ANTP	PHAZAR CORP Common Stock	Common Stock	NCM	12(g)	0000724267	000-12866
PHII	PHI, Inc. Common Stock	Common Stock	NGM	12(g)	0000350403	000-09827
PHIIK	PHI, Inc. Non-Voting Common Stock	Common Stock	NGM	12(g)	0000350403	000-09827
PHLY	Philadelphia Consolidated Holding Corp. Common Stock	Common Stock	NGS	12(g)	0000909109	000-22280
PTEC	Phoenix Technologies Ltd. Common Stock	Common Stock	NGM	12(g)	0000832767	000-17111
PHMD	PhotoMedex, Inc. Common Stock	Common Stock	NGM	12(g)	0000711665	000-11635
PHTN	Photon Dynamics, Inc. Common Stock	Common Stock	NGM	12(g)	0001002663	000-27234
PLAB	Photonics, Inc. Common Stock	Common Stock	NGS	12(g)	0000810136	000-15451
PICO	PICO Holdings Inc. Common Stock	Common Stock	NGM	12(g)	0000830122	000-18786
PNCL	Pinnacle Airlines Corp. Common Stock	Common Stock	NGM	12(g)	0001166291	001-31898
PNFP	Pinnacle Financial Partners, Inc. Common Stock	Common Stock	NGS	12(g)	0001115055	000-31225
PONR	Pioneer Companies, Inc. Common Stock	Common Stock	NGM	12(g)	0000830141	000-31230

Issue Symbol	Issue Name	Issue Type	Issue Market Segment	Registration Type	CIK	SEC File #
PXPL	Pixelpus Co., Ltd. American Depository Shares Representing 0.5 Common Shares	American Depository Shares	NGM	12(g)	0001331588	000-51643
PXLW	Pixelworks, Inc. Common Stock	Common Stock	NGM	12(g)	0001040161	000-30269
PZZI	Pizza Inn, Inc. Common Stock	Common Stock	NCM	12(g)	0000718332	000-12919
PLSB	Placer Sierra Bancshares Common Stock	Common Stock	NGS	12(g)	0001279410	000-50662
PLNR	Planar Systems, Inc. Common Stock	Common Stock	NGM	12(g)	0000722392	000-23018
LGBT	PlanetOut, Inc. Common Stock	Common Stock	NGM	12(g)	0001287258	000-50879
TUTR	PLATO Learning Inc. Common Stock	Common Stock	NGM	12(g)	0000893965	000-20842
PLXS	Plexus Corp. Common Stock	Common Stock	NGS	12(g)	0000785786	000-14824
PLUG	Plug Power, Inc. Common Stock	Common Stock	NGM	12(g)	0001093691	000-27527
PLBC	Plumas Bancorp (Quincy, CA) Common Stock	Common Stock	NCM	12(g)	0001168455	000-49883
PLXT	PLX Technology, Inc. Common Stock	Common Stock	NGM	12(g)	0000850579	000-25699
PMACA	PMA Capital Corporation Class A Common Stock	Common Stock	NGM	12(g)	0001041665	000-22761
PMCS	PMC - Sierra, Inc. Common Stock	Common Stock	NGS	12(g)	0000767920	000-19084
PFSL	Pocahontas Bancorp, Inc. Common Stock	Common Stock	NGM	12(g)	0001051859	000-23969
POTP	Point Therapeutics Inc Common Stock	Common Stock	NCM	12(g)	0000919745	000-19410
PTSX	Point.360 Common Stock	Common Stock	NGM	12(g)	0001014733	000-21917
PNTR	Pointer Telocation Ltd. Ordinary Shares (Israel)	Ordinary Shares	NCM	12(g)	0000920532	001-13138
PTEK	PokerTek, Inc. Common Stock	Common Stock	NGM	12(g)	0001302177	000-51572
PLCM	Polycom, Inc. Common Stock	Common Stock	NGS	12(g)	0001010552	000-27978
PLMD	PolyMedica Corporation Common Stock	Common Stock	NGS	12(g)	0000878748	000-19842
PMRY	Pomeroy IT Solutions, Inc. Common Stock	Common Stock	NGM	12(g)	0000883979	000-20022
PARD	Poniard Pharmaceuticals, Inc. Common Stock	Common Stock	NCM	12(g)	0000755806	000-16614
POOL	Pool Corporation Common Stock	Common Stock	NGS	12(g)	0000945841	000-26640
POPEZ	Pope Resources Depository Receipts of Limited Partnership Units	Depository Receipt	NGM	12(g)	0000784011	001-09035
BPOP	Popular, Inc. 6.70% Cumulative Monthly Income Trust Preferred Securities	Other Securities	NGS	12(g)	0000763901	000-13818
BPOP	Popular, Inc. Common Stock	Common Stock	NGS	12(g)	0000763901	000-13818
BPOPO	Popular, Inc. Noncumulative Monthly Income Preferred Stock 2003 Series A	Preferred Stock	NGS	12(g)	0000763901	000-13818
BPOPM	Popular, Inc. Popular Capital Trust II - 6.125% Cumulative Monthly Income Trust Preferred Securities	Other Securities	NGS	12(g)	0000763901	000-13818
PLAY	PortalPlayer, Inc. Common Stock	Common Stock	NGS	12(g)	0001297633	000-51004

Issue Symbol	Issue Name	Issue Type	Issue Market Segment	Registration Type	CIK	SEC File #
PRPX	Portec Rail Products, Inc. Common Stock	Common Stock	NGM	12(g)	0001263074	000-50543
PRAA	Portfolio Recovery Associates, Inc. Common Stock	Common Stock	NGS	12(g)	0001185348	000-50058
POSS	Possis Medical, Inc. Common Stock	Common Stock	NGS	12(g)	0000079677	000-944
POWL	Powell Industries, Inc. Common Stock	Common Stock	NGM	12(g)	0000080420	001-12488
POWI	Power Integrations, Inc. Common Stock	Common Stock	NGM	12(g)	0000833640	000-23441
PDSN	PowerDsine Ltd. Ordinary Shares	Ordinary Shares	NGM	12(g)	0001275816	000-50787
PWER	Power-One, Inc. Common Stock	Common Stock	NGM	12(g)	0001042825	000-29454
PWAV	Powerwave Technologies, Inc. Common Stock	Common Stock	NGS	12(g)	0001023362	000-21507
POZN	Pozen, Inc. Common Stock	Common Stock	NGM	12(g)	0001059790	000-31719
PRAI	PRA International Common Stock	Common Stock	NGS	12(g)	0001293243	000-51029
PRCS	PRAECIS PHARMACEUTICALS INCORPORATED Common Stock	Common Stock	NGM	12(g)	0001033025	000-30289
PRAN	Prana Biotechnology Ltd American Depository Shares	American Depository Shares	NCM	12(g)	0001131343	000-49843
PLPC	Preformed Line Products Company Common Stock	Common Stock	NGM	12(g)	0000800035	000-31164
PREM	Premier Community Bankshares Inc Common Stock	Common Stock	NCM	12(g)	0000854399	000-18868
PRXI	Premier Exhibitions, Inc. Common Stock	Common Stock	NCM	12(g)	0000796764	000-24452
PFB1	Premier Financial Bancorp, Inc. Common Stock	Common Stock	NGM	12(g)	0000887919	000-20908
PFBIP	Premier Financial Bancorp, Inc. PFBI Capital Trust - 9.75% Preferred Securities	Other Securities	NGM	12(g)	0000887919	000-20908
PRWT	PremierWest Bancorp Common Stock	Common Stock	NCM	12(g)	0001102287	000-50332
PORK	Premium Standard Farms, Inc. Common Stock	Common Stock	NGS	12(g)	0001143967	000-51347
PLFE	Presidential Life Corporation Common Stock	Common Stock	NGS	12(g)	0000080124	000-05486
PRST	Presstek, Inc. Common Stock	Common Stock	NGS	12(g)	0000846876	000-17541
PBIO	Pressure BioSciences, Inc. Common Stock	Common Stock	NCM	12(g)	0000830656	000-21615
PRGX	PRG-Schultz International Inc. Common Stock	Common Stock	NGM	12(g)	0001007330	000-28000
PCLN	priceline.com Incorporated Common Stock	Common Stock	NGS	12(g)	0001075531	000-25581
PSMT	PriceSmart, Inc. Common Stock	Common Stock	NGM	12(g)	0001041803	000-22793
PNRG	PrimeEnergy Corporation Common Stock	Common Stock	NCM	12(g)	0000056868	000-07406
PNBC	Princeton National Bancorp, Inc. Common Stock	Common Stock	NGM	12(g)	0000707855	000-20050
REVV	Princeton Review, Inc. (The) Common Stock	Common Stock	NGM	12(g)	0001113668	000-32469
PTNX	Printronic, Inc. Common Stock	Common Stock	NGM	12(g)	0000311505	000-09321
PRVT	Private Media Group, Inc. Common Stock	Common Stock	NGM	12(g)	0001068084	000-25067
PVTB	PrivateBancorp, Inc. Common Stock	Common Stock	NGS	12(g)	0000889936	000-25887

Issue Symbol	Issue Name	Issue Type	Issue Market Segment	Registration Type	CIK	SEC File #
PROS	ProCentury Corporation Common Stock	Common Stock	NGM	12(g)	0001273397	000-50641
PDEX	Pro-Dex, Inc. Common Stock	Common Stock	NCM	12(g)	0000788920	000-14942
PFACP	Pro-Fac Cooperative, Inc. Class A Cumulative Preferred Stock	Preferred Stock	NCM	12(g)	0000202932	000-20539
PGLAF	Progen Industries Limited Ordinary Shares	Ordinary Shares	NCM	12(g)	0000943502	000-29228
PGNX	Progenics Pharmaceuticals Inc. Common Stock	Common Stock	NGM	12(g)	0000835887	000-23143
PROG	Programmer's Paradise, Inc. Common Stock	Common Stock	NCM	12(g)	0000945983	000-26408
PRGS	Progress Software Corporation Common Stock	Common Stock	NGS	12(g)	0000876167	000-19417
PGIC	Progressive Gaming International Corporation Common Stock	Common Stock	NGM	12(g)	0000912241	000-22752
PSEC	Prospect Energy Corporation Common Stock	Common Stock	NGM	12(g)	0001287032	000-50691
PRSP	Prosperity Bancshares, Inc. Common Stock	Common Stock	NGS	12(g)	0001068851	000-25051
PTIL	Protherics plc American Depository Shares	American Depository Shares	NGM	12(g)	0000945725	000-51463
PBKS	Provident Bankshares Corporation Common Stock	Common Stock	NGS	12(g)	0000818969	000-16421
PCBS	Provident Community Bancshares, Inc. Common Stock	Common Stock	NGM	12(g)	0000926164	001-5735
PROV	Provident Financial Holdings, Inc. Common Stock	Common Stock	NGS	12(g)	0001010470	000-28304
PBNY	Provident New York Bancorp Common Stock	Common Stock	NGS	12(g)	0001070154	000-25233
PILL	ProxyMed, Inc. Common Stock	Common Stock	NGM	12(g)	0000906337	000-22052
PBIP	Prudential Bancorp, Inc. of Pennsylvania Common Stock	Common Stock	NGM	12(g)	0001302324	000-51214
PSBI	PSB Bancorp, Inc. Common Stock	Common Stock	NGM	12(g)	0001047537	000-24601
PSBH	PSB Holdings, Inc. Common Stock	Common Stock	NGM	12(g)	0001293211	000-50970
PSIT	PSI Technologies Holdings, Inc. American Depository Shares	American Depository Shares	NCM	12(g)	0001106714	000-30582
PSDV	pSivida Limited American Depository Shares	American Depository Shares	NGM	12(g)	0001314102	000-51122
PSSI	PSS World Medical Inc. Common Stock	Common Stock	NGS	12(g)	0000920527	000-23832
PSYS	Psychiatric Solutions, Inc. Common Stock	Common Stock	NGS	12(g)	0000829608	000-20488
PULB	Pulaski Financial Corporation Common Stock	Common Stock	NGS	12(g)	0001062438	000-24571
PCYO	Pure Cycle Corporation Common Stock	Common Stock	NCM	12(g)	0000276720	000-08814
PVFC	PVF Capital Corp. Common Stock	Common Stock	NCM	12(g)	0000928592	000-24948
PWEI	PW Eagle Inc. Common Stock	Common Stock	NGM	12(g)	0000852426	000-18050
PMID	Pyramid Breweries, Inc. Common Stock	Common Stock	NGM	12(g)	0001001917	000-27116
QEPC	Q.E.P. Co., Inc. Common Stock	Common Stock	NGM	12(g)	0001017815	000-21161
QADI	QAD Inc. Common Stock	Common Stock	NGS	12(g)	0001036188	000-22823
QCCO	QC Holdings, Inc. Common Stock	Common Stock	NGM	12(g)	0001289505	000-50840
QCRH	QCR Holdings, Inc. Common Stock	Common Stock	NCM	12(g)	0000906465	000-22208

Issue Symbol	Issue Name	Issue Type	Issue Market Segment	Registration Type	CIK	SEC File #
QGEN	Qiagen N.V. Ordinary Shares	Ordinary Shares	NGS	12(g)	0001015820	000-28564
XING	Qiao Xing Universal Telephone, Inc. Common Stock	Common Stock	NGM	12(g)	0001051846	000-29946
QLGC	QLogic Corporation Common Stock	Common Stock	NGS	12(g)	0000918386	000-23298
QLTI	QLT Inc. Common Shares	Common Stock	NGS	12(g)	0000827809	000-17082
QMED	QMed Inc. Common Stock	Common Stock	NCM	12(g)	0000729213	000-11411
QSNID	QSound Labs, Inc. Common Shares	Common Stock	NCM	12(g)	0000840518	000-17212
QFAB	Quaker Fabric Corporation Common Stock	Common Stock	NGM	12(g)	0000103341	000-22199
QCOM	QUALCOMM Incorporated Common Stock	Common Stock	NGS	12(g)	0000804328	000-19528
QLTY	Quality Distribution, Inc. Common Stock	Common Stock	NGM	12(g)	0000922863	000-24180
QSII	Quality Systems, Inc. Common Stock	Common Stock	NGS	12(g)	0000708818	000-13801
QBAK	Qualstar Corporation Common Stock	Common Stock	NGM	12(g)	0000758938	000-30083
QNTAP	Quanta Capital Holdings Ltd. Series A Preferred Shares	Preferred Stock	NGM	12(g)	0001264242	001-32138
QTTWW	Quantum Fuel Systems Technologies Worldwide, Inc. COMMON STOCK	Common Stock	NGM	12(g)	0001166380	000-49629
QRCP	Quest Resource Corporation Common Stock	Common Stock	NGM	12(g)	0000775351	000-17371
QSFT	Quest Software, Inc. Common Stock	Common Stock	NGS	12(g)	0001088033	000-26937
QUIK	QuickLogic Corporation Common Stock	Common Stock	NGM	12(g)	0000882508	000-22671
QDEL	Quidel Corporation Common Stock	Common Stock	NGM	12(g)	0000353569	000-10961
QGLY	Quigley Corporation (The) Common Stock	Common Stock	NGM	12(g)	0000868278	000-21617
QMAR	Quintana Maritime Limited Common Stock	Common Stock	NGM	12(g)	0001325098	000-51412
QUIP	Quipp, Inc. Common Stock	Common Stock	NGM	12(g)	0000796577	000-14870
QUIX	Quixote Corporation Common Stock	Common Stock	NGM	12(g)	0000032870	000-7903
QVDX	Quovadx Inc. Common Stock	Common Stock	NGM	12(g)	0001094561	000-29273
RACK	Rackable Systems, Inc. Common Stock	Common Stock	NGS	12(g)	0001316625	000-51333
RADI	Rada Electronics Industries Limited Ordinary Shares	Ordinary Shares	NCM	12(g)	0000761238	000-15375
RDCM	Radcom Ltd. Ordinary Shares	Ordinary Shares	NGM	12(g)	0001016838	000-29452
RADS	Radiant Systems, Inc. Common Stock	Common Stock	NGM	12(g)	0000845818	000-22065
RTSX	Radiation Therapy Services, Inc. Common Stock, par value \$0.0001 per share	Common Stock	NGS	12(g)	0001056904	000-50802
RADA	Radica Games Limited Common Stock	Common Stock	NGM	12(g)	0000919642	000-23696
ROIA	Radio One, Inc. Class A Common Stock	Common Stock	NGM	12(g)	0001041657	000-25969
ROIAK	Radio One, Inc. Class D Common Stock	Common Stock	NGM	12(g)	0001041657	000-25969
RSYS	RadiSys Corporation Common Stock	Common Stock	NGS	12(g)	0000873044	000-26844
RVSN	RADVision Ltd. Ordinary Shares	Ordinary Shares	NGS	12(g)	0001105519	000-29871

Issue Symbol	Issue Name	Issue Type	Issue Market Segment	Registration Type	CIK	SEC File #
RDWR	Radware Ltd. Ordinary Shares	Ordinary Shares	NGS	12(g)	0001094366	000-30324
RADN	Radyne Corporation Common Stock	Common Stock	NGS	12(g)	0000718573	000-11685
RPFQ	Rainier Pacific Financial Group, Inc. Common Stock	Common Stock	NGM	12(g)	0001243800	000-50362
RDTA	Raining Data Corporation Common Stock	Common Stock	NCM	12(g)	0000820738	000-16449
RMKR	Rainmaker Systems, Inc. Common Stock	Common Stock	NCM	12(g)	0001094007	000-28009
RAM	RAM Energy Resources, Inc. Common Stock	Common Stock	NCM	12(g)	0001282648	000-50682
RAMEU	RAM Energy Resources, Inc. Units	Unit	NCM	12(g)	0001282648	000-50682
RAMW	RAM Energy Resources, Inc. Warrant 5/11/2008	Warrant	NCM	12(g)	0001282648	000-50682
RAMR	RAM Holdings Ltd. Common Shares	Common Stock	NGM	12(g)	0001352713	001-32864
RMBS	Rambus, Inc. Common Stock	Common Stock	NGS	12(g)	0000917273	000-22339
RMTR	Ramtron International Corporation Common Stock	Common Stock	NGM	12(g)	0000849502	000-17739
RAND	Rand Capital Corporation Common Stock (\$0.10 Par Value)	Common Stock	NCM	12(g)	0000081955	811-01825
GOLD	Randgold Resources Limited American Depository Shares	American Depository Shares	NGS	12(g)	0001175580	000-49888
RARE	RARE Hospitality International Inc. Common Stock	Common Stock	NGS	12(g)	0000883976	000-19924
RAVN	Raven Industries, Inc. Common Stock	Common Stock	NGS	12(g)	0000082166	000-3136
ROLL	RBC Bearings Incorporated Common Stock	Common Stock	NGM	12(g)	0001324948	000-51486
RCRC	RC2 Corporation Common Stock	Common Stock	NGS	12(g)	0001034239	000-22635
RCMT	RCM Technologies, Inc. Common Stock	Common Stock	NGM	12(g)	0000700841	001-10245
RCNI	RCN Corporation Common Stock New	Common Stock	NGS	12(g)	0001041858	000-22825
RNWK	RealNetworks, Inc. Common Stock	Common Stock	NGS	12(g)	0001046327	000-23137
RHAT	Red Hat, Inc. Common Stock	Common Stock	NGS	12(g)	0001087423	000-26281
RRGB	Red Robin Gourmet Burgers, Inc. Common Stock	Common Stock	NGS	12(g)	0001171759	000-49916
RBAK	Redback Networks Inc. Common Stock	Common Stock	NGS	12(g)	0001081290	000-25853
REDE	RedEnvelope, Inc. Common Stock	Common Stock	NGM	12(g)	0001236038	000-50387
HOOK	Redhook Ale Brewery, Incorporated Common Stock	Common Stock	NGM	12(g)	0000892222	000-26542
REDF	Rediff.com India Limited American Depository Shares	American Depository Shares	NCM	12(g)	0001103783	000-30735
RGNC	Regency Energy Partners LP Common Units Representing Limited Partner Interests	Limited Partnership	NGM	12(g)	0001338613	000-51757
RTIX	Regeneration Technologies, Inc. Common Stock	Common Stock	NGM	12(g)	0001100441	000-31271
REGN	Regeneron Pharmaceuticals, Inc. Common Stock	Common Stock	NGM	12(g)	0000872589	000-19034
RGCI	Regent Communications, Inc. Common Stock	Common Stock	NGM	12(g)	0000913015	000-15392
RNHDA	Reinhold Industries, Inc. Class A Common Stock	Common Stock	NCM	12(g)	0000862255	000-18434
RELV	Reliv International, Inc. Common Stock	Common Stock	NGS	12(g)	0000768710	001-11768

Issue Symbol	Issue Name	Issue Type	Issue Market Segment	Registration Type	CIK	SEC File #
RLRN	Renaissance Learning, Inc. Common Stock	Common Stock	NGS	12(g)	0001030484	000-22187
RNST	Renasant Corporation Common Stock	Common Stock	NGS	12(g)	0000715072	000-12154
RNVS	Renovis, Inc. Common Stock	Common Stock	NGM	12(g)	0001118361	000-50584
RCII	Rent-A-Center Inc. Common Stock	Common Stock	NGS	12(g)	0000933036	000-25370
RENT	Rentrak Corporation Common Stock	Common Stock	NGM	12(g)	0000800458	000-15159
RDYN	Replidyne, Inc. Common Stock	Common Stock	NGM	12(g)	0001180145	000-52082
RGEN	Repligen Corporation Common Stock	Common Stock	NGM	12(g)	0000730272	000-14656
RPFX	Repros Therapeutics Inc. Common Stock	Common Stock	NCM	12(g)	0000897075	000-21198
RJET	Republic Airways Holdings, Inc. Common stock	Common Stock	NGS	12(g)	0001159154	000-49697
RBNC	Republic Bancorp Inc. Capital Trust I - 8.60% Cumulative Trust Preferred Securities	Other Securities	NGS	12(g)	0000813808	000-15734
RBNC	Republic Bancorp Inc. Common Stock	Common Stock	NGS	12(g)	0000813808	000-15734
RBCAA	Republic Bancorp, Inc. Class A Common Stock	Common Stock	NGS	12(g)	0000921557	000-24649
RUTX	Republic Companies Group, Inc. Common Stock	Common Stock	NGM	12(g)	0001320092	000-51455
FRBK	Republic First Bancorp, Inc. Common Stock	Common Stock	NGS	12(g)	0000834285	000-17007
RSCR	Res-Care, Inc. Common Stock	Common Stock	NGS	12(g)	0000776325	000-20372
REFR	Research Frontiers Incorporated Common Stock	Common Stock	NCM	12(g)	0000793524	001-09399
RIMM	Research in Motion Limited Common Stock	Common Stock	NGS	12(g)	0001070235	000-29898
REXI	Resource America, Inc. Class A Common Stock	Common Stock	NGS	12(g)	0000083402	000-04408
RECN	Resources Connection, Inc. Common Stock	Common Stock	NGS	12(g)	0001084765	000-32113
RESP	Respironics, Inc. Common Stock	Common Stock	NGS	12(g)	0000780434	000-16723
RSTO	Restoration Hardware, Inc. Common Stock	Common Stock	NGM	12(g)	0000863821	000-24261
REST	Restore Medical, Inc. Common Stock	Common Stock	NGM	12(g)	0001350620	000-51998
RTLX	Retail Ltd. Ordinary Shares	Ordinary Shares	NGS	12(g)	0001064060	000-29742
RTRS	Reuters Group PLC American Depository Shares	American Depository Shares	NGS	12(g)	0001056084	000-26579
RFIL	RF Industries, Inc. Common Stock	Common Stock	NCM	12(g)	0000740664	000-13301
RFMD	RF Micro Devices, Inc. Common Stock	Common Stock	NGS	12(g)	0000911160	000-22511
RFMI	RF Monolithics, Inc. Common Stock	Common Stock	NGM	12(g)	0000922204	000-24414
RGCO	RGC Resources Inc. Common Stock	Common Stock	NGM	12(g)	0001069533	000-26591
RELL	Richardson Electronics, Ltd. Common Stock	Common Stock	NGM	12(g)	0000355948	000-12906
RICK	Rick's Cabaret International, Inc. Common Stock	Common Stock	NCM	12(g)	0000935419	000-26958
RIGL	Rigel Pharmaceuticals, Inc. Common Stock	Common Stock	NGM	12(g)	0001034842	000-29889
RINOW	RightNow Technologies, Inc. Common Stock	Common Stock	NGM	12(g)	0001111247	000-31321

Issue Symbol	Issue Name	Issue Type	Issue Market Segment	Registration Type	CIK	SEC File #
RIMG	Rimage Corporation Common Stock	Common Stock	NGS	12(g)	0000892482	000-20728
RVEP	Rio Vista Energy Partners L.P. Common Units representing limited partner interests	Limited Partnership	NGM	12(g)	0001260828	000-50394
RITT	RIT Technologies Ltd. Common Stock	Common Stock	NCM	12(g)	0001041844	000-29360
RITA	RITA Medical Systems, Inc. Common Stock	Common Stock	NGM	12(g)	0001056421	000-30959
RIVR	River Valley Bancorp. Common Stock	Common Stock	NCM	12(g)	0001015593	000-21765
RVSB	Riverview Bancorp Inc Common Stock	Common Stock	NGS	12(g)	0001041368	000-22957
ROCM	Rochester Medical Corporation Common Stock	Common Stock	NGM	12(g)	0000868368	000-18933
ROAC	Rock of Ages Corporation Class A Common Stock	Common Stock	NGM	12(g)	0000084581	000-29464
ROFO	Rockford Corporation Common Stock	Common Stock	NGM	12(g)	0000828064	000-30138
RCKB	Rockville Financial, Inc. Common Stock	Common Stock	NGS	12(g)	0001311131	000-51239
RMTI	Rockwell Medical Technologies, Inc. Common Stock	Common Stock	NCM	12(g)	0001041024	000-23661
RCKY	Rocky Brands, Inc. Common Stock	Common Stock	NGS	12(g)	0000895456	000-21026
RMCF	Rocky Mountain Chocolate Factory, Inc. Common Stock	Common Stock	NGM	12(g)	0000785815	000-14749
RSTI	Rofin-Sinar Technologies, Inc. Common Stock	Common Stock	NGS	12(g)	0001019361	000-21377
ROMA	Roma Financial Corporation Common Stock	Common Stock	NGS	12(g)	0001355823	000-52000
ROME	Rome Bancorp, Inc. Common Stock	Common Stock	NGM	12(g)	0001088144	000-27481
RONC	Ronson Corporation Common Stock	Common Stock	NCM	12(g)	0000084919	001-1031
ROSE	Rosetta Resources Inc. Common Stock	Common Stock	NGS	12(g)	0001340282	000-1340282
ROST	Ross Stores, Inc. Common Stock	Common Stock	NGS	12(g)	0000745732	000-14678
ROHI	Rotech Healthcare Inc Common Stock	Common Stock	NGM	12(g)	0001175108	000-50940
RBPA	Royal Bancshares of Pennsylvania, Inc. Class A Common Stock	Common Stock	NGM	12(g)	0000922487	000-26366
RGLD	Royal Gold, Inc. Common Stock	Common Stock	NGS	12(g)	0000085535	000-5664
ROYL	Royale Energy, Inc. Common Stock	Common Stock	NGM	12(g)	0000864839	000-22750
RSAS	RSA Security, Inc. Common Stock	Common Stock	NGS	12(g)	0000932064	000-25120
RTWI	RTW, Inc.	Common Stock	NGM	12(g)	0000915781	000-25508
RUBO	Rubio's Restaurants, Inc. Common Stock	Common Stock	NGM	12(g)	0001082423	000-26125
RTEC	Rudolph Technologies, Inc. Common Stock	Common Stock	NGS	12(g)	0001094392	000-27965
RCCC	Rural Cellular Corporation Class A Common Stock	Common Stock	NGM	12(g)	0000869561	000-27416
RURL	Rural/Metro Corporation Common Stock	Common Stock	NCM	12(g)	0000906326	000-22056
RBNF	Rurban Financial Corp Common Stock	Common Stock	NGM	12(g)	0000767405	000-13507
RUSHB	Rush Enterprises, Inc. Class B	Common Stock	NGS	12(g)	0001012019	000-20797
RUSHA	Rush Enterprises, Inc. COMMON STOCK CL A	Common Stock	NGS	12(g)	0001012019	000-20797

Issue Symbol	Issue Name	Issue Type	Issue Market Segment	Registration Type	CIK	SEC File #
RUTH	Ruth's Chris Steak House, Inc. Common Stock	Common Stock	NGS	12(g)	0001324272	000-51485
RYAAY	Ryanair Holdings plc American Depository Shares	American Depository Shares	NGS	12(g)	0001038683	000-29304
RYAN	Ryan's Restaurant Group, Inc. Common Stock	Common Stock	NGS	12(g)	0000355622	000-10943
STBA	S&T Bancorp, Inc. Common Stock	Common Stock	NGS	12(g)	0000719220	000-12508
SYBT	S.Y. Bancorp, Inc. Common Stock	Common Stock	NGS	12(g)	0000835324	000-17262
SONE	S1 Corporation Common Stock	Common Stock	NGM	12(g)	0001063254	000-24931
SABA	Saba Software, Inc. Common Stock	Common Stock	NGM	12(g)	0001070380	000-30221
SAFC	SAFECO Corporation Common Stock	Common Stock	NGS	12(g)	0000086104	001-06563
SFNT	SafeNet Inc Common Stock	Common Stock	NGS	12(g)	0000850313	000-20634
SAPT	Safety Insurance Group, Inc. Common Stock	Common Stock	NGS	12(g)	0001172052	000-50070
SFLK	SAFLINK Corporation Common Stock	Common Stock	NCM	12(g)	0000847555	000-20270
SAIA	Saia, Inc. Common Stock	Common Stock	NGS	12(g)	0001177702	000-49983
SFJN	Saifun Semiconductors Ltd. Ordinary Shares	Ordinary Shares	NGS	12(g)	0001297627	000-51581
SALM	Salem Communications Corporation Class A Common Stock	Common Stock	NGM	12(g)	0001050606	000-26497
SLXP	Salix Pharmaceuticals, Ltd. Common Stock	Common Stock	NGM	12(g)	0001009356	000-23265
SMHG	Sanders Morris Harris Group, Inc. Common Stock	Common Stock	NGM	12(g)	0001071341	000-30066
SAFM	Sanderson Farms, Inc. Common Stock	Common Stock	NGS	12(g)	0000812128	000-16567
SNDK	SanDisk Corporation Common Stock	Common Stock	NGS	12(g)	0001000180	000-26734
SNDS	Sands Regent (The) Common Stock	Common Stock	NCM	12(g)	0000753899	000-14050
SASR	Sandy Spring Bancorp, Inc. Common Stock	Common Stock	NGS	12(g)	0000824410	000-19065
SGMO	Sangamo BioSciences, Inc. Common Stock	Common Stock	NGM	12(g)	0001001233	000-30171
SANM	Sanmina-SCI Corporation Common Stock	Common Stock	NGS	12(g)	0000897723	000-21272
SNTS	Santarus, Inc. Common Stock	Common Stock	NGM	12(g)	0001172480	000-50651
SPNS	Sapiens International Corporation N.V. Common Shares	Common Stock	NCM	12(g)	0000885740	000-20181
SAPE	Sapient Corporation Common Stock	Common Stock	NGS	12(g)	0001008817	000-28074
SATC	SatCon Technology Corporation Common Stock	Common Stock	NGM	12(g)	0000889423	001-11512
SAVB	Savannah Bancorp, Inc. (The) Common Stock	Common Stock	NGM	12(g)	0000860519	000-18560
SVVS	SAVVIS, Inc. Common Stock	Common Stock	NCM	12(g)	0001058444	000-29375
SBAC	SBA Communications Corporation Common Stock	Common Stock	NGS	12(g)	0001034054	000-30110
SBEI	SBE, Inc. Common Stock	Common Stock	NCM	12(g)	0000087050	000-08419
SCIX	Scalix Corporation Ltd. Ordinary Shares	Ordinary Shares	NGM	12(g)	0000315816	000-12332
SCSC	ScanSource, Inc. Common Stock	Common Stock	NGS	12(g)	0000918965	000-26926
SCBT	SCBT Financial Corporation Common Stock	Common Stock	NGS	12(g)	0000764038	001-12669

Issue Symbol	Issue Name	Issue Type	Issue Market Segment	Registration Type	CIK	SEC File #
SMIT	Schmitt Industries, Inc. Common Stock	Common Stock	NCM	12(g)	0000922612	000-23996
SCHN	Schnitzer Steel Industries, Inc. Class A Common Stock	Common Stock	NGS	12(g)	0000912603	000-22496
SCHL	Scholastic Corporation Common Stock	Common Stock	NGS	12(g)	0000866729	000-19860
SCHS	School Specialty, Inc. Common Stock	Common Stock	NGS	12(g)	0001055454	000-24385
SCLN	SciClone Pharmaceuticals, Inc. Common Stock	Common Stock	NGM	12(g)	0000880771	000-19825
SCRX	Sciele Pharma, Inc. Common Stock	Common Stock	NGS	12(g)	0001106773	000-30123
SGMS	Scientific Games Corp Class A Common Stock	Common Stock	NGS	12(g)	0000750004	000-13063
SCIL	Scientific Learning Corporation Common Stock	Common Stock	NGM	12(g)	0001042173	000-24547
STIZ	Scientific Technologies, Incorporated Common Stock	Common Stock	NGM	12(g)	0000708250	000-12254
SCMM	SCM Microsystems, Inc. Common Stock	Common Stock	NGM	12(g)	0001036044	000-22689
SCOX	SCO Group, Inc. (The) Common Stock	Common Stock	NCM	12(g)	0001102542	000-29911
SCOP	Scopus Video Networks Ltd. Ordinary Shares	Ordinary Shares	NGM	12(g)	0001342575	000-51654
SEAB	SeaBright Insurance Holdings, Inc. Common Stock	Common Stock	NGS	12(g)	0001267201	000-51124
SEAC	SeaChange International, Inc. Common Stock	Common Stock	NGM	12(g)	0001019671	000-21393
SBCF	Seacoast Banking Corporation of Florida Common Stock	Common Stock	NGS	12(g)	0000730708	000-13660
SHLD	Sears Holdings Corporation Common Stock	Common Stock	NGS	12(g)	0001310067	000-51217
SGEN	Seattle Genetics, Inc. Common Stock	Common Stock	NGM	12(g)	0001060736	000-32405
SCUR	Secure Computing Corporation Common Stock	Common Stock	NGS	12(g)	0001001916	000-27074
SBKC	Security Bank Corporation Common Stock	Common Stock	NGS	12(g)	0000925464	000-23261
SNFCA	Security National Financial Corporation Class A Common Stock	Common Stock	NGM	12(g)	0000318673	000-09341
SEIC	SEI Investments Company Common Stock	Common Stock	NGS	12(g)	0000350894	000-10200
SCSS	Select Comfort Corporation Common Stock	Common Stock	NGS	12(g)	0000827187	000-25121
SLTC	Selectica, Inc. Common Stock	Common Stock	NGM	12(g)	0001090908	000-29637
SIGI	Selective Insurance Group, Inc. Common Stock	Common Stock	NGS	12(g)	0000230557	000-08641
SMTL	Semtool, Inc. Common Stock	Common Stock	NGM	12(g)	0000934550	000-25424
SMTC	Semtech Corporation Common Stock	Common Stock	NGM	12(g)	0000088941	001-6395
SENEA	Seneca Foods Corp. Class A Common Stock	Common Stock	NGM	12(g)	0000088948	000-01989
SENEB	Seneca Foods Corp. Class B Common Stock	Common Stock	NGM	12(g)	0000088948	000-01989
SNMX	Senomyx, Inc. Common Stock	Common Stock	NGM	12(g)	0001123979	000-50791
SGHL	Sentigen Holding Corp. Common Stock	Common Stock	NCM	12(g)	0000864890	000-18700
SNTO	Sento Corporation Common Stock	Common Stock	NCM	12(g)	0000004317	000-06425
SEPR	Sepracor Inc. Common Stock	Common Stock	NGS	12(g)	0000877357	000-19410
SQNM	Sequenom, Inc. Common Stock	Common Stock	NGM	12(g)	0001076481	000-29101
SERV	Servidyne, Inc. Common Stock	Common Stock	NGM	12(g)	0000001923	000-10146

Issue Symbol	Issue Name	Issue Type	Issue Market Segment	Registration Type	CIK	SEC File #
SVBI	Severn Bancorp Inc (Md) Common Stock	Common Stock	NCM	12(g)	0000868271	000-49731
SFOC	SFBC International, Inc. Common Stock	Common Stock	NGS	12(g)	0001089542	000-31273
SGXP	SGX Pharmaceuticals, Inc. Common Stock	Common Stock	NGM	12(g)	0001125603	000-51745
SHMR	Shamir Optical Industry Ltd. Common Shares	Ordinary Shares	NGM	12(g)	0001317362	000-51183
SNDA	Shanda Interactive Entertainment Limited American Depository Shares	American Depository Shares	NGS	12(g)	0001278308	000-50705
SHRP	Sharper Image Corporation Common Stock	Common Stock	NGM	12(g)	0000811696	000-15827
SHEN	Shenandoah Telecommunications Co Common Stock	Common Stock	NGS	12(g)	0000354963	000-09881
SHLO	Shiloh Industries, Inc. Common Stock	Common Stock	NGM	12(g)	0000904979	000-21964
SHPGY	Shire plc American Depository Shares	American Depository Shares	NGS	12(g)	0000936402	000-29630
SCVL	Shoe Carnival, Inc. Common Stock	Common Stock	NGS	12(g)	0000895447	000-21360
SHOE	Shoe Pavilion, Inc Common Stock	Common Stock	NGM	12(g)	0001051009	000-23669
SHBI	Shore Bancshares Inc Common Stock	Common Stock	NCM	12(g)	0001035092	000-22345
SHBK	Shore Financial Corporation Common Stock	Common Stock	NGM	12(g)	0001045690	000-23847
SHFL	Shuffle Master, Inc. Common Stock	Common Stock	NGS	12(g)	0000718789	000-20820
SIFI	SI Financial Group, Inc. Common Stock	Common Stock	NGM	12(g)	0001292580	000-50801
SINT	SI International, Inc. common stock	Common Stock	NGS	12(g)	0001143363	000-50080
SIEB	Siebert Financial Corp. Common Stock	Common Stock	NGM	12(g)	0000065596	000-05703
BSRR	Sierra Bancorp Common Stock	Common Stock	NGS	12(g)	0001130144	000-33063
SWIR	Sierra Wireless, Inc. Common Stock	Common Stock	NGM	12(g)	000111863	000-30718
SIFY	Sify Limited American Depository Shares	American Depository Shares	NGM	12(g)	0001094324	000-27663
SIGA	SIGA Technologies Inc. Common Stock	Common Stock	NCM	12(g)	0001010086	000-23047
SIGM	Sigma Designs, Inc. Common Stock	Common Stock	NGM	12(g)	0000790715	000-15116
SIAL	Sigma-Aldrich Corporation Common Stock	Common Stock	NGS	12(g)	0000090185	000-08135
SGTL	Sigmatel, Inc. Common Stock	Common Stock	NGS	12(g)	0001043639	000-50391
SGMA	SigmaTron International, Inc. Common Stock	Common Stock	NCM	12(g)	0000915358	000-23248
SLGN	Silgan Holdings, Inc. Common Stock	Common Stock	NGS	12(g)	0000849869	000-22117
SILC	Silicom Ltd Ordinary Shares	Ordinary Shares	NCM	12(g)	0000916793	000-23288
SIMG	Silicon Image, Inc. Common Stock	Common Stock	NGS	12(g)	0001003214	000-26887
SLAB	Silicon Laboratories, Inc. Common Stock	Common Stock	NGS	12(g)	0001038074	000-29823
SIMO	Silicon Motion Technology Corporation American Depository Shares	American Depository Shares	NGM	12(g)	0001329394	000-51380
SSTI	Silicon Storage Technology, Inc. Common Stock	Common Stock	NGM	12(g)	0000855906	000-26944

Issue Symbol	Issue Name	Issue Type	Issue Market Segment	Registration Type	CIK	SEC File #
SPIL	Siliconware Precision Industries Company, Ltd. American Depository Shares	American Depository Shares	NGS	12(g)	0001111759	000-30702
SSRI	Silver Standard Resources, Inc Common Stock	Common Stock	NGM	12(g)	0000921638	000-26424
SSTR	Silverstar Holdings Ltd Common Shares	Common Stock	NCM	12(g)	0001003390	000-27494
SIMC	Simclar, Inc. Common Stock	Common Stock	NCM	12(g)	0000764039	000-14659
SFNC	Simmons First National Corporation Class A Common Stock	Common Stock	NGS	12(g)	0000090498	000-06253
STEC	SimpleTech Inc Common Stock	Common Stock	NGM	12(g)	0001102741	000-31623
SINA	sina.com Ordinary Shares	Ordinary Shares	NGS	12(g)	0001094005	000-30698
SBGI	Sinclair Broadcast Group, Inc. Class A Common Stock	Common Stock	NGS	12(g)	0000912752	000-26076
SMDI	Sirenza Microdevices, Inc. Common Stock	Common Stock	NGM	12(g)	0001103777	000-30615
SIRF	SIRF Technology Holdings, Inc. Common Stock	Common Stock	NGS	12(g)	0001163943	000-50669
SIRI	Sirius Satellite Radio Inc. Common Stock	Common Stock	NGS	12(g)	0000908937	000-24710
RNAI	Sirna Therapeutics, Inc. Common Stock	Common Stock	NGM	12(g)	0000892112	000-27914
SIRO	Sirona Dental Systems, Inc. Common Stock	Common Stock	NGS	12(g)	0001014507	000-22673
SKIL	SkillSoft plc American Depository Shares	American Depository Shares	NGM	12(g)	0000940181	000-25674
SECDP	Sky Financial Group, Inc. - Second Bancorp Capital Trust I - 9.00% Cumulative Trust Preferred Securities	Other Securities	NGS	12(g)	0000855876	000-18209
SKYF	Sky Financial Group, Inc. Common Stock	Common Stock	NGS	12(g)	0000855876	000-18209
SKYE	SkyePharma PLC American Depository Shares	American Depository Shares	NGM	12(g)	0001018117	000-29860
SKYW	SkyWest, Inc. Common Stock	Common Stock	NGS	12(g)	0000793733	000-14719
SWKS	Skyworks Solutions, Inc. Common Stock	Common Stock	NGS	12(g)	0000004127	001-5560
SFBC	Slade's Ferry Bancorp Common Stock	Common Stock	NCM	12(g)	0000857499	000-23904
WINS	SM&A Common Stock	Common Stock	NGM	12(g)	0001050031	000-23585
SMOD	SMART Modular Technologies, Inc. Ordinary Shares	Ordinary Shares	NGS	12(g)	0001326973	000-51771
SWHC	Smith & Wesson Holding Corp Common Stock	Common Stock	NGS	12(g)	0001092796	000-29015
SWRG	Smith & Wollensky Restaurant Group, Inc. (The) Common Stock	Common Stock	NGM	12(g)	0001137047	001-16505
SMSI	Smith Micro Software, Inc. Common Stock	Common Stock	NCM	12(g)	0000948708	000-26536
SMTB	Smittown Bancorp Inc Common Stock	Common Stock	NCM	12(g)	0000747345	000-13314
SMXC	Smithway Motor Xpress Corp. Class A Common Stock	Common Stock	NCM	12(g)	0000941914	000-20793
SMTX	SMTC Corporation Common Stock	Common Stock	NGM	12(g)	0001108320	000-31051
SSCCP	Smurfit-Stone Container Corporation 7% Series A Cumulative Exchangeable Redeemable Convertible Preferred Stock	Preferred Stock	NGS	12(g)	0000919226	000-23876

Issue Symbol	Issue Name	Issue Type	Issue Market Segment	Registration Type	CIK	SEC File #
SSCC	Smurfit-Stone Container Corporation Common Stock	Common Stock	NGS	12(g)	0000919226	000-23876
SCKT	Socket Communications, Inc. Common Stock	Common Stock	NGM	12(g)	0000944075	001-13810
SOHU	Sohu.com Inc. Common Stock	Common Stock	NGS	12(g)	0001104188	000-30961
SLXA	Solexa, Inc. Common Stock	Common Stock	NGM	12(g)	0000913275	000-22570
SMTS	Somanetics Corporation Common Stock	Common Stock	NGM	12(g)	0000704328	000-19095
SOMX	Somaxon Pharmaceuticals, Inc. Common Stock	Common Stock	NGM	12(g)	0001339455	000-51665
SMRA	Somera Communications, Inc. Common Stock	Common Stock	NGM	12(g)	0001094243	000-27843
SOMH	Somerset Hills Bancorp Common Stock	Common Stock	NCM	12(g)	0001189396	000-50055
SOMHW	Somerset Hills Bancorp warrants to purchase one share of common stock	Warrant	NCM	12(g)	0001189396	000-50055
SNSTA	Sonesta International Hotels Corporation Class A Common Stock	Common Stock	NGM	12(g)	0000091741	000-09032
SONC	Sonic Corp. Common Stock	Common Stock	NGS	12(g)	0000868611	000-18859
SOFO	Sonic Foundry, Inc. Common Stock	Common Stock	NGM	12(g)	0001029744	001-14007
SNCI	Sonic Innovations, Inc. Common Stock	Common Stock	NGM	12(g)	0001105982	000-30335
SNIC	Sonic Solutions Common Stock	Common Stock	NGS	12(g)	0000916235	000-23190
SNWL	SonicWALL, Inc. Common Stock	Common Stock	NGM	12(g)	0001093885	000-27723
SONO	SonoSite, Inc. Common Stock	Common Stock	NGM	12(g)	0001055355	000-23791
SONT	Sontra Medical Corporation Common Stock	Common Stock	NCM	12(g)	0001031927	000-23017
SONS	Sonus Networks, Inc. Common Stock	Common Stock	NGS	12(g)	0001105472	000-30229
SNIUS	SONUS Pharmaceuticals, Inc. Common Stock	Common Stock	NGM	12(g)	0000949858	000-26866
SORL	SORL Auto Parts, Inc. Common Stock	Common Stock	NCM	12(g)	0000714284	000-11991
TSFG	South Financial Group Inc. (The) Common Stock	Common Stock	NGS	12(g)	0000797871	000-15083
SSFC	South Street Financial Corporation Common Stock	Common Stock	NGM	12(g)	0001014964	000-21083
SOCB	Southcoast Financial Corporation Common Stock	Common Stock	NGM	12(g)	0001083689	000-25933
SCMF	Southern Community Financial Corporation Common Stock	Common Stock	NGS	12(g)	0001159427	000-33227
SCMFO	Southern Community Financial Corporation Southern Community Capital Trust II - % Cumulative Trust Preferred Securities	Other Securities	NGS	12(g)	0001159427	000-33227
SMBC	Southern Missouri Bancorp, Inc. Common Stock	Common Stock	NGM	12(g)	0000916907	000-23406
SBSI	Southside Bancshares, Inc. Common Stock	Common Stock	NGS	12(g)	0000705432	000-12247
OKSB	Southwest Bancorp, Inc. Common Stock	Common Stock	NGS	12(g)	0000914374	000-23064
SWWC	Southwest Water Company Common Stock	Common Stock	NGS	12(g)	0000092472	000-08176
SPAB	SPACEHAB, Incorporated Common Stock	Common Stock	NCM	12(g)	0001001907	000-27206
SPAN	Span-America Medical Systems, Inc. Common Stock	Common Stock	NGM	12(g)	0000718924	000-11392

Issue Symbol	Issue Name	Issue Type	Issue Market Segment	Registration Type	CIK	SEC File #
SBSA	Spanish Broadcasting System, Inc. Class A Common Stock	Common Stock	NGM	12(g)	0000927720	000-27823
SPSN	Spanion Inc. Class A Common Stock	Common Stock	NGS	12(g)	0001322705	000-51666
SGRP	SPAR Group, Inc. Common Stock	Common Stock	NCM	12(g)	0001004989	000-27824
SPAR	Spartan Motors, Inc. Common Stock	Common Stock	NGS	12(g)	0000743238	000-13611
SPTN	Spartan Stores, Inc. Common Stock	Common Stock	NGM	12(g)	0000877422	000-31127
HDTV	SpatialLight, Inc. Common Stock	Common Stock	NCM	12(g)	0000881468	000-19828
SUAI	Specialty Underwriters' Alliance, Inc. Common Stock	Common Stock	NGM	12(g)	0001297568	000-50891
SLNK	SpectraLink Corporation Common Stock	Common Stock	NGS	12(g)	0000894268	000-28180
SPNC	Spectranetics Corporation (The) Common Stock	Common Stock	NGM	12(g)	0000789132	000-19711
SPEC	Spectrum Control, Inc. Common Stock	Common Stock	NGM	12(g)	0000092769	000-08796
SPP1	Spectrum Pharmaceuticals, Inc. Common Stock	Common Stock	NGM	12(g)	0000831547	000-28782
SSP1	Spectrum Signal Processing Inc. Common Stock	Common Stock	NCM	12(g)	0000884455	000-19906
SPDE	Speedus Corp. Common Stock	Common Stock	NCM	12(g)	0001002520	000-27582
SPEX	Spherix Incorporated Common Stock	Common Stock	NGM	12(g)	0000012239	000-05576
SPIR	Spire Corporation Common Stock	Common Stock	NGM	12(g)	0000731657	000-12742
SPCHB	Sport Chalet, Inc. Class B Common Stock	Common Stock	NGM	12(g)	0000892907	000-20736
SPCHA	Sport Chalet, Inc. Common Stock Class A	Common Stock	NGM	12(g)	0000892907	000-20736
SPOR	Sport-Haley, Inc. Common Stock	Common Stock	NGM	12(g)	0000892653	001-12888
SGDE	Sportsman's Guide, Inc. (The) Common Stock	Common Stock	NGS	12(g)	0000791450	000-15767
SPSS	SPSS Inc. Common Stock	Common Stock	NGS	12(g)	0000869570	000-22194
STRC	SRI/Surgical Express, Inc. Common Stock	Common Stock	NGM	12(g)	0001014041	000-20997
SRSL	SRS Labs, Inc. Common Stock	Common Stock	NGM	12(g)	0001016470	000-21123
SJOE	St Joseph Capital Corp Common Stock	Common Stock	NCM	12(g)	0001015856	000-50219
STAA	STAAR Surgical Company Common Stock	Common Stock	NGM	12(g)	0000718937	000-11634
STGSW	STAGE STORES INC NEW Stage Stores Inc Warrants A	Warrant	NGM	12(g)	0000006885	000-21011
STGSZ	STAGE STORES INC NEW Stage Stores Inc Warrants B	Warrant	NGM	12(g)	0000006885	000-21011
STAK	Staktek Holdings, Inc. Common Stock	Common Stock	NGM	12(g)	0000866830	000-50553
STMP	Stamps.com Inc. Common Stock (\$0.001 Par Value)	Common Stock	NGM	12(g)	0001082923	000-26427
SMSC	Standard Microsystems Corporation Common Stock	Common Stock	NGS	12(g)	0000093384	000-07422
STAN	Standard Parking Corporation common stock	Common Stock	NGM	12(g)	0001059262	000-50796
STLY	Stanley Furniture Company, Inc. Common Stock	Common Stock	NGS	12(g)	0000797465	000-14938
SPLS	Staples, Inc. Common Stock	Common Stock	NGS	12(g)	0000791519	000-17586
STRZ	Star Buffet, Inc. Common Stock	Common Stock	NCM	12(g)	0001043156	000-23099
STSI	Star Scientific, Inc. Common Stock	Common Stock	NGM	12(g)	0000776008	000-15324

Issue Symbol	Issue Name	Issue Type	Issue Market Segment	Registration Type	CIK	SEC File #
SBUX	Starbucks Corporation Common Stock	Common Stock	NGS	12(g)	0000829224	000-20322
STFC	State Auto Financial Corporation Common Stock	Common Stock	NGS	12(g)	0000874977	000-19289
STBC	State Bancorp, Inc. Common Stock	Common Stock	NGM	12(g)	0000723458	000-14874
SNBI	State National Bancshares, Inc. Common Stock	Common Stock	NGM	12(g)	0001332626	000-51548
STTS	STATS ChipPAC Ltd. American Depository Shares	American Depository Shares	NGS	12(g)	0001101873	000-29103
GASS	StealthGas, Inc. Common Stock	Common Stock	NGM	12(g)	0001328919	000-51559
STLD	Steel Dynamics, Inc. Common Stock	Common Stock	NGS	12(g)	0001022671	000-21719
STTX	Steel Technologies Inc. Common Stock	Common Stock	NGS	12(g)	0000771790	000-14061
SCLD	SteelCloud Inc. Common Stock	Common Stock	NCM	12(g)	0001058027	000-24015
SMRT	Stein Mart, Inc. Common Stock	Common Stock	NGS	12(g)	0000884940	000-20052
STNR	Steiner Leisure Limited Common Shares	Common Stock	NGS	12(g)	0001018946	000-28972
STEL	Stellent, Inc. Common Stock	Common Stock	NGM	12(g)	0000867347	000-19817
STEM	StemCells, Inc. Common Stock	Common Stock	NGM	12(g)	0000883975	000-19871
STEN	STEN Corporation Common Stock	Common Stock	NCM	12(g)	0000350557	000-18785
STXS	Stereotaxis, Inc. Common Stock	Common Stock	NGM	12(g)	0001289340	000-50884
SRCL	Stericycle, Inc. Common Stock	Common Stock	NGS	12(g)	0000861878	000-21229
SBIB	Sterling Bancshares, Inc. Common Stock	Common Stock	NGS	12(g)	0000891098	000-20750
SBIBN	Sterling Bancshares, Inc. Sterling Bancshares Capital Trust III -% Trust Preferred Securities	Other Securities	NGS	12(g)	0000891098	000-20750
STRL	Sterling Construction Company Inc Common Stock	Common Stock	NGS	12(g)	0000874238	000-19450
SLFI	Sterling Financial Corporation Common Stock	Common Stock	NGS	12(g)	0000811671	000-16276
STSA	Sterling Financial Corporation Common Stock	Common Stock	NGS	12(g)	0000891106	000-20800
SHOO	Steven Madden, Ltd. Common Stock	Common Stock	NGS	12(g)	0000913241	000-23702
STEI	Stewart Enterprises, Inc. Class A Common Stock	Common Stock	NGS	12(g)	0000878522	001-15449
STKR	StockerYale Inc. Common Stock	Common Stock	NGM	12(g)	0000094538	000-27372
SNSA	Stolt-Nielsen S.A. American Depository Shares	American Depository Shares	NGS	12(g)	0000831980	000-16977
STON	StoneMor Partners L.P. Common Unit Rep Limited Partnership Interests	Limited Partnership	NGM	12(g)	0001286131	000-50910
STGN	Stratagene Corporation Common Stock	Common Stock	NGM	12(g)	0001108674	000-50786
SDIX	Strategic Diagnostics Inc. Common Stock	Common Stock	NGM	12(g)	0000911649	000-68440
STRD	Strategic Distribution, Inc. Common Stock	Common Stock	NGM	12(g)	0000073822	000-05228
STXN	Stratex Networks Inc Common Stock	Common Stock	NGM	12(g)	0000812703	000-15895
STLW	Stratos International, Inc. Common Stock	Common Stock	NGM	12(g)	0001111721	000-30869

Issue Symbol	Issue Name	Issue Type	Issue Market Segment	Registration Type	CIK	SEC File #
STRT	Strattec Security Corporation Common Stock	Common Stock	NGM	12(g)	0000933034	000-25150
STRS	Stratus Properties, Inc. Common Stock	Common Stock	NGM	12(g)	0000885508	000-19989
STRA	Strayer Education, Inc. Common Stock	Common Stock	NGS	12(g)	0001013934	000-21039
STRM	Streamline Health Solutions, Inc. Common Stock	Common Stock	NCM	12(g)	0001008586	000-28132
FUEL	Streichler Mobile Fueling, Inc. Common Stock	Common Stock	NCM	12(g)	0001024452	000-21825
SUBK	Suffolk Bancorp Common Stock	Common Stock	NGS	12(g)	0000754673	000-13580
SUMX	Summa Industries Common Stock	Common Stock	NGM	12(g)	0000062262	001-7755
SBIT	Summit Bancshares, Inc. Common Stock	Common Stock	NGM	12(g)	0000745344	000-11986
SBGA	Summit Bank Corporation Common Stock	Common Stock	NGM	12(g)	0000820067	000-21267
SMMF	Summit Financial Group, Inc. Common Stock	Common Stock	NCM	12(g)	0000811808	000-16587
SUMT	SumTotal Systems, Inc. Common Stock	Common Stock	NGM	12(g)	0001269132	000-50640
SNBC	Sun Bancorp, Inc. Common Stock	Common Stock	NGS	12(g)	0001017793	000-20957
SUNH	Sun Healthcare Group, Inc. Common Stock	Common Stock	NGM	12(g)	0000904978	000-49663
SNHY	Sun Hydraulics Corporation Common Stock	Common Stock	NGS	12(g)	0001024795	000-21835
SUNW	Sun Microsystems, Inc. Common Stock	Common Stock	NGS	12(g)	0000709519	000-15086
SDAY	SUNDAY Communications Limited American Depository Shares	American Depository Shares	NGM	12(g)	0001106952	000-30590
SNSS	Sunesis Pharmaceuticals, Inc. Common Stock	Common Stock	NGM	12(g)	0001061027	000-51531
STKL	SunOpta, Inc. Common Stock	Common Stock	NGS	12(g)	0000351834	000-09989
SPWR	SunPower Corporation Class A Common Stock	Common Stock	NGM	12(g)	0000867773	000-51593
SUNN	Suntron Corporation Common Stock	Common Stock	NCM	12(g)	0001160513	000-49651
SUPVA	Super Vision International, Inc. Class A Common Stock	Common Stock	NCM	12(g)	0000917523	000-23590
SCON	Superconductor Technologies Inc. Common Stock	Common Stock	NCM	12(g)	0000895665	000-21074
SUPG	SuperGen, Inc. Common Stock	Common Stock	NGM	12(g)	0000919722	000-27628
SUPR	Superior Bancorp Common Stock	Common Stock	NGM	12(g)	0001065298	000-25033
SPSX	Superior Essex Inc Common Stock	Common Stock	NGS	12(g)	0001271193	000-50514
SWSI	Superior Well Services, Inc. Common Stock	Common Stock	NGS	12(g)	0001323715	000-51435
SPPR	Supertel Hospitality, Inc. Common Stock	Common Stock	NGM	12(g)	0000929545	000-25060
SPPRP	Supertel Hospitality, Inc. Series A Convertible Preferred Stock	Preferred Stock	NGM	12(g)	0000929545	000-25060
SUPX	Supertex, Inc. Common Stock	Common Stock	NGS	12(g)	0000730000	000-12718
SPRT	Support.com, Inc. Common Stock	Common Stock	NGS	12(g)	0001104855	000-30901
SURW	SureWest Communications Common Stock	Common Stock	NGM	12(g)	0000943117	000-29660
SRDX	SurModics, Inc. Common Stock	Common Stock	NGS	12(g)	0000924717	000-23837
SUSQ	Susquehanna Bancshares, Inc. Common Stock	Common Stock	NGS	12(g)	0000700863	000-10674

Issue Symbol	Issue Name	Issue Type	Issue Market Segment	Registration Type	CIK	SEC File #
STRN	Sutron Corporation Common Stock	Common Stock	NCM	12(g)	0000728331	000-12227
SIVBO	SVB Capital II Cumulative Trust Preferred Securities	Other Securities	NGS	12(g)	0000719739	000-15637
SIVB	SVB Financial Group Common Stock	Common Stock	NGS	12(g)	0000719739	000-15637
SWFT	Swift Transportation Co., Inc. Common Stock	Common Stock	NGS	12(g)	0000863557	000-18605
SCMR	Sycamore Networks, Inc. Common Stock	Common Stock	NGM	12(g)	0001092367	000-27273
SYKE	Sykes Enterprises, Incorporated Common Stock	Common Stock	NGS	12(g)	0001010612	000-28274
SYMC	Symantec Corporation Common Stock	Common Stock	NGS	12(g)	0000849399	000-17781
SMBI	Symbion, Inc. Common Stock	Common Stock	NGS	12(g)	0001091312	000-50574
SYMM	Symmetricon, Inc. Common Stock	Common Stock	NGM	12(g)	0000082628	000-02287
SMMX	Synyx Technologies, Inc. Common Stock	Common Stock	NGS	12(g)	0001095330	000-27765
SYGR	Synagro Technologies, Inc. Common Stock	Common Stock	NGM	12(g)	0000895565	000-21054
SYNL	Synalloy Corporation Common Stock	Common Stock	NGM	12(g)	0000095953	000-19687
SYNA	Synaptics Incorporated Common Stock \$0.001 Par Value	Common Stock	NGS	12(g)	0000817720	000-49602
SNCR	Synchronoss Technologies, Inc. Common Stock	Common Stock	NGM	12(g)	0001131554	000-52049
SURG	Synergetics USA, Inc. Common Stock	Common Stock	NCM	12(g)	0000836429	000-51602
SYNX	SYNERGX SYSTEMS INC	Common Stock	NCM	12(g)	0000823130	000-17580
SYBR	Synergy Brands Inc. Common Stock	Common Stock	NCM	12(g)	0000870228	000-19409
SYNF	Synergy Financial Group, Inc. Common Stock	Common Stock	NGM	12(g)	0001263766	000-50467
ELOS	Syneron Medical Ltd. Ordinary Shares	Ordinary Shares	NGS	12(g)	0001291361	000-50867
SNPS	Synopsys, Inc. Common Stock	Common Stock	NGS	12(g)	0000883241	000-19807
SYNO	Synovis Life Technologies, Inc. Common Stock	Common Stock	NGM	12(g)	0000780127	000-13907
SYNP	Synplicity, Inc. Common Stock	Common Stock	NGM	12(g)	0001027362	000-31545
BRLC	Syntax-Brilliant Corporation Common Stock	Common Stock	NGM	12(g)	0001232229	000-50289
SYNT	Syntel, Inc. Common Stock	Common Stock	NGS	12(g)	0001040426	000-22903
SYNM	Syntroleum Corporation Common Stock	Common Stock	NGM	12(g)	0001029023	000-21911
SYNMZ	Syntroleum Corporation Warrants (Expire 5/26/2008)	Warrant	NGM	12(g)	0001029023	000-21911
SYNMW	Syntroleum Corporation Warrants 11/4/2007	Warrant	NGM	12(g)	0001029023	000-21911
SYPR	Sypris Solutions, Inc. Common Stock	Common Stock	NGM	12(g)	0000864240	000-24020
SXCI	Systems Excellence Inc. Common Stock	Common Stock	NGM	12(g)	0001363851	000-52073
TROW	T. Rowe Price Group, Inc. Common Stock	Common Stock	NGS	12(g)	0001113169	000-32191
TTES	T-3 Energy Services Inc Common Stock	Common Stock	NGM	12(g)	0000879884	000-19580
TAIT	Taitron Components Incorporated Class A Common Stock	Common Stock	NCM	12(g)	0000942126	000-25844
TTWO	Take-Two Interactive Software, Inc. Common Stock	Common Stock	NGS	12(g)	0000946581	000-29230
TLEO	Taleo Corporation Class A Common Stock	Common Stock	NGM	12(g)	0001134203	000-51299

Issue Symbol	Issue Name	Issue Type	Issue Market Segment	Registration Type	CIK	SEC File #
TALK	Talk America Holdings Inc. Common Stock	Common Stock	NGS	12(g)	0000948545	000-26728
TALX	TALX Corporation Common Stock	Common Stock	NGS	12(g)	0000917524	000-21465
TBAC	Tandy Brands Accessories, Inc. Common Stock	Common Stock	NGM	12(g)	0000869487	000-18927
TNOX	Tanox, Inc. Common Stock	Common Stock	NGM	12(g)	0001099414	000-30231
TPPH	Tapstry Pharmaceuticals, Inc. Common Stock	Common Stock	NCM	12(g)	0000891504	000-24320
TRGT	Targacept, Inc. Common Stock	Common Stock	NGM	12(g)	0001124105	000-51173
TGEN	Targeted Genetics Corporation Common Stock	Common Stock	NCM	12(g)	0000921114	000-23930
TARO	Taro Pharmaceutical Industries Ltd. Ordinary Shares	Ordinary Shares	NGS	12(g)	0000906338	000-22286
TARR	Tarragon Corporation Common Stock	Common Stock	NGS	12(g)	0001038217	000-22999
TAGS	Tarrant Apparel Group Common Stock	Common Stock	NGM	12(g)	0000944948	000-26430
TASR	TASER International, Inc. Common Stock	Common Stock	NGS	12(g)	0001069183	001-16391
TSTY	Tasty Baking Company Common Stock	Common Stock	NGM	12(g)	0000096412	000-50369
TATTF	TAT Technologies Ltd. Ordinary Shares	Ordinary Shares	NCM	12(g)	0000808439	000-16050
TAYC	Taylor Capital Group, Inc. Common Stock	Common Stock	NGS	12(g)	0001025536	000-50035
TAYCP	Taylor Capital Group, Inc. Cumulative Trust Preferred Securities	Other Securities	NGS	12(g)	0001025536	000-50035
TAYD	Taylor Devices, Inc. Common Stock	Common Stock	NCM	12(g)	0000096536	000-03498
TBWC	TBWood's Corporation Common Stock	Common Stock	NGM	12(g)	0001000227	001-14182
TBSI	TBS International Limited Class A Common Stock	Common Stock	NGM	12(g)	0001065648	000-51368
TCLP	TC PipeLines, LP Common Units representing Limited Partner Interests	Limited Partnership	NGS	12(g)	0001075607	000-26091
AMTD	TD Ameritrade Holding Corporation Common Stock	Common Stock	NGS	12(g)	0001173431	000-22163
TFIN	Team Financial, Inc. Common Stock	Common Stock	NGM	12(g)	0001082484	000-26335
TFINP	Team Financial, Inc. Team Financial Capital Trust I - 9.50% Cumulative Trust Preferred Securities	Other Securities	NGM	12(g)	0001082484	000-26335
TSTF	TeamStaff, Inc. Common Stock	Common Stock	NGM	12(g)	0000785557	000-18492
TECD	Tech Data Corporation Common Stock	Common Stock	NGS	12(g)	0000790703	000-14625
TECH	Techne Corporation Common Stock	Common Stock	NGS	12(g)	0000842023	000-17272
TICC	Technology Investment Capital Corp. Common Stock	Common Stock	NGS	12(g)	0001259429	000-50398
TRCI	Technology Research Corporation Common Stock	Common Stock	NGM	12(g)	0000741556	000-13763
TSSC	Technology Solutions Company Common Stock	Common Stock	NGM	12(g)	0000877645	000-19433
TEAM	TechTeam Global, Inc. Common Stock	Common Stock	NGM	12(g)	0000805054	000-16284
TWLL	Techwell, Inc. COMMON STOCK	Common Stock	NGM	12(g)	0001171529	000-52014
TECUA	Tecumseh Products Company Class A Common Stock	Common Stock	NGM	12(g)	0000096831	000-00452
TECUB	Tecumseh Products Company Class B Common Stock	Common Stock	NGM	12(g)	0000096831	000-00452

Issue Symbol	Issue Name	Issue Type	Issue Market Segment	Registration Type	CIK	SEC File #
TGALD	Tegal Corporation New Common Stock	Common Stock	NCM	12(g)	0000931059	000-26824
TKLC	Tekelec Common Stock	Common Stock	NGM	12(g)	0000790705	000-15135
TELOZ	TEL Offshore Trust Units of Beneficial Interest	Units/Benef Int	NCM	12(g)	0000097148	000-06910
TSYS	TeleCommunication Systems, Inc. Class A Common Stock	Common Stock	NGM	12(g)	0001111665	000-30821
TFONY	Telefonos de Mexico SA de CV Ser A Spons ADR American Depository Shares	American Depository Shares	NCM	12(g)	0000866213	001-32741
TELN	Telenor ASA American Depository Shares	American Depository Shares	NGS	12(g)	0001126113	000-31054
TTEC	TeleTech Holdings, Inc. Common Stock	Common Stock	NGS	12(g)	0001013880	000-21055
TELK	Telik, Inc. Common Stock	Common Stock	NGM	12(g)	0001109196	000-31265
TLAB	Tellabs, Inc. Common Stock	Common Stock	NGS	12(g)	0000317771	000-09692
WRLS	Telular Corporation Common Stock	Common Stock	NGM	12(g)	0000915324	000-23212
TLVT	Telvent GIT, S.A. Ordinary Shares	Ordinary Shares	NGM	12(g)	0001257803	000-50991
TMCV	Temecula Valley Bancorp Inc. (CA) Common Stock	Common Stock	NGS	12(g)	0001172678	000-49844
TNCC	Tennessee Commerce Bancorp, Inc. (TN) Common Stock	Common Stock	NGM	12(g)	0001323033	000-51281
TRBM	Terabeam, Inc. Common Stock	Common Stock	NCM	12(g)	0000712511	000-29053
TRCA	Tercica, Inc. Common Stock	Common Stock	NGM	12(g)	0001262175	000-50461
TESOF	Tesco Corporation Common Stock	Common Stock	NGM	12(g)	0001022705	000-28778
TESS	TESSCO Technologies Incorporated Common Stock	Common Stock	NGM	12(g)	0000927355	000-24746
TSRA	Tessera Technologies, Inc. Common Stock	Common Stock	NGS	12(g)	0001261694	000-50460
TTEK	Tetra Tech, Inc. Common Stock	Common Stock	NGS	12(g)	0000831641	000-19655
TEVA	Teva Pharmaceutical Industries Limited American Depository Shares	American Depository Shares	NGS	12(g)	0000818686	000-16174
TCBI	Texas Capital Bancshares, Inc. Common Stock	Common Stock	NGS	12(g)	0001077428	000-30533
TRBS	Texas Regional Bancshares, Inc. Class A Voting Common Stock	Common Stock	NGS	12(g)	0000787648	000-14517
TXRH	Texas Roadhouse, Inc. Class A Common Stock	Common Stock	NGS	12(g)	0001289460	000-50972
TXUI	Texas United Bancshares Common Stock	Common Stock	NGM	12(g)	0001169238	000-49928
THRD	TF Financial Corporation Common Stock	Common Stock	NGM	12(g)	0000921051	000-24168
ARTL	The Aristotle Corporation Common Stock	Common Stock	NCM	12(g)	0000790071	000-14669
ARTLP	The Aristotle Corporation Series I \$6.00 convertible voting cumulative 11% Preferred Stock	Preferred Stock	NCM	12(g)	0000790071	000-14669
TBBK	The Bancorp Inc Common Stock	Common Stock	NGM	12(g)	0001295401	000-51018
TBHS	The Bank Holdings, Inc. Common Stock	Common Stock	NCM	12(g)	0001234383	000-50645
TXCO	The Exploration Company Common Stock	Common Stock	NCM	12(g)	0000313395	000-09120

Issue Symbol	Issue Name	Issue Type	Issue Market Segment	Registration Type	CIK	SEC File #
PRSC	The Providence Service Corporation Common Stock	Common Stock	NGS	12(g)	0001220754	000-50364
NCTY	The9 Limited American Depository Shares	American Depository Shares	NGM	12(g)	0001296774	000-51053
THRX	Theravance, Inc. Common Stock	Common Stock	NGM	12(g)	0001080014	000-30319
TWAV	Therma-Wave, Inc. Common Stock	Common Stock	NGM	12(g)	0000828119	000-26911
KOOL	THERMOGENESIS Corp. Common Stock	Common Stock	NCM	12(g)	0000811212	000-16375
TSCM	TheStreet.com, Inc. Common Stock (\$0.01 Par Value)	Common Stock	NGM	12(g)	0001080056	000-25779
TWTI	Third Wave Technologies, Inc. Common Stock	Common Stock	NGM	12(g)	0001120438	000-31745
TGIS	Thomas Group, Inc. Common Stock	Common Stock	NCM	12(g)	0000900017	000-22010
TPGI	Thomas Properties Group, Inc. Common Stock	Common Stock	NGM	12(g)	0001283709	000-50854
TWPG	Thomas Weisel Partners Group, Inc. Common Stock	Common Stock	NGM	12(g)	0001340354	000-51730
THOR	Thoratec Corporation Common Stock	Common Stock	NGS	12(g)	0000350907	000-49798
THQI	THQ Inc. Common Stock	Common Stock	NGS	12(g)	0000865570	000-18813
THLD	Threshold Pharmaceuticals, Inc. Common Stock	Common Stock	NGM	12(g)	0001183765	000-51136
TIBB	TIB Financial Corporation Common Stock	Common Stock	NGS	12(g)	0001013796	000-21329
TIBX	TIBCO Software, Inc. Common Stock	Common Stock	NGS	12(g)	0001085280	000-26579
TONE	TierOne Corporation Common Stock	Common Stock	NGS	12(g)	0001170605	000-50015
TIII	TII Network Technologies, Inc. Common Stock	Common Stock	NCM	12(g)	0000277928	001-08048
TSBK	Timberland Bancorp, Inc. Common Stock	Common Stock	NGM	12(g)	0001046050	000-23333
TWTC	Time Warner Telecom Inc. Class A Common Stock	Common Stock	NGS	12(g)	0001057758	000-30218
TIVO	TiVo Inc. Common Stock	Common Stock	NGM	12(g)	0001088825	000-27141
TLCV	TLC Vision Corporation Common Stock	Common Stock	NGM	12(g)	0001010610	000-29302
TLGD	Tollgrade Communications, Inc. Common Stock	Common Stock	NGS	12(g)	0001002531	000-27312
TOMO	Tom Online Inc. ADS	American Depository Shares	NGS	12(g)	0001263288	000-50631
TOPT	TOP Tankers, Inc. Common Stock	Common Stock	NGS	12(g)	0001296484	000-50859
TOPP	Topps Company, Inc. (The) Common Stock	Common Stock	NGS	12(g)	0000812076	000-15817
TORM	TOR Minerals International Inc Common Stock	Common Stock	NCM	12(g)	0000842295	000-17321
TRGL	Toreador Resources Corporation Common Stock	Common Stock	NGM	12(g)	0000098720	000-02517
TOFC	Tower Financial Corporation Common Stock	Common Stock	NGM	12(g)	0001072847	000-25287
TWGP	Tower Group, Inc. Common Stock	Common Stock	NGS	12(g)	0001289592	000-50990
TSEMG	Tower Semiconductor Ltd. Debentures Convertible into Common Stock	Convertible Debenture	NCM	12(g)	0000928876	000-24790
TSEM	Tower Semiconductor Ltd. Ordinary Shares	Ordinary Shares	NGM	12(g)	0000928876	000-24790

Issue Symbol	Issue Name	Issue Type	Issue Market Segment	Registration Type	CIK	SEC File #
TSEMW	Tower Semiconductor Ltd. Warrants - convert into one ordinary share at an exercise price of \$7.50.	Warrant	NCM	12(g)	0000928876	000-24790
CLUB	Town Sports International Holdings, Inc. Common Stock	Common Stock	NGM	12(g)	0001281774	000-52013
TRAC	Track Data Corporation Common Stock	Common Stock	NGM	12(g)	0000922811	000-24634
TSCO	Tractor Supply Company Common Stock	Common Stock	NGS	12(g)	0000916365	000-23314
TRAD	TradeStation Group Inc Common Stock	Common Stock	NGS	12(g)	0001111559	000-31049
TRFC	Traffic.com, Inc. Common Stock	Common Stock	NGM	12(g)	0001097503	000-51746
TRFX	Traffix, Inc. Common Stock	Common Stock	NGM	12(g)	0001000297	000-27046
TRBR	Trailer Bridge, Inc. Common Stock	Common Stock	NCM	12(g)	0001039184	000-22837
TWMC	Trans World Entertainment Corp. Common Stock	Common Stock	NGM	12(g)	0000795212	000-14818
TACT	TransAct Technologies Incorporated Common Stock	Common Stock	NGM	12(g)	0001017303	000-21121
TSAI	Transaction Systems Architects, Inc. Common Stock	Common Stock	NGS	12(g)	0000935036	000-25346
TRNS	Transcat, Inc. Common Stock	Common Stock	NCM	12(g)	000099302	000-03905
TRCR	Transcend Services, Inc. Common Stock	Common Stock	NCM	12(g)	0000858452	000-18217
TBIO	Transgenomic, Inc. Common Stock	Common Stock	NGM	12(g)	0001043961	000-30975
TMTA	Transmeta Corporation Common Stock	Common Stock	NGM	12(g)	0001001193	000-31803
TXCC	TranSwitch Corporation Common Stock	Common Stock	NGM	12(g)	0000944739	000-25996
TZOO	Travelzoo Inc Common Stock	Common Stock	NGS	12(g)	0001133311	000-50171
TMIC	Trend Micro Incorporated American Depository Shares	American Depository Shares	NGS	12(g)	0001089463	333-10486
TGIC	Triad Guaranty Inc. Common Stock	Common Stock	NGS	12(g)	0000911631	000-22342
TCBK	TriCo Bancshares Common Stock	Common Stock	NGS	12(g)	0000356171	000-10661
TRMA	Trico Marine Services, Inc. Common Stock New	Common Stock	NGM	12(g)	0000921549	000-28316
TRID	Trident Microsystems, Inc. Common Stock	Common Stock	NGM	12(g)	0000859475	000-20784
TRMB	Trimble Navigation Limited Common Stock	Common Stock	NGS	12(g)	0000864749	000-18645
TRMS	Trimeris, Inc. Common Stock	Common Stock	NGM	12(g)	0000911326	000-23155
TRIB	Trinity Biotech plc American Depository Shares	American Depository Shares	NGS	12(g)	0000888721	000-22320
TTPA	Trintech Group PLC American Depository Shares	American Depository Shares	NGM	12(g)	0001094316	000-30320
TPTH	TriPath Imaging Inc. Common Stock	Common Stock	NGM	12(g)	0001041426	000-22885
TCMI	Triple Crown Media, Inc. Common Stock	Common Stock	NGM	12(g)	0001333291	000-51636
TRPS	Tripos, Inc. Common Stock	Common Stock	NGM	12(g)	0000920691	000-23666
TQNT	TriQuint Semiconductor, Inc. Common Stock	Common Stock	NGS	12(g)	0000913885	000-22660
TRIS	Tri-S Security Corporation Common Stock	Common Stock	NCM	12(g)	0001304901	000-51148

Issue Symbol	Issue Name	Issue Type	Issue Market Segment	Registration Type	CIK	SEC File #
TRISW	Tri-S Security Corporation Warrants Expires 2/08/2010	Warrant	NCM	12(g)	0001304901	000-511148
TZIX	TriZetto Group, Inc. (The) Common Stock	Common Stock	NGS	12(g)	0001092458	000-27501
TRMM	TRM Corporation Common Stock	Common Stock	NGM	12(g)	0000749254	000-19657
TRLG	True Religion Apparel, Inc. Common Stock	Common Stock	NGM	12(g)	0001160858	000-51483
TRMP	Trump Entertainment Resorts, Inc. Common Stock	Common Stock	NGM	12(g)	0000943320	001-13794
TRST	TrustCo Bank Corp NY Common Stock	Common Stock	NGS	12(g)	0000357301	000-10592
TRMK	Trustmark Corporation Common Stock	Common Stock	NGS	12(g)	0000036146	000-03683
TRXI	TRX, Inc. Common Stock	Common Stock	NGM	12(g)	0001103025	000-51478
TSRI	TSR, Inc. Common Stock	Common Stock	NGM	12(g)	0000983338	000-08656
TTIL	TTI Team Telecom International Ltd. Ordinary Shares	Ordinary Shares	NGM	12(g)	0001026266	000-28986
TTMI	TTM Technologies, Inc. Common Stock	Common Stock	NGS	12(g)	0001116942	000-31285
TUES	Tuesday Morning Corp. Common Stock	Common Stock	NGS	12(g)	0000878726	000-19658
TFCO	Tufco Technologies, Inc. Common Stock	Common Stock	NGM	12(g)	0000895329	000-21018
TMWD	Tumbleweed Communications Corp. Common Stock	Common Stock	NGM	12(g)	0001022509	000-26223
OVEN	TurboChef Technologies, Inc. Common Stock	Common Stock	NGM	12(g)	0000916545	001-32334
TUTS	Tut Systems, Inc. Common Stock	Common Stock	NGM	12(g)	0000878436	000-25291
TVIN	TVI Corporation Common Stock	Common Stock	NCM	12(g)	0000352079	000-10449
TVIA	TVIA, Inc. Common Stock	Common Stock	NCM	12(g)	0001109279	000-30539
TWTR	Tweeter Home Entertainment Group, Inc Common Stock	Common Stock	NGM	12(g)	0001060390	000-24091
TWIN	Twin Disc, Incorporated Common Stock	Common Stock	NGM	12(g)	0000100378	000-50987
RMIX	U.S. Concrete, Inc. Common Stock	Common Stock	NGM	12(g)	0001073429	000-26025
USEG	U.S. Energy Corp. Common Stock	Common Stock	NCM	12(g)	0000101594	000-06814
USEY	U.S. Energy Systems, Inc. Common Stock	Common Stock	NCM	12(g)	0000351917	000-10238
GROW	U.S. Global Investors, Inc. Class A Common Stock	Common Stock	NCM	12(g)	0000754811	000-13928
USHS	U.S. Home Systems, Inc. Common Stock	Common Stock	NGM	12(g)	0000844789	000-18291
USPH	U.S. Physical Therapy, Inc. Common Stock	Common Stock	NGS	12(g)	0000885978	001-11151
XPRSA	U.S. Xpress Enterprises, Inc. Class A Common Stock	Common Stock	NGS	12(g)	0000923571	000-24806
UAJA	UAL Corporation Common Stock New	Common Stock	NGS	12(g)	0000100517	001-6033
UAPH	UAP Holding Corp. Common Stock	Common Stock	NGS	12(g)	0001279529	000-51035
UCBH	UCBH Holdings, Inc. Common Stock	Common Stock	NGS	12(g)	0001061580	000-24947
UFPT	UFP Technologies, Inc. Common Stock	Common Stock	NCM	12(g)	0000914156	001-12648
ULCM	Ulticom, Inc. Common Stock	Common Stock	NGM	12(g)	0001103184	000-30121
ULTI	Ultimate Software Group, Inc. (The) Common Stock	Common Stock	NGM	12(g)	0001016125	000-24347
UCTT	Ultra Clean Holdings, Inc. Common Stock	Common Stock	NGS	12(g)	0001275014	000-50646

Issue Symbol	Issue Name	Issue Type	Issue Market Segment	Registration Type	CIK	SEC File #
ULBI	Ultralife Batteries, Inc. Common Stock	Common Stock	NGM	12(g)	0000875657	000-20852
UTEK	Ultratech, Inc. Common Stock	Common Stock	NGM	12(g)	0000909791	000-22248
UMBF	UMB Financial Corporation Common Stock	Common Stock	NGS	12(g)	0000101382	000-04887
UMPQ	Umpqua Holdings Corporation Common Stock	Common Stock	NGS	12(g)	0001077771	000-25597
UARM	Under Armour, Inc. Class A Common Stock	Common Stock	NGS	12(g)	0001336917	001-10635
UNCA	Unica Corporation Common Stock	Common Stock	NGM	12(g)	0001138804	000-51461
UNAM	Unico American Corporation Common Stock	Common Stock	NGM	12(g)	0000100716	000-03978
UBSH	Union Bankshares Corporation Common Stock	Common Stock	NGS	12(g)	0000883948	000-20293
UDRL	Union Drilling, Inc. Common Stock	Common Stock	NGM	12(g)	0001133260	000-51630
UBCD	UnionBancorp, Inc Common Stock	Common Stock	NGM	12(g)	0001019650	000-28846
INDM	United America Indemnity, Ltd. Class A Common Stock	Common Stock	NGM	12(g)	0001263813	000-50511
UAHC	United American Healthcare Corporation Common Stock	Common Stock	NCM	12(g)	0000867963	001-11638
UBCP	United Bancorp, Inc. Common Stock	Common Stock	NCM	12(g)	0000731653	000-16540
UBOH	United Bancshares, Inc. Common Stock	Common Stock	NGM	12(g)	0001087456	000-29283
UBSI	United Bankshares, Inc. Common Stock	Common Stock	NGS	12(g)	0000729986	000-13322
UCBA	United Community Bancorp Common Stock	Common Stock	NGM	12(g)	0001344970	000-51800
UCBI	United Community Banks, Inc. Common Stock	Common Stock	NGS	12(g)	0000857855	000-21656
UCFC	United Community Financial Corp. Common Stock	Common Stock	NGS	12(g)	0000707886	000-24399
UBNK	United Financial Bancorp, Inc. Common Stock	Common Stock	NGS	12(g)	0001319572	000-51369
UBMT	United Financial Corp Common Stock	Common Stock	NGM	12(g)	0001011309	000-28080
UHCP	United Heritage Corporation Common Stock	Common Stock	NCM	12(g)	0000354567	000-9997
UNFI	United Natural Foods, Inc. Common Stock	Common Stock	NGS	12(g)	0001020859	000-21531
UNTD	United Online, Inc. Common Stock	Common Stock	NGS	12(g)	0001142701	000-33367
UPFC	United PanAm Financial Corporation Common Stock	Common Stock	NGS	12(g)	0001049231	000-24051
URGI	United Retail Group, Inc. Common Stock	Common Stock	NGM	12(g)	0000881905	000-19774
UBFO	United Security Bancshares Common Stock	Common Stock	NGS	12(g)	0001137547	000-32897
USBI	United Security Bancshares, Inc. Common Stock	Common Stock	NCM	12(g)	0000717806	000-14549
USLM	United States Lime & Minerals, Inc. Common Stock	Common Stock	NGM	12(g)	000082020	000-04197
USTR	United Stationers Inc. Common Stock	Common Stock	NGS	12(g)	0000355999	000-10653
USPI	United Surgical Partners International, Inc. Common Stock	Common Stock	NGS	12(g)	0001101723	000-32837
UTHR	United Therapeutics Corporation Common Stock	Common Stock	NGS	12(g)	0001082554	000-26301
UNTY	Unity Bancorp, Inc. Common Stock	Common Stock	NGM	12(g)	0000920427	000-24893
UHCO	Universal American Financial Corp. Common Stock	Common Stock	NGS	12(g)	0000709878	001-08506
UEIC	Universal Electronics Inc. Common Stock	Common Stock	NGS	12(g)	0000101984	000-21044

Issue Symbol	Issue Name	Issue Type	Issue Market Segment	Registration Type	CIK	SEC File #
UFPI	Universal Forest Products, Inc. Common Stock	Common Stock	NGS	12(g)	0000912767	000-22684
USAP	Universal Stainless & Alloy Products, Inc. Common Stock	Common Stock	NGM	12(g)	0000931584	000-25032
UACL	Universal Truckload Services, Inc. Common Stock	Common Stock	NGM	12(g)	0001308208	000-51142
UNIB	University Bancorp Inc Michigan Common Stock	Common Stock	NCM	12(g)	0000811211	000-16023
UVSP	Univest Corporation of Pennsylvania Common Stock	Common Stock	NGS	12(g)	0000102212	000-07617
URBN	Urban Outfitters, Inc. Common Stock	Common Stock	NGS	12(g)	0000912615	000-16999
ULGX	Urologix, Inc. Common Stock	Common Stock	NGM	12(g)	0000882873	000-28414
CLEC	US LEC Corp. Class A Common Stock	Common Stock	NGM	12(g)	0001054290	000-24061
USMO	USA Mobility, Inc. Common Stock	Common Stock	NGS	12(g)	0001289945	000-51027
USAK	USA Truck, Inc. Common Stock	Common Stock	NGS	12(g)	0000883945	000-19858
USNA	USANA Health Sciences Inc. Common Stock	Common Stock	NGS	12(g)	0000896264	000-21116
USIH	USI Holdings Corporation Common Stock	Common Stock	NGS	12(g)	0001102643	000-50041
UTMD	Utah Medical Products, Inc. Common Stock	Common Stock	NGM	12(g)	0000706698	000-11178
UTW	UTI Worldwide Inc. Ordinary Shares	Ordinary Shares	NGS	12(g)	0001124827	000-31869
UTSI	UTStarcom, Inc. Common Stock	Common Stock	NGS	12(g)	0001030471	000-29661
LNUX	VA Software Corporation Common Stock	Common Stock	NGM	12(g)	0001096199	000-28369
VAIL	Vail Banks, Inc. Common Stock	Common Stock	NGM	12(g)	0001035770	000-25081
VLNC	Valence Technology, Inc. Common Stock	Common Stock	NCM	12(g)	0000885551	000-20028
VLTS	Valentis, Inc. Common Stock	Common Stock	NCM	12(g)	0000932352	000-22987
VLRX	Valera Pharmaceuticals, Inc. Common Stock	Common Stock	NGM	12(g)	0001305409	000-51768
VLLY	Valley Bancorp Common Stock	Common Stock	NGM	12(g)	0001295334	000-50950
VYFC	Valley Financial Corporation Common Stock	Common Stock	NCM	12(g)	0000921590	000-28342
VALU	Value Line, Inc. Common Stock	Common Stock	NGM	12(g)	0000717720	000-11306
VCLK	ValueClick, Inc. Common Stock	Common Stock	NGS	12(g)	0001080034	000-30135
VVTV	ValueVision Media, Inc. Class A Common Stock	Common Stock	NGM	12(g)	0000870826	000-20243
VNDA	Vanda Pharmaceuticals Inc. Common Stock	Common Stock	NGM	12(g)	0001347178	000-51863
VSEA	Varian Semiconductor Equipment Associates, Inc. Common Stock	Common Stock	NGS	12(g)	0001079023	000-25395
VARI	Varian, Inc. Common Stock	Common Stock	NGS	12(g)	0001079028	000-25393
VSTY	Varsity Group, Inc. Common Stock	Common Stock	NGM	12(g)	0001069502	000-28977
VDSI	VASCO Data Security International, Inc. Common Stock	Common Stock	NCM	12(g)	0001044777	000-24389
VASC	Vascular Solutions, Inc. Common Stock	Common Stock	NGM	12(g)	0001030206	000-27605
VSGN	Vasogen Inc. Common Shares	Common Stock	NGM	12(g)	0001042018	000-29350
WOOF	VCA Antech, Inc. Common Stock	Common Stock	NGS	12(g)	0000817366	001-16783

Issue Symbol	Issue Name	Issue Type	Issue Market Segment	Registration Type	CIK	SEC File #
VECO	Veeco Instruments Inc. Common Stock	Common Stock	NGS	12(g)	0000103145	000-16244
VEXP	Velocity Express Corporation New Common Stock	Common Stock	NCM	12(g)	0001002902	000-28452
VMSI	Ventana Medical Systems, Inc. Common Stock	Common Stock	NGS	12(g)	0000893160	000-20931
VRGY	Verigy Ltd. Ordinary Shares	Ordinary Shares	NGS	12(g)	0001352341	000-52038
VRNT	Verint Systems Inc. Common Stock	Common Stock	NGM	12(g)	0001166388	000-49790
VRSN	VeriSign, Inc. Common Stock	Common Stock	NGS	12(g)	0001014473	000-23593
VNLS	Vernalis plc American Depository Shares	American Depository Shares	NGM	12(g)	0000851616	000-20104
VSNT	Versant Corporation Common Stock	Common Stock	NCM	12(g)	0000865917	000-28540
VRSO	Verso Technologies, Inc. Common Stock	Common Stock	NCM	12(g)	0000797448	000-22190
VRTX	Vertex Pharmaceuticals Incorporated Common Stock	Common Stock	NGS	12(g)	0000875320	000-19319
VERT	VerticalNet, Inc. Common Stock	Common Stock	NCM	12(g)	0001043946	000-25269
VTRU	Vertrue Incorporated Common Stock	Common Stock	NGS	12(g)	0001020996	000-21527
VRTA	Vestin Realty Mortgage I, Inc. Common Stock	Common Stock	NGM	12(g)	0001328300	000-51964
VRTB	Vestin Realty Mortgage II, Inc. Common Stock	Common Stock	NGS	12(g)	0001327603	000-51892
VIAC	ViaCell, Inc. Common Stock	Common Stock	NGM	12(g)	0001114529	000-51110
VSAT	ViaSat, Inc. Common Stock	Common Stock	NGS	12(g)	0000797721	000-21767
VICL	Vical Incorporated Common Stock	Common Stock	NGM	12(g)	0000819050	000-21088
VICR	Vicor Corporation Common Stock	Common Stock	NGS	12(g)	0000751978	000-18277
VIDE	Video Display Corporation Common Stock	Common Stock	NGM	12(g)	0000758743	000-13394
VWPT	Viewpoint Corporation Common Stock	Common Stock	NGM	12(g)	0000919794	000-27168
VIGN	Vignette Corporation Common Stock	Common Stock	NGM	12(g)	0001042185	000-25375
VISG	Visage Technology, Inc. Common Stock	Common Stock	NGM	12(g)	0001018332	000-21559
VBFC	Village Bank and Trust Financial Corp. Common Stock	Common Stock	NCM	12(g)	0001290476	000-50765
VLGEA	Village Super Market, Inc. Class A Common Stock	Common Stock	NGM	12(g)	0000103595	000-02633
VIMC	Vimicro International Corporation American Depository Shares	American Depository Shares	NGM	12(g)	0001341088	000-51606
VNBC	Vineyard National Bancorp Common Stock	Common Stock	NGS	12(g)	0000840256	000-20862
VION	Vion Pharmaceuticals Inc. Common Stock	Common Stock	NCM	12(g)	0000944522	000-26534
VIRL	Virage Logic Corporation Common Stock	Common Stock	NGM	12(g)	0001050776	000-31089
VBAC	Virbac Corporation Common Stock	Common Stock	NCM	12(g)	0000922814	000-24312
VCBI	Virginia Commerce Bancorp Common Stock	Common Stock	NGS	12(g)	0001099305	000-28635
VFGI	Virginia Financial Group Inc Common Stock	Common Stock	NGS	12(g)	0001036070	000-22283
VPHM	ViroPharma Incorporated Common Stock	Common Stock	NGS	12(g)	0000946840	000-21699
VSCP	VirtualScopies, Inc. Common Stock	Common Stock	NCM	12(g)	0001307752	000-52018

Issue Symbol	Issue Name	Issue Type	Issue Market Segment	Registration Type	CIK	SEC File #
VRYA	ViryaNet Ltd. Ordinary Shares	Ordinary Shares	NCM	12(g)	0001119744	000-31513
EICU	Visicu, Inc. Common Stock	Common Stock	NGM	12(g)	0001166463	000-51865
VSCI	Vision-Sciences, Inc. Common Stock	Common Stock	NCM	12(g)	0000894237	000-20970
VSTA	VistaCare Common Stock	Common Stock	NGM	12(g)	0000787030	000-50118
VPRT	VistaPrint Limited Common Stock	Common Stock	NGS	12(g)	0001262976	000-51539
VTAL	Vital Images, Inc. Common Stock	Common Stock	NGM	12(g)	0000912888	000-22229
VITL	Vital Signs, Inc. Common Stock	Common Stock	NGS	12(g)	0000865846	000-18793
VSTH	VitalStream Holdings, Inc. Common Stock	Common Stock	NCM	12(g)	0000789851	001-10013
VTNC	Vitran Corporation, Inc. Common Stock	Common Stock	NGM	12(g)	0000946823	000-26256
VITR	Vitria Technology, Inc. Common Stock	Common Stock	NGM	12(g)	0001050808	000-27207
VVUS	VIVUS, Inc. Common Stock	Common Stock	NGM	12(g)	0000881524	000-23490
VNUS	VNUS Medical Technologies, Inc. Common Stock	Common Stock	NGM	12(g)	0001040666	000-50988
VOCL	VocalTec Communications Ltd. Ordinary shares	Ordinary Shares	NCM	12(g)	0001005699	000-27648
VOCS	Vocus, Inc. Common Stock	Common Stock	NGM	12(g)	0001329919	000-51644
VTEK	Vodavi Technology, Inc. Common Stock	Common Stock	NCM	12(g)	0000949491	000-26912
VOLC	Volcano Corporation Common Stock	Common Stock	NGM	12(g)	0001137567	000-52045
VLCM	Volcom, Inc. Common Stock	Common Stock	NGS	12(g)	0001324570	000-51382
VLTR	Volterra Semiconductor Corporation Common Stock	Common Stock	NGM	12(g)	0001050550	000-50857
VOXW	Voxware, Inc. Common Stock	Common Stock	NCM	12(g)	0000933454	000-21403
VSEC	VSE Corporation Common Stock	Common Stock	NGM	12(g)	0000102752	000-03676
VYYO	Vyyo, Inc. Common Stock	Common Stock	NGM	12(g)	0001104730	000-30189
WBPRN	W Holding Company Incorporated 2001 Series C 7.60% Non-Cumulative Monthly Income Preferred Stock	Preferred Stock	NGM	12(g)	0001084887	000-27377
WBPRK	W Holding Company Incorporated 2003 Series G Non-Cumulative Preferred Stock	Preferred Stock	NGM	12(g)	0001084887	000-27377
WBPRJ	W Holding Company Incorporated 2004 Series H Non-Cumulative Preferred Stock	Preferred Stock	NGM	12(g)	0001084887	000-27377
WBPRO	W Holding Company Incorporated 7.25% 1999 Series B Noncumulative Monthly Income Preferred Stock	Preferred Stock	NGM	12(g)	0001084887	000-27377
WBPRM	W Holding Company Incorporated 7.40% Noncumulative Monthly Income Preferred Stock, 2001 Series D	Preferred Stock	NGM	12(g)	0001084887	000-27377
WBPRL	W Holding Company Incorporated Series E Preferred Stock	Preferred Stock	NGM	12(g)	0001084887	000-27377
WBPRZ	W Holding Company Incorporated Series F Preferred Stock	Preferred Stock	NGM	12(g)	0001084887	000-27377
WBANK	Waccamaw Bankshares Inc Common Stock	Common Stock	NCM	12(g)	0001144686	000-32985

Issue Symbol	Issue Name	Issue Type	Issue Market Segment	Registration Type	CIK	SEC File #
WACLY	Wacoal Holdings Corporation American Depository Shares	American Depository Shares	NCM	12(g)	0000104040	000-11743
WRNC	Warnaco Group Inc (The) Common Stock	Common Stock	NGS	12(g)	0000801351	001-10857
WRES	Warren Resources, Inc. Common Stock	Common Stock	NGM	12(g)	0000892986	000-33275
WARR	Warrior Energy Service Corporation New Common Stock	Common Stock	NGM	12(g)	0000839871	000-18754
WVVY	Warwick Valley Telephone Company Common Stock	Common Stock	NGM	12(g)	0000104777	000-11174
WBCO	Washington Banking Company Common Stock	Common Stock	NGS	12(g)	0001058690	000-24503
WFSL	Washington Federal, Inc. Common Stock	Common Stock	NGS	12(g)	0000936528	000-25454
WGII	Washington Group International, Inc. Common Stock	Common Stock	NGS	12(g)	0000906469	001-12054
DIMEZ	Washington Mutual, Inc. Dime Bancorp Litigation Tracking Warrant	Other Securities	NGM	12(g)	0000933136	001-14667
WASH	Washington Trust Bancorp, Inc. Common Stock	Common Stock	NGS	12(g)	0000737468	000-13091
WWIN	Waste Industries USA, Inc. Common Stock	Common Stock	NGM	12(g)	0001125845	000-31050
WSII	Waste Services, Inc. Common Stock	Common Stock	NGM	12(g)	0001065736	000-25955
WGRD	WatchGuard Technologies, Inc. Common Stock	Common Stock	NGM	12(g)	0001062019	000-26819
WAUW	Wauwatosa Holdings, Inc. Common Stock	Common Stock	NGS	12(g)	0001329517	000-51507
WAVXD	Wave Systems Corp. Class A New Common Stock	Common Stock	NGM	12(g)	0000919013	000-24752
WVCM	Wavecom S.A. American Depository Shares	American Depository Shares	NGM	12(g)	0001085763	000-30078
WAYN	Wayne Savings Bancshares Inc. Common Stock	Common Stock	NGM	12(g)	0001036030	000-23433
WCAA	WCA Waste Corporation Common Stock	Common Stock	NGM	12(g)	0001282398	000-50808
WDFC	WD-40 Company Common Stock	Common Stock	NGS	12(g)	0000105132	000-06936
WWWV	Web.com, Inc. Common Stock	Common Stock	NGM	12(g)	0000854460	000-17932
WEBX	WebEx Communications, Inc. Common Stock	Common Stock	NGS	12(g)	0001109935	000-30849
WBMD	WebMD Health Corp. Class A Common Stock	Common Stock	NGS	12(g)	0001326583	000-51547
WEBM	webMethods, Inc. Common Stock	Common Stock	NGM	12(g)	0001035096	001-15681
WBSN	WebSense, Inc. Common Stock	Common Stock	NGS	12(g)	0001098277	000-30093
WSSI	WebSideStory, Inc. Common Stock	Common Stock	NGM	12(g)	0001091158	000-31613
WSPJ	Website Pros, Inc. Common Stock	Common Stock	NGM	12(g)	0001095291	000-51595
WBSTP	Webster Financial Corporation Series B 8.625% Cumulative	Preferred Stock	NGM	12(g)	0001047865	000-23513
WZEN	Webzen Inc American Depository Shares	American Depository Shares	NGM	12(g)	0001266467	000-50476
WGNR	Wegener Corporation Common Stock	Common Stock	NCM	12(g)	0000715073	000-11003
WERN	Werner Enterprises, Inc. Common Stock	Common Stock	NGS	12(g)	0000793074	000-14690
WSBC	WebBanco, Inc. Common Stock	Common Stock	NGS	12(g)	0000203596	000-08467

Issue Symbol	Issue Name	Issue Type	Issue Market Segment	Registration Type	CIK	SEC File #
WTBA	West Bancorporation Common Stock	Common Stock	NGM	12(g)	0001166928	000-49677
WCBO	West Coast Bancorp Common Stock	Common Stock	NGS	12(g)	0000717059	000-10997
WSTC	West Corporation Common Stock	Common Stock	NGS	12(g)	0001024657	000-21771
WMAR	West Marine, Inc. Common Stock	Common Stock	NGM	12(g)	0000912833	000-22512
WSTF	Weststaff Inc. Common Stock	Common Stock	NGM	12(g)	0000931911	000-24990
WEDX	Westaim Corporation (The) Common Stock	Common Stock	NGM	12(g)	0001108828	000-30600
WABC	Westamerica Bancorporation Common Stock	Common Stock	NGS	12(g)	0000311094	001-09383
WBKC	WestBank Corporation Common Stock	Common Stock	NGM	12(g)	0000742070	000-12784
WSTL	Westell Technologies, Inc. Class A Common Stock	Common Stock	NGS	12(g)	0001002135	000-27266
WTSLA	Wet Seal, Inc. (The) Class A Common Stock	Common Stock	NGM	12(g)	0000863456	000-18692
WEYS	Weyco Group, Inc. Common Stock	Common Stock	NGM	12(g)	0000106532	000-09068
WGNB	WGNB Corp. Common Stock	Common Stock	NCM	12(g)	0001115568	000-30805
WPSC	Wheeling-Pittsburgh Corporation Common Stock	Common Stock	NGM	12(g)	0000941738	000-50300
WEDC	White Electronic Designs Corporation Common Stock	Common Stock	NGM	12(g)	0000013606	001-04817
WTNY	Whitney Holding Corporation Common Stock	Common Stock	NGS	12(g)	0000106926	000-01026
WHIT	Whittier Energy Corporation Common Stock	Common Stock	NGM	12(g)	0001108520	000-30598
WFMI	Whole Foods Market, Inc. Common Stock	Common Stock	NGS	12(g)	0000865436	000-19797
WTHN	WiderThan Co., Ltd. American Depository Shares	American Depository Shares	NGM	12(g)	0001342167	000-51631
OATS	Wild Oats Markets, Inc. Common Stock	Common Stock	NGM	12(g)	0000909990	000-21577
WVVI	Willamette Valley Vineyards, Inc. Common Stock	Common Stock	NCM	12(g)	0000838875	000-21522
WMSI	Williams Industries, Inc. Common Stock	Common Stock	NCM	12(g)	0000107294	000-08190
WLSC	Williams Scotsman International, Inc. Common Stock	Common Stock	NGS	12(g)	0000923144	000-51521
WLFC	Willis Lease Finance Corporation Common Stock	Common Stock	NGM	12(g)	0001018164	000-28774
WLFCP	Willis Lease Finance Corporation Series A Preferred Shares	Preferred Stock	NGM	12(g)	0001018164	000-28774
WGBC	Willow Grove Bancorp, Inc. Common Stock	Common Stock	NGS	12(g)	0001163428	000-25191
WIBC	Wilshire Bancorp, Inc. Common Stock	Common Stock	NGS	12(g)	0001285224	000-50923
WLSN	Wilson's The Leather Experts Inc. Common Stock	Common Stock	NGM	12(g)	0001016607	000-21543
WIND	Wind River Systems, Inc. Common Stock	Common Stock	NGS	12(g)	0000833829	000-21342
WINA	Wimark Corporation Common Stock	Common Stock	NGM	12(g)	0000908315	000-22012
WTFC	Wintrust Financial Corporation Common Stock	Common Stock	NGS	12(g)	0001015328	000-21923
WTFCP	Wintrust Financial Corporation Wintrust Capital Trust I - 9.0% Cumulative Trust Preferred Securities	Other Securities	NGS	12(g)	0001015328	000-21923
WFII	Wireless Facilities, Inc. Common Stock	Common Stock	NGS	12(g)	0001069258	000-27231

Issue Symbol	Issue Name	Issue Type	Issue Market Segment	Registration Type	CIK	SEC File #
WITS	Witness Systems, Inc. Common Stock	Common Stock	NGS	12(g)	0001097338	000-29335
WJCI	WJ Communications, Inc. Common Stock	Common Stock	NGM	12(g)	0000105006	000-31337
WDHD	Woodhead Industries, Inc. Common Stock	Common Stock	NGS	12(g)	0000108215	000-05971
WGOV	Woodward Governor Company Common Stock	Common Stock	NGS	12(g)	0000108312	000-08408
WRLD	World Acceptance Corporation Common Stock	Common Stock	NGS	12(g)	0000108385	000-19599
WHRT	World Heart Corporation Ordinary Shares (Canada)	Ordinary Shares	NGM	12(g)	0001024520	000-28882
WGAT	Worldgate Communications, Inc. Common Stock	Common Stock	NCM	12(g)	0001030058	000-25755
WRSP	WorldSpace, Inc. Common Stock	Common Stock	NGM	12(g)	0001315054	000-51466
WPCS	WPCS International, Inc. Common Stock	Common Stock	NCM	12(g)	0001086745	000-26277
WPPGY	WPP Group plc American Depository Shares	American Depository Shares	NGS	12(g)	0000806968	000-16350
WPT	WPT Enterprises, Inc. Common Stock	Common Stock	NGM	12(g)	0001283843	000-50848
WMGI	Wright Medical Group, Inc. Common Stock	Common Stock	NGS	12(g)	0001137861	000-32883
WSFS	WSFS Financial Corporation Common Stock	Common Stock	NGS	12(g)	0000828944	000-16668
WSCI	WSI Industries Inc. Common Stock	Common Stock	NCM	12(g)	0000104897	000-00619
WVFC	WVS Financial Corp. Common Stock	Common Stock	NGM	12(g)	0000910679	000-22444
WYNN	Wynn Resorts, Limited Common stock	Common Stock	NGS	12(g)	0001174922	000-50028
XATA	XATA Corporation Common Stock	Common Stock	NCM	12(g)	0000854398	000-27166
XGEN	Xenogen Corporation Common Stock	Common Stock	NGM	12(g)	000116449	000-32239
XNPT	XenoPort, Inc. Common Stock	Common Stock	NGM	12(g)	0001130591	000-51329
XETA	XETA Technologies, Inc. Common Stock	Common Stock	NGM	12(g)	0000742550	000-16231
XLNX	Xilinx, Inc. Common Stock	Common Stock	NGS	12(g)	0000743988	000-18548
XMSR	XM Satellite Radio Holdings Inc. Class A Common Stock	Common Stock	NGS	12(g)	0001091530	000-27441
XOMA	XOMA Ltd. Common Stock	Common Stock	NGM	12(g)	0000791908	000-14710
XRIT	X-Rite, Incorporated Common Stock	Common Stock	NGS	12(g)	0000790818	000-14800
XTLB	XTL Biopharmaceuticals Ltd. American Depository Shares	American Depository Shares	NGM	12(g)	0001023549	000-51310
XRTX	Xyratex Ltd. Common Shares	Common Stock	NGS	12(g)	0001284823	000-50800
YHOO	Yahoo! Inc. Common Stock	Common Stock	NGS	12(g)	0001011006	000-28018
YAKC	Yak Communications, Inc. Common Stock	Common Stock	NGM	12(g)	0001084544	000-33471
YANB	Yardville National Bancorp Common Stock	Common Stock	NGS	12(g)	0000787849	000-26086
YORW	York Water Company (The) Common Stock	Common Stock	NGS	12(g)	0000108985	000-00690
UBET	Youbet.com, Inc. Common Stock	Common Stock	NCM	12(g)	0000814055	000-26015
YBTV	Young Broadcasting, Inc. Class A Common Stock	Common Stock	NGM	12(g)	0000929144	000-25042
YDNT	Young Innovations, Inc. Common Stock	Common Stock	NGS	12(g)	0000949874	000-23213

Issue Symbol	Issue Name	Issue Type	Issue Market Segment	Registration Type	CIK	SEC File #
YRCW	YRC Worldwide, Inc. Common Stock	Common Stock	NGS	12(g)	0000716006	000-12255
ZANE	Zanett Inc. Common Stock	Common Stock	NCM	12(g)	0001133872	000-27068
ZRBA	Zareba Systems, Inc. Common Stock	Common Stock	NCM	12(g)	0000104987	000-01388
ZBRA	Zebra Technologies Corporation Class A Common Stock	Common Stock	NGS	12(g)	0000877212	000-19406
ZVXI	Zevex International, Inc. Common Stock	Common Stock	NGM	12(g)	0000827056	001-12965
ZHNE	Zhone Technologies, Inc. Common Stock	Common Stock	NGM	12(g)	0001101680	000-50263
ZICA	ZI Corporation Common Stock	Common Stock	NGM	12(g)	0000922658	000-24018
ZILA	Zila, Inc. Common Stock	Common Stock	NGM	12(g)	0000827156	000-17521
ZILG	ZILOG, Inc. New Common Stock	Common Stock	NGM	12(g)	0000319450	001-13748
ZION	Zions Bancorporation Common Stock (No Par Value)	Common Stock	NGS	12(g)	0000109380	000-02610
ZIPR	ZipRealty, Inc. Common Stock	Common Stock	NGM	12(g)	0001142512	000-51002
ZIXI	Zixit Corporation Common Stock	Common Stock	NGM	12(g)	0000855612	000-17995
ZOLL	Zoll Medical Corporation Common Stock	Common Stock	NGS	12(g)	0000887568	000-20225
ZOLT	Zoltek Companies, Inc. Common Stock	Common Stock	NGM	12(g)	0000890923	000-20600
ZOMX	Zomax Incorporated Common Stock	Common Stock	NGM	12(g)	0001010788	000-28426
ZONS	Zones Inc. Common Stock	Common Stock	NGM	12(g)	0001013786	000-28488
ZOOM	Zoom Technologies, Inc. Common Stock	Common Stock	NCM	12(g)	0000822708	000-18672
ZFRAN	Zoran Corporation Common Stock	Common Stock	NGS	12(g)	0001003022	000-27246
ZUMZ	Zumiez Inc. Common Stock	Common Stock	NGS	12(g)	0001318008	000-51300
ZIGO	Zygo Corporation Common Stock	Common Stock	NGS	12(g)	0000730716	000-12944
ZGEN	ZymoGenetics, Inc. Common Stock	Common Stock	NGM	12(g)	0001129425	000-33489
ADRA	BLDRS Index Funds Trust BLDRS Asia 50 ADR Index Fund	Other Securities	NGM	12(g)(2)(B)	0001169717	811-21057
ADRD	BLDRS Index Funds Trust BLDRS Developed Markets 100 ADR Index Fund	Other Securities	NGM	12(g)(2)(B)	0001169717	811-21057
ADRE	BLDRS Index Funds Trust BLDRS Emerging Markets 50 ADR Index Fund	Other Securities	NGM	12(g)(2)(B)	0001169717	811-21057
ADRU	BLDRS Index Funds Trust BLDRS Europe 100 ADR Index Fund	Other Securities	NGM	12(g)(2)(B)	0001169717	811-21057
CSQ	Calamos Strategic Total Return Common Stock	Shares of Beneficial Interest	NGS	12(g)(2)(B)	0001275214	811-21484
ONEQ	Fidelity Nasdaq Composite Index Tracking Stock	Other Securities	NGM	12(g)(2)(B)	0000205323	811-2546
QTEC	First Trust NASDAQ - 100-Technology Sector Index Fund	Other Securities	NGM	12(g)(2)(B)	0001329377	001-32621
QQEW	First Trust NASDAQ-100 Equal Weighted Index Fund	Other Securities	NGM	12(g)(2)(B)	0001329377	001-32621
CUBA	Herzfeld Caribbean Basin Fund, Inc. (The) Common Stock	Common Stock	NCM	12(g)(2)(B)	0000880406	811-06445
JHFT	John Hancock Financial Trends Fund, Inc. Common Stock	Common Stock	NGS	12(g)(2)(B)	0000852954	811-05734

Issue Symbol	Issue Name	Issue Type	Issue Market Segment	Registration Type	CIK	SEC File #
QQQQ	Nasdaq-100 Trust, Series I Nasdaq-100 Shares	Other Securities	NGM	12(g)(2)(B)	0001067839	811-08947
JLA	Nuveen Equity Premium Advantage Fund Nuveen Equity Premium Advantage Fund Common Shares of Beneficial Interest	Shares of Beneficial Interest	NGM	12(g)(2)(B)	0001320492	811-21731
JPZ	Nuveen Equity Premium Income Fund Nuveen Equity Income Premium Fund Shares of Beneficial Interest	Shares of Beneficial Interest	NGM	12(g)(2)(B)	0001298699	811-21619
JSN	Nuveen Equity Premium Opportunity Fund Nuveen Equity Premium Opportunity Fund Shares of Beneficial Interest	Shares of Beneficial Interest	NGM	12(g)(2)(B)	0001308658	811-21674
FUND	Royce Focus Trust, Inc. Common Stock	Common Stock	NGS	12(g)(2)(B)	0000825202	811-05379
PEFX	S&P 500 Protected Equity Fund, Inc. (The) Common Stock	Common Stock	NGS	12(g)(2)(B)	0001090431	811-9479
WSCC	Waterside Capital Corporation Common Stock	Common Stock	NCM	12(g)(2)(B)	0000924095	811-8387

Exhibit B: List of securities of issuers that have elected to opt-out of requested relief

Issue Symbol	Issue Name	Issue Type	Issue Market Segment	Registration Type	CIK	SEC File #
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None

Exhibit C: List of securities exempt from Section 12(g) registration under Section 12(g)(2)(G) and Rule 12g3-2(b)

Issue Symbol	Issue Name	Issue Type	Issue Market Segment	Exemption Type	CIK	SEC File #
AAUK	Anglo American plc American Depositary Shares	American Depositary Shares	NCM	12g3-2(b)	0001088370	82-97
DAIEY	Dai'ei, Inc. American Depositary Shares	American Depositary Shares	NCM	12g3-2(b)	0000800167	82-230
FUJIY	Fuji Photo Film Co., Ltd. American Depositary Shares	American Depositary Shares	NCM	12g3-2(b)	0000800365	82-00078
HSVLY	Highveld Steel and Vanadium Corporation Limited American Depositary Shares	American Depositary Shares	NCM	12g3-2(b)	0000800630	82-596
NSANY	Nissan Motor Co., Ltd. American Depositary Shares	American Depositary Shares	NCM	12g3-2(b)	0000800937	82-207
REXMY	Rexam, Plc American Depositary Shares	American Depositary Shares	NCM	12g3-2(b)	0000013522	82-00004
STOSY	Santos, Ltd. American Depositary Shares (Australia)	American Depositary Shares	NCM	12g3-2(b)	0000800861	82-34
SANYY	Sanyo Electric Co., Ltd. American Depositary Shares	American Depositary Shares	NCM	12g3-2(b)	0000800863	82-264
VELCF	Veicro Industries N.V. Common Stock	Common Stock	NCM	12g3-2(b)	0000802100	82-145
ANAT	American National Insurance Company Common Stock	Common Stock	NGS	12(g)(2)(G)		
KCLI	Kansas City Life Insurance Company Common Stock	Common Stock	NCM	12(g)(2)(G)	0000054473	002-40764
NWLIA	National Western Life Insurance Company Class A Common Stock	Common Stock	NGS	12(g)(2)(G)	0000070684	002-17039
UFCS	United Fire & Casualty Company Common Stock	Common Stock	NGS	12(g)(2)(G)	0000101199	002-39621

[FR Doc. 06-6708 Filed 8-7-06; 8:45 am]

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-54241]

### In the Matter of the Application of the Nasdaq Stock Market, Inc. and the NASDAQ Stock Market LLC for an Exemption From Section 12(a) Allowing Trading of Certain Unregistered Securities

July 31, 2006.

#### I. Introduction

On January 13, 2006, the Commission approved the application of the Nasdaq Stock Market, Inc. ("Nasdaq") to register one of its subsidiaries, the NASDAQ Stock Market LLC ("Nasdaq Exchange") as a national securities exchange.<sup>1</sup> Prior to Nasdaq's submission of the application to become an exchange, Nasdaq was a wholly-owned subsidiary of the National Association of Securities Dealers, Inc. ("NASD") that operated as an interdealer quotation system. Historically under NASD rules, a company's securities were eligible for listing on Nasdaq if the security was registered under either Section 12(g)<sup>2</sup> or Section 12(b)<sup>3</sup> of the Securities Exchange Act of 1934 ("Exchange Act").<sup>4</sup> However, in certain circumstances, NASD rules also permitted the trading of securities that are exempt from registration under Section 12(g) of the Exchange Act.

Among other exempt securities, NASD rules allow the trading of any security of an insurance company that is exempt from registration under Section 12(g)(2)(G) of the Exchange Act<sup>5</sup> and the

securities of certain foreign private issuers that are exempt from Section 12(g) registration pursuant to Exchange Act Rule 12g3-2(b).<sup>6</sup>

Once the Nasdaq Exchange begins to operate as a national securities exchange, Section 12(a) of the Exchange Act<sup>7</sup> would prohibit any Nasdaq Exchange member, broker, or dealer from effecting any transaction in any security, other than an "exempted security" as defined in Section 3(a)(12) of the Exchange Act,<sup>8</sup> on the Nasdaq Exchange, unless the security is registered under Section 12(b) of the Exchange Act. There are no exemptions from Section 12(b) registration afforded to insurance companies and foreign private issuers that correspond to the exemptions available to these issuers under Section 12(g)(2)(G) of the Exchange Act and Exchange Act Rule 12g3-2(b). Accordingly, the securities of these issuers would need to be registered under Section 12(b) of the Exchange Act before transactions in those securities could be effected by Nasdaq Exchange members, brokers and dealers, consistent with Section 12(a) on the Nasdaq Exchange, absent the exemption provided by this order.

#### II. Request by Nasdaq and the Nasdaq Exchange for an Exemption From Section 12(a) of the Exchange Act

On July 31, 2006, the Commission received an application (the "Nasdaq Application")<sup>9</sup> from the Nasdaq and the Nasdaq Exchange for an exemption pursuant to Section 36 of the Exchange Act,<sup>10</sup> in accordance with the procedures set forth in Exchange Act Rule 0-12.<sup>11</sup> Section 36 of the Exchange Act gives the Commission the authority to exempt any person, security or transaction from any Exchange Act provision by rule, regulation or order, to the extent that the exemption is necessary or appropriate in the public interest and consistent with the protection of investors. Nasdaq and the Nasdaq Exchange have requested a three-year exemption from Section 12(a) of the Exchange Act, with respect to transactions in securities of the issuers

beneficial owners, directors, or officers of such company are subject to regulation (including reporting) by its domiciliary State substantially in the manner provided in Section 16.

<sup>6</sup> See 17 CFR 240.12g3-2(b).

<sup>7</sup> 15 U.S.C. 78(a).

<sup>8</sup> 15 U.S.C. 78c(a)(12).

<sup>9</sup> Letter from Edward S. Knight to Nancy M. Morris (July 31, 2006). The Nasdaq Application is included in accompanying Release No. 34-54240 (July 31, 2006).

<sup>10</sup> 15 U.S.C. 78mm.

<sup>11</sup> 17 CFR 240.0-12. Exchange Act Rule 0-12 sets forth procedures for filing applications for orders for exemptive relief pursuant to Section 36.

listed in Exhibit C to the Nasdaq Application that are currently exempt from registration under Section 12(g) of the Exchange Act. According to Nasdaq and the Nasdaq Exchange, the securities of four insurance companies and nine foreign private issuers currently are trading on Nasdaq in reliance on these exemptions.<sup>12</sup>

An exemption from Section 12(a) would permit Nasdaq Exchange members and brokers or dealers to effect transactions in these securities on the Nasdaq Exchange without registration under Section 12(b) of the Exchange Act. Nasdaq and the Nasdaq Exchange believe that the three-year period will provide these issuers with adequate time to complete the Section 12(b) registration process and prepare financial statements should they choose to continue to have their securities traded on the Nasdaq Exchange after expiration of the three-year period. Under the terms of the requested exemption, the insurance companies would have to continue to satisfy the conditions set forth in Section 12(g)(2)(G) of the Exchange Act and the foreign private issuers would have to remain in compliance with the conditions set forth in Exchange Act Rule 12g3-2(b) to qualify for the exemption.

Prior to submitting this request, Nasdaq and the Nasdaq Exchange notified the insurance companies and the foreign private issuers of their plan to request a Section 12(a) exemption on the issuers' behalf and allowed each issuer that did not wish to be the subject of the request to opt-out of the process. Nasdaq and the Nasdaq Exchange provided these issuers a period of 10 business days to notify Nasdaq of an opt-out preference. The issuers that chose to opt-out from the request are listed in Exhibit B to the Nasdaq Application.

#### III. Order Granting Nasdaq's Application for an Exemption Pursuant to Section 36 of the Exchange Act

We believe that exempting Nasdaq Exchange members, brokers and dealers for a limited time from the requirements of Section 12(a) regarding the trading of the securities listed in Exhibit C to the Nasdaq Application is necessary and appropriate in the public interest, and is consistent with the protection of investors in order to afford these issuers time to comply with the Section 12(b) registration requirements. As represented by Nasdaq and the Nasdaq Exchange in their request, immediate registration under Section 12(b) could

<sup>12</sup> See the Nasdaq Application.

<sup>1</sup> See Release No. 34-53128 (January 13, 2006) [71 FR 3550].

<sup>2</sup> 15 U.S.C. 78l(g).

<sup>3</sup> 15 U.S.C. 78l(b).

<sup>4</sup> 15 U.S.C. 78a *et seq.*

<sup>5</sup> 15 U.S.C. 78l(g)(2)(G). Section 12(g)(2)(G) provides that any security issued by an insurance company is exempt from registration if all of the following conditions are met:

- Such insurance company is required to and does file an annual statement with the Commissioner of Insurance (or other officer or agency performing a similar function) of its domiciliary State, and such annual statement conforms to that prescribed by the National Association of Insurance Commissioners or in the determination of such State commissioner, officer or agency substantially conforms to that so prescribed.

- Such insurance company is subject to regulation by its domiciliary State of proxies, consents, or authorizations in respect of securities issued by such company and such regulation conforms to that prescribed by the National Association of Insurance Commissioners.

- After July 1, 1966, the purchase and sales of securities issued by such insurance company by

force these issuers to withdraw from Nasdaq, consequently depriving U.S. investors of the accustomed market for the securities of those issuers and, in some cases, potentially reducing the depth and liquidity of the market for these securities. We believe that a three-year exemption will serve the public interest by minimizing any unnecessary disruptions that could result from the sudden withdrawal of these securities from Nasdaq, thereby potentially exposing investors in these securities to a less liquid market, absence of market surveillance by an exchange, and delays in execution of transfers.

We concur with Nasdaq and the Nasdaq Exchange that the requested three-year exemption period is appropriate and will provide the affected issuers with sufficient transition time to register their securities.<sup>13</sup> Until the expiration of the

<sup>13</sup> Issuers whose securities are exempt from Section 12(g) under Section 12(g)(2)(G) of the Exchange Act or Exchange Act Rule 12g3-2(b) would be required to prepare and file a registration statement on Form 10 for domestic companies or Form 20-F for foreign private issuers. Under Form

exemption granted by this Order, Nasdaq Exchange members, brokers and dealers will be permitted to effect transactions in the securities subject to this exemption so long as the issuers of these securities continue to satisfy the conditions of Section 12(g)(2)(G) of the Exchange Act or Exchange Act Rule 12g3-2(b), whichever is applicable.

Accordingly, *it is ordered* pursuant to Section 36 of the Exchange Act that, under the terms and conditions set forth below, a Nasdaq Exchange member, broker or dealer may effect a transaction on the Nasdaq Exchange in a security of an issuer listed in Exhibit C to the Nasdaq Application that has not been registered under Section 12(b) of the Exchange Act without violating Section

20-F, foreign private issuers would have to restate their financial statements in accordance with U.S. generally accepted accounting principles, or provide a reconciliation of their primary financial statements to U.S. GAAP, for at least two fiscal years. Thus, the three year period would give these issuers sufficient time to prepare the required financial statements should they choose to continue to have their securities traded on the Nasdaq Exchange.

12(a) of the Exchange Act. This exemption shall take effect on August 1, 2006, the same date as the start of Nasdaq Exchange's operation, and shall expire on August 1, 2009.

This exemption is limited to the securities of the issuers listed in Exhibit C to the Nasdaq Application and is conditioned on the continued satisfaction of the conditions set forth in Section 12(g)(2)(G) of the Exchange Act with respect to the securities of the insurance companies, or Exchange Act Rule 12g3-2(b) with respect to the securities of the foreign private issuers. As specified in the Nasdaq Application, Nasdaq will verify the satisfaction of these conditions. In addition, this exemption does not extend to any other section or provision of the Exchange Act.

By the Commission (Chairman Cox and Commissioners Glassman, Atkins, Campos and Nazareth).

**Nancy M. Morris,**  
*Secretary.*

[FR Doc. 06-6707 Filed 8-7-06; 8:45 am]

**BILLING CODE 8010-01-P**

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#### MINE SAFETY AND HEALTH FEDERAL REVIEW COMMISSION

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Repeal of tax interest on nonresident alien individuals and foreign corporations received from certain portfolio debt investments; public hearing; comments due by 8-14-06; published 6-13-06 [FR E6-09151]

#### LIST OF PUBLIC LAWS

This is a continuing list of public bills from the current session of Congress which have become Federal laws. It may be used in conjunction with "PLUS" (Public Laws Update Service) on 202-741-6043. This list is also available online at <http://www.archives.gov/federal-register/laws.html>.

The text of laws is not published in the **Federal Register** but may be ordered in "slip law" (individual pamphlet) form from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402 (phone, 202-512-1808). The text will also be made available on the Internet from GPO Access at <http://www.gpoaccess.gov/plaws/index.html>. Some laws may not yet be available.

#### H.R. 4456/P.L. 109-258

To designate the facility of the United States Postal Service located at 2404 Race Street in Jonesboro, Arkansas, as the "Hattie W. Caraway Station". (Aug. 2, 2006; 120 Stat. 661)

#### H.R. 4561/P.L. 109-259

To designate the facility of the United States Postal Service located at 8624 Ferguson Road in Dallas, Texas, as the "Francisco 'Pancho' Medrano Post Office Building". (Aug. 2, 2006; 120 Stat. 662)

#### H.R. 4688/P.L. 109-260

To designate the facility of the United States Postal Service located at 1 Boyden Street in Badin, North Carolina, as the "Mayor John Thompson 'Tom' Garrison Memorial Post Office". (Aug. 2, 2006; 120 Stat. 663)

**H.R. 4786/P.L. 109-261**

To designate the facility of the United States Postal Service located at 535 Wood Street in Bethlehem, Pennsylvania, as the "H. Gordon Payrow Post Office Building". (Aug. 2, 2006; 120 Stat. 664)

**H.R. 4995/P.L. 109-262**

To designate the facility of the United States Postal Service located at 7 Columbus Avenue in Tuckahoe, New York, as the "Ronald Bucca Post Office". (Aug. 2, 2006; 120 Stat. 665)

**H.R. 5245/P.L. 109-263**

To designate the facility of the United States Postal Service

located at 1 Marble Street in Fair Haven, Vermont, as the "Matthew Lyon Post Office Building". (Aug. 2, 2006; 120 Stat. 666)

**H.R. 4019/P.L. 109-264**

To amend title 4 of the United States Code to clarify the treatment of self-employment for purposes of the limitation on State taxation of retirement income. (Aug. 3, 2006; 120 Stat. 667)

**S. 310/P.L. 109-265**

Newlands Project Headquarters and Maintenance Yard Facility Transfer Act (Aug. 3, 2006; 120 Stat. 668)

**S. 1496/P.L. 109-266**

Electronic Duck Stamp Act of 2005 (Aug. 3, 2006; 120 Stat. 670)

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