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 3. The important elements of typical Federal Register documents.
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- 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, December 12, 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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Proclamation 8086 of November 27, 2006

The President

National Methamphetamine Awareness Day, 2006

By the President of the United States of America

A Proclamation

Methamphetamine abuse shatters families and threatens our communities. On National Methamphetamine Awareness Day, we underscore the dangers of methamphetamine and reaffirm our collective responsibility to combat all forms of drug abuse.

Methamphetamine is a powerfully addictive drug that dramatically affects users' minds and bodies. Chronic use can lead to violent behavior, paranoia, and an inability to cope with the ordinary demands of life. Methamphetamine abusers can transform homes into places of danger and despair by neglecting or endangering the lives of their children, spouses, and other loved ones. Additionally, methamphetamine production exposes anyone near the process to toxic chemicals and the risk of explosion.

My Administration is committed to fighting the spread of methamphetamine abuse throughout our country. While the number of teens who have tried this deadly drug and the number of people testing positive for methamphetamine in the workplace have decreased in recent years, methamphetamine use is still a dangerous public health problem. In the Synthetic Drug Control Strategy released earlier this year, my Administration set goals of a 15 percent decrease in methamphetamine use and 25 percent reduction in domestic methamphetamine labs over the next 3 years. To help reach these objectives, my proposed 2007 budget includes \$25 million to help ensure that Americans have access to effective methamphetamine abuse recovery services and programs. Earlier this year, I also signed into law the Combat Methamphetamine Epidemic Act of 2005, which makes manufacturing the drug more difficult and imposes tougher penalties on those who smuggle or sell it.

The struggle against methamphetamine is a national, State, and local effort. To find out how to raise awareness and to learn more about the battle against methamphetamine abuse, concerned citizens may visit theantidrug.com and methresources.gov. By working together, we can build a stronger, healthier America for generations to come.

NOW, THEREFORE, I, GEORGE W. BUSH, President of the United States of America, by virtue of the authority vested in me by the Constitution and laws of the United States, do hereby proclaim November 30, 2006, as National Methamphetamine Awareness Day. I call upon the people of the United States to observe this day with appropriate programs and activities.

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

A handwritten signature in black ink, appearing to be "George W. Bush", written in a cursive style.

Rules and Regulations

Federal Register

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Thursday, November 30, 2006

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

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

SMALL BUSINESS ADMINISTRATION

13 CFR Parts 121 and 126

RIN 3245-AE76, 3245-AE66

Small Business Size Regulations, HUBZone Program; Correction

AGENCY: U.S. Small Business Administration.

ACTION: Correcting amendments.

SUMMARY: The U.S. Small Business Administration (SBA) is correcting amendments to regulations governing SBA's Small Business Innovation Research (SBIR) Program and its Historically Underutilized Business Zone (HUBZone) Program. These regulations addressed Employee Stock Ownership Plans, or ESOPs, but incorrectly referred to the ESOP as an Employee Stock Option Plan.

EFFECTIVE DATE: These corrections are effective on November 30, 2006.

FOR FURTHER INFORMATION CONTACT: Carl Jordan, Office of Size Standards, (202) 205-6618 or by e-mail at sizestandards@SBA.gov; Michael P. McHale, Associate Administrator for the HUBZone Program, (202) 205-8885 or by e-mail, at hubzone@sba.gov.

SUPPLEMENTARY INFORMATION: The SBA published a final rule in the December 3, 2004 *Federal Register* (69 FR 70180) that amended the regulations governing size for the SBIR program. In the preamble to the regulation, SBA stated that it received comments supporting ownership and control of SBIR concerns by Employee Stock Ownership Plans, or ESOPs, for investment and employee incentive purposes. In the final rule, however, SBA inadvertently referred to the ESOP as an Employee Stock Option Plan. An ESOP is a retirement plan in which the small business contributes its stock to the plan for the benefit of the company's employees. Hence, SBA's regulations provide that it will consider

each stock trustee and plan member to be an owner of an SBIR concern, since with an ESOP all employees that are part of the plan own the stock in the company. In comparison, an employee stock option plan is merely a right given to an employee to buy the company's stock at a set price within a certain period of time. To avoid confusion on this issue, SBA is correcting this error.

SBA published in the May 24, 2004 *Federal Register* (69 FR 29411) a final rule that amended the regulations governing the HUBZone Program. In the final rule, SBA inadvertently referred to an ESOP as an Employee Stock Option Plan. Again, SBA meant to state that an ESOP is an Employee Stock Ownership Plan. Therefore, SBA is correcting this regulation as well.

List of Subjects

13 CFR Part 121

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

13 CFR Part 126

Administrative practice and procedure, Government procurement, Reporting and recordkeeping requirements, Small businesses.

■ Accordingly, 13 CFR parts 121 and 126 are corrected by making the following correcting amendments:

PART 121—SMALL BUSINESS SIZE REGULATIONS

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

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

■ 2. Amend § 121.702 by revising paragraph (a)(2) to read as follows:

§ 121.702 What size standards are applicable to the SBIR program?

* * * * *

(a) * * *

(2) If an Employee Stock Ownership Plan owns all or part of the concern, SBA considers each stock trustee and plan member to be an owner.

* * * * *

PART 126—HUBZONE PROGRAM

■ 3. The authority citation for part 126 continues to read as follows:

Authority: 15 U.S.C. 632(a), 632(j), 632(p) and 657a.

■ 4. Amend § 126.201 by revising the second sentence of the introductory text to read as follows:

§ 126.201 Who does SBA consider to own a HUBZone SBC?

* * * If an Employee Stock Ownership Plan owns all or part of the concern, SBA considers each stock trustee and plan member to be an owner. * * *

* * * * *

Dated: November 17, 2006.

Anthony Martoccia,

Associate Deputy Administrator, Government Contracting and Business Development.

[FR Doc. E6-20268 Filed 11-29-06; 8:45 am]

BILLING CODE 8025-01-P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 25

[Docket No. NM321; Special Condition No. 25-338-SC]

Special Conditions: Airbus Model A380-800 Airplane, Ground Turning Loads

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final special conditions.

SUMMARY: These special conditions are issued for the Airbus A380-800 airplane. This airplane will have novel or unusual design features when compared to the state of technology envisioned in the airworthiness standards for transport category airplanes. Many of these novel or unusual design features are associated with the complex systems and the configuration of the airplane, including its full-length double deck. For these design features, the applicable airworthiness regulations do not contain adequate or appropriate safety standards regarding ground turning loads. These special conditions contain the additional safety standards that the Administrator considers necessary to

establish a level of safety equivalent to that established by the existing airworthiness standards. Additional special conditions will be issued for other novel or unusual design features of the Airbus Model A380–800 airplane.

EFFECTIVE DATE: The effective date of these special conditions is November 9, 2006.

FOR FURTHER INFORMATION CONTACT: Holly Thorson, FAA, International Branch, ANM–116, Transport Airplane Directorate, Aircraft Certification Service, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 227–1357; facsimile (425) 227–1149.

SUPPLEMENTARY INFORMATION:

Background

Airbus applied for FAA certification/validation of the provisionally-designated Model A3XX–100 in its letter AI/L 810.0223/98, dated August 12, 1998, to the FAA. Application for certification by the Joint Aviation Authorities (JAA) of Europe had been made on January 16, 1998, reference AI/L 810.0019/98. In its letter to the FAA, Airbus requested an extension to the 5-year period for type certification in accordance with 14 CFR 21.17(c). The request was for an extension to a 7-year period, using the date of the initial application letter to the JAA as the reference date. The reason given by Airbus for the request for extension is related to the technical challenges, complexity, and the number of new and novel features on the airplane. On November 12, 1998, the Manager, Aircraft Engineering Division, AIR–100, granted Airbus' request for the 7-year period, based on the date of application to the JAA.

In its letter AI/LE–A 828.0040/99 Issue 3, dated July 20, 2001, Airbus stated that its target date for type certification of the Model A380–800 has been moved from May 2005, to January 2006, to match the delivery date of the first production airplane. In a subsequent letter (AI/L 810.0223/98 issue 3, dated January 27, 2006), Airbus stated that its target date for type certification is October 2, 2006. In accordance with 14 CFR 21.17(d)(2), Airbus chose a new application date of April 20, 1999, and requested that the 7-year certification period which had already been approved be continued. The FAA has reviewed the part 25 certification basis for the Model A380–800 airplane, and no changes are required based on the new application date.

The Model A380–800 airplane will be an all-new, four-engine jet transport

airplane with a full double-deck, two-aisle cabin. The maximum takeoff weight will be 1.235 million pounds with a typical three-class layout of 555 passengers.

Type Certification Basis

Under the provisions of 14 CFR 21.17, Airbus must show that the Model A380–800 airplane meets the applicable provisions of 14 CFR part 25, as amended by Amendments 25–1 through 25–98. If the Administrator finds that the applicable airworthiness regulations do not contain adequate or appropriate safety standards for the Airbus A380–800 airplane because of novel or unusual design features, special conditions are prescribed under the provisions of 14 CFR 21.16.

In addition to the applicable airworthiness regulations and special conditions, the Airbus Model A380–800 airplane must comply with the fuel vent and exhaust emission requirements of 14 CFR part 34 and the noise certification requirements of 14 CFR part 36. In addition, the FAA must issue a finding of regulatory adequacy pursuant to section 611 of Public Law 93–574, the “Noise Control Act of 1972.”

Special conditions, as defined in 14 CFR 11.19, are issued in accordance with 14 CFR 11.38 and become part of the type certification basis in accordance with 14 CFR 21.17(a)(2).

Special conditions are initially applicable to the model for which they are issued. Should the type certificate for that model be amended later to include any other model that incorporates the same novel or unusual design feature, the special conditions would also apply to the other model under the provisions of 14 CFR 21.101(a)(1).

Discussion of Novel or Unusual Design Features

The A380 has a landing gear arrangement consisting of a nose gear, two wing mounted gears, and two body mounted gears. This is different from the conventional tricycle landing gear arrangement envisioned by 14 CFR 25.495. The simple load condition specified in § 25.495, while providing a realistic approximation for designing a tricycle landing gear arrangement, will give unrealistic results for the A380. Safe sizing of the A380 landing gears necessitates a rational ground turning analysis that considers the way the airplane as a whole responds to a turning maneuver.

Furthermore, recent studies of the current generation of transport category airplanes carried out in the U.S. and in

Europe indicate a correlation between lower load factors in ground turns and higher gross weight of an airplane. This correlation was documented in the FAA-sponsored report, DOT/FAA/AR–02/129 *Side Load Factor Statistics from Commercial Aircraft Ground Operations*, dated January 2003. As stated in the report's abstract, “The results of this study clearly indicate, however, that the lateral loads experienced by the larger/heavier transport jets during ground turns are substantially less than those of smaller jet transports.” Based on this rationale, for the Model A380 airplane at maximum ramp weight—which is more than 30% heavier than any currently certificated airplane—the 0.5 g design turning load factor specified in § 25.495 is conservative. A load factor of 0.45 g is more appropriate for the A380 at maximum ramp weight. The data provided to the FAA support this reduced factor.

Therefore, in lieu of the requirements of § 25.495, a special condition regarding ground turning loads is justified for the Model A380 airplane. The special condition would require the applicant to determine the loads on the airplane during ground turning in a rational manner and would allow the applicant to determine a limit turning lateral load factor—not less than 0.45 g's—for the A380 at maximum ramp weight.

Discussion of Comments

Notice of Proposed Special Conditions No. 25–05–16–SC, pertaining to ground turning loads for the Airbus A380 airplane, was published in the **Federal Register** on August 9, 2005 (70 FR 46106). Comments supporting the intent and the language of the proposed special conditions were received from the Airline Pilots Association (ALPA). Comments requesting changes were received from the Boeing Company.

Requested change 1: Boeing states that it agrees special conditions are necessary, because the current regulations do not adequately address the A380 landing gear arrangement. However, Boeing disagrees with the general content of the proposed special conditions, because the proposed special conditions do not apply either the current safety standard for the Model 747 four-post gear arrangement or the standards for ground and loading conditions for multi-post gear arrangements developed by the FAA's Aviation Regulatory Advisory Committee (ARAC).

Boeing adds that the current safety standard for a four post gear

arrangement is found in Special Conditions A-4 issued for the Boeing 747 airplane and that this standard should apply to the Model A380 "since the configurations and gear arrangements are very similar to the Model 747 gear arrangement." * * *

Alternatively, Boeing suggests, the set of standards developed by ARAC for ground and landing conditions for multi-post gear arrangements should be incorporated as the basis of the Model A380 ground handling and landing requirements.

FAA response: This special condition was proposed in accordance with 14 CFR 21.16, which states that the Administrator prescribes special conditions, if she or he finds that the airworthiness regulations do not contain adequate or appropriate safety standards for an aircraft because of a novel or unusual design feature. Section 21.16 does not constrain the Administrator to prescribe only such standards as have been proposed by ARAC, and the Administrator routinely prescribes special conditions that are neither existing standards nor standards proposed by ARAC.

These special conditions are motivated primarily by the size and weight of the Model A380 airplane and the effect of these parameters on ground turning loads. Nevertheless, the FAA recognizes the importance of the multi-post landing gear configuration on the individual landing gear loads. (In separate special conditions for the A380, we have adopted the set of standards developed by ARAC for ground and landing conditions for multi-post landing gear arrangements, as Boeing suggests. Those special conditions, No. 25-324-SC, do not address ground turning loads.)

As discussed in the Notice of Proposed Special Conditions, pertaining to ground turning loads, the FAA concludes that, "Safe sizing of the A380 landing gear necessitates a rational ground turning analysis that considers the way the airplane as a whole responds to a turning maneuver," and the proposed special condition contains provisions for such an analysis. The FAA considers these provisions to adequately address the commenter's safety concern. The 747 Special Condition A-4 was not adopted for the A380, because it does not constitute a current safety standard for all four-post main landing gear.

Requested change 2: Boeing states that the proposed special conditions are not justified by the rationale stated by the FAA in the *Discussion of Novel or Unusual Design Features*. This rationale was essentially that the simple load

conditions specified in § 25.495-while providing a realistic approximation for designing a tricycle landing gear arrangement-would give unrealistic results for the A380 and that recent studies of the current generation of transport category airplanes show a correlation between lower load factors in ground turns and higher gross weight.

The FAA concluded that "Based on this rationale, for the A380 at a maximum ramp weight—which is more than 30% heavier than any currently certificated airplane—the 0.5 g design turning load factor specified in § 25.495 is conservative." However, the Boeing Company suggests that these conclusions from the operational data are broadly applicable to the current large/heavy fleet of transport airplanes and are not unique to the Model A380 configuration or design weights.

FAA response: The FAA agrees with Boeing that conclusions from the recent studies are broadly applicable to the current large/heavy fleet and that these studies indicate that the ground turning load factor of § 25.495 is conservative for certain heavier model airplanes. That conclusion does not alter the fact that an airplane of the size and gross weight of the A380 also exhibits decreased ground turning loads and thus warrants issuance of special conditions with ground turning loads lower than those specified in § 25.495.

Requested change 3: Boeing states that—by proposing to lower the side load factor in the ground turn—the proposed special conditions would adopt a lesser safety standard. According to the commenter,

This is a reduction of the established standard, which will result in decreased gear strength relative to the existing fleet. We consider the current 0.5g side load factor as a 'book' case intended to provide relatively simple criteria to ensure adequate side strength in lieu of an all-inclusive rational analysis. The special condition does not consider supplementary criteria to maintain equivalence to existing safety standards.

FAA response: As discussed above, data show that there is an inverse relationship between load factors experienced by airplanes in turns and their size and gross weight (i.e., greater weight implies lower load factors). Statistical analysis of these data indicates that the probability of achieving the "book" case on the A380 is exceedingly low—to the point that it cannot practically be achieved. Using a side load factor of 0.45g still results in a turning load that is very unlikely to be exceeded in operation. (By way of comparison, a single aisle airplane, such as an A320 or a Boeing 737, is more likely to exceed the "book" case of 0.5

g's in a turn than the A380 is of exceeding 0.45 g's.) Furthermore, the special condition states that the 0.45g load factor may be used, only if it can be shown by rational analysis that this lower value cannot be exceeded in service considering adverse variations in airplane characteristics and operations. Thus there is no practical decrease in safety relative to that provided by § 25.495. Since this special condition is based on a more realistic analysis, no supplementary criteria are necessary.

Requested change 4: The commenter indicates that "[Additionally,] the proposed SC would require a rational distribution of side load among the tires. While this provision may be conservative for the inboard gears, we find the SC not to be conservative for the wing gears. We suspect this will result in a lower level of strength for portions of the landing gear structure relative to the current commercial airplane fleet."

FAA response: The FAA does not agree. The special condition requires a rational distribution of side loads among tires in a severe turn, assuming a conservative turning load factor. This can be expected to result in side loads that are rationally distributed and conservative for both inboard gear and wing gear in comparison to any loading actually expected in operation. Boeing did not provide any data to support its claim that the special condition, as proposed, would result in a lower level of strength for portions of the landing gear structure relative to the current commercial fleet.

Requested change 5: Boeing comments that "In order to justify the reduced side factor, a more extensive set of likely ground maneuvers should be considered than those listed in the proposed special conditions." * * * At a minimum, regardless of the side load factor, the rational turning analysis should consider critical combinations of steering, braking, and power as well as turning in a crosswind."

FAA response: The FAA does not agree that to justify the reduced side load factor, a set of likely ground maneuvers more extensive than those listed should be considered in the special conditions. The special conditions require that the rational analysis consider "the maximum load factor that can be reached during the full range of likely ground operations at maximum ramp weight." * * *

The full range of likely ground operations would include likely critical combinations of steering, braking, power, and turning in crosswinds.

Requested change 6: Finally, Boeing comments that “A significant amount of the Model 747 main gear truck and axle assembly is designed by ground turn. Additionally, the axle stiffness, which is a very important parameter for brake interaction and for tire shoulder wear, could be negatively affected if the requirements are reduced. By lowering the loads below current practice, new service-related problems could result.”

FAA response: The special conditions require the applicant to demonstrate that the reduced ground turning load cannot be exceeded in service. If the applicant can demonstrate this and can demonstrate compliance with other regulations affecting the integrity of landing gear, brakes, and tires, we consider that the potential for new service-related problems would be minimized. Nevertheless, as with any other type design, the FAA continually monitors the safety of airplanes in the operating fleet and has the means to require mandatory corrective actions, if warranted.

Accordingly, the special conditions are adopted, as proposed, with a minor clarifying change to the text of subparagraph b.

Applicability

As discussed above, these special conditions are applicable to the Airbus A380–800 airplane. Should Airbus apply at a later date for a change to the type certificate to include another model incorporating the same novel or unusual design features, these special conditions would apply to that model as well under the provisions of § 21.101.

Conclusion

This action affects only certain novel or unusual design features of the Airbus A380–800 airplane. It is not a rule of general applicability.

List of Subjects in 14 CFR Part 25

Aircraft, Aviation safety, Reporting and recordkeeping requirements.

The authority citation for these special conditions is as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701, 44702, 44704.

The Special Conditions

Accordingly, pursuant to the authority delegated to me by the Administrator, the following special conditions are issued as part of the type certification basis for the Airbus A380–800 airplane.

In lieu of the requirements of § 25.495, the following special condition applies:

a. The airplane is assumed to execute a steady turn by steering of any steerable

gear or by application of any differential power. The airplane limit vertical load factor must be 1.0, and, in the absence of a more rational analysis, the limit airplane lateral load factor must be 0.5.

b. The airplane is assumed to be in static balance, the lateral load factor being reacted by friction forces applied at the ground contact point of each tire. The lateral load must be shared between each individual tire in a rational or conservative manner. The distribution of the load among the tires must account at least for the effects of the factors specified in subparagraph c. (2) of this special condition.

c. At maximum ramp weight, a limit value of lateral center of gravity (cg) inertia load factor lower than specified in subparagraph a. but not less than 0.45g (wing axis) may be used, if it can be shown by a rational analysis that this lower value cannot be exceeded. The rational analysis must consider at least the following:

1. The maximum lateral load factor that can be reached during the full range of likely ground operations at maximum ramp weight, including ground turning, “fishtailing,” and high-speed runway exit. In each case, the full dynamic maneuver must be considered.

2. The rational analysis must include at least the following parameters:

(a) Landing gear spring curves and landing gear kinematics.

(b) Reliable tire friction characteristics.

(c) Airframe and landing gear flexibility when significant.

(d) Airplane rigid body motion.

(e) The worst combination of tire diameter, tire pressure, and runway shapes, specified in §§ 25.511(b)(2), 25.511(b)(3), and 25.511(b)(4).

d. The limit lateral load factor at maximum landing weight is 0.5.

e. Details of the analysis and any assumptions used must be agreed to by the FAA. Any assumptions made in the analysis must be based on the intrinsic characteristics of the airplane and must be independent of airfield geometry. Other influences that cannot be controlled by the airplane design must be conservatively assessed.

Issued in Renton, Washington, on November 9, 2006.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E6–20275 Filed 11–29–06; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 25

[Docket No. NM354; Special Conditions No. 25–336–SC]

Special Conditions: Boeing Commercial Airplane Group, Boeing Model 777 Series Airplane; Overhead Cross Aisle Stowage Compartments

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final special conditions.

SUMMARY: These special conditions are issued for the Boeing Model 777 series airplanes. This airplane will have novel or unusual design features associated with overhead cross aisle stowage compartments. The applicable airworthiness regulations do not contain adequate or appropriate safety standards for these design features. These special conditions contain the additional safety standards the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards.

EFFECTIVE DATE: November 15, 2006.

FOR FURTHER INFORMATION CONTACT: Jayson Claar, FAA, Airframe/Cabin Branch, ANM–115, Transport Airplane Directorate, Aircraft Certification Service, 1601 Lind Avenue SW., Renton, Washington, 98057–3356; telephone (425) 227–2194; facsimile (425) 227–1232.

SUPPLEMENTARY INFORMATION:

Background

On April 20, 2005, Boeing Commercial Airplane Group, Seattle, Washington, applied for a supplemental type certificate to permit installation of overhead cross aisle stowage compartments in Boeing 777 series airplanes. The Boeing Model 777 series airplanes are large twin engine airplanes with four or five pairs of Type A exits. The Boeing 777 airplanes can be configured with various passenger capacities and ranges.

The regulations do not address the novel and unusual design features associated with the installation of overhead cross aisle stowage compartments installed on the Boeing Model 777, making these special conditions necessary. Generally, the requirements for overhead stowage compartments are similar to stowage compartments in remote crew rest compartments (i.e., located on lower lobe, main deck or overhead) already in use on Boeing Model 777 and 747 series

airplanes. Remote crew rest compartments have been previously installed and certified in the main passenger cabin area, above the main passenger area, and below the passenger cabin area adjacent to the cargo compartment of the Boeing Model 777-200, and -300 series airplanes.

Type Certification Basis

Under the provisions of § 21.101, Boeing Commercial Airplane Group must show that the Boeing Model 777, as changed, continues to meet the applicable provisions of the regulations incorporated by reference in Type Certificate No. T00001SE or the applicable regulations in effect on the date of application for the change. The regulations incorporated by reference in the type certificate are commonly referred to as the "original type certification basis." The regulations incorporated by reference in Type Certificate No. T00001SE for the Boeing Model 777 series airplanes include Title 14 Code of Federal Regulations (CFR), part 25, as amended by Amendments 25-1 through 25-100, with exceptions, for various models. Refer to Type Certificate No. T00001SE, as applicable, for a complete description of the certification basis for this model, including certain special conditions that are not relevant to these special conditions.

If the Administrator finds the applicable airworthiness regulations (part 25 as amended) do not contain adequate or appropriate safety standards for the Boeing Model 777 because of a novel or unusual design feature, special conditions are prescribed under the provisions of § 21.16.

In addition to the applicable airworthiness regulations and special conditions, the Boeing Model 777 must comply with the fuel vent and exhaust emission requirements of 14 CFR part 34 and the noise certification requirements of 14 CFR part 36.

The FAA issues special conditions, as defined in § 11.19, under § 11.38, and they become part of the type certification basis under § 21.101.

Special conditions are initially applicable to the model for which they are issued. Should the applicant apply for a change to modify any other model included on the same type certificate to incorporate the same or similar novel or unusual design feature, the special conditions would also apply to the other model under § 21.101.

Novel or Unusual Design Features

The Boeing Model 777 will incorporate the following novel or unusual design features: the installation

of powered lift-enabled stowage compartments that rise into the overhead area and lower into the cabin.

The overhead cross aisle stowage compartments are configured to allow stowage of galley type standard containers as well as coats, bags, and other items typically stowed in closets or bins. These stowage compartments may be located above the emergency exit cross aisles of Boeing Model 777 series airplanes. Because the compartment is lowered into the main cabin, it could affect egress if it cannot be raised again. The overhead compartment may lower into a cross aisle as defined in § 25.813, but it may also lower into other potential egress paths. For the purposes of these special conditions, the same criteria apply, whether or not the egress path is required by § 25.813. Therefore, as used in these special conditions, the term "overhead cross aisle stowage compartment" addresses all such compartments.

Each stowage compartment is accessed from the main deck by a powered lift that lowers and raises the stowage compartment between the overhead and the main deck. In addition, the lift can be hand cranked down and up in the event of a power or lift motor failure. A smoke detection system will be provided in the overhead cross aisle stowage compartments.

Discussion of the Special Conditions

In general, the requirements listed in these special conditions for overhead cross aisle stowage compartments are similar to those previously approved for overhead crew rest compartments in earlier certification programs, such as for the Boeing Model 777 and Model 747 series airplanes. These special conditions establish compartment access, power lift, electrical power, smoke/fire detection, fire extinguisher, fire containment, smoke penetration, and compartment design criteria for the overhead cross aisle stowage compartments. The overhead stowage compartments are not a direct analogy to stowage compartments in remote crew rest compartments installed and certified for Boeing Model 777 series airplanes, but the safety issues raised are similar. Features similar to those considered in the development of previous special conditions for fire protection will be included here also. The requirements provide an equivalent level of safety to that provided by other Boeing Model 777 series airplanes with similar overhead compartments.

Operational Evaluations and Approval

The FAA's Aircraft Certification Service will administer these special conditions, which specify requirements for design approvals (that is, type design changes and supplemental type certificates) of overhead cross aisle stowage compartments.

The Aircraft Evaluation Group of the FAA's Flight Standards Service must evaluate and approve the operational use of overhead cross aisle stowage compartments prior to use. The Aircraft Evaluation Group must receive all instructions for continued airworthiness, including service bulletins, prior to the FAA accepting and issuing approval of the modification.

Special Condition No. 1, Compartment Access and Placards

Appropriate placards, or other means, are required to address door access and locking to prohibit or prevent passenger access, and operation of the overhead storage compartment. There must also be a means to preclude anyone from being trapped inside the stowage compartment, if it is large enough for a person to enter. If there is more than one door providing access, each door must be equipped with these means.

Special Condition No. 2, Power Lift

The power lift must be designed so the overhead stowage compartment will not jam in the down position, even if lowered on top of a hard structure. The lift must operate at a speed, and stop above the floor at such a height, that allows anyone underneath the compartment to move clear without injury. The lift controls must be placed clear of the compartment door and must be pressed continuously for lift operation. Training on power lift operation procedures must be added to appropriate manuals.

Special Condition No. 3, Manual Operation

There must be a means to manually operate the lift that is independent of the electrical drive system. The lift must be operable by a range of occupants, including a fifth percentile female. The manual means must be capable of lowering the overhead stowage compartment quickly to the main deck to fight a fire. The manual system must be capable of raising the compartment quickly so the cross aisle or other egress path (if applicable) is not blocked in an emergency. If electrical or manual power is removed, there must be a means, such as a brake, to prevent the compartment from unrestricted movement, i.e., falling. Training on

manual operation procedures must be added to appropriate manuals.

Special Condition No. 4, Handheld Fire Extinguisher

For compartments larger than 25 cubic feet, a handheld fire extinguisher appropriate to fight the kinds of fire likely to occur in the overhead stowage compartment must be provided. This handheld fire extinguisher must be adjacent to the overhead compartment. This extinguisher must be in addition to those required for the passenger cabin.

Special Condition No. 5, Fire Containment

This special condition requires either the installation of a manually activated fire extinguishing system that is accessible from outside the overhead stowage compartment, or a demonstration that the crew could satisfactorily perform the function of extinguishing a fire under the prescribed conditions. A manually activated built-in fire extinguishing system would be required only if a crewmember could not successfully locate and get access to the fire during a demonstration where the crewmember is responding to the alarm. For the duration of the flight, the system must have adequate capacity to suppress any fire occurring in the stowage compartment considering the fire threat, volume of the compartment, and the ventilation rate.

Special Condition No. 6, Smoke Penetration

The design of the compartment must provide means to exclude hazardous quantities of smoke or extinguishing agent originating in the compartment from entering other occupied areas. The means must take into account the time period during which the compartment may be accessed to manually fight a fire, if applicable.

Smoke entering any other compartment occupied by crewmembers or passengers, when access to the stowage compartment is opened to manually fight a fire, must dissipate within five minutes after the access to the stowage compartment is closed.

During the one-minute smoke detection time (see Special Condition No. 7), penetration of a small quantity of smoke (one that would dissipate within 3 minutes under normal ventilation conditions) from this overhead stowage compartment into an occupied area on this airplane configuration would be acceptable based on the limitations placed in this and other associated special conditions. These special conditions place

sufficient restrictions in the quantity and type of material allowed in the overhead stowage compartment that threat from a fire in this remote area would be equivalent to that experienced on the main cabin.

If a built-in fire extinguishing system is used in lieu of manual fire fighting, then the fire extinguishing system must be designed so that no hazardous quantities of extinguishing agent will enter other compartments occupied by passengers or crew.

Special Condition No. 7, Compartment Design Criteria

The material used to construct the overhead stowage compartment must meet the flammability requirements for compartment interiors in § 25.853 and be fire resistant. Depending on the size of the compartment, certain fire protection features of Class B cargo compartments are also required. Enclosed stowage compartments equal to or exceeding 25 ft³ in interior volume must be provided with a smoke or fire detection system to ensure that a fire can be detected within a one-minute detection time. This is the same requirement as has been applied to remote crew rest compartments.

Enclosed stowage compartments equal to or greater than 57 ft³ in interior volume but less than or equal to 200 ft³, must have a liner that meets the requirements of § 25.855 for a Class B cargo compartment. The overhead stowage compartment may not be greater than 200 ft³ in interior volume. The in-flight accessibility of very large enclosed stowage compartments and the subsequent impact on the crewmember's ability to effectively reach any part of the compartment with the contents of a handheld fire extinguisher would require additional fire protection considerations similar to those required for inaccessible compartments such as Class C cargo compartments.

The overhead stowage compartment smoke or fire detection and fire suppression systems (including airflow management features which prevent hazardous quantities of smoke or fire extinguishing agent from entering any other compartment occupied by crewmembers or passengers) is considered complex in terms of paragraph 6d of Advisory Circular (AC) 25.1309-1A, "System Design and Analysis." The FAA considers failure of the overhead stowage compartment fire protection system (that is, smoke or fire detection and fire suppression systems) in conjunction with an overhead stowage fire to be a catastrophic event. Based on the "Depth of Analysis

Flowchart" shown in Figure 2 of AC 25.1309-1A, the depth of analysis should include both qualitative and quantitative assessments (reference paragraphs 8d, 9, and 10 of AC 25.1309-1A).

The requirements to enable crewmember(s) quick access to the overhead stowage compartment and to locate a fire source inherently places limits on the amount of baggage stowed and the size of the overhead stowage compartment. The overhead stowage compartment is limited to stowage of galley type standard containers as well as coats, bags, and other items typically stowed in closets or bins. It is not intended to be used for the stowage of other items. The design of such a system to include other items may require additional special conditions to ensure safe operation.

Discussion of Comments

Notice of proposed special conditions No. 25-06-09-SC for the Boeing Model 777-200 series airplanes was published in the **Federal Register** on October 18, 2006 (71 FR 61432). An amended proposed notice of special conditions No. SC-06-29A-SC for the Boeing Model 777 series airplanes was published in the **Federal Register** on November 2, 2006 (71 FR 64478). No comments were received, and the special conditions are adopted as proposed, except for clarifying changes.

Applicability

These special conditions are applicable to the Boeing Model 777 series airplanes with overhead cross aisle stowage compartments. Should Boeing Commercial Airplane Group apply later for a change to Type Certificate No. T00001SE to include another model on the same type certificate incorporating the same novel or unusual design feature, the special conditions would apply to that model as well.

Under standard practice, the effective date of final special conditions would be 30 days after the date of publication in the **Federal Register**, however, as the certification date for the Boeing 777 series is imminent, the FAA finds that good cause exists for make these special conditions effective upon issuance.

Conclusion

This action affects only certain novel or unusual design features on the Boeing Model 777 series airplanes. It is not a rule of general applicability and affects only the applicant who applied to the FAA for approval of these features on the airplane.

List of Subjects in 14 CFR Part 25

Aircraft, Aviation safety, Reporting and recordkeeping requirements.

The authority citation for these special conditions is as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701, 44702, 44704.

The Special Conditions

Accordingly, pursuant to the authority delegated to me by the Administrator, the following special conditions are issued as part of the type certification basis for Boeing Model 777 series airplanes. Each overhead cross aisle stowage compartment and the adjacent area, including the structural frame, mechanical system and drive motor, must meet the following requirements:

1. *Compartment Access and Placards.* There must be a means to prohibit or prevent passengers from entering or operating the overhead cross aisle stowage compartment. Placards prohibiting access are acceptable. If a compartment is large enough for a person to enter, there must be a means to preclude anyone from being trapped inside the stowage compartment. If a latching/locking mechanism is installed, the door must be capable of being opened from the outside without the aid of special tools. The mechanism must not prevent opening from the inside of the stowage at any time.

2. *Power Lift.* There must be a means such as a load or force limiter to protect the overhead cross aisle stowage compartment power lift from failure or jamming in the down position in the event it is lowered on top of a hard structure such as a galley cart.

(a) The lift controls must be placed so the operator is clear of the lift and designed such that the controls must be pressed continuously for lift operation.

(b) The lift must raise and lower the stowage compartment at a slow enough rate, and stop above the floor at such a height, that anyone underneath can easily move clear without injury.

(c) Stowage compartment operation training procedures must be added to the appropriate flight attendant manuals.

3. *Manual Lift.* There must be a means in the event of failure of the aircraft's main power system, or of the powered overhead cross aisle stowage

compartment lift system, for manually activating the lift system.

(a) This manual means must be independent of the electrical drive system

(b) The manual means must be accessible and operable by a range of occupants, including a fifth percentile female.

(c) The manual means must be capable of lowering the stowage compartment to the main deck quickly enough to fight a fire in the stowage compartment before overhead cross aisle stowage compartment fire containment is compromised.

(d) The manual means must be capable of quickly raising the stowage compartment such that the cross aisle, or other egress path is not blocked in the event of an emergency.

(e) Stowage compartment firefighting training procedures must be added to the appropriate manuals.

(f) The lift system must include a means, such as a brake, to retain the overhead cross aisle stowage compartment in any position of travel when the manual or electric drive force is removed.

4. *Fire Extinguisher.* The means to manually fight a fire in the overhead cross aisle stowage compartment must consider the additional stowage volume and time required to manually lower the compartment after indication. For compartments larger than 25 ft³ the following equipment must be provided directly adjacent to each overhead cross aisle stowage compartment: at least one approved handheld fire extinguisher, in addition to the fire extinguisher requirements of § 25.851 and § 121.309, appropriate for the kinds of fires likely to occur within the overhead stowage compartment.

5. *Fire Containment.* Fires originating within the overhead cross aisle stowage compartment must be controlled for the duration of the flight without a crewmember having to access the compartment. Alternatively, the design of the access provisions must allow crewmembers equipped for firefighting to have unrestricted access to the compartment. If the latter approach is elected it must be demonstrated that a crewmember has sufficient access to enable them to extinguish a fire. The time for a crewmember on the main deck to react to the fire alarm, (and, if applicable, to don the firefighting

equipment and to open the compartment) must not exceed the flammability and fire containment capabilities of the stowage compartment.

6. *Smoke Penetration.* There must be a means provided to exclude hazardous quantities of smoke or extinguishing agent originating in the overhead cross aisle stowage compartment from entering any other compartment occupied by crewmembers or passengers. If access is required to comply with Special Condition No. 5, this means must include the time period when accessing the stowage compartment to manually fight a fire. Smoke entering any other compartment occupied by crewmembers or passengers, when access to the stowage compartment is opened to manually fight a fire, must dissipate within five minutes after the access to the stowage compartment is closed. Prior to the one minute smoke detection time (reference note 2 in paragraph (7)) penetration of a small quantity of smoke (one that would dissipate within 3 minutes under normal ventilation conditions) from the stowage compartment into an occupied area is acceptable. Flight tests must be conducted to show compliance with this requirement.

7. *Compartment Design Criteria.* The overhead cross aisle stowage compartment must be designed to minimize the hazards to the airplane in the event of a fire originating in the stowage compartment.

(a) *Fire Extinguishing System.* If a built-in fire extinguishing system is used in lieu of manual firefighting, then the fire extinguishing system must be designed so no hazardous quantities of extinguishing agent will enter other compartments occupied by passengers or crew. The system must have adequate capacity to suppress any fire occurring in the stowage compartment, considering the fire threat, volume of the compartment, and the ventilation rate.

(b) *Compartment Size.* All overhead cross aisle stowage compartments must meet the design criteria given in the table below. As indicated by the table below, enclosed stowage compartments greater than 200 ft³ in interior volume are not addressed by this special condition.

STOWAGE COMPARTMENT INTERIOR VOLUMES

Fire protection features	Less than 25 ft ³	25 ft ³ to 57 ft ³	57 ft ³ to 200 ft ³
Materials of Construction ¹	Yes	Yes	Yes.
Detectors ²	No	Yes	Yes.

STOWAGE COMPARTMENT INTERIOR VOLUMES—Continued

Fire protection features	Less than 25 ft ³	25 ft ³ to 57 ft ³	57 ft ³ to 200 ft ³
Liner ³	No	Yes	Yes.

¹ *Material*

The material used to construct each enclosed stowage compartment must be at least fire resistant and must meet the flammability standards established for interior components (that is, 14 CFR Part 25 Appendix F, Parts I, IV, and V) per the requirements of § 25.853. For compartments less than 25 ft³ in total interior volume, the design must ensure the ability to contain a fire likely to occur within the compartment under normal use.

² *Detectors*

Enclosed stowage compartments equal to or exceeding 25 ft³ in total interior volume must be provided with a smoke or fire detection system to ensure that a fire can be detected within one minute. Flight tests must be conducted to show compliance with this requirement. Each system (or systems) must provide:

- (a) A visual indication in the flight deck within one minute after the start of a fire;
- (b) A warning in the main passenger cabin. This warning must be readily detectable by a flight attendant, taking into consideration the positioning of flight attendants throughout the main passenger compartment during various phases of flight.

³ *Liner*

If it can be shown the material used to construct the stowage compartment meets the flammability requirements of a liner for a Class B cargo compartment (that is, § 25.855 at Amendment 25–93 and Appendix F, part I, paragraph (a)(2)(ii)), in addition to the above ¹ *Material requirement*, then no liner would be required for enclosed stowage compartments equal to or greater than 25 ft³ in total interior volume but less than 57 ft³ in total interior volume. For all enclosed stowage compartments equal to or greater than 57 ft³ in total interior volume but less than or equal to 200 ft³, a liner must be provided that meets the requirements of § 25.855 for a Class B cargo compartment.

Issued in Renton, Washington, on November 15, 2006.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E6–20277 Filed 11–29–06; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 43

[Docket No.: FAA–2004–17683]

RIN 2120–A119

Implementing the Maintenance Provisions of Bilateral Agreements

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; notice of effective date.

SUMMARY: The FAA is announcing the effective date of the final rule, published July 14, 2005, that amended the regulations governing maintenance, preventive maintenance, and alterations performed on U.S. aeronautical products by certain Canadian persons. That revision removes specific regulatory references and other requirements and requires that the maintenance, preventive maintenance, and alterations be performed in accordance with a Bilateral Aviation Safety Agreement (BASA) between the United States and Canada and associated Maintenance Implementation Procedures (MIP). When the rule was published, the FAA announced the amendments would become effective concurrent with the date the MIP entered into force. The MIP was signed

and entered into force on August 31, 2006; accordingly, the amendments became effective on that date.

DATES: The effective date of § 43.17 is August 31, 2006.

FOR FURTHER INFORMATION CONTACT: William D. Scott, Flight Standards, Aircraft Maintenance Division, AFS–300, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone (502) 753–4202; facsimile (502) 753–4232, e-mail: william.d.scott@faa.gov.

SUPPLEMENTARY INFORMATION:

The Final Rule

On July 14, 2005, the FAA issued a final rule amending § 43.17 of Title 14 of the Code of Federal Regulations (CFR), Maintenance, preventive maintenance, and alterations performed on U.S. aeronautical products by certain Canadian persons. (70 FR 40872). The United States and Canada had entered into an international agreement called a Bilateral Aviation Safety Agreement (BASA) that was in line with BASAs negotiated with other countries. The FAA and its Canadian counterpart, Transport Canada Civil Aviation (TCCA) of the Department of Transport, were negotiating Maintenance Implementation Procedures (MIP) to accompany the BASA. The amendment to § 43.17 removes specific regulatory references that if not removed would have constrained development of a standardized MIP.

The amendment also makes other minor changes and requires that all maintenance, preventive maintenance, and alterations performed by Canadian Approved Maintenance Organizations (AMOs) and Aviation Maintenance Engineers (AMEs) on U.S. aeronautical products be done in accordance with a

BASA between the United States and Canada and the associated MIP.

The MIP has been finalized. It was signed on August 31, 2006, and became effective immediately upon signing. In the preamble to the final rule the FAA stated, “These amendments become effective concurrent with the date the MIP accompanying the BASA between the United States and Canada enters into force.” Since the MIP is now final and entered into force on August 31, 2006, the FAA now sets the effective date for the above-referenced amendment to § 43.17 to be August 31, 2006.

The FAA has also prepared guidance material to assist maintenance providers in complying with the MIP. This guidance is contained in Advisory Circular (AC) AC 43–10B. A copy of the AC may be obtained by accessing the FAA’s Regulatory and Guidance Library Web page at http://www.airweb.faa.gov/Regulatory_and_Guidance_Library/rgWebcomponents.nsf/HomeFrame?OpenFrameSet.

International Compatibility

In keeping with U.S. obligations under the Convention on International Civil Aviation, it is FAA policy to comply with International Civil Aviation Organization (ICAO) Standards and Recommended Practices to the maximum extent practicable. The FAA has reviewed the corresponding ICAO Standards and Recommended Practices and has identified no differences with these regulations.

Good Cause for Immediate Adoption

In accordance with 5 U.S.C. 553(b)(3)(B), FAA finds good cause for issuing this rule without prior notice and comment. Seeking public comment

is impracticable, unnecessary, and contrary to the public interest. This rule sets the effective date for a rulemaking that has already been through the public comment process. Seeking prior public comments on the effective date is impracticable, as well as contrary to the public interest in the orderly promulgation and implementation of this rule.

In consideration of the foregoing, the FAA announces the effective date of 14 CFR part 43, Amendment 43-40, published July 14, 2005. The amendments require that the maintenance, preventive maintenance, and alterations be performed in accordance with a Bilateral Aviation Safety Agreement (BASA) between the United States and Canada and associated Maintenance Implementation Procedures (MIP). The MIP was signed and entered into force on August 31, 2006; accordingly, the amendments became effective on that date.

Issued in Washington, DC, on November 22, 2006.

John M. Allen,

Acting Director, Flight Standards Service.

[FR Doc. E6-20254 Filed 11-29-06; 8:45 am]

BILLING CODE 4910-13-P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA-2006-25270; Airspace Docket No. 06-ASO-9]

Establishment of Class D Airspace; Eastman, GA

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action changes the name of the Eastman-Dodge County Airport to Heart of Georgia Regional Airport and establishes Class D airspace at Eastman, GA. On October 9, 1995, the Eastman-Dodge County Airport Authority adopted a name change for the airport. A non-Federal contract tower with a weather reporting system has been constructed at Heart of Georgia Regional Airport. Therefore, the airport meets criteria for Class D airspace. Class D surface area airspace is required when the control tower is open to contain Standard Instrument Approach Procedures (SIAPs) and other Instrument Flight Rules (IFR) operations at the airport. This action establishes Class D airspace extending upward from the surface to and including 2,500 feet

MSL within a 4.1-mile radius of the airport.

EFFECTIVE DATE: 0901 UTC, January 18, 2000. The Director of the Federal Register approves this incorporation by reference under 1 CFR part 51, subject to the annual revision of FAA Order 7400.9 and publication of conforming amendments.

FOR FURTHER INFORMATION CONTACT: Mark D. Ward, Group Manager, System Support, Eastern Service Center, Federal Aviation Administration, P.O. Box 20636, Atlanta, Georgia 30320; telephone (404) 305-5627.

SUPPLEMENTARY INFORMATION:

History

On August 2, 2006, the FAA proposed to amend part 71 of the Federal Aviation Regulations (14 CFR part 71) by changing the name of the Eastman-Dodge City Airport and establishing Class D airspace at Eastman, GA (71 FR 43678). This action provides adequate Class D airspace for IFR operations at Heart of Georgia Regional Airport. Designations for Class D Airspace are published in FAA Order 7400.9P, effective September 16, 2006, which is incorporated by reference in 14 CFR part 71.1. The Class D airspace designation listed in this document will be published subsequently in the Order.

Interested parties were invited to participate in this rulemaking proceeding by submitting written comments on the proposal to the FAA. No comments objecting to the proposal were received.

The Rule

This amendment to part 71 of the Federal Aviation Regulations (14 CFR part 71) changes the name of the Eastman-Dodge County Airport to Heart of Georgia Regional Airport and establishes Class D airspace at Eastman, GA.

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

substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (Air).

Adoption of the Amendment

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

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

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

Authority: 49 U.S.C. 106(g); 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 7400.9P, Airspace Designations and Reporting Points, effective September 16, 2006, is amended as follows:

Paragraph 5000 Class D Airspace.

* * * * *

ASO GA D Eastman, GA [NEW]

Heart of Georgia Regional Airport, GA
(Lat. 32°12'51" N, long. 83°07'41" W)

That airspace extending upward from the surface to and including 2,500 feet MSL within a 4.1-mile radius of the Heart of Georgia Regional Airport. This Class D airspace area is effective during the specific days and times established in advance by a Notice to Airmen. The effective days and times will thereafter be continuously published in the Airport/Facility Directory.

* * * * *

Issued in College Park, Georgia, on October 6, 2006.

Anne Boykin,

Acting Group Manager, System Support, Eastern Service Center.

[FR Doc. 06-9232 Filed 11-29-06; 8:45 am]

BILLING CODE 4910-13-M

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 931

[NM-044-FOR]

New Mexico Regulatory Program

AGENCY: Office of Surface Mining Reclamation and Enforcement, Interior.

ACTION: Final rule; approval of amendment.

SUMMARY: The Secretary of the Interior (Secretary) is announcing the approval of an amendment to the New Mexico regulatory program (the “New Mexico program”) under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act) and the removal of the remaining condition of program approval. New Mexico proposed addition of rules and revision of a statute concerning the award of costs and expenses, including attorney fees, incurred in connection with the administrative and judicial appeals process.

New Mexico revised its program to be consistent with SMCRA and the corresponding Federal regulations.

EFFECTIVE DATE: November 30, 2006.

FOR FURTHER INFORMATION CONTACT: Willis Gainer, Telephone: (505) 248-5096, e-mail address: wgainer@osmre.gov.

SUPPLEMENTARY INFORMATION:

- I. Background on the New Mexico Program
- II. Submission of the Proposed Amendment
- III. Secretary’s Findings
- IV. Summary and Disposition of Comments
- V. Secretary’s Decision
- VI. Procedural Determinations

I. Background on the New Mexico Program

Section 503(a) of the Act permits a State to assume primacy for the regulation of surface coal mining and reclamation operations on non-Federal and non-Indian lands within its borders by demonstrating that its State program includes, among other things, “a State law which provides for the regulation of surface coal mining and reclamation operations in accordance with the requirements of this Act * * *; and rules and regulations consistent with regulations issued by the Secretary pursuant to this Act.” See 30 U.S.C. 1253(a)(1) and (7). On the basis of these criteria, the Secretary conditionally approved the New Mexico program on December 31, 1980. You can find background information on the New Mexico program, including the Secretary’s findings, the disposition of comments, and conditions of approval in the December 31, 1980, **Federal Register** (45 FR 86459). You can also find later actions concerning New Mexico’s program and program amendments at 30 CFR 931.10, 931.11, 931.13, 931.15, 931.16, and 931.30.

II. Submission of the Proposed Amendment

By letter dated November 18, 2005, New Mexico sent us an amendment to

its program (Administrative Record No. 874) under SMCRA (30 U.S.C. 1201 *et seq.*). New Mexico sent the amendment in response to a condition of the New Mexico program approval at 30 CFR 931.11(e), concerning the award of attorney fees and legal costs.

We announced receipt of the proposed amendment in the February 13, 2006, **Federal Register** (71 FR 7477; Administrative Record No. NM-882). In the same document, we opened the public comment period and provided an opportunity for a public hearing or meeting on the amendment’s adequacy. We did not hold a public hearing or meeting because no one requested one. The public comment period ended on March 15, 2006. We received one agency comment from the State Historic Preservation Officer and one public comment from the Zuni Tribe.

III. Secretary’s Findings

Following is the finding the Secretary made concerning the amendment under SMCRA and the Federal regulations at 30 CFR 732.15 and 732.17. The Secretary is approving the amendment as described below.

New Mexico Surface Mining Act (NMSA), Section 69-25A-29.F, and New Mexico Annotated Code (NMAC), Section 19.8.12.1204, Award of Legal Costs and Expenses

The Secretary required, as a condition of program approval (codified at 30 CFR 931.11(e)), that New Mexico implement regulations containing provisions which are the same as or similar to those in 43 CFR 4.1290-4.1296, relating to the award of costs, including attorney fees, in administrative proceedings, or otherwise amend its program to accomplish the same result.

OSM’s current standard for approval of State program provisions concerning assessment of costs in administrative proceedings is that the State statutory and regulatory provisions must be in accordance with section 525(e) of SMCRA and consistent with 43 CFR Part 4. “Same or similar” is OSM’s standard for approval of State program counterparts to the Federal provisions in section 518 of SMCRA concerning penalties, and section 521 of SMCRA concerning enforcement.

In response to the condition at 30 CFR 931.11(e), New Mexico proposes to (1) revise its statutory provision at NMSA, section 69-25A-29.F, concerning administrative review and the assessment of costs and expenses, including attorney fees, for a person’s participation in administrative proceedings, including judicial review of agency actions, and (2) add newly-

created rules at NMAC, section 19.8.12.1204, which contain provisions allowing for the award of appropriate costs and expenses, including attorney fees, reasonably incurred as a result of participation in an administrative review.

NMSA, Section 69-25A-29.F

New Mexico proposes to revise NMSA, section 69-25A-29.F, concerning administrative review and the assessment of costs and expenses, including attorney fees, for a person’s participation in administrative proceedings, including judicial review of agency actions, by deleting the provision stating that no such assessment shall be imposed upon the Director of the New Mexico program. With this revision, the Director of the New Mexico program has authority to determine whether expenses (that have been reasonably incurred for or in connection with participation in administrative proceedings, including any judicial review of agency actions) may be assessed against any party which would now include the Director.

Section 525(e) of SMCRA allows for an award of a sum equal to the aggregate amount of all costs, expenses, and attorney fees determined by the Secretary of the Interior to have been reasonably incurred by a person for or in connection with his participation in administrative proceedings, including any judicial review of agency actions.

NMAC, Section 19.8.12.1204

New Mexico proposes addition of rules at NMAC, sections 19.8.12.1204A-G, which establish procedures, timeframes and standards for petitions for award of legal costs and expenses. New Mexico’s proposed rules are intended to be consistent with the corresponding Federal regulations at 43 CFR 4.1290-4.1296, thereby satisfying the condition of State program approval at 30 CFR 931.11(e). With the exceptions discussed below, New Mexico’s proposed revisions are substantively the same as the corresponding Federal regulations at 43 CFR 4.1290-4.1296.

No State Counterpart to 43 CFR 4.1294(a)(2)

New Mexico does not propose a counterpart regulation to 43 CFR 4.1294(a)(2) concerning the award of costs and expenses for alleged discriminatory acts. The regulations pertaining to the reporting and handling of such acts are found at 30 CFR Part 830 (now Part 865). These regulations were promulgated pursuant to section 703 of the Act. Because the provisions

for Employee Protection in section 703 of SMCRA are strictly Federal requirements, State programs are not required to include counterparts to these requirements. Therefore, the lack of a New Mexico program counterpart provision to the Federal regulation at 43 CFR 4.1294(a)(2) is not inconsistent with the Act.

NMAC, Section 19.8.12.1204E(2), and 43 CFR 4.1294(b), Award of Fees to Those Who Prevail in Whole or Significant Part and Achieve at Least Some Degree of Success on the Merits

New Mexico's proposed rule at NMAC, section 19.8.12.1204E(2), provides for awards from the Mining and Minerals Division (MMD) to a person other than the permittee who initiates or participates in a proceeding under the New Mexico program, prevails in whole or in significant part and achieves at least some degree of success on the merits. The award is contingent upon a finding that the person substantially contributed to the issues' full and fair determination, except that the contribution of the person who did not initiate the proceeding must be separate and distinct from the contribution made by the person initiating the proceeding. New Mexico's proposed rule differs from the Federal counterpart regulation at 43 CFR 4.1294(b) in that it requires that the person prevail in whole or in significant part where the Federal rule requires that the person prevail in whole or in part without the "significant" qualifier. New Mexico's proposed rule also distinguishes the contribution to a proceeding made by a participating person from the contribution made by an initiating party.

For the reasons discussion below, we believe that New Mexico's qualifying language adds reasonable clarification for administrative and judicial reviewers and is, therefore, not inconsistent with the Federal regulations.

In order to establish procedures governing petitions for the award of costs and expenses under section 525(e), the Secretary promulgated the regulations which appear at 43 CFR 4.1290–4.1296. The original regulations were published on August 3, 1978 (43 FR 34376). The 1978 regulations at 43 CFR 4.1294(b) provided that costs and expenses may be awarded from OSM to persons other than the permittee, if the person "made a substantial contribution to the full and fair determination of the issues." They did not contain criteria with regard to the degree of success on

the merits to be achieved for such awards.

After the Secretary conditionally approved the New Mexico Regulatory program, the 1978 regulations at 43 CFR 4.1294(b) were revised (50 FR 47222; November 15, 1985). The revision was prompted by the decision of the United States Supreme Court in *Ruckelshaus v. Sierra Club*, 463 U.S. 680 (1983), which held in a statutory context similar to section 525(e) of the Act, that an award of costs and expenses is conditioned upon a party prevailing in whole or in part in the underlying proceeding. In view of the court's decision in *Ruckelshaus*, the Secretary revised paragraph (b) of 30 CFR 4.1294 to state explicitly that eligibility to receive an award is "subject to the condition that the person shall have prevailed in whole or in part, achieving at least some degree of success on the merits." The 1985 revision retained the requirement that the "person made a substantial contribution to a full and fair determination of the issues."

Subsequent court cases have held that plaintiffs may be considered "prevailing parties" for attorney fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought.¹ The relief cannot be merely declaratory or procedural; it must reach the underlying merits of the claim. The level of success is relevant to the amount of fees to be awarded.

In the context of the above discussion, the Secretary finds that New Mexico's proposed NMAC, section 19.8.12.1204E(2), is consistent with and no less effective than the Act and counterpart Federal regulation at 43 CFR 4.1294(b).

Removal of Program Condition

Based on the above discussion, the Secretary (1) finds that New Mexico's proposed revision of NMSA, section 69–25A–29.F, and addition of NMAC, section 19.8.12.1204, satisfy the requirements of the program condition at 30 CFR 931.11(e) and (2) therefore, removes the condition.

IV. Summary and Disposition of Comments

Public Comments

We asked for public comments on the amendment (Administrative Record No. NM–876). We received one comment letter.

By letter dated February 2, 2006 (Administrative Record No. NM–879), we received comments from the

Governor of the Zuni Tribe in Zuni, New Mexico. Our response to the Governor's comments regarding New Mexico's proposed rule revisions NMAC, section 19.8.12.1204, concerning the award of attorney fees, is discussed below.

The Governor raised concerns about a provision at proposed NMAC, section 19.8.12.1204.E(5), that allows attorney fees to be awarded to the New Mexico Minerals and Mining Division (MMD) by the Director of the New Mexico program. The Director of the New Mexico program is also the Director of MMD. The Governor expressed concern that the allowance for the agency to collect attorney fees would intimidate parties from challenging agency actions.

The authority for the Director of the New Mexico program to award attorney fees to any party, including MMD, has existed in New Mexico's statute at NMSA, section 69–25A–29.F, since 1979. New Mexico's proposed rules at NMAC, section 19.8.12.1204, are intended to provide counterpart provisions to the Federal regulations at 43 CFR 4.1290–1296, which restrict the right of certain parties, including the agency and the permittee, to collect fees from other parties.

As discussed in the Secretary's finding above, New Mexico's proposed rule at NMAC, section 19.8.12.1204.E(5), which allows the award of attorney fees to MMD is consistent with New Mexico's existing statute at NMSA, section 69–25A–29.F, and with the counterpart Federal regulations at 43 CFR 4.1290–1296. Both New Mexico's proposed rule and the Federal regulations limit an agency's right to collect attorney fees in either an administrative or judicial proceeding to situations where the agency can demonstrate that another party participated in the proceeding in bad faith and for the purpose of harassing or embarrassing the government. Furthermore, as discussed above, without the proposed revision at NMAC, section 19.8.12.1204.E(5), the agency could apply, under the existing statutory provision for attorney fees, on the same basis as other parties.

For the reasons discussed above, we are not requiring any revision of New Mexico's proposed rules in response to these comments.

Federal Agency Comments

Under 30 CFR 732.17(h)(11)(i) and section 503(b) of SMCRA, we requested comments on the amendment from various Federal agencies with an actual or potential interest in the New Mexico program (Administrative Record No. NM–876). We received no comments.

¹ *Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 789 (1989).

Environmental Protection Agency (EPA) Concurrence and Comments

Under 30 CFR 732.17(h)(11)(i) and (ii), we are required to get concurrence from EPA for those provisions of the program amendment that relate to air or water quality standards issued under the authority of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or the Clean Air Act (42 U.S.C. 7401 *et seq.*).

None of the revisions that New Mexico proposed to make in this amendment pertains to air or water quality standards. Under 30 CFR 732.17(h)(11)(i), OSM requested comments on the amendment from EPA (Administrative Record No. NM-876). EPA did not respond to our request.

State Historic Preservation Officer (SHPO) and the Advisory Council on Historic Preservation (ACHP)

Under 30 CFR 732.17(h)(4), we are required to request comments from the SHPO and ACHP on amendments that may have an effect on historic properties. On December 20, 2005, we requested comments on New Mexico's amendment (Administrative Record No. NM-876). The SHPO responded on February 9, 2006, that it had no comments because the proposed amendments do not affect cultural resources (Administrative Record No. NM-881). We did not receive a response from the ACHP.

V. Secretary's Decision

Based on the above findings, we approve New Mexico's November 18, 2005, proposed amendment, as revised on March 27, 2006.

We approve New Mexico's proposed statutory revisions as they were enacted by New Mexico (effective on June 17, 2005) and rule revisions as they were promulgated by New Mexico (effective on April 28, 2006).

To implement this decision, we are amending the Federal regulations at 30 CFR part 931, which codify decisions concerning the New Mexico program. We find that good cause exists under 5 U.S.C. 553(d)(3) to make this final rule effective immediately. Section 503(a) of SMCRA requires that the State's program demonstrate that the State has the capability of carrying out the provisions of the Act and meeting its purposes. Making this regulation effective immediately will expedite that process. SMCRA requires consistency of State and Federal standards.

VI. Procedural Determinations*Executive Order 12630—Takings*

This rule does not have takings implications. This determination is

based on the analysis performed for the counterpart Federal regulation.

Executive Order 12866—Regulatory Planning and Review

This rule is exempted from review by the Office of Management and Budget (OMB) under Executive Order 12866 (Regulatory Planning and Review).

Executive Order 12988—Civil Justice Reform

The Department of the Interior has conducted the reviews required by section 3 of Executive Order 12988 and has determined that this rule meets the applicable standards of subsections (a) and (b) of that section. However, these standards are not applicable to the actual language of State regulatory programs and program amendments because each program is drafted and promulgated by a specific State, not by OSM. Under sections 503 and 505 of SMCRA (30 U.S.C. 1253 and 1255) and the Federal regulations at 30 CFR 730.11, 732.15, and 732.17(h)(10), decisions on proposed State regulatory programs and program amendments submitted by the States must be based solely on a determination of whether the submittal is consistent with SMCRA and its implementing Federal regulations and whether the other requirements of 30 CFR Parts 730, 731, and 732 have been met.

Executive Order 13132—Federalism

This rule does not have Federalism implications. SMCRA delineates the roles of the Federal and State governments with regard to the regulation of surface coal mining and reclamation operations. One of the purposes of SMCRA is to "establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations." Section 503(a)(1) of SMCRA requires that State laws regulating surface coal mining and reclamation operations be "in accordance with" the requirements of SMCRA, and section 503(a)(7) requires that State programs contain rules and regulations "consistent with" regulations issued by the Secretary pursuant to SMCRA.

Executive Order 13175—Consultation and Coordination With Indian Tribal Governments

In accordance with Executive Order 13175, we have evaluated the potential effects of this rule on Federally recognized Indian Tribes and have determined that the rule does not have substantial direct effects on one or more Indian Tribes, on the relationship

between the Federal government and Indian Tribes, or on the distribution of power and responsibilities between the Federal government and Indian Tribes. The rule does not involve or affect Indian Tribes in any way.

Executive Order 13211—Regulations That Significantly Affect the Supply, Distribution, or Use of Energy

On May 18, 2001, the President issued Executive Order 13211 which requires agencies to prepare a Statement of Energy Effects for a rule that is (1) considered significant under Executive Order 12866, and (2) likely to have a significant adverse effect on the supply, distribution, or use of energy. Because this rule is exempt from review under Executive Order 12866 and is not expected to have a significant adverse effect on the supply, distribution, or use of energy, a Statement of Energy Effects is not required.

National Environmental Policy Act

This rule does not require an environmental impact statement because section 702(d) of SMCRA (30 U.S.C. 1292(d)) provides that agency decisions on proposed State regulatory program provisions do not constitute major Federal actions within the meaning of section 102(2)(C) of the National Environmental Policy Act (42 U.S.C. 4321).

Paperwork Reduction Act

This rule does not contain information collection requirements that require approval by OMB under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*).

Regulatory Flexibility Act

The Department of the Interior certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The State submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an economic analysis was prepared and certification made that such regulations would not have a significant economic effect upon a substantial number of small entities. In making the determination as to whether this rule would have a significant economic impact, the Department relied upon the data and assumptions for the counterpart Federal regulations.

Small Business Regulatory Enforcement Fairness Act

This rule is not a major rule under 5 U.S.C. 804(2), of the Small Business

Regulatory Enforcement Fairness Act. This rule:

- a. Does not have an annual effect on the economy of \$100 million.
 - b. Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions.
 - c. Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.
- This determination is based upon the fact that the State submittal which is the subject of this rule is based upon counterpart Federal regulations for which an analysis was prepared and a determination made that the Federal regulation was not considered a major rule.

Unfunded Mandates

This rule will not impose an unfunded mandate on State, local, or tribal governments or the private sector of \$100 million or more in any given year. This determination is based upon the fact that the State submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an analysis was prepared and a determination made that the Federal regulation did not impose an unfunded mandate.

List of Subjects in 30 CFR Part 931

Intergovernmental relations, Surface mining, Underground mining.

Dated: November 9, 2006.

C. Stephen Allred,

Assistant Secretary, Land and Minerals Management.

■ For the reasons set out in the preamble, 30 CFR part 931 is amended as set forth below:

PART 931—NEW MEXICO

■ 1. The authority citation for part 931 continues to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

§ 931.11 [Amended]

- 2. Section 931.11 is amended by removing and reserving paragraph (e).
- 3. Section 931.15 is amended in the table by adding a new entry in chronological order by “Date of final publication” to read as follows:

§ 931.15 Approval of New Mexico regulatory program amendments

* * * * *

Original amendment submission date	Date of final publication	Citation/description
* * * * *	* * * * *	* * * * *
November 18, 2005	November 30, 2006	NMSA, sections 69–25A–29.F, concerning award of legal costs and expenses; and NMAC, sections 19.8.12.1204.A through G, concerning award of legal costs and expenses, including attorney fees.

[FR Doc. 06–9461 Filed 11–29–06; 8:45 am]
BILLING CODE 4310–05–M

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

49 CFR Part 655

[Docket No. FTA–2006–24592]

RIN 2132–AA86

Controlled Substances and Alcohol Misuse Testing

AGENCY: Federal Transit Administration (FTA), United States Department of Transportation.

ACTION: Final rule.

SUMMARY: This rule codifies existing FTA administrative guidance for safety-sensitive employees of ferryboat operations that are subject to the drug and alcohol (D&A) testing regulations of both FTA and the United States Coast Guard (USCG). This rule will provide regulatory relief to ferryboat operators who were previously subject to duplicative D&A testing regulations, and improve ferryboat operator compliance with FTA D&A testing regulations.

This rule does not adopt the proposed rule with respect to certain motor carrier operators who are subject to the D&A testing regulations of both FTA and the Federal Motor Carrier Safety Administration (FMCSA). FTA will retain its current guidance and interpretation with respect to these motor carrier operators.

EFFECTIVE DATE: This rule is effective January 2, 2007.

FOR FURTHER INFORMATION CONTACT: For program issues, Gerald Powers, Office of Safety and Security, (617) 494–2395 (telephone); (202) 366–7951 (fax); or *Gerald.Powers@dot.gov* (e-mail). For legal issues, Shauna Coleman, Office of the Chief Counsel, (202) 366–4011 (telephone); (202) 366–3809 (fax); or *Shauna.Coleman@dot.gov* (e-mail).

SUPPLEMENTARY INFORMATION:

Availability of the Final Rule

A copy of this rule and comments and material received from the public, as well as any documents indicated in the preamble as being available in the docket, are part of docket FTA–2006–24592, 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.

An electronic copy of this rule and comments are available online through the Document Management System (DMS) at: <http://dms.dot.gov>. Enter docket number 24592 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.

Internet users may also download an electronic copy of this document by using a computer, modem and suitable communications software from the Government Printing Office’s Electronic Bulletin Board Service at (202) 512–1661. Additionally, internet users may 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>.

I. Background

In 2001, FMCSA issued a rule that eliminated duplicative D&A testing regulations for holders of Commercial Drivers Licenses (CDLs) who provide public transportation services. This rule

provided that transit agencies with safety-sensitive employees holding CDLs are covered by FTA D&A testing regulations, and FMCSA testing requirements would not apply. (See 49 CFR 382.103(d)). However, FMCSA determined individual CDL holders would remain subject to FMCSA sanctions and other ramifications for FMCSA rule violations that were not included in the FTA D&A testing regulations.

Subsequently, FTA agreed with FMCSA's position with regard to holders of CDLs who provide public transportation services in its "Implementation Guidelines for Drug and Alcohol Regulations in Mass Transit" (Revised November, 2003) (Implementation Guidelines). The Implementation Guidelines provided that the FTA D&A testing regulations would cover transit agencies with safety-sensitive employees holding CDLs. In line with 49 CFR 382.103(d), FTA's Implementation Guidelines maintained FMCSA's determination that that these individual CDL holders be subject to FMCSA sanctions and other ramifications for FMCSA D&A testing regulation violations that were not included in FTA D&A testing regulations.

FTA undertook similar administrative steps to eliminate duplicative testing requirements for ferryboat operators by revising our policy for these operators in a Notice of Interpretation published in the **Federal Register** on April 22, 2002 (67 FR 19615). Specifically, FTA determined that it would deem ferryboat operators that are subject to both FTA D&A testing regulations and USCG chemical and alcohol testing regulations, as in concurrent compliance with the testing requirements of FTA D&A regulations when they comply with the USCG chemical and alcohol testing requirements. FTA determined, however, that those ferryboat operators would remain subject to FTA's random alcohol testing requirement because USCG does not have a similar requirement.

In response to Section 3030 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: a Legacy for Users (SAFETEA-LU, Pub. L. 109-59, August 10, 2005), FTA published a **Federal Register** notice seeking comments on a proposal to exclude certain motor carrier operators who provide public transportation services from FTA testing requirements, and to codify the above notice of interpretation for ferryboat operators. (71 FR 32298, June 5, 2006.)

Based on comments received and the safety requirements of FTA D&A testing regulations, we are partially adopting our proposal to amend the applicability section of 49 CFR 655.3 in this final rule.

II. Response to comments received

FTA received five comments in response to the NPRM. FTA reviewed and considered all comments submitted. The following discussion summarizes our responses.

A. Overview of the Proposed Rule

FTA proposed to eliminate duplicative testing requirements for ferryboat operators, and certain classes of motor carrier operators by amending the applicability section of FTA's D&A regulation at 49 CFR part 655.

One commenter supported FTA's efforts to eliminate duplicative requirements, and suggested that FTA also provide a graph or chart to guide the reader through the various D&A regulations for FTA, USCG, and FMCSA.

FTA response: Because the final rule is limited to codifying existing FTA interpretation, we conclude that a graph or chart is unnecessary to implement this final rule. As resources allow, however, we will work with USCG and the Office of the Secretary of Transportation (OST) to develop a chart or table to assist the regulated community with determining which regulations apply.

B. Motor carrier operators

FTA proposed that private or nonprofit motor carrier operators regulated by both the FTA and FMCSA, who determines that a majority (more than 50 percent) its employees are regulated by FMCSA, may opt to only comply with FMCSA D&A testing regulations for that class of employees.

However, FTA proposed that its post-accident requirements in 49 CFR § 655.44 would continue to apply when an accident, as defined in 49 CFR § 655.4, occurred in the performance of public transportation activities. Further, the administrative requirements of subpart G, H, and I of 49 CFR part 655 would continue to apply to motor carrier operators receiving Federal transit funds.

FTA proposed that an employer exercising this option would have discretion to determine the timeframe and the manner in which it apportions the employees' safety-sensitive functions (i.e., daily, monthly, or annually). FTA proposed that the employer would make this determination annually, at the

beginning of the calendar year, and that this determination would remain applicable throughout that calendar year.

One commenter, a State recipient responsible for administering the program for subrecipients, suggested that FTA provide further clarification regarding the applicability of FTA's proposed motor carrier exemption to contractor providers or recipients that receive Federal transit funds directly from the State.

This commenter also expressed concern as to how national contractors that provide local public transportation services would determine whether FMCSA regulated a majority of these employees. The commenter suggested that the employer make this determination on a location-by-location basis as opposed to on a national basis. This commenter further suggested that the employer determine which D&A regulations to follow based on the full-time equivalent number of employees as opposed to the total number of employees either at the national level or in the specific location.

Another commenter, representing an association, suggested that our proposal to retain oversight of "post-accident" testing would cause industry confusion and administrative errors. This commenter suggested that post accident testing under the same mode would eliminate potential risks of confusion and administrative error.

FTA Response: We agree with the commenter who indicated that the proposed regulatory construction had the potential to cause more confusion for those responsible for administering the program rather than achieving the intended goal of reducing the administrative burden. We also note that the implementation issues presented when the State is the pass-through recipient has the potential of adding complexity rather than providing administrative relief.

In addition to determining that codifying a similar exception in our regulation would cause confusion as to which testing scheme to apply, FTA has further determined, after further review of 49 CFR part 382 and consultation with FMCSA and the Office of Drug and Alcohol Control Compliance and Policy, that the existing regulatory framework of 49 CFR part 382 provides sufficient administrative relief by eliminating duplicative testing requirements for motor carrier operators. Specifically, 49 CFR 382.103(d) exempts from FMCSA testing those motor carrier operators who are also subject to the FTA D&A testing regulations. Therefore, we withdraw the proposals set out in the

Federal Register notice with regard to motor carrier operators, and we will not amend the regulation to exclude private or nonprofit motor carrier operators from FTA D&A regulations.

C. Ferryboat Operators

FTA proposed to deem ferryboat operators who are subject to both FTA D&A regulations and USCG chemical and alcohol testing requirements, as in concurrent compliance with the testing requirements of FTA D&A regulations when they comply with the USCG chemical and alcohol testing requirements. FTA proposed, however, that those ferryboat operators would remain subject to FTA's random alcohol testing requirement because USCG does not have a similar requirement. Further, because FTA remains statutorily responsible for ensuring that recipients of public transportation funds comply with Federal regulations, it proposed that ferryboat operators remain subject to the administrative and oversight requirements of 49 CFR part 655.

FTA received four comments from representatives of associations on this issue.

One commenter indicated that there are differences between FTA and USCG testing requirements. It recommended that FTA identify and address each of the differences between FTA and USCG testing requirements. For instance, this commenter indicated that there are differences in the Medical Review Officer (MRO) reporting requirements under 49 CFR Part 40 and USCG guidance documents. This commenter also indicated that another difference exists between the USCG guidance and Substance Abuse Professional's duties prescribed in 46 CFR part 16, Subpart B.

Specifically, this commenter suggested that FTA inform all MROs currently processing test results for FTA that the MRO procedures for USCG do not follow 49 CFR part 40, Subpart G for reporting test results. It further suggested that USCG and FTA follow Part 40 reporting requirements "to the letter."

Another commenter indicated that the proposed rule does not sufficiently address how it affects Management Information System (MIS) reports for each mode. It recommended that FTA provide clarification regarding MIS reports required by each mode.

The third commenter applauded FTA's efforts to codify the existing interpretation regarding ferryboat operators, and felt that this codification would streamline the D&A testing regulations. This commenter also indicated that this change would provide the same level of safety and

oversight as the existing regime while saving time and money at the operational level.

The fourth commenter further welcomed FTA's decision to continue the administrative oversight of ferryboat operators. This commenter indicated that the continuation of administrative oversight of such operators standardizes and creates a stronger D&A program.

FTA Response: We consulted with administrators of the USCG chemical and alcohol program, and they verified that USCG continues to follow 49 CFR Part 40. Furthermore, MROs are already required to be familiar with USCG testing and reporting procedures, including Part 40 and Part 16 irrespective of FTA D&A testing regulations.

USCG did note that mariners are subject to additional testing requirements, such as the requirements for obtaining mariner credentials. As mariners, therefore, ferryboat operators are already subject to these additional requirements irrespective of FTA D&A testing regulations.

Moreover, we emphasize that this rule permits ferryboat operators to primarily follow the testing requirements of USCG, and thereby concurrently comply with FTA testing requirements. It does not impose additional requirements on MROs. The only testing exception this rule imposes is that ferryboat operators will remain subject to FTA random alcohol testing because USCG does not have a similar requirement. Since USCG follows Part 40 for D&A testing purposes, we have not amended the proposed rule language to address this comment.

With regard to the MIS report, the Department is working with USCG to mitigate potential confusion with MIS reporting for ferryboat operators. The Department has reconfigured its web-based reporting format. Specifically, FTA will identify FTA funded ferryboat employers, and provide a separate method for the rest of the transit systems that have no ferryboat operators, within the Drug & Alcohol Management Information System (DAMIS), the Department's internet-based reporting system. The industry already utilizes this system.

In DAMIS, these identified employers will receive a message upon clicking on the "Covered Employees" tab. This message will instruct them to separate the testing results of USCG/FTA covered employees from FTA-only covered employees. To separate the results, an additional employee category (Crewmembers) will appear on the screen. The message will instruct the employer to report the drug and alcohol

testing results for USCG/FTA employees only within the Crewmember employee category, and not to duplicate the data within FTA defined employee categories.

Once the reporting process is complete and approved, USCG covered tests (all but random alcohol) will be provided electronically to the administrators of USCG testing program.

III. Regulatory Analyses and Notices

Statutory/Legal Authority for This Proposed Rulemaking

This rule is authorized under Section 3030 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: a Legacy for Users (SAFETEA-LU) (Pub. L. 109-59, August 10, 2005). This section amended Title 49 U.S.C. 5331(a)(3). This amendment provides for departmental discretion in determining whether public transportation safety-sensitive employees are adequately covered for drug and alcohol testing purposes by one agency, when those employees are subject to the drug and alcohol regulations of more than one agency within the Department of Transportation (DOT) or the Coast Guard.

Executive Order 12866

Under Executive Order 12866, the Department must examine whether this rule is a "significant regulatory action." A significant regulatory action is subject to OMB review and the requirements of the Executive Order. A "significant regulatory action" as one that is likely to result in a rule that may: (1) Have an annual effect on the economy of \$120 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

This final rule codifies an existing agency interpretation, and, therefore, will not impose costs to the industry of \$120 million or more annually, will not create an inconsistency, will not materially alter the Federal financial assistance from FTA, and does not raise new or novel legal or policy issues.

Accordingly, this final rule is a nonsignificant regulatory action under section 3(f) of Executive Order 12866 and has not been reviewed by OMB.

Executive Order 13132

FTA has analyzed this final rule in accordance with the principles and criteria contained in Executive Order 13132 (Federalism). This final rule does not include any provisions that have substantial direct effect 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. Therefore, the consultation and funding requirements of Executive Order 13132 do not apply.

Executive Order 13175

FTA finalized this rule in accordance with the principles and criteria of Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments). This rule does not have tribal implications, and does not impose direct compliance costs. Therefore, the funding and consultation requirements of Executive Order 13175 do not apply.

Executive Order 13272 and the Regulatory Flexibility Act

Section 603 of the Regulatory Flexibility Act requires a Federal agency to conduct an initial regulatory flexibility analysis describing impacts to small entities when developing a Notice of Proposed Rulemaking in accordance with 5 U.S.C. 553. Currently, approximately 3000 employers are subject to FTA D&A testing regulations. Of this number, a small percentage is also subject to the D&A testing regulations of FMSCA or the USCG. This final rule would have the effect of eliminating the administrative burden on those few employers who are subject to multiple testing requirements by permitting them to comply with the testing requirements of only one Federal agency.

FTA analyzed this rule to assess its impact on small businesses and other small entities to determine whether this rule will have a significant economic

impact on a substantial number of small entities. This rule imposes no new costs because it merely permits jointly regulated entities to comport with the drug and alcohol testing procedures of only one agency. FTA hereby certifies that this final rule will not have a significant economic impact on a substantial number of small entities.

Paperwork Reduction Act

Under the provisions of the Paperwork Reduction Act, FTA may not conduct or sponsor, and a person is not required to respond to or may not be penalized for failing to comply with, a collection of information unless it displays currently valid OMB control number.

This rule has information collection requirements that are covered by the Office of the Secretary of Transportation (OST) paperwork collection number 2105-0529. OST applied to renew that collection number on August 4, 2006. (71 FR 44345, August 4, 2006).

Unfunded Mandates Reform Act of 1995

This rule it will not result in costs of \$100 million or more (adjusted annually for inflation), in the aggregate, to any of the following: State, local, or Native American tribal governments, or the private sector.

National Environmental Policy Act

The National Environmental Policy Act of 1969, (42 U.S.C. 4321-4347) as amended, 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. There are no significant environmental impacts associated with this rule.

List of Subjects in 49 CFR Part 655

Alcohol abuse, Drug abuse, Drug testing, Grant programs—transportation, Mass transportation, Reporting and recordkeeping requirements, Safety, Transportation.

■ For the reasons described in the preamble, FTA amends part 655 to read as follows:

PART 655—PREVENTION OF ALCOHOL MISUSE AND PROHIBITED DRUG USE IN TRANSIT OPERATIONS

■ 1. The authority citation for part 655 continues to read as follows:

Authority: 49 U.S.C. 5331; 49 CFR 1.51.

■ 2. Amend § 655.3 by revising the introductory text of paragraph (a) and adding new paragraph (c) to read as follows:

§ 655.3 Applicability.

(a) Except as specifically excluded in paragraphs (b), and (c) of this section, this part applies to:

* * * * *

(c) A recipient operating a ferryboat regulated by the United States Coast Guard (USCG) that satisfactorily complies with the testing requirements of 46 CFR Parts 4 and 16, and 33 CFR Part 95 shall be in concurrent compliance with the testing requirements of this part. This exception shall not apply to the provisions of section 655.45, or subparts G, or H of this part.

■ 3. Amend § 655.83 by adding new paragraph (d) to read as follows:

§ 655.83 Requirement to Certify Compliance.

* * * * *

(d) FTA may determine that a recipient, who fails to comply with the USCG chemical and alcohol testing requirements, shall be in noncompliance with the alcohol misuse and controlled substances testing requirements of this part. A finding of noncompliance by FTA may lead to the suspension of eligibility for Federal public transportation funding.

Issued in Washington, DC this 27th day of November 2006.

James S. Simpson,
Administrator, Federal Transit Administration.

[FR Doc. E6-20278 Filed 11-29-06; 8:45 am]

BILLING CODE 4910-57-P

Notices

Federal Register

Vol. 71, No. 230

Thursday, November 30, 2006

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

November 21, 2006.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104-13. Comments regarding (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), OIRA_Submission@OMB.EOP.GOV or fax (202) 395-5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250-7602. Comments regarding these information collections are best assured of having their full effect if received within 30 days of this notification. Copies of the submission(s) may be obtained by calling (202) 720-8958.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to

the collection of information unless it displays a currently valid OMB control number.

Foreign Agricultural Service

Title: Dairy Tariff-Rate Import Quota Licensing Regulation.

OMB Control Number: 0551-0001.

Summary of Collection: The Importation of most cheese made from cow's milk and certain non-cheese dairy articles (butter, dried milk, and butter substitutes) are subject to Tariff-rate Quotas (TRQs) and must be accompanied by an import license issue by the Department to enter at the lower tariff. Licenses are issued in accordance with the Department's Import Licensing Regulation (7 CFR Part 6). Importers without licenses may enter these dairy articles, but are required to pay the higher tariff. The Foreign Agricultural Service (FAS) will collect information using several forms.

Need and Use of the Information: FAS will use the information to assure that the intent of the legislation is correctly administered and to determine eligibility to obtain benefits under the Import Regulation. If the information were collected less frequently, FSA would be unable to issue licenses on an annual basis in compliance with the Import Regulation.

Description of Respondents: Business or other-for-profit; Individuals or households.

Number of Respondents: 680.

Frequency of Responses: Record keeping, Reporting: Annually.

Total Burden Hours: 291.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. E6-20267 Filed 11-29-06; 8:45 am]

BILLING CODE 3410-10-P

DEPARTMENT OF AGRICULTURE

Forest Service

Fishtrap EIS, Lolo National Forest, Sanders County, Montana

AGENCY: Forest Service, USDA.

ACTION: Notice; intent to prepare supplemental environmental impact statement.

SUMMARY: The Forest Service will prepare a supplemental environmental impact statement (EIS) for the Fishtrap

project. The original Fishtrap Record of Decision, signed on November 22, 2005, was litigated in May 2006. The primary issue of the lawsuit was related to treatments intended to maintain and/or enhance old growth stands. As a result of a Court-ordered settlement agreement with Plaintiffs, the Lolo National Forest Supervisor agreed to: (a) Withdraw the project decision; (b) monitor past maintenance/restorative treatments within old growth stands and evaluate the effects of these activities; and (c) prepare a supplemental environmental impact statement (SEIS), incorporating this new information, before proceeding with the project. Over the last several months, Lolo National Forest personnel have been monitoring the effects of past maintenance/restorative treatments in old growth stands and are currently evaluating the information they collected. The Fishtrap SEIS will incorporate the results of this monitoring work.

The project proposes to implement timber harvest, pre-commercial thinning, prescribed burning, herbicide treatment of noxious weeds, temporary road construction, road improvement work, and road decommissioning in the Fishtrap Creek drainage, Lolo National Forest, Plains/Thompson Falls Ranger District, Sanders County, Montana.

FOR FURTHER INFORMATION CONTACT: Randy Hojem, District Ranger (406-826-4308), or Pat Partyka, Team Leader (406-826-4314), at the Plains/Thompson Falls Ranger District, Lolo National Forest, P.O. Box 429, Plains, Montana 59859.

SUPPLEMENTARY INFORMATION: The Fishtrap analysis area of approximately 36,400 acres is located approximately 20 air miles north of Thompson Falls, Montana, Sanders County, in T23N, R28W; T23N, R29W; T24N, R27W; T24N, R28W; T24N, R29W; and T25N, R28W; PMM. Within this area, the Lolo National Forest proposes: (1) Approximately 2260 acres of timber harvest; (2) approximately 437 acres of pre-commercial thinning; (3) approximately 984 acres of prescribed burning; (4) approximately 0.75 miles of temporary road construction to access two harvest units; (5) approximately 151 miles of road decommissioning; (6) approximately 36 miles of road reconstruction; (7) approximately 40 miles of road maintenance of existing roads that would be used for timber

haul; (8) approximately 124 miles of herbicide treatment of noxious weeds along roadsides.

The Lolo National Forest Plan provides overall guidance for land management activities in the project area. The purposes for these actions are to: (1) Improve water quality, fish habitat and fish passage. (2) Improve grizzly bear habitat within the Cabinet-Yaak Grizzly Bear Recovery Zone. (3) Restore, maintain or enhance native "at risk" vegetative communities. (4) Provide for ecological sustainability and community stability through the use of forest products. (5) Improve and maintain big game winter range. (6) Provide for a transportation system that better reflects current access and resource concerns and reduces economic burdens associated with maintaining unneeded roads.

Issues currently identified for analysis in the SEIS include potential effects on old growth, soils, wildlife (particularly grizzly bear), water quality, fisheries, and forest access.

The Forest Service will consider a range of alternatives. A No Action alternative and other alternatives, which respond to significant issues, will be analyzed and compared to the Draft SEIS.

The Draft SEIS is expected to be filed with the Environmental Protection Agency (EPA) and available for public review in June 2007. Comments on the Draft SEIS will be considered and responded to in the Final SEIS, scheduled to be completed by October 2007.

The comment period on the draft environmental impact statement will be 45 days from the date the Environmental Protection Agency publishes the notice of availability in the **Federal Register**.

The Forest Service believes, at this early stage, it is important to give reviewers notice of several court rulings related to public participation in the environmental review process. First, reviewers of draft environmental impact statements must structure their participation in the environmental review of the proposal so that it is meaningful and alerts an agency to the reviewer's position and contentions. *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 553 (1978). Also environmental objections that could be raised at the draft environmental impact statement stage but that are not raised until after completion of the final environmental impact statement may be waived or dismissed by the courts. *City of Angoon v. Hodel*, 803 F.2d 1016, 1022 (9th Cir. 1986) and *Wisconsin Heritages, Inc. v. Harris*, 490 F. Supp.

1334, 1338 (E.D. Wis. 1980). Because of these court rulings, it is very important that those interested in this proposed action participate by the close of the 45-day comment period so that substantive comments and objections are made available to the Forest Service at a time when it can meaningfully consider them and respond to them in the final environmental impact statement.

To assist the Forest Service in identifying and considering issues and concerns on the proposed action, comments on the draft environmental impact statement should be as specific as possible. It is also helpful if comments refer to specific pages or chapters of the draft statement. Comments may also address the adequacy of the draft environmental impact statement or the merits of the alternatives formulated and discussed in the statement. Reviewers may wish to refer to the Council on Environmental Quality Regulations for implementing the procedural provisions of the National Environmental Policy Act at 40 CFR 1503.3 in addressing these points.

Responsible Official: Deborah L.R. Austin, Forest Supervisor, Lolo National Forest, Building 24—Fort Missoula, Missoula, MT 59804, is the responsible official. In making the decision, the responsible official will consider comments, responses, disclosure of environmental consequences, and applicable laws, regulations, and policies. The responsible official will state the rationale for the chosen alternative in the Record of Decision.

Dated: November 21, 2006.

Deborah L.R. Austin,

Forest Supervisor.

[FR Doc. 06-9462 Filed 11-29-06; 8:45 am]

BILLING CODE 3410-11-M

DEPARTMENT OF AGRICULTURE

Rural Telephone Bank

Determination of the 2006 Fiscal Year Interest Rate on Rural Telephone Bank Loans

AGENCY: Rural Telephone Bank, USDA.

ACTION: Notice of 2006 fiscal year interest rate determination.

SUMMARY: In accordance with 7 CFR 1610.10, the Rural Telephone Bank (Bank) cost of money rate has been established as 5.49% for all advances made during fiscal year 2006 (the period beginning October 1, 2005 and ending September 30, 2006). All advances made during fiscal year 2006 were under Bank loans approved on or after October 1,

1992. These loans are sometimes referred to as financing account loans.

The calculation of the Bank's cost of money rate for fiscal year 2006 is provided in Table 1. Since the calculated rate is greater than or equal to the minimum rate (5.00%) allowed under 7 U.S.C. 948(b)(3)(A), the cost of money rate is set at 5.49%. The methodology required to calculate the cost of money rates is established in 7 CFR 1610.10(c).

FOR FURTHER INFORMATION CONTACT:

Jonathan P. Claffey, Deputy Assistant Governor, Rural Telephone Bank, STOP 1590—Room 5151, 1400 Independence Avenue, SW., Washington, DC 20250-1590. Telephone: (202) 720-9556.

SUPPLEMENTARY INFORMATION: The cost of money rate methodology develops a weighted average rate for the Bank's cost of money considering total fiscal year loan advances, debentures and other obligations, and the costs to the Bank of obtaining funds from these sources.

Dissolution of the Bank

At its quarterly meeting on August 4, 2005, the Board of Directors (the "Board") approved a resolution to dissolve the Bank. On November 10, 2005, the liquidation and dissolution process was initiated with the signing by President Bush of the 2006 Agriculture Appropriations bill, which contained a provision lifting the restriction on the retirement of more than 5 percent of the Class A stock held by the Government.

In accordance with the Board's resolution and the terms of the Loan Transfer Agreement between the Bank and the Government, dated August 4, 2005, the Bank's liquidating account loan portfolio (the portfolio of Bank loans approved before October 1, 1992) was transferred to the Government on October 1, 2005. As a result of that transfer, there are no more advances of liquidating account loan funds.

The dissolution of the Bank will not affect future advances of financing account loan funds. Requests for financing account advances will continue to be processed by employees of USDA Rural Development's Telecommunications Program, just as they were while the Bank remained in operation. The terms and conditions of the financing account loans will not change, nor will the method for determining the interest rates, including the determination of the cost of money rates after the end of each fiscal year. The only significant change to the financing account advances is that beginning October 1, 2005, Class B stock in the Bank is no longer being

purchased with financing account loan advances.

Sources and Costs of Funds

Due to the ongoing dissolution of the Bank, no stock of any kind was issued

during fiscal year 2006. Issuance of debentures or any other obligations related to advances from the financing account during the fiscal year were \$66,496,919 at an interest rate of 5.494%. The Bank's cost of money rate

for advances from the financing account is provided in Table 1.

Curtis M. Anderson,

Deputy Governor, Rural Telephone Bank.

BILLING CODE 3410-15-P

Table 1

Rural Telephone Bank Cost of Money Rate - Financing Account

FY 2006 Source of Bank Funds	(a) Amount	(b) Cost	(c) (a)x(b)	(c) / Advances
Issuance of Class A Stock	NA	NA	NA	NA
Issuance of Class B Stock	NA	NA	NA	NA
Issuance of Class C Stock	NA	NA	NA	NA
Issuance of Debentures and Other Obligations*	\$ 66,496,919	5.494%	\$ 3,653,438	5.4941%
Excess of Total Advances Over Issuances	\$ -	5.813%	\$ -	0.0000%

Total FY 2006 Advances \$ 66,496,919 **CALCULATED COST OF MONEY RATE =** 5.49%

MINIMUM RATE ALLOWABLE = 5.00%

* RTB borrowed \$94,839,000 from the Financing Account in FY2006; the remaining funds will be used to cover other obligations of the fund.

Rural Telephone Bank Historical Cost of Money Rate - Financing Account

Fiscal Year	(a) Cost of Money	(b) Advances	(c) (a)x(b)	(c) / Total Advances
FY 1992	7.38%	\$ 4,056,250	\$ 299,351	0.047%
FY 1993	6.35%	\$ 23,839,200	\$ 1,513,789	0.237%
FY 1994	6.40%	\$ 56,838,902	\$ 3,637,690	0.569%
FY 1995	6.88%	\$ 37,161,517	\$ 2,556,712	0.400%
FY 1996	6.42%	\$ 44,536,621	\$ 2,859,251	0.447%
FY 1997	6.54%	\$ 34,368,726	\$ 2,247,715	0.351%
FY 1998	5.71%	\$ 34,446,458	\$ 1,966,893	0.307%
FY 1999	5.54%	\$ 38,685,732	\$ 2,143,190	0.335%
FY 2000	6.05%	\$ 31,401,867	\$ 1,899,813	0.297%
FY 2001	5.17%	\$ 55,405,896	\$ 2,864,485	0.448%
FY 2002	6.05%	\$ 60,232,919	\$ 3,644,092	0.570%
FY 2003	5.67%	\$ 55,835,695	\$ 3,165,884	0.495%
FY 2004	5.36%	\$ 67,074,751	\$ 3,595,207	0.562%
FY 2005	5.00%	\$ 95,987,530	\$ 4,799,377	0.750%

TOTAL ADVANCES \$ 639,872,064 **COST OF MONEY** 5.81%

DEPARTMENT OF COMMERCE**Foreign-Trade Zones Board**

[Order No. 1491]

Grant of Authority for Subzone Status, Sony Electronics, Inc. (Audio, Video, Communications and Information Technology Products and Accessories); Los Angeles, Carson and Lynwood, CA

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, the Foreign-Trade Zones Act provides for “* * * the establishment * * * of foreign-trade zones in ports of entry of the United States, to expedite and encourage foreign commerce, and for other purposes,” and authorizes the Foreign-Trade Zones Board to grant to qualified corporations the privilege of establishing foreign-trade zones in or adjacent to U.S. Customs and Border Protection ports of entry;

Whereas, the Board’s regulations (15 CFR Part 400) provide for the establishment of special-purpose subzones when existing zone facilities cannot serve the specific use involved, and when the activity results in a significant public benefit and is in the public interest;

Whereas, the Board of Harbor Commissioners of the City of Los Angeles, grantee of Foreign-Trade Zone 202, has made application to the Board for authority to establish a special-purpose subzone at the warehouse and distribution facilities of Sony Electronics, Inc., located in Los Angeles, Carson and Lynwood, California (FTZ Docket 16–2006, filed 4/28/06);

Whereas, notice inviting public comment was given in the **Federal Register** (71 FR 26923–26924, 5/9/06); and

Whereas, the Board adopts the findings and recommendations of the examiner’s report, and finds that the requirements of the FTZ Act and the Board’s regulations are satisfied, and that approval of the application is in the public interest;

Now, therefore, the Board hereby grants authority for subzone status for activity related to audio, video, communications and information-technology products and accessories warehousing and distribution at the facilities of Sony Electronics, Inc., located in Los Angeles, Carson and Lynwood, California (Subzone 202E), as described in the application and **Federal Register** notice, and subject to

the FTZ Act and the Board’s regulations, including § 400.28.

Signed at Washington, DC, this 21st day of November, 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. E6–20288 Filed 11–29–06; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE**Foreign-Trade Zones Board**

[Order No. 1490]

Approval for Expanded Manufacturing Authority (Manufacture/Refurbish Toner Cartridges), Foreign-Trade Subzone 77B, Brother Industries (U.S.A.) Inc., Bartlett, TN

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, the City of Memphis and Shelby County (Tennessee), grantee of Foreign-Trade Zone 77, has applied to expand the scope of manufacturing authority under zone procedures within Subzone 77B, at the Brother Industries (U.S.A.) Inc. (Brother) plant located in Bartlett, Tennessee, to include manufacturing/refurbishing toner cartridges (FTZ Docket 58–2005, filed 11/17/2005);

Whereas, notice inviting public comment has been given in the **Federal Register** (70 FR 72292–72293, 12/2/2005); and

Whereas, the Board adopts the findings and recommendations of the examiner’s report, and finds that the requirements of the FTZ Act and the Board’s regulations would be satisfied, and that approval of the application would be in the public interest;

Now, therefore, the Board hereby approves the request for expanded manufacturing authority related to manufacturing/refurbishing toner cartridges, as described in the application and **Federal Register** notice, subject to the FTZ Act and the Board’s regulations, including Section 400.28, and further subject to a restriction that privileged foreign status (19 CFR Part 146.41) shall be elected on foreign merchandise that falls under HTSUS headings or subheadings 2821, 2823, 3901.20, all of Chapter 32, or where the foreign merchandise in question is

described as a “pigment, pigment preparation, masterbatch, plastic concentrate, flush color, paint dispersion, coloring preparation, or colorant.”

Signed at Washington, DC, November 21, 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. E6–20287 Filed 11–29–06; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE**Foreign-Trade Zones Board**

[T–3–2006]

Foreign-Trade Zone 86—Tacoma, WA; Temporary/Interim Manufacturing Authority; Norvanco International Inc./Panasonic Consumer Electronics Co. (Kitting of Home Theater Systems); Notice of Approval

On September 26, 2006, the Acting Executive Secretary of the Foreign-Trade Zones Board filed an application submitted by the Port of Tacoma (Washington), grantee of Foreign-Trade Zone (FTZ) 86, requesting temporary/interim manufacturing (T/IM) authority for Norvanco International Inc. (Norvanco) to process (kit) certain imported components into home theater systems on behalf of the company’s client, Panasonic Consumer Electronics Co., within Site 6 of FTZ 86, at Norvanco’s facility located in Sumner, Washington.

The application was processed in accordance with T/IM procedures, as authorized by FTZ Board Order 1347, including notice in the **Federal Register** inviting public comment (71 FR 58372, 10/3/06). The FTZ staff examiner reviewed the application and determined that it meets the criteria for approval under T/IM procedures. Pursuant to the authority delegated to the FTZ Board Executive Secretary in Board Order 1347, the application was approved on a modified basis, effective November 6, 2006, until November 6, 2008, subject to the FTZ Act and the Board’s regulations, including Section 400.28. The pre-approval modification to the application involved limiting the requested T/IM inputs to merchandise classifiable within HTSUS categories 8518.21 and 8518.22.

Dated: November 21, 2006.

Pierre V. Duy,

Acting Executive Secretary.

[FR Doc. E6-20290 Filed 11-29-06; 8:45 am]

BILLING CODE 3510-DS-P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Docket 45-2006]

Foreign-Trade Zone 86—Tacoma, WA, Request for Manufacturing, Authority (Home Theater System Kits)

An application has been submitted to the Foreign-Trade Zones Board (the Board) by the Port of Tacoma (Washington), grantee of Foreign-Trade Zone (FTZ) 86, requesting authority on behalf of Panasonic Consumer Electronics Co. (PCEC) and its warehouse/FTZ operator, Norvanco International Inc. (Norvanco), for the manufacture (kitting) of home theater systems under FTZ procedures. (Norvanco/PCEC has already been approved for this activity through November 2008 under FTZ temporary/interim manufacturing procedures.) The application was submitted pursuant to the provisions of the Foreign-Trade Zones Act, as amended (19 U.S.C. 81a-81u), and the regulations of the Board (15 CFR part 400). It was formally filed on November 8, 2006.

Norvanco operates a facility (100 employees) in Sumner, Washington, within Site 6 of FTZ 86, that will be used for the kitting of home theater systems (HTSUS 8527.31). The finished products would enter the United States duty free. Imported components/inputs that may be admitted under FTZ procedures are subwoofers (HTSUS 8518.21) and speaker boxes (HTSUS 8518.22). Since submission of the application to the FTZ Board, the applicant has clarified that it is not seeking authority for a third listed input—packing materials—to be admitted to the FTZ other than as ancillary to the other listed components. Duty rates on the two proposed imported components are currently 4.9 percent *ad valorem*.

This application requests authority for Norvanco to conduct the kitting activity under FTZ procedures on behalf of PCEC, which would allow the company to choose the duty rate that applies to the finished product for the foreign components noted above. Norvanco/PCEC also anticipates realizing logistical savings. The application indicates that the proposed kitting activity is currently performed abroad and that FTZ-related savings would enable the shifting of that

activity to Norvanco's Washington facility, thereby helping to improve the facility's international competitiveness.

In accordance with the Board's regulations, a member of the FTZ Staff has been designated examiner to investigate the application and report to the Board.

Public comment is invited from interested parties. Submissions (original and 3 copies) shall be addressed to the Board's Executive Secretary at the address listed below. The closing period for their receipt is January 29, 2007. Rebuttal comments in response to material submitted during the forgoing period may be submitted during the subsequent 15-day period (to February 13, 2007).

A copy of the application and accompanying exhibits will be available for public inspection at each of the following locations: The Seattle U.S. Export Assistance Center, 2601 Fourth Avenue, Suite 320, Seattle, WA 98121; and Office of the Executive Secretary, Foreign-Trade Zones Board, Room 2814B, U.S. Department of Commerce, 1401 Constitution Avenue, NW., Washington, DC 20230.

Dated: November 21, 2006.

Pierre V. Duy,

Acting Executive Secretary.

[FR Doc. E6-20292 Filed 11-29-06; 8:45 am]

BILLING CODE 3510-DS-P

DEPARTMENT OF COMMERCE

International Trade Administration

A-570-846

Brake Rotors From the People's Republic of China: Initiation of New Shipper Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce

EFFECTIVE DATE: November 30, 2006.

SUMMARY: The Department of Commerce (the "Department") received a timely request to conduct a new shipper review of the antidumping duty order on brake rotors from the People's Republic of China ("PRC"). In accordance with 19 CFR 351.214(d)(1), we are initiating a review for Longkou Qizheng Auto Parts Co., Ltd. ("Qizheng").

FOR FURTHER INFORMATION CONTACT: Frances Veith or Blanche Ziv, 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) 482-4295 and (202) 482-4207, respectively.

SUPPLEMENTARY INFORMATION: The Department received a timely request from Qizheng on October 31, 2006, pursuant to section 751(a)(2)(B) of the Tariff Act of 1930, as amended ("the Act"), and in accordance with 19 CFR 351.214(c), for a new shipper review of the antidumping duty order on brake rotors from the PRC. See *Notice of Antidumping Duty Order: Brake Rotors from the People's Republic of China*, 62 FR 18740 (April 17, 1997).

Pursuant to 19 CFR 351.214(b)(2)(i), 19 CFR 351.214(b)(2)(iii)(A), and 19 CFR 351.214(b)(2)(iii)(B), in its request for a new shipper review, Qizheng certified that as a producing exporter it did not export brake rotors to the United States during the period of investigation ("POI"); that since the initiation of the investigation it has never been affiliated with any company that exported subject merchandise to the United States during the POI; and that its export activities were not controlled by the central government of the PRC.

In accordance with 19 CFR 351.214(b)(2)(iv), Qizheng submitted documentation establishing the following: (1) the date on which it first shipped brake rotors for export to the United States; (2) the volume of its first shipment; and (3) the date of its first sale to an unaffiliated customer in the United States.

Initiation of New Shipper Review

In accordance with section 751(a)(2)(B) of the Act and 19 CFR 351.214(d)(1), and based on information on the record, we find that Qizheng's request meets the initiation threshold requirements and we are initiating a new shipper review for shipments of brake rotors produced and exported by Qizheng. See Memorandum to the File through Wendy J. Frankel, Director, New Shipper Initiation Checklist, dated, November 22, 2006. The Department will conduct this new shipper review according to the deadlines set forth in section 751(a)(2)(B)(iv) of the Act.

Pursuant to 19 CFR 351.214(g)(1)(i)(B), the period of review ("POR") for a new shipper review, normally initiated in the month immediately following the semiannual anniversary month, will be the six-month period immediately preceding the semiannual anniversary month. Therefore, the POR for the new shipper review of Qizheng will be April 1, 2006, through September 30, 2006.

Pursuant to the Department's regulations, in cases involving non-market economies, the Department requires that a company seeking to establish eligibility for an antidumping duty rate separate from the country—

wide rate provide evidence of *de jure* and *de facto* absence of government control over the company's export activities. Accordingly, we will issue a questionnaire to Qizheng, including a separate rate section. The review will proceed if the responses provide sufficient indication that Qizheng is not subject to either *de jure* or *de facto* government control with respect to its exports of brake rotors. However, if Qizheng does not demonstrate its eligibility for a separate rate, the company will be deemed not separate from other companies that exported during the POI, and the new shipper review for Qizheng will be rescinded.

On August 17, 2006, the Pension Protection Act of 2006 (H.R. 4) was signed into law by Congress. Section 1632 of H.R. 4 temporarily suspends the authority of the Department to instruct U.S. Customs and Border Protection to collect a bond or other security in lieu of a cash deposit in new shipper reviews. Therefore, the posting of a bond or other security under section 751(a)(2)(B)(iii) of the Act in lieu of a cash deposit is not available in this case. Importers of brake rotors exported and produced by Qizheng must continue to post a cash deposit of estimated antidumping duties on each entry of subject merchandise (i.e., brake rotors) at the PRC-wide entity rate of 43.32 percent.

Interested parties that need access to proprietary information in this new shipper review should submit applications for disclosure under administrative protective order in accordance with 19 CFR 351.305 and 351.306.

This initiation and notice are issued in accordance with section 751(a)(2)(B) of the Act and 19 CFR 351.214 and 351.221(c)(1)(i).

Dated: November 22, 2006.

Susan H. Kuhbach

Acting Deputy Assistant Secretary for Import Administration.

[FR Doc. E6-20256 Filed 11-29-06; 8:45 am]

BILLING CODE 3510-DS-S

DEPARTMENT OF COMMERCE

International Trade Administration

[A-570-848]

Helical Spring Lock Washers From the People's Republic of China: Notice of Court Decision Not In Harmony With Final Results of Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: On August 25, 2006, the United States Court of International Trade ("Court") sustained the final remand determination made by the Department of Commerce ("the Department") pursuant to the Court's remand of the final results of the administrative review of Helical Spring Lock Washers ("HSLWs") from the People's Republic of China. See *Shakeproof Assembly Components Division of IL Tool Works, Inc. v. United States*, Consol. Ct. 05-00404, Slip Op. 06-129 (Ct. Int'l Trade Aug. 25, 2006) ("Shakeproof Assembly"). This case arises out of the Department's October 1, 2002, through September 30, 2003, administrative review final results. See *Certain Helical Spring Lock Washers from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 70 FR 28274 (May 17, 2005) ("Final Results"). The final judgment in this case was not in harmony with the Department's *Final Results*.

EFFECTIVE DATE: September 4, 2006.

FOR FURTHER INFORMATION CONTACT: Marin Weaver 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) 482-2336 or (202) 482-0650, respectively.

SUPPLEMENTARY INFORMATION:

In *Shakeproof Assembly Components v. United States*, Slip Op. 05-163 (CIT, Dec. 22, 2005), the Court remanded the underlying results to the Department for reconsideration of the methodology employed to value plating services in the calculation of the antidumping duty rate for Hangzhou Spring Washer Co., Ltd. ("Hangzhou").

On May 15, 2006, the Department issued the draft results of redetermination pursuant to remand to Hangzhou and Shakeproof Assembly Components Division of Illinois Tool Works Inc. ("Shakeproof") for comment. On May 18, 2006, we received comments on our draft redetermination from both parties. On June 2, 2006, the Department issued its final results of redetermination pursuant to remand to the Court. The remand redetermination explained that the Department found the Sudha Electroplaters price quote to be the most reliable information on the record with which to value zinc plating. Moreover, based on the information on the record, the Department found that this quote should be applied to the weight of the un-plated lock washers. Thus, the Department recalculated the antidumping duty margin for Hangzhou.

On August 25, 2006, the Court sustained the final redetermination made by the Department pursuant to the Court's remand of the final results of the administrative review of HSLWs from the People's Republic of China. See *Shakeproof Assembly*.

In its decision in *Timken Co. v. United States*, 893 F. 2d 337, 341 (Fed. Cir. 1990) ("Timken"), the United States Court of Appeals for the Federal Circuit held that, pursuant to section 516A(e) of the Tariff Act of 1930, as amended ("the Act"), the Department must publish a notice of a court decision that is not "in harmony" with a Department determination, and must suspend liquidation of entries pending a "conclusive" court decision. The Court's decision in *Shakeproof Assembly* on August 25, 2006, constitutes a final decision of that court that is not in harmony with the Department's *Final Results*. This notice is published in fulfillment of the publication requirements of *Timken*. Accordingly, the Department will continue the suspension of liquidation of the subject merchandise pending a final and conclusive court decision. The Court's ruling has been appealed, and if it is upheld by the Court of Appeals for the Federal Circuit, the Department will instruct U.S. Customs and Border Protection to revise cash deposit rates and liquidate relevant entries covering the subject merchandise effective September 4, 2006.

This notice is issued and published in accordance with section 516A(c)(1) of the Act.

Dated: November 17, 2006.

Stephen J. Claeys,

Acting Assistant Secretary for Import Administration.

[FR Doc. E6-20285 Filed 11-29-06; 8:45 am]

BILLING CODE 3510-DS-P

DEPARTMENT OF DEFENSE

Office of the Secretary of Defense

Meeting of the DoD Advisory Group on Electron Devices

AGENCY: Department of Defense, Advisory Group on Electron Devices.

ACTION: Notice.

SUMMARY: The DoD Advisory Group on Electron Devices (AGED) announces a closed session meeting.

DATES: The meeting will be held at 0900, Tuesday, December 5, 2006.

ADDRESSES: The meeting will be held at ITS Noesis Business Unit, 4100 N. Fairfax Drive, Suite 800, Arlington, VA 22203.

FOR FURTHER INFORMATION CONTACT: Ms. Vicki Schneider, ITS Noesis Business Unit, 4100 N. Fairfax Drive, Suite 800, Arlington, VA 22203, 703-741-0300.

SUPPLEMENTARY INFORMATION: The mission of the Advisory Group is to provide advice to the Under Secretary of Defense for Acquisition, Technology and Logistics to the Director of Defense Research and Engineering (DDR&E), and through the DDR&E to the Director, Defense Advanced Research Projects Agency and the Military Departments in planning and managing an effective and economical research and development program in the area of electron devices.

The AGED meeting will be limited to review of research and development efforts in electronics and photonics with a focus on benefits to national defense. These reviews may form the basis for research and development programs initiated by the Military Departments and Defense Agencies to be conducted by industry, universities or in government laboratories. The agenda for this meeting will include programs on molecular electronics, microelectronics, electro-optics, and electronic materials. Due to unforeseen circumstances, this announcement does not give the standard 15-day notification.

In accordance with Section 10(d) of Pub. L. 92-463, as amended, (5 U.S.C. App. 2), it has been determined that this Advisory Group meeting concerns matters listed in 5 U.S.C. 552b(c)(1), and that accordingly, this meeting will be closed to the public.

Dated: November 21, 2006.

L.M. Bynum,

Alternate, OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 06-9465 Filed 11-29-06; 8:45 am]

BILLING CODE 5001-06-M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP05-357-005]

Cheniere Creole Trail Pipeline, L.P.; Notice of Motion to Vacate Certificate in Part

November 22, 2006.

Take notice that on November 16, 2006, Cheniere Creole Trail Pipeline, L.P. (Creole Trail Pipeline), 717 Texas Avenue, Suite 3100, Houston, Texas 77002, filed in Docket No. CP05-357-005, a motion to vacate the certificate authority granted on June 15, 2006, in Docket Nos. CP05-357-000, et al., to construct, own and operate one of the lines, referred to as Line 2, of the

originally certificated 116.8-mile, dual 42-inch pipelines. Creole Trail Pipeline explains that construction of a single 42-inch pipeline, referred to as Line 1, is sufficient for it to satisfy its transportation service obligations.

The motion is on file with the Commission and open for public inspection. This motion is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at <http://www.ferc.gov> using the "eLibrary" link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at FERCOnlineSupport@ferc.gov or toll free at (866) 208-3676, or for TTY, contact (202) 502-8659.

Any questions regarding the application should be directed to Patricia Outtrim, Cheniere Creole Trail Pipeline, L.P., 717 Texas Avenue, Suite 3100, Houston, Texas 77002, (713) 659-1361 or Lisa Tonery, King & Spalding LLP, 1185 Avenue of the Americas, New York, NY 10036, (212) 556-2307.

There are two ways to become involved in the Commission's review of this project. First, any person wishing to obtain legal status by becoming a party to the proceedings for this project should, on or before the comment date listed below, file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, a motion to intervene in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the NGA (18 CFR 157.10). A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies of all documents filed by the applicant and by all other parties. A party must submit 14 copies of this filing and all subsequent filings made with the Commission and must mail a copy of all filing to the applicant and to every other party in the proceeding. Only parties to the proceeding can ask for court review of Commission orders in the proceeding.

However, other persons do not have to intervene in order to have comments considered. The second way to participate is by filing with the Secretary of the Commission, as soon as possible, an original and two copies of comments in support of or in opposition to this project. The Commission will consider these comments in determining the appropriate action to be taken, but the filing of a comment alone will not serve to make the filer a party to the proceeding. The Commission's

rules require that persons filing comments in opposition to this project provide copies of their protests only to the party or parties directly involved in the protest.

Persons who wish to comment only on the environmental review of this project, or in support of or in opposition to this project, should submit an original and two copies of their comments to the Secretary of the Commission. Environmental commenters will be placed on the Commission's environmental mailing list, will receive copies of the environmental documents, and will be notified of meetings associated with the Commission's environmental review process. Environmental commenters will not be required to serve copies of filed documents on all other parties. The Commission's rules require that persons filing comments in opposition to the project provide copies of their protests only to the applicant. However, the non-party commenters will not receive copies of all documents filed by other parties or issued by the Commission (except for the mailing of environmental documents issued by the Commission) and will not have the right to seek court review of the Commission's final order.

The Commission strongly encourages electronic filings of comments, protests, and interventions via the Internet in lieu of paper. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site (<http://www.ferc.gov>) under the "e-Filing" link.

Comment Date: December 4, 2006.

Magalie R. Salas,

Secretary.

[FR Doc. E6-20258 Filed 11-29-06; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP05-357-004]

Cheniere Creole Trail Pipeline, L.P.; Notice of Amendment

November 22, 2006.

Take notice that on November 16, 2006, Cheniere Creole Trail Pipeline, L.P. (Creole Trail Pipeline), 717 Texas Avenue, Suite 3100, Houston, Texas 77002, filed in Docket No. CP05-357-004, an application to amend its pending amendment application filed on August 4, 2006, in Docket No. CP05-357-003. Creole Trail Pipeline explains that it was granted certificate authorization on June 15, 2006, in

Docket Nos. CP05-357-000, *et al.*, to, in part, construct 116.8-mile, dual 42-inch pipelines, referred to as Line 1 and Line 2—Segments 2 and 3. In the pending August 4, 2006 amendment application, Creole Trail Pipeline requests authorization to construct 18.1 miles of 42-inch pipeline, referred to as Segment 1, to interconnect the certificated 116.8-mile dual pipelines to Cheniere Sabine Pass Pipeline, L.P. On November 16, 2006, concurrently with the instant filing, Creole Trail Pipeline submitted, in Docket No. CP05-357-005, a motion to vacate the certificate authorization granted on June 15, 2006, to construct Line 2. Herein, Creole Trail Pipeline withdraws its pending request for deferred rate and accounting treatment and requests approval of revised initial system-wide transportation rates to reflect the effects of vacating its authorization to construct Line 2.

The application is on file with the Commission and open for public inspection. This application is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at <http://www.ferc.gov> using the "eLibrary" link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at FERCOnlineSupport@ferc.gov or toll free at (866) 208-3676, or for TTY, contact (202) 502-8659.

Any questions regarding the application should be directed to Patricia Outtrim, Cheniere Creole Trail Pipeline, L.P., 717 Texas Avenue, Suite 3100, Houston, Texas 77002, (713) 659-1361 or Lisa Toney, King & Spalding LLP, 1185 Avenue of the Americas, New York, NY 10036, (212) 556-2307.

There are two ways to become involved in the Commission's review of this project. First, any person wishing to obtain legal status by becoming a party to the proceedings for this project should, on or before the comment date listed below, file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, a motion to intervene in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the NGA (18 CFR 157.10). A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies of all documents filed by the applicant and by all other parties. A party must submit 14 copies of this filing and all subsequent filings made with the Commission and must mail a copy of all

filing to the applicant and to every other party in the proceeding. Only parties to the proceeding can ask for court review of Commission orders in the proceeding.

However, other persons do not have to intervene in order to have comments considered. The second way to participate is by filing with the Secretary of the Commission, as soon as possible, an original and two copies of comments in support of or in opposition to this project. The Commission will consider these comments in determining the appropriate action to be taken, but the filing of a comment alone will not serve to make the filer a party to the proceeding. The Commission's rules require that persons filing comments in opposition to this project provide copies of their protests only to the party or parties directly involved in the protest.

Persons who wish to comment only on the environmental review of this project, or in support of or in opposition to this project, should submit an original and two copies of their comments to the Secretary of the Commission. Environmental commenters will be placed on the Commission's environmental mailing list, will receive copies of the environmental documents, and will be notified of meetings associated with the Commission's environmental review process. Environmental commenters will not be required to serve copies of filed documents on all other parties. The Commission's rules require that persons filing comments in opposition to the project provide copies of their protests only to the applicant. However, the non-party commenters will not receive copies of all documents filed by other parties or issued by the Commission (except for the mailing of environmental documents issued by the Commission) and will not have the right to seek court review of the Commission's final order.

The Commission strongly encourages electronic filings of comments, protests, and interventions via the Internet in lieu of paper. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site (<http://www.ferc.gov>) under the "e-Filing" link.

Comment Date: December 13, 2006.

Magalie R. Salas,
Secretary.

[FR Doc. E6-20262 Filed 11-29-06; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. NJ07-1-000]

East Kentucky Power Cooperative; Notice of Filing

November 22, 2006.

Take notice that on November 14, 2006, East Kentucky Power Cooperative, Inc. filed amendments to its Open Access Transmission Tariff, pursuant to 18 CFR 35.28(e) (2006) and Rule 207 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission, 18 CFR 385.207(a)(2) (2006).

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the "eFiling" link at <http://www.ferc.gov>. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at <http://www.ferc.gov>, using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail FERCOnlineSupport@ferc.gov, or call (866) 208-3676 (toll free). For TTY, call (202) 502-8659.

Comment Date: 5 p.m. Eastern Time on December 12, 2006.

Magalie R. Salas,
Secretary.

[FR Doc. E6-20260 Filed 11-29-06; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY**Federal Energy Regulatory Commission**

[Docket No. ER06-1094-002]

Midwest Independent Transmission System Operator, Inc.; Notice of Supplemental Request for Waiver

November 22, 2006.

Take notice that on July 24, 2006, the Midwest Independent Transmission System Operator, Inc. (Midwest ISO) filed a request to amend its June 1, 2006 request for waiver of standards for business practices. In addition, on November 3, 2006, Midwest ISO, filed an Affidavit of James F. Pewarski in further support of the waiver request.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant and all the parties in this proceeding.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the "eFiling" link at <http://www.ferc.gov>. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at <http://www.ferc.gov>, using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail FERCOnlineSupport@ferc.gov, or call (866) 208-3676 (toll free). For TTY, call (202) 502-8659.

Comment Date: 5 p.m. Eastern Time on December 4, 2006.

Magalie R. Salas,
Secretary.

[FR Doc. E6-20259 Filed 11-29-06; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY**Federal Energy Regulatory Commission**

[Docket No. RM05-30-000]

Rules Concerning Certification of Electronic Reliability Organization; and Procedures for the Establishment, Approval and Enforcement of Electric Reliability Standards; Notice of Availability of Filing

November 22, 2006.

Take notice that, on November 21, 2006, the Commission received the 2006/2007 Winter Assessment prepared by the North American Electric Reliability Council (NERC).

Section 39.11 of the Commission's regulations provides that the Electric Reliability Organization (ERO) shall conduct assessments of, among other things, the adequacy of the Bulk-Power System in North America and report its findings to the Commission, the Secretary of Energy, each Regional Entity, and each Regional Advisory Body annually or more frequently if so ordered by the Commission. According to NERC, the 2006/2007 Winter Assessment is the second assessment filed by NERC in its capacity as the ERO.

This assessment is filed under Docket No. RM05-30-000 and is accessible on-line at <http://www.ferc.gov>, using the "eLibrary" link and is available for review in the Commission's Public Reference Room. For assistance with any FERC Online service, please e-mail FERCOnlineSupport@ferc.gov, or call (866) 208-3676 (toll free). For TTY, call (202) 502-8659.

Magalie R. Salas,
Secretary.

[FR Doc. E6-20257 Filed 11-29-06; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY**Federal Energy Regulatory Commission**

[Docket No. EL07-17-000, QF86-36-003]

PowerSmith Cogeneration Project Limited Partnership; Notice of Filing

November 22, 2006.

Take notice that on November 16, 2006, PowerSmith Cogeneration Project Limited Partnership filed a request for a limited waiver of the operating standards, pursuant to 18 CFR 292.205(a)(2), and efficiency standards, pursuant to 18 CFR 292.205(a)(1), for a topping-cycle cogeneration facility

located in Oklahoma City, Oklahoma, for calendar years 2007 and 2008.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant and all the parties in this proceeding.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the "eFiling" link at <http://www.ferc.gov>. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at <http://www.ferc.gov>, using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail FERCOnlineSupport@ferc.gov, or call (866) 208-3676 (toll free). For TTY, call (202) 502-8659.

Comment Date: 5 p.m. Eastern Time on December 18, 2006.

Magalie R. Salas,
Secretary.

[FR Doc. E6-20261 Filed 11-29-06; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY**Federal Energy Regulatory Commission****Combined Notice of Filings # 1**

November 22, 2006.

Take notice that the Commission received the following electric rate filings.

Docket Numbers: ER04-441-014; ER04-445-019; ER04-443-015; ER04-435-022.

Applicants: California Independent System Operator Corporation.

Description: California Independent System Operator Corporation submits its Substitute Second Revised Sheet 1077 to its FERC Electric Tariff, Third Replacement Volume 2.

Filed Date: 11/16/2006.

Accession Number: 20061121-0227.

Comment Date: 5 p.m. Eastern Time on Thursday, December 7, 2006.

Docket Numbers: ER06-192-002.

Applicants: Midwest Independent Transmission System Operator, Inc.

Description: Midwest Independent Transmission System Operator, Inc. submits an errata to its 10/25/06 filing of Order 2006 Amended Compliance filing.

Filed Date: 11/17/2006.

Accession Number: 20061121-0228.

Comment Date: 5 p.m. Eastern Time on Friday, December 8, 2006.

Docket Numbers: ER06-1118-003; ER99-4463-007; ER06-1291-001.

Applicants: NE Energy Management, LLC; NE Hydro Generating Company; Mt. Tom Generating Company LLC.

Description: NE Energy Management, LLC et al submits a notice in change in status re the market-based rate authority to each subsidiary.

Filed Date: 11/16/2006.

Accession Number: 20061121-0226.

Comment Date: 5 p.m. Eastern Time on Thursday, December 7, 2006.

Docket Numbers: ER07-131-001; ER07-132-001; ER07-133-001.

Applicants: CalPeak Power-El Cajon LLC; CalPeak Power-Border, LLC; CalPeak Power-Enterprise, LLC.

Description: CalPeak Power-El Cajon, LLC et al submit tariff sheets that correctly reflect a 2007 Contract Year re Must-Run Service Agreements with the California Independent System Operator Corporation.

Filed Date: 11/17/2006.

Accession Number: 20061121-0229.

Comment Date: 5 p.m. Eastern Time on Friday, December 8, 2006.

Docket Numbers: ER07-231-000.

Applicants: PJM Interconnection, LLC; New York Independent System Operator, Inc.; ISO New England Inc.

Description: PJM Interconnection, LLC et al submit Procedure to Protect for the Loss of Phase II Imports Report.

Filed Date: 11/16/2006.

Accession Number: 20061121-0230.

Comment Date: 5 p.m. Eastern Time on Thursday, December 7, 2006.

Docket Numbers: ER07-232-000.

Applicants: Aragonne Wind LLC.
Description: Aragonne Wind LLC submits an Application for Order accepting Market-based Rate Tariff, Granting Authorizations and Blanket Authority and Waiving Certain Requirements.

Filed Date: 11/17/2006.

Accession Number: 20061121-0225.

Comment Date: 5 p.m. Eastern Time on Friday, December 8, 2006.

Docket Numbers: ER07-233-000.

Applicants: Occidental Power Services, Inc.

Description: Occidental Power Services, Inc submits revised sheets of its Rate Schedule No. 1.

Filed Date: 11/17/2006.

Accession Number: 20061121-0272.

Comment Date: 5 p.m. Eastern Time on Friday, December 8, 2006.

Docket Numbers: ER07-234-000.

Applicants: American Transmission Company LLC

Description: American Transmission Company, LLC submits an executed Distribution-Transmission Interconnection Agreement with Evansville Water & Light.

Filed Date: 11/17/2006.

Accession Number: 20061121-0270.

Comment Date: 5 p.m. Eastern Time on Friday, December 8, 2006.

Any person desiring to intervene or to protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern time on the specified comment date. It is not necessary to separately intervene again in a subdocket related to a compliance filing if you have previously intervened in the same docket. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at <http://www.ferc.gov>. To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St. NE., Washington, DC 20426.

The filings in the above proceedings are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail FERCOnlineSupport@ferc.gov or call (866) 208-3676 (toll free). For TTY, call (202) 502-8659.

Magalie R. Salas,

Secretary.

[FR Doc. E6-20263 Filed 11-29-06; 8:45 am]

BILLING CODE 6717-01-P

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR Part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The application also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States. Additional information on all bank holding companies may be obtained from the National Information Center website at www.ffiec.gov/nic/.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of

Governors not later than December 26, 2006.

A. Federal Reserve Bank of Philadelphia (Michael E. Collins, Senior Vice President) 100 North 6th Street, Philadelphia, Pennsylvania 19105-1521:

1. *EHPW Acquisition Company*, Harrisburg, Pennsylvania; to become a bank holding company by merging with Vartan Financial Corporation, Harrisburg, Pennsylvania, and thereby acquire Vartan National Bank, Harrisburg, Pennsylvania.

B. Federal Reserve Bank of Kansas City (Donna J. Ward, Assistant Vice President) 925 Grand Avenue, Kansas City, Missouri 64198-0001:

1. *Investment Opts, LLC*, Wray, Colorado; to become a bank holding company by acquiring 60 percent of the voting shares of FarmBank Holding, Inc., and thereby acquire First FarmBank, both in Greeley, Colorado (in organization). In connection with this proposal FarmBank Holding, Inc. has applied to become a bank holding company by acquiring 100 percent of the voting shares of First FarmBank, both of Greeley, Colorado (in organization).

Board of Governors of the Federal Reserve System, November 27, 2006.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. E6-20283 Filed 11-29-06; 8:45 am]

BILLING CODE 6210-01-S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

Federal Financial Participation in State Assistance Expenditures; Federal Matching Shares for Medicaid, the State Children's Health Insurance Program, and Aid to Needy Aged, Blind, or Disabled Persons for October 1, 2007 Through September 30, 2008

AGENCY: Office of the Secretary, HHS.

ACTION: Notice.

SUMMARY: The Federal Medical Assistance Percentages and Enhanced Federal Medical Assistance Percentages for Fiscal Year 2008 have been calculated pursuant to the Social Security Act (the Act). These percentages will be effective from October 1, 2007 through September 30, 2008. This notice announces the calculated "Federal Medical Assistance Percentages" and "Enhanced Federal Medical Assistance Percentages" that we will use in determining the amount of Federal matching for State medical assistance (Medicaid) and State

Children's Health Insurance Program (CHIP) expenditures, and Temporary Assistance for Needy Families (TANF) Contingency Funds, the federal share of Child Support Enforcement collections, Child Care Mandatory and Matching Funds of the Child Care and Development Fund, Foster Care Title IV-E Maintenance payments, and Adoption Assistance payments.

The table gives figures for each of the 50 States, the District of Columbia, Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands. Programs under title XIX of the Act exist in each jurisdiction; programs under titles I, X, and XIV operate only in Guam and the Virgin Islands; while a program under title XVI (Aid to the Aged, Blind, or Disabled) operates only in Puerto Rico. Programs under title XXI began operating in fiscal year 1998. The percentages in this notice apply to State expenditures for most medical services and medical insurance services, and assistance payments for certain social services. The statute provides separately for Federal matching of administrative costs.

Sections 1905(b) and 1101(a)(8)(B) of the Act require the Secretary of Health and Human Services to publish the Federal Medical Assistance Percentages each year. The Secretary is to calculate the percentages, using formulas in sections 1905(b) and 1101(a)(8)(B), from the Department of Commerce's statistics of average income per person in each State and for the Nation as a whole. The percentages are within the upper and lower limits given in section 1905(b) of the Act. The percentages to be applied to the District of Columbia, Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Northern Mariana Islands are specified in statute, and thus are not based on the statutory formula that determines the percentages for the 50 states.

The "Federal Medical Assistance Percentages" are for Medicaid. Section 1905(b) of the Act specifies the formula for calculating Federal Medical Assistance Percentages as follows:

"Federal medical assistance percentage" for any State shall be 100 per centum less the State percentage; and the State percentage shall be that percentage which bears the same ratio to 45 per centum as the square of the per capita income of such State bears to the square of the per capita income of the continental United States (including Alaska) and Hawaii; except that (1) the Federal medical assistance percentage shall in no case be less than 50 per centum or more than 83 per centum, (2) the Federal medical assistance percentage for Puerto Rico, the Virgin Islands, Guam, the Northern Mariana

Islands, and American Samoa shall be 50 per centum.

Section 4725 of the Balanced Budget Act of 1997 amended section 1905(b) to provide that the Federal Medical Assistance Percentage for the District of Columbia for purposes of titles XIX and for the purpose of calculating the enhanced FMAP under title XXI shall be 70 percent. For the District of Columbia, we note under the table of Federal Medical Assistance Percentages the rate that applies in certain other programs calculated using the formula otherwise applicable, and the rate that applies in certain other programs pursuant to section 1118 of the Social Security Act.

Section 2105(b) of the Act specifies the formula for calculating the Enhanced Federal Medical Assistance Percentages as follows:

The "enhanced FMAP", for a State for a fiscal year, is equal to the Federal medical assistance percentage (as defined in the first sentence of section 1905(b)) for the State increased by a number of percentage points equal to 30 percent of the number of percentage points by which (1) such Federal medical assistance percentage for the State, is less than (2) 100 percent; but in no case shall the enhanced FMAP for a State exceed 85 percent.

The "Enhanced Federal Medical Assistance Percentages" are for use in the State Children's Health Insurance Program under Title XXI, and in the Medicaid program for certain children for expenditures for medical assistance described in sections 1905(u)(2) and 1905(u)(3) of the Act. There is no specific requirement to publish the Enhanced Federal Medical Assistance Percentages. We include them in this notice for the convenience of the States.

These percentages are being announced today to provide States with advance notice of Fiscal Year 2008 changes in their FMAP percentages and to allow States to make any necessary preparations. However, these percentages may change for Titles XIX and XXI of the Social Security Act, pending comments received on the implementation of Section 6053 (b) of the Deficit Reduction Act (DRA) of 2005, Public Law 109-171. Section 6053 (b) relates to any state(s) affected by an influx of a significant number of evacuees as a result of Hurricane Katrina as of October 1, 2005. HHS plans to soon release a notice and seek comments on proposed adjustments to the FMAP percentages based on Section 6053 (b). The final percentages may change from those in this notice for affected states pending receipt and review of those comments.

EFFECTIVE DATES: The percentages listed will be effective for each of the four (4)

quarter-year periods in the period beginning October 1, 2007 and ending September 30, 2008.

FOR FURTHER INFORMATION CONTACT:
Thomas Musco or Robert Stewart, Office of Health Policy, Office of the Assistant Secretary for Planning and Evaluation,

Room 447D—Hubert H. Humphrey Building, 200 Independence Avenue, SW., Washington, DC 20201, (202) 690–6870.

(Catalog of Federal Domestic Assistance Program Nos. 93.778: Medical Assistance

Program; 93.767: State Children’s Health Insurance Program)

Dated: October 18, 2006.

Michael O. Leavitt,
Secretary of Health and Human Services.

FEDERAL MEDICAL ASSISTANCE PERCENTAGES AND ENHANCED FEDERAL MEDICAL ASSISTANCE PERCENTAGES

[Effective October 1, 2007–September 30, 2008 (Fiscal Year 2008)***]

State	Federal medical assistance percentages	Enhanced federal medical assistance percentages
Alabama	67.62	77.33
Alaska	52.48	66.74
American Samoa*	50.00	65.00
Arizona	66.20	76.34
Arkansas	72.94	81.06
California	50.00	65.00
Colorado	50.00	65.00
Connecticut	50.00	65.00
Delaware	50.00	65.00
District of Columbia**	70.00	79.00
Florida	56.83	69.78
Georgia	63.10	74.17
Guam*	50.00	65.00
Hawaii	56.50	69.55
Idaho	69.87	78.91
Illinois	50.00	65.00
Indiana	62.69	73.88
Iowa	61.73	73.21
Kansas	59.43	71.60
Kentucky	69.78	78.85
Louisiana	72.47	80.73
Maine	63.31	74.32
Maryland	50.00	65.00
Massachusetts	50.00	65.00
Michigan	58.10	70.67
Minnesota	50.00	65.00
Mississippi	76.29	83.40
Missouri	62.42	73.69
Montana	68.53	77.97
Nebraska	58.02	70.61
Nevada	52.64	66.85
New Hampshire	50.00	65.00
New Jersey	50.00	65.00
New Mexico	71.04	79.73
New York	50.00	65.00
North Carolina	64.05	74.84
North Dakota	63.75	74.63
Northern Mariana Islands*	50.00	65.00
Ohio	60.79	72.55
Oklahoma	67.10	76.97
Oregon	60.86	72.60
Pennsylvania	54.08	67.86
Puerto Rico*	50.00	65.00
Rhode Island	52.51	66.76
South Carolina	69.79	78.85
South Dakota	60.03	72.02
Tennessee	63.71	74.60
Texas	60.53	72.37
Utah	71.63	80.14
Vermont	59.03	71.32
Virgin Islands*	50.00	65.00
Virginia	50.00	65.00
Washington	51.52	66.06
West Virginia	74.25	81.98
Wisconsin	57.62	70.33
Wyoming	50.00	65.00

* For purposes of section 1118 of the Social Security Act, the percentage used under titles I, X, XIV, and XVI will be 75 per centum.

** The values for the District of Columbia in the table were set for the state plan under titles XIX and XXI and for capitation payments and DSH allotments under those titles. For other purposes, including programs remaining in Title IV of the Act, the percentage for DC is 50.00.

*** These percentages may change for some states pending comments received on implementation of Section 6053 (b) of the Deficit Reduction Act.

[FR Doc. E6-20264 Filed 11-29-06; 8:45 am]
BILLING CODE 4150-24-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Statement of Organization, Functions, and Delegations of Authority

Part C (Centers for Disease Control and Prevention) of the Statement of Organization, Functions, and Delegations of Authority of the Department of Health and Human Services (45 FR 67772-76, dated October 14, 1980, and corrected at 45 FR 69296, October 20 1980, as amended most recently at 17 FR 50065, dated August 24, 2006) is amended to reflect the title change for the Division of Hereditary Blood Disorders, National Center on Birth Defects and Developmental Disabilities, Coordinating Center for Health Promotion, Centers for Disease Control and Prevention.

Section C-B, Organization and Functions, is hereby amended as follows:

Delete in its entirety the title for the *Division of Hereditary Blood Disorders (CUBD)*, and insert the *Division of Blood Disorders (CUBD)*.

Dated: November 15, 2006.

William H. Gimson,

Chief Operating Officer, Centers for Disease Control and Prevention (CDC).

[FR Doc. 06-9472 Filed 11-29-06; 8:45 am]

BILLING CODE 4160-18-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

Blood Products Advisory Committee; Notice of Meeting

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

This notice announces a forthcoming meeting of a public advisory committee of the Food and Drug Administration (FDA). The meeting will be open to the public.

Name of Committee: Blood Products Advisory Committee.

General Function of the Committee: To provide advice and

recommendations to the agency on FDA's regulatory issues.

Date and Time: The meeting will be held on December 14, 2006, from 8 a.m. to 6 p.m.

Location: Crown Plaza Silver Spring, 8777 Georgia Ave, Silver Spring, MD. The hotel telephone number is 301-589-0800.

Contact Person: Donald W. Jehn, or Pearline K. Muckelvene, Center for Biologics Evaluation and Research (HFM-71), Food and Drug Administration, 1401 Rockville Pike, Rockville, MD 20852, 301-827-0314, or FDA Advisory Committee Information Line, 1-800-741-8138 (301-443-0572 in the Washington, DC area), code 3014519516. Please call the Information Line for up-to-date information on this meeting.

Agenda: On December 14, 2006, the committee will hear an update summary of the October 11, 2006, Public Hearing on Emergency Research. The committee will then discuss pre-clinical and clinical studies of the hemoglobin-based oxygen carrier, bovine polymerized hemoglobin (HBOC-201). In addition, the committee will discuss an emergency research study of HBOC-201, proposed by the Naval Medical Research Center. FDA intends to make background material available to the public no later than one business day before the meeting. If FDA is unable to post the background material on its Web site prior to the meeting, the background material will be made publicly available at the location of the advisory committee meeting, and the background material will be posted on FDA's Web site after the meeting. Background material is available at <http://www.fda.gov/ohrms/dockets/ac/acmenu.htm>, click on the year 2006 and scroll down to the appropriate advisory committee link.

Procedure: Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Written submissions may be made to the contact person on or before December 11, 2006. Oral presentations from the public will be scheduled between approximately 1:15 p.m. and 2:15 p.m. Those desiring to make formal oral presentations should notify the contact person and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time requested to make their presentation on

or before December 6, 2006. Time allotted for each presentation may be limited. If the number of registrants requesting to speak is greater than can be reasonably accommodated during the scheduled open public session, FDA may conduct a lottery to determine the speakers for the scheduled open public hearing session. The contact person will notify interested persons regarding their request to speak by December 7, 2006.

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 Donald W. Jehn or Pearline K. Muckelvene at least 7 days in advance of the meeting.

FDA regrets that it was unable to publish this notice 15 days prior to the December 14, 2006, Blood Products Advisory Committee meeting. Because the agency believes there is some urgency to bring this issue to public discussion and qualified members of the Blood Products Advisory Committee were available at this time, the Commissioner of Food and Drugs concluded that it was in the public interest to hold this meeting even if there was not sufficient time for the customary 15-day public notice.

Notice of this meeting is given under the Federal Advisory Committee Act (5 U.S.C. app. 2).

Dated: November 22, 2006.

Randall W. Lutter,

Associate Commissioner for Policy and Planning.

[FR Doc. E6-20265 Filed 11-29-06; 8:45 am]

BILLING CODE 4160-01-S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C.,

as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Cancer Institute Special Emphasis Panel; Development and Discovery.

Date: February 7–9, 2007.

Time: 5 p.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Double Tree Rockville, 1750 Rockville Pike, Rockville, MD 20852.

Contact Person: Peter J. Wirth, PhD, Scientific Review Administrator, Research Programs Review Branch, Division of Extramural Activities, National Cancer Institute, 6116 Executive Boulevard, Room 8131, Bethesda, MD 20892–8328. 301–496–7565. pw2q@nih.gov.

Name of Committee: National Cancer Institute Special Emphasis Panel; SPORE II.

Date: February 13–15, 2007.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Caron Lyman, Scientific Review Administrator, Division of Extramural Activities, National Cancer Institute, National Institutes of Health, 6116 Executive Blvd, Room 8119, Bethesda, MD 20892–8328. 301–451–4761. lymanc@mail.nih.gov.

(Catalogue of Federal Domestic Assistance Program Nos. 93.392, Cancer Construction; 93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control, National Institutes of Health, HHS)

Dated: November 20, 2006.

David Clary,

Acting Director, Office of Federal Advisory Committee Policy.

[FR Doc. 06–9469 Filed 11–29–06; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Neurological Disorders and Stroke; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Neurological Disorders and Stroke Special Emphasis Panel; GENSAT Review.

Date: November 29, 2006.

Time: 1 p.m. to 3 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 (Telephone Conference Call).

Contact Person: Phillip F. Wiethorn, Scientific Review Administrator, DHHS/NIH/NINDS/DER/SRB, 6001 Executive Boulevard, MSC 9529, Neuroscience Center, Room 3203, Bethesda, MD 20892–9529. (301) 496–5388. wiethorp@ninds.nih.gov.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.853, Clinical Research Related to Neurological Disorders; 93.854, Biological Basis Research in the Neurosciences, National Institutes of Health, HHS)

Dated: November 20, 2006.

David Clary,

Acting Director, Office of Federal Advisory Committee Policy.

[FR Doc. 06–9466 Filed 11–29–06; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of General Medical Sciences; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant

applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of General Medical Sciences Emphasis Panel; Minority Biomedical Research Support SCORE and RISE.

Date: December 1, 2006.

Time: 9:30 a.m. to 12 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Natcher Building, 45 Center Drive, Room 3AN–12, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Helen R. Sunshine, PhD, Chief, Office of Scientific Review, National Institute of General Medical Sciences, National Institutes of Health, Natcher Building, Room 3AN12F, Bethesda, MD 20892. 301–594–2881.

sunshinh@nigms.nih.gov.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.375, Minority Biomedical Research Support; 93.821, Cell Biology and Biophysics Research; 93.859, Pharmacology, Physiology, and Biological Chemistry Research; 93.862, Genetics and Developmental Biology Research; 93.88, Minority Access to Research Careers; 93.96, Special Minority Initiatives, National Institutes of Health, HHS)

Dated: November 20, 2006.

David Clary,

Acting Director, Office of Federal Advisory Committee Policy.

[FR Doc. 06–9467 Filed 11–29–06; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Child Health and Human Development; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Child Health and Human Development Special Emphasis Panel; Health Behavior in School-Aged Children (HBSC) Study—US.

Date: December 1, 2006.

Time: 12 p.m. to 1 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Institutes of Health, 6100 Executive Boulevard, Room 5B01, Rockville, MD 20852 (Telephone Conference Call).

Contact Person: Hameed Khan, PhD, Scientific Review Administrator, Division of Scientific Review, National Institute of Child Health and Human Development, NIH, 6100 Executive Blvd., Room 5B01, Bethesda, MD 20892. (301) 435-6902. khanh@mail.nih.gov.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.864, Population Research; 93.865, Research for Mothers and Children; 93.929, Center for Medical Rehabilitation Research; 93.209, Contraception and Infertility Loan Repayment Program, National Institutes of Health, HHS)

Dated: November 20, 2006.

David Clary,

Acting Director, Office of Federal Advisory Committee Policy.

[FR Doc. 06-9468 Filed 11-29-06; 8:45 am]

BILLING CODE 4140-01-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meetings.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Aging Special Emphasis Panel; Gene Delivery for Alzheimer Disease.

Date: December 1, 2006.

Time: 11 a.m. to 12 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, 2C212, Bethesda, MD 20814. (Telephone Conference Call).

Contact Person: Ramesh Vemuri, PhD, Scientific Review Office, National Institute on Aging, National Institutes of Health, 7201 Wisconsin Avenue, Suite 2C-212, Bethesda, MD 20892. 301-402-7700. rv23r@nih.gov.

This notice is being published less than 15 days prior to the meeting due to the urgent need to meet timing limitations imposed by the intramural research review cycle.

Name of Committee: National Institute on Aging Special Emphasis Panel; Cognition and Hippocampal Aging.

Date: December 6, 2006.

Time: 2 p.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute on Aging, 7201 Wisconsin Avenue, Bethesda, MD 20814 (Telephone Conference Call).

Contact Person: William Cruce, PhD, Health Scientist Administrator, Scientific Review Office, National Institute on Aging, National Institutes of Health, Room 2C212, 7201 Wisconsin Avenue, Bethesda, MD 20814. 301-402-7704. crucew@nia.nih.gov.

This notice is being published less than 15 days prior to the meeting due to the urgent need to meet timing limitations imposed by the intramural research review cycle.

Name of Committee: National Institute on Aging Special Emphasis Panel; Alzheimer Pathogenesis.

Date: December 7, 2006.

Time: 3 p.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Bethesda, MD 20814 (Telephone Conference Call).

Contact Person: William Cruce, PhD, Health Scientist Administrator, Scientific Review Office, National Institute on Aging, National Institutes of Health, Room 2C212, 7201 Wisconsin Avenue, Bethesda, MD 20814. 301-402-7704. crucew@nia.nih.gov.

This notice is being published less than 15 days prior to the meeting due to the urgent need to meet timing limitations imposed by the intramural research review cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: November 20, 2006.

David Clary,

Acting Director, Office of Federal Advisory Committee Policy.

[FR Doc. 06-9470 Filed 11-29-06; 8:45 am]

BILLING CODE 4140-01-M

DEPARTMENT OF HOMELAND SECURITY

[USCG-2006-26267]

Double Hull Standards for Vessels Carrying Oil in Bulk; U.S. Position on International Standards for Tank Vessel Design

AGENCY: Coast Guard, DHS.

ACTION: Notice.

SUMMARY: This notice is to inform the public that on January 25, 2005, the U.S. Embassy in London deposited a declaration with the International Maritime Organization stating that the express approval of the U.S. Government will be necessary before Regulations 19, 20, and 21 of the revised Annex I of the International Convention for the Prevention of Pollution from Ships (MARPOL 73/78) would enter into force for the U.S.

FOR FURTHER INFORMATION CONTACT: For information concerning this notice, contact Mr. David A. Du Pont, Project Manager, Office of Standards Evaluation and Development, Project Development Division (CG-3PSR-2), telephone 202-372-1497 or via e-mail at David.A.DuPont@uscg.mil. If you have questions on viewing material to the DOT Docket Management Facility docket, call Ms. Renee V. Wright, Program Manager, Docket Operations, telephone 202-493-0402.

ADDRESSES: Comments and material received from the public, as well as documents mentioned in this preamble as being available in the docket, are part of docket USCG-2006-26267 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, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. You may also find this docket on the Internet at <http://dms.dot.gov>.

SUPPLEMENTARY INFORMATION: The International Convention for the Prevention of Pollution from Ships (MARPOL 73/78), implemented by the Act to Prevent Pollution from Ships at 33 U.S.C. 1901 *et seq.*, is the primary international agreement aimed at reducing pollution of the marine environment from a variety of vessel-generated sources. Annex I to MARPOL 73/78, "Regulations for the Prevention of Pollution by Oil," contains provisions intended to reduce both intentional and accidental discharges of oil. The entire annex was revised by adoption of Resolution MEPC.117(52) on October 15, 2004. Revised Annex I will enter into force on January 1, 2007. Three of the revised Annex I regulations are the focus of this notice.

- Regulation 19 of revised Annex I, "Double hull and double bottom requirements for oil tankers delivered on or after 6 July 1996," establishes design requirements for double hull oil tank vessels delivered on or after July 6, 1996.

- Regulation 20 of revised Annex I, "Double hull and double bottom

requirements for oil tankers delivered before 6 July 1996," establishes design requirements for double hull oil tank vessels delivered before July 6, 1996.

- Regulation 21 of revised Annex I, "Prevention of oil pollution from oil tankers carrying heavy grade oil as cargo," bans the carriage of heavy grade oil in certain single hull tank vessels.

Through its January 25, 2005 declaration, which is available in the docket, the U.S. advised the IMO that the express approval of the U.S. will be necessary before these amendments will be applied in place of existing U.S. law. As a result, the U.S. has reaffirmed with the IMO that the Oil Pollution Act of 1990 (OPA 90) continues to be the

national governing design standard for tank vessels operating in U.S. waters.

This January 25, 2005, declaration is fully consistent with prior actions by the U.S. in this area. In each of the three past instances, the U.S. deposited an instrument with IMO and published a notice in the **Federal Register**. Details of these past notices are found in the table below.

Notice title	Docket number, federal register cite, date of publication	Notice summary
Double Hull Standards for Vessels Carrying Oil in Bulk; U.S. Position on International Standards for Tank Vessel Design.	CGD 90-051; 58 FR 39087; July 21, 1993.	International standards for new and existing tank vessel designs were developed and adopted by the International Maritime Organization (IMO) in March 1992. The U.S. has taken the position with IMO that the express approval of the U.S. Government would be necessary before these international tank vessel design standards will be enforced by the U.S. This is due to technical differences with the mandated requirements of the Oil Pollution Act of 1990 (OPA 90) and IMO's adopted international tank vessel design standards.
Double Hull Standards for Vessels Carrying Oil in Bulk; U.S. Position on the Amendment of International Standards for the Phase-Out of Existing Single Hull Tank Vessels.	USCG-2002-10298; 67 FR 7443; February 19, 2002.	This notice is to inform the public that on February 12, 2002, the U.S. Embassy in London deposited a declaration with the International Maritime Organization (IMO) stating that the express approval of the U.S. Government will be necessary before the revised Regulation 13G of the International Convention for the Prevention of Pollution from Ships (MARPOL 73/78) would enter into force for the U.S. In this declaration, the U.S. cited specific technical differences between the revised MARPOL Regulation for new and existing tankers and OPA 90.
U.S. Position on Amendments to MARPOL 73/78 Regarding the Phase-Out of Existing Single Hull Tank Vessels.	USCG-2004-18656; 69 FR 46172; August 2, 2004.	This notice is to inform the public that on Friday, July 2, 2004, the U.S. Embassy in London deposited a declaration with the International Maritime Organization stating that the express approval of the U.S. Government will be necessary before the December 2003 revised Regulation 13G and new Regulation 13H of the International Convention for the Prevention of Pollution from Ships (MARPOL 73/78) would enter into force for the U.S. In this declaration, the U.S. cited specific technical differences between the revised MARPOL 73/78 regulations for new and existing tank vessels and provisions of the Oil Pollution Act of 1990.

Copies of these notices are available in the docket.

Authority: 33 U.S.C. 1231, 33 U.S.C. 1321, E.O. 12777, Department of Homeland Security Delegation No. 0170.1.

Dated: November 24, 2006.

P.E. Little,

Captain, U.S. Coast Guard, Acting Director of National and International Standards, Assistant Commandant for Prevention.

[FR Doc. E6-20286 Filed 11-29-06; 8:45 am]

BILLING CODE 4910-15-P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

Agency Information Collection Activities: Extension of a Currently Approved Information Collection; Comment Request

ACTION: 60-Day Notice of Information Collection Under Review: Application for Advance Permission To Return to Unrelinquished Domicile, Form I-191, OMB Control Number 1615-0016.

The Department of Homeland Security, U.S. Citizenship and Immigration Services (USCIS) has

submitted the following information collection request for review and clearance in accordance with the Paperwork Reduction Act of 1995. The information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted for sixty days until January 29, 2007.

Written comments and suggestions regarding items contained in this notice, and especially with regard to the estimated public burden and associated response time should be directed to the Department of Homeland Security (DHS), USCIS, Director, Regulatory Management Division, Clearance Office, 111 Massachusetts Avenue, NW., Suite 3008, Washington, DC 20529.

Comments may also be submitted to DHS via facsimile to 202-272-8352, or via e-mail at rfs.regs@dhs.gov. When submitting comments by e-mail add the OMB Control Number 1615-0016 in the subject box.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information should address one or more of the following four points:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agencies estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* Extension of a currently approved collection.

(2) *Title of the Form/Collection:* Application for Advance Permission to Return to Unrelinquished Domicile.

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* Form I-191. U.S. Citizenship and Immigration Services.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Individuals or Households. The information collected on this form will be used by U.S. Citizenship and Immigration Services to determine whether the applicant is eligible for discretionary relief under section 212(c) of the Act.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 300 responses at 15 minutes (.25 hours) per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 75 annual burden hours.

If you have additional comments, suggestions, or need a copy of the proposed information collection instrument, please contact USCIS,

Regulatory Management Division, 111 Massachusetts Avenue, NW., Suite 3008, Washington, DC 20529, telephone 202-272-8377.

Dated: November 27, 2006.

Stephen Tarragon,

Deputy Director, Regulatory Management Division, U.S. Citizenship and Immigration Services, Department of Homeland Security.

[FR Doc. E6-20280 Filed 11-29-06; 8:45 am]

BILLING CODE 4410-10-P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Notice of Availability of an Environmental Assessment and Receipt of an Application for an Incidental Take Permit for the Oakmont Industrial Group Development, City of Ontario, San Bernardino County, CA

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability and receipt of application.

SUMMARY: The Oakmont Industrial Group (Applicant) has applied to the Fish and Wildlife Service (Service) for an incidental take permit pursuant to section 10(a)(1)(B) of the Endangered Species Act (Act) of 1973, as amended. The Service is considering issuing a 5-year permit to the Applicant that would authorize take of the federally endangered Delhi Sands flower-loving fly (*Rhaphiomidas terminatus abdominalis*; DSF). The proposed permit would authorize the incidental taking of individual DSF. The permit is needed by the Applicant because take of DSF could occur during the proposed construction of a commercial development on a 19-acre site in the City of Ontario, San Bernardino County, California.

The permit application includes the proposed Habitat Conservation Plan (Plan), which describes the proposed action and the measures that the Applicant will undertake to minimize and mitigate the impact of the take of the DSF.

DATES: We must review any written comments on or before January 29, 2007.

ADDRESSES: Send written comments to Mr. Jim Bartel, Field Supervisor, Fish and Wildlife Service, Carlsbad Fish and Wildlife Office, 6010 Hidden Valley Road, Carlsbad, CA 92011. You also may send comments by facsimile to (760) 918-0638. To review the permit application and plan, see "Availability of Documents" under **SUPPLEMENTARY INFORMATION**.

FOR FURTHER INFORMATION CONTACT: Ms. Karen Goebel, Assistant Field Supervisor (see **ADDRESSES**), (760) 431-9440.

SUPPLEMENTARY INFORMATION:

Availability of Documents

You may obtain copies of these documents for review by contacting the office under **ADDRESSES**. Documents also will be available for public inspection, by appointment, during normal business hours at our Carlsbad office (see **ADDRESSES**) and at the San Bernardino County Libraries. Addresses for the San Bernardino County Libraries are: (1) 13180 Central Avenue, Chino, CA 91710; (2) 2003 Grand Avenue, Chino Hills, CA 91709; (3) 16860 Valencia Avenue, Fontana, CA 92335; and (4) 104 West Fourth Street, San Bernardino, CA 92415.

Background

Section 9 of the Act (16 U.S.C. 1531 *et seq.*) and Federal regulations prohibit the "take" of fish and wildlife species listed as endangered or threatened. Take of federally listed fish and wildlife is defined under the Act to include "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." The Service may, under limited circumstances, issue permits to authorize incidental take (i.e., take that is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity). Regulations governing incidental take permits for threatened and endangered species are found in 50 CFR 17.32 and 17.22.

The Applicant is proposing development of commercial facilities on 19 acres of land in the City of Ontario, San Bernardino County, California. The project site is located south of Greystone Drive, north of Brentstone Street, and west of Stanford Avenue. The proposed project site is bordered by existing commercial facilities to the east and west, State Route 60 to the south, and approximately 13 acres of open space to the north. Over the past several years, the site has experienced heavy use by off-highway vehicles.

Approximately 10 acres of the site are considered occupied by the DSF. The Service has determined that the proposed development would result in incidental take of the DSF. No other federally listed species are known to utilize the site.

To mitigate take of DSF on the project site, the Applicant proposes to purchase credits towards conservation in perpetuity of 10 acres of occupied DSF habitat at the Colton Dunes Conservation Bank in eastern San

Bernardino Valley. The conservation bank collects fees that fund a management endowment to ensure the permanent management and monitoring of sensitive species and habitats, including the DSF.

The Service's Environmental Assessment considers the environmental consequences of three alternatives, including: (1) The Proposed Project Alternative, which consists of issuance of the incidental take permit and implementation of the Plan; (2) the Alternative Site Layout, which would consist of DSF conservation on the project site and no offsite conservation; and (3) the No Action Alternative, which would result in no impacts to DSF and no conservation.

National Environmental Policy Act

Proposed permit issuance triggers the need for compliance with the National Environmental Policy Act (NEPA). Accordingly, a draft NEPA document has been prepared. The Service is the Lead Agency responsible for compliance under NEPA. As the NEPA lead agency, the Service is providing notice of the availability and is making available for public review the Environmental Assessment.

Public Review

The Service invites the public to review the Plan and Environmental Assessment during a 60-day public comment period (see **DATES**). Any comments received, including names and addresses, will become part of the official administrative record and may be made available to the public. Our practice is to make comments, including names, home addresses, home phone numbers, and email addresses of respondents, available for public review. Individual respondents may request that we withhold their names and /or homes addresses, etc., but if you wish us to consider withholding this information you must state this prominently at the beginning of your comments. In addition, you must present a rationale for withholding this information. This rationale must demonstrate that disclosure would constitute a clearly unwarranted invasion of privacy. Unsupported assertions will not meet this burden. In the absence of exceptional, documentable circumstances, this information will be released. We will always make submissions from organization or businesses, and from individuals identifying themselves as representatives of or officials of organizations or businesses, available for public inspection in their entirety.

This notice is provided pursuant to section 10(a) of the Act and the regulations for implementing NEPA, as amended (40 CFR 1506.6). We will evaluate the application, associated documents, and comments submitted thereon to determine whether the application meets the requirements of NEPA regulations and section 10(a) of the Act. If we determine that those requirements are met, we will issue a permit to the Applicant for the incidental take of the DSF. We will make our final permit decision no sooner than 60 days after the date of this notice.

Dated: November 23, 2006.

Ken McDermond,

Deputy Manager, California/Nevada Operations Office, Sacramento, California.

[FR Doc. E6-20284 Filed 11-29-06; 8:45 am]

BILLING CODE 4310-55-P

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Scoping for Commercial Services Plan; Haleakala National Park, Maui, HI

Summary: Pursuant to requirements of the National Environmental Policy Act of 1969 (Pub. L. 91-190), the National Park Service is initiating the conservation planning and environmental impact analysis process regarding a commercial services plan proposed for Haleakala National Park. This Notice initiates scoping for the process that is expected to result in changes to the types of commercial services offered in the park and the way they are managed by the park. Haleakala National Park proposes to develop a long-term Commercial Services Plan (CSP) so that increasing visitor use may be accommodated in a manner compatible with the park's mission; and to assure that a full range of necessary and appropriate commercial services are developed and managed so that potential impacts to cultural and natural resources and visitor experience would be minimized. The CSP will be consistent with the park's mission and purpose statements and management goals as specified in legislation and as outlined in the Strategic Plan for Haleakala National Park (fiscal year 2005-2008).

Background and Preliminary Issues: Thus far, topics considered necessary to address in developing the CSP include: Assessing if, or the degree to which, commercial service uses of the park and overcrowding are contributing to the degradation of natural and cultural

resources, as well as adversely affecting visitor use and appreciation of the park; determining whether public health and safety are being compromised through uncontrolled uses of the park; and evaluating whether commercial services are operated in a manner that is consistent with the mission of the park and/or whether there is a consistent portrayal by commercial service operators of the park message.

Information from the public and interested groups is desired so that all pertinent issues and concerns which should be addressed in the conservation planning and environmental impact analysis for the CSP may be identified. At this time, the preliminary range of issues and public concerns deemed necessary to consider include the following:

Sunrise atop Haleakala is one of the most promoted tourist activities offered by the visitor industry on Maui. The Summit area of the park frequently receives over 1,300 visitors at sunrise. The concentration of visitor use has resulted in trampling of threatened and endangered plant species, increased social trailing resulting in accelerated erosion, and introduction of non-native species. Sunrise visitation has increased over the past decade to a point that visitors in private vehicles are turned away from parking areas filled beyond capacity on a regular basis by commercial vehicles. Members of the park's Kipuna Groups on Maui indicated that the sacredness of the Haleakala Summit area is diminished by too many people visiting the site, and opportunities to conduct cultural practices in peace are limited. More than one in five visitors to the Haleakala Visitor Center before 8 a.m. felt moderately or more crowded; more than one third of the visitors surveyed before 8 a.m. saw more people than they think the park should allow.

Throughout the day, there are other significant peaks of visitation that result in facilities at many park destinations being filled beyond capacity by visitors arriving in private vehicles or on commercial tours (often with simultaneous arrival of several commercial operators). When the parking areas are filled, health and safety concerns result due to inability of emergency vehicles (ambulance, law enforcement, and fire apparatus) to rapidly access these areas.

Other NPS concerns include degradation of various park trails resulting partially from commercial horse tour activities. In the Summit Area, trails are used jointly by hikers and by horse riders. The trails are located in fragile ecosystems where the

trail tread does not hold up well to excessive use resulting in un-natural erosion. At the trailheads and along the first three to five miles into the backcountry and designated Wilderness, trail crowding from multiple users including commercial horse and hiking tours is diminishing the experience of solitude in Wilderness. The mixed use also leads to conflicts and off-trail damage as hikers seek to move away from dust, manure, and smell of horses. Current permits allow for limited sizes of groups but do not regulate numbers of trips per day or per week.

Presently commercial use activities in the Kipahulu area includes guided and unguided hikes along the park's existing visitor trails and horse tour guided trips on a separate trail designated for horses only. Commercial tours typically leave from the same pick-up points and arrive at generally the same time at Kipahulu; this combined with tour vans and buses of various sizes crowd into the parking area causing traffic congestion and crowded hiking (which in turn prompts trampling of vegetation and unsafe off-trail use). Visitor injuries and deaths have occurred in these stream areas and the park discourages visitors from entering these pools and narrow areas.

Privately guided hiking activities in the Kipahulu area may also be contributing to formation of social (unauthorized) trails that follow the stream corridor and lead to upstream pools. All park visitors and service providers should be using NPS authorized and maintained trail to minimize resource; the deep trail substrate combined with very high average rainfall causes erosion, deep trenching, and very slippery and dangerous conditions.

Scoping Process: At this time, the NPS invites the public, other Federal agencies, Native Hawaiian groups, state and local governments, and all other interested parties to participate in the initial scoping and in the alternative development process. For initial scoping and alternatives development, the most useful comments are those that provide the NPS with assistance in identifying environmental issues, suitable range of alternatives, and other concerns that should be considered early in the commercial services and environmental planning process for these projects. At this time it has not been determined if an Environmental Assessment or an Environmental Impact Statement will be prepared. Although it is anticipated that an Environmental Assessment will be the appropriate level of environmental compliance, this scoping process will aid in the preparation of either document (and

responses during this scoping period will be helpful in making this determination).

All respondents to this Notice will be included in a mailing list to be used to invite review and comment on the subsequent environmental document. The public scoping period for the commercial services plan has been initiated—all written comments must be postmarked or transmitted not later than 60 days from the date of publication of this Notice (as soon as this date can be confirmed it will be announced on the park's Web site). Interested individuals, organizations, and agencies wishing to provide written comments may respond by regular mail to Commercial Services Plan, c/o Superintendent, Haleakala National Park, P.O. Box 369, Makawao, Maui, HI 96768 (or via e-mail c/o HALE_CSP@nps.gov).

Our practice is to make comments, including names, home addresses, home phone numbers, and e-mail addresses of respondents, available for public review. Individual respondents may request that we withhold their names and/or home addresses, etc., but if you wish us to consider withholding this information you must state this prominently at the beginning of your comments. In addition, you must present a rationale for withholding this information. This rationale must demonstrate that disclosure would constitute a clearly unwarranted invasion of privacy. Unsupported assertions will not meet this burden. In the absence of exceptional, documentable circumstances, this information will be released. We will always make submissions from organizations or businesses, and from individuals identifying themselves as representatives of or officials of organizations or businesses, available for public inspection in their entirety.

Public Meetings: The NPS will also conduct a public scoping meeting and open house to provide information about this project, to discuss issues and concerns informally with NPS representatives and to receive written comments. These scoping activities will be conducted on October 17 and 18, 2006. The October 17th meeting will be at 6 p.m. at Helene Hall in Hana. The October 18th meeting will be at 6 p.m. at the Mayor Hanibal Tavares Community Center in Pukulani.

Future Information and Decision Process: Future information about this conservation planning and environmental impact analysis process for the proposed commercial services plan will be distributed via direct mailings and announcements in regional and local news media, and

updates will be regularly posted on the park's Web site (<http://www.nps.gov/hale>). Availability of the forthcoming environmental document for review and written comment will be announced by local and regional news media, the above listed Web site, direct mailing (or in the case of an EIS, also by formal Notice of Availability of a Draft EIS published in the **Federal Register**). At this time the document is anticipated to be available for public review and comment in late summer, 2007. Comments on the document will be fully considered in the environmental decision-making process and responded to as appropriate. The official responsible for the decision is the Regional Director, Pacific West Region, National Park Service; subsequently the official responsible for implementation would be the Superintendent, Haleakala National Park.

Dated: August 31, 2006.

Patricia L. Neubacher,

Acting Regional Director, Pacific West Region.

[FR Doc. 06-9464 Filed 11-29-06; 8:45 am]

BILLING CODE 4312-50-M

INTERNATIONAL TRADE COMMISSION

Notification of Distribution of Administrative Protective Order Documents in Electronic Format

AGENCY: U.S. International Trade Commission.

ACTION: Notification of Distribution of Administrative Protective Order Documents in Electronic Format via CD or DVD.

EFFECTIVE DATE: January 9, 2007.

SUMMARY: The U.S. International Trade Commission (ITC, or Commission) has determined that, beginning January 9, 2007, it will distribute Administrative Protective Order (APO) Release documents in electronic format on either a compact disc (CD) or digital versatile disc (DVD) to parties on the APO service list for Title VII and Safeguard investigations. Parties requiring paper copies will be accommodated based on receipt of a request made to the Secretary to the Commission. The request may be made at the time the party files its application for disclosure of business proprietary information (BPI) or confidential business information (CBI) under APO. It may also be made subsequent to filing of the application at which point it will be accommodated within three (3) business days of receipt of the request.

Each CD/DVD will include APO Release documents in PDF format. In addition, it will include an ASCII text file with a table of contents listing all document files included on the CD/DVD, as well as the investigation number and phase of the investigation for which the documents were submitted. Each CD/DVD will be color coded and clearly marked as containing BPI or CBI. It will also be labeled with the investigation number, phase of the investigation, and date of release. Multiple CDs or DVDs will be used when the cumulative size of all document files exceeds the amount of space available on an individual CD or DVD.

The ITC is instituting this practice as a means of addressing several cost and resource issues with paper distribution, including increasing paper costs, greater storage and handling requirements, and higher postal costs for mailing the documents. In addition, feedback from the Service List community also indicated a preference for receiving APO Release documents in electronic form via CD/DVD.

All obligations imposed on recipients of APO releases by Commission rules and APOs continue in force with respect to the releases made on CD and DVD.

ADDRESSES: Correspondence on this matter should be directed to Marilyn R. Abbott, Secretary to the Commission, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436.

FOR FURTHER INFORMATION CONTACT: Technical questions or comments regarding this change may be directed to Joel Moeller, E-Business Division Manager, Office of Information Technology Services, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436 (telephone 202-205-2220; e-mail joel.moeller@usitc.gov). Hearing-impaired individuals are advised that information on this matter can be obtained by contacting our TTD terminal at 202-205-1810. General information concerning the Commission may also be obtained by accessing its Internet server (<http://www.usitc.gov>).

By order of the Commission.

Issued: November 27, 2006.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. E6-20282 Filed 11-29-06; 8:45 am]

BILLING CODE 7020-02-P

DEPARTMENT OF LABOR

Office of the Secretary

Combating Exploitive Child Labor Trough Education in Angola

AGENCY: Bureau of International Labor Affairs, U.S. Department of Labor

Announcement Type: New. Notice of Availability of Funds and Intent for Solicitation of Limited Competition for Cooperative Agreement Applications.

SUMMARY: The U.S. Department of Labor (USDOL), Bureau of International Labor Affairs (ILAB), intends to obligate up to approximately U.S. \$3.5 million through a Cooperative Agreement to organization(s) to improve access to and quality of education programs as a means to combat exploitive child labor in Angola. The project(s) funded under this award should address gaps and challenges to basic education found in Angola.

ILAB intends to solicit cooperative agreement applications through a limited competition of organizations qualified to implement a project that focuses on innovative ways to provide educational services to children engaged, or at risk of engaging, in exploitive labor in Angola. Qualified organizations include any commercial, international, educational, or non-profit organization that is capable of successfully developing and implementing education projects in Angola and that meets the following criteria—qualified organizations must have (1) an established presence in Angola (i.e., one or more offices and employees) and be legally recognized and permitted to operate by the Government of Angola, and (2) direct and current experience implementing technical cooperation programs for children-in-need in Angola that aim to combat exploitive child labor and/or promote educational and training opportunities for children-in-need who are under the age of 18 years. Among the organizations deemed eligible based on this criteria are the Christian Children's Fund, Save the Children—UK, and World Vision.

Other organizations wishing to be considered under this limited competition must submit to USDOL, at the contact address provided below and within 10 working days of this announcement, a formal request for funding consideration, providing verifiable evidence that the aforementioned criteria are met. Such requests will be evaluated by USDOL, which will add any additional organizations found eligible to the list of

those organizations to be considered under this limited competition.

This limited competition involves the re-granting of funds remaining from SGA 05-05 for "Combating Exploitive Child Labor through Education in Angola," published in the **Federal Register** on May 27, 2005. Please refer to <http://www.dol.gov/ILAB/grants/main.htm> for examples of previous notices of availability of funds and solicitations for cooperative agreement applications. Further information on the specific sectors, geographical regions, and funding levels for the potential project(s) in Angola, as well as the selection criteria to be used, will be addressed in the solicitation for cooperative agreement applications that will be made available to those organizations found to be eligible for consideration under the limited competition. For a list of frequently asked questions on Child Labor Education Initiative Solicitations for Cooperative Agreement Applications, please visit <http://www.dol.gov/ILAB/faq/faq36.htm>.

Key Dates: Organizations—other than those specifically referenced by name in this Notice of Intent—wishing to be considered under this limited competition must submit to USDOL, at the contact address provided below, a formal request within 10 working days of the date of this announcement.

A specific solicitation for cooperative agreement applications will be provided to those organizations deemed eligible for the limited competition within 20 working days of this announcement. The solicitation will remain open for at least 30 calendar days.

To Request Consideration Under This Limited Competition or For Further Information Contact: Ms. Lisa Harvey. E-mail address: harvey.lisa@dol.gov. All formal requests for consideration and other inquiries should make reference to the USDOL Child Labor Education Initiative—Solicitations for Cooperative Agreement Applications.

Background Information: Since 1995, USDOL has supported a worldwide technical assistance program implemented by the International Labor Organization's International Program on the Elimination of Child Labor (ILO-IPEC). ILAB has also supported the efforts of other organizations involved in efforts to combat child labor internationally through the promotion of educational opportunities for children-in-need. In total, ILAB has provided over U.S. \$530 million to ILO-IPEC and other organizations for international technical assistance to combat abusive child labor around the world.

USDOL's Child Labor Education Initiative seeks to nurture the development, health, safety, and enhanced future employability of children around the world by increasing access to basic education for children removed from child labor or at risk of entering it. Eliminating child labor depends, in part, on improving access to, quality of, and relevance of educational and training opportunities for children less than 18 years of age. Without improving such opportunities, children withdrawn from exploitive forms of labor may not have viable alternatives to child labor and may be more likely to return to such work or resort to other hazardous means of subsistence.

In addition to increasing access to education and eliminating exploitive child labor through direct withdrawal and prevention services to children, the Child Labor Education Initiative has the following four strategic goals:

1. Raise awareness of the importance of education for all children and mobilize a wide array of actors to improve and expand education infrastructures;
2. Strengthen formal and transitional education systems that encourage working children and those at risk of working to attend school;
3. Strengthen national institutions and policies on education and child labor; and
4. Ensure the long-term sustainability of these efforts.

When working to increase access to quality basic education, USDOL strives to complement existing efforts to eradicate the worst forms of child labor, to build on the achievements of and lessons learned from these efforts, to expand impact and build synergies among actors, and to avoid duplication of resources and efforts.

Signed at Washington, DC, this 20th day of November, 2006.

Lisa Harvey,
Grant Officer.

[FR Doc. E6-20269 Filed 11-29-06; 8:45 am]

BILLING CODE 4510-28-P

DEPARTMENT OF LABOR

Employment and Training Administration

Proposed Collection; Comment Request

ACTION: Notice.

SUMMARY: The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden

conducts a pre-clearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA95) [44 U.S.C. 3506(c)(2)(A)]. This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. The Employment and Training Administration (ETA) is soliciting comments regarding an extension of a current Office of Management and Budget (OMB) clearance for a series of quick turnaround surveys in which data will be collected from state workforce agencies and local workforce investment areas.

DATES: Submit comments on or before January 29, 2006.

ADDRESSES: Send comments to Richard Muller, Employment and Training Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Room N-5637, Washington, DC 20210; (202) 693-3680 (this is not a toll-free number); e-mail: Muller.Richard@dol.gov; fax: (202) 693-2766 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION:

I. Background

The Employment and Training Administration (ETA) is soliciting comments regarding an extension of a current Office of Management and Budget (OMB) clearance for a series of quick turnaround surveys in which data will be collected from state workforce agencies and local workforce investment areas. The surveys will focus on issues relating to the governance, administration, funding, service design, and delivery structure of workforce programs authorized by the Workforce Investment Act (WIA). Enacted in 1998, WIA has sought to redesign the workforce development system by linking over a dozen separately funded Federal programs and streamlining services, and establishing new accountability requirements.

ETA has developed quick turnaround surveys on several aspects of WIA services and outreach to businesses, under the current OMB clearance. Other surveys are also under consideration at this time.

The agency has a continuing need for information on WIA operations and is seeking a further extension of the

clearance for conducting a series of eight (8) to twenty (20) separate surveys over the next three years. Each survey will be relatively short (10-30 questions) and, depending on the nature of the survey, may be administered to state workforce agencies, local workforce boards, One-Stop Centers, employment service offices, or other local-area WIA partners. Each survey will be designed on an ad hoc basis and will focus on emerging topics of pressing policy interest. Each survey will either cover the universe of respondents (for state level information) or a properly drawn random sample (for local level information). Examples of broad topic areas include:

- Local management information system developments
- New processes and procedures
- Services to different target groups
- Integration and coordination with other programs
- Local workforce investment board membership and training

Quick turnaround surveys are needed for a number of reasons. The most pressing concerns the need to understand key operational issues in light of challenges deriving from the Administration's policy priorities and from the coming reauthorization of WIA and of other partner programs.

Timely information, that identifies the scope and magnitude of various practices or problems, is needed for ETA to fulfill its obligations to develop high quality policy, administrative guidance, regulations, and technical assistance.

The data that will be requested in the quick turnaround surveys is not otherwise available. Other research and evaluation efforts, including case studies or long-range evaluations, either cover only a limited number of sites or take many years for data to be gathered and analyzed. Administrative information and data are too limited: The five-year Workforce Investment Plans, developed by states and local areas, are too general in nature to meet ETA's specific informational needs and are updated infrequently. Quarterly or annual data reporting by states and local areas do not provide information on key operational practices and issues. Thus, ETA has no alternative mechanism for collecting information that both identifies the scope and magnitude of emerging WIA implementation issues and provides the information on a quick turnaround basis.

ETA will make every effort to coordinate the quick turnaround surveys with other research it is conducting, in order to ease the burden on local and state respondents, to avoid

duplication, and to explore fully how interim data and information from each study can be used to inform the other studies. Information from the quick response surveys will complement but not duplicate other ETA reporting requirements or evaluation studies.

II. Review Focus

Currently, ETA is soliciting comments, concerning the proposed extension of the Quick Turnaround Surveys of WIA, that:

(a) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(b) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(c) Enhance the quality, utility and clarity of the information to be collected; and

(d) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submissions of responses.

A copy of the proposed information collection request (ICR) can be obtained by contacting the office listed above in the addressee section of this notice. It can also be accessed at <http://www.doleta.gov/OMBControlNumber.cfm>.

III. Current Actions

Type of Review: Extension.

Agency: Employment and Training Administration.

Title: Quick Turnaround Surveys of WIA.

OMB Number: 1205-0436.

Affected Public: State and local workforce agencies and workforce investment boards, and WIA partner program agencies at the state and local levels.

Total Respondents: Annual average, based on 250 respondents for each of 20 surveys, 5,000.

Total Burden Cost for capital and startup: \$0.

Total Burden Cost for operation and maintenance: \$0.

Comments submitted in response to this comment request will be summarized and/or included in the request for OMB approval of the information collection request; they will also become a matter of public record.

Dated: November 21, 2006.

Maria K. Flynn,

Administrator, Office of Policy Development and Research.

[FR Doc. E6-20266 Filed 11-29-06; 8:45 am]

BILLING CODE 4510-30-P

POSTAL SERVICE

United States Postal Service Board of Governors; Sunshine Act Meeting

DATE AND TIME: Tuesday, December 5, 2006, at 2 p.m.; and Wednesday, December 6, 2006, at 8:30 a.m. and 10:30 a.m.

PLACE: Washington, DC, at U.S. Postal Service Headquarters, 475 L'Enfant Plaza, SW., in the Benjamin Franklin Room.

STATUS: December 5-2 p.m.—Closed; December 6-8:30 a.m.—Open; December 6-10 a.m.—Closed

MATTERS TO BE CONSIDERED: Tuesday, December 5 at 2 p.m. (Closed)

1. Strategic Planning.
2. Rate Case Update.
3. Labor Negotiations Update.
4. Financial Update.
5. Personnel Matters and Compensation Issues.
6. Negotiated Service Agreement.

Wednesday, December 6 at 8:30 a.m. (Open)

1. Minutes of the Previous Meeting, November 14-15, 2006.
2. Remarks of the Postmaster General and CEO Jack Potter.
3. Committee Reports.
4. Consideration of Postal Service Fiscal Year 2006 Annual Report.
5. Consideration of Final Fiscal Year 2008 Appropriation Request.
6. Capital Investment.
 - a. Flats Sequencing System—Phase I Program.
7. Tentative Agenda for the January 9-10, 2007, meeting in Washington, DC.

Wednesday, December 6 at 10 a.m. (Closed)—if needed

1. Continuation of Tuesday's closed session agenda.

CONTACT PERSON FOR MORE INFORMATION: Wendy A. Hocking, Secretary of the Board, U.S. Postal Service, 475 L'Enfant Plaza, SW., Washington, DC 20260-1000. Telephone (202) 268-4800.

Wendy A. Hocking,

Secretary.

[FR Doc. 06-9475 Filed 11-27-06; 8:45 am]

BILLING CODE 7710-12-M

DEPARTMENT OF STATE

[Public Notice 5632]

Bureau of International Security and Nonproliferation; Termination of Nonproliferation Measures Against a Foreign Entity

AGENCY: Department of State.

ACTION: Notice.

SUMMARY: A determination has been made to terminate sanctions imposed pursuant to Section 3 of the Iran Nonproliferation Act of 2000 on a Russian entity (71 FR 5483).

EFFECTIVE DATE: November 21, 2006.

FOR FURTHER INFORMATION CONTACT: On general issues: J. Christian Kessler, Office of Conventional Arms Threat Reduction, Bureau of International Security and Nonproliferation, Department of State (202-647-2718). On U.S. Government procurement ban issues: Gladys Gines, Office of the Procurement Executive, Department of State (703-516-1691).

SUPPLEMENTARY INFORMATION: Pursuant to Section 4 of the Iran Nonproliferation Act of 2000 (Pub. L. 106-178), the U.S. Government determined on November 17, 2006 that the sanctions imposed effective July 28, 2006 (71 FR 5483), on the Russian entity Sukhoy, are terminated.

Dated: November 22, 2006.

John C. Rood,

Assistant Secretary of State for International Security and Nonproliferation, Department of State.

[FR Doc. E6-20274 Filed 11-29-06; 8:45 am]

BILLING CODE 4710-25-P

DEPARTMENT OF STATE

[Public Notice 5620]

Announcement of Meetings of the International Telecommunication Advisory Committee

SUMMARY: This notice announces meetings of the International Telecommunication Advisory Committee (ITAC) to prepare advice on U.S. positions for the Study Group 7 meetings of the International Telecommunication Union—Radiocommunication Sector (ITU-R), for a Rapporteur Group meeting for Study Group 2 of the ITU Telecommunication Development Sector, and for the ITU Telecommunication Sector Advisory Group (TSAG), Study Group 4 (Telecommunication Management) and Study Group 2 (Operational aspects of

service provision, networks and performance).

The ITAC will meet to prepare advice on U.S. positions to be taken at the February meeting of ITU-R Study Group 7 (Science services) on January 11, 2007 from 1:30 to 4 p.m. Eastern Time at NASA Headquarters, 300 E St., SW., Washington, DC 20546, Room 7H45 (also known as MIC 7A). For access to NASA HQ use 4th St. entrance and contact Ron Carbery (202-358-0985) at visitor station. A conference badge will be provided: 888-550-9509 (from within U.S.); 203-692-0779 (from outside U.S.); Passcode—221181#. For further information on this meeting, contact Wayne Whyte, Chairman U.S. SG-7 at wayne.a.whyte@nasa.gov, telephone (216) 235-6024.

The ITAC will meet to prepare advice on U.S. positions to be taken at the March meeting of ITU-D Study Group 2 Question 22 "Utilization of ICT for disaster management and active and passive sensing systems as they apply to disaster prediction, detection and mitigation" on December 19, 2006, and January 23, 2007, both 10 a.m.–noon. The meetings will both be held in the offices of TerreStar, 1050 Connecticut Avenue, NW., Suite 1000, Washington, DC 20036. TerreStar is located a block from Farragut North (red line metro) and 3 blocks from Farragut West (orange and blue lines). For further information on TerreStar's offices, call Kelly O'Keefe at 202-772-1873. A telephone bridge will be provided: Call-in: 866-917-3767, Passcode: 1729853.

The ITAC will meet to prepare advice on U.S. positions to be taken at the March meeting of the Telecommunication Sector Advisory Group (TSAG) on December 18 and January 18. Times and locations of these meetings may be obtained by calling the secretariat below.

The ITAC will meet to prepare advice on U.S. positions to be taken at ITU-T Study Groups 4 and 2 on January 17, 2006 at the offices of Verizon Communications, 1300 Eye Street, Washington, DC from 9:30–noon. Study Group 4 agenda items will be considered before Study Group 2 items. A conference bridge will be provided: Call in: 866-259-6272, Passcode: 3552338.

These meetings are open to the public. Further information may be obtained from the secretariat minardje@state.gov, telephone 202-647-3234.

Dated: November 21, 2006.

James G. Ennis,

Foreign Affairs Officer, International Communications & Information Policy, Multilateral Affairs, Department of State.

[FR Doc. E6-20273 Filed 11-29-06; 8:45 am]

BILLING CODE 4710-07-P

DEPARTMENT OF THE TREASURY

Submission for OMB Review; Comment Request

November 22, 2006.

The Department of the 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 January 2, 2007 to be assured of consideration.

Internal Revenue Service (IRS)

OMB Number: 1535-0089.

Type of Review: Revision.

Title: Implementing Regulations: Government Securities Act of 1986, as amended.

Description: Regulations require government securities broker/dealers to keep certain records concerning government securities activities and submit financial reports.

Respondents: Business and other for-profits.

Estimated Total Burden Hours: 373,335 hours.

Clearance Officer: Vicki S. Thorpe (304) 480-8150, Bureau of the Public Debt, 200 Third Street, Parkersburg, West Virginia 26106.

OMB Reviewer: Alexander T. Hunt (202) 395-7316, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503.

Michael A. Robinson,

Treasury PRA Clearance Officer.

[FR Doc. E6-20271 Filed 11-29-06; 8:45 am]

BILLING CODE 4810-39-P

DEPARTMENT OF THE TREASURY

Submission for OMB Review; Comment Request

November 22, 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 January 2, 2007 to be assured of consideration.

Federal Consulting Group

OMB Number: 1505-0010.

Type of Review: Extension.

Title: Monthly Consolidated Foreign Currency Report of Major Market Participants.

Form: FC-2.

Description: Collection of information on Form FC-2 is required by law. Form FC-2 is designed to collect timely information on foreign exchange contracts purchased and sold; foreign exchange futures purchased and sold; foreign currency options and net delta equivalent value; foreign currency denominated assets and liabilities; net reported dealing positions.

Respondents: Business and other for-profits.

Estimated Total Reporting Burden: 1,152 hours.

OMB Number: 1505-0012.

Type of Review: Extension.

Title: Weekly Consolidated Foreign Currency Report of Major Market Participants.

Form: FC-1.

Description: Collection of information on Form FC-1 is required by law. Form FC-1 is designed to collect timely information on foreign exchange spot, forward and futures purchased and sold; net options position, delta equivalent value long or short; net reported dealing position long or short.

Respondents: Business and other for-profits.

Estimated Total Reporting Burden: 1,248 hours.

OMB Number: 1505-0014.

Type of Review: Extension.

Title: Quarterly Consolidated Foreign Currency Report.

Form: FC-3.

Description: Collection of information on Form FC-3 is required by law. Form FC-3 is designed to collect timely information on foreign exchange contracts purchased and sold; foreign exchange futures purchased and sold; foreign currency denominated assets and liabilities; foreign currency options and net delta equivalent value.

Respondents: Business and other for-profits.

Estimated Total Reporting Burden: 1,408 hours.

Clearance Officer: Dwight Wolkow (202) 622-1276, Department of the Treasury, 1500 Pennsylvania Avenue, NW., Room 5205, Washington, DC 20220.

OMB Reviewer: Alexander T. Hunt (202) 395-7316, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503.

Michael A. Robinson,

Treasury PRA Clearance Officer.

[FR Doc. E6-20272 Filed 11-29-06; 8:45 am]

BILLING CODE 4811-37-P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 2439

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104-13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form 2439, Notice to Shareholder of Undistributed Long-Term Capital Gains.

DATES: Written comments should be received on or before January 29, 2007 to be assured of consideration.

ADDRESSES: Direct all written comments to Glenn Kirkland, Internal Revenue Service, room 6516, 1111 Constitution Avenue, NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to Allan Hopkins, at (202) 622-6665, or at Internal Revenue

Service, room 6516, 1111 Constitution Avenue, NW., Washington, DC 20224, or through the internet, at Allan.M.Hopkins@irs.gov.

SUPPLEMENTARY INFORMATION:

Title: Alternative Minimum Tax—Individuals.

OMB Number: 1545-0145.

Form Number: 2439.

Abstract: Form 2439 is used by regulated investment companies or real estate investment trusts to show shareholders the amount of tax paid on undistributed capital gains under section 852(b)(3)(D) or 857(b)(3)(D).

Current Actions: There are no changes being made to the form at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit institutions.

Estimated Number of Respondents: 6,275.

Estimated Time Per Respondent: 4 hrs., 47 min.

Estimated Total Annual Burden Hours: 29,995.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: November 17, 2006.

Glenn Kirkland,

IRS Reports Clearance Officer.

[FR Doc. E6-20252 Filed 11-29-06; 8:45 am]

BILLING CODE 4830-01-P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 13614NR

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104-13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form 13614NR, Nonresident Alien Intake and Interview Sheet.

DATES: Written comments should be received on or before January 29, 2007 to be assured of consideration.

ADDRESSES: Direct all written comments to Glenn Kirkland, Internal Revenue Service, room 6516, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to Allan Hopkins, at (202) 622-6665, or at Internal Revenue Service, room 6516, 1111 Constitution Avenue NW., Washington, DC 20224, or through the internet, at Allan.M.Hopkins@irs.gov.

SUPPLEMENTARY INFORMATION:

Title: Nonresident Alien Intake and Interview Sheet.

OMB Number: 1545-XXXX. Form Number: 13614NR.

Abstract: Although volunteer tax return preparers receive quality training and tools, Form 13614NR ensures they consistently collect personal information from each taxpayer to assure the returns are prepared accurately, avoiding erroneous returns. This form is critical to continued improvements in the accuracy of volunteer-prepared returns for International Students and Scholars.

Current Actions: There are no changes being made to the form at this time.

Type of Review: This is a new collection.

Affected Public: Individuals or households.

Estimated Number of Respondents: 569,039.

Estimated Time Per Respondent: 15 min.

Estimated Total Annual Burden Hours: 141,260.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long

as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on:

- (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility;
- (b) the accuracy of the agency's estimate

of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: November 9, 2006.

Glenn Kirkland,

IRS Reports Clearance Officer.

[FR Doc. E6-20253 Filed 11-29-06; 8:45 am]

BILLING CODE 4830-01-P



Federal Register

**Thursday,
November 30, 2006**

Part II

Millennium Challenge Corporation

**Notice of Entering into a Compact With
the Government of the Republic of Mali;
Notice**

MILLENNIUM CHALLENGE CORPORATION

[MCC FR 06–20]

Notice of Entering Into a Compact With the Government of the Republic of Mali

AGENCY: Millennium Challenge Corporation.

ACTION: Notice.

SUMMARY: In accordance with Section 610(b)(2) of the Millennium Challenge Act of 2003 (Pub. L. 108–199, Division D), the Millennium Challenge Corporation (MCC) is publishing a summary and the complete text of the Millennium Challenge Compact between the United States of America, acting through the Millennium Challenge Corporation, and the Government of the Republic of Mali. Representatives of the United States Government and the Government of the Republic of Mali executed the Compact documents on November 13, 2006.

Dated: November 16, 2006.

William G. Anderson, Jr.,

Vice President & General Counsel (Acting), Millennium Challenge Corporation.

Summary of Millennium Challenge Compact With the Government of the Republic of Mali

I. Introduction

The five-year, approximately \$460 million Millennium Challenge Compact aims to support policy reform and the development of key infrastructure for productive sectors, by addressing Mali's constraints to growth and capitalizing on two of the country's major assets, the Bamako-Sénou International Airport (the "Airport"), a gateway for regional and international trade and the Niger River Delta for irrigated agriculture. These investments will create a platform for increased production and productivity of agriculture and small- and medium-sized enterprises, as well as expand Mali's access to markets and trade.

The MCC investments will be strengthened by policy reforms and institutional support, such as formal land titles for the rural poor, demand-driven rural advisory services, an improved business environment, and increased access to markets and trade. These institutional and infrastructure investments will impact the poor in Mali, particularly Malian farmers and small- and medium-sized entrepreneurs, not only in project intervention zones but, over time, on a regional and national scale.

II. Program

The projects under the Compact are as follows:

1. *Airport Improvement Project:* Establish an independent and secure link to the regional and global economy, addressing the specific need of a landlocked developing country.

2. *Industrial Park Project:* Provide properly managed and serviced land for close to 200 businesses and leverage reforms that will decrease the cost of doing business.

3. *Alatona Irrigation Project:* Provide a catalyst for the transformation and commercialization of family farms, supporting Mali's national development strategy objectives to increase the contribution of the rural sector to economic growth and help achieve national food security.

Airport Improvement Project

The Airport Improvement Project is intended to remove constraints to air traffic growth and increase the Airport's efficiency in both passenger and freight handling through airside and landside infrastructure improvements, as well as the establishment of appropriate institutional mechanisms to ensure effective management, security, operation, and maintenance of the Airport facilities over the long term.

The Airport Improvement Project includes the following activities:

- *Airside Infrastructure:* Improvements will include reinforcement overlay to, and expansion of, the runway, taxiway, and apron areas; replacement of deteriorating navigational equipment; and upgrades of Airport security systems.

- *Landside Infrastructure:* Improvements will be made to the existing passenger terminal and a new passenger terminal will be constructed, as well as support facilities, Airport roads, and parking lots. Certain utilities, including water supply, solid waste disposal facilities, wastewater treatment, and power generation, are also planned to be constructed and designed as joint systems to support both the proposed investments at the Airport and the adjacent Industrial Park.

- *Institutional Strengthening:* Infrastructure improvements will be accompanied by the establishment of appropriate institutional mechanisms to ensure effective management, operation and maintenance of the Airport facilities over the long term. These measures will involve both the management of the Airport, as well as the wider regulatory framework governing the civil aviation sector in Mali.

Industrial Park Project

The Industrial Park Project, located within the Airport domain, will develop a platform for industrial activity (initially 100 hectares (ha)) to meet the high and growing demand for well managed and serviced industrial land. The 100 ha industrial park (the "Industrial Park") is intended to be an anchor for a growing industrial sector in Mali, thereby alleviating a key constraint to value added production and economic growth. Reliable provision of utility services, including electricity, water, and wastewater, will increase business productivity.

The Industrial Park Project includes the following activities:

- *Primary and Secondary Infrastructure:* The Industrial Park Project will fund primary and secondary infrastructure systems for the 100 ha Industrial Park, designed for potential expansion to a larger 200 ha industrial zone. The primary infrastructure will include major road systems and utilities such as water supply mains and pump stations. Secondary infrastructure will include roads leading into Industrial Park sub-zones as well as lateral water/drainage piping, etc. to service the smaller parcels. The tertiary (on-lot) infrastructure, to be financed and built by the industries locating in the Industrial Park, includes interior roads and parking, water supply taps/connections and fire protection, electrical and telecommunications, and wastewater collection (and possibly pretreatment).

- *Resettlement:* Resettlement activities, which must be consistent with World Bank Operational Policy 4.12 on Involuntary Resettlement, require compensation for loss of livelihoods as a result of both physical and economic displacement. The scope of this displacement is larger than the 200 ha acquisition of land and compensation of users for the Industrial Park. Common infrastructure facilities¹ require acquisition and clearing of land and rights of way outside the Industrial Park, both inside and outside the Airport domain. To compensate peri-urban cultivators who practice rain-fed agriculture in the Airport domain and whose lands are required for the Industrial Park Project and the Airport Improvement Project, the Industrial Park Project will develop serviced garden plots offered on a long-term (e.g., 40-year) lease on land elsewhere in the

¹ This infrastructure includes wastewater treatment, power generation, water supply, conveyance and storage, and solid and hazardous waste disposal to serve both the Industrial Park and the Airport.

Airport domain. Acquisition of other land for infrastructure and rights of way located outside the Airport domain will also require compensation, the nature of which will be determined during the development of the RAP, which will cover the resettlement and compensation issues related to both the Industrial Park Project and the Airport Improvement Project.

- **Institutional Strengthening:** Infrastructure improvements will be accompanied by the establishment of appropriate mechanisms that will ensure effective management, operation and maintenance of the facilities over the long term. These mechanisms will involve the management of the Industrial Park itself, as well as administrative and regulatory reforms to alleviate current constraints to business development in Mali. To encourage the development of small- and medium-sized enterprises (“SMEs”), the Industrial Park Project will provide business services such as access to financial and market information and export facilitation services. The Industrial Park Project will also focus on how to ensure coordination in operations and maintenance of shared utilities between the Airport and Industrial Park operators.

Alatona Irrigation Project

The Alatona Irrigation Project is focused on increasing production and productivity, increasing farmer incomes, improving land tenure security, modernizing irrigated production systems and mitigating the uncertainty from subsistence rain-fed agriculture.

This project seeks to develop 16,000 ha of newly irrigated lands in the Alatona production zone of the Office du Niger (the “ON”), representing an almost 20 percent increase of “drought-proof” cropland. The Alatona Irrigation Project will introduce innovative agricultural, land tenure, and water management practices, as well as policy and organizational reforms aimed at realizing the ON’s potential to serve as an engine of rural growth for Mali.

The Alatona Irrigation Project includes the following activities:

- **Niono-Goma Coura Road:** This activity will involve upgrading an 81 kilometer north-south road within the national highway network from its current earth/gravel condition to a paved standard. The investment will also include an additional access spur to the Alatona perimeter at the village of Dogofry.

- **Irrigation Planning and Infrastructure:** This activity will involve main conveyance system expansion, Alatona irrigation system development, and support to the ON agency on water management.

- **Land Allocation:** The Alatona Irrigation Project will improve rural land tenure security in Mali by allocating newly developed, irrigated land to family farmers, women market gardeners, and farming companies in private ownership. These land recipients will purchase the land by making annual payments over a 15–20 year period. This activity consists of land parcel creation, land rights education, registration system upgrade, land parcel allocation and titling, and management of land revenues.

- **Resettlement, Social Infrastructure, and Social Services:** This activity will compensate families residing in the perimeter or with rights to land therein, consistent with World Bank Operational Policy 4.12 on Involuntary Resettlement, by offering land in the irrigation perimeter or, if the land option is not chosen, other compensation alternatives. This activity will provide social infrastructure to serve these project affected persons as well as incoming settlers and other migrant families and will also support social services (primarily education and health staff) during the last three years of the Compact.

- **Agricultural Services:** This activity will support a range of agricultural, institutional and related services to strengthen capacity and improve agricultural practice through applied agricultural research, extension and farmer training, support to farmer organizations, and support to water users associations.

- **Financial Services:** This activity will encourage agricultural lending by reducing the risks of extending credit in this newly developed zone, improving transparency within the existing financial system, and strengthening the capabilities of local financial institutions through a credit risk sharing program, microfinance credit bureau strengthening, financial institution capacity building, and direct support to farmers.

The table below outlines the estimated MCC contribution to the program by year and category over the term of the Compact.

MULTI-YEAR FINANCIAL PLAN SUMMARY						
Project	Totals Including Contingencies (USD)					
	Year 1	Year 2	Year 3	Year 4	Year 5	Total
1. Airport Improvement Project	6,264,292	24,433,578	39,291,383	19,211,924	430,000	89,631,177
2. Industrial Park Project	7,161,000	27,633,932	49,561,416	9,124,171	786,000	94,266,519
3. Alatona Irrigation Project	21,971,279	65,417,249	66,815,632	54,197,204	26,207,104	234,608,468
4. Monitoring and Evaluation	1,500,000	520,000	655,000	705,000	1,525,000	4,905,000
5. Program Management and Oversight	8,200,000	7,300,000	7,400,000	7,200,000	7,300,000	37,400,000
TOTAL ESTIMATED MCC CONTRIBUTION	45,096,571	125,304,759	163,723,431	90,438,299	36,248,104	460,811,164

III. Impacts

The Airport Improvement Project will expand Mali’s access to markets and trade through improvements in the transportation infrastructure at the Airport, as well as better management of the national air transport system. Evidence suggests that economic growth and poverty reduction depend on enhanced access to markets and trade. However, Mali’s access is severely

constrained. Mali is landlocked and heavily dependent on inadequate rail and road networks. Mali depends on freight transport through ports in unstable countries, such as Conakry, Guinea (Bamako’s closest port, which is 1000 km away) and Abidjan, Cote d’Ivoire. In the last few years, the instability in Cote d’Ivoire has dramatically limited Mali’s market access. Before the outbreak of the

Ivorian crisis, 70 percent of Malian exports were leaving via the port of Abidjan. In 2003, this amount dwindled to less than 18 percent. Mali cannot control overland routes to international and regional markets. Therefore, air traffic has become Mali’s lifeline for transportation of both passengers and export products.

Malian exports are predominantly agriculture based and depend on rural

small-scale producers, who would benefit from increased exports in high-value products such as mangoes, green beans, and gum arabic. Additionally, international tourists arriving at the Airport spend the majority of their time in rural areas, benefiting businesses in far-away places such as Timbuktu, Mopti, and Djenné. Finally, the improved management of the national airport system will facilitate links to primary destinations through regional air travel.

The Industrial Park Project will leverage national reforms in the business sector, reducing the cost and time to register a business, and enhance management and planning of the industrial sector. The existing, heavily congested, poorly managed, and degraded “industrial zone” is inappropriately located, lacks basic utilities and services, and has no room for expansion. The proposed Industrial Park would become the anchor for a growing industrial sector in Mali and alleviate a key constraint to value-added production and economic growth. Businesses in the agro-processing sector, where Mali has a comparative advantage, are likely to install in the Industrial Park. Growth generated by the Industrial Park will generally be poverty reducing due to the link to small-scale agricultural production.

The Alatona Irrigation Project focuses on a high-potential geographical zone in one of the poorest areas of central Mali. The Alatona Irrigation Project will develop 16,000 ha of irrigable agricultural land in the Alatona zone of the ON resulting in increased productivity and production, as well as diversification of high-value crops. MCC’s investments will include construction of a road, irrigation infrastructure, and social infrastructure, such as schools, clinics, and water and sanitation facilities. This project will provide social services, access to credit, and agricultural extension and will help establish and empower rural producer organizations by giving them access to information and productive assets. The Alatona Irrigation Project will leverage policy reforms expected to have a broad impact on the agricultural landscape throughout Mali.

Together, the three projects will result in increased industrial growth in the urban area, increased agricultural production and productivity in the ON and improved access to national, regional, and international markets.

IV. Program Management

The accountable entity (the “MCA-Mali”) will be organized under the laws of Mali as a *service rattaché* attached to

the Prime Minister’s office. MCA-Mali will have a mixed public-private board of directors responsible for program oversight. The board will consist of eleven voting members and two non-voting members. A management team will have overall management responsibility for the day-to-day implementation of the program. MCA-Mali will remain accountable for the successful execution of the program while working through implementing entities, contractors and consultants, whose interaction will be facilitated by a fiscal agent and a procurement agent. The Government of Mali (“GOM”) will also create two advisory councils to represent beneficiaries for each of the project sites—the Airport domain and the Alatona zone. In addition to the fiscal agent and the procurement agent, financial auditors and possibly a data quality agent will provide external controls.

V. Other Highlights

A. Consultative Process

The program strongly supports the third pillar of Mali’s Poverty Reduction Strategy Paper (“PRSP”)—development of infrastructure and key support for productive sectors. The participatory process of the PRSP is characterized as having “breadth” and being “systematic.” The PRSP identifies the following as top constraints to economic growth in its consultative process:

- Climatic risks affecting the rural sector with consequences on the national economy.
- High cost of factors of production.
- Fluctuations in prices of principal import and export products.
- Isolation/landlocked nature of the country.

The Compact was designed to address these constraints. Priorities were defined by the national PRSP structure and refinement occurred in consultation with civil society and the private sector. This consultative process enriched and helped form the GOM proposal and its development. The insistence on rural land ownership and titling derived from dialogue with civil society and private sector actors. The need for inclusion of a strong component of social services for the Alatona zone was also reinforced through the consultative process.

Members of the GOM, private sector, and civil society (Malian and U.S. non-governmental organizations (“NGOs”)) played an active role in developing the Compact proposal. Local NGOs, including village-level women’s associations, were directly involved in the process through numerous on-site workshops and meetings in the ON

region. Consultations also took place with private sector and civil society actors around Bamako, as well as communities surrounding the Airport domain, who emphasized the need for improved infrastructure and increased economic activity to reduce poverty. In addition, the consultative process involved participation of the U.S. NGO community, which has a strong presence in Mali, working on health, education, agriculture, governance, and economic development programs throughout the country.

B. GOM Commitment and Effectiveness

MCC and GOM have been in discussions over the following policy and institutional reforms that will reinforce the implementation and sustainability of the program. Relevant reforms will serve as conditions precedent in the disbursement agreement. Below is a list of policy and institutional reforms that have been adopted or are pending:

Airport Improvement Project

- GOM is in the process of restructuring several aspects of the civil aviation sector to reflect the recommendations of international organizations such as the International Civil Aviation Organization (“ICAO”) and the U.S. Federal Aviation Administration (“FAA”). Among these reforms:

- GOM recently (December 2005) created an independent and financially autonomous civil aviation agency, the Agence Nationale de l’Aéronautique Civile (ANAC). Implementation of the new agency is considered by GOM to be a high priority and a proposal has been made to include approximately \$5 million in the national budget of Mali over the next three years for this purpose.

- A new law is expected to be approved before the end of 2006 that will modernize the operations and management of Aéroports du Mali (“AdM”), the operator of the landside facilities. The text of the new law will grant AdM more flexibility, better define its mandate, and lay the groundwork for the eventual possibility of opening its capital to participation by third parties and creation of a *société d’économie mixte*.

Industrial Park Project

- Law 05–019 was ratified by Parliament in September 2005 establishing API–Mali, a new investment promotion agency. This agency will encourage and sustain foreign direct and national investment, improve the business climate, and

develop and regulate industrial zones and other economic activities. Implementation of this law will determine the agency's exact role vis-à-vis the Industrial Park Project.

- In response to the Doing Business Indicators and the Multilateral Investment Guarantee Agency benchmarking study, GOM has developed a short-term action plan to improve Mali's performance. Recently, the Ministry of Investment Promotion has engaged the International Finance Corporation to develop a legal regulatory framework, in addition to frameworks relating to land allocation and taxation for industrial zone activities in the country.

- Among the various efforts that GOM is undertaking to address weaknesses in the Malian business climate, an important and innovative measure includes the establishment of the Presidential Investors' Council ("PIC") in September 2004. The purpose of the PIC is to introduce a global business perspective into policy formulation and implementation. In response to one of its recommendations, GOM is targeting early 2007 to put in place a one-stop shop for business registration housed in the newly established API-Mali.

Alatona Irrigation Project

- GOM has expressed its high-level commitment to increase land-tenure security, to secure property rights and to increase issuance of land titles in the Alatona zone. This represents a major policy departure for GOM. Although Alatona will not be the first experiment with land titles in the rural area, the Alatona Irrigation Project is on an unprecedented scale.

- GOM reforms have included (a) the restructuring of the National Directorate of Public Works to create the National Directorate of Roads, including the establishment of a unit for emergency road works and (b) the establishment of a Road Authority (as a successor to the old Road Fund) with sole responsibility for managing the financing of road maintenance activities. The initial steps to create a specialized autonomous contracting agency for road maintenance, the AGEROUTE, have also been made. These steps provide assurance to MCC of GOM's commitment to a sustainable road maintenance program.

C. Sustainability

The Mali program is embedded in the institutional framework of Mali with the limited creation of parallel structures. It reinforces GOM's approach and commitment to democracy, decentralization, and empowerment of

local communities. MCC-supported interventions will complement and reinforce national strategies for poverty reduction and economic growth. The program objectives draw from the following national development strategies: PRSP, National Food Security Strategy, ON Master Plan, and Agriculture Orientation Law.

Airport Improvement Project. Under the present division of jurisdictions, a number of entities have responsibility for the civil aviation sector in Mali in general and the regulation, oversight, management, operation, and development of the Airport in particular. In response to ICAO safety and security audits and FAA assessments, GOM is in the process of restructuring and consolidating this institutional framework. One major result has been the establishment of ANAC in December 2005, which now has financial and administrative independence.

The Airport Improvement Project will reinforce the new civil aviation regulatory and oversight agency (ANAC) by providing technical assistance to establish a new organizational structure, administrative and financial procedures, staffing and training, and provision of equipment and facilities. Additionally, the project will rationalize and reinforce the Airport's management and operations agency (AdM) by providing technical assistance to establish a model for the management of the Airport and the long-term future status and organizational structure of AdM.

Industrial Park Project. In 1999, GOM passed Decree 99-252 declaring the 7,194 ha of land encompassing the Airport and the proposed Industrial Park as public domain land. Based on this decree, the Ministry of Public Works and Transportation and Ministry of Territorial Administration were named the responsible parties for the management of the Airport domain. Although AdM is viewed as the asset holding agency, GOM intends to enter into a management contract with a private operator for the Industrial Park. Under the World Bank Mali Growth Support Project, API-Mali will serve as the public-sector regulator for the Industrial Park, while day-to-day management will be assigned to a private entity (the "Operator") through an international, competitive procurement process. MCC will support the recruitment and start-up of the Operator, and will finance limited business support services to tenants.

To ensure the creation of new SMEs, the Industrial Park Project will help these SMEs access financial and market information, as well as export

facilitation services. In addition, the project will focus on how to ensure coordination in operations and maintenance of shared utilities between the Airport and Industrial Park operators.

Alatona Irrigation Project. The Alatona perimeter is located at the "tail end" of the ON gravity-fed irrigation system. Long term success hinges on effective and efficient management of the entire system. The project addresses this issue by financing additional capacity on the main conveyance structures, as well as supporting the ON to achieve sustainable management of its entire stock of assets. In addition, the Alatona Irrigation Project will address the need to update the existing ON Master Plan, which is based on scenarios and assumptions developed in 2001, and upon which current expansion plans are based. Maintenance of the main system and structures is the financial responsibility of GOM, which delegates this to the ON. Through a two-tiered system of joint ON-farmer committees, the ON also maintains the distributors and secondary canals within the five regional zones, while farmer organizations manage the tertiary canals. The water fees collected would seem adequate to cover the operations and maintenance cost of the major distribution systems within the zones.

The Niono-Goma Coura road is part of GOM's annual routine maintenance program. Current allocations should ensure routine maintenance on this road. Periodic maintenance funding (about every 10 years) is considered a major challenge, although it is anticipated that EU and World Bank efforts to increase user fees will over time ensure such funding.

The financial services activity will provide microfinance institutions and banks with training in agricultural credit and other aspects of managing the delivery of financial services to the inhabitants of Alatona. The project will create a new legal entity—the Revenue Authority—to collect and manage the revenues generated through land payments. MCC funding will support the costs of structuring this entity and facilitate some initial capacity building. Following this, the Revenue Authority will support itself through the land revenues collected. This structure has the potential to encourage local institutions to organize themselves around project design and implementation, thereby building local capacity for community planning and service delivery and helping to strengthen nascent decentralized government.

Research and extension are considered public goods and are funded by GOM. Over the life of the Compact, demand-driven and fee-based research and extension techniques will be tested. It is expected that the financially self-sufficient Alatona producers' organization as well as farmers' groups and village associations will play a key role in demanding and paying for these services.

D. Environment and Social Assessment

Airport Improvement Project. A Category A environmental impact assessment ("EIA"), following MCC Environmental Guidelines and Malian law, will be required. The recommended wastewater treatment, expanded water supply and distribution, solid and hazardous waste disposal, power supplies, drainage and other infrastructure are currently conceived and sized to serve both the Airport and the Industrial Park. Therefore, the Airport and the Industrial Park will be treated together for purposes of the EIA and the resettlement action plan ("RAP"), because of their common infrastructure, joint road access, shared space within the Airport domain and the cumulative effects of both projects. The joint RAP (covering physical and economic displacement, both temporary and permanent in areas inside and outside the Airport domain) will be prepared based on the World Bank's Operational Policy 4.12 on Involuntary Resettlement. Some of the infrastructure poses implementation risks, because they are municipal facilities not yet funded or built and located outside the Airport domain.

Industrial Park Project. The Industrial Park will be assessed in the joint Airport/Industrial Park EIA. In this context, the RAP will address compensation for those cultivating and using land in the Industrial Park and in other locations, both on and off the Airport domain. The approach and issues discussed above for the Airport Improvement Project with respect to common infrastructure construction impacts, the EIA, and the RAP remain the same.

Alatona Irrigation Project. Irrigation-related activities of the Alatona Irrigation Project, including activities external to the Alatona zone (such as presettlement activities and expansion and enhancement of the overall conveyance capacity of the ON's main canal system) will require a full Category A EIA, under MCC Environmental Guidelines and Malian law. The Niono-Goma Coura road's Category B environmental and social

assessment will be prepared in advance of the irrigation EIA to expedite implementation of road improvements. The Environmental Assessment (2003) and updated Environmental Management Plan (2005), which already exist for road rehabilitation of a much longer stretch of the national route, will be supplemented and updated for the 80-kilometer section to be funded under the Compact. Cumulative impacts of the road as well as the irrigation activities will be addressed in the Alatona EIA. Both documents will include HIV/AIDS mitigation plans. Two RAPs consistent with World Bank Operational Policy 4.12 on Involuntary Resettlement will also be needed, one for the road activity and another for the irrigation activities. A prerequisite to preparing the Alatona EIA is preparation of an overall land use and natural resources management plan to address the sustainability of the Alatona large-scale land development and population increase of about 60,000.

E. Donor Coordination

All three projects complement and leverage other donors' efforts in Mali. The World Bank is also investing in activities to improve the Airport, Industrial Park, and business climate. Due to the World Bank's funding gap, GOM requested additional funds from the MCC to support the larger and more costly infrastructure improvements. For the Alatona Irrigation Project, the Dutch Development Agency, French Development Agency ("AFD"), the World Bank, and the U.S. Agency for International Development ("USAID"), in particular, have been working in the ON over the past several decades, resulting in a more efficient, decentralized management structure, while increasing production and productivity of the zone. Relevant donor activities are described in more detail below.

USAID: The Mali program builds on USAID's Accelerated Economic Growth and Trade Development Project (2003–2012), which includes the Program in Development of Agricultural Production, Mali Finance, and Trade Mali.

World Bank: The Mali program complements and reinforces several ongoing or recently launched World Bank programs such as the Mali Growth Support Project, the National Project for Rural Infrastructure, the Agricultural Competitiveness and Diversification Project, and the Rural Community Development Project. The World Bank is also assisting in the funding of a regional program in West and Central Africa aimed at improving civil aviation

safety and security as a key element of improving the performance and affordability of air transportation and optimizing its role as an engine of economic and social development.

Regional Civil Aviation Cooperation: ANAC has recently received a draft Common Civil Aviation Code and Regulatory Texts from the West African Economic and Monetary Union. These documents were prepared as a model to be used by states belonging to regional groupings, as part of an effort sponsored by ICAO to reduce the financial burden for inspections on the part of countries with small aviation markets, by establishing common civil aviation regulations and the creation of regional entities to assist countries.

U.S. Department of Transportation (USDOT) Safe Skies for Africa (SSFA): The SSFA program is intended to promote sustainable improvements in aviation safety and security, air navigation, and to support Africa's integration into the global economy. The SSFA program coordinates activities of other agencies, such as the FAA, the Transportation Security Administration and the National Transportation Safety Board, to improve the capacities of African aviation organizations. MCC has signed a Memorandum of Understanding with USDOT to collaborate on projects such as the present effort in Mali and discussions regarding the coordination of our respective projects have already taken place.

AFD: The AFD has supported various initiatives in the ON for many years and is a lead donor in the donors group for the ON. The proposed expansion of the main canal system will complement a planned AFD project to strengthen certain sections of a primary canal.

Other Donors: The Mali program complements other donors' programs, such as the Dutch Development Agency's activities in agricultural diversification and marketing, agricultural processing, improved water management, and institutional strengthening in the ON. The Dutch have recently approved financing for a cold-storage facility in Bamako that will be located in the Airport domain. This facility will be used for mangoes and other high value horticulture products, such as green beans.

Millennium Challenge Compact Between the United States of America Acting Through the Millennium Challenge Corporation and the Government of the Republic of Mali

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Millennium Challenge Compact

This Millennium Challenge Compact (the "Compact") is made between the United States of America, acting through the Millennium Challenge Corporation, a United States

Government corporation ("MCC") and the Government of the Republic of Mali (the "Government") (referred to herein individually as a "Party" and collectively, the "Parties"). A compendium of capitalized terms defined herein is included in Exhibit A attached hereto.

Recitals

Whereas, MCC, acting through its Board of Directors, has selected the Republic of Mali ("Mali") as eligible to present to MCC a proposal for the use of Millennium Challenge Account ("MCA") assistance to help facilitate poverty reduction through economic growth in Mali;

Whereas, the Government has carried out a consultative process with the country's private sector and civil society to outline the country's priorities for the use of MCA assistance and developed a proposal, which final proposal was submitted to MCC on October 28, 2005 (the "Proposal");

Whereas, the Proposal focused on, among others, increasing farmer incomes through modernizing Mali's agricultural sector, together with investments in developing transportation infrastructure and rural institutions, all designed to dismantle obstacles to realizing Mali's agricultural potential as an engine of economic growth;

Whereas, MCC has evaluated the Proposal and related documents to determine whether the Proposal is consistent with core MCA principles and includes projects and related activities that will advance the progress of Mali towards achieving poverty reduction through economic growth; and

Whereas, based on MCC's evaluation of the Proposal and related documents and subsequent discussions and negotiations between the Parties, the Government and MCC determined to enter into this Compact to implement a program using MCC Funding to advance Mali's progress towards poverty reduction through economic growth (the "Program");

Now, Therefore, in consideration of the foregoing and the mutual covenants and agreements set forth herein, the Parties hereby agree as follows:

Article I. Purpose and Term

Section 1.1 Compact Goal; Objectives

The goal of this Compact is to reduce poverty through economic growth in Mali by increasing production and productivity of agriculture and small and medium-sized enterprises, as well as expanding Mali's access to markets

and trade (the "Compact Goal"). The key to advancing the Compact Goal is through the development of critical infrastructure and policy reform for productive sectors and addressing Mali's constraints to growth by capitalizing on two of its major assets, the Bamako-Sénou International Airport (the "Airport"), the gateway for regional and international trade, and the agricultural potential of the Niger River (collectively, the "Program Objective"). The Parties have identified the following project-level objectives (each, a "Project Objective") of this Compact to advance the Program Objective, and thus the Compact Goal, each of which is described in more detail in the Annexes attached hereto:

(a) Establish an independent and secure link to the regional and global economy through infrastructure investments at the Airport and policy reform of the national air transport system (the "Bamako-Sénou Airport Improvement Project Objective");

(b) Develop a platform for industrial activity to be located within the Airport domain in response to the growing demand for well managed and serviced industrial land (the "Industrial Park Project Objective"); and

(c) Increase the agricultural production and productivity in the Alatona zone of the Office du Niger ("ON") through the construction of a road, irrigation infrastructure, social infrastructure, agricultural services, land allocation and increased access to credit (the "Alatona Irrigation Project Objective").

The Government expects to achieve, and shall use its best efforts to ensure the achievement of, the Compact Goal, Program Objective and Project Objectives during the Compact Term. The Program Objective and the individual Project Objectives are collectively referred to herein as "Objectives" and each individually as an "Objective."

Section 1.2 Projects

The Annexes attached hereto describe the specific projects, the policy reforms and other activities related thereto (each, a "Project") that the Government will carry out, or cause to be carried out, in furtherance of this Compact to achieve the Objectives and the Compact Goal.

Section 1.3 Entry into Force; Compact Term

This Compact shall enter into force on the date of the last letter in an exchange of letters between the Principal Representatives of each Party confirming that each Party has

completed its domestic requirements for entry into force of this Compact (including as set forth in Section 3.10) and that all conditions set forth in Section 4.1 have been satisfied by the Government and MCC (the "Entry into Force"). This Compact shall remain in force for five (5) years from the Entry into Force, unless earlier terminated in accordance with Section 5.4 (the "Compact Term").

Article II. Funding and Resources

Section 2.1 MCC Funding

(a) MCC's Contribution. MCC hereby grants to the Government, subject to the terms and conditions of this Compact, an amount not to exceed Four Hundred Sixty Million and Eight Hundred Eleven Thousand One Hundred Sixty Four United States Dollars (US\$ 460,811,164) ("MCC Funding") during the Compact Term to enable the Government to implement the Program and achieve the Objectives.

(i) Subject to Sections 2.1(a)(ii), 2.2(b) and 5.4(b), the allocation of MCC Funding within the Program and among and within the Projects shall be as generally described in Annex II or as otherwise agreed upon by the Parties from time to time.

(ii) If at any time MCC determines that a condition precedent to an MCC Disbursement has not been satisfied, MCC may, upon written notice to the Government, reduce the total amount of MCC Funding by an amount equal to the amount estimated in the applicable Detailed Budget for the Program, Project, Project Activity or sub-activity for which such condition precedent has not been met. Upon the expiration or termination of this Compact, (A) any amounts of MCC Funding not disbursed by MCC to the Government shall be automatically released from any obligation in connection with this Compact and (B) any amounts of MCC Funding disbursed by MCC to the Government as provided in Section 2.1(b)(i), but not re-disbursed as provided in Section 2.1(b)(ii) or otherwise incurred as permitted pursuant to Section 5.4(e) prior to the expiration or termination of this Compact, shall be returned to MCC in accordance with Section 2.5(a)(ii).

(iii) Notwithstanding any other provision of this Compact and pursuant to the authority of Section 609(g) of the Millennium Challenge Act of 2003, as amended (the "Act"), upon the conclusion of this Compact (and without regard to the satisfaction of all of the conditions for Entry into Force required under Section 1.3), MCC shall make available up to Nine Million Two

Hundred Thousand United States Dollars (US\$ 9,200,000) ("Compact Implementation Funding") to facilitate certain aspects of Compact implementation as described in Schedule 2.1(a)(iii) attached hereto; *provided*, such Compact Implementation Funding shall be subject to (A) the limitations on the use or treatment of MCC Funding set forth in Section 2.3, as if such provision were in full force and effect, and (B) any other requirements for, and limitations on the use of, such Compact Implementation Funding as may be required by MCC in writing; *provided further*, that any Compact Implementation Funding granted in accordance with this Section 2.1(a)(iii) shall be included in, and not additional to, the total amount of MCC Funding; and *provided further*, any obligation to provide such Compact Implementation Funding shall expire upon the expiration or termination of this Compact or five (5) years from the conclusion of this Compact, whichever occurs sooner, and in accordance with Section 5.4(e). Notwithstanding anything to the contrary in this Compact, this Section 2.1(a)(iii) shall provisionally apply, prior to Entry into Force, upon execution of this Compact by the Parties.

(b) Disbursements.

(i) Disbursements of MCC Funding. MCC shall from time to time make disbursements of MCC Funding (each such disbursement, an "MCC Disbursement") to a Permitted Account or through such other mechanism agreed by the Parties under and in accordance with the procedures and requirements set forth in Annex I, the Disbursement Agreement or as otherwise provided in any other Supplemental Agreement.

(ii) Re-Disbursements of MCC Funding. The release of MCC Funding from a Permitted Account (each such release, a "Re-Disbursement") shall be made in accordance with the procedures and requirements set forth in Annex I, the Disbursement Agreement or as otherwise provided in any other Supplemental Agreement.

(c) Interest. Unless the Parties agree otherwise in writing, any interest or other earnings on MCC Funding that accrue (collectively, "Accrued Interest") shall be held in a Permitted Account and accrue in accordance with the requirements for the accrual and treatment of Accrued Interest as specified in Annex I or any Supplemental Agreement. On a quarterly basis and upon the termination or expiration of this Compact, the Government shall return, or ensure the return of, all Accrued

Interest to any United States Government account designated by MCC.

(d) Currency; Conversion. The Government shall ensure that all MCC Funding that is held in any Permitted Account shall be denominated in the currency of the United States of America ("United States Dollars," "US\$" or "\$") prior to Re-Disbursement. To the extent that any amount of MCC Funding held in United States Dollars must be converted into the currency of Mali for any purpose, including for any Re-Disbursement or any transfer of MCC Funding into a Local Account, the Government shall ensure that such amount is converted consistent with the requirements of the Bank Agreement or any other Supplemental Agreement between the Parties.

(e) Guidance. From time to time, MCC may provide guidance to the Government through Implementation Letters on the frequency, form and content of requests for MCC Disbursements and Re-Disbursements or any other matter relating to MCC Funding. The Government shall apply such guidance in implementing this Compact.

Section 2.2 Government Resources

(a) The Government shall provide or cause to be provided such Government funds and other resources, and shall take or cause to be taken such actions, including obtaining all necessary approvals and consents, as are specified in this Compact or in any Supplemental Agreement to which the Government is a party or as are otherwise necessary and appropriate effectively to carry out the Government Responsibilities or other responsibilities or obligations of the Government under or in furtherance of this Compact during the Compact Term and through the completion of any post-Compact Term activities, audits or other responsibilities.

(b) If at any time during the Compact Term, the Government materially reallocates or reduces the allocation in its national budget or any other governmental authority of Mali at a departmental, municipal, regional or other jurisdictional level materially reallocates or reduces the allocation in its respective budget of the normal and expected resources that the Government or such other governmental authority, as applicable, would have otherwise received or budgeted, from external or domestic sources, for the activities contemplated herein, the Government shall notify MCC in writing within fifteen (15) days of such reallocation or reduction, such notification to contain information regarding the amount of the

reallocation or reduction, the affected activities, and an explanation for the reallocation or reduction. In the event that MCC independently determines, upon review of the executed national annual budget that such a material reallocation or reduction of resources has occurred, MCC shall notify the Government and, following such notification, the Government shall provide a written explanation for such reallocation or reduction and MCC may (i) reduce, in its sole discretion, the total amount of MCC Funding or any MCC Disbursement by an amount equal to the amount estimated in the applicable Detailed Budget for the activity for which funds were reduced or reallocated or (ii) otherwise suspend or terminate MCC Funding in accordance with Section 5.4(b).

(c) The Government shall use its best efforts to ensure that all MCC Funding is fully reflected and accounted for in the annual budget of Mali on a multi-year basis.

Section 2.3 Limitations on the Use or Treatment of MCC Funding

(a) **Abortions and Involuntary Sterilizations.** The Government shall ensure that MCC Funding shall not be used to undertake, fund or otherwise support any activity that is subject to prohibitions on use of funds contained in (i) paragraphs (1) through (3) of section 104(f) of the Foreign Assistance Act of 1961 (22 U.S.C. 2151b(f)(1)–(3)), a United States statute, which prohibitions shall apply to the same extent and in the same manner as such prohibitions apply to funds made available to carry out Part I of such Act; or (ii) any provision of law comparable to the eleventh and fourteenth provisos under the heading “Child Survival and Health Programs Fund” of division E of Public Law 108–7 (117 Stat. 162), a United States statute.

(b) **United States Job Loss or Displacement of Production.** The Government shall ensure that MCC Funding shall not be used to undertake, fund or otherwise support any activity that is likely to cause a substantial loss of United States jobs or a substantial displacement of United States production, including:

(i) Providing financial incentives to relocate a substantial number of United States jobs or cause a substantial displacement of production outside the United States;

(ii) Supporting investment promotion missions or other travel to the United States with the intention of inducing United States firms to relocate a substantial number of United States jobs

or a substantial amount of production outside the United States;

(iii) Conducting feasibility studies, research services, studies, travel to or from the United States, or providing insurance or technical and management assistance, with the intention of inducing United States firms to relocate a substantial number of United States jobs or cause a substantial displacement of production outside the United States;

(iv) Advertising in the United States to encourage United States firms to relocate a substantial number of United States jobs or cause a substantial displacement of production outside the United States;

(v) Training workers for firms that intend to relocate a substantial number of United States jobs or cause a substantial displacement of production outside the United States;

(vi) Supporting a United States office of an organization that offers incentives for United States firms to relocate a substantial number of United States jobs or cause a substantial displacement of production outside the United States; or

(vii) Providing general budget support for an organization that engages in any activity prohibited above.

(c) **Military Assistance and Training.** The Government shall ensure that MCC Funding shall not be used to undertake, fund or otherwise support the purchase or use of goods or services for military purposes, including military training, or to provide any assistance to the military, police, militia, national guard or other quasi-military organization or unit.

(d) **Prohibition of Assistance Relating to Environmental, Health or Safety Hazards.** The Government shall ensure that MCC Funding shall not be used to undertake, fund or otherwise support any activity that is likely to cause a significant environmental, health, or safety hazard. Unless MCC and the Government agree otherwise in writing, the Government shall ensure that activities undertaken, funded or otherwise supported in whole or in part (directly or indirectly) by MCC Funding comply with environmental guidelines delivered by MCC to the Government or posted by MCC on its Web site or otherwise publicly made available, as such guidelines may be amended from time to time (the “Environmental Guidelines”), including any definition of “likely to cause a significant environmental, health, or safety hazard” as may be set forth in such Environmental Guidelines.

(e) **Taxation.**

(i) Taxes. The Government shall ensure that the Program, MCC Funding and Accrued Interest, and any other Program Asset, shall be free from any

taxes imposed under the laws currently or hereafter in effect in Mali during the Compact Term. This exemption shall apply to any use of MCC Funding and Accrued Interest, and any other Program Asset, including any Exempt Uses, and to any work performed under or activities undertaken in furtherance of this Compact by any person or entity (including contractors and grantees) funded by MCC Funding, and shall apply to all taxes, tariffs, duties, and other levies (each a “Tax” and collectively, “Taxes”), including:

(1) To the extent attributable to MCC Funding, income taxes and other taxes on profit or businesses imposed on organizations or entities, other than nationals of Mali, receiving MCC Funding, including taxes on the acquisition, ownership, rental, disposition or other use of real or personal property, taxes on investment or deposit requirements and currency controls in Mali, or any other tax, duty, charge or fee of whatever nature, except fees for specific services rendered; for purposes of this Section 2.3(e), the term “national” refers to organizations established under the laws currently or hereafter in effect in Mali, other than MCA–Mali or any other entity established solely for purposes of managing or overseeing the implementation of the Program or any wholly-owned subsidiaries, divisions, or Affiliates of entities not registered or established under the laws currently or hereafter in effect in Mali;

(2) Customs duties, tariffs, import and export taxes, or other levies on the importation, use and re-exportation of goods, services, or the personal belongings and effects, including personally-owned automobiles, for Program use or the personal use of individuals who are neither citizens nor permanent residents of Mali and who are present in Mali for purposes of carrying out the Program or their family members, including all charges based on the value of such imported goods;

(3) Taxes on the income or personal property of all individuals who are neither citizens nor permanent residents of Mali, including income and social security taxes of all types and all taxes on the personal property owned by such individuals, to the extent such income or property are attributable to MCC Funding; and

(4) Taxes or duties levied on the last transaction for the purchase of goods or services funded by MCC Funding, including sales taxes, tourism taxes, value-added taxes or other similar charges. For purposes of this Section 2.3(e)(i)(4), the term “last transaction” refers to the last transaction by which

the goods or services were purchased for use in the activities funded by MCC Funding.

(ii) This Section 2.3(e) shall apply, but is not limited, to (A) any transaction, service, activity, contract, grant or other implementing agreement funded in whole or in part by MCC Funding; (B) any supplies, equipment, materials, property or other goods (referred to herein collectively as "goods") or funds introduced into, acquired in, used or disposed of in, or imported into or exported from, Mali by MCC, or by any person or entity (including contractors and grantees) as part of, or in conjunction with, MCC Funding or the Program; (C) any contractor, grantee, or other organization carrying out activities funded in whole or in part by MCC Funding; and (D) any employee of such organizations (the uses set forth in clauses (A) through (D) are collectively referred to herein as "Exempt Uses").

(iii) If a Tax has been levied and paid contrary to the requirements of this Section 2.3(e), whether inadvertently, due to the impracticality of implementation of this provision with respect to certain types or amounts of taxes, or otherwise, the Government shall refund promptly to an account designated by MCC the amount of such Tax in the currency of Mali, within thirty (30) days (or such other period as may be agreed in writing by the Parties) after the Government is notified in writing of such levy and tax payment, in accordance with procedures agreed by the Parties, whether by MCC or otherwise; *provided, however*, the Government shall apply national funds to satisfy its obligations under this paragraph and no MCC Funding, Accrued Interest, or any assets, goods, or property (real, tangible, or intangible) purchased or financed in whole or in part (directly or indirectly) by MCC Funding (collectively, the "Program Assets") may be applied by the Government in satisfaction of its obligations under this paragraph.

(iv) At MCC's request, the Parties shall memorialize in a mutually acceptable Supplemental Agreement, Implementation Letter or other suitable document the mechanisms for implementing this Section 2.3(e), including (A) a formula for determining refunds for Taxes paid, the amount of which is not susceptible to precise determination; (B) a mechanism for ensuring the tax-free importation, use, and re-exportation of goods, services, or the personal belongings of individuals (including all Providers) described in Section 2.3(e)(i)(2) above; (C) a requirement for the provision by the Government of a tax-exemption

certificate which expressly includes, inter alia, the thirty (30) day refund requirement of Section 2.3(e)(iii) above; and (D) any other appropriate Government action to facilitate the administration of this Section 2.3(e).

(f) Alteration. The Government shall ensure that no MCC Funding, Accrued Interest or other Program Asset shall be subject to any impoundment, rescission, sequestration or any provision of law now or hereafter in effect in Mali that would have the effect of requiring or allowing any impoundment, rescission or sequestration of any MCC Funding, Accrued Interest or other Program Asset.

(g) Liens or Encumbrances. The Government shall ensure that no MCC Funding, Accrued Interest or other Program Asset shall be subject to any lien, attachment, enforcement of judgment, pledge, or encumbrance of any kind (each a "Lien"), except with the prior approval of MCC in accordance with Section 3(c) of Annex I. In the event of the imposition of any Lien not so approved, the Government shall promptly seek the release of such Lien and, if required by final non-appealable order, shall pay any amounts owed to obtain such release; *provided, however*, the Government shall apply national funds to satisfy its obligations under this Section 2.3(g) and no MCC Funding, Accrued Interest, or other Program Asset may be applied by the Government in satisfaction of its obligations under this Section 2.3(g).

(h) Other Limitations. The Government shall ensure that the use or treatment of MCC Funding, Accrued Interest, and other Program Assets shall be subject to and in conformity with such other limitations (i) as required by the applicable law of the United States of America now or hereafter in effect during the Compact Term, (ii) as advisable under or required by applicable United States Government policies now or hereafter in effect during the Compact Term, or (iii) to which the Parties may otherwise agree in writing.

(i) Utilization of Goods, Services and Works. The Government shall ensure that any Program Assets and any services, facilities or works funded in whole or in part (directly or indirectly) by MCC Funding, unless otherwise agreed by the Parties in writing, shall be used solely in furtherance of this Compact.

(j) Notification of Applicable Laws and Policies. MCC shall notify the Government of any applicable United States law or policy affecting the use or treatment of MCC Funding, whether or not specifically identified in this Section 2.3, and shall provide to the

Government a copy of the text of any such applicable law and a written explanation of any such applicable policy.

Section 2.4 Incorporation; Notice; Clarification

(a) The Government shall include, or ensure the inclusion of, all of the requirements set forth in Section 2.3 in all Supplemental Agreements (except for Supplemental Agreements with Providers defined in Section 2.4(b)(ii) below) to which MCC is not a party.

(b) The Government shall ensure notification of all of the requirements set forth in Section 2.3 to any Provider and all relevant officers, directors, employees, agents, representatives, Affiliates, contractors, sub-contractors, grantees and sub-grantees of any Provider. The term "Provider" shall mean (i) MCA-Mali, (ii) any Government Affiliate or Permitted Designee (other than MCA-Mali) that receives or utilizes any Program Asset in carrying out activities in furtherance of this Compact, or (iii) any third party who receives at least US\$ 50,000 in the aggregate of MCC Funding (other than employees of MCA-Mali) during the Compact Term or such other amount as the Parties may agree in writing, whether directly from MCC, indirectly through Re-Disbursements, or otherwise.

(c) In the event the Government or any Provider requires clarification from MCC as to whether an activity contemplated to be undertaken in furtherance of this Compact violates or may violate any provision of Section 2.3, the Government shall notify MCC in writing and provide in such notification a detailed description of the activity in question. In such event, the Government shall not proceed, and shall use its best efforts to ensure that no relevant Provider proceeds, with such activity, and the Government shall ensure that no Re-Disbursements shall be made for such activity, until MCC advises the Government or such Provider in writing that the activity is permissible. MCC shall use good faith efforts to respond timely to such notification for clarification.

Section 2.5 Refunds; Violation

(a) Notwithstanding the availability to MCC, or exercise by MCC, of any other remedies, including under international law, this Compact or any Supplemental Agreement:

(i) If any amount of MCC Funding, Accrued Interest or any other Program Asset is used for any purpose prohibited under this Article II or otherwise in violation of any of the terms and

conditions of this Compact, any guidance in any Implementation Letter, or any Supplemental Agreement between the Parties, then MCC, upon written notice, may require the Government to repay promptly to MCC to an account designated by MCC, or to others as MCC may direct, the amount of such misused MCC Funding or Accrued Interest, or the cash equivalent of the value of any other misused Program Asset, in United States Dollars, plus any interest that accrued or would have accrued thereon, within thirty (30) days after the Government is notified, whether by MCC or other duly authorized representative of the United States Government, of such prohibited use; *provided, however*, the Government shall apply national funds to satisfy its obligations under this Section 2.5(a)(i) and no MCC Funding, Accrued Interest, or any other Program Asset may be applied by the Government in satisfaction of its obligations under this Section 2.5(a)(i); and

(ii) Upon the termination or suspension of all or any portion of this Compact or upon the expiration of this Compact, the Government shall, subject to the requirements of Sections 5.4(e) and 5.4(f), refund, or ensure the refund of, to such account designated by MCC the amount of any MCC Funding, plus any Accrued Interest, promptly, but in no event later than thirty (30) days after the Government receives MCC's request for such refund; *provided*, that if this Compact is terminated or suspended in part, MCC may request a refund for only the amount of MCC Funding, plus any Accrued Interest, then allocated to the terminated or suspended portion; *provided further*, that any refund of MCC Funding or Accrued Interest shall be to such account(s) as designated by MCC.

(b) Notwithstanding any other provision in this Compact or any other agreement to the contrary, MCC's right under this Section 2.5 for a refund shall continue during the Compact Term and for a period of (i) five (5) years thereafter or (ii) one (1) year after MCC receives actual knowledge of such violation, whichever is later.

(c) If MCC determines that any activity or failure to act violates, or may violate, any Section in this Article II, then MCC may refuse any further MCC Disbursements for or conditioned upon such activity, and may take any action to prevent any Re-Disbursement related to such activity.

Section 2.6 Bilateral Agreement

All MCC Funding shall be considered United States assistance under the Economic and Technical Assistance

Agreement by and between the Government of the United States of America and the Government, dated January 4, 1961, as amended from time to time (the "Bilateral Agreement"). If there are conflicts or inconsistencies between any parts of this Compact and the Bilateral Agreement, as either may be amended from time to time, the provisions of this Compact shall prevail over those of the Bilateral Agreement.

Article III. Implementation

Section 3.1 Implementation Framework

This Compact shall be implemented by the Parties in accordance with this Article III and as further specified in the Annexes and in relevant Supplemental Agreements.

Section 3.2 Government Responsibilities

(a) The Government shall have principal responsibility for oversight and management of the implementation of the Program (i) in accordance with the terms and conditions specified in this Compact and relevant Supplemental Agreements, (ii) in accordance with all applicable laws then in effect in Mali, and (iii) in a timely and cost-effective manner and in conformity with sound technical, financial and management practices (collectively, the "Government Responsibilities"). Unless otherwise expressly provided, any reference to the Government Responsibilities or any other responsibilities or obligations of the Government herein shall be deemed to apply to any Government Affiliate and any of their respective directors, officers, employees, contractors, sub-contractors, grantees, sub-grantees, agents or representatives.

(b) The Government shall ensure that no person or entity shall participate in the selection, award, administration or oversight of a contract, grant or other benefit or transaction funded in whole or in part (directly or indirectly) by MCC Funding, in which (i) the entity, the person, members of the person's immediate family or household or his or her business partners, or organizations controlled by or substantially involving such person or entity, has or have a direct or indirect financial or other interest, or (ii) the person or entity is negotiating or has any arrangement concerning prospective employment, unless such person or entity has first disclosed in writing to the Government the conflict of interest and, following such disclosure, the Parties agree in writing to proceed notwithstanding such conflict. The Government shall

ensure that no person or entity involved in the selection, award, administration, oversight or implementation of any contract, grant or other benefit or transaction funded in whole or in part (directly or indirectly) by MCC Funding shall solicit or accept from or offer to a third party or seek or be promised (directly or indirectly) for itself or for another person or entity any gift, gratuity, favor or benefit, other than items of *de minimis* value and otherwise consistent with such guidance as MCC may provide from time to time.

(c) The Government shall not designate any person or entity, including any Government Affiliate, to implement, in whole or in part, this Compact or any Supplemental Agreement between the Parties (including any Government Responsibilities or any other responsibilities or obligations of the Government under this Compact or any Supplemental Agreement between the Parties) or to exercise any rights of the Government under this Compact or any Supplemental Agreement between the Parties, except as expressly provided herein or with the prior written consent of MCC; *provided, however*, the Government may designate MCA-Mali or, with the prior written consent of MCC, such other mutually acceptable persons or entities (each, a "Permitted Designee") to implement some or all of the Government Responsibilities or any other responsibilities or obligations of the Government or to exercise any rights of the Government under this Compact or any Supplemental Agreement between the Parties, each in accordance with the terms and conditions set forth in this Compact or such Supplemental Agreement (referred to herein collectively as "Designated Rights and Responsibilities"). Notwithstanding any provision herein or any other agreement to the contrary, no such designation shall relieve the Government of such Designated Rights and Responsibilities, for which the Government shall retain ultimate responsibility. In the event that the Government designates any person or entity, including any Government Affiliate, to implement any portion of the Government Responsibilities or other responsibilities or obligations of the Government, or to exercise any rights of the Government under this Compact or any Supplemental Agreement between the Parties, in accordance with this Section 3.2(c), then the Government shall (i) cause such person or entity to perform such Designated Rights and Responsibilities in the same manner and to the full extent to which the Government is

obligated to perform such Designated Rights and Responsibilities; (ii) ensure that such person or entity does not assign, delegate or contract (or otherwise transfer) any of such Designated Rights and Responsibilities to any person or entity; and (iii) cause such person or entity to certify to MCC in writing that it will so perform such Designated Rights and Responsibilities and will not assign, delegate, or contract (or otherwise transfer) any of such Designated Rights and Responsibilities to any person or entity without the prior written consent of MCC.

(d) The Government shall, upon a request from MCC, execute, or ensure the execution of, an assignment to MCC of any cause of action which may accrue to the benefit of the Government, a Government Affiliate or any Permitted Designee, including MCA-Mali, in connection with or arising out of any activities funded in whole or in part (directly or indirectly) by MCC Funding.

(e) The Government shall ensure that (i) no decision of MCA-Mali is modified, supplemented, unduly influenced or rescinded by any governmental authority, except by a non-appealable judicial decision, and (ii) the authority of MCA-Mali shall not be expanded, restricted, or otherwise modified, except in accordance with this Compact, any Governing Document or any other Supplemental Agreement between the Parties.

(f) The Government shall ensure that all persons and individuals that enter into agreements to provide goods, services or works under the Program or in furtherance of this Compact shall do so in accordance with the Procurement Guidelines and shall obtain all necessary immigration, business and other permits, licenses, consents and approvals to enable them and their personnel to fully perform under such agreements.

Section 3.3 Government Deliveries

The Government shall proceed, and cause others to proceed, in a timely manner to deliver to MCC all reports, notices, certificates, documents or other deliveries required to be delivered by the Government under this Compact or any Supplemental Agreement between the Parties, in form and substance as set forth in this Compact or in any such Supplemental Agreement.

Section 3.4 Government Assurances

The Government hereby provides the following assurances to MCC that as of the date this Compact is signed:

(a) The information contained in the Proposal and any agreement, report, statement, communication, document or

otherwise delivered or communicated to MCC by or on behalf of the Government on or after the date of the submission of the Proposal (i) are true, correct and complete in all material respects and (ii) do not omit any fact known to the Government that if disclosed would (1) alter in any material respect the information delivered, (2) likely have a material adverse effect on the Government's ability to effectively implement, or ensure the effective implementation of, the Program or any Project or to otherwise carry out its responsibilities or obligations under or in furtherance of this Compact, or (3) have likely adversely affected MCC's determination to enter into this Compact or any Supplemental Agreement between the Parties.

(b) Unless otherwise disclosed in writing to MCC, the MCC Funding made available hereunder is in addition to the normal and expected resources that the Government usually receives or budgets for the activities contemplated herein from external or domestic sources.

(c) This Compact does not conflict and will not conflict with any international agreement or obligation to which the Government is a party or by which it is bound.

(d) No payments have been (i) received by any official of the Government or any other Governmental Affiliate in connection with the procurement of goods, services or works to be undertaken or funded in whole or in part (directly or indirectly) by MCC Funding, except fees, taxes, or similar payments legally established in Mali (subject to Section 2.3(e)) and consistent with the applicable requirement of the laws of Mali or (ii) made to any third party, in connection with or in furtherance of this Compact, in violation of the United States Foreign Corrupt Practices Act of 1977, as amended (15 U.S.C. 78a *et seq.*).

Section 3.5 Implementation Letters; Supplemental Agreements

(a) MCC may, from time to time, issue one or more letters to furnish additional information or guidance to assist the Government in the implementation of this Compact (each, an "Implementation Letter"). The Government shall apply such guidance in implementing this Compact.

(b) The details of any funding, implementing and other arrangements in furtherance of this Compact may be memorialized in one or more agreements or other instruments between (i) the Government (or any Government Affiliate or Permitted Designee) and MCC, (ii) MCC or the Government (or any Government

Affiliate or Permitted Designee) and any third party, including any of the Providers or Permitted Designee, or (iii) Providers where neither MCC nor the Government is a party, before, on, or after the Entry into Force (each, a "Supplemental Agreement"). The Government shall deliver, or cause to be delivered, to MCC within five (5) days of its request, or such other period as may be specified in the Disbursement Agreement, the execution copy of any Supplemental Agreement to which MCC is not a party.

Section 3.6 Procurement; Awards of Assistance

(a) The Government shall ensure that the procurement of all goods, services and works by the Government or any Provider in furtherance of this Compact shall be consistent with the procurement guidelines (the "Procurement Guidelines") reflected in the Disbursement Agreement or other Supplemental Agreement between the Government (and a mutually acceptable Government Affiliate or MCA-Mali) and MCC, which Procurement Guidelines shall include the following requirements:

(i) Internationally accepted procurement rules with open, fair and competitive procedures are used in a transparent manner to solicit, award and administer contracts, grants, and other agreements and to procure goods, services and works;

(ii) Solicitations for goods, services, and works shall be based upon a clear and accurate description of the goods, services or works to be acquired;

(iii) Contracts shall be awarded only to qualified and capable contractors that have the capability and willingness to perform the contracts in accordance with the terms and conditions of the applicable contracts and on a cost effective and timely basis; and

(iv) No more than a commercially reasonable price, as determined, for example, by a comparison of price quotations and market prices, shall be paid to procure goods, services, and works.

(b) The Government shall maintain, and shall use its best efforts to ensure that all Providers maintain, records regarding the receipt and use of goods, services and works acquired in furtherance of this Compact, the nature and extent of solicitations of prospective suppliers of goods, services and works acquired in furtherance of this Compact, and the basis of award of contracts, grants and other agreements in furtherance of this Compact.

(c) The Government shall use its best efforts to ensure that information,

including solicitations, regarding procurement, grant and other agreement actions funded (or to be funded) in whole or in part (directly or indirectly) by MCC Funding shall be made publicly available in the manner outlined in the Procurement Guidelines or in any other manner agreed upon by the Parties in writing.

(d) The Government shall ensure that no goods, services or works that are funded in whole or in part (directly or indirectly) by MCC Funding are procured pursuant to orders or contracts firmly placed or entered into prior to the Entry into Force, except as the Parties may otherwise agree in writing.

(e) The Government shall ensure that MCA-Mali and any other Permitted Designee follows, and uses its best efforts to ensure that all Providers follow, the Procurement Guidelines in procuring (including soliciting) goods, services and works and in awarding and administering contracts, grants and other agreements in furtherance of this Compact, and shall furnish MCC evidence of the adoption of the Procurement Guidelines by MCA-Mali no later than the time specified in the Disbursement Agreement.

(f) The Government shall include, or ensure the inclusion of, the requirements of this Section 3.6 into all Supplemental Agreements between the Government, any Government Affiliate or Permitted Designee or any of their respective directors, officers, employees, Affiliates, contractors, sub-contractors, grantees, sub-grantees, representatives or agents, on the one hand, and a Provider, on the other hand.

Section 3.7 Policy Performance; Policy Reforms

In addition to the specific policy and legal reform commitments identified in Annex I and the Schedules thereto, the Government shall seek to maintain and to improve its level of performance under the policy criteria identified in Section 607 of the Act, and the MCA selection criteria and methodology published by MCC pursuant to Section 607 of the Act from time to time ("MCA Eligibility Criteria").

Section 3.8 Records and Information; Access; Audits; Reviews

(a) Reports and Information. The Government shall furnish to MCC, and shall use its best efforts to ensure that all Providers and any other third party receiving MCC Funding, as appropriate, furnish to the Government (and the Government shall provide to MCC), any records and other information required to be maintained under this Section 3.8 and such other information, documents

and reports as may be necessary or appropriate for the Government to effectively carry out its obligations under this Compact, including under Section 3.12.

(b) Government Books and Records. The Government shall maintain, and shall use its best efforts to ensure that all Providers maintain, accounting books, records, documents and other evidence relating to this Compact adequate to show, to the satisfaction of MCC, without limitation, the use of all MCC Funding, including all costs incurred by the Government and the Providers in furtherance of this Compact, the receipt, acceptance and use of goods, services and works acquired in furtherance of this Compact by the Government and the Providers, agreed-upon cost sharing requirements, the nature and extent of solicitations of prospective suppliers of goods, services and works acquired by the Government and the Providers in furtherance of this Compact, the basis of award of Government and other contracts and orders in furtherance of this Compact, the overall progress of the implementation of the Program, and any documents required by this Compact or any Supplemental Agreement between the Parties or reasonably requested by MCC upon reasonable notice ("Compact Records"). The Government shall maintain, and shall use its best efforts to ensure that all Covered Providers maintain, Compact Records in accordance with generally accepted accounting principles prevailing in the United States, or at the Government's option and with the prior written approval by MCC, other accounting principles, such as those (i) prescribed by the International Accounting Standards Committee (an affiliate of the International Federation of Accountants) or (ii) then prevailing in Mali. Compact Records shall be maintained for at least five (5) years after the end of the Compact Term or for such longer period, if any, required to resolve any litigation, claims or audit findings or any statutory requirements.

(c) Access. Upon the request of MCC, the Government, at all reasonable times, shall permit, or cause to be permitted, authorized representatives of MCC, the Inspector General, the United States Government Accountability Office, any auditor responsible for an audit contemplated herein or otherwise conducted in furtherance of this Compact, and any agents or representatives engaged by MCC or a Permitted Designee to conduct any assessment, review or evaluation of the Program, the opportunity to audit, review, evaluate or inspect (i) activities

funded in whole or in part (directly or indirectly) by MCC Funding or undertaken in connection with the Program, the utilization of goods and services purchased or funded in whole or in part (directly or indirectly) by MCC Funding, and (ii) Compact Records, including those of the Government or any Provider, relating to activities funded or undertaken in furtherance of, or otherwise relating to, this Compact. The Government shall use its best efforts to ensure access by MCC, the Inspector General, the United States Government Accountability Office or relevant auditor, reviewer or evaluator or their respective representatives or agents to all relevant directors, officers, employees, Affiliates, contractors, representatives and agents of the Government or any Provider.

(d) Audits.

(i) Government Audits. Except as the Parties may otherwise agree in writing, the Government shall, on at least a semi-annual basis, conduct, or cause to be conducted, financial audits of all MCC Disbursements and Re-Disbursements covering the period from signing of the Compact until the earlier of the following December 31 or June 30 and covering each six month period thereafter ending December 31 and June 30, through the end of the Compact Term, in accordance with the following terms. As requested by MCC in writing, the Government shall use, or cause to be used, or select or cause to be selected, an auditor named on the approved list of auditors in accordance with the "Guidelines for Financial Audits Contracted by Foreign Recipients" (the "Audit Guidelines") issued by the Inspector General of the United States Agency for International Development (the "Inspector General"), and as approved by MCC, to conduct such annual audits. Such audits shall be performed in accordance with such Audit Guidelines and be subject to quality assurance oversight by the Inspector General in accordance with such Audit Guidelines. An audit shall be completed and delivered to MCC no later than ninety (90) days after the first period to be audited and no later than ninety (90) days after each June 30th and December 31st thereafter, or such other period as the Parties may otherwise agree in writing.

(ii) Audits of U.S. Entities. The Government shall ensure that Supplemental Agreements between the Government or any Provider, on the one hand, and a United States non-profit organization, on the other hand, state that the United States organization is subject to the applicable audit requirements contained in OMB

Circular A-133, notwithstanding any other provision of this Compact to the contrary. The Government shall ensure that Supplemental Agreements between the Government or any Provider, on the one hand, and a United States for-profit Covered Provider, on the other hand, state that the United States organization is subject to audit by the cognizant United States Government agency, unless the Government and MCC agree otherwise in writing.

(iii) Audit Plan. The Government shall submit, or cause to be submitted, to MCC no later than twenty (20) days prior to the date of its adoption a plan, in accordance with the Audit Guidelines, for the audit of the expenditures of any Covered Providers, which audit plan, in the form and substance as approved by MCC, the Government shall adopt, or cause to be adopted, no later than sixty (60) days prior to the end of the first period to be audited (such plan, the "Audit Plan").

(iv) Covered Provider. A "Covered Provider" is (1) a non-United States Provider that receives (other than pursuant to a direct contract or agreement with MCC) US\$ 300,000 or more of MCC Funding in any MCA-Mali fiscal year or any other non-United States person or entity that receives, directly or indirectly, US\$ 300,000 or more of MCC Funding from any Provider in such fiscal year, or (2) any United States Provider that receives (other than pursuant to a direct contract or agreement with MCC) US\$ 500,000 or more of MCC Funding in any MCA-Mali fiscal year or any other United States person or entity that receives, directly or indirectly, US\$ 500,000 or more of MCC Funding from any Provider in such fiscal year.

(v) Corrective Actions. The Government shall use its best efforts to ensure that Covered Providers take, where necessary, appropriate and timely corrective actions in response to audits, consider whether a Covered Provider's audit necessitates adjustment of its own records, and require each such Covered Provider to permit independent auditors to have access to its records and financial statements as necessary.

(vi) Audit Reports. The Government shall furnish, or use its best efforts to cause to be furnished, to MCC an audit report in a form satisfactory to MCC for each audit required by this Section 3.8, other than audits arranged for by MCC, no later than ninety (90) days after the end of the period under audit, or such other time as may be agreed by the Parties from time to time.

(vii) Other Providers. For Providers who receive MCC Funding pursuant to direct contracts or agreements with

MCC, MCC shall include appropriate audit requirements in such contracts or agreements and shall, on behalf of the Government, unless otherwise agreed by the Parties, conduct the follow-up activities with regard to the audit reports furnished pursuant to such requirements.

(viii) Audit by MCC. MCC retains the right to perform, or cause to be performed, the audits required under this Section 3.8 by utilizing MCC Funding or other resources available to MCC for this purpose, and to audit, conduct a financial review, or otherwise ensure accountability of any Provider or any other third party receiving MCC Funding, regardless of the requirements of this Section 3.8.

(e) Application to Providers. The Government shall include, or ensure the inclusion of, at a minimum, the requirements of:

(i) Paragraphs (a), (b), (c), (d)(ii), (d)(iii), (d)(v), (d)(vi), and (d)(viii) of this Section 3.8 into all Supplemental Agreements between the Government, any Government Affiliate, any Permitted Designee or any of their respective directors, officers, employees, Affiliates, contractors, sub-contractors, grantees, sub-grantees, representatives or agents (each, a "Government Party"), on the one hand, and a Covered Provider that is not a non-profit organization domiciled in the United States, on the other hand;

(ii) Paragraphs (a), (b), (c), (d)(ii), and (d)(viii) of this Section 3.8 into all Supplemental Agreements between a Government Party and a Provider that does not meet the definition of a Covered Provider; and

(iii) Paragraphs (a), (b), (c), (d)(ii), (d)(v) and (d)(viii) of this Section 3.8 into all Supplemental Agreements between a Government Party and a Covered Provider that is a non-profit organization domiciled in the United States.

(f) Reviews or Evaluations. The Government shall conduct, or cause to be conducted, such performance reviews, data quality reviews, environmental and social audits, or program evaluations during the Compact Term or otherwise and in accordance with the M&E Plan or as otherwise agreed in writing by the Parties.

(g) Cost of Audits, Reviews or Evaluations. MCC Funding may be used to fund the costs of any audits, reviews or evaluations required under this Compact, including as reflected on Exhibit A to Annex II, and in no event shall the Government be responsible for the costs of any such audits, reviews or

evaluations from financial sources other than MCC Funding.

Section 3.9 Insurance; Performance Guarantees

The Government shall, to MCC's satisfaction, insure or cause to be insured all Program Assets and shall obtain or cause to be obtained such other appropriate insurance and other protections to cover against risks or liabilities associated with the operations of the Program, including by requiring Providers to obtain adequate insurance and post adequate performance bonds or other guarantees. MCA-Mali or the Implementing Entity or Contractor, as applicable, shall be named as the payee on any such insurance and the beneficiary of any such guarantee, including performance bonds, to the extent permissible under applicable laws unless otherwise agreed by the Parties. MCC, and to the extent it is not named as the insured party, MCA-Mali shall be named as additional insureds on any such insurance or other guarantee, to the extent permissible under applicable laws unless otherwise agreed by the Parties. The Government shall ensure that any proceeds from claims paid under such insurance or any other form of guarantee shall be used to replace or repair any loss of Program Assets or to pursue the procurement of the covered goods, services, works, or otherwise; *provided, however*, at MCC's election, such proceeds shall be deposited in a Permitted Account as designated by MCA-Mali and acceptable to MCC or as otherwise directed by MCC. To the extent MCA-Mali is held liable under any indemnification or other similar provision of any agreement between MCA-Mali, on the one hand, and any other Provider or other third party, on the other hand, the Government shall pay in full on behalf of MCA-Mali any such obligation; *provided further*, the Government shall apply national funds to satisfy its obligations under this Section 3.9 and no MCC Funding, Accrued Interest, or Program Asset may be applied by the Government in satisfaction of its obligations under this Section 3.9.

Section 3.10 Domestic Requirements

The Government shall proceed in a timely manner to seek ratification of this Compact as necessary or required by the laws of Mali, or similar domestic requirement, in order that (a) this Compact (and any Supplemental Agreement to which MCC is a party) shall be given the status of an international agreement; (b) no laws of Mali (other than the Constitution of

Mali) now or hereafter in effect shall take precedence or prevail over this Compact (or any Supplemental Agreement to which MCC is a party) during the Compact Term (or a longer period to the extent provisions of this Compact remain in force following the expiration of the Compact Term pursuant to Section 5.13); and (c) each of the provisions of this Compact (and each of the provisions of any Supplemental Agreement to which MCC is a party) is valid, binding and in full force and effect under the laws of Mali. The Government shall initiate such process promptly after the conclusion of this Compact. Notwithstanding anything to the contrary in this Compact, this Section 3.10 shall provisionally apply prior to Entry into Force.

Section 3.11 No Conflict

The Government undertakes not to enter into any agreement in conflict with this Compact or any Supplemental Agreement during the Compact Term.

Section 3.12 Reports

The Government shall provide, or cause to be provided, to MCC at least on each anniversary of the Entry into Force (or such other anniversary agreed by the Parties in writing) and otherwise within thirty (30) days of any written request by MCC, or as otherwise agreed in writing by the Parties, the following information:

(a) The name of each entity to which MCC Funding has been provided;

(b) The amount of MCC Funding provided to such entity;

(c) A description of the Program and each Project funded in furtherance of this Compact, including:

(i) A statement of whether the Program or any Project was solicited or unsolicited; and

(ii) A detailed description of the objectives and measures for results of the Program or Project;

(d) The progress made by Mali toward achieving the Compact Goal and Objectives;

(e) A description of the extent to which MCC Funding has been effective in helping Mali to achieve the Compact Goal and Objectives;

(f) A description of the coordination of MCC Funding with other United States foreign assistance and other related trade policies;

(g) A description of the coordination of MCC Funding with assistance provided by other donor countries;

(h) Any report, document or filing that the Government, any Government Affiliate or any Permitted Designee submits to any government body in connection with this Compact;

(i) Any report or document required to be delivered to MCC under the Environmental Guidelines, any Audit Plan, or any Implementation Document; and

(j) Any other report, document or information requested by MCC or required by this Compact or any Supplemental Agreement between the Parties.

Article IV. Conditions Precedent; Deliveries

Section 4.1 Conditions Prior to the Entry Into Force and Deliveries

As conditions precedent to the Entry into Force, the Parties shall satisfy the conditions set forth in this Section 4.1.

(a) The Government (or a mutually acceptable Government Affiliate), a Permitted Designee, and MCC shall execute a disbursement agreement (the "Disbursement Agreement"), which agreement shall be in full force and effect as of the Entry into Force.

(b) The Government (or a mutually acceptable Government Affiliate), a Permitted Designee, and MCC shall execute a governance agreement (the "Governance Agreement"), which agreement shall be in full force and effect as of the Entry into Force.

(c)(i) The Government shall deliver one or more of the Supplemental Agreements or other documents identified on Exhibit B attached hereto, which agreements or other documents shall be fully executed by the parties thereto and in full force and effect, or (ii) the Government (or a mutually acceptable Government Affiliate), a Permitted Designee, and MCC shall execute one or more term sheets that set forth the material and principal terms and conditions that will be included in any such Supplemental Agreement or other documents that have not been entered into or effective as of the Entry into Force (the "Supplemental Agreement Term Sheets").

(d) The Government shall deliver a written statement as to the incumbency and specimen signature of the Principal Representative and each Additional Representative of the Government executing any document under this Compact, such written statement to be signed by a duly authorized official of the Government other than the Principal Representative or any such Additional Representative.

(e) The Government shall deliver a certificate signed and dated by the Principal Representative of the Government, or such other duly authorized representative of the Government acceptable to MCC, that:

(i) Certifies the Government has completed all of its domestic

requirements in order that, and attaches a legal opinion from the Supreme Court of Mali (or such other legal opinion as may be acceptable to MCC) to the effect that (1) this Compact (and any Supplemental Agreement to which MCC is a party) shall be given the status of an international agreement; (2) no laws of Mali (other than the Constitution of Mali) now or hereafter in effect shall take precedence or prevail over this Compact (or any Supplemental Agreement to which MCC is a party) during the Compact Term (or a longer period to the extent provisions of this Compact remain in force following the Compact Term pursuant to Section 5.13); and (3) each of the provisions of this Compact (and each of the provisions of any Supplemental Agreement to which MCC is a party) shall be valid, binding and in full force and effect under the laws of Mali; and

(ii) Attaches thereto, and certifies that such attachments are, true, correct and complete copies of all decrees, legislation, regulations or other governmental documents relating to its domestic requirements for this Compact to enter into force and the satisfaction of Section 3.10, which MCC may post on its Web site or otherwise make publicly available.

(f) MCC shall deliver a written statement as to the incumbency and specimen signature of the Principal Representative and each Additional Representative of MCC executing any document under this Compact such written statement to be signed by a duly authorized official of MCC other than the Principal Representative or any such Additional Representative.

(g) The Government has not engaged subsequent to the conclusion of this Compact in any action or omission inconsistent with the MCA Eligibility Criteria, as determined by MCC in its sole discretion.

Section 4.2 Conditions Precedent to MCC Disbursements or Re-Disbursements

Prior to, and as condition precedent to, any MCC Disbursement or Re-Disbursement, the Government shall satisfy, or ensure the satisfaction of, all applicable conditions precedent in the Disbursement Agreement.

Article V. Final Clauses

Section 5.1 Communications

Unless otherwise expressly stated in this Compact or otherwise agreed in writing by the Parties, any notice, certificate, request, report, document or other communication required, permitted, or submitted by either Party

to the other under this Compact shall be (a) in writing, (b) in English, and (c) deemed duly given: (i) Upon personal delivery to the Party to be notified; (ii) when sent by confirmed facsimile or electronic mail, if sent during normal business hours of the recipient Party, if not, then on the next business day; or (iii) three (3) business days after deposit with an internationally recognized overnight courier, specifying next day delivery, with written verification of receipt to the Party to be notified at the address indicated below, or at such other address as such Party may designate:

To MCC:

Millennium Challenge Corporation, Attention: Vice President for Operations (with a copy to the Vice President and General Counsel), 875 Fifteenth Street, NW., Washington, DC 20005, United States of America, Facsimile: +1 (202) 521-3700, Phone: +1 (202) 521-3600, E-mail: VPOperations@mcc.gov (Vice President for Operations); VPGeneralCounsel@mcc.gov (Vice President and General Counsel)

To the Government:

Prime Minister of the Republic of Mali, Primature, Bamako, Mali, Facsimile: +223 223-9595, Phone: +223 222-5534

With a copy to MCA-Mali:

At an address, and to the attention of the person, to be designated in writing to MCC by the Government.

Notwithstanding the foregoing, any audit report delivered pursuant to Section 3.8, if delivered by facsimile or electronic mail, shall be followed by an original in overnight express mail. This Section 5.1 shall not apply to the exchange of letters contemplated in Section 1.3 or any amendments under Section 5.3.

Section 5.2 Representatives

Unless otherwise agreed in writing by the Parties, for all purposes relevant to this Compact, the Government shall be represented by the individual holding the position of, or acting as, the Prime Minister of the Republic of Mali, and MCC shall be represented by the individual holding the position of, or acting as, Vice President for Operations (each, a "Principal Representative"), each of whom, by written notice to the other Party, may designate one or more additional representatives (each, an "Additional Representative") for all purposes other than signing amendments to this Compact. The names of the Principal Representative and any Additional Representative of each of the Parties shall be provided, with specimen signatures, to the other Party, and the Parties may accept as

duly authorized any instrument signed by such representatives relating to the implementation of this Compact, until receipt of written notice of revocation of their authority. A Party may change its Principal Representative to a new representative of equivalent or higher rank upon written notice to the other Party, which notice shall include the specimen signature of the new Principal Representative.

Section 5.3 Amendments

The Parties may amend this Compact only by a written agreement signed by the Principal Representatives of the Parties and subject to the respective domestic approval requirements to which this Compact was subject.

Section 5.4 Termination; Suspension

(a) Subject to Section 2.5, either Party may terminate this Compact in its entirety by giving the other Party thirty (30) days' written notice.

(b) Notwithstanding any other provision of this Compact, including Section 2.1, or any Supplemental Agreement between the Parties, subject to Section 2.5, MCC may suspend or terminate this Compact or MCC Funding, in whole or in part, and any obligation or sub-obligation related thereto, upon giving the Government written notice, if MCC determines, in its sole discretion, that:

(i) Any use or proposed use of MCC Funding or any other Program Asset or continued implementation of the Compact would be in violation of applicable law or United States Government policy, whether now or hereafter in effect;

(ii) The Government, any Provider, or any other third party receiving MCC Funding or using any other Program Asset is engaged in activities that are contrary to the national security interests of the United States;

(iii) The Government or any Permitted Designee has committed an act or omission or an event has occurred that would render Mali ineligible to receive United States economic assistance under Part I of the Foreign Assistance Act of 1961, as amended (22 U.S.C. 2151 *et seq.*), by reason of the application of any provision of the Foreign Assistance Act of 1961 or any other provision of law;

(iv) The Government or any Permitted Designee has engaged in a pattern of actions or omissions inconsistent with the MCA Eligibility Criteria, or there has occurred a significant decline in the performance of Mali on one or more of the eligibility indicators contained therein;

(v) The Government or any Provider has materially breached one or more of its assurances or any covenants, obligations or responsibilities under this Compact or any Supplemental Agreement;

(vi) An audit, review, report or any other document delivered in furtherance of the Compact or any Supplemental Agreement or any other evidence reveals that actual expenditures for the Program, any Project or any Project Activity were greater than the projected expenditure for such activities identified in the applicable Detailed Budget or are projected to be greater than projected expenditures for such activities;

(vii) If the Government (1) materially reallocates or reduces the allocation in its national budget or any other Government budget of the normal and expected resources that the Government would have otherwise received or budgeted, from external or domestic sources, for the activities contemplated herein; (2) fails to contribute or provide the amount, level, type and quality of resources required to effectively carry out the Government Responsibilities or any other responsibilities or obligations of the Government under or in furtherance of this Compact; or (3) fails to pay any of its obligations as required under this Compact or any Supplemental Agreement, including such obligations which shall be paid solely out of national funds;

(viii) If the Government, any Provider, or any other third party receiving MCC Funding or using any other Program Asset, or any of their respective directors, officers, employees, Affiliates, contractors, sub-contractors, grantees, sub-grantees, representatives or agents, is found to have been convicted of a narcotics offense or to have been engaged in drug trafficking;

(ix) Any MCC Funding or Program Assets are applied, directly or indirectly, to the provision of resources and support to, individuals and organizations associated with terrorism, sex trafficking or prostitution;

(x) An event or condition of any character has occurred that; (1) Materially and adversely affects, or is likely to materially and adversely affect, the ability of the Government or any other party to effectively implement, or ensure the effective implementation of, the Program or any Project or to otherwise carry out its responsibilities or obligations under or in furtherance of this Compact or any Supplemental Agreement or to perform its obligations under or in furtherance of this Compact or any Supplemental Agreement or to exercise its rights thereunder; (2) makes

it improbable that the Objectives will be achieved during the Compact Term; (3) materially and adversely affects any Program Asset or any Permitted Account; or (4) constitutes misconduct injurious to MCC, or constitutes a fraud or a felony, by the Government, any Government Affiliate, Permitted Designee or Provider, or any officer, director, employee, agent, representative, Affiliate, contractor, grantee, subcontractor or sub-grantee of any of the foregoing;

(xi) The Government, any Permitted Designee or Provider has taken any action or omission or engaged in any activity in violation of, or inconsistent with, the requirements of this Compact or any Supplemental Agreement to which the Government or any Permitted Designee or Provider is a party;

(xii) There has occurred a failure to meet a condition precedent or series of conditions precedent or any other requirements or conditions in connection with MCC Disbursement as set out in and in accordance with any Supplemental Agreement between the Parties; or

(xiii) Any MCC Funding, Accrued Interest or Program Asset becomes subject to a Lien without the prior approval of MCC, and the Government fails to obtain the release of such Lien (utilizing national funds and not with MCC Funding, Accrued Interest, or any other Program Asset) within thirty (30) days after the imposition of such Lien.

(c) MCC may reinstate any suspended or terminated MCC Funding under this Compact or any Supplemental Agreement if MCC determines, in its sole discretion, that the Government or other relevant party has demonstrated a commitment to correcting each condition for which MCC Funding was suspended or terminated.

(d) The authority under this Section 5.4 to suspend or terminate this Compact or any MCC Funding includes the authority to suspend or terminate any obligations or sub-obligations relating to MCC Funding under any Supplemental Agreement without any liability to MCC whatsoever.

(e) All MCC Disbursements and Re-Disbursements shall cease upon expiration, suspension, or termination of this Compact; *provided, however*, (i) reasonable expenditures for goods, services and works that are properly incurred under or in furtherance of this Compact before such expiration, suspension or termination of this Compact, and (ii) reasonable expenditures for goods and services (including certain administrative expenses) properly incurred in connection with the winding up of the

Program within one hundred and twenty (120) days after such expiration, suspension or termination of the Compact may be paid from MCC Funding if (1) the request for such payment is properly submitted within ninety (90) days after such expiration, suspension or termination of the Compact, and (2) MCC had approved the making of such expenditure in writing in advance thereof.

(f) Other than the payments permitted pursuant to Section 5.4(e), in the event of the suspension or termination of this Compact or any Supplemental Agreement, in whole or in part, the Government, shall suspend, at MCC's sole discretion, for the period of the suspension, or terminate, or ensure the suspension or termination of, as applicable, any obligation or sub-obligation of the Parties to provide financial or other resources under this Compact or any Supplemental Agreement, or to the suspended or terminated portion of this Compact or such Supplemental Agreement, as applicable. In the event of such suspension or termination, the Government shall use its best efforts to suspend or terminate, or ensure the suspension or termination of, as applicable, all such noncancelable commitments related to the suspended or terminated MCC Funding. Any portion of this Compact or any such Supplemental Agreement that is not suspended or terminated shall remain in full force and effect.

(g) Upon the full or partial suspension or termination of this Compact or any MCC Funding, MCC may, at its expense, direct that title to Program Assets be transferred to MCC if such Program Assets are in a deliverable state; *provided*, for any Program Asset partially purchased or funded (directly or indirectly) by MCC Funding, the Government shall reimburse to a United States Government account designated by MCC the cash equivalent of the portion of the value of such Program Asset, such value as determined by MCC.

(h) Prior to the expiration of this Compact or upon termination of this Compact, the Parties shall consult in good faith with a view to reaching an agreement in writing on (i) the post-Compact Term treatment of MCA-Mali, (ii) the process for ensuring the refunds of MCC Disbursements that have not yet been released from a Permitted Account through a valid Re-Disbursement or otherwise committed in accordance with Section 5.4(e), or (iii) any other matter related to the winding up of the Program and this Compact.

Section 5.5 Privileges and Immunities

MCC is an agency of the Government of the United States of America and its personnel assigned to Mali will be notified pursuant to the Vienna Convention on Diplomatic Relations as members of the mission of the Embassy of the United States of America. The Government shall ensure that any personnel of MCC so notified, including individuals detailed to or contracted by MCC, and the members of the families of such personnel, while such personnel are performing duties in Mali, shall enjoy the privileges and immunities that are enjoyed by a member of the United States Foreign Service, or the family of a member of the United States Foreign Service so notified, as appropriate, of comparable rank and salary of such personnel, if such personnel or the members of the families of such personnel are not a national of, or permanently resident in, Mali.

Section 5.6 Attachments

Any annex, schedule, exhibit, table, appendix or other attachment expressly attached hereto (collectively, the "Attachments") is incorporated herein by reference and shall constitute an integral part of this Compact.

Section 5.7 Inconsistencies

(a) Conflicts or inconsistencies between any parts of this Compact shall be resolved by applying the following descending order of precedence:

- (i) Articles I through V, and
- (ii) Any Attachments.

(b) In the event of any conflict or inconsistency between this Compact and any Supplemental Agreement between the Parties, the terms of this Compact shall prevail. In the event of any conflict or inconsistency between any Supplemental Agreement between the Parties and any other Supplemental Agreement, the terms of the Supplemental Agreement between the Parties shall prevail. In the event of any conflict or inconsistency between Supplemental Agreements between any parties, the terms of a more recently executed Supplemental Agreement between such parties shall take precedence over a previously executed Supplemental Agreement between such parties. In the event of any inconsistency between a Supplemental Agreement between the Parties and any Implementation Document, the terms of the relevant Supplemental Agreement shall prevail.

Section 5.8 Indemnification

The Government shall indemnify and hold MCC and any MCC officer, director, employee, Affiliate, contractor,

agent or representative (each of MCC and any such persons, an "MCC Indemnified Party") harmless from and against, and shall compensate, reimburse and pay such MCC Indemnified Party for, any liability or other damages which (a) are directly or indirectly suffered or incurred by such MCC Indemnified Party, or to which any MCC Indemnified Party may otherwise become subject, regardless of whether or not such damages relate to any third-party claim, and (b) arise from or as a result of the negligence or willful misconduct of the Government, any Government Affiliate, MCA-Mali or any Permitted Designee, directly or indirectly connected with, any activities (including acts or omissions) undertaken in furtherance of this Compact; *provided, however*, the Government shall apply national funds to satisfy its obligations under this Section 5.8 and no MCC Funding, Accrued Interest, or other Program Asset may be applied by the Government in satisfaction of its obligations under this Section 5.8.

Section 5.9 Headings

The Section and Subsection headings used in this Compact are included for convenience only and are not to be considered in construing or interpreting this Compact.

Section 5.10 Interpretation

(a) Any reference to the term "including" in this Compact shall be deemed to mean "including without limitation" except as expressly provided otherwise.

(b) Any reference to activities undertaken "in furtherance of this Compact" or similar language shall include activities undertaken by the Government, any Government Affiliate, any Permitted Designee, any Provider or any other third party receiving MCC Funding involved in carrying out the purposes of this Compact or any Supplemental Agreement, including their respective directors, officers, employees, Affiliates, contractors, sub-contractors, grantees, sub-grantees, representatives or agents, whether pursuant to the terms of this Compact, any Supplemental Agreement or otherwise.

(c) References to "day" or "days" shall be calendar days unless provided otherwise.

(d) Defined terms importing the singular also include the plural, and vice versa.

Section 5.11 Signatures

A signature to this Compact or an amendment to this Compact pursuant to

Section 5.3 shall be delivered only as an original signature. With respect to all other signatures, a signature delivered by facsimile or electronic mail in accordance with Section 5.1 shall be deemed an original signature and shall be binding on the Party delivering such signature, and the Parties hereby waive any objection to such signature or to the validity of the underlying document, certificate, notice, instrument or agreement on the basis of the signature's legal effect, validity or enforceability solely because it is in facsimile or electronic form. Without limiting the foregoing, a signature on an audit report or a signature evidencing any modification identified in Section 2(a) and Section 4(a)(iv) of Annex I, Section 4 of Annex II, or Section 5(d) of Annex III shall be followed by an original in overnight express mail.

Section 5.12 Designation

MCC may designate any Affiliate, agent, or representative to implement, in whole or in part, its obligations, and exercise any of its rights, under this Compact or any Supplemental Agreement between the Parties. MCC shall inform the Government of any such designation.

Section 5.13 Survival

Any Government Responsibilities, covenants, or obligations or other responsibilities to be performed by the Government after the Compact Term shall survive the termination or expiration of this Compact and expire in accordance with their respective terms. Notwithstanding the termination or expiration of this Compact, the following provisions shall remain in force: Sections 2.2, 2.3, 2.5, 3.2, 3.3, 3.4, 3.5, 3.8, 3.9 (for one year), 3.12, 5.1, 5.2, 5.4(d), 5.4(e) (for one hundred and twenty (120) days), 5.4(f), 5.4(g), 5.4(h), 5.5, 5.6, 5.7, 5.8, 5.9, 5.10, 5.11, 5.12, this Section 5.13, 5.14, and 5.15.

Section 5.14 Consultation

Either Party may, at any time, request consultations relating to the interpretation or implementation of this Compact or any Supplemental Agreement between the Parties. Such consultations shall begin at the earliest possible date. The request for consultations shall designate a representative for the requesting Party with the authority to enter consultations and the other Party shall endeavor to designate a representative of equal or comparable rank. If such representatives are unable to resolve the matter within twenty (20) days from the commencement of the consultations, then each Party shall forward the

consultation to the Principal Representative or such other representative of comparable or higher rank. The consultations shall last no longer than forty-five (45) days from date of commencement. If the matter is not resolved within such time period, either Party may terminate this Compact pursuant to Section 5.4(a). The Parties shall enter any such consultations guided by the principle of achieving the Compact Goal in a timely and cost-effective manner and by the principles of international law. Any dispute arising under or related to this Compact shall be determined exclusively through the consultation mechanism set forth in this Section 5.14.

Section 5.15 MCC Status

MCC is a United States Government corporation acting on behalf of the United States Government in the implementation of this Compact. As such, MCC has no liability under this Compact, is immune from any action or proceeding arising under or relating to this Compact and the Government hereby waives and releases all claims related to any such liability. In matters arising under or relating to this Compact, MCC is not subject to the jurisdiction of the courts or other body of Mali or any other jurisdiction, and all disputes arising under or relating to this Compact shall be determined in accordance with Section 5.14.

Section 5.16 Language

This Compact is prepared in English and in the event of any ambiguity or conflict between this official English version and any other version translated into any language for the convenience of the Parties, this official English version shall prevail.

Section 5.17 Publicity; Information and Marking

The Government shall give appropriate publicity to this Compact as a program to which the United States, through MCC, has contributed, including by posting this Compact, and any amendments thereto, on the Web site operated by MCA-Mali ("MCA-Mali Web site"), identifying Program activity sites, and marking Program Assets; *provided*, any announcement, press release or statement regarding MCC or the fact that MCC is funding the Program or any other publicity materials referencing MCC, including the publicity described in this Section 5.17, shall be subject to prior approval by MCC and shall be consistent with any instructions provided by MCC from time to time in relevant Implementation Letters. Upon the termination or

expiration of this Compact, MCC may request the removal of, and the Government shall, upon such request, remove, or cause the removal of, any such markings and any references to MCC in any publicity materials or on the MCA-Mali Web site. MCC may post this Compact, and any amendments thereto, on the Web site of MCC. MCC shall have the right to use any information or data provided in any report or document provided to MCC for the purpose of satisfying MCC reporting requirements or in any other manner.

In Witness Whereof, the undersigned, duly authorized by their respective governments, have signed this Compact this 13th day of November 2006 and this Compact shall enter into force in accordance with Section 1.3.

Done at Washington, DC in English.

For the United States of America, acting through the Millennium Challenge Corporation, Name: John J. Danilovich, Title: Chief Executive Officer.

For the Government of the Republic of Mali, Name: Mocror Ouane, Title: Minister of Foreign Affairs and International Cooperation.

Exhibit A—Definitions

The following compendium of capitalized terms that are used herein is provided for the convenience of the reader. To the extent that there is a conflict or inconsistency between the definitions in this Exhibit A and the definitions elsewhere in the text of this Compact, the definition elsewhere in this Compact shall prevail over the definition in this Exhibit A.

Accrued Interest shall have the meaning set forth in Section 2.1(c).

Act shall have the meaning set forth in Section 2.1(a)(iii).

Ad Hoc Evaluation shall have the meaning set forth in Section 3(b) of Annex III.

Additional Representative shall have the meaning set forth in Section 5.2.

AdM shall have the meaning set forth in Section 2(c) of Schedule 1 to Annex I.

Advisory Council(s) shall have the meaning set forth in Section 3(e)(i) of Annex I.

Affiliate means the affiliate of a party, which is a person or entity that controls, is controlled by, or is under the same control as the party in question, whether by ownership or by voting, financial or other power or means of influence. References to Affiliate herein shall include any of their respective directors, officers, employees, affiliates, contractors, sub-contractors, grantees, sub-grantees, representatives, and agents.

Agriculture Activity shall have the meaning set forth in Section 2(e) of Schedule 3 to Annex I.

Airport shall have the meaning set forth in Section 1.1.

Airport Domain Advisory Council shall have the meaning set forth in Section 3(e)(i) of Annex I.

Airport Improvement Project shall have the meaning set forth in the Preamble of Schedule 1 to Annex I.

Airside Infrastructure Activity shall have the meaning set forth in Section 2(a) of Schedule 1 to Annex I.

Alatona Irrigation Project shall have the meaning set forth in the Preamble of Schedule 3 to Annex I.

Alatona Irrigation Project Objective shall have the meaning set forth in Section 1.1(c).

Alatona Zone Advisory Council shall have the meaning set forth in Section 3(e)(i) of Annex I.

ANAC means the Agence Nationale de l'Aéronautique Civile.

ASECNA means the Agence pour la Sécurité de la Navigation Aérienne en Afrique et à Madagascar.

Attachments shall have the meaning set forth in Section 5.6.

Audit Guidelines shall have the meaning set forth in Section 3.8(d)(i).

Audit Plan shall have the meaning set forth in Section 3.8(d)(iii).

Auditor shall have the meaning set forth in Section 3(h) of Annex I.

Auditor/Reviewer Agreement shall have the meaning set forth in Section 3(h) of Annex I.

Bamako-Sénou Airport Improvement Project Objective shall have the meaning set forth in Section 1.1(a).

Bank(s) means any bank holding a Permitted Account.

Bank Agreement shall have the meaning set forth in Section 4(d) of Annex I.

BDS shall have the meaning set forth in Section 4 of Schedule 2 to Annex I.

Beneficiaries shall have the meaning set forth in Section 2(a) of Annex III.

Bilateral Agreement shall have the meaning set forth in Section 2.6.

Board shall have the meaning set forth in Section 3(d)(i)(2) of Annex I.

Chair shall have the meaning set forth in Section 3(d)(ii)(2)(A)(i) of Annex I.

Civil Member shall have the meaning set forth in Section 3(d)(ii)(2)(A) of Annex I.

Civil Society Stakeholders shall have the meaning set forth in Section 3(e)(ii)(1) of Annex I.

CNPI means the Centre National de la Promotion des Investissements.

Community Activity shall have the meaning set forth in Section 2(d) of Schedule 3 to Annex I.

Compact shall have the meaning set forth in the Preamble.

Compact Goal shall have the meaning set forth in Section 1.1.

Compact Implementation Funding shall have the meaning set forth in Section 2.1(a)(iii).

Compact Records shall have the meaning set forth in Section 3.8(b).

Compact Reports shall have the meaning set forth in Section 3(d)(ii)(3)(C) of Annex I.

Compact Term shall have the meaning set forth in Section 1.3.

Contract shall have the meaning set forth in Section 3(f) of Annex I.

Contractor shall have the meaning set forth in Section 3(f) of Annex I.

COSCAP shall have the meaning set forth in Section 4 of Schedule 1 to Annex I.

Covered Provider shall have the meaning set forth in Section 3.8(d)(iv).

Designated Rights and Responsibilities shall have the meaning set forth in Section 3.2(c).

Detailed Budget shall have the meaning set forth in Section 4(a)(ii) of Annex I.

DNCPN means the Direction Nationale du Contrôle de la Pollution et des Nuisances.

Director General shall have the meaning set forth in Section 3(d)(iii) of Annex I.

Disbursement Agreement shall have the meaning set forth in Section 4.1(a).

EA shall have the meaning set forth in Section 6(a) of Annex I.

EIA shall have the meaning set forth in Section 6(a) of Annex I.

EMP shall have the meaning set forth in Section 6(a) of Annex I.

EMS shall have the meaning set forth in Section 6 of Schedule 1 to Annex I.

Entry into Force shall have the meaning set forth in Section 1.3.

Environmental Guidelines shall have the meaning set forth in Section 2.3(d).

Evaluation Component shall have the meaning set forth in Section 1 of Annex III.

Exempt Uses shall have the meaning set forth in Section 2.3(e)(ii).

Final Evaluation shall have the meaning set forth in Section 3(a) of Annex III.

Finance Activity shall have the meaning set forth in Section 2(f) of Schedule 3 to Annex I.

Financial Plan Annex shall have the meaning set forth in the Preamble of Annex II.

Fiscal Accountability Plan shall have the meaning set forth in Section 4(c) of Annex I.

Fiscal Agent shall have the meaning set forth in Section 3(g)(i) of Annex I.

Fiscal Agent Agreement shall have the meaning set forth in Section 3(g)(i) of Annex I.

GDP means gross domestic product.
Goal Indicator shall have the meaning set forth in Section 2(a) of Annex III.

Governance Agreement shall have the meaning set forth in Section 4.1(b).

Governing Document shall have the meaning set forth in Section 3(c)(i)(9) of Annex I.

Government shall have the meaning set forth in the Preamble.

Government Affiliate means an Affiliate, ministry, bureau, department, agency, government, corporation or any other entity chartered or established by the Government or local government in Mali. References to Government Affiliate shall include any of their respective directors, officers, employees, affiliates, contractors, sub-contractors, grantees, sub-grantees, representatives, and agents.

Government Member shall have the meaning set forth in Section 3(d)(ii)(2)(A) of Annex I.

Government Party shall have the meaning set forth in Section 3.8(e)(i).

Government Responsibilities shall have the meaning set forth in Section 3.2(a).

Ha means hectare.

Implementation Document shall have the meaning set forth in Section 3(a) of Annex I.

Implementation Letter shall have the meaning set forth in Section 3.5(a).

Implementing Entity shall have the meaning set forth in Section 3(f) of Annex I.

Implementing Entity Agreement shall have the meaning set forth in Section 3(f) of Annex I.

Indicators shall have the meaning set forth in Section 2(a) of Annex III.

Industrial Park shall have the meaning set forth in Section 1(a) of Annex I.

Industrial Park Project shall have the meaning set forth in the Preamble of Schedule 2 to Annex I.

Industrial Park Project Objective shall have the meaning set forth in Section 1.1(b).

Inspector General shall have the meaning set forth in Section 3.8(d)(i).

Institutional Strengthening Activity for the Airport Improvement Project shall have the meaning set forth in Section 2(c) of Schedule 1 to Annex I.

Institutional Strengthening Activity for the Industrial Park Project shall have the meaning set forth in Section 2(c) of Schedule 2 to Annex I.

Irrigation Activity shall have the meaning set forth in Section 2(b) of Schedule 3 to Annex I.

Land Activity shall have the meaning set forth in Section 2(c) of Schedule 3 to Annex I.

Landside Infrastructure Activity shall have the meaning set forth in Section 2(b) of Schedule 1 to Annex I.

Lien shall have the meaning set forth in Section 2.3(g).

Local Account shall have the meaning set forth in Section 4(d)(ii) of Annex I.

M&E shall have the meaning set forth in Section 3 of Annex I.

M&E Annex shall have the meaning set forth in the Preamble of Annex III.

M&E Plan shall have the meaning set forth in Section 2(d) of Annex I.

Mali shall have the meaning set forth in the Recitals.

Management shall have the meaning set forth in Section 3(d)(i)(2) of Annex I.

Material Agreement shall have the meaning set forth in Section 3(c)(i)(4) of Annex I.

Material Re-Disbursement shall have the meaning set forth in Section 3(c)(i)(7) of Annex I.

MCA shall have the meaning set forth in the Recitals.

MCA Eligibility Criteria shall have the meaning set forth in Section 3.7.

MCA-Mali shall have the meaning set forth in Section 3(b)(i) of Annex I.

MCA-Mali Web site shall have the meaning set forth in Section 5.17.

MCC shall have the meaning set forth in the Preamble.

MCC Disbursement shall have the meaning set forth in Section 2.1(b)(i).

MCC Disbursement Request shall have the meaning set forth in Section 4(b) of Annex I.

MCC Funding shall have the meaning set forth in Section 2.1(a).

MCC Indemnified Party shall have the meaning set forth in Section 5.8.

MCC Representative shall have the meaning set forth in Section 3(d)(ii)(2)(B)(i) of Annex I.

MFIs means microfinance institutions.

Monitoring Component shall have the meaning set forth in Section 1 of Annex III.

MSMEs shall have the meaning set forth in Section 4 of Schedule 2 to Annex I.

Multi-Year Financial Plan shall have the meaning set forth in Section 4(a)(i) of Annex I.

Multi-Year Financial Plan Summary shall have the meaning set forth in Section 1 of Annex II.

NGOs shall have the meaning set forth in Section 1(b) of Annex I.

Objective(s) shall have the meaning set forth in Section 1.1.

Objective Indicator shall have the meaning set forth in Section 2(a) of Annex III.

Observer shall have the meaning set forth in Section 3(d)(ii)(2)(B) of Annex I.

Officer shall have the meaning set forth in Section 3(d)(iii)(1) of Annex I.
ON shall have the meaning set forth in Section 1.1(c).

Outcomes shall have the meaning set forth in Section 1 of Annex III.

Outcome Indicator shall have the meaning set forth in Section 2(a) of Annex III.

Output Indicator shall have the meaning set forth in Section 2(a) of Annex III.

Party or *Parties* shall have the meaning set forth in the Preamble.

Permitted Account(s) shall have the meaning set forth in Section 4(d) of Annex I.

Permitted Designee shall have the meaning set forth in Section 3.2(c).

Pledge shall have the meaning set forth in Section 3(c)(i)(8) of Annex I.

Primary and Secondary Infrastructure Activity shall have the meaning set forth in Section 2(a) of Schedule 2 to Annex I.

Principal Representative shall have the meaning set forth in Section 5.2.

Procurement Agent shall have the meaning set forth in Section 3(i) of Annex I.

Procurement Agent Agreement shall have the meaning set forth in Section 3(i) of Annex I.

Procurement Guidelines shall have the meaning set forth in Section 3.6(a).

Procurement Plan shall have the meaning set forth in Section 3(i) of Annex I.

Program shall have the meaning set forth in the Recitals.

Program Annex shall have the meaning set forth in the Preamble of Annex I.

Program Assets shall have the meaning set forth in Section 2.3(e)(iii).

Program Objective shall have the meaning set forth in Section 1.1.

Project shall have the meaning set forth in Section 1.2.

Project Activity shall have the meaning set forth in Section 2(a) of Annex I.

Project Objective shall have the meaning set forth in Section 1.1.

Proposal shall have the meaning set forth in the Recitals.

Provider shall have the meaning set forth in Section 2.4(b).

PRSP shall have the meaning set forth in Section 1(b) of Annex I.

RAP shall have the meaning set forth in Section 6(a) of Annex I.

Re-Disbursement shall have the meaning set forth in Section 2.1(b)(ii).

Resettlement Activity shall have the meaning set forth in Section 2(b) of Schedule 2 to Annex I.

Revenue Authority shall have the meaning set forth in Section 2(c)(v) of Schedule 3 to Annex I.

Reviewer shall have the meaning set forth in Section 3(h) of Annex I.

Road Activity shall have the meaning set forth in Section 2(a) of Schedule 3 to Annex I.

Special Account shall have the meaning set forth in Section 4(d)(i) of Annex I.

STIs means sexually transmitted infections.

Supplemental Agreement shall have the meaning set forth in Section 3.5(b).

Supplemental Agreement between the Parties means any agreement between MCC on the one hand, and the Government, any Government Affiliate or Permitted Designee on the other hand.

Supplemental Agreement Term Sheets shall have the meaning set forth in Section 4.1(c).

Target shall have the meaning set forth in Section 2(a) of Annex III.

Tax(es) shall have the meaning set forth in Section 2.3(e)(i).

United States Dollars, US\$ or \$ shall have the meaning set forth in Section 2.1(d).

United States Government means any branch, agency, bureau, government corporation, government chartered entity or other body of the Federal government of the United States.

USAID shall have the meaning set forth in Section 5 of Schedule 1 to Annex I.

VOCs shall have the meaning set forth in Section 3 of Schedule 3 to Annex I.

Voting Member means each Government Member and each Civil Member.

WAEMU shall have the meaning set forth in Section 4 of Schedule 1 to Annex I.

Work Plan shall have the meaning set forth in Section 3(a) of Annex I.

WUAs shall have the meaning set forth in Section 2 of Schedule 3 to Annex I.

Exhibit B—List of Certain Supplemental Agreements

1. Fiscal Agent Agreement.
2. Procurement Agent Agreement.
3. Bank Agreement.
4. Form of Implementing Entity Agreement.

Schedule 2.1(a)(iii)—Compact Implementation Funding

The Compact Implementation Funding provided pursuant to Section 2.1(a)(iii) of this Compact shall support the following activities:

(a) Fiscal and procurement administration activities;

(b) Administrative activities including start-up costs such as staff salaries and administrative support expenses of

MCA-Mali (or a mutually acceptable Government Affiliate) such as rent, computers and other information technology or capital equipment;

(c) Baseline surveys for M&E; and
(d) Additional work for feasibility studies.

The total amount of funds disbursed in accordance with Section 2.1(a)(iii) shall not exceed the amount set forth in Section 2.1(a)(iii).

Annex I—Program Description

This Annex I to the Compact (this “Program Annex”) generally describes the Program that MCC Funding will support in Mali during the Compact Term and the results to be achieved from the investment of MCC Funding. Prior to any MCC Disbursement or Re-Disbursement, including for the Projects described herein, MCC, the Government (or a mutually acceptable Government Affiliate) and MCA-Mali shall enter into the Disbursement Agreement, which agreement shall be in form and substance mutually satisfactory to the Parties, and signed by the Principal Representative of each Party (or in the case of a Government Affiliate, the principal representative of such Government Affiliate) and of MCA-Mali.

Except as specifically provided herein, the Parties may amend this Program Annex only by written agreement signed by the Principal Representative of each Party. Each capitalized term used but not defined in this Program Annex shall have the same meaning given such term elsewhere in this Compact. Unless otherwise expressly stated, each Section reference herein is to the relevant Section of the main body of this Compact.

1. Background; Consultative Process

(a) Background. Mali is a landlocked country of 1.24 million sq km that shares a border with seven West African countries. One of the world’s poorest countries, Mali ranks 174 out of 177 on the United Nations Development Program’s Human Development Index, with low levels of literacy (19%) and life expectancy of 47.9 years. Sixty-four percent of Mali’s approximate 13 million people are poor, a third living in extreme poverty. MCC’s investments will support the development of key infrastructure and policy reform for productive sectors, by addressing the country’s constraints to growth and capitalizing on two of Mali’s major assets, the Airport, gateway for regional and international trade, and the Niger River Delta for irrigated agriculture. As proposed by the Government, the Program will create a platform for increased production and productivity

of agriculture and small and medium-sized enterprises, as well as expand Mali’s access to markets and trade.

Investment in the Airport infrastructure will establish an independent and secure link to the regional and global economy, addressing the specific need of a landlocked, developing country. The investments in the industrial park to be located within the Airport domain (“Industrial Park”) will provide properly managed and serviced land for businesses and will leverage reforms that will decrease the cost of doing business in Mali. The investments in the Alatona zone of ON will be a catalyst for the transformation and commercialization of family farms. It will support Mali’s national development strategy to increase the contribution of the rural sector to economic growth and help achieve national food security. These investments will be strengthened by policy reforms and institutional support such as formal land titles for the rural poor, demand-driven rural advisory services, an improved business environment, and increased access to markets and trade. These hard and soft investments will impact the poor in Mali, particularly Malian farmers and small and medium-size entrepreneurs, not only in Project zones but, over time, on a national and regional scale. The Program reinforces the Government’s approach and commitment to democracy, decentralization, and empowerment of local communities. MCC-financed interventions will complement and reinforce national strategies for poverty reduction and economic growth.

(b) Consultative Process. The Program strongly supports the third pillar of the poverty reduction strategy paper (“PRSP”): Development of infrastructure and key support for productive sectors. The participatory process of the PRSP is characterized as having “breadth” and being “systematic.” The national structure for the implementation of the PRSP identified the following among the top constraints to economic growth in its consultative process:

(i) Climatic risks affecting the rural sector with consequences on the national economy;

(ii) High cost of factors of production;

(iii) Fluctuations in prices of principal import and export products; and

(iv) Isolation/landlocked nature of the country.

The Program was designed to address these constraints. Priorities were defined by the national PRSP structure and refinement occurred in consultation with civil society and the private sector.

This consultative process enriched and helped form the Proposal and its development. The insistence on rural land ownership and titling derived from dialogue with civil society and private sector actors. The need for inclusion of a strong component of social services for the Alatona zone was also reinforced through the consultative process.

Members of the Government, private sector, and civil society (national non-governmental organizations and U.S. non-governmental organizations) played an active role in developing the Millennium Challenge Account proposal. Local non-governmental organizations (“NGOs”), including village-level women’s associations, were directly involved in the process through numerous on-site workshops and meetings in the ON region. Consultations also took place with private sector and civil society actors around Bamako, as well as communities surrounding the Airport domain, who emphasized the need for improved infrastructure and increased economic activity to reduce poverty. Lastly, the Consultative Process involved participation of the U.S. NGO community, that has a strong presence in Mali, working on health, education, agriculture, governance, and economic development programs throughout the country.

2. Overview

(a) Projects. The Parties have identified the Projects that the Government will implement, or cause to be implemented, using MCC Funding to advance each Objective. Each Project is described in the Schedules to this Program Annex. The Schedules to this Program Annex also identify one or more of the activities that will be undertaken in furtherance of each Project (each, a “Project Activity”), as well as the various activities within each Project Activity. Notwithstanding anything to the contrary in this Compact, the Parties may agree to modify, amend, terminate or suspend these Projects or to create a new project by written agreement signed by the Principal Representative of each Party without amending this Compact; *provided, however*, any such modification or amendment of a Project or creation of a new project shall (i) be consistent with the Objectives; (ii) not cause the amount of MCC Funding to exceed the aggregate amount specified in Section 2.1(a) of this Compact; (iii) not cause the Government’s responsibilities or contribution of resources to be less than specified in Section 2.2 of this Compact or

elsewhere in this Compact; and (iv) not extend the Compact Term.

(b) Beneficiaries. The intended beneficiaries of each Project are described in the respective Schedule to this Program Annex and Annex III to the extent identified as of the date hereof. The intended beneficiaries shall be identified more precisely during the initial phases of implementation of the Program. The Government shall provide to MCC information on the population of the areas in which the Projects will be active, disaggregated by gender, income level and age. The Parties shall agree upon the description of the intended beneficiaries and the Parties will make publicly available a more detailed description of the intended beneficiaries of the Program, including publishing such description on the MCA-Mali Web site.

(c) Civil Society. Civil society shall participate in overseeing the implementation of the Program through its representation on the Board and the Advisory Councils, as provided in Section 3(d) and Section 3(e), respectively, of this Program Annex. In addition, ongoing consultations with the civil society regarding the manner in which each Project is being implemented will take place throughout the Compact Term.

(d) Monitoring and Evaluation. Annex III generally describes the plan to measure and evaluate progress toward achievement of the Compact Goal and the Objectives (the “M&E Plan”). As outlined in the Disbursement Agreement and other Supplemental Agreements, continued disbursement of MCC Funding under this Compact (whether as MCC Disbursements or Re-Disbursements) shall be contingent on, among other things, successful achievement of certain Targets as set forth in the M&E Plan.

3. Implementation Framework

The implementation framework and the plan for ensuring adequate governance, oversight, management, monitoring and evaluation (“M&E”) and fiscal accountability for the use of MCC Funding is summarized below and in the Schedules attached to this Program Annex, and as may otherwise be agreed in writing by the Parties.

(a) General. The elements of the implementation framework will be further described in the Supplemental Agreements and in a set of detailed documents for the implementation of the Program, consisting of (i) a Multi-Year Financial Plan, (ii) a Fiscal Accountability Plan, (iii) a Procurement Plan, (iv) an M&E Plan, and (v) a Work Plan (each, an “Implementation

Document”). MCA-Mali shall adopt each Implementation Document in accordance with the requirements and timeframe as may be specified in this Program Annex, Annex II, Annex III, and the Disbursement Agreement or as may otherwise be agreed by the Parties from time to time. MCA-Mali may amend any Implementation Document without amending this Compact, *provided* that any material amendment of such Implementation Document has been approved by MCC and is otherwise consistent with the requirements of this Compact and any Supplemental Agreement. By such time as may be specified in the Disbursement Agreement, or as may otherwise be agreed by the Parties from time to time, MCA-Mali shall adopt a work plan for the overall administration of the Program (the “Work Plan”). The Work Plan shall set forth, with respect to (i) the administration of the Program, (ii) the monitoring and evaluation of the Program, and (iii) the implementation of each Project, the following: (1) Each activity to be undertaken or funded by MCC Funding (to the level of detail mutually acceptable to MCA-Mali and MCC), (2) the Detailed Budget, and (3) where appropriate, the allocation of roles and responsibilities for specific activities, other programmatic guidelines, performance requirements, targets, and other expectations related thereto.

(b) Government.

(i) The Government shall promptly take all necessary and appropriate actions to carry out the Government Responsibilities and other obligations or responsibilities of the Government under and in furtherance of this Compact, including undertaking or pursuing such legal, legislative or regulatory actions or procedural changes and contractual arrangements as may be necessary or appropriate to achieve the Objectives, to successfully implement the Program, to designate any rights or responsibilities to any Permitted Designee, and to establish a legal entity, in a form mutually agreeable to the Parties (“MCA-Mali”), which shall be a Permitted Designee and shall be responsible for the oversight and management of the implementation of this Compact on behalf of the Government. The Government shall promptly deliver to MCC certified copies of any documents, orders, decrees, laws or regulations evidencing such legal, legislative, regulatory, procedural, contractual or other actions.

(ii) The Government shall ensure that MCA-Mali is duly authorized and organized, sufficiently staffed and empowered to carry out fully the

Designated Rights and Responsibilities. Without limiting the generality of the preceding sentence, MCA-Mali shall be organized, and have such roles and responsibilities, as described in Section 3(d) of this Program Annex and as provided in the Governing Documents.

(c) MCC.

(i) Notwithstanding Section 3.11 of this Compact or any provision in this Program Annex to the contrary, and except as may be otherwise agreed upon by the Parties from time to time, MCC must approve in writing each of the following transactions, activities, agreements and documents prior to the execution or carrying out of such transaction, activity, agreement or document and prior to MCC Disbursements or Re-Disbursements in connection therewith:

(1) MCC Disbursements;

(2) Each Implementation Document (including each component thereto) and any material amendments and supplements thereto;

(3) Any Audit Plan;

(4) Agreements (i) between the Government and MCA-Mali, (ii) between the Government, a Government Affiliate, MCA-Mali or any other Permitted Designee, on the one hand, and any Provider or Affiliate of a Provider, on the other hand, which require such MCC approval under applicable law, the Disbursement Agreement, any Governing Document, or any other Supplemental Agreement, or (iii) in which the Government, a Government Affiliate, MCA-Mali or any other Permitted Designee appoints, hires, or engages any of the following in furtherance of this Compact:

(A) Auditor;

(B) Reviewer;

(C) Fiscal Agent;

(D) Procurement Agent;

(E) Bank;

(F) Implementing Entity (as required under Section 3(f) of this Program Annex); and

(G) A member of the Board (including any Observer), any Officer or any other key employee of MCA-Mali (including agreements involving the terms of any compensation for any such person).

(Any agreement described in clause (i) through (iii) of this Section 3(c)(i)(4) of this Program Annex and any amendments and supplements thereto, each, a "Material Agreement");

(5) Any modification, termination or suspension of a Material Agreement, or any action that would have the effect of such a modification, termination or suspension of a Material Agreement;

(6) Any agreement that is (A) not at arm's length or (B) with a party related to the Government, MCA-Mali or any of their respective Affiliates;

(7) Any Re-Disbursement that requires such MCC approval under applicable law, any Governing Document, or any other Supplemental Agreement (each, a "Material Re-Disbursement");

(8) Any pledge of any MCC Funding or any Program Assets, or any guarantee, directly or indirectly, of any indebtedness (each, a "Pledge");

(9) Any decree, legislation, regulation, contractual arrangement (including the Governance Agreement), or other charter document establishing or governing MCA-Mali (each, a "Governing Document");

(10) Any disposition, in whole or in part, liquidation, dissolution, winding up, reorganization or other change of (A) MCA-Mali, including any revocation or modification of or supplement to any Governing Document related thereto, or (B) any subsidiary or Affiliate of MCA-Mali;

(11) Any change in character or location of any Permitted Account;

(12) Formation or acquisition of any direct or indirect subsidiary, or other Affiliate, of MCA-Mali;

(13) (A) Any change of any member of the Board (including any Observer), of the member serving as the Chair or in the composition or size of the Board, and the filling of any vacant seat of any member of the Board (including any Observer), (B) any change of any Officer or other key employee of MCA-Mali or in the composition or size of the Management, and the filling of any vacant position of any Officer or other key employee of MCA-Mali, and (C) any material change in the composition or size of any Advisory Council;

(14) Any decision by MCA-Mali to engage, to accept or to manage any funds from any donor agencies or organizations in addition to MCC Funding during the Compact Term;

(15) Any decision to amend, supplement, replace, terminate, or otherwise change any of the foregoing; and

(16) Any other activity, agreement, document or transaction requiring the approval of MCC in this Compact, applicable law, any Governing Document, the Disbursement Agreement, or any other Supplemental Agreement between the Parties.

(ii) MCC shall have the authority to exercise its approval rights set forth in this Section 3(c) of this Program Annex in its sole discretion and independent of any participation or position taken by the MCC Representative at a meeting of the Board. MCC retains the right to revoke its approval of any matter, agreement, or action if MCC concludes, in its sole discretion, that its approval was issued on the basis of incomplete,

inaccurate or misleading information furnished by the Government, any Government Affiliate, MCA-Mali or any other Permitted Designee.

Notwithstanding any provision in this Compact or any Supplemental Agreement to the contrary, the exercise by MCC of its approval rights under this Compact or any Supplemental Agreement shall not (1) diminish or otherwise affect the Government Responsibilities or any other obligations or responsibilities of the Government under this Compact or any Supplemental Agreement, (2) transfer any such obligations or responsibilities of the Government, or (3) otherwise subject MCC to any liability.

(d) MCA-Mali.

(i) General. Unless otherwise agreed by the Parties in writing, MCA-Mali shall, as a Permitted Designee, be responsible for the oversight and management of the implementation of this Compact. MCA-Mali shall be governed by applicable law and the Governing Documents. Each Governing Document shall be in form and substance satisfactory to MCC and effective on or before the time specified in the Disbursement Agreement, and based on the following principles:

(1) The Government shall ensure that MCA-Mali shall not assign, delegate or contract any of the Designated Rights and Responsibilities without the prior written consent of the Government and MCC. MCA-Mali shall not establish any Affiliates or subsidiaries (direct or indirect) without the prior written consent of the Government and MCC.

(2) Unless otherwise agreed by the Parties in writing, MCA-Mali shall consist of (A) an independent board of directors (the "Board") to oversee MCA-Mali's responsibilities and obligations under this Compact (including any Designated Rights and Responsibilities) and (B) a management unit to have overall management (the "Management") responsibility for the implementation of this Compact.

(3) The Government shall ensure that the Governing Documents comply with the requirements set forth in this Program Annex.

(ii) Board.

(1) Formation. The Government shall ensure that the Board shall be formed, constituted, governed and operated in accordance with the terms and conditions set forth in the Governing Documents and any Supplemental Agreement.

(2) Composition. Unless otherwise agreed by the Parties in writing, the Board shall consist of no more than eleven (11) voting members and two (2) non-voting observers identified below.

(A) The Board shall initially be composed of eleven (11) voting members as follows, *provided* that the members identified in subsections (i)–(vi) below (each, a “Government Member,” and each of the other voting members, a “Civil Member”) may be replaced by another government official from a ministry or other government body relevant to the Program activities pursuant to the Governing Documents, subject to approval by MCC (such replacement to be referred to thereafter as a Government Member):

(i) Representative from the Prime Minister’s Office, appointed as the chair (“Chair”) as provided in the Governing Documents;

(ii) Representative from the Ministry of Equipment and Transport;

(iii) Representative from the Ministry of Economy and Finance;

(iv) Representative from the Ministry for Investment Promotion and Small and Medium-Size Industries;

(v) Representative from the Ministry of Agriculture;

(vi) Representative from the Ministry of Territorial Administration;

(vii) Representative from the National Committee for Business Owners;

(viii) Representative from the Chamber of Commerce and Industry;

(ix) Representative from the Chamber of Agriculture;

(x) Representative from civil society organizations representing youth, selected by the relevant national NGOs and civil society organizations and based on selection criteria agreed upon by the Parties; and

(xi) Representative from civil society organizations representing women, selected by the relevant national NGOs and civil society organizations and based on selection criteria agreed upon by the Parties.

(B) The non-voting observers of the Board (each, an “Observer”) shall be:

(i) A representative designated by MCC (the “MCC Representative”); and

(ii) A representative of environmental NGOs, selected by the relevant national NGOs and civil society organizations and based on selection criteria agreed upon by the Parties.

(C) Each Government Member position (other than the Chair) shall be filled by the individual, during the Compact Term, holding the office identified, and all Government Members (including the Chair) shall serve in their capacity as the applicable Government officials and not in their personal capacity.

(D) Each Civil Member shall serve a two (2) year term.

(E) The Voting Members, by majority vote, may alter the size of the Board in

accordance with the Governing Documents so long as the total does not exceed eleven (11) members.

(F) Each Observer shall have rights to attend all meetings of the Board, participate in the discussions of the Board, and receive all information and documents provided to the Board, together with any other rights of access to records, employees or facilities as would be granted to a member of the Board under the Governing Documents.

(G) The Voting Members shall exercise their duties solely in accordance with the best interests of MCA-Mali, the Program, the Compact Goal and the Objectives, and shall not undertake any action that is contrary to those interests or would result in personal gain or a conflict of interest.

(3) Roles and Responsibilities. The roles and responsibilities of the Board shall include the following:

(A) The Board shall oversee the Management, the overall implementation of the Program, and the performance of the Designated Rights and Responsibilities.

(B) Certain actions may be taken and certain agreements, documents or instruments executed and delivered, as the case may be, by MCA-Mali only upon the approval and authorization of the Board as provided under applicable law or as set forth in any Governing Document, including each MCC Disbursement Request, selection or termination of certain Providers and any Implementation Document.

(C) The Chair, unless otherwise provided in the applicable Governing Documents, shall certify any documents or reports delivered to MCC in satisfaction of the Government’s reporting requirements under this Compact or any Supplemental Agreement between the Parties (the “Compact Reports”) or any other documents or reports from time to time delivered to MCC by MCA-Mali (whether or not such documents or reports are required to be delivered to MCC), and that such documents or reports are true, correct and complete.

(D) Without limiting the generality of the Designated Rights and Responsibilities that the Government may designate to MCA-Mali, and subject to MCC’s contractual rights of approval as set forth in Section 3(c) of this Program Annex, elsewhere in this Compact or any Supplemental Agreement, the Board shall have the exclusive authority as between the Board and the Management for all actions defined for the Board in any Governing Document and which are expressly designated therein as

responsibilities that cannot be delegated further.

(E) The Board shall meet with and exchange information with the Advisory Councils, as contemplated in Section 3(e) of this Program Annex. Without limiting the generality of the foregoing, the Board shall take each Advisory Council’s suggestions into consideration in connection with any amendment to the M&E Plan, pursuant to Section 5(b) of Annex III.

(4) Indemnification of Civil Members, Observers, and Officers. The Government shall ensure, at the Government’s sole cost and expense, that appropriate insurance is obtained and appropriate indemnifications and other protections are provided, acceptable to MCC and to the fullest extent permitted under the laws of Mali, to ensure that (A) the Civil Members and the Observers shall not be held personally liable for the actions or omissions of the Board or MCA-Mali and (B) Officers shall not be held personally liable for the actions or omissions of the Board, MCA-Mali or actions or omissions of the Officer so long as properly within the scope of Officer’s authority. Pursuant to Section 5.5 and Section 5.8 of this Compact, the Government and MCA-Mali shall hold harmless the MCC Representative for any liability or action arising out of the MCC Representative’s role as an Observer on the Board. The Government hereby waives and releases all claims related to any such liability and acknowledges that the MCC Representative has no fiduciary duty to MCA-Mali. In matters arising under or relating to this Compact, the MCC Representative is not subject to the jurisdiction of the courts or any other governmental body of Mali. MCA-Mali shall provide a written waiver and acknowledgement that no fiduciary duty to MCA-Mali is owed by the MCC Representative.

(iii) Management. Unless otherwise agreed in writing by the Parties, the Management shall report, through its chief executive officer (the “Director General”) or other Officer as designated in any Governing Document, directly to the Board and shall have the composition, roles and responsibilities described below and set forth more particularly in the Governing Documents.

(1) Composition. The Government shall ensure that the Management shall be composed of qualified experts from the public or private sectors, including such officers and staff as may be necessary to carry out effectively its responsibilities, each with such powers and responsibilities as set forth in the

Governing Documents, and from time to time in any Supplemental Agreement between the Parties, including the following: (A) Director General; (B) Director of Finance and Administration; (C) Legal Adviser; (D) Director of Procurement; (E) Director of Environmental and Social Assessment; (F) Director of Monitoring and Evaluation; (G) Director of Airport Improvement Project; (H) Director of Industrial Park Project; and (I) Director of Alatona Irrigation Project. Each person holding the position in any of the sub-clauses (A) through (I), and such other offices as may be created and designated in accordance with any Governing Document and any Supplemental Agreement, shall be referred to as an "Officer." The Management shall be supported by appropriate administrative and support personnel consistent with the Detailed Budget for Program administration and any Implementation Document.

(2) Appointment of Officers. The Director General shall be selected after an open and competitive recruitment and selection process, and appointed in accordance with the Governing Documents, which appointment shall be subject to MCC approval. Such appointment shall be further evidenced by such document as the Parties may agree. Unless otherwise specified in the Governing Documents, the Officers of MCA-Mali other than the Director General shall be selected and hired by the Board after an open and competitive recruitment and selection process, and appointed in accordance with the Governing Documents, which appointment shall be subject to MCC approval. Such appointment shall be further evidenced by such document as the Parties may agree.

(3) Roles and Responsibilities. The roles and responsibilities of the Management shall include:

(A) The Management shall assist the Board in overseeing the implementation of the Program and shall have principal responsibility (subject to the direction and oversight of the Board and subject to MCC's contractual rights of approval as set forth in Section 3(c) of this Program Annex or elsewhere in this Compact or any Supplemental Agreement) for the overall management of the implementation of the Program.

(B) Without limiting the foregoing general responsibilities or the generality of Designated Rights and Responsibilities that the Government may designate to MCA-Mali, the Management shall develop each Implementation Document, oversee the implementation of the Projects, manage and coordinate monitoring and

evaluation, ensure compliance with the Fiscal Accountability Plan, and such other responsibilities as set out in the Governing Documents or otherwise delegated to the Management by the Board from time to time.

(C) Appropriate Officers as designated in the Governing Documents shall have the authority to contract on behalf of MCA-Mali under any procurement undertaken in accordance with the Disbursement Agreement (including the Procurement Guidelines) in furtherance of the Program.

(D) The Management shall have the obligation and right to approve certain actions and documents or agreements, including certain Re-Disbursements, MCC Disbursement Requests, Compact Reports, certain human resources decisions and certain other actions, as provided in the Governing Documents.

(e) Advisory Councils.

(i) Formation. The Government shall ensure the establishment of (1) an advisory council to the Board representing the beneficiaries of the Airport Improvement Project and the Industrial Park Project ("Airport Domain Advisory Council"); and (2) an advisory council to the Board representing the beneficiaries of the Alatona Irrigation Project (the "Alatona Zone Advisory Council," together with the Airport Domain Advisory Council, the "Advisory Councils" and each an "Advisory Council"), which Advisory Councils shall be independent of MCA-Mali and shall be established to the satisfaction of MCC. The Government shall take all steps necessary to establish the Advisory Councils as soon as possible following the execution of this Compact.

(ii) Composition.

(1) Each Advisory Council shall consist of no more than fifteen (15) voting members and shall be composed of representatives of relevant banking organizations, microfinance institutions, farmer associations, women's associations, chambers of commerce, local government, anti-corruption associations and environmental and social organizations ("Civil Society Stakeholders").

(2) The Government shall take all actions necessary and appropriate to ensure that each Advisory Council is established consistent with this Section 3(e) of this Program Annex and as otherwise specified in the Governing Documents or otherwise agreed in writing by the Parties. The composition of each Advisory Council may be adjusted by agreement of the Parties from time to time to ensure, among others, an adequate representation of the intended beneficiaries of the relevant

Projects. Each member of an Advisory Council may appoint an alternate, approved by majority vote of the other members of such Advisory Council, to serve when the member is unable to participate in a meeting of the Advisory Council.

(iii) Roles and Responsibilities. Each Advisory Council shall be a mechanism to provide representatives of the private sector, civil society and local government the opportunity to provide advice and input to MCA-Mali regarding the implementation of this Compact. At the request of any Advisory Council, MCA-Mali shall provide such information and documents as it deems advisable, subject to appropriate treatment of such information and documents by the members of such Advisory Council. Specifically, during each meeting of an Advisory Council, MCA-Mali shall present an update on the implementation of this Compact and progress towards achievement of the Objectives. Each Advisory Council shall have an opportunity to provide regularly to MCA-Mali its views or recommendations on the performance and progress on the Projects and Project Activities, any Implementation Document, procurement, financial management or such other issues as may be presented from time to time to such Advisory Council or as otherwise raised by such Advisory Council.

(iv) Meetings. Each Advisory Council shall hold at least two general meetings per year as well as such other periodic meetings as may be necessary or appropriate from time to time. The members of each Advisory Council shall be provided timely advance notice of all such general meetings, invited to participate in all such meetings and afforded an opportunity during each such meeting to present their views or recommendations to such Advisory Council.

(v) Accessibility; Transparency. The members of each Advisory Council shall be accessible to the beneficiaries they represent to receive the beneficiaries' comments or suggestions regarding the Program. The notices for, and the minutes (including the views or recommendations of the Civil Society Stakeholders expressed) of all general meetings of, each Advisory Council shall be made public on the MCA-Mali Web site or otherwise (including television, radio and print) in a timely manner.

(f) Implementing Entities. Subject to the terms and conditions of this Compact and any other Supplemental Agreement between the Parties, MCA-Mali may engage one or more Government Affiliates to implement and

carry out any Project, Project Activity (or a component thereof) or any other activities to be carried out in furtherance of this Compact (each, an "Implementing Entity"). The Government shall ensure that MCA-Mali enters into an agreement with each Implementing Entity, in form and substance satisfactory to MCC, that sets forth the roles and responsibilities of such Implementing Entity and other appropriate terms and conditions (including the payment of the Implementing Entity, if any) (an "Implementing Entity Agreement"). Any Implementing Entity Agreement between MCA-Mali and a Government Affiliate that is a Provider or as may otherwise be required under the Disbursement Agreement shall be in form and substance satisfactory to MCC. The Implementing Entity shall report directly to the relevant Officer, as designated in the applicable Implementing Entity Agreement or as otherwise agreed by the Parties.

(g) Fiscal Matters.

(i) Fiscal Agent. The Government shall ensure that MCA-Mali engages a fiscal agent following an international competitive process (a "Fiscal Agent"), who shall be responsible for, among other things: (1) Assisting MCA-Mali in preparing the Fiscal Accountability Plan; (2) ensuring and certifying that Re-Disbursements are properly authorized and documented in accordance with established control procedures set forth in the Disbursement Agreement, the Fiscal Agent Agreement and other Supplemental Agreements; (3) Re-Disbursement from, and cash management and account reconciliation of, any Permitted Account established and maintained for the purpose of receiving MCC Disbursements and making Re-Disbursements (to which the Fiscal Agent has sole signature authority); (4) providing applicable certifications for MCC Disbursement Requests; (5) maintaining and retaining proper accounting, records and document disaster recovery system of all MCC-funded financial transactions and certain other accounting functions; (6) producing reports on MCC Disbursements and Re-Disbursements (including any requests therefor) in accordance with established procedures set forth in the Disbursement Agreement, the Fiscal Agent Agreement, the Fiscal Accountability Plan, or any other Supplemental Agreements; (7) assisting in the preparation of budget development procedures; and (8) internal management of the Fiscal Agent operations. Upon the written request of MCC, the Government shall ensure that MCA-Mali terminates the Fiscal Agent,

without any liability to MCC, and the Government shall ensure that MCA-Mali engages a new Fiscal Agent, subject to approval by the Board and MCC. The Government shall ensure that MCA-Mali enters into an agreement with the Fiscal Agent, in form and substance satisfactory to MCC, that sets forth the roles and responsibilities of the Fiscal Agent and other appropriate terms and conditions, such as payment of the Fiscal Agent (a "Fiscal Agent Agreement"). Such Fiscal Agent Agreement shall not be terminated until MCA-Mali has engaged a successor Fiscal Agent or as otherwise agreed by MCC in writing.

(h) Auditors and Reviewers. The Government shall ensure that MCA-Mali carries out the Government's audit responsibilities as provided in Sections 3.8(d), (e) and (f) of this Compact, including engaging one or more auditors (each, an "Auditor") required by Section 3.8(d) of this Compact. As requested by MCC in writing from time to time, the Government shall ensure that MCA-Mali also engages (i) an independent reviewer to conduct reviews of performance and compliance under this Compact pursuant to Section 3.8(f) of this Compact, which reviewer shall have the capacity to (1) conduct general reviews of performance or compliance, (2) conduct environmental audits, and (3) conduct data quality assessments in accordance with the M&E Plan, as described more fully in Annex III; and/or (ii) an independent evaluator to assess performance as required under the M&E Plan (each, a "Reviewer"). MCA-Mali shall select any such Auditor(s) and Reviewer(s) in accordance with any Governing Document or other Supplemental Agreement. The Government shall ensure that MCA-Mali enters into an agreement with each Auditor and each Reviewer, in form and substance satisfactory to MCC, that sets forth the roles and responsibilities of the Auditor or Reviewer with respect to the audit, review or evaluation, including access rights, required form and content of the applicable audit, review or evaluation and other appropriate terms and conditions such as payment of the Auditor or Reviewer (the "Auditor/Reviewer Agreement"). In the case of a financial audit required by Section 3.8(d) of this Compact, such Auditor/Reviewer Agreement shall be effective no later than one hundred and twenty (120) days prior to the end of the relevant period to be audited; *provided, however*, if MCC requires concurrent audits of financial information or reviews of performance and compliance

under this Compact, then such Auditor/Reviewer Agreement shall be effective no later than the date agreed by the Parties in writing.

(i) Procurement Agent. The Government shall ensure that MCA-Mali engages one or more procurement agents through an international competitive process (each, a "Procurement Agent") to carry out and certify specified procurement activities in furtherance of this Compact on behalf of the Government, MCA-Mali, or the Implementing Entity. The roles and responsibilities of each Procurement Agent and the criteria for selection of a Procurement Agent shall be as set forth in the applicable Implementation Letter or Supplemental Agreement. The Government shall ensure that MCA-Mali enters into an agreement with each Procurement Agent, in form and substance satisfactory to MCC, that sets forth the roles and responsibilities of the Procurement Agent with respect to the conduct, monitoring and review of procurements and other appropriate terms and conditions, such as payment of the Procurement Agent (each, a "Procurement Agent Agreement"). Any Procurement Agent shall adhere to the procurement standards set forth in the Disbursement Agreement and the Procurement Guidelines and ensure procurements are consistent with the procurement plan adopted by MCA-Mali pursuant to the Disbursement Agreement (the "Procurement Plan"), unless MCA-Mali and MCC otherwise agree in writing.

4. Finances and Fiscal Accountability

(a) Multi-Year Financial Plan; Detailed Budget.

(i) Multi-Year Financial Plan. The multi-year financial plan for the Program, showing the estimated amount of MCC Funding allocable to each Project (and related Project Activities), the administration of the Program (and its components) and the monitoring and evaluation of the Program (the "Multi-Year Financial Plan") over the Compact Term on an annual basis, is summarized in Annex II to this Compact.

(ii) Detailed Budget. During the Compact Term, the Government shall ensure that MCA-Mali timely delivers to MCC a detailed budget, at a level of detail and in a format acceptable to MCC, for the administration of the Program, the monitoring and evaluation of the Program, and the implementation of each Project (the "Detailed Budget"). The Detailed Budget shall be a component of the Work Plan and shall be delivered by such time as specified in the Disbursement Agreement, or as may otherwise be agreed by the Parties.

(iii) Expenditures. Unless the Parties otherwise agree in writing, no financial commitment involving MCC Funding shall be made, no obligation of MCC Funding shall be incurred, and no Re-Disbursement shall be made or MCC Disbursement Request shall be submitted, for any activity or expenditure unless the expense for such activity or expenditure is provided for in the Detailed Budget, and unless uncommitted funds exist in the balance of the Detailed Budget for the relevant period.

(iv) Modifications to Multi-Year Financial Plan or Detailed Budget. Notwithstanding anything to the contrary in this Compact, MCA-Mali may amend the Multi-Year Financial Plan, the Detailed Budget, or any component thereof (including any amendment that would reallocate the funds among the Projects, the Project Activities, or any activity under Program administration or M&E as shown in Annex II), without amending this Compact so long as MCA-Mali requests in writing and receives the approval of MCC for such amendment and such amendment is consistent with the requirements of this Compact (including Section 4 of Annex II), the Disbursement Agreement and any other Supplemental Agreement between the Parties. Any such amendment shall (1) be consistent with the Objectives and the Implementation Documents; (2) shall not materially adversely impact the applicable Project, Project Activity (or any component thereof), or any activity under Program administration or M&E as shown in Annex II; (3) shall not cause the amount of MCC Funding to exceed the aggregate amount specified in Section 2.1(a) of this Compact; and (4) shall not cause the Government's obligations or responsibilities or overall contribution of resources to be less than as specified in Section 2.2(a) of this Compact, this Annex I or elsewhere in this Compact. Upon any such amendment, MCA-Mali shall deliver to MCC a revised Detailed Budget, together with a revised Multi-Year Financial Plan, reflecting such amendment, along with the next MCC Disbursement Request.

(b) Disbursement and Re-Disbursement. The Disbursement Agreement, as amended from time to time, shall specify the terms, conditions and procedures on which MCC Disbursements and Re-Disbursements shall be made. The obligation of MCC to make MCC Disbursements or approve Re-Disbursements is subject to the fulfillment, waiver or deferral of any such terms and conditions. The Government and MCA-Mali shall jointly

submit the applicable request for an MCC Disbursement (the "MCC Disbursement Request") as may be specified in the Disbursement Agreement. MCC will make MCC Disbursements in tranches to a Permitted Account from time to time as provided in the Disbursement Agreement or as may otherwise be agreed by the Parties, subject to Program requirements and performance by the Government, MCA-Mali and other relevant parties in furtherance of this Compact. Re-Disbursements will be made from time to time based on requests by an authorized representative of the appropriate party designated for the size and type of Re-Disbursement in accordance with any Governing Document and Disbursement Agreement; provided, however, unless otherwise agreed by the Parties in writing, no Re-Disbursement shall be made unless and until the written approvals specified herein and in any Governing Document and the Disbursement Agreement for such Re-Disbursement have been obtained and delivered to the Fiscal Agent.

(c) Fiscal Accountability Plan. By such time as specified in the Disbursement Agreement or as otherwise agreed by the Parties, MCA-Mali shall adopt, as part of the Implementation Documents, a plan that identifies the principles, mechanisms and procedures to ensure appropriate fiscal accountability for the use of MCC Funding provided under this Compact, including the process to ensure that open, fair, and competitive procedures will be used in a transparent manner in the administration of grants or cooperative agreements and the procurement of goods, works and services for the accomplishment of the Objectives (the "Fiscal Accountability Plan"). The Fiscal Accountability Plan shall set forth, among others, requirements with respect to the following matters: (i) Re-Disbursements, timely payment to vendors, cash management and account reconciliation; (ii) funds control and documentation; (iii) accounting standards and systems; (iv) content and timing of reports; (v) preparing budget development procedures and the Compact implementation budget; (vi) policies concerning records, document disaster recovery, public availability of all financial information and asset management; (vii) procurement and contracting practices; (viii) inventory control; (ix) the role of independent auditors; (x) the roles of fiscal agents and procurement agents; (xi) separation of duties and internal controls; and (xii)

certifications, powers, authorities and delegations.

(d) Permitted Accounts. The Government shall establish, or cause to be established, such accounts (each, a "Permitted Account," and, collectively, the "Permitted Accounts") as may be agreed by the Parties in writing from time to time, including:

(i) A single, completely separate United States Dollar interest-bearing account (the "Special Account") at a commercial bank, subject to MCC approval, that is procured through a competitive process to receive MCC Disbursements;

(ii) If necessary, an interest-bearing local currency of Mali account (the "Local Account") at a commercial bank in Mali, subject to MCC approval, that is procured through a competitive process to which funds deposited in the Special Account will be transferred for the purpose of making Re-Disbursements; and

(iii) Such other interest-bearing accounts to receive MCC Disbursements in such banks as the Parties mutually agree upon in writing.

No other funds shall be commingled in a Permitted Account other than MCC Funding and Accrued Interest thereon. All MCC Funding held in an interest-bearing Permitted Account shall earn interest at a rate of no less than such amount as the Parties may agree in the applicable Bank Agreement or otherwise. MCC shall have the right, among others, to view any Permitted Account statements and activity directly on-line, where feasible, or at such other frequency as the Parties may otherwise agree. By such time as shall be specified in the Disbursement Agreement or as otherwise agreed by the Parties, the Government shall ensure that, for each Permitted Account, MCA-Mali enters into an agreement with the applicable Bank, satisfactory to MCC, that sets forth the signatory authority, access rights, anti-money laundering and anti-terrorist financing provisions, and other terms related to the Permitted Account (each, a "Bank Agreement"). For purposes of this Compact, the banks holding an account referenced in Sections 4(d) of this Program Annex are each a "Bank" and are collectively referred to as the "Banks."

5. Transparency; Accountability

Transparency and accountability to MCC and to the beneficiaries are important aspects of the Program and the Projects. Without limiting the generality of the foregoing, and in an effort to achieve the goals of transparency and accountability, the

Government shall ensure that MCA-Mali:

(a) Establishes an e-mail suggestion box as well as a means for other written comments that interested persons may use to communicate ideas, suggestions or feedback to MCA-Mali;

(b) Considers as a factor in its decisionmaking the recommendations of the Advisory Councils;

(c) Develops and maintains, in a timely, accurate and appropriately comprehensive manner, the MCA-Mali Web site that includes postings of information and documents in English and French;

(d) Posts on the MCA-Mali Web site, and otherwise makes publicly available via appropriate means (including television, radio and print), in the appropriate language the following documents or information from time to time:

(i) This Compact;

(ii) All minutes of the meetings of the Board and the meetings of the Advisory Councils, unless otherwise agreed by the Parties;

(iii) The M&E Plan, as amended from time to time, along with periodic reports on Program performance;

(iv) Such financial information as may be required by this Compact, the Disbursement Agreement or any other Supplemental Agreement, or as may otherwise be agreed from time to time by the Parties;

(v) All Compact Reports;

(vi) All audit reports by an Auditor and any periodic reports or evaluations by a Reviewer;

(vii) All relevant environmental impact assessments and supporting documents, and such other environmental documentation as MCC may request;

(viii) A copy of the Disbursement Agreement, as amended from time to time;

(ix) A copy of any document relating to the formation, organization and governance of MCA-Mali, including all Governing Documents, together with any amendments thereto; and

(x) A copy of the Procurement Guidelines, any procurement policies or procedures and standard documents, certain information derived from each Procurement Plan (as specified in the Disbursement Agreement), and all bid requests and notifications of awarded contracts.

6. Environmental Accountability

(a) The Government shall ensure that MCA-Mali (or any other Permitted Designee) (i) undertakes and completes any environmental impact assessments (each, an "EIA"), any environmental

assessment (each an "EA"), environmental management plans (each, an "EMP") and resettlement action plans (each, a "RAP"), each in form and substance satisfactory to MCC, and as required under the laws of Mali, the Environmental Guidelines, this Compact or any Supplemental Agreement or as otherwise required by MCC; and (ii) undertakes to implement any environmental and social mitigation measures identified in such assessments or plans to MCC's satisfaction.

(b) The Government shall commit to fund all necessary costs of environmental mitigation (including costs of resettlement) not specifically provided for in the budget for any Project.

Schedule 1 to Annex I—Airport Improvement Project

This Schedule 1 generally describes and summarizes the key elements of the project that the Parties intend to implement in furtherance of the Bamako-Sénou Airport Improvement Project Objective (the "Airport Improvement Project"). Additional details regarding the implementation of the Airport Improvement Project will be included in the Implementation Documents and in the relevant Supplemental Agreements.

1. Background

Economic growth and poverty reduction depend on enhanced access to markets and trade, but Mali's access is severely constrained. The Airport Improvement Project will expand Mali's access to markets and trade through improvements to the transportation infrastructure at the Airport, and better management of the national air transport system. The Government recognizes the importance of improved air transportation infrastructure. Mali's PRSP for 2002 includes rehabilitation of Airport infrastructure to "promote access of Malian producers to domestic and international markets."

Mali, a landlocked country, depends heavily on inadequate rail and road networks that result in high transportation costs, as well as on freight transport through seaports in neighboring countries, such as Conakry, Guinea (Bamako's closest port which is 1000 km away) and Abidjan, Cote d'Ivoire. In the last few years, the instability in Cote d'Ivoire has dramatically limited Mali's market access. Before the outbreak of the Ivorian crisis, 70% of Malian exports were transported via the port of Abidjan. In 2003, this amount dwindled to less than 18% due to the aforementioned crisis. Mali cannot

control overland routes to international and regional markets. Therefore, air traffic has become Mali's lifeline for transportation of both passengers and export products.

The deteriorating conditions at the Airport will soon limit the Airport's capacity to handle air traffic growth if significant capital improvements are not made. The Airport's basic infrastructure dates from 1974, is in poor condition, and is inadequate to handle increased passenger and cargo traffic. On the airside, the runway is too short to accommodate large aircraft without take-off load penalties, the aeronautical pavements urgently need resurfacing and reinforcement, the air navigation aids are reaching the end of their useful life, and airfield security is deficient. On the landside, the passenger terminal building is too small to handle current traffic volumes at acceptable levels of service, and the facilities and equipment are in poor physical condition.

2. Summary of Project and Related Project Activities

The Airport Improvement Project is intended to remove constraints to air traffic growth and increase the Airport's efficiency in both passenger and freight handling through airside and landside infrastructure improvements, as well as the establishment of appropriate institutional mechanisms to ensure effective management, operation, and maintenance of the Airport facilities over the long term. The Airport Improvement Project includes the following Project Activities:

- Airside Infrastructure.

Improvements will include reinforcement overlay to, and expansion of, the runway, taxiway, and apron areas; replacement of deteriorating navigational equipment; and upgrades of Airport security systems.

- Landside Infrastructure.

Improvements will be made to the existing passenger terminal and a new passenger terminal will be constructed, as well as support facilities, airport roads, and parking lots. Certain utilities, including water supply, solid waste disposal facilities, wastewater treatment, and power generation, are also planned to be constructed and designed as joint systems to support both the proposed investments at the Airport and the adjacent Industrial Park.

- Institutional Strengthening.

Infrastructure improvements will be accompanied by the establishment of appropriate institutional mechanisms to ensure effective management, operation and maintenance of the Airport facilities over the long term. These measures will involve both the management of the

Airport, as well as the wider regulatory framework governing the civil aviation sector in Mali.

In connection with the Project Activities, MCA-Mali will assist and take all necessary steps to ensure that the joint EIA, EMP/EMS, including an HIV/AIDS awareness plan, and RAP (consistent with World Bank Operational Policy 4.12 on Involuntary Resettlement) for all activities of the Airport Improvement Project and the Industrial Park Project are processed and permits delivered in accordance with Mali Decrét No. 03-594-P-RM on environmental impact studies and the Environmental Guidelines, all of which will be subject to MCC approval. MCC Funding will support implementation of the environmental and social mitigation measures identified in the EIA, EMP/EMS, and RAP, in a manner satisfactory to MCC, according to the conditions precedent set forth in the Disbursement Agreement.

The M&E Plan (described in Annex III) will set forth anticipated results and, where appropriate, regular benchmarks that may be used to monitor the progress of the implementation of the Airport Improvement Project.

Performance against these benchmarks, as well as the overall impact of the Airport Improvement Project, will be assessed and reported at the intervals to be specified in the M&E Plan, or as otherwise agreed by the Parties, from time to time. The Parties expect that additional indicators will be identified during implementation of the Airport Improvement Project. The expected results from, and the key benchmarks to measure progress on, the Airport Improvement Project, as well as the Project Activities undertaken or funded thereunder, are set forth in Annex III.

Estimated amounts of MCC Funding for each Project Activity for the Airport Improvement Project are identified in Annex II. Conditions precedent to each Project Activity under the Airport Improvement Project, and the sequencing of such Project Activities, shall be set forth in the Disbursement Agreement, other Supplemental Agreements and the relevant Implementation Documents. The following summarizes each Project Activity under the Airport Improvement Project:

(a) Airside Infrastructure (the "Airside Infrastructure Activity").

Although the existing aircraft pavements, runway, and parking apron surfaces are functional, they are more than thirty years old and detailed studies have indicated that they will deteriorate without near-term improvements. In addition to being in

poor condition, the runway is also one of the shortest in West Africa, which has further constrained the Airport's ability to attract air services to Mali and retain them. This Project Activity will improve the design parameters (geometry and bearing strength) of the airside infrastructure and improve safety and security operations such that the Airport can more efficiently accommodate a greater volume of air traffic and heavier loads in the future. Specifically, MCC Funding will support the following:

(i) Resurfacing, reinforcement, and expansion of the runway, apron, and aircraft pavement areas through (1) a structural overlay to apron, taxiway, and runway areas; (2) an extension of the runway of at least 400 meters; and (3) an extension of the taxiway connector aircraft parking apron to provide a location for additional aircraft overnight staging and a back-up for smaller domestic and charter aircraft.

(ii) Replacement and upgrading of existing aging navigational aids to bring Airport facilities up to a "common level of service," as the equipment has reached the end of its useful life. The extension of the runway will also require additions to the airfield lighting system.

(iii) Improvement to airfield security will include (1) a perimeter security road; (2) explosives detection, x-ray, and handheld metal detection equipment; (3) security identification/access and video surveillance systems; and (4) a central security control point and communications equipment.

(b) Landside Infrastructure (the "Landside Infrastructure Activity").

Due to limited expansion over the past 32 years, the ability of the terminal to accommodate passenger traffic has steadily deteriorated to the point that it operates at IATA Level of Service "F" (chronic congestion and frequent system breakdown). The existing ground support equipment facilities are inefficient, outdated, and lacking in space for storage of materials; their current location separates passenger activities from Airport support operations, with a resulting negative impact on the functionality and security of the Airport. As passenger and cargo traffic increase over the next 10-15 years, significant utility infrastructure improvements will also be needed to meet projected demand. This Project Activity will expand the size, quality, and operational efficiency of the Airport's landside infrastructure so that it can accommodate significant increases in passenger and cargo traffic in the future. Specifically, MCC Funding will support the following:

(i) Upgrade of the passenger terminal facilities by (1) refurbishing the existing Terminal A's passenger ticketing, lounge, and passport control areas; (2) expanding the existing Terminal B's immigration and baggage areas; and (3) constructing a new passenger terminal building.

(ii) Enhancement of support facilities and equipment for ground support vehicles and materials, Airport maintenance and auxiliary equipment areas, and fire-fighting vehicles.

(iii) Provision for road and terminal parking improvements to improve current circulation areas and meet future projected needs.

(iv) Construction of supporting utility infrastructure, much of which will be shared with the Industrial Park Project, to handle the projected service requirements of the Airport. In particular, wastewater, water, solid waste, power, telecommunications, and drainage systems will be improved and enhanced.

(c) Project Activity: Institutional Strengthening (the "Institutional Strengthening Activity").

Under the present division of jurisdictions, a number of entities have responsibility for the civil aviation sector in Mali in general and the regulation, oversight, management, operation, and development of the Airport in particular. The Ministry of Equipment and Transport has overall responsibility, with oversight and regulation of the civil aviation sector and airports delegated to a new independent agency, ANAC. The Airport's maintenance and operation responsibilities are split between the air navigation service provider, ASECNA, for airside facilities and the Airport operator, Aéroports du Mali ("AdM"), for landside facilities. ASECNA is responsible for the "technical" aspects of the Airport, including the runway, taxiways, apron, airfield lighting, navigational aids, control tower, telecommunications and fire fighting and rescue facilities. AdM, in turn, is responsible for the "commercial" aspects of the Airport, including the passenger terminal, landside roads and parking, cargo terminal, flight kitchen and freight forwarders' facilities. According to the existing institutional arrangements, both organizations operate and maintain facilities put at their disposal by the Government.

Specifically, MCC Funding will support the following:

(i) Reinforcement of the new civil aviation regulatory and oversight agency (ANAC) by providing technical assistance to establish a new organizational structure, administrative

and financial procedures, staffing and training, and providing equipment and facilities.

(ii) Rationalization and reinforcement of the Airport's management and operations agency (AdM) by providing technical assistance to establish a model for the management of the Airport and the long-term future status and organizational structure of AdM, including provision for eventual private sector participation.

3. Beneficiaries

Improvements in the airside and landside facilities in the Airport are intended to support economic growth through (a) increased revenue generated by growth in passenger and aircraft traffic, and (b) increases in the value and volume of goods shipped through the Airport. Direct beneficiaries include passengers who spend less time going through Airport procedures prior to boarding, additional Airport services employees for Airport operations, baggage handling, and flight kitchen, as well as passenger terminal commercial concessions. An increase in foreign passengers implies additional substantial benefits for the tourism industry, both in terms of increased revenues to hotels and restaurants and additional employment and wages.

The indirect impact of the Airport Improvement Project through increased tourism and impact on the informal sector could have a significant effect on growth and poverty reduction. Increased demand for airline services should have significant additional long-term benefits for Mali as tourist facilities expand in tandem with increased tourism. Further, new business travelers may translate into additional foreign investment for Mali which could transform the economic profile of the country.

The informal sector active around the Airport will benefit from an expansion of Airport passenger and cargo traffic. Since unemployment and underemployment in the Bamako region are substantial, a proportion of new service employees are likely to transfer from low paying, sporadic informal activity to higher paying, steady work at the Airport, an additional important indirect benefit to the economy.

A majority of those impacted by the Airport Improvement Project are expected to be women since official Malian employment data indicate that 82% of hotel and restaurant workers in Bamako are women. Women also account for 56% of the informal sector and the majority of working women in Bamako are employed in the informal sector. Further analysis using data from specific surveys to be conducted, will

provide more detailed and reliable data on employment and poverty in the Bamako area.

4. Donor Coordination; Role of Private Sector and Civil Society

The Airport Improvement Project leverages and complements other donor, private sector and civil society activities in Mali as described below. Throughout implementation, MCC will continue to collaborate with these donors to strengthen the institutional reforms and broaden access to the Airport for passengers and goods.

USDOT Safe Skies for Africa (SSFA)

The SSFA program is intended to promote sustainable improvements in aviation safety, security, and air navigation, and to support Africa's integration into the global economy. It is based on the premise that "Safe Skies" are a prerequisite for increased trade and investment and long-term economic development in Africa. Specific goals of the SSFA program include: (a) Increasing the number of sub-Saharan African countries that meet ICAO safety standards (based on Federal Aviation Administration (FAA) assessments); (b) improving airport security in the region; and (c) improving regional air navigation services. SSFA coordinates activities of other agencies such as the FAA, TSA and the National Transportation Safety Board to improve the capacities of African aviation organizations.

World Bank

The World Bank is assisting in the funding of a regional program in West and Central Africa aimed at improving civil aviation safety and security as a key element of improving the performance and affordability of air transportation and optimizing its role as an engine of economic and social development. With respect to Mali, a country agreement under this program focuses on strengthening the oversight capacities of ANAC and improving Airport security and safety, including the provision of civil aviation authority equipment, Airport screening equipment, a crisis center to meet ICAO requirements, some Airport infrastructure and consulting services aimed at reform and capacity building.

The World Bank has also signed an agreement with the Government for the "Mali Growth Support Project" which includes, among other activities, loan financing for the development of Airport and industrial park facilities located within the Airport domain. It also includes assistance aimed at strengthening the management of the

Airport and Industrial Park. The program is to be realized between 2006 and 2011.

COSCAP/WAEMU

Mali is a signatory of a recent agreement involving the West African Economic and Monetary Union ("WAEMU") and Mauritania and ICAO, referred to as Cooperative Operational Safety and Continuing Airworthiness Project ("COSCAP"), with the goal of promoting the security and safety of aviation in the West African region. Under this agreement, a permanent community agency of safety and security is to be established, with the aim of achieving better efficiency and economy by means of the common use of resources on the part of the signatory countries.

Private Sector and Civil Society

Private sector and civil society participated in the consultative process that resulted in inclusion of the Airport Improvement Project in the Compact. This Project aims to leverage investment by businesses in the Airport, as well as through businesses that benefit from Airport traffic (including airlines, ground support operators, retail concessions, businesses exporting and importing through the Airport, tourism operators, etc.), so efforts will be made to continue to involve their feedback on the design and implementation of this Project. Both civil society and the private sector will be represented on the MCA-Mali Board of Directors and Advisory Councils. In addition, consultations on the EIA will be conducted with affected parties and other stakeholders, in accordance with the Environmental Guidelines, Mali Décret No. 03-594-P-RM on environmental impact studies, and the draft Arrête Interministeriel on the procedure for public consultation on environmental impact studies. Also, consultations of persons affected by the Airport Improvement Project will be conducted for the RAP, consistent with World Bank Operational Policy 4.12 on Involuntary Resettlement.

5. U.S. Agency for International Development ("USAID")

Both USAID-funded "Mali Finance" and "Mali Trade" projects have improved the value chains of agricultural products such as mangoes and green beans. These high value products have strong potential for increased exportation via air freight.

6. Sustainability

The Airport Improvement Project will build on recent Government efforts to

reform the Malian civil aviation sector through the Institutional Strengthening Activity, providing technical assistance to both ANAC and AdM. The Airport Improvement Project will also assist in improving the maintenance and operation of the Airport by ensuring the implementation of efficient, transparent and effective private participation in the management of the Airport, in collaboration with relevant Government entities, as well as the private sector. Environmental and social sustainability is expected to be achieved through the development and implementation of an EMP that will guide construction activities and implementation of pollution control for new and rehabilitated infrastructure. An Environmental Management System (“EMS”) will be developed to provide for continuing environmental sustainability of Airport operations. AdM and the DNCNP will receive technical assistance to develop environmental capacity during the Compact Term. AdM will be required to seek ISO 14000 certification prior to the end of the Compact Term. AdM will also be required to hire an Airport and Industrial Park environmental manager to oversee the implementation of environmental requirements.

7. Proposals

Public solicitations for proposals are anticipated to procure goods, works and services, as appropriate, to implement all Project Activities under the Airport Improvement Project. MCA-Mali will develop, subject to MCC approval, a process for consideration of all such proposals. Notwithstanding the foregoing, MCA-Mali may also consider, using a process developed subject to MCC approval, any unsolicited proposals it might receive.

8. Government Obligation

The Government shall assure the provision of adequate financing for the rehabilitation and expansion of air cargo facilities.

Schedule 2 to Annex I—Industrial Park Project

This Schedule 2 generally describes and summarizes the key elements of the project that the Parties intend to implement in furtherance of the Industrial Park Project Objective (the “Industrial Park Project”). Additional details regarding the implementation of the Industrial Park Project will be included in the Implementation Documents and in the relevant Supplemental Agreements.

1. Background

An adequate water supply, reliable power, wastewater treatment systems, and solid waste disposal are necessary to attract entrepreneurs and promote economic growth. Currently, Mali lacks the infrastructure to provide these services reliably. The Industrial Park Project will create this necessary infrastructure to respond to the pent-up demand for serviced industrial land. Through an MCC-funded demand study conducted in January 2006, Malian business owners strongly expressed a willingness to pay for good quality land with solid infrastructure and reliable services. The Industrial Park Project also aims to reduce the excessive cost and time of setting up and running businesses in Mali. Out of all manufacturing projects licensed by the CNPI, only a fraction are implemented. This poor implementation rate is a current concern of the Government and steps have been taken to improve the business climate and provide the necessary infrastructure through MCC’s investment. In addition to contributing to the efforts toward policy and institutional reform, the Industrial Park Project will provide business services to support small- and medium-sized enterprises.

2. Summary of Project and Related Project Activities

The Industrial Park Project, located within the Airport domain, will develop a platform for industrial activity (100 hectares (“ha”) initially) to meet the high and growing demand for industrial land. The Industrial Park is intended to be an anchor for a growing industrial sector in Mali, thereby alleviating a key constraint to value-added production and economic growth. Reliable provision of utility services, including electricity, water, and wastewater, will increase business productivity. This Project will leverage national reforms in the business sector, reducing the cost and time to register a business, and enhance management and planning of the industrial sector. The Industrial Park Project includes the following Project Activities:

- **Primary and Secondary Infrastructure.** The Industrial Park Project will fund primary and secondary infrastructure systems for the 100 ha Industrial Park, designed for potential expansion to a larger 200 ha industrial zone (as identified in the Proposal). The primary infrastructure will include major road systems and utilities such as water supply mains and pump stations. Secondary infrastructure will include roads leading into Industrial Park

subzones as well as lateral water/drainage piping, etc. to service the smaller parcels. The tertiary (on-lot) infrastructure, including interior roads and parking, water supply taps/connections and fire protection, electrical and telecommunications, and wastewater collection (and possibly pretreatment), are all to be financed and built by the industries locating in the Industrial Park.

- **Resettlement.** Resettlement activities, which must be consistent with World Bank Operational Policy 4.12 on Involuntary Resettlement, require compensation for loss of livelihoods as a result of both physical and economic displacement. The scope of this displacement is larger than the 200 ha acquisition of land and compensation of users for the Industrial Park. Common infrastructure facilities for wastewater treatment, power generation, water supply, conveyance and storage, and solid and hazardous waste disposal serve both the Industrial Park and the Airport. All of these infrastructure facilities require acquisition and clearing of land and rights of way outside the Industrial Park, both inside and outside the Airport domain. To compensate peri-urban cultivators who practice rain-fed agriculture in the Airport domain and whose lands are required for the Industrial Park Project and the Airport Improvement Project, the Industrial Park Project will develop serviced garden plots offered on a long-term (e.g., 40-year) lease on land elsewhere in the Airport domain. Acquisition of other land for infrastructure and rights of way located outside the Airport domain will also require compensation, the nature of which will be determined during the development of the RAP, which will cover the resettlement and compensation issues related to both the Industrial Park Project and the Airport Improvement Project.

- **Institutional Strengthening.** Infrastructure improvements will be accompanied by the establishment of appropriate mechanisms that will ensure effective management, operation and maintenance of the facilities over the long term. These mechanisms will involve the management of the Industrial Park itself, as well as administrative and regulatory reforms to alleviate current constraints to business development in Mali. To encourage the development of small- and medium-sized enterprises, the Industrial Park Project will provide business services such as access to financial and market information and export facilitation services. The Industrial Park Project will also focus on how to ensure

coordination in operations and maintenance of shared utilities between the Airport and Industrial Park operators.

In connection with the Project Activities, MCA-Mali will assist and take all necessary steps to ensure that the joint EIA, EMP/EMS, including an HIV/AIDS awareness plan, and RAP (consistent with World Bank Operational Policy 4.12 on Involuntary Resettlement) for all activities of the Industrial Park Project and the Airport Improvement Project are processed and permits delivered in accordance with Mali Décret No. 03-594-P-RM on environmental impact study and the Environmental Guidelines, all of which will be subject to MCC approval. MCC Funding will support implementation of the environmental and social mitigation measures as identified in the EIA, EMP/EMS, and RAP, satisfactory to MCC, according to the conditions precedent set forth in the Disbursement Agreement.

The M&E Plan (described in Annex III) will set forth anticipated results and, where appropriate, regular benchmarks that may be used to monitor the progress of the implementation of the Industrial Park Project. Performance against these benchmarks, as well as the overall impact of the Industrial Park Project, will be assessed and reported at the intervals to be specified in the M&E Plan, or as otherwise agreed by the Parties, from time to time. The Parties expect that additional indicators will be identified during implementation of the Industrial Park Project. The expected results from, and the key benchmarks to measure progress on, the Industrial Park Project, as well as the Project Activities undertaken or funded thereunder, are set forth in Annex III.

Estimated amounts of MCC Funding for each Project Activity for the Industrial Park Project are identified in Annex II. Conditions precedent to each Project Activity under the Industrial Park Project, and the sequencing of such Project Activities, shall be set forth in the Disbursement Agreement, any other Supplemental Agreements and the relevant Implementation Documents. The following summarizes each Project Activity under the Industrial Park Project:

(a) Primary and Secondary Infrastructure (the "Primary and Secondary Infrastructure Activity").

The Primary and Secondary Infrastructure Activity will involve the building of necessary infrastructure and the reliable provision of utility services for the Industrial Park. Consistent with international best practices, the Industrial Park Project's primary and

secondary infrastructure has been sized to meet projected demand for land over a 20-year horizon (100 ha within a larger 200 ha zone). As plots are marketed and leased, the industries themselves will build the on-lot buildings and facilities to begin operations. This Project Activity will provide the backbone for the first modernly managed, serviced industrial park in Mali, meeting the significant immediate and projected need for industrial space in the country. Specifically, MCC Funding will support the following:

(i) Transportation improvements including construction of a primary road, adjustment and construction of traffic rotaries, and development of internal access roads and sidewalks, to handle the projected traffic for the Industrial Park. In addition, some earthworks (leveling and compacting) are required due to existing site topography.

(ii) Wastewater collection and treatment including construction of a wastewater treatment plant (to be shared with the Airport Improvement Project), pumping station, and collection system, as there is currently no adequate system available in the Airport domain.

(iii) Solid and hazardous waste treatment and disposal through the development of a Government landfill site located east of the Airport domain or an alternative incinerator facility. Solid and hazardous waste cells will be constructed to meet the projected waste arising from the Airport Improvement Project and Industrial Park Project.

(iv) Power generation and distribution by funding a 20 MW co-generation power plant to be shared with the Airport Improvement Project, along with high-tension lines, transformers, back-up emergency generators, and electric substations.

(v) Water treatment and supply through development of a water treatment plant and pump station west of the Airport domain, to be shared with the Airport Improvement Project. In addition, the Industrial Park Project will fund water storage tanks and an enhanced distribution network for the Airport domain.

(vi) Telecommunications improvements by installing backbone fiber-optic cable network.

(vii) Surface drainage improvements, including retention basins, drainage canal improvements, and stormwater collection drains, to control and retain storm water runoff, especially during the rainy season.

(viii) Security improvements such as a perimeter security fence will be required for the new Industrial Park.

(b) Resettlement (the "Resettlement Activity").

The Resettlement Activity will involve resettlement compensation for all those economically or physically displaced as a result of the Industrial Park Project and related support infrastructure, which will be shared by the Industrial Park Project and the Airport Improvement Project. Specifically, MCC funding will support the following:

(i) Development of serviced garden plots on approximately 20 ha of the Airport domain, to be offered on a long-term (e.g., 40-year) lease to replace the loss of resources (physical or economic displacement) of those cultivating or otherwise using the Industrial Park area or other parts of the Airport domain where land acquisition is required for the common infrastructure. The specific area needed will depend upon the cadastral mapping of lands and identification of rights holders, to be provided by the Government, for lands required by the Project Activities within the Airport domain.

(ii) Final design and implementation of siting and designs of serviced market gardening plots, based on consultation with those affected and agreement on the location.

(iii) Compensation, which could include serviced garden plots or other forms of compensation, for those physically or economically displaced in locations outside the Airport domain that are required for infrastructure construction and rights of way, based on the locations of the infrastructure and the analysis to be conducted in the RAP.

(c) Institutional Strengthening (the "Institutional Strengthening Activity").

Currently, enterprises in the Bamako area have one major option for industrial land—Sotuba, located in the Bamako region and one of the few industrial zones in the country. Unfortunately, Sotuba is unsuitable for further industrial development. Roads are unpaved, narrow, and congested; water and electricity connections are inadequate; drainage is poor, with flooding common in the rainy season; and there is no control on the kind or location of uses in the industrial zone, so that slaughterhouses are located next to milk factories and residential areas have encroached into industrial spaces. The problems of Sotuba can be directly attributed to a lack of initial planning and the absence of an appropriate management structure to supervise the development and the ongoing operation of the industrial zone. Specifically, MCC Funding will support the following:

(i) Recruitment and start-up of a private operator, selected through

international tender, to manage the day-to-day operations of the Industrial Park.

(ii) Support to businesses in the Industrial Park and other related organizations to the Industrial Park. This will involve limited support services to small- and medium-sized enterprises in areas such as access to financial and market information and export facilitation. As part of this sub-activity, the Industrial Park will also coordinate closely with and support organizations responsible for attracting and approving industrial projects, as well as with regulatory and licensing bodies.

(iii) Coordination in operations and maintenance of shared utilities between the Airport and Industrial Park operators. This will also involve coordination with utility companies and other Government agencies involved in approving, managing, and operating utilities that will serve the Industrial Park and Airport.

3. Beneficiaries

The industrial sector in Mali currently accounts for eight percent of GDP. The IMF projections suggest that industry (manufacturing, mining, energy, and construction) will continue to expand at more than a six percent annual rate through 2010. Manufacturing output accounts for about one-third of all industrial activity, with the majority of manufacturing firms located in the Bamako region.

The tenants of the Industrial Park would be start-up and relocated businesses—both attracted by a convenient site, good infrastructure, and support services. Existing firms will choose to relocate to the Industrial Park if the gains in efficiency more than compensate their relocation costs and higher expenses on utilities such as water and power. While the exact pattern of investments in the Industrial Park cannot be predicted, it is expected that the agro-processing, printing, packaging, and information technology-related firms will constitute the main sector of activities. Based on current trends, business ownership is most likely to be Malian, although there may also be joint ventures.

Direct beneficiaries will be firms locating in the Industrial Park, especially small and medium enterprises with fewer alternatives, who will benefit from improved infrastructure and services. Employees of these firms also constitute direct beneficiaries of this Project. Firms that will supply the Industrial Park with goods and services will also benefit from the Project, adding to the employment impact.

It is expected that the indirect benefits will be considerably greater than the direct benefits, encouraging prospective entrepreneurs and investors through an improved business climate and better infrastructure. Shifting even a portion of Malian real estate investments to value-added activities would also contribute to poverty reduction.

4. Donor Coordination; Role of Private Sector and Civil Society

The Industrial Park Project leverages and complements other donor, private sector and civil society activities in Mali as described below. This Project will continue to collaborate closely with these actors throughout implementation to support private management of, and attract new businesses to invest in, the Industrial Park.

World Bank

Among other objectives, the World Bank "Mali Growth Support Project" aims to improve the investment climate to increase total factor productivity and growth; assist in the development of infrastructure with a focus on the Airport and Industrial Park; expand the telecommunications network; make various infrastructure improvements for tourism and mining; and increase term financing for micro-, small-, and medium-sized enterprises ("MSMEs") and provide business development services ("BDS"). The Industrial Park Project also complements the World Bank Agriculture and Diversification Project which aims to increase agricultural productivity and diversification into higher value crops.

Other Donors

The Industrial Park Project complements other donors' programs, such as the Dutch Development Agency's activities in agricultural diversification and marketing, agricultural processing, improved water management, and institutional strengthening in the ON zone. The Dutch Development Agency has recently approved financing for a cold storage facility in Bamako that will be located in the Airport domain. This facility will be used for mangoes and other high value agricultural products, such as green beans and potatoes.

Private Sector and Civil Society

Private sector and civil society participated in the consultative process that resulted in inclusion of the Industrial Park Project in the Compact. The Industrial Park Project aims to leverage investment by the private sector in the Industrial Park, so efforts will be made to continue to seek private

sector and civil society feedback on the design and implementation of the Industrial Park Project. Both the private sector and civil society will be represented on the Board and Advisory Councils. In addition, consultations on the EIA will be conducted with affected parties and other stakeholders, in accordance with the Environmental Guidelines, Mali Décret No. 03-594-P-RM on environmental impact studies and the draft Arrête Interministeriel on the procedure for public consultation on environmental impact studies. Also, consultations of persons affected by the Industrial Park Project will be conducted for the RAP, consistent with World Bank Operational Policy 4.12 on Involuntary Resettlement.

5. USAID

The Industrial Park Project will build on USAID's efforts during implementation and strengthen best practices in agricultural and financial support to farmers and capacity building of API-Mali.

- Mali Finance provides business development services through financial institutions and other partners, such as MSMEs and MFIs, especially in northern Mali. Through this project, USAID is supporting the establishment and start-up of API-Mali, the investment promotion agency, responsible for promoting, approving and regulating industrial activity in Mali.
- Trade Mali provides marketing support and targets six agricultural sectors: mango, potato, red meat, rice, shea butter, and sesame.

6. Sustainability

MCC will support the recruitment and start-up of a private operator to manage the Industrial Park and will finance limited business support services to tenants of the Industrial Park. To encourage the creation and growth of MSMEs, the Industrial Park Project will help MSMEs access financial and market information, as well as export facilitation services. In addition, the Industrial Park Project will focus on how to ensure coordination in operations and maintenance of shared utilities between the Airport and Industrial Park operators.

Environmental and social sustainability provisions for the Industrial Park will be similar to those for the Airport Improvement Project. In addition, agreement to adhere to pre-established site standards and requirements for pollution control, such as pre-treatment of effluents and appropriate management of waste, will be pre-requisites for installation by industry into the Industrial Park. Site

standards and requirements will be outlined in the EMP and EMS.

7. *Proposals*

Public solicitations for proposals are anticipated to procure goods, works and services, as appropriate, to implement all Project Activities under the Industrial Park Project. MCA-Mali will develop, subject to MCC approval, a process for consideration of all such proposals. Notwithstanding the foregoing, MCA-Mali may also consider, using a process developed subject to MCC approval, any unsolicited proposals it might receive.

Schedule 3 to Annex I—Alatona Irrigation Project

This Schedule 3 generally describes and summarizes the key elements of the project that the Parties intend to implement in furtherance of the Alatona Irrigation Project Objective (the "Alatona Irrigation Project"). Additional details regarding the implementation of the Alatona Irrigation Project will be included in the Implementation Documents and in the relevant Supplemental Agreements.

1. *Background*

MCC's investments will support the development of key infrastructure and policy reform for productive sectors and capitalize on one of Mali's major assets, the Niger River Delta, for irrigated agriculture. The Alatona Irrigation Project will create a platform for increased production and productivity of agriculture and will be a catalyst for the transformation and commercialization of family farms. It will support Mali's national development strategy to increase the contribution of the rural sector to economic growth and help achieve national food security. Agriculture is a vital economic sector, contributing 40% to GDP. Eighty percent of the population earns a living from agriculture. MCC's investments in this sector will be strengthened by policy reforms and institutional support such as formal land titles for farmers, demand-driven rural advisory services, an improved business environment, and increased access to markets and trade. The hard and soft investments will impact the poor in Mali, particularly Malian farmers and small and medium-size entrepreneurs, not only in the Alatona zone but, over time, on a national and regional scale.

The Alatona zone is located in the ON. The term ON refers both to the geographical zone and the authority charged with the management of water resources and agricultural support in

the zone. The ON comprises one million ha of a vast fossilized inland delta whose rich, alluvial soils can be irrigated via a gravity-fed system from the Niger River, the largest river in West Africa. Its waters are highly suitable for irrigation with low sediment and salt content, minimizing the risk of salinization. Recognized as a high potential agricultural zone, the French colonial administration established an extensive hydrological network of diversions, canals, and drains in the 1930s. Rice production has been the dominant agricultural activity since 1970, with some counter-season horticultural production. Approximately 77,000 ha are under production today, with the possibility for expansion to 200,000 ha, with further infrastructure investment.

2. *Summary of the Alatona Irrigation Project and Related Project Activities*

The Alatona Irrigation Project is focused on increasing production and productivity, increasing farmer incomes, improving land tenure security, modernizing irrigated production systems and mitigating the uncertainty from subsistence rain-fed agriculture. It seeks to develop 16,000 ha of newly irrigated lands, representing an almost 20% increase of "drought-proof" cropland and a 7% increase of the country's total stock of fully or partially irrigated land. The Alatona Irrigation Project will introduce innovative agricultural, land tenure, and water management practices, as well as policy and organizational reforms aimed at realizing the ON's potential to serve as an engine of rural growth for Mali. The Project Activities that are funded under this Project are:

- Niono-Goma Coura Road. This Project Activity will upgrade an 81 km north-south road within the national highway network from its current earth/gravel condition to a paved standard. The investment will also include an additional access spur to the Alatona perimeter at the village of Dogofry.
- Irrigation Planning and Infrastructure. This Project Activity will involve main conveyance system expansion, Alatona irrigation system development, and support to the ON agency on water management.
- Land Allocation. The Alatona Irrigation Project will improve rural land tenure security in Mali by allocating newly developed, irrigated land to family farmers, women market gardeners, and farming companies in private ownership. These land recipients will purchase the land by making annual payments over a 15–20 year period. This Project Activity

consists of land parcel creation, land rights education, registration system upgrade, land parcel allocation and titling, and management of land revenues.

- Resettlement, Social Infrastructure, and Social Services. This Project Activity will compensate families residing in the perimeter or with rights to land therein consistent with World Bank Operational Policy 4.12 on Involuntary Resettlement by offering land in the irrigation perimeter or, if the land option is not chosen, other compensation alternatives. This Project Activity will provide social infrastructure, to serve these project-affected persons plus incoming settlers and other migrant families and also support social services (primarily education and health staff) during the last three years of the Compact Term.

- Agricultural Services. This Project Activity will support a range of agricultural, institutional and related services to strengthen capacity and improve agricultural practice through applied agricultural research, extension and farmer training, support to farmer organizations, and support to water users associations ("WUAs").

- Financial Services. This Project Activity will encourage agricultural lending by reducing the risks of extending credit in this newly developed zone, improving transparency within the existing financial system, and strengthening the capabilities of local financial institutions through a credit risk sharing program, microfinance credit bureau strengthening, financial institution capacity building, and direct support to farmers.

In connection with the Project Activities (other than the Road Activity, except as provided in Section 2(a) below), MCA-Mali will assist and take all necessary steps to ensure that the EIA, EMP (including an HIV/AIDS awareness plan and a pest management plan), and RAP (consistent with World Bank Operational Policy 4.12 on Involuntary Resettlement) for all irrigation activities of the Alatona Irrigation Project are processed and permits delivered in accordance with Mali Décret No. 03–594–P–RM on environmental impact studies and the Environmental Guidelines, all of which will be subject to MCC approval. MCC funding will support implementation of the environmental and social mitigation measures as identified in the EIA, EMP, HIV/AIDS awareness plan, pest management plan and RAP, satisfactory to MCC, according to the conditions precedent set forth in the Disbursement Agreement.

The M&E Plan (described in Annex III) will set forth anticipated results and, where appropriate, regular benchmarks that may be used to monitor the progress of the implementation of the Alatona Irrigation Project. Performance against these benchmarks, as well as the overall impact of the Alatona Irrigation Project, will be assessed and reported at the intervals to be specified in the M&E Plan, or as otherwise agreed by the Parties. The Parties expect that additional indicators will be identified during implementation of the Alatona Irrigation Project. The expected results from, and the key benchmarks to measure progress on, the Alatona Irrigation Project, as well as the Project Activities undertaken or funded thereunder, are set forth in Annex III.

Estimated amounts of MCC Funding for each Project Activity for the Alatona Irrigation Project are identified in Annex II. Conditions precedent to each Project Activity under the Alatona Irrigation Project, and the sequencing of such Project Activities, shall be set forth in the Disbursement Agreement, any other Supplemental Agreements and the relevant Implementation Documents. The following summarizes each Project Activity under the Alatona Irrigation Project:

(a) Niono-Goma Coura Road (the "Road Activity").

The Road Activity involves the upgrading of a key segment of the national highway network serving the Alatona zone, providing vital access to inputs, markets, and social services to the Alatona zone and other farmers in the northern sector. The Niono-Goma Coura road forms the first 81 km of a 450 km road from Niono to Tonka, recently reclassified as National Road 33. It is presently an earth road with laterite surface and varying width of 6–7 meters, which has been compromised by erosion of the embankment slopes. The laterite is worn away in numerous locations, leading to washouts and difficult driving conditions during the wet season. Specifically, MCC Funding will support the following:

(i) Double bitumen surface treatment paving of 81 km of National Road 33 (7 meter carriageway and 1.5 meter shoulders).

(ii) Construction of a small bridge and 2 km spur to the village of Dogofry to provide a direct access from the Alatona perimeter to the main road network.

(iii) Various social measures, such as parallel tracks to accommodate non-motorized traffic, of which there is a significant amount in and around the populated areas and safety measures for slowing traffic, as well as additional parking areas at the villages.

Additionally, in connection with the Road Activity, MCA-Mali will assist and take all necessary steps to ensure that the EA, EMP (including an HIV/AIDS awareness plan), and RAP (consistent with World Bank Operational Policy 4.12 on Involuntary Resettlement) for the Road Activity of the Alatona Irrigation Project are processed and permits delivered in accordance with Mali Décret No. 03–594–P–RM on environmental impact studies and the Environmental Guidelines, all of which shall be subject to MCC approval; *provided, however*, that such EA, EMP and RAP may be processed as part of the EIA, EMP, and RAP for all other Project Activities (as described in Section 2 above). MCC funding will support implementation of the environmental and social mitigation measures as identified in the EA (or EIA, as applicable), EMP, and RAP, satisfactory to MCC, according to the conditions precedent set forth in the Disbursement Agreement.

(b) Irrigation Planning and Infrastructure (the "Irrigation Activity").

This Project Activity will increase the capacity of the ON's main conveyance structures (the Canal Adducteur, the Canal du Sahel and the Fala de Molodo) to ensure sufficient capacity to transport wet season water to all the developed perimeters. MCC Funding will support the ON in achieving physical capacity to realize its immediate development goals, improve and increase service, and to move toward a next generation of standards and operational water management procedures, based on best international practice. Specifically, MCC Funding will support the following:

(i) Alatona irrigation system development, which will involve the construction of a primary canal off the main system, a 63 km distributor canal, a network of secondary and tertiary canals and drainage structures, as well as land leveling and internal access roads. This will allow for an additional 16,000 ha of irrigated lands in the Alatona zone.

(ii) Main conveyance system expansion, which will increase the conveyance capacity of two main canals and an ancient riverbed that transport water from the Niger River to the ON irrigated zones. This will involve: (1) Removal of the central island separating the two branches of Canal Adducteur; (2) enlarging the main canal leading from the main conveyance canal (Canal du Sahel—23 km); and (3) raising the banks of the Fala de Molodo along approximately 8 km.

(iii) Support to ON Water Management, which will provide

technical assistance and equipment to the ON for installing and operationalizing a communications-based water management system as well as improving overall system management to ensure more efficient and effective water management throughout the ON system. This system will also provide the basis for data analysis and permitting flow adjustments according to climatic fluctuations and other water demand factors and will establish incentive structures for better on-farm water efficiency.

(c) Land Allocation (the "Land Activity").

Through the sale of irrigated land under the oversight of a selection commission, land will be allocated to small-, medium-, and large-scale farmers. A selection commission will select land recipients according to pre-defined criteria, and enforce safeguards designed to ensure transparency and fairness. The recipients will purchase the land at prices that are both affordable to farm families, yet high enough to discourage speculation. Land payments will be managed by private financial institutions, and land registration capacity will be bolstered. MCC Funding will support education and dissemination of information about land rights, benefits and responsibilities, and the allocation process in order to execute land allocation in an effective manner and for long term land management. In addition, the Alatona Irrigation Project will establish year-round market gardens for growing vegetables, to provide the women of the Alatona zone with an independent source of family income. This market garden opportunity supplements the opportunity women will have to receive larger land parcels through the selection commission process. Specifically, MCC Funding will support the following:

(i) Land Parcel Creation. Land will be divided into tertiary irrigation blocks, and the land contained therein will be subdivided into individual land parcels. This sub-activity will include land parcel platting, boundary surveying, and preparation of a technical description of each parcel.

(ii) Land Rights Education. A land-education effort will be carried out to provide the rural population of the Alatona zone and nearby areas with an understanding of private land ownership, the rights and responsibilities it entails, and the benefits it can bring. The effort also will inform people about the opportunity to acquire newly developed irrigated land, and work with land recipients on how

to properly manage their land rights and obligations.

(iii) Registration System Upgrade. The Alatona Irrigation Project will support establishment of a temporary land registration office in the Alatona zone that will remain under the jurisdiction of the Sogou office of the National Directorate for State Property and Cadastre (a technical agency within the Ministry of State Property and Land). This temporary office will operate for the four-year period during which virtually all of the land will be allocated and titled. Once the initial wave of titling occurs, the Sogou office may choose to maintain the temporary office, or replace it with a more limited alternative depending upon demand and cost considerations.

(iv) Land Parcel Allocation and Titling. A selection commission consisting of government officials and private stakeholder group representatives (both men and women), will review people's applications for land and decide who will receive land based on pre-defined criteria. The criteria include various technical and other qualifications, are differentiated by farm size, and give special consideration to people already in the Alatona zone,¹ women, and young farmers. After a short waiting period, land recipients will receive land ownership titles that they will pay for over a 15–20 year period. In addition to this main land allocation effort, women in the Alatona zone will receive small land plots for use in market gardening.

(v) Management of Land Revenues. This sub-activity will assure that land revenues are transparently managed and not co-mingled with other accounts and reinvested in locally responsive and appropriate ways in the Project area. This sub-activity will create a new entity (the "Revenue Authority") to collect and manage the land purchase payments under Government oversight. Collection payment mechanisms will encourage the entry and participation of private financial institutions in the area. In cases when land owners fail to make the required payments, the Revenue Authority will manage resolution of the problem, up to and including executing a foreclosure action and public sale of the land to satisfy the debt.

(d) Resettlement, Social Infrastructure, Social Services (the "Community Activity").

The Community Activity will provide funds to implement the RAP, build social infrastructure and support social

services, primarily health staff and teachers, to ensure appropriate utilization of the social infrastructure.

Specifically, MCC Funding will support the following:

(i) Resettlement. This sub-activity will support implementation of the RAP previously developed in collaboration with the relevant Government agencies, to compensate approximately 800 families who lose land rights or access to resources, with land in the irrigated perimeter or, where the land option is refused, other compensation options. Physically relocated resettlers will be provided with construction materials or built houses. For reasons of social equity, this sub-activity will implement procedures to provide equitable access to both dry and rainy season water and additional supporting measures during the first year of farming to assist these agro-pastoralist families to take up irrigated rice cultivation successfully.

(ii) Social Infrastructure. This sub-activity will provide social infrastructure and social services sufficient to serve an anticipated total population of approximately 60,000, including the resettlers, new settlers and other migrants. Access roads, potable water, sanitation, schools, health centers, public markets, warehouses, literacy and youth centers, laundry facilities and solar electricity supply for health centers and schools will be constructed or existing facilities renovated in accordance with international and national norms.

(iii) Social Services. This sub-activity will support social services, primarily health staff and teachers, over the last three-year period of the Compact Term. Services will be provided according to population thresholds established by the Government on the basis of international and regional norms. This sub-activity will equip community health centers in the Alatona zone and health centers serving the larger area, as well as support a variety of health promotion and disease prevention activities related to obstetric care, nutrition, STIs, HIV/AIDs, malaria, schistosomiasis and intestinal worms. Limited support will be provided for maintenance of water supply and sanitation.

(e) Agricultural Services (the "Agriculture Activity").

The Agriculture Activity will focus on the basics of irrigated farming and will support a range of interventions that target capacity building, support, and techniques for rice, shallots, livestock and crop integration, and women's vegetable garden production. During the first two years of the Alatona Irrigation Project, while the road and core

irrigation infrastructure are designed and constructed (the pre-settlement phase), efforts will focus on building an institutional environment and testing agricultural, marketing, and water management practices focused on achieving farm profitability. The Project Activity will be conducted in pre-existing ON irrigated perimeters involving, to the extent feasible, collaboration with the ON, existing institutions, and entities. The pre-settlement phase will allow for the development, testing, and piloting of activities to be transferred and scaled up to the newly developed perimeter. Specifically, MCC Funding will support the following:

(i) Applied Agricultural Research. This sub-activity includes undertaking field-level, applied technology research on rice production and processing; water use, control and management; agronomic practices; livestock enterprises and integration with irrigation; improved equipment and technologies; commodity chains development, including strengthening the supply system for agricultural inputs and equipment; identifying, testing, and promoting improved conservation techniques; processing technologies, and improving marketing of crops; and natural resource management and wood supply.

(ii) Extension and Farmer Training. This sub-activity will include communication, extension, and training through a variety of low-cost, sustainable mechanisms and techniques that may include Farmer Field Schools, Training and Visit, farmer-to-farmer, stakeholder, and systems approaches. The focus of this sub-activity will include improving rice yields, production of dry season diversified crops, integrating crop and livestock production, improving water management, group promotion and formation, integrated pest management, organizational management, accounting and budgeting, and farmer rights and advocacy.

(iii) Support to Farmer Organizations. This sub-activity will provide intensive organizational development and management training to help selected service providers and farmer-controlled organizations (including women's groups) increase capacity. This may include training on the preparation of by-laws and business plans; election of officers, personnel and group management; management by objectives; financial sustainability and credit management; knowledge of rights, facilitation and advocacy; group procurement of inputs and marketing; and accounting and financial

¹ Those who currently reside or use land in the Alatona zone will automatically be eligible to receive land.

management capabilities and commercialization.

(iv) Support to Water User Associations. This sub-activity will provide training to WUAs on organization management, cropping patterns and water requirements, secondary and tertiary canal maintenance planning, and establishing procedures for collecting and accounting for water fees.

(f) Financial Services (the "Finance Activity").

The Finance Activity will support agricultural development in the Alatona zone by promoting a sustainable, inclusive financial system and improving farmers' access to credit. Interventions will be focused on encouraging local financial institutions to move into the Alatona zone and on building their capacity and willingness to meet the financial services needs emerging from activities supported by the Alatona Irrigation Project. The Finance Activity will encourage financial institutions to lend to clients that have good prospects of success but may lack sufficient collateral or a suitable record of transactions to prove creditworthiness. It will also provide support to the ON Credit Bureau to strengthen its capacity to increase transparency among MFIs in the region. Direct support will also be provided to farmers to improve access to credit for first-time borrowers. Specifically, MCC Funding will support the following:

(i) Credit risk sharing program. The credit risk sharing program will encourage eligible financial institutions to increase their lending to clients by reducing the risk of providing loans in the Alatona zone. MCC Funding will support risk sharing (up to 50%). Participating financial institutions will also be provided with technical assistance.

(ii) Credit bureau strengthening. This sub-activity will finance: (1) A study to identify recommended improvements to the ON Credit Bureau and to test their feasibility; (2) development and acquisition of hardware and software necessary to create an electronic database (pending satisfactory completion of the feasibility study); and (3) training for ON Credit Bureau staff, among other changes as identified in the needs assessment and feasibility study.

(iii) Financial institution capacity building. This sub-activity will provide training and technical assistance to financial institutions (banks and MFIs), focusing on areas such as risk analysis, portfolio management, and new product development in order to help financial institutions meet the needs of potential clients. In order to encourage MFIs to

move rapidly into the Alatona zone, this sub-activity will also assist with a portion of the costs of setting up and staffing new offices.

(iv) Direct support to farmers. In addition to training and support to farmer organizations, the Alatona Irrigation Project will provide financial assistance to improve access to credit for first-time borrowers. This sub-activity will provide a grant to assist new clients with paying a portion of the initial mandatory deposit required by MFIs in order for the new clients to access their first loan.

3. Beneficiaries

As a result of the incremental agricultural production achieved through the Alatona Irrigation Project, incomes of farm owners, agricultural laborers in the Alatona, suppliers, transporters, processors, and traders will increase.

The upgrading of the existing Niono-Goma Coura road is anticipated to lower vehicle operating costs ("VOCs") and to generate time savings for road users. It is anticipated that the reduction in VOCs will be passed on to populations located along the road in the form of reduced rates of cargo spoilage and lower charges for the transport of cargo goods, including the transport of agricultural produce from the Alatona zone to regional markets in Niono and potentially national markets in Bamako.

Finally, the Alatona Irrigation Project is also expected to generate non-quantified social, health, and education improvements through investment in social infrastructure in the Alatona zone and greater access through the Niono-Goma Coura road upgrade to existing health and social services facilities.

4. Donor Coordination; Role of Private Sector and Civil Society

The Dutch Development Agency, French Development Agency, the World Bank, and USAID, in particular, have been working in the ON over the past several decades resulting in a more efficient, decentralized management structure, while increasing production and productivity of the Alatona zone. The Alatona Irrigation Project leverages and complements other donor, private sector and civil society activities in Mali as described below. Throughout implementation, MCC will continue to collaborate with these donors to ensure equitable water distribution, transfer of skills and knowledge in agriculture production, farm management and access to credit for the farmers. The Alatona Irrigation Project will involve close coordination with donors involved in strengthening the management of the

ON agency to provide effective operations and maintenance of the irrigation infrastructure, as well as conformity with the established cropping calendar.

World Bank

The Alatona Irrigation Project complements and reinforces several ongoing or recently launched World Bank programs as described below.

- National Project for Rural Infrastructure provides rural infrastructure for irrigation, transportation, clean water and sanitation, and institutional strengthening. In May 2005, this project launched a bid for small- and medium-scale farmers to purchase land in the pilot zone of Koumouna in the ON. This marked the ON's first experience of issuing land titles to individual farmers.

- Agricultural Competitiveness and Diversification Project aims to expand production and improve the productivity of diversified, high value commodities and to increase their export and market competitiveness; to remove logistical bottlenecks to increased exportation; to reinforce food security; and to promote rural credit and financing.

- Rural Community Development Project enhances the capacity of communities to propose and manage local development initiatives, including Communal Initiatives Funds and Local Productive Initiatives Funds.

Private Sector and Civil Society

Private sector and civil society participated in the consultative process that resulted in inclusion of the Alatona Irrigation Project in the Compact. The Alatona Irrigation Project aims to attract farmers to purchase land and increase the revenue of farmers and farming enterprises. Businesses along the value chain will be integral to the success of this Project. In addition, civil society will play an active role to ensure that land allocation is fair and transparent and that social services are provided in the Alatona zone in a fair and equitable manner. Lastly, both civil society and private sector will be represented on the MCA-Mali Board of Directors and Advisory Councils. In addition, consultations will be conducted with affected parties and other stakeholders on the EIA for all Project Activities (other than the Road Activity) and the EA (or EIA, as applicable) for the Road Activity, in accordance with MCC Environmental Guidelines, Mali Décret No. 03-594-P-RM on environmental impact studies and the draft Arrête Interministeriel on the procedure for public consultation on environmental

impact studies. Consultations will also take place with project affected persons for the RAPs, consistent with World Bank Operational Policy 4.12 on Involuntary Resettlement. NGOs are also expected to play a role in implementation, particularly in the provision of health promotion activities.

5. USAID

The Alatona Irrigation Project builds on the USAID's Accelerated Economic Growth and Trade Development Project (2003–2012), which includes the following sub-projects:

- Program in Development of Agricultural Production (PRODEPAM) includes agricultural intensification activities, appropriate technologies, animal feed, and natural resource management activities.

- Program on Shared Governance includes capacity building, planning, and financial management in the communes of Diabaly and Dogofry (the two municipalities located in the Alatona zone).

The Alatona Irrigation Project will continue to build on these efforts during implementation and strengthen USAID best practices in agricultural support and capacity building in local governance within the Alatona zone.

6. Sustainability

- Sustainable Irrigation Management. To assure the long term success of the Alatona Irrigation Project, MCC will finance additional capacity on the main conveyance structures, as well as support the ON to achieve sustainable management of its entire stock of assets. A core element of this effort will be technical assistance to introduce a communications-based technology for real-time water monitoring and management on the main system. The Alatona Irrigation Project will collaborate with the ON to establish appropriate and equitable water allocation rules among the perimeters, optimum cropping calendars and practices (such as the adoption of short cycle varieties) and the gradual introduction of volumetric water charges, all aimed to make the most efficient use of scarce water during the critical months of the dry season. The MCC-financed technical assistance will assist the ON to develop revised expansion scenarios based on updated assumptions and practices, such that any further expansion does not jeopardize the minimum water requirements and functioning of the Alatona zone and other existing perimeters. In the existing ON irrigated perimeters, the water fees collected are adequate to cover approximately 90% of

the operating and maintenance costs of the major distribution systems within the zones, with the Government assuming responsibility for the remaining costs. The Alatona Irrigation Project will address the utilization of revenues associated with land sales and water fees within the Alatona zone to fund the ongoing expenses of Alatona institutions during and beyond the Compact Term.

- Sustainable Road Maintenance. A new road maintenance agency, AGEROUTE, has recently been established with donor support. The major donors to the road sector (World Bank, European Union and African Development Bank) are promoting long term solutions to road maintenance, including more reliance on user fees to finance maintenance. The upgrading of the road to a double bituminous surface will result in estimated annual maintenance requirements falling within the range of the Government's current maintenance allocations for the road.

- Sustainable Rural Infrastructure Management. The Alatona Irrigation Project will finance initial recurrent costs of the social infrastructure so as to "kick-start" operations. Within the context of the country's decentralization program, the planning and implementation of these infrastructure and services will be carried out in close collaboration with the appropriate technical ministries and local authorities (in particular the communes), so as to ensure a smooth transition to sustainable provision of staffing, operations, and maintenance of all these facilities beyond the life of the Compact.

- Sustainable Access to Financial Services. The Finance Activity will provide MFIs and banks with training in agricultural credit and other aspects of managing the delivery of financial services to the inhabitants of the Alatona zone. This training should enable the financial institutions to better analyze the risks of extending credit in the Alatona zone and to better monitor and manage the repayment process. Meanwhile, the support to the ON Credit Bureau will promote transparency in the sector and provide institutions with better data from which to evaluate loan applications.

- Sustainable Management of Land Revenues. The Land Activity will create a new entity—the Revenue Authority—to collect and manage the revenues generated through land payments. MCC funding will support the costs of structuring this entity and providing some initial capacity building, until the

Revenue Authority can support itself through the land revenues collected.

- Sustainable Agricultural Services. Skilled local institutions with proven capacity will be contracted to deliver services, and design and coordinate research activities. It will include on-station evaluation of varieties and/or technologies under development; on-farm confirmation and adaptation of existing research results; and participatory, farmer-led research. Eventually, involvement of farmers, farmer organizations, and a possible fee-for-service approach could make the research demand-driven and partly funded by users.

- Environmental and Social Sustainability. Sustainability is to be achieved through the implementation of a land use and natural resources management plan (a prerequisite planning tool for the EIA), the identification of institutions responsible for natural resources management over the long term, and the implementation of an EMP that will incorporate an HIV/AIDS awareness plan and a pest management plan. Pre-settlement activities will provide the opportunity to test the sustainability of practices to be applied in the Alatona zone. Resettlers will be eligible to receive agricultural inputs for the first year and all cultivators will be able to receive technical assistance in farming techniques and training to improve their ability to secure credit. The provision of social infrastructure will allow improvements in health care, education, potable water supply and sanitation and the funding of social services will provide for a transition to full government funding of these services after the Compact Term.

7. Policy; Legal; and Regulatory Reform

The Parties have identified the following policy, legal and regulatory reforms and actions that the Government shall pursue in support, and to reach the full benefits of the Alatona Irrigation Project, the satisfactory implementation of which will be conditions precedent to certain MCC Disbursements as provided in the Disbursement Agreement:

- The establishment of the Revenue Authority to manage the collection and use of land revenues generated through the Alatona Irrigation Project. The structure of the Revenue Authority and its operating guidelines will be subject to MCC approval.

- Within the Compact Term, and in any event no later than six to nine months prior to the end of the Compact Term, the identification of a fiduciary or liquidation agent to manage or liquidate

all of the remaining financial assets at the end of the Compact Term. The selection of the fiduciary or liquidation agent and the final plan for the disposition of financial assets from the credit risk sharing program in the Finance Activity will be subject to MCC approval.

- The execution of a memorandum of understanding between MCA-Mali and the ON that ensures equitable allocation of dry-season water among the ON zones, measured at the headworks of primary canals, prior to initial MCC Disbursement for the Project Activities within the Alatona Irrigation Project, other than the Road Activity.

- The provision of evidence by the Government of an agreed allocation of land for dry season and wet season cultivation in the Alatona zone prior to approval of final design of the first tranche of the irrigation and planning infrastructure sub-activity of the Alatona Irrigation Project.

8. Proposals

Public solicitations for proposals are anticipated to procure goods, works and services, as appropriate, to implement all Project Activities under the Alatona Irrigation Project. MCA-Mali will develop, subject to MCC approval, a process for consideration of all such proposals. Notwithstanding the foregoing, MCA-Mali may also consider, using a process developed subject to MCC approval, any unsolicited proposals it might receive.

Annex II—Summary of Multi-Year Financial Plan

This Annex II to the Compact (the “Financial Plan Annex”) summarizes the Multi-Year Financial Plan for the Program. Each capitalized term in this Financial Plan Annex shall have the same meaning given such term elsewhere in this Compact. Unless otherwise expressly stated, each Section reference herein is to the relevant Section of the main body of the Compact.

1. General

A multi-year financial plan summary (“Multi-Year Financial Plan Summary”) is attached hereto as Exhibit A. By such time as specified in the Disbursement Agreement, MCA-Mali will adopt, subject to MCC approval, a Multi-Year

Financial Plan that includes, in addition to the multi-year summary of estimated MCC Funding and the Government’s contribution of funds and resources, an estimated draw-down rate for the first year of the Compact Term based on the achievement of performance milestones, as appropriate, and the satisfaction or waiver of conditions precedent. Each year, at least 30 days prior to the anniversary of the Entry into Force, the Parties shall mutually agree in writing to a Detailed Budget for the upcoming year of the Program, which shall include a more detailed budget for such year, taking into account the status of the Program at such time and making any necessary adjustments to the Multi-Year Financial Plan.

2. Implementation and Oversight

The Multi-Year Financial Plan and each Detailed Budget shall be implemented by MCA-Mali, consistent with the approval and oversight rights of MCC and the Government as provided in this Compact, the Governing Documents and the Disbursement Agreement.

3. Estimated Contributions of the Parties

The Multi-Year Financial Plan Summary identifies the estimated annual contribution of MCC Funding for Program administration, M&E and each Project. The Government’s contribution of resources to Program administration, M&E and each Project shall consist of (a) “in-kind” contributions in the form of Government Responsibilities and any other obligations and responsibilities of the Government identified in this Compact, and (b) such other contributions or amounts as may be identified in this Compact (including adequate funding for the rehabilitation and expansion of air cargo facilities, as specified in Section 8 of Schedule 1 of Annex I) and in relevant Supplemental Agreements between the Parties or as may otherwise be agreed by the Parties; provided, in no event shall the Government’s contribution of resources be less than the amount, level, type and quality of resources required effectively to carry out the Government Responsibilities or any other responsibilities or obligations of the Government under or in furtherance of this Compact.

4. Modifications

The Parties recognize that the anticipated distribution of MCC Funding between and among the various activities for Program administration, M&E, the Projects and the Project Activities will likely require adjustment from time to time during the Compact Term. In order to preserve flexibility in the administration of the Program, as provided in Section 4(a)(iv) of Annex I, the Parties may, upon agreement of the Parties in writing and without amending the Compact, change the designations and allocations of funds among the Projects, the Project Activities, or any activity under Program administration or M&E, or between a Project identified as of the Entry into Force and a new project, without amending this Compact; *provided, however*, that such reallocation (a) is consistent with the Objectives and the Implementation Documents; (b) shall not materially adversely impact the applicable Project, Project Activity (or any component thereof), or any activity under Program administration or M&E as specified in this Annex II; (c) shall not cause the amount of MCC Funding to exceed the aggregate amount specified in Section 2.1(a) of this Compact; and (d) shall not cause the Government’s obligations or responsibilities or overall contribution of resources to be less than specified in Section 2.2(a) of this Compact, this Annex II or elsewhere in the Compact.

5. Conditions Precedent; Sequencing

MCC Funding will be disbursed in tranches. The obligation of MCC to approve MCC Disbursements and Material Re-Disbursements for the Program is subject to satisfactory progress in achieving the Objectives and on the fulfillment or waiver of any conditions precedent specified in the Disbursement Agreement for the relevant activity under the Program. The sequencing of Project Activities or sub-activities and other aspects of how the Parties intend the Program to be implemented will be set forth in the Implementation Documents, including the Work Plan for the applicable Program (and each component thereof), and MCC Disbursements and Re-Disbursements will be made consistent with such sequencing.

EXHIBIT A						
MULTI-YEAR FINANCIAL PLAN SUMMARY						
Project	Totals Including Contingencies (USD)					
	Year 1	Year 2	Year 3	Year 4	Year 5	Total
1. Bamako-Sénou Airport Improvement Project						
Airside Infrastructure Activity	2,600,371	13,438,227	13,965,677	0	0	30,004,275
Landside Infrastructure Activity ¹	3,463,921	10,795,351	25,125,706	19,011,924	230,000	58,626,902
Institutional Strengthening Activity	200,000	200,000	200,000	200,000	200,000	1,000,000
Subtotal	6,264,292	24,433,578	39,291,383	19,211,924	430,000	89,631,177
2. Industrial Park Project						
Primary and Secondary Infrastructure Activity ¹	5,161,000	27,133,932	49,061,416	8,624,171	286,000	90,266,519
Resettlement Activity ²	1,500,000	0	0	0	0	1,500,000
Institutional Strengthening Activity	500,000	500,000	500,000	500,000	500,000	2,500,000
Subtotal	7,161,000	27,633,932	49,561,416	9,124,171	786,000	94,266,519
3. Alatona Irrigation Project						
Niono-Goma Coura Road Activity	8,346,908	17,331,423	9,241,224	147,665	150,841	35,218,061
Irrigation Planning and Infrastructure Activity	8,081,963	39,043,654	45,528,966	43,258,533	14,145,301	150,058,417
Land Allocation Activity	279,125	1,264,995	1,125,270	854,021	628,315	4,151,726
Resettlement, Social Infra. & Social Services Activity	3,201,666	5,025,813	5,353,208	3,657,049	3,596,637	20,834,373
Agricultural Services Activity ³	1,905,307	2,176,366	3,505,943	3,437,267	4,066,914	15,091,797
Financial Services Activity	156,310	574,998	2,061,021	2,842,669	3,619,096	9,254,094
Subtotal	21,971,279	65,417,249	66,815,632	54,197,204	26,207,104	234,608,468
4. Monitoring and Evaluation						
	1,500,000	520,000	655,000	705,000	1,525,000	4,905,000
Subtotal	1,500,000	520,000	655,000	705,000	1,525,000	4,905,000
5. Program Management and Oversight						
MCA Mali	3,400,000	2,500,000	2,600,000	2,400,000	2,500,000	13,400,000
Fiscal Agent	1,600,000	1,600,000	1,600,000	1,600,000	1,600,000	8,000,000
Procurement Agent	1,600,000	1,600,000	1,600,000	1,600,000	1,600,000	8,000,000
Auditing	1,600,000	1,600,000	1,600,000	1,600,000	1,600,000	8,000,000
Subtotal	8,200,000	7,300,000	7,400,000	7,200,000	7,300,000	37,400,000
TOTAL ESTIMATED MCC CONTRIBUTION	45,096,571	125,304,759	163,723,431	90,438,299	36,248,104	460,811,164

¹ Includes costs for environmental mitigation and technical assistance to strengthen environmental management.

² Resettlement costs also include some modest needs related to utility infrastructure for the Airport Improvement Project.

³ The first 2 years of this Activity includes costs for the Pre-Settlement Phase.

Annex III—Description of The M&E Plan

This Annex III to the Compact (the “M&E Annex”) generally describes the components of the M&E Plan for the Program. Except as defined in this M&E Annex, each capitalized term in this M&E Annex shall have the same meaning given such term elsewhere in this Compact.

1. Overview

MCC and the Government (or a mutually acceptable Government Affiliate or Permitted Designee) shall formulate, agree to and the Government shall implement, or cause to be implemented, an M&E Plan that specifies (a) how progress toward the Compact Goal, Objectives, and the intermediate results of each Project and

Project Activity set forth in this M&E Annex (the “Outcomes”) will be monitored (the “Monitoring Component”); (b) a methodology, process and timeline for the evaluation of planned, ongoing, or completed Projects and Project Activities to determine their efficiency, effectiveness, impact and sustainability (the “Evaluation Component”); and (c) other components of the M&E Plan described below. Information regarding the Program’s performance, including the M&E Plan, and any amendments or modifications thereto, as well as periodically generated reports, will be made publicly available on the MCA-Mali Web site and elsewhere.

2. Monitoring Component

To monitor progress toward the achievement of the Compact Goal, Objectives, and Outcomes, the Monitoring Component of the M&E Plan shall identify (a) the Indicators, (b) the party or parties responsible, the timeline, and the instrument for collecting data and reporting on each Indicator to MCA-Mali, and (c) the method by which the reported data will be validated.

(a) Indicators. The M&E Plan shall measure the impacts of the Program using objective and reliable information (“Indicators”). Each Indicator will have one or more expected values that specify the expected results and expected time for the impacts to be achieved (“Target”). The M&E Plan will measure and report on Indicators at four

levels. First, the Indicator(s) at the Compact Goal level (“Goal Indicator”) will measure the impact of the overall Program and each Project. Second, the Indicators at the Objective level (“Objective Indicator”) will measure the final results of each of the Projects, including impacts on the intended beneficiaries identified in Annex I

(collectively, the “Beneficiaries”). Third, Indicators at the intermediate level (“Outcome Indicator”) will measure the results achieved under each of the Project Activities and will provide an early measure of the likely impact under each of the Projects. A fourth level of Indicators (“Output Indicator”) will be included in the M&E

Plan to measure the direct outputs of Project Activities. All Indicators will be disaggregated by sex, income level and age, to the extent practicable. Subject to prior written approval from MCC, MCA-Mali may add Indicators or modify the Targets of existing Indicators.

GOAL INDICATORS AND DEFINITIONS

Goal-level results	Indicator	Definition of Indicator
Income of Airport services firms is increased ...	Total revenue of firms servicing the Airport	Total receipts of commercial concessions, flight kitchens, fuel suppliers, and baggage handling (US\$).
Tourism income is increased	Total receipts of hotels and restaurants in Bamako.	Total receipts of hotels and restaurants in Bamako (US\$).
Industrial value added is increased	Gross value-added of firms in the Industrial Park.	Total earnings including salaries and taxes of firms located in the Industrial Park (US\$).
Poverty rate of existing Alatona zone population is reduced.	Poverty rate of existing Alatona zone population.	Poverty Headcount Ratio of existing Alatona zone population (percent).
Income from irrigated agricultural production in the Alatona zone is increased.	Real income from irrigated agricultural production.	Real annual income from sale of agricultural production per household member in the Alatona zone (US\$) ¹ .

¹ Data to be disaggregated by current residents and newly settled population to track whether resettled population’s incomes are restored as compared to their baseline incomes. This indicator will also be disaggregated by sex.

COMPACT GOAL BASELINES AND TARGETS

Goal-level Indicators	Baseline	Year 5	Year 10
Total revenue of firms servicing the Airport (million US\$)	\$8	\$9	\$11
Total receipts of hotels and restaurants in Bamako (million US\$)	133	174	226
Gross value-added of firms in the Industrial Park (million US\$)	0	33	106
Poverty rate of existing Alatona zone population (percent)	TBD ¹	TBD	TBD
Real income from irrigated agricultural production (US\$ per capita)	0	316	725

¹ Baseline and targets will be determined through a combination of the following data collection activities: (1) resettlement action plan census under the Community Activity of the Alatona Irrigation Project, and (2) Baseline household survey conducted by Direction Nationale de la Statistique et de l’Informatique. Results are expected in 2007.

AIRPORT IMPROVEMENT PROJECT INDICATORS AND DEFINITIONS

Objective-level results	Indicator	Definition of indicator
Number of foreign visitors is increased	Annual foreign (non-resident) passenger traffic.	Foreign and non-resident passengers arriving to and departing from the Airport per year ¹ (number).
Passenger terminal services are improved	Improved security and safety	FAA audit report ²
Outcome-level Results	Indicator	Definition of Indicator.
Air traffic is increased	Weekly flight arrivals and departures	Aircraft arriving to or departing from the Airport per week (number).
Increased efficiency of passenger terminal services.	Time required for passenger processing at departures and arrivals.	Average time for passengers to complete departure or arrival procedures at peak hour at the Airport (minutes).

¹ Indicator will be disaggregated by country of origin, purpose of travel, and sex.

² A qualitative Indicator will be developed in collaboration with airport sector experts and according to FAA standards. Yearly targets will be milestones.

AIRPORT IMPROVEMENT PROJECT INDICATORS AND TARGETS

Objective-level indicators	Baseline	Year 5	Year 10
Annual foreign (non-resident) passenger traffic (number)	126,300	164,780	214,000
Improved security and safety at the Airport	TBD	TBD	TBD
Outcome-level Indicators			
Weekly flight arrivals and departures (number)	87	97	106

AIRPORT IMPROVEMENT PROJECT INDICATORS AND TARGETS—Continued

Objective-level indicators	Baseline	Year 5	Year 10
Time required for passenger processing at departures and arrivals (minutes) ¹	TBD	Baseline minus 60 minutes	Baseline minus 60 minutes ²

¹ A special survey will be conducted at the Airport in 2006/2007 to collect baseline information and additional surveys will be conducted during the Project to estimate the time required for passenger processing.

² From the economic analysis, it is estimated an efficiency gain of one hour will be achieved by Year 5 and maintained thereafter.

INDUSTRIAL PARK PROJECT INDICATORS AND DEFINITIONS

Objective-level results	Indicator	Definition of indicator
Industrial output of the Industrial Park is increased.	Share of enterprise growth represented by the Industrial Park.	Enterprises located in the Industrial Park as a share of the total number of enterprises in Bamako (percent).
Industrial Park firms are financially stable	Long-term jobs created in the Industrial Park	Long-term jobs in firms located in the Industrial Park (number). ¹
Outcome-level Results: The Industrial Park is developed and operational.	Occupancy level	Tertiary infrastructure built in the Industrial Park (ha). ²
Access to industrial infrastructure is provided ...	Time required to access services	Time required for connection to water and electricity in the Industrial Park (days).

¹ This does not include temporary jobs created during construction. This indicator will be disaggregated by sex and skill level.

² Tertiary (on-lot) infrastructure, to be built and financed by industries locating in the Industrial Park, includes buildings and facilities, interior roads and parking, water supply taps/connections and fire protection, electrical and telecommunications, wastewater collection (and possibly pre-treatment), etc.

INDUSTRIAL PARK PROJECT INDICATORS AND TARGETS

Objective-level indicators	Baseline	Year 5	Year 10
Share of enterprise growth represented by the Industrial Park (percent)	0	22%	49%
Long-term jobs created in the Industrial Park (number, cumulative)	0	3,400	11,000
Outcome-level Indicators:			
Occupancy level (ha, cumulative)	0	15	54
Time required to access services (days) ¹	TBD	TBD	

¹ Baseline value will be the average time required for a new industrial firm to access water and electricity in Bamako in 2006. This information will be obtained from Énergie Du Mali. Targets will be set after consultations with industry experts.

ALATONA IRRIGATION PROJECT INDICATORS AND DEFINITIONS

Objective-level results	Indicator	Definition of indicator
Rice yields are increased	Main season rice yield	Average rice yield in the rainy season in the Alatona zone (tons/ha).
Diversification into high value crops is increased.	Dry season cropped area in non-cereal crops	Share of the total cropped area that is devoted to non-cereal crops (i.e., shallots, tomatoes, potatoes, etc) in the Alatona zone (percent).
Outcome-level Results: Vehicle Operating Costs (VOCs) are reduced ...	International Roughness Index (IRI) for the Niono-Goma Coura road.	Weighted index to measure road roughness (correlated with vehicle operating costs) (meters/km). ¹
Transport of people and goods is facilitated	Traffic on the Niono-Goma Coura road	Annual average daily count of vehicles on the Niono-Goma Coura road (AADT) ² (number/day).
Irrigable land is increased	Land made irrigable by the Project	Total irrigable land in the Alatona zone (ha).
Water for agricultural production is provided	Average water volume delivered at the farm level.	Average water volume delivered at the tertiary level during the rainy season in the Alatona zone (m ³ /ha).
Irrigation system efficiency is improved	Alatona zone irrigation system efficiency	Water supply at the headworks of Canal de l'Alatona as a share of crop water requirements (percent).
Family farms are established	5 and 10 ha farms allocated	Total 5 and 10 ha farm plots allocated in the Alatona zone (number).
Land allocated to women is increased	Market garden parcels allocated	Total market garden parcels allocated in the Alatona zone (number).
Land tenure security is increased	Titles granted to Alatona zone households	Titles registered in the land registration office of the Alatona zone (number). ³
Access to social infrastructure is provided	Student enrollment	Students enrolled in schools established by the Project (number).

ALATONA IRRIGATION PROJECT INDICATORS AND DEFINITIONS—Continued

Objective-level results	Indicator	Definition of indicator
Improved agricultural techniques are adopted ...	Adoption rate of extension techniques	Number of farms adopting at least one new extension technique as a share of all farms receiving technical assistance under the Project (percent).
Access to financial services in the Alatona zone is improved.	Amount of credit extended	Total loan portfolios of financial institutions (MFIs and banks) in the Alatona zone (US\$). ⁴
	Active clients of MFIs	Active clients of MFIs in the Alatona zone (number). ⁵

¹ The International Roughness Index (IRI) is used to define a characteristic of the longitudinal profile of a traveled wheeltrack and constitutes an internationally recognized, standardized roughness measurement. The IRI is an open-ended scale.

² AADT: Annual Average Daily Traffic.

³ Disaggregated by settlers, re-settlers, sex.

⁴ Disaggregated by Short-Term (seasonal term) and Medium-Term credit (two to three-year term).

⁵ Disaggregated by sex.

ALATONA PROJECT INDICATORS AND TARGETS

Objective-level indicators	Baseline	Year 5
Main season rice yield (tons/ha)	0	5
Dry season cropped area in non-cereal crops (percent)	0	46
Outcome-level Indicators:		
International Roughness Index (IRI) for the Niono-Goma Coura road (m/km)	17	2
Traffic on the Niono-Goma Coura road (number/day)	208	417
Land made irrigable by the Project (ha, cumulative)	0	16,000
Average water volume delivered at the farm level (m ³ /ha)	N/A	13,000
Alatona zone irrigation system efficiency (percent)	35	40
5 and 10 ha farms allocated (number, cumulative)	0	1,700
Market garden parcels allocated (number, cumulative)	0	2,000
Titles granted to Alatona zone households (number, cumulative)	0	1,200
Student enrollment (number, cumulative)	0	10,500
Adoption rate of extension techniques (percent)	0	50
Amount of credit extended (million US\$)	0	4
Active clients of MFIs (number, cumulative)	0	1,050

(b) Data Collection and Reporting. The M&E Plan shall establish guidelines for data collection and a reporting framework, including a schedule of Program reporting and responsible parties. The Management shall conduct regular assessments of Program performance to inform MCA-Mali and MCC of progress under the Program and to alert these parties to any problems. These assessments will report the actual results compared to the Targets on the Indicators referenced in the Monitoring Component, explain deviations between these actual results and Targets, and in general, serve as a management tool for implementation of the Program. With respect to any data or reports received by MCA-Mali, MCA-Mali shall promptly deliver such reports to MCC along with any other related documents, as specified in the M&E Plan or as may be requested from time to time by MCC.

(c) Data Quality Reviews. As determined in the M&E Plan or as otherwise requested by MCC, the quality of the data gathered through the M&E Plan shall be reviewed to ensure that data reported are as valid, reliable, and timely as resources will allow. The

objective of any data quality review will be to verify the quality and the consistency of performance data across different implementation units and reporting institutions. Such data quality reviews also will serve to identify where consistent levels of quality are not possible, given the realities of data collection. The data quality reviewer shall enter into an Auditor/Reviewer Agreement with MCA-Mali in accordance with Annex I.

3. Evaluation Component

The Program shall be evaluated on the extent to which the interventions contribute to the Compact Goal. The Evaluation Component of the M&E Plan shall contain a methodology, process and timeline for collecting and analyzing data in order to assess planned, ongoing, or completed Project Activities to determine their efficiency, effectiveness, impact and sustainability. The evaluations should use rigorous methods for addressing selection bias, as applicable. The Government shall implement, or cause to be implemented, surveys to collect baseline and follow-up data on both Beneficiaries and non-

Beneficiaries. The Evaluation Component shall contain two types of reports: Final Evaluations and Ad Hoc Evaluations, and shall be finalized before any MCC Disbursement or Re-Disbursement for specific Program activities or Project Activities.

(a) Final Evaluation. MCA-Mali, in connection with MCC's request to the Government pursuant to Section 3(h) of Annex I, shall engage an independent evaluator to conduct an evaluation at the expiration or termination of the Compact Term ("Final Evaluation"). The Final Evaluation must at a minimum (i) evaluate the efficiency and effectiveness of the Program; (ii) estimate, quantitatively and in a statistically valid way, the causal relationship between the three Projects and the Compact Goal (to the extent possible), the Objectives and Outcomes; (iii) determine if, and analyze the reasons why, the Compact Goal, Objectives and Outcomes were or were not achieved; (iv) identify positive and negative unintended results of the Program; (v) provide lessons learned that may be applied to similar projects; (vi) assess the likelihood that results

will be sustained over time; and (vii) any other guidance and direction that will be provided in the M&E Plan. To the extent engaged by MCA-Mali, such independent evaluator shall enter into an Auditor/Reviewer Agreement with MCA-Mali in accordance with Annex I.

(b) Ad Hoc Evaluations. Either MCC or MCA-Mali may request ad hoc or interim evaluations or special studies of Projects, Project Activities, or the Program as a whole prior to the expiration of the Compact Term (each, an “*Ad Hoc Evaluation*”). If MCA-Mali engages an evaluator for an Ad Hoc Evaluation, the evaluator will be an externally contracted independent source selected by MCA-Mali, subject to the prior written approval of MCC, following a tender in accordance with the Procurement Guidelines, and otherwise in accordance with any relevant Implementation Letter or Supplemental Agreement. If MCA-Mali requires an ad hoc independent evaluation or special study at the request of the Government for any reason, including for the purpose of contesting an MCC determination with respect to a Project or Project Activity or seeking funding from other donors, no MCC Funding or MCA-Mali resources may be applied to such evaluation or special study without MCC’s prior written approval.

4. Other Components of the M&E Plan

In addition to the Monitoring Component and the Evaluation Component, the M&E Plan shall include the following components for the Program, Projects and Project Activities, including, where appropriate, roles and responsibilities of the relevant parties and Providers:

(a) Costs. A detailed annual cost estimate for all components of the M&E Plan.

(b) Assumptions and Risks. Any assumptions and risks external to the Program that underlie the accomplishment of the Compact Goal, Objectives, and Outcomes; *provided*, such assumptions and risks shall not excuse performance of the Parties, unless otherwise expressly agreed to in writing by the Parties.

5. Implementation of the M&E Plan

(a) Approval and Implementation. The approval and implementation of the M&E Plan, as amended from time to time, shall be in accordance with the Program Annex, this M&E Annex, the Governing Documents, and any other relevant Supplemental Agreement.

(b) Advisory Councils. The completed portions of the M&E Plan will be presented to each Advisory Council at such Advisory Council’s initial meeting, and any amendments or modifications thereto or any additional components of the M&E Plan will be presented to each

Advisory Council at appropriate subsequent meetings of such Advisory Council. Each Advisory Council will have opportunity to present its suggestions to the M&E Plan, which the Board shall take into consideration in its review of any amendments to the M&E Plan during the Compact Term.

(c) MCC Disbursement and Re-Disbursement for a Project Activity. As a condition to each MCC Disbursement or Re-Disbursement there shall be satisfactory progress on the M&E Plan for the relevant Project or Project Activity, and substantial compliance with the M&E Plan, including any reporting requirements.

(d) Modifications. Notwithstanding anything to the contrary in the Compact, including the requirements of this M&E Annex, MCC and the Government (or a mutually acceptable Government Affiliate or Permitted Designee) may modify or amend the M&E Plan or any component thereof, including those elements described herein, *without* amending the Compact; *provided*, any such modification or amendment of the M&E Plan has been approved by MCC in writing and is otherwise consistent with the requirements of this Compact and any relevant Supplemental Agreement between the Parties.

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Federal Register

**Thursday,
November 30, 2006**

Part III

Federal Deposit Insurance Corporation

12 CFR Part 327

**Deposit Insurance Assessments; Final
Rules**

FEDERAL DEPOSIT INSURANCE CORPORATION**12 CFR Part 327**

RIN-3064-AD03

Assessments**AGENCY:** Federal Deposit Insurance Corporation (FDIC).**ACTION:** Final rule.

SUMMARY: The FDIC is improving and modernizing its operational systems for deposit insurance assessments in 12 CFR Part 327 to make the deposit insurance assessment system react more quickly and more accurately to changes in institutions' risk profiles and to ameliorate several causes for complaint by insured depository institutions. Under the amendments set out in this final rule, deposit insurance assessments will be collected after each quarter ends—which will allow for consideration of more current information than under the prior rule. Ratings changes will become effective when the rating change is transmitted to the institution. Although the FDIC will retain the existing assessment base as applied in practice with only minor modifications, the computation of institutions' assessment bases will change in the following significant ways: institutions with \$1 billion or more in assets will determine their assessment bases using average daily deposit balances; existing smaller institutions will have the option of using average daily deposits to determine their assessment bases; and the float deductions used to determine the assessment base will be eliminated. In addition, the rules governing assessments of institutions that go out of business will be simpler; newly insured institutions will be assessed for the assessment period in which they become insured; prepayment and double payment options will be eliminated; institutions will have 90 days from each quarterly certified statement invoice to file requests for review of their risk assignment and requests for revision of the computation of their quarterly assessment payment; and the rules governing quarterly certified statement invoices will be adjusted for a quarterly assessment system and for a three-year retention period rather than the former five-year period.

DATES: This final rule will become effective on January 1, 2007.**FOR FURTHER INFORMATION CONTACT:** Munsell W. St. Clair, Senior Policy Analyst, Division of Insurance and

Research, (202) 898-8967; Donna M. Saulnier, Senior Assessment Policy Specialist, Division of Finance, (703) 562-6167; or Christopher Bellotto, Counsel, Legal Division, (202) 898-3801.

SUPPLEMENTARY INFORMATION:**I. Background**

On May 18, 2006, the FDIC published in the **Federal Register**, for a 60-day comment period, a notice of proposed rulemaking and request for comment on proposed amendments to 12 CFR 327 (71 FR 28790). The comment period was extended for 30 additional days (71 FR 36718) and expired on August 16, 2006. The FDIC received six comment letters—five from trade organizations and one from a depository institution.¹ Four of the commenters generally supported all of the FDIC's proposals; of those four, three suggested modifications to the provisions governing the use of average daily balances in determining assessment bases. Two commenters opposed elimination of the float deductions; three others opposed eliminating the deductions, but only where deposit bases are calculated using quarter-end balances. The following is a discussion of the amendments to §§ 327.1 through 327.8 and the comments received.

Prior to passage of the Federal Deposit Insurance Reform Act of 2005 and the Federal Deposit Insurance Reform Conforming Amendments Act of 2005 (collectively, the Reform Act),² the FDIC was statutorily required to set assessments semiannually. The FDIC did so by setting assessment rates and assigning institutions to risk classes prior to each semiannual assessment period. The semiannual assessment was collected in two installments, one near the start of the semiannual period and the other three months into the period, so that, in practice, assessment collection was accomplished prospectively every quarter.

Provisions in the Reform Act removed longstanding constraints on the deposit insurance assessment system and granted the FDIC discretion to revamp and improve the manner in which assessments are determined and collected from insured depository institutions. The FDIC was vested with

¹ The trade organizations were: the American Bankers Association, the Independent Community Bankers of America, the Association for Financial Professionals, the New York Bankers Association, and America's Community Bankers; the depository institution was Capital One Financial Corp.

² Federal Deposit Insurance Reform Act of 2005, Public Law 109-171, 120 Stat. 9; Federal Deposit Insurance Conforming Amendments Act of 2005, Public Law 109-173, 119 Stat. 3601.

discretion to set assessment rates, classify institutions for risk-based assessment purposes and collect assessments within a system and on a schedule designed to track more accurately the degree of risk to the deposit insurance fund posed by depository institutions. The Reform Act also eliminated any requirement that the assessment system be semiannual.

The FDIC's experience with the risk-based system over the past 13 years, and with approaches and arguments made by institutions that have filed requests for review with the FDIC's Division of Insurance and Research (DIR) and subsequent appeals to the FDIC's Assessment Appeals Committee (AAC), prompted some of the proposed revisions made to the FDIC's deposit insurance assessment system. For example, many appeals to the AAC involved assertions by insured institutions that the FDIC's system did not take into account their improved condition quickly enough. The final rules will ensure that assessment rates reflect changes in an institution's risk profile much nearer to the time the changes occur. The standard float deductions will be eliminated because they appear to be obsolete and arbitrary, and because actual float appears to be small and decreasing as the result of legal, technological, and payment system changes. The revisions will enhance the assessment process for institutions and should eliminate many of the bases for requests and appeals. The amendments to the FDIC's operational processes governing assessments affect 12 CFR 327.1 through 12 CFR 327.8.³ These sections detail the procedures governing deposit insurance assessment and collection as well as calculation of the assessment base.

³ Pursuant to the Section 2109 of the Reform Act, current assessment regulations remain in effect until the effective date of new regulations. Section 2109(a)(5) of the Reform Act requires the FDIC, within 270 days of enactment, to prescribe final regulations, after notice and opportunity for comment, providing for assessments under section 7(b) of the Federal Deposit Insurance Act. Section 2109 also requires the FDIC to prescribe, within 270 days, rules on the designated reserve ratio, changes to deposit insurance coverage, the one-time assessment credit, and dividends. A final rule on deposit insurance coverage was published on September 12, 2006. 71 FR 53547. Final rules on the one-time assessment credit and dividends were published on October 18, 2006. 71 FR 61374 and 71 FR 61385. The FDIC is publishing final rulemakings on the designated reserve ratio and on risk based assessments in the same issue of the **Federal Register** as this final rule.

II. The Final Rule

A. Assessments Collected After Each Quarterly Assessment Period

Under the existing system, assessments are collected from insured institutions on a semiannual basis in

two installments. The first collection is made at the beginning of the semiannual period; the second collection is made in the middle of the semiannual period.⁴ Under the final rule, assessments will be collected after each quarterly period

being insured. The assessment for each quarter will be due approximately at the end of the following quarter, on the specified payment date.⁵ The chart below shows the new assessment process.

Calendar year quarter	Date of capital evaluation *	Assessment base *	Invoice date	Payment date
1	March 31, 2007	March 31, 2007	June 15, 2007	June 30, 2007.
2	June 30, 2007	June 30, 2007	September 15, 2007	September 30, 2007.
3	September 30, 2007	September 30, 2007	December 15, 2007	December 30, 2007.
4	December 31, 2007	December 31, 2007	March 15, 2008	March 30, 2008.

* That is, the date of the report of condition on which the capital evaluation and assessment base are determined.

Collecting quarterly assessments after each assessment period was expressly supported by five commenters and opposed by none. One commenter, a trade group, stated “[t]his should help banks better manage their risk positions and expected premiums during the quarter for which they will be assessed.” Similarly, another trade group observed that “banks should be able to predict at the end of each quarter what their assessment will be for that quarter.” In line with the comments received, the FDIC believes quarterly assessment collection after the period being insured will markedly improve the responsiveness and accuracy of the assessment system.

The final rule will take effect January 1, 2007. The last deposit insurance collection under the existing system (made on September 30, 2006, in the middle of the semiannual period before the new system becomes effective) represents payment for insurance coverage through December 31, 2006. The first deposit insurance collection under the new system (made on June 30, 2007, at the end of the second quarter under the new system) will represent payment for insurance coverage from January 1 through March 31, 2007. No deposit insurance assessments will be based upon September 30 or December 31, 2006 reported assessment bases. However, institutions will continue to make the scheduled quarterly Financing Corporation (“FICO”) payments on January 2, 2007 (or on the alternate payment date, December 30, 2006) and March 30, 2007, using, respectively, these two reported assessment bases. No changes to the way FICO payments are charged or collected are being made.⁶

FICO collections will continue during the transition period to the new assessment system and will not be affected by the FDIC’s new rules, except to the extent that the definition and computation of assessment bases has changed. Language has been added to the regulatory text to make this clear (12 CFR 327.3(a)(3)). The date of the assessment base on which FICO payments are based will not change. Any effect on the reserve ratio of transitioning to collecting assessments after each quarterly period will be minimal. Consistent with the concepts of generally accepted accounting principles, the FDIC will recognize assessment revenue in advance of receipt based on a reliable estimate.

Invoices will continue to be presented using *FDICconnect*, and institutions will continue to be required to designate and fund deposit accounts from which the FDIC can make direct debits. Invoices will, as at present, be made available on *FDICconnect* no later than 15 days prior to the payment date. However, the payment dates themselves, in relation to the coverage period, will shift. Collections will be made at or near the end of the following quarter (*i.e.*, June 30, September 30, December 30, and March 30). In this way, the proposed assessment system will synchronize the insurance coverage period with the reporting dates and the institutions’ risk assignments.⁷

The FDIC will set assessment rates for each risk category no later than 30 days before the date of the invoice for the quarter, which will give the FDIC’s Board of Directors the option of setting rates before the beginning of a quarter or after its completion. The final rule will

provide the FDIC with flexibility to set final rates for the first quarter of a year at any time up to May 16 of that year (30 days before the June 15 invoice date). However, the FDIC will not necessarily need to continually reconsider or update assessment rates. Once set, rates will remain in effect until changed by the FDIC’s Board. Institutions will have at least 45 days notice of the applicable rates before assessment payments are due.

B. Ratings Changes Effective When Transmitted

Under the present system, an insured institution retains its supervisory and capital group ratings throughout a semiannual period. Any change is reflected in the next semiannual period; in this way, an examination can remain the basis for an institution’s assessment rating long after newer information has become available.

The FDIC proposed that changes to an institution’s supervisory rating be reflected as of the date the examination or targeted examination began; if no such date existed, then an institution’s supervisory rating would have changed as of the date the institution was notified of its rating change by its primary federal regulator (or state authority). In either case, if the FDIC, after taking into account other information that could affect the rating, did not agree with the classification implied by the examination, then the institution’s rating would change as of the date that the FDIC determined that the change in the supervisory rating occurred.

Five commenters supported making ratings changes effective when they occur; no one opposed. One of the

⁴ In December of 1994, the FDIC modified the procedure for collecting deposit insurance assessments, changing from semiannual to quarterly collection.

⁵ Adjustments to prior period invoices will continue to be reflected in invoices for later periods.

⁶ Pursuant to statute and a memorandum of understanding with the Financing Corporation, the FDIC collects FICO assessments from insured depository institutions based upon quarterly report dates. See 12 U.S.C. 1441(f)(2). FICO payments represent funds remitted to FICO to ensure sufficient funding to distribute interest payments for the outstanding FICO obligations.

⁷ The existing regulations refer to an institution’s “risk classification,” that is, one of the nine classifications in the nine-cell matrix, 1A, 2A, and so forth. Under the final rule, an institution’s “risk assignment” (see 12 CFR 327.4(a)) includes assignment to Risk Category I, II, III, or IV, and, within Risk Category I, assignment to an assessment rate or rates.

supporters, a trade group, suggested that in all cases the change be implemented “when the bank is notified of a change, not the date an examination begins * * * .”

The FDIC has decided to adopt the suggested approach. Under the final rule, changes to an institution’s supervisory rating will be reflected as of the date that the rating change is transmitted to the institution. However, if the FDIC disagrees with the CAMELS composite rating assigned by an institution’s primary federal regulator, and assigns a different composite rating, the supervisory change will be effective for assessment purposes as of the date that the FDIC assigns a rating. Disagreements of this type between the FDIC and the other federal regulators have been rare.

Using the transmittal date as the effective date for supervisory changes has a number of benefits. First, additional research after publication of the NPR in May revealed that the federal banking agencies do not all define and record an examination start date the same way.⁸ If the start date were used to determine ratings changes for supervisory purposes, similarly situated institutions could be treated differently, simply because they have different primary federal regulators. This result could have been unfair to a large number of institutions. Second, using the start date would have potentially produced ratings changes in many prior quarters, with adjustments to prior assessments paid. By contrast, the final rule should result in far fewer alterations to earlier assessments, allowing greater finality in assessments and enabling institutions to better plan their finances. Several commenters recommended notifying institutions in advance of a ratings change. While the final rule does not provide for advance notification, institutions will receive notice contemporaneously with a change. Third, the final rule is simpler and more uniform than the proposed rule and produces a more cohesive system. The effective date of a ratings change will be defined in the same way for all institutions, large and small. This result comports with the opinions of several commenters who recommended that the risk differentiation and

⁸ For example, while the Board of Governors of the Federal Reserve System and the Office of Thrift Supervision (OTS) define and record as the start date the date that an examiner arrives at an institution to begin the bulk of examination activity, the Office of the Comptroller of the Currency does not. Rather, for the OCC the start date represents the date that examination activity begins based on an activity plan. This date bears no consistent relation to the date that an examiner arrives at an institution.

assessment system be made simpler and more cohesive. Fourth, as stated, the trade group specifically recommended that in all cases the effective date for recognition of a change in supervisory rating should be when the bank is notified of a change.⁹

Accordingly, under the final rule, supervisory ratings changes will become effective as of the date the institution is notified of its rating change by its primary federal regulator or state authority, assuming that the FDIC, after taking into account other information that could affect the rating, agrees with the assignment implied by the examination, or it will change as of the date that the FDIC determines that the change in the supervisory rating occurs.

C. Modifications to the Assessment Base

At present, an institution’s assessment base is principally derived from total domestic deposits. The current definition of the assessment base is detailed in 12 CFR 327.5. Generally, the definition is deposit liabilities as defined by section 3(l) of the Federal Deposit Insurance Act (FDI Act) (12 U.S.C. 1813(l)) with some adjustments. However, because the total deposits that institutions report in their reports of condition do not coincide with the section 3(l) definition, institutions report several adjustments elsewhere in their reports of condition; these adjustments are used to determine the assessment base.

For example, banks are specifically instructed to exclude uninvested trust funds from deposit liabilities as reported on Schedule RC–E of their Reports of Condition and Income (Call Reports). However, these funds are considered deposits as defined by section 3(l) of the FDI Act and are therefore included in the assessment base. Line item 3 on Schedule RC–O of the Call Report was included to facilitate reporting these funds. For this line item and for the many others, banks simply report the amount of each item that was excluded from the RC–E calculation. Other line items require the restoration of amounts that were netted for reporting purposes on Schedule RC–E. For example, when banks were instructed to file Call Reports in accordance with Generally Accepted Accounting Principles, they were permitted to offset deposit liabilities against assets in certain circumstances. In order to comply with the statutory definition of deposits, lines 12a and 12b were added to Schedule RC–O to recapture those amounts.

⁹ The FDIC received no other comments specifically directed to this issue.

The final rule will retain the current assessment base as applied in practice with minor modifications. The reworded definition will operate in concert with a proposed simplification of the associated reporting requirements on insured institutions’ reports of condition.¹⁰ The assessment base definition will continue to be deposit liabilities as defined by section 3(l) of the FDI Act with enumerated allowable adjustments. These adjustments will include drafts drawn on other depository institutions that meet the definition of deposits per section 3(l) of the FDI Act, but are specifically excluded from reporting requirements in section 7(a)(4) of the FDI Act (12 U.S.C. 1817(a)(4)). Similarly, although depository institution investment contracts meet the definition of deposits as defined by section 3(l) of the FDI Act, they are presently excluded from the assessment base under 12 CFR 327.5 and will continue to be excluded, as will pass-through reserves. Certain reciprocal bank balances will also be excluded. In addition, hypothecated deposits will be excluded.

Unposted debits will not reduce the assessment base and unposted credits will be excluded from the definition of the assessment base for institutions that report average daily balances because these debits and credits are captured in the next day’s deposits (and thus reflected in the averages). For consistency, and because they should not materially affect assessment bases, unposted debits will not reduce the assessment base and unposted credits

¹⁰ At present, 26 items are required in the Reports of Condition and Income (Call Reports) to determine a bank’s assessment base, and 11 items are required in the Thrift Financial Report (TFRs) to determine a thrift’s assessment base. Under the final rule, changes to the way the assessment base is reported should reduce these items to between two and six, depending, in part, on whether an institution reports average daily balances. Essentially, instead of starting with deposits as reported in the report of condition and making adjustments, banks will start with a balance that approximates the statutory definition of deposits. The FDIC believes that this balance is typically found within most insured institutions’ deposit systems. In this way, institutions will be required to track far fewer adjustments. In any case, no additional burden will result for insured institutions since the items required to be reported will remain essentially the same under the new regulatory definition. The changes to reporting requirements should also allow institutions to report daily average deposits more easily, since they will not have to track and average adjustment items separately. As now, the Call Report and TFR instructions will continue to specify the items required to meet the requirements of section 3(l) of the FDI Act for reporting purposes. The FDIC has proposed appropriate changes to reports of condition, to become effective March 31, 2007, and is coordinating with the Federal Financial Institutions Examination Council (FFIEC) on the necessary changes to the reports of condition.

will also be excluded from the definition of the assessment base for institutions that report quarter-end balances.

The current definition of the assessment base, in 12 CFR 327.5, has been driven by reporting requirements that have evolved over time. These requirements have changed because of the evolving reporting needs of all of the federal regulators. As a result, the FDIC's regulatory definition of the assessment base has required periodic updates when reporting requirements in reports of condition are changed for other purposes.¹¹ By rewording the definition of the assessment base to deposit liabilities as defined by section 3(l) of the FDI Act with allowable exclusions, the FDIC will no longer be required to update its regulation periodically in response to outside factors. Two commenters generally supported the minor modifications the FDIC is making to the definition of assessment base; no commenters opposed them.

D. Average Daily Deposit Balance for Institutions With Assets of \$1 Billion or More

Currently, an insured institution's assessment base is computed using quarter-end deposit balances. Most schedules of the Call Report and the TFR are based on quarter-end data, but there are drawbacks to using quarter-end balances for assessment determinations. Under the current system, deposits at quarter-end are used as a proxy for deposits for an entire quarter, but balances on a single day in a quarter may not accurately reflect an institution's typical deposit level. For example, if an institution receives an unusually large deposit at the end of a quarter and holds it only briefly, the institution's assessment base and deposit insurance assessment may increase disproportionately to the amount of deposits it typically holds. A misdirected wire transfer received at the end of a quarter can create a similar result. Using quarter-end balances creates incentives to temporarily reduce deposit levels at the end of a quarter for the sole purpose of avoiding assessments. Institutions of various sizes have raised these issues with the FDIC.

Under the final rule, instead of using quarter-end deposits, certain institutions will use average daily balances over the quarter, which will

give a more accurate depiction of an institution's deposits. When combined with other operational changes to the assessment system, the use of average daily balances will provide a more realistic and timely depiction of actual events. The FDIC's proposal to use average daily balances was supported by all six commenters; however, three of those six suggested that the use of average daily balances be mandatory only for institutions of \$1 billion or more in assets rather than \$300 million as proposed. For example, one trade group suggested the higher cutoff because "the FDIC and other federal bank regulators use \$1 billion in assets as the cutoff in other Call Report requirements and for other regulatory purposes." Similarly, another trade group urged the higher cutoff because "[t]his increase would be consistent with other FDIC regulations and reporting requirements * * * and would affect only a very small proportion of insured deposits." In addition, a third trade group urged the \$1 billion cutoff "to not impose unnecessary paperwork burden on smaller institutions and to be consistent with the \$1 billion threshold for other FDIC regulations * * *." After consideration of these comments, the FDIC has changed the final rule to incorporate the higher cutoff amount.

Institutions do not at present report average daily balances on Call Reports and TFRs. Reporting average assessment bases will therefore necessitate changes to Call Reports and TFRs requiring the approval of the FFIEC and time to implement. Until these changes to the Call Report and TFR are made, institutions will continue to determine assessment bases using quarter-end balances.

Under the final rule, for one year after the necessary changes to the Call Report and TFR have been made, each existing institution will have the option of continuing to use quarter-end balances to determine its assessment base. Thereafter, institutions with \$1 billion or more in assets will be required to report average daily balances. To avoid burdening smaller institutions, which might have to modify their accounting and reporting systems, existing institutions with less than \$1 billion in assets will have the option of continuing to use quarter-end balances to determine their assessment bases.¹²

¹² In those instances where a parent bank or savings association files its Call Report or TFR on a consolidated basis by including a subsidiary bank(s) or savings association(s), the assessment bases for all institutions included in the consolidated reporting must be reported separately

If its assessment base is growing, an institution will pay smaller assessments if it reports daily averages rather than quarter-end balances, all else equal. Nevertheless, a smaller institution that elects to report quarter-end balances may continue to do so, so long as its assets, as reported in its Call Report or TFR, do not equal or exceed \$1 billion in two consecutive reports. Otherwise, the institution will be required to begin reporting average daily balances for the quarter that begins six months after the end of the quarter in which the institution reported that its assets equaled or exceeded \$1 billion for the second consecutive time. An institution with less than \$1 billion in assets may switch from reporting quarter-end balances to reporting average daily balances for an upcoming quarter. Any institution, once having begun to report average daily balances, either voluntarily or because required to, may not switch back to reporting quarter-end balances.

Finally, one commenter, a trade group, urged that the \$1 billion cutoff apply to newly insured institutions because those institutions "should not be treated differently in the assessment base calculation" and because "having the option to file using quarter-end balances is important as some banks believe the cost of the more involved General Ledger systems is excessive." The FDIC believes that systems likely to be in place in newly insured institutions can generate average daily balances and will therefore impose no additional costs in doing so. In addition, this approach will encourage the transition to average daily balances throughout the industry, which will improve the accuracy of institutions' assessment base calculations. Accordingly, under the final rule, any institution that becomes insured after the necessary modifications to the Call Report and TFR have been made will be required to report average daily balances for assessment purposes.

E. Float Deductions Eliminated

The largest overall adjustments to the current assessment base are deductions for float, deposits reported as such for assessment purposes that were created by deposits of cash items (checks) for which the institution has not itself received credit or payment. The current float deductions are 16 $\frac{2}{3}$ percent for demand deposits and 1 percent for time and savings deposits. Under the final rule, the float deductions will be eliminated.

on an unconsolidated basis so that assessment bases can be determined separately for each institution.

¹¹ In fact, the regulatory definition has not kept pace with these reporting changes. In practice, however, the assessment base is calculated as if the regulatory definition had kept pace.

Two basic rationales existed for allowing institutions to deduct float. First, without float deductions, institutions would be assessed for balances created by deposits of checks for which they had not actually been paid. Second, crediting an uncollected cash item (a check) to a deposit account can temporarily create double counting in the aggregate assessment base—once at the insured institution that credited the cash item to the deposit account, and again at the payee insured institution on which the cash item is drawn. Deducting float from deposits when calculating the assessment base reduced this double counting.

Before 1960, institutions computed actual float and deducted it from deposits when computing their assessment bases. This proved to be onerous at the time. In 1960, Congress by statute established the standardized float deductions in an effort to simplify and streamline the assessment base calculation. Section 7(b) of the FDI Act defined the deposit insurance assessment base until passage of the Federal Deposit Insurance Corporation Improvement Act of 1991 (FDICIA), which removed the statutory definition.¹³ In its proposal, the FDIC sought comment on whether to eliminate the float deductions, whether to allow the deduction of actual float, or whether to retain the present standardized float deductions.

All six commenters addressed the float issue. Two opposed elimination of the float deductions. One supported retaining the standard float deductions and “if necessary, modifying them to recognize reduction in float due to technology advances” but opposed requiring banks to deduct actual float. Another urged the adoption of “rules that allow for the deduction of actual float—base assessments on collected balances” and opposed eliminating the standard float deductions because that would “increase in the premiums that corporate depositors pay.” Three other commenters generally supported elimination of the float deductions, but urged retention of the deductions for quarter-end filers, as opposed to institutions reporting average daily balances. A trade group noted that while float has declined, it has not gone away, and without the float deductions for quarter-end filers “the assessment base using quarter-end balances would be greater than appropriate and, therefore, the premium assessed would be higher

than appropriate.” Two of the trade groups suggested revising the current float deductions for quarter-end filers and allowing such institutions to continue their use.

The FDIC has decided to eliminate the float deductions for all institutions on the grounds that, based on available information, the standard float deductions appear to be obsolete. Actual float appears to be small and decreasing as the result of legal, technological, and payment systems changes. The basis for the percentages in the standardized deductions chosen by Congress is not clear. However, even if the percentages were a realistic approximation of average bank float when they were selected over 40 years ago, legal, technological, and payment systems changes—such as Check 21—that have accelerated check clearing should have reduced float, everything else being equal, and made the existing standard float deductions obsolete.¹⁴ Consequently, the current standardized float deductions probably do not reflect real float for most institutions. In addition, cash items in the process of collection as a percent of domestic deposits for commercial banks with total assets greater than or equal to \$300 million has been decreasing. Over the long term, the ratio of cash items in the process of collection to total domestic deposits has fallen significantly. Cash items in the process of collection can be viewed as a rough approximation of actual float.

Eliminating the float deductions will favor some institutions over others. Institutions with larger percentages of time and savings deposits will see smaller increases in their assessment bases; conversely, those with larger percentages of demand deposits will see greater increases in their assessment bases. However, eliminating the float deductions will only minimally affect the relative distribution of the aggregate assessment base among institutions of

different asset sizes and between banks and thrifts (although it will have a greater effect on the assessment bases of some individual institutions). While eliminating the float deductions will increase assessment bases and affect the distribution of the assessment burden among institutions, it should not, in itself, increase assessments. The assessment rates that the FDIC will set in the new pricing system will take into account the elimination of the float deductions.

The FDIC has decided not to deduct actual float to arrive at the assessment base for a number of reasons. Deducting actual float would require that institutions report actual float; and institutions that determine their assessment base using average daily balances would be required to report average daily float. This would necessitate a new information requirement for float data.¹⁵ Before 1960, institutions computed actual float and deducted it from deposits when computing their assessment bases. Because this proved to be onerous at one time, Congress established the standardized float deductions by statute. Asking institutions again to report actual float could create significant regulatory burden, which the FDIC has decided to avoid.

Finally, the FDIC does not agree with the suggestion that the float deductions (or revised or adjusted float deductions) be retained for institutions reporting quarter-end balances, as three commenters urged. It is not clear that reporting quarter-end balances would result in a larger than appropriate assessment than reporting average daily balances, as one commenter suggested. Moreover, allowing standardized deductions for institutions that report quarter-end balances could provide institutions with incentives for retaining the quarter-end balance method. The FDIC believes that institutions will generally benefit from reporting average daily balances and believes the assessment system should generally be structured to encourage the bulk of institutions with less than \$1 billion in assets to opt to use average daily

¹⁴ Congress enacted Public Law 108–100, the Check Clearing for the 21st Century Act (Check 21), on October 28, 2004. Check 21 allows banks to electronically transfer check images instead of physically transferring paper checks. The Federal Reserve Board, What You Should Know About Your Checks, <http://www.federalreserve.gov/pubs/check21/shouldknow.htm> (updated Feb. 16, 2005). As a result, the transmission and processing of electronic checks can be done faster than transferring paper checks through the clearing process. A recent Federal Reserve payment survey indicates that, for the first time, bank-to-bank electronic payments have exceeded payments by check. Treasury and Risk Management, Just Another Step Along the Way to a Checkless Economy, www.treasuryandrisk.com, September 2005. With Check 21, the volume of paper checks processed is expected to continue to decline with more payments processed electronically resulting in a smaller float.

¹⁵ Despite one commenter's suggestion, the Call Report item “Cash items in process of collection” could not be used to determine the actual float deduction for individual institutions. Because “Cash items in process of collection” contains items other than float, it may overstate actual float. For a few institutions, “Cash items in process of collection,” exceeds the institutions' assessment bases. (These institutions' “Cash items” are not included in the approximation of actual float in the text.) Conversely, given the small size of the “Cash items in process of collection” reported by many institutions, this item may understate float at some institutions.

¹³ Since FDICIA, the FDIC's regulations alone defined the assessment base. The current definition, at 12 CFR 327.5, generally tracks the former statutory definition.

balances in reporting their assessment bases.

F. Terminating Transfer Rule Modified

At present, complex rules apply to terminating transfers¹⁶ to ensure that the assessment of a terminating institution is paid. Determining and collecting assessments after the end of each quarter and using average daily assessment bases make these complex rules largely obsolete. An acquiring institution (or institutions) will remain liable for the quarterly assessment(s) owed by a terminating institution; the assessment base of the terminating institution will be zero for the remainder of the quarter after the terminating transfer.

The terminating transfer provision in the final rule will deal with a few remaining situations. If the terminating institution does not file a report of condition for the quarter prior to the quarter in which the terminating transfer occurred, calculation of its quarterly certified statement invoices for those quarters will be based on its assessment base from its most recently filed report of condition. For the quarter before the terminating transfer occurs, the terminating institution's assessment will be determined using its most recent rate; for the quarter in which the terminating transfer occurs, the acquirer's rate will apply, but the calculation will be different depending upon whether the acquiring institution reports its assessment base using average daily balances or quarter-end balances.

Under the final rule, once institutions begin reporting average daily deposits, the average assessment base of the acquiring institution will properly reflect the terminating transfer and will increase after the terminating transfer. When this happens, the terminating institution's assessment for the quarter in which the terminating transfer occurs will be reduced by the percentage of the quarter remaining after the terminating transfer and calculated at the acquirer's rate.

Three of the six commenters generally supported these changes to the terminating transfer rule, and none opposed them.

¹⁶ Generally speaking, a *terminating transfer* occurs when an institution assumes another institution's liability for deposits—often through merger or consolidation—when the terminating institution essentially goes out of business. Neither the assumption of liability for deposits from the estate of a failed institution nor a transaction in which the FDIC contributes its own resources in order to induce a surviving institution to assume liabilities of a terminating institution is a terminating transfer.

Under the final rule, an acquiring institution that reports quarter-end balances will have its assessment for the quarter in which the terminating transfer occurred calculated slightly differently from the language in the proposal. Because the acquiring institution is not averaging its assessment base, its assessment for the quarter in which the terminating transfer occurs will be its assessment base (which will include the acquired deposits) calculated at its assessment rate. Thus, for example, an institution that reports quarter-end balances might acquire another institution by merger one month (one-third of the way) into a quarter. Since the acquiring institution's assessment base for that quarter will include the acquired deposits, application of the acquirer's rate to that base will obviate the need to assess the terminating institution separately for that quarter. The final rule has been revised from the proposed rule to reflect this simpler calculation for acquiring institutions that use quarter-end balances.

G. Newly Insured Institutions Assessed for the Quarter in Which They Become Insured

At present, a newly insured institution is not liable for assessments for the semiannual period in which it becomes insured, but is liable for assessments for the following semiannual period. The institution's assessment base as of the day before the following semiannual period begins is deemed to be its assessment base for the entire semiannual period. These special rules were needed because assessments were based upon assessment bases that an institution reported in the past. Under the existing rules, a newly insured institution reports an assessment base at the end of the quarter in which it becomes insured but that assessment base is not used to calculate its assessment until the following semiannual period. Further, if an institution becomes insured in the second half of a semiannual period, it has no reported assessment base on which to calculate the first installment of its premium for the next semiannual period.

Under the final rules, each quarterly assessment will be based upon the assessment base that an institution reports at the end of that quarter. Since a newly insured institution will have reported an assessment base (using average daily balances) for the quarter in which it becomes insured, its assessment will be computed in the same manner as all other institutions. Three commenters generally supported

elimination of the special rules for newly insured institutions, and none opposed it.

H. Ninety Days Each Quarter To File a Request for Review or Request for Revision

The current deadline for an institution to request a review of its assessment risk classification is 90 days from the invoice date for the first quarterly installment of a semiannual period. Under the final rule, each quarterly assessment will be separately computed. Consequently, the final rule will provide institutions with 90 days from the date of each quarterly certified statement invoice to file a request for review from its risk assignment. Institutions will also have 90 days from the date of any subsequent invoice that adjusted the assessment of an earlier assessment period to request a review. The final rule clarifies that an institution with between \$5 billion and \$10 billion in assets may request review if the FDIC denies its request to be assessed as a large bank; in addition, institutions may request review of an FDIC determination that they are new.¹⁷

A parallel amendment will allow requests for revision of an institution's quarterly assessment payment computation to be filed within 90 days of the quarterly assessment invoice for which revision is requested (rather than the present 60 days). Three commenters generally supported these changes to the rules; none opposed them.

I. Conforming Changes to the Certified Statement Rules

The Reform Act eliminated the requirement that the deposit insurance assessment system be semiannual and provided a new three-year statute of limitations for assessments. Accordingly, the FDIC has revised the provisions of 12 CFR 327.2 to clarify that the certified statement is the quarterly certified statement invoice and to provide for the retention of the quarterly certified statement invoice by insured institutions for three years, rather than five years under the prior law. Three commenters generally supported these changes; none opposed them.

J. Prepayment and Double Payment Options Eliminated

When the present assessment system was proposed more than 10 years ago, the original quarterly dates for payment of assessments were: March 30; June 30;

¹⁷ 12 CFR 327.9(d)(6) and (7). See the FDIC's final rulemaking regarding risk based assessments published in this issue of the **Federal Register**.

September 30; and December 30. The FDIC recognized that the December 1995 collection date could present a one-time problem for institutions using cash-basis accounting, since these institutions would, in effect, be paying assessments for five quarters in 1995. The FDIC believed that few institutions would be adversely affected. Soon after the new system was adopted, however, the FDIC began to receive information that more institutions than had originally been identified would be adversely affected by the December collection date. As a result, the FDIC amended the regulation in 1995 to move the collection date to January 2, but allowed institutions to elect to pay on December 30, thus establishing the prepayment date.

The prepayment option is eliminated under the final rule. With implementation of the new assessment system, a transition period will be created in which institutions will not be subject to collection of deposit insurance assessments after the September 30, 2006 payment date until June 30, 2007. Consequently, reestablishing the original December 30 payment date should have no adverse consequences for institutions that use cash-basis accounting. No institution would make more than four insurance payments in calendar year 2006; those using the December 30, 2005 payment date would make only three payments in 2006. All institutions would make four payments annually thereafter. This change will keep all assessment payments within each calendar year.¹⁸

In addition, insured institutions presently have the regulatory option of making double payments on any payment date except January 2. Under the final rule, this option is also eliminated. The double payment option originated in the 1995 amendment, when the payment date was modified from December 30, 1995 to January 2, 1996. The double payment option was adopted to provide cash-basis institutions the opportunity to pay the full amount of their semiannual assessment premium on December 30 so as to have the complete benefit of this modification. The transition period from September 30, 2006 to June 30, 2007 and four payments annually beginning in 2007 should eliminate the need for the double payment option, since the FDIC will no longer be charging semiannual premiums.

The final rule also makes clear that scheduled quarterly FICO payments will

be collected from all institutions on January 2, 2007, and March 30, 2007, based upon, respectively, their September 30, 2006 and December 31, 2006 reported assessment bases (see 12 CFR 327.3(a)(3)). Institutions that elect to do so, however, will still be able to make prepayment of their first quarter 2007 FICO payment on December 30, 2006, as provided for under the existing rules at 12 CFR 327.3(c)(3). Institutions that do not choose this prepayment option will make their first quarter 2007 FICO payment on January 2, 2007, as the final rule will provide.

III. Regulatory Analysis and Procedure

A. Solicitation of Comments on Use of Plain Language

Section 722 of the Gramm-Leach-Bliley Act (GLBA), Public Law 106–102, 113 Stat. 1338, 1471 (Nov. 12, 1999), requires the Federal banking agencies to use plain language in all proposed and final rules published after January 1, 2000. The proposed rules requested comments on how the rules might be changed to reflect the requirements of GLBA. No GLBA comments were received.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) requires that each Federal agency either certify that a proposed rule would not, if adopted in final form, have a significant economic impact on a substantial number of small entities or prepare an initial regulatory flexibility analysis of the proposal and publish the analysis for comment. See 5 U.S.C. 603, 604, 605. Certain types of rules, such as rules of particular applicability relating to rates or corporate or financial structures, or practices relating to such rates or structures, are expressly excluded from the definition of “rule” for purposes of the RFA. 5 U.S.C. 601. The final rule provides operational procedures governing assessments and relates directly to the rates imposed on insured depository institutions for deposit insurance, by providing for the determination of assessment bases to which the rates will apply and providing the operational processes required for deposit insurance assessments. Consequently, no regulatory flexibility analysis is required. Nonetheless, the FDIC is voluntarily undertaking a regulatory flexibility analysis of the final rule.

The provisions dealing with determining assessment bases using average daily balances include an opt-out for insured institutions with assets of less than \$1 billion, which would permit small institutions under the RFA

(i.e., those with \$165 million or less in assets) to continue (as they do now) reporting quarter-end balances. Newly insured institutions with \$165 million or less in assets, however, will be required to report average daily balances. For the period from 2001 through 2005, the average number of small institutions that became insured each year was approximately 126. Most small, newly insured institutions will ordinarily implement systems permitting calculation of average daily balances and, therefore, will not be significantly burdened by this requirement.

Similarly, elimination of the float deduction in calculating assessment bases will not have a significant economic impact on a substantial number of small (\$165 million in assets or less) insured depository institutions within the meaning of the RFA. Based on December 31, 2005 reports of condition, small institutions represented 5.09 percent of the total assessment base, with large institutions (i.e., those with more than \$165 million in assets) representing 94.91 percent. Without the existing float deduction, those percentages would have been 5.14 and 94.86, respectively, a change of only 0.05 percent. By way of example, if a flat 2 basis point annual charge had been assessed on the December 31, 2005 assessment base without the float deduction (i.e., with the float deduction added back to the assessment base), the amount collected would have been approximately \$1.267 billion. To collect the same amount from the industry on the same assessment base, but allowing the float deduction, approximately a 2.05 basis point charge would have been required, since the assessment base would have been smaller. The average difference in assessment charged a small institution for one year if the float deduction were eliminated (charging 2 basis points) versus allowing the float deduction (charging 2.05 basis points) would be about \$110. The actual increase in assessments charged small institutions for one year if the float deduction were eliminated (charging 2 basis points) versus allowing the float deduction (charging 2.05 basis points) would be greater than or equal to \$1,000 for only 38 out of 5,362 small institutions as of December 31, 2005.¹⁹ The largest resulting increase for any small institution would be about \$2,500.

Moreover, the final rule will not have a significant economic impact on a

¹⁸ The allowance for payment on the following business day—should January 2 fall on a non-business day—is eliminated as well.

¹⁹ Of the 8,832 insured depository institutions, there were 5,362 small insured depository institutions (i.e., those with \$165 million or less in assets) as of December 31, 2005.

substantial number of small institutions within the meaning of those terms as used in the RFA. The final rule sets out the operational format for the FDIC's assessment system for the collection of deposit insurance assessments. Most of the processes within this proposed regulation are analogous to existing FDIC assessment processes; variances occur largely in timing, not in the processes themselves; no additional reporting requirements or record retention requirements are created by the proposed rules.

Comments were sought regarding any information about the likely quantitative effects of the proposal on small insured depository institutions; no comments were received.

C. Paperwork Reduction Act

No collections of information pursuant to the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*) are contained in the final rule. Any paperwork created as the result of the conversion to reporting average daily assessment balances will be submitted to the Office of Management and Budget (OMB) for review and approval as an adjustment to the Consolidated Reports of Condition and Income (Call Reports), an existing collection of information approved by OMB under Control No. 3064-0052.

D. The Treasury and General Government Appropriations Act, 1999—Assessment of Federal Regulations and Policies on Families

The FDIC has determined that the final rule will not affect family well-being within the meaning of section 654 of the Treasury and General Government Appropriations Act, enacted as part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999 (Public Law 105-277, 112 Stat. 2681).

E. Small Business Regulatory Enforcement Fairness Act

The Office of Management and Budget has determined that the final rule is not a "major rule" within the meaning of the relevant sections of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) (5 U.S.C. 801 *et seq.*). As required by SBREFA, the FDIC will file the appropriate reports with Congress and the Government Accountability Office so that the final rule may be reviewed.

List of Subjects in 12 CFR Part 327

Bank deposit insurance, Banks, banking, Savings associations.

■ For the reasons set forth in the preamble, the FDIC hereby amends part 327 of chapter III of title 12 of the Code of Federal Regulations as follows:

PART 327—ASSESSMENTS

■ 1. The authority citation for part 327 is revised to read as follows:

Authority: 12 U.S.C. 1441, 1813, 1815, 1817-1819, 1821; Sec. 2101-2109, Pub. L. 109-171, 120 Stat. 9-21, and Sec. 3, Pub. L. 109-173, 119 Stat. 3605.

■ 2. Revise §§ 327.1 through 327.8 of Subpart A to read as follows:

§ 327.1 Purpose and scope.

(a) *Scope.* This part 327 applies to any insured depository institution, including any insured branch of a foreign bank.

(b) *Purpose.* (1) Except as specified in paragraph (b)(2) of this section, this part 327 sets forth the rules for:

- (i) The time and manner of filing certified statements by insured depository institutions;
- (ii) The time and manner of payment of assessments by such institutions;
- (iii) The payment of assessments by depository institutions whose insured status has terminated;
- (iv) The classification of depository institutions for risk; and
- (v) The processes for review of assessments.

(2) Deductions from the assessment base of an insured branch of a foreign bank are stated in subpart B part 347 of this chapter.

§ 327.2 Certified statements.

(a) *Required.* (1) The certified statement shall also be known as the quarterly certified statement invoice. Each insured depository institution shall file and certify its quarterly certified statement invoice in the manner and form set forth in this section.

(2) The quarterly certified statement invoice shall reflect the institution's risk assignment, assessment base, assessment computation, and assessment amount, for each quarterly assessment period.

(b) *Availability and access.* (1) The Corporation shall make available to each insured depository institution via the FDIC's e-business Web site *FDICconnect* a quarterly certified statement invoice each assessment period.

(2) Insured depository institutions shall access their quarterly certified statement invoices via *FDICconnect*, unless the FDIC provides notice to insured depository institutions of a successor system. In the event of a contingency, the FDIC may employ an

alternative means of delivering the quarterly certified statement invoices. A quarterly certified statement invoice delivered by any alternative means will be treated as if it had been downloaded from *FDICconnect*.

(3) Institutions that do not have Internet access may request a renewable one-year exemption from the requirement that quarterly certified statement invoices be accessed through *FDICconnect*. Any exemption request must be submitted in writing to the Manager of the Assessments Section.

(4) Each assessment period, the FDIC will provide courtesy e-mail notification to insured depository institutions indicating that new quarterly certified statement invoices are available and may be accessed on *FDICconnect*. E-mail notification will be sent to all individuals with *FDICconnect* access to quarterly certified statement invoices.

(5) E-mail notification may be used by the FDIC to communicate with insured depository institutions regarding quarterly certified statement invoices and other assessment-related matters.

(c) *Review by institution.* The president of each insured depository institution, or such other officer as the institution's president or board of directors or trustees may designate, shall review the information shown on each quarterly certified statement invoice.

(d) *Retention by institution.* If the appropriate officer of the insured depository institution agrees that, to the best of his or her knowledge and belief, the information shown on the quarterly certified statement invoice is true, correct, and complete and in accordance with the Federal Deposit Insurance Act and the regulations issued under it, the institution shall pay the amount specified on the quarterly certified statement invoice and shall retain it in the institution's files for three years as specified in section 7(b)(4) of the Federal Deposit Insurance Act.

(e) *Amendment by institution.* If the appropriate officer of the insured depository institution determines that, to the best of his or her knowledge and belief, the information shown on the quarterly certified statement invoice is not true, correct, and complete and in accordance with the Federal Deposit Insurance Act and the regulations issued under it, the institution shall pay the amount specified on the quarterly certified statement invoice, and may:

(1) Amend its report of condition, or other similar report, to correct any data believed to be inaccurate on the quarterly certified statement invoice; amendments to such reports timely filed under section 7(g) of the Federal Deposit

Insurance Act but not permitted to be made by an institution's primary federal regulator may be filed with the FDIC for consideration in determining deposit insurance assessments; or

(2) Amend and sign its quarterly certified statement invoice to correct a calculation believed to be inaccurate and return it to the FDIC by the applicable payment date specified in § 327.3(b)(2).

(f) *Certification.* Data used by the Corporation to complete the quarterly certified statement invoice has been previously attested to by the institution in its reports of condition, or other similar reports, filed with the institution's primary federal regulator. When an insured institution pays the amount shown on the quarterly certified statement invoice and does not correct that invoice as provided in paragraph (e) of this section, the information on that invoice shall be deemed true, correct, complete, and certified for purposes of paragraph (a) of this section and section 7(c) of the Federal Deposit Insurance Act.

(g) *Requests for revision of assessment computation.* (1) The timely filing of an amended report of condition or other similar report under paragraph (e)(1) of this section, or the timely filing of an amended quarterly certified statement invoice under paragraph (e)(2), that will result in a change to deposit insurance assessments owed or paid by an insured depository institution, shall be treated as a timely filed request for revision of computation of quarterly assessment payment under § 327.3(f).

(2) The assessment rate on the quarterly certified statement invoice shall be amended only if it is inconsistent with the assessment risk assignment(s) provided to the institution by the Corporation for the assessment period in question pursuant to § 327.4(a). Agreement with the assessment rate shall not be deemed to constitute agreement with the assessment risk assignment. An institution may request review of an assessment risk assignment it believes to be incorrect pursuant to § 327.4(c).

§ 327.3 Payment of assessments.

(a) *Required—(1) In general.* Except as provided in paragraph (b) of this section, each insured depository institution shall pay to the Corporation for each assessment period an assessment determined in accordance with this part 327.

(2) *Notice of designated deposit account.* For the purpose of making such payments, each insured depository institution shall designate a deposit account for direct debit by the

Corporation. No later than 30 days prior to the next payment date specified in paragraph (b)(2) of this section, each institution shall provide notice to the Corporation via FDICconnect of the account designated, including all information and authorizations needed by the Corporation for direct debit of the account. After the initial notice of the designated account, no further notice is required unless the institution designates a different account for assessment debit by the Corporation, in which case the requirements of the preceding sentence apply.

(3) *Transition Rule for Financing Corporation (FICO) Payments.* Quarterly FICO payments shall be collected by the FDIC without interruption during the assessment system transitional period in 2007. All insured depository institutions shall make scheduled quarterly FICO payments on January 2, 2007 (unless prepaid on December 30, 2006), and March 30, 2007, based upon, respectively, their September 30, 2006, and December 31, 2006 reported assessment bases, which shall be the final assessment bases calculated pursuant to 12 CFR 327.5(a) and (b) (2006). Simultaneous collection of deposit insurance assessments and FICO assessments will resume in June of 2007, based on the March 31, 2007 reported assessment base.

(b) *Assessment payment—(1) Quarterly certified statement invoice.* Starting with the first assessment period of 2007, no later than 15 days prior to the payment date specified in paragraph (b)(2) of this section, the Corporation will provide to each insured depository institution a quarterly certified statement invoice showing the amount of the assessment payment due from the institution for the prior quarter (net of credits or dividends, if any), and the computation of that amount. Subject to paragraph (e) of this section, the invoiced amount on the quarterly certified statement invoice shall be the product of the following: the assessment base of the institution for the prior quarter computed in accordance with § 327.5 multiplied by the institution's rate for that prior quarter as assigned to the institution pursuant to §§ 327.4(a) and 327.9.

(2) *Quarterly payment date and manner.* The Corporation will cause the amount stated in the applicable quarterly certified statement invoice to be directly debited on the appropriate payment date from the deposit account designated by the insured depository institution for that purpose, as follows:

(i) In the case of the assessment payment for the quarter that begins on

January 1, the payment date is the following June 30;

(ii) In the case of the assessment payment for the quarter that begins on April 1, the payment date is the following September 30;

(iii) In the case of the assessment payment for the quarter that begins on July 1, the payment date is the following December 30; and

(iv) In the case of the assessment payment for the quarter that begins on October 1, the payment date is the following March 30.

(c) *Necessary action, sufficient funding by institution.* Each insured depository institution shall take all actions necessary to allow the Corporation to debit assessments from the insured depository institution's designated deposit account. Each insured depository institution shall, prior to each payment date indicated in paragraph (b)(2) of this section, ensure that funds in an amount at least equal to the amount on the quarterly certified statement invoice are available in the designated account for direct debit by the Corporation. Failure to take any such action or to provide such funding of the account shall be deemed to constitute nonpayment of the assessment. Penalties for failure to timely pay assessments are provided for at 12 CFR 308.132(c)(3)(v).

(d) *Business days.* If a payment date specified in paragraph (b)(2) falls on a date that is not a business day, the applicable date shall be the previous business day.

(e) *Payment adjustments in succeeding quarters.* Quarterly certified statement invoices provided by the Corporation may reflect adjustments, initiated by the Corporation or an institution, resulting from such factors as amendments to prior quarterly reports of condition, retroactive revision of the institution's assessment risk assignment, and revision of the Corporation's assessment computations for prior quarters.

(f) *Request for revision of computation of quarterly assessment payment—(1) In general.* An institution may submit a written request for revision of the computation of the institution's quarterly assessment payment as shown on the quarterly certified statement invoice in the following circumstances:

(i) The institution disagrees with the computation of the assessment base as stated on the quarterly certified statement invoice;

(ii) The institution determines that the rate applied by the Corporation is inconsistent with the assessment risk assignment(s) provided to the institution in writing by the Corporation

for the assessment period for which the payment is due; or

(iii) The institution believes that the quarterly certified statement invoice does not fully or accurately reflect adjustments provided for in paragraph (e) of this section.

(2) *Inapplicability.* This paragraph (f) is not applicable to requests for review of an institution's assessment risk assignment, which are covered by § 327.4(c) of this part.

(3) *Requirements.* Any such request for revision must be submitted within 90 days from the date the computation being challenged appears on the institution's quarterly certified statement invoice. The request for revision shall be submitted to the Manager of the Assessments Section and shall provide documentation sufficient to support the change sought by the institution. If additional information is requested by the Corporation, such information shall be provided by the institution within 21 days of the date of the request for additional information. Any institution submitting a timely request for revision will receive written notice from the Corporation regarding the outcome of its request. Upon completion of a review, the DOF Director (or designee) shall promptly notify the institution in writing of his or her determination of whether revision is warranted. If the institution requesting revision disagrees with that determination, it may appeal to the FDIC's Assessment Appeals Committee. Notice of the procedures applicable to appeals will be included with the written determination.

(g) *Quarterly certified statement invoice unavailable.* Any institution whose quarterly certified statement invoice is unavailable on FDICconnect by the fifteenth day of the month in which the payment is due shall promptly notify the Corporation. Failure to provide prompt notice to the Corporation shall not affect the institution's obligation to make full and timely assessment payment. Unless otherwise directed by the Corporation, the institution shall preliminarily pay the amount shown on its quarterly certified statement invoice for the preceding assessment period, subject to subsequent correction.

§ 327.4 Assessment rates.

(a) *Assessment risk assignment.* For the purpose of determining the annual assessment rate for insured depository institutions under § 327.9, each insured depository institution will be provided an assessment risk assignment. Notice of an institution's current assessment risk assignment will be provided to the

institution with each quarterly certified statement invoice. Adjusted assessment risk assignments for prior periods may also be provided by the Corporation. Notice of the procedures applicable to reviews will be included with the notice of assessment risk assignment provided pursuant to paragraph (a) of this section.

(b) *Payment of assessment at rate assigned.* Institutions shall make timely payment of assessments based on the assessment risk assignment in the notice provided to the institution pursuant to paragraph (a) of this section. Timely payment is required notwithstanding any request for review filed pursuant to paragraph (c) of this section. Assessment risk assignments remain in effect for future assessment periods until changed. If the risk assignment in the notice is subsequently changed, any excess assessment paid by the institution will be credited by the Corporation, with interest, and any additional assessment owed shall be paid by the institution, with interest, in the next assessment payment after such subsequent assignment or change. Interest payable under this paragraph shall be determined in accordance with § 327.7.

(c) *Requests for review.* An institution that believes any assessment risk assignment provided by the Corporation pursuant to paragraph (a) of this section is incorrect and seeks to change it must submit a written request for review of that risk assignment. An institution cannot request review through this process of the CAMELS ratings assigned by its primary federal regulator; each federal regulator has established procedures for that purpose. An institution may also request review of a determination by the FDIC to assess the institution as a large or a small institution (12 CFR 327.9(d)(6)) or a determination by the FDIC that the institution is a new institution (12 CFR 327.9(d)(7)). Any request for review must be submitted within 90 days from the date the assessment risk assignment being challenged pursuant to paragraph (a) of this section appears on the institution's quarterly certified statement invoice. The request shall be submitted to the Corporation's Director of the Division of Insurance and Research in Washington, DC, and shall include documentation sufficient to support the change sought by the institution. If additional information is requested by the Corporation, such information shall be provided by the institution within 21 days of the date of the request for additional information. Any institution submitting a timely request for review will receive written notice from the Corporation regarding

the outcome of its request. Upon completion of a review, the Director of the Division of Insurance and Research (or designee) or the Director of the Division of Supervision and Consumer Protection (or designee), as appropriate, shall promptly notify the institution in writing of his or her determination of whether a change is warranted. If the institution requesting review disagrees with that determination, it may appeal to the FDIC's Assessment Appeals Committee. Notice of the procedures applicable to appeals will be included with the written determination.

(d) *Disclosure restrictions.* The portion of an assessment risk assignment provided to an institution by the Corporation pursuant to paragraph (a) of this section that reflects any supervisory evaluation or confidential information is deemed to be exempt information within the scope of § 309.5(g)(8) of this chapter and, accordingly, is governed by the disclosure restrictions set out at § 309.6 of this chapter.

(e) *Limited use of assessment risk assignment.* Any assessment risk assignment provided to a depository institution under this part 327 is for purposes of implementing and operating the FDIC's risk-based assessment system. Unless permitted by the Corporation or otherwise required by law, no institution may state in any advertisement or promotional material, or in any other public place or manner, the assessment risk assignment provided to it pursuant to this part.

(f) *Effective date for changes to risk assignment.* (1) Changes to an insured institution's risk assignment resulting from a supervisory ratings change become effective as of the date of written notification to the institution by its primary federal regulator or state authority of its supervisory rating (even when the CAMELS component ratings have not been disclosed to the institution), if the FDIC, after taking into account other information that could affect the rating, agrees with the rating. If the FDIC does not agree, changes to an insured institution's risk assignment become effective as of the date that the FDIC determines that a change in the supervisory rating is warranted.

(2) Changes to an insured institution's risk assignment resulting from a change in a long-term debt issuer rating become effective as of the date the change is announced by the rating agency.

§ 327.5 Assessment base.

(a) *Quarter-end balances and average daily balances.* An insured depository institution shall determine its assessment base using quarter-end

balances until changes in the quarterly report of condition allow it to report average daily deposit balances on the quarterly report of condition, after which—

(1) An institution that becomes newly insured after the first report of condition allowing for average daily balances shall have its assessment base determined using average daily balances;

(2) An insured depository institution (other than one covered in paragraph (a)(1) of this section) reporting assets of \$1 billion or more on the first report of condition allowing for average daily balances, shall within one year after so reporting have its assessment base determined using average daily balances;

(3) An insured depository institution (other than one covered in paragraph (a)(1) of this section) that was insured prior to the first report of condition allowing for average daily balances, reporting less than \$1 billion in assets on the first report of condition allowing for average daily balances—

(i) May continue to have its assessment base determined using quarter end balances; or

(ii) May opt permanently to have its assessment base determined using average daily balances after notice to the Corporation, but

(iii) Shall have its assessment rate determined using average daily balances for any quarter beginning six months after the institution reported that its assets equaled or exceeded \$1 billion for two consecutive quarters and thereafter; and

(4) In any event, an insured depository institution that files its report of condition on a consolidated basis by including a subsidiary bank(s) or savings association(s) shall report its assessment base on an unconsolidated basis.

(b) *Computation of assessment base.* Whether computed on a quarter-end balance or an average daily balance, the assessment base for any insured institution that is required to file a quarterly report of condition shall be computed by:

(1) Adding all deposit liabilities as defined in section 3(l) of the Federal Deposit Insurance Act, to include deposits that are held in any insured branches of the institution that are located in the territories and possessions of the United States, but does not include unposted credits and is not reduced by unposted debits; and

(2) Subtracting the following allowable exclusions, in the case of any institution that maintains such records as will readily permit verification of the correctness of its assessment base—

(i) Any demand deposit balance due from or cash item in the process of collection due from any depository institution (not including a private depository institution, a foreign depository institution, a foreign office of another U.S. depository institution, or a U.S. branch of a foreign depository institution) up to the total of the amount of deposit balances due to and cash items in the process of collection due to such depository institution that are included in paragraph (b)(1) of this section;

(ii) Any outstanding drafts (including advices and authorization to charge deposit institution's balance in another bank) drawn in the regular course of business;

(iii) Any pass-through reserve balances;

(iv) Liabilities arising from a depository institution investment contract that are not treated as insured deposits under section 11(a)(5) of the Federal Deposit Insurance Act (12 U.S.C. 1821(a)(5)); and

(v) Deposits accumulated for the payment of personal loans, which represent actual loan payments received by the depository institution from borrowers and accumulated by the depository institution in hypothecated deposit accounts for payment of the loans at maturity. Time and savings deposits that are pledged as collateral to secure loans are not "deposits accumulated for the payment of personal loans."

(c) *Newly insured institutions.* A newly insured institution shall pay an assessment for the assessment period during which it became an insured institution.

§ 327.6 Terminating transfers; other terminations of insurance.

(a) *Terminating institution's final two quarterly certified statement invoices.* If a terminating institution does not file a report of condition for the quarter prior to the quarter in which the terminating transfer occurs, its assessment base for the quarterly certified statement invoice or invoices for which it failed to file a report of condition shall be deemed to be its assessment base for the last quarter for which the institution filed a report of condition. The acquiring institution in a terminating transfer is liable for paying the final invoices of the terminating institution. The terminating institution's assessment for the quarter prior to the quarter in which the terminating transfer occurs shall be calculated at the terminating institution's rate.

(b) *Assessment for quarter in which the terminating transfer occurs—(1)*

Acquirer using Average Daily Balances. If an acquiring institution's assessment base is computed using average daily balances pursuant to § 327.5, the terminating institution's assessment for the quarter in which the terminating transfer occurs shall be reduced by the percentage of the quarter remaining after the terminating transfer and calculated at the acquiring institution's rate.

(2) *Acquirer using Quarter-end Balances.* If an acquiring institution's assessment base is computed as a quarter-end balance pursuant to § 327.5, its assessment for the quarter in which the terminating transfer occurs shall be the acquiring institution's quarter-end balance calculated at the acquiring institution's assessment rate, and the terminating institution shall not be assessed separately for that quarter.

(c) *Other terminations.* When the insured status of an institution is terminated, and the deposit liabilities of such institution are not assumed by another insured depository institution—

(1) *Payment of assessments; quarterly certified statement invoices.* The terminating depository institution shall continue to file and certify its quarterly certified statement invoice and pay assessments for the assessment period its deposits are insured. Such terminating institution shall not be required to certify its quarterly certified statement invoice and pay further assessments after it has paid in full its deposit liabilities and the assessment to the Corporation required to be paid for the assessment period in which its deposit liabilities are paid in full, and after it, under applicable law, goes out of business or transfers all or substantially all of its assets and liabilities to other institutions or otherwise ceases to be obliged to pay subsequent assessments.

(2) *Payment of deposits; certification to Corporation.* When the deposit liabilities of the depository institution have been paid in full, the depository institution shall certify to the Corporation that the deposit liabilities have been paid in full and give the date of the final payment. When the depository institution has unclaimed deposits, the certification shall further state the amount of the unclaimed deposits and the disposition made of the funds to be held to meet the claims. For assessment purposes, the following will be considered as payment of the unclaimed deposits:

(i) The transfer of cash funds in an amount sufficient to pay the unclaimed and unpaid deposits to the public official authorized by law to receive the same; or

(ii) If no law provides for the transfer of funds to a public official, the transfer of cash funds or compensatory assets to an insured depository institution in an amount sufficient to pay the unclaimed and unpaid deposits in consideration for the assumption of the deposit obligations by the insured depository institution.

(3) *Notice to depositors.* (i) The terminating depository institution shall give sufficient advance notice of the intended transfer to the owners of the unclaimed deposits to enable the depositors to obtain their deposits prior to the transfer. The notice shall be mailed to each depositor and shall be published in a local newspaper of general circulation. The notice shall advise the depositors of the liquidation of the depository institution, request them to call for and accept payment of their deposits, and state the disposition to be made of their deposits if they fail to promptly claim the deposits.

(ii) If the unclaimed and unpaid deposits are disposed of as provided in paragraph (b)(2)(i) of this section, a certified copy of the public official's receipt issued for the funds shall be furnished to the Corporation.

(iii) If the unclaimed and unpaid deposits are disposed of as provided in paragraph (b)(2)(ii) of this section, an affidavit of the publication and of the mailing of the notice to the depositors, together with a copy of the notice and a certified copy of the contract of assumption, shall be furnished to the Corporation.

(4) *Notice to Corporation.* The terminating depository institution shall advise the Corporation of the date on which it goes out of business or transfers all or substantially all of its assets and liabilities to other institutions or otherwise ceases to be obliged to pay subsequent assessments and the method whereby the termination has been effected.

(d) *Resumption of insured status before insurance of deposits ceases.* If a depository institution whose insured status has been terminated is permitted by the Corporation to continue or resume its status as an insured depository institution before the insurance of its deposits has ceased, the institution will be deemed, for assessment purposes, to continue as an insured depository institution and must thereafter file and certify its quarterly certified statement invoices and pay assessments as though its insured status had not been terminated. The procedure for applying for the continuance or resumption of insured status is set forth in § 303.248 of this chapter.

§ 327.7 Payment of interest on assessment underpayments and overpayments.

(a) *Payment of interest—(1) Payment by institutions.* Each insured depository institution shall pay interest to the Corporation on any underpayment of the institution's assessment.

(2) *Payment by Corporation.* The Corporation will pay interest on any overpayment by the institution of its assessment.

(3) *Accrual of interest.* (i) Interest on an amount owed to or by the Corporation for the underpayment or overpayment of an assessment shall accrue interest at the relevant interest rate.

(ii) Interest on an amount specified in paragraph (a)(3)(i) of this section shall begin to accrue on the day following the regular payment date, as provided for in § 327.3(b)(2), for the amount so overpaid or underpaid, provided, however, that interest shall not begin to accrue on any overpayment until the day following the date such overpayment was received by the Corporation. Interest shall continue to accrue through the date on which the overpayment or underpayment (together with any interest thereon) is discharged.

(iii) The relevant interest rate shall be redetermined for each quarterly assessment interval. A quarterly assessment interval begins on the day following a regular payment date, as specified in § 327.3(b)(2), and ends on the immediately following regular payment date.

(b) *Interest rates.* (1) The relevant interest rate for a quarterly assessment interval that includes the month of January, April, July, and October, respectively, is the coupon equivalent yield of the average discount rate set on the 3-month Treasury bill at the last auction held by the United States Treasury Department during the preceding December, March, June, and September, respectively.

(2) The relevant interest rate for a quarterly assessment interval will apply to any amounts overpaid or underpaid on the payment date immediately prior to the beginning of the quarterly assessment interval. The relevant interest rate will also apply to any amounts owed for previous overpayments or underpayments (including any interest thereon) that remain outstanding, after any adjustments to such overpayments or underpayments have been made thereon, at the end of the regular payment date immediately prior to the beginning of the quarterly assessment interval. Interest will be compounded daily.

§ 327.8 Definitions.

For the purpose of this part 327:

(a) *Deposits.* The term *deposits* has the meaning specified in section 3(l) of the Federal Deposit Insurance Act.

(b) *Quarterly report of condition.* The term *quarterly report of condition* means a report required to be filed pursuant to section 7(a)(3) of the Federal Deposit Insurance Act.

(c) *Assessment period—In general.* The term *assessment period* means a period beginning on January 1 of any calendar year and ending on March 31 of the same year, or a period beginning on April 1 of any calendar year and ending on June 30 of the same year; or a period beginning on July 1 of any calendar year and ending on September 30 of the same year; or a period beginning on October 1 of any calendar year and ending on December 31 of the same year.

(d) *Acquiring institution.* The term *acquiring institution* means an insured depository institution that assumes some or all of the deposits of another insured depository institution in a terminating transfer.

(e) *Terminating institution.* The term *terminating institution* means an insured depository institution some or all of the deposits of which are assumed by another insured depository institution in a terminating transfer.

(f) *Terminating transfer.* The term *terminating transfer* means the assumption by one insured depository institution of another insured depository institution's liability for deposits, whether by way of merger, consolidation, or other statutory assumption, or pursuant to contract, when the terminating institution goes out of business or transfers all or substantially all its assets and liabilities to other institutions or otherwise ceases to be obliged to pay subsequent assessments by or at the end of the assessment period during which such assumption of liability for deposits occurs. The term *terminating transfer* does not refer to the assumption of liability for deposits from the estate of a failed institution, or to a transaction in which the FDIC contributes its own resources in order to induce a surviving institution to assume liabilities of a terminating institution.

(g) *Small Institution.* An insured depository institution with assets of less than \$10 billion as of December 31, 2006 (other than an insured branch of a foreign bank) shall be classified as a small institution. If, after December 31, 2006, an institution classified as large under paragraph (h) of this section reports assets of less than \$10 billion in its reports of condition for four

consecutive quarters, the FDIC will reclassify the institution as small beginning the following quarter.

(h) *Large Institution*. An insured depository institution with assets of \$10 billion or more as of December 31, 2006 (other than an insured branch of a foreign bank) shall be classified as a large institution. If, after December 31, 2006, an institution classified as small under paragraph (g) of this section reports assets of \$10 billion or more in its reports of condition for four consecutive quarters, the FDIC will reclassify the institution as large beginning the following quarter.

(i) *Long-Term Debt Issuer Rating*. A long-term debt issuer rating shall mean a current rating of an insured depository institution's long-term debt obligations by Moody's Investor Services, Standard & Poor's, or Fitch Ratings. A long-term debt issuer rating does not include a rating of a company that controls an insured depository institution, or an affiliate or subsidiary of the institution. A current rating shall mean one that has been confirmed or assigned within 12 months before the end of the quarter for which an assessment rate is being determined. If no current rating is available, the institution will be deemed to have no long-term debt issuer rating.

(j) *CAMELS composite and CAMELS component ratings*. The terms *CAMELS composite ratings* and *CAMELS component ratings* shall have the same meaning as in the Uniform Financial Institutions Rating System as published by the Federal Financial Institutions Examination Council.

(k) *ROCA supervisory ratings*. ROCA supervisory ratings rate risk management, operational controls, compliance, and asset quality.

(l) *New depository institution*. A new insured depository institution is a bank or thrift that has not been chartered for at least five years as of the last day of any quarter for which it is being assessed.

(m) *Established depository institution*. An established institution is a bank or thrift that has been chartered for at least five years as of the last day of any quarter for which it is being assessed.

(n) *Risk assignment*. An institution's risk assignment includes assignment to Risk Category I, II, III, or IV, and, within Risk Category I, assignment to an assessment rate or rates.

By order of the Board of Directors.

Dated at Washington, DC, this 2nd day of November, 2006.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

[FR Doc. 06-9267 Filed 11-29-06; 8:45 am]

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FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 327

RIN 3064-AD09

Assessments

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Final rule.

SUMMARY: The Federal Deposit Insurance Reform Act of 2005 requires that the Federal Deposit Insurance Corporation (the FDIC) prescribe final regulations, after notice and opportunity for comment, to provide for deposit insurance assessments under section 7(b) of the Federal Deposit Insurance Act (the FDI Act). In this rulemaking, the FDIC is amending its regulations to create a new risk differentiation system, to establish a new base assessment rate schedule, and to set assessment rates effective January 1, 2007.

DATES: *Effective Date:* January 1, 2007.

FOR FURTHER INFORMATION CONTACT: Munsell W. St. Clair, Senior Policy Analyst, Division of Insurance and Research, (202) 898-8967; or Christopher Bellotto, Counsel, Legal Division, (202) 898-3801.

SUPPLEMENTARY INFORMATION:

I. Background

On February 8, 2006, the President signed the Federal Deposit Insurance Reform Act of 2005 into law; on February 15, 2006, he signed the Federal Deposit Insurance Reform Conforming Amendments Act of 2005 (collectively, the Reform Act).¹ The Reform Act enacts the bulk of the recommendations made by the FDIC in 2001. The Reform Act, among other things, requires that the FDIC, within 270 days, "prescribe final regulations, after notice and opportunity for comment * * * providing for assessments under section 7(b) of the Federal Deposit Insurance Act, as amended * * *," thus giving the FDIC, through its rulemaking authority, the opportunity to better price deposit insurance for risk.²

¹ Federal Deposit Insurance Reform Act of 2005, Public Law 109-171, 120 Stat. 9; Federal Deposit Insurance Conforming Amendments Act of 2005, Public Law 109-173, 119 Stat. 3601.

² Section 2109(a)(5) of the Reform Act. Pursuant to the Section 2109 of the Reform Act, current

On July 24, 2006, the FDIC published in the **Federal Register**, for a 60-day comment period, a notice of proposed rulemaking providing for deposit insurance assessments (the NPR). 71 FR 41910. The FDIC sought public comment on its proposal and received 707 comment letters, including numerous comments from trade organizations.³ The comments and the final rule providing for assessments are discussed in later sections.

A. The Current Risk-Differentiation Framework

The Federal Deposit Insurance Corporation Improvement Act of 1991 (FDICIA) required that the FDIC establish a risk-based assessment system. To implement this requirement, the FDIC adopted by regulation a system that places institutions into risk categories⁵ based on two criteria: capital levels and supervisory ratings. Three capital groups—well capitalized, adequately capitalized, and undercapitalized, which are numbered 1, 2 and 3, respectively—are based on leverage ratios and risk-based capital ratios for regulatory capital purposes. Three supervisory subgroups, termed A, B, and C, are based upon the FDIC's consideration of evaluations provided by the institution's primary federal regulator and other information the FDIC deems relevant.⁶ Subgroup A

assessment regulations remain in effect until the effective date of new regulations. Section 2109(a)(5) of the Reform Act requires the FDIC, within 270 days of enactment, to prescribe final regulations, after notice and opportunity for comment, providing for assessments under section 7(b) of the Federal Deposit Insurance Act. Section 2109 also requires the FDIC to prescribe, within 270 days, rules on the designated reserve ratio, changes to deposit insurance coverage, the one-time assessment credit, and dividends. A final rule on deposit insurance coverage was published on September 12, 2006. 71 FR 53547. Final rules on the one-time assessment credit and dividends were published on October 18, 2006. 71 FR 61374; 71 FR 61385. The FDIC is publishing final rulemakings on the designated reserve ratio and on operational changes to part 327 elsewhere in this issue of the **Federal Register**.

³ The comment period expired on September 22, 2006. The FDIC also received many comments relevant to this rulemaking in response to the other rulemakings discussed in footnote 2. All comments have been considered and are available on the FDIC's Web site, <http://www.fdic.gov/regulations/laws/federal/propose.html>.

⁴ The trade associations included the American Bankers Association, the Independent Community Bankers of America, America's Community Bankers, the Clearing House, the Financial Services Roundtable, the New York Bankers Association, the New Jersey League of Community Bankers, the Massachusetts Bankers Association, the Kansas Bankers Association, and the Association for Financial Professionals.

⁵ The FDIC's regulations refer to these risk categories as "assessment risk classifications."

⁶ The term "primary federal regulator" is synonymous with the statutory term "appropriate federal banking agency." 12 U.S.C. 1813(q).

consists of financially sound institutions with only a few minor weaknesses; subgroup B consists of institutions that demonstrate weaknesses that, if not corrected, could result in significant deterioration of the institution and increased risk of loss to the insurance fund; and subgroup C consists of institutions that pose a substantial probability of loss to the insurance fund unless effective

corrective action is taken. In practice, the subgroup evaluations are generally based on an institution's composite CAMELS rating, a rating assigned by the institution's supervisor at the end of a bank examination, with 1 being the best rating and 5 being the lowest.⁷ Generally speaking, institutions with a CAMELS rating of 1 or 2 are put in supervisory subgroup A, those with a CAMELS rating of 3 are put in subgroup

B, and those with a CAMELS rating of 4 or 5 are put in subgroup C. Thus, in the current assessment system, the highest-rated (least risky) institutions are assigned to category 1A and the lowest-rated (riskiest) institutions to category 3C. The three capital groups and three supervisory subgroups form a nine-cell matrix for risk-based assessments:

Capital Group	Supervisory Subgroup		
	A	B	C
1. Well Capitalized	1A	1B	1C
2. Adequately Capitalized	2A	2B	2C
3. Undercapitalized	3A	3B	3C

B. Reform Act Provisions

The Federal Deposit Insurance Act, as amended by the Reform Act, continues to require that the assessment system be risk-based and allows the FDIC to define risk broadly. It defines a risk-based system as one based on an institution's probability of causing a loss to the deposit insurance fund due to the composition and concentration of the institution's assets and liabilities, the amount of loss given failure, and revenue needs of the Deposit Insurance Fund (the fund).⁸

At the same time, the Reform Act also restores to the FDIC's Board of Directors the discretion to price deposit insurance according to risk for all insured institutions regardless of the level of the fund reserve ratio.⁹

The Reform Act leaves in place the existing statutory provision allowing the FDIC to "establish separate risk-based

assessment systems for large and small members of the Deposit Insurance Fund."¹⁰ Under the Reform Act, however, separate systems are subject to a new requirement that "[n]o insured depository institution shall be barred from the lowest-risk category solely because of size."¹¹

II. Summary of the Final Rule

The final rule is set out in detail in ensuing sections, but is briefly summarized here.

The final rule consolidates the existing nine risk categories into four and names them Risk Categories I, II, III and IV. Risk Category I replaces the 1A risk category.

Within Risk Category I, the final rule combines supervisory ratings with other risk measures to differentiate risk. For most institutions, the final rule combines CAMELS component ratings

with financial ratios to determine an institution's assessment rate. For large institutions that have long-term debt issuer ratings, the final rule differentiates risk by combining CAMELS component ratings with these ratings. For large institutions within Risk Category I, initial assessment rate determinations may be modified within limits upon review of additional relevant information.

The final rule defines a large institution as an institution that has \$10 billion or more in assets. With certain exceptions, beginning in 2010, the final rule treats new institutions (those established for less than five years) in Risk Category I the same, regardless of size, and assesses them at the maximum rate applicable to Risk Category I institutions.

The final rule sets actual rates beginning January 1, 2007, as follows:

	Risk Category				
	I*		II	III	IV
	Minimum	Maximum			
Annual Rates (in basis points)	5	7	10	28	43

* Rates for institutions that do not pay the minimum or maximum rate vary between these rates.

⁷ CAMELS is an acronym for component ratings assigned in a bank examination: Capital adequacy, Asset quality, Management, Earnings, Liquidity, and Sensitivity to market risk. A composite CAMELS rating combines these component ratings, which also range from 1 (best) to 5 (worst).

⁸ 12 U.S.C. 1817(b)(1)(A) and (C). The Bank Insurance Fund and Savings Association Insurance Fund were merged into the newly created Deposit Insurance Fund on March 31, 2006.

⁹ The Reform Act eliminates the prohibition against charging well-managed and well-capitalized institutions when the deposit insurance fund is at or above, and is expected to remain at or above, the designated reserve ratio (DRR). This prohibition was included as part of the Deposit Insurance Funds Act of 1996, Public Law 104-208, 110 Stat. 3009, 3009-479. However, while the Reform Act allows the DRR to be set between 1.15 percent and 1.50 percent, it also generally requires dividends of

one-half of any amount in the fund in excess of the amount required to maintain the reserve ratio at 1.35 percent when the insurance fund reserve ratio exceeds 1.35 percent at the end of any year. The Board can suspend these dividends under certain circumstances. 12 U.S.C. 1817(e)(2).

¹⁰ 12 U.S.C. 1817(b)(1)(D).

¹¹ Section 2104(a)(2) of the Reform Act (to be codified at 12 U.S.C. 1817(b)(2)(D)).

These rates are three basis points above the base rate schedule adopted in the final rule:

	Risk Category				
	I*		II	III	IV
	Minimum	Maximum			
Annual Rates (in basis points)	2	4	7	25	40

* Rates for institutions that do not pay the minimum or maximum rate vary between these rates.

The final rule continues to allow the FDIC Board to adjust rates uniformly from one quarter to the next, except that no single adjustment can exceed three basis points. In addition, cumulative adjustments cannot exceed a maximum of three basis points higher or lower

than the base rates without further notice-and-comment rulemaking.

III. General Risk Differentiation Framework

The final rule consolidates the number of assessment risk categories

from nine to four. The four new categories will continue to be defined based upon supervisory and capital evaluations, which are both established measures of risk. The consolidation creates four new Risk Categories as shown in Table 1:

Table 1

New Risk Categories

Capital Group	Supervisory Group		
	A	B	C
Well Capitalized	I		III
Adequately Capitalized	II		
Undercapitalized	III		IV

Risk Category I contains all well-capitalized institutions in Supervisory Group A (generally those with CAMELS composite ratings of 1 or 2); i.e., those institutions that would be placed in the former 1A category. Risk Category II contains all institutions in Supervisory Groups A and B (generally those with CAMELS composite ratings of 1, 2 or 3), except those in Risk Category I and undercapitalized institutions.¹² Risk Category III contains all undercapitalized institutions in Supervisory Groups A and B, and institutions in Supervisory Group C (generally those with CAMELS composite ratings of 4 or 5) that are not undercapitalized. Risk Category IV contains all undercapitalized institutions in Supervisory Group C; i.e., those institutions that would be placed in the former 3C category.¹³

Comments

No comments disagreed with the proposed reduction in the number of risk categories from nine to four. However, one comment recommended adding subcategories to Risk Category I to provide a warning to institutions that are moving toward Risk Category II if corrective action is not taken and giving an institution that slips from Risk Category I to Risk Category II an opportunity to show quick improvement. The FDIC does not believe that these subcategories are necessary. For an institution in Risk Category I, its assessment rate will provide the same information. The FDIC also does not believe that special treatment should be accorded an institution that slips from Risk Category I, as opposed to other institutions already in Risk Category II.

Some comments argued that, for CAMELS 3, 4 and 5-rated institutions in Risk Categories II and III, some provision for lower premiums should be made for institutions that augment and

maintain strong capital, maintain adequate reserves for loan losses and have a plan for recovery approved by the FDIC. The FDIC does not see a need for special provisions for these institutions, as they have other incentives to improve capital and business operations.

IV. Risk Differentiation Within Risk Category I

A. Overview

Risk Category I, as of June 30, 2006, would include approximately 95 percent of all insured institutions. The final rule will further differentiate risk within this category using one of two methods. Both methods share a common feature, namely, the use of CAMELS component ratings. However, each method combines these measures with different sources of information on risk. For small institutions within Risk Category I and for large institutions within Risk Category I that do not have long-term debt issuer ratings, the final rule combines CAMELS component ratings with current financial ratios to determine an institution's assessment rate. For large institutions within Risk Category I that have long-term debt

¹² Under current regulations, bridge banks and institutions for which the FDIC has been appointed or serves as conservator are charged the assessment rate applicable to the 2A category. 12 CFR 327.4(c). The final rule places these institutions in Risk Category I and charges them the minimum rate applicable to that category.

¹³ For clarity, the final rule uses the phrase "Supervisory Group" to replace "Supervisory Subground." The final rule also designates the capital categories as "Well Capitalized,"

"Adequately Capitalized" and "Undercapitalized," rather than Capital Groups 1, 2 and 3. However, the definitions of the Supervisory Groups and Capital Group have not changed in substance.

issuer ratings, the final rule combines CAMELS component ratings with these debt ratings. For all large institutions, initial assessment rates may be modified within limits upon review of additional relevant information.

The risk differentiation methods for institutions in Risk Category I measure levels of risk and result in rank orderings of risk within the category. Within Risk Category I, the final rule assesses those institutions that pose the least risk a minimum assessment rate and those that pose the greatest risk a maximum assessment rate that is two basis points higher than the minimum rate. An institution that poses an intermediate risk within Risk Category I will be charged a rate between the minimum and maximum that will vary by institution. Under the final rule, small changes in an institution's financial ratios, long-term debt issuer ratings or CAMELS component ratings should produce only small changes in assessment rates.

The final rule defines a large institution as an institution that has \$10 billion or more in assets and a small institution as an institution that has less than \$10 billion in assets. Also, as described below in Section VII,

beginning in 2010, with certain exceptions, the final rule treats new institutions in Risk Category I the same, regardless of size, and assesses them at the maximum rate applicable to Risk Category I institutions.

B. Distribution of Assessment Rates

As stated above, within Risk Category I, the final rule results in assessing those institutions that pose the least risk a minimum assessment rate and those that pose the greatest risk a maximum assessment rate that is two basis points higher. An institution that poses an intermediate risk within Risk Category I will be charged a rate between the minimum and maximum that will vary incrementally by institution.

In this regard, the final rule differs from the NPR in its application to large institutions. The NPR had proposed assessing large institutions that posed an intermediate risk within Risk Category I one of four rates between the minimum and maximum based on subcategory assignments. A number of comments expressed concern over the proposed use of assessment rate subcategories and the possibility that large increases (and decreases) in assessment rates could result from

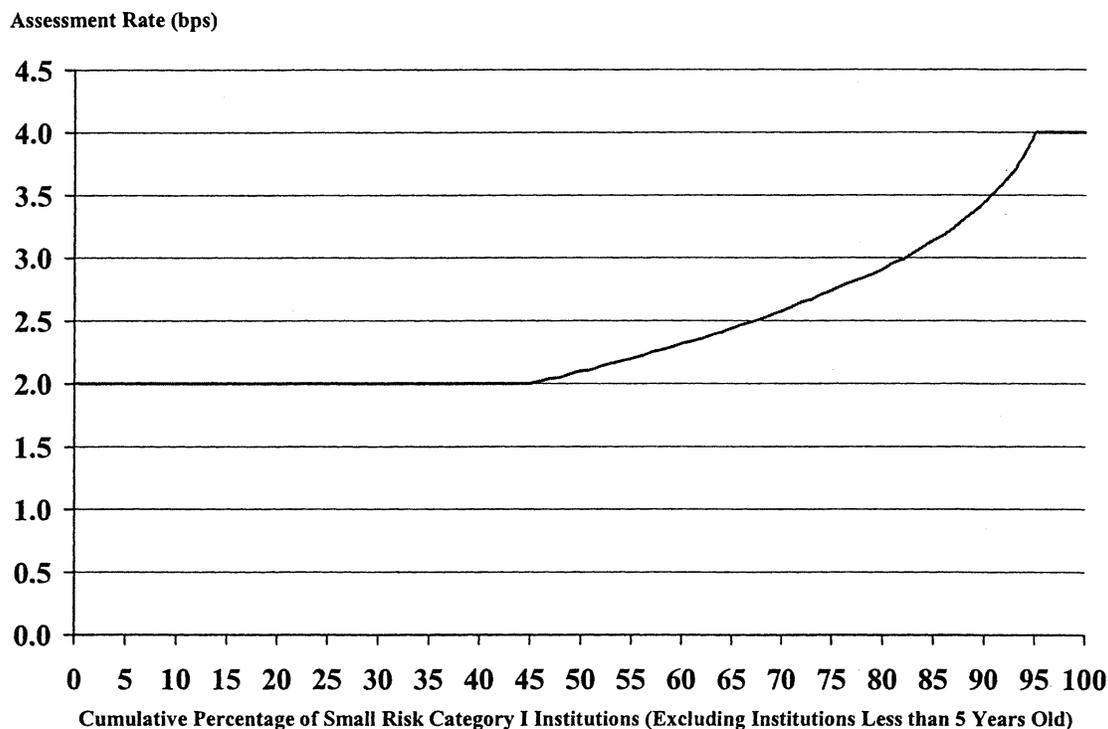
relatively small changes in risk. Some of these comments recommended using as few as three assessment rate subcategories, and some comments recommended using incremental pricing, as proposed in the NPR for small institutions. The FDIC has decided to adopt an incremental pricing framework for all institutions so that a small change in risk will produce a small change in assessment rates.

Under the final rule, as of June 30, 2006: (1) Approximately 45 percent of all institutions that would have been in Risk Category I (other than institutions less than 5 years old) would have been charged the minimum assessment rate; and (2) approximately 5 percent of all institutions that would have been in Risk Category I (other than institutions less than 5 years old) would have been charged the maximum assessment rate. In future periods, different percentages of institutions may be charged the minimum and maximum rates.

Chart 1 shows the cumulative distribution of assessment rates based on June 30, 2006 data, using base assessment rates for institutions in Risk Category I. The chart excludes Risk Category I institutions less than 5 years old.

Chart 1

Cumulative Distribution of Assessment Rates Based on June 30, 2006 Data



Comments

Percentages of institutions paying the minimum rate. A comment agreed that charging 45 percent of institutions the minimum rate makes sense given the current health of the banking industry. Several comments (including comments from some trade groups), however, suggested that initially charging 45 percent of institutions the minimum rate was arbitrary or inappropriate. These comments suggested initially charging a larger percentage of institutions the minimum rate, at least in part, because risk in the banking industry is very low at present.

Two comments expressed the view that the decision to place roughly 45 percent of large institutions in the minimum assessment rate subcategory and 5 percent in the maximum assessment rate subcategory was subjective and arbitrary. In one of these comments, it was suggested that large institutions might be restricted from the lowest premium rate by this decision. Several other comments also urged the FDIC to expand the availability of the minimum assessment rate to a larger proportion of large institutions. Some comments argued for the elimination of premiums altogether for the highest-rated large institutions.

The FDIC has found that small institutions with a probability of downgrade to a CAMELS 3 or worse that is equal to or less than the probability

of downgrade for the 40th to 50th percentile as of June 30, 2006, had minimal risk of a CAMELS downgrade over time. The remainder of small institutions in the industry had increasing and distinguishable risk of CAMELS downgrades. The FDIC believes it is appropriate to initially assign roughly similar proportions of large and small institutions to the minimum assessment rate to achieve parity. While the initial proportions of large and small institutions being charged the minimum and maximum rates will be similar, the final rule does not fix the proportions for the future. Thus, in future periods, more or less than 45 percent of large (or small) institutions may pay the minimum rate and more or less than 5 percent may pay the maximum rate.

Risk Category I assessment rate spread. Several comments (including comments from trade groups) recommended that the FDIC eliminate or narrow the spread between the minimum and maximum base rates for Risk Category I. Arguments in favor of eliminating or narrowing the spread included:

- The new risk differentiation system is untested and could lead to unintended consequences.
- Improvements in bank risk-management systems, improvements in supervisory evaluations and off-site monitoring, and enhanced supervisory

powers enjoyed by the regulators have reduced risk.

- A narrower spread would reduce the adverse effect of changes in subcategories on large banks and the adverse effect of paying the maximum rate on new banks.

Other comments (including comments from some trade groups) recommended increasing the spread between minimum and maximum assessment rates for Risk Category I to 3 basis points. According to these comments, a wider spread would improve risk differentiation and could subject more institutions to incremental rates between the minimum and maximum rates.

The final rule strikes a balance between the arguments for a narrower spread and those for a wider spread. The two basis point spread adopted in the final rule is narrower than the historical loss data would suggest.¹⁴ However, as the comments have noted, the new system is, as yet, untested.

C. CAMELS Ratings

For all institutions in Risk Category I, supervisory ratings will be taken into account in setting assessment rates using a weighted average of an institution's CAMELS components. This weighted average will be created by combining the components as follows:¹⁵

CAMELS Component	Weight
C	25%
A	20%
M	25%
E	10%
L	10%
S	10%

Comments

Almost every comment that discussed the use of CAMELS ratings to differentiate risk within Risk Category I supported their use. One comment questioned their use and a few comments opposed any differentiation within Risk Category I.

One trade group asserted that the FDIC should use a simple, rather than

weighted, average of CAMELS components on the grounds that using financial ratios related to these components effectively weights the components. The trade group noted that capital, for example, is already reflected in an institution's risk category and as a CAMELS component. The trade group also asserted that asset quality is given extra emphasis in the proposed

weighting scheme by including several asset quality financial ratios as well as the A rating in the CAMELS component average. With regards to the M component, the trade group asserted that:

Management—the most subjective of all the CAMELS components—must by necessity be involved in all the financial ratios and other examination components. In practice,

¹⁴ See Table 1.6 in Appendix 1 to the NPR, 71 FR 41910.

¹⁵ The FDIC and other bank supervisors do not use a weighting system to determine CAMELS

composite ratings. The weights in the table reflect the view of the FDIC regarding the relative importance of each of the CAMELS components for differentiating risk among institutions in Risk Category I for deposit insurance purposes. Different

weights might apply if this measure were being used to evaluate risk for deposit insurance purposes for all institutions, including those outside Risk Category I.

therefore, it is unlikely that examiners would rate management higher than the other components. Thus, there is always a bias against a high management rating.

Several comments proposed different weighting schemes for large institutions, such as heavier weights for Liquidity, Capital, and Asset quality.

The final rule retains the weights proposed in the NPR to determine the weighted average CAMELS component rating. These weights reflect the view of the FDIC on the relative importance of each of the CAMELS components in differentiating risk among institutions in Risk Category I for deposit insurance purposes.

D. Financial Ratios

For small institutions and for large institutions without a long-term debt issuer rating, the final rule uses certain financial ratios, in addition to supervisory ratings, to differentiate risk. The final rule differs slightly from the proposal in the NPR with respect to the financial ratios being used and their definitions.

The financial ratios that will be used are:

- The Tier 1 Leverage Ratio;
- Loans past due 30–89 days/gross assets;
- Nonperforming assets/gross assets;¹⁶
- Net loan charge-offs/gross assets; and
- Net income before taxes/risk-weighted assets.

The Tier 1 Leverage Ratio has the definition used for regulatory capital purposes. Appendix A defines each of the ratios.

Many comments (including comments from several industry trade groups) opposed including time deposits greater than \$100,000 in the definition of volatile liabilities for a variety of reasons, including: (1) These deposits are core deposits or should be so considered; and (2) including them would have an effect on attracting municipal deposits. One comment opposed including brokered deposits in the definition of volatile liabilities on the grounds that they are less volatile than many core deposits. One trade group argued that deposits in excess of \$100,000 that are insured by excess deposit insurance should not be

included in the definition of volatile liabilities.

The final rule eliminates the basis for these concerns by excluding one of the financial ratios proposed in the NPR, the ratio of volatile liabilities to gross assets. The financial data used to compute volatile liabilities reported by thrifts in the Thrift Financial Reports (TFRs) and reported by banks in their Reports of Condition and Income (Call Reports) were not compatible and could not be made compatible without changes in reporting requirements.¹⁷

The final rule also excludes the portion of loans and leases that is guaranteed by the U.S. Government, including government agencies and government-sponsored agencies, from the computation of loans past due 30–89 days and from the computation of non-performing assets. These types of guaranteed loans are treated as less risky than other loans for risk-based capital purposes. Moreover, the use of past due and nonaccrual loan measures that do not adjust for these guaranteed loans might overstate credit risk and result in assessment rates that are too high for some institutions.

Comments

Almost all comments (including comments from a trade group) on using financial ratios (in addition to CAMELS ratings) to determine assessment rates supported their use. However, some suggested that different financial ratios be used.

In the NPR, the definition of volatile liabilities did not include Federal Home Loan Bank advances, but the FDIC asked for comment on whether it should. The FDIC received 569 comments on this issue. All but one argued that the definition of volatile liabilities should not include Federal Home Loan Bank advances; one argued that the definition should include these advances. The final rule does not include the volatile liability ratio.

A trade group suggested excluding the loans past due 30–89 days to gross assets ratio on the grounds that loan delinquencies are already considered in two CAMELS components, A (Assets) and M (Management). The final rule retains the loans past due 30–89 days to gross assets ratio. Independent of the CAMELS components, this ratio is

statistically significant and highly predictive of CAMELS downgrades and institution failures even when it is considered together with the nonperforming ratio.¹⁸

A trade group commented that the risk weighting formula used to establish risk weighted assets is biased against residential mortgage lenders. It argued that, since they are secured by property liens, all 1–4 family, owner occupied residential mortgage loans with a loan-to-value ratio under 80 percent should be given a risk weighting of zero.

In the final rule, pre-tax earnings are divided by risk-weighted assets rather than by gross assets to avoid penalizing certain types of institutions, including those that hold low-risk and low-yielding assets. The FDIC's analysis shows that institutions specializing in mortgage lending are not charged a higher average assessment rate than other institutions under the final rule. Moreover, Call Reports and TFRs currently do not collect separate data on the loan-to-value ratio for 1–4 family, owner occupied residential mortgage loans; thus, it is not feasible to treat loans with a low loan-to-value ratio differently.

This trade group also requested that the FDIC study how mutual institutions are affected by including earnings in the financial ratios. The FDIC found that, while mutual institutions typically have a lower ratio of pre-tax earnings to risk-weighted assets, they typically have a higher Tier 1 leverage ratio and lower non-performing loan and charge-off ratios than other small institutions in Risk Category I. As a result, mutual institutions are not charged a higher average assessment rate than other institutions under the final rule.

Another trade group advocated averaging financial ratios over a period not less than four quarters, arguing that taking “a one-quarter snap shot” can be a misleading indicator of risk, since many financial institutions can experience seasonal variations. By averaging, these seasonalities would be removed.

The final rule uses a four-quarter sum for two of the five financial ratios—the pre-tax earnings and net charge-offs ratios—to reduce volatility related to seasonality. The final rule uses the values of the three other financial ratios as of each quarter-end for several reasons. First, the seasonality of these

¹⁶ The NPR used the phrase “nonperforming loans” rather than “nonperforming assets.” Because this ratio includes repossessed real estate in the numerator, the FDIC has concluded that the phrase “nonperforming assets” would be more accurate. No change in the definition of the ratio is intended by this name change (although, as discussed later, a slight revision to the definition is being made for other reasons).

¹⁷ The largest item in volatile liabilities for the great majority of institutions is time-and-savings deposits greater than \$100,000. Institutions that file Call Reports report this figure, but institutions that file TFRs do not report this item separately. Instead, they report all deposits greater than \$100,000, including demand deposits. Time-and-savings deposits greater than \$100,000 cannot be determined from TFRs.

¹⁸ One comment suggested excluding total loans and lease financing receivables past due 30 to 59 days in the ratio. Call Reports and TFRs currently do not collect separate data on loans and lease financing receivables past due 30 to 59 days; thus, it is not feasible to exclude these past due receivables from the ratio.

financial ratios is more modest. Second, with a quarterly computation of assessment rates, the average assessment rate an institution would be charged throughout the year would roughly equate to the assessment rate calculated with average ratios. Third, averaging financial ratios over time has the disadvantage of blunting the effect of changes in an institution's financial condition that are not related to seasonality; thus, averaging ratios would prevent assessments from fully adjusting to changes in risk.

One trade group supported the FDIC's use of a Tier 1 leverage ratio and suggested that it should be weighted heaviest among the financial ratios considered. However, several comments (including comments from other trade groups) stated that capital should be measured by a risk-adjusted capital ratio rather than the Tier 1 leverage ratio because a risk-adjusted capital ratio is a better measure of capital adequacy.

Several comments stated that the FDIC should not use a Tier 1 leverage ratio to determine assessment rates for large institutions, in particular. One of these comments argued that this ratio is not an accurate measure of risk, effectively penalizes institutions that invest in high quality short-term assets, such as U.S. government securities, and places U.S. banks at a competitive disadvantage with foreign banks.

Another comment suggested that larger institutions might tend to be penalized by inclusion of a leverage ratio.

The final rule uses the Tier 1 leverage ratio. The Tier 1 leverage ratio is highly significant in predicting CAMELS downgrades and failures. Using a risk-based capital measure in place of the Tier 1 leverage ratio does not improve predictive accuracy. For the relatively few large Risk Category I institutions that do not have long-term debt issuer ratings, the FDIC's ability to adjust assessment rates based on consideration of other risk information, as discussed below, should ensure that these institutions are treated equitably.

Several comments (including comments from several trade groups) stated that the capital measure should include subordinated debt and stated or implied that subordinated debt should reduce assessment rates because it would reduce loss given failure. Several comments (including comments from some trade groups) argued that the statutes governing the risk-based pricing system require that the FDIC take loss given failure into account when determining assessments and that the proposed system does not do so. Because it does not do so, they argue, the assessment system is actuarially

unfair. These issues are discussed in a subsequent section (Section IX).

One commenter explicitly argued that, for large institutions in Risk Category I, only CAMELS components should be used to differentiate risk. However, the comment also implied that only CAMELS components should be used for all Risk Category I institutions, including small institutions. The method adopted in the final rule, which combines financial ratios and supervisory ratings, predicts downgrades better than one without financial ratios. For this reason, the final rule does not adopt the method suggested in the comment.

E. Long-Term Debt Issuer Ratings

For large institutions with long-term debt issuer ratings, the final rule uses these ratings, in addition to supervisory ratings, to differentiate risk. The final rule uses the current long-term debt issuer rating or ratings assigned by the major U.S. rating agencies.¹⁹ Debt issuer ratings of holding companies and other third party debt ratings will not be used in the calculation of an assessment rate, but may be considered along with other information in determining whether adjustments to the resulting assessment rate are appropriate. Possible adjustments to assessment rates are discussed in a subsequent section.

Comments

A number of comments (including comments from some trade groups) supported the use of debt issuer ratings as an objective measure of risk in large institutions and as complementary to supervisory ratings. One trade group urged the FDIC to use ratings issued by any nationally recognized credit rating agency; a rating agency requested that its ratings be used. The rating agency also urged the FDIC to consider agency ratings for both small and large institutions when available.

While there is merit in considering ratings provided by other rating agencies, long-term debt issuer ratings issued by the three major U.S. rating agencies are widely accepted and used by market participants to gauge the relative risk of large financial institutions for many purposes, including the determination of required rates of return on institution-issued debt. They provide market-based views of risk that are complementary to supervisory views.²⁰ The final rule does

not incorporate debt issuer rating information into the pricing methodology used for smaller institutions; however, as described in a subsequent section, institutions with assets between \$5 billion and \$10 billion may request to be treated as a large institution for pricing purposes.

Other comments (including comments from other trade groups) either urged caution in the use of agency ratings on the grounds of bias in favor of large institutions or argued they should not be used. The FDIC's ability to adjust assessment rates for large institutions, discussed below, should alleviate these concerns.

Several comments urged the FDIC to use holding company debt issuer ratings to determine assessment rates. These comments noted that debt is often issued at the parent level, that holding companies are required to serve as a source of strength to their subsidiary institutions, and that holding company considerations apply to insured subsidiaries due to the cross guarantee liabilities of affiliated institutions.

The long-term debt issuer rating of an insured entity relates directly to the risk in that particular entity. As noted in the NPR, the risk profiles of affiliated institutions within a holding company can differ. Additionally, the value of a cross-guarantee in the future is uncertain because the financial condition of affiliated institutions may, in certain circumstances, weigh against the FDIC's invoking such cross-guarantee provisions.

Nevertheless, it is prudent to consider all available risk information in setting assessment rates. As discussed below, the FDIC will consider additional information, including any holding company debt issuer ratings, in determining whether the assessment rate for any large institution is appropriate.²¹

F. Combining Supervisory Ratings and Financial Ratios

For small institutions within Risk Category I and for large institutions within Risk Category I that do not have long-term debt issuer ratings, the final rule combines supervisory ratings and

implementing regulations within 270 days of enactment. The FDIC expects to revisit how best to incorporate the ratings of other agencies in the future. Any future revisions would involve notice-and-comment rulemaking.

²¹ There are, at present, only a few cases where holding company debt issuer ratings are available and insured entity debt issuer ratings are not. Of these, two cases involve entities owned by non-bank parents. Where both holding company ratings and insured entity debt issuer ratings exist, most insured entity ratings are better (indicating lower risk) than those of the parent company.

¹⁹ That is, Moody's, Standard & Poor's, and Fitch.

²⁰ The FDIC is aware of the enactment of the Credit Rating Agency Reform Act of 2006, Public Law 109-291. However, this legislation has not yet been implemented. The Act requires the Securities and Exchange Commission to issue final

financial ratios to determine assessment rates. The financial ratios and the weighted average CAMELS component rating are used to estimate the probability that an institution will be downgraded to CAMELS 3, 4 or 5 at its next examination using data from the end of the years 1984 to 2004.²² This period covers both periods of stress and strength in the banking industry.²³ The final rule converts the probabilities of downgrade to specific base assessment rates. The analysis and conversion produced the following multipliers for each risk measure:

Risk measures *	Pricing multipliers **
Tier 1 Leverage Ratio	(0.042)
Loans Past Due 30–89 Days/Gross Assets	0.372
Nonperforming Assets/Gross Assets	0.719
Net Loan Charge-Offs/Gross Assets	0.841
Net Income before Taxes/Risk-Weighted Assets ...	(0.420)
Weighted Average CAMELS Component Rating	0.534

* Ratios are expressed as percentages.

²² The “S” component rating was first assigned in 1997. Because the statistical analysis relies on data from before 1997, the “S” component rating was excluded from the analysis. Appendix A describes the statistical analysis.

²³ 2005 data had to be excluded because the analysis is based upon supervisory downgrades within one year and 2006 downgrades have yet to be determined.

**Multipliers are rounded to three decimal places.

To determine an institution’s insurance assessment rate under the base assessment rate schedule, each of these risk measures (that is, each institution’s financial ratios and weighted average CAMELS component rating) will be multiplied by the corresponding pricing multipliers. The sum of these products will be added to (or subtracted from) a uniform amount, 1.954.²⁴ The uniform amount is derived from a statistical analysis.²⁵ However, no rate within Risk Category I will be less than the minimum assessment rate applicable to the category or higher than the maximum assessment rate applicable to the category. The final rule sets the minimum base assessment rate for Risk Category I at two basis points and the maximum base assessment rate for Risk Category I two basis points higher.

²⁴ Appendix A provides the derivation of the pricing multipliers and the uniform amount to be added to compute an assessment rate. The rate derived will be an annual rate, but will be determined every quarter.

²⁵ The uniform amount will be the same for all institutions in Risk Category I (other than large institutions that have long-term debt issuer ratings, insured branches of foreign banks and, beginning in 2010, new institutions). In the NPR, the FDIC had proposed that the uniform amount would be adjusted for assessment rates set by the FDIC. The final rule is mathematically equivalent. Rather than adjusting the uniform amount, the final rule simply calculates rates for Risk Category I institutions with respect to the base assessment rates, and adjusts all rates by the same amount to conform to actual rates.

To compute the values of the uniform amount and pricing multipliers shown above, the FDIC chose cutoff values for the predicted probabilities of downgrade such that, as of June 30, 2006: (1) 45 percent of smaller institutions that would have been in Risk Category I (other than institutions less than 5 years old) would have been charged the minimum assessment rate; and (2) 5 percent of smaller institutions that would have been in Risk Category I (other than institutions less than 5 years old) would have been charged the maximum assessment rate.²⁶ These cutoff values will be used in future periods, which could lead to different percentages of institutions being charged the minimum and maximum rates.

Table 2 gives assessment rates for three institutions with varying characteristics, assuming the pricing multipliers given above, using the base assessment rates for institutions in Risk Category I (which range between a minimum of 2 basis points to a maximum of 4 basis points).²⁷

²⁶ The cutoff value for the minimum assessment rate is a predicted probability of downgrade of approximately 2 percent. The cutoff value for the maximum assessment rate is approximately 14 percent.

²⁷ These are the base rates for Risk Category I adopted in Section VIII. Under the final rule, actual rates for any year could be as much as 3 basis points higher or lower than the base rates without the necessity of notice-and-comment rulemaking. Beginning in 2007, actual rates will be 3 basis points higher than the base rates.

Table 2

Base Assessment Rates for Three Institutions*

A	B	C		D		E		F		G		H	
		Institution 1				Institution 2				Institution 3			
		Risk Measure Value	Assessment Rate										
Uniform Amount	1.954		1.95		1.95		1.95		1.95		1.95		1.95
Tier 1 Leverage Ratio (%)	(0.042)	9.590	(0.40)	8.570	(0.36)	7.500	(0.32)						
Loans Past Due 30-89 Days/Gross Assets (%)	0.372	0.400	0.15	0.600	0.22	1.000	0.37						
Nonperforming Assets/Gross Assets (%)	0.719	0.200	0.14	0.400	0.29	1.500	1.08						
Net Loan Charge-Offs/Gross Assets (%)	0.841	0.147	0.12	0.079	0.07	0.300	0.25						
Net Income before Taxes/Risk-Weighted Assets (%)	(0.420)	2.500	(1.05)	1.951	(0.82)	0.518	(0.22)						
Weighted Average CAMELS Component Ratings	0.534	1.200	0.64	1.450	0.77	2.100	1.12						
Sum of Contributions			1.56		2.13		4.25						
Assessment Rate			2.00		2.13		4.00						

* Figures may not multiply or add to totals due to rounding.²⁸

The assessment rate for an institution in the table is calculated by multiplying the pricing multipliers (Column B) by the risk measure values (Column C, E or G) to produce each measure's contribution to the assessment rate. The sum of the products (Column D, F or H) plus the uniform amount (the first item in Column D, F and H) yields the total assessment rate. For Institution 1 in the table, this sum actually equals 1.56, but the table reflects the assumed minimum assessment rate of 2 basis points. For Institution 3 in the table, the sum actually equals 4.25, but the table reflects the assumed maximum assessment rate of 4 basis points.

Under the final rule, the FDIC will have the flexibility to update the pricing multipliers and the uniform amount annually, without further notice-and-comment rulemaking. In particular, the FDIC will be able to add data from each new year to its analysis and may, from time to time, exclude some earlier years from its analysis. For example, some time during 2007 the FDIC may include data in the statistical analysis covering the period 1984 to 2005, rather than 1984 to 2004. Because the analysis will continue to use many earlier years' data as well, pricing multiplier changes from year to year should usually be relatively small.

²⁸ The final rule provides that pricing multipliers, the uniform amount, and financial ratios will be rounded to three digits after the decimal point. Resulting assessment rates will be rounded to the nearest one-hundredth (1/100th) of a basis point.

On the other hand, as a result of the annual review and analysis, the FDIC may conclude that additional or alternative financial measures, ratios or other risk factors should be used to determine risk-based assessments or that a new method of differentiating for risk should be used. In any of these events, changes would be made through notice-and-comment rulemaking.

Under the final rule, the financial ratios for any given quarter will be calculated from the report of condition filed by each institution as of the last day of the quarter.²⁹ In a separate rule, the FDIC has determined that, for purposes of assigning an institution to one of the four risk categories, changes to an institution's supervisory rating will be reflected as of the date that the rating change is transmitted to the institution.³⁰ This final rule adopts the same rule with respect to CAMELS component rating changes for purposes of determining assessment rates for all institutions in Risk Category I.^{31 32}

²⁹ Reports of condition include Reports of Condition and Income and Thrift Financial Reports.

³⁰ See final rule on Operational Changes to Assessments, published elsewhere in this issue of the **Federal Register**. However, if the FDIC disagrees with the CAMELS composite rating assigned by an institution's primary federal regulator, and assigns a different composite rating, the supervisory change will be effective for assessment purposes as of the date that the FDIC assigned the new rating. Disagreements of this type have been rare.

³¹ Pursuant to existing supervisory practice, the FDIC does not assign a different component rating from that assigned by an institution's primary federal regulator, even if the FDIC disagrees with a

Using the transmittal date of a ratings change for assessment purposes represents a change from the method proposed in the NPR. Under the NPR, transmittal dates would only have been used in the absence of an examination start date (for example, for a large institution with continuous on-site supervision). Otherwise, in almost all instances, the examination start date would have been used.

The final rule adopts a suggestion contained in a banking trade group comment and alters the proposed rule for several reasons discussed in more detail in the final rule on operational changes to the assessment system.³³

The final rule also differs from the NPR for large institutions without long-term debt issuer ratings. The NPR proposed determining assessment rates for these institutions from insurance scores using a weighted average CAMELS rating and a financial ratio factor, with each weighted 50 percent. While the supervisory ratings and financial ratios in the final rule are

CAMELS component rating assigned by an institution's primary federal regulator, unless: (1) the disagreement over the component rating also involves a disagreement over a CAMELS composite rating; and (2) the disagreement over the CAMELS composite rating is not a disagreement over whether the CAMELS composite rating should be a 1 or a 2. The FDIC has no plans to alter this practice.

³² A rating change that is transmitted before this final rule becomes effective (*i.e.*, before January 1, 2007) will be deemed to have been transmitted prior to January 1, 2007.

³³ See final rule on Operational Changes to Assessments, published elsewhere in this issue of the **Federal Register**.

nearly the same as those proposed in the NPR, they are combined differently.³⁴

The approach in the final rule is simpler because it uses one consistent method for all institutions other than those with at least \$10 billion in assets that have long-term debt issuer ratings.

Comments

Supervisory ratings. Several comments supported the use of supervisory ratings. One comment asserted that supervisory ratings are the only reliable method to differentiate risk among financial institutions. One trade group supported using supervisory ratings as one of the variables used to determine assessment rates as proposed in the NPR and opposed either allowing supervisory ratings to “be greater than 50 percent of the overall risk score” or automatically giving supervisory ratings a 50 percent weight for small institutions, which was suggested in the NPR as an alternative method of determining assessment rates. Another trade group urged that “supervisory ratings should never be weighted more than half of the total weight of both the supervisory ratings and financial ratios.” Both trade groups urged these limitations because of the perceived subjectivity of supervisory ratings.

The FDIC has decided not to impose a cap on the contribution that supervisory ratings can make to an institution’s assessment rate for two reasons. First, the final rule combining supervisory ratings and financial ratios does not use a weighting scheme or a risk score. The final rule uses pricing multipliers, which can be either positive or negative, based on a statistical model that relates financial ratios and component ratings to CAMELS downgrades. The pricing multipliers—including the multiplier for the weighted average CAMELS component rating—are based on the actual historical experience of how well financial ratios and weighted average CAMELS component ratings predict whether an institution will be downgraded to a CAMELS composite rating of 3 or worse at its next examination. Second, a cap on the contribution that supervisory ratings can make to an institution’s assessment rate would affect only a small percentage of institutions and the effect would be very small.³⁵

³⁴ The ratio of volatile liabilities to gross assets was included in the proposed rule, but is not included in the final rule. Other minor changes to the ratios have been made. The changes are discussed earlier in the text.

³⁵ As of June 30, 2006: (1) the contribution of CAMELS component ratings would have exceeded 50 percent of the assessment rate; and (2)

Updating pricing multipliers. One trade group agreed that the FDIC should have the flexibility to update the pricing multipliers and the uniform amount annually, without further notice-and-comment rulemaking and that adding additional or alternative financial measures, ratios or other risk factors to determine risk-based assessments or adopting a new method of differentiating for risk should be done through notice-and-comment rulemaking. The final rule is consistent with this comment. No comments disagreed.

Additional comments. One trade group urged that the FDIC avoid having low-risk multi-family loans lead to higher assessment rates to avoid chilling this type of lending. The final rule does not target this kind of lending.

G. Combining Supervisory Ratings With Long-Term Debt Issuer Ratings

For large institutions that have long-term debt issuer ratings, a combination of these ratings and supervisory ratings will determine assessment rates, using equal weighting for each. The base assessment rate will be derived as follows: (1) CAMELS component ratings will be weighted to derive a weighted average CAMELS rating;³⁶ (2) long-term debt issuer ratings will be converted to numerical values between 1 and 3 using the conversion values in Appendix B;³⁷ (3) the weighted average CAMELS rating and converted long-term debt issuer rating will be multiplied by a pricing multiplier and the products will be summed; and (4) a uniform amount, which will always be negative, will be added to the result. The resulting base assessment rate will be subject to a minimum and a maximum assessment rate. The pricing multiplier for both the weighted average CAMELS ratings and converted long-term debt issuer rating will be 1.176, and the uniform amount will be -1.882 .

The conversion of long-term debt issuer ratings into numerical values in the final rule differs slightly from the conversion proposed in the NPR. Specifically, the final rule assigns the

assessment rates would have exceeded the minimum rate for less than 1.3 percent of small institutions in Risk Category I (other than institutions less than 5 years old). Most of these institutions, however, would have been charged a rate only slightly above the minimum rate. For a Risk Category I institution being charged the minimum rate, the contribution of the weighted average CAMELS component rating does not increase the institution’s assessment rate.

³⁶ Each component rating will typically, if not always, range from “1” to “3” for institutions in Risk Category I.

³⁷ Where more than one long-term debt issuer rating is available, the converted values will be averaged.

lowest conversion value of “1” to the best possible long-term debt issuer rating rather than to double A ratings or better (Aa2 or better for Moody’s ratings), and the highest conversion value of “3” to triple B or worse ratings (Baa2 or worse for Moody’s ratings), rather than to double B plus or worse ratings (Ba1 or worse for Moody’s ratings). This revised conversion methodology takes better advantage of the possible range of ratings for large Risk Category I institutions, which are concentrated primarily in the triple B rating range and higher.

Pricing multipliers and the uniform amount for large institutions with debt ratings were derived using cutoff values of the combination of weighted average CAMELS ratings and converted long-term debt issuer ratings (weighted 50 percent each) such that, as of June 30, 2006: (1) Approximately 44 percent of large institutions with long-term debt issuer ratings that would have been in Risk Category I (other than institutions less than 5 years old) would have been charged the minimum assessment rate; and (2) approximately 6 percent of the large institutions with long-term debt issuer ratings that would have been in Risk Category I (other than institutions less than 5 years old) would have been charged the maximum assessment rate.³⁸ The derivation of pricing multipliers and the uniform amount is described in Appendix 1.

Under the final rule, the base assessment rate for an institution with CAMELS component ratings of “222111,” a Moody’s long-term debt issuer rating of “A1,” and a Standard and Poor’s long-term debt issuer rating of “A” would be 2.06 basis points. This rate is calculated as follows:

- The weighted average CAMELS rating is computed by multiplying each component rating by its associated weight to produce values of 0.50, 0.40, 0.50, 0.10, 0.10, and 0.10, respectively. The sum of these values, the weighted average CAMELS rating, is 1.70.
- The Moody’s and Standard and Poor’s long-term debt issuer ratings are converted to numerical values and averaged. The average of the two long-term debt issuer ratings, converted to numerical values of 1.50 and 1.80, respectively, is 1.65.
- The weighted average CAMELS rating and converted long-term debt

³⁸ As of June 30, 2006, approximately 46 percent of all large institutions that would have been in Risk Category I (other than institutions less than 5 years old) would have been charged the minimum assessment rate and approximately 5 percent of all large institutions that would have been in Risk Category I (other than institutions less than 5 years old) would have been charged the maximum assessment rate.

issuer ratings are multiplied by the pricing multiplier and summed ($1.700 \times 1.176 + 1.650 \times 1.176$)³⁹ to produce a value of 3.940. A uniform amount of 1.882 is subtracted from this result to produce a base assessment rate of 2.06 basis points.⁴⁰

The final rule also differs from the NPR in that it does not use financial ratios to determine assessment rates for any large institution that has long-term debt issuer ratings, and does not use varying weights for long-term debt issuer ratings for institutions with between \$10 billion and \$30 billion in assets. The final rule simplifies the derivation of assessment rates by applying the same weight to weighted average CAMELS component ratings and long-term debt issuer ratings (when they exist) regardless of an institution's size.

Several trade groups commented that the proposed risk differentiation methodology for large banks was too complex, in part because of the varying weights given risk factors for institutions between \$10 billion and \$30 billion in assets. These comments noted that an institution's assessment rate could change simply because of an increase or decrease in assets even when the institution's risk profile remained unchanged. After considering comments, the FDIC concluded that this simpler approach for all large institutions with debt issuer ratings achieves the objective of differentiating risk in these large institutions without the need to introduce further complexity in the form of varying weights for large institutions in different size categories.

Additional Comments

One trade group expressed concern that dissimilar methods for differentiating risk in large and small institutions could lead to possible inequity among institutions due solely to size. This comment expressed the view that agency and supervisory ratings tend to favor larger institutions, possibly because of diversification considerations.

The FDIC notes that the distribution of current supervisory ratings for large and small institutions does not support this view. Agency debt issuer ratings do take diversification into account, and the FDIC believes that it is appropriate to reflect these considerations in

assessment rates. The final rule ensures, as required by statute, that no institution is precluded from the lowest assessment rate solely because of size. This statutory requirement underlies, in part, the FDIC's decision to initially include roughly similar proportions of large and small institutions in Risk Category I that would be charged minimum and maximum assessment rates. As discussed later, the FDIC will have the ability to adjust an institution's assessment rate when this rate is inconsistent with assessment rates of other large institutions with similar risk profiles.

This comment further noted that financial ratios also could be applied to all large institutions. Another trade group argued that the financial ratios should not be phased out in importance as institutions increase in size and should be used for all large institutions. This comment argued that measurements other than the financial ratios that are combined with supervisory ratings might be necessary to assess the off-balance sheet, securitization, trading, and securities processing activities engaged in by large institutions and to serve as a quality control check on long-term debt issuer ratings.

The FDIC believes that consideration of additional risk information (including financial performance and condition measures), discussed below, will be sufficient to ensure that the range of activities engaged in by banking organizations are fully considered and that debt issuer ratings are appropriately considered in assessment rates.

One comment suggested that business diversification should be more explicitly taken into account in determining deposit insurance premiums. This comment also recommended that the FDIC consider lowering or even eliminating premium rates for institutions that adopt the advanced approaches under the Basel II framework or whose actual capital sufficiently exceeds their Basel II required capital, since these institutions will have demonstrated capital levels and risk management practices that virtually eliminate risk to the deposit insurance fund. The FDIC believes that, in most cases, diversification, capital adequacy, and risk management considerations are reflected in supervisory or agency ratings or in financial ratios and the consideration of additional factors (in Appendix C) ensures that they are taken into account in all cases.

One comment argued that the large institution methodology proposed in the NPR was overly subjective because

cutoff values to determine the percentage of institutions that would be charged the minimum and maximum rates would be set quarterly by the FDIC. In fact, under the final rule, minimum and maximum assessment rate cutoff values will be established using data as of June 30, 2006. No change will be made to these cutoff values without further notice and opportunity for comment.

H. Additional Provisions Relating to Large Institutions' Assessment Rates in Risk Category I

1. Adjustments to a Large Institution's Assessment Rate

To ensure consistency, fairness, and consideration of all available information, the FDIC will determine, in consultation with the primary federal regulator, whether or not to adjust the assessment rates for large institutions derived from either a combination of long-term debt issuer ratings and supervisory ratings or financial ratios and supervisory ratings (when no long-term debt issuer rating is available). The FDIC will make these determinations by evaluating additional risk information including current financial performance and condition information and trends, current market information, information pertaining to an institution's ability to withstand financial adversity, and information pertaining to severity of losses in the event of failure.

Any adjustments to assessment rates will be limited to 0.50 basis points (higher or lower). Upward adjustments will not take effect without notification to and consideration of responses from both the primary federal regulator and the institution. Downward adjustments will not take effect without notification to and consideration of responses from the primary federal regulator. No rate will be adjusted below the minimum rate for Risk Category I institutions in effect for an assessment period or above the maximum rate for Risk Category I institutions in effect for the period. Rate adjustments in Risk Category I are not meant to (and will not) override supervisory evaluations.⁴¹

Examples of additional risk factors that will be considered are enumerated in Appendix C. Evaluating this additional risk information on an ongoing basis will help the FDIC ensure that relative levels of risk posed by large

³⁹ Under the final rule, the pricing multipliers will be rounded to three digits after the decimal point.

⁴⁰ Under the final rule, the assessment rates resulting from these calculations will be rounded to the nearest one-hundredth (1/100th) of a basis point.

⁴¹ This rule addresses only adjustments to assessment rates. It does not address the FDIC's role as back-up supervisor involving possible disagreements between the FDIC and the primary federal regulator over CAMELS ratings. Notification and resolution of such disagreements are covered by existing supervisory processes. See also footnote 34.

Risk Category I institutions are consistently represented by resulting assessment rates. Additional information will be evaluated in the following way:

- Current financial performance indicators such as capital levels, profitability measures, and asset quality measures of each large institution will be compared to those of institutions that are ranked similarly in terms of their assessment rates.

- Current market indicators such as subordinated debt spreads and holding company market indicators of each institution will be compared to market indicators of institutions that are ranked similarly in terms of their assessment rates.

- Recent information pertaining to an institution's ability to withstand financial stress will be evaluated by comparing this information to that of institutions ranked similarly in terms of their assessment rates. This information includes the internal risk characteristics of an institution's credit portfolios and other business lines as well as information from internal stress-test models.

- Current loss severity indicators of institutions will be evaluated by comparing this information to that of institutions ranked similarly in terms of their assessment rates. This information includes funding structure considerations such as the extent of priority and subordinated claims, as well as the availability of sufficient information (e.g., information pertaining to the level of insured deposits and qualified financial contracts) to resolve an institution in an orderly and cost-efficient manner.

- Evaluations of financial performance, market information, information pertaining to an institution's ability to withstand financial stress, and loss severity indicators will focus on: first, identifying those institutions that exhibit significantly different risk profiles, as indicated by risk indicators such as those enumerated above, than institutions with similar assessment rates; and second, where inconsistencies between assessment rates and these risk indicators are identified, determining the assessment rate adjustment that would be necessary to bring an institution's assessment rate into better alignment with those of other institutions that pose similar levels or risk.

Some comments (including comments from trade groups) indicated that the FDIC should consider certain information pertaining to losses that might be sustained by the insurance

fund in the event of failure. For example, some comments indicated the FDIC should explicitly incorporate information about the relative level of subordinated claims into the determination of assessment rates for large institutions. The FDIC believes the final rule does consider loss given failure by explicitly incorporating consideration of this information into decisions of whether or not to adjust an institution's assessment rate.

In addition to ongoing consultations with the primary federal regulator on whether or not to make assessment rate adjustments, the FDIC will formally notify an institution's primary federal regulator when it decides to recommend an adjustment in assessment rates and will consider the primary federal regulator's response to this notification. The FDIC will also notify an institution in advance when the FDIC intends to increase its assessment rate because of the FDIC's consideration of additional risk information. This notice will include the reasons for the adjustment and when the adjustment will take effect, and provide the institution an opportunity to respond. An institution will, of course, have the right to request a review of any assessment rate that is adjusted in this manner.

After considering an institution's response to the notice, the FDIC will determine whether an adjustment to an institution's assessment rate is warranted, taking into account any revisions to weighted average CAMELS component ratings, long-term debt issuer ratings, and financial ratios, as well as any actions taken by the institution to respond to the FDIC's concerns described in the notice. The FDIC will evaluate the need for the adjustment each subsequent assessment period, until it determines that an adjustment is no longer warranted. The amount of adjustment will in no event be larger than that contained in the initial notice without further notice to, and consideration of responses from, both the primary federal regulator and the institution.

Any downward adjustment in assessment rates will remain in effect for subsequent assessment periods until the FDIC determines that an adjustment is no longer warranted. However, the FDIC will provide advance notice to an institution and its primary federal regulator and give them an opportunity to respond before removing a downward adjustment. Of course, the FDIC may raise an institution's assessment rate without notice if the institution's supervisory or agency ratings or financial ratios (for an institution

without long-term debt issuer ratings) deteriorate.

The FDIC acknowledges the need to clarify its processes for making any adjustments to ensure fair treatment and accountability and plans to propose and seek comment on additional guidelines for evaluating whether assessment rate adjustments are warranted and the size of the adjustments. The FDIC will not adjust assessment rates until the guidelines are approved by the FDIC's Board.

2. Timing of Evaluations

Under the final rule, a large institution's risk category will change as of the date the institution is notified of its rating change by its primary federal regulator (or state authority). If the supervisory rating change results in a large institution moving from Risk Category I to Risk Category II, III, or IV, the institution's assessment rate for the portion of the quarter it was in Risk Category I will be based on its assessment rate for the prior quarter. The assessment rate for that portion of the quarter it was in Risk Category II, III, or IV will be based on the assessment rate for these risk categories.

When a large institution is moved from Risk Category II, III, or IV to Risk Category I during a quarter because of a supervisory rating change, the FDIC will determine the associated assessment rate (subject to adjustment as described above) for that portion of the quarter that the institution was in Risk Category I. The assessment rate for that portion of the quarter it was in Risk Category II, III, or IV will be based on the assessment rate for these risk categories.

When an institution remains in Risk Category I during a quarter, but a CAMELS component or long-term debt issuer rating change during the quarter would affect its assessment rate, the FDIC will determine an assessment rate for each portion of the quarter before and after the change. A long-term debt issuer rating change will be effective as of the date the change is announced by the rating agency. Changes in supervisory ratings will be effective as of the date the institution is notified by its primary federal regulator (or state authority).

The timing of changes in assessment rates due to changes in supervisory or long-term debt issuer ratings described above differs only slightly from the proposal in that it uses, in all cases, the date of transmittal of a supervisory rating change by the primary federal regulator to the institution. The reasons

for this change are discussed in a separate rule.⁴²

One trade group expressed concern about the possibility of retroactive changes in assessment rates and the prospects for accounting restatements. This comment pointed out that CAMELS rating changes often occur one and even two quarters after the start date of an examination. The use of the transmittal date of examination findings rather than start date of an examination to effect changes in assessment rates should alleviate this concern about retroactive accounting adjustments.

Another comment expressed a similar concern that institutions would not be able to plan for the financial impact of assessment rate changes if they were applied retroactively, either because of a change in supervisory or long-term debt issuer ratings, or because of a decision by the FDIC to adjust an institution's assessment rate. The FDIC believes that the final rule sufficiently addresses this concern since: (1) the transmittal of revised CAMELS ratings or the announcement of revised long-term debt issuer ratings will provide sufficient notice to the institution that a change in assessment rates will occur; and (2) assessment rate changes caused by a decision by the FDIC to adjust an institution's assessment rate will not become effective before the institution is duly notified and has had an opportunity to respond to the proposed change.

Additional Comments

Adjustments to an institution's assessment rates. A number of comments (including several comments from trade groups) questioned the need for the FDIC to incorporate additional information into its pricing decisions for large institutions. Some of the main objections were that:

- Adjustments would override the evaluations of the primary federal regulator;
- The FDIC should not be allowed to unilaterally override CAMELS ratings assigned by the primary federal regulator since they are viewed to have better information than the FDIC about the risks posed by these institutions;
- The need for more timely information is not necessary since many

large institutions are supervised on a continuous basis;

- Supervisory ratings incorporate all relevant risk information and therefore consideration of additional information is not necessary;
- The application of the FDIC's discretion over pricing decisions has not been sufficiently described; and
- Many of the additional risk indicators identified in Appendix C of the proposal are vaguely defined and not necessarily aligned with risk.

Several comments specifically criticized the proposal's use of additional stress consideration factors. For example, some comments stated that these factors were not well developed and expressed concern about the possibly conflicting role such information would play in evaluations by the primary federal regulators and the FDIC.

One trade group supported the FDIC's consideration of additional risk information to ensure that assessment rates were consistently assigned, that risk information was incorporated into the assessment rate in a timely manner, and that assessment rates reflected consideration of all relevant risk information.

For the reasons described earlier, the FDIC has decided to retain its ability to adjust assessment rates based upon consideration of additional risk factors.

A number of comments supported providing institutions with prior notification relating to any possible increase in assessment rates. However, many of these comments were made in the context of the proposed risk "bucket" or subcategory pricing approach. Given the adoption of an incremental pricing approach for institutions in the incremental pricing range, the FDIC believes advance notice is only needed in two cases based on consideration of additional risk information: (1) Where the FDIC intends to make an upward adjustment to a large institution's assessment rate above that derived from supervisory and long-term debt issuer ratings (or from supervisory ratings and financial ratios); and (2) where it intends to remove a previously made downward adjustment to an institution's assessment rate.

V. Definitions of Large and Small Institutions and Exceptions

Under a companion final rule making operational changes to the FDIC's assessment regulations, a Risk Category I institution will be defined as large if it has \$10 billion or more in assets and small if it has assets of less than \$10 billion. This determination will initially be made as of December 31, 2006.

Thereafter, a small Risk Category I institution will be reclassified as a large institution when it reports assets of \$10 billion or more for four consecutive quarters. Similarly, a large Risk Category I institution will be reclassified as a small institution when it reports assets under \$10 billion for four consecutive quarters. Any reclassification will remain effective for subsequent quarters, unless an institution reports assets that would change its size category (from large to small or vice versa) for four consecutive quarters.

The definition of large and small institutions for Risk Category I institutions in the final rule is the same as that contained in the proposal. One trade group commented that the \$10 billion cutoff point for categorizing institutions as either large or small was appropriate given the tendency of larger institutions to have more available risk information. This same comment indicated that large institutions should be evaluated using more information than current financial ratios and CAMELS component ratings given the types of complex activities engaged in by the largest institutions, such as securitization, derivatives, and trading.

As described in the NPR, the final rule makes an exception to the \$10 billion size threshold for Risk Category I institutions with between \$5 billion and \$10 billion in assets that request treatment as a large institution. The FDIC will grant such requests if it determines that it has sufficient information to evaluate the institution's risk profile adequately under the risk differentiation methods used for large institutions. The absence of long-term debt issuer ratings alone will not preclude the FDIC from granting a request. The assessment rate for an institution without a long-term debt issuer rating would still be derived from supervisory ratings and financial ratios, but would be subject to adjustment. Once a request has been granted, an institution could again request treatment under a different approach after three years, subject to FDIC approval.⁴³

As discussed in the NPR, small institutions that are affiliated with large institutions will be evaluated separately under the final rule. Specifically, assessment rates for small institutions will be determined using supervisory ratings and financial ratios, whether or

⁴² See final rule on Operational Changes to Assessments, published elsewhere in this issue of the *Federal Register*. If the FDIC disagrees with the CAMELS composite rating assigned by an institution's primary federal regulator, and assigns a different composite rating, the supervisory change will be effective for assessment purposes as of the date that the FDIC assigned the new rating. Disagreements of this type have been rare. See also footnote 34.

⁴³ In the event that the FDIC grants an institution's request to be treated as a large institution and the institution subsequently reports assets of less than \$5 billion for four consecutive quarters, the institution will be assessed as a small institution thereafter.

not these institutions are affiliated with large institutions.

An institution that disagrees with the FDIC's determination that it is small or large may request review of the determination pursuant to 12 CFR 327.4(c).

Comments

One comment supported the proposal to allow institutions with between \$5 billion and \$10 billion in assets to request treatment as a large institution. This comment noted that the proposal will allow flexibility for small institutions that are transitioning to large institutions and want to be evaluated using long-term debt issuer ratings.

Some comments supported: (1) Assigning the same assessment rate to all affiliated institutions, possibly by strengthening cross guarantees; (2) assigning the assessment rate of the largest institution in a holding company to all institutions in the holding company; or (3) applying the same method of calculating assessment rates to all institutions in a holding company regardless of size to avoid different assessment rate approaches for institutions within the same holding company. The FDIC acknowledges that often each institution in a holding company derives managerial, operational, and financial support from the parent holding company. However, financial condition and operating performance can and does vary among banks within a holding company. Consequently, the FDIC believes it is necessary to evaluate risk at each insured institution individually. Any modifications to current cross guarantee provisions are outside the scope of this proposal.

VI. Risk Differentiation Among Insured Foreign Branches

The final rule for insured foreign branches (insured branches) is substantially similar to the proposed rule. The main difference is the use of incremental pricing for insured branches whose assigned assessment rates fall between the minimum and maximum assessment rates.

Insured branches that are assigned to Risk Category II, III or IV, based on their asset pledge and asset maintenance ratios and supervisory ratings, will be treated in the same manner as other insured institutions in these risk categories. For insured branches that are assigned to Risk Category I, assessment rates will be determined from the supervisory ROCA component ratings

assigned to the insured branch.⁴⁴ Each of these component ratings will be weighted to produce a weighted average ROCA rating. The weights applied to individual ROCA component ratings will be the same as those contained in the NPR: 35 percent, 25 percent, 25 percent, and 15 percent, respectively. An assessment rate for insured branches will be determined by multiplying the average ROCA rating by a pricing multiplier of 2.353 and adding a uniform amount of -1.882 from this product.⁴⁵ The derivation of the pricing multipliers and uniform amount for insured branches is described in Appendix 2.

As with the large institution risk differentiation approach, the FDIC may adjust these assessment rates up or down by 0.50 basis points after consideration of the additional risk factors described in Appendix C. The same process for making adjustments described to large institution rates, including advance notification and consultation with the primary federal regulator, will apply to insured foreign branches.

The FDIC received no comments on the proposed treatment of insured foreign branches.

VII. New Institutions in Risk Category I

Under the final rule, beginning in 2010, new institutions in Risk Category I generally will be assessed at the same rate, which will be the highest rate charged any other institution in this Risk Category. For this purpose, the final rule on operational changes defines a new institution as one that is not an established institution.⁴⁶ With

⁴⁴ROCA stands for Risk Management, Operational Controls, Compliance, and Asset Quality.

⁴⁵The pricing multiplier and uniform amount for insured branches are computed in the same manner as those used for large Risk Category I institutions with long-term debt issuer ratings. The uniform amount is the same as described under that approach, and the pricing multiplier for weighted average ROCA ratings is simply two times the pricing multiplier used for either weighted average CAMELS ratings or converted long-term debt issuer ratings (*i.e.*, the weighted average ROCA rating is weighted 100 percent).

⁴⁶Empirical studies show that new institutions exhibit a "life cycle" pattern and it takes close to a decade after its establishment for a new institution to mature. Despite low profitability and rapid growth, institutions that are three years or newer have, on average, a very low probability of failure—lower than established institutions, perhaps owing to large capital cushions and close supervisory attention. However, after three years, new institutions' failure probability, on average, surpasses that of established institutions. New institutions typically grow more rapidly than established institutions and tend to engage in more high-risk lending activities funded by large deposits. Studies based on data from the 1980s

three exceptions, beginning in 2010, an established institution, as defined in the final rule on operational changes, will be one that has been chartered as a bank or thrift for at least five years as of the last day of any quarter for which it is being assessed. Before 2010, all Risk Category I institutions will be assessed using either the supervisory ratings and financial ratios method or the supervisory and debt ratings method.

Where an established institution merges or consolidates with a new institution, the surviving or resulting institution will be new unless:

1. The assets of the established institution, as reported in its report of condition for the quarter ending immediately before the merger, exceeded the assets of the new institution, as reported in its report of condition for the quarter ending immediately before the merger; and

2. Substantially all of the management of the established institution continued as management of the resulting or surviving institution.^{47 48}

However, where a new institution merges into an established institution and the merger agreement was entered into on or before July 11, 2006, the final rule contains a grandfather clause under which the surviving institution will be deemed to be an established institution.

This exception to the definition of a new institution represents a change from the proposed rule. The NPR proposed that, when an established institution merged into or consolidated with a new institution, the surviving or resulting institution would be new, but would be allowed to request that the FDIC determine that it was established. The NPR also proposed that, when a new institution merged into an established institution or when an established institution acquired a

showed that asset quality deteriorated rapidly for many new institutions as a result, and failure probability (conditional upon survival in prior years) reached a peak by the ninth year. Many financial ratios of new institutions generally begin to resemble those of established institutions by about the seventh or eighth year of their operation. See Chiwon Yom, "Recently Chartered Banks" Vulnerability to Real Estate Crisis," FDIC Banking Review 17 (2005): 1–15 and Robert DeYoung, "For How Long Are Newly Chartered Banks Financially Fragile?" Federal Reserve Bank of Chicago Working Paper Series 2000–09.

⁴⁷A surviving or resulting Risk Category I institution that qualifies as an established institution under this exception will have its assessment rate determined using the CAMELS component ratings of the established institution involved in the merger or consolidation until the surviving or resulting institution receives a new supervisory rating.

⁴⁸The resulting institution in a consolidation (as well as the surviving institution in a merger) involving only established institutions will, of course, be deemed to be an established institution.

substantial portion of a new institution's assets or liabilities, and the merger or acquisition agreement was entered into after July 11, 2006 (the date that the FDIC's Board approved the NPR), the FDIC would conduct a review to determine whether the surviving or acquiring institution remained an established institution. The NPR proposed that the FDIC would make determinations based upon factors that included factors similar to the two listed above.

The final rule differs from the NPR in this regard. By specifying the particular circumstances that will allow an institution to be considered established, the final rule will give institutions greater certainty regarding the effects of mergers and consolidations and should reduce the necessity of filing requests for review. The final rule should not result in denying an exception to any institution that would have been considered established under the proposed rule, while still achieving the purpose of the proposed rule.

The second exception was raised in comment letters in response to the FDIC's specific request for comment on its proposed definition of a new institution.⁴⁹ This exception will apply to a new institution that is a subsidiary of a holding company with an established institution or that is a subsidiary of an established institution, provided certain criteria are met. Under these circumstances, the institution will be considered established for assessment purposes.⁵⁰ Specifically, an institution that would otherwise be new will be considered established if it is a wholly owned subsidiary of:

1. A company that is a "bank holding company" under the Bank Holding Company Act of 1956 or a "savings and loan holding company" under the Home Owners' Loan Act, and:

a. At least one "eligible" depository institution (as defined in 12 CFR 303.2(r)) that is owned by the holding company has been chartered as a bank or thrift for at least five years as of the

date that the otherwise new institution was established; and

b. The holding company has a composite rating of at least "2" for bank holding companies or an above average or "A" rating for thrift holding companies and at least 75 percent of its depository institution assets are assets of "eligible" depository institutions, as defined in 12 CFR 303.2(r);^{51 52} or

2. An "eligible" insured depository institution, as defined in 12 CFR 303.2(r), that has been chartered as a bank or thrift for at least five years as of the date that the otherwise new institution was established.

Several comments (including comments from trade groups) argued that, at a minimum, new institutions in a bank holding company should be charged at the same rate as other institutions in the holding company. Arguments for this position included:

- Assessing new institutions at a higher rate will affect a holding company's decision to charter a new institution or to branch; in the context of mergers and acquisitions, the deal structure could be influenced to retain the seasoned banks post-consolidation solely for the purpose of avoiding high assessments, even though a different structure would otherwise be more appropriate.

- The articles referenced by the FDIC in support of assessing all "new" institutions at a higher rate did not take into account holding company support or enhancements in supervision.
- Holding companies often have considerable banking experience, so that the institution is not really new. Institutions in a holding company typically share management.

The FDIC is persuaded that a new institution within an established

holding company structure does not necessarily pose a higher risk than established institutions, in part because of the banking experience within the holding company, and has created an exception from the new bank definition for these institutions. However, the assessment rate for a new institution subsidiary of an insured depository institution or holding company that qualifies for the exception will not necessarily be the same rate charged an affiliate. As with any established institution in Risk Category I, its assessment rate will be determined based upon the risk it poses.

The third exception was also raised in comment letters in response to the FDIC's specific request for comment on its proposed definition of a new bank.⁵³ For a credit union that converts to a bank or thrift charter, some comments (including comments from trade groups) urged the FDIC to take into account the period that a credit union has had federal deposit insurance in determining whether it is new or established. As one trade group pointed out:

These institutions have a seasoned loan portfolio, experienced leaders, and an established business history. They have been carefully screened by their new banking regulator.

The final rule takes into account the period that a credit union has been federally insured as a credit union in determining whether it is new or established.⁵⁴

The final rule also differs from the NPR in its definition of a new institution. Under the NPR, a new institution would have been defined as an institution that had not been chartered as a bank or thrift for at least seven years as of the last day of any quarter for which it was being assessed (subject to the exceptions above).

Several comments (including comments from trade groups) suggested that charging the maximum Risk Category I assessment rate to new institutions for 7 years was too long and

⁴⁹ 71 FR 41910.

⁵⁰ A Risk Category I institution that has no CAMELS component ratings shall be assessed at one basis point above the minimum rate applicable to Risk Category I institutions until it receives CAMELS component ratings. If an institution has less than \$10 billion in assets or has at least \$10 billion in assets and no long-term debt issuer rating, once it receives CAMELS component ratings, its assessment rate will be determined under the supervisory ratings and financial ratios method. The assessment rate will be determined by annualizing, where appropriate, financial ratios obtained from the reports of condition that have been filed, until the earlier of the following two events occurs: (1) the institution files four reports of condition; or (2) if it has at least \$10 billion in assets, it receives a long-term debt issuer rating.

⁵¹ 12 CFR, 303.2(r) defines an eligible depository institution as one that:

(1) Received an FDIC-assigned composite rating of 1 or 2 under the Uniform Financial Institutions Rating System (UFIRS) as a result of its most recent federal or state examination;

(2) Received a satisfactory or better Community Reinvestment Act (CRA) rating from its primary federal regulator at its most recent examination, if the depository institution is subject to examination under part 345 of this chapter;

(3) Received a compliance rating of 1 or 2 from its primary federal regulator at its most recent examination;

(4) Is well-capitalized as defined in the appropriate capital regulation and guidance of the institution's primary federal regulator; and

(5) Is not subject to a cease and desist order, consent order, prompt corrective action directive, written agreement, memorandum of understanding, or other administrative agreement with its primary federal regulator or chartering authority.

⁵² For bank holding companies, RFI ratings replaced BOPEC ratings as of December 2004. For a bank holding company that does not yet have an RFI composite rating, BOPEC ratings will be used.

⁵³ 71 FR 41910.

⁵⁴ Again, a Risk Category I institution that has no CAMELS component ratings shall be assessed at one basis point above the minimum rate applicable to Risk Category I institutions until it receives CAMELS component ratings. If an institution has less than \$10 billion in assets or has at least \$10 billion in assets and no long-term debt issuer rating, once it receives CAMELS component ratings, its assessment rate will be determined under the supervisory ratings and financial ratios method. The assessment rate will be determined by annualizing, where appropriate, financial ratios obtained from the reports of condition that have been filed, until the earlier of the following two events occurs: (1) The institution files four reports of condition; or (2) if it has at least \$10 billion in assets, it receives a long-term debt issuer rating.

avored a shorter period, such as 3 or 5 years (assuming new institutions were assessed separately). One trade group argued that, after three years, an institution's loan portfolio and its operations should be seasoned enough so that the FDIC can assess the risks of the institution based on financial ratios and CAMELS ratings as it does for other institutions. Other arguments for shortening the period that an institution is considered new included:

- Higher failure rates for new institutions occurred in earlier periods, but not in recent periods, partly because supervision has been enhanced.
- The banking industry uses three years as an estimate of banking maturity; banking supervisors use the same period when reviewing new bank applications.

The FDIC's decision to assess new institutions separately from established institutions is based on the difficulty of assessing new institutions' risk with the same risk measures used to assess the risk of established institutions. New institutions undergo rapid changes in the scale and scope of operations for a period of time after being chartered and these changes can make new institutions' financial condition and performance measures volatile. Moreover, new institutions' loan portfolios are unseasoned, and their management is often untested, making it difficult to assess loan quality through standard financial performance measures.

These differences between new and established institutions' financial characteristics could lead to mis-measurement of risk when new institutions are evaluated by the same financial risk measurement model used to evaluate established institutions' risk. More specifically, the FDIC finds that new institution risk is, in general, underestimated by the manner in which supervisory ratings are combined with financial ratios; however, the degree of underestimation of risk declines with bank age.

Under the final rule, all new institutions in Risk Category I will be assessed at the same rate and this rate will be the highest rate charged any other institution in Risk Category I. The FDIC finds that the failure rates of institutions that have been in existence for less than 5 years are greater than those of established institutions that would have historically paid the highest assessment rate in Risk Category I (the riskiest Risk Category I established institutions). Historical failure rates among institutions that have been in

existence between 5 and 7 years, however, are somewhat lower than those of the riskiest Risk Category I established institutions. For this reason, for purposes of setting assessment rates, the final rule defines new institutions as those institutions that have been in existence less than 5 years.

Some comments expressed concern that a combination of factors could result in inequitable treatment for new institutions. These factors included the need to initially charge more than the base rates, the lack of credits for most new institutions, and charging the maximum rate to these institutions. The FDIC recognizes that during the transition from the existing system to the new system, this combination of factors could significantly increase assessment rates for new institutions. Consequently, the final rule delays the effective date of the provisions subjecting new Risk Category I institutions to the maximum Risk Category I rate until January 1, 2010.

Before 2010, a Risk Category I institution that has no CAMELS component ratings shall be assessed at one basis point above the minimum rate applicable to Risk Category I institutions until it receives CAMELS component ratings. If an institution has less than \$10 billion in assets or has at least \$10 billion in assets and no long-term debt issuer rating, once it receives CAMELS component ratings, its assessment rate will be determined under the supervisory ratings and financial ratios method. The assessment rate will be determined by annualizing, where appropriate, financial ratios obtained from the reports of condition that have been filed, until the earlier of the following two events occurs: (1) The institution files four reports of condition; or (2) if it has at least \$10 billion in assets, it receives a long-term debt issuer rating.

Additional Comments

No rule for new institutions. Several comments (including comments from trade groups) argued that the FDIC should assess new institutions as other institutions are assessed. Arguments for assessing new institutions as other institutions are assessed included:

- New institutions are scrutinized by examiners more intently and more frequently.
- There is an inherent bias against new institutions in CAMELS ratings.
- Capital is usually higher in new institutions.
- Many new institutions are started by experienced bankers or are spin-offs of established institutions.

- A separate rule for new institutions will undermine public confidence in these institutions.

- A single rate for new institutions does not adequately differentiate risk.
- A new institution has no incentive to reduce its risk because it will not reduce its assessment rate.

The final rule changes the new institution period from seven to five years, but assesses new institutions separately for the reasons described. However, the final rule does delay the effective date of the provisions governing new institutions for three years.

An institution that disagrees with the FDIC's determination that it is new or established may request review of the determination pursuant to 12 CFR 327.4(c).

Mergers. One trade group opposed treating established institutions that merge into or consolidate with new institutions as new on the grounds that such treatment is unreasonable and prejudicial to shareholders. Other comments also took issue, at least implicitly, with the proposed rule regarding mergers and consolidations. A comment from a trade group, however, stated that the FDIC should judge an individual institution based on the specific risk profile that it presents to the deposit insurance fund:

Generally, a new institution that merges with, acquires or is acquired by an existing depository institution will immediately exhibit certain risk characteristics, such as market penetration, strength of management, amount of capital and experience of the officers and employees of the resulting institution, that will allow the primary federal supervisor of the resulting institution to make a determination whether it most appropriately should be characterized in accordance with the risk profile of the new institution or the established one.

The FDIC has simplified the final rule in response to comments. The final rule allows the FDIC to review the surviving or resulting institution in a merger or consolidation involving both a new and an established institution to determine whether the surviving or resulting institution is new or established based on the criteria previously discussed without, in general, requiring that the institution file a request for review.

VIII. Assessment Rates

A. Rate Schedules

Beginning on January 1, 2007, assessment rates will be as shown in the following table:

	Risk Category				
	I *		II	III	IV
	Minimum	Maximum			
Annual Rates (in basis points)	5	7	10	28	43

* Rates for institutions that do not pay the minimum or maximum rate will vary between these rates.

All institutions in any one risk category, other than Risk Category I, will be charged the same assessment rate.

For all institutions in Risk Category I, annual assessment rates will range between 5 and 7 basis points.

The final rule also adopts the base schedule of rates proposed in the NPR:⁵⁵

	Risk Category				
	I *		II	III	IV
	Minimum	Maximum			
Annual Rates (in basis points)	2	4	7	25	40

* Rates for institutions that do not pay the minimum or maximum rate will vary between these rates.

The assessment rates that take effect January 1, 2007, will be uniformly 3 basis points higher than the base rate schedule. Under the present assessment system, the Board has adopted a base assessment schedule where it can uniformly adjust rates up to a maximum of five basis points higher or lower than the base rate schedule without the necessity of further notice-and-comment rulemaking, provided that any single adjustment cannot move rates more than five basis points.⁵⁶ In the NPR, the Board indicated its intention to retain the ability to adjust rates up to five basis points without seeking further public

comment. Upon considering the comments received on this issue (discussed below), the Board has decided to retain this feature, but limit its ability to adjust rates without seeking further public comment to three basis points. Hence, the final rule allows the Board to adjust rates uniformly up to a maximum of three basis points higher or lower than the base rates without the necessity of further notice-and-comment rulemaking, provided that any single adjustment from one quarter to the next cannot move rates more than three basis points.⁵⁷ In the event that the Board uniformly adjusts rates, rates calculated

for institutions in Risk Category I in reference to the base assessment rates will be uniformly adjusted by the same amount. Once set by the Board, assessment rates will remain in effect until changed.

Table 3 shows projected reserve ratios assuming different average annual growth rates for insured deposits if the actual rate schedule (as opposed to base rate schedule) adopted in this rule remains in effect through the year in which the reserve ratio first reaches or exceeds the designated reserve ratio (DRR) of 1.25 percent.⁵⁸

⁵⁵ With respect to the base schedule of rates, the NPR contains the FDIC's analysis of the statutory factors that must be considered whenever the FDIC's Board of Directors sets rates. These factors include: (1) estimated fund operating expenses; (2) estimated fund case resolution expenses and income; (3) the projected effects of assessments on institution capital and earnings; (4) the risk factors

and other factors taken into account pursuant to 12 U.S.C § 1817(b)(1) under the risk-based assessment system, including the requirement under 12 U.S.C § 1817(b)(1)(A) to maintain a risk-based system; and (5) any other factors the Board of Directors may determine to be appropriate. 12 U.S.C. 1817(b)(1)(C).

⁵⁶ In addition, no assessment rate may be negative. See 12 CFR 327.9.

⁵⁷ And provided, again, that no assessment rate may be negative.

⁵⁸ The FDIC is contemporaneously adopting a DRR of 1.25 percent. See final rule on the Designated Reserve Ratio, to be published elsewhere in this issue of the **Federal Register**.

Table 3

**Projected Reserve Ratios Assuming Different Growth Rates in Insured Deposits
Under the Rate Schedule Adopted in this Rule**

Period	Insured Deposit Growth Rate					
	3%	4%	5%	6%	7%	8%
2007	1.22%	1.21%	1.20%	1.19%	1.17%	1.16%
2008	1.27%	1.24%	1.22%	1.20%	1.18%	1.16%
2009		1.31%	1.28%	1.25%	1.22%	1.19%
2010					1.26%	1.22%
2011						1.25%

- (1) The year-end 2006 reserve ratio is estimated to be 1.21 percent.
 (2) Projections of the components of fund balance growth that result in the reserve ratios shown in this table are provided below.

In summary, the Board bases its decision to adopt this rate schedule on the following:

- The Reform Act gives the Board flexibility to achieve the DRR within a time frame that it believes appropriate, rather than treat the DRR as a "hard" annual target. In the Board's view, reaching the DRR within the third year of the new assessment system would be a reasonable goal, which this rate schedule would facilitate, given the FDIC's assumptions regarding insured deposit growth.

- An objective of the Reform Act is to allow the fund to increase under favorable conditions so that it can decline under adverse conditions without sharp increases in assessments. The outlook for economic conditions affecting banks remains generally favorable, industry conditions remain strong, and projected reserve ratios under the rate schedule assume very low insurance losses.

- During the next few years, the rate schedule is likely to prevent the reserve ratio from declining below the 1.15 percent statutory lower bound for the DRR and unlikely to raise the reserve ratio above the 1.35 percent threshold

that could trigger the payment of dividends.

- It is reasonable to plan for future annual insured deposit growth in the 4-to-6 percent range, down from higher rates observed last year and estimated for this year. Reaching the DRR within three years under this rate schedule assumes that insured deposit growth will be in this range.

- Assessment credits authorized under the Reform Act will limit assessment revenue in the near term.
- Implementation of the rate schedule is unlikely to have a materially adverse effect on the earnings and capital of insured institutions.

B. Factors Supporting the Rate Schedule

As required by statute, the FDIC's Board of Directors considered the following factors in setting rates:

(i) The estimated operating expenses of the Deposit Insurance Fund.

(ii) The estimated case resolution expenses and income of the Deposit Insurance Fund.

(iii) The projected effects of the payment of assessments on the capital and earnings of insured depository institutions.

(iv) The risk factors and other factors taken into account pursuant to 12 U.S.C. section 1817(b)(1) under the risk-based assessment system, including the requirement under 12 U.S.C. section 1817(b)(1)(A) to maintain a risk-based system.

(v) Other factors that the Board of Directors determined to be appropriate.⁵⁹

These factors, including those determined by the Board to be appropriate, are discussed in more detail below.

1. Projected Changes to the Fund Balance From Case Resolution Expenses, Operating Expenses, Investment Contributions, and Risk-Based Assessments

Table 4 shows projected changes to the fund balance over the next two years under the rate schedule adopted in this rule. Future changes to the fund balance depend, in turn, on projections and assumptions for insurance losses (case resolution expenses), operating expenses, assessment revenue, and investment contributions. These components of fund balance changes are discussed below.

⁵⁹ Section 2104 of the Reform Act (to be codified at 12 U.S.C. 1817(b)(2)(B)). The risk factors referred to in factor (iv) include:

(i) the probability that the Deposit Insurance Fund will incur a loss with respect to the institution, taking into consideration the risks attributable to—

(I) different categories and concentrations of assets;

(II) different categories and concentrations of liabilities, both insured and uninsured, contingent and noncontingent; and

(III) any other factors the Corporation determines are relevant to assessing such probability;

(ii) the likely amount of any such loss; and
 (iii) the revenue needs of the Deposit Insurance Fund. 12 U.S.C. 1817(b)(1)(C).

Table 4

Changes to the Fund Balance* under the Adopted Rate Schedule, 2007-2008
(\$ in millions)**

Period	Beginning Fund Balance	Net Assessment Revenue	Investment Income	Loss Provisions	Operating Expenses	Ending Fund Balance
2007	50,293	617	2,278	71	1,000	52,117
2008	52,117	2,561	2,361	74	1,000	55,965

* The beginning fund balance for 2007 is estimated from the most recent actual fund balance and expected revenue, expenses, and loss provisions through the end of 2006.

** Revenue and loss projections in this table and Table 5 assume that domestic deposits (the assessment base) increase slightly faster than a projected insured deposit growth rate of 5 percent. Alternative deposit growth assumptions would result in relatively small changes in projected fund balances.

a. *Insurance losses and operating expenses.* The rate schedule adopted assumes a continuing trend of very few bank failures and very low insurance losses. Reserve ratio projections based on the rate schedule assume that annual insurance loss provisions beginning in 2007 equal one thousandth of one percent of industry aggregate domestic deposits. This is less than one quarter of the average annual rate over the last 10 years—also a time of few failures and modest insurance losses. Loss provisions in 2007 are projected at \$71 million, and rise slightly in proportion to domestic deposit growth.⁶⁰

Banks in general appear to be well positioned to withstand considerable financial stress from unlikely economic shocks.⁶¹ Nonetheless, the possibility remains that insurance losses may be higher than anticipated. Higher losses, in turn, would reduce the likelihood of raising the reserve ratio to the DRR within three years under the rate schedule adopted in this rule. Future assessment rate setting under such conditions would have to weigh several

factors, including the desirability of avoiding sharp increases in assessments at a time of industry stress and the need to maintain the fund within the range authorized by the Reform Act.

In Table 3, the reserve ratio projections based on the rate schedule adopted also assume that annual operating expenses remain flat over the next few years, at approximately \$1 billion.⁶²

b. *Investment contributions.* As shown in Table 4 above, projections of fund balances assume that annual investment contributions beginning in 2007 amount to slightly over 4.5 percent of the fund balance. Investment contributions equal interest income plus (minus) unrealized gains (losses) on available-for-sale securities. The investment yield used in the projections assumes a continuation of recent investment return experience.

The use of expert forecasts for interest rates next year, as detailed in the Blue Chip Financial Forecasts, would yield similar projections for 2007 investment contributions. Since May of this year,

short-term Treasury yields have increased slightly as the Federal Reserve raised the target for the federal funds rate to 5.25 percent. Long-term Treasury yields declined by over 35 basis points over the same period, resulting in a modestly inverted yield curve since late July. Low longer-term interest rates reflect historically low and stable long-term inflationary expectations, heightened global demand for low-risk, long-term assets and, potentially, expectations of slower economic growth ahead. The economy is forecast to grow below its long-run average level for the remainder of 2006, and the futures market places little chance of any further federal funds rate increases. Many economic forecasters expect long-term interest rates and the yield curve to remain steady through 2007.

c. *Risk-based assessment revenue and assessment credits.* Table 5 below shows projected gross assessment revenue, assessment credit use, and net assessment revenue for 2007–2008 under the rate schedule adopted in this rule.

⁶⁰ The projection for 2007 is very close to the result obtained from the statistical method that has been used to develop estimates of losses to support past semiannual assessment rate schedules. This method estimates likely ranges of insurance losses based on projected changes in the estimated liability for anticipated failures (contingent loss reserve) through December 31, 2007.

⁶¹ Two-year stress event simulations were run based on data through June 30, 2006, affecting

institutions specializing in residential mortgages, subprime loans, commercial real estate mortgages, commercial and industrial loans, and consumer loans. The results of each simulation, which were derived from historical stress events, demonstrate that banks are well positioned to withstand a significant degree of financial adversity. In no case did the stress simulation results raise significant concerns for the insurance fund. However, the effects were not evaluated beyond a two-year horizon. Also, the historical experiences underlying

the stress scenarios may be less applicable in the future, so conclusions drawn from the stress analyses should be treated with some degree of caution.

⁶² Alternatively, if operating expenses increased by 5 percent per year after 2007, the reserve ratio would still be projected to reach the 1.25 percent DRR during, or by year-end, 2009, assuming that insured deposit growth averages between 4 and 6 percent annually.

Table 5

Assessment Revenue and Assessment Credit Use in 2007-2008
Under the Rate Schedule Adopted in this Rule
(\$ in millions)

Period	Gross Revenue	Credits Used	Net Revenue	Effective Rate (bp)
2007	3,777	3,160	617	0.9
2008	3,978	1,417	2,561	3.4

Projected gross assessment revenue is derived by assigning each insured institution to a Risk Category, and assigning each institution in Risk Category I to the minimum rate, maximum rate, or rate in between, using

the most recently available supervisory and debt issuer ratings, and June 30, 2006, financial data. Table 6 shows the distribution of institutions and assessment bases among the Risk Categories using the most recently

available data.⁶³ For purposes of assessment revenue projections, the distribution of assessable deposits among Risk Categories (and within Risk Category I) is assumed to remain constant.

Table 6

Distribution of Institutions and Domestic Deposits Among Risk Categories
(\$ in millions)*

Risk Category	Number of Institutions	Percent of Total Institutions	Domestic Deposits	Percent of Total Domestic Deposits
I -- Minimum	3,605	41%	4,018,374	62%
I -- Middle	4,300	49%	2,186,515	34%
I -- Maximum	413	5%	129,290	2%
II	416	5%	105,684	2%
III	53	1%	4,312	0%
IV	2	0%	202	0%

*Estimates are based on most recent supervisory and debt issuer ratings, and June 30, 2006, financial data.

Assessment revenue projections reflect the use of assessment credits authorized under the Reform Act and distributed in accordance with the recent final rule adopted for assessment credits.⁶⁴ In 2007, most institutions that have credits will apply them to offset either their entire assessment or an amount equal to their total credit, whichever is less. Therefore, as

indicated in Table 5 above, the effective rate applicable to the industry next year under this rate schedule is projected to be only 0.9 basis points. The effective rate is projected to rise to 3.4 basis points in 2008 as some institutions exhaust their credits.⁶⁵

2. Projected Insured Deposits

Chart 2 shows levels of insured deposits and corresponding four-quarter growth rates since 1990, including forecasts through 2007. Over the 1990–2005 period, annual growth rates in insured deposits ranged between –2.8 percent and 7.4 percent. After three consecutive annual declines in insured

⁶³ The table actually reflects domestic deposits rather than assessment bases. However, pursuant to a final rule adopted simultaneously with this final rule, beginning in 2007 the assessment base will equal domestic deposits with minor adjustments.

The final rule eliminates the standard amounts deducted from domestic deposits for float. See Final Rule on Operational Changes to Assessments, to be published elsewhere in this issue of the **Federal Register**.

⁶⁴ 71 FR 61374 (October 18, 2006).

⁶⁵ In 2008, 2009 and 2010, credit use will be capped at 90 percent of an institution's assessment, as required by the Reform Act and implementing regulations.

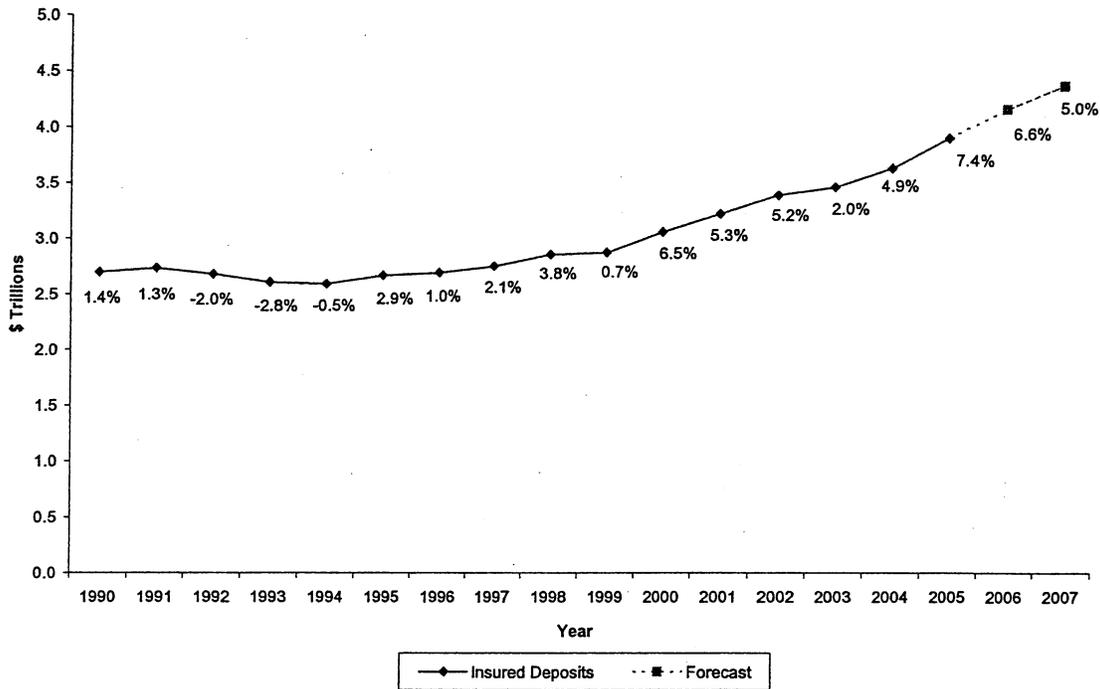
deposits—from year-end 1991 to year-end 1994—annual growth in insured deposits picked up in the mid-1990s and reached 6.5 percent in 2000. Improved stock market conditions and historically low short-term interest rates helped reduce growth to 2.0 percent in

2003. However, insured deposit growth then climbed to 4.9 percent in 2004 and 7.4 percent in 2005. The high growth in insured deposits may have resulted partly from an increase in short-term interest rates, triggered by a tightening in monetary policy by the Federal

Reserve. An increase in short-term interest rates relative to long-term rates makes short-term investment instruments, such as bank deposits, more attractive to investors.

Chart 2

Annual Insured Deposit Growth Rates
(December over December)



Based on the results of a statistical forecast model, insured deposits are predicted to increase by 6.6 percent in 2006 and 5.0 percent in 2007.⁶⁶ The projected growth rate in 2007 is approximately the same as the average annual growth rate for the five years ending in 2005.⁶⁷

Beyond 2007, while not relying on a statistical forecast model, the FDIC believes that it is reasonable to plan for average annual insured deposit growth in the 4 percent-to-6 percent range. Table 3 shows that, with an average

annual growth rate between 4 percent and 6 percent beginning next year, implementation of a rate schedule 3 basis points above the base rate schedule has a reasonable chance of raising the reserve ratio to the 1.25 percent DRR in the third year (2009) of the new assessment system. That table also indicates that average annual growth of 7 percent or higher would make it unlikely to achieve a reserve ratio of 1.25 percent within three years. Yet, while insured deposits rose by

more than 7 percent in 2005, the historical data suggest that it is very unlikely that insured deposits will increase at an average annual rate as high as 7 percent for three consecutive years.⁶⁸

3. Projected Reserve Ratios

Assuming insured deposit growth of 5 percent per year beginning in 2007, projections for year-end 2006 and the first three years under the new rate schedule are as follows:⁶⁹

Table 7

Projected Fund Balances, Insured Deposits, and Reserve Ratios (\$ in millions)

Period	Ending Fund Balance	Ending Insured Deposits	Ending Reserve Ratio
2006	50,293	4,148,918	1.21%
2007	52,117	4,356,364	1.20%
2008	55,965	4,574,182	1.22%
2009	61,477	4,802,891	1.28%

The table indicates that the reserve ratio is expected to decline slightly next year as the use of assessment credits prevents the fund balance from rising in pace with insured deposits. However, with two-thirds of credits drawn down by the end of 2007, assessment revenue should accelerate in 2008 and help the fund meet the DRR during 2009.

4. Effect of the Rate Schedule on Capital and Earnings of Insured Institutions

Appendix 3 contains an analysis of the projected effects of the payment of assessments under the actual (as opposed to base) rate schedule adopted in this rule on the capital and earnings of insured depository institutions. In sum, the actual rate schedule is not

expected to impair the capital or earnings of insured institutions materially.

5. Other Factors Supporting the Rate Schedule

As permitted by law, the FDIC Board considered other factors in establishing the rate schedule adopted in this rule:

a. *Flexibility to manage the reserve ratio within a range.* While the Reform Act requires the FDIC Board to set a DRR annually, there is no longer a requirement for the reserve ratio to meet the DRR within a particular time frame. The DRR is no longer a statutory “hard” target. The Board may choose a time period that it believes appropriate to bring the reserve ratio in line with the

DRR and, subject to the range established in the Reform Act, decide how much variation from the DRR would be acceptable.⁷⁰

As of June 30, 2006, the reserve ratio stood at 1.23 percent, and is expected to decline to 1.21 percent by year-end. Returning the fund to the DRR within a 12-month period, as had been required when the DRR was treated as a “hard” target, would require charging a minimum rate of 10.5 basis points (assuming insured deposit growth of 5 percent next year, as well as low losses and flat operating expenses). The FDIC does not believe that this steep an increase is advisable or consistent with the Reform Act’s objective of providing for greater premium stability. Therefore,

⁶⁶ Specifically, the statistical forecast model explains growth in insured deposits as dependent on current and last quarter growth in domestic deposits (both insured and uninsured) as well as on last quarter’s growth in insured deposits. The 95 percent confidence interval for the 2006 growth rate is +/- 2.6 percent. The range of uncertainty grows beyond 2006 as the forecast horizon lengthens. An alternative forecasting model, which also uses lagged growth in the federal funds rate to explain domestic deposits, resulted in a slightly lower 2007 insured deposit growth rate (4.7 percent).

⁶⁷ The forecast does not explicitly account for the effect of the Reform Act provision raising the insurance coverage limit on retirement accounts from \$100,000 to \$250,000. The increase in

coverage became effective on April 1, 2006. There is considerable uncertainty about the provision’s effect on aggregate estimated insured deposits and the reserve ratio. Regulatory reporting changes that will help capture the magnitude of any increase in estimated insured deposits took effect in the second quarter of 2006 for Call Report filers and are scheduled to take effect in the fourth quarter of 2006 for TFR filers. Based on the very limited information currently available, staff anticipates that the retirement account coverage limit increase may reduce the reserve ratio by between one-half and one basis point.

⁶⁸ Rolling 12-quarter growth rates in insured deposits were calculated beginning with the March 1995 to March 1998 period and ending with the

June 2003 to June 2006 period. The mean 12-quarter growth rate over this period was 3.8 percent (annualized), and the largest reported 12-quarter growth rate was 5.7 percent.

⁶⁹ These projections also assume that domestic deposits (the assessment base) increase by 5.6 percent in 2007, 5.3 percent in 2008, and 5.2 percent in 2009.

⁷⁰ The Reform Act requires the FDIC to establish the DRR within a range of 1.15 percent to 1.50 percent of estimated insured deposits. The Board must establish a restoration plan when the reserve ratio falls below 1.15 percent. The FDIC must also pay dividends when the reserve ratio exceeds 1.35 percent, unless the Board elects to suspend them.

the FDIC is using the flexibility provided in the Reform Act to raise the reserve ratio more gradually and permit a less steep increase in assessment rates.

b. *Increasing the fund when conditions are favorable.* An objective of the Reform Act is to allow the fund to increase under favorable conditions so that it can decline under adverse conditions without sharp increases in assessments. The outlook for economic conditions affecting banks remains favorable. There have been no failures in over two years. Banking industry profits have continued to set records and capital remains strong. Loan performance has been solid and charge-offs are at, or near, 15-year lows. There is little evidence of material adverse

conditions currently impairing industry performance.

Nonetheless, it is difficult to predict how long such favorable conditions will last. Areas of concern already visible include the compression in net interest margins, weakening housing markets, and the uncertainty over energy prices, among other risks. In the FDIC's view, it would be prudent not to stretch out too long the time to raise the fund to the 1.25 percent DRR and risk encountering a worsening of industry conditions before the fund is at the desired level.

c. *Ensuring that the fund stays within the range established by Congress.* As Table 3 shows, the rate schedule adopted in this rule is unlikely to cause the reserve ratio to decline below the

1.15 percent lower bound for the range, even in the unlikely event that insured deposit growth averages as much as 8 percent over the next few years.

Furthermore, the FDIC Board can act to adjust rates when the reserve ratio achieves the DRR to prevent the fund from growing too large and triggering the requirement to pay dividends.

On the other hand, if the FDIC Board sets rates equal to the base rate schedule, Table 8 below shows that it would be highly unlikely for the fund to reach the 1.25 percent DRR within five years. Furthermore, there would be a significantly greater chance that insured deposit growth would push the fund below the 1.15 percent lower bound.

Table 8

Projected Reserve Ratios Assuming Assessment Rates are Set at the Base Rate Schedule*

Period	Insured Deposit Growth Rate					
	3%	4%	5%	6%	7%	8%
2007	1.21%	1.20%	1.19%	1.18%	1.17%	1.15%
2008	1.21%	1.19%	1.17%	1.15%	1.13%	1.11%
2009	1.22%	1.19%	1.16%	1.13%	1.10%	1.07%
2010	1.24%	1.20%	1.16%	1.12%	1.08%	1.04%
2011	1.27%	1.22%	1.16%	1.12%	1.07%	1.02%

*Note: Assumes the same assumptions for losses, operating expenses, and investment income as the projections based on the rate schedule adopted.

Comments

Overall base rates: Some comments (including a comment from a trade group) noted that the base rates for Risk Categories II, III and IV were not sufficiently high multiples of the average Risk Category I base rate, given the historical costs to the FDIC from failures of institutions in these categories. Thus, "under the Proposal, a substantial subsidization will remain of the riskier institutions by the safer ones."

The NPR itself notes that, at least with respect to Risk Category IV, the base rate is substantially lower than the historical analysis would suggest is needed to recover costs from failures. The lower rate is intended to decrease the chance of assessments being so large that they cause these institutions to fail.

When losses due to fraud are taken into account by prorating among all risk categories, the base rates for Categories II and III and for the riskier institutions

in Risk Category I are slightly lower than the historical analysis would suggest and the base rates for the less risky institutions in Risk Category I are slightly higher than the historical analysis would suggest.⁷¹ However, the historical analysis can only be a guide to rates. The base rates also take into account the FDIC's estimate of its long-term revenue needs, including the requirement to manage the reserve ratio within a range. In addition, the base rates for institutions in Risk Category I are equal to or lower than the base rate being replaced (four basis points) and the base rates for Risk Categories II, III and IV are, with a single exception, higher than the base rates being replaced.⁷² Thus, the new base rates

⁷¹ See Table 1.6 in Appendix 1 to the NPR. 71 FR 41910.

⁷² The base rate for institutions in the 2B risk classification was 14 basis points, compared with a base rate for institutions in Risk Category II of 7 basis points.

substantially reduce the subsidization of non-Risk Category I institutions by Risk Category I institutions and also substantially reduce the subsidization of higher risk institutions in Risk Category I by lower risk institutions in that category. For these reasons, the FDIC is adopting the proposed base rate schedule unchanged.

Minimum rate. Several comments argued in favor of a lower minimum base rate for institutions in Risk Category I. Suggestions for the minimum base rate included 0, 1 basis point or less, 1 basis point, and 1.25 basis points. Arguments in favor of a lower minimum base rate included:

- The FDIC is not likely to set actual rates below the base rates.
- Institutions in Risk Category I do not present much, if any, risk.
- The FDIC's data does not support charging the least risky institutions 2 basis points.

- Over certain periods in the past, average rates for Risk Category I required to maintain a given reserve ratio have been lower than 2 basis points.

- 2 basis points would unfairly penalize those institutions that could qualify for an assessment of less than 2 basis points under the proposed small institution method.

- The base rates do not take into account loss given default.

As discussed earlier, the historical analysis of costs attributable to each risk category can only be a guide to rates. The base rates take into account the FDIC's estimate of its long-term revenue needs. Moreover, the base rates do not in any sense represent a floor below which rates cannot be set. If these rates prove to generate too much revenue over time, the FDIC's Board can reduce actual rates.

That some institutions appear to qualify for an assessment of less than 2 basis points using the method that combines supervisory ratings with financial ratios is largely an artifact of the statistical method used to estimate an institution's probability of downgrade. Had the FDIC employed the more commonly used logit model rather than an ordinary least squares (OLS) model, this artifact would have nearly disappeared.⁷³

The issue of loss given default is discussed in a subsequent section (XI(C)).

Rate adjustments. Several comments (including comments from trade groups) opposed allowing the FDIC to adjust rates from the base rate schedule without further notice-and-comment rulemaking; one suggested that the FDIC be allowed to increase rates above the base rate schedule a maximum of 2 basis points without further notice-and-comment rulemaking. Arguments in support of requiring further notice-and-comment rulemaking included:

- The FDIC is no longer required to raise rates when the reserve ratio falls below the designated reserve ratio; therefore, the FDIC no longer needs to be able to raise rates quickly and drastically.

- If the FDIC must raise rates quickly, it can do so on an expedited basis or on an emergency basis, subject to subsequent notice and comment.

- Notice-and-comment rulemaking will allow banks time to plan for higher rates.

Arguments in support of allowing the FDIC to increase rates above the base rate schedule a maximum of 2 basis points without further notice-and-comment rulemaking included:

- Given historical longer-term insured deposit growth rates, an increase above the base rates of more than 2 basis points is unnecessary.

- An increase above the base rates of more than 2 basis points would affect institutions' earnings and their ability to lend in ways that cannot be justified given the present size of the DIF.

- Limiting the increase in this way should make assessment rates more stable from quarter to quarter.

Congress has granted the FDIC broad authority to establish a risk-based assessment system. 12 U.S.C. 1817(b)(1). Maintaining the ability to adjust rates within limits without notice and comment rulemaking is consistent with our well established practice and will allow the FDIC to act expeditiously to adjust rates in the face of constantly changing conditions, subject to the statutory factors we are required to consider. The NPR gave institutions notice that rates may be significantly higher than the base rates temporarily, partly because of the ongoing trend of high insured deposit growth and partly because the use of one-time credits will limit assessment revenue. For this reason, the final rule continues to allow the FDIC to adjust rates within limits without further notice-and-comment rulemaking. However, in light of the comments, the FDIC has decided to limit its ability to adjust rates without further notice-and-comment rulemaking to three basis points, as discussed above.

One comment opposed making uniform increases from the base rate schedule in determining actual rates and argued that any increase above the base rate schedule that was uniform would not reflect actual risk:

Any basis point "surcharge" should be risk-weighted, so that an institution with a lower risk profile would be charged a lower "surcharge" (e.g., 1 basis point or lower), and an institution with a higher risk profile would be charged a higher "surcharge" (e.g., 5 basis points).

The FDIC believes that this comment contains a valid point. In the event that revenue needs increase or decrease greatly and variations in risk among institutions suggest non-uniform rate changes, the FDIC will consider whether to increase or decrease the range of assessment rates between risk categories and within Risk Category I. Any such

change would only be made pursuant to further rulemaking.

Fraud costs. Two comments argued that the FDIC had failed to take fraud costs into account in the NPR. This is incorrect. Fraud was not excluded from the data used to develop the risk differentiation methods. The risk differentiation methodology was applied to analyze historical costs attributable to the risk categories (and to subsets of Risk Category I). The FDIC conducted this analysis in two steps. In the first step, the FDIC excluded fraud costs because, until fraud is uncovered, an institution engaged in fraud is usually not assigned to the correct risk category. After this step was concluded, the FDIC then distributed these fraud costs pro rata among all risk categories to determine historical costs attributable to the risk categories (and to subsets of Risk Category I). The FDIC used these historical costs to determine and validate base assessment rates.

Currently, fraud cannot be predicted. When it does appear, it can cause the failure of very large institutions. Keystone Bank, which was a relatively large bank, failed as the result of massive fraud. The Bank of Credit and Commerce International and Barings Brothers, Inc., were both very large banks that failed as a result of fraud. Outside of the banking industry, many failures have resulted as the result of fraud.

Actual rates. Many comments dealt with the actual assessment rates to be charged, either explicitly or by implication. Many comments (including comments from trade groups) suggested or implied that the FDIC keep assessment rates low, particularly for institutions in Risk Category I, and build the reserve ratio gradually over a period of years. The reasons cited for keeping assessment rates low included many of the reasons for lowering the base rate schedule for Risk Category I. In addition, other arguments included:

- The Reform Act eliminates the requirement that the reserve ratio reach any particular level within any particular time period.

- There should be a period of transition to allow banks to gradually use up their one-time assessment credits and adjust to paying premiums again under the new risk-based assessment system.

- High rates would be a burden on all institutions and would particularly and unnecessarily burden institutions without one-time credits, harming their competitive position and discouraging the formation of new banks.

- Insured deposit growth rates are not likely to be high over the long term; in

⁷³ The FDIC chose to use an OLS model for two primary reasons. The two models, logit and OLS, produced very similar risk rankings and the OLS model allowed institutions to easily calculate their potential base assessment rate for given changes in their financial ratios and CAMELS component ratings.

the past 15 years, there has been no 5-year period where annual growth rates much exceeded 5 percent. Given realistic growth rates of 4 to 5 percent, charging high rates will quickly increase the reserve ratio to unnecessarily high levels.

- The banking industry is extremely healthy because of improved risk management policies and procedures in the banking industry, and legislation that has equipped the federal bank regulatory agencies with additional supervisory and enforcement tools and the increased sophistication of the supervisory process.

- The risk of failure for Category I institutions is extremely low, and the risk of loss to the FDIC is even lower.

- Bank customers, particularly corporate customers, actually bear the burden of assessments.

The FDIC has decided on actual rates based upon the analysis described earlier. In sum, the FDIC is using the flexibility afforded under the Reform Act to raise the reserve ratio more gradually than if the 1.25 percent DRR remained a “hard” annual target. Nonetheless, consistent with the legislation’s objectives, the FDIC believes that rates should currently be set to build up the fund while economic conditions are generally favorable and the industry remains strong. Absent persistent high insured deposit growth, the FDIC expects that future assessment rates should be able to decline toward the base rate schedule once the reserve ratio reaches the DRR. Rates could be set below the base rate schedule if insured deposit growth slows considerably. Finally, the rates adopted in this rule (including rates charged new institutions when the provisions regarding new institutions become effective) remain well below rates that were charged during periods of both economic and industry stress and are not expected to have material adverse effects on established or new institutions.

IX. Comments on Additional Issues

Rapid Growth Premium

Some trade groups proposed imposing an additional premium for institutions (or new institutions) that have rapid deposit growth to offset dilution of the reserve ratio. Other trade groups proposed such a premium for large institutions that have rapid deposit growth.

The FDIC has decided against imposing a specific growth premium, primarily for two reasons. First,

Congress has already considered and resolved the issue of rapid growth during the past 10 years, when most institutions have paid nothing for deposit insurance, by awarding a one-time credit to those institutions that helped build the deposit insurance funds before 1996. Second, assessments under the final rule take future growth into account. An institution’s assessment equals the product of its assessment rate times its assessment base (which, under a final rule adopted simultaneously with this final rule, will be identical or nearly identical with its domestic deposits). Thus, any growth in domestic deposits will proportionally increase an institution’s assessment.⁷⁴

In addition, in the FDIC’s view, it is not practicable to define or impose such a premium. One difficult issue with defining an appropriate level of growth as a trigger is that a relatively small dollar increase in deposits at a small institution could represent a significant percentage of growth while a very large increase in deposits at a large institution might result in a small increase in the institution’s percentage of growth. Additionally, rapid growth alone may or may not warrant an additional premium. Finally, it would be very difficult—and probably impossible—to specify a rule for triggering a specific growth premium that could not be circumvented by some institutions.

Risk Differentiation

Several comments (including comments from trade groups) asserted that the FDIC cannot accurately differentiate risk amongst Category I institutions (or at least accurately enough for incremental pricing in small banks and/or six sub-categories for large banks) and, therefore, all institutions in Risk Category I should be charged the same assessment rate. These comments argued that subcategories and incremental pricing introduce unnecessary complexities. These comments claim that this additional complexity creates confusion and undermines confidence in the assessment system. One comment added that looking beyond three years when analyzing Category I institutions’ risk is unnecessary, since failing institutions would still be placed in a higher risk category well before failure.

The FDIC has found significant differences in risk among institutions in Risk Category I. To illustrate these differences in risk, consider differences in failure rates between CAMELS 1-rated and CAMELS 2-rated institutions

that make up Risk Category I. The historical failure rate for CAMELS 2-rated institutions is 2.5 times that of CAMELS 1-rated institutions for both three- and five-year horizons. Moreover, for a two-year horizon, CAMELS 2-rated institutions fail three times more often than do CAMELS 1-rated institutions.

In the FDIC’s view, while the analysis that produced the risk differentiation and pricing methodology underlying the final rule is complex, its application is not. Moreover, in general, the simpler a system is, the less able it is to capture differences in risk. The statistical analysis used may be complex, but it produces meaningful distinctions in risk.

One commenter also stated that the proposal makes assessment rates most risk sensitive for those banks that are least likely to fail. The FDIC recognizes that institutions in Risk Category I are less likely to fail than institutions in Risk Categories II, III and IV. These differences are reflected in assessment rates. Base assessment rates for Category IV institutions are 10 to 20 times higher than rates for the riskiest Category I institutions.

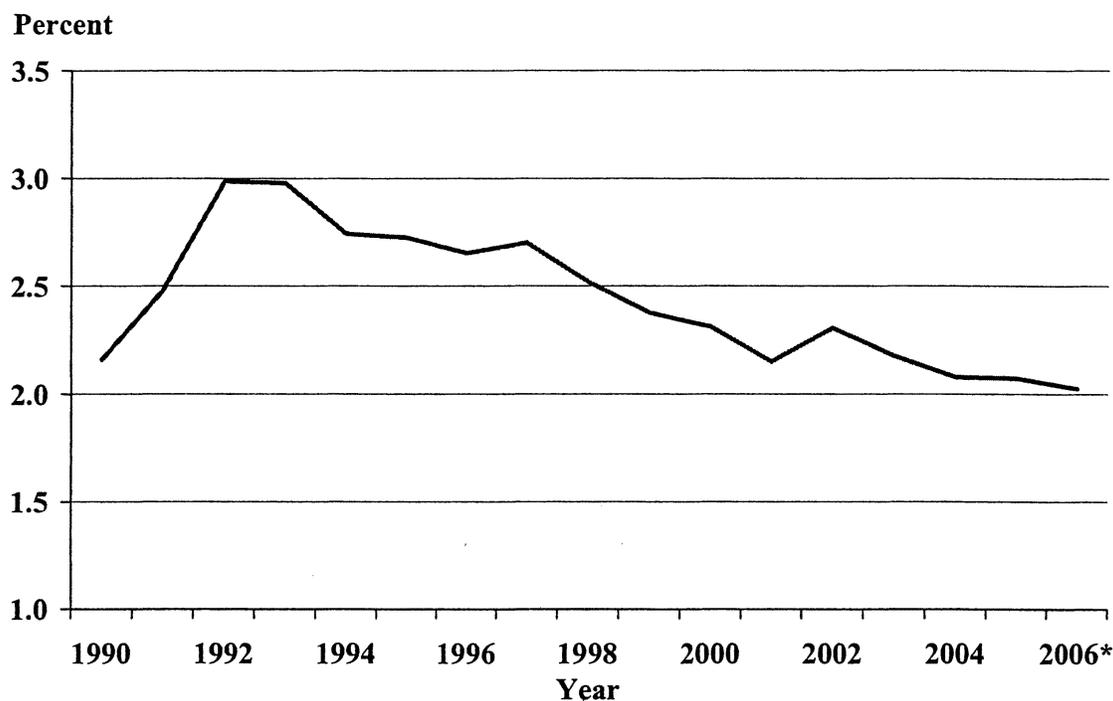
Calibration

One trade group argued that the FDIC’s model is not well calibrated to economic cycles because “the percentage of institutions that would qualify for the floor rate is greater than the 45 percent for every year since 1992, except one.” The inference apparently intended to be drawn from this argument is that, because the industry is healthier now than it has been for almost all years since 1992, the percentage of institutions that would qualify for the floor rate should be greater now than in the past. However, this argument overlooks two important points. First, the profitability of the banking industry in this decade compared to the 1990s has resulted, in part, from increased risk. From the mid-1990s to the present, earnings did not grow as fast as risk-weighted assets. As shown in Chart 3 below, the median ratio of earnings before taxes to risk-weighted assets has declined steadily since the early 1990s. The risk differentiation methods adopted in the final rule are designed to capture this increased risk. Second, not all institutions are prospering as much as they were in the past. In 2005, the pre-tax return on assets for institutions with under \$100 million in assets was 1.29 percent, which was less than in any year between 1992 and 1999.

⁷⁴ Of course, only growth in insured deposits can dilute the reserve ratio.

Chart 3

Ratio of Median Earnings before Taxes to Risk-Weighted Assets*



* As of June 30, 2006

Loss Given Failure

Several comments (including comments from trade groups) stated that the capital measure should include subordinated debt and stated or implied that subordinated debt should reduce assessment rates. For example, one comment recommended that institutions with subordinated liabilities and equity in excess of 25 percent of assets be placed in the minimum assessment rate subcategory. Several comments (including comments from trade groups) argued that the statutes governing the risk-based pricing system require that the FDIC take loss given default into account when determining assessments and that the proposed system fails to do so. This failure, they argue, makes the system actuarially unfair.

The FDIC recognizes that the Federal Deposit Insurance Act requires that the FDIC take the likely amount of any loss from failure into account in the assessment system. The final rule takes loss given failure (and expected loss pricing in general) into account in several ways. For a large institution, the FDIC will consider loss given failure (through the loss severity indicators enumerated in Appendix C) in

determining whether to make an adjustment to an institution's assessment rate. The final rule also takes loss given failure into account in the historical analysis that informed the base rate schedule and in each institution's assessment base. However, the FDIC's ability to take loss given failure into account in determining the assessment rate for some institutions, particularly small institutions, is somewhat limited for several reasons.⁷⁵ First, Call Reports and TFRs do not provide complete disclosure of several important determinants of loss given failure, such as secured liabilities, loan collateral requirements and the maturity structure of assets and liabilities. Second, as the FDIC explained in the

⁷⁵ Another comment illustrated the loss given failure problem by noting that the FDIC would suffer lower losses, all else equal, at an institution that relied more on non-deposit borrowing relative to one that relied on deposits. However, the FDIC would collect lower assessment revenue from an institution that used non-deposit borrowing, because only deposits are included in the assessment base. In addition, the comment assumes that, between the time the FDIC assesses an institution and the time it fails, the institution's liability structure will not change. As discussed later in the text, this is usually not the case. As an institution approaches failure, insured deposit liabilities and secured liabilities tend to become a larger percentage of an institution's liabilities.

NPR, at present it is not always clear which assumptions regarding loss given failure are most appropriate.⁷⁶

Thus, as the NPR noted, the FDIC is using an alternative to expected loss pricing to differentiate risk and set assessment rates. The FDIC hopes to refine its treatment of loss given failure (and expected loss pricing) in the future. As part of any refinement, the FDIC plans to consider whether, for example, to factor the composition of liabilities into loss given failure.

One comment also argued that the proposed risk differentiation and pricing system is unfair because institutions are assessed on deposits that are not insured, which "results in institutions with larger-than-average uninsured deposits (as a fraction of total deposits) subsidizing other institutions." This argument is inconsistent with studies that show that, as an institution approaches failure, uninsured deposits tend to be replaced by insured deposits and secured liabilities, which increases the FDIC's

⁷⁶ Rosalind L. Bennett, "Evaluating the Adequacy of the Deposit Insurance Fund: A Credit-Risk Modeling Approach," *FDIC Working Paper Series* 2001-02.

loss given failure.⁷⁷ Restricting the assessment base in this manner would reduce the assessment system's ability to take into account loss given failure.

Guidance on Disclosure

Some comments expressed concern over potential disclosure of an institution's assessment rate or amount, and changes to that rate or amount, through which third parties could determine an institution's confidential CAMELS component ratings. Concern also was expressed that disclosure of an institution's assessment rate or amount could create funding problems for an institution. Finally, the question was raised whether an institution can disclose its assessment rate because an element of that rate is examination ratings.

Assessment rates remain confidential and cannot be disclosed directly, except to the extent required by law. However, the proposed assessment system, similar to the current system, is based in part on publicly available information. Even under the current system, it is possible to estimate an institution's composite CAMELS rating using publicly available information. Under the proposed system it may be possible to estimate component or composite ratings or assessment rates. The additional information that could be determined under the new assessment system should not materially affect an institution's funding costs compared to the current system.

X. Regulatory Analysis and Procedure

A. Solicitation of Comments on Use of Plain Language

Section 722 of the Gramm-Leach-Bliley Act, Public Law 106–102, 113 Stat. 1338, 1471 (Nov. 12, 1999), requires the federal banking agencies to use plain language in all proposed and final rules published after January 1, 2000. The FDIC invited comments on how to make this proposal easier to understand, but received none.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) requires that each federal agency either certify that a proposed rule would not, if adopted in final form, have a significant economic impact on a substantial number of small entities or

prepare an initial regulatory flexibility analysis of the proposal and publish the analysis for comment. See 5 U.S.C. 603, 604, 605. Certain types of rules, such as rules of particular applicability relating to rates or corporate or financial structures, or practices relating to such rates or structures, are expressly excluded from the definition of "rule" for purposes of the RFA. 5 U.S.C. 601. The final rule governs assessments and sets the rates imposed on insured depository institutions for deposit insurance. Consequently, no regulatory flexibility analysis is required. Nonetheless, the FDIC voluntarily undertook a regulatory flexibility analysis to aid the public in commenting upon the small business impact of its proposed rule. The initial regulatory flexibility analysis was published in the **Federal Register** (71 FR 60674) on October 16, 2006. Public comment was invited and the comment period closed on October 26, 2006. The FDIC received no comments on the Initial Regulatory Flexibility Act analysis.

In its analysis, the FDIC used data as of December 31, 2005, and calculated the total assessments that would be collected under the base rate schedule in the final rule. The economic impact on each small institution for RFA purposes (i.e., institutions with assets of \$165 million or less) was then calculated as the difference in annual assessments under the base rate schedule compared to the prior rule as a percentage of the institution's annual revenue and annual profits, assuming the same total assessments collected by the FDIC from the banking industry.

Based on the December 2005 data, under the final base rate schedule, for more than 99 percent of small institutions (as defined for RFA purposes), the change in the assessment system would result in assessment changes (up or down) totaling one percent or less of annual revenue.⁷⁸ Of the total of 5,362 small institutions for RFA purposes, just 10 would have experienced an increase or decrease equal to 2 percent or greater of their total revenue. These figures do not reflect a significant economic impact on revenues for a substantial number of small insured institutions.

The FDIC performed a similar analysis to determine the impact on profits for small (again, as defined for RFA purposes) institutions. Based on December 2005 data, under the final base rate schedule, 85 percent of the

small institutions (as defined for RFA purposes) with reported profits would have experienced an increase or decrease in their annual profits of one percent or less.^{79–81} The data indicate that, out of those small institutions, as defined for RFA purposes, with reported profits, just 4 percent would have experienced an increase or decrease in their total profits of 3 percent or greater. Again, these figures do not reflect a significant economic impact on profits for a substantial number of small (as defined for RFA purposes) insured institutions.

The FDIC analyzed the effect of the proposal on these institutions that showed no profit or loss by determining the annual assessment change (either an increase or a decrease) that would result. The analysis showed that 56 percent (224) of the 399 small insured institutions in this category would have experienced a change (increase or decrease) in annual assessments of \$5,000 or less. Of the remainder, 3 percent (12) would have experienced assessment changes (increases or decreases) of \$20,000 or more.

The final rule makes only minor modifications to the way assessment rates are calculated for small institutions (although the final rule does set assessment rates higher than the base rates). Again assuming that the same assessment revenue would be collected under the old system as under the final rule, these modifications have a minimal effect on almost all small institutions. The effect of the final rule on a small institution's annualized profit and revenue as of June 30, 2006 is nearly identical to the effect shown under the proposal.

The final rule does not directly impose any "reporting" or "recordkeeping" requirements within the meaning of the Paperwork Reduction Act. The compliance requirements for the final rule do not exceed existing compliance requirements for the present system of FDIC deposit insurance assessments, which, in any event, are governed by separate regulations. The FDIC is unaware of any duplicative, overlapping or conflicting Federal rules. Accordingly, the FDIC certifies that the final rule will not have a significant economic impact on a substantial number of small institutions for purposes of the RFA.

⁷⁷ See, e.g., Lawrence G. Goldberg and Sylvia Hudgins, "Response of Uninsured Depositors to Impending S&L Failures: Evidence of Depositor Discipline," *Quarterly Review of Economics and Finance* 36, no. 3 (1996), 311–325; Andrew Davenport and Kathleen McDill, "The Depositor behind the Discipline: A Micro-Level Case Study of Hamilton Bank," *Journal of Financial Services Research* 30: 93–109 (2006).

⁷⁸ For about half of the small institutions analyzed, the change reflected an assessment decrease and a revenue increase.

^{79–81} For about half of the small institutions analyzed, the change reflected an assessment decrease and a profit increase.

C. Paperwork Reduction Act

No collections of information pursuant to the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*) are contained in the final rule.

D. The Treasury and General Government Appropriations Act, 1999—Assessment of Federal Regulations and Policies on Families

The FDIC has determined that the final rule will not affect family well-being within the meaning of section 654 of the Treasury and General Government Appropriations Act, enacted as part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999 (Public Law 105–277, 112 Stat. 2681).

E. Small Business Regulatory Enforcement Fairness Act

The Office of Management and Budget has determined that the final rule is not a “major rule” within the meaning of the relevant sections of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) (5 U.S.C. 801 *et seq.*). As required by SBREFA, the FDIC will file the appropriate reports with Congress and the Government Accountability Office so that the final rule may be reviewed.

List of Subjects in 12 CFR Part 327

Bank deposit insurance, Banks, banking, Savings associations.

■ For the reasons set forth in the preamble, the FDIC hereby amends chapter III of title 12 of the Code of Federal Regulations as follows:

PART 327—ASSESSMENTS

■ 1. The authority citation for part 327 continues to read as follows:

Authority: 12 U.S.C. 1441, 1813, 1815, 1817–1819, 1821; Sec. 2101–2109, Pub. L. 109–171, 120 Stat. 9–21, and Sec. 3, Pub. L. 109–173, 119 Stat. 3605.

■ 2. Revise §§ 327.9 and 327.10 of Subpart A to read as follows:

§ 327.9 Assessment risk categories and pricing methods.

(a) *Risk Categories.* Each insured depository institution shall be assigned to one of the following four Risk Categories based upon the institution’s capital evaluation and supervisory evaluation as defined in this section.

(1) *Risk Category I.* All institutions in Supervisory Group A that are Well Capitalized;

(2) *Risk Category II.* All institutions in Supervisory Group A that are Adequately Capitalized, and all

institutions in Supervisory Group B that are either Well Capitalized or Adequately Capitalized;

(3) *Risk Category III.* All institutions in Supervisory Groups A and B that are Undercapitalized, and all institutions in Supervisory Group C that are Well Capitalized or Adequately Capitalized; and

(4) *Risk Category IV.* All institutions in Supervisory Group C that are Undercapitalized.

(b) *Capital evaluations.* An institution will receive one of the following three capital evaluations on the basis of data reported in the institution’s Consolidated Reports of Condition and Income, Report of Assets and Liabilities of U.S. Branches and Agencies of Foreign Banks, or Thrift Financial Report dated as of March 31 for the assessment period beginning the preceding January 1; dated as of June 30 for the assessment period beginning the preceding April 1; dated as of September 30 for the assessment period beginning the preceding July 1; and dated as of December 31 for the assessment period beginning the preceding October 1.

(1) *Well Capitalized.* (i) Except as provided in paragraph (b)(1)(ii) of this section, a Well Capitalized institution is one that satisfies each of the following capital ratio standards: Total risk-based ratio, 10.0 percent or greater; Tier 1 risk-based ratio, 6.0 percent or greater; and Tier 1 leverage ratio, 5.0 percent or greater.

(ii) For purposes of this section, an insured branch of a foreign bank will be deemed to be Well Capitalized if the insured branch:

(A) Maintains the pledge of assets required under § 347.209 of this chapter; and

(B) Maintains the eligible assets prescribed under § 347.210 of this chapter at 108 percent or more of the average book value of the insured branch’s third-party liabilities for the quarter ending on the report date specified in paragraph (b) of this section.

(2) *Adequately Capitalized.* (i) Except as provided in paragraph (b)(2)(ii) of this section, an Adequately Capitalized institution is one that does not satisfy the standards of Well Capitalized under this paragraph but satisfies each of the following capital ratio standards: Total risk-based ratio, 8.0 percent or greater; Tier 1 risk-based ratio, 4.0 percent or greater; and Tier 1 leverage ratio, 4.0 percent or greater.

(ii) For purposes of this section, an insured branch of a foreign bank will be deemed to be Adequately Capitalized if the insured branch:

(A) Maintains the pledge of assets required under § 347.209 of this chapter; and

(B) Maintains the eligible assets prescribed under § 347.210 of this chapter at 106 percent or more of the average book value of the insured branch’s third-party liabilities for the quarter ending on the report date specified in paragraph (b) of this section; and

(C) Does not meet the definition of a Well Capitalized insured branch of a foreign bank.

(3) *Undercapitalized.* An undercapitalized institution is one that does not qualify as either Well Capitalized or Adequately Capitalized under paragraphs (b)(1) and (b)(2) of this section.

(c) *Supervisory evaluations.* Each institution will be assigned to one of three Supervisory Groups based on the Corporation’s consideration of supervisory evaluations provided by the institution’s primary federal regulator. The supervisory evaluations include the results of examination findings by the primary federal regulator, as well as other information that the primary federal regulator determines to be relevant. In addition, the Corporation will take into consideration such other information (such as state examination findings, if appropriate) as it determines to be relevant to the institution’s financial condition and the risk posed to the Deposit Insurance Fund. The three Supervisory Groups are:

(1) *Supervisory Group “A.”* This Supervisory Group consists of financially sound institutions with only a few minor weaknesses;

(2) *Supervisory Group “B.”* This Supervisory Group consists of institutions that demonstrate weaknesses which, if not corrected, could result in significant deterioration of the institution and increased risk of loss to the Deposit Insurance Fund; and

(3) *Supervisory Group “C.”* This Supervisory Group consists of institutions that pose a substantial probability of loss to the Deposit Insurance Fund unless effective corrective action is taken.

(d) *Determining Assessment Rates for Risk Category I Institutions.* Subject to paragraphs (d)(4), (6), (7) and (8) of this section, an insured depository institution in Risk Category I, except for a large institution that has at least one long-term debt issuer rating, as defined in § 327.8(i), shall have its assessment rate determined using the supervisory ratings and financial ratios method set forth in paragraph (d)(1) of this section. A large insured depository institution in Risk Category I that has at least one

long-term debt issuer rating shall have its assessment rate determined using the supervisory and debt ratings method set forth in paragraph (d)(2) of this section (subject to paragraphs (d)(4), (6), (7) and (8) of this section). The assessment rate for a large institution whose assessment rate in the prior quarter was determined using the supervisory and debt ratings method, but which no longer has a long-term debt issuer rating, shall be determined using the supervisory ratings and financial ratios method.

(1) *Supervisory ratings and financial ratios method.* Under the supervisory ratings and financial ratios method for Risk Category I institutions, each of five financial ratios and a weighted average of CAMELS component ratings will be multiplied by a corresponding pricing multiplier. The sum of these products will be added to or subtracted from a uniform amount. The resulting sum, subject to adjustment pursuant to paragraph (d)(4) of this section, if appropriate, and adjusted for the actual assessment rates set by the Board under § 327.10, will equal an institution's assessment rate; provided, however, that no institution's assessment rate will be less than the minimum rate in effect for Risk Category I institutions for that quarter nor greater than the maximum rate in effect for Risk Category I institutions for that quarter. The five financial ratios are: Tier 1 Leverage Ratio; Loans past due 30–89 days/gross assets; Nonperforming assets/gross assets; Net loan charge-offs/gross assets; and Net income before taxes/risk-weighted assets. The ratios are defined in Table A.1 of Appendix A to this subpart. The ratios will be determined for an assessment period based upon information contained in an institution's report of condition filed as of the last day of the assessment period as set out in § 327.9(b). The weighted average of CAMELS component ratings is created by multiplying each component by the following percentages and adding the products: Capital adequacy—25%, Asset quality—20%, Management—25%, Earnings—10%, Liquidity—10%, and Sensitivity to market risk—10%. Appendix A to this subpart contains the initial values of the pricing multipliers and uniform amount, describes their derivation, and explains how they will be periodically updated.

(i) *Publication of uniform amount and pricing multipliers.* The FDIC will publish notice in the **Federal Register** whenever a change is made to the uniform amount or the pricing multipliers for the supervisory ratings and financial ratios method.

(ii) *Implementation of CAMELS rating changes—(A) Changes between risk categories.* If, during a quarter, a CAMELS rating change occurs that results in an institution whose Risk Category I assessment rate is determined using the supervisory ratings and financial ratios method moving from Risk Category I to Risk Category II, III or IV, the institution's assessment rate for the portion of the quarter that it was in Risk Category I shall be determined using the CAMELS rating in effect before the change, subject to adjustment pursuant to paragraph (d)(4) of this section, if appropriate, and adjusted for the actual assessment rates set by the Board under § 327.10. For the portion of the quarter that the institution was not in Risk Category I, the institution's assessment rate shall be determined under the assessment schedule for the appropriate Risk Category. If, during a quarter, a CAMELS rating change occurs that results in an institution (other than a large institution that has at least one long-term debt issuer rating) moving from Risk Category II, III or IV to Risk Category I, the institution's assessment rate for the portion of the quarter that it was in Risk Category I shall be determined using the supervisory ratings and financial ratios method, subject to adjustment pursuant to paragraph (d)(4) of this section, if appropriate, and adjusted for the actual assessment rates set by the Board under § 327.10. For the portion of the quarter that the institution was not in Risk Category I, the institution's assessment rate shall be determined under the assessment schedule for the appropriate Risk Category.

(B) *Changes within Risk Category I.* If, during a quarter, an institution's CAMELS component ratings change in a way that would change the institution's assessment rate within Risk Category I, the assessment rate for the period before the change shall be determined under the supervisory ratings and financial ratios method using the CAMELS component ratings in effect before the change. Beginning on the date of the CAMELS component ratings change, the assessment rate for the remainder of the quarter shall be determined using the CAMELS component ratings in effect after the change.

(2) *Supervisory and debt ratings method.* A large insured depository institution in Risk Category I that has at least one long-term debt issuer rating shall have its assessment rate determined using the supervisory and debt ratings method (subject to paragraphs (d)(4) through (8) of this section). Its CAMELS component ratings will be weighted to derive a weighted

average CAMELS rating using the same weights applied in the supervisory ratings and financial ratios method as set forth under paragraph (d)(1) of this section. Long-term debt issuer ratings will be converted to numerical values between 1 and 3 as provided in Appendix B to this subpart and the converted values will be averaged. The weighted average CAMELS rating and the average of converted long-term debt issuer ratings each will be multiplied by 1.176 (which shall be the pricing multiplier), and the products will be summed. To this result will be added – 1.882 (which shall be a uniform amount for all institutions subject to the supervisory and debt ratings method). The resulting sum, subject to adjustment pursuant to paragraph (d)(4) of this section, if appropriate, and adjusted for the actual assessment rates set by the Board pursuant to § 327.10, will equal an institution's assessment rate; provided, however, that no institution's assessment rate will be less than the minimum rate in effect for Risk Category I institutions for that quarter nor greater than the maximum rate in effect for Risk Category I institutions for that quarter.

(3) *Assessment rate for insured branches of foreign banks—(i) Insured branches of foreign banks in Risk Category I.* Insured branches of foreign banks in Risk Category I shall be assessed using the weighted average ROCA component rating, as determined under paragraph (d)(3)(ii) of this section.

(ii) *Weighted average ROCA component rating.* The weighted average ROCA component rating shall equal the sum of the products that result from multiplying ROCA component ratings by the following percentages: Risk Management—35%, Operational Controls—25%, Compliance—25%, and Asset Quality—15%. The weighted average ROCA rating will be multiplied by 2.353 (which shall be the pricing multiplier). To this result will be added – 1.882 (which shall be a uniform amount for all insured branches of foreign banks). The resulting sum, subject to adjustment pursuant to paragraph (d)(4) of this section and adjusted for assessment rates set by the FDIC pursuant to § 327.10(b), will equal an institution's assessment rate; provided, however, that no institution's assessment rate will be less than the minimum rate in effect for Risk Category I institutions for that quarter nor greater than the maximum rate in effect for Risk Category I institutions for that quarter.

(4) *Adjustments to the initial risk assignment for large banks or insured branches of foreign banks—(i) Basis for and size of adjustment.* Within Risk

Category I, large institutions and insured branches of foreign banks are subject to risk assignment adjustment. In determining whether to make an adjustment for a large institution or an insured branch of a foreign bank, the FDIC may consider other relevant information in addition to the factors used to derive the risk assignment under paragraphs (d)(1), (2), or (3) of this section. Relevant information includes financial performance and condition information, other market information, and stress considerations, as described in Appendix C to this subpart. Any such adjustment shall be limited to a change in assessment rate of up to 0.5 basis points higher or lower than the rate determined using the supervisory ratings and financial ratios method, the supervisory and debt ratings method, or the weighted average ROCA component rating method, whichever is applicable.

(ii) *Adjustment subject to maximum and minimum rates.* No rate will be adjusted below the minimum rate or above the maximum rate for Risk Category I institutions in effect for the quarter.

(iii) *Prior notice of adjustments—(A) Prior notice of upward adjustment.* Prior to making any upward adjustment to an institution's rate because of considerations of additional risk information, the FDIC will formally notify the institution and its primary federal regulator and provide an opportunity to respond. This notification will include the reasons for the adjustment and when the adjustment will take effect.

(B) *Prior notice of downward adjustment.* Prior to making any downward adjustment to an institution's rate because of considerations of additional risk information, the FDIC will formally notify the institution's primary federal regulator and provide an opportunity to respond.

(iv) *Determination whether to adjust upward; effective period of adjustment.* After considering an institution's and the primary federal regulator's responses to the notice, the FDIC will determine whether the adjustment to an institution's assessment rate is warranted, taking into account any revisions to weighted average CAMELS component ratings, long-term debt issuer ratings, and financial ratios, as well as any actions taken by the institution to address the FDIC's concerns described in the notice. The FDIC will evaluate the need for the adjustment each subsequent assessment period, until it determines that an adjustment is no longer warranted. The amount of adjustment will in no event

be larger than that contained in the initial notice without further notice to, and consideration of, responses from the primary federal regulator and the institution.

(v) *Determination whether to adjust downward; effective period of adjustment.* After considering the primary federal regulator's responses to the notice, the FDIC will determine whether the adjustment to an institution's assessment rate is warranted, taking into account any revisions to weighted average CAMELS component ratings, long-term debt issuer ratings, and financial ratios, as well as any actions taken by the institution to address the FDIC's concerns described in the notice. Any downward adjustment in an institution's assessment rate will remain in effect for subsequent assessment periods until the FDIC determines that an adjustment is no longer warranted. Downward adjustments will be made without notification to the institution. However, the FDIC will provide advance notice to an institution and its primary federal regulator and give them an opportunity to respond before removing a downward adjustment.

(vi) *Adjustment without notice.* Notwithstanding the notice provisions set forth above, the FDIC may change an institution's assessment rate without advance notice under this paragraph, if the institution's supervisory or agency ratings or the financial ratios set forth in Appendix A to this subpart (for an institution without long-term debt issuer ratings) deteriorate.

(5) *Implementation of Supervisory and Long-Term Debt Issuer Rating Changes—(i) Changes between risk categories.* If, during a quarter, a CAMELS rating change occurs that results in an institution whose Risk Category I assessment rate is determined using the supervisory and debt ratings method or an insured branch of a foreign bank moving from Risk Category I to Risk Category II, III or IV, the institution's assessment rate for the portion of the quarter that it was in Risk Category I shall be based upon its assessment rate for the prior quarter; no new Risk Category I assessment rate will be developed for the quarter in which the institution moved to Risk Category II, III or IV. If, during a quarter, a CAMELS rating change occurs that results in a large institution with a long-term debt issuer rating or an insured branch of a foreign bank moving from Risk Category II, III or IV to Risk Category I, the institution's assessment rate for the portion of the quarter that it was in Risk Category I shall equal the rate determined under paragraphs (d)(2)

and (4) or (d)(3) and (4) of this section, as appropriate.

(ii) *Changes within Risk Category I.* If, during a quarter, an institution whose Risk Category I assessment rate is determined using the supervisory and debt ratings method remains in Risk Category I, but a CAMELS component or a long-term debt issuer rating changes that would affect the institution's assessment rate, or if, during a quarter, an insured branch of a foreign bank remains in Risk Category I, but a ROCA component rating changes that would affect the institution's assessment rate, separate assessment rates for the portion(s) of the quarter before and after the change(s) shall be determined under paragraphs (d)(2) and (4) or (d)(3) and (4) of this section, as appropriate.

(6) *Request to be treated as a large institution—(i) Procedure.* Any institution in Risk Category I with assets of between \$5 billion and \$10 billion may request that the FDIC determine its assessment rate as a large institution. The FDIC will grant such a request if it determines that it has sufficient information to do so. The absence of long-term debt issuer ratings alone will not preclude the FDIC from granting a request. The assessment rate for an institution without a long-term debt issuer rating will be derived using the supervisory ratings and financial ratios method, but will be subject to adjustment. Any such request must be made to the FDIC's Division of Insurance and Research. Any approved change will become effective within one year from the date of the request. If an institution whose request has been granted subsequently reports assets of less than \$5 billion in its report of condition for four consecutive quarters, the FDIC will consider such institution to be a small institution subject to the supervisory ratings and financial ratios method. An institution that disagrees with the FDIC's determination that it is a large or small institution may request review of that determination pursuant to § 327.4(c).

(ii) *Time limit on subsequent request for alternate method.* An institution whose request to be assessed as a large institution is granted by the FDIC shall not be eligible to request that it be assessed as a small institution for a period of three years from the first quarter in which its approved request to be assessed as a large bank became effective. Any request to be assessed as a small institution must be made to the FDIC's Division of Insurance and Research.

(7) *New and established institutions and exceptions—(i) New Risk Category I institutions—(A) Rule as of January 1,*

2010. Effective for assessment periods beginning on or after January 1, 2010, a new institution shall be assessed the Risk Category I maximum rate for the relevant assessment period, except as provided in paragraphs (d)(7)(ii)–(viii) of this section.

(B) *Rule prior to January 1, 2010.* Prior to January 1, 2010, a new institution's risk assignment shall be determined under paragraph (d)(1) or (2) of this section, as appropriate. Prior to January 1, 2010, a Risk Category I institution that has no CAMELS component ratings shall be assessed at one basis point above the minimum rate applicable to Risk Category I institutions until it receives CAMELS component ratings. If an institution has less than \$10 billion in assets or has at least \$10 billion in assets and no long-term debt issuer rating, its assessment rate will be determined under the supervisory ratings and financial ratios method once it receives CAMELS component ratings. The assessment rate will be determined by annualizing, where appropriate, financial ratios obtained from the reports of condition that have been filed, until the earlier of the following two events occurs: the institution files four reports of condition, or, if it has at least \$10 billion in assets, it receives a long-term debt issuer rating.

(ii) *Merger or consolidation involving new and established institution(s).* Subject to paragraphs (d)(7)(iii)–(viii) of this section, when an established institution merges into or consolidates with a new institution, the resulting institution is a new institution unless:

(A) The assets of the established institution, as reported in its report of condition for the quarter ending immediately before the merger, exceeded the assets of the new institution, as reported in its report of condition for the quarter ending immediately before the merger; and

(B) Substantially all of the management of the established institution continued as management of the resulting or surviving institution.

(iii) *Consolidation involving established institutions.* When

established institutions consolidate into a new institution, the resulting institution is an established institution.

(iv) *Grandfather exception.* If a new institution merges into an established institution, and the merger agreement was entered into on or before July 11, 2006, the resulting institution shall be deemed to be an established institution for purposes of this section.

(v) *Subsidiary exception.* Subject to paragraph (d)(7)(vi) of this section, a new institution will be considered established if it is a wholly owned subsidiary of:

(A) A company that is a bank holding company under the Bank Holding Company Act of 1956 or a savings and loan holding company under the Home Owners' Loan Act, and:

(1) At least one eligible depository institution (as defined in 12 CFR 303.2(r)) that is owned by the holding company has been chartered as a bank or savings association for at least five years as of the date that the otherwise new institution was established; and

(2) The holding company has a composite rating of at least "2" for bank holding companies or an above average or "A" rating for savings association holding companies and at least 75 percent of its insured depository institution assets are assets of eligible depository institutions, as defined in 12 CFR 303.2(r); or

(B) An eligible depository institution, as defined in 12 CFR 303.2(r), that has been chartered as a bank or savings association for at least five years as of the date that the otherwise new institution was established.

(vi) *Effect of credit union conversion.* In determining whether an insured depository institution is new or established, as those terms are defined in § 327.8, the FDIC will include any period of time that the institution was a federally insured credit union.

(vii) *CAMELS ratings for the surviving institution in a merger or consolidation.* When an established institution merges with or consolidates into a new institution, if the FDIC determines the resulting institution to be an established

institution under paragraph (d)(ii) of this section, its CAMELS ratings will be based upon the established institution's ratings prior to the merger or consolidation until new ratings become available.

(viii) *Rate applicable to institutions subject to subsidiary or credit union exception.* On or after January 1, 2010, if an institution is considered established under paragraph (d)(7)(v) or (vi) of this section, but does not have CAMELS component ratings, it shall be assessed at one basis point above the minimum rate applicable to Risk Category I institutions until it receives CAMELS component ratings. If an institution has less than \$10 billion in assets or has at least \$10 billion in assets and no long-term debt issuer rating, its assessment rate will be determined under the supervisory ratings and financial ratios method once it receives CAMELS component ratings. The assessment rate will be determined by annualizing, where appropriate, financial ratios obtained from all reports of condition that have been filed, until the earlier of the following two events occurs: the institution files four reports of condition, or, if it has at least \$10 billion in assets, it receives a long-term debt issuer rating.

(ix) *Request for review.* An institution that disagrees with the FDIC's determination that it is a new institution may request review of that determination pursuant to § 327.4(c).

(8) *Assessment rates for bridge banks and conservatorships.* Institutions that are bridge banks under 12 U.S.C. 1821(n) and institutions for which the Corporation has been appointed or serves as conservator shall, in all cases, be assessed at the Risk Category I minimum rate.

§ 327.10 Assessment rate schedules.

(a) *Base Assessment Schedule.* The base annual assessment rate for an insured depository institution shall be the rate prescribed in the following schedule:

TABLE 1 TO PARAGRAPH (a)

	Risk Category				
	I*		II	III	IV
	Minimum	Maximum			
Annual Rates (in basis points)	2	4	7	25	40

* Rates for institutions that do not pay the minimum or maximum rate vary between these rates.

(1) *Risk Category I Base Rate Schedule.* The base annual assessment

rates for all institutions in Risk Category I shall range from 2 to 4 basis points.

(2) *Risk Category II, III, and IV Base Rate Schedule.* The base annual

assessment rates for Risk Categories II, III, and IV shall be 7, 25, and 40 basis points respectively.

(3) All institutions in any one risk category, other than Risk Category I, will be charged the same assessment rate.
 (b) *Adjusted Rate Schedule.* Beginning on January 1, 2007, the

adjusted annual assessment rate for an insured depository institution shall be the rate prescribed in the following schedule:

TABLE 1 TO PARAGRAPH (b)

	Risk Category				
	I*		II	III	IV
	Minimum	Maximum			
Annual Rates (in basis points)	5	7	10	28	43

*Rates for institutions that do not pay the minimum or maximum rate vary between these rates.

(1) *Risk Category I Adjusted Rate Schedule.* The adjusted annual assessment rates for all institutions in Risk Category I shall range from 5 to 7 basis points.

(2) *Risk Category II, III, and IV Adjusted Rate Schedule.* The adjusted annual assessment rates for Risk Categories II, III, and IV shall be 10, 28, and 43 basis points respectively.

(3) All institutions in any one risk category, other than Risk Category I, will be charged the same assessment rate.

(c) *Rate schedule adjustments and procedures—(1) Adjustments.* The Board may increase or decrease the base assessment schedule up to a maximum increase of 3 basis points or a fraction thereof or a maximum decrease of 3 basis points or a fraction thereof (after aggregating increases and decreases), as the Board deems necessary. Any such adjustment shall apply uniformly to each rate in the base assessment schedule. In no case may such adjustments result in an assessment rate that is mathematically less than zero or in a rate schedule that, at any time, is more than 3 basis points above or below the base assessment schedule for the Deposit Insurance Fund, nor may any one such adjustment constitute an

increase or decrease of more than 3 basis points.

(2) *Amount of revenue.* In setting assessment rates, the Board shall take into consideration the following:

- (i) Estimated operating expenses of the Deposit Insurance Fund;
- (ii) Case resolution expenditures and income of the Deposit Insurance Fund;
- (iii) The projected effects of assessments on the capital and earnings of the institutions paying assessments to the Deposit Insurance Fund;
- (iv) The risk factors and other factors taken into account pursuant to 12 U.S.C. 1817(b)(1); and
- (v) Any other factors the Board may deem appropriate.

(3) *Adjustment procedure.* Any adjustment adopted by the Board pursuant to this paragraph will be adopted by rulemaking, except that the Corporation may set assessment rates as necessary to manage the reserve ratio, within set parameters not exceeding cumulatively 3 basis points, pursuant to paragraph (c)(1) of this section, without further rulemaking.

(4) *Announcement.* The Board shall announce the assessment schedule and the amount and basis for any adjustment thereto not later than 30 days before the quarterly certified statement invoice

date specified in § 327.3(b) of this part for the first assessment period for which the adjustment shall be effective. Once set, rates will remain in effect until changed by the Board.

■ 3–4. Add Appendices A through C to subpart A to read as follows:

Appendix A to Subpart A

Method to Derive Pricing Multipliers and Uniform Amount

I. Introduction

The uniform amount and pricing multipliers are derived from:

- A model (the Statistical Model) that estimates the probability that a Risk Category I institution will be downgraded to a composite CAMELS rating of 3 or worse within one year;
- Minimum and maximum downgrade probability cutoff values, based on data from June 2006, that will determine which small institutions will be charged the minimum and maximum assessment rates in Risk Category I;
- The minimum base assessment rate for Risk Category I, equal to two basis points, and
- The maximum base assessment rate for Risk Category I, which is two basis points higher than the minimum rate.

II. The Statistical Model

The Statistical Model is defined in equation 1a below.

Equation 1a

$$\begin{aligned}
 \text{Downgrade}(0,1)_{i,t} = & \beta_0 + \beta_1 (\text{Tier 1 leverage ratio}_{i,t}) \\
 & + \beta_2 (\text{Loans past due 30 to 89 days ratio}_{i,t}) \\
 & + \beta_3 (\text{Nonperforming asset ratio}_{i,t}) \\
 & + \beta_4 (\text{Net loan charge-off ratio}_{i,t}) \\
 & + \beta_5 (\text{Net income before taxes ratio}_{i,t}) \\
 & + \beta_6 (\text{Weighted average of the C, A, M, E and L component ratings}_{i,t})
 \end{aligned}$$

where Downgrade(0,1)_{i,t} (the dependent variable—the event being explained) is the incidence of downgrade from a composite

rating of 1 or 2 to a rating of 3 or worse during an on-site examination for an institution i between 3 and 12 months after

time t. Time t is the end of a year within the multi-year period over which the model was estimated (as explained below). The

dependent variable takes a value of 1 if a downgrade occurs and 0 if it does not.

The explanatory variables (regressors) in the model are five financial ratios and a weighted average of the “C,” “A,” “M,” “E” and “L” component ratings. The five financial ratios included in the model are:

- Tier 1 leverage ratio
- Loans past due 30–89 days/Gross assets
- Nonperforming assets/Gross assets
- Net loan charge-offs/Gross assets

- Net income before taxes/Risk-weighted assets.

The financial ratios and the weighted average of the “C,” “A,” “M,” “E” and “L” component ratings (collectively, the regressors) are defined in Table A.1. The component rating for sensitivity to market risk (the “S” rating) is not available for years prior to 1997. As a result, and as described in Table A.1, the Statistical Model is estimated using a weighted average of five component ratings excluding the “S”

component. In addition, delinquency and non-accrual data on government guaranteed loans are not available before 1993 for Call Report filers and before the third quarter of 2005 for TFR filers. As a result, and as also described in Table A.1, the Statistical Model is estimated without deducting delinquent or past-due government guaranteed loans from either the loans past due 30–89 days to gross assets ratio or the nonperforming assets to gross assets ratio.

TABLE A.1.—DEFINITIONS OF REGRESSORS

<i>Regressor</i>	<i>Description</i>
Tier 1 Leverage Ratio (%)	Tier 1 capital for Prompt Corrective Action (PCA) divided by adjusted average assets based on the definition for prompt corrective action
Loans Past Due 30–89 Days/Gross Assets (%)	Total loans and lease financing receivables past due 30 through 89 days and still accruing interest divided by gross assets (gross assets equal total assets plus allowance for loan and lease financing receivable losses and allocated transfer risk)
Nonperforming Assets/Gross Assets (%)	Sum of total loans and lease financing receivables past due 90 or more days and still accruing interest, total nonaccrual loans and lease financing receivables, and other real estate owned divided by gross assets
Net Loan Charge-Offs/Gross Assets (%)	Total charged-off loans and lease financing receivables debited to the allowance for loan and lease losses less total recoveries credited to the allowance to loan and lease losses for the most recent twelve months divided by gross assets
Net Income before Taxes/Risk-Weighted Assets (%)	Income before income taxes and extraordinary items and other adjustments for the most recent twelve months divided by risk-weighted assets
Weighted Average of C, A, M, E and L Component Ratings	The weighted sum of the “C,” “A,” “M,” “E” and “L” CAMELS components, with weights of 28 percent each for the “C” and “M” components, 22 percent for the “A” component, and 11 percent each for the “E” and “L” components. (For the regression, the “S” component is omitted.)

The financial ratio regressors used to estimate the downgrade probabilities are obtained from quarterly reports of condition (Reports of Condition and Income and Thrift Financial Reports). The weighted average of the “C,” “A,” “M,” “E” and “L” component ratings regressor is based on component ratings obtained from the most recent bank examination conducted within 24 months before the date of the report of condition.

The Statistical Model uses ordinary least squares (OLS) regression to estimate downgrade probabilities. The model is estimated with data from a multi-year period (as explained below) for all institutions in Risk Category I, except for institutions

established within five years before the date of the report of condition.

The OLS regression estimates coefficients, β_j , for a given regressor j and a constant amount, β_0 , as specified in equation 1a. As shown in equation 1b below, these coefficients are multiplied by values of risk measures at time T , which is the date of the report of condition corresponding to the end of the quarter for which the assessment rate is computed. The sum of the products is then added to the constant amount to produce an estimated probability, $d_{i,T}$, that an institution will be downgraded to 3 or worse within 3 to 12 months from time T .

The risk measures are financial ratios as defined in Table A.1, except that the loans past due 30 to 89 days ratio and the nonperforming asset ratio are adjusted to exclude the maximum amount recoverable from the U.S. Government, its agencies or government-sponsored agencies, under guarantee or insurance provisions. Also, the weighted sum of six CAMELS component ratings is used, with weights of 25 percent each for the “C” and “M” components, 20 percent for the “A” component, and 10 percent each for the “E,” “L,” and “S” components.

Equation 1b

$$\begin{aligned}
 d_{i,T} = & \beta_0 + \beta_1 (\text{Tier 1 leverage ratio}_{i,T}) \\
 & + \beta_2 (\text{Loans past due 30 to 89 days ratio}_{i,T}) \\
 & + \beta_3 (\text{Nonperforming asset ratio}_{i,T}) \\
 & + \beta_4 (\text{Net loan charge-off ratio}_{i,T}) \\
 & + \beta_5 (\text{Net income before taxes ratio}_{i,T}) \\
 & + \beta_6 (\text{Weighted average of CAMELS component ratings}_{i,T})
 \end{aligned}$$

III. Minimum and maximum downgrade probability cutoff values

The pricing multipliers are also determined by minimum and maximum downgrade probability cutoff values, which will be computed as follows:

- The minimum downgrade probability cutoff value will be the maximum downgrade probability among the forty-five percent of all small insured institutions in Risk Category I (excluding new institutions) with the lowest estimated downgrade probabilities, computed using values of the risk measures

as of June 30, 2006.¹ The minimum downgrade probability cutoff value is approximately 2 percent.

- The maximum downgrade probability cutoff value will be the minimum downgrade probability among the five percent of all small insured institutions in Risk Category I (excluding new institutions) with the highest estimated downgrade probabilities, computed using values of the risk measures as of June 30, 2006.² The maximum downgrade probability cutoff value is approximately 14 percent.

IV. Derivation of uniform amount and pricing multipliers

The uniform amount and pricing multipliers used to compute the annual base assessment rate in basis points, P_{iT} , for any such institution i at a given time T will be determined from the Statistical Model, the minimum and maximum downgrade probability cutoff values, and minimum and maximum base assessment rates in Risk Category I as follows:

Equation 2

$$P_{iT} = \alpha_0 + \alpha_1 * d_{iT}, \text{ subject to } 2 \leq P_{iT} \leq 4$$

where α_0 and α_1 are a constant term and a scale factor used to convert d_{iT} (the estimated downgrade probability for institution i at a given time T from the Statistical Model) to

an assessment rate, respectively. The numbers 2 and 4 in the restriction to equation 2 are the minimum base assessment rate and maximum base assessment rate,

respectively, and they are expressed in basis points.

(P_{iT} is expressed as an annual rate, but the actual rate applied in any quarter will be $\frac{P_{iT}}{4}$.)

Solving equation 2 for minimum and maximum base assessment rates simultaneously, ($2 = \alpha_0 + \alpha_1 * 0.02$ and $4 = \alpha_0 + \alpha_1 * 0.14$), where 0.02 is the minimum downgrade probability cutoff value and 0.14 is the maximum downgrade probability cutoff value, results in values for the constant amount, α_0 , and the scale factor, α_1 :

Equation 3

$$\alpha_0 = 2 - \frac{2 * 0.02}{(0.14 - 0.02)} = 1.67 \text{ and}$$

Equation 4

$$\alpha_1 = \frac{2}{(0.14 - 0.02)} = 16.67$$

Substituting equations 1b, 3 and 4 into equation 2 produces an annual base assessment rate for institution i at time T , P_{iT} , in terms of the uniform amount, the pricing multipliers and the ratios and weighted average CAMELS component rating referred to in 12 CFR 327.9(d)(2)(i):

Equation 5

$$P_{iT} = [1.67 + 16.67 * \beta_0] + 16.67 * [\beta_1 (\text{Tier 1 Leverage Ratio}_T)] + 16.67 * [\beta_2 (\text{Loans past due 30 to 89 days ratio}_T)] + 16.67 * [\beta_3 (\text{Nonperforming asset ratio}_T)] + 16.67 * [\beta_4 (\text{Net loan charge - off ratio}_T)] + 16.67 * [\beta_5 (\text{Net income before taxes ratio}_T)] + 16.67 * [\beta_7 (\text{Weighted average CAMELS component rating}_T)]$$

again subject to $2 \leq P_{iT} \leq 4$

where $1.67 + 16.67 * \beta_0$ equals the uniform amount, $16.67 * \beta_j$ is a pricing multiplier for the associated risk measure j , and T is the date of the report of condition corresponding to the end of the quarter for which the assessment rate is computed.

V. Updating the Statistical Model, uniform amount, and pricing multipliers

The initial Statistical Model is estimated using year-end financial ratios and the weighted average of the "C," "A," "M," "E" and "L" component ratings over the 1984 to

2004 period and downgrade data from the 1985 to 2005 period. The FDIC may, from time to time, but no more frequently than annually, re-estimate the Statistical Model with updated data and publish a new formula for determining assessment rates—equation 5—based on updated uniform amounts and pricing multipliers. However, the minimum and maximum downgrade probability cutoff values will not change without additional notice-and-comment rulemaking. The period covered by the analysis will be lengthened by one year each

year; however, from time to time, the FDIC may drop some earlier years from its analysis.

Appendix B to Subpart A

NUMERICAL CONVERSION OF LONG-TERM DEBT ISSUER RATINGS

Current long-term debt issuer rating*	Converted value
Standard & Poor's	

¹ As used in this context, a "new institution" means an institution that has been chartered as a bank or thrift for less than five years.

² As used in this context, a "new institution" means an institution that has been chartered as a bank or thrift for less than five years.

NUMERICAL CONVERSION OF LONG-TERM DEBT ISSUER RATINGS—Continued		NUMERICAL CONVERSION OF LONG-TERM DEBT ISSUER RATINGS—Continued		NUMERICAL CONVERSION OF LONG-TERM DEBT ISSUER RATINGS—Continued	
Current long-term debt issuer rating*	Converted value	Current long-term debt issuer rating*	Converted value	Current long-term debt issuer rating*	Converted value
AAA	1.00	Aa2	1.15	A+	1.50
AA+	1.05	Aa3	1.30	A	1.80
AA	1.15	A1	1.50	A-	2.20
AA-	1.30	A2	1.80	BBB+	2.70
A+	1.50	A3	2.20	BBB or worse	3.00
A	1.80	Baa1	2.70		
A-	2.20	Baa2 or worse	3.00		
BBB+	2.70	Fitch's			
BBB or worse	3.00	AAA	1.00		
Moody's		AA+	1.05		
Aaa	1.00	AA	1.15		
Aa1	1.05	AA-	1.30		

* A current rating is defined as one that has been assigned or reviewed in the last 12 months. Stale ratings are not considered.

Appendix C to Subpart A

ADDITIONAL RISK CONSIDERATIONS FOR LARGE RISK CATEGORY I INSTITUTIONS

Information source	Examples of Associated Risk Indicators or Information
Financial Performance and Condition Information	<p><i>Capital Measures (Level and Trend)</i></p> <ul style="list-style-type: none"> • Regulatory capital ratios • Capital composition • Dividend payout ratios • Internal capital growth rates relative to asset growth <p><i>Profitability Measures (Level and Trend)</i></p> <ul style="list-style-type: none"> • Return on assets and return on risk-adjusted assets • Net interest margins, funding costs and volumes, earning asset yields and volumes • Noninterest revenue sources • Operating expenses • Loan loss provisions relative to problem loans • Historical volatility of various earnings sources <p><i>Asset Quality Measures (Level and Trend)</i></p> <ul style="list-style-type: none"> • Loan and securities portfolio composition and volume of higher risk lending activities (e.g., sub-prime lending) • Loan performance measures (past due, nonaccrual, classified and criticized, and renegotiated loans) and portfolio characteristics such as internal loan rating and credit score distributions, internal estimates of default, internal estimates of loss given default, and internal estimates of exposures in the event of default • Loan loss reserve trends • Loan growth and underwriting trends • Off-balance sheet credit exposure measures (unfunded loan commitments, securitization activities, counterparty derivatives exposures) and hedging activities <p><i>Liquidity and Funding Measures (Level and Trend)</i></p> <ul style="list-style-type: none"> • Composition of deposit and non-deposit funding sources • Liquid resources relative to short-term obligations, undisbursed credit lines, and contingent liabilities <p><i>Interest Rate Risk and Market Risk (Level and Trend)</i></p> <ul style="list-style-type: none"> • Maturity and repricing information on assets and liabilities, interest rate risk analyses • Trading book composition and Value-at-Risk information
Market Information	<ul style="list-style-type: none"> • Subordinated debt spreads • Credit default swap spreads • Parent's debt issuer ratings and equity price volatility • Market-based measures of default probabilities • Rating agency watch lists • Market analyst reports
Stress Considerations	<p><i>Ability to Withstand Stress Conditions</i></p> <ul style="list-style-type: none"> • Internal analyses of portfolio composition and risk concentrations, and vulnerabilities to changing economic and financial conditions • Stress scenario development and analyses • Results of stress tests or scenario analyses that show the degree of vulnerability to adverse economic, industry, market, and liquidity events. Examples include: <ol style="list-style-type: none"> i. an evaluation of credit portfolio performance under varying stress scenarios ii. an evaluation of non-credit business performance under varying stress scenarios. iii. an analysis of the ability of earnings and capital to absorb losses stemming from unanticipated adverse events • Contingency or emergency funding strategies and analyses • Capital adequacy assessments <p><i>Loss Severity Indicators</i></p> <ul style="list-style-type: none"> • Nature of and breadth of an institution's primary business lines and the degree of variability in valuations for firms with similar business lines or similar portfolios • Ability to identify and describe discrete business units within the banking legal entity • Funding structure considerations relating to the order of claims in the event of liquidation (including the extent of subordinated claims and priority claims) • Extent of insured institutions assets held in foreign units • Degree of reliance on affiliates and outsourcing for material mission-critical services, such as management information systems or loan servicing, and products • Availability of sufficient information, such as information on insured deposits and qualified financial contracts, to resolve an institution in an orderly and cost-efficient manner

By order of the Board of Directors.
 Dated at Washington, D.C., this 2nd day of
 November, 2006.

Federal Deposit Insurance Corporation.
Robert E. Feldman,
Executive Secretary.

BILLING CODE 6714-01-P

Note: The following appendices will not appear in the Code of Federal Regulations.

Appendix 1

Uniform Amount and Pricing Multipliers for Large Risk Category I Institutions Where Long-Term Debt Issuer Ratings are Available

This appendix provides technical details of the derivation of the uniform amount and pricing multipliers used to determine annual assessment rates for large Risk Category I institutions that have long-term debt issuer ratings. These values are determined as follows.

Using information as of June 30, 2006 for large Risk Category I institutions with long-term debt issuer ratings, a score is computed by converting the long-term debt issuer rating into a numeric value ranging from 1 to 3, as described in Appendix B, multiplying the weighted average CAMELS rating and the numeric value of the long-term debt issuer rating by 0.50 each, and summing the resulting values. That is, score (S_i) equals:

Equation 1:

$$S_i = 0.50 * \text{Weighted Average CAMELS Component Rating}_i + 0.50 * \text{Long - Term Debt Issuer Rating}_i$$

The minimum and maximum score cut-off values are then determined based on data as of June 30, 2006 such that approximately 44 percent of large institutions with long-term debt issuer ratings that would have been in Risk Category I (other than institutions less than 5 years old) would have been charged the minimum assessment rate and approximately 6 percent of large institutions with long-term debt issuer ratings that would have been in Risk Category I (other than institutions less than 5 years old) would have been charged the maximum assessment rate.⁸² The minimum score cut-off value is 1.65 and the maximum score cut-off value is 2.50.

When the score falls between the minimum and maximum score cut-off values, the assessment rate for an institution i (P_i) is calculated by dividing the difference between the score and the minimum score cut-off value by the difference between the maximum and minimum score cut-off value, multiplying the resulting value by the difference between the maximum assessment rate and the minimum base assessment rate, and adding the result to the minimum assessment rate. The maximum and minimum base assessment rates are 2 basis points and 4 basis points, respectively. That is, the assessment rate equals:

Equation 2:

⁸² As used in this context, a "new institution" means an institution that has been chartered as a bank or thrift for less than five years.

$$P_i = 2 + \left(\frac{S_i - 1.65}{0.85} \right) * 2$$

Substituting equation 1 into equation 2 produces the following equation for P_i :

Equation 3:

$$P_i = 1.176 * \text{Weighted Average CAMELS Component Rating}_i + 1.176 * \text{Long - Term Debt Issuer Rating}_i - 1.882$$

where 1.176 is the pricing multiplier and -1.882 is the uniform amount.

Appendix 2

Uniform Amount and Pricing Multipliers for Insured Foreign Branches

This appendix provides technical details of the derivation of the uniform amount and pricing multipliers used to determine annual assessment rates for insured foreign branches (insured branches). These values are determined as follows.

The score for an insured branch in Risk Category I equals the weighted average ROCA rating as of June 30, 2006. That is, score (S_i) equals:

Equation 1:

$$S_i = \text{Weighted Average ROCA Rating}_i$$

As described in Appendix 1, the minimum score cut-off value is 1.65 and the maximum score cut-off is 2.50.

When S_i falls between the minimum and maximum score cut-off values, the assessment rate (P_i) for insured branches is calculated by dividing the difference between the score and the minimum score cut-off value by the difference between the maximum and minimum score cut-off value, multiplying the resulting value by the difference between the maximum assessment rate and the minimum base assessment rate, and adding the result to the minimum assessment rate. That is, the assessment rate equals:

Equation 2:

$$P_i = 2 + \left(\frac{S_i - 1.65}{0.85} \right) * 2$$

Substituting equation 1 into equation 2 produces the following equation for P_i :

Equation 3:

$$P_i = 2.353 * \text{Weighted Average ROCA Rating}_i - 1.882$$

where 2.353 is the pricing multiplier and -1.882 is the uniform amount.

Appendix 3

Analysis of the Projected Effects of the Payment of Assessments On the Capital and Earnings of Insured Depository Institutions

This analysis estimates the effect of an increase in the annual deposit insurance assessment rates for all insured institutions on their tangible equity capital and profitability based on the rate schedule adopted in this rule.

While an assessment rate increase would not take effect until 2007, the effect of the new rates is projected using June 2006 reports of condition, and rates are assumed to remain in effect for four quarters.⁸³ Furthermore, the analysis excludes the effect of any reduction in assessment costs from institutions' use of one-time credits authorized under the Reform Act, in order to evaluate the effect on earnings and capital once the one-time credits have been exhausted. For the majority of institutions, the availability of credits will significantly reduce or completely eliminate any effect of the new rate schedule on earnings and capital in the first year that the schedule is in effect.

While an increase in deposit insurance assessment rates will reduce institutions' profitability and capitalization, the reduction will not necessarily equal the full amount of the assessment increase. Two factors can reduce the effect of increased assessments on institutions' profits and capital. First, a portion of the assessment increase may be transferred to customers in the form of higher borrowing rates, increased service fees and lower deposit interest rates. Since information is not readily available on the extent to

⁸³ Institution earnings and capital are projected using the same methodology currently used by the FDIC in determining the contingent loss reserve for potential insured institution failures.

which institutions are able to share assessment costs with their customers, this analysis assumes that institutions bear the full after-tax cost of the assessment increase. Second, deposit insurance assessments are a tax-deductible operating expense; therefore, the increase in the assessment expense can be used to lower taxable income. This analysis considers the tax consequences of assessments and estimates the effective after-tax cost of assessments.⁸⁴

Institutions' earnings retention and dividend policies also influence the extent to which increased assessments affect equity levels. If institutions maintain dividend levels, despite an increase in operating costs, equity (retained earnings) will decline by the full amount of the after-tax cost of the assessment. This analysis assumes that institutions' dividend rates remain unchanged from those reported in the June 30, 2006 reports of condition.

The analysis indicates that the effect on institution profitability and capital is very small. Industry tangible equity capital of insured institutions as of June 30, 2006, is approximately \$793.4 billion. June 30, 2007 tangible equity capital is projected to equal \$806.6 billion if the current assessment rates are maintained.⁸⁵ It would be \$1.7 billion lower, i.e., \$804.9 billion, under the adopted assessment rate schedule. The number of institutions projected to be undercapitalized by June 30, 2007 under the new rate schedule is unchanged from the number based on current assessment rates.⁸⁶

⁸⁴ The analysis does not incorporate tax-loss carry-back (carry-forward).

⁸⁵ Under current assessment rates, approximately 95 percent of insured institutions are charged nothing for deposit insurance.

⁸⁶ Undercapitalized institutions are defined as institutions with projected tangible equity capitalization of less than 2 percent by March 31, 2007.

With an increase in assessment rates, the approximately \$3.4 billion in additional assessment costs to insured institutions is projected to lead to \$1.7 billion less in tangible capital and \$0.8 billion less in dividends as of June 30, 2007, compared to amounts if current assessment rates applied. The remaining \$0.9 billion in additional assessment costs are projected to be offset by the tax benefit of deducting assessment expenses.

The effect of higher assessments on institution income is measured by the percentage change in income before taxes and extraordinary items, gross of loan loss provisions, due to the assessment rate increase (hereafter, referred to as income). This income measure is used in order to eliminate the potentially transitory effects of loan losses, extraordinary items and taxes on profitability. Institutions' income is projected using June 30, 2006 year-to-date income, adjusted to reflect the increase in operating costs (pre-tax) that might result from the proposed assessment rate increase. The analysis indicates that the proposed increases in assessment rates will reduce institution income moderately.⁸⁷ Table 1.1 shows that approximately 76.3 percent of institutions, with 95.1 percent of insured institution assets, are projected to experience a 0 to 5 percent reduction in income. In addition, 12.5 percent of institutions, with 3.3 percent of aggregate assets, are projected to incur a 5 to 10 percent reduction in income.⁸⁸

⁸⁷ Because assessments are tax deductible, the after-tax dollar effect on income should be smaller.

⁸⁸ In a separate analysis (not presented here), the economic effect of a smaller assessment rate increase – specifically, an increase only to the proposed base rates -- was also analyzed. If assessment rates were to increase to the proposed base rates, projected income for approximately 88 percent of banks would decline by only between 0 to 5 percent.

Table 1.1

Percentage Change in Income
Under the Rate Schedule Adopted in this Rule
(All FDIC-Insured Institutions, \$Millions)

Percentage Change	Number	Percent	Assets	Percent
Below -50%	61	0.7	\$8,108	0.1
-25% to -50%	86	1.0	29,587	0.3
-15% to -25%	125	1.4	24,119	0.2
-10% to -15%	228	2.6	63,876	0.6
-5% to -10%	1,091	12.4	384,871	3.3
0% to -5%	6,696	76.3	10,958,217	95.1
Missing	491	5.6	54,468	0.5

Notes:

- (1) Income refers to income before taxes and extraordinary items, gross of loan loss provisions.
- (2) The effects do not take into account the availability of one-time assessment credits in order to determine the effect on income once credits have been used up.
- (3) Most banks with results categorized as "Missing" already have negative pre-tax income. The percentage change cannot therefore be calculated.
- (4) Insured branches of foreign banks were not included in the analysis.

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FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 327

RIN 3064-AD02

Deposit Insurance Assessments— Designated Reserve Ratio

AGENCY: Federal Deposit Insurance Corporation.

ACTION: Final rule.

SUMMARY: Under the Federal Deposit Insurance Reform Act of 2005, the Federal Deposit Insurance Corporation (FDIC) must by regulation set the Designated Reserve Ratio (DRR) for the Deposit Insurance Fund (DIF) within a range of 1.15 percent to 1.50 percent. In this rulemaking, the FDIC establishes the DRR for the DIF at 1.25 percent.

DATES: *Effective Date:* January 1, 2007.

FOR FURTHER INFORMATION CONTACT: Munsell St. Clair, Senior Policy Analyst, Division of Insurance and Research, (202) 898-8967; or Christopher Bellotto, Counsel, Legal Division, (202) 898-3801, Federal Deposit Insurance

Corporation, 550 17th Street, NW., Washington, DC 20429.

SUPPLEMENTARY INFORMATION:

I. Background

The Federal Deposit Insurance Reform Act of 2005 (the Reform Act) amends section 7(b)(3) of the Federal Deposit Insurance Act (the FDI Act) to eliminate the current fixed designated reserve ratio (DRR) of 1.25 percent.¹ Section 2105 of the Reform Act directs the FDIC Board of Directors (Board) to set and publish annually a DRR for the Deposit Insurance Fund (DIF) within a range of 1.15 percent to 1.50 percent.² 12 U.S.C. 1817(b)(3)(A), (B). Under section 2109(a)(1) of the Reform Act, the Board must prescribe final regulations setting the DRR after notice and opportunity for comment not later than 270 days after enactment of the Reform Act.³

In setting the DRR for any year, section 2105(a) of the Reform Act, amending section 7(b)(3) of the FDI Act,

¹ Section 2104 of the Reform Act, Public Law 109-171, 120 Stat. 9.

² To be codified at 12 U.S.C. 1817(b)(3)(A)(i), (B).

³ Thereafter, any change to the DRR must be made by regulation after notice and opportunity for comment. Section 2105 of the Reform Act, to be codified at 12 U.S.C. 1817(b)(3)(A) (ii).

directs the Board to consider the following factors:

(1) The risk of losses to the DIF in the current and future years, including historic experience and potential and estimated losses from insured depository institutions.

(2) Economic conditions generally affecting insured depository institutions. (In general, the Board should consider allowing the DRR to increase during more favorable economic conditions and decrease during less favorable conditions.)

(3) That sharp swings in assessment rates for insured depository institutions should be prevented.

(4) Other factors as the Board may deem appropriate, consistent with the requirements of the Reform Act.⁴ The

⁴ To be codified at 12 U.S.C. 1817(b)(3)(C). The Reform Act provides:

(C) FACTORS—In designating a reserve ratio for any year, the Board of Directors shall—

(i) take into account the risk of losses to the Deposit Insurance Fund in such year and future years, including historic experience and potential and estimated losses from insured depository institutions;

(ii) take into account economic conditions generally affecting insured depository institutions so as to allow the designated reserve ratio to increase during more favorable economic conditions and to decrease during less favorable

Continued

DRR may not exceed 1.50 percent nor be less than 1.15 percent.⁵

II. The Final Rule

Statutory Analysis

In July 2006, the FDIC published a proposed rule that would set the DRR at 1.25 percent. In its proposal, the FDIC analyzed the statutory factors that must be considered in setting the DRR. The FDIC also identified three "other factors" that it considered.

1. Risk of Losses to the DIF

In the proposal, the FDIC's best estimate of potential loss provisions for 2006 related to future failures was \$93 million. The FDIC also considered economic stress events and their potential implications for losses to the insurance fund by running several two-year stress event simulations. The results of each simulation, which were derived from historical stress events, demonstrate that banks are well positioned to withstand a significant degree of financial adversity. In no case did the stress simulation results raise any significant concerns.

So far this year no banks have failed. In addition, loss provisions anticipated for next year are expected to remain low. These estimates suggest that near-term losses to the insurance fund would not significantly alter the reserve ratio.

2. Economic Conditions Affecting FDIC-Insured Institutions

U.S. economic growth appears to be moderating in the second half of 2006. Consensus estimates of U.S. economic growth are in the 2.0 to 2.5 percent range for the second half of 2006, compared to growth of 3.2 percent reported for 2005. While the cumulative effects of higher interest rates, higher energy prices and slower home price appreciation are expected to slow consumer spending, exports and nonresidential investment appear

economic conditions, notwithstanding the increased risks of loss that may exist during such less favorable conditions, as determined to be appropriate by the Board of Directors;

(iii) seek to prevent sharp swings in the assessment rates for insured depository institutions; and

(iv) take into account such other factors as the Board of Directors may determine to be appropriate, consistent with the requirements of this subparagraph.

Section 2105 of the Reform Act (to be codified at 12 U.S.C. 1817(b)(3)(C)).

⁵ Any future change to the DRR shall be made by regulation after notice and opportunity for comment. In soliciting comment on any proposed change in the DRR, the FDIC must include in the published proposal a thorough analysis of the data and projections on which the proposal is based. Section 2105 of the Reform Act (to be codified at 12 U.S.C. 1817(b)(3)(D)).

poised to make up a larger portion of net growth in the economy. This rebalancing of economic activity should be consistent with stability in the outlook for bank credit quality, and problem loan ratios are likely to move up modestly over time from today's historic low levels. Possible exceptions to this generally positive credit outlook include certain subsectors of residential real estate loan portfolios, where higher interest rates and a leveling off of home price increases could contribute to a higher incidence of credit distress.

The condition of the banking industry remains strong. Earnings have set records each of the last five years, capital measures are still near historically high levels, and asset quality indicators remain solid. For the first half of 2006, the industry's annualized return on assets (ROA) remained high at 1.34 percent. The aggregate equity-to-asset ratio was 10.27 percent as of June 30, 2006, and more than 99 percent of all insured institutions met or exceeded the requirements of the highest regulatory capital standards. The ratio of noncurrent loans to total loans is its lowest since institutions began reporting that data 23 years ago. No insured institutions have failed in over two years, extending the longest period without a failure since the creation of the FDIC in 1933. Therefore, banks and thrifts generally appear to be well positioned to withstand the financial stress that may arise from potential economic shocks in the next few years.

3. Prevent Sharp Swings in Assessment Rates

The Reform Act directs the FDIC's Board to consider preventing sharp swings in assessment rates for insured depository institutions.

Strong insured deposit growth has contributed to a decline in the reserve ratio from 1.31 percent at year-end 2004 to 1.23 percent as of June 30, 2006. If recent robust insured deposit growth continues, there will be further downward pressure on the reserve ratio. This downward pressure could be offset by raising assessment rates; however, the availability of assessment credits will temporarily limit future revenue. Raising the reserve ratio to a DRR of 1.25 percent within a reasonably short time frame could require (depending upon insured deposit growth) a temporary, substantial increase in assessment rates, which would exhaust most of the credits rapidly. Increasing the reserve ratio more gradually could result in less substantial increases in rates.

4. Other Factors

The FDIC's Board also considered certain "other factors" in its decision to propose setting the DRR at 1.25 percent.

a. *Transition to a new assessment system.* The FDIC noted that the assessment system is about to undergo significant change. Once proposed risk-based assessment regulations are finalized and become effective, all insured institutions will pay deposit insurance assessments regardless of the level of the reserve ratio. These proposed regulations also will change how the FDIC differentiates among insured institutions for risk in assigning assessment rates.

Furthermore, to provide institutions a transition to the new system, one-time assessment credits will be available to those institutions that contributed in earlier years to the build-up of the insurance funds. The application of these credits to assessments will limit assessment revenue in the near term. If insured deposit growth remains strong, this may place temporary downward pressure on the reserve ratio, which is expected to reverse itself once banks begin to use up their credits.

Finally, the FDIC will be changing to a system where the reserve ratio will be managed within a range from a system where a hard target for the reserve ratio applied.

b. *Midpoint of the normal operating range for the reserve ratio.* The Reform Act authorizes the Board to set the DRR at no less than 1.15 percent and no greater than 1.50 percent. The FDIC must adopt a restoration plan when the reserve ratio falls below 1.15 percent. When the reserve ratio exceeds 1.35 percent, the Reform Act generally requires the FDIC to begin to pay dividends. Because there is no requirement to achieve a specific reserve ratio within a given time frame, these provisions in effect establish a normal operating range for the reserve ratio of 1.15 percent to 1.35 percent within which the Board has considerable discretion to manage the size of the insurance fund. The FDIC noted that the current DRR of 1.25 percent is the midpoint of the normal operating range.

c. *Historical experience.* The FDIC also observed that historical experience with a DRR of 1.25 percent indicates that it has worked well under varying economic conditions in ensuring an adequate insurance fund and maintaining a sound deposit insurance system and concluded that more experience with managing the fund under the new framework established by the Reform Act will be of benefit in

determining whether the DRR should be raised or lowered from 1.25 percent.

5. Role of the DRR

The FDIC also noted that the manner in which the FDIC's Board evaluates the statutory factors may depend on its view of the role of the DRR, which may change over time. The FDIC identified two potential general roles for the DRR: a signal of the reserve ratio that the Board would like the fund to achieve; and a signal of the Board's expectation of the change in the reserve ratio under the assessment rate schedule adopted by the Board.

III. Comments on the Proposed Rule

The FDIC received 16 comments directly addressed to the proposed rule for setting the DRR.⁶ These comments generally fell into several main groups: the DRR should be set at the low end of the range; the DRR should be raised gradually over time; the reserve ratio should be raised gradually; the DRR should not be set at the minimum of the range; the DRR should be a rough guide to the DIF reserve ratio; and further economic rationale should be provided for setting the DRR at 1.25.

One individual set out several arguments for setting the DRR at 1.50 percent, including:

- Greater risk in the banking industry;
- Strong insured deposit growth;
- Inadequacy of a 1.25 percent DRR as evidenced by the FDIC fund falling from 1.24 percent in 1981 to a negative number in 1991; and

• The number of times the reserve ratio has been above 1.50 percent during the FDIC's history.

Several other commenters suggested setting the DRR below 1.25 percent. Arguments in support of this suggestion included:

- A lower ratio would provide the industry with time to recapitalize the fund without facing sharp swings in assessment rates, particularly for those institutions which will not have credits;
- The FDIC is unrealistic in its optimism about the economy, and Congress expected the FDIC to set the DRR at the lower end of the range when institutions generally would face difficulty making payments, such as in difficult economic times, while setting the DRR higher when the economy was

good and payments could be made more easily;

- The banking industry is financially healthy;

• The risk of fund losses is low, at least in part due to prompt corrective action requirements and other new supervisory and enforcement tools that enhance safety and soundness;

• Congress intended for the FDIC to determine an appropriate level for the DRR annually, rather than allowing the reserve ratio to meet the DRR over a period of a few years;

• The number of bank failures has been low;

• hardship on new growth institutions would be lessened; and

• The risk to the industry is lower now than in 1991 when Congress set the DRR at 1.25.

Other commenters suggested that increases in the DRR be phased in gradually:

• Starting with a DRR of 1.20 percent and phasing in an increase to 1.25 percent over a five-year period; and

• Allowing an initial drift toward 1.15 percent, with a phased-in move to 1.25 percent over time.

One comment from a banking industry trade group, however, stated that "it would not be prudent" to set the target at the minimum of 1.15 percent.

Several commenters suggested that, if the DRR were set at 1.25 percent initially, or wherever it is set, the FDIC should increase the reserve ratio gradually over a period of no less than three years, or three to five years, in order to avoid unnecessary surges in assessment rates. More generally, the FDIC should take a slow and steady approach.

Several commenters viewed the DRR as useful only for guidance in setting assessments, suggesting that the DRR:

• Is a very rough guide to a long-run equilibrium for the reserve ratio, and not a primary driver of premiums in the short-run;

• Should be analyzed each year to determine whether it is reasonable given the actual risk of loss to the DIF;

• Should not be viewed as requiring the imposition of higher assessments, but rather the FDIC should consider economic factors and the condition of the banking industry generally to determine whether to lower the DRR or whether it will be restored through deposit base changes, growth in investment earnings, low levels of expected failures, and similar factors.

Three commenters sought greater analytical justification for setting the DRR at 1.25 percent, asserting that the FDIC's rationale was:

- Unclear;

• Not sufficiently explained, requesting more thorough analysis within two years; and

• Not justified based on actual risk and market conditions.

IV. The Final Rule

The FDIC believes that the statutory analysis conducted in the proposed rulemaking is correct. Based upon that analysis, and for the reasons that follow, the FDIC has determined to set the DRR at 1.25 percent.⁷

The FDIC concludes that the best way to balance all of the statutory factors (including the "other factors" identified above) and to preserve the FDIC's new flexibility to manage the DIF is to maintain the DRR at 1.25 percent. Several factors that the Board must (or may) consider—preventing sharp swings in assessment rates, the transitional nature of the assessment system, maintaining a DRR at the midpoint of the reserve ratio's normal operating range, the historical experience with a DRR of 1.25 percent, as well as the intent of the new legislation to provide the FDIC with flexibility to manage the reserve ratio within a range—all support or are consistent with maintaining the current DRR of 1.25 percent.

Several commenters argued that the present good health of the industry argues in favor of a DRR lower than 1.25 percent. A goal of the Reform Act, however, is to allow the fund to rise when conditions are good so that it could decline when conditions are less favorable without the need to raise assessments sharply. In fact, the Reform Act directs the FDIC to consider allowing the DRR to increase under favorable economic conditions.

Generally favorable economic conditions and the strong condition of the industry provide little justification for lowering the DRR.

Further, most of the comments seeking to have the DRR set lower than 1.25 percent appear to be concerned with the assessment rates that will be charged, and the resulting amount of assessments that will be collected, if the DRR is set at 1.25 percent. This issue will be addressed in the risk-based assessments final rule being presented to the FDIC Board of Directors along with this DRR final rule case.

How the FDIC will use the DRR may change over time. The FDIC views the role of the DRR as a signal of the level that the DIF should achieve; however,

⁷ The final rule adds paragraph (g) of 327.4 (Subpart A) to the revised part 327 as set forth in the final rule on Operational Changes to Assessments (RIN 3064-AD03) published elsewhere in this issue of the **Federal Register**.

⁶ Several other commenters also addressed the DRR, at least in passing, in comments directed to other FDIC rulemakings, particularly the rulemaking that proposed substantive improvements to the risk-based assessment system. 71 FR 41910 (July 24, 2006). All of the comments received that relate to the DRR have been considered in adopting this final rule and are available on the FDIC's Web site at <http://www.fdic.gov/regulations/laws/federal/index.html>.

the FDIC does not expect the DIF to reach this level within the first year of the new system. As required by the Reform Act, the FDIC will determine the appropriate DRR annually. Section 2105 of the Reform Act, to be codified at 12 U.S.C. 1817(b)(3)(A).

V. Effective Date

The final rule setting the DRR at 1.25 percent will become effective on January 1, 2007.

VI. Paperwork Reduction Act

The proposed rule will set the Designated Reserve Ratio for the Deposit Insurance Fund. It will not involve any new collections of information pursuant to the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). Consequently, no information has been submitted to the Office of Management and Budget for review.

VII. Regulatory Flexibility Act

Pursuant to 5 U.S.C. 605(b), the FDIC certifies that the final rule will not have a significant economic impact on a substantial number of small businesses (*i.e.*, insured depository institutions with \$165 million or less in assets) within the meaning of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601, *et seq.*). The final rule sets the Designated Reserve Ratio (DRR) at 1.25 percent, which is unchanged from the present Designated Reserve Ratio. Under the Federal Deposit Insurance Reform Act of

2005, the DRR provides no trigger for assessment determinations, recapitalization of the insurance fund, assessment credit use, or dividends. Consequently, retaining the DRR at 1.25 percent will not have a significant economic impact on a substantial number of small insured institutions. No comments were received concerning the proposal's RFA certification.

VIII. The Treasury and General Government Appropriations Act, 1999—Assessment of Federal Regulations and Policies on Families

The FDIC has determined that the final rule will not affect family well-being within the meaning of section 654 of the Treasury and General Government Appropriations Act, enacted as part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999 (Pub. L. 105-277, 112 Stat. 2681).

IX. Small Business Regulatory Enforcement Fairness Act

The Office of Management and Budget has determined that the final rule is not a "major rule" within the meaning of the relevant sections of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) (5 U.S.C. 801, *et seq.*). As required by SBFERA, the FDIC will file the appropriate reports with Congress and the General Accounting Office so that the final rule may be reviewed.

List of Subjects in 12 CFR Part 327

Bank deposit insurance, Banks, banking, Savings associations.

■ For the reasons stated above, the Board of Directors of the Federal Deposit Insurance Corporation hereby amends part 327 of Title 12 of the Code of Federal Regulations as follows:

PART 327—ASSESSMENTS

■ 1. The authority citation for part 327 continues to read as follows:

Authority: 12 U.S.C. 1441, 1813, 1815, 1817-1819, 1821; Sec. 2101-2109, Pub. L. 109-171, 120 Stat. 9-21, and Sec. 3, Pub. L. 109-173, 119 Stat. 3605.

Subpart A—In General

■ 2. In § 327.4 of subpart A, add paragraph (g) to read as follows:

§ 327.4 Assessment rates.

* * * * *

(g) *Designated reserve ratio.* The designated reserve ratio for the Deposit Insurance Fund is 1.25 percent.

By order of the Board of Directors.

Dated at Washington, DC this 2nd day of November 2006.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

[FR Doc. 06-9203 Filed 11-29-06; 8:45 am]

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Federal Register

**Thursday,
November 30, 2006**

Part IV

Department of the Interior

National Park Service

**36 CFR Part 13
Glacier Bay National Park, Vessel
Management Plan Regulations; Final Rule**

DEPARTMENT OF THE INTERIOR**National Park Service****36 CFR Part 13**

RIN 1024-AD25

Glacier Bay National Park, Vessel Management Plan Regulations**AGENCY:** National Park Service, Interior.**ACTION:** Final rule and technical amendment.

SUMMARY: This rule revises the special regulations for vessel quotas and operating requirements for cruise ships, tour vessels, charter vessels, private vessels, and passenger ferries within Glacier Bay National Park and Preserve. The rule implements the related final environmental impact statement completed in 2003 for vessel management in the park and preserve. This rule also makes nonsubstantive technical reorganizational changes for all of part 13. The part 13 reorganization, while not included in the proposed rule, is a result of comments received regarding the complexity of the Glacier Bay regulations specifically, as well as comments received previously for various rulemaking documents concerning the organization of part 13 generally.

DATES: This rule is effective on January 2, 2007.**FOR FURTHER INFORMATION CONTACT:**

Glacier Bay vessel management information: Tomie Patrick Lee, Superintendent, Glacier Bay National Park and Preserve, P.O. Box 140, Gustavus, Alaska 99826. Telephone: (907) 967-2230.

Part 13 reorganization information: Vic Knox, Deputy Regional Director, National Park Service, 240 W. 5th Avenue, Anchorage, Alaska 99501. Telephone: (907) 644-3501.

SUPPLEMENTARY INFORMATION:**Background**

This rule revises the special regulations for vessel quotas and operating requirements for cruise ships, tour vessels, charter vessels, private vessels, and passenger ferries within Glacier Bay National Park. The rule implements a final environmental impact statement (FEIS) completed in 2003 for vessel management in the Park. In 2001, the Ninth Circuit Court of Appeals determined that a 1996 increase in vessels into Glacier Bay violated the National Environmental Policy Act because an environmental impact statement (EIS) had not been

prepared when the vessel entry quota was increased. The court prohibited vessel traffic above the pre-1996 levels, unless an EIS was prepared. The court decision went into effect in late summer 2001 resulting in a reduction in vessel traffic. Following the court decision, Congress enacted legislation (Sec. 130, Pub. L. 107-63, 115 Stat. 442, Nov. 5, 2001) that returned the vessel quotas to the 2000 calendar year level until changed based on an EIS that was directed to be completed by January 1, 2004. The EIS was completed and announced in the **Federal Register** on October 10, 2003. The Record of Decision (ROD) for the EIS was signed on November 21, 2003. On March 3, 2006, a proposed rule was published in the **Federal Register** (71 FR 10940) to implement a portion of the ROD.

Under these revised rules, daily vessel quotas remain unchanged, however, the regulations provide an administrative procedure for increases in seasonal quotas up to the daily maximum of two cruise ships. Although the final regulation provides for an increase in seasonal quotas of cruise ships, increased resource protection is also provided by extending the seasonal-use day quota season for cruise ships to include May and September, requiring the superintendent to carefully evaluate available studies before allowing any increase in cruise ship numbers, and revising operating requirements. Subject to the established daily quotas, seasonal limitations are eliminated for all other vessel categories. Pursuant to statute, a new vessel category, passenger ferry, is added with a daily quota of one. The various proposals regarding definitions and vessel operational requirements have also been adopted unless noted otherwise in the "Changes to the Final Rule" section. As used within this document, the terms "we," "our," and "us" refer to the National Park Service.

Summary of Comments

The proposed rule was published for public comment on March 3, 2006 (71 FR 10940), with the initial comment period lasting until May 2, 2006. The National Park Service received 28 timely written responses, plus two petitions, regarding various sections of the proposed rule. One petition was signed by 113 individuals and the other was signed by 106 individuals. All of the written responses were either separate letters or e-mail messages. Of the 28 written responses, one was from the State of Alaska, two were from non-governmental organizations (including one consolidated response from 6 signatory groups), 5 were from small businesses, and 15 were submitted by

individuals. Many proposed changes either received supporting comments or no comments. These sections are being adopted as proposed, unless noted otherwise below. The proposed sections that did receive comments of opposition or revision are discussed below.

General Comments*Proposed Quota/Permit System*

1. One commenter expressed support for the simplification of vessel management in Glacier Bay. The State of Alaska also commended the NPS on efforts to simplify the rules, but said the rule is still complex and recommended that the NPS further simplify the system.

NPS Response: One of the goals of the NPS in this rulemaking was to simplify the vessel regulations for Glacier Bay to the extent practical, while protecting park resources and access by all user groups. The NPS will continue to evaluate other ways to further simplify vessel management.

NPS Administrative Use

2. Several commenters suggested the NPS address and possibly limit administrative use. Other commenters recommended that NPS increase scientific research efforts.

NPS Response: The majority of NPS use of Glacier Bay is for research purposes so the park can make better management decisions. There are other NPS administrative uses of the Bay; including emergency response, law enforcement, personnel transfers to cruise ships, and access by other State and Federal agencies with shared jurisdiction of the Bay. The NPS is aware that administrative use of vessels has an impact and the park carefully considers the need for such use against the effect on park resources.

Poor Communication Between the City of Gustavus and the NPS

3. One commenter stated that there has been insufficient communication between the NPS and the City of Gustavus and that the City Council was not adequately informed about the changes in vessel management.

NPS Response: The NPS is committed to cooperating with all interested parties, including the City of Gustavus, regarding management of park resources. The NPS has consistently communicated with the Mayor of Gustavus and the City Council since the city's formation on April 1, 2004. Additionally, there have been numerous public meetings in the Gustavus area over the past several years regarding changes to vessel management in Glacier Bay.

Regulation of Private Vessels

4. One individual commented that the NPS is over-regulating private vessels. This individual observed that all known collisions with whales have been caused by large commercial touring vessels.

NPS Response: The NPS does not believe that the park can support unlimited private vessel traffic. The environmental analysis indicates that all types of vessel traffic impact marine resources as well as the visitor experience in Glacier Bay. All vessels used for non-administrative purposes, including private vessels, are limited by number, route, and speed in particular parts of the Bay where whales are known to occur during the summer months. There have been two known whale fatalities that have occurred in the Bay due to vessel strikes. One was caused by a large commercial vessel and the other by a vessel of unknown size. In 2003, there also was a nonfatal collision between a small vessel and a whale in park waters.

Reduced Public Access

5. One individual commented that the rules will reduce public access.

NPS Response: In fact, public access to the Bay is increased by eliminating the private seasonal vessel quota, which allows an increase from 1,972 vessel use days currently to a potential for 2,300 private vessel use days per season. A portion of the daily private vessel quota would be reserved and made available on a short notice basis (48 hours before the date for which the permit would be issued) to accommodate visitors and local area residents. The Superintendent would have the ability to adjust the ratio between short notice and advanced notice permits from year to year to accommodate private vessel use changes over time. Additionally, the seasonal vessel quota for cruise ships may increase, which, when combined with having ships with large passenger capacities, will allow substantially larger numbers of the public to visit Glacier Bay. All national park areas must balance the congressional mandate to preserve park resources in a manner that will leave them unimpaired for future generations. The NPS believes the vessel management regulations achieve this balance.

Organization of Regulations

6. The State of Alaska and other individuals commented that the regulatory structure is hard to follow.

NPS Response: The NPS agrees that the organization of the regulations in Part 13, in particular Glacier Bay, needs improvement. As currently organized,

the regulations are difficult for the public and government to use. Accordingly, the NPS has decided to reorganize the entire Part 13. This reorganization will establish several new subparts and redesignate all sections. It also redesignates numerous paragraphs as sections. These changes will make the rule much easier to use by introducing new headings and eliminating many levels of subdivisions, particularly in the Glacier Bay regulations. With the exception of vessel management in Glacier Bay, the substance of the Part 13 regulations and their corresponding relationship to 36 CFR parts 1–7 and 12 remain completely unaffected by these changes. The changes to vessel management in Glacier Bay are clearly identified in the proposed rule and changes to the proposed rule are delineated in the following section of this document titled “Changes to the Final Rule.”

Specific Comments

Eliminating the Permit Exception

7. We received 24 comments on the proposal to eliminate the permit exception for vessels based in Bartlett Cove. Many commenters requested that the NPS retain the permit exemption. Alternative suggestions included providing “grandfather rights” to people who have utilized this exception, suspend the implementation of the regulation until a new dock is built in Gustavus or until after the 2006 vessel permit season, enforce speed limits and require evasive action if whales are encountered, issue seasonal or right-of-way permits to those based in Bartlett Cove, allow only charter boats or commercial fishermen with lifetime access permits to use the exception, designate one private vessel permit as a “transit” permit that only one vessel could use at a time, or modify the regulatory definition of Glacier Bay or the boundaries of the Park to exclude Bartlett Cove. Other individuals commented that accessing Bartlett Cove was a right under the provisions of ANILCA section 1110(b), Access to Inholdings.

NPS Response: The NPS appreciates how eliminating this exception would affect some local residents. The City of Gustavus is planning on upgrading facilities outside the park for mooring or basing vessels in the near future. The NPS believes this will provide a reasonable alternative for local residents who are not interested in recreating in the Bay. For that reason, as a five-year interim solution the NPS has decided to adopt one commenter’s suggestion to designate one out of the 25 private

vessel permits each day as a “transit” permit. This “transit” permit could be used by several different vessels provided that only one vessel is using the permit at a time. The “transit” permit could be used to directly exit Bartlett Cove and allow the vessel to return directly to Bartlett Cove. It would not allow travel into any other part of Glacier Bay. The superintendent will develop application procedures and operating conditions as part of the compendium. This provision would cease to be effective five years from the effective date of these regulations.

The NPS does not believe ANILCA section 1110(b) applies in this circumstance. Gustavus is not within the boundaries of the park or effectively surrounded by the park, nor is access to or from Gustavus impeded by the park boundary.

Vessel Definitions

8. One commenter suggested that the NPS adopt vessel definitions that conform to U.S. Coast Guard definitions.

NPS Response: One of the changes in the charter vessel definition was established to conform to a new USCG category that includes vessels between 100 and 200 tons that are uninspected, which falls into the NPS charter vessel category. USCG definitions are based primarily on safety, which the NPS has found does not sufficiently account for visitor use patterns, concessions authorizations, and fee structures. For this reason, the NPS has adopted different vessel definitions.

Adopt a Separate Vessel Category

9. One commenter suggested that the Glacier Bay Lodge vessel and a possible future kayak drop-off vessel be removed from the charter or tour categories.

NPS Response: This would increase the number of vessels in Glacier Bay since these boats would not count toward the quotas for these two categories. The quotas, based on biological opinions, the FEIS, and ROD, have been determined to be the appropriate number of vessels to protect the environment while providing public access.

Safe Harbor Rule

10. A few commenters expressed support for the safe harbor exception to the permit requirement. One individual requested clarification on how the safe harbor would be implemented.

NPS Response: The safe harbor exception would allow vessels to operate in Glacier Bay without a permit if the superintendent determines on a case-by-case basis that there is a bona fide need for safe harbor. This would

apply to urgent weather, mechanical, or other safety-related emergencies; not situations where operating within Glacier Bay is a matter of convenience, such as provisioning or dropping off passengers to make a transportation connection on time.

Quotas

11. We received several comments regarding the vessel quotas. The State of Alaska requested the NPS allow two cruise ships each day from June 1 to August 31 so the maximum of 184 cruise ships can visit Glacier Bay during this time. Three commenters recommended the NPS maintain existing quota levels. One commenter suggested that charter or bare boat rentals should be excluded from private vessel status when there are no clients on board.

NPS Response: The purpose of the FEIS, biological opinions, and related studies was to determine the appropriate number of vessels that can visit Glacier Bay while protecting park resources and values. These quotas represent the NPS's primary mission to conserve park resources while providing for public enjoyment. The NPS believes the proposed quotas best achieve that mission.

Vessel quotas are directly tied to research and available scientific information. The connection was made by several commenters. One commenter suggested utilizing a scientific advisory board regarding cruise ship quotas. The proposed regulation ensures that the annual cruise ship quota will be based in part on available scientific information. This would involve input from the Glacier Bay Science Advisory Board, which was established to provide the superintendent with the best available information of the effect of cruise ships on park resources.

Closing Beardslee Entrance and Adams Inlets

12. Several commenters expressed support for the proposed closure of the Beardslee Entrance and Adams Inlet to cruise ships and tour vessels. Two commenters suggested also closing this area to charter vessels due to the potential size of vessels in this class. One individual suggested making a safe harbor exception to the closure.

NPS Response: The NPS believes the proposed rule protects resources and public safety. The NPS will continue to monitor the effectiveness of the rule. Visitor safety is an important concern to the NPS and individual situations will be assessed on a case-by-case basis.

Passenger Ferry

12. Two non-governmental organizations commented on the passenger ferry service. One organization expressed opposition to the ferry and the other organization suggested adopting size limits.

NPS Response: Passenger ferry service is authorized by federal law and the proposed regulations appropriately implement the statutory provisions.

Speed Limits

13. Two commenters objected to increasing speed limits in Glacier Bay whale waters. One of these commenters recommended adopting a 10-knot speed limit due to potential acoustic impact on whales. Another commenter stated boats will not be able to come up on step with the 13-knot speed limit.

NPS Response: The NPS adopts a speed limit when there is a safety or resource protection need. The current state of scientific information does not differentiate between 13 knots or lower speeds as a means of reducing acoustic impact on whales. Published scientific data indicate that fatal whale strikes are more likely to occur at vessel speeds of 14 knots or higher. Consequently, allowing higher speeds in whale waters would be inappropriate. For this reason, the NPS believes that a 13-knot speed limit is the appropriate limit to protect park resources. However, based on NOAA guidelines or new scientific information, the superintendent may change the speed limit.

Whale Waters

14. One commenter said that whales use Whidbey Passage regularly which would compel the superintendent to adopt vessel operating restrictions, effectively making this area "de facto" whale waters.

NPS Response: Whales commonly use Whidbey Passage, but variability in their distribution usually requires whale waters to be designated seasonally, rather than using a permanent boundary. The NPS has also found that permanent whale waters outside the Lower Bay unnecessarily restrict vessel operators when whales are not using those areas. Experience has shown that permanent whale waters in areas where whale presence is inconsistent can detract from the effectiveness of the whale protection regulations. The NPS therefore believes that whales will be best protected by designating customized whale waters on a case-by-case basis, rather than relying on permanent boundaries that may not be valid each year.

Changes to the Final Rule

Based on the preceding comments and responses, the NPS has made the following changes to the proposed rule language for vessel management at Glacier Bay National Park:

Part 13 reorganization—Based on public comments that the rule is confusing due to the structure of the regulations, the NPS has decided to reorganize the entire Part 13. This reorganization will establish several new subparts and redesignate all sections. It also redesignates numerous paragraphs as sections. A derivation table showing the old and revised section numbers follows. These changes will make the rule much easier to use by introducing new headings and eliminating many levels of subdivisions, particularly in the Glacier Bay regulations. With the exception of vessel management in Glacier Bay, the substance of the Part 13 regulations and their corresponding relationship to 36 CFR Parts 1–7 and 12 remain completely unaffected by these changes.

Part 13 Technical amendment—The NPS revised Part 13 in 2004 (69 FR 70070, Dec. 2, 2004) and inadvertently removed the hearing provision for temporary closures and restrictions relating to the taking of fish and wildlife in the old § 13.30(d) (now § 13.50(d)). We are correcting this mistake.

Section 13.1160(c)—Permits for vessels based in Bartlett Cove—As discussed in the Comments Section, the NPS decided to adopt a "transit" permit provision for private vessels. This regulation would be in effect for five years from the effective date of this final rule, allowing time for vessel owners to plan for alternatives to basing their vessels in Bartlett Cove, and for the City of Gustavus to upgrade boat facilities outside the Park. The "transit" permit would count toward the private daily vessel quota of 25. This "transit" permit could be used by several different vessels in a day provided that only one vessel is using the permit at a time. The "transit" permit could be used only to directly exit Bartlett Cove and allow the vessel to return directly to Bartlett Cove. It would not allow travel into any other part of Glacier Bay. The superintendent will develop application procedures and operating conditions as part of the compendium. The superintendent is considering the following procedures and conditions for the 2007 compendium: (1) Making a percentage of the 25 private vessel permits available on an advance-notice basis and the remaining portion on a short-notice basis (48 hours before the date for which the permit would be issued) to

accommodate visitors and local area residents; (2) one of the short notice permits would be set aside as a "transit" permit available the previous day; (3) multiple parties could use the "transit" permit so long as only one party was using the permit to transit at any given time; (4) the "transit" permit could be reserved for a given block of time; (5) the "transit" permit may not be used for travel further up the Bay or to stop and engage in other activities such as fishing; and (6) if no party reserves the "transit" permit by a specified time on the available day of travel, the permit would go back in the pool of short-notice private vessel permits that could be used to go up the Bay. The NPS welcomes comments on these provisions, and other items in the Glacier Bay compendium. The 2007 proposed Glacier Bay compendium will be available online at www.nps.gov/glba and from the park directly by December 31, 2006. Comments can be made online through the park Web site or directly to the park (park address and phone number online at www.nps.gov/glba).

Section 13.1176(a)(c)—Speed Restrictions—The NPS is increasing the speed limit to 13 knots from 10 knots as discussed in the proposed rule; however, the superintendent may modify the speed limit based on NOAA guidelines or new scientific information.

Section 13.1102—Definitions—The reorganized Glacier Bay regulations will have one definitions section for all of Glacier Bay. In the old 13.65 regulations, the commercial fishing and resource protection subsections each had a definitions section. Creating a single definitions section for all of Glacier Bay results in a non-substantive change to the definition of Glacier Bay with respect to commercial fishing. The old 13.65(a) commercial fishing definition of Glacier Bay was "all marine waters within Glacier Bay National Park, including coves and inlets, north of an imaginary line drawn from Point Gustavus and Point Carolus." The definition for Glacier Bay set forth in the proposed rule will now apply throughout Glacier Bay and covers the same area; however, it defines the area using coordinates. This definition of Glacier Bay is: "all waters inside a line drawn between Point Gustavus at 135°54.927' W longitude; 58°22.748' N latitude and Point Carolus at 136°2.535' W longitude; 58°22.694' N latitude."

Section 13.1104—Coordinates—The NPS added a new regulation to clarify that all coordinates referenced in subpart M use Horizontal datum World Geodetic System of 1984 (WGS 84).

DERIVATION TABLE FOR PART 13

New Section	Derived From
Subpart A—Administrative Provisions	
13.1	13.1
13.2	13.2
[removed]	13.3 [reserved]
13.4	13.4
[removed]	13.11–13.16 [reserved]
Subpart B—General Provisions	
13.20	13.10
13.25	13.18(a)
13.26	13.18(b)
13.30	13.19
13.35	13.20
13.40	13.21
13.45	13.22
13.50	13.30
13.55	13.31
Subpart C—Cabins	
13.100	13.17(a)
13.102	13.17(b)
13.104	13.17(c)
13.108	13.17(d)(1)
13.110	13.17(d)(2)
13.112	13.17(d)(3)
13.114	13.17(d)(4)
13.116	13.17(d)(5)
13.118	13.17(d)(6)
13.120	13.17(d)(7)
13.122	13.17(d)(8)
13.124	13.17(d)(9)
13.126	13.17(e) introductory text
13.130	13.17(e)(8)
13.136	13.17(e)(1) introductory text
13.138	13.17(e)(1)(i)
13.140	13.17(e)(1)(ii)
13.142	13.17(e)(1)(iii)
13.144	13.17(e)(2)(i)
13.146	13.17(e)(2)(ii)
13.148	13.17(e)(2)(iii)
13.149	13.17(e)(2)(iv)
13.150	13.17(e)(3)
13.160	13.17(e)(4)(i) and (ii)
13.161	13.17(e)(4)(iii)
13.162	13.17(e)(4)(iv)
13.164	13.17(e)(4)(v)
13.166	13.17(e)(4)(vi)
13.168	13.17(e)(4)(vii)
13.170	13.17(e)(5)(i)
13.172	13.17(e)(5)(ii) and (iii)
13.176	13.17(e)(6)
13.182	13.17(e)(7)(i)
13.184	13.17(e)(7)(ii)
13.186	13.17(e)(7)(iii)
13.188	13.17(e)(7)(iv)
Subpart E—Special Visitor Services	
13.300	13.80
13.305	13.81
13.310	13.82
13.315	13.83
13.320	13.84
13.325	13.85
13.330	13.86
13.335	13.87

DERIVATION TABLE FOR PART 13—
Continued

New Section	Derived From
Subpart F—Subsistence	
13.400	13.40
13.410	13.41
13.420	13.42
13.430	13.43
13.440	13.44
13.450	13.45
13.460	13.46
13.470	13.47
13.480	13.48
13.485	13.49
13.490	13.50
13.495	13.51
Subpart H—Alagnak Wild River [Reserved]	
Subpart I—Aniakchak National Monument and Preserve	
13.602	13.60(a)
13.604	13.60(b)
Subpart J—Bering Land Bridge National Preserve	
13.702	13.61
Subpart K—Cape Krusenstern National Monument	
13.802	13.62
Subpart L—Denali National Park and Preserve	
13.902	13.63(a)
13.904	13.63(b)
13.906	13.63(c)
13.908	13.63(e)
13.910	13.63(f)
13.912	13.63(g)
13.914	13.63(j)
13.916	13.63(k)
13.930	13.63(d)(1)
13.932	13.63(d)(2)
13.934	13.63(d)(3)
13.936	13.63(d)(4)
13.950	13.63(h)(1)
13.952	13.63(h)(2)
13.954	13.63(h)(3)
13.956	13.63(h)(4)
13.958	13.63(h)(5)
13.960	13.63(h)(6)
13.962	13.63(h)(7)
13.970	13.63(i) introductory text
13.972	13.63(i)(1)
13.974	13.63(i)(2)
13.976	13.63(i)(3)
13.978	13.63(i)(4)
13.980	13.63(i)(5)
Subpart M—Gates of the Arctic National Park and Preserve	
13.1002	13.64(a)(1)
13.1004	13.64(a)(2)
13.1006	13.64(a)(3)

DERIVATION TABLE FOR PART 13—
Continued

New Section	Derived From
Subpart N—Glacier Bay National Park and Preserve	
13.1102	13.65(a)(1)
13.1102	13.65(b)(1)
13.1110	13.65(b)(5)
13.1112	13.65(b)(6)
13.1114	13.65(b)(7)
13.1116	13.65(b)(8)
13.1120	13.65(b)(3)(ix)(C)(1)(v)
13.1122	13.65(b)(3)(ix)(C)(2)
13.1124	13.65(b)(3)(ix)(C)(1)(i)–(iii)
13.1126	13.65(b)(3)(ix)(C)(1)(iv)
13.1128	13.65(b)(9)
13.1130	13.65 (a)(2)
13.1132	13.65 (a)(3)
13.1134	13.65 (a)(4)
13.1136	13.65 (a)(5)
13.1138	13.65 (a)(6)
13.1140	13.65 (a)(7)
13.1142	13.65 (a)(8)
13.1144	13.65 (a)(9)
13.1146	13.65 (a)(10)
13.1150	13.65(b)(2) introductory text
13.1152	13.65(b)(2)(i)
13.1154	13.65(b)(2)(ii)
13.1156	13.65(b)(2)(iii)
13.1158	13.65(b)(2)(iv)
13.1160	13.65(b)(2)(v)
13.1170	13.65(b)(3)(i)–(iii)
13.1172	13.65(b)(3)(xi)
13.1174	13.65(b)(3)(iv)
13.1176	13.65(b)(3)(v)
13.1178	13.65(b)(3)(vi)
13.1180	13.65(b)(3)(vii)
13.1182	13.65(b)(3)(viii)
13.1184	13.65(b)(3)(ix) introductory text–(c) introductory text
13.1186	13.65(b)(4)
13.1188	13.65(b)(3)(x)

Subpart O—Katmai National Park and Preserve

13.1202	13.66(a)
13.1204	13.66(b)
13.1206	13.66(d)
13.1208	13.66(e)
13.1220	13.66(c) introductory text
13.1222	13.66(c)(1)
13.1224	13.66(c)(2)
13.1226	13.66(c)(3)
13.1228	13.66(c)(4)
13.1230	13.66(c)(5)
13.1232	13.66(c)(6)
13.1234	13.66(c)(7)
13.1236	13.66(c)(8)
13.1238	13.66(c)(9)
13.1240	13.66(c)(10)
13.1242	13.66(c)(11)

Subpart P—Kenai Fjords National Park

13.1302	13.67(a)
13.1304	13.67(b)
13.1306	13.67(c)

DERIVATION TABLE FOR PART 13—
Continued

New Section	Derived From
Subpart Q—Klondike Gold Rush National Historical Park	
13.1402	13.68(a)
13.1404	13.68(b)
13.1406	13.68(c)

Subpart R—Kobuk Valley National Park

13.1502	13.69(a)(1)
13.1504	13.69(a)(2)

Subpart S—Lake Clark National Park and Preserve

13.1602	13.70
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Subpart T—Noatak National Preserve

[reserved]	13.71
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Subpart U—Sitka National Historical Park

13.1802	13.72
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Subpart V—Wrangell-St. Elias National Park and Preserve

13.1902	13.73(a)(1)–(3)
13.1904	13.73(b)
13.1906	13.73(c)
13.1908	13.73(d)
13.1910	13.73(e)

Subpart W—Yukon-Charley Rivers National Preserve

[reserved]	13.74
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Compliance with Other Laws

Regulatory Planning and Review (Executive Order 12866)

This document is not a significant rule and has not been reviewed by the Office of Management and Budget under Executive Order 12866.

(1) This rule will not have an effect of \$100 million or more on the economy. It will not adversely affect in a material way the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities. These conclusions are based on the analysis contained in the final environmental impact statement and a report prepared on the economic impact of this regulation, “Economic Analysis of Vessel Management Alternatives in Glacier Bay National Park and Preserve”, prepared for the NPS, Environmental Quality Division, by Research Triangle Institute, copies available from Glacier Bay National Park and Preserve, P.O. Box 140, Gustavus, Alaska 99826, (907) 697–2230.

(2) This rule will not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency. Actions taken under this rule will not interfere with other agencies or local government plans, policies, or controls. This is an agency specific rule.

(3) This rule does not alter the budgetary effects of entitlements, grants, user fees, or loan programs or the rights or obligations of their recipients. It affects only the operations of various types of motor vessels on waters managed by the park. No grants or other forms of monetary supplement are involved.

(4) This rule does not raise novel legal or policy issues.

Regulatory Flexibility Act

The Department of the Interior certifies that this document will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). It has been determined that there will be no incremental negative impacts on small entities because revenue losses are not expected. Possible future increases in vessel quota levels relative to the baseline are expected to lead to increases in business revenue. This certification is based on information contained in the report titled “Economic Analysis of Vessel Management Alternatives in Glacier Bay National Park and Preserve” (RTI International, Health, Social, and Economic Research, Research Triangle Park, N.C. 27709), copies available from Glacier Bay National Park and Preserve, P.O. Box 140, Gustavus, Alaska 99826, (907) 697–2230.

Small Business Regulatory Enforcement Fairness Act (SBREFA)

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. The Final rule:

a. Does not have an annual effect on the economy of \$100 million or more. No incremental negative impacts on small businesses are expected and possible future increases in vessel quota levels will likely result in revenue growth.

b. Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions. The final rule will generally maintain existing patterns of vessel management in the park relative to costs or prices; and

c. Does not have significant adverse effects on competition, employment,

investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises. The various provisions of this rule do not apply differently to U.S.-based enterprises and foreign-based enterprises.

Unfunded Mandates Reform Act (UMRA) of 1995

This final rule does not impose an unfunded mandate on State, local or tribal governments or the private sector of more than \$100 million per year. The rule does not have a significant or unique effect on State, local, or tribal governments or the private sector. A statement containing the information required by the UMRA (2 U.S.C. 1531 *et seq.*) is not required.

Takings (Executive Order 12630)

In accordance with Executive Order 12630, the rule does not have significant takings implications. A takings implications assessment is not required because no taking of personal property will occur as a result of this final rule.

Federalism (Executive Order 13132)

In accordance with Executive Order 13132, the rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment. The final rule is limited in effect to federal lands and waters managed by the NPS and will not have a substantial direct effect on state and local government in Alaska.

Civil Justice Reform (Executive Order 12988)

In accordance with Executive Order 12988, the Office of the Solicitor has determined that this rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order. This rule does not impose a new burden on the judicial system.

Paperwork Reduction Act

This regulation requires an information collection from 10 or more parties, which must be submitted for OMB approval under the Paperwork Reduction Act. However, these are not new collection requirements and, therefore, no additional request to OMB has been prepared in conjunction with this rule. The information collection activities are necessary for the public to obtain benefits in the form of concession contracts and special use permits. Information collection associated with the award of concession contracts is covered under OMB control number 1024-0125; the information collection associated with the issuance of special

use permits is covered under OMB control number 1024-0026.

National Environmental Policy Act

A Draft Environmental Impact Statement (DEIS) and Final Environmental Impact Statement (FEIS) were completed and a Record of Decision (ROD) issued. The FEIS and ROD are available online at: <http://www.nps.gov/glba> or at Glacier Bay National Park and Preserve, as indicated above under **FOR FURTHER INFORMATION CONTACT**.

Government-to-Government Relationship With Tribes

In accordance with Executive Order 13175 "Consultation and Coordination with Indian Tribal Governments" (65 FR 67249); the President's memorandum of April 29, 1994, "Government to Government Relations with Native American Tribal Governments" (59 FR 22951); the Department of the Interior-Alaska Policy on Government-to-Government Relations with Alaska Native Tribes dated January 18, 2001; Part 512 of the Departmental Manual, Chapter 2, "Departmental Responsibilities for Indian Trust Resources"; and the park consultation agreement with tribal governments, the potential effects on federally-recognized Indian tribes and have been evaluated.

During the past several years, the NPS has developed an effective working relationship with the Hoonah Indian Association and other regional Native organizations with interests in matters pertaining to Glacier Bay National Park and Preserve. All parties consulted concur that Glacier Bay and Dundas Bay lie within the traditional homelands of the Hoonah Tlingits, and that the Hoonah Indian Association, a federally recognized tribal government, is the representative government for Hoonah Tlingits. During this extended consultation the full range of issues relating to vessel quotas, operating requirements, and cultural resources has been identified and discussed at length. Extensive ethnographic research had been conducted to gather detailed information about cultural resources important to Hoonah Tlingits. Meetings were held with the tribal government and with community and tribal members.

Clarity of Rule

Executive Order 12866 requires each agency to write regulations that are easy to understand. We invite your comments on how to make this rule easier to understand, including answers to questions such as the following: (1) Are the requirements in the rule clearly

stated? (2) Does the rule contain technical language or jargon that interferes with its clarity? (3) Does the format of the rule (grouping and order of sections, use of headings, paragraphing, etc.) aid or reduce its clarity? (4) Would the rule be easier to read if it were divided into more (but shorter) sections? (A "section" appears in bold type and is preceded by the symbol "\$" and a numbered heading; for example § 7.XX). (5) Is the description of the rule in the "Supplementary Information" section of the preamble helpful in understanding the proposed rule? What else could we do to make the rule easier to understand?

Drafting Information: The principal contributors to this final rule were: Vic Knox, Deputy Regional Director; Tomie Lee, Superintendent, Glacier Bay National Park and Preserve; Chuck Young, Chief Ranger, Glacier Bay National Park and Preserve; Russ Wilson, Deputy Superintendent, Sequoia-Kings Canyon National Park; Jay Liggett, Jane Hendrick, Andee Hansen, Paul Hunter, Nancy Swanton, Alaska Regional Office; Jerry Case, Regulations Program Manager, WASO, and John Strylowski, Department of the Interior.

List of Subjects in 36 CFR Part 13

Alaska, National Parks, Reporting and recordkeeping requirements.

■ In consideration of the foregoing, the National Park Service revises 36 CFR part 13 to read as follows:

PART 13—NATIONAL PARK SYSTEM UNITS IN ALASKA

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- 13.2 Applicability and scope.
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- 13.30 Weapons, traps and nets.
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- 13.40 Taking of fish and wildlife.
- 13.45 Unattended or abandoned property.
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- 13.102 Applicability.
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General Provisions

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- 13.116 Permittee's interest.
- 13.118 Cabin site compatibility.
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- 13.305 Definitions.
- 13.310 Historical operators.
- 13.315 Preferred operators.
- 13.320 Preference to Cook Inlet Region, Incorporated.
- 13.325 Most directly affected Native Corporation.
- 13.330 Appeal procedures.
- 13.335 Information collection.

Subpart F—Subsistence

- 13.400 Purpose and policy.
- 13.410 Applicability.
- 13.420 Definitions.
- 13.430 Determination of resident zones.
- 13.440 Subsistence permits for persons whose primary, permanent home is outside a resident zone.
- 13.450 Prohibition on aircraft use.

- 13.460 Use of snowmobiles, motorboats, dog teams, and other means of surface transportation traditionally employed by local rural residents engaged in subsistence uses.
- 13.470 Subsistence fishing.
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Subpart G [Reserved]

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- 13.602 Subsistence resident zone.
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Authority: 16 U.S.C. 1, 3, 462(k), 3101 et seq.; Subpart M also issued under 16 U.S.C. 1a–2(h), 20, 1361, 1531, 3197; Pub. L. 105–277, 112 Stat. 2681–259, October 21, 1998; Pub. L. 106–31, 113 Stat. 72, May 21, 1999; Sec. 13.1202 also issued under Sec. 1035, Pub. L. 104–333, 110 Stat. 4240, November 12, 1996.

Subpart A—Administrative Provisions

§ 13.1 Definitions.

The following definitions shall apply to all regulations contained in this part:

Adequate and feasible access means a reasonable method and route of pedestrian or vehicular transportation which is economically practicable for achieving the use or development desired by the applicant on his/her non-Federal land or occupancy interest, but does not necessarily mean the least costly alternative.

Aircraft means a machine or device that is used or intended to be used to carry persons or objects in flight through the air, including, but not limited to airplanes, helicopters and gliders.

Airstrip means visible, marked, or known aircraft landing areas in park areas. Airstrips may be marked with cones, lights, flagging, or windsocks, or be unmarked but recognizable because they have been cleared of vegetation or other obstructions.

ANILCA means the Alaska National Interest Lands Conservation Act (94 Stat. 2371; Pub. L. 96–487 (December 2, 1980)).

Carry means to wear, bear or carry on or about the person and additionally, in the case of firearms, within or upon a device or animal used for transportation.

Downed aircraft means an aircraft that as a result of mechanical failure or accident cannot take off.

Facility means buildings, structures, park roads as defined by § 1.4, parking lots, campgrounds, picnic areas, paved trails, and maintenance support yards.

Firearm means any loaded or unloaded pistol, revolver, rifle, shotgun or other weapon which will or is designated to or may readily be converted to expel a projectile by the action of expanded gases, except that it does not include a pistol or rifle powered by compressed gas. The term “firearm” also includes irritant gas devices.

Fish and wildlife means any member of the animal kingdom, including without limitation any mammal, fish, bird (including any migratory, nonmigratory or endangered bird for which protection is also afforded by treaty or other international agreement), amphibian, reptile, mollusk, crustacean, arthropod, or other invertebrate, and includes any part, produce, egg, or offspring thereof, or the dead body or part thereof.

Fossil means any remains, impression, or trace of any animal or plant of past geological ages that has been preserved, by natural processes, in the earth’s crust.

Gemstone means a silica or igneous mineral including, but not limited to:

- (1) Geodes;
- (2) Petrified wood; and
- (3) Jade, agate, opal, garnet, or other mineral that when cut and polished is customarily used as jewelry or other ornament.

Motorboat refers to a motorized vessel other than a personal watercraft.

National Preserve shall include the following areas of the National Park System: Alagnak National Wild and Scenic River, Aniakchak National Preserve, Bering Land Bridge National Preserve, Denali National Preserve, Gates of the Arctic National Preserve, Glacier Bay National Preserve, Katmai National Preserve, Lake Clark National Preserve, Noatak National Preserve, Wrangell-St. Elias National Preserve, and Yukon-Charley Rivers National Preserve.

Net means a seine, weir, net wire, fish trap, or other implement designed to entrap fish, except a landing net.

Off-road vehicle means any motor vehicle designed for or capable of crosscountry travel on or immediately over land, water, sand, snow, ice, marsh, wetland or other natural terrain, except snowmachines or snowmobiles as defined in this chapter.

Park areas means lands and waters administered by the National Park Service within the State of Alaska.

Person means any individual, firm, corporation, society, association, partnership, or any private or public body.

Possession means exercising dominion or control, with or without ownership, over weapons, traps, nets or other property.

Public lands means lands situated in Alaska which are federally owned lands, except—

- (1) Land selections of the State of Alaska which have been tentatively approved or validly selected under the Alaska Statehood Act (72 Stat. 339) and lands which have been confirmed to,

validly selected by, or granted to the Territory of Alaska or the State under any other provision of Federal law;

(2) Land selections of a Native Corporation made under the Alaska Native Claims Settlement Act (85 Stat. 688) which have not been conveyed to a Native Corporation, unless any such selection is determined to be invalid or is relinquished; and

(3) Lands referred to in section 19(b) of the Alaska Native Claims Settlement Act.

Snowmachine or snowmobile means a self-propelled vehicle intended for off-road travel primarily on snow having a curb weight of not more than 1,000 pounds (450 kg), driven by a track or tracks in contact with the snow and steered by a ski or skis on contact with the snow.

Take or taking as used with respect to fish and wildlife, means to pursue, hunt, shoot, trap, net, capture, collect, kill, harm, or attempt to engage in any such conduct.

Temporary means a continuous period of time not to exceed 12 months, except as specifically provided otherwise.

Trap means a snare, trap, mesh, or other implement designed to entrap animals other than fish.

Unload means there is no unexpended shell or cartridge in the chamber or magazine of a firearm; bows, crossbows and spearguns are stored in such a manner as to prevent their ready use; muzzle-loading weapons do not contain a powder charge; and any other implement capable of discharging a missile into the air or under the water does not contain a missile or similar device within the loading or discharging mechanism.

Weapon means a firearm, compressed gas or spring powered pistol or rifle, bow and arrow, crossbow, blow gun, speargun, hand thrown spear, slingshot, explosive device, or any other implement designed to discharge missiles into the air or under the water.

§ 13.2 Applicability and scope.

(a) The regulations contained in part 13 are prescribed for the proper use and management of park areas in Alaska and supplement the general regulations of this chapter. The general regulations contained in this chapter are applicable except as modified by part 13.

(b) Subparts A through F contain regulations applicable to park areas. Such regulations amend in part the general regulations contained in this chapter. The regulations in subparts A through F govern use and management, including subsistence activities, within the park areas, except as modified by

special park regulations in subparts H through V.

(c) Subpart F contains regulations applicable to subsistence uses. Such regulations apply on federally owned lands and interests therein within park areas where subsistence is authorized. Subsistence uses are not allowed in Kenai Fjords National Park, Katmai National Park, Glacier Bay National Park, Klondike Gold Rush National Historical Park, Sitka National Historical Park, the former Mt. McKinley National Park. The regulations in subpart F amend in part the general regulations contained in this chapter and the regulations contained in subparts A through C of part 13.

(d) Subparts H through V contain special regulations for specific park areas. Such regulations amend in part the general regulations contained in this chapter and the regulations contained in subparts A through F of part 13.

(e) Subpart E of this part 13 contains regulations applicable to authorized visitor service providers operating within certain park areas. The regulations in subpart E amend in part the general regulations contained in this chapter.

(f) For purposes of this chapter, "federally owned lands" does not include those land interests:

(1) Tentatively approved to the State of Alaska; or

(2) Conveyed by an interim conveyance to a Native corporation.

§ 13.4 Information collection.

The information collection requirements contained in subparts C and G, and §§ 13.55, 13.440, 13.450, 13.485, and 13.495 are necessary for park Superintendents to issue concession contracts and special use permits, and have been approved by the Office of Management and Budget under 44 U.S.C. 3507. Information collections associated with the award of concession contracts are covered under OMB control number 1024-0125; the information collections associated with the issuance of special use permits are covered under OMB control number 1024-0026.

Subpart B—General Provisions

§ 13.20 Obstruction of airstrips.

(a) A person may not place an object on the surface of an airstrip that, because of its nature or location, might cause injury or damage to an aircraft or person riding in the aircraft.

(b) A person may not dig a hole or make any kind of excavation, or drive a sled, tractor, truck, or any kind of vehicle upon an airstrip that might

make ruts, or tracks, or add to an accumulation of tracks so as to endanger aircraft using the airstrip or persons riding in the aircraft.

§ 13.25 Camping.

(a) Camping is authorized in park areas except where such use is prohibited or otherwise restricted by the Superintendent in accordance with this section, the provisions of § 13.50, or as set forth for specific park areas in subparts H through V of this part.

(b) *Site time-limits.* Camping is authorized for 14 consecutive days in one location. Camping is prohibited after 14 consecutive days in one location unless the camp is moved at least 2 miles or unless authorized by the Superintendent. A camp and associated equipment must be relocated immediately if determined by the Superintendent to be interfering with public access or other public interests or adversely impacting park resources.

(c) *Designated campgrounds.* Except at designated campgrounds, camping is prohibited on NPS facilities. The Superintendent may establish restrictions, terms, and conditions for camping in designated campgrounds. Violating restrictions, terms, and conditions is prohibited.

§ 13.26 Picnicking.

Picnicking is authorized in park areas except where such activity is prohibited or otherwise restricted by the Superintendent. The public will be notified by one or more of the following methods—

(a) Signs posted at conspicuous locations, such as normal points of entry or reasonable intervals along the boundary of the affected park locale;

(b) Maps available in the office of the Superintendent and other places convenient to the public;

(c) Publication in a newspaper of general circulation in the affected area; or

(d) Other appropriate methods, including park Web sites, brochures, maps, and handouts.

§ 13.30 Weapons, traps and nets.

(a) Irritant chemical devices, including bear spray, may be carried, possessed, and used in accordance with applicable Federal and non-conflicting State laws, except when prohibited or restricted under § 13.50.

(b) Paragraphs (d) through (g) of this section apply to all park areas in Alaska except Klondike Gold Rush National Historical Park, Sitka National Historical Park and the former Mt. McKinley National Park, Glacier Bay National Monument and Katmai National Monument.

(c) Except as provided in this section and § 2.4 of this chapter, the following are prohibited—

- (1) Possessing a weapon, trap, or net;
- (2) Carrying a weapon, trap, or net;
- (3) Using a weapon, trap, or net.
- (d) Firearms may be carried,

possessed, and used within park areas in accordance with applicable State and Federal laws, except where such carrying, possession, or use is prohibited or otherwise restricted under § 13.50.

(e) Traps, bows and other implements (other than firearms) authorized by applicable State and Federal law for the taking of fish and wildlife may be carried, possessed, and used within park areas only during those times when the taking of fish and wildlife is authorized by applicable law or regulation.

(f) In addition to the authorities provided in paragraphs (d) and (e) of this section, weapons (other than firearms), traps, and nets may be possessed within park areas provided such weapons, traps, or nets are within or upon a device or animal used for transportation and are unloaded and cased or otherwise packed in such a manner as to prevent their ready use while in a park area.

(g) Notwithstanding the provisions of this section, local rural residents who are authorized to engage in subsistence uses, including the taking of wildlife under § 13.480, may use, possess, or carry traps, nets and other weapons in accordance with applicable State and Federal laws.

§ 13.35 Preservation of natural features.

(a) This section applies to all park areas in Alaska except Klondike Gold Rush National Historical Park, Sitka National Historical Park, the former Mt. McKinley National Park, and the former Katmai National Monument.

(b) Gathering or collecting natural products is prohibited except as allowed by this section, § 2.1 of this chapter, or part 13, subparts F through V. For purposes of this paragraph, “natural products” includes living or dead fish and wildlife or parts or products thereof, plants or parts or products thereof, live or dead wood, fungi, seashells, rocks, and minerals.

(c) Gathering or collecting, by hand and for personal use only, of the following renewable resources is permitted—

- (1) Natural plant food items, including fruits, berries and mushrooms, but not including threatened or endangered species;
- (2) Driftwood and uninhabited seashells;

(3) Such plant materials and minerals as are essential to the conduct of traditional ceremonies by Native Americans; and

(4) Dead wood on the ground for use as fuel for campfires within the park area.

(d) The Superintendent may authorize, with or without conditions, the collection of dead standing wood in all or a portion of a park area. Collecting dead or downed wood in violation of terms and conditions is prohibited.

(e) Surface collection, by hand (including hand-held gold pans) and for personal recreational use only, of rocks and minerals is permitted, with the following exceptions:

- (1) Collection of silver, platinum, gemstones and fossils is prohibited; and
- (2) Collection methods that may result in disturbance of the ground surface, such as the use of shovels, pickaxes, sluice boxes, and dredges, are prohibited.

(f) The Superintendent may limit the size and quantity of the natural products that may be gathered or possessed.

(1) Under conditions where it is found that significant adverse impact on park resources, wildlife populations, subsistence uses, or visitor enjoyment of resources will result, the Superintendent will prohibit the gathering or otherwise restrict the collecting of natural products.

(2) The Superintendent will notify the public of portions of a park area in which closures or restrictions apply by:

- (i) Publishing a notice in at least one newspaper of general circulation in the State and providing a map available for public inspection in the office of the Superintendent; or
- (ii) Posting appropriate signs.

(g) *Subsistence*. Nothing in this section shall apply to local rural residents authorized to take renewable resources.

§ 13.40 Taking of fish and wildlife.

(a) [Reserved]

(b) *Fishing*. Fishing is permitted in all park areas in accordance with applicable State and Federal law, and such laws are hereby adopted and made a part of these regulations to the extent they are not inconsistent with § 2.3 of this chapter.

(c) *Commercial fishing*. The exercise of valid commercial fishing rights or privileges obtained prior to December 2, 1980, pursuant to existing law in Cape Krusenstern National Monument, the Malaspina Glacier Forelands area of the Wrangell–St. Elias National Preserve, and the Dry Bay area of Glacier Bay National Preserve, including the use of these park areas for existing campsites,

cabins and other structures, motorized vehicles, and aircraft landings on existing airstrips, may continue provided that all such use is directly incident to the exercise of those rights or privileges.

(1) *Restrictions*. The Superintendent may restrict or revoke the exercise of a valid commercial fishing right or privilege based upon specific findings, following public notice and an opportunity for response, that continuation of such use of a park area constitutes a direct threat to or significant impairment of the values and purposes for which the park area was established.

(2) *Expansion of uses*. (i) A person holding a valid commercial fishing right or privilege may expand his or her level of use of a park area beyond the level of such use in 1979 only pursuant to the terms of a permit issued by the Superintendent.

(ii) The Superintendent may deny a permit or otherwise restrict the expanded use of a park area directly incident to the exercise of such rights or privileges, if the Superintendent determines, after conducting a public hearing in the affected locality, that the expanded use constitutes either:

(A) A significant expansion of the use of a park area beyond the level of such use during 1979 (taking into consideration the relative levels of use in the general vicinity, as well as the applicant's levels of use); or

(B) A direct threat to, or significant impairment of, the values and purposes for which the park area was established.

(d) *Hunting and trapping*. (1) Hunting and trapping are allowed in national preserves in accordance with applicable Federal and non-conflicting State law and regulations.

(2) Violating a provision of either Federal or non-conflicting State law or regulation is prohibited.

(3) Engaging in trapping activities as the employee of another person is prohibited.

(4) It shall be unlawful for a person having been airborne to use a firearm or any other weapon to take or assist in taking any species of bear, caribou, Sitka black-tailed deer, elk, coyote, arctic and red fox, mountain goat, moose, Dall sheep, lynx, bison, musk ox, wolf and wolverine until after 3 a.m. on the day following the day in which the flying occurred. This prohibition does not apply to flights on regularly scheduled commercial airlines between regularly maintained public airports.

(5) Persons transporting wildlife through park areas must identify themselves and the location where the wildlife was taken when requested by

an NPS employee or other authorized person.

(e) *Closures and restrictions.* The Superintendent may prohibit or restrict the non-subsistence taking of fish or wildlife in accordance with the provisions of § 13.50 of this chapter. Except in emergency conditions, such restrictions shall take effect only after the Superintendent has consulted with the appropriate State agency having responsibility over fishing, hunting, or trapping and representatives of affected users.

§ 13.45 Unattended or abandoned property.

(a) This section applies to all park areas in Alaska except Klondike Gold Rush National Historical Park and Sitka National Historical Park, or as further restricted for specific park areas in subparts H through V of this part.

(b) *Personal property.* (1) Leaving personal property longer than 4 months is prohibited. The Superintendent may authorize property to be left in place for more than 4 months.

(2) Identification information is required for all personal property left in park areas. Identification information consists of the owner's name, home address, telephone number, date that the property was left, and the type of fuel if the property contains fuel. This information must be—

- (i) Labeled on the property; or
- (ii) Provided to the Superintendent.

(3) All property must be stored in such a manner that wildlife is unable to access the contents. Storing property in a manner that wildlife can access contents is prohibited.

(4) Leaving fuel in more than one location in a park area or leaving more than 30 gallons of fuel is prohibited unless authorized by the Superintendent.

(5) Storing fuel within 100 feet of a water source, high water mark of a body of water, or mean high tide is prohibited unless stored in a spill proof overpack container or authorized by the Superintendent. Fuel must be contained in an undamaged and closed fuel container designed for fuel storage. Fueling from containers must occur in such a manner that any spillage would be prevented from coming into contact with water, soil, or vegetation. Failure to properly contain or prevent spillage is prohibited.

(6) Leaving property unattended for longer than 24 hours on facilities is prohibited unless authorized by the Superintendent.

(7) Property left in violation of this section is prohibited and subject to

impoundment and, if abandoned, disposal or forfeiture.

(c) The Superintendent may designate areas where personal property may not be left unattended for any time period, establish limits on the amount and type of personal property that may be left unattended, prescribe the manner in which personal property may be left unattended, or establish limits on the length of time personal property may be left unattended. Such designations and restrictions shall be published in at least one newspaper of general circulation within the State, posted at community post offices within the vicinity affected, made available for broadcast on local radio stations in a manner reasonably calculated to inform residents in the affected community, and designated on a map which shall be available for public inspection at the office of the Superintendent, or designated by the posting of appropriate signs, or both.

(d) In the event unattended property interferes with the safe and orderly management of a park area or is causing damage to the resources of the area, it may be impounded by the Superintendent at any time.

§ 13.50 Closure procedures.

(a) *Authority.* The Superintendent may close an area or restrict an activity on an emergency, temporary, or permanent basis.

(b) *Criteria.* In determining whether to close an area or restrict an activity on an emergency basis, the Superintendent shall be guided by factors such as public health and safety, resource protection, protection of cultural or scientific values, subsistence uses, endangered or threatened species conservation, and other management considerations necessary to ensure that the activity or area is being managed in a manner compatible with the purposes for which the park area was established.

(c) *Emergency Closures.* (1) Emergency closures or restrictions relating to the taking of fish and wildlife shall be accomplished by notice and hearing.

(2) Other emergency closures shall become effective upon notice as prescribed in paragraph (f) of this section; and

(3) No emergency closure or restriction shall extend for a period exceeding 30 days, nor may it be extended.

(d) *Temporary closures or restrictions.*

(1) Temporary closures or restrictions relating to the taking of fish and wildlife, shall not be effective prior to notice and hearing in the vicinity of the area(s) directly affected by such closures

or restrictions, and other locations as appropriate;

(2) Temporary closures shall be effective upon notice as prescribed in paragraph (f) of this section; and

(3) Temporary closures or restrictions shall not extend for a period exceeding 12 months and may not be extended.

(e) *Permanent closures or restrictions.* Permanent closures or restrictions shall be published as rulemaking in the **Federal Register** with a minimum public comment period of 60 days and shall be accompanied by public hearings in the area affected and other locations as appropriate.

(f) *Notice.* Emergency, temporary, and permanent closures or restrictions shall be:

(1) Published in at least one newspaper of general circulation in the State and in at least one local newspaper if available, posted at community post offices within the vicinity affected, made available for broadcast on local radio stations in a manner reasonably calculated to inform residents in the affected vicinity, and designated on a map which shall be available for public inspection at the office of the Superintendent and other places convenient to the public;

(2) Designated by the posting of appropriate signs; or

(3) Both.

(g) *Openings.* In determining whether to open an area to public use or activity otherwise prohibited, the Superintendent shall provide notice in the **Federal Register** and shall, upon request, hold a hearing in the affected vicinity and other locations as appropriate prior to making a final determination.

(h) *Facility closures and restrictions.* The Superintendent may close or restrict specific facilities for reasons of public health, safety, and protection of public property for the duration of the circumstance requiring the closure or restriction. Notice of facility closures and restrictions will be available for inspection at the park visitor center. Notice will also be posted near or within the facility, published in a newspaper of general circulation in the affected vicinity, or made available to the public by such other means as deemed appropriate by the Superintendent. Violating facilities closures or restrictions is prohibited.

(i) Except as otherwise specifically permitted under the provisions of this part, entry into closed areas or failure to abide by restrictions established under this section is prohibited.

§ 13.55 Permits.

(a) *Application.* (1) Application for a permit required by any section of this part shall be submitted to the Superintendent having jurisdiction over the affected park area, or in the absence of the Superintendent, the Regional Director. If the applicant is unable or does not wish to submit the application in written form, the Superintendent shall provide the applicant an opportunity to present the application orally and shall keep a record of such oral application.

(2) The Superintendent shall grant or deny the application in writing within 45 days. If this deadline cannot be met for good cause, the Superintendent shall so notify the applicant in writing. If the permit application is denied, the Superintendent shall specify in writing the reasons for the denial.

(b) *Denial and appeal procedures.* (1) An applicant whose application for a permit, required pursuant to this part, has been denied by the Superintendent has the right to have the application reconsidered by the Regional Director by contacting him/her within 180 days of the issuance of the denial. For purposes of reconsideration, the permit applicant shall present the following information:

(i) Any statement or documentation, in addition to that included in the initial application, which demonstrates that the applicant satisfies the criteria set forth in the section under which the permit application is made.

(ii) The basis for the permit applicant's disagreement with the Superintendent's findings and conclusions; and

(iii) Whether or not the permit applicant requests an informal hearing before the Regional Director.

(2) The Regional Director shall provide a hearing if requested by the applicant. After consideration of the written materials and oral hearing, if any, and within a reasonable period of time, the Regional Director shall affirm, reverse, or modify the denial of the Superintendent and shall set forth in writing the basis for the decision. A copy of the decision shall be forwarded promptly to the applicant and shall constitute final agency action.

Subpart C—Cabins**Administrative Provisions****§ 13.100 Purpose and policy.**

The policy of the National Park Service is to manage the use, occupancy and disposition of cabins and other structures in park areas in accordance with the language and intent of

ANILCA, the National Park Service Organic Act (16 U.S.C. 1 *et seq.*) and other applicable law. Except as Congress has directly and specifically provided to the contrary, the use, occupancy and disposition of cabins and other structures in park areas shall be managed in a manner that is compatible with the values and purposes for which the National Park System and these park areas have been established. In accordance with this policy, this subpart governs the following authorized uses of cabins and other structures in park areas:

(a) Use and/or occupancy pursuant to a valid existing lease or permit;

(b) Use and occupancy of a cabin not under valid existing lease or permit;

(c) Use for authorized commercial fishing activities;

(d) Use of cabins for subsistence purposes;

(e) Public use cabins; and

(f) Use of temporary facilities related to the taking of fish and wildlife.

§ 13.102 Applicability.

Unless otherwise specified, this subpart applies to all park areas in Alaska except Klondike Gold Rush National Historical Park and Sitka National Historical Park.

§ 13.104 Definitions.

The following definitions apply to this subpart:

Cabin means a small, usually one-story dwelling of simple construction, completely enclosed, with a roof and walls which may have windows and door(s).

Claimant means a person who has occupied and used a cabin or other structure as a primary, permanent residence for a substantial portion of the time, and who, when absent, has the intention of returning to it as his/her primary, permanent residence. Factors demonstrating a person's primary, permanent residence include, but are not limited to documentary evidence, e.g. the permanent address indicated on licenses issued by the State of Alaska and tax returns and the location where the person is registered to vote.

Immediate family member means a claimant's spouse, or a grandparent, parent, brother, sister, child or adopted child of a claimant or of the claimant's spouse.

Possessory interest means the partial or total ownership of a cabin or structure. "Right of occupancy" means a valid claim to use or reside in a cabin or other structure.

Shelter means a structure designed to provide temporary relief from the elements and is characterized as a lean-to having one side open.

Substantial portion of the time means at least 50 percent of the time since beginning occupancy and at least 4 (four) consecutive months of continuous occupancy in every calendar year after 1986.

Temporary campsite means a natural, undeveloped area suitable for the purpose of overnight occupancy without modification.

Temporary facility means a structure or other manmade improvement that can be readily and completely dismantled and/or removed from the site when the authorized use terminates. The term does not include a cabin.

Tent platform means a structure, usually made of manufactured timber products, constructed to provide a solid, level floor for a tent, with or without partial walls not exceeding three feet in height above the floor, and having only the tent fabric, the ridge pole and its support poles extending higher than three feet above the floor.

General Provisions**§ 13.108 Permit application procedures.**

Except as otherwise specified in this subpart, the procedures set forth in § 13.55(a) govern application for any permit authorized pursuant to this subpart.

§ 13.110 Notice and comment on proposed permit.

Before a permit for the use and occupancy of a cabin or other structure is issued pursuant to this subpart, the Superintendent shall publish notice of the proposed issuance in the local media and provide a public comment period of at least sixty days, subject to the following exceptions: Prior notice and comment are not required for a permit authorizing use and occupancy for 14 days or less of a public use cabin or use and occupancy of a temporary facility for the taking of fish or wildlife for sport or subsistence purposes.

§ 13.112 Permit revocation.

(a) The superintendent may revoke a permit or lease issued pursuant to this subpart when the superintendent determines that the use under the permit or lease is causing or may cause significant detriment to the principal purposes for which the park area was established. *Provided, however*, that if a permittee submits a written request for a hearing concerning the revocation, based on the cause listed above, of a permit or lease issued pursuant to §§ 13.130, 13.136–13.149, or 13.160–168 of this subpart, the matter shall be assigned to an administrative law judge who, after notice and hearing and based on substantial evidence in the

administrative record as a whole, shall render a recommended decision for the superintendent's review. The superintendent shall then accept, reject or modify the administrative law judge's recommended decision in whole or in part and issue a final decision in writing.

(b) The superintendent may revoke or modify any permit or lease issued pursuant to this subpart when the permittee violates a term of the permit or lease.

§ 13.114 Appeal procedures.

The procedures set forth in § 13.55(b) govern appeals of a permit denial, a denial of a permit renewal, a permit revocation and a superintendent's final decision on a permit revocation issued pursuant to § 13.112(a).

§ 13.116 Permittee's interest.

(a) A permittee shall not accrue a compensable interest in a cabin or other structure in a park area unless specifically authorized by Federal statutory law.

(b) A cabin or other structure in a park area may not be sold, bartered, exchanged, assigned or included as a portion of any sale or exchange of other property by a permittee unless specifically authorized by Federal statutory law.

(c) The Superintendent shall determine the extent and nature of a permittee's possessory interest at the time a permit is issued or denied.

§ 13.118 Cabin site compatibility.

The Superintendent shall establish permit conditions that require a permittee—

(a) When constructing, maintaining or repairing a cabin or other structure authorized under this subpart, to use materials and methods that blend with and are compatible with the immediate and surrounding landscape; and

(b) When terminating an activity that involves a structure authorized under this subpart, to dismantle and remove the structure and all personal property from the park area within a reasonable period of time and in a manner consistent with the protection of the park area.

§ 13.120 Access.

(a) A permittee under this subpart who holds a permit for use and occupancy of a cabin or other structure located on public lands in a park area, not under valid existing lease or permit in effect on December 2, 1980, does not have a "valid property or occupancy interest" for purposes of ANILCA section 1110(b) and its implementing regulations.

(b) When issuing a permit under this subpart, the Superintendent shall provide for reasonable access which is appropriate and consistent with the values and purposes for which the park area was established.

(c) All impacts of the access to a cabin or other structure are deemed to be a part of, and shall be considered in any evaluation of, the effects of a use authorized by a permit issued under this subpart.

§ 13.122 Abandonment.

(a) An existing cabin or other structure not under valid lease or permit, and its contents, are abandoned:

(1) When no permit application has been received for its use and occupancy before October 20, 1987, one year after the effective date of this subpart; or

(2) One year after a permit application for its use and occupancy has been denied or a permit for its use and occupancy has been revoked, denied or has expired.

(b) A claimant or applicant whose application for a permit has been denied or whose permit has expired may remove all or a portion of a cabin or other structure and its contents from a park area, to the extent of his or her possessory interest and under conditions established by the Superintendent, until the date the cabin or structure is considered abandoned.

(c) The contents of a cabin or other structure are considered abandoned when the cabin or other structure is considered abandoned.

(d) A person whose permit for the use and occupancy of a cabin or other structure is revoked may remove his or her personal property from a park area under conditions established by the Superintendent until one year after the date of the permit's revocation.

(e) The Superintendent shall dispose of abandoned property in accordance with §§ 2.22 and 13.45 of this chapter. No property shall be removed from a cabin until such property has been declared abandoned or determined to constitute a direct threat to the safety of park visitors or area resources.

§ 13.124 Emergency use.

During an emergency involving the safety of human life, a person may use any cabin designated by the Superintendent for official government business, general public use or shared subsistence use. The person shall report such use to the Superintendent as soon as is practicable.

§ 13.126 Authorized cabin use and occupancy.

Use or occupancy of a cabin or structure in a park area is prohibited,

except pursuant to the terms of a permit issued by the Superintendent under this subpart or as otherwise authorized by provisions of this chapter.

§ 13.130 New cabins and other structures otherwise authorized.

The Superintendent may issue a permit for the construction, temporary use, occupancy, and maintenance of a cabin or other structure which is authorized by law but not governed by any other section in this subpart.

Cabin Use—Leases or Permits in Effect on December 2, 1980

§ 13.136 Use and/or occupancy pursuant to a valid existing lease or permit.

A person who holds a valid lease or permit in effect on December 2, 1980, for a cabin, homesite or similar structure not subject to the provisions of §§ 13.146–13.149 of this subpart, on Federal lands in a park area, may continue the use authorized by that lease or permit, subject to the conditions in §§ 13.138–13.142.

§ 13.138 Renewal.

The Superintendent shall renew a valid lease or permit upon its expiration in accordance with the provisions of the original lease or permit, subject to any modifications or new conditions that the Superintendent finds necessary for the protection of the values and purposes of the park area.

§ 13.140 Denial of renewal.

The Superintendent may deny the renewal or continuation of a valid lease or permit only after issuing specific findings, following notice and an opportunity for the leaseholder or permittee to respond, that renewal or continuation constitutes a direct threat to, or a significant impairment of, the purposes for which the park area was established.

§ 13.142 Transfer.

Subject to any prohibitions or restrictions that apply to transfer in the existing lease or permit, the Superintendent may transfer a valid existing lease or permit to another person at the election or death of the original permittee or leaseholder, only if the Superintendent determines that:

(a) The continued use is appropriate and compatible with the values and purposes of the park area;

(b) The continued use is non-recreational in nature;

(c) There is no demonstrated overriding need for public use; and

(d) The continued use and occupancy will not adversely impact soils, vegetation, water or wildlife resources.

Cabin Use—Cabin Not Under Valid Lease or Permit as of December 1, 1978**§ 13.144 Use and occupancy of a cabin prior to December 18, 1973.**

A cabin or other residential structure in existence and occupied by a claimant, both prior to December 18, 1973, with the claimant's occupancy continuing for a substantial portion of the time, may continue to be used and occupied by the claimant pursuant to a renewable, nontransferable five-year permit. Upon the request of the claimant or a successor who is an immediate family member and residing in the cabin or structure, the Superintendent shall renew this permit every five years until the death of the last immediate family member of the claimant who was residing with the claimant in the structure under permit at the time of issuance of the original permit.

§ 13.146 Use and occupancy of a cabin between December 18, 1973 and December 1, 1978.

A cabin or other residential structure in existence prior to December 1, 1978, with occupancy commenced by a claimant between December 18, 1973 and December 1, 1978, which a claimant has continued to occupy or use for a substantial portion of the time, may continue to be used and occupied by the claimant pursuant to a non-transferable permit. The Superintendent may issue and extend such permit for a term not to exceed December 1, 1999 for such reasons as are deemed by the Superintendent to be equitable and just. The Superintendent shall review the permit at least every two years and modify the permit as necessary to protect park resources and values.

§ 13.148 Permit application.

In order to obtain, renew or extend a permit, a claimant shall submit a written application. In the case of an application to renew or extend a permit issued pursuant to §§ 13.144 or 13.146, if no circumstance relating to the permittee's occupancy and use of the cabin or structure has changed in the interim, applicable material submitted by the permittee to satisfy the original application requirements is considered sufficient and need not be resubmitted. The following information is required to be included in a permit application:

(a) Reasonable proof of possessory interest or right of occupancy in the cabin or structure, demonstrated by affidavit, bill of sale, or other documentation. In order for a claimant to qualify for a permit described in section 13.144, the claimant's possessory interest or right of occupancy must have been acquired

prior to December 18, 1973. In order for a claimant to qualify for a permit described in section 13.146, the claimant's possessory interest or right of occupancy must have been acquired prior to December 1, 1978;

(b) A sketch or photograph that accurately depicts the cabin or structure;

(c) A map that shows the geographic location of the cabin or structure;

(d) The claimant's agreement to vacate and remove all personal property from the cabin or structure upon expiration of the permit;

(e) The claimant's acknowledgement that he or she has no legal interest in the real property on which the cabin or structure is located;

(f) Reasonable proof that the claimant has lived in the cabin or structure during a substantial portion of the time and continues to use the cabin or other structure as a primary, permanent residence; and

(g) A list of all immediate family members residing with the claimant within the cabin or structure for which the application is being submitted. Such list need only include those immediate family members who will be eligible to continue to use and occupy the cabin or other structure upon the death or departure of the original claimant.

§ 13.149 Permit application deadline.

The deadline for receipt of a permit application for the occupancy and use of an existing cabin or other structure described in §§ 13.144 or 13.146 is October 20, 1987. The Superintendent may extend this deadline for a reasonable period of time only when a permit applicant demonstrates that extraordinary circumstances prevented timely application.

Cabin Use for Commercial Fishing Activities**§ 13.150 Use for authorized commercial fishing activities.**

The use of a campsite, cabin or other structure in conjunction with commercial fishing activities authorized by section 205 of ANILCA in Cape Krusenstern National Monument, the Malaspina Glacier Forelands area of Wrangell-Saint Elias National Preserve, and the Dry Bay area of Glacier Bay National Preserve is authorized pursuant to the provisions of § 13.40(c) of this chapter and the terms of a permit issued by the Superintendent.

Cabin Use for Subsistence Purposes**§ 13.160 Use of cabins for subsistence purposes.**

(a) A local rural resident who is an eligible subsistence user may use an

existing cabin or other structure or temporary facility or construct a new cabin or other structure, including temporary facilities, in a portion of a park area where subsistence use is allowed, pursuant to the applicable provisions of subparts F through V of this part and the terms of a permit issued by the Superintendent. However, the Superintendent may designate existing cabins or other structures that may be shared by local rural residents for authorized subsistence uses without a permit.

(b) For purposes of this section, the term "local rural resident", with respect to national parks, monuments, and preserve, is defined in § 13.420 of this chapter.

§ 13.161 Permit application.

In order to obtain or renew a permit, a person shall submit an application. In the case of an application to renew a permit issued pursuant to § 13.160, if no circumstance relating to the permittee's occupancy and use of the cabin or structure has changed in the interim, applicable material submitted by the permittee to satisfy the original application requirements is considered sufficient and need not be resubmitted. The following information is required to be included in a permit application:

(a) An explanation of the applicant's need for the cabin or structure;

(b) A description of an applicant's past, present and anticipated future subsistence uses relevant to his or her need for the cabin or structure;

(c) A blueprint, sketch or photograph of the cabin or structure;

(d) A map that shows the geographic location of the cabin or structure; and

(e) A description of the types of occupancy and schedule for use of the cabin or structure. All information may be provided orally except the cabin blueprint, sketch or photograph and the map.

§ 13.162 Permit issuance.

(a) In making a decision on a permit application, the Superintendent shall consider whether the use by local rural residents of a cabin or other structure for subsistence purposes is customary and traditional in that park area and shall determine whether the use and occupancy of a new or existing cabin or structure is "necessary to reasonably accommodate" the applicant's subsistence uses. In making this determination, the Superintendent shall examine the applicant's particular circumstances, including but not limited to his or her past patterns of subsistence uses and his or her future subsistence use plans, reasonable

subsistence use alternatives, the specific nature of the subsistence uses to be accommodated by the cabin or structure, the impacts of the cabin or structure on other local rural residents who depend on subsistence uses and the impacts of the proposed structure and activities on the values and purposes for which the park area was established.

(b) The Superintendent may permit the construction of a new cabin or other new structure for subsistence purposes only if a tent or other temporary facility would not adequately and reasonably accommodate the applicant's subsistence uses without significant hardship and the use of no other type of cabin or other structure provided for in this subpart can adequately and reasonably accommodate the applicant's subsistence uses with a lesser impact on the values and purposes for which the park area was established.

§ 13.164 Permit terms.

The Superintendent shall, among other conditions, establish terms of a permit that:

(a) Allow for use and occupancy during the harvest or gathering of subsistence resources, at such times as may be reasonably necessary to prepare for a harvest season (*e.g.*, opening or closing a cabin or structure at the beginning or end of a period of use), and at other times reasonably necessary to accommodate the permittee's specified subsistence uses;

(b) Prohibit residential use in conjunction with subsistence activities; and

(c) Limit the term of a permit to a period of five years or less.

§ 13.166 Temporary facilities.

A temporary facility or structure directly and necessarily related to the taking of subsistence resources may be constructed and used by a qualified subsistence user without a permit so long as such use is for less than thirty days and the site is returned to a natural condition. The Superintendent may establish conditions and standards governing the use or construction of these temporary structures and facilities which shall be published annually in accordance with § 1.7 of this chapter.

§ 13.168 Shared use.

In any permit authorizing the construction of a cabin or other structure necessary to reasonably accommodate authorized subsistence uses, the Superintendent shall provide for shared use of the facility by the permittee and other local rural residents

rather than for exclusive use by the permittee.

Public Use Cabins

§ 13.170 General public use cabins.

The Superintendent may designate a cabin or other structure located outside of designated wilderness areas and not otherwise under permit under this subpart (or under permit for only a portion of the year) as a public use cabin. Such designated public use cabins are intended for short term recreational use and occupancy only.

§ 13.172 Management of public use cabins.

The Superintendent may establish conditions and develop an allocation system in order to manage the use of designated public use cabins. The Superintendent shall mark all public use cabins with a sign and shall maintain a map showing their locations.

§ 13.176 Cabins in wilderness areas.

The use and occupancy of a cabin or other structure located in a designated wilderness area are subject to the other applicable provisions of this subpart, and the following conditions:

(a) A previously existing public use cabin located within wilderness designated by ANILCA may be allowed to remain and may be maintained or replaced subject to such restrictions as the Superintendent finds necessary to preserve the wilderness character of the area. As used in this section, the term "previously existing public use cabin" means a cabin or other structure which, on November 30, 1978, was recognized and managed by a Federal land managing agency as a structure available for general public use.

(b) Within a wilderness area designated by ANILCA, a new public use cabin or shelter may be constructed, maintained and used only if necessary for the protection of the public health and safety.

(c) A cabin or other structure located in a designated wilderness area may not be designated, assigned or used for commercial purposes, except that designated public use cabins may be used in conjunction with commercial guided visitor services, but not to the exclusion of the general public.

Use of Temporary Facilities Related to Taking Fish and Wildlife

§ 13.182 Temporary facilities.

In a national preserve where the taking of fish and wildlife is permitted, the construction, maintenance or use of a temporary campsite, tent platform, shelter or other temporary facility or equipment directly and necessarily

related to such activities is prohibited except pursuant to the terms of a permit issued by the Superintendent. This requirement applies only to a temporary facility that will remain in place for a period longer than 14 days.

§ 13.184 Permit application.

In order to obtain or renew a permit, a person shall submit an application. In the case of an application to renew a permit issued pursuant to this section and § 13.186, if no circumstance relating to the permittee's occupancy and use of the structure has changed in the interim, applicable material submitted by the permittee to satisfy the original application requirements is considered sufficient and need not be resubmitted. The following information is required to be included in a permit application:

(a) An explanation of the applicant's need for the temporary facility, including a description of the applicant's hunting and fishing activities relevant to his or her need for the facility;

(b) A diagram, sketch or photograph of the temporary facility;

(c) A map that shows the geographic location of the temporary facility; and

(d) A description of both the past use (if any) and the desired use of the temporary facility, including a schedule for its projected use and removal. All information may be provided orally except the diagram, sketch or photograph of the facility and the map.

§ 13.186 Permit issuance.

(a) In making a decision on a permit application, the Superintendent shall determine whether a temporary facility is "directly and necessarily related to" the applicant's legitimate hunting and fishing activities by examining the applicant's particular circumstances, including, but not limited to his or her reasonable need for a temporary facility and any reasonable alternatives available that are consistent with the applicant's needs. The Superintendent shall also consider whether the proposed use would constitute an expansion of existing facilities or use and would be detrimental to the purposes for which the national preserve was established. If the Superintendent finds that the proposed use would either constitute an expansion above existing levels or be detrimental to the purposes of the preserve, he/she shall deny the permit. The Superintendent may authorize the replacement or relocation within the national preserve of an existing temporary facility or structure.

(b) The Superintendent shall deny an application for a proposed use that

would exceed a ceiling or allocation established pursuant to the national preserve's General Management Plan.

§ 13.188 Permit terms.

The Superintendent shall allow for use and occupancy of a temporary facility only to the extent that such facility is directly and necessarily related to the permittee's hunting and fishing activities, and shall provide that the temporary facility be used and maintained in a manner consistent with the protection of the values and purposes of the park area in which it is located. The Superintendent may also establish permit terms that:

(a) Limit use to a specified period, not to exceed the applicable hunting or fishing season and such additional brief periods necessary to maintain the facility before and after the season;

(b) Require the permittee to remove a temporary facility and all associated personal property from the park area upon termination of the permittee's hunting and fishing activities and related use of the facility or on a specific date;

(c) Require reasonable seasonal relocation of a temporary facility in order to protect the values and purposes for which the park area was established;

(d) Require that a temporary facility be used on a shared basis and not exclusively by the permittee; and

(e) Limit the overall term of a permit to a reasonable period of time, not to exceed one year.

Subpart D—[Reserved]

Subpart E—Special Visitor Services

§ 13.300 Applicability and scope.

(a) Except as otherwise provided for in this section, the regulations contained in this part apply to visitor services provided within all national park areas in Alaska.

(b) The rights granted by this subpart to historical operators, preferred operators, and Cook Inlet Region, Incorporated are not exclusive. The Director may authorize other persons to provide visitor services on park lands. Nothing in this subpart shall require the Director to issue a visitor services authorization if not otherwise mandated by statute to do so. Nothing in this subpart shall authorize the Director to issue a visitor services authorization to a person who is not capable of carrying out its terms and conditions in a satisfactory manner.

(c) This subpart does not apply to the guiding of sport hunting or sport fishing.

§ 13.305 Definitions.

The following definitions apply to this subpart:

Best offer means a responsive offer that best meets, as determined by the Director, the selection criteria contained in a competitive solicitation for a visitor services authorization.

Controlling interest means, in the case of a corporation, an interest, beneficial or otherwise, of sufficient outstanding voting securities or capital of the business so as to permit the exercise of managerial authority over the actions and operations of the corporation or election of a majority of the board of directors of the corporation.

Controlling interest in the case of a partnership, limited partnership, joint venture, or individual entrepreneurship, means a beneficial ownership of or interest in the entity or its capital so as to permit the exercise of managerial authority over the actions and operations of the entity. In other circumstances, *controlling interest* means any arrangement under which a third party has the ability to exercise management authority over the actions or operations of the business.

Director means the Director of the National Park Service or an authorized representative.

Historical operator, except as otherwise may be specified by a statute other than ANILCA, means the holder of a valid written authorization from the Director to provide visitor services within a park area that:

(1) On or before January 1, 1979, was lawfully engaged in adequately providing such visitor services in the applicable park area;

(2) Has continued, as further defined in § 13.310, to lawfully provide that visitor service since January 1, 1979, without a change in controlling interest; and

(3) Is otherwise determined by the Director to have a right to continue to provide such services or similar services pursuant to § 13.310.

Local area means an area in Alaska within 100 miles of the location within the park area where any of the applicable visitor services is authorized to be provided.

Local resident means:

For individuals. Those individuals who have lived within the local area for 12 consecutive months before issuance of a solicitation of offers for a visitor services authorization for a park area and who maintain their primary, permanent residence and business within the local area and whenever absent from this primary, permanent residence, have the intention of returning to it. Factors demonstrating

the location of an individual's primary, permanent residence and business may include, but are not limited to, the permanent address indicated on licenses issued by the State of Alaska, tax returns and voter registration.

For corporations. A corporation in which the controlling interest is held by an individual or individuals who qualify as *local resident(s)* within the meaning of this subpart. For non-profit corporations a majority of the board members and a majority of the officers must qualify individually as local residents.

Native Corporation means the same as defined in section 102(6) of ANILCA.

Preferred operator means a Native Corporation that is determined under § 13.325 to be "most directly affected" by the establishment or expansion of a park area by ANILCA, or a local resident as defined in this subpart.

Responsive offer is one that is timely received and meets the terms and conditions of a solicitation for a visitor services authorization.

Visitor services authorization is a written authorization from the Director to provide visitor services in a park area. Such authorization may be in the form of a concession permit, concession contract, or other document issued by the Director under National Park Service policies and procedures.

§ 13.310 Historical operators.

(a) A historical operator will have a right to continue to provide visitor services in a park area under appropriate terms and conditions contained in a visitor services authorization issued by the Director as long as such services are determined by the Director to be consistent with the purposes for which the park area was established. A historical operator may not operate without such an authorization. The authorization will be for a fixed term. Failure to comply with the terms and conditions of the authorization will result in cancellation of the authorization and consequent loss of historical operator rights under this subpart.

(b) Nothing in this subpart will prohibit the Director from permitting persons in addition to historical operators to provide visitor services in park areas at the Director's discretion as long as historical operators are permitted to conduct a scope and level of visitor services equal to those provided before January 1, 1979, under terms and conditions consistent with this subpart. A historical operator may be permitted by the Director under separate authority to increase the scope or level of visitor services provided

prior to January 1, 1979, but no historical operating rights will be obtained in such increase.

(c) If a historical operator applies for a visitor services authorization in the form of a joint venture, the application will not be considered as validly made unless the historical operator demonstrates, to the satisfaction of the Director, that it has the controlling interest in the joint venture.

(d) A historical operator may apply to the Director for an authorization or amended authorization to provide visitor services similar to those it provided before January 1, 1979. The Director will grant the request if such visitor services are determined by the Director to be:

(1) Consistent with the protection of park resources and the purposes for which the park area was established;

(2) Similar in kind and scope to the visitor services provided by the historical operator before January 1, 1979; and

(3) Consistent with the legal rights of any other person.

(e) When a historical operator's visitor services authorization expires, and if the applicable visitor services continue to be consistent with the purposes for which the park area was established as determined by the Director, the Director will offer to renew the authorization for a fixed term under such new terms and conditions as the Director determines are in the public interest.

(f) If the Director determines that authorized visitor services must be curtailed or reduced in scope, level, or season to protect park resources, or for other purposes, the Director will require the historical operator to make such changes in visitor services. If more than one historical operator providing the same type of visitor services is required to have those services curtailed, the Director will establish a proportionate reduction of visitor services among all such historical operators, taking into account historical operating levels and other appropriate factors so as to achieve a fair curtailment of visitor services among the historical operators. If the level of visitor services must be so curtailed that only one historical operator feasibly may continue to provide the visitor services, the Director will select one historical operator to continue to provide the curtailed visitor services through a competitive selection process.

(g) Any of the following will result in loss of historical operator status:

(1) Revocation of an authorization for historic types and levels of visitor services for failure to comply with the

terms and conditions of the authorization.

(2) A historical operator's declination of a renewal of the authorization made pursuant to paragraph (d) of this section.

(3) A change in the controlling interest of the historical operator through sale, assignment, devise, transfer, or by any other means, direct or indirect. A change in the controlling interest of a historical operator that results only in the acquisition of the controlling interest by an individual or individuals who were personally engaged in the visitor services activities of the historical operator before January 1, 1979, will not be deemed a change in the historical operator's controlling interest for the purposes of this subpart.

(4) A historical operator's failure to provide the authorized services for more than 24 consecutive months.

(h) The Director may authorize other persons to provide visitor services in a park area in addition to historical operators.

§ 13.315 Preferred operators.

(a) In selecting persons to provide visitor services for a park area, the Director will, if the number of visitor services authorizations is to be limited, give a preference (subject to any rights of historical operators or CIRI under this subpart) to preferred operators determined qualified to provide such visitor services.

(b) In such circumstances, the Director will publicly solicit competitive offers for persons to apply for a visitor services authorization, or the renewal of such an authorization, to provide such visitor services pursuant to 36 CFR part 51 and/or other National Park Service procedures. All offerors, including preferred operators, must submit a responsive offer to the solicitation in order to be considered for the authorization. If the best offer from a preferred operator is at least substantially equal to the best offer from a non-preferred operator, the preferred operator will receive authorization. If an offer from a person besides a preferred operator is determined to be the best offer (and no preferred operator submits a responsive offer that is substantially equal to it), the preferred operator who submitted the best offer from among the offers submitted by preferred operators will be given the opportunity, by amending its offer, to meet the terms and conditions of the best offer received. If the amended offer of such a preferred operator is considered by the Director as at least substantially equal to the best offer, the preferred operator will receive the visitor service authorization.

If a preferred operator does not amend its offer to meet the terms and conditions of the best offer, the Director will issue the authorization to the person who submitted the best offer in response to the solicitation.

(c) The Native Corporation(s) determined to be "most directly affected" under this subpart and local residents have equal preference. The rights of preferred operators under this section take precedence over the right of preference that may be granted to existing satisfactory National Park Service concessioners pursuant to the Concessions Policy Act (16 U.S.C. 20) and its implementing regulations and procedures, but do not take precedence over the rights of historical operators or CIRI as described in this subpart.

(d) An offer from a preferred operator under this subpart, if the offer is in the form of a joint venture, will not be considered valid unless it documents to the satisfaction of the Director that the preferred operator holds the controlling interest in the joint venture.

(e) Nothing in this subpart will prohibit the Director from authorizing persons besides preferred operators to provide visitor services in park areas as long as the procedures described in this section have been followed. Preferred operators are not entitled by this section to provide all visitor services in a park area.

(f) The preferences described in this section may not be sold, assigned, transferred or devised, directly or indirectly.

§ 13.320 Preference to Cook Inlet Region, Incorporated.

(a) The Cook Inlet Region, Incorporated (CIRI), in cooperation with village corporations within the Cook Inlet region when appropriate, will have a right of first refusal to provide new visitor services within that portion of Lake Clark National Park and Preserve that is within the boundaries of the Cook Inlet region. In order to exercise this right of first refusal, the National Park Service will publicly solicit competitive offers for the visitor services authorization pursuant to 36 CFR part 51 or other applicable National Park Service procedures. CIRI must submit a responsive offer within 90 days of such solicitation. If CIRI makes such an offer and is determined by the Director to be capable of carrying out the terms and conditions of the visitor services authorization, it will receive the authorization. If it does not, the authorization may be awarded to another person pursuant to usual National Park Service policies and procedures if otherwise appropriate.

(b) The CIRI right of first refusal will have precedence over the rights of preferred operators. An offer from CIRI under this section, if the offer is in the form of a joint venture, will not be considered valid unless it demonstrates to the satisfaction of the Director that CIRI has a controlling interest in the joint venture.

(c) The CIRI right of first refusal may not be sold, transferred, devised or assigned, directly or indirectly.

§ 13.325 Most directly affected Native Corporation.

(a) Before the award of the first visitor service authorization in a park area to be made after the effective date of this subpart, the Director will provide an opportunity for any Native Corporation interested in providing visitor services within the applicable park area to submit an application to the superintendent to be determined the Native Corporation most directly affected by the establishment or expansion of the park area by or under the provisions of ANILCA. An application from an interested Native Corporation will include the following information:

(1) Name, address, and phone number of the Native Corporation; date of incorporation; its articles of incorporation and structure;

(2) Location of the corporation's population center or centers; and

(3) An assessment of the socioeconomic impacts, including historical and traditional use and land-ownership patterns and their effects on the Native Corporation as a result of the expansion or establishment of the applicable park area by ANILCA.

(4) Any additional information the Native Corporation considers relevant or the Director may reasonably require.

(b) Upon receipt of all applications from interested Native Corporations, the Director will determine the "most directly affected" Native Corporation considering the following factors:

(1) Distance and accessibility from the corporation's population center and/or business address to the applicable park area; and

(2) Socioeconomic impacts, including historical and traditional use and landownership patterns, on Native Corporations and their effects as a result of the expansion or establishment of the applicable park area; and

(3) Information provided by Native Corporations and other information considered relevant by the Director to the particular facts and circumstances of the effects of the establishment or expansion of the applicable park area.

(c) In the event that more than one Native Corporation is determined to be equally affected within the meaning of this section, each such Native Corporation will be considered as a preferred operator under this subpart.

(d) The Director's most directly affected Native Corporation determination applies to the award of all future visitor service authorizations for the applicable park area. However, a Native Corporation that did not apply for this determination in connection with an earlier visitor services authorization may apply for a determination that it is an equally affected Native Corporation for the applicable park area in connection with a later visitor services authorization. Such subsequent applications must contain the information required by paragraph (a) of this section, and must be made in a timely manner as described by the Director in the applicable solicitation document so as not to delay the consideration of offers for the visitor services authorization.

§ 13.330 Appeal procedures.

An appeal of the denial of rights with respect to providing visitor services under this subpart may be made to the next higher level of authority. Such an appeal must be submitted in writing within 30 days of receipt of the denial. Appeals must set forth the facts and circumstances that the appellant believes support the appeal. The appellant may request an informal meeting to discuss the appeal with the National Park Service. After consideration of the materials submitted by the appellant and the National Park Service record of the matter, and meeting with the appellant if so requested, the Director will affirm, reverse, or modify the denial appealed and will set forth in writing the basis of the decision. A copy of the decision will be forwarded to the appellant and will constitute the final administrative decision in the matter. No person will be considered to have exhausted administrative remedies with respect to a denial of rights to provide visitor services under this subpart until a final administrative decision has been made pursuant to this section.

§ 13.335 Information collection.

(a) The information collection requirements contained in this part have received emergency approval from the Office of Management and Budget under 44 U.S.C. 3507, *et seq.*, for the basic contracting program under OMB clearance number 1024-0125. The information is being collected as part of the process of reviewing the procedures

and programs of State and local governments participating in the national historic preservation program. The information will be used to evaluate those procedures and programs. The obligation to respond is required to obtain a benefit.

(b) The public reporting burden for the collection of information is estimated to be 480 hours for large operations and 240 hours for small operations, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed and completing and reviewing the collection of information, including suggestions for reducing the burden, to Information Collection Officer, National Park Service, 800 North Capitol Street, Washington, DC 20013; and the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention: Desk Officer for the Department of Interior (1024-0125), Washington, DC 20503.

Subpart F—Subsistence

§ 13.400 Purpose and policy.

(a) Consistent with the management of fish and wildlife in accordance with recognized scientific principles and the purposes for which each park area was established, designated, or expanded by ANILCA, the purpose of this subpart is to provide the opportunity for local rural residents engaged in a subsistence way of life to do so pursuant to applicable State and Federal law.

(b) Consistent with sound management principles, and the conservation of healthy populations of fish and wildlife, the utilization of park areas is to cause the least adverse impact possible on local rural residents who depend upon subsistence uses of the resources of the public lands in Alaska.

(c) Nonwasteful subsistence uses of fish, wildlife and other renewable resources by local rural residents shall be the priority consumptive uses of such resources over any other consumptive uses permitted within park areas pursuant to applicable State and Federal law.

(d) Whenever it is necessary to restrict the taking of a fish or wildlife population within a park area for subsistence uses in order to assure the continued viability of such population or to continue subsistence uses of such population, the population shall be allocated among local rural residents engaged in subsistence uses in accordance with a subsistence priority system based on the following criteria:

(1) Customary and direct dependence upon the resource as the mainstay of one's livelihood;

(2) Local residency; and

(3) Availability of alternative resources.

(e) The State of Alaska is authorized to regulate the taking of fish and wildlife for subsistence uses within park areas to the extent such regulation is consistent with applicable Federal law, including but not limited to ANILCA.

(f) Nothing in this subpart shall be construed as permitting a level of subsistence use of fish and wildlife within park areas to be inconsistent with the conservation of healthy populations, and within a national park or monument to be inconsistent with the conservation of natural and healthy populations, of fish and wildlife.

§ 13.410 Applicability.

Subsistence uses by local rural residents are allowed pursuant to the regulations of this subpart in the following park areas:

(a) In national preserves;

(b) In Cape Krusenstern National Monument and Kobuk Valley National Park;

(c) Where such uses are traditional (as may be further designated for each park or monument in the applicable special regulations of this part) in Aniakchak National Monument, Gates of the Arctic National Park, Lake Clark National Park, Wrangell-St. Elias National Park, and the Denali National Park addition.

§ 13.420 Definitions.

Local rural resident. As used in this part with respect to national parks and monuments, the term "local rural resident" shall mean either of the following:

(1) Any person who has his/her primary, permanent home within the resident zone as defined by this section, and whenever absent from this primary, permanent home, has the intention of returning to it. Factors demonstrating the location of a person's primary, permanent home may include, but are not limited to, the permanent address indicated on licenses issued by the State of Alaska Department of Fish and Game, driver's license, and tax returns, and the location of registration to vote.

(2) Any person authorized to engage in subsistence uses in a national park or monument by a subsistence permit issued pursuant to § 13.440.

Resident zone. As used in this part, the term "resident zone" shall mean the area within, and the communities and areas near, a national park or monument in which persons who have customarily and traditionally engaged in subsistence

uses within the national park or monument permanently reside. The communities and areas near a national park or monument included as a part of its resident zone shall be determined pursuant to § 13.430 and listed for each national park or monument in the applicable special regulations of this part.

Subsistence uses. As used in this part, the term "subsistence uses" shall mean the customary and traditional uses by rural Alaska residents of wild, renewable resources for direct personal or family consumption as food, shelter, fuel, clothing, tools or transportation; for the making and selling of handcraft articles out of nonedible byproducts of fish and wildlife resources taken for personal or family consumption; for barter or sharing for personal or family consumption; and for customary trade. For the purposes of this paragraph, the term—

(1) "Family" shall mean all persons related by blood, marriage, or adoption, or any person living within the household on a permanent basis; and

(2) "Barter" shall mean the exchange of fish or wildlife or their parts taken for subsistence uses—

(i) For other fish or game or their parts; or

(ii) For other food or for nonedible items other than money if the exchange is of a limited and noncommercial nature; and

(3) "Customary trade" shall be limited to the exchange of furs for cash (and such other activities as may be designated for a specific park area in the applicable special regulations of this part).

§ 13.430 Determination of resident zones.

(a) A resident zone shall include—

(1) The area within a national park or monument; and

(2) The communities and areas near a national park or monument which contain significant concentrations of rural residents who, without using aircraft as a means of access for purposes of taking fish or wildlife for subsistence uses (except in extraordinary cases where no reasonable alternative existed), have customarily and traditionally engaged in subsistence uses within a national park or monument. For purposes of determining "significant" concentrations, family members shall also be included.

(b) After notice and comment, including public hearing in the affected local vicinity, a community or area near a national park or monument may be—

(1) Added to a resident zone; or

(2) Deleted from a resident zone, when such community or area does or

does not meet the criteria set forth in paragraph (a) of this section, as appropriate.

(c) For purposes of this section, the term "family" shall mean all persons living within a rural resident's household on a permanent basis.

§ 13.440 Subsistence permits for persons whose primary, permanent home is outside a resident zone.

(a) Any rural resident whose primary, permanent home is outside the boundaries of a resident zone of a national park or monument may apply to the appropriate Superintendent pursuant to the procedures set forth in § 13.495 for a subsistence permit authorizing the permit applicant to engage in subsistence uses within the national park or monument. The Superintendent shall grant the permit if the permit applicant demonstrates that,

(1) Without using aircraft as a means of access for purposes of taking fish and wildlife for subsistence uses, the applicant has (or is a member of a family which has) customarily and traditionally engaged in subsistence uses within a national park or monument; or

(2) The applicant is a local rural resident within a resident zone for another national park or monument, or meets the requirements of paragraph (a)(1) of this section for another national park or monument, and there exists a pattern of subsistence uses (without use of an aircraft as a means of access for purposes of taking fish and wildlife for subsistence uses) between the national park or monument previously utilized by the permit applicant and the national park or monument for which the permit applicant seeks a subsistence permit.

(b) In order to provide for subsistence uses pending application for and receipt of a subsistence permit, until August 1, 1981, any rural resident whose primary permanent home is outside the boundaries of a resident zone of a national park or monument and who meets the criteria for a subsistence permit set forth in paragraph (a) of this section may engage in subsistence uses in the national park or monument without a permit in accordance with applicable State and Federal law. Effective August 1, 1981, however, such rural resident must have a subsistence permit as required by paragraph (a) of this section in order to engage in subsistence uses in the national park or monument.

(c) For purposes of this section, the term "family" shall mean all persons living within a rural resident's household on a permanent basis.

§ 13.450 Prohibition of aircraft use.

(a) Notwithstanding the provisions 43 CFR 36.11(f) the use of aircraft for access to or from lands and waters within a national park or monument for purposes of taking fish or wildlife for subsistence uses within the national park or monument is prohibited except as provided in this section.

(b) *Exceptions.* (1) In extraordinary cases where no reasonable alternative exists, the Superintendent shall permit, pursuant to specified terms and conditions, a local rural resident of an "exempted community" to use aircraft for access to or from lands and water within a national park or monument for purposes of taking fish or wildlife for subsistence uses.

(i) A community shall qualify as an "exempted community" if, because of the location of the subsistence resources upon which it depends and the extraordinary difficulty of surface access to these subsistence resources, the local rural residents who permanently reside in the community have no reasonable alternative to aircraft use for access to these subsistence resources.

(ii) A community which is determined, after notice and comment (including public hearing in the affected local vicinity), to meet the description of an "exempted community" set forth in paragraph (b)(1) of this section shall be included in the appropriate special regulations for each park and monument in this part.

(iii) A community included as an "exempted community" in the special regulations of this part may be deleted therefrom upon a determination, after notice and comment (including public hearing in the affected local vicinity), that it does not meet the description of an "exempted community" set forth in paragraph (b)(1) of this section.

(2) Any local rural resident aggrieved by the prohibition on aircraft use set forth in this section may apply for an exception to the prohibition pursuant to the procedures set forth in § 13.495. In extraordinary cases where no reasonable alternative exists, the Superintendent may grant the exception upon a determination that the location of the subsistence resources depended upon and the difficulty of surface access to these resources, or other emergency situation, requires such relief.

(c) Nothing in this section shall prohibit the use of aircraft for access to lands and waters within a national park or monument for purposes of engaging in any activity allowed by law other than the taking of fish and wildlife. Such activities include, but are not limited to, transporting supplies.

§ 13.460 Use of snowmobiles, motorboats, dog teams, and other means of surface transportation traditionally employed by local rural residents engaged in subsistence uses.

(a) Notwithstanding any other provision of this chapter, the use of snowmobiles, motorboats, dog teams, and other means of surface transportation traditionally employed by local rural residents engaged in subsistence uses is permitted within park areas except at those times and in those areas restricted or closed by the Superintendent.

(b) The Superintendent may restrict or close a route or area to use of snowmobiles, motorboats, dog teams, or other means of surface transportation traditionally employed by local rural residents engaged in subsistence uses if the Superintendent determines that such use is causing or is likely to cause an adverse impact on public health and safety, resource protection, protection of historic or scientific values, subsistence uses, conservation of endangered or threatened species, or the purposes for which the park area was established.

(c) No restrictions or closures shall be imposed without notice and a public hearing in the affected vicinity and other locations as appropriate. In the case of emergency situations, restrictions or closures shall not exceed sixty (60) days and shall not be extended unless the Superintendent establishes, after notice and public hearing in the affected vicinity and other locations as appropriate, that such extension is justified according to the factors set forth in paragraph (b) of this section. Notice of the proposed or emergency restrictions or closures and the reasons therefore shall be published in at least one newspaper of general circulation within the State and in at least one local newspaper if appropriate, and information about such proposed or emergency actions shall also be made available for broadcast on local radio stations in a manner reasonably calculated to inform local rural residents in the affected vicinity. All restrictions and closures shall be designated on a map which shall be available for public inspection at the office of the Superintendent of the affected park area and the post office or postal authority of every affected community within or near the park area, or by the posting of signs in the vicinity of the restrictions or closures, or both.

(d) Motorboats, snowmobiles, dog teams, and other means of surface transportation traditionally employed by local rural residents engaged in subsistence uses shall be operated:

(1) In compliance with applicable State and Federal law;

(2) In such a manner as to prevent waste or damage to the park areas; and

(3) In such a manner as to prevent the herding, harassment, hazing or driving of wildlife for hunting or other purposes.

(e) At all times when not engaged in subsistence uses, local rural residents may use snowmobiles, motorboats, dog teams, and other means of surface transportation in accordance with 43 CFR 36.11(c), (d), (e), and (g).

§ 13.470 Subsistence fishing.

Fish may be taken by local rural residents for subsistence uses in park areas where subsistence uses are allowed in compliance with applicable State and Federal law, including the provisions of §§ 2.3 and 13.40 of this chapter: *Provided, however,* That local rural residents in park areas where subsistence uses are allowed may fish with a net, seine, trap, or spear where permitted by State law. To the extent consistent with the provisions of this chapter, applicable State laws and regulations governing the taking of fish which are now or will hereafter be in effect are hereby incorporated by reference as a part of these regulations.

§ 13.480 Subsistence hunting and trapping.

Local rural residents may hunt and trap wildlife for subsistence uses in park areas where subsistence uses are allowed in compliance with applicable State and Federal law. To the extent consistent with the provisions of this chapter, applicable State laws and regulations governing the taking of wildlife which are now or will hereafter be in effect are hereby incorporated by reference as a part of these regulations.

§ 13.485 Subsistence use of timber and plant material.

(a) Notwithstanding any other provision of this part, the non-commercial cutting of live standing timber by local rural residents for appropriate subsistence uses, such as firewood or house logs, may be permitted in park areas where subsistence uses are allowed as follows:

(1) For live standing timber of diameter greater than three inches at ground height, the Superintendent may permit cutting in accordance with the specifications of a permit if such cutting is determined to be compatible with the purposes for which the park area was established;

(2) For live standing timber of diameter less than three inches at ground height, cutting is permitted unless restricted by the Superintendent.

(b) The noncommercial gathering by local rural residents of fruits, berries, mushrooms, and other plant materials for subsistence uses, and the noncommercial gathering of dead or downed timber for firewood, shall be allowed without a permit in park areas where subsistence uses are allowed.

(c) Notwithstanding any other provision of this part, the Superintendent, after notice and public hearing in the affected vicinity and other locations as appropriate, may temporarily close all or any portion of a park area to subsistence uses of a particular plant population only if necessary for reasons of public safety, administration, or to assure the continued viability of such population. For the purposes of this section, the term "temporarily" shall mean only so long as reasonably necessary to achieve the purposes of the closure.

(1) If the Superintendent determines that an emergency situation exists and that extraordinary measures must be taken for public safety or to assure the continued viability of a particular plant population, the Superintendent may immediately close all or any portion of a park area to the subsistence uses of such population. Such emergency closure shall be effective when made, shall be for a period not to exceed sixty (60) days, and may not subsequently be extended unless the Superintendent establishes, after notice and public hearing in the affected vicinity and other locations as appropriate, that such closure should be extended.

(2) Notice of administrative actions taken pursuant to this section, and the reasons justifying such actions, shall be published in at least one newspaper of general circulation within the State and at least one local newspaper if available, and information about such actions and reasons also shall be made available for broadcast on local radio stations in a manner reasonably calculated to inform local rural residents in the affected vicinity. All closures shall be designated on a map which shall be available for public inspection at the office of the Superintendent of the affected park area and the post office or postal authority of every affected community within or near the park area, or by the posting of signs in the vicinity of the restrictions, or both.

§ 13.490 Closure to subsistence uses of fish and wildlife.

(a) Notwithstanding any other provision of this part, the Superintendent, after consultation with the State and adequate notice and public hearing in the affected vicinity and other locations as appropriate, may

temporarily close all or any portion of a park area to subsistence uses of a particular fish or wildlife population only if necessary for reasons of public safety, administration, or to assure the continued viability of such population. For purposes of this section, the term "temporarily" shall mean only so long as reasonably necessary to achieve the purposes of the closure.

(b) If the Superintendent determines that an emergency situation exists and that extraordinary measures must be taken for public safety or to assure the continued viability of a particular fish or wildlife population, the Superintendent may immediately close all or any portion of a park area to the subsistence uses of such population. Such emergency closure shall be effective when made, shall be for a period not to exceed sixty (60) days, and may not subsequently be extended unless the Superintendent establishes, after notice and public hearing in the affected vicinity and other locations as appropriate, that such closure should be extended.

(c) Notice of administrative actions taken pursuant to this section, and the reasons justifying such actions, shall be published in at least one newspaper of general circulation within the State and in at least one local newspaper if available, and information about such actions and reasons also shall be made available for broadcast on local radio stations in a manner reasonably calculated to inform local rural residents in the affected vicinity. All closures shall be designated on a map which shall be available for public inspection at the office of the Superintendent of the affected park area and the post office or postal authority of every affected community within or near the park area, or by the posting of signs in the vicinity of the restrictions, or both.

§ 13.495 Application procedures for subsistence permits and aircraft exceptions.

(a) Any person applying for the subsistence permit required by § 13.440(a), or the exception to the prohibition on aircraft use provided by § 13.450(b)(2), shall submit his/her application to the Superintendent of the appropriate national park or monument. If the applicant is unable or does not wish to submit the application in written form, the Superintendent shall provide the applicant an opportunity to present the application orally and shall keep a record of such oral application. Each application must include a statement which acknowledges that providing false information in support

of the application is a violation of Section 1001 of Title 18 of the United States Code, and additional statements or documentation which demonstrates that the applicant satisfies the criteria set forth in § 13.440(a) for a subsistence permit or § 13.450(b)(2) for the aircraft exception, as appropriate. Except in extraordinary cases for good cause shown, the Superintendent shall decide whether to grant or deny the application in a timely manner not to exceed forty-five (45) days following the receipt of the completed application. Should the Superintendent deny the application, he/she shall include in the decision a statement of the reasons for the denial and shall promptly forward a copy to the applicant.

(b) An applicant whose application has been denied by the Superintendent has the right to have his/her application reconsidered by the Alaska Regional Director by contacting the Regional Director within 180 days of the issuance of the denial. The Regional Director may extend the 180-day time limit to initiate a reconsideration for good cause shown by the applicant. For purposes of reconsideration, the applicant shall present the following information:

(1) Any statement or documentation, in addition to that included in the initial application, which demonstrates that the applicant satisfies the criteria set forth in paragraph (a) of this section;

(2) The basis for the applicant's disagreement with the Superintendent's findings and conclusions; and

(3) Whether or not the applicant requests an informal hearing before the Regional Director.

(c) The Regional Director shall provide a hearing if requested by the applicant. After consideration of the written materials and oral hearing, if any, and within a reasonable period of time, the Regional Director shall affirm, reverse, or modify the denial of the Superintendent and shall set forth in writing the basis for the decision. A copy of the decision shall be forwarded promptly to the applicant and shall constitute final agency action.

Subpart G [Reserved]

Subpart H—Special Regulations—Alagnak Wild River [Reserved]

Subpart I—Special Regulations—Aniakchak National Monument and Preserve

§ 13.602 Subsistence resident zone.

The following communities and areas are included within the resident zone for Aniakchak National Monument:

Chignik, Chignik Lagoon, Chignik Lake, Meshik, and Port Heiden.

§ 13.604 Wildlife distance conditions.

(a) Approaching a bear or any large mammal within 50 yards is prohibited.

(b) Continuing to occupy a position within 50 yards of a bear that is using a concentrated food source, including, but not limited to, animal carcasses, spawning salmon, and other feeding areas is prohibited.

(c) The prohibitions do not apply to persons—

- (1) Engaged in a legal hunt;
- (2) On a designated bear viewing structure;
- (3) In compliance with a written protocol approved by the Superintendent; or
- (4) Who are otherwise directed by a park employee.

Subpart J—Special Regulations—Bering Land Bridge National Preserve

§ 13.702 Off-Road Vehicles.

The use of off-road vehicles for purposes of reindeer grazing may be permitted in accordance with a permit issued by the Superintendent.

Subpart K—Special Regulations—Cape Krusenstern National Monument

§ 13.802 Subsistence resident zone.

The following area is included within the resident zone for Cape Krusenstern National Monument: The NANA Region.

Subpart L—Special Regulations—Denali National Park and Preserve

General Provisions

§ 13.902 Subsistence resident zone.

The following communities and areas are included within the resident zone for Denali National Park addition: Cantwell, Minchumina, Nikolai, and Telida.

§ 13.904 Camping.

Camping is allowed in accordance with the backcountry management plan.

§ 13.906 Unattended or abandoned property.

Leaving unattended and abandoned property along the road corridor, at Wonder Lake, and in the areas included in the backcountry management plan, is prohibited.

§ 13.908 Fishing limit of catch and in possession.

The limit of catch per person per day shall be 10 fish but not to exceed 10 pounds and one fish, except that the limit of catch of lake trout (mackinaw)

per person per day shall be two fish including those hooked and released. Possession of more than one day's limit of catch by one person at any one time is prohibited.

§ 13.910 Mountain climbing.

Climbing on Mount McKinley or Mount Foraker without registering, on a form provided by the Superintendent, at least 60 days in advance of any climb is prohibited.

§ 13.912 Kantishna area summer season firearm safety zone.

What is prohibited? No one may fire a gun during the summer season in or across the Kantishna area firearm safety zone, unless they are defending life or property.

(a) The summer season begins on the Saturday of Memorial Day weekend and continues through the second Thursday following Labor Day or September 15, whichever comes first.

(b) The Kantishna Area firearm safety zone includes: The Kantishna Airstrip; the State Omnibus Act Road right-of-way; and all public lands located within one mile of the Kantishna Airstrip or the State Omnibus Act Road right-of-way, from the former Mt. McKinley National Park boundary at mile 87.9 to the south end of the Kantishna Airstrip.

§ 13.914 Bicycle use.

The use of a bicycle is prohibited—

(a) On the Savage River Loop Trail; the Savage Cabin Trail; the Triple Lakes Trail; the McKinley Bar Trail; and the Eielson Area Trails; and

(b) Within the Frontcountry Developed Area as defined by § 13.970 except on park roads, road shoulders, and in public parking areas, or on trails and areas designated for bicycle use by the Superintendent. A map of the designated trails and areas open to bicycle use is available for inspection at the park visitor center and on the park Web site.

§ 13.916 Use of roller skates, skateboards, roller skis, in-line skates, and similar devices.

The use of roller skates, skateboards, roller skis, in-line skates, and similar devices is prohibited—

(a) On the Savage River Loop Trail; the Savage Cabin Trail; the Triple Lakes Trail; the McKinley Bar Trail; and the Eielson Area Trails; and

(b) Within the Frontcountry Developed Area as defined by § 13.970 except on trails and areas designated by the Superintendent. A map of the designated trails and areas is available for inspection at the park visitor center and on the park Web site.

Motor Vehicle Permits

§ 13.930 Do I need a permit to operate a motor vehicle on the Denali Park road west of the Savage River?

Yes, you must obtain a permit from the superintendent to operate a motor vehicle on the restricted section of the Denali Park road. The restricted section begins at the west end of the Savage River Bridge (mile 14.8) and continues to the former Mt. McKinley National Park boundary north of Wonder Lake (mile 87.9).

§ 13.932 How many permits will be issued each summer?

The superintendent is authorized, under this subpart, to issue no more than 10,512 motor vehicle permits each year for access to the restricted section of the road. The superintendent will issue the permits for the period that begins on the Saturday of Memorial Day weekend and continues through the second Thursday following Labor Day or September 15, whichever comes first. Each permit allows one vehicle one entry onto the restricted portion of the Park road.

§ 13.934 How will the superintendent manage the permit program?

(a) The superintendent will apportion motor vehicle permits among authorized users following the procedures in § 13.55. Authorized users are individuals, groups and governmental entities who are allowed by law or policy to use the restricted section of the road.

(b) The superintendent will establish an annual date to evaluate permit requests and publish that date, along with the results of the annual apportionment, in the superintendent's compendium of rules and orders. The superintendent's compendium is available to the public upon request.

(c) The superintendent will reevaluate the access requirements of any business that is sold, ceases to operate or that significantly changes the services currently offered to the public.

§ 13.936 What is prohibited?

(a) No one may operate a motor vehicle on the restricted section of the Park road without a valid permit.

(b) No one may use a motor home, camper or trailer to transport guests to a lodge or other business in Kantishna.

(c) No one may transfer or accept transfer of a Denali Park road permit without the superintendent's approval.

Snowmachine (Snowmobile) Operations

§ 13.950 What is the definition of a traditional activity for which Section 1110(a) of ANILCA permits snowmachines to be used in the former Mt. McKinley National Park (Old Park) portion of Denali National Park and Preserve?

A *traditional activity* is an activity that generally and lawfully occurred in the Old Park contemporaneously with the enactment of ANILCA, and that was associated with the Old Park, or a discrete portion thereof, involving the consumptive use of one or more natural resources of the Old Park such as hunting, trapping, fishing, berry picking or similar activities. Recreational use of snowmachines was not a traditional activity. If a traditional activity generally occurred only in a particular area of the Old Park, it would be considered a traditional activity only in the area where it had previously occurred. In addition, a traditional activity must be a legally permissible activity in the Old Park.

§ 13.952 May a snowmachine be used in that portion of the park formerly known as Mt. McKinley National Park (Old Park)?

No, based on the application of the definition of traditional activities within the park to the factual history of the Old Park, there are no traditional activities that occurred during periods of adequate snow cover within the Old Park; and, thus, Section 1110(a) of ANILCA does not authorize snowmachine access. Hunting and trapping were not and are not legally permitted activities in the Old Park at any time of the year. Sport fishing has not taken place in the Old Park during periods of adequate snow cover due to weather conditions that are adverse to sport fishing, and the limited fishery resources within the Old Park. During periods of adequate snow cover, berry picking is not feasible, and has not taken place in the Old Park. Under the definition, recreational use of snowmachines is not a traditional activity. There are no villages, homesites or other valid occupancies within the Old Park. Access by snowmachine through the Old Park in transit to homesites, villages and other valid occupancies was not lawful prior to the enactment of ANILCA and is available through routes outside the Old Park that have been historically used for that purpose. Therefore, the use of snowmachines is not authorized by section 1110(a) for such travel. Further, Congress did not authorize subsistence activities in the Old Park. In addition, the National Park Service has determined that the use of even a few

snowmachines in the Old Park would be detrimental to the resource values of the area. Therefore, because no usage is authorized in the Old Park by section 1110(a) the Old Park remains closed to all snowmachine use in accordance with 36 CFR 2.18.

§ 13.954 Where can I operate a snowmachine in Denali National Park and Preserve?

You can use a snowmachine outside of the Old Park for traditional activities or travel to and from villages and homesites and other valid occupancies as authorized by 43 CFR 36.11(c), or when lawfully engaged in subsistence activities authorized by § 13.460.

§ 13.956 What types of snowmachines are allowed?

The types of snowmachines allowed are defined in § 13.1 under "snowmachine or snowmobile".

§ 13.958 What other regulations apply to snowmachine use?

Snowmachine use is governed by regulations at § 2.18(a) of this chapter, traffic safety, § 2.18(b) of this chapter, state laws, and § 2.18(d) and (e) of this chapter, prohibited activities; and 43 CFR 36.11(a)(2) adequate snow cover, and 43 CFR 36.11(c) traditional activities.

§ 13.960 Who determines when there is adequate snow cover?

The superintendent will determine when snow cover is adequate for snowmachine use. The superintendent will follow the procedures in §§ 1.5 and 1.7 of this chapter to inform the public.

§ 13.962 Does the Superintendent have other regulatory authority?

Nothing in this subpart shall limit the authority of the superintendent to restrict or limit uses of an area under other statutory authority.

Frontcountry Developed Area (FDA)

§ 13.970 Frontcountry Developed Area definition.

For purposes of this subpart, the Frontcountry Developed Area (FDA) means all park areas within the portion of the park formerly known as Mt. McKinley National Park (Old Park) not designated as Wilderness by Congress. A map showing the FDA is available at the park visitor center.

§ 13.972 Camping from April 15 through September 30.

(a) Camping is prohibited in the FDA except in designated campgrounds in accordance with the terms and conditions of a permit. Violation of permit terms and conditions is prohibited.

(b) Camping in designated campgrounds in the FDA for more than a total of 14 days, either in a single period or combined periods, is prohibited.

§ 13.974 Camping from October 1 through April 14.

(a) Camping is prohibited in the FDA except in designated campgrounds and the designated area where the park road is closed to motor vehicle use. A map showing the designated area is available at the park visitor center and on the park Web site.

(b) Camping in the FDA without a permit is prohibited. Violation of permit terms and conditions is prohibited.

(c) Camping in the FDA for more than a total of 30 days, either in a single period or combined periods, is prohibited.

§ 13.976 Fire.

Lighting or maintaining a fire is prohibited in the FDA except—

(a) In established receptacles within designated campgrounds;

(b) From October 1 through April 14 in that portion of the FDA where the park road is closed to motor vehicle use; and

(c) Under conditions that may be established by the Superintendent.

§ 13.978 Pets.

Possessing a pet is prohibited—

(a) In the FDA, except in public parking areas, on or immediately adjacent to park roads, or in designated campgrounds;

(b) Within 150 feet of the park sled dog kennels; and

(c) Within 150 feet of the park water system intake facilities.

§ 13.980 Other FDA closures and restrictions.

The Superintendent may prohibit or otherwise restrict activities in the FDA to protect public health, safety, or park resources. Information on FDA closures and restrictions will be available for inspection at the park visitor center and on the park Web site. Violating FDA closures or restrictions is prohibited.

Subpart M—Special Regulations—Gates of the Arctic National Park and Preserve

§ 13.1002 Subsistence resident zone.

The following communities and areas are included within the resident zone for Gates of the Arctic National Park: Alatna, Allakaket, Ambler, Anaktuvuk Pass, Bettles/Evansville, Hughes, Kobuk, Nuiqsut, Shungnak, and Wiseman.

§ 13.1004 Aircraft use.

In extraordinary cases where no reasonable alternative exists, local rural residents who permanently reside in the following exempted community(ies) may use aircraft for access to lands and waters within the park for subsistence purposes in accordance with a permit issued by the Superintendent: Anaktuvuk Pass.

§ 13.1006 Customary trade.

In the Gates of the Arctic National Preserve unit which contains the Kobuk River and its tributaries, "customary trade" shall include—in addition to the exchange of furs for cash—the selling of handicraft articles made from plant material taken by local rural residents of the park area.

**Subpart N—Special Regulations—
Glacier Bay National Park and
Preserve**

Administrative Provisions**§ 13.1102 Definitions.**

As used in this subpart:

Bartlett Cove Developed Area means all NPS-administered lands and waters within 1 mile of any Bartlett Cove facility. A map showing the Bartlett Cove Developed Area is available at the park visitor center.

Charter vessel means any motor vessel under 100 tons gross (U.S. System) or 2,000 tons gross (International Convention System) engaged in transport of passengers for hire and certified to carry no more than 12 passengers overnight and no more than 49 passengers for daytime use. Charter vessels also include any uninspected motor vessel measuring less than 200 tons gross (U.S. Tonnage "Simplified Measurement System") and not more than 24 meters (79 feet) in length engaged in transport of passengers for hire.

Commercial fishing means conducting fishing activities under the appropriate commercial fishing permits and licenses as required and defined by the State of Alaska.

Commercial fishing vessel means any motor vessel conducting fishing activities under the appropriate commercial fishing licenses as authorized under this subpart.

Cruise ship means any motor vessel of at least 100 tons gross (U.S. System) or 2,000 tons gross (International Convention System) certificated to carry more than 12 passengers for hire.

Daily vessel quota means the maximum number of vessels allowed, by vessel category, on any one calendar day.

Glacier Bay means all waters inside a line drawn between Point Gustavus at 135°54.927' W longitude; 58°22.748' N latitude and Point Carolus at 136°2.535' W longitude; 58°22.694' N latitude.

Motor vessel means any vessel, other than a seaplane, propelled or capable of being propelled by machinery (including steam), whether or not such machinery is the principal source of power, except a skiff or tender under tow or carried on board another vessel.

Outer waters means all of the non-wilderness marine waters of the park located outside of Glacier Bay.

Passenger ferry means a motor vessel authorized by the Superintendent to engage in the transport of passengers for hire to Bartlett Cove.

Private vessel means any motor vessel that is not engaged in business (business includes, but is not limited to, transportation of passengers for hire or commercial fishing).

Seasonal vessel quota means the maximum number of vessels allowed, by vessel category, during a specific seasonal period.

Speed through the water means the speed at which a vessel moves through the water (which itself may be moving); as distinguished from "speed over the ground" (speed measured in relation to a fixed point on the earth).

Tour vessel means any motor vessel of less than 100 tons gross (U.S. System) or 2,000 tons gross (International Convention System) engaged in transport of passengers for hire and certificated to carry more than 12 passengers overnight or more than 49 passengers for daytime use.

Transit means to operate a motor vessel under power and continuously so as to accomplish ½ nautical mile of littoral (i.e., along the shore) travel.

Vessel includes every type or description of craft used as a means of transportation on the water, including a buoyant device permitting or capable of free flotation and a seaplane while operating on the water.

Whale means any humpback whale (*Megaptera novaeangliae*).

Whale waters means any portion of Glacier Bay, designated by the superintendent, having a high probability of whale occupancy, based upon recent sighting and/or past patterns of occurrence.

§ 13.1104 Coordinates.

All coordinates referenced in this subpart use horizontal datum World Geodetic System of 1984 (WGS 84).

General Provisions**§ 13.1110 May I collect or burn interstadial wood?**

Collecting or burning interstadial wood (aged wood preserved in glacial deposits) is prohibited.

§ 13.1112 May I collect rocks and minerals?

Collecting rocks and minerals in the former Glacier Bay National Monument is prohibited.

§ 13.1114 May I collect goat hair?

The collection of naturally shed goat hair is authorized in accordance with terms and conditions established by the Superintendent. Violating terms and conditions for collecting goat hair is prohibited.

§ 13.1116 Do I need a camping permit in Glacier Bay?

From May 1 through September 30, camping within Glacier Bay as defined by this subpart up to ¼ nautical mile (1519 feet) above the line of mean high tide without a camping permit is prohibited. The Superintendent may establish permit terms and conditions. Failure to comply with permit terms and conditions is prohibited.

Bartlett Cove**§ 13.1120 Bartlett Cove Developed Area closures and restrictions.**

The Superintendent may prohibit or otherwise restrict activities in the Bartlett Cove Developed Area to protect public health, safety, or park resources, or to provide for the equitable and orderly use of park facilities. Information on closures and restrictions will be available at the park visitor information center. Violating Bartlett Cove Developed Area closures or restrictions is prohibited.

§ 13.1122 Bartlett Cove Public Use Dock.

(a) Docking, tying down, or securing aircraft is prohibited except at the designated aircraft float at the Bartlett Cove Public Use Dock. Docking, tying down, or securing aircraft to the Bartlett Cove Public Use Dock for longer than 3 hours in a 24-hour period is prohibited. Pilots must remain with the aircraft or provide notice of their location to a park ranger. Failure to remain with the aircraft or provide notice to a park ranger is prohibited.

(b) Vehicles exceeding 30,000 pounds gross vehicle weight are prohibited on the dock, unless authorized by the Superintendent.

(c) Leaving personal property (other than vessels) unattended on, or attached to, the floats or pier without prior

permission from the Superintendent is prohibited.

(d) Processing commercially caught fish on the Public Use Dock is prohibited.

(e) The Superintendent may authorize the buying or selling of fish or fish products on or at the Public Use Dock. Buying or selling of fish or fish products is prohibited on or at the Public Use Dock without written permission from the Superintendent.

(f) Utilizing the fuel dock for activities other than fueling and waste pump-out is prohibited. Other uses may be authorized by the Superintendent to protect park resources or public safety.

(g) Leaving a vessel unattended on the fuel dock for any length of time is prohibited.

(h) Using electrical shore power for vessels is prohibited unless otherwise authorized by the Superintendent.

§ 13.1124 Bartlett Cove Campground.

(a) Camping is prohibited in the Bartlett Cove Developed Area except in the Bartlett Cove Campground. From May 1 through September 30, all overnight campers must register to camp in the Bartlett Cove Campground. Failure to register is prohibited.

(b) Cooking, consuming, or preparing food in the Bartlett Cove Campground is prohibited except in designated areas.

(c) *Food storage.* In the Bartlett Cove Developed Area, storing food in any manner except in a sealed motor vehicle, a vessel (excluding kayaks), a building, an approved bear-resistant food container, a bear-resistant trash receptacle, or a designated food cache is prohibited.

§ 13.1126 Bicycles.

Use of a bicycle is prohibited on the Forest Loop, Bartlett River and Bartlett Lake trails.

§ 13.1128 Is a permit required to transport passengers between Bartlett Cove and Gustavus?

Commercial transport of passengers between Bartlett Cove and Gustavus by motor vehicles legally licensed to carry 15 or fewer passengers is allowed without a permit. However, if required to protect public health and safety or park resources, or to provide for the equitable use of park facilities, the Superintendent may establish a permit requirement with appropriate terms and conditions for the transport of passengers. Failure to comply with permit terms and conditions is prohibited.

Commercial Fishing

§ 13.1130 Is commercial fishing authorized in the marine waters of Glacier Bay National Park?

Yes—Commercial fishing is authorized within the outer waters of the park and within the non-wilderness waters of Glacier Bay, subject to the provisions of this chapter.

(a) Commercial fishing shall be administered pursuant to a cooperatively developed State/federal park fisheries management plan, international conservation and management treaties, and existing federal and non-conflicting State law. The management plan shall provide for the protection of park values and purposes, the prohibition on any new or expanded fisheries, and the opportunity to study marine resources.

(b) Commercial fishing or conducting an associated buying or processing operation in wilderness waters is prohibited.

(c) A new or expanded fishery is prohibited. The Superintendent shall compile a list of the existing fisheries and gear types used in the outer waters and follow the procedures in §§ 1.5 and 1.7 of this chapter to inform the public.

(d) Maps and charts showing which marine areas of Glacier Bay are closed to commercial fishing are available from the Superintendent.

§ 13.1132 What types of commercial fishing are authorized in Glacier Bay?

Three types of commercial fishing are authorized in Glacier Bay non-wilderness waters: Longline fishing for halibut; pot and ring fishing for Tanner crab; and trolling for salmon.

(a) All other commercial fishing, or a buying or a processing operation not related to an authorized fishery is prohibited in Glacier Bay.

(b) On October 1, 2000, each fishery will be limited to fishermen who qualify for a non-transferable commercial fishing lifetime access permit (see § 13.1134). Commercial fishing without a permit issued by the superintendent, or other than in accordance with the terms and conditions of the permit, is prohibited.

(c) The Superintendent shall include in a permit the terms and conditions that the superintendent deems necessary to protect park resources. Violating a term or condition of the permit is prohibited.

§ 13.1134 Who is eligible for a Glacier Bay commercial fishing lifetime access permit?

A Glacier Bay commercial fishing lifetime access permit will be issued by the superintendent to fishermen who have submitted documentation to the

superintendent, on or before October 1, 2000, which demonstrates to the satisfaction of the superintendent that:

(a) They possess valid State limited entry commercial fishing permits for the district or statistical area encompassing Glacier Bay for each fishery for which a lifetime access permit is being sought; and,

(b) They have participated as a limited entry permit holder or crewmember in the district or statistical area encompassing Glacier Bay for each fishery for which a lifetime access permit is being sought.

(1) For the Glacier Bay commercial halibut fishery, the applicant must have participated as a permit holder or crewmember for at least 2 years during the period 1992–1998.

(2) For the Glacier Bay salmon or Tanner crab commercial fisheries, the applicant must have participated as a permit holder or crewmember for at least 3 years during the period 1989–1998.

§ 13.1136 How can an individual apply for a commercial fishing lifetime access permit?

An applicant for a lifetime access permit must provide information sufficient to establish eligibility as follows:

(a) The applicant's full name, date of birth, mailing address and phone number;

(b) A notarized affidavit (required), sworn by the applicant, attesting to his or her history of participation as a limited entry permit holder or crewmember in Glacier Bay during the qualifying period for each fishery for which a lifetime access permit is being sought;

(c) A copy of the applicant's current State of Alaska limited entry permit or, in the case of halibut, an international Pacific Halibut Commission quota share (required), that is valid for the area that includes Glacier Bay, for each fishery for which a lifetime access permit is sought;

(d) For qualifying years as a limited entry permit holder, available corroborating documentation of the applicant's permit and quota share history for the Glacier Bay fishery during the qualifying period, and/or for qualifying years as a crewmember, other available corroborating documentation of crewmember status. This may include a copy of the applicant's commercial crewmember license for each qualifying year, a notarized affidavit from their employer (generally a limited entry permit holder, or boat owner hired or contracted by a limited entry permit holder) stating the years worked by the

applicant in a qualifying fishery in Glacier Bay, copies of tax forms W-2 or 1099, pay stubs, or other documentation; and

(e) For applicants qualifying as a limited entry permit holder, available corroborating documentation of commercial landings for the Glacier Bay fishery during the qualifying periods—i.e., within the statistical unit or area that includes Glacier Bay. For halibut, this includes regulatory sub-area 184. For Tanner crab, this includes statistical areas 114-70 through 114-77. For salmon, the Superintendent may need additional documentation that supports the applicant's declaration of Glacier Bay salmon landings. For halibut and Tanner crab, the Superintendent may consider documented commercial landings from the unit or area immediately adjacent to Glacier Bay (in Icy Strait) if additional documentation supports the applicant's declaration that landings occurred in Glacier Bay.

(f) Any additional corroborating documentation that might assist the superintendent in a timely determination of eligibility for the access permits.

§ 13.1138 Where should the documentation for a lifetime access permit be sent?

Before October 1, 2000, all required information (as listed in § 13.1136) should be sent to: Superintendent, Attn: Access Permit Program, Glacier Bay National Park and Preserve, P.O. Box 140, Gustavus, Alaska 99826.

§ 13.1140 Who determines eligibility?

The superintendent will make a written determination of an applicant's eligibility for the lifetime access permit based on information provided. A copy of the determination will be mailed to the applicant. If additional information is required to make an eligibility determination, the applicant will be notified in writing of that need and be given an opportunity to provide it.

§ 13.1142 Can I appeal denial of my commercial fishing lifetime access permit application?

Yes—If an applicant's request for a commercial fishing lifetime access permit is denied, the superintendent will provide the applicant with the reasons for the denial in writing within 15 days of the decision. The applicant may appeal to the Regional Director, Alaska Region, within 180 days. The appeal must substantiate the basis of the applicant's disagreement with the Superintendent's determination. The Regional Director (or his representative) will meet with the applicant to discuss the appeal within 30 days of receiving

the appeal. Within 15 days of receipt of written materials and the meeting, if requested, the Regional Director will affirm, reverse, or modify the Superintendent's determination and explain the reasons for the decision in writing. A copy of the decision will be forwarded promptly to the applicant and will be the final agency action.

§ 13.1144 How often will commercial fishing lifetime access permit be renewed?

The superintendent will renew lifetime access permit at 5-year intervals for the lifetime of a permittee who continues to hold a valid State limited entry commercial fishing permit, and for halibut an International Pacific Halibut Commission quota share, and is otherwise eligible to participate in the fishery under Federal and State law.

§ 13.1146 What other closures and restrictions apply to commercial fishermen and commercial fishing vessels?

The following are prohibited:

(a) Commercial fishing in the waters of Geikie, Tarr, Johns Hopkins and Reid Inlets.

(b) Commercial fishing in the waters of the west arm of Glacier Bay north of 58° 50.0' N latitude, except commercial fishermen who have been authorized by the superintendent to troll for salmon may troll for king salmon during the period October 1 through April 30, in compliance with state commercial fishing regulations.

(c) Commercial fishing in the east arm of Glacier Bay, north of an imaginary line running from Point Caroline through the southern point of Garforth Island and extending to the east side of Muir Inlet, except commercial fishermen who have been authorized by the superintendent to troll for salmon may troll for king salmon south of 58° 50.0' N latitude during the period October 1 through April 30, in compliance with state commercial fishing regulations.

Vessel Permits

§ 13.1150 Is a permit required for a vessel in Glacier Bay?

A permit from the superintendent is required for motor vessels in accordance with this subpart and applicable regulations in this part.

§ 13.1152 Private vessel permits and conditions.

In Glacier Bay from June 1 through August 31 an individual must have a permit from the NPS issued for a specific vessel for a specific period of time.

(a) From June 1 through August 31, when the operator of a private vessel

enters Glacier Bay for the first time that calendar year, the operator must go directly to the Bartlett Cove Ranger Station for orientation.

(b) From May 1 through September 30, the operator of a private vessel must immediately notify the Bartlett Cove Ranger Station of the vessel's entry to or exit from Glacier Bay.

§ 13.1154 Commercial vessel permits and conditions.

Each commercially operated motor vessel must have a permit to operate in Glacier Bay National Park and Preserve in accordance with § 5.3 of this chapter.

(a) A cruise ship must have a concession contract to operate in Glacier Bay.

(b) A tour vessel, charter vessel, and passenger ferry must have a commercial authorization to operate in Glacier Bay.

(c) The operator of a cruise ship, tour vessel, charter vessel, and passenger ferry must notify the Bartlett Cove Ranger Station of the vessel's entry into Glacier Bay within 48 hours in advance of entering Glacier Bay or immediately upon entry.

(d) Cruise ships and tour vessels are prohibited from operating in the Beardslee Entrance and at the entrance to Adams Inlet, as defined as waters within the Wilderness boundaries in those respective areas.

(e) Off-boat activity from a cruise ship, tour vessel, or charter vessel is prohibited, unless authorized by the superintendent.

(f) Off-boat activity from a passenger ferry is prohibited, except for passenger access at the Bartlett Cove docks.

(g) A passenger ferry must travel a direct course between the mouth of Glacier Bay and Bartlett Cove, except when the vessel is granted safe harbor by the Superintendent as stated in § 13.1156(e).

§ 13.1156 Exceptions from vessel permit requirement.

A vessel permit is not required in Glacier Bay when:

(a) A motor vessel is engaged in official, non-commercial business of the State or Federal Government;

(b) A motor vessel is operating in Bartlett Cove waters east of a line extending from the long axis of the fuel dock to the wilderness boundary of Lester Island;

(c) One motor vessel is launched from a motor vessel that has a permit and only while the authorized motor vessel remains at anchor or operated in accordance with a concession agreement from a permitted motor vessel while that vessel is not underway;

(d) A commercial fishing vessel authorized under this subpart is actually engaged in commercial fishing; or
 (e) A vessel is granted safe harbor by the superintendent.

§ 13.1158 Prohibitions.

(a) Operating a motor vessel in Glacier Bay without a required permit is prohibited.

(b) Violating a term or condition of a permit or an operating condition or restriction issued or imposed pursuant to this chapter is prohibited.

(c) The superintendent may immediately suspend or revoke a permit or deny a future permit request as a result of a violation of a provision of this chapter.

§ 13.1160 Restrictions on vessel entry.

The superintendent will allow vessel entry in accordance with the following table:

Type of vessel	Daily vessel quotas (DVQ)	Period covered by DVQ	Seasonal vessel quota (SVQ)	Period covered by SVQ
Cruise ship	2	Year-round	Up to 184	June 1–August 31.
Tour vessel	3	Year-round	Up to 122	May and September.
Charter vessel	6	Jun 1–Aug 31	N/A	N/A.
Private vessel	25	Jun 1–Aug 31	N/A	N/A.
Passenger ferry	1	Year-round	N/A	N/A.

Note: Cruise ships and tour vessels are limited to the daily vessel quota year-round. Charter and private vessels are not subject to quotas from September through May.

(a) The Director will reduce the vessel quota levels for any or all categories of vessels in this subpart as required to protect the values and purposes of Glacier Bay National Park and Preserve. The director will make these reductions based on the controlling biological opinion issued by the National Oceanic and Atmospheric Administration Fisheries Service under section 7 of the Endangered Species Act, applicable authority, and any other relevant information.

(b) The superintendent will annually determine the cruise ship quota. This determination will be based upon applicable authorities, appropriate public comment and available scientific and other information. The number will be subject to the maximum daily vessel quota of two vessels.

(c) From June 1 through August 31, the superintendent will designate one private vessel permit from the daily quota of 25 as a transit permit. This transit permit may be used only to directly exit Glacier Bay from Bartlett Cove and return directly to Bartlett Cove. The superintendent may establish application procedures and operating conditions. Violating operating conditions is prohibited. This paragraph will cease to have effect on November 30, 2011.

(d) Nothing in this section will be construed to prevent the superintendent from taking any action at any time to protect the values and purposes of Glacier Bay National Park and Preserve.

Vessel Operating Restrictions

§ 13.1170 What are the rules for operating vessels?

(a) Operating a vessel within 1/4 nautical mile of a whale is prohibited, except for a commercial fishing vessel authorized under this subpart that is actively trolling, setting, or pulling long lines, or setting or pulling crab pots.

(b) The operator of a vessel inadvertently positioned within 1/4 nautical mile of a whale must immediately slow the vessel to ten knots or less, without shifting into reverse unless impact is likely. The operator must direct or maintain the vessel on as steady a course as possible away from the whale until at least 1/4 nautical mile of separation is established. Failure to take such action is prohibited.

(c) The operator of a vessel or seaplane positioned within 1/2 nautical mile of a whale is prohibited from altering course or speed in a manner that results in decreasing the distance between the whale and the vessel or seaplane.

§ 13.1172 When general operating restrictions do not apply.

Section 13.1170 does not apply to a vessel being used in connection with federally permitted whale research or monitoring; other closures and restrictions in “Vessel Operating Restrictions,” §§ 13.1170 through 13.1180, do not apply to authorized persons conducting emergency or law enforcement operations, research or resource management, park administration/supply, or other necessary patrols.

§ 13.1174 Whale water restrictions.

(a) May 15 through September 30, the following waters are designated as whale waters.

(1) Waters north of a line drawn from Point Carolus to Point Gustavus; and south of a line drawn from the northernmost point of Lars Island across the northernmost point of Strawberry Island to the point where it intersects the line that defines the Beardslee Island group, as described in § 13.1180(a)(4), and following that line south and west to the Bartlett Cove shore (so as to include the Beardslee Entrance and Bartlett Cove); and

(2) Other waters designated by the superintendent as temporary whale waters.

(b) The public will be notified of other waters designated as temporary whale waters in accordance with § 1.7 of this chapter.

(c) Violation of a whale water restriction is prohibited. The following restrictions apply in whale waters unless otherwise provided by the superintendent in the designation:

(1) Operating a motor vessel less than one nautical mile from shore (where the width of the water permits), or in narrower areas navigating outside of mid-channel is prohibited. This restriction does not apply to motor vessels less than 18 feet in length, or vessels actively engaged in fishing activities or operating solely under sail.

(2) Unless other restrictions apply, operators may perpendicularly approach or land on shore (i.e., by the most direct line to shore) through designated whale waters, but they may not transit along the shore.

(3) Operators must follow motor vessel speed limits in § 13.1176(a).

§ 13.1176 Speed restrictions.

(a) From May 15 through September 30, in designated whale waters the following are prohibited:

(1) Operating a motor vessel at more than 20 knots speed through the water; or

(2) Operating a motor vessel at more than 13 knots speed through the water, when the superintendent has designated a maximum speed of 13 knots, or at a maximum speed designated by the superintendent based on NOAA guidelines or new scientific information.

(b) From July 1 through August 31, operating a motor vessel on Johns Hopkins Inlet waters south of 58°54.2' N latitude (a line running due west from Jaw Point) at more than 10 knots speed through the water is prohibited.

§ 13.1178 Closed waters, islands and other areas.

The following are prohibited:

(a) Operating a vessel or otherwise approaching within 100 yards of South Marble Island; or Flapjack Island; or any of the three small unnamed islets approximately one nautical mile southeast of Flapjack Island; or Eider Island; or Boulder Island; or Geikie Rock; or Lone Island; or the northern three-fourths of Leland Island (north of 58°39.1' N latitude); or any of the four small unnamed islands located approximately one nautical mile north (one island), and 1.5 nautical miles east (three islands) of the easternmost point of Russell Island; or Graves Rocks (on the outer coast); or Cormorant Rock, or any adjacent rock, including all of the near-shore rocks located along the outer coast, for a distance of 1½ nautical miles, southeast from the mouth of Lituya Bay; or the surf line along the outer coast, for a distance of 1½ nautical miles northwest of the mouth of the glacial river at Cape Fairweather.

(b) Operating a vessel or otherwise approaching within 100 yards of a Steller (northern) sea lion (*Eumetopias jubatus*) hauled-out on land or a rock or a nesting seabird colony: *Provided, however,* that vessels may approach within 50 yards of that part of South Marble Island lying south of 58°38.6' N latitude (approximately the southern one-half of South Marble Island) to view seabirds.

(c) May 1 through August 31, operating a vessel, or otherwise approaching within ¼ nautical mile of, Spider Island or any of the four small islets lying immediately west of Spider Island.

(d) May 1 through August 31, operating a cruise ship on Johns Hopkins Inlet waters south of 58°54.2' N

latitude (an imaginary line running approximately due west from Jaw Point).

(e) May 1 through June 30, operating a vessel or a seaplane on Johns Hopkins Inlet waters south of 58°54.2' N latitude (an imaginary line running approximately due west from Jaw Point).

(f) July 1 through August 31, operating a vessel or a seaplane on Johns Hopkins Inlet waters south of 58°54.2' N latitude (an imaginary line running approximately due west from Jaw Point), within ¼ nautical mile of a seal hauled out on ice; except when safe navigation requires, and then with due care to maintain the ¼ nautical mile distance from concentrations of seals.

(g) Restrictions imposed in this section are minimum distances. Park visitors are advised that protection of park wildlife may require that visitors maintain greater distances from wildlife. *See*, 36 CFR 2.2 (Wildlife protection).

§ 13.1180 Closed waters, motor vessels and seaplanes.

(a) May 1 through September 15, operating a motor vessel or a seaplane on the following water is prohibited:

(1) Adams Inlet, east of 135°59.2' W longitude (an imaginary line running approximately due north and south through the charted (5) obstruction located approximately 2¼ nautical miles east of Pt. George).

(2) Rendu Inlet, north of the wilderness boundary at the mouth of the inlet.

(3) Hugh Miller complex, including Scidmore Bay and Charpentier Inlet, west of the wilderness boundary at the mouth of the Hugh Miller Inlet.

(4) Waters within the Beardslee Island group (except the Beardslee Entrance), that is defined by an imaginary line running due west from shore to the easternmost point of Lester Island, then along the south shore of Lester Island to its western end, then to the southernmost point of Young Island, then north along the west shore and east along the north shore of Young Island to its northernmost point, then at a bearing of 15 true to an imaginary point located one nautical mile due east of the easternmost point of Strawberry Island, then at a bearing of 345 true to the northernmost point of Flapjack Island, then at a bearing of 81 true to the northernmost point of the unnamed island immediately to the east of Flapjack Island, then southeasterly to the northernmost point of the next unnamed island, then southeasterly along the (Beartrack Cove) shore of that island to its easternmost point, then due east to shore.

(b) June 1 through July 15, operating a motor vessel or a seaplane on the waters of Muir Inlet north of 59°02.7' N latitude (an imaginary line running approximately due west from the point of land on the east shore approximately 1 nautical mile north of the McBride Glacier) is prohibited.

(c) July 16 through August 31, operating a motor vessel or a seaplane on the waters of Wachusett Inlet west of 136°12.0' W longitude (an imaginary line running approximately due north from the point of land on the south shore of Wachusett Inlet approximately 2¼ nautical miles west of Rowlee Point) is prohibited.

§ 13.1182 Noise restrictions.

June 1 through August 31, except on vessels in transit or as otherwise authorized by the superintendent, the use of generators or other non-propulsive motors (except a windlass) is prohibited from 10 p.m. until 6 a.m. in Reid Inlet, Blue Mouse Cove and North Sandy Cove.

§ 13.1184 Other restrictions on vessels.

The superintendent will make rules for the safe and equitable use of Bartlett Cove waters and for park docks. The superintendent will notify the public of these rules by posting of a sign or a copy of them at the dock. Failure to obey a sign or posted rule is prohibited.

§ 13.1186 What are the emission standards for vessels?

(a) The State of Alaska statutes and regulations applicable to marine vessel emission standards are adopted as a part of these regulations.

(b) Violating a State of Alaska statute or regulation applicable to marine vessel visible emission standards is prohibited.

§ 13.1188 Where to get charts depicting closed waters.

Closed waters and islands within Glacier Bay as described in §§ 13.1174–13.1180 of this subpart are described as depicted on NOAA Chart #17318 GLACIER BAY (4th Ed., Mar. 6/93) available to the public at park offices at Bartlett Cove and Juneau, Alaska.

Subpart O—Special Regulations—Katmai National Park and Preserve**General Provisions****§ 13.1202 Fishing.**

Fishing is allowed in accordance with § 13.40 of this chapter, but only with artificial lures and with the following additional exceptions:

(a) Bait, as defined by State law, may be used only on the Naknek River during times and dates established by

the Alaska Department of Fish and Game, and only from markers located just above Trefon's cabin downstream to the park boundary.

(b) Flyfishing only is allowed on the Brooks River between Brooks Lake and the posted signs near Brooks Camp.

(c) No person may retain more than one fish per day caught on Brooks River, on the waters between the posted signs 200 yards from the outlet of Brooks Lake, or on the water between the posted signs 200 yards from the mouth of the Brooks River on Naknek Lake.

§ 13.1204 Traditional red fish fishery.

Local residents who are descendants of Katmai residents who lived in the Naknek Lake and River Drainage will be authorized, in accordance with State fishing regulations or conditions established by the Superintendent, to continue their traditional fishery for red fish (spawned-out sockeye salmon that have no significant commercial value).

§ 13.1206 Wildlife distance conditions.

(a) Approaching a bear or any large mammal within 50 yards is prohibited.

(b) Continuing to occupy a position within 50 yards of a bear that is using a concentrated food source, including, but not limited to, animal carcasses, spawning salmon, and other feeding areas is prohibited.

(c) The prohibitions in this section do not apply to persons—

- (1) Engaged in a legal hunt;
- (2) On a designated bear viewing structure;
- (3) In compliance with a written protocol approved by the Superintendent; or
- (4) Who are otherwise directed by a park employee.

§ 13.1208 Lake Camp.

Leaving a boat, trailer, or vehicle unattended for more than 72 hours at the facilities associated with the Lake Camp launching ramp is prohibited without authorization from the Superintendent. Leaving a boat unattended at the Lake Camp dock is prohibited.

Brooks Camp Developed Area

§ 13.1220 Brooks Camp Developed Area definition.

For purposes of this subpart, the Brooks Camp Developed Area (BCDA) means all park areas within a 1.5 mile radius from the Brooks Falls Platform and is depicted on a map available at the park visitor center. Sections 13.1222–13.2240 of this subpart apply from May 1 through October 31 unless stated otherwise.

§ 13.1222 Camping.

(a) Camping is prohibited in all areas of the BCDA except within the Brooks Camp Campground and other designated areas.

(b) Camping in Brooks Camp Campground for more than a total of 7 nights during the month of July is prohibited.

(c) Exceeding a group size limit of 6 persons per site in the Brooks Camp Campground while in operation as a designated fee area is prohibited.

§ 13.1224 Visiting hours.

The Falls and Riffles bear viewing platforms and boardwalks are closed from 10 pm to 7 am from June 15 through August 15. Entering or going upon these platforms and boardwalks during these hours is prohibited.

§ 13.1226 Brooks Falls area.

The area within 50 yards of the ordinary high water marks of the Brooks River from the Riffles Bear Viewing Platform to a point 100 yards above Brooks Falls is closed to entry from June 15 through August 15, unless authorized by the Superintendent. The Superintendent may designate a route to transit through the closed area.

§ 13.1228 Food storage.

In the BCDA, all fish must be stored in designated facilities and in accordance with conditions established by the Superintendent. Storing fish in any other manner is prohibited. Employees may store fish in employee residences.

§ 13.1230 Campfires.

Lighting or maintaining a fire is prohibited except in established receptacles in the BCDA.

§ 13.1232 Sanitation.

Within the BCDA, washing dishes or cooking utensils at locations other than the water spigot near the food cache in the Brooks Campground or other designated areas is prohibited.

§ 13.1234 Pets.

Possessing a pet in the BCDA is prohibited.

§ 13.1236 Bear orientation.

All persons visiting the BCDA must receive an NPS-approved Bear Orientation. Failure to receive an NPS-approved Bear Orientation is prohibited.

§ 13.1238 Picnicking.

Within the BCDA, picnicking in locations other than the Brooks Camp Visitor Center picnic area, Brooks Campground, Brooks Lake Picnic Area, and a site designated in the employee

housing area is prohibited. Food consumption or possession while at the Brooks River is prohibited.

§ 13.1240 Unattended property.

Leaving property, other than motorboats and planes, unattended for any length of time within the BCDA is prohibited, except at the Brooks Lodge Porch, Brooks Campground, or designated equipment caches as posted at the Brooks Camp Visitor Center.

§ 13.1242 BCDA closures and restrictions.

The Superintendent may prohibit or otherwise restrict activities in the BCDA to protect public health and safety or park resources. Information on BCDA closures and restrictions will be available for inspection at the park visitor center. Violating BCDA closures or restrictions is prohibited.

Subpart P—Special Regulations—Kenai Fjords National Park

§ 13.1302 Subsistence.

Subsistence uses are prohibited in, and the provisions of Subpart F of this part shall not apply to, Kenai Fjords National Park.

§ 13.1304 Exit Glacier.

(a) Except for areas designated by the Superintendent, climbing or walking on, in, or under Exit Glacier is prohibited within ½ mile of the glacial terminus from May 1 through October 31, and during other periods as determined by the Superintendent. Restrictions and exceptions will be available for inspection at the park visitor center, on bulletin boards or signs, or by other appropriate means.

(b) Entering an ice fall hazard zone is prohibited. These zones will be designated with signs, fences, rope barriers, or similar devices.

§ 13.1306 Public use cabins.

(a) Camping within 500 feet of the North Arm or Holgate public use cabin is prohibited except by the cabin permit holder on a designated tent site, or as otherwise authorized by the Superintendent.

(b) Camping within the 5-acre NPS-leased parcel surrounding the Aialik public use cabin is prohibited except by the cabin permit holder on a designated tent site, or as otherwise authorized by the Superintendent.

(c) Lighting or maintaining a fire within 500 feet of the North Arm or Holgate public use cabins is prohibited except by the cabin permit holder in NPS established receptacles, or as otherwise authorized by the Superintendent.

(d) Lighting or maintaining a fire within the 5-acre NPS-leased parcel surrounding the Aialik public use cabin is prohibited except by the cabin permit holder in NPS-established receptacles, or as otherwise authorized by the Superintendent.

Subpart Q—Special Regulations—Klondike Gold Rush National Historical Park

§ 13.1402 Camping.

(a) Camping is permitted only in designated areas.

(b) Camping without a permit is prohibited. The Superintendent may establish permit terms and conditions. Failure to comply with permit terms and conditions is prohibited.

(c) Camping at Dyea campground more than 14 days in a calendar year is prohibited.

§ 13.1404 Preservation of natural, cultural, and archaeological resources.

The Superintendent may allow the gathering of mushrooms in accordance with § 2.1(c) of this chapter.

§ 13.1406 State lands.

The National Park Service administers certain state-owned lands and waters within the boundary of Klondike Gold Rush National Historical Park under a memorandum of understanding with the State of Alaska. The prohibition on carrying, possession, and use of weapons, traps, and nets in this chapter does not apply to the lawful taking of wildlife on these State-owned lands and waters.

Subpart R—Special Regulations—Kobuk Valley National Park

§ 13.1502 Subsistence resident zone.

The following area is included within the resident zone for Kobuk Valley National Park: The NANA Region.

§ 13.1504 Customary trade.

In addition to the exchange of furs for cash, “customary trade” in Kobuk Valley National Park shall include the selling of handicraft articles made from plant material taken by local rural residents of the park area.

Subpart S—Special Regulations—Lake Clark National Park and Preserve

§ 13.1602 Subsistence resident zone.

The following communities and areas are included within the resident zone for Lake Clark National Park: Iliamna, Lime Village, Newhalen, Nondalton, Pedro Bay, and Port Alsworth.

Subpart T—Special Regulations—Noatak National Preserve [Reserved]

Subpart U—Special Regulations—Sitka National Historical Park

§ 13.1802 Prohibited activities.

The following activities are prohibited in Sitka National Historical Park—

- (a) Camping.
- (b) Riding a bicycle, except in the public parking areas and on routes designated by the Superintendent. Routes may only be designated for bicycle use based on a written determination that such use is consistent with the purposes for which the park was established.

(c) The use of roller skates, skateboards, roller skis, in-line skates, and other similar devices.

Subpart V—Special Regulations—Wrangell-St. Elias National Park and Preserve

§ 13.1902 Subsistence.

(a) *Subsistence resident zone communities.* The following communities and areas are included within the resident zone for Wrangell-St. Elias National Park: Chisana, Chistochina, Chitina, Copper Center, Dot Lake, Gakona, Gakona Junction, Glennallen, Gulkana, Healy Lake, Kenny Lake, Lower Tonsina, McCarthy, Mentasta Lake, Nabesna, Northway/Northway Village/Northway Junction, Slana, Tanacross, Tazlina, Tetlin, Tok, Tonsina, and Yakutat.

(b) *Subsistence resident zone boundaries.* Boundaries for communities and areas added to the park resident zone will be determined by the Superintendent after consultation with the affected area or community. If the Superintendent and community are not able to agree on a boundary within two years, the boundary of the area or community added will be the boundary of the Census Designated Place, or other area designation, used by the Alaska Department of Labor for census purposes for that community or area. Copies of the boundary map will be available in the park headquarters office.

(c) *Subsistence aircraft exemption.* In extraordinary cases where no reasonable alternative exists local rural residents who permanently reside in the following exempted community(ies) may use aircraft for access to lands and waters within the park for subsistence purposes in accordance with a permit issued by the Superintendent: Yakutat (for access to the Malaspina Forelands Area only).

§ 13.1904 Kennecott Mines National Historic Landmark (KNHL).

A map showing the boundaries of the KNHL is available at the park visitor center. The following activities are prohibited within the KNHL—

- (a) Entering closed structures or passing beyond barricades;
- (b) Entering mine tunnels and other mine openings;
- (c) Camping in or on any historic structure; and
- (d) Camping within the mill site of the KNHL. The mill site consists of the collection of buildings clustered around the mill building on both sides of National Creek. For purposes of this subpart, the mill site is the area bounded by Bonanza Creek to the north, the Kennicott Glacier to the west, the 2,200 foot contour line to the east, and Sweet Creek to the south. The mill site is depicted on a map available at the park visitor center; and

(e) Lighting or maintaining a fire within the mill site as defined in paragraph (d) of this section.

§ 13.1906 Headquarters/Visitor Center Developed Area (HVCDA).

For purposes of this subpart, the HVCDA consists of all park areas within a ½ mile radius of the Wrangell-St. Elias National Park and Preserve Headquarters building, other than the Valdez Trail. The following activities are prohibited within the HVCDA:

- (a) Lighting or maintaining a fire;
- (b) Camping;
- (c) Entering the area after visiting hours (visiting hours will be posted at the entrance gate).

§ 13.1908 Slana Developed Area (SDA).

For purposes of this subpart, the Slana Developed Area consists of all park areas within a ¼ mile radius of the Slana Ranger Station.

§ 13.1910 KNHL and developed area closures and restrictions.

The Superintendent may prohibit or otherwise restrict activities in the KNHL, Headquarters/Visitor Center Developed Area, and Slana Developed Area to protect public health and safety or park resources. Information on closures and restrictions will be available at the park visitor center. Violating these closures or restrictions is prohibited. Notwithstanding the provisions of this subpart, the Superintendent may issue a Special Use Permit to authorize uses in the KNHL and either developed area.

**Subpart W—Special Regulations—
Yukon Charley Rivers National
Preserve [Reserved]**

Dated: November 17, 2006.

David M. Verhey,

*Acting Assistant Secretary, Fish and Wildlife
and Parks.*

[FR Doc. E6-19968 Filed 11-29-06; 8:45 am]

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Federal Register

**Thursday,
November 30, 2006**

Part V

Department of Defense

Department of the Army

32 CFR Parts 536 and 537

**Claims Against the United States and
Claims on Behalf of the United States;
Final Rule**

DEPARTMENT OF DEFENSE**Department of the Army****32 CFR Part 536**

[Docket No. USA-2006-0022]

RIN 0702-AA54

Claims Against the United States**AGENCY:** Department of the Army, DOD.**ACTION:** Final rule.

SUMMARY: The Department of the Army is publishing as a final rule an amendment to its regulations to reflect a substantial revision of AR 27-20, an Army publication which governs the processing of claims worldwide. The purpose of this revision is to make AR 27-20 clearer and easier to use, after years of piecemeal amendments. This rewrite also ensures that AR 27-20 is in keeping with current statutes, legal opinions and Department of Justice guidance pertaining to claims processing. This updated rule will expedite payment of meritorious claims throughout the world.

DATES: *Effective date:* January 2, 2007.**ADDRESSES:** U.S. Army Claims Service, ATTN: JACS-TCO, 4411 Llewellyn Avenue, Fort Meade, MD 20755-5360.**FOR FURTHER INFORMATION CONTACT:** George Westerbeke, (301) 677-7009, x220.**SUPPLEMENTARY INFORMATION:****A. Background**

In the August 11, 2006 issue of the *Federal Register* (71 FR 46260), the Department of the Army published a proposed rule amending 32 CFR Part 536. The Department of the Army received no responses to the proposed rule.

AR 27-20 and its companion DA Pam 27-162 will be available on the Web site of the U.S. Army Publications Directorate, <http://www.apd.army.mil>, within a few months of the date of this *Federal Register* publication of 32 CFR Part 536. Users are encouraged to consult the online versions, whose structure and paragraph numbering are comparable.

B. Regulatory Flexibility Act

The Department of the Army has determined that the Regulatory Flexibility Act does not apply because the rule does not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601-612.

C. Unfunded Mandates Reform Act

The Department of the Army has determined that the Unfunded Mandates Reform Act does not apply because the rule does not include a mandate that may result in estimated costs to State, local or tribal governments in the aggregate, or the private sector, of \$100 million or more.

D. National Environmental Policy Act

The Department of the Army has determined that the National Environmental Policy Act does not apply because the rule does not have an adverse impact on the environment.

E. Paperwork Reduction Act

The Department of the Army has determined that the Paperwork Reduction Act does not apply because the rule does not involve collection of information from the public.

F. Executive Order 12630 (Government Actions and Interference With Constitutionally Protected Property Rights)

The Department of the Army has determined that Executive Order 12630 does not apply because the rule does not impair private property rights.

G. Executive Order 12866 (Regulatory Planning and Review)

The Department of the Army has determined that according to the criteria defined in Executive Order 12866 this rule is not a significant regulatory action. As such, the rule is not subject to Office of Management and Budget review under section 6(a)(3) of the Executive Order.

H. Executive Order 13045 (Protection of Children From Environmental Health Risk and Safety Risks)

The Department of the Army has determined that according to the criteria defined in Executive Order 13045 this rule does not apply.

I. Executive Order 13132 (Federalism)

The Department of the Army has determined that according to the criteria defined in Executive Order 13132 this rule does not apply because it will not have a substantial 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.

Colonel Jill M. Grant,
Commander, United States Army Claims Service.

List of Subjects in 32 CFR 536

Claims, Government employees, Military personnel.

■ For reasons stated in the preamble the Department of the Army revises 32 CFR part 536 to read as follows:

PART 536—CLAIMS AGAINST THE UNITED STATES**Subpart A—The Army Claims System**

Sec.

536.1 Purpose of the Army Claims System.

536.2 Claims authorities.

536.3 Command and organizational relationships.

536.4 Designation of claims attorneys.

536.5 The Judge Advocate General.

536.6 The Army claims mission.

536.7 Responsibilities of the Commander USARCS.

536.8 Responsibilities and operations of command claims services.

536.9 Responsibilities and operations of area claims offices.

536.10 Responsibilities and operations of claims processing offices.

536.11 Chief of Engineers.

536.12 Commanding General, U.S. Army Medical Command.

536.13 Chief, National Guard Bureau.

536.14 Commanders of major Army commands.

536.15 Claims policies.

536.16 Release of information policies.

536.17 Single-service claims responsibility (DODD 5515.8 and DODD 5515.9).

536.18 Cross-servicing of claims.

536.19 Disaster claims planning.

536.20 Claims assistance visits.

536.21 Annual claims award.

Subpart B—Investigation and Processing of Claims

536.22 Claims Investigative Responsibility—general.

536.23 Identifying claims incidents both for and against the government.

536.24 Delegation of investigative responsibility.

536.25 Procedures for accepting claims.

536.26 Identification of a proper claim.

536.27 Identification of a proper claimant.

536.28 Claims acknowledgment.

536.29 Revision of filed claims.

536.30 Action upon receipt of claim.

536.31 Opening claim files.

536.32 Transfer of claims among armed services branches.

536.33 Use of small claims procedures.

536.34 Determination of correct statute.

536.35 Unique issues related to environmental claims.

536.36 Related remedies.

536.37 Importance of the claims investigation.

536.38 Elements of the investigation.

536.39 Use of experts, consultants and appraisers.

- 536.40 Conducting the investigation.
- 536.41 Determination of liability—generally.
- 536.42 Constitutional torts.
- 536.43 Incident to service.
- 536.44 FECA and LSHWCA claims exclusions.
- 536.45 Statutory exceptions.
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- 536.47 Statute of limitations.
- 536.48 Federal employee requirement.
- 536.49 Scope of employment requirement.
- 536.50 Determination of damages—applicable law.
- 536.51 Collateral source rule.
- 536.52 Subrogation.
- 536.53 Evaluation of claims—general rules and guidelines.
- 536.54 Joint tortfeasors.
- 536.55 Structured settlements.
- 536.56 Negotiations—purpose and extent.
- 536.57 Who should negotiate.
- 536.58 Settlement negotiations with unrepresented claimants.
- 536.59 Settlement or approval authority.
- 536.60 Splitting property damage and personal injury claims.
- 536.61 Advance payments.
- 536.62 Action memorandums.
- 536.63 Settlement agreements.
- 536.64 Final offers.
- 536.65 Denial notice.
- 536.66 The “Parker” denial.
- 536.67 Mailing procedures.
- 536.68 Appeal or reconsideration.
- 536.69 Retention of file.
- 536.70 Preparation and forwarding of payment vouchers.
- 536.71 Fund sources.
- 536.72 Finality of settlement.
- Subpart C—Claims Cognizable Under the Military Claims Act**
- 536.73 Statutory authority for the Military Claims Act.
- 536.74 Scope for claims under the Military Claims Act.
- 536.75 Claims payable under the Military Claims Act.
- 536.76 Claims not payable under the Military Claims Act.
- 536.77 Applicable law for claims under the Military Claims Act.
- 536.78 Settlement Authority for claims under the Military Claims Act.
- 536.79 Action on appeal under the Military Claims Act.
- 536.80 Payment of costs, settlements, and judgments related to certain medical malpractice claims.
- 536.81 Payment of costs, settlements, and judgments related to certain legal malpractice claims.
- 536.82 Reopening an MCA claim after final action by a settlement authority.
- Subpart D—Claims Cognizable Under the Federal Tort Claims Act**
- 536.83 Statutory Authority for the Federal Tort Claims Act.
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- Subpart E—Claims Cognizable Under the Non-Scope Claims Act**
- 536.90 Statutory authority for the Non-Scope Claims Act.
- 536.91 Scope for claims under the Non-Scope Claims Act.
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- Subpart F—Claims Cognizable Under the National Guard Claims Act**
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- 536.100 Applicable law for claims under the National Guard Claims Act.
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- Subpart G—Claims Cognizable Under International Agreements**
- 536.103 Statutory authority for claims cognizable under international claims agreements.
- 536.104 Current agreements in force.
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- 536.106 Definitions for international agreements claims.
- 536.107 Scope for international agreements claims arising in the United States.
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- 536.118 Related statutes for maritime claims.
- 536.119 Scope for maritime claims.
- 536.120 Claims payable as maritime claims.
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- 536.122 Limitation of settlement of maritime claims.
- 536.123 Limitation of liability for maritime claims.
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- Subpart I—Claims Cognizable Under Article 139, Uniform Code of Military Justice**
- 536.125 Statutory authority for the Uniform Code of Military Justice (UCMJ) claims.
- 536.126 Purpose of UCMJ claims.
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Authority: 10 U.S.C. 2733; 10 U.S.C. 1089; 10 U.S.C. 1054; 28 U.S.C. 1291, 2401–2402, 2411–2412, 2671–2680; 10 U.S.C. 2737; 32 U.S.C. 715; 10 U.S.C. 2734a, 2734b; 10 U.S.C. 2734; 10 U.S.C. 4801, 4802, 4806; 46 U.S.C. app. 740; 39 U.S.C. 411; 10 U.S.C. 939; 10 U.S.C. 2736; 10 U.S.C. 2735; 10 U.S.C. 2731.

PART 536—CLAIMS AGAINST THE UNITED STATES

Subpart A—The Army Claims System

§ 536.1 Purpose of the Army Claims System.

This part sets forth policies and procedures that govern the investigating, processing, and settling of claims against, and in favor of, the United States under the authority conferred by statutes, regulations, international and interagency agreements, and Department of Defense Directives (DODDs). It is intended to ensure that claims are investigated properly and adjudicated according to applicable law, and valid recoveries and affirmative claims are pursued against carriers, third-party insurers, and tortfeasors.

§ 536.2 Claims authorities.

(a) *General.* Claims cognizable under the following list of statutes and authorities are processed and settled under DA Pam 27–162 and this part. All of these materials may be viewed on the USARCS Web site, [https://www.jagcnet.army.mil/85256F33005C2B92/\(JAGCNETDocID\)/HOME?OPENDOCUMENT](https://www.jagcnet.army.mil/85256F33005C2B92/(JAGCNETDocID)/HOME?OPENDOCUMENT). Select the link “Claims Resources.”

(1) *Tort Claims.* (i) The Military Claims Act (MCA), 10 United States Code (U.S.C.) 2733 (see subpart C of this part). The “incident-to-service” provision, applicable to both military and civilian personnel of the Department of Defense, is contained in the MCA.

(ii) The Gonzales Act, 10 U.S.C. 1089. This act permits individual suits against health care providers for certain torts (see § 536.80).

(iii) Certain suits arising out of legal malpractice, 10 U.S.C. 1054, discussed at § 536.81 and at DA Pam 27–162, paragraph 2–62f.

(iv) The Federal Tort Claims Act (FTCA), 28 U.S.C. 1291, 1402, 2401–2402, 2411–2412, and 2671–2680 (see subpart D of this part). The Westfall Act, 28 U.S.C. 2679, an integral part of the FTCA, provides absolute immunity from individual suit for common law torts for employees of the United States acting within the scope of their employment.

(A) The legislative history of the FTCA.

(B) Regulations of the Attorney General implementing the Federal Tort Claims Act, 28 CFR Part 14.

(C) An appendix to 28 CFR Part 14 sets forth certain delegations of settlement authority to the Secretary of Veterans Affairs, the Postmaster General, the Secretary of Defense, the Secretary of Transportation, and the Secretary of Health and Human Services.

(v) The Non-Scope Claims Act (NSCA), 10 U.S.C. 2737 (see subpart E of this part).

(vi) The National Guard Claims Act (NGCA), 32 U.S.C. 715 (see subpart F of this part).

(vii) Claims under International Agreements or the Foreign Claims Act.

(A) International Agreements Claims Act (IACA), 10 U.S.C. 2734a and 2734b.

(B) Foreign Claims Act (FCA), 10 U.S.C. 2734 (see subpart J of this part).

(viii) The Army Maritime Claims Settlement Act (AMCSA), 10 U.S.C. 4801, 4802 and 4806. Affirmative claims under the AMCSA are processed under 10 U.S.C. 4803 and 4804 (see § 537.16 of this chapter).

(ix) Admiralty Extension Act (AEA), 46 U.S.C. app. 740 (see subpart H of this part).

(x) Claims against nonappropriated fund (NAF) activities and the risk management program (RIMP) (see subpart K of this part), processed under Army Regulation (AR) 215–1 and AR 608–10.

(xi) Claims by the U.S. Postal Service for losses or shortages in postal accounts caused by unbonded Army personnel (39 U.S.C. 411 and Department of Defense (DOD) Manual 4525.6–M).

(2) *Personnel Claims (subpart I of this part and AR 27–20, chapter 11).*

(i) The Personnel Claims Act (PCA), 31 U.S.C. 3721 (see AR 27–20, chapter 11).

(ii) Redress of injuries to personal property, Uniform Code of Military

Justice (UCMJ), Article 139, 10 U.S.C. 939 (see subpart I of this part).

(3) *Affirmative Claims (32 CFR Part 537).*

(i) The Federal Claims Collection Act (FCCA), 31 U.S.C. 3711–3720E.

(ii) The Federal Medical Care Recovery Act (FMCRA), 42 U.S.C. 2651–2653.

(iii) Collection from third-party payers of reasonable costs of healthcare services, 10 U.S.C. 1095.

(b) *Fund source authority for claims under Title 10 statutes.* 10 U.S.C. 2736, advance payments for certain property claims (see § 536.71).

(c) *Fund source authority for tort claims paid by Financial Management Service (FMS).* 31 U.S.C. 1304, provides authority for judgments, awards and compromise settlements.

(d) *Additional authorities under Title 10.* (1) 10 U.S.C. 2735, establishes that settlements (or “actions”) under the Title 10 claims processing statutes are final and conclusive.

(2) 10 U.S.C. 2731, provides a definition of the word “settle.”

(e) *Related remedies statutes.* The Army frequently receives claims or inquiries that are not cognizable under the statutory and other authorities administered by the U.S. Army under this publication and DA Pam 27–162. Every effort should be made to refer the claim or inquiry to the proper authority following the guidance in § 536.34 or § 536.36. (See also the corresponding paragraphs 2–15 and 2–17, respectively, in DA Pam 27–162). Some authorities for related remedies are used more frequently than others. Where an authority for a related remedy is frequently used, it is listed below and is posted on the USARCS Web site (for the address see § 536.2(a)).

(1) Tucker Act, 28 U.S.C. 1346, provides exclusive jurisdiction in the Court of Federal Claims over causes of actions alleging property loss caused by a Fifth Amendment “taking.”

(2) Maritime authority statutes, Public Vessels Act (PVA), 46 U.S.C. app. 781–790, Suits in Admiralty Act (SIAA), 46 U.S.C. app. 741–752, and the Rivers and Harbors Act, 33 U.S.C. 408 and 412.

(3) Federal Employees Compensation Act (FECA), two excerpts: 5 U.S.C. 8116 and 8140, providing guidance on personal injury and death claims by civilian employees arising within the scope of their employment (see DA Pam 27–162, paragraph 2–15b) and information on certain claims by Reserve Officers Training Corps (ROTC) cadets, respectively, (see DA Pam 27–162, paragraph 2–17d(2)).

(4) Longshore and Harbor Workers Compensation Act (LHWCA), 33 U.S.C. 901–950.

(5) Claims for consequential property damage by civilian employees may only be considered in the Court of Federal Claims pursuant to 28 U.S.C. 1491.

(f) *Additional materials.* There are some additional authoritative materials for the processing of claims, mostly of an administrative nature. For a complete listing of all of the supplementary materials relevant to claims processing under this publication and DA Pam 27–162 see appendix B of DA Pam 27–162.

(g) *Conflict of authorities.* Where a conflict exists between a general provision of this publication and a specific provision found in one of this publication's subparts implementing a specific statute, the specific provision, as set forth in the statute, will control.

§ 536.3 Command and organizational relationships.

(a) *The Secretary of the Army.* The Secretary of the Army (SA) heads the Army Claims System and acts on certain claims appeals directly or through a designee.

(b) *The Judge Advocate General.* The SA has delegated authority to The Judge Advocate General (TJAG) to assign areas of responsibility and designate functional responsibility for claims purposes. TJAG has delegated authority to the Commander USARCS to carry out the responsibilities assigned in § 536.7 and as otherwise lawfully delegable.

(c) *U.S. Army Claims Service.* USARCS, a command and component of the Office of TJAG, is the agency through which the SA and TJAG discharge their responsibilities for the administrative settlement of claims worldwide (see AR 10–72). USARCS' mailing address is: U.S. Army Claims Service, 4411 Llewellyn Ave., Fort George G. Meade, MD 20755–5360, Commercial: (301) 677–7009.

(d) *Command claims services.* (1) Command claims services exercise general supervisory authority over claims matters arising within their assigned areas of operation. Command claims services will:

(i) Effectively control and supervise the investigation of potentially compensable events (PCEs) occurring within the command's geographic area of responsibility, in other areas for which the command is assigned claims responsibility, and during the course of the command's operations.

(ii) Provide services for the processing and settlement of claims for and against the United States.

(2) The Commander USARCS, may delegate authority to establish a

command claims service to the commander of a major overseas command or other commands that include areas outside the United States, its territories and possessions.

(i) When a large deployment occurs, the Commander USARCS, may designate a command claims service for a limited time or purpose, such as for the duration of an operation and for the time necessary to accomplish the mission. The appropriate major Army command (MACOM) will assist the Commander USARCS, in obtaining resources and personnel for the mission.

(ii) In coordination with the Commander USARCS, the MACOM will designate the area of responsibility for each new command claims service.

(3) A command claims service may be a separate organization with a designated commander or chief. If it is part of the command's Office of the Staff Judge Advocate (SJA), the SJA will also be the chief of the command claims service, however, the SJA may designate a field grade officer as chief of the service.

(e) *Area claims offices.* The following may be designated as area claims offices (ACOs):

(1) An office under the supervision of the senior judge advocate (JA) of each command or organization so designated by the Commander USARCS. The senior JA is the head of the ACO.

(2) An office under supervision of the senior JA of each command in the area of responsibility of a command claims service so designated by the chief of that service after coordination with the Commander USARCS. The senior JA is the head of the ACO.

(3) The office of counsel of each U.S. Army Corps of Engineers (COE) district within the United States and such other COE commands or agencies as designated by the Commander USARCS, with concurrence of the Chief Counsel, Office of the Chief of Engineers, for all claims generated within such districts, commands or agencies. The district counsel or the attorney in charge of the command's or agency's legal office is the head of the ACO.

(f) *Claims processing offices.* Claims processing offices (CPOs) are normally small legal offices or ACO subordinate elements, designated by the Commander USARCS, a command claims service or an ACO. These offices are established for the investigation of all actual and potential claims arising within their jurisdiction, on either an area, command or agency basis. There are four types of claims processing offices (see § 536.10):

(1) Claims processing offices without approval authority.

(2) Claims processing offices with approval authority.

(3) Medical claims processing offices.

(4) Special claims processing offices.

(g) *Limitations on delegation of authority under any subpart.* (1) The Commander USARCS, commanders or chiefs of command claims services, or the heads of ACOs or CPOs with approval authority may delegate, in writing, all or any portion of their monetary approval authority to subordinate JAs or claims attorneys in their services or offices.

(2) The authority to act upon appeals or requests for reconsideration, to deny claims (including disapprovals based on substantial fraud), to grant waivers of maximum amounts allowable, or to make final offers will not be delegated except that the Commander USARCS may delegate this authority to USARCS Division Chiefs.

(3) CPOs will provide copies of all delegations affecting them to the ACO and, if so directed, to command claims services.

§ 536.4 Designation of claims attorneys.

(a) *Who may designate.* The Commander USARCS, the senior JA of a command having a command claims service, the chief of a command claims service, the head of an ACO, or the Chief Counsel of a COE District, may designate a qualified attorney other than a JA as a claims attorney. The head of an ACO may designate a claims attorney to act as a CPO with approval authority.

(b) *Eligibility.* To qualify as a claims attorney, an individual must be a civilian employee of the Department of the Army (DA) or DOD, a member of the bar of a state, the District of Columbia, or a jurisdiction where U.S. federal law applies, serving in the grade of GS–11 or above, and performing primary duties as a legal adviser.

§ 536.5 The Judge Advocate General.

TJAG has worldwide Army Staff responsibility for administrative settlement of claims by and against the U.S. government, generated by employees of the U.S. Army and DOD components other than the Departments of the Navy and Air Force. Where the Army has single-service responsibility, TJAG has responsibility for the Army. See DODD 5515.9. Certain claims responsibilities of TJAG are exercised by The Assistant Judge Advocate General (TAJAG) as set forth in this part and directed by TJAG.

§ 536.6 The Army claims mission.

(a) Promptly investigate potential claims incidents with a view to determining the degree of the Army's

exposure to liability, the damage potential, and when the third party is at fault, whether the Army should take action to collect for medical expenses, lost wages and property damage.

(b) Efficiently and expeditiously dispose of claims against the U.S. by fairly settling meritorious claims at the lowest level within the claims system commensurate with monetary jurisdiction delegated, or by denying non-meritorious claims.

(c) Develop a system that has a high level of proficiency, so that litigation and appeals can be avoided or kept to a minimum.

§ 536.7 Responsibilities of the Commander USARCS.

The Commander USARCS shall:

(a) Supervise and inspect claims activities worldwide.

(b) Formulate and implement claims policies and uniform standards for claims office operations.

(c) Investigate, process and settle claims beyond field office monetary authority and consider appeals and requests for reconsideration on claims denied by the field offices.

(d) Supervise the investigation, processing, and settlement of claims against, and in favor of, the United States under the statutes and regulations listed in § 536.2 and pursuant to other appropriate statutes, regulations, and authorizations.

(e) Designate ACOs, CPOs, and claims attorneys within DA and DOD components other than the Departments of the Navy and Air Force, subject to concurrence of the commander concerned.

(f) Designate continental United States (CONUS) geographic areas of claims responsibility.

(g) Recommend action to be taken by the SA, TJAG or the U.S. Attorney General, as appropriate, on claims in excess of \$25,000 or the threshold amount then current under the FTCA, on claims in excess of \$100,000 or the threshold amount then current under the FCA, the MCA, the NGCA, AMCSA, FCCA and FMRCA and on other claims that have been appealed. Direct communication with Department of Justice (DOJ) and the SA's designee is authorized.

(h) Operate the "receiving State office" for claims arising in the United States, its territories, commonwealths and possessions cognizable under Article VIII of the North Atlantic Treaty Organization (NATO) Status of Forces Agreement (SOFA), Partnership for Peace (PFP) SOFA, Article XVI of the Singapore SOFA, and other SOFAs which have reciprocal claims provisions

as delegated by TJAG, as implemented by 10 U.S.C. 2734a and 2734b (subpart G of this part).

(i) Settle claims of the U.S. Postal Service for reimbursement under 39 U.S.C. 411 (see DOD Manual 4525.6-M).

(j) Settle claims against carriers, warehouse firms, insurers, and other third parties for loss of, or damage to, personal property of DA or DOD soldiers or civilians incurred while the goods are in storage or in transit at government expense (AR 27-20, chapter 11).

(k) Formulate and recommend legislation for Congressional enactment of new statutes and the amendment of existing statutes considered essential for the orderly and expeditious administrative settlement of noncontractual claims.

(l) Perform post-settlement review of claims.

(m) Prepare, justify, and defend estimates of budgetary requirements and administer the Army claims budget.

(n) Maintain permanent records of claims for which TJAG is responsible.

(o) Assist in developing disaster and maneuver claims plans designed to implement the responsibilities set forth in § 536.9(a)(12).

(p) Develop and maintain plans for a disaster or civil disturbance in those geographic areas that are not under the jurisdiction of an area claims authority and in which the Army has single-service responsibility or in which the Army is likely to be the predominant Armed Force.

(q) Take initial action, as appropriate, on claims arising in emergency situations.

(r) Provide assistance as available or take appropriate action to ensure that command claims services and ACOs are carrying out their responsibilities as set forth in §§ 536.8 and 536.9, including claims assistance visits.

(s) Serve as proponent for the database management systems for torts, personnel and affirmative claims and provide standard automated claims data management programs for worldwide use.

(t) Ensure proper training of claims personnel.

(u) Coordinate claims activities with the Air Force, Navy, Marine Corps, and other DOD agencies to ensure a consistent and efficient joint service claims program.

(v) Investigate, process and settle, and supervise the field office investigation and processing of, medical malpractice claims arising in Army medical centers within the United States; provide medical claims judge advocates (MCJAs), medical claims attorneys, and

medical claims investigators assigned to such medical centers with technical guidance and direction on such claims.

(w) Coordinate support with the U.S. Army Medical Command (MEDCOM) on matters relating to medical malpractice claims.

(x) Issue an accounting classification to all properly designated claims settlement and approval authorities.

(y) Perform the investigation, processing, and settlement of claims arising in areas outside command claims service areas of operation.

(z) Maintain continuous worldwide deployment and operational capability to furnish claims advice to any legal office or command throughout the world. When authorized by the chain of command or competent authority, issue such claims advice or services, including establishing a claims system within a foreign country, interpreting claims aspects of international agreements, and processing claims arising from Army involvement in civil disturbances, chemical accidents under the Chemical Energy Stockpile Program, other man-made or natural disasters, and other claims designated by competent authority.

(aa) Upon receiving both the appropriate authority's directive or order and full fiscal authorization, disburse the funds necessary to administer civilian evacuation, relocation, and similar initial response efforts in response to a chemical disaster arising at an Army facility.

(bb) Respond to all inquiries from the President, members of Congress, military officials, and the general public on claims within USARCS' responsibility.

(cc) Serve as the proponent for this publication and DA Pam 27-162, both of which set forth guidance on personnel, tort, disaster and affirmative claims, as well as claims management and administration.

(dd) Provide supervision for the Army's affirmative claims and carrier recovery programs, as well as other methods for recovering legal debts.

(ee) Provide support for the overseas environmental claims program as designated by the DA.

(ff) Execute other claims missions as designated by DOD, DA, TJAG and other competent authority.

(gg) Appoint Foreign Claims Commissions outside Command Claims Services' geographic areas of responsibility.

(hh) Budget for and fund claims investigations and activities; such as per diem and transportation of claims personnel, claimants and witnesses; independent medical examinations;

appraisals; independent expert opinions; long distance telephone calls; recording and photographic equipment; use of express mail or couriers; and other necessary expenses.

§ 536.8 Responsibilities and operations of command claims services.

(a) *Chiefs of command claims services.* Chiefs of command claims services shall:

(1) Exercise claims settlement authority as specified in this part, including appellate authority where so delegated.

(2) Supervise the investigation, processing, and settlement of claims against, and in favor of the United States under the statutes and regulations listed in § 536.2, and pursuant to other appropriate statutes, regulations, and authorizations.

(3) Designate and grant claims settlement authority to ACOs. A grant of such authority will not be effective until coordinated with the Commander USARCS, and assigned an office code. However, the chief of a command claims service may redesignate a CPO that already has an assigned office code as an ACO without coordination with the Commander USARCS. The Commander USARCS will be informed of such a designation.

(4) Designate and grant claims approval authority to CPOs. Only CPOs staffed with a claims judge advocate (CJA) or claims attorney may be granted approval authority. A grant of such authority will not be effective until coordinated with the Commander USARCS, and assigned an office code.

(5) Train claims personnel and monitor their operations and ongoing claims administration. Conduct a training course annually.

(6) Implement pertinent claims policies.

(7) Prepare and publish command claims directives.

(8) Administer the command claims expenditure allowance, providing necessary data, estimates, and reports to USARCS on a regular basis.

(9) Perform the responsibilities of an ACO (see § 536.9), as applicable, ensure that SOFA claims are investigated properly and timely filed with the receiving State and adequately funded.

(10) Serve as the United States "sending State office," if so designated, when operating in an area covered by a SOFA.

(11) Supervise and provide technical assistance to subordinate ACOs within the command claims service's geographic area of responsibility.

(12) Appoint FCCs.

(b) *Operations of Command Claims Services.* The SJA of the command shall

supervise the command claims service. The command SJA may designate a field grade JA as the chief of the service. An adequate number of qualified claims personnel shall be assigned to ensure that claims are promptly investigated and acted upon. With the concurrence of the Commander USARCS, a command claims service may designate ACOs within its area of operations to carry out claims responsibilities within specified geographic areas subject to agreement by the commander concerned.

§ 536.9 Responsibilities and operations of area claims offices.

(a) *Heads of ACOs.* Heads of ACOs, including COE offices (see § 536.3(e)(3)) shall:

(1) Ensure that claims and potential claims incidents in their area of responsibility are promptly investigated in accordance with this part.

(2) Ensure that each organization or activity (for example, U.S. Army Reserve (USAR) or Army National Guard of the United States (ARNGUS) unit, ROTC detachment, recruiting company or station, or DOD agency) within the area appoints a claims officer to investigate claims incidents not requiring investigation by a JA (see § 536.23) and ensure that this officer is adequately trained.

(3) Supervise the investigation, processing, and settlement of claims against, and in favor of, the United States under the statutes and regulations listed in § 536.2 and pursuant to other appropriate statutes, regulations, and authorizations.

(4) Act as a claims settlement authority on claims that fall within the appropriate monetary jurisdictions set forth in this part and forward claims exceeding such jurisdictions to the Commander USARCS, or to the chief of a command claims service, as appropriate, for action.

(5) Designate CPOs and request that the Commander USARCS, or the chief of a command claims service, as appropriate, grant claims approval authority to a CPO for claims that fall within the jurisdiction of that office.

(6) Supervise the operations of CPOs within their area.

(7) Implement claims policies and guidance furnished by the Commander USARCS.

(8) Ensure that there are adequate numbers of qualified and adequately trained CJAs or claims attorneys, RCJAs or attorneys, recovery claims clerks, claims examiners, claims adjudicators and claims clerks in all claims offices within their areas to act promptly on claims.

(9) Budget for and fund claims investigations and activities, such as: per diem and transportation of claims personnel, claimants and witnesses; independent medical examinations; appraisals and independent expert opinions; long distance telephone calls; recording and photographic equipment; use of express mail or couriers; and other necessary expenses.

(10) Within the United States and its territories, commonwealths and possessions, procure and disseminate, within their areas of jurisdiction, appropriate legal publications on state or territorial law and precedent relating to tort claims.

(11) Notify the Commander USARCS, of all claims and potentially compensable events (PCEs) as required by § 536.22(c); notify the chief of a command claims service of all claims and PCEs.

(12) Develop and maintain written plans for a disaster or civil disturbance. These plans may be internal SJA office plans or an annex to an installation or an agency disaster response plan.

(13) Implement the Army's Article 139 claims program. (See subpart I of this part).

(14) Notify USARCS of possible deployments and ensure adequate FCCs are appointed by USARCS and are trained.

(b) *Operations of Area Claims Offices.* (1) The ACO is the principal office for the investigation and adjudication or settlement of claims, and shall be staffed with qualified legal personnel under the supervision of the SJA, command JA, or COE district or command legal counsel.

(2) In addition to the utilization of unit claims officers required by § 536.10(a), if indicated, the full-time responsibility for investigating and processing claims arising within or related to the activities of a unit or organization located within a section of the designated area may be delegated to another command, unit, or activity by establishing a CPO at the command, unit, or activity (see § 536.10(b)(4)). Normally, all CPOs will operate under the supervision of the ACO in whose area the CPO is located. Where a proposed CPO is not under the command of the ACO parent organization, this designation may be achieved by a support agreement or memorandum of understanding between the affected commands.

(3) Normally, claims that cannot be settled by a COE ACO will be forwarded directly to the Commander USARCS, with notice of referral to the Chief Counsel, COE. However, as part of his or her responsibility for litigating suits that involve civil works and military

construction activities, the Chief Counsel, COE, may require that a COE ACO forward claims through COE channels, provided that such requirement does not preclude the Commander USARCS from taking final action within the time limitations set forth in subparts D and H of this part.

§ 536.10 Responsibilities and operations of claims processing offices.

(a) *Heads of CPOs.* Heads of CPOs will:

(1) Investigate all potential and actual claims arising within their assigned jurisdiction, on either an area, command, or agency basis. Only a CPO that has approval authority may adjudicate and pay presented claims within its monetary jurisdiction.

(2) Ensure that units and organizations within their jurisdiction have appointed claims officers for the investigation of claims not requiring a JA's investigation. (See § 536.22).

(3) Budget for and fund claims investigations and activities; including, per diem and transportation of claims personnel, claimants and witnesses; independent medical examinations; appraisals; independent expert opinions; long distance telephone calls; recording and photographic equipment; use of express mail or couriers; and other necessary expenses.

(4) Within CONUS, procure and maintain legal publications on local law relating to tort claims pertaining to their jurisdiction.

(5) Notify the Commander USARCS of all claims and claims incidents, as required by § 536.22 and AR 27-20, paragraph 2-12.

(6) Implement the Army's Article 139 claims program (see subpart I of this part).

(b) *Operations of Claims Processing Offices—(1) Claims processing office with approval authority.* A CPO that has been granted approval authority must provide for the investigation of all potential and actual claims arising within its assigned jurisdiction, on an area, command, or agency basis, and for the adjudication and payment of all claims presented within its monetary jurisdiction. If the estimated value of a claim, after investigation, exceeds the CPO's payment authority, or if disapproval is the appropriate action, the claim file will be forwarded to the ACO unless otherwise specified in this part, or forwarded to USARCS or the command claims service, if directed by such service.

(2) *Claims processing offices without approval authority.* A CPO that has not been granted claims approval authority will provide for the investigation of all

potential and actual claims arising within its assigned jurisdiction on an area, command, or agency basis. Once the investigation has been completed, the claim file will be forwarded to the appropriate ACO for action.

Alternatively, an ACO may direct the transfer of a claim investigation from a CPO without approval authority to another CPO with approval authority, located within the ACO's jurisdiction.

(3) *Medical claims processing offices.* The MCJAs or medical claims attorneys at Army medical centers, other than Walter Reed Army Medical Center, may be designated by the SJA or head of the ACO for the installation on which the center is located as CPOs with approval authority for medical malpractice claims only. Claims for amounts exceeding a medical CPO's approval authority will be investigated and forwarded to the Commander USARCS.

(4) *Special claims processing offices—(i) Designation and authority.* The Commander USARCS, the chief of a command claims service, or the head of an ACO may designate special CPOs within his or her command for specific, short-term purposes (for example, maneuvers, civil disturbances and emergencies). These special CPOs may be delegated the approval authority necessary to effect the purpose of their creation, but in no case will this delegation exceed the maximum monetary approval authority set forth in other subparts of this part for regular CPOs. All claims will be processed under the claims expenditure allowance and claims command and office code of the authority that established the office or under a code assigned by USARCS. The existence of any special CPO must be reported to the Commander USARCS, and the chief of a command claims service, as appropriate.

(ii) *Maneuver damage and claims office jurisdiction.* A special CPO is the proper organization to process and approve maneuver damage claims, except when a foreign government is responsible for adjudication pursuant to an international agreement (see subpart G of this part). Personnel from the maneuvering command should be used to investigate claims and, at the ACO's discretion, may be assigned to the special CPO. The ACO will process claims filed after the maneuver terminates. The special CPO will investigate claims arising while units are traveling to or from the maneuver within the jurisdiction of other ACOs, and forward such claims for action to the ACO in whose area the claims arose. Claims for damage to real or personal property arising on private land that the Army has used under a permit may be

paid from funds specifically budgeted by the maneuver for such purposes in accordance with AR 405-15.

(iii) *Disaster claims and civil disturbance.* A special CPO provided for a disaster or civil disturbance should include a claims approving authority with adequate investigatory, administrative, and logistical support, including damage assessment and finance and accounting support. It will not be dispatched prior to notification of the Commander USARCS, whose concurrence must be obtained before the first claim is paid.

(5) *Supervisory requirements.* The CPOs discussed in paragraphs (b)(2) through (b)(4) of this section must be supervised by an assigned CJA or claims attorney in order to exercise delegated approval authority.

§ 536.11 Chief of Engineers.

The Chief of Engineers, through the Chief Counsel, shall:

(a) Provide general supervision of the claims activities of COE ACOs.

(b) Ensure that each COE ACO has a claims attorney designated in accordance with § 536.4.

(c) Ensure that claims personnel are adequately trained, and monitor their ongoing claims administration.

(d) Implement pertinent claims policies.

(e) Provide for sufficient funding in accordance with existing Army regulations and command directives for temporary duty (TDY), long distance telephone calls, recording equipment, cameras, and other expenses for investigating and processing claims.

(f) Procure and maintain adequate legal publications on local law relating to claims arising within the United States, its territories, commonwealths and possessions.

(g) Assist USARCS in evaluation of claims by furnishing qualified expert and technical advice from COE resources, on a non-reimbursable basis except for temporary duty (TDY) and specialized lab services expenses.

§ 536.12 Commanding General, U.S. Army Medical Command.

(a) After consulting with the Commander USARCS on the selection of medical claims attorneys, the Commander of the U.S. Army MEDCOM, the European Medical Command, or other regional medical command, through his or her SJA/Center Judge Advocate, shall ensure that an adequate number of qualified MCJAs or medical claims attorneys and medical claims investigators are assigned to investigate and process medical malpractice claims arising at Army

medical centers under the Commander's control. In accordance with an agreement between TJAG and The Surgeon General, such personnel shall be used primarily to investigate and process medical malpractice claims and affirmative claims and will be provided with the necessary funding and research materials to carry out this function.

(b) Upon request of a claims judge advocate or claims officer, shall provide a qualified health care provider at a medical treatment facility (MTF) to examine a claimant for his injuries even if the claimant is not otherwise entitled to care at an MTF (See AR 40-400, Patient Administration, paragraph 3-47).

§ 536.13 Chief, National Guard Bureau.

The Chief, National Guard Bureau (NGB), shall:

(a) Ensure the designation of a point of contact for claims matters in each State Adjutant General's office.

(b) Provide the name, address, and telephone number of these points of contact to the Commander USARCS.

(c) Designate claims officers to investigate claims generated by ARNG personnel and forward investigations to the Active Army ACO that has jurisdiction over the area in which the claims incident occurred.

§ 536.14 Commanders of major Army commands.

Commanders of MACOMs, through their SJAs, shall:

(a) Assist USARCS in monitoring ACOs and CPOs under their respective commands for compliance with the responsibilities assigned in §§ 536.9 and 536.10.

(b) Assist claims personnel in obtaining qualified expert and technical advice from command units and organizations on a nonreimbursable basis (although the requesting office may be required to provide TDY funding).

(c) Assist TJAG, through the Commander USARCS, in implementing the functions set forth in § 536.7.

(d) Coordinate with the ACO within whose jurisdiction a maneuver is scheduled, to ensure the prompt investigation and settlement of any claims arising from it.

§ 536.15 Claims policies.

(a) *General.* The following policies will be adhered to in processing and adjudicating claims falling within this regulation. The Commander USARCS is authorized to publish new policies or rescind existing policies from time to time as the need arises.

(1) *Notification.* The Commander USARCS must be notified as soon as

possible of both potential and actual claims which are serious incidents that cannot be settled within the monetary jurisdiction of a Command Claims Service or an ACO, including those which occur in the area of responsibility of a CPO. On such claims, the USARCS Area Action Officer (AAO) must coordinate with the field office as to all aspects of the investigation, evaluation and determination of liability. An offer of settlement or the assertion of an affirmative claim must be the result of a discussion between the AAO and the field office. Payment of a subrogated claim may commit the United States to liability as to larger claims. On the other hand, where all claims out of an incident can be paid within field authority they should be paid promptly with maximum use of small claims procedures.

(2) *Consideration under all subparts.* Prior to denial, a claim will be considered under all subparts of this part, regardless of the form on which the claim is presented. A claim presented as a personnel claim will be considered as a tort prior to denial. A claim presented as a tort will first be considered as a personnel claim, and if not payable, then considered as a tort. If deniable, the claim will be denied both as a personnel claim and as a tort.

(3) *Compromise.* DA policy seeks to compromise claims in a manner that represents a fair and equitable result to both the claimant and the United States. This policy does not extend to frivolous claims or claims lacking factual or legal merit. A claim should not be settled solely to avoid further processing time and expense. All claims, regardless of amount, should be evaluated. Congress imposed no minimum limit on payable claims nor did it intend that small non-meritorious claims be paid. Practically any claim, regardless of amount, may be subject to compromise through direct negotiation. A CJA or claims attorney should develop expertise in assessing liability and damages, including small property damage claims. For example, a property damage claim may be compromised by deducting the cost of collection, i.e., attorney fees and costs, even where liability is certain.

(4) *Expeditious processing at the lowest level.* Claims investigation and adjudication should be accomplished at the lowest possible level, such as the CPO or ACO that has monetary authority over the estimated total value of all claims arising from the incident. The expeditious investigation and settlement of claims is essential to successfully fulfilling the Army's responsibilities under the claims statutes implemented by this part.

(5) *Notice to claimants of technical errors in claim.* When technical errors are found in a claim's filing or contents, claimants should be advised of such errors and the need to correct the claim. If the errors concern a jurisdictional matter, a record should be maintained and the claimant should be immediately warned that the error must be corrected before the statute of limitations (SOL) expires.

(b) *Cooperative investigative environment.* Any person who indicates a desire to file a claim against the United States cognizable under one of the subparts of this part will be instructed concerning the procedure to follow. The claimant will be furnished claim forms and, when necessary, assisted in completing claim forms, and may be assisted in assembling evidence. Claims personnel may not assist any claimant in determining what amount to claim. During claims investigation, every effort should be made to create a cooperative environment that engenders the free exchange of information and evidence. The goal of obtaining sufficient information to make an objective and fair analysis should be paramount. Personal contact with claimants or their representatives is essential both during investigation and before adjudication. When settlement is not feasible, issues in dispute should be clearly identified to facilitate resolution of any reconsideration, appeal or litigation.

(c) *Claims directives and plans—(1) Directives.* Two copies of command claims directives will be furnished to the Commander USARCS. ACO directives will be distributed to all DA and DOD commands, installations and activities within the ACO's area of responsibility, with an information copy to the Commander USARCS.

(2) *Disaster and civil preparedness plan.* One copy of all ACOs' disaster or civil disturbance plans or annexes will be furnished to the Commander USARCS.

(d) *Interpretations.* The Commander USARCS will publish written interpretations of this part. Interpretations will have the same force and effect as this part.

(e) *Authority to grant exceptions to and deviations from this part.* If, in particular instances, it is considered to be in the best interests of the government, the Commander USARCS may authorize deviations from this part's specific requirements, except as to matters based on statutes, treaties and international agreements, executive orders, controlling directives of the Attorney General or Comptroller

General, or other publications that have the force and effect of law.

(f) *Guidance.* The Commander USARCS, may publish bulletins, manuals, handbooks and notes, and a DA Pamphlet that provides guidance to claims authorities on administrative and procedural rules implementing this part. These will be binding on all Army claims personnel.

(g) *Communication.* All claims personnel are authorized to communicate directly with USARCS personnel for guidance on matters of policy or on matters relating to the implementation of this part.

(h) *Private relief bills.* The issue of a private relief bill is one between a claimant and his or her Congressional representative. There is no established procedure under which the DA sponsors private relief legislation. Claims personnel shall remain neutral in all private relief matters and shall not make any statement that purports to reflect the DA's position on a private relief bill.

§ 536.16 Release of information policies.

(a) *Conflict of interest.* Except as part of their official duties, government personnel are forbidden from advising or representing claimants or from receiving any payment or gratuity for services rendered. They may not accept any share or interest in a claim or assist in its presentation, under penalty of federal criminal law (18 U.S.C. 203 and 205).

(b) *Release of information.* (1) Relevant statutes pertinent to the release of information include the Privacy Act of 1974, 5 U.S.C. 552a and 552b, the Freedom of Information Act (FOIA), 5 U.S.C. 552 and the Health Insurance Portability and Accountability Act (HIPAA), 42 U.S.C. 1320d through 1320d-8.

(2) It is the policy of USARCS that unclassified attorney work product may be released with or without a request from the claimant or attorney, whenever such release may help settle the claim or avoid unnecessary litigation.

(3) A statutory exemption or privilege may not be waived. Similarly, documents subject to such statutorily required nondisclosure, exemption, or privilege may not be released. Regarding other exemptions and privileges, authorities may waive such exemptions or privileges and direct release of the protected documents, upon balancing all pertinent factors, including finding that release of protected records will not harm the government's interest, will promote settlement of a claim and will avoid unnecessary litigation, or for other good cause.

(4) All requests for records and information made pursuant to the FOIA, 5 U.S.C. 552, the Privacy Act of 1974, 5 U.S.C. 552a, or HIPAA, 42 U.S.C. 1320d, will be processed in accordance with the procedures set forth in AR 25-55 and AR 340-21, respectively as well as 45 CFR Parts 160 and 164, DODD 6025.18-R, this part, and DA Pam 27-162.

(i) Any request for DOD records that either explicitly or implicitly cites the FOIA shall be processed under the provisions of AR 25-55. Requests for DOD records submitted by a claimant or claimant's attorney will be processed under both the FOIA and under the Privacy Act when the request is made by the subject of the records requested and those records are maintained in a system of records. Such requests will be processed under the FOIA time limits and the Privacy Act fee provisions. Withheld information must be exempt from disclosure under both Acts.

(ii) Requests that cite both Acts or neither Act are processed under both Acts, using the FOIA time limits and the Privacy Act fee provisions. For further guidance, see AR 25-55, paragraphs 1-301 and 1-503.

(5) The following records may not be disclosed:

(i) Medical quality assurance records exempt from disclosure pursuant to 10 U.S.C. 1102(a).

(ii) Records exempt from disclosure pursuant to appropriate balancing tests under FOIA exemption (6) (clearly unwarranted invasion of personal privacy), exemption (7)(c) (reasonably constitutes unwarranted invasion of privacy), and law enforcement records (5 U.S.C. § 552(b)) unless requested by the subject of the record.

(iii) Records protected by the Privacy Act.

(iv) Records exempt from disclosure pursuant to FOIA exemption (1) (National security) (5 U.S.C. 552(b)), unless such records have been properly declassified.

(v) Records exempt from disclosure pursuant to FOIA exemption (5) (5 U.S.C. 552(b)), unless the client consents to the disclosure.

(6) Records within a category for which withholding of the record is discretionary (AR 25-55, paragraph 3-101), such as exemptions under the deliberative process or attorney work product privileges (exemption (5) (5 U.S.C. 552(b))) may be released when there is no foreseeable harm to government interests in the judgment of the releasing authority.

(7) When it is determined that exempt information should not be released, or a

question as to its releaseability exists, forward the request and two copies of the responsive documents to the Commander USARCS. The Commander USARCS, acting on behalf of TJAG (the initial denial authority), may deny release of records processed under the FOIA only. The Commander USARCS, will forward to TJAG all such requests processed under both the FOIA and PA. TJAG is the denial authority for Privacy Act requests (AR 340-21, paragraph 1-7i).

(c) *Claims assistance.* In the vicinity of a field exercise, maneuver or disaster, claims personnel may disseminate information on the right to present claims, procedures to be followed, and the names and location of claims officers and the COE repair teams. When the government of a foreign country in which U.S. Armed Forces are stationed has assumed responsibility for the settlement of certain claims against the United States, officials of that country will be furnished as much pertinent information and evidence as security considerations permit.

§ 536.17 Single-service claims responsibility (DODD 5515.8 and DODD 5515.9).

(a) *Assignment for DOD claims.* The army is responsible for processing DOD claims pursuant to DODD 5515.9 (posted on the USARCS Web site; for the address see § 536.2(a)).

(b) *Statutes and agreements.* DOD has assigned single-service responsibility for the settlement of certain claims in certain countries, pursuant to DODD 5515.8 (posted on the USARCS Web site; for the address see § 536.2(a)) under the following statutes and agreements:

- (1) FCA (10 U.S.C. 2734);
- (2) MCA (10 U.S.C. 2733);
- (3) Status of Forces Agreements (10 U.S.C. 2734a and 2734b);
- (4) NATO SOFA (4 U.S.T. 1792, Treaties and International Acts Series (T.I.A.S.) 2846) and other similar agreements;
- (5) FCCA (31 U.S.C. 3711-3720E) and FMCRA (42 U.S.C. 2651-2653);
- (6) Claims not cognizable under any other provision of law, 10 U.S.C. 2737; and
- (7) Advance payments, 10 U.S.C. 2736.

(c) *Specified foreign countries.* Responsibility for the settlement of claims cognizable under the laws listed above has been assigned to military departments pursuant to DODD 5515.8, as supplemented by executive agreement and other competent directives.

(d) *When claims responsibility has not been assigned.* When necessary to

implement contingency plans, the unified or specified commander with authority over the geographic area in question may, on an interim basis before receiving confirmation and approval from the General Counsel, DOD, assign single-service responsibility for processing claims in countries where such assignment has not already been made.

Note to § 536.17: See also § 536.32 for information on transferring claims among armed services branches.

§ 536.18 Cross-servicing of claims.

(a) *Where claims responsibility has not been assigned.* Claims cognizable under the FCA or the MCA that are generated by another military department within a foreign country for which single-service claims responsibility has not been assigned, may be settled by the Army upon request of the military department concerned. Conversely, Army claims may in appropriate cases be referred to another military department for settlement, DODD 5515.8, E1.2 (posted on the USARCS Web site; for the address see § 536.2(a)). Tables listing claims offices worldwide are posted to the USARCS Web site at that address. U.S. Air Force claims offices may be identified by visiting the Web site at http://afmove.hq.af.mil/page_afclaims.asp.

(b) *Claims generated by the Coast Guard.* Claims resulting from the activities of, or generated by, soldiers or civilian employees of the Coast Guard while it is operating as a service of the U.S. Department of Homeland Security may upon request be settled under this part by a foreign claims commission appointed as authorized herein, but they will be paid from Coast Guard appropriations, 10 U.S.C. 2734.

(c) *SOFA claims within the United States.* Claims cognizable under the NATO PFP or Singaporean SOFAs arising out of the activities of aircraft within the United States may be investigated and adjudicated by the U.S. Air Force under a delegation from the Commander USARCS. Claims exceeding the delegated amount will be adjudicated by the USARCS.

(d) *Claims generated by the American Battle Monuments Commission.* Claims arising out of the activities of or in cemeteries outside the United States managed by the American Battle Monuments Commission (36 U.S.C. 2110) will be investigated and adjudicated by the U.S. Army.

Note to § 536.18: See also § 536.32 for information on transferring claims among armed services branches.

§ 536.19 Disaster claims planning.

All ACOs will prepare a disaster claims plan and furnish a copy to USARCS. See DA Pam 27–162, paragraph 1–21 for specific requirements related to disaster claims planning.

§ 536.20 Claims assistance visits.

Members of USARCS and command claims services will make claims assistance visits to field offices on a periodic basis. See DA Pam 27–162, paragraph 1–22 for specific requirements related to claims assistance visits.

§ 536.21 Annual claims award.

The Commander USARCS will make an annual claims award to outstanding field offices. See DA Pam 27–162, para 1–23 for more information on annual claims awards.

Subpart B—Investigation and Processing of Claims

§ 536.22 Claims Investigative Responsibility—General.

(a) *Scope.* This subpart addresses the investigation, processing, evaluation, and settlement of tort and tort-related claims for and against the United States. The provisions of this subpart do not apply to personnel claims (AR 27–20, chapter 11), or to claims under subpart G of this part, §§ 536.114 through 536.116.

(b) *Cooperation.* Claims investigation requires team effort between the U.S. Army Claims Service (USARCS), command claims services, and area claims offices (ACOs) including U.S. Army Corps of Engineers (COE) District Offices, claims processing offices (CPOs), and unit claims officers. Essential to this effort is the immediate investigation of claims incidents. Prompt investigation depends on the timely reporting of claims incidents as well as continuous communication between all commands or echelons bearing claims responsibility.

(c) *Notification to USARCS.* A CPO or an ACO receiving notice of a potentially compensable event (PCE) that requires investigation will immediately refer it to the appropriate claims office. The Commander USARCS will be notified of all major incidents involving serious injury or death or those in which property damage exceeds \$50,000. A command claims service may delegate to an ACO the responsibility for advising USARCS of serious incidents and complying with mirror file requirements. A copy of the written delegation and any changes made thereafter will be forwarded to the Commander USARCS.

(d) *Geographic concept of responsibility.* A command claims service or an ACO in whose geographic area a claims incident occurs is primarily responsible for initiating investigation and processing of any claim filed in the absence of a formal transfer of responsibility (see §§ 536.30 through 536.36). DOD and Army organizations whose personnel are involved in the incident will cooperate with and assist the ACO, regardless of where the former may be located.

Note to § 536.22: See the parallel discussion at DA Pam 27–162, paragraph 2–1.

§ 536.23 Identifying claims incidents both for and against the government.

(a) Investigation is required when:
(1) There is property loss or damage.
(i) Property other than that belonging to the government is damaged, lost, or destroyed by an act or omission of a government employee or a member of North Atlantic Treaty Association (NATO), Australian or Singaporean forces stationed or on temporary duty within the United States.

(ii) Property belonging to the government is damaged or lost by a tortious act or omission not covered by the report of survey system or by a carrier's bill of lading.

(2) There is personal injury or death.
(i) A civilian other than an employee of the U.S. government is injured or killed by an act or omission of a government employee or by a member of a NATO, Australian or Singaporean force stationed or on temporary duty within the United States. (This category includes patients injured during treatment by a health care provider).

(ii) Service members, active or retired, family members of either, or U.S. employees, are injured or killed by a third party and receive medical care at government expense.

(3) A claim is filed.

(4) A competent authority or another armed service or federal agency requires investigation.

(b) Determining who is a government employee is a matter of federal, not local, law. Categories of government employees usually accepted as tortfeasors under federal law are:

(1) Military personnel (soldiers of the Army, or members of other services where the Army exercises single-service jurisdiction on foreign soil; and soldiers or employees within the United States who are members of NATO or of other foreign military forces with whom the United States has a reciprocal claims agreement and whose sending States have certified that they were acting

within the scope of their duty) who are serving on full-time active duty in a pay status, including soldiers:

(i) Assigned to units performing active or inactive duty.

(ii) Serving on active duty as Reserve Officer Training Corps (ROTC) instructors.

(iii) Serving as Army National Guard (ARNG) instructors or advisors.

(iv) On duty or training with other federal agencies, for example: the National Aeronautics and Space Administration, the Department of State, the Navy, the Air Force, or DOD (federal agencies other than the armed service to which the Soldier is attached may also provide a remedy).

(v) Assigned as students or ordered into training at a non-federal civilian educational institution, hospital, factory, or other facility (excluding soldiers on excess leave or those for whom the training institution or organization has assumed liability by written agreement).

(vi) Serving on full-time duty at nonappropriated fund (NAF) activities.

(vii) Of the United States Army Reserve (USAR) and ARNG on active duty under Title 10, U.S.C.

(2) Military personnel who are United States Army Reserve soldiers including ROTC cadets who are Army Reserve soldiers while at annual training, during periods of active duty and inactive duty training.

(3) Military personnel who are soldiers of the ARNG while engaged in training or duty under 32 U.S.C. 316, 502, 503, 504, 505, or engaged in properly authorized community action projects under the Federal Tort Claims Act (FTCA), the Non-Scope Claims Act (NSCA), or the National Guard Claims Act (NGCA), unless performing duties in furtherance of a mission for a state, commonwealth, territory or possession.

(4) Civilian officials and employees of both the DOD and DA (there is no practical significance to the distinction between the terms "official" and "employee"), including but not limited to the following:

(i) Civil service and other full-time employees of both the DOD and DA who are paid from appropriated funds.

(ii) Persons providing direct health care services pursuant to personal service contracts under 10 U.S.C. 1089 or 1091 or where another person exercised control over the health care provider's day-to-day practice. When the conduct of a health care provider performing services under a personal service contract is implicated in a claim, the CJA, Medical Claims Judge Advocate (MCJA), or claims attorney should consult with USARCS to determine if

that health care provider can be considered an employee for purposes of coverage.

(iii) Employees of a NAF instrumentality (NAFI) if it is an instrumentality of the United States and thus a federal agency. To determine whether a NAFI is a "federal agency," consider both whether it is an integral part of the Army charged with an essential DA operational function and also what degree of control and supervision DA personnel exercise over it. Members or users, unlike employees of NAFIs, are not considered government employees; the same is true of family child care providers. However, claims arising out of the use of some NAFI property or from the acts or omissions of family child care providers may be payable from such funds under subpart K of this part as a matter of policy, even when the user is not acting within the scope of employment and the claim is not otherwise cognizable under any of the other authorities described in this part.

(5) Prisoners of war and interned enemy aliens.

(6) Civilian employees of the District of Columbia ARNG, including those paid under "service contracts" from District of Columbia funds.

(7) Civilians serving as ROTC instructors paid from federal funds.

(8) ARNG technicians employed under 32 U.S.C. 709(a) for claims accruing on or after January 1, 1969 (Public Law 90-486, August 13, 1968 (82 Stat. 755)), unless performing duties solely in pursuit of a mission for a state, commonwealth, territory or possession.

(9) Persons acting in an official capacity for the DOD or DA either temporarily or permanently with or without compensation, including but not limited to the following:

(i) Dollar-a-year personnel.

(ii) Members of advisory committees, commissions, or boards.

(iii) Volunteers serving in an official capacity in furtherance of the business of the United States, limited to those categories set forth in DA Pam 27-162, paragraph 2-45.

Note to § 536.23: See the parallel discussion at DA Pam 27-162, paragraph 2-2.

§ 536.24 Delegation of investigative responsibility.

(a) *Area Claims Office.* An ACO is authorized to carry out its investigative responsibility as follows:

(1) At the request of the area claims authority, commanders and heads of Army and DOD units, activities, or components will appoint a

commissioned, warrant, or noncommissioned officer or a qualified civilian employee to investigate a claims incident in the manner set forth in DA Pam 27-162 and this part. An ACO will direct such investigation to the extent deemed necessary.

(2) CPOs are responsible for investigating claims incidents arising out of the activities and operations of their command or agency. An ACO may assign area jurisdiction to a CPO after coordination with the appropriate commander to investigate claims incidents arising in the ACO's designated geographic area. (See § 536.3(f).)

(3) Claims incidents involving patients arising from treatment by a health care provider in an Army medical treatment facility (MTF), including providers defined in 536.23(b)(4)(ii), will be investigated by a claims judge advocate (CJA), medical claims judge advocate (MCJA), or claims attorney rather than by a unit claims officer.

(4) An ACO will publish and distribute a claims directive to all DOD and Army installations and activities including active, Army Reserve, and ARNG units as well as units located on the post at which the ACO is located. The directive will outline each installations' and activities' claims responsibilities. It will institute a serious claims incident reporting system.

(b) *Command claims service responsibility.* A command claims service is responsible for the investigation and processing of claims incidents arising in its geographic area of responsibility or for any incidents within the authority of any foreign claims commission (FCC) it appoints. This responsibility will be carried out by an ACO or a CPO to the extent possible. A command claims service will publish a claims directive outlining the geographic areas of claims investigative responsibilities of each of its installations and activities, requiring each ACO or CPO to report all serious claims incidents directly to the Commander USARCS.

(c) *USARCS responsibility.* USARCS exercises technical supervision over all claims offices, providing guidance on specific cases throughout the claims process, including the method of investigation. Where indicated, USARCS may investigate a claims incident that normally falls within a command claims services', an ACO's, or a CPO's jurisdiction. USARCS typically acts through an area action officer (AAO) who is assigned as the primary point of contact with command claims

services, ACOs or CPOs within a given geographic area. In areas outside the United States and its commonwealths, territories and possessions, where there is no command claims service or ACO, USARCS is responsible for investigation and for appointment of FCCs.

Note to § 536.24: See the parallel discussion at DA Pam 27-162, paragraph 2-3.

§ 536.25 Procedures for accepting claims.

All ACOs and CPOs will institute procedures to ensure that potential claimants or attorneys speak to a CJA, claims attorney, investigator, or examiner. On initial contact, claims personnel will render assistance, discuss all aspects of the potential claim, and determine what statutes or procedures apply. Assistance will be furnished to the extent set forth in DA Pam 27-162, paragraph 2-4. To advise claimants on the correct remedy, claims personnel will familiarize themselves with the remedies listed in DA Pam 27-162, paragraphs 2-15 and 2-17.

§ 536.26 Identification of a proper claim.

(a) A claim is a writing that contains a sum certain for each claimant and that is signed by each claimant, or by an authorized representative, who must furnish written authority to sign on a claimant's behalf. The writing must contain enough information to permit investigation. The writing must be received not later than two years from the date the claim accrues. A claim under the Foreign Claims Act (FCA) may be presented orally to either the United States or the government of the foreign country in which the incident occurred, within two years, provided that it is reduced to writing not later than three years from the date of accrual. A claim may be transmitted by facsimile or telegram. However, a copy of an original claim must be submitted as soon as possible.

(b) Where a claim is only for property damage and it is filed under circumstances where there might be injuries, the CJA should inquire if the claimant desires to split the claim as discussed in § 536.60.

(c) Normally, a claim will be presented on a Standard Form (SF) 95 (Claim for Damage, Injury, or Death). When the claim is not presented on an SF 95, the claimant will be requested to complete an SF 95 to ease investigation and processing.

(d) If a claim names two claimants and states only one sum certain, the claimants will be requested to furnish a sum certain for each. A separate sum certain must be obtained prior to payment under the Federal Tort Claims

Act (FTCA), Military Claims Act (MCA), National Guard Claims Act (NGCA) or the FCA. The Financial Management Service will only pay an amount above the threshold amount of \$2,500 for the FTCA, or \$100,000 for the other statutes.

(e) A properly filed claim meeting the definition of "claim" in paragraph (a) of this section tolls the two-year statute of limitations (SOL) even though the documents required to substantiate the claim are not present, such as those listed on the back of an SF 95 or in the Attorney General's regulations implementing the FTCA, 28 CFR 14.1-14.11. However, refusal to provide such documents may lead to dismissal of a subsequent suit under the FTCA or denial of a claim under other subparts of this part.

(f) Receipt of a claim by another federal agency does not toll the SOL. Receipt of a U.S. Army claim by DOD, Navy, or Air Force does toll the SOL.

(g) The guidelines set forth in federal FTCA case law will apply to other subparts of this part in determining whether a proper claim was filed.

Note to § 536.26: See the parallel discussion at DA Pam 27-162, paragraph 2-5.

§ 536.27 Identification of a proper claimant.

The following are proper claimants:

(a) *Claims for property loss or damage.* A claim may be presented by the owner of the property or by a duly authorized agent or legal representative in the owner's name. As used in this part, the term "owner" includes the following:

(1) *For real property.* The mortgagor, mortgagee, executor, administrator, or personal representative, if he or she may maintain a cause of action in the local courts involving a tort to the specific property, is a proper claimant. When notice of divided interests in real property is received, the claim should if feasible be treated as a single claim and a release from all interests must be obtained. This includes both the owner and tenant where both claim.

(2) *For personal property.* A claim may be presented by a bailee, lessee, mortgagee, conditional vendor, or others holding title for purposes of security only, unless specifically prohibited by the applicable subpart. When notice of divided interests in personal property is received, the claim should if feasible be treated as a single claim; a release from all interests must be obtained. Property loss is defined as loss of actual tangible property, not consequential damage resulting from such loss.

(b) *Claims for personal injury or wrongful death—* (1) *For personal*

injury. A claim may be presented by the injured person or by a duly authorized agent or legal representative or, where the claimant is a minor, by a parent or a person in loco parentis. However, determine whether the claimant is a proper claimant under applicable state law or, if considered under the MCA, under § 536.77. If not, the claimant should be so informed in the acknowledgment letter and requested to withdraw the claim. If not withdrawn, deny the claim without delay. An example is a claim filed on behalf of a minor for loss of consortium for injury to a parent where not permitted by state law. Personal injury claims deriving from the principal injury may be presented by other parties. A claim may not be presented by a "volunteer," meaning one who has no legal or contractual obligation, yet voluntarily pays damages on behalf of an injured party and then seeks reimbursement for their economic damages by filing a claim. See paragraph (f) (3) of this section.

(2) *For wrongful death.* A claim may be presented by the executor or administrator of the deceased's estate, or by any person determined to be legally or beneficially entitled under applicable local law. The amount allowed will be apportioned, to the extent practicable, among the beneficiaries in accordance with the law applicable to the incident. Under the MCA (subpart C of this part), only one wrongful death claim is authorized (see § 536.77(c)(1)(i)). Under subparts D and H of this part, a claim by the insured for property damage may be considered as a claim by the insurer as the real party in interest provided the insured has been reimbursed by the insurer and the insurance information is listed on the SF 95. The insurer should be required to file a separate SF 95 for payment purposes even though the SOL has expired. Where the insurance information is not listed on the SF 95 and the insured is paid by the United States, the payment of the insurer is the responsibility of the insured even though the insurer subsequently files a timely claim. To avoid this situation, always inquire as to the status of any insurance prior to payment of a property damage claim.

(c) *By an agent or legal representative.* A claimant's agent or legal representative who presents a claim will do so in the claimant's name and sign the form in such a way that indicates the agent's or legal representative's title or capacity. When a claim is presented by an agent or legal representative:

(1) It must contain written evidence of the agent's or legal representative's

authority to sign, such as a power of attorney, or

(2) It must refer to or cite the statute granting authority.

(d) *Subrogation.* A claim may be presented by the subrogee in his or her own name if authorized by the law of the place where the incident giving rise to the claim occurred, under subpart D or H of this part only. A lienholder is not a proper claimant and should be distinguished from a subrogee to avoid violation of the Antiassignment Act. See paragraph (f) of this section. However, liens arising under Medicare will be processed directly with the Center for Medicare and Medicaid Systems. See DA Pam 27–162, paragraphs 2–57g and h and 2–58.

(e) *Contribution or indemnity.* A claim may be filed for contribution or indemnification by the party who was held liable as a joint tortfeasor where authorized by state law. Such a claim is not perfected until payment has been made by the claimant/joint tortfeasor. A claim filed for contribution prior to payment being made should be considered as an opportunity to share a settlement where the United States is liable.

(f) *Transfer or assignment.* (1) Under the Antiassignment Act (31 U.S.C. 3727) and Defense Finance and Accounting Service—Indianapolis (DFAS-IN) regulation 37–1, a transfer or assignment is null and void except where it occurs by operation of law or after a voucher for the payment has been issued. The following are null and void:

(i) Every purported transfer or assignment of a claim against the United States, or any interest, in whole or in part, on a claim, whether absolute or conditional; and

(ii) Every power of attorney or other purported authority to receive payment for all or part of any such claim.

(2) The Antiassignment Act was enacted to eliminate multiple payment of claims, to cause the United States to deal only with original parties and to prevent persons of influence from purchasing claims against the United States.

(3) In general, this statute prohibits voluntary assignments of claims, with the exception of transfers or assignments made by operation of law. The operation of law exception has been held to apply to claims passing to assignees because of bankruptcy proceedings, assignments for the benefit of creditors, corporate liquidations, consolidations, or reorganizations, and where title passes by operation of law to heirs or legatees. Subrogated claims that arise under a statute are not barred by the Antiassignment Act. For example,

subrogated workers' compensation claims are cognizable when presented by the insurer under subpart D or H of this part, but not other subparts.

(4) Subrogated claims that arise pursuant to contractual provisions may be paid to the subrogee, if the legal basis for the subrogated claim is recognized by state statute or case law, only under subpart D or H of this part. For example, an insurer that issues an insurance policy becomes subrogated to the rights of a claimant who receives payment of a property damage claim. Generally, such subrogated claims are authorized by state law and are therefore not barred by the Antiassignment Act.

(5) Before claims are paid, it is necessary to determine whether there may be a valid subrogated claim under a federal or state statute or a subrogation contract held valid by state law.

(g) *Interdepartmental waiver rule.* Neither the U.S. government nor any of its instrumentalities are proper claimants due to the interdepartmental waiver rule. This rule bars claims by any organization or activity of the Army, whether or not the organization or activity is funded with appropriated or nonappropriated funds. Certain federal agencies are authorized by statute to file claims, for example, Medicare and the Railroad Retirement Commission. See DA Pam 27–162, paragraph 2–17f.

(h) *States are excluded.* If a state, U.S. commonwealth, territory, or the District of Columbia maintains a unit to which ARNG personnel causing the injury or damage are assigned, such governmental entity is not a proper claimant for loss or damage to its property. A unit of local government other than a state, commonwealth, or territory is a proper claimant.

Note to § 536.27: See the parallel discussion at DA Pam 27–162, paragraph 2–6.

§ 536.28 Claims acknowledgment.

Claims personnel will acknowledge all claims immediately upon receipt, in writing, by telephone, or in person. A defective claim will be acknowledged in writing, pointing out its defects. Where the defects render the submission jurisdictionally deficient based on the requirements discussed in DA Pam 27–162, paragraphs 2–5 and 2–6, the claimant or attorney will be informed in writing of the need to present a proper claim no later than two years from the date of accrual. Suit must be filed in maritime claims not later than two years from the date of accrual. See § 536.122. In any claim for personal injury or wrongful death, an authorization signed by the patient, natural or legal guardian

or estate representative will be obtained authorizing the use of medical information, including medical records, in order to use sources other than claims personnel to evaluate the claim as required by the Health Care Portability and Accountability Act (HIPAA), 42 U.S.C. 1320d–1320d–8. See the parallel discussion at DA Pam 27–162, paragraph 2–7.

§ 536.29 Revision of filed claims.

(a) *General.* A revision or change of a previously filed claim may constitute an amendment or a new claim. Upon receipt, the CJA must determine whether a new claim has been filed. If so, the claim must be logged with a new number and acknowledged in accordance with § 536.27.

(b) *New claim.* A new claim is filed whenever the writing alleges a new theory of liability, a new tortfeasor, a new party claimant, a different date or location for the claims incident, or other basic element that constitutes an allegation of a different tort not originally alleged. If the allegation is made verbally or by e-mail, the claimant will be informed in writing that a new SF 95 must be filed. A new claim must be filed not later than two years from the accrual date under the FTCA. Filing a new claim creates an additional six month period during which suit may not be filed.

(c) *Amendment.* An increase or decrease in the amount claimed constitutes an amendment, not a new claim. Similarly, the addition of required information not on the original claim constitutes an amendment. Examples are date of birth, marital status, military status, names of witnesses, claimant's address, description, or location of property or insurance information. An amendment may be filed before or after the two year SOL has run unless final action has been taken. A new number will not be assigned to an amended claim; however, a change in the amount will be annotated in the database.

Note to § 536.29: See the parallel discussion at DA Pam 27–162, paragraph 2–8.

§ 536.30 Action upon receipt of claim.

(a) A properly filed claim stops the running of the SOL when it is received by any organization or activity of the DOD or the U.S. Armed Services. Placing a claim in the mail does not constitute filing. The first Army claims office that receives the claim will date, time stamp, and initial the claim as of the date the claim was initially received "on post," not by the claims office. If initially received close to the SOL's

expiration date by an organization or activity that does not have a claims office, claims personnel will discover and record in the file the date of original receipt.

(b) The ACO or CPO that first receives the claim will enter the claim into the Tort and Special Claims Application (TSCA) database and let the system assign a number to the claim. The claim, whether on an SF 95 or in any other format, shall be scanned into a computer and uploaded onto the TSCA database so that it will become a permanent part of the electronic record. A joint claim will be given a number for each claimant, for example, husband and wife, injured parent and children. If only one sum is filed for all claimants, the same sum will be assigned for each claimant. However, request the claimant to name a sum for each claimant. The claim will bear this number throughout the claims process. Upon transfer, a new number will not be assigned by the receiving office. If a claim does not meet the definition of a proper claim under §§ 536.26 and 536.27, it will be date stamped and logged as a Potentially Compensable Event (PCE).

(c) The claim will be transferred if the claim incident arose in another ACO's geographic area; the receiving ACO will use the claims number originally assigned.

(d) Non-Appropriated Fund Instrumentality (NAFI) claims that relate to claims determined cognizable under subpart K of this part will be marked with the symbol "NAFI" immediately following the claimant's name, to preclude erroneous payment from appropriated funds (APF). This symbol will also be included in the subject line of all correspondence.

(e) Upon receipt, copies of the claims will be furnished as follows (when a current e-mail address is available and it is agreeable with the receiving party, providing copies by e-mail is acceptable):

(1) To USARCS, if the amount claimed exceeds \$25,000, or \$50,000 per incident. However, if the claim arises under the FTCA or AMCSA, only furnish copies if the amount claimed exceeds \$50,000, or \$100,000 per incident.

(2) For medical malpractice claims, to the appropriate MTF Commander/s through MEDCOM Headquarters, and to the Armed Forces Institute of Pathology at the addresses listed below.

MEDCOM, ATTN: MCHO-CL-Q,
2050 Worth Road, Suite 26, Fort Sam
Houston, TX 78234-5026.

Department of Legal Medicine, Armed
Forces Institute of Pathology, 1335 E.
West Highway, #6-100, Silver Spring,

MD 20910-6254, Commercial: 301-295-8115, e-mail: *casha@afip.osd.mil*.

(3) If the claim is against AAFES forward a copy to: HQ Army and Air Force Exchange Service (AAFES), ATTN: Office of the General Counsel (GC-Z), P.O. Box 650062, Dallas, TX 75265-0062, e-mail: *blanchp@aafes.com*.

(4) If the claim involves a NAFI, including a recreational user or family child care provider forward a copy to: Army Central Insurance Fund, ATTN: CFSC-FM-I, 4700 King Street, Alexandria, VA 22302-4406, e-mail: *riskmanagement@cfsc.army.mil*.

(f) ACOs or CPOs will furnish a copy of any medical or dental malpractice claim to the MTF or dental treatment facility commander and advise the commander of all subsequent actions. The commander will be assisted in his or her responsibility to complete DD Form 2526 (Case Abstract for Malpractice Claims).

Note to § 536.30: See the parallel discussion at DA Pam 27-162, paragraph 2-9.

§ 536.31 Opening claim files.

A claim file will be opened when:

(a) Information that requires investigation under § 536.23 is received.

(b) Records or other documents are requested by a potential claimant or legal representative.

(c) A claim is filed.

Note to § 536.31: See the parallel discussion at DA Pam 27-162, paragraph 2-10.

§ 536.32 Transfer of claims among armed services branches.

(a) Claims filed with the wrong federal agency, or claims that should be adjudicated by receiving State offices under NATO or other SOFA, will be immediately transferred to the proper agency together with notice of same to the claimant or legal representative. Where multiple federal agencies are involved, other agencies will be contacted and a lead agency established to take all actions on the claim. Where the DA is the lead agency, any final action will include other agencies. Similarly, where another agency is the lead agency, that agency will be requested to include DA in any final action. Such inclusion will prevent multiple dates for filing suit or appeal.

(b) If another agency has taken denial action on a claim that involves the DA, without informing the DA, and in which the DA desires to make a payment, the denial action may be reconsidered by the DA not later than six months from the date of mailing and payment made thereafter.

Note to § 536.32: See also §§ 536.17 and 536.18; AR 27-20, paragraph 13-2; and the parallel and related discussion of this topic at DA Pam 27-162, paragraphs 1-19, 1-20, 2-13 and 13-2.

§ 536.33 Use of small claims procedures.

Small claims procedures are authorized for use whenever a claim may be settled for \$5,000 or less. These procedures are designed to save processing time and eliminate the need for most of the documentation otherwise required. These procedures are described in DA Pam 27-162, paragraphs 2-14 and 2-26.

§ 536.34 Determination of correct statute.

(a) *Consideration under more than one statute.* When Congress enacted the various claims statutes, it intended to allow federal agencies to settle meritorious claims. A claim must be considered under other statutes in this part unless one particular statute precludes the use of other statutes, whether the claim is filed on DD Form 1842 (Claim for Loss of or Damage to Personal Property Incident to Service) or SF 95. Prior to denial of an AR 27-20, chapter 11 claim, consider whether it may fall within the scope of subparts C, D, or F of this part, and where indicated, question the claimant to determine whether the claim sounds in tort.

(b) *Exclusiveness of certain remedies.* Certain remedies exclude all others. For example, the Court of Federal Claims has exclusive jurisdiction over U.S. Constitution Fifth Amendment takings, express or implied-in-fact, as well as governmental contract losses, or intangible property losses. Claims of this nature for \$10,000 or less may be filed in a U.S. District Court. There is no administrative remedy. While the FTCA is the preemptive tort remedy in the United States, its commonwealths, territories and possessions, nevertheless, other remedies must be exhausted prior to favorable consideration under the FTCA. The FTCA does not preclude use of the MCA or the NGCA for claims arising out of noncombat activities or brought by soldiers for incident-to-service property losses sustained within the United States. See DA Pam 27-162, paragraphs 2-15a and b for a more detailed discussion of determining the correct statute for property claims versus personal injury and death claims. In addition, it is important to consider the nature of the claim, e.g., whether the claim may be medical malpractice in nature, related to postal matter, or an automobile accident. Discussions of these and many other different types of claims are also provided herein as well

as in the corresponding paragraph 2–15 of DA Pam 27–162. It is also very important to consider when a claim may fall outside the jurisdiction of the Army claims system. Some of these instances are alluded to immediately above, but for a detailed discussion of related remedies see § 536.36 of this part and paragraph 2–17 of DA Pam 27–162.

(c) *Status of Forces Agreement claims.*

(1) Claims arising out of the performance of official duties in a foreign country where the United States is the sending State must be filed and processed under a SOFA, provided that the claimant is a proper party claimant under the SOFA. DA Pam 27–162, paragraph 2–15c sets forth the rules applicable in particular countries. A SOFA provides an exclusive remedy subject to waiver as set forth in § 536.76(h) of this part.

(2) Single-service jurisdiction is established for all foreign countries in which a SOFA is in effect and for certain other countries. A list of these countries is posted on the USARCS Web site; for the address see § 536.2(a). Claims will be processed by the service exercising single-service responsibility. In the United States, USARCS is the receiving State office and all SOFA claims should be forwarded immediately to USARCS for action. Appropriate investigation under subpart B of this part procedures is required of an ACO or a CPO under USARCS' direction.

(d) *Foreign Claims Act claims.* (1) Claims by foreign inhabitants, arising in a foreign country, which are not cognizable under a SOFA, fall exclusively under the FCA. The determination as to whether a claimant is a foreign inhabitant is governed by the rules set out in subpart C and subpart J of this part. In case of doubt, this determination must be based on information obtained from the claimant and others, particularly where the claimant is a former U.S. service member or a U.S. citizen residing in a foreign country.

(2) Tort claims will be processed by the armed service that exercises single-service responsibility. When requested, the Commander USARCS may furnish a Judge Advocate or civilian attorney to serve as a Foreign Claims Commission (FCC) for another service. With the concurrence of the Commander USARCS, Army JAs may be appointed as members of another department's foreign claims commissions. See subpart J of this part. The FCA permits compensation for damages caused by "out-of-scope" tortious conduct of Soldier and civilian employees. Many of these claims are also compensable

under Article 139, Uniform Code of Military Justice. See DA Pam 27–162, chap. 9. To avoid the double payment of claims, ACOs and CPOs must promptly notify the Command Claims Service of each approved Article 139 claim involving a claimant who could also file under an applicable SOFA.

(e) *National Guard Claims Act claims.*

(1) Claims attributed to the acts or omissions of ARNG personnel in the course of employment fall into the categories set forth in subpart F of this part.

(2) An ACO will establish with a state claims office routine procedures for the disposition of claims, designed to ensure that the United States and state authorities do not issue conflicting instructions for processing claims. The procedures will require personnel to advise the claimant of any remedy against the state or its insurer.

(i) Where the claim arises out of the act or omission of a member of the ARNG or a person employed under 32 U.S.C. 709, it must be determined whether the employee is acting on behalf of the state or the United States. For example, an ARNG pilot employed under section 709 may be flying on a state mission, federal mission, or both, on the same trip. This determination will control the disposition of the claim. If agreement with the concerned state cannot be reached and the claim is otherwise payable, efforts may be made to enter into a sharing agreement with the state concerned. The following procedures are required in the event there is a remedy against the state and the state refuses to pay or the state maintains insurance coverage and the claimant has filed an administrative claim against the United States. First, forward the file and the tort claim memorandum, including information on the status of any judicial or administrative action the claimant has taken against the state or its insurer to the Commander USARCS. Upon receipt, the Commander USARCS will determine whether to require the claimant to exhaust his or her remedy against the state or its insurer or whether the claim against the United States can be settled without requiring such exhaustion. If the Commander USARCS decides to follow the latter course of action, he or she will also determine whether to obtain an assignment of the claim against the state or its insurer and whether to initiate recovery action to obtain contribution or indemnification. The state or its insurer will be given appropriate notification in accordance with state law.

(ii) If an administrative claim remedy exists under state law or the state

maintains liability insurance, the Commander USARCS or an ACO acting upon the Commander USARCS' approval may enter into a sharing agreement covering payment of future claims. The purpose of such an agreement is to determine in advance whether the state or the DA is responsible for processing a claim (did the claim arise from a federal or state mission?), to expedite payment in meritorious claims, and to preclude double recovery by a claimant.

(f) *Third-party claims involving an independent contractor—(1) Generally.*

(i) Upon receipt, all claims will be examined to determine whether a contractor of the United States is the tortfeasor. If so, the claimant or legal representative will be notified of the name and address of the contractor and further advised that the United States is not responsible for the acts or omissions of an independent contractor. This will be done prior to any determination as to the contractor's degree of culpability as compared to that of the United States.

(ii) If, upon investigation, the damage is considered to be primarily due to the contractor's fault or negligence, the claim will be referred to the contractor or the contractor's insurance carrier for settlement and the claimant will be so advised.

(iii) Health care providers hired under personal services contracts under the provisions of 10 U.S.C. 1089 are not considered to be independent contractors but employees of the United States for tort claims purposes.

(2) *Claims for injury or death of contractor employees.* Upon receipt of a claim for injury or death of a contractor employee, a copy of the portions of the contract applicable to claims and workers' compensation will be obtained, either through the contracting office or from the contractor. Claims personnel must find out the status of any claim for workers' compensation benefits as well as whether the United States paid the premiums. The goal is to involve the contractor in any settlement, where indicated, in the manner set forth in DA Pam 27–162, paragraphs 2–15f and 2–61. In claims arising in foreign countries consider whether the claim is covered by the Defense Bases Act, 42 U.S.C. 1651–1654.

(g) *Claims by contractors for damage to or loss of their property during the performance of their contracts.* Claims by contractors for property damage or loss should be referred to the contracting officer for determination as to whether the claim is payable under the contract. Such a claim is not payable under the FTCA where the damage results from an in-scope act or omission.

Contract appeal procedures must be exhausted prior to consideration as a bailment under the MCA or FCA.

(h) *Maritime claims.* Maritime torts are excluded from consideration under the FTCA. The various maritime statutes are exclusive remedies within the United States and its territorial waters. Maritime statutes include the Army Maritime Claims Settlement Act (AMCSA), 10 U.S.C. 4801, 4802 and 4806, the Suits in Admiralty Act (SIAA), 46 U.S.C. app. 781–790, the Public Vessels Act (PVA), 46 U.S.C. app. 781–790, and the Admiralty Extension Act (AEA), 46 U.S.C. app. 740. Within the U.S. and its territorial waters, maritime suits may be filed under the SIAA or the PVA without first filing an administrative claim, except where administrative filing is required by the AEA. Administrative claims may also be filed under the AMCSA. In any administrative claim brought under the AMCSA, all action must be completed not later than two years from its accrual date or the SOL will expire. Outside the United States, a maritime tort may be brought under the MCA or FCA as well as the AMCSA. The body of water on which it occurs must be navigable and a maritime nexus must exist. Once a maritime claim is identified, give the claimant written notice of the two-year filing requirement. In case of doubt, the ACO or CPO should discuss the matter with the appropriate AAO. Even when the claimant does not believe that a maritime claim is involved, provide the claimant with precautionary notice. See DA Pam 27–162, paragraphs 2–7e and 8–6.

(i) *Postal claims.* See also DA Pam 27–162, paragraphs 2–15i, 2–30 and 2–56g discussing postal claims.

(1) Claims by the U.S. Postal Service for funds and stock are adjudicated by USARCS with assistance from the Military Postal Service Agency and the ACO or CPO having jurisdiction over the particular Army post office, when directed by USARCS to assist in the investigation of the claim.

(2) Claims for loss of registered and insured mail are processed under subpart C of this part by the ACO or CPO having jurisdiction over the particular Army post office.

(3) Claims for loss of, or damage to, parcels delivered by United Parcel Service (UPS) are the responsibility of UPS.

(j) *Blast damage claims.* After completing an investigation and prior to final action, all blast damage claims resulting from Army firing and demolition activities must be forwarded to the Commander USARCS for technical review. The sole exception to

this rule is when a similar claim is filed citing the same time, place and type of damage as one which has already received technical review. See also DA Pam 27–162, paragraph 2–28.

(k) *Motor vehicle damage claims arising from the use of non-governmental vehicles.* See also § 536.60 (splitting property damage and personal injury claims) and DA Pam 27–162, paragraphs 2–15k (determining the correct statute), 2–61 (joint tortfeasors), and 2–62e (indemnity or contribution).

(1) *Government tortfeasors.* A Soldier or U.S. government civilian employee who negligently damages his or her personal property while acting within the scope of employment is not a proper claimant for damage to that property.

(2) *Claims by lessors for damage to rental vehicles.* Third-party claims arising from the use of rental vehicles will be processed in the same manner as NAFI commercially insured activities after exhaustion of any other remedy under the Government Travel Card Program or the Surface Deployment and Distribution Command Car Rental Agreement.

(3) *Third-party damages arising from the use of privately owned vehicles.* Third-party tort claims arising within the United States from a Soldier's use of a privately owned vehicle (POV) while allegedly within the scope of employment must be forwarded to the Commander USARCS for review and consultation before final action. The claim will be investigated and any authorization for use ascertained including payment for mileage. A copy of the Soldier's POV insurance policy will be obtained prior to forwarding. If the DA is an additional insurer under applicable state law, the claim will be forwarded to the Soldier's liability carrier for payment. When the tort claim arises in a foreign country, follow the provisions of subpart J of this part.

(l) *Claims arising from gratuitous use of DOD or Army vehicles, equipment or facilities.*

(1) Before the commencement of any event that involves the use of DOD or Army land, vehicles, equipment or Army personnel for community activities, the Command involved should be advised to first determine and weigh the risk to potential third-party claimants against the benefits to the DOD or the Army. Where such risk is excessive, try to obtain an agreement from the sponsoring civilian organization holding the Army harmless. When feasible, third-party liability insurance may be required from the sponsor and the United States added to the policy as a third-party insured.

(2) When Army equipment and personnel are used for debris removal relief pursuant to the Federal Disaster Relief Act, 42 U.S.C. 5173, the state is required to assume responsibility for third-party claims. The senior judge advocate for a task force engaged in such relief should obtain an agreement requiring the state to hold the Army harmless and establish a procedure for payment by the state. Claims will be received, entered into the TSCA database, investigated and forwarded to state authorities for action.

(m) *Real estate claims.* Claims for rent, damage, or other payments involving the acquisition, use, possession or disposition of real property or interests therein, are generally payable under AR 405–15. These claims are handled by the Real Estate Claims Office in the appropriate COE District or a special office created for a deployment. Directorate of Real Estate, Office of the Chief of Engineers, has supervisory authority. Claims for damage to real property and incidental personal property, but not for rent (for example, claims arising during a maneuver or deployment) may be payable under subparts C or J of this part. However, priority should be given to the use of AR 405–15 as it is more flexible and expeditious. In contingency operations and deployments, there is a large potential for overlap between contractual property damage claims and noncombat activity/maneuver claims. Investigate carefully to ensure the claim is in the proper channel (claims or real estate), that it is fairly settled, and that the claimant does not receive a double payment. For additional guidance, see subpart J of this part and United States Army Claims Service Europe (USACSEUR) Real Estate/Office of the Judge Advocate Standard Operating Procedures for Processing Claims Involving Real Estate During Contingency Operations (August 20, 2002).

(n) *Claims generated by civil works projects.* Civil works projects claims arising from tortious activities are defined by whether the negligent or wrongful act or omission arising from a project or activity is funded by a civil works appropriation. Civil works claims are those noncontractual claims which arise from a negligent or wrongful act or omission during the performance of a project or activity funded by civil works appropriations as distinguished from a project or activity funded by Army operation and maintenance funds. Civil works claims are paid out of civil works appropriations to the extent set forth in § 536.71(f). A civil works claim can also arise out of a noncombat activity, for

example, an inverse condemnation claim in which flooding exceeds the high water mark. Maritime claims under subpart H of this part are civil works claims when they arise out of the operation of a dam, locks or navigational aid.

Note to § 536.34: See parallel discussion at DA Pam 27-162, paragraph 2-1.

§ 536.35 Unique issues related to environmental claims.

Claims for property damage, personal injury, or death arising in the United States based on contamination by toxic substances found in the air or the ground must be reported by USARCS to the Environmental Law Division of the Army Litigation Center and the Environmental Torts Branch of DOJ. Such claims arising overseas must be reported to the Command Claims Service with geographical jurisdiction over the claim and USARCS. Claims for personal injury from contamination frequently arise at an area that is the subject of claims for cleanup of the contamination site. The cleanup claims involve other Army agencies, use of separate funds, and prolonged investigation. Administrative settlement is not usually feasible because settlement of property damage claims must cover all damages, including personal injury. Payment by Defense Environmental Rehabilitation Funds should be considered initially and any such payment should be deducted from any settlement under AR 27-20.

§ 536.36 Related remedies.

An ACO or a CPO routinely receives claims or inquiries about claims that clearly are not cognizable under this part. It is the DA's policy that every effort be made to discover another remedy and inform the inquirer as to its nature. Claims personnel will familiarize themselves with the remedies set forth in DA Pam 27-162, paragraph 2-17, to carry out this policy. If no appropriate remedy can be discovered, forward the file to the Commander USARCS, with recommendations.

§ 536.37 Importance of the claims investigation.

Prompt and thorough investigation will be conducted on all potential and actual claims for and against the government. Evidence developed during an investigation provides the basis for every subsequent step in the administrative settlement of a claim or in the pursuit of a lawsuit. Claims personnel must gather and record adverse as well as favorable information. The CJA, claims attorney or

unit claims officer must preserve their legal and factual findings.

§ 536.38 Elements of the investigation.

(a) The investigation is conducted to ascertain the facts of an incident. Which facts are relevant often depends on the law and regulations applicable to the conduct of the parties involved but generally the investigation should develop definitive answers to such questions as "When?" "Where?" "Who?" "What?" and "How?".

Typically, the time, place, persons, and circumstances involved in an incident may be established by a simple report, but its cause and the resulting damage may require extensive effort to obtain all the pertinent facts.

(b) The object of the investigation is to gather, with the least possible delay, the best available evidence without accumulating excessive evidence concerning any particular fact. The claimant is often an excellent source of such information and should be contacted early in the investigation, particularly when there is a question as to whether the claim was timely filed.

§ 536.39 Use of experts, consultants and appraisers.

(a) ACOs or CPOs will budget operation and maintenance (O&M) funds for the costs of hiring property appraisers, accident reconstructionists, expert consultants to furnish opinions, and medical specialists to conduct independent medical examinations (IMEs). Other expenses to be provided for from O&M funds include the purchase of documents, such as medical records, and the hiring of mediators. See § 536.53(b). Where the cost exceeds \$750 or local funds are exhausted, a request for funding should be directed to the Commander USARCS, with appropriate justification. The USARCS AAO must be notified as soon as possible when an accident reconstruction is indicated.

(b) Where the claim arises from treatment at an Army MTF, the MEDDAC commander should be requested to fund the cost of an independent consultant's opinion or an IME.

(c) The use of outside consultants and appraisers should be limited to claims in which liability or damages cannot be determined otherwise and in which the use of such sources is economically feasible, for instance, where property damage is high in amount and not determinable by a government appraiser or where the extent of personal injury is serious and a government IME is neither available nor acceptable to a claimant. Prior to such an examination at an MTF,

ensure that the necessary specialists are available and a prompt written report may be obtained.

(d) Either an IME or an expert opinion is procured by means of a personal services contract under the Federal Acquisition Regulation (FAR), part 37, 48 CFR 37.000 *et seq.*, through the local contracting office. The contract must be in effect prior to commencement of the records review. Payment is authorized only upon receipt of a written report responsive to the questions asked by the CJA or claims attorney.

(e) Whenever a source other than claims personnel is used to assist in the evaluation of a claim in which medical information protected by HIPAA is involved, the source must sign an agreement designed to protect the patient's privacy rights.

§ 536.40 Conducting the investigation.

(a) The methods and techniques for investigating specific categories of claims are set forth in DA Pam 27-162, paragraphs 2-25 through 2-34. The investigation of medical malpractice claims should be conducted by a CJA or claims attorney, using a medical claims investigator.

(b) A properly filed claim must contain enough information to permit investigation. For example, if the claim does not specify the date, location or details of every incident complained of, the claimant or legal representative should be required to furnish the information.

(c) Request the claimant or legal representative to specify a theory of liability. However, the investigation should not be limited to the theories specified, particularly where the claimant is unrepresented. All logical theories should be investigated.

§ 536.41 Determination of liability—generally.

(a) Under the FTCA, the United States is liable in the same manner and to the same extent as a private individual under like circumstances in accordance with the law of the place where the act or omission giving rise to the tort occurred (28 U.S.C. 2673 and 2674). This means that liability must rest on the existence of a tort cognizable under state law, hereinafter referred to as a state tort. A finding of state tort liability requires the litigating attorney to prove the elements of duty, breach of duty, causation, and damages as interpreted by federal case law.

(b) The foregoing principles and requirements will be followed in regard to tort claims against the United States under other subparts, with certain

exceptions noted within the individual subparts or particular tort statutes.

(c) Interpretation will be made in accordance with FTCA case law and also maritime case law where applicable. Additionally, a noncombat activity can furnish the basis for a claim under subparts C, F, and J of this part. Noncombat activities include claims arising out of civil works, such as inverse condemnation.

(d) Federal, not state or local, law applies to a determination as to who is a federal employee or a member of the armed forces. Under all subparts, the designation "federal employee" excludes a contractor of the United States. See 28 U.S.C. 2671. See however, § 536.23(b)(4)(ii) concerning personal services contractors. For employment identification purposes apply FTCA case law in making a determination.

(e) Federal, not state or local, law applies to an interpretation of the SOL under all subparts. Minority or incompetence does not toll the SOL. Case law developed under the FTCA will be used in other subparts in interpreting SOL questions.

(f) Under the FTCA state or local law is used to determine scope of employment and under other subparts for guidance.

§ 536.42 Constitutional torts.

A claim for violation of the U.S. Constitution does not constitute a state tort and is not cognizable under any subpart. A constitutional claim will be scrutinized in order to determine whether it is totally or partially payable as a state tort. For example, a Fifth Amendment taking may be payable in an altered form as a real estate claim. For further discussion see DA Pam 27-162, paragraph 2-36.

§ 536.43 Incident to service.

(a) A member of the armed forces' claim for personal injury or wrongful death arising incident to service is not payable under any subpart except to the extent permitted by the receiving State under §§ 536.114 through 536.116 (Claims arising overseas); however, a claim by a member of the United States Armed Forces for property loss or damage may be payable under AR 27-20, chapter 11 or, if not, under subparts C, E, F, or G of this part. Derivative claims and claims for indemnity are also excluded.

(b) Claims for personal injury or wrongful death by members of a foreign military force participating in a joint military exercise or operation arising incident to service are not payable under any subpart. Claims for property loss or damage, but not subrogated

claims, may be payable under subpart C of this part. Derivative claims and claims for indemnity or contribution are not payable under any subpart.

Note to § 536.43: For further discussion see DA Pam 27-162, paragraph 2-37.

§ 536.44 FECA and LSHWCA claims exclusions.

A federal or NAFI employee's personal injury or wrongful death claim payable under the Federal Employees Compensation Act (FECA) or the Longshore and Harbor Workers Compensation Act (LSHWCA) is not payable under any subpart. Derivative claims are also excluded but a claim for indemnity may be payable under certain circumstances. A federal or NAFI employee's claim for an incident-to-service property loss or damage may be payable under AR 27-20, chapter 11 or, if not, under subparts C, D, F, G, H or J of this part. For further discussion see DA Pam 27-162, paragraph 2-38.

§ 536.45 Statutory exceptions.

This topic is more fully discussed in DA Pam 27-162, paragraph 2-39. The exclusions listed below are found at 28 U.S.C. 2680 and apply to subparts C, D, F, and H and §§ 536.107 through 536.113 (Claims arising in the United States) of subpart G, except as noted therein, and not to subparts E, J or §§ 536.107 through 536.113 (Claims arising overseas) of subpart G of this part. A claim is not payable if it:

(a) Is based upon an act or omission of an employee of the U.S. government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation is valid. This exclusion does not apply to a noncombat activity claim.

(b) Is based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the government, whether or not the discretion is abused. This exclusion does not apply to a noncombat activity claim.

(c) Arises out of the loss, miscarriage, or negligent transmission of letters or postal matters. This exclusion is not applicable to registered or certified mail claims under subpart C of this part. See § 536.34(i).

(d) Arises in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any customs or other law enforcement officer. See 28 U.S.C. 2680(c).

(e) Is cognizable under the SIAA (46 U.S.C. app. 741-752), the PVA (46 U.S.C. app. 781-790), or the AEA (46 U.S.C. app. 740). This exclusion does

not apply to subparts C, F, H or J of this part.

(f) Arises out of an act or omission of any federal employee in administering the provisions of the Trading with the Enemy Act, 50 U.S.C. app. 1-44.

(g) Is for damage caused by the imposition or establishment of a quarantine by the United States.

(h) Arises out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights, except for acts or omissions of investigation of law enforcement officers of the U.S. government with regard to assault, battery, false imprisonment, false arrest, abuse of process or malicious prosecution. This exclusion also does not apply to a health care provider as defined in 10 U.S.C. 1089 and § 536.80 of this part, under the conditions listed therein.

(i) Arises from the fiscal operations of the U.S. Department of the Treasury or from the regulation of the monetary system.

(j) Arises out of the combatant activities of U.S. military or naval forces, or the Coast Guard during time of war.

(k) Arises in a foreign country. This exclusion does not apply to subparts C, E, F, H, J or §§ 536.114 through 536.116 (Claims arising overseas) of subpart G of this part.

(l) Arises from the activities of the Tennessee Valley Authority, 28 U.S.C. 2680(l).

(m) Arises from the activities of the Panama Canal Commission, 28 U.S.C. 2680(m).

(n) Arises from the activities of a federal land bank, a federal intermediate credit bank, or a bank for cooperatives, 28 U.S.C. 2680(n).

Note to § 536.45: This topic is more fully discussed in DA Pam 27-162, paragraph 2-39.

§ 536.46 Other exclusions.

(a) *Statutory employer.* A claim is not payable under any subpart if it is for personal injury or death of any contract employee for whom benefits are provided under any workers' compensation law, if the provisions of the workers' compensation insurance are retrospective and charge an allowable expense to a cost-type contract, or if precluded by state law. See Federal Tort Claims Handbook (FTCH), section II, D7 (posted on the Web at <https://www.jagcnet.army.mil/laawsxxi/cds.nsf>). Select the link "Claims" under "JAG Publications." The statutory employer exclusion also

applies to claims that may be covered by the Defense Bases Act, 42 U.S.C. 1651–1654.

(b) *Flood exclusion.* Within the United States a claim is not payable if it arises from damage caused by flood or flood waters associated with the construction or operation of a COE flood control project, 33 U.S.C. 702(c). See DA Pam 27–162, paragraph 2–40.

(c) *ARNG property.* A claim is not payable under any subpart if it is for damage to, or loss of, property of a state, commonwealth, territory, or the District of Columbia caused by ARNG personnel, engaged in training or duty under 32 U.S.C. 316, 502, 503, 504, or 505, who are assigned to a unit maintained by that state, commonwealth, territory, or the District of Columbia. See DA Pam 27–162, paragraph 2–41.

(d) *Federal Disaster Relief Act.* Within the United States a claim is not payable if it is for damage to, or loss of, property or for personal injury or death arising out of debris removal by a federal agency or employee in carrying out the provisions of the Federal Disaster Relief Act, 42 U.S.C. 5173. See DA Pam 27–162, paragraph 2–42.

(e) *Non-justiciability doctrine.* A claim is not payable under any subpart if it arises from activities that present a non-justiciable political question. See DA Pam 27–162, paragraph 2–43.

(f) *National Vaccine Act.* (42 U.S.C. 300aa–1 through 300aa–7). A claim is not payable under any subpart if it arises from the administration of a vaccine unless the conditions listed in the National Vaccine Injury Compensation Program (42 U.S.C. 300aa–9 through 300aa–19) have been met. See DA Pam 27–162, paragraph 2–17c(6)(a).

(g) *Defense Mapping Agency.* A claim is not payable under any subpart if it arises from inaccurate charting by the Defense Mapping Agency, 10 U.S.C. 456. See FTCH section II, B4s (Web address at paragraph (a) of this section).

(h) *Quiet Title Act.* Within the U.S., a claim is not payable if it falls under the Quiet Title Act 28 U.S.C. 2409a.

(i) *Defense Bases Act.* A claim arising outside the United States is not payable if it is covered by the Defense Bases Act, 42 U.S.C. 1651–1654.

Note to § 536.46: See parallel discussion at DA Pam 27–162, paragraphs 2–40 through 2–43.

§ 536.47 Statute of limitations.

To be payable, a claim against the United States under any subpart, except §§ 536.114 through 536.116 (Claims arising overseas), must be filed no later

than two years from the date of accrual as determined by federal law. The accrual date is the date on which the claimant is aware of the injury and its cause. The claimant is not required to know of the negligent or wrongful nature of the act or omission giving rise to the claim. The date of filing is the date of receipt by the appropriate federal agency, not the date of mailing. See also § 536.26(a) and parallel discussion at DA Pam 27–162, paragraph 2–44.

§ 536.48 Federal employee requirement.

To be payable, a claim under any subpart except subpart K of this part, §§ 536.153 through 536.157 (Claims involving tortfeasors other than nonappropriated fund employees), must be based on the acts or omissions of a member of the armed forces, a member of a foreign military force within the United States with which the United States has a reciprocal claims agreement, or a federal civilian employee. This does not include a contractor of the United States. Apply federal case law for interpretation. See parallel discussion at DA Pam 27–162, paragraph 2–46.

§ 536.49 Scope of employment requirement.

To be payable, a claim must be based on acts or omissions of a member of the armed forces, a member of a foreign military force within the United States with which the United States has a reciprocal claims agreement, or a federal employee acting within the scope of employment, except for subparts E, J, or subpart K of this part, §§ 536.153 through 536.157 (Claims involving tortfeasors other than nonappropriated fund employees). A claim arising from noncombat activities must be based on the armed service's official activities. Excluded are claims based on vicarious liability or the holder theory in which the owner of the vehicle is responsible for any injury or damage regardless of who the operator was. See parallel discussion at DA Pam 27–162, paragraph 2–46.

§ 536.50 Determination of damages—applicable law.

(a) *The Federal Tort Claims Act.* The whole law of the place where the incident giving rise to the claim occurred, including choice of law rules, is applicable. Therefore, the law of the place of injury or death does not necessarily apply. Where there is a conflict between local law and an express provision of the FTCA, the latter governs.

(b) *The Military Claims Act or National Guard Claims Act.* See subparts C and F of this part. The law set forth in § 536.80 applies only to claims accruing on or after September 1, 1995. The law of the place of the incident giving rise to the claim will apply to claims arising in the United States, its commonwealths, territories and possessions prior to September 1, 1995. The general principles of U.S. tort law will apply to property damage or loss claims arising outside the United States prior to September 1, 1995. Established principles of general maritime law will apply to injury or death claims arising outside the United States prior to September 1, 1995. See *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970) and federal case law. Where general maritime law provides no guidance, the general principles of U.S. tort law will apply.

(c) *The Foreign Claims Act.* See subpart J of this part. The law of the place of occurrence applies to the resolution of claims. However, the law of damages set forth in § 536.139 will serve as a guide.

(d) *The Army Maritime Claims Settlement Act.* Maritime law applies.

(e) *Damages not payable.* Under all subparts, property loss or damage refers to actual tangible property. Accordingly, consequential damages, including, but not limited to bail, interest (prejudgment or otherwise), or court costs are not payable. Costs of preparing, filing, and pursuing a claim, including expert witness fees, are not payable. The payment of punitive damages, that is, damages in addition to general and special damages that are otherwise payable, is prohibited. See DA Pam 27–162, paragraphs 2–56 and 3–4b.

(f) *Source of attorney's fees.* Attorney's fees are taken from the settlement amount and not added thereto. They may not exceed 20 percent of the settlement amount under any subpart.

Note to § 536.50: For further discussion see DA Pam 27–162, paragraph 2–51.

§ 536.51 Collateral source rule.

Where permitted by applicable state or maritime law, damages recovered from collateral sources are payable under subparts D and H, but not under subparts C, E, F, or J of this part. For further discussion see DA Pam 27–162, paragraph 2–57.

§ 536.52 Subrogation.

Subrogation is the substitution of one person in place of another with regard to a claim, demand or right. It should

not be confused with a lien, which is an obligation of the claimant. Applicable state law should be researched to determine the distinction between subrogation and a lien. Subrogation claims are payable under subparts D and H, but not under subparts C, E, F or J of this part. For further discussion see DA Pam 27-162, paragraph 2-58.

§ 536.53 Evaluation of claims—general rules and guidelines.

(a) Before claims personnel evaluate a claim:

(1) A claimant or claimant's legal representative will be furnished the opportunity to substantiate the claim by providing essential documentary evidence according to the claim's nature including, but not instead of, the following: Medical records and reports, witness statements, itemized bills and paid receipts, estimates, federal tax returns, W-2 forms or similar proof of loss of earnings, photographs, and reports of appraisals or investigation. If necessary, request permission, through the legal representative, to interview the claimant, the claimant's family, proposed witnesses and treating health care providers (HCPs). In a professional negligence claim, the claimant will submit an expert opinion when requested. State law concerning the requirement for an affidavit of merit should be cited.

(2) When the claimant or the legal representative fails to respond in a timely manner to informal demands for documentary evidence, interviews, or an independent medical examination (IME), make a written request. Such written request provides notice to the claimant that failure to provide substantiating evidence will result in an evaluation of the claim based only on information currently in the file. When, despite the government's request, there is insufficient information in the file to permit evaluation, the claim will be denied for failure to document it. Failure to submit to an IME or sign an authorization to use medical information protected by HIPAA, for review or evaluation by a source other than claims personnel, are both grounds for denial for failure to document, provided such evaluation is essential to the determination of liability or damages. State a time limit, for example, 30 or 60 days, to furnish the substantiation or expert opinion required in a medical malpractice claim.

(3) If, in exchange for complying with the government's request for the foregoing information, the claimant or the legal representative requests similar information from the file, the claimant may be provided such information and

documentation as is releasable under the Federal Rules of Civil Procedure (FRCP). Additionally, work product may be released if such release will help settle the claim. See § 536.18.

(b) An evaluation should be viewed from the claimant's perspective. In other words, before denying a claim, first determine whether there is any reasonable basis for compromise. Certain jurisdictional issues and statutory bases may not be open for compromise. The incident to service and FECA exclusions are rarely subject to compromise, whereas the SOL is more subject to compromise. Factual and legal disputes are compromiseable, frequently providing a basis for limiting damages, not necessarily grounds for denial. Where a precise issue of dispute is identified and is otherwise unresolvable, mediation by a disinterested qualified person, such as a federal judge, or foreign equivalent for claims arising under the FCA, should be obtained upon agreement with the claimant or the claimant's legal representative. Contributory negligence has given way to comparative negligence in most United States jurisdictions. In most foreign countries, comparative negligence is the rule of law.

Note to § 536.53: For further discussion see DA Pam 27-162, paragraph 2-59.

§ 536.54 Joint tortfeasors.

When joint tortfeasors are liable, it is DA policy to pay only the fair share of a claim attributable to the fault of the United States rather than pay the claim in full and then bring suit against the joint tortfeasor for contribution. If payment from a joint tortfeasor is not forthcoming after the CJA's demand, the United States should settle for its fair share, provided the claimant is willing to hold the United States harmless. Where a joint tortfeasor's liability greatly outweighs that of the United States, the claim should be referred to the joint tortfeasor for action.

§ 536.55 Structured settlements.

(a) The use of future periodic payments, including reversionary medical trusts, is encouraged to ensure that the injured party is adequately compensated and able to meet future needs.

(1) It is necessary to ensure adequate care and compensation for a minor or other incompetent claimant or unemployed survivor over a period of years.

(2) A medical trust is necessary to ensure the long-term availability of funds for anticipated future medical

care, the cost of which is difficult to predict.

(3) The injured party's life expectancy cannot be reasonably determined or is likely to be shortened.

(b) Under subpart D of this part, structured settlements cannot be required but are encouraged in situations listed above or where state law permits them. In the case of a minor, every effort should be made to insure that the minor, and not the parents, receives the benefit of the settlement. Annuity payments at the age of majority should be considered. If rejected, a blocked bank account may be used.

(c) It is the policy of the Department of Justice never to discuss the tax-free nature of a structured settlement.

Note to § 536.55: For further discussion, see DA Pam 27-162, paragraph 2-63.

§ 536.56 Negotiations—purpose and extent.

It is DA policy to settle meritorious claims promptly and fairly through direct negotiation at the lowest possible level. The Army's negotiator should not admit liability as such is not necessary. However, the settlement should reflect diminished value where contributory negligence or other value-diminishing factors exist. The negotiator should be thoroughly familiar with all aspects of the case, including the claimant's background, the key witnesses, the anticipated testimony and the appearance of the scene. There is no substitute for the claims negotiator's personal study of, and participation in, the case before settlement negotiations begin. If settlement is not possible due to the divergence in the offers, refine the issues as much as possible in order to expedite any subsequent suit. Mediation should be used if the divergence is due to an issue of law affecting either liability or damages. For further discussion see DA Pam 27-162, paragraph 2-64.

§ 536.57 Who should negotiate.

An AAO or, when delegated additional authority, an ACO or a CPO, has authority to settle claims in an amount exceeding the monetary authority delegated by regulation. It is DA policy to delegate USARCS authority, on a case-by-case basis, to an ACO or a CPO possessing the appropriate ability and experience. Only an attorney should negotiate with a claimant's attorney. Negotiations with unrepresented claimants may be conducted by a non-attorney, under the supervision of an attorney. For further discussion see DA Pam 27-162, paragraph 2-65.

§ 536.58 Settlement negotiations with unrepresented claimants.

All aspects of the applicable law and procedure, except the amount to be claimed, should be explained to both potential and actual claimants. The negotiator will ensure that the claimant is aware of whether the negotiator is an attorney or a non-attorney, and that the negotiator represents the United States. As to claims within USARCS' monetary authority, the chronology and details of negotiations should be memorialized with a written record furnished to the claimant. The claimant should understand that it is not necessary to hire an attorney, but when an attorney is needed, the negotiator should recommend hiring one. In a claim where liability is not an issue, the claimant should be informed that if an attorney is retained, the claimant should attempt to negotiate an hourly fee for determination of damages only. For further discussion see DA Pam 27-162, paragraph 2-68.

§ 536.59 Settlement or approval authority.

"Settlement authority" is a statutory term (10 U.S.C. 2735) meaning that officer authorized to approve, deny or compromise a claim, or make final action. "Approval authority" means the officer empowered to settle, pay or compromise a claim in full or in part, provided the claimant agrees. "Final action authority" means the officer empowered to deny or make a final offer on a claim. Determining the proper officer empowered to approve or make final action on a claim depends on the claims statute involved and any limitations that apply under that statute. DA Pam 27-162, paragraph 2-69, outlines how various authority is delegated among offices.

§ 536.60 Splitting property damage and personal injury claims.

Normally, a claim will include all damages that accrue by reason of the incident. Where a claimant has a claim for property damage and personal injury arising from the same incident, the property damage claim may be paid, under certain circumstances, prior to the filing of the personal injury claim. The personal injury claim may be filed later provided it is filed within the applicable statute of limitations. When both property damage and personal injury arise from the same incident, the property damage claim may be paid to either the claimant or, under subparts D or H of this part, the insurer and the same claimant may receive a subsequent payment for personal injury. Only under subparts D or H of this part may the insurer receive subsequent payment for

subrogated medical bills and lost earnings when the personal injury claim is settled. The primary purpose of settling an injured claimant's property damage claim before settling the personal injury claim is to pay the claimant for vehicle damage expeditiously and avoid costs associated with delay such as loss of use, loss of business, or storage charges. The Commander USARCS' approval must be obtained whenever the estimated value of any one claim exceeds \$25,000, or the value of all claims, actual or potential, arising from the incident exceeds \$50,000; however, if the claim arises under the FTCA or AMCSA, only if the amount claimed exceeds \$50,000, or \$100,000 per incident.

§ 536.61 Advance payments.

(a) This section implements 10 U.S.C. 2736 (Act of September 8, 1961 (75 Stat. 488)) as amended by Public Law 90-521 (82 Stat. 874); Public Law 98-564 (90 Stat. 2919); and Public Law 100-465 (102 Stat. 2005)). No new liability is created by 10 U.S.C. 2736, which merely permits partial advance payments, only under subparts C, F or J of this part, on claims not yet filed. See AR 27-20, paragraph 11-18 for information on emergency partial payments in personnel claims, which are not governed by 10 U.S.C. 2736.

(b) The Judge Advocate General (TJAG) and the Assistant Judge Advocate General (TAJAG) may make advance payments in amounts not exceeding \$100,000; the Commander USARCS, in amounts not exceeding \$25,000, and the authorities designated in §§ 536.786(4) and (5) and 536.101, in amounts not exceeding \$10,000, subject to advance coordination with USARCS, if the estimated total value of the claim exceeds their monetary authority. Requests for advance payments in excess of \$10,000 will be forwarded to USARCS for processing.

(c) Under subpart J of this part, three-member foreign claims commissions may make advance payments under the FCA in amounts not exceeding \$10,000, subject to advance coordination with USARCS if the estimated total value of the claim exceeds their monetary authority.

(d) An advance payment, not exceeding \$100,000, is authorized in the limited category of claims or potential claims considered meritorious under subparts C, F or J of this part, that result in immediate hardship. An advance payment is authorized only under the following circumstances:

(1) The claim, or potential claim, must be determined to be cognizable and

meritorious under the provisions of subparts C, F or J of this part.

(2) An immediate need for food, clothing, shelter, medical or burial expenses, or other necessities exists.

(3) The payee, so far as can be determined, would be a proper claimant, including an incapacitated claimant's spouse or next-of-kin.

(4) The total damage sustained must exceed the amount of the advance payment.

(5) A properly executed advance payment acceptance agreement has been obtained. This acceptance agreement must state that it does not constitute an admission of liability by the United States and that the amount paid shall be deducted from any subsequent award.

(e) There is no statutory authority for making advance payments for claims payable under subparts D or H of this part.

Note to § 536.61: For further discussion see DA Pam 27-162, paragraph 2-71.

§ 536.62 Action memorandums.

(a) *When required.* (1) All claims will be acted on prior to being closed except for those that are transferred. For claims on which suit is filed before final action, see § 536.66. A settlement authority may deny or pay in full or in part any claim in a stated amount within his or her delegated authority. An approval authority may pay in full or in part, but may not deny, a claim in a stated amount within his or her delegated authority. If any one claim arising out of the same incident exceeds a settlement or approval authority's monetary jurisdiction, all claims from that incident will be forwarded to the authority having jurisdiction.

(2) In any claim which must be supported by an expert opinion as to duty, negligence, causation or damages, an expert opinion must be submitted upon request. All opinions must meet the standards set forth in Federal Rule of Evidence 702.

(3) An action memorandum is required for all final actions regardless of whether payment is made electronically. The memorandum will contain a sufficient rendition of the facts, law or damages to justify the action being taken. (A model action is posted on the USARCS Web site; for the address see § 536.2(a).)

(b) *Memorandum of Opinion.* Upon completion of the investigation, the ACO or CPO will prepare a memorandum of opinion in the format prescribed at DA Pam 27-162, when a claim is forwarded to USARCS for action. This requirement can be waived by the USARCS AAO.

(c) *Claim brought by a claims authority or superior.* A claim filed by an approval or settlement authority or his or her superior officer in the chain of command or a family member of either will be investigated and forwarded for final action, without recommendation, to the next higher settlement authority (in an overseas area, this includes a command claims service) or to USARCS.

Note to § 536.62: For further discussion see DA Pam 27-162, paragraph 2-72.

§ 536.63 Settlement agreements.

(a) *When required.* (1) A claimant's acceptance of an award constitutes full and final settlement and release of any and all claims against the United States and its employees, except as to payments made under §§ 536.60 and 536.61. A settlement agreement is required prior to payment on all tort claims, whether the claim is paid in full or in part.

(2) DA Form 1666 (Claims Settlement Agreement) may be used for payment of COE claims of \$2,500 or less or all Army Central Insurance Fund and Army and Air Force Exchange Service claims.

(3) DA Form 7500 (Tort Claim Payment Report) will be used for all payments from the Defense Finance and Accounting Service (DFAS), for example, FTCA claims of \$2,500 or less, FCA and MCA claims of \$100,000 or less and all maritime claims regardless of amount.

(4) Financial Management Service (FMS) Forms 194, 196 and 197 will be used for all payments from the Judgment Fund, for example, FTCA claims exceeding \$2,500, MCA and FCA claims exceeding \$100,000.

(5) An alternative settlement agreement will be used when the claimant is represented by an attorney, or when any of the above settlement agreement forms are legally insufficient (such as when multiple interests are present, a hold harmless agreement is reached, or there is a structured settlement). For further discussion, see DA Pam 27-162, paragraph 2-73c.

(b) *Unconditional settlement.* The settlement agreement must be unconditional. The settlement agreement represents a meeting of the minds. Any changes to the agreement must be agreed upon by all parties. The return of a proffered settlement agreement with changes written thereon or on an accompanying document represents, in effect, a counteroffer and must be resolved. Even if the claimant signs the agreement and objects to its terms, either in writing or verbally, the settlement is defective and the objection

must be resolved. Otherwise a final offer should be made.

(c) *Court approval*—(1) *When required.* Court approval is required in a wrongful death claim, or where the claimant is a minor or incompetent. The claimant is responsible to obtain court approval in a jurisdiction that is locus of the act or omission giving rise to the claim or in which the claimant resides. The court must be a state or local court, including a probate court. If the claimant can show that court approval is not required under the law of the jurisdiction where the incident occurred or where the claimant resides, the citation of the statute will be provided and accompany the payment documents.

(2) *Attorney representation.* If the claimant is a minor or incompetent, the claimant must be represented by a lawyer. If not already represented, the claimant should be informed that the requirement is mandatory unless state or local law expressly authorizes the parents or a person in loco parentis to settle the claim.

(3) *Costs.* The cost of obtaining court approval will be factored into the amount of the settlement; however, the amount of the costs and other costs will not be written into the settlement, only the 20% limitation on attorney fees will be included.

(4) *Claims involving an estate or personal representative of an estate.* On claims presented on behalf of a decedent's estate, the law of the state having jurisdiction should be reviewed to determine who may bring a claim on behalf of the estate, if court appointment of an estate representative is required, and if court approval of the settlement is required.

(d) *Signature requirements.* (1) Except as noted in paragraphs (d)(2) through (d)(6) of this section, all settlement agreements will be signed individually by each claimant. A limited power of attorney signed by the claimant specifically stating the amount being accepted and authorizing an attorney at law or in fact to sign is acceptable when the claimant is unavailable to sign. The signatures of the administrator or executor of the estate, appointed by a court of competent jurisdiction or authorized by local law, are required. The signatures of all adult beneficiaries, acknowledging the settlement, should be obtained unless permission is given by Commander USARCS. Court approval must be obtained where required by state law. If not required by state law, the citation of the state statute will accompany the payment document. Additionally, all adult heirs will sign as acknowledging the settlement. In lieu

thereof, where the adult heirs are not available, the estate representative will acknowledge that all heirs have been informed of the settlement.

(2) Generally, only a court-appointed guardian of a minor's estate, or a person performing a similar function under court supervision, may execute a binding settlement agreement on a minor's claim. In the United States, the law of the state where the minor resides or is domiciled will determine the age of majority and the nature and type of court approval that is needed, if any. The age of majority is determined by the age at the time of settlement, not the date of filing.

(3) For claims arising in foreign countries where the amount agreed upon does not exceed \$2,500, the requirement to obtain a guardian may be eliminated. For settlements over \$2,500, whether or not the claim arose in the United States, refer to applicable local law, including the law of the foreign country where the minor resides.

(4) In claims where the claimant is an incompetent, and for whom a guardian has been appointed by a court of competent jurisdiction, the signature of the guardian must be obtained. In cases in which competence of the claimant appears doubtful, a written statement by the plaintiff's attorney and a member of the immediate family should be obtained.

(5) Settlement agreements involving subrogated claims must be executed by a person authorized by the corporation or company to act in its behalf and accompanied by a document signed by a person authorized by the corporation or company to delegate execution authority.

(6) If it is believed that the foregoing requirements are materially impeding settlement of the claim, bring the matter to the attention of the Commander USARCS for appropriate resolution.

(e) *Attorneys' fees and costs.* (1) Attorneys' fees for all subparts in this part 536 fall under the American Rule and are payable only out of the up front cash in any settlement. Attorneys' fees will be stated separately in the settlement agreement as a sum not to exceed 20% of the award.

(2) Costs are a matter to be determined solely between the attorney and the claimant and will not be set forth or otherwise enumerated in the settlement agreement.

(f) *Claims involving workers' compensation carriers.* The settlement of a claim involving a claimant who has elected to receive workers' compensation benefits under local law may require the consent of the workers' compensation insurance carrier, and in

certain jurisdictions, the state agency that has authority over workers' compensation awards. Accordingly, claims approval and settlement authorities should be aware of local requirements.

(g) *Claims involving multiple interests.* Where two or more parties have an interest in the claim, obtain signatures on the settlement agreement from all parties. Examples are where both the subrogee and subrogor file a single claim for property damage, where both landlord and tenant file a claim for damage to real property, or when a POV is leased, both the lessor or lessee.

(h) *Claims involving structured settlements.* All settlement agreements involving structured settlements will be prepared by the Tort Claims Division, USARCS, and approved by the Chief or Deputy Chief, Tort Claims Division.

§ 536.64 Final offers.

(a) When claims personnel believe that a claim should be compromised, and after every reasonable effort has been made to settle at less than the amount claimed, a settlement authority will make a written final offer within his or her monetary jurisdiction or forward the claim to the authority having sufficient monetary jurisdiction, recommending a final offer under the applicable statute. The final offer notice will contain sufficient detail to outline each element of damages as well as discuss contributory negligence, the SOL or other reasons justifying a compromise offer. The offer letter should include language indicating that if the offer is not accepted within a named time period, for example, 30 or 60 days the offer is withdrawn and the claim is denied.

(b) A final offer under subpart D of this part will notify the claimant of the right to sue, not later than six months from the notice's date of mailing, and of the right to request reconsideration. The procedures for processing a request for reconsideration are set forth in § 536.89.

(c) Under subparts C or F of this part, the notice will contain an appeal paragraph. A similar procedure will be followed in subparts E and H of this part. Subpart J of this part sets forth its own procedures for FCA final offers. The procedures for processing an appeal are set forth in § 536.79 of this part. The letter must inform claimants of the following:

(1) They must accept the offer within 60 days or appeal. The appeal should state a counteroffer.

(2) The identity of the official who will act on the appeal, and the requirement that the appeal will be

addressed to the settlement authority who last acted on the claim.

(3) No form is prescribed for the appeal, but the notice of appeal must fully set forth the grounds for appeal or state that it is based on the record as it exists at the time of denial or final offer.

(4) The appeal must be postmarked not later than 60 days after the date of mailing of the final notice of action. If the last day of the appeal period falls on a Saturday, Sunday, or legal holiday, as specified in Rule 6a of the Federal Rules of Civil Procedure, the following day will be considered the final day of the appeal period.

(d) Where a claim for the same injury falls under both subparts C and D of this part (the MCA and the FTCA), and the denial or final offer applies equally to each such claim, the letter of notification must advise the claimant that any suit brought on any portion of the claim filed under the FTCA must be brought not later than six months from the date of mailing of the notice of final offer and any appeal under subpart C of this part must be made as stated in paragraph (c) of this section. Further, the claimant must be advised that if suit is brought, action on any appeal under subpart C of this part will be held in abeyance pending final determination of such suit.

(e) Upon request, the settlement authority may extend the six-month reconsideration or 60-day appeal period provided good cause is shown. The claimant will be notified as to whether the request is granted under the FTCA and that the request precludes the filing of suit under the FTCA for 6 months. Only one reconsideration is authorized. Accordingly, that claimant should be informed of the need to make all submissions timely.

Note to § 536.64: For further discussion see DA Pam 27-162, paragraph 2-74.

§ 536.65 Denial notice.

(a) Where there is no reasonable basis for compromise, a settlement authority will deny a claim within his or her monetary jurisdiction or forward the claim recommending denial to the settlement authority that has jurisdiction. The denial notice will contain instructions on the right to sue or request reconsideration. The notice will state the basis for denial. No admission of liability will be made. A notice to an unrepresented claimant should detail the basis for denial in lay language sufficient to permit an informed decision as to whether to request appeal or reconsideration. In the interest of deterring reconsideration, appeal or suit, a denial notice may be

releasable under the Federal Rules of Civil Procedure or by the work product documents doctrine.

(b) Regardless of the claim's nature or the statute under which it may be considered, letters denying claims on jurisdictional grounds that are valid, certain, and not easily overcome (and for this reason no detailed investigation as to the merits of the claim was conducted), must state that denial on such grounds is not to be construed as an opinion on the merits of the claim or an admission of liability. In medical malpractice claims, the denial should state that the file is being referred to U.S. Army Medical Command for review. If sufficient factual information exists to make a tentative ruling on the merits of the claim, liability may be expressly denied.

Note to § 536.65: See § 536.53, on denying a claim for failure to substantiate. In addition, the procedures and rules in DA Pam 27-162, paragraph 2-69, settlement and approval authority, apply equally to the denial of claims. See also DA Pam 27-162, paragraph 2-75.

§ 536.66 The "Parker" denial.

(a) When suit is filed before final action is taken on a subpart D of this part claim, a denial letter will be issued only upon request of DOJ or the trial attorney. If suit is filed prematurely or in error, the claimant may be requested to withdraw the suit without prejudice. Such a request must be coordinated with the trial attorney.

(b) Claimants who have filed companion claims should be notified that, due to suit being filed, no action can be taken pending the outcome of suit and they may file suit if they wish.

Note to § 536.66: For further discussion see DA Pam 27-162, paragraph 2-76.

§ 536.67 Mailing procedures.

Thirty or sixty day letters seeking information from claimants, final offers and denial notices are time-sensitive as they require a claimant to take additional action within certain time limits. Accordingly, follow procedures to ensure that the date of mailing and receipt of a request for reconsideration are documented. Use certified mail with return receipt requested (or registered mail, if being sent to a foreign country other than by the military postal system) to mail such notices. Upon receipt, an appeal or request for reconsideration will be date-time stamped, logged in, and acknowledged as set forth in § 536.68.

Note to § 536.67: See also AR 27-20, paragraph 13-5, and DA Pam 27-162, paragraph 2-77.

§ 536.68 Appeal or reconsideration.

(a) An appeal or a request for reconsideration will be acknowledged in writing. A request for reconsideration under subpart D of this part invokes the six-month period during which suit cannot be filed, 28 CFR 14.9(b). The acknowledgment letter will underscore this restriction.

(b) Where the contents of the appeal or request for reconsideration indicate, additional investigation will be conducted and the original action changed if warranted. Except for subpart J of this part, which sets forth separate rules for FCCs, if the relief requested is not warranted the settlement authority will forward the claim to a higher settlement authority with a claims memorandum of opinion (see § 536.62) stating the reasons why the request is invalid.

Note to § 536.68: See also DA Pam 27-162, paragraph 2-78.

§ 536.69 Retention of file.

After final action has been taken, the settlement authority will retain the file until at least one month after either the period of filing suit or the appeal has expired and until all data has been entered into the database. A paid claim file will be retained until final action has been taken on all other claims arising out of the same incident. If any single claim arising out of the same incident must be forwarded to higher authority for final action, all claims files for that incident will be forwarded at the same time. For further discussion see DA Pam 27-162, paragraph 2-79.

§ 536.70 Preparation and forwarding of payment vouchers.

(a) An unrepresented claimant will be listed as the sole payee. Joint claimants will not be listed since settlement agreements must specify the amount payable to each claimant individually and each must be issued a separate check.

(b) When a claimant is represented by an attorney, only one payment voucher will be issued with the claimant and the attorney as joint payees. The payment will be sent to the office of the claimant's attorney. The attorney of record, either an individual or firm designated by the claimant, will be the co-payee. If claimant has been represented by other attorneys in the same claim, such attorneys will not be listed as payees, even if they have a lien. Satisfaction of any such fee will be a matter between the claimant and such attorney. If payment is made by electronic transfer, the funds will be paid into the account of the claimant.

However, if requested, the payment may be made into the attorney's escrow account provided the claimant has provided written authorization.

(c) In a structured settlement the structured settlement broker will be the sole payee, who is authorized to issue checks for the amounts set forth in the settlement agreement. The up-front cash payment may be deposited into an escrow account established for the benefit of the claimant.

(d) If a claimant is a minor or has been declared incompetent by a court or other authority authorized to do so, payment will be made to the court-appointed guardian of the minor or incompetent, at a financial institution approved by the court approving the settlement.

(e) If the claimant is representing a deceased's estate on a wrongful death claim, or a survival action on behalf of the deceased, the payment will be made to the court-appointed representative of the estate. No payment will be made directly to the estate.

Note to § 536.70: See also § 536.63 and DA Pam 27-162, paragraphs 2-73 and 2-81.

§ 536.71 Fund sources.

(a) 31 U.S.C. 1304 sets forth the type and limits of claims payable out of the Judgment Fund. Only final payments that are not payable out of agency funds are allowable, per the Treasury Financial Manual, Volume I, Part 6, Chapter 3110, at Section 3115, September 2000. Threshold amounts for payment from the judgment fund vary according to the subpart and statutes under which a claim is processed. To determine the threshold amount for any given payment procedure one must arrive at a sum of all awards for all claims arising out of that incident, including derivative claims. A joint amount is not acceptable. A claim for injury to a spouse or a child is a separate claim from one for loss of consortium or services by a spouse or parent. The monetary limits of \$2,500 set forth in subpart D and \$100,000 set forth in subparts C, F or J of this part, apply to each separate claim.

(b) A claim for \$2,500 or less arising under subpart D or E, or under §§ 536.107 through 536.113 of subpart G, is paid from the open claims allotment (see AR 27-20 paragraph 13-6 b(1)) or, if arising from a project funded by a civil works appropriation, from COE civil works funds. The Department of the Treasury pays any settlement exceeding \$2,500 in its entirety, from the Judgment Fund. However, if a subpart G of this part, §§ 536.107 through 536.113 claim is

treated as a noncombat activity claim, payment is made as set forth in paragraph (c) of this section.

(c) The first \$100,000 for each claimant on a claim settled under subparts C, F or J of this part is paid from the open claims allotment. Any amount over \$100,000 is paid out of the Judgment Fund.

(d) If not over \$500,000, a claim arising under subpart H of this part is paid from the open claims allotment or civil works project funds as appropriate. A claim exceeding \$500,000 is paid entirely by a deficiency appropriation.

(e) AAFES or NAFI claims are paid from nonappropriated funds, except when such claims are subject to apportionment between appropriated and nonappropriated funds. See DA Pam 27-162, paragraph 2-80h.

(f) COE claims arising out of projects not funded out of civil works project funds are payable from the open claims allotment not to exceed \$2,500 for subpart D claims and \$100,000 for claims arising from subparts C, F or J of this part and from the Judgment Fund, over such amounts.

Note to § 536.71: For further discussion see DA Pam 27-162, paragraph 2-80.

§ 536.72 Finality of settlement.

A claimant's acceptance of an award, except for an advance payment or a split payment for property damage only, constitutes a release of the United States and its employees from all liability. Where applicable, a release should include the ARNG or the sending State. For further discussion see DA Pam 27-162, paragraph 2-82.

Subpart C—Claims Cognizable Under the Military Claims Act**§ 536.73 Statutory authority for the Military Claims Act.**

The statutory authority for this subpart is contained in the Act of August 10, 1956 (70A Stat. 153, 10 U.S.C. 2733), commonly referred to as the Military Claims Act (MCA), as amended by 90-521, September 1968 (82 Stat. 874); Public Law 90-522, September 1968 (82 Stat. 875); Public Law 90-525, September 1968 (82 Stat. 877); Public Law 93-336, July 8, 1974 (88 Stat. 291); Public Law 98-564, October 1984, (98 Stat. 2918); and Public Law 103-337, October 1994 (108 Stat. 2664).

§ 536.74 Scope for claims under the Military Claims Act.

(a) The guidance set forth in this subpart applies worldwide and prescribes the substantive bases and special procedural requirements for the

settlement of claims against the United States for death or personal injury, or damage to, or loss or destruction of, property:

(1) Caused by military personnel or civilian employees (enumerated in § 536.23(b)) acting within the scope of their employment, except for non-federalized Army National Guard soldiers as explained in subpart F of this part; or

(2) Incident to the noncombat activities of the armed services (see AR 27–20, Glossary).

(b) A tort claim arising in the United States, its commonwealths, territories, and possessions may be settled under this subpart if the Federal Tort Claims Act (FTCA) does not apply to the type of claim under consideration or if the claim arose incident to noncombat activities. For example, a claim by a service member for property loss or damage incident to service may be settled if the loss arises from a tort and is not payable under AR 27–20, Chapter 11.

(c) A tort claim arising outside the United States may be settled under this subpart only if the claimant has been determined to be an inhabitant (normally a resident) of the United States at the time of the incident giving rise to the claim. See § 536.136(b).

§ 536.75 Claims payable under the Military Claims Act.

(a) *General.* Unless otherwise prescribed, a claim for personal injury, death, or damage to, or loss or destruction of, property is payable under this subpart when:

(1) Caused by an act or omission of military personnel or civilian employees of the DA or DOD, acting within the scope of their employment, that is determined to be negligent or wrongful; or

(2) Incident to the noncombat activities of the armed services.

(b) *Property.* Property that may be the subject of claims for loss or damage under this subpart includes:

(1) Real property used and occupied under lease (express, implied, or otherwise). See § 536.34(m) and paragraph 2–15m of DA Pam 27–162.

(2) Personal property bailed to the government under an agreement (express or implied), unless the owner has expressly assumed the risk of damage or loss.

(3) Registered or insured mail in the DA's possession, even though the loss was caused by a criminal act.

(4) Property of a member of the armed forces that is damaged or lost incident to service, if such a claim is not payable as a personnel claim under AR 27–20, chapter 11.

(c) *Maritime claims.* Claims that arise on the high seas or within the territorial waters of a foreign country are payable unless settled under subpart H of this part.

§ 536.76 Claims not payable under the Military Claims Act.

(a) Those resulting wholly from the claimant's or agent's negligent or wrongful act. (See § 536.77(a)(1)(i) on contributory negligence.)

(b) Claims arising from private or domestic obligations rather than from government transactions.

(c) Claims based solely on compassionate grounds.

(d) A claim for any item, the acquisition, possession, or transportation of which was in violation of DA directives, such as illegal war trophies.

(e) Claims for rent, damage, or other payments involving the acquisition, use, possession or disposition of real property or interests therein by and for the Department of the Army (DA) or Department of Defense (DOD). See § 536.34(m) and paragraph 2–15m of DA Pam 27–162.

(f) Claims not in the best interests of the United States, contrary to public policy, or otherwise contrary to the basic intent of the governing statute (10 U.S.C. 2733); for example, claims for property damage or loss or personal injury or death of inhabitants of unfriendly foreign countries or individuals considered to be unfriendly to the United States. When a claim is considered not payable for the reasons stated in this section, it will be forwarded for appropriate action to the Commander USARCS, with the recommendations of the responsible claims office.

(g) Claims presented by a national, or a corporation controlled by a national, of a country at war or engaged in armed conflict with the United States, or any country allied with such enemy country unless the appropriate settlement authority determines that the claimant is, and at the time of the incident was, friendly to the United States. A prisoner of war or an interned enemy alien is not excluded from bringing an otherwise payable claim for damage, loss, or destruction of personal property in the custody of the government.

(h) A claim for damages or injury, which a receiving State should adjudicate and pay under an international agreement, unless a consistent and widespread alternative process of adjudicating and paying such claims has been established within the receiving State. See DA Pam 27–162,

paragraph 3–4a, for further discussion of the conditions of waiver.

(i) Claims listed in §§ 536.42, 536.43, 536.44, 536.45, and 536.46 of this part, except for the exclusion listed in § 536.45(k). Additionally, the exclusions in § 536.45(a), (b), (e) and (k) do not apply to a claim arising incident to noncombat activities.

(j) Claims based on strict or absolute liability and similar theories.

(k) Claims payable under subparts D or J of this part, or under AR 27–20, chapter 11.

(l) Claims involving DA vehicles covered by insurance in accordance with requirements of a foreign country unless coverage is exceeded or the insurer is bankrupt. When an award is otherwise payable and an insurance settlement is not reasonably available, a field claims office should request permission from the Commander USARCS to pay the award, provided that an assignment of benefits is obtained.

§ 536.77 Applicable law for claims under the Military Claims Act.

(a) *General principles—(1) Tort claims excluding claims arising out of noncombat activities.* (i) In determining liability, such claims will be evaluated under general principles of law applicable to a private individual in the majority of American jurisdictions, except where the doctrine of contributory negligence applies. The MCA requires that contributory negligence be interpreted and applied according to the law of the place of the occurrence, including foreign (local) law for claims arising in foreign countries (see 10 U.S.C. 2733(b)(4)).

(ii) Claims are cognizable when based on those acts or omissions recognized as tortious by a majority of jurisdictions that require proof of duty, negligence, and proximate cause resulting in compensable injury or loss subject to the exclusions set forth at § 536.76. Strict or absolute liability and similar theories are not grounds for liability under this subpart.

(2) *Tort claims arising out of noncombat activities.* Claims arising out of noncombat activities under §§ 536.75(a)(2) and (b) are not tort claims and require only proof of causation. However, the doctrine of contributory negligence will apply, to the extent set forth in 10 U.S.C. 2733(b)(4) and paragraph (a)(1)(i) of this section.

(3) *Principles applicable to all subpart C claims.* (i) Interpretation of meanings and construction of questions of law under the MCA will be determined in accordance with federal law. The

formulation of binding interpretations is delegated to the Commander USARCS, provided that the statutory provisions of the MCA are followed.

(ii) Scope of employment will be determined in accordance with federal law. Follow guidance from reported FTCA cases. The formulation of a binding interpretation is delegated to the Commander USARCS, provided the statutory provisions of the MCA are followed.

(iii) The collateral source doctrine is not applicable.

(iv) The United States will only be liable for the portion of loss or damage attributable to the fault of the United States or its employees. Joint and several liability is inapplicable.

(v) No allowance will be made for court costs, bail, interest, inconvenience or expenses incurred in connection with the preparation and presentation of the claim.

(vi) Punitive or exemplary damages are not payable.

(vii) Claims for negligent infliction of emotional distress may only be entertained when the claimant suffered physical injury arising from the same incident as the claim for emotional distress, or the claimant is the immediate family member of an injured party/decendent, was in the zone of danger and manifests physical injury for the emotional distress. Claims for intentional infliction of emotional distress will be evaluated under general principles of American law as set forth in paragraph (a)(1)(i) of this section and will be considered as an element of damages under paragraph (b)(3)(ii) of this section. Claims for either negligent or intentional infliction of emotional distress are excluded when they arise out of assault, battery, false arrest, false imprisonment, malicious prosecution, abuse of process, libel, or slander, as defined in § 536.45(h).

(viii) In a claim for personal injury or wrongful death, the total award for non-economic damages to any direct victim and all persons, including those derivative to the claim, who claim injury by or through that victim will not exceed \$500,000. However, separate claims for emotional distress considered under paragraph (b)(1) of this section are not subject to the \$500,000 cap for the wrongful death claim as they are not included in the wrongful death claim; rather, each is a separate claim with its own \$500,000 cap under paragraph (b)(3)(ii) of this section. Continuous or repeated exposure to substantially the same or similar harmful activity or conditions is treated as one incident for the purposes of determining the extent of liability. If the claim accrued prior to

September 1, 1995, these limitations do not apply. Any such limitation in the law of the place of occurrence will apply.

(b) *Personal injury claims*—(1) *Eligible claimants*. Only the following may claim:

(i) Persons who suffer physical injuries or intentional emotional distress, but not subrogees (when claiming property loss or damage, medical expenses or lost earnings); see paragraph (a)(3)(iii) of this section.

(ii) Spouses for loss of consortium, but not parent-child or child-parent loss of consortium;

(iii) Members of the immediate family who were in the zone of danger of the injured person as defined in paragraph (a)(3)(vii) of this section.

(2) *Economic damages*. Elements of economic damage are limited to the following:

(i) Past expenses, including medical, hospital and related expenses actually incurred. Nursing and similar services furnished gratuitously by a family member are compensable. Itemized bills or other suitable proof must be furnished. Expenses paid by, or recoverable from, insurance or other sources are not recoverable.

(ii) Future medical, hospital, and related expenses. When requested, a medical examination is required.

(iii) Past lost earnings as substantiated by documentation from both the employer and a physician.

(iv) Loss of earning capacity and ability to perform services, as substantiated by acceptable medical proof. When requested, past federal income tax forms must be submitted for the previous five years and the injured person must undergo an independent medical examination (IME). Estimates of future losses must be discounted to present value at a discount rate of one to three percent after deducting for income taxes. When a medical trust providing for all future care is established, personal consumption may be deducted from future losses.

(v) Compensation paid to a person for essential household services that the injured person can no longer provide for himself or herself. These costs are recoverable only to the extent that they neither have been paid by, nor are recoverable from, insurance.

(3) *Non-economic damages*. Elements of non-economic damages are limited to the following:

(i) *Past and future conscious pain and suffering*. This element is defined as physical discomfort and distress as well as mental and emotional trauma. Loss of enjoyment of life, whether or not it is discernible by the injured party, is

compensable. The inability to perform daily activities that one performed prior to injury, such as recreational activities, is included in this element. Supportive medical records and statements by health care personnel and acquaintances are required. When requested, the claimant must submit to an interview.

(ii) *Emotional distress*. Emotional distress under the conditions set forth in paragraph (a)(3)(vii) of this section.

(iii) *Physical disfigurement*. This element is defined as impairment resulting from an injury to a person that causes diminishment of beauty or symmetry of appearance rendering the person unsightly, misshapen, imperfect, or deformed. A medical statement and photographs, documenting claimant's condition, may be required.

(iv) *Loss of consortium*. This element is defined as conjugal fellowship of husband and wife and the right of each to the company, society, cooperation, and affection of the other in every conjugal relation.

(c) *Wrongful death claims*. The law of the place of the incident giving rise to the claim will apply to claims arising in the United States, its commonwealths, territories or possessions.

(1) *Claimant*. (i) Only one claim may be presented for a wrongful death. It shall be presented by the decedent's personal representative on behalf of all parties in interest. The personal representative must be appointed by a court of competent jurisdiction prior to any settlement and must agree to make distribution to the parties in interest under court jurisdiction, if required.

(ii) Parties in interest are the surviving spouse, children, or dependent parents to the exclusion of all other parties. If there is no surviving spouse, children, or dependent parents, the next of kin will be considered a party or parties in interest. A dependent parent is one who meets the criteria set forth by the Internal Revenue Service to establish eligibility for a DOD identification card.

(2) *Economic loss*. Elements of economic damages are limited to the following:

(i) Loss of monetary support of a family member from the date of injury causing death until expiration of decedent's worklife expectancy. When requested, the previous five years federal income tax forms must be submitted. Estimates must be discounted to present value at one to three percent after deducting for taxes and personal consumption. Loss of retirement benefits is compensable and similarly discounted after deductions.

(ii) Loss of ascertainable contributions, such as money or gifts to other than family member claimants as

substantiated by documentation or statements from those concerned.

(iii) Loss of services from date of injury to end of life expectancy of the decedent or the person reasonably expected to receive such services, whichever is shorter.

(iv) Expenses as set forth in paragraph (b)(2)(i) of this section. In addition, burial expenses are allowable. Expenses paid by, or recoverable from, insurance or other sources are not recoverable.

(3) *Non-economic loss.* Elements of damages are limited to the following:

(i) Pre-death conscious pain and suffering.

(ii) Loss of companionship, comfort, society, protection, and consortium suffered by a spouse for the death of a spouse, a child for the death of a parent, or a parent for the death of a child.

(iii) Loss of training, guidance, education, and nurture suffered by a child under the age of 18 for the death of a parent, until the child becomes 18 years old.

(iv) Claims for the survivors' emotional distress, mental anguish, grief, bereavement, and anxiety are not payable, in particular claims for intentional or negligent infliction of emotional distress to survivors arising out of the circumstances of a wrongful death are personal injury claims falling under § 536.77(b)(3).

(d) *Property damage claims.* The following provisions apply to all claims arising in the United States, its commonwealths, territories and possessions.

(1) Such claims are limited to damage to, or loss of, tangible property and costs directly related thereto. Consequential damages are not included. (See § 536.50(e) and DA Pam 27-162, paragraph 2-56a.)

(2) Proper claimants are described in § 536.27. Claims for subrogation are excluded. (See § 536.27(e)). However, there is no requirement that the claimant use personal casualty insurance to mitigate the loss.

(3) Allowable elements of damages and measure of proof (additions to these elements are permissible with concurrence of the Commander USARCS). These elements are discussed in detail in DA Pam 27-162, paragraph 2-54.

(i) Damages to real property.

(ii) Damage to or loss of personal property, or personal property that is not economically repairable.

(iii) Loss of use.

(iv) Towing and storage charges.

(v) Loss of business or profits.

(vi) Overhead.

§ 536.78 Settlement authority for claims under the Military Claims Act.

(a) *Authority of the Secretary of the Army.* The Secretary of the Army, the Army General Counsel, as the Secretary's designee, or another designee of the Secretary of the Army may approve settlements in excess of \$100,000.

(b) *Delegations of Authority.* (1) Denials and final offers made under the delegations set forth herein are subject to appeal to the authorities specified in paragraph (d) of this section.

(2) The Judge Advocate General (TJAG) and the Assistant Judge Advocate General (TAJAG) are delegated authority to pay up to \$100,000 in settlement of a claim and to disapprove a claim regardless of the amount claimed.

(3) The Commander USARCS is delegated authority to pay up to \$25,000 in settlement of a claim and to disapprove or make a final offer in a claim regardless of the amount claimed.

(4) The Judge Advocate (JA) or Staff Judge Advocate (SJA), subject to limitations that USARCS may impose, and chiefs of a command claims service are delegated authority to pay up to \$25,000 in settlement, regardless of the amount claimed, and to disapprove or make a final offer in a claim presented in an amount not exceeding \$25,000.

(5) A head of an area claims office (ACO) is delegated authority to pay up to \$25,000 in settlement of a claim, regardless of the amount claimed, and to disapprove or make a final offer in a claim presented in an amount not exceeding \$25,000. A head of a claims processing office (CPO) with approval authority is delegated authority to approve, in full or in part, claims presented for \$5,000 or less, and to pay claims regardless of the amount claimed, provided an award of \$5,000 or less is accepted in full satisfaction of the claim.

(6) Authority to further delegate payment authority is set forth in § 536.3(g)(1) of this part. For further discussions also related to approval, settlement and payment authority see also paragraph 2-69 of DA Pam 27-162.

(c) *Settlement of multiple claims arising from a single incident.* (1) Where a single act or incident gives rise to multiple claims cognizable under this subpart, and where one or more of these claims apparently cannot be settled within the monetary jurisdiction of the authority initially acting on them, no final offer will be made. All claims will be forwarded, along with a recommended disposition, to the authority who has monetary jurisdiction over the largest claim for a

determination of liability. However, where each individual claim, including derivative claims, can be settled within the monetary authority initially acting on them, and none are subject to denial, all such claims may be settled even though the total amount exceeds the monetary jurisdiction of the approving or settlement authority.

(2) If such authority determines that federal liability is established, he or she may return claims of lesser value to the field claims office for settlement within that office's jurisdiction. The field claims office must take care to avoid compromising the higher authority's discretion by conceding liability in claims of lesser amount.

(d) *Appeals.* Denials or final offers on claims described as follows may be appealed to the official designated:

(1) For claims presented in an amount over \$100,000, final decisions on appeals will be made by the Secretary of the Army or designee.

(2) For claims presented for \$100,000 or less, and any denied claim, regardless of the amount claimed, in which the denial was based solely upon an incident-to-service bar, exclusionary language in a federal statute governing compensation of federal employees for job-related injuries (see § 536.44), or untimely filing, TJAG or TAJAG will render final decisions on appeals, except that claims presented for \$25,000 or less, and not acted upon by the Commander USARCS, are governed by paragraph (d)(3) of this section.

(3) For claims presented for \$25,000 or less, final decisions on appeals will be made by the Commander USARCS, his or her designee, or the chief of a command claims service when such claims are acted on by an ACO under such service's jurisdiction.

(4) Sections 536.64, 536.65, and 536.66 of this part set forth the rules relating to the notification of appeal rights and processing.

(e) *Delegated authority.* Authority delegated by this section will not be exercised unless the settlement or approval authority has been assigned an office code.

§ 536.79 Action on appeal under the Military Claims Act.

(a) The appeal will be examined by the settlement authority who last acted on the claim, or his or her successor, to determine if the appeal complies with the requirements of this regulation. The settlement authority will also examine the claim file and decide whether additional investigation is required; ensure that all allegations or evidence presented by the claimant, agent, or attorney are documented; and ensure

that all pertinent evidence is included. If claimants state that they appeal, but do not submit supporting materials within the 60-day appeal period or an approved extension thereof, these appeals will be determined on the record as it existed at the time of denial or final offer. Unless action under paragraph (b) of this section is taken, the claim and complete investigative file, including any additional investigation, and a tort claims memorandum will be forwarded to the appropriate appellate authority for necessary action on the appeal.

(b) If the evidence in the file, including information submitted by the claimant with the appeal and that found by any necessary additional investigation, indicates that the appeal should be granted in whole or in part, the settlement authority who last acted on the claim, or his or her successor, will attempt to settle the claim. If a settlement cannot be reached, the appeal will be forwarded in accordance with paragraph (a) of this section.

(c) As to an appeal that requires action by TJAG, TAJAG, or the Secretary of the Army or designee, the Commander USARCS may take the action in paragraph (b) of this section or forward the claim together with a recommendation for action. All matters submitted by the claimant will be forwarded and considered.

(d) Since an appeal under this subpart is not an adversarial proceeding, no form of hearing is authorized. A request by the claimant for access to documentary evidence in the claim file to be used in considering the appeal will be granted unless law or regulation does not permit access.

(e) If the appellate authority upholds a final offer or authorizes an award on appeal from a denial of a claim, the notice of the appellate authority's action will inform the claimant that he or she must accept the award within 180 days of the date of mailing of the notice of the appellate authority's action or the award will be withdrawn, the claim will be deemed denied, and the file will be closed without future recourse.

§ 536.80 Payment of costs, settlements, and judgments related to certain medical malpractice claims.

(a) *General.* Costs, settlements, or judgments cognizable under 10 U.S.C. 1089(f) for personal injury or death caused by any physician, dentist, nurse, pharmacist, paramedic, or other supporting personnel (including medical and dental technicians, nurse assistants, therapists, and Red Cross volunteers of the Army Medical Department (AMEDD), AMEDD

personnel detailed for service with other than a federal department, agency, or instrumentality and direct contract personnel identified in the contract as federal employees), will be paid provided that:

(1) The alleged negligent or wrongful actions or omissions occurred during the performance of medical, dental, or related health care functions (including clinical studies and investigations) while the medical or health care employee was acting within the scope of employment.

(2) Such personnel furnish prompt notification and delivery of all process served or received and other documents, information, and assistance as requested.

(3) Such personnel cooperate in the defense of the action on its merits.

(b) *Requests for contribution or indemnification.* All requests for contribution or indemnification under this section should be forwarded to the Commander USARCS for action, following the procedures set forth in this subpart.

§ 536.81 Payment of costs, settlements, and judgments related to certain legal malpractice claims.

(a) *General.* Costs, settlements, and judgments cognizable under 10 U.S.C. 1054(f) for damages for personal injury or loss of property caused by any attorney, paralegal, or other member of a legal staff will be paid if:

(1) The alleged negligent or wrongful actions or omissions occurred during the provision or performance of legal services while the attorney or legal employee was acting within the scope of duties or employment;

(2) Such personnel furnish prompt notification and delivery of all process served or received and other documents, information, and assistance as requested;

(3) Such personnel cooperate in the defense of the action on the merits.

(b) *Requests for contribution or indemnification.* All requests for contribution or indemnification under this section should be forwarded to the Commander USARCS, for action, following the procedures set forth in this subpart.

§ 536.82 Reopening an MCA claim after final action by a settlement authority.

(a) *Original approval or settlement authority (including TAJAG, TJAG, Secretary of the Army, or the Secretary's designees).* (1) An original settlement authority may reconsider the denial of, or final offer on, a claim brought under the MCA upon request of the claimant or the claimant's authorized agent. In

the absence of such a request, the settlement authority may on his or her initiative reconsider a claim.

(2) An original approval or settlement authority may reopen and correct action on an MCA claim previously settled in whole or in part (even if a settlement agreement has been executed) when it appears that the original action was incorrect in law or fact based on the evidence of record at the time of the action or subsequently received. For errors in fact, the new evidence must not have been discoverable at the time of final action by either the Army or the claimant through the exercise of reasonable diligence. Corrective action may also be taken when an error contrary to the parties' mutual understanding is discovered in the original action. If the settlement or approval authority determines that their original action was incorrect, they will modify the action and, if appropriate, make a supplemental payment. The basis for a change in action will be stated in a memorandum included in the file. For example, a claim was settled for \$15,000, but the settlement agreement was typed to read "\$1,500" and the error is not discovered until the file is being prepared for payment. If appropriate, a corrected payment will be made. A settlement authority who has reason to believe that a settlement was obtained by fraud on the part of the claimant or claimant's legal representative, will reopen action on that claim and, if the belief is substantiated, correct the action. The basis for correcting an action will be stated in a memorandum and included in the file.

(b) *A successor approval or settlement authority (including TAJAG, TJAG, Secretary of the Army, or the Secretary's designees)—(1) Reconsideration.* A successor approval or settlement authority may reconsider the denial of, or final offer on, an MCA claim upon request of the claimant or the claimant's authorized agent only on the basis of fraud, substantial new evidence, errors in calculation, or mistake (misinterpretation) of law.

(2) *Settlement correction.* A successor approval or settlement authority may reopen and correct a predecessor's action on a claim that was previously settled in whole or in part for the same reasons that an original authority may do so.

(c) *Time requirement for filing request for reconsideration.* Requests postmarked more than five years from the date of mailing of final notice will be denied based on the doctrine of laches.

(d) *Finality of action.* Action by the appropriate authority (either affirming the prior action or granting full or granting full or partial relief) is final under the provisions of 10 U.S.C. 2735. Action upon a request for reconsideration constitutes final administrative disposition of a claim. No further requests for reconsideration will be allowed except on the basis of fraud.

Subpart D—Claims Cognizable Under the Federal Tort Claims Act

§ 536.83 Statutory authority for the Federal Tort Claims Act.

The statutory authority for this subpart is the Federal Tort Claims Act (FTCA) (60 Stat. 842, 28 U.S.C. 2671–2680), as amended by Public Law 89–506, July 1966 (80 Stat. 306); Public Law 93–253, March 1974 (88 Stat. 50); Public Law 97–124, December 1981 (93 Stat. 1666); Public Law 100–694, November 1988 (102 Stat. 4563–67); and Public Law 101–552, November 1996 (104 Stat. 734); and as implemented by the Attorney General’s Regulations (28 CFR 14.1–14.11 and its appendix), all of which are posted on the USARCS Web site; for the address see § 536.2(a).

§ 536.84 Scope for claims under the Federal Tort Claim Act.

(a) *General.* This subpart applies in the United States, its commonwealths, territories and possessions (all hereinafter collectively referred to as United States or U.S.). It prescribes the substantive bases and special procedural requirements under the FTCA and the implementing Attorney General’s regulations for the administrative settlement of claims against the United States based on death, personal injury, or damage to, or loss of, property caused by negligent or wrongful acts or omissions by the United States or its employees acting within the scope of their employment. If a conflict exists between this part and the Attorney General’s regulations, the latter governs.

(b) *Effect of the Military Claims Act.* A tort claim arising in the United States, its commonwealths, territories, and possessions may be settled under subpart C of this part if the Federal Tort Claims Act (FTCA) does not apply to the type of claim under consideration or if the claim arose incident to noncombat activities. If a claim is filed under both the FTCA and the Military Claims Act (MCA), or when both statutes apply equally, final action thereon will follow the procedures set forth in DA Pam 27–162, paragraphs 2–74 through 2–76, discussing final offers and denial letters.

§ 536.85 Claims payable under the Federal Tort Claims Act.

(a) Unless otherwise prescribed, claims for death, personal injury, or damage to, or loss of, property (real or personal) are payable under this subpart when the injury or damage is caused by negligent or wrongful acts or omissions of military personnel or civilian employees of the Department of the Army or Department of Defense while acting within the scope of their employment under circumstances in which the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. The FTCA is a limited waiver of sovereign immunity without which the United States may not be sued in tort.

Similarly, neither the Fifth Amendment nor any other provision of the U.S. Constitution creates or permits a federal cause of action allowing recovery in tort. Immunity must be expressly waived, as the FTCA waives it.

(b) To be payable, a claim must arise from the acts or omissions of an “employee of the government” under 28 U.S.C. 2671. Categories of such employees are listed in § 536.23(b) of this part.

§ 536.86 Claims not payable under the Federal Tort Claims Act.

A claim is not payable if it is identified as an exclusion in DA Pam 27–162, paragraphs 2–36 through 2–43.

§ 536.87 Applicable law for claims under the Federal Tort Claims Act.

The applicable law for claims falling under the Federal Tort Claims Act is set forth in §§ 536.41 through 536.52.

§ 536.88 Settlement authority for claims under the Federal Tort Claims Act.

(a) *General.* Subject to the Attorney General’s approval of payments in excess of \$200,000 for a single claim, or if the total value of all claims and potential claims arising out of a single incident exceeds \$200,000 (for which USARCS must write an action memorandum for submission to the Department of Justice), the following officials are delegated authority to settle (including payment in full or in part, or denial) and make final offers on claims under this subpart:

(1) The Judge Advocate General (TJAG);

(2) The Assistant Judge Advocate General (TAJAG); and

(3) The Commander USARCS.

(b) *ACO heads.* A head of an area claims office (ACO) is delegated authority to pay up to \$50,000 in settlement of a claim, regardless of the amount claimed, and to disapprove or

make a final offer in a claim presented in an amount not exceeding \$50,000, provided the value of all claims and potential claims arising out of a single incident does not exceed \$200,000.

(c) *CPO heads.* A head of a claims processing office (CPO) with approval authority is delegated authority to approve, in full or in part, claims presented for \$5,000 or less, and to pay claims regardless of amount, provided an award of \$5000 or less is accepted in full satisfaction of the claim.

(d) *Further guidance.* Authority to further delegate payment authority is set forth in § 536.3(g)(1) of this part. For further discussions related to approval, settlement and payment authority, see paragraphs 2–69 and 2–71 of DA Pam 27–162.

(e) *Settlement of multiple claims from a single incident.* (1) Where a single act or incident gives rise to multiple claims cognizable under this subpart, and where one claim cannot be settled within the monetary jurisdiction for one claim of the authority acting on the claim or all claims cannot be settled within the monetary jurisdiction for a single incident, no final offer will be made. All claims will be forwarded, along with a recommended disposition, to the Commander USARCS.

(2) If the Commander USARCS determines that all claims can be settled for a total of \$200,000 or less, he may return claims to the field office for settlement. If the Commander USARCS determines that all claims cannot be settled for a total of \$200,000, he must request Department of Justice authority prior to settlement of any one claim. The field claims office must not concede liability by paying any one claim of lesser value.

§ 536.89 Reconsideration of Federal Tort Claims Act claims.

(a) *Reconsideration of paid claims.* Under the provision of 28 U.S.C. 2672, neither an original or successor authority may reconsider a claim which has been paid except as expressly set forth below. Payment of an amount for property damage will bar payment for personal injury or death except for a split claim provided the provisions of § 536.60 are followed. Supplemental payments for either property or injury are barred by 10 U.S.C. 2672. Accordingly, claimants will be informed that only one claim or payment is permitted.

(b) *Notice of right to reconsideration.* Notice of disapproval or final offer issued by an authority listed in § 536.88(b) will advise the claimant of a right to reconsideration to be submitted in writing not later than six months

from the date of mailing the notice. Such a request will suspend the requirement to bring suit for a minimum of six months or until action is taken on the request. The claimant will be so informed. See the Attorney General's Regulations at 28 CFR 14.9(b), posted on the USARCS Web site; for the address see § 536.2(a).

(c) *Original approval or settlement authority*—(1) *Reconsideration*. An original settlement authority may reconsider the denial of, or final offer on, a claim brought under the FTCA upon request of the claimant or the legal representative.

(2) *Settlement correction*. An original approval or settlement authority may reopen and correct action on a claim previously settled in whole or in part (even if a settlement agreement has been executed) when an error contrary to the parties' mutual understanding is discovered in the original action. For example: a claim was settled for \$15,000, but the settlement agreement was typed to read "\$1,500" and the error is not discovered until the file is being prepared for payment. If appropriate, a corrected payment will be made. An approval or settlement authority who has reason to believe that a settlement was obtained by fraud on the part of the claimant or claimant's legal representative will reopen action on that claim, and if the belief is substantiated, correct the action. The basis for correcting an action will be stated in a memorandum and included in the file.

(d) *A successor approval or settlement authority*—(1) *Reconsideration*. A successor approval or settlement authority may reconsider the denial of, or final offer on, an FTCA claim upon request of the claimant, the claimant's authorized agent, or the claimant's legal representative only on the basis of fraud, substantial new evidence, errors in calculation, or mistake (misinterpretation) of law.

(2) *Settlement correction*. A successor approval or settlement authority may reopen and correct a predecessor's action on a claim that was previously settled in whole or in part for the same reasons that an original authority may do so.

(e) *Requirement to forward a request for reconsideration*. When full relief is not granted, forward all requests for reconsideration of an ACO's denial or final offer to the Commander USARCS for action. Include all investigative material and legal analyses generated by the request.

(f) *Action prior to forwarding*. A request for reconsideration should disclose fully the legal and/or factual

bases that the claimant has asserted as grounds for relief and provide appropriate supporting documents or evidence. Following completion of any investigation or other action deemed necessary for an informed disposition of the request, the approval or settlement authority will reconsider the claim and attempt to settle it, granting relief as warranted. When further settlement efforts appear unwarranted, the entire file with a memorandum of opinion will be forwarded to the Commander USARCS. The claimant will be informed of such transfer.

(g) *Finality of action*. Action by the appropriate authority (either affirming the prior action or granting full or partial relief) upon a request for reconsideration constitutes final administrative disposition of a claim. No further requests for reconsideration will be allowed except on the basis of fraud. Attempted further requests for reconsideration on other grounds will not toll the six-month period set forth in 28 U.S.C. 2401(b).

Subpart E—Claims Cognizable Under the Non-Scope Claims Act

§ 536.90 Statutory authority for the Non-Scope Claims Act.

The statutory authority for this subpart is set forth in the Act of October 1962, 10 U.S.C. 2737, 76 Stat. 767, commonly called the "Non-Scope Claims Act (NSCA)."

§ 536.91 Scope for claims under the Non-Scope Claims Act.

(a) This subpart applies worldwide and prescribes the substantive bases and special procedural requirements for the administrative settlement and payment of not more than \$1,000 for any claim against the United States for personal injury, death or damage to, or loss of, property caused by military personnel or civilian employees, incident to the use of a U.S. vehicle at any location, or incident to the use of other U.S. property on a government installation, which claim is not cognizable under any other provision of law.

(b) For the purposes of this subpart, a "government installation" is a facility having fixed boundaries owned or controlled by the government, and a "vehicle" includes every description of carriage or other artificial contrivance used, or capable of being used, as means of transportation on land (1 U.S.C. 4).

(c) Any claim in which there appears to be a dispute about whether the employee was acting within the scope of employment will be considered under subparts C, D, or F of this part. Only when all parties, including an insurer,

agree that there is no "in scope" issue will the claim be considered under this subpart.

§ 536.92 Claims payable under the Non-Scope Claims Act.

(a) *General*. A claim for personal injury, death, or damage to, or loss of, property, real or personal, is payable under this subpart when:

(1) Caused by negligent or wrongful acts or omissions of Department of Defense or Department of the Army (DA) military personnel or civilian employees, as listed in § 536.23(b):

(i) Incident to the use of a vehicle belonging to the United States at any place or;

(ii) Incident to the use of any other property belonging to the United States on a government installation.

(2) The claim is not payable under any other claims statute or regulation available to the DA for the administrative settlement of claims.

(b) *Personal injury or death*. A claim for personal injury or death is allowable only for the cost of reasonable medical, hospital, or burial expenses actually incurred and not otherwise furnished or paid by the United States.

(c) *Property loss or damage*. A claim for damage to or loss of property is allowable only for the cost of reasonable repairs or value at time of loss, whichever is less.

§ 536.93 Claims not payable under the Non-Scope Claims Act.

Under this subpart, a claim is not payable that:

(a) Results in whole or in part from the negligent or wrongful act of the claimant or his or her agent or employee. The doctrine of comparative negligence does not apply.

(b) Is for medical, hospital, or burial expenses furnished or paid by the United States.

(c) Is for any element of damage pertaining to personal injuries or death other than as provided in § 536.93(b). All other items of damage, for example, compensation for loss of earnings and services, diminution of earning capacity, anticipated medical expenses, physical disfigurement and pain and suffering are not payable.

(d) Is for loss of use of property or for the cost of substitute property, for example, a rental.

(e) Is legally recoverable by the claimant under an indemnifying law or indemnity contract. If the claim is in part legally recoverable, the part recoverable by the claimant is not payable.

(f) Is a subrogated claim.

(g) In some circumstances some claims may be partially payable. See DA

Pam 27–162, paragraph 5–4 for more information on claims that may be partially payable.

§ 536.94 Settlement authority for claims under the Non-Scope Claims Act.

(a) *Settlement authority.* The following are delegated authority to pay up to \$1,000 in settlement of each claim arising out of one incident and to disapprove a claim presented in any amount under this subpart:

(1) The Judge Advocate General (TJAG);

(2) The Assistant Judge Advocate General (TAJAG);

(3) The Commander USARCS;

(4) The Judge Advocate (JA) or Staff Judge Advocate (SJA) or chief of a command claims service; and

(5) The head of an area claims office (ACO).

(b) *Approval authority.* The head of a claims processing office (CPO) with approval authority is delegated authority to approve and pay, in full or in part, claims presented for \$1,000 or less and to compromise and pay, regardless of amount claimed, an agreed award of \$1,000 or less.

(c) *Further guidance.* Authority to further delegate payment authority is set forth in § 536.3(g)(1) of this part. For further discussions also related to approval, settlement and payment authority, see also paragraphs 2–69 and 2–71 of DA Pam 27–162.

§ 536.95 Reconsideration of Non-Scope Claims Act claims.

The provisions of § 536.89 addressing reconsideration apply and are incorporated herein by reference. If the claim is not cognizable under the Federal Tort Claims Act, appellate procedures under the Military Claims Act or NGCA apply.

Subpart F—Claims Cognizable Under the National Guard Claims Act

§ 536.96 Statutory authority/ National Guard Claims Act.

The statutory authority for this subpart is contained in the Act of September 1960 (32 U.S.C. 715, 74 Stat. 878), commonly referred to as the “National Guard Claims Act” (NGCA), as amended by Public Law 87–212, (75 Stat. 488), September 1961; Public Law 90–486, (82 Stat. 756), August 1968; Public Law 90–521, (82 Stat. 874), September 1968; Public Law 90–525, (82 Stat. 877), September 1968; Public Law 91–312, (84 Stat. 412), July 1970; Public Law 93–336, (88 Stat. 291), July 1974; and Public Law 98–564, (98 Stat. 2918), October 1984.

§ 536.97 Scope for claims under National Guard Claims Act.

This subpart applies worldwide and prescribes the substantive bases and special procedural regulations for the settlement of claims against the United States for death, personal injury, damage to, or loss or destruction of property.

(a) Soldiers of the Army National Guard (ARNG) can perform military duty in an active duty status under the authority of Title 10 of the United States Code, in a full-time National Guard duty or inactive-duty training status under the authority of Title 32 of the United States Code, or in a state active duty status under the authority of a state code.

(1) When ARNG soldiers perform active duty, they are under federal command and control and are paid from federal funds. For claims purposes, those soldiers are treated as active duty soldiers. The NGCA, 32 U.S.C. 715, does not apply.

(2) When ARNG soldiers perform full-time National Guard duty or inactive-duty training, they are under state command and control and are paid from federal funds. The NGCA does apply, but as explained in paragraph (c) of this section it is seldom used.

(3) When ARNG soldiers perform state active duty, they are under state command and control and are paid from state funds. Federal claims statutes do not apply, but state claims statutes may apply.

(b) The ARNG also employs civilians, referred to as technicians and employed under 32 U.S.C. 709. Technicians are usually, but not always, ARNG soldiers who perform the usual 15 days of annual training (a category of full-time duty) and 48 drills (inactive-duty training) per year.

(c) NGCA coverage applies only to ARNG soldiers performing full-time National Guard duty or inactive-duty training and to technicians. However, since the NGCA’s enactment in 1960, Congress has also extended Federal Tort Claims Act (FTCA) coverage to these personnel.

(1) In 1968, technicians, who were state employees formerly, were made federal employees. Along with federal employee status came FTCA coverage. Technicians no longer have any state status, albeit they are hired, fired, and administered by a state official, the Adjutant General, acting as the agent of the federal government.

(2) In 1981, Congress extended FTCA coverage to ARNG soldiers performing full-time National Guard duty or inactive-duty training (such as any training or other duty under 32 U.S.C.

316, 502–505). Unlike making technicians federal employees, this extension of coverage did not affect their underlying status as state military personnel.

(d) Claims arising from the negligent acts or omissions of ARNG soldiers performing full-time National Guard duty or inactive-duty training, or of technicians, will be processed under the FTCA. Therefore, the NGCA is generally relevant only to claims arising from noncombat activities or outside the United States. Additionally, claims by members of the National Guard may be paid for property loss or damage incident to service if the claim is based on activities falling under this subpart and is not payable under AR 27–20, chapter 11.

§ 536.98 Claims payable under the National Guard Claims Act.

The provisions of § 536.75 apply to claims arising under this subpart.

§ 536.99 Claims not payable under the National Guard Claims Act.

The provisions of § 536.76 apply to claims arising under this subpart.

§ 536.100 Applicable law for claims under the National Guard Claims Act.

The provisions of § 536.77 apply to claims arising under this subpart.

§ 536.101 Settlement authority for claims under the National Guard Claims Act.

The provisions of § 536.78 apply to claims arising under this subpart.

§ 536.102 Actions on appeal under the National Guard Claims Act.

The provisions of § 536.79 apply to claims arising under this subpart.

Subpart G—Claims Cognizable Under International Agreements

§ 536.103 Statutory authority for claims cognizable under international claims agreements.

The authority for claims presented or processed under this subpart is set forth in the following federal laws and bi- or multinational agreements:

(a) 10 U.S.C. 2734a and 10 U.S.C. 2734b (the International Agreements Claims Act) as amended, for claims arising overseas under international agreements.

(b) Various international agreements, such as the North Atlantic Treaty Organization (NATO) Status of Forces Agreement (SOFA) and the Partnership for Peace (PPF) SOFA.

§ 536.104 Current agreements in force.

Current listings of known agreements in force are also posted on the USARCS Web site; for the address see § 536.2(a).

§ 536.105 Responsibilities generally/ international agreements claims.

(a) The Commander USARCS is responsible for:

(1) Providing policy guidance to command claims services or other responsible judge advocate (JA) offices on SOFA or other treaty reimbursement programs implementing 10 U.S.C. 2734a and 2734b.

(2) Monitoring the reimbursement system to ensure that programs for the proper verification and certification of reimbursement are in place.

(3) Monitoring funds reimbursed to or by foreign governments.

(b) Responsibilities in the continental United States (CONUS)—The responsibility for implementing these agreements within the United States has been delegated to the Secretary of the Army (SA). The SA, in turn, has delegated that responsibility to the Commander USARCS, who is in charge of the receiving State office for the United States, as prescribed in DODD 5515.8. The Commander USARCS is responsible for maintaining direct liaison with sending State representatives and establishing procedures designed to carry out the provisions of this subpart.

§ 536.106 Definitions for international agreements claims.

(a) *Force and civilian component of force.* Members of the sending State's armed forces on temporary or permanent official duty within the receiving State, civilian employees of the sending State's armed forces, and those individuals acting in an official capacity for the sending State's armed forces. However, under provisions of the applicable SOFAs the sending State and the receiving State may agree to exclude from the definition of "force" certain individuals, units or formations that would otherwise be covered by the SOFA. Where such an exclusion has been created, this subpart will not apply to claims arising from actions or omission by those individuals, units or formations. "Force and civilian component of force" also includes claims arising out of acts or omissions made by military or civilian personnel, regardless of nationality, who are assigned or attached to, or employed by, an international headquarters established under the provisions of the Protocol on the Status of International Military Headquarters Set Up Pursuant to the North Atlantic Treaty, dated August 28, 1952, such as Supreme Allied Command, Atlantic.

(b) *Types of claims under agreements*—(1) *Intergovernmental claims.* Claims of one contracting party

against any other contracting party for damage to property owned by its armed services, or for injury or death suffered by a member of the armed services engaged in the performance of official duties, are waived. Claims above a minimal amount for damage to property owned by a governmental entity other than the armed services may be asserted. NATO SOFA, Article VIII, paragraph 1–4; Singapore SOFA, Article XVI, paragraph 2–3.

(2) *Third-party scope claims.* Claims arising out of any acts or omissions of members of a force or the civilian component of a sending State done in the performance of official duty or any other act, omission, or occurrence for which the sending State is legally responsible shall be filed, considered and settled in accordance with the laws and regulations of the receiving State with respect to claims arising from the activities of its own armed service; see, for example, NATO SOFA, Article VIII, paragraph 5.

(3) *Ex gratia claims.* Claims arising out of tortious acts or omissions not done in the performance of official duties shall be considered by the sending State for an "ex gratia" payment that is made directly to the injured party; see, for example, NATO SOFA, Article VIII, paragraph 6.

§ 536.107 Scope for international agreements claims arising in the United States.

This section sets forth procedures and responsibilities for the investigation, processing, and settlement of claims arising out of any acts or omissions of members of a foreign military force or civilian component present in the United States or a territory, commonwealth, or possession thereof under the provisions of cost sharing reciprocal international agreements which contain claims settlement provisions applicable to claims arising in the United States. Article VIII of the NATO SOFA has reciprocal provisions applying to all NATO member countries; the Partnership for Peace (PFP) Agreement has similar provisions, as do the Singapore and Australian SOFAs.

§ 536.108 Claims payable under international agreements (for those arising in the United States).

(a) Within the United States, Art. VIII, NATO SOFA applies to claims arising within the North Atlantic Treaty Area, which includes CONUS and its territories and possessions north of the Tropic of Cancer (23.5 degrees north latitude). This excludes Puerto Rico, the Virgin Islands, and parts of Hawaii.

Third-party scope claims are payable under subpart D or, if the claim arises incident to noncombat activities, under subpart C of this part. Maritime claims are payable under subpart H of this part. The provisions of these subparts on what claims are payable apply equally here. The members of the foreign force or civilian component must be acting in pursuance of the applicable treaty's objectives.

(b) Within the United States, third-party ex gratia claims are payable only by the sending State and are not payable under subpart E of this part.

§ 536.109 Claims not payable under international agreements (for those arising in the United States).

The following claims are not payable:

(a) Claims arising from a member of a foreign force or civilian component's acts or omissions that do not accord with the objectives of a treaty authorizing their presence in the United States.

(b) Claims arising from the acts or omissions of a member of a foreign force or civilian component who has been excluded from SOFA coverage by agreement between the sending State and the United States.

(c) Third-party scope claims arising within the United States that are not payable under subparts C, D, or H of this part are listed as barred under those subparts. As sending State forces are considered assimilated into the U.S. Armed Services for purposes of the SOFAs, their members are also barred from receiving compensation from the United States when they are injured incident to their service, *Daberkow v. United States*, 581 F.2d 785 (9th Cir. 1978).

§ 536.110 Notification of incidents arising under international agreements (for claims arising in the United States).

To enable USARCS to properly discharge its claims responsibilities under the applicable SOFAs, it must be notified of all incidents, including off-duty incidents, in which members of a foreign military force or civilian component are involved. Any member or employee of the U.S. armed services who learns of an incident involving a member of a foreign military force or civilian component resulting in personal injury, death, or property damage will immediately notify the judge advocate (JA) or legal officer at the installation or activity to which such person is assigned or attached. The JA or legal officer receiving such notification will in turn notify the Commander USARCS. If the member is neither assigned nor attached to any

installation or activity within the United States, the Commander USARCS, will be notified.

§ 536.111 Investigation of claims arising under international agreements (for those claims arising in the United States).

Responsibility for investigating an incident rests upon the area claims office (ACO) or claims processing office (CPO) responsible for the geographic area in which the incident occurred. The Commander USARCS, an ACO, and a CPO are authorized to designate the legal office of the installation at which the member of the foreign force or civilian component is attached, including the legal office of another armed force, to carry out the responsibility to investigate. The investigation will comply with the responsible Service's implementing claims regulation. When the member is neither assigned nor attached within the United States, the Commander USARCS will furnish assistance.

§ 536.112 Settlement authority for claims arising under international agreements (for those claims arising in the United States).

Settlement authority is delegated to the Commander USARCS, except for settlement amounts exceeding the Commander's authority as set forth in subparts C, D, or H of this part, or in those cases where settlement is reserved to a higher authority. Pursuant to the applicable SOFA, the Commander USARCS will report the proposed settlement to the sending State office for concurrence or objection. See, for example, NATO SOFA, Article VIII.

§ 536.113 Assistance to foreign forces for claims arising under international agreements (as to claims arising in the United States).

As claims arising from activities of members of NATO, Partnership for Peace, Singaporean, or Australian forces in the United States are processed in the same manner as those arising from activities of U.S. government personnel. All JAs and legal offices will provide assistance similar to that provided to U.S. armed services personnel.

§ 536.114 Scope for claims arising overseas under international agreements.

(a) This section sets forth guidance on claims arising from any act or omission of soldiers or members of the civilian component of the U.S. armed services done in the performance of official duty or arising from any other act or omission or occurrence for which the U.S. armed services are responsible under an international agreement. Claims incidents arising in countries for which the SOFA requires the receiving State to

adjudicate and pay the claims in accordance with its laws and regulations are subject to partial reimbursement by the United States.

(b) Claims by foreign inhabitants based on acts or omissions outside the scope of official duties are cognizable under subpart J of this part. Claims arising from nonscope acts or omissions by third parties who are not foreign inhabitants are cognizable under subpart E but not under subparts C or F of this part.

§ 536.115 Claims procedures for claims arising overseas under international agreements.

(a) SOFA provisions that call for the receiving State to adjudicate claims have been held to be the exclusive remedy for claims against the United States, *Aaskov v. Aldridge*, 695 F. Supp. 595 (D.D.C. 1988); *Dancy v. Department of the Army*, 897 F. Supp. 612 (D.D.C. 1995).

(b) SOFA provisions that call for the receiving State to adjudicate claims against the United States usually refer to claims by third parties brought against members of the force or civilian component. This includes claims by tourists or business travelers as well as inhabitants of foreign countries. Depending on how the receiving State interprets the particular SOFA's class of proper claimants, the receiving State may also consider claims by U.S. soldiers, civilian employees, and their family members. Chiefs of command claims services or other Army JA offices responsible for claims that arise in countries bound by SOFA or other treaty provisions requiring a receiving State to consider claims against the United States will ensure that all claims personnel know the receiving State's policy on which persons or classes of persons are proper claimants under such provisions. When a claim is filed both with the receiving State and under either the Military Claims Act (MCA) or Foreign Claims Act (FCA), the provisions of § 536.76(h) of this part and DA Pam 27-162, paragraph 3-4a apply.

(c) When SOFA provisions provide for receiving state claims consideration, the time limit for filing such claims may be much shorter than the two years otherwise allowed under the FCA or MCA. For example, receiving state claims offices in Germany require that a claim be filed under the SOFA within three months of the date that the claimant is aware of the U.S. involvement. If the filing period is about to expire for claims arising in Germany, have the claimant fill out a claim form, make two copies, and date-stamp each copy as received by the sending State

claims office. Return the date-stamped original of the claim to the claimant with instructions to promptly file with the receiving State claims office. Keep one date-stamped copy as a potential claim. Forward one date-stamped copy of the claim to the U.S. Army Claims Service Europe (USACSEUR). This may toll the applicable German statute of limitations. Additionally, many receiving state claims offices do not require claimants to demand a sum certain. All claims personnel must familiarize themselves with the applicable receiving state law and procedures governing SOFA claims.

(d) All foreign inhabitants who file claims against the United States that fall within the receiving State's responsibility, such as claims based on acts or omissions within the scope of U.S. Armed Forces members' or civilian employees' duties, must file the claim with the appropriate receiving State office. Those U.S. inhabitants whose claims would be otherwise cognizable under the Military Claims Act (subpart C of this part) and whom the receiving State deems proper claimants under the SOFA must also file with the receiving State.

(e) A claim filed with, and considered by, a receiving State under a SOFA or other international agreement claims provision may be considered under other subparts of this part only if the receiving State denied the claim on the basis that it was not cognizable under the treaty or agreement provisions. See DA Pam 27-162, paragraph 3-4a(2), for conditions of waiver of the foregoing requirement. See also §§ 536.76(h) and 536.138(j) of this part. When a claimant has filed a claim with a receiving State and received payment, or the claim has been denied on the merits, such action will be the claimant's final and exclusive remedy and will bar any further claims against the United States.

§ 536.116 Responsibilities as to claims arising overseas under international agreements.

(a) Command claims services or other responsible JA offices within whose jurisdiction SOFA or other treaty provisions provide for a claim reimbursement system, and where DA has been assigned single-service responsibility for the foreign country seeking reimbursement (see § 536.17) are responsible for:

(1) Establishing programs for verifying, certifying, and reimbursing claims payments. Such service or JA office will provide a copy of its procedures implementing the program to the Commander USARCS.

(2) Providing the Commander USARCS with budget estimates for reimbursements in addition to the reports required by AR 27–20, paragraph 13–7.

(3) Providing the Commander USARCS each month in which payments are made, with statistical information on the number of individual claims reimbursed, the total amount paid by the foreign government, and the total amount reimbursed by the United States.

(4) Providing the Commander USARCS with a quarterly report showing total reimbursements paid during the quarter for maneuver damage and tort claims classified according to major categories of damage determined by the Commander USARCS, and an update on major issues or activities that could affect the reimbursement system's operation or funding.

(b) Command claims services or other responsible Army JA offices will ensure that all claims personnel within their areas of responsibility:

(1) Receive annual training on the receiving State's claims procedures, including applicable time limitations, procedures and the responsible receiving State claims offices' locations.

(2) Screen all new claims and inquiries about claims to identify those claimants who must file with the receiving State.

(3) Ensure that all such claimants are informed of this requirement and the applicable time limitation.

(4) Ensure that all applicable SOFA claims based on incidents occurring in circumstances that bring them within the United States' primary sending State jurisdiction are fully investigated.

Subpart H—Maritime Claims

§ 536.117 Statutory authority for maritime claims.

The Army Maritime Claims Settlement Act (AMCSA) (10 U.S.C. 4801–04, 4806, as amended) authorizes the Secretary of the Army or his designee to administratively settle or compromise admiralty and maritime claims in favor of, and against, the United States.

§ 536.118 Related statutes for maritime claims.

(a) The AMCSA permits the settlement of claims that would ordinarily fall under the Suits in Admiralty Act (SIAA), 46 U.S.C. app. 741–752; the Public Vessels Act (PVA), 46 U.S.C. app. 781–790; or the Admiralty Extension Act (AEA), 46 U.S.C. app. 740. Outside the United States the AMCSA may be used to settle

admiralty claims in lieu of the Military Claims Act or Foreign Claims Act. Within the United States, filing under the AMCSA is not mandatory for causes of action as it is for the SIAA or PVA.

(b) Similar maritime claims settlement authority is exercised by the Department of the Navy under 10 U.S.C. 7363 and 7621–23 and by the Department of the Air Force under 10 U.S.C. 9801–9804 and 9806.

§ 536.119 Scope for maritime claims.

The AMCSA applies worldwide and includes claims that arise on high seas or within the territorial waters of a foreign country. At 10 U.S.C. 4802 it provides for the settlement or compromise of claims for:

(a) Damage caused by a vessel of, or in the service of, the Department of the Army (DA) or by other property under the jurisdiction of the DA.

(b) Compensation for towage and salvage service, including contract salvage, rendered to a vessel of, or in the service of, the DA or other property under the jurisdiction of the DA.

(c) Damage that is maritime in nature and caused by tortious conduct of U.S. military personnel or federal civilian employees, an agent thereof, or property under the Army's jurisdiction.

§ 536.120 Claims payable as maritime claims.

A claim is cognizable under this subpart if it arises in or on a maritime location, involves some traditional maritime nexus or activity, and is caused by the wrongful act or omission of a member of the U.S. Army, Department of Defense (DOD) or DA civilian employee, or an agent thereof, while acting within the scope of employment. This class of claims includes, but is not limited to:

(a) Damage to a ship, boat, barge, or other watercraft;

(b) An injury that involves a ship, boat, barge, or other watercraft;

(c) Damage to a wharf, pier, jetty, fishing net, farm facilities or other structures in, on, or adjacent to any body of water;

(d) Damage or injury on land or on water arising under the AEA and allegedly due to operation of an Army-owned or leased ship, boat, barge, or other watercraft;

(e) An injury that occurs on board an Army ship, boat, barge or other watercraft; and

(f) Crash into water of an Army aircraft.

§ 536.121 Claims not payable as maritime claims.

Under this subpart, claims are not payable if they:

(a) Are listed in §§ 536.42, 536.43, 536.44, 536.45 (except at (e) and (k)), and 536.46;

(b) Are not maritime in nature;

(c) Are not in the best interests of the United States, are contrary to public policy, or are otherwise contrary to the basic intent of the governing statute, for example, claims for property loss or damage or personal injury or death by inhabitants of unfriendly foreign countries or by individuals considered to be unfriendly to the United States. When a claim is considered not payable for the reasons stated in this section, it will be forwarded for appropriate action to the Commander USARCS, along with the recommendations of the responsible claims office.

(d) Are presented by a national, or a corporation controlled by a national, of a country at war or engaged in armed conflict with the United States, or any country allied with such enemy country, unless the appropriate settlement authority determines that the claimant is and, at the time of incident, was friendly to the United States. A prisoner of war or an interned enemy alien is not excluded or barred from bringing a claim for damage, loss, or destruction of personal property while held in the custody of the government if the claim is otherwise payable.

(e) Are for damages or injuries that a receiving State should pay for under an international agreement. See § 536.34(c).

§ 536.122 Limitation of settlement of maritime claims.

(a) Within the United States the period of completing an administrative settlement under the AMCSA is subject to the same time limitation as that for beginning suit under the SIAA or PVA; that is, a two-year period from the date the cause of the action accrued. The claimant must have agreed to accept the settlement and it must be approved for payment by the Secretary of the Army or other approval authority prior to the end of such period. The presentation of a claim, or its consideration by the DA, neither waives nor extends the two-year limitation period and the claimant should be so informed, in writing, when the claim is acknowledged. See § 536.28.

(b) For causes of action under the AEA, filing an administrative claim is mandatory. However, suit is required under the two-year time limit applicable to the SIAA and PVA, even though the AEA provides that no suit shall be filed under six months after filing a claim.

(c) For causes of action arising outside the United States, there is no time limitation for completing an administrative settlement.

§ 536.123 Limitation of liability for maritime claims.

For admiralty claims arising within the United States under the provisions of the Limitation of Shipowners' Liability Act, 46 U.S.C. app. 181–188, in cases alleging injury or loss due to negligent operation of its vessel, the United States may limit its liability to the value of its vessel after the incident from which the claim arose. The act requires filing of an action in federal District Court within six months of receiving written notice of a claim. Therefore, USARCS, or the Chief Counsel, U.S. Army Corps of Engineers (COE), or his designee, must be notified within 10 working days of the receipt of any maritime claim arising in the United States or on the high seas out of the operation of an Army vessel, including pleasure craft owned by the United States. USARCS or Chief Counsel, COE will coordinate with the Department of Justice (DOJ) as to whether to file a limitation of liability action.

§ 536.124 Settlement authority for maritime claims.

(a) The Secretary of the Army, the Army General Counsel as designee of the Secretary, or other designee of the Secretary may approve any settlement or compromise of a claim in any amount. A claim settled or compromised in a net amount exceeding \$500,000 will be investigated and processed and, if approved by the Secretary of the Army or his or her designee, will be certified to Congress for final approval.

(b) The Judge Advocate General (TJAG), The Assistant Judge Advocate General (TAJAG), the Commander USARCS, the Chief Counsel COE, or Division or District Counsel Offices are delegated authority to settle, such as to deny or approve payment in full or in part, any claim under this subpart regardless of the amount claimed, provided that any award does not exceed \$100,000.

(c) A Staff Judge Advocate (SJA) or chief of a command claims service and heads of area claims offices (ACOs) are delegated authority to pay up to \$50,000, regardless of the amount claimed, and to disapprove or make a final offer on a claim presented in an amount not exceeding \$50,000.

(d) Authority to further delegate payment authority is set forth in § 536.3(g)(1) of this part. For further discussion also related to settlement and approval authority see paragraph 2–69 of DA Pam 27–162.

(e) Where the claimed amount or potential claim damage exceeds

\$100,000 for COE claims or \$50,000 for all others, Commander USARCS will be notified immediately, and be furnished a copy of the claim and a mirror file thereafter. See § 536.30 and AR 27–20, paragraph 2–12.

Subpart I—Claims Cognizable Under Article 139, Uniform Code of Military Justice**§ 536.125 Statutory authority for Uniform Code of Military Justice (UCMJ) Claims.**

The authority for this subpart is Article 139, Uniform Code of Military Justice (UCMJ) (10 U.S.C. 939, which provides redress for property willfully damaged or destroyed, or wrongfully taken, by members of the Armed Forces of the United States.

§ 536.126 Purpose of UCMJ claims.

This subpart sets forth the standards to apply and the procedures to follow in processing claims for the wrongful taking or willful damage or destruction of property by military members of the Department of the Army.

§ 536.127 Proper claimants; unknown accused—under the UCMJ.

(a) A proper claimant under this subpart includes any individual (whether civilian or military), a business, charity, or state or local government that owns, has an ownership interest in, or lawfully possesses property.

(b) When cognizable claims are presented against a unit because the individual offenders cannot be identified, this subpart sets forth the procedures for approval authorities to direct pay assessments, equivalent to the amount of damages sustained, against the unit members who were present at the scene and to allocate individual liability in such proportion as is just under the circumstances.

§ 536.128 Effect of disciplinary action, voluntary restitution, or contributory negligence for claims under the UCMJ.

(a) *Disciplinary action.* Administrative action under Article 139, UCMJ, and this subpart is entirely separate and distinct from disciplinary action taken under other sections of the UCMJ or other administrative actions. Because action under both Article 139, UCMJ, and this subpart requires independent findings on issues other than guilt or innocence, a soldier's conviction or acquittal of claim-related charges is not dispositive of liability under Article 139, UCMJ.

(b) *Voluntary restitution.* The approval authority may terminate Article 139 proceedings without

findings if the soldier voluntarily makes full restitution to the claimant.

(c) *Contributory negligence.* A claim otherwise cognizable and meritorious is payable whether or not the claimant was negligent.

§ 536.129 Claims cognizable as UCMJ claims.

Claims cognizable under Article 139, UCMJ, are limited to the following:

(a) *Requirement that conduct constructively violate UCMJ.* In order to subject a person to liability under Article 139, the soldier's conduct must be such as would constitute a violation of one or more punitive Articles of the UCMJ. However, a referral of charges is not a prerequisite to action under this subpart.

(b) *Claims for property willfully damaged.* Willful damage is damage inflicted intentionally, knowingly, and purposefully without justifiable excuse, as distinguished from damage caused inadvertently, thoughtlessly or negligently. Damage, loss, or destruction of property caused by riotous, violent, or disorderly acts or acts of depredation, or through conduct showing reckless or wanton disregard of the property rights of others, may be considered willful damage.

(c) *Claims for property wrongfully taken.* A wrongful taking is any unauthorized taking or withholding of property, with the intent to deprive, temporarily or permanently, the owner or person lawfully in possession of the property. Damage, loss, or destruction of property through larceny, forgery, embezzlement, fraud, misappropriation, or similar offense may be considered wrongful taking. However, mere breach of a fiduciary or contractual duty that does not involve larceny, forgery, embezzlement, fraud, or misappropriation does not constitute wrongful taking.

(d) *Definition of property.* Article 139 provides compensation for loss of or damage to both personal property, whether tangible or intangible, and real property. Contrast this to the Personnel Claims Act and chapter 11 of AR 27–20, which provides compensation only for tangible personal property. Monetary losses may fall into the category of either tangible property (for example, cash), or intangible property (for example, an obligation incurred by a claimant to a third party as a result of fraudulent conduct by a soldier), although recovery for losses of intangible property may be limited by other provisions of this part, such as the exclusion of theft of services (see § 536.130(f)) or consequential damages (see § 536.130(g)).

(e) *Claims cognizable under more than one statute.* Claims cognizable under other claims statutes may be processed under this subpart.

§ 536.130 Claims not cognizable as UCMJ claims.

Claims not cognizable under Article 139, UCMJ, and this subpart, include the following:

(a) Claims resulting from negligent acts.

(b) Claims for personal injury or death.

(c) Claims resulting from acts or omissions of military personnel acting within the scope of their employment, including claims resulting from combat activities or noncombat activities, as those terms are defined in the Glossary of AR 27–20.

(d) Claims resulting from the conduct of Reserve component personnel who are not subject to the UCMJ at the time of the offense.

(e) Subrogated claims.

(f) Claims for theft of services, even if such theft constitutes a violation of Article 134 of the UCMJ.

(g) Claims for indirect, remote, or consequential damages.

(h) Claims by entities in conflict with the United States or whose interests are hostile to the United States.

§ 536.131 Limitations on assessments arising from UCMJ claims.

(a) *Limitations on amount.* (1) A special court-martial convening authority (SPCMCA) has authority to approve a pay assessment in an amount not to exceed \$5,000 per claimant per incident and to deny a claim in any amount. If the Judge Advocate responsible for advising the SPCMCA decides that the SPCMCA's final action under the provisions of Rule for Courts-Martial 1107 in a court-martial arising out of the same incident would be compromised, the SPCMCA may forward the Article 139 claim to the general court-martial convening authority (GCMCA) for action.

(2) A GCMCA, or designee, has authority to approve a pay assessment in an amount not to exceed \$10,000 per claimant per incident and to deny a claim in any amount.

(i) If the GCMCA or designee determines that a claim exceeding \$10,000 per claimant per incident is meritorious, that officer will assess the soldier's pay in the amount of \$10,000 and forward the claim to the Commander USARCS, with a recommendation to increase the assessment.

(ii) If the head of the area claims office (ACO) (usually the GCMCA's Staff Judge

Advocate (SJA)) decides that the GCMCA's final action under the provisions of Rule for Courts-Martial 1107 in a court-martial arising out of the same incident would be compromised, that officer may forward the Article 139 claim to USARCS for action.

(3) Only TJAG, TAJAG, the Commander USARCS, or designee has authority to approve assessments in excess of \$10,000 per claimant per incident.

(b) *Limitations on type of damages.* Property loss or damage assessments are limited to direct damages. This subpart does not provide redress for indirect, remote, or consequential damages.

§ 536.132 Procedure for processing UCMJ claims.

(a) *Time limitations on submission of a claim.* A claim must be submitted within 90 days of the incident that gave rise to it, unless the SPCMCA acting on the claim determines there is good cause for delay. Lack of knowledge of the existence of Article 139, or lack of knowledge of the identity of the offender, are examples of good cause for delay.

(b) *Form and presentment of a claim.* The claimant or authorized agent may present a claim orally or in writing. If presented orally, the claim must be reduced to writing, signed, and seek a definite sum in U.S. dollars within 10 days after oral presentment.

(c) *Action upon receipt of a claim.* Any officer receiving a claim will forward it within two working days to the SPCMCA exercising jurisdiction over the soldier or soldiers against whom the claim is made. If the claim is made against soldiers under the jurisdiction of two or more convening SPCMCA's who are under the same GCMCA, forward the claim to that GCMCA. That GCMCA will designate one SPCMCA to investigate and act on the claim as to all soldiers involved. If the claim is made against soldiers under the jurisdiction of more than one SPCMCA at different locations and not under the same GCMCA, forward the claim to the SPCMCA whose headquarters is located nearest the situs of the alleged incident. That SPCMCA will investigate and act on the claim as to all soldiers involved. If a claim is brought against a member of one of the other military services, forward the claim to the commander of the nearest major command of that service equivalent to a major Army command (MACOM).

(d) *Action by the special court-martial convening authority.* (1) If the claim appears to be cognizable, the SPCMCA will appoint an investigating officer

within four working days of receipt of a claim. The investigating officer will follow the procedures of this subpart supplemented by DA Pam 27–162, chapter 9, and AR 15–6, chapter 4, which applies to informal investigations. The SPCMCA may appoint the claims officer of a command (if the claims officer is a commissioned officer) as the investigating officer. In cases where the special court-martial convening authority is an inactive duty soldier of the United States Army Reserve, the appointment of an investigating officer will be made within 30 calendar days.

(2) If the claim is not brought against a person who is a member of the Armed Forces of the United States at the time the claim is received, or if the claim does not appear otherwise cognizable under Article 139, UCMJ, the SPCMCA may refer it for legal review (see paragraph (g) of this section) within four working days of receipt. If after legal review the SPCMCA determines that the claim is not cognizable, final action may be taken disapproving the claim (see paragraph (h) of this section) without appointing an investigating officer. In claims where the special court-martial convening authority is an inactive duty soldier of the United States Army Reserve, the request for a legal review will be made within 30 calendar days.

(e) *Expediting payment through Personnel Claims Act and Foreign Claims Act procedures.* When assessment action on a particular claim will be unduly delayed, the claims office supporting the SPCMCA may consider the claim under the Personnel Claims Act, 31 U.S.C. 3721, and chapter 11 of AR 27–20, or under the Foreign Claims Act, 10 U.S.C. 2734, and subpart J of this part, as long as it is otherwise cognizable under that authority. If the Article 139 claim is later successful, the claims office will inform the claimant of the obligation to repay to the government any overpayment received under these statutes.

(f) *Action by the investigating officer.* The investigating officer will notify the soldier against whom the claim is made.

(1) If the soldier wishes to make voluntary restitution, the investigating officer may, with the SPCMCA's concurrence, delay proceedings until the end of the next pay period to permit restitution. If the soldier makes payment to the claimant's full satisfaction, the SPCMCA will dismiss the claim.

(2) In the absence of full restitution, the investigating officer will determine whether the claim is cognizable and meritorious under the provisions of Article 139, UCMJ, and this subpart, and the amount to be assessed against each

offender. This amount will be reduced by any restitution the claimant accepts from an offender in partial satisfaction. Within 10 working days, or such time as the SPCMCA may determine, the IO will submit written findings and recommendations to the SPCMCA.

(3) If the soldier is absent without leave and cannot be notified, a claims office may process the Article 139 claim in the soldier's absence. If an assessment is approved, forward a copy of the claim and the memorandum authorizing pay assessment by transmittal letter to the servicing Defense Accounting Office (DAO) for offset against the soldier's pay. If the soldier is dropped from the rolls, the servicing DAO will forward the assessment documents to: Commander, Defense Finance and Accounting Service (DFAS), ATTN: Military Pay Operations, 8899 E. 56th Street, Indianapolis, IN 46249.

(g) *Legal review.* The SPCMCA will refer the claim for legal review to its servicing legal office upon either completion of the investigating officer's report or the SPCMCA's determination that the claim is not cognizable (see paragraph (d)(2) of this section).

(1) Within five working days or such time as the SPCMCA determines, that office will furnish a written opinion as to:

(i) Whether the claim is cognizable under the provisions of Article 139, UCMJ, and this subpart.

(ii) Whether the findings and recommendations are supported by a preponderance of the evidence.

(iii) Whether the investigation substantially complies with the procedural requirements of Article 139, UCMJ; this subpart; DA Pam 27-162, chapter 9; and AR 15-6, chapter 4.

(iv) Whether the claim is clearly not cognizable (see paragraph (d)(2) of this section) and final denial action can be taken without appointing an investigating officer.

(2) If the investigating officer's recommended assessment does not exceed \$5,000, the claims judge advocate (CJA) or claims attorney will, upon legal review, forward the claim to the SPCMCA for final action.

(3) If the investigating officer's recommended assessment is more than \$5,000, the CJA or claims attorney will, upon legal review, forward the claim file to the head of the ACO, who will also conduct a legal review within five working days.

(i) If the recommended assessment does not exceed \$10,000, the head of the ACO will forward the claim file to the GCMCA for final action.

(ii) If the recommended assessment exceeds \$10,000, the head of the ACO will forward the claim file to the GCMCA for approval of an assessment up to \$10,000 and for a recommendation of an additional assessment. The head of the ACO will then forward the claims file and the GCMCA's recommendation to the Commander USARCS for approval.

(h) *Final action.* After consulting with the legal advisor, the approval authority will disapprove or approve the claim in an amount equal to, or less than, the amount of the assessment limitation. The approval authority is not bound by the findings or recommendations of the IO; AR 15-6, paragraph 2-3a. The approval authority will notify the claimant, and any soldier subject to that officer's jurisdiction, of the determination and the right of any party to request reconsideration (see § 536.133). A copy of the investigating officer's findings and recommendation will be enclosed with the notice. The approval authority will then suspend action on the claim for 10 working days pending receipt of a request for reconsideration, unless the approval authority determines that this delay will result in substantial injustice. If after this period the approval authority determines that an assessment is still warranted, the approval authority will direct the appropriate DAO to withhold such amount from the soldier's pay account (see § 536.131(a)). For any soldier not subject to the approval authority's jurisdiction, the approval authority will forward the claim to the commander who exercises SPCMCA jurisdiction over the soldier for assessment. The receiving SPCMCA is bound by the determination of the approval authority.

(i) *Assessment.* Subject to any limitations set forth in appropriate regulations, the servicing DAO will withhold the amount directed by the approval authority and pay it to the claimant. The assessment is not subject to appeal and is binding on any finance officer. If the servicing DAO cannot withhold the required amount because it does not have custody of the soldier's pay record, the record is missing, or the soldier is in a no pay due status, that office will promptly notify the approval authority of this fact in writing.

(j) *Remission of indebtedness.* 10 U.S.C. 4837, which authorizes the remission and cancellation of indebtedness of an enlisted person to the United States or its instrumentalities, is not applicable and may not be used to remit and cancel indebtedness determined as a result of action under Article 139, UCMJ.

§ 536.133 Reconsideration of UCMJ claims.

(a) *General.* Although Article 139, UCMJ, does not provide for a right of appeal, either the claimant or a soldier whose pay is assessed may request the approval authority (SPCMCA or GCMCA, depending on the amount assessed) or successor in command to reconsider the action. Either party must submit such a request for reconsideration in writing and clearly state the factual or legal basis for the relief requested. The approval authority may direct that the matter be reinvestigated.

(b) *Reconsideration by the original approval authority.* The original approval authority may reconsider the action at any time while serving as the approval authority for the claim in question, even after the transfer of the soldier whose pay was assessed. The original approval authority may modify the action if it was incorrect, subject to paragraph (d) of this section. However, the approval authority should modify the action only because of fraud, substantial new evidence, errors in calculation, or mistake of law.

(c) *Reconsideration by a successor in command.* Subject to paragraph (d) of this section, a successor in command may modify an action only because of fraud, substantial new evidence, errors in calculation, or mistake of law apparent on the face of the record.

(d) *Legal review and action.* Prior to modifying the original action, the approval authority will have the servicing claims office render a legal opinion and fully explain the basis for modification as part of the file. If the legal review agrees that a return of the assessed pay is appropriate, the approval authority should request in writing that the claimant return the money, setting forth in the letter the basis for the request. There is no authority for repayment from appropriated funds.

(e) *Disposition of files.* After completing action on reconsideration, the approval authority will forward the reconsideration action to the servicing claims office, which will then file the action per § 536.132(h).

§ 536.134 Additional claims judge advocate and claims attorney responsibilities (for UCMJ claims).

In addition to the duties set forth in this subpart, the CJA or claims attorney is responsible for forwarding copies of completed Article 139 actions to USARCS, maintaining a log, monitoring the time requirements of pending Article 139 actions, and publicizing the

Article 139 program to commanders, soldiers, and the community.

Subpart J—Claims Cognizable Under the Foreign Claims Act

§ 536.135 Statutory authority for the Foreign Claims Act.

(a) The statutory authority for this subpart is the Act of August 10, 1956, 10 U.S.C. 2734 (70 Stat. 154), commonly referred to as the Foreign Claims Act (FCA), as amended by Public Law 86–223, September 1959 (73 Stat. 453); Public Law 86–411, April 1960 (74 Stat. 16); Public Law 90–521, September 1968 (82 Stat. 874); Public Law 91–312, July 1970 (84 Stat. 412); Public Law 93–336, July 1974 (88 Stat. 292); Public Law 96–513, Title V, § 511 (95), December 1980 (94 Stat. 2928). It is posted on the USARCS Web site; for the address see § 536.2(a).

(b) Claims arising from the acts or omissions of the U.S. Armed Forces in the Marshall Islands or the Federated States of Micronesia are settled in accordance with Art. XV, Non-contractual Claims, of the U.S.-Marshall Islands and Micronesian Status of Forces Agreement (the “SOFA”) (posted on the USARCS Web site; for the address see § 536.2(a)). This is pursuant to the “agreed upon minutes” that are appended to the SOFA, pursuant to Section 323 of the Compact of Free Association between the U.S. and the Marshall Islands and the Federated States of Micronesia, enacted by Public Law 99–239, January 14, 1986. (The Compact may be viewed at <http://www.fm/jcn/compact/reindex.html>). The “agreed upon minutes” state that “all claims within the scope of paragraph 1 of Article XV [Claims], [of the Compact] * * * shall be processed and settled exclusively pursuant to the Foreign Claims Act, 10 U.S.C. 2734, and any regulations promulgated in implementation thereof.” Therefore, Title I, Article 178 of the Compact, regarding claims processing, is not applicable to claims arising from the acts or omissions of the U.S. armed forces, but only to other federal agencies. Those agencies are required to follow the provisions of the Federal Tort Claims Act, 28 U.S.C. 2672.

§ 536.136 Scope for claims arising under the Foreign Claims Act.

(a) *Application.* This subpart, which is applicable outside the United States, its commonwealths, territories and possessions, including areas under the jurisdiction of the United States, implements the FCA and prescribes the substantive basis and special procedural requirements for settlement of claims of

inhabitants of a foreign country, or of a foreign country or a political subdivision thereof, against the United States for personal injury, death, or property damage caused by service members or civilian employees, or claims that arise incident to noncombat activities of the armed forces.

(b) *Effect of Military Claims Act (MCA).* Claims arising in foreign countries will be settled under the MCA if the injured party is an inhabitant of the U.S., for example, a member of the U.S. armed forces, a U.S. civilian employee, or a family member of either category. In a wrongful death case, if the decedent is an inhabitant of a foreign country, even though his survivors are U.S. inhabitants, the FCA will apply. See § 536.74(c). For claims arising outside the U.S. involving foreign-born spouses, see DA Pam 27–20, paragraph 2–20a.

(c) *Effect of Army Maritime Claims Settlement Act (AMCSA) (10 U.S.C. 4801, 4802 and 4808).* A maritime claim may be settled under the FCA.

§ 536.137 Claims payable under the Foreign Claims Act.

(a) A claim for death, personal injury, or loss of or damage to property may be allowed under this subpart if the alleged damage results from noncombat activity or a negligent or wrongful act or omission of soldiers or civilian employees of the U.S. armed forces, as enumerated in § 536.23(b), regardless of whether the act or omission was made within the scope of their employment. This includes non-U.S. citizen employees recruited elsewhere but employed in a country of which they are not a citizen. However, a claim generated by non-U.S. citizen employees in the country in which they were recruited and are employed will be payable only if the act or omission was made in the scope of employment. But claims arising from the operation of U.S. armed forces vehicles or other equipment by such employees may be paid, even though the employees are not acting within the scope of their employment, provided the employer or owner of the vehicle or other equipment would be liable under local law in the circumstances involved.

(b) Claims generated by officers or civilian employees of the American Battle Monuments Commission (36 U.S.C. 2110), acting within the scope of employment, will be paid from American Battle Monuments Commission appropriations.

(c) Claims for the loss of, or damage to, property that may be settled under this subpart include the following:

(1) Real property used and occupied under lease, express, implied, or otherwise. See § 536.34(m) of this part and paragraph 2–15m of DA Pam 27–162.

(2) Personal property bailed to the government under an agreement, express or implied, unless the owner has expressly assumed the risk of damage or loss.

§ 536.138 Claims not payable under the Foreign Claims Act.

A claim is not payable if it:

(a) Results wholly from the negligent or wrongful act of the claimant or agent;

(b) Is purely contractual in nature;

(c) Arises from private or domestic obligations as distinguished from government transactions;

(d) Is based solely on compassionate grounds;

(e) Is a bastardy claim for child support expenses;

(f) Is for any item whose acquisition, possession, or transportation is in violation of Department of the Army (DA) or Department of Defense (DOD) directives, such as illegal war trophies.

(g) Is for rent, damage, or other payments involving the acquisition, use, possession, or disposition of real property or interests therein by and for the DA. See § 536.34(m) of this part and paragraph 2–15m of DA Pam 27–162.

(h) Is not in the best interest of the United States, is contrary to public policy, or otherwise contrary to the basic intent of the governing statute (10 U.S.C. § 2734); for example, claims for property loss or damage, or personal injury or death caused by inhabitants of unfriendly foreign countries or by individuals considered to be unfriendly to the United States.

(i) Is presented by a national, or a corporation controlled by a national, of a country at war or engaged in armed conflict with the United States, or any country allied with such enemy country unless the appropriate settlement authority determines that the claimant is, and at the time of the incident was friendly to the United States. A prisoner of war or an interned enemy alien is not excluded from filing a claim for damage, loss, or destruction of personal property within the federal government’s custody if the claim is otherwise payable.

(j) Is for damages or injury, the claim for which a receiving State should adjudicate and pay pursuant to an international agreement, subject to waiver by the Commander USARCS. See DA Pam 27–162, paragraph 3–4a(2), for a discussion of the conditions of waiver.

(k) Is listed in §§ 536.45 and 536.46, except for the exclusions listed in §§ 536.45(e), (h) and (k). Additionally,

the exclusions set forth in §§ 536.45(a) and (b) do not apply to a claim arising incident to noncombat activities.

(l) Is brought by a subrogee.

(m) Is covered by insurance on the involved U.S. Armed Forces' vehicle or the tortfeasor's privately owned vehicle (POV), in accordance with requirements of a foreign country, unless the claim exceeds the coverage or the insurer is insolvent. See § 536.139(c).

(n) Is payable under subpart C of this part or AR 27–20, chapter 11.

(o) Is brought by or on behalf of a member of a foreign military force for personal injury or death arising incident to service, or pursuant to combined military operations. Combined military operations include exercises and United Nations and North Atlantic Treaty Association (NATO) peacekeeping and humanitarian missions. Derivative claims arising from these incidents are also excluded.

§ 536.139 Applicable law for claims under the Foreign Claims Act.

(a) *Venue of incident and domicile of claimant.* In determining an appropriate award, apply the law and custom of the country in which the incident occurred to determine which elements of damages are payable and which individuals are entitled to compensation. However, where the claimant is an inhabitant of another foreign country and only temporarily within the country in which the incident occurred, the quantum of certain elements of damages, such as lost wages and future medical care, may be calculated based on the law and economic conditions in the country of the claimant's permanent residence. Where the decedent is the subject of a wrongful death case, the quantum will be determined based on the country of the decedent's permanent residence regardless of the fact that his survivors live in the U.S. or a different foreign country than the decedent. See § 536.77 for further damages guidance.

(b) *Other guidance.* The guidance set forth in §§ 536.77(b) through (d) as to allowable elements of damages is generally applicable. Where moral damages, as defined in DA Pam 27–162, paragraph 2–53c(4), are permitted, such damages are payable. In some countries it is customary to get a professional appraisal to substantiate certain claims and pass this cost on to the tortfeasor. The Commander USARCS or the chief of a command claims service may, as an exception to policy, permit the reimbursement of such costs in appropriate cases. Where feasible, claimants should be discouraged from incurring such costs.

(c) *Deductions for insurance.* (1) Insurance coverage recovered or recoverable will be deducted from any award. In that regard, every effort will be made to monitor the insurance aspect of the case and encourage direct settlement between the claimant and the insurer of the tortfeasor.

(2) When efforts under paragraph (c)(1) of this section are of no avail, or when it otherwise is determined that an insurance settlement will not be reasonably available for application to the award, no award will be made until the chief of the command claims service or the Commander USARCS, has first granted consent. In such cases, an assignment of the insured's rights against the insurer will be obtained and, in appropriate cases, reimbursement action will be instituted against the insurer under applicable procedures.

(3) If an insurance settlement is not available due to the insurer's insolvency or bankruptcy, a report on the bankruptcy will be forwarded to the Commander USARCS without delay, setting forth all pertinent information, including the alleged reasons for the bankruptcy and the facts concerning the licensing of the insurer.

(d) *Deductions for amounts paid by tortfeasor.* Settlement authorities will deduct from the damages any direct payments by a member or civilian employee of the U.S. armed forces for damages (other than solatia).

§ 536.140 Appointment and functions of Foreign Claims Commissions.

(a) Claims cognizable under this subpart will be referred to the command responsible for claims arising within its geographic area of responsibility, including claims transferred by agreement between the services involved. The senior judge advocate of a command having a command claims service, or his delegee, will appoint a sufficient number of Foreign Claims Commissions (FCCs) to dispose of the claims. If there is no command claims service, the responsible commander may ask the Commander USARCS for permission to establish one. Otherwise, the Commander USARCS will appoint a sufficient number of FCCs from personnel furnished by the command involved. See § 576.3(d) for more information about command claims services.

(b) The Commander USARCS will appoint all other FCCs to act on all other claims, regardless of where such claims arose, unless they arose in a country for which single-service responsibility has been assigned to another service. FCCs appointed by the Commander USARCS at units based in the continental United

States (CONUS) may act on any claim arising out of such unit's operations. Any FCC operating in, or adjudicating claims arising out of, a geographical area within a command claims service's jurisdiction, will comply with that service's legal and procedural rules.

(c) An FCC may operate as an integral part of a command claims service, which will determine the cases to be assigned to it, furnish necessary administrative services, and establish and maintain its records. Where an FCC does not operate as part of a command claims service, it may operate as part of the office or a division, corps or higher command staff judge advocate (SJA), which will perform the foregoing functions.

(d) An appointing authority who appoints or relieves an FCC whom he or she has appointed will forward one copy of each order addressing an FCC's appointment, relief, or change of responsibility to the Commander USARCS. Upon receipt of an initial appointing order, the Commander USARCS will assign an office code number to the FCC. Without such a number the FCC has no authority to approve or pay claims. See AR 27–20, paragraph 13–1.

(e) Normally, the FCC is responsible for the investigation of all claims referred to it, using both the procedures set forth in subpart B of this part and any local procedures established by the appointing authority or command claims service responsible for the geographical area in which the claim arose. Chiefs of a command claims service may request assistance on claims investigation within their geographical areas from units or organizations other than the FCC. The Commander USARCS may make the same request for any claim referred to an FCC appointed under his or her authority.

(f) When an FCC intends to deny a claim, or offer an award less than the amount claimed, it will notify in writing the claimant, the claimant's authorized agent, or legal representative of the intended action on the claim and the legal and factual bases for that action. If the FCC proposes a partial award, a settlement agreement should be enclosed with the notice. Claimants will be advised that they may either accept the FCC action by returning the signed settlement agreement or, if dissatisfied with the FCC's action, they may submit a request for reconsideration stating the factual or legal reasons why they believe the FCC's proposed action is incorrect. This notice serves to give the claimant an opportunity to request reconsideration of the FCC action and state the reasons for the request before

final action is taken on the claim. When the FCC intends to award the amount claimed, or recommend an award equal to the amount claimed to a higher authority, this procedure is not necessary. However, a settlement agreement is required for all awards, full or partial. See § 536.63(a).

(1) This notice should be given at least 30 days before the FCC takes final action, except on small claims processed pursuant to § 536.33. The notice should be mailed via certified or registered mail to the claimant. The claimant should be informed that any request for reconsideration should be addressed to the FCC that took final action, and that all materials the claimant wishes the FCC to consider should be included with the request for reconsideration.

(2) An FCC may alter its initial decision based on the claimant's response or proceed with the intended action. If the claimant's response raises a general policy issue, the FCC may request an advisory opinion from the Commander USARCS or the chief of the command claims service while retaining the claim for final action at its level.

(3) Upon completing of its evaluation of the claimant's response, the FCC will notify the claimant of its final decision and advise the claimant that its action is final and conclusive as a matter of law (10 U.S.C. 2735), unless the final decision is a recommendation for payment above its authority. In that case, the FCC will forward any response submitted by the claimant along with its claims memorandum of opinion to the approval authority, and will notify the claimant accordingly.

(4) When an FCC determines that a claim is valued at more than \$50,000 or all claims arising out of a single incident are valued at more than \$100,000, the file will be transferred to the Commander USARCS for further action; see § 536.143(d)(2). Upon request of the Commander USARCS, the FCC may negotiate a settlement, the amount of which exceeds the FCC's authority; however, prior approval by a higher authority is required.

(5) Every reasonable effort should be made to negotiate a mutually agreeable settlement on meritorious claims. When an agreement can be reached, the notice and response provisions above are not necessary. If the FCC recommends an award in excess of its monetary authority, the settlement agreement should indicate that its recommendation is contingent upon approval by higher authority.

(g) The chief of an overseas command claims service may delegate to a one-member FCC the responsibility for the

receipt, processing, and investigation of any claim, regardless of amount, except those required to be referred to a receiving State office for adjudication under the provisions of a treaty concerning the status of U.S. forces in the country in which the claim arose. If, after investigation, it appears that action by a three-member FCC is appropriate, the one-member FCC should send the claim to the appropriate three-member FCC with a complete investigation report, including a discussion of the applicable local law and a recommendation for disposition.

§ 536.141 Composition of Foreign Claims Commissions.

(a) Normally, an FCC will be composed of either one or three members. Alternate members of three-member FCCs may be appointed when circumstances require, and may be substituted for regular members on specific cases by order of the appointing authority. The appointing orders will clearly designate the president of a three-member FCC. Two members of a three-member FCC will constitute a quorum, and the FCC's decision will be determined by majority vote.

(b) Upon approval by the Commander USARCS and the appropriate authority of another uniformed service, the membership may be composed of one or more members of another uniformed service. If another service has single-service responsibility over the foreign country in which the claim arose, that service is responsible for the claim. If requested, the Commander USARCS may furnish a JAG officer or claims attorney to be a member of another service's FCC.

§ 536.142 Qualification of members of Foreign Claims Commissions.

Normally, a member of an FCC will be either a commissioned officer or a claims attorney. At least two members of a three-member FCC must be JAs or claims attorneys. In exigent circumstances, a qualified non-lawyer employee of the armed forces may be appointed to an FCC, subject to prior approval by the Commander USARCS. Such approval may be granted only upon a showing of the employee's status and qualifications and adequate justification for such appointment (for example, lack of legally qualified personnel). The FCC will be limited to employees who are citizens of the United States. An officer, claims attorney, or employee of another armed force will be appointed a member of an Army FCC only if approved by the Commander USARCS.

§ 536.143 Settlement authority of Foreign Claims Commissions.

(a) In order to determine whether the claim will be considered by a one-member or three-member FCC, the claimed amount will be converted to the U.S. dollar equivalent (based on the annual Foreign Currency Fluctuation Account exchange rate, where applicable). However, the FCC's jurisdiction to approve is determined by the conversion rate on the date of final action. Accordingly, if the value of the U.S. dollar has decreased, the FCC will forward the recommendation to a higher authority, if necessary.

(b) Payment will be made in the currency of the country in which the incident occurred or in which the claimant resided at the time of the incident, unless the claimant requests payment in U.S. dollars or another currency and such request is approved by the chief of a command claims service or the Commander USARCS. However, if the claimant resides in another foreign country at the time of payment, payment in an amount equivalent to that which would have been paid under the preceding sentence may be made in the currency of that third country without the approval of the Commander USARCS.

(c) A one-member FCC may consider and pay claims presented in any amount provided a mutually agreed settlement may be reached in an amount not exceeding the FCC's monetary authority. A one-member FCC may deny any claim when the claimed amount does not exceed its monetary authority. Unless otherwise restricted by the appointing authority, a one-member FCC who is a JA or claims attorney has \$15,000 monetary authority, while any other one-member commission has \$5,000 monetary authority.

(d) A three-member FCC, unless otherwise restricted by the appointing authority, may take the following actions on a claim that is properly before it:

(1) *Disapprove a claim presented in any amount.* After following the procedures in § 536.140, including reconsideration, the disapproval is final and conclusive under 10 U.S.C. 2735. The FCC will inform the appointing authority of its action. After it takes final action and disapproves a claim presented in any amount over \$50,000, the FCC will forward to the appointing authority the written notice to the claimant required by § 536.140(f), any response from the claimant, and its notice of final action on the claim.

(2) *Approve and pay meritorious claims presented in any amount.* (i) Claims paid in full or in part for an

amount not exceeding \$50,000 will be paid after any reconsideration as set forth in § 536.140. This action is final and conclusive under 10 U.S.C. 2735.

(ii) Claims valued at an amount exceeding \$50,000, or multiple claims arising from the same incident valued at more than \$100,000, will be forwarded through the appointing authority with a memorandum of opinion to the Commander USARCS for action; see DA Pam 27-162, paragraph 2-60. The memorandum of opinion will discuss the amount for which the claimant will settle and include the recommendation of the FCC.

(e) The Judge Advocate General (TJAG), The Assistant Judge Advocate General (TAJAG) and the Commander USARCS, or his or her designee serving at USARCS, may approve and pay, in whole or in part, any claim as long as the amount of the award does not exceed \$100,000; may disapprove any claim, regardless of either the amount claimed or the recommendation of the FCC forwarding the claim; or, if a claim is forwarded to USARCS for approval of payment in excess of \$50,000, refer the claim back to the FCC or another FCC for further action.

(f) Payments in excess of \$100,000 will be approved by the Secretary of the Army, the Army General Counsel as the Secretary's designee, or other designee of the Secretary.

(g) Following approval where required and receipt of an agreement by the claimant accepting the specific sum awarded by the FCC, the claim will be processed for payment in the appropriate currency. The first \$100,000 of any award will be paid from Army claims funds. The excess will be reported to the Financial Management Service, Department of the Treasury, with the documents listed in DA Pam 27-162, paragraph 2-81.

(h) If the settlement authority upholds a final offer or authorizes an award on appeal from a denial of a claim, the notice of the settlement authority's action will inform the claimant that he or she must accept the award within 180 days of the date of mailing of the notice of the settlement authority's action or the award will be withdrawn, the claim will be deemed denied, and the file will be closed without future recourse.

§ 536.144 Reopening a claim after final action by a Foreign Claims Commission.

(a) *Original approval or settlement authority (including TAJAG, TJAG, Secretary of the Army, or the Secretary's designees).* (1) An original settlement authority may reconsider the denial of, or final offer on a claim brought under the FCA upon request of the claimant or

the claimants authorized agent. In the absence of such a request, the settlement authority may reconsider a claim on its own initiative.

(2) An original approval or settlement authority may reopen and correct action on an FCA claim previously settled in whole or in part (even if a settlement agreement has been executed) when it appears that the original action was incorrect in law or fact based on the evidence of record at the time of the action or subsequently received. For errors in fact, the new evidence must not have been discoverable at the time of final action by either the Army or the claimant through the exercise of reasonable diligence. Corrective action may also be taken when an error contrary to the parties' mutual understanding is discovered in the original action. If it is determined that the original action was incorrect, the action will be modified, and if appropriate, a supplemental payment made. The basis for a change in action will be stated in a memorandum included in the file. For example, a claim was settled for \$15,000, but the settlement agreement was typed to read "\$1,500" and the error is not discovered until the file is being prepared for payment. If appropriate, a corrected payment will be made. A settlement authority who has reason to believe that a settlement was obtained by fraud on the part of the claimant or the claimant's legal representative, will reopen action on that claim and, if the belief is substantiated, correct the action. The basis for correcting an action will be stated in a memorandum and included in the file.

(b) *A successor approval or settlement authority (including TAJAG, TJAG, Secretary of the Army, or the Secretary's designees)*—(1) *Reconsideration.* A successor approval or settlement authority may reconsider the denial of, or final offer on, an FCA claim upon request of the claimant or the claimant's authorized agent only on the basis of fraud, substantial new evidence, errors in calculation, or mistake (misinterpretation) of law.

(2) *Settlement correction.* A successor approval or settlement authority may reopen and correct a predecessor's action on a claim that was previously settled in whole or in part for the same reasons that an original authority may do so.

(c) *Time requirement for filing request for reconsideration.* Requests postmarked more than five years from the date of mailing of final notice will be denied based on the doctrine of laches.

(d) *Finality of action.* Action by the appropriate authority (either affirming the prior action or granting full or partial relief) is final under the provisions of 10 U.S.C. 2735. Action upon request for reconsideration constitutes final administrative disposition of a claim. No further requests for reconsideration will be allowed except on the basis of fraud.

§ 536.145 Solatia payment.

Payment of solatia in accordance with local custom as an expression of sympathy toward a victim or his or her family is common in some overseas commands. Solatia payments are known to be a custom in the Federated States of Micronesia, Japan, Korea, and Thailand. In other countries, the FCC should consult the command claims service or Commander USARCS for guidance. Such payments are not to be made from the claims expenditure allowance. These payments are made from local operation and maintenance funds. This applies even where a command claims service is directed to administer the command's solatia program. See, for example, United States Forces Korea Regulation 526-11 regarding solatia amounts and procedures.

Subpart K—Nonappropriated Fund Claims

§ 536.146 Claims against nonappropriated fund employees—generally.

This subpart sets forth the procedures to follow in the settlement and payment of claims generated by the acts or omissions of the employees of nonappropriated fund (NAF) activities. NAF activities include NAF or Army and Air Force Exchange Service (AAFES) facilities, post exchanges, bowling centers, officers and noncommissioned officers' clubs, and other facilities located on land or situated in a building used by an activity that employs personnel compensated from NAFs.

§ 536.147 Claims by NAFI employees for losses incident to employment.

Claims by employees for the loss of or damage to personal property incident to employment will be processed in the manner prescribed by AR 27-20, chapter 11 and will be paid from NAFs in accordance with § 536.152.

§ 536.148 Claims generated by the acts or omissions of NAFI employees.

(a) *Processing.* Claims arising out of acts or omissions of employees of NAFI activities will be processed and settled in the manner specified for similar claims against the United States, except

that payment will be made from NAFs in accordance with AR 215-1 (Morale, Welfare, and Recreation Activities and Nonappropriated Fund Instrumentalities) and § 536.152 of this part.

(b) *Procedural requirements.*

Procedural requirements of this part's pertinent subparts, as stated below, will be followed except as provided in §§ 536.151 and 536.152. However, when the Nonappropriated Fund Instrumentality (NAFI) is protected by a commercial insurer (for example, flying and parachute activities), the claim will be referred to the insurer as outlined in § 536.148(d). See Department of Defense Directive (DODD) 5515.6, dated November 3, 1956, posted on the USARCS Web site (see § 536.2(a)).

(1) Claims arising within the United States, its territories, commonwealths, or possessions. Such claims will be processed in the manner prescribed by subparts C, D, E, F, H or J of this part, as appropriate.

(2) Claims arising outside the United States, its territories, commonwealths, or possessions. Such claims will be processed in accordance with the provisions of applicable Status of Forces Agreements (SOFAs) or in the manner prescribed by subparts C, D, E, F, H or J of this part, as appropriate.

(c) *Reporting and investigation.* Such claims will be investigated in accordance with AR 215-1 and subpart B of this part.

(1) *Reporting.* Personal injury, death, or property damage resulting from vehicular collisions, falls, falling objects, assaults, or accidents of similar nature will be reported immediately to the person in charge of the NAFI or activity at which it occurred. The report should be made by the employee who initially received notice of the incident, even if the individual involved denies sustaining personal injury or property damage. Upon receipt of the report of the incident, the person in charge of the NAF activity concerned will transmit the report to the area claims office (ACO) or claims processing office (CPO) for investigation.

(2) *Investigation.* Claims arising out of acts or omissions of employees of NAF activities will be investigated in the manner set forth in subpart B of this part. A determination as to whether the claim is cognizable under this section will be made as soon as practicable.

(d) *Customer complaints.* AAFES-generated complaints will be handled in accordance with Exchange Service Manual 57-2. NAFI-generated complaints will be handled in accordance with AR 215-1, chapter 3. Complaints generated by appropriated

funds laundry and dry-cleaning operations will be handled in accordance with AR 210-130, chapter 2. Complaints generated by refunds of sales proceeds will be handled in accordance with Exchange Operating Procedures (EOP) 57-2.

(e) *Commercial insurance.* Certain NAFI activities (such as flying and parachute activities, and all AAFES concessionaires) may have private commercial insurance.

(1) A claims investigation under subpart B of this part will not be conducted except when the claim's estimated value may exceed the insurance policy limits. In that event, the Commander USARCS, will be notified immediately and an investigation will be conducted with a view to determining whether the United States may be liable under subparts C, D, F, H or J of this part. Otherwise, the ACO or CPO will refer the claim to the insurer and furnish copies to the USARCS AAO, as required in AR 27-20, paragraph 2-12. Assistance will be furnished to the insurer as needed. Copies of any other required investigations may be furnished to the insurer.

(2) The claim will be reviewed at key intervals to ensure that progress is being made, negotiations are properly conducted, and the file is closed. The Commander USARCS will be advised of any problems.

(3) If requested by either the insurer or NAFI officials, the appropriate claims authority will assist in or conduct negotiations.

(4) Where NAFI vehicles are required to be covered by insurance in foreign countries, the insurer will process the claim. However, if the policy coverage limit is exceeded or the insurer is insolvent, the claim may be processed under subpart G, §§ 536.114 through 536.116 (Claims arising overseas) or, if subpart G does not apply, under subparts C or J of this part. See § 536.139(c) for additional guidance.

§ 536.149 Identification of persons whose actions may generate liability.

Claims resulting from the acts or omissions of members of the classes of persons listed below may be processed under this section. An ACO or a CPO authority will ask the Commander USARCS, for an advisory opinion prior to settling any claim where the person whose conduct generated the claim does not clearly fall within one of the following categories:

(a) Civilian employees of NAFI activities whose salaries are paid from NAFs.

(b) Active duty military personnel while performing off-duty part-time work for which they are compensated from NAFIs, not to include members who are acting in their capacity as an officer or other official of the NAFI.

(c) Volunteers serving in an official capacity in furtherance of the business of the United States, limited to those categories set forth in DA Pam 27-162, paragraph 2-45d.

§ 536.150 Claims payable from appropriated funds.

Claims payable from appropriated funds will be processed under the appropriate subpart. Appropriated fund payable claims include those resulting from:

(a) Acts or omissions of military personnel while performing assigned military duties in connection with NAFI activities.

(b) Acts or omissions of civilian employees paid from appropriated funds in connection with NAFI activities.

(c) Negligent maintenance of an appropriated funds facility used by a NAFI activity but for which the Department of Defense or Department of the Army (DA) command concerned is responsible and has been notified of the deficiency by the NAF. Where liability is determined to exist for both a NAFI and an appropriated fund activity, liability will be apportioned between the two activities.

(d) Temporary use of a NAFI facility by an appropriated fund activity.

(e) Operation of government owned or rented vehicles on authorized missions for NAFI activities where the driver is a DA soldier or civilian employee and is paid from APFs.

§ 536.151 Settlement authority for claims generated by acts or omissions of NAFI employees.

(a) *Settlement.* Claims cognizable under this section and processed under subparts C, D, E, G, H or J of this part will be settled by claims authorities authorized to settle claims under those subparts subject to the same monetary and denial authority limitations, except that The Judge Advocate General (TJAG), The Assistant Judge Advocate General (TAJAG), and the Commander USARCS may settle such claims without regard to monetary limitations. However, the approval of the Attorney General or Assistant General Counsel may be required for an apportioned amount to be paid from APFs when subpart D of this part procedures are used and the amount to be paid from APFs exceeds \$200,000. Similarly, approval of TAJAG, the Attorney

General or the Assistant General Counsel is required when using procedures under subparts C, F, H, or J of this part and an apportioned amount to be paid from APFs exceeds the limits set for the Commander, USARCS.

(b) *Finality of settlement.* A determination made by a claims settlement authority on a claim processed under subpart D of this part is subject to suit. A claim processed under subparts C or F of this part may be appealed. Claims processed under subparts C, D, E, H, or J of this part, or AR 27–20, chapter 11 may be reconsidered in accordance with the sections addressing reconsideration in those subparts (or paragraphs in the case of Chapter 11).

§ 536.152 Payment of claims generated by acts or omissions of NAFI employees.

(a) The settlement or approval authority will forward the appropriate payment documents to the office listed in DA Pam 27–162, paragraph 2–80h, for payment.

(b) Reimbursement to a foreign country of the United States' pro rata share of a claim paid pursuant to an international agreement will be made from NAFs.

§ 536.153 Claims involving tortfeasors other than nonappropriated fund employees: NAFI contractors.

AAFES concessionaires and NAFI contractors, such as entertainment performers or groups, carnival operators, and fireworks displayers are considered independent contractors and claims arising from their activities should be disposed of as set forth in DA Pam 27–162, paragraph 2–15f. If a dispute arises as to the availability of liability or workers compensation insurance the claims should be referred to AAFES Dallas (see address in § 536.30(e)(4)) or the Central Insurance Fund, U.S. Army Community and Family Support Agency as applicable.

§ 536.154 Claims involving tortfeasors other than nonappropriated fund employees: NAFI risk management program (RIMP) claims.

The risk management program (RIMP) is administered by the U.S. Army Community and Family Support Center under the provisions of AR 215–1 and AR 608–10 (Family Child Care Provider Claims). Providers in order to encourage authorized personnel, that is, military and civilian employees, to use the family child care program and sports equipment, such claims are processed in a manner similar to NAFI claims in §§ 536.146 through 536.152 of this subpart. Certain claims are payable from nonappropriated funds even though the

U.S. is not liable under the FTCA or the MCA as the tortfeasor is not an appropriated fund or nonappropriated fund employee.

§ 536.155 Claims payable involving tortfeasors other than nonappropriated fund employees.

(a) Non-NAFI RIMP claims can arise from the activities of:

(1) Members of NAFIs or authorized users of NAFI sports equipment or devices for recreational purposes, while using such property, except real property, in the manner and for the purposes authorized by DA regulations and the charter, constitution, and bylaws of the particular NAF activity.

(2) Family child care providers, authorized members of the provider's household and approved substitute providers while care under the family child care program is being provided in the manner prescribed in AR 608–10, except as excluded below. Such claims are generally limited to injuries to, or death of, children receiving care under the family child care program that are caused by the negligence of authorized providers. Claims arising from the transportation of such children in motor vehicles and claims involving loss of or damage to property are not cognizable.

(b) An ACO or a CPO will ask the Commander USARCS for an advisory opinion prior to settling any non-NAFI RIMP claim where the person whose conduct generated liability does not fall clearly within the categories listed above. Such authorities may also ask, through the Commander USARCS, for an advisory opinion from the U.S. Army Community and Family Support Center prior to settling any claim arising under paragraph (a)(2) of this section, where it is not clear that the injured or deceased child was receiving care within the scope of the family child care program.

(c) Where liability has been determined to exist for both non-NAFI RIMP and APF activities, liability will be apportioned between the two activities.

(d) The total payment for all claims (including derivative claims), arising as a result of injury to, or death of, any one person is limited to \$500,000 for each incident. Continuous or repeated exposure to substantially the same or similar harmful activity or conditions is treated as one incident for purposes of determining the limits of liability.

§ 536.156 Procedures for claims involving tortfeasors other than nonappropriated fund employees.

(a) *Reporting.* Non-NAFI RIMP claims (regardless of the amount claimed) and incidents that could give rise to non-

NAFI RIMP claims will be reported to USARCS and the Army Central Insurance Fund immediately.

(b) *Investigation.* ACOs and CPOs are responsible for the investigation of non-NAFI RIMP claims. Such investigation will be closely coordinated with program managers responsible for the activity generating the claim. Close coordination with USARCS is also required, and USARCS will maintain mirror files containing the investigative materials of all actual and potential claims.

(c) *Payment.* Non-NAFI RIMP claims will be transmitted for payment to: The Army Central Insurance Fund, ATTN: CFSC–FM–I, 4700 King Street, Alexandria, VA 22302–4406.

(d) *Commercial insurance.* The provisions of § 536.148(d) also apply to claims arising under this section, except that in claims involving family child care providers, a claims investigation will be conducted regardless of whether commercial insurance exists.

§ 536.157 Settlement/approval authority for claims involving tortfeasors other than nonappropriated fund employees.

(a) *Settlement authority.* TJAG, TAJAG, and the Commander USARCS are authorized to approve in full or in part, or deny a non-NAFI RIMP claim, regardless of the amount claimed, except where an apportioned amount to be paid from APFs exceeds their monetary authority and the action of the Attorney General or Assistant General Counsel is required as set forth in § 536.151(a).

(b) *Approval authority.* (1) The staff judge advocate, Commander or chief of a command claims service, and a head of an area claims office are authorized to approve in full or in part non-NAFI RIMP claims presented in the amount of \$50,000 or less, provided the acceptance is in full settlement and all claims and potential claims arising out of a single incident do not exceed \$100,000.

(2) The above authorities are not delegated authority to deny or make a final offer on a claim under this section. Claims requiring such action will be forwarded to the Commander USARCS with an appropriate recommendation.

(c) *Finality of settlement.* A denial or final offer on a non-NAFI RIMP claim is final and conclusive and is not subject to reconsideration or appeal.

[FR Doc. E6–19894 Filed 11–29–06; 8:45 am]

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DEPARTMENT OF DEFENSE**Department of the Army****32 CFR Part 537**

[Docket No. USA-2006-0023]

RIN 0702-AA55

Claims on Behalf of the United States

AGENCY: Department of the Army, DoD.
ACTION: Final rule.

SUMMARY: The Department of the Army is publishing as a final rule an amendment to its regulation to reflect a substantial revision of AR 27-20, an Army publication which governs the processing of claims worldwide. The purpose of this revision is to make AR 27-20 clearer and easier to use, after years of piecemeal amendments. This rewrite also ensures that AR 27-20 is in keeping with current statutes, legal opinions and Department of Justice guidance pertaining to claims processing. This updated rule will expedite payment of meritorious claims throughout the world. AR 27-20 includes rules for processing affirmative claims, i.e., recovery actions on behalf of the United States.

DATES: *Effective date:* January 2, 2007.

ADDRESSES: U.S. Army Claims Service, ATTN: JACS-TCO, 4411 Llewellyn Avenue, Fort Meade, MD 20755-5360.

FOR FURTHER INFORMATION CONTACT: George Westerbeke, (301) 677-7009, x220.

SUPPLEMENTARY INFORMATION:**A. Background**

This rule was published as a proposed rule in the August 9, 2006 issue of the **Federal Register** (71 FR 45475). The Army received no responses to the proposed rule.

Rules for processing affirmative claims are found mostly in Chapter 14 of AR 27-20; however, rules for processing maritime affirmative claims are contained in Chapter 8. For purposes of this **Federal Register** publication and its corresponding codification in the Code of Federal Regulations, all rules for affirmative claims processing have been incorporated into 32 CFR Part 537. AR 27-20 and its companion DA Pam 27-162 will be available on the Web site of the U.S. Army Publications Directorate, <http://www.apd.army.mil>, within a few months of the date of this **Federal Register** publication of 32 CFR Part 537. Users are encouraged to consult the online versions, whose structure and paragraph numbering are comparable.

B. Regulatory Flexibility Act

The Department of the Army has determined that the Regulatory Flexibility Act does not apply because the rule does not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601-612.

C. Unfunded Mandates Reform Act

The Department of the Army has determined that the Unfunded Mandates Reform Act does not apply because the rule does not include a mandate that may result in estimated costs to State, local or tribal governments in the aggregate, or the private sector, of \$100 million or more.

D. National Environmental Policy Act

The Department of the Army has determined that the National Environmental Policy Act does not apply because the rule does not have an adverse impact on the environment.

E. Paperwork Reduction Act

The Department of the Army has determined that the Paperwork Reduction Act does not apply because the rule does not involve collection of information from the public.

F. Executive Order 12630 (Government Actions and Interference With Constitutionally Protected Property Rights)

The Department of the Army has determined that Executive Order 12630 does not apply because the rule does not impair private property rights.

G. Executive Order 12866 (Regulatory Planning and Review)

The Department of the Army has determined that according to the criteria defined in Executive Order 12866 this rule is not a significant regulatory action. As such, the rule is not subject to Office of Management and Budget review under section 6(a)(3) of the Executive Order.

H. Executive Order 13045 (Protection of Children From Environmental Health Risk and Safety Risks)

The Department of the Army has determined that according to the criteria defined in Executive Order 13045 this rule does not apply.

I. Executive Order 13132 (Federalism)

The Department of the Army has determined that according to the criteria defined in Executive Order 13132 this rule does not apply because it will not have a substantial 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.

Colonel Jill M. Grant,
Commander, United States Army Claims Service.

List of Subjects in 32 CFR 537

Claims, Government employees, Health care, Military personnel.

■ For reasons stated in the preamble the Department of the Army revises 32 CFR Part 537 to read as follows:

PART 537—CLAIMS ON BEHALF OF THE UNITED STATES

- Sec.
- 537.1 Statutory authority for non-maritime claims.
 - 537.2 Scope of non-maritime affirmative claims statutes.
 - 537.3 Claims collectible.
 - 537.4 Claims not collectible.
 - 537.5 Applicable law.
 - 537.6 Identification of recovery incidents.
 - 537.7 Notice to USARCS.
 - 537.8 Investigation.
 - 537.9 Assertion.
 - 537.10 Recovery procedures.
 - 537.11 Litigation.
 - 537.12 Settlement authority.
 - 537.13 Enforcement of assertions.
 - 537.14 Depositing of collections.
 - 537.15 Statutory authority for maritime claims and claims involving civil works of a maritime nature.
 - 537.16 Scope for maritime claims.
 - 537.17 Scope for civil works claims of maritime nature.
 - 537.18 Settlement authority for maritime claims.
 - 537.19 Demands arising from maritime claims.
 - 537.20 Certification to Congress.

Authority: 31 U.S.C. 3711-3720E; 42 U.S.C. 2651-2653; 10 U.S.C. 1095; 10 U.S.C. 4803-4804; 33 U.S.C. 408.

PART 537—CLAIMS ON BEHALF OF THE UNITED STATES**§ 537.1 Statutory authority for non-maritime claims.**

(a) *The Federal Claims Collection Act.* The Federal Claims Collection Act (FCCA), is set forth at 31 U.S.C. 3711-3720E, as amended by the Debt Collection Act of 1982, Public Law 97-365, 96 Stat. 1749 (October 1982), Public Law 101-552, 104 Stat. 2746 (November 1990).

(b) *Federal Medical Care Recovery Act.* The Federal Medical Care Recovery Act (FMCRA) is set forth at 42 U.S.C. 2651-53, as amended by the National Defense Authorization Act for Fiscal Year 1997, Public Law 104-202, section 1075, 110 Stat. 2422.

(c) *Title 10 United States Code Section 1095.* 10 U.S.C. 1095, Public Law 101–510, section 713, 107 Stat. 1547, 1689 (1993), as amended by Public Law 103–160, 104 Stat. 1485 (November 1990).

Note to § 537.1: All of these statutes may be viewed on the USARCS Web site, [https://www.jagcnet.army.mil/85256F33005C2B92/\(JAGCNETDocID\)/HOME?OPENDOCUMENT](https://www.jagcnet.army.mil/85256F33005C2B92/(JAGCNETDocID)/HOME?OPENDOCUMENT). Select the link “Claims Resources.”

§ 537.2 Scope of non-maritime affirmative claims statutes.

(a) *Recovery for government property loss or damage.* The FCCA, originally passed in 1966, gives federal agencies the authority to collect a claim of the United States government for money or property arising out of the activities of the agency in question. However, the broad authority is limited for purposes of this regulation to claims for loss of or damage to property, as the FMCRA takes precedence for medical care recoveries.

(b) *Recovery for medical expenses and lost military pay.* (1) The FMCRA, passed in 1962, authorizes recovery from a third person of the expenses for medical care the United States furnishes to a person who is injured or suffers a disease when such care is authorized or required by law. Likewise the United States is authorized to recover the cost of pay for members of the uniformed services unable to perform duties. Recovery normally arises out of a third-party tort under local law as to which the United States has an independent cause of action.

(2) Under 10 U.S.C. 1095 the United States is also deemed a third-party beneficiary or subrogee under an alternative system of computations such as workers’ compensation; hospital lien laws; contract rights under the terms of insurance policies including medical payment coverage; uninsured, underinsured and no-fault coverage; and no-fault laws.

(c) *Recovery of health insurance.* 10 U.S.C. 1095 permits recovery of health insurance for medical care furnished at military medical treatment facilities (MTFs), including supplemental policies. This third-party collection program has been delegated to the Surgeon General of the Army by the Judge Advocate General (TJAG).

(d) *Worldwide applicability.* The foregoing authorities are worldwide in application, except for intergovernmental claims waived by treaty, for example, North Atlantic Treaty Association Status of Forces Agreement (NATO SOFA), Article VIII, paragraph 1.

§ 537.3 Claims collectible.

(a) *Claims for medical expenses.* Claims for the value of medical care furnished to active or retired members of the uniformed services, family members of either category, employees of the Department of the Army (DA) or Department of Defense (DOD), or other persons to whom care was furnished because authorized or required by law and resulting in injury, death or disease, including those:

(1) Arising out of a tort under local law,

(2) Arising out of an on-the-job injury compensable under workers’ compensation law except for Federal Employees Compensation Act (FECA) recoveries,

(3) Based on the United States being a third-party beneficiary of the insurance contract of the injured party to include medical payment coverage, lost wages, as well as uninsured, underinsured, and no-fault coverage.

(b) *Claims for lost military pay.* Claims for the value of lost pay of active members of the uniformed services arising out of a tort under local law resulting in injury, death or disease.

(c) *Claims for property loss.* Claims arising out of a tort under local law for the value of lost or missing DA or DOD property, including non-appropriated fund instrumentality (NAFI) property, or for the cost of repairs of such property, including damage to assigned quarters, are not collectible under 10 U.S.C. 2775. (See § 537.4).

§ 537.4 Claims not collectible.

(a) Where the tortfeasor is a department, agency or instrumentality of the United States. (See § 536.27(g) of this chapter).

(b) Where the tortfeasor is a member of the uniformed services or an employee of the DA or DOD, acting within the scope of employment, who damages or loses property. See AR 735–5, chapter 13.

(c) Where the damage or loss of property falls under a contractor bill of lading and recovery is pursued by the contracting agency, e.g., Surface Deployment and Distribution Command (SDDC), formerly the Military Traffic Management Command (MTMC), for lost or destroyed shipments.

(d) Where damage to assigned quarters, or equipment or furnishings therein, is collectible from a member of the uniformed services under 10 U.S.C. 2775.

(e) Where the medical care is furnished by a Department of Veterans Affairs facility to other than active duty members of the uniformed services for service-connected disabilities.

§ 537.5 Applicable law.

(a) *Basis for recovery.* (1) Most recovery assertions are based on the negligence or wrongful acts or omissions of the person or entity that caused the loss. These actions or omissions must constitute a tort as determined by the law of place of occurrence, except in no-fault jurisdictions where the no-fault law permits recovery. Where the tort is not complete within the jurisdiction where it originally occurred, the law of the original jurisdiction is nevertheless applicable. For example, if a plane crashes in Virginia due to the negligence of a Federal Aviation Administration controller in Maryland, Maryland law determines the extent and nature of the tort. However, as to what law of damages is applicable, Maryland or Virginia depechage (choice of law) theory may apply. For example, if the flight originated in Indiana and the destination was Virginia, the conflict law of both Maryland and Virginia must be applied. See DA Pam 27–162, paragraph 2–35.

(2) Recovery assertions based on the United States being a third-party beneficiary or subrogee are not based on tort, but on the right to recover under local law, for example, the right of a third party to recover workers’ compensation benefits is based on local law. However, the right of a third-party beneficiary to recover under an insurance contract may turn on whether an exclusionary clause is valid under the law of the jurisdiction where the contract was made.

(b) *Statute of limitations.* (1) Federal law determines when a recovery assertion must be made. Assertions for the value of medical expenses, lost military pay or property loss or damage based on a tort must be made not later than three years from the date of accrual, 28 U.S.C. 2415(b). The date of accrual is usually the date of the occurrence giving rise to the recovery, for example, the date of injury or death for medical expenses and lost military pay or the date of damage or loss for a government property assertion. There are exceptions. For example, the loss of property in rightful possession of another accrues when that person claims ownership or converts the property to his own use.

(2) Recovery assertions based on an implied-in-law contract against a no-fault or personal-injury-protection insured must be brought no later than six years from the date of accrual, 28 U.S.C. 2415(a), *United States v. Limbs*, 524 F.2d 799 (9th Cir. 1975). The date of accrual is usually the date of occurrence.

(3) Actions asserted on a third-party beneficiary basis against an insurer or workers compensation fund must comply with the state notice requirement, which varies from one to six years, or the insurer's notice requirement set forth in the policy. *United States v. Hartford Acci. & Indem. Co.*, 460 F.2d 17 (9th Cir. 1972), cert. den. 409 U.S. 979 (1972).

(4) The statute of limitations is tolled or does not start running until the responsible federal official is notified of the existence of a recoverable loss, *Jankowitz v. United States*, 533 F.2d 538 (D.C. Cir. 1976), *United States v. Golden Acres, Inc.*, 684 F. Supp. 96 (D. Del. 1986). The responsible federal official can be the area claims office (ACO), the claims processing office (CPO), a command claims service or USARCS, depending on who receives the notice under this regulation. However, because of the responsibility to notify the MTF or TRICARE fiscal intermediary, and by regulation the notice must be expeditious, delayed notification could start the statute of limitations running. Additionally, when an ACO or CPO discovers the existence of an assertion, the statute of limitations will begin to run regardless of when the MTF or the TRICARE intermediary sends a notice. The date of receipt of a notice must be entered into the affirmative claims management program/database (ACMP) and the notice must be date-stamped and initialed.

§ 537.6 Identification of recovery incidents.

(a) *Responsibilities.* Each command claims service and ACO will develop means to identify recovery incidents arising in its geographic area of responsibility. See §§ 536.10 and 536.11 of this chapter and paragraph 2–2 of DA Pam 27–162. This requires publication of a claims directive to all DOD and Army installations, units and activities in its area, emphasizing the importance of reporting serious incidents to recovery judge advocates (RJAs) or civilian recovery attorneys.

(b) *Screening procedures.* (1) Establish a point of contact in each unit and activity in the area of responsibility and screen their sources periodically, including motor pools, family housing, departments of public works, safety offices, provost marshals, and criminal investigation divisions. Review civilian news and police reports, military police blotters and reports, court proceedings, line of duty and AR 15–6 investigations and similar sources to identify potential medical care recovery claims.

(2) The MTF commander will ensure that the claims office is notified of

instances in which the MTF provides, or is billed by a civilian facility for, inpatient or outpatient care resulting from injuries (such as broken bones or burns arising from automobile accidents, gas explosions, falls, civilian malpractice, and similar incidents) that do not involve collections from a health benefits or Medicare supplemental insurer. Claims personnel will coordinate with MTF personnel to ensure that inpatient and outpatient records and emergency room and clinic logs are properly screened to identify potential cases. The RJA or recovery attorney will screen the MTF comptroller records database and division records as well as ambulance logs to identify potential medical care recovery cases. The RJA or recovery attorney will also coordinate with Navy and Air Force claims offices and MTFs to ensure they identify potential claims involving treatment provided to Army personnel.

(3) The MTF commander will also ensure that the MTF does not release billings or medical records, or respond to requests for assistance with workers' compensation forms, without coordinating with the RJA or recovery attorney.

(4) The TRICARE fiscal intermediary is required to identify and mail certain information promptly to the claims office designated as the state point of contact. The fiscal intermediary must mail the TRICARE Explanation of Benefits, showing the amount TRICARE paid on the claim along with what diagnostic codes were used, and DD Form 2527, Statement of Personal Injury. A sample Statement of Personal Injury (DD Form 2527) is posted on the USARCS Web site; for the address see the Note to § 537.1.

(5) The RJA or recovery attorney will also coordinate with Navy and Air Force claims offices and MTFs to ensure they identify potential claims involving treatment provided to Army personnel, AR 40–400, paragraph 13–5.

(c) *When to open a recovery file.* (1) Upon identification of a potential recovery incident or upon receipt of a billing from a TRICARE Fiscal Intermediary or an MTF, a file will be opened and entered into the ACMP by the first ACO or CPO that learns of the event even if liability has not been established. Incidents under Navy, Air Force or Coast Guard jurisdiction will not be so entered but referred to the responsible service. Complete listings of claims/recovery offices worldwide are posted on the USARCS Web site; for the address see the Note to § 537.1. At the site, select the link "Claims Resources."

At the next screen, click on "Tables Listing Claims Offices Worldwide.")

(2) Army responsibility for affirmative claims is as follows:

(i) Damage to or loss of real or personal property of the DOD or the Army even if located at installations or activities under the jurisdiction of other uniformed services.

(ii) Personal injury to persons whose primary care for an accident-related injury is furnished at an Army MTF, regardless of the uniformed services affiliation of the person or sponsor, but not to those treated at another uniformed service's MTF even if the person is an active duty Army member.

(iii) Personal injury to an active duty or retired Army member or a family member of either category treated under TRICARE.

(iv) A lead agency will be established whenever:

(A) Property damaged or lost belonging to more than one service is involved in the same incident.

(B) Personal injury victims are treated at MTFs of more than one service.

(C) Personal injury victims with affiliations to more than one service are treated under TRICARE.

(D) Lead agencies may be established locally for claims valued at \$50,000 or less. For claims greater than \$50,000 USARCS will be notified and will deal with the other service at headquarters level. (See § 536.32 of this chapter.)

§ 537.7 Notice to USARCS.

Upon receipt of notice of a claim involving either actual or potential amounts within USARCS' monetary jurisdiction, that is, where final action will be taken by USARCS or the Department of Justice, immediate notice will be given to USARCS. Forwarding a copy of the serious incident report, discussed in § 536.22(c) of this chapter, to USARCS, will meet this requirement. Thereafter, mirror file copies will be furnished to USARCS in accordance with AR 27–20, paragraph 2–12. This allows for continuous monitoring and discussion between the ACO and the USARCS area action officer (AAO).

§ 537.8 Investigation.

(a) *Claims over \$50,000.* Hands-on investigation will be conducted by claims personnel as set forth in DA Pam 27–162, Chapter 2, Section IV, regardless of the amount of insurance coverage immediately available, with a view to discovery of other sources of recovery, for example, vehicle defects or improper maintenance, road design and absence of warning signs, products liability, medical malpractice in civilian treatment facilities. Where the

employment of experts is indicated follow the procedures in § 536.39 of this chapter. No attorney representation agreement will be sent to the injured party's representative without USARCS approval.

(b) *Claims of \$50,000 or less.* The amount of hands-on investigative effort is directly related to the amount of insurance coverage that the tortfeasor possesses and the amount of coverage that the injured party has. Where the injured party is represented, request information from his lawyer or insurer, in addition to the documents obtained in initial screening. The ACO should be able to form an independent opinion as to liability based on the investigation of the government and not solely on that of the injured party's attorney.

(c) *Claims of \$5,000 or less.* Small claims procedures are applicable to the extent feasible. See § 536.33 of this chapter. Investigation, assertion and settlement by e-mail, phone or fax is encouraged. The investigation and action should be recorded. DA Form 1668, Small Claims Certificate, may be used as a model, modifying it as needed. A sample completed Small Claims Certificate is posted at USARCS Web site for the address see the Note to § 537.1.

(d) *Relations with injured party.* (1) When the injured party becomes known and an interview can be conducted locally, all relevant facts will be obtained unless the injured party is represented by a lawyer. In this latter event, basic information as set forth on DD Form 2527, Statement of Personal Injury (a completed sample is posted at the USARCS Web site; for the address see the Note to § 537.1) can be obtained without violating lawyer-client privilege. If the injured party is not immediately available, the information can be obtained by requesting assistance from another ACO, a unit claims officer, a reservist or Army National Guard (ANG) member, another federal agency, or another means.

(2) When the injured party is represented, a Health Insurance Portability and Accountability Act (HIPAA) medical release form (sample posted at the USARCS Web site; see § 537 (b)(4)) permitting USARCS to send out the medical records of the injured party for claims purposes, will be sent to the injured party's lawyer for completion and return.

(3) When the injured party or his or her lawyer refuses to furnish necessary information, it can usually be obtained by other means, for example, from an accident report or investigation. A notice will be furnished to all parties that the government has been assigned

the right to bring a claim for the value of medical care furnished, lost pay or value of property lost or destroyed, and that the United States has the right to bring an independent cause of action. In absence of timely and appropriate response, discuss with the AAO to determine what action should be taken.

§ 537.9 Assertion.

(a) *Asserting demands.* If a prima facie claim exists under state law, a written demand will be made against all the tortfeasors and insurers. This includes demands against the injured party's own insurance coverage, no-fault coverage and workers' compensation carrier. The earlier the demand the better. A demand will not be delayed until the exact amount of medical expenses or lost pay is determined. The demand letter will state that the amount will be furnished when known. A copy of the demand will be furnished to the injured party or, if represented, his lawyer. Two sample demand (or assertion) letters are posted at the USARCS Web site (for the address see the Note to § 537.1). Demand letters are for initial contact with insurance companies. One of the posted samples is for a medical assertion for a soldier (that includes wages). The other is for a medical assertion for a civilian (that does not include wages). Remember the following points when asserting demands:

(1) The fact that the medical expenses have been assigned to the United States and as a result the United States has a cause of action in federal or state court. All parties will be notified that if the insurer pays the amount to another party, the United States has the right to collect from the insurer.

(2) Demands for third-party torts are under the authority of the FMCRA; demands where there is no tortfeasor are under the authority of 10 U.S.C. 1095; demands for property loss or damage are under the authority of the FCCA.

(b) *Documentation of damages.* MTFs are required by AR 40-400, Patient Administration, chapter 13 to furnish complete billing documents to RJAs.

(1) TRICARE bills are obtained from the fiscal intermediary servicing the ACO. The amounts are based on the amount TRICARE pays and not the amount the patient is billed by the provider. TRICARE bills must be screened to insure that the care is incident or accident related as the demand is limited to that amount.

(2) MTF bills, both outpatient and inpatient, are obtained from either the MTF co-located with the ACO or if another MTF is involved, from that MTF, regardless of uniformed service affiliation. Outpatient bills include not

only the cost of the visit but also the cost of each procedure, such as x-rays or laboratory tests. Inpatient billing is not based on services rendered but on a diagnostic group. Charges for professional inpatient services will be itemized the same as outpatient care. Charges for prescription services will be included. Screening to ensure that only incident or accident related care is claimed is essential. The cost of ambulance services, ground or air, will be calculated with MTF assistance and demanded. Burial expenses are obtained from the local mortuary affairs office on DD Form 2063, but will be demanded only when the insurance coverage includes such expenses.

(3) Lost pay will be obtained from the leave or earnings statement or the active duty pay chart for the year or years in question and will include special and incentive pay unless the injured service member did not receive either due to the length of time off assigned duty. The time off duty will be based on the time service members are unable to perform duties for which they have been trained (their military occupational specialty). It will not be limited to inpatient time. Time in a medical holding or convalescent leave will be lost time.

(4) The amount recoverable for personal property losses is limited to its value at the time of loss. Depreciation charts may be used to determine the reduction from the value at purchase. Replacement value will not be used. Both real and personal property damage will be on the value of labor and cost of material including the use of heavy equipment. When the cost of repairs is greater than \$50,000, 10% overhead will be added. This can be substantiated using case law and by seeking documentation from the repair facility.

(c) *Double collections prohibited.* When the cost of medical care is recoverable by the MTF from medical care insurance, both primary and supplemental under 10 U.S.C. 1095, an assertion under FMCRA will be made, including a demand for lost pay not recoverable out of health insurance. While the United States is entitled to recover costs of medical care from both the injured parties' medical insurance and from the third-party tortfeasor, USARCS policy is not to collect twice. RJAs will carefully coordinate with the MTF to insure that double collection does not occur. Demand for lost pay should be enforced as it is not recoverable from medical care insurance.

§ 537.10 Recovery procedures.

(a) Recovery personnel have three means of enforcing recovery following initial assertion.

(1) Referral to litigation pursuant to § 537.11;

(2) The head of an ACO should request Chief, Litigation Division, OTJAG to have the RJA appointed as a Special Assistant United States Attorney when the following criteria are met:

(i) Filing suit is a frequent necessity, e.g., insurance companies are refusing payment on small claims either by raising issues well settled or by regularly reducing the amount of medical care as not fair and reasonable;

(ii) The local U.S. Attorney's office is in favor of such appointment due to his previous experience with the RJA and the additional burden of affirmative claims litigation on his staff;

(iii) The RJA has at least two years experience and is likely to continue in the RJA assignment for at least one year; and

(iv) Commander USARCS concurs in the appointment and is willing to furnish support.

(3) The RJA may request that the attorney representing the injured party include the amount asserted by the United States as part of special damages. The injured party's attorney may not represent the United States nor may the United States pay attorney fees as this would be in violation of 5 U.S.C. 3106. Where indicated, this arrangement should be reduced to writing. Be mindful that the attorney's duty to the injured party is in conflict with the interests of the United States where the amount potentially recoverable is small in comparison to the amount asserted by the United States. In this event the RJA should pursue recovery independently.

(b) Careful monitoring of all assertions is required to insure timely follow-up resulting in collection or suit where indicated. Installation of a suspense system to avoid the expiration of the statute of limitations is essential. Recommendations to file suit should be forwarded by the RJA well prior to the expiration of the statute of limitations. Within six months prior to the running of the statute of limitations, USARCS must be notified of the status of the claim or potential claim. Follow-up demands should precede filing suit to create a written record of efforts to avoid suit. Personal contact with all parties is encouraged. When represented, contact the representative.

(c) Sources other than vehicle liability coverage should be exhausted in cases where the amount of the potential recovery exceeds \$50,000 and the coverage is small. Coordination with

USARCS is required. USARCS can obtain expert witnesses for medical malpractice cases, product liability cases, or other cases in which another tortfeasor may be involved.

§ 537.11 Litigation.

(a) If a tortfeasor or insurer refuses to settle, or if an injured party's attorney improperly withholds funds, the RJA or recovery attorney must consider litigation to protect the interests of the United States. Litigation is particularly appropriate if a particular insurer consistently refuses to settle claims, or if the government's interests are not adequately represented on a claim over \$25,000.

(b) RJAs or recovery attorneys must maintain close contact with local U.S. Attorney's Offices to ensure these offices are willing to initiate litigation on cases.

(c) In order to directly initiate or intervene in litigation, an RJA or recovery attorney must prepare a litigation report and formally refer the case through the Affirmative Claims Branch, USARCS, and the Litigation Division, OTJAG (as required by AR 27-40, chapter 5), to the U.S. Attorney. While the RJA or recovery attorney, in conjunction with the Litigation Division Torts Branch, should attempt to have the U.S. Attorney's Office initiate litigation at least six months before the expiration of the statute of limitations (SOL), the RJA or recovery attorney may contact USARCS telephonically if SOL problems necessitate quick action on a case. The RJA or recovery attorney should also contact USARCS if a U.S. Attorney is reluctant to pursue an important case. An injured party's attorney may represent the government's interest in litigation without any special coordination.

§ 537.12 Settlement authority.

(a) *Assertions for \$50,000 or less*—(1) *Approval authority.* An RJA or civilian recovery attorney, if delegated authority by his or her ACO or CPO, may compromise a collection on a claim asserted for \$50,000 or less, unless recovery action is reserved by a command claims service.

(2) *Final action authority.* (i) An ACO, or CPO if delegated authority by its ACO, may terminate collection action on a claim asserted for \$50,000 or less, unless action is reserved by a command claims service.

(ii) The foregoing authorities may waive a claim asserted for \$50,000 or less where undue hardship exists.

(iii) Determination of amount. The amount of \$50,000 is determined totaling the amounts for medical care,

lost military wages, lost earnings or government property damage arising from the same claims incident.

(b) *Assertions over \$50,000.* USARCS retains final authority over assertions over \$50,000. By use of the mirror file system and through a dialogue between USARCS and the field during the course of the assertion, USARCS will decide whether it or the RJA or civilian recovery attorney will conduct the negotiations. To help it decide, the RJA or civilian recovery attorney will forward a memorandum for either medical or property recovery approval, in the format of the samples posted at the USARCS Web site (for the address see the Note to § 537.1). USARCS may waive the requirement to submit a memorandum.

(c) *Appeals*—(1) *Assertion for \$50,000 or less.* Where the assertion is made by an RJA or civilian recovery attorney, the appeal will be determined by the SJA, the medical center judge advocate, or head of the ACO or CPO. Otherwise, the appeal will be determined by the Commander USARCS.

(2) *Assertion over \$50,000.* Where the assertion is made by a Claims Judge Advocate or claims attorney, the appeal will be determined by the Commander USARCS.

(d) *Compromise or waiver.* Any assertion may be compromised, waived or terminated in whole or in part, if for example:

(1) The cost to collect does not justify the cost of enforcement.

(2) There is evidence of fraud or misrepresentation.

(3) The U.S. cannot locate the tortfeasor.

(4) Legal merit has not been substantiated.

(5) The statute of limitations has run and the debtor refuses to pay.

(6) Collection of all or part of the amount of funds demanded would create inequity. The following criteria apply:

(i) Detailed information on what funds are available for recovery.

(ii) Reasonable value of the injured party's claim for permanent injury, pain and suffering, decreased earning power, and any other special damages.

(iii) Military, Department of Veterans Affairs, Social Security disability, and any other government benefits accruing to the injured party.

(iv) Probability and amount of future medical expenses of the government and the injured party.

(v) Present and prospective assets, income, and obligations of the injured party and those dependent on him or her.

(vi) The financial condition of the debtor.

(vii) The degree and nature of contributory negligence on the part of the injured party in causing his injury or death.

(viii) The percentage of attorney's fees that his attorney is willing to reduce.

(ix) The willingness of the tortfeasor to enter into an installment agreement.

(e) *Releases.* The RJA or recovery attorney may execute a release for affirmative claims in the pre-litigation stage acknowledging that the government has received payment in full of the amount asserted or the compromised amount agreed upon, or the final installment payment. The format of the release should be similar to the sample posted at the USARCS Web site (for the address see the Note to § 537.1). However, the RJA or recovery attorney may not execute either an indemnity agreement or a release which prejudices the government's right to recover on other claims arising out of the same incident without the approval of USARCS. In addition, the RJA or recovery attorney may not execute a release that purports to release any claim that the injured party may have other than for medical care furnished or to be furnished by the United States. The RJA or recovery attorney will not execute a release if the government's claim is waived or terminated.

§ 537.13 Enforcement of assertions.

Meritorious assertions that do not result in collections should be enforced as follows:

(a) Where the debtor is a business or corporation otherwise financially capable the RJA or equivalent should forward a recommendation to bring suit or intervene in an existing suit regardless of the amount of the debt. As authorized by 28 U.S.C. 3011, the demand amount in the complaint shall include an additional 10% of the original claimed amount, to cover the administrative costs of processing and handling the enforcement of the debt.

(b) Where the debtor is an individual rather than a business, an asset determination should be made both as to existing assets or prospective earnings. If the injured party's attorney has made an assets search which is reliable, review the search before requesting a new one. Such a search can be paid for out of existing collections.

(1) If the debtor has assets refer to USARCS for transfer to a debt collection contractor or an agency debt collection center as determined by USARCS.

(2) If the debtor has no assets, but prospective future earnings, RJA may seek a confession of judgment and maintain contact with the debtor for

future collection where authorized by state law and filing of suit is not required. If the amount is less than \$5,000, enter into an installment payment arrangement.

§ 537.14 Depositing of collections.

(a) *Depositing property damage recovery—(1) Machines, supplies, watercraft, aircraft, vehicles other than General Services Administration-owned.* Recovered money must be deposited into the General Treasury Account 21R3019. This account remains the same every fiscal year. It was established in accordance with 31 U.S.C. 3302(b) and by Comptroller General decision B-205508, 64 Comp. Gen. 431.

(2) *Real property.* Collection for damage to real property must be deposited into an escrow account on behalf of the installation or activity at which the loss occurred. This escrow account must be set up at the request of the command claims service, ACO or CPO with the local finance office or resource management office with responsibility for department of engineering and housing or department of public works funds. The escrow account must be set up and managed by the department of engineering and housing or the department of public works to (1) temporarily hold deposits, and (2) to "roll over" deposits each fiscal year in order to avoid reversion of these deposits to the General Treasury at the end of each fiscal year. If the escrow account is not set up and managed in this manner it is operating in violation of 10 U.S.C. 2782.

(3) *NAFI property.* The Risk Management Program (RIMP) often reimburses local NAFIs for property loss or damage to facilitate return of equipment to daily use. When money is recovered from tortfeasors and their insurance carriers contact the NAFI involved for instructions on the current procedures as to where the recovered money is to be forwarded and deposited.

(4) *Army Stock Fund or Defense Business Operations Fund property.* Monies recovered for damage to property belonging to one of these funds will be returned to that fund unless the fund has charged the cost of repair or replacement to an appropriated fund account. The Defense Business Operations Fund replaced the Army Industrial Fund.

(5) *Government housing in cases of abuse or neglect by soldiers or families.* Monies recovered for damage to government housing caused by a soldier's abuse or negligence (or by a soldier's family member or guest of the

soldier) will be deposited into that installation's family housing operations and maintenance (O&M) account.

(6) *Government housing in cases of negligence by nonresidents.* Government housing caused by the negligence of a nonresident must be asserted against the nonresident directly or through his/her insurer. Settlement checks must be deposited into the real property escrow account in accordance with 10 U.S.C. 2782.

(b) *Depositing recovery of pay provided to a soldier while incapacitated.* Monies recovered for the costs of pay provided to a soldier injured by the tortious acts of another shall be credited to the local O&M account that supports the command, activity, or other unit to which the soldier was assigned at the time of the injury.

(c) *Depositing medical care recovery—(1) To a medical treatment facility account.* Continental U.S. (CONUS) and outside the continental U.S. (OCONUS) claims offices, and command claims services, will deposit money recovered from an automobile insurer for medical care provided, paid for by, in or through an MTF to the O&M account of the Army, Navy, or Air Force MTF that provided the care. CONUS and OCONUS claims offices, and command claims services, will deposit money recovered from any payor, under any provision of law, for medical care provided or paid for by, in or through an MTF into the MTF's O&M account.

(2) *Deposits when TRICARE paid directly for treatment.* The account in which to deposit affirmative claims recoveries when TRICARE has paid directly for the medical treatment is a Defense Health Program (DHP) account for reallocation to the services. This replaces the general treasury miscellaneous receipts account published in AR 37-100 (obsolete). Deposit to TRICARE using this new account for recoveries pending deposit, and recoveries for any claim settled on or after October 1, 2002. Retroactive claims depositing is not necessary.

(3) *Apportionment of medical care recovery between accounts.* Claims offices will often have to apportion recovered money among different accounts.

(i) *Apportioning money between accounts.* If care was provided by an MTF and paid for by or through the MTF and/or directly by TRICARE and/or a unit account for military lost wages if any, and the amount recovered is less than the amount asserted, deposit a prorated amount of money into each TRICARE account.

(ii) *Apportioning money between two or more medical treatment facility accounts.* If care was provided by two or more MTFs and the claims office recovers less than the amount asserted, the claims office should give each MTF a pro rata share of the money recovered. For example, if MTF one provided \$2,000 worth of care and MTF two provided \$1,000 worth of care, the claims office will deposit \$800 of a \$1,200 recovery to MTF one's account and the remaining \$400 to MTF two's account. Similarly, if the claims office recovers an amount less than that asserted for medical care expenses and costs of pay provided, the claims office should give a pro rata share of the money recovered to both the MTF and the appropriation account that supports the injured soldier's unit.

(d) *Fiscal Integrity.* Field claims offices must reconcile the property damage and medical care recovery accounts with their servicing defense accounting office. Field claims offices must ensure that their deposits have been credited to the proper accounts and that these accounts have not been improperly charged. All accounts must be reconciled at the end of the fiscal year.

§ 537.15 Statutory authority for maritime claims and claims involving civil works of a maritime nature.

(a) The Army Maritime Claims Settlement Act. The sections pertinent to maritime affirmative claims are set out at 10 U.S.C. 4803–4804.

(b) The Rivers and Harbors Act. The section of the Act pertinent to affirmative claims involving civil works of a maritime nature is set out at 33 U.S.C. 408.

§ 537.16 Scope for maritime claims.

The Army Maritime Claims Settlement Act (10 U.S.C. 4803–4804) applies worldwide and includes claims that arise on high seas or within the territorial waters of a foreign country.

(a) 10 U.S.C. 4803 provides for agency settlement or compromise of claims for damage to:

(1) DA-accountable properties of a kind that are within the federal maritime jurisdiction.

(2) Property under the DA's jurisdiction or DA property damaged by a vessel or floating object.

(b) 10 U.S.C. 4804 provides for the settlement or compromise of claims in any amount for salvage services (including contract salvage and towage) performed by the DA. Claims for salvage services are based upon labor cost, per

diem rates for the use of salvage vessels and other equipment, and repair or replacement costs for materials and equipment damaged or lost during the salvage operation. The sum claimed is usually intended to compensate the United States for operational costs only, reserving, however, the government's right to assert a claim on a salvage bonus basis in accordance with commercial practice.

(c) The United States has three years from the date a maritime claim accrues under this section to file suit against the responsible party or parties.

§ 537.17 Scope for civil works claims of maritime nature.

Under the River and Harbors Act (33 U.S.C. 408), the United States has the right to recover fines, penalties, forfeitures and other special remedies in addition to compensation for damage to civil works structures such as a lock or dam. However, claims arising under 10 U.S.C. 4804 are limited to recovery of actual damage to Corps of Engineers (COE) civil works structures.

§ 537.18 Settlement authority for maritime claims.

(a) The Secretary of the Army, the Army General Counsel as designee of the Secretary, or other designee of the Secretary may compromise an affirmative claim brought by the United States in any amount. A claim settled or compromised in a net amount exceeding \$500,000 will be investigated and processed and, if approved by the Secretary of the Army or his or her designee, certified to Congress for final approval.

(b) TJAG, TAJAG, the Commander USARCS, the Chief Counsel COE, or Division or District Counsel Offices may settle or compromise and receive payment on a claim by the United States under this part if the amount to be received does not exceed \$100,000. These authorities may also terminate collection of claims for the convenience of the government in accordance with the standards specified by the DOJ.

(c) An SJA or a chief of a command claims service and heads of ACOs may receive payment for the full amount of a claim not exceeding \$100,000, or compromise any claim in which the amount to be recovered does not exceed \$50,000 and the amount claimed does not exceed \$100,000.

(d) Any money collected under this authority shall be deposited into the U.S. General Treasury, except that money collected on civil works claims in favor of the United States pursuant to

33 U.S.C. 408 "shall be placed to the credit of the appropriation for the improvement of the harbor or waterway in which the damage occurred * * *" (33 U.S.C. 412; 33 U.S.C. 571).

§ 537.19 Demands arising from maritime claims.

(a) It is essential that Army claims personnel demand payment, or notify the party involved of the Army's intention to make such demands, as soon as possible following receipt of information of damage to Army property where the party's legal liability to respond exists or might exist. Except as provided below pertaining to admiralty claims and claims for damage to civil works in favor of the United States pursuant to 33 U.S.C. 408, copies of the initial demand or written notice of intention to issue a demand letter, as well as copies of subsequent correspondence, will be provided promptly to the Commander USARCS, who will monitor the progress of such claims.

(b) Subject to limitation of settlement authority, demands for admiralty claims and civil works damages in favor of the United States pursuant to 33 U.S.C. 408 may be asserted, regardless of amount, by the Chief Counsel COE, or his designees in COE Division or District Counsel offices.

(c) Where, in response to any demand, a respondent denies liability, fails to respond within a reasonable period, or offers a compromise settlement, the file will be promptly forwarded to the Commander USARCS, except in those cases in which a proposed compromise settlement is deemed acceptable and the claim is otherwise within the authority delegated in § 537.18 of this part. Files for admiralty claims and civil works claims in favor of the United States pursuant to 33 U.S.C. 408 will be promptly forwarded to the United States Department of Justice.

§ 537.20 Certification to Congress.

Admiralty claims, including claims for damage to civil works in favor of the United States pursuant to 33 U.S.C. 408, proposed for settlement or compromise in a net amount exceeding \$100,000 will be submitted through the Commander USARCS to the Secretary of the Army for approval and if in excess of \$500,000 for certification to Congress for final approval.

[FR Doc. E6–19901 Filed 11–29–06; 8:45 am]

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Federal Register

**Thursday,
November 30, 2006**

Part VI

Department of Transportation

Federal Transit Administration

49 CFR Part 661

**Buy America Requirements; End Product
Analysis and Waiver Procedures;
Proposed Rule**

DEPARTMENT OF TRANSPORTATION**Federal Transit Administration****49 CFR Part 661**

[Docket No. FTA-2005-23082]

RIN 2132-AA90

Buy America Requirements; End Product Analysis and Waiver Procedures**AGENCY:** Federal Transit Administration (FTA), DOT.**ACTION:** Second notice of proposed rulemaking.

SUMMARY: The Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) requires the Federal Transit Administration (FTA or the Agency) to make certain changes to the Buy America requirements. This Second Notice of Proposed Rulemaking (SNPRM) proposes a publication process for public interest waivers to provide an opportunity for public comment; a clarification of Buy America requirements with respect to microprocessor waivers; new provisions to permit post-award waivers; clarifications in the definition of "end products" with regards to components and subcomponents, major systems, and a representative list of end products; a clarification of the requirements for final assembly of rolling stock and a list of representative examples of rolling stock items; expanding FTA's list of eligible communications, train control, and traction power equipment; and an update of the debarment and suspension provisions to bring them into conformity with statutory amendments made by SAFETEA-LU.

DATES: Comments must be submitted by January 29, 2007. Late filed comments will be considered to the extent practicable. FTA will also hold a public hearing in Washington, DC, to receive comments for the docket. The date and time of that hearing will be published as a separate **Federal Register** document.

ADDRESSES: You may submit comments [identified by DOT DMS Docket Number FTA-2005-23082] by any of the following methods:

Federal Rulemaking 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-2005-23082) 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.

FOR FURTHER INFORMATION CONTACT:

Richard Wong, Office of the Chief Counsel, Federal Transit Administration, 400 Seventh Street, SW., Room 9316, Washington, DC 20590, (202) 366-4011 or Richard.Wong@dot.gov.

SUPPLEMENTARY INFORMATION:**I. Background**

On November 28, 2005, the Federal Transit Administration (FTA) published a Notice of Proposed Rulemaking (NPRM) in the **Federal Register** (70 FR 71246) that discussed several proposals mandated by the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) (Pub. L. 109-59, August 10, 2005), and proposed to provide further clarification of existing FTA decisions on Buy America. Due to the complexity of many of the Buy America issues addressed in the NPRM and the divergence of opinion in important areas, FTA issued a final rule that addressed fewer subjects than addressed in the NPRM. (71 FR 14112, Mar. 21, 2006.) These more routine topics covered in the final rule included: (1) Administrative review; (2) the definition of "negotiated procurement;" (3) the definition of "contractor;" (4) repeal of the general waiver for Chrysler vans; (5) certification under negotiated procurements; (6) pre-award and post-award review of rolling stock purchases; and (7) miscellaneous corrections and clarifications to the Buy America regulations.

This Second Notice of Proposed Rulemaking (SNPRM) will address six issues identified in the NPRM but not covered in the final rule, and one new one: (1) A publication process for public interest waivers to provide an opportunity for public comment; (2) a clarification of Buy America requirements with respect to microprocessor waivers; (3) new provisions to permit post-award waivers; (4) clarifications in the definition of "end products" with regards to (a) components and subcomponents, (b) major systems, and (c) a representative list of end products; (5) a clarification of the requirements for final assembly of rolling stock and a list of representative examples of rolling stock items; (6) expanding FTA's list of eligible communications, train control, and traction power equipment; and (7) an update of the debarment and suspension provisions to bring them into conformity with statutory amendments made by SAFETEA-LU.

1. Published Justification for Public Interest Waivers

In the first NPRM, FTA proposed amending 49 CFR 661.7(b) to implement the SAFETEA-LU requirement that FTA publish justifications for public interest waivers in the **Federal Register** and provide for notice and comment.

A. Comments Received

FTA received ten comments, two of which were identical. Four commenters stated that FTA's proposal created a two-step process of waiver review. These commenters expressed concern that a two-step process would cause delay. One commenter noted in particular that the proposed process would have the effect of providing multiple opportunities for filing comments, would significantly lengthen the procurement process, would adversely affect the contract schedule, and would introduce additional uncertainty in the procurement process. One commenter stated an unduly long processing time would have a negative impact on cost and competition. Another commenter expressed concern that in cases involving construction contracts, where design and/or construction might be underway, and the "notice and comment process" would delay projects, inducing engineers and builders to offer less effective substitutes in order to avoid the delay from a notice and comment process.

B. Commenter Proposals

Four commenters provided alternatives to FTA's proposal. One

commenter recommended FTA post “notification of every public interest waiver request received by FTA in the **Federal Register**, with information on finding the request on the FTA Internet site and submitting comments. After a suitable public comment period has passed, FTA should post its decision to the FTA Internet site.” Similarly, two other commenters recommended FTA post notification of all requests for public interest waivers in the **Federal Register** at one time, along with a request for public comment, thus, creating a single comment period rather than two. Each of these four commenters, however, omitted any mention of SAFETEA-LU’s requirement to publish waiver “justification” in the **Federal Register** for notice and comment. Two other commenters noted this, stating that “the legislators clearly wanted the waiver’s justification to be published” with an opportunity to comment on it.

Commenters offered additional suggestions for streamlining the waiver application process. One commenter recommended the following: FTA should restrict receipt of comments on the initial waiver request to immediately affected parties; to handle comments by e-mail; to commit to a fixed time period for releasing the written justification in the event a waiver request is granted; to limit the comment period to one week after the publication date in the **Federal Register**; and to limit the time for confirmation of FTA’s determination to one week. Another commenter recommended FTA limit the comment period to ten days after **Federal Register** publication, and that FTA post its final decision on the FTA Web site within seven days. One commenter suggested that 30 days would be a reasonable time for review of FTA’s proposed waiver decision with supporting justification.

Two commenters recommended that FTA publish grantees’ written waiver requests and justifications in the **Federal Register**, with an opportunity to comment on them. Two other commenters expressed concern that FTA not release confidential or proprietary information, which might be provided to support a waiver request, during the waiver application process. One commenter noted the importance of protecting the names of prospective contractors while procurement is underway. This commenter specifically recommended FTA not disclose names of any prospective contractors in the notice and comment process.

The majority of commenters also recommended FTA continue its internal practice of publishing all waiver

decisions on the FTA Web site (http://www.fta.dot.gov/legal/buy_america/14328?ENG_HTML.htm), including denials. One commenter noted that lessons learned from disapprovals lead to a better understanding and application of the Buy America requirements.

C. FTA Response

FTA agrees that SAFETEA-LU requires it to publish its “justification” in the **Federal Register** for notice and comment. FTA disagrees, however, that it should also publish grantees’ written justifications in the **Federal Register**. SAFETEA-LU does not require this. Moreover, FTA notes that several commenters expressed a legitimate concern that publishing a grantee’s waiver request and justification in the **Federal Register** could result in an unwanted dissemination of confidential business information. Furthermore, FTA disagrees with the comment that it should post “notification of every public interest waiver request received in the **Federal Register**, with information on finding the request on FTA’s Internet site and submitting comments.” This and other comments that recommend FTA publish all requests for public interest waivers in the **Federal Register**, misconstrue the unequivocal language in SAFETEA-LU, which requires FTA to publish only a written justification in the **Federal Register**.

While several commenters complain of a “two-step” process for waiver approval, none explain how FTA can simultaneously publish a notice of waiver request and the justification for it in a single **Federal Register** notice while still providing the public an opportunity to comment on the waiver request. As a matter of fact, combining these processes would negate any comments received on the waiver request because FTA would have already made a decision. Therefore, FTA declines to adopt this proposal.

In addition, as explained in the NPRM, FTA believes the plain language of SAFETEA-LU, and its legislative history, expressly requires FTA to issue a written justification and publish it in the **Federal Register**, only in instances where the justification supports a waiver request. See 49 U.S.C. 5323(j)(3); see also H.R. Conf. Rep. No. 109–203, at 952 (2005).

FTA shares the concern of many commenters who state that the proposed rule could cause delay by creating a so-called “two-step” process for waiver approvals. FTA will endeavor to implement a rule in a way that minimizes delays. It should be noted

that any potential delay resulting from the requirement to publish a justification in the **Federal Register** applies only in instances where the justification supports granting the waiver, as explained earlier.

Under the current Buy America process, FTA’s Chief Counsel has been delegated with the responsibility to issue public interest waivers, soliciting comments via the FTA Web site and concurrent notification to the American Public Transportation Association (APTA). As FTA explained in the first NPRM: “This process functions well. The relevant industries and grantees actively respond and provide valuable information to FTA.” In fact, FTA relies heavily on the public comments it receives during the comment period for waiver requests. For this reason, FTA disagrees with a commenter’s suggestion FTA should limit the receipt of comments on the waiver request to “immediately-affected parties.” To the contrary, FTA finds that frequent and wide-ranging public comment is an invaluable part of the Buy America process.

Because FTA relies on public input in making Buy America determinations, SAFETEA-LU’s requirement to publish justifications of public interest waivers in the **Federal Register** necessarily creates a multi-step process. FTA interprets the term “justification” in this context as a preliminary decision, which explains the rationale for granting a waiver. FTA believes that in order to issue a well reasoned justification, it should first receive preliminary comment from the public on the waiver request. Such comments would form the basis of the justification.

D. FTA Proposal

Accordingly, FTA believes SAFETEA-LU requires the following process: (1) Post notification of the public interest waiver request on FTA’s Web site and solicit comments on the request; (2) based on the comments received, prepare a justification that explains the rationale for approving a waiver request; (3) publish the justification in the **Federal Register** for notice and comment within a reasonable time; and (4) issue a final decision on FTA’s Web site regarding the waiver request, based on comments received in response to the published justification. It should be noted that upon review of the **Federal Register** comments, FTA may ultimately determine that a waiver is *not* in the public interest, and deny the request. FTA believes that this methodology would create a total processing time of about 30 calendar days. FTA requests comment on this

new process for granting public interest waiver requests, including the proposed processing time.

2. Microcomputer/Microprocessor Waivers

In the NPRM, FTA requested comment on its proposal to implement the SAFETEA-LU requirement to “clarify” that any waiver of the Buy America requirements for a microprocessor, computer, or microcomputer, applies “only to a device used solely for the purpose of processing or storing data” and does not extend to the product or device containing a microprocessor, computer, or microcomputer.

A. Comments Received

FTA received sixteen comments on this issue, three of which concurred outright with FTA’s proposed change to the regulation without further substantive comment. Nine commenters appeared to endorse FTA’s proposed change to the microcomputer waiver, but raised an additional issue about “input/output” facilities or devices. For example, one commenter noted that “FTA has dropped a significant phrase, ‘input/output,’ facility from past practices.” This commenter then recommended that “existing regulatory practices must be continued to avoid significant disruption in the industry.” Four other commenters similarly recommended that FTA make clear that input/output devices or facilities are covered by the waiver. Citing the Conference Report for SAFETEA-LU (H.R. Conf. Rep. No. 109–203, *supra*), one of these commenters noted that in directing FTA to clarify the microprocessor waiver, Congress did not intend for FTA to change its current regulatory treatment of microcomputer equipment.

On the other hand, four other commenters opposed including “input/output” devices in the microcomputer waiver and provided comments that interpreted this matter entirely differently. The commenters congratulated FTA for purportedly “dropping” input/output facilities or devices from waiver coverage, or, recommended that FTA drop such devices from the scope of the waiver. Two of these comments also recommended FTA not include “software” in the proposed “definition” of computers, microcomputers, and other equipment covered by the waiver. The two comments also appeared to request that FTA clarify that what is “exempt” under the microprocessor waiver can not be counted as either foreign or domestic for purposes of Buy

American content calculations in rolling stock procurements.

B. Commenter Proposals

One commenter proposed amending Appendix A to 49 CFR 661.7(b) by adding a sentence clarifying that if an “end product (e.g., a fare card system) contains a microcomputer,” the microcomputer is exempt from the requirements of Buy America, but the rest of the end product is not. This commenter also recommended that if a microcomputer is exempt from Buy America, FTA should make clear whether the device is counted as domestic or foreign when calculating the costs of an end product.

Another commenter proposed an alternative version of the microcomputer waiver that includes a “hardware definition” of microprocessor, as follows: “[t]his general waiver does not extend to a product or device which merely uses microprocessor circuit chip(s) imbedded in the material or uses one or more printed circuit board assemblies consisting of microprocessor circuit chip(s) either as a group of separate items or as a single integrated microcomputer unit for controlling its end function which is not used solely for the purpose of processing or storing data.” A final comment made note of FTA’s proposed changes to the microcomputer waiver, but did not appear to either approve or disapprove of FTA’s proposal.

C. FTA Response

Regarding the “input/output” facility issue raised by nine commenters, it is unclear why so many of these commenters believe FTA “dropped” input/output devices from the microcomputer waiver in the first NPRM. The current version of the general waiver at 49 CFR 661.7, Appendix A, does not include the term “input/output” facility. It merely states that, “microcomputer equipment, including software, of foreign origin can be procured by grantees.” 49 CFR 661.7, Appendix A. Likewise, FTA’s proposed language in the first NPRM does not mention “input/output” facilities or devices. Rather, that term is mentioned in a separate definition of a microcomputer, which FTA referred to in the NPRM. See 50 FR 18760, May 2, 1985 (“A basic microcomputer includes a microprocessor, storage, and *input/output facility*, which may or may not be on one chip.”) (Emphasis added.)

In clarifying that the waiver applied to devices “used solely for the purpose of processing or storing data,” as required by SAFETEA-LU, commenters

may have interpreted this to mean that “input/output” facilities were somehow excluded from waiver coverage. Such is not the case. FTA agrees with the commenter who noted that in directing FTA to clarify the microcomputer waiver, Congress did not intend for FTA to change its current regulatory treatment of microcomputer equipment. See H.R. Conf. Rep. No. 109–203, at 952 (2005) (“In directing the Secretary to issue new regulations regarding microprocessors, computers, or microcomputers, there is no intent to change the existing regulatory treatment of software or of microcomputer equipment.”) While it is arguable whether FTA’s definitions of “computer system” and “microcomputer” are outdated and should be modified to reflect a twenty-year advance in technology, FTA believes Congress’ clear intent is not to change these definitions in this rulemaking.

D. FTA Proposal

Accordingly, since FTA’s existing regulatory definition of a microcomputer already includes an “input/output facility” as one of its component items, consistent with Congressional intent not to change the definitions in this rulemaking, FTA believes it is unnecessary to further amend the regulation to reiterate that input/output facilities or devices are covered by the waiver. Furthermore, in keeping with the above Congressional guidance, FTA does not agree with recommendations to eliminate “software” from the scope of the microcomputer waiver.

FTA also disagrees with the recommendation that it should clarify whether equipment subject to the microcomputer waiver is counted as foreign or domestic in calculating component content in rolling stock procurements. That change is unnecessary because FTA’s regulation already dictate that components subject to the microcomputer waiver are counted as domestic in rolling stock procurements. See, 49 CFR 661.7(f).

3. Post-Award Waivers

FTA sought comment in the first NPRM on its proposal to create a post-award non-availability waiver. Under FTA’s current regulation, a bidder or offeror that certifies compliance with Buy America is “bound by its original certification” and “is not eligible for a waiver of those requirements.” 49 CFR 661.13(c). The proposed language would allow grantees to request a non-availability waiver after contract award where a bidder or offeror had originally certified compliance with the Buy

America requirements in good faith, but can no longer comply with its certification and contractual obligations due to commercial impossibility or impracticability. To implement the SAFETEA-LU requirement for post-award waivers, FTA proposed amending 49 CFR 661.7(c)(3).

A. Comments Received

FTA received eight comments on this proposal, one of which concurred with FTA's proposed change to the regulation, without further substantive comment. A second commenter noted some minor variations in language between the proposed rule in the "Supplementary Information" section of the NPRM, and the actual proposed amendment of 49 CFR part 661. This commenter then stated that the actual proposed amendment, "appears to address this requirement." FTA presumes the commenter is referring to the requirement of SAFETEA-LU.

B. Commenter Proposals

The six remaining commenters endorsed the concept of a post-award waiver, but felt that FTA's proposal was unnecessarily complex or unduly restrictive. Three commenters proposed the following alternative language:

Waivers based on non-availability may be granted when the Administrator or the Administrator's designee is satisfied that the applicable certificate of Buy America compliance was made reasonably and in good faith and that intervening circumstances have made compliance with that certification impossible or commercially impracticable.

Another commenter proposed similar language, as follows:

The Administrator may grant a non-availability waiver under section 661.7(c) in any case in which a contractor has originally certified compliance with the Buy America requirements in good faith, but can no longer comply with its certification. The Administrator will grant this non-availability waiver only if the grantee provides sufficient information which indicates that the original certification was made in good faith and that the item to be procured cannot now be obtained domestically due to commercial impossibility or impracticability.

Five commenters stated that in deciding whether to grant a post-award waiver, FTA's consideration of the status of other competitors was immaterial and beyond the statutory intent of SAFETEA-LU. These commenters argued that FTA's proposal forecloses a potential waiver when, after contract award and discovery that supplies are unavailable, another bidder or offeror who certified compliance is still able to supply domestic products or

materials. The five commenters argued that this would force a grantee and its winning contractor, in spite of their good faith, to be "held economic hostage" to a frustrated competitor who had obtained limited remaining domestic supplies through exclusive distribution agreement or other arrangement. According to these commenters, the situation would result in significant cost increases, as the grantee would be forced to terminate its contract and procure with the compliant contractor, with no effective competition to assure reasonable pricing.

Two commenters noted that FTA's discussion of the waiver proposal encompassed both commercial impossibility and impracticability "due to price." These two commenters argued that the provision should allow waiver under *any* commercial impracticability, not just due to price. A third commenter suggested that in determining the monetary value of the "commercially impracticable" criteria, the "current 25 percent price differential figure within the waivers might be a reasonable benchmark for consideration."

None of the commenters discussed or questioned the meaning of the term "impossibility." However, a fourth commenter argued that FTA should not require grantees to produce evidence of changed market conditions that demonstrate the non-availability of materials or supplies after contract award in order to obtain a post-award waiver. Furthermore, this commenter stated that the grantee should not have to demonstrate the impossibility or impracticability of completing the third party contract. The commenter emphasized that such a requirement would prove burdensome to grantees, and goes beyond the stated provisions of SAFETEA-LU.

C. FTA Response

FTA agrees with the commenters who recommended that the proposed language in the NPRM should be simplified. In fact, FTA favors the alternative post-award waiver provision proposed by one commenter, as it matches in tone and language the existing non-availability waiver found in 49 CFR 661.7(c).

The intent of Buy America is to safeguard American jobs by requiring that "steel, iron, and manufactured goods used in the [FTA-funded] project are produced in the United States." 49 U.S.C. 5323(j). Buy America is not intended to protect any particular contractor or supplier. In deciding whether to grant a post-award waiver, therefore, FTA should not deliberately

ignore the status of other bidders or offerors who are Buy America compliant and can furnish domestic material or products on an FTA-funded project. Concluding otherwise would violate the legislative intent behind Buy America.

Therefore, commenters' disagreement notwithstanding, FTA believes the status of other bidders or offerors on an FTA-funded procurement may be a relevant factor in deciding whether to grant a post-award waiver. For example, if a winning contractor is unable to comply with its Buy America certification due to commercial impossibility or impracticability, but a second low bidder who certified compliance is available to provide domestic material or products at a reasonable price, FTA believes it would be appropriate to take that into account when deciding whether to grant the waiver request.

Moreover, FTA is mindful that a decision on a post-award waiver could adversely impact a grantee's project schedule and budget, as several commenters have stated. Therefore, it is FTA's intent to consider "all appropriate factors on a case-by-case basis," in deciding whether to grant a post-award waiver. Such factors may include project schedule and budget. It will be the grantee's responsibility to point out such factors to FTA in requesting a post-award waiver.

FTA disagrees with the comment suggesting FTA not require grantees to produce evidence of "impossibility or impracticability of completing the third party contract," *i.e.*, evidence of changed market conditions, which would demonstrate the non-availability of materials or supplies after contract award. FTA notes no other commenter made this suggestion or otherwise disagreed with the concept of using commercial impossibility or impracticability as the applicable standard for granting a post-award waiver. In addition, while the commenter would have FTA do away with requiring a grantee to produce specific evidence of commercial impossibility or impracticability in support of a waiver request, the commenter offered no alternative methodology or standard which would guard against potential abuse of the post-award waiver. Accordingly, FTA does not adopt the commenter's recommendations.

In fact, FTA believes further clarification of what constitutes "commercial impracticability" is warranted but disagrees with the several commenters who suggested that impracticability should not be limited "due to price," but should apply to *any*

commercial impracticability and with the one commenter who suggested that in determining the monetary value of what constitutes “commercial impracticability,” that the “current 25 percent price differential figure,” referring to the price-differential waiver at 49 CFR 661.7(d), “might represent a reasonable benchmark.”

As stated in this SNPRM, FTA prefers to base any regulatory requirements on existing precedents in public contracting law and practice. For example, in *Raytheon Co. v. White*, 305 F.3d 1354, 1667 (Fed. Cir. 2002), the U.S. Court of Appeals for the Federal Circuit defined “commercial impracticability,” in part, as follows:

A contract is commercially impracticable when performance would cause “extreme and unreasonable difficulty, expense, injury, or loss to one of the parties.” *Restatement (Second) of Contracts § 261 cmt. d* (1981).
* * *

A contract is said to be commercially impracticable when, because of unforeseen events, “it can be performed only at an excessive and unreasonable cost,” *Int’l Elecs. Corp. v. United States*, 227 Ct.Cl. 208, 646 F.2d 496, 510 (1981), or when “all means of performance are commercially senseless,” *Jennie-O Foods, Inc. v. United States*, 217 Ct.Cl. 314, 580 F.2d 400, 409 (1978). Whether performance of a particular contract would be commercially senseless is a question of fact. Cf. *Maxwell Dynamometer Co. v. United States*, 181 Ct.Cl. 607, 386 F.2d 855, 870 (1967). A contractor is not entitled to relief “merely because he cannot obtain a productive level sufficient to sustain his anticipated profit margin.” *Natus Corp. v. United States*, 178 Ct.Cl. 1, 371 F.2d 450, 457 (1967).

FTA believes this “commercially senseless” standard, as articulated in Federal case law, represents the appropriate standard for determining commercial impracticability in Buy America post-award waivers. Therefore, when questions arise as to what constitutes commercial impracticability or impossibility in a specific post-award waiver request, FTA will rely on the precedents established in Federal contract law for guidance.

D. FTA Proposal

In the new proposal, FTA steps away from the language in the first NPRM because it is persuaded by the issues raised by commenters who stated the language included in the first NPRM should not be included in a final rule. FTA agrees and believes the better approach is to require the grantee, in making a request for a post-award waiver, to provide specific evidence of a contractor’s good faith and evidence justifying the post-award waiver. This evidence may include information about

the origin of the product or materials, invoices, or other relevant solicitation documents as requested and that the item to be procured cannot now be obtained domestically due to commercial impossibility or in practicability. Additionally, when determining whether conditions exist to grant a post-award waiver, FTA will consider all appropriate factors on a case-by-case basis. FTA requests comments on this new proposal to modify the post-award waiver procedures.

4. “End Products”

FTA’s initial NPRM sought comments on two alternative definitions of the term “end product.” The first proposed definition comes from FTA’s current, long-standing practice whereby the end product of a procurement is the deliverable item specified by the grantee in the third party contract. Under this so-called “shifting” methodology, the same item may be an end-product, a component, or a subcomponent, depending on the article specified in the third party contract, with resulting differences in the applicability of Buy America requirements to the same item based on its characterization as an end product, component or subcomponent. Applying this shifting approach, FTA’s first proposed definition stated: “End product means any item subject to 49 U.S.C. 5323(j) that is to be acquired by a grantee, as specified in the overall project contract.”

The second proposed definition was based on the definition of end product in the Buy American Act, 41 U.S.C. 10a–10d, as implemented in the Federal Acquisition Regulation (FAR) Part 25. Under this second definition, FTA proposed to abandon the “shifting” methodology in favor of one where the end products do not shift, and components and subcomponents retain their designation. FTA’s second proposed definition stated: “End product means any article, material, supply, or system, whether manufactured or unmanufactured, that is acquired for public use under a federally funded third party contract.” A list of representative end products is included at Appendix A to this section.

FTA’s second proposed definition includes the term “system” and mentions a “list of representative end products.” FTA will address these two important issues separately in the SNPRM; that is, whether a “system” should be included as an end product, and what items should be included on a representative list of end products.

4a. “End Product” Under the Non-Shift Approach

A. Comments Received

FTA received twenty-one comments on the definition of “end product.” Four commenters expressly endorsed retaining some form of FTA’s current “shifting” methodology. All four of these commenters are transit operators receiving FTA funds, three of whom are among the largest transit operators in the country.

One of the commenters who specifically supported FTA’s first proposed definition noted a discrepancy between the proposed rule in the “Supplementary Information” section of the NPRM, and the actual proposed amendment of 49 CFR part 661, to the effect that the proposed amendment omits the clause, “A list of representative end products is included at Appendix A to this section.” FTA agrees that this sentence should have been included in the proposed amendment. Furthermore, this same commenter stated that the second “non-shifting” proposed definition of end product “would substantially reduce much of the current flexibility in the Buy America program.” A second commenter stated that to “rigidly fix the nature of a component at the time a vehicle is purchased would create massive uncertainty in the marketplace.”

A third commenter, a large transit operator, expressed “grave concerns” about abandoning FTA’s long standing shifting methodology in favor of one where the end products do not shift. According to the commenter, such a change in methodology would undermine the basic purpose of the Buy America rule, which is to encourage the creation of American jobs. The commenter explained that the shifting methodology encourages American job creation by providing an incentive for manufacturers of end product components to invest in domestic facilities for after market support. A manufacturer of rail car equipment, for example, would have an incentive to invest in domestic facilities in order to achieve Buy America compliance when selling former “components” as “end products” in an after market procurement.

The commenter also stated that the alternative proposal cannot be practically implemented. Such a new methodology would necessarily place great reliance on the accompanying list of end product items. The commenter explained that the burden for transit agencies to track the status of rolling stock component items (as either foreign

or domestic) from the time of their original purchase would be untenable given that “the useful life of a rail car can exceed 30 years.”

This commenter argued that the “non-shift” methodology would not, in fact, create consistency. Again, using the example of a rail car manufacturer, the commenter explained that it is the manufacturer who decides in each particular case whether a given component should be of domestic or foreign manufacture in order for the end product to meet the sixty percent domestic content requirement for rolling stock [forty percent of the components, by cost, may be foreign]. Thus, any typical component of a rail car could be “of foreign manufacturer in one specific instance and * * * of domestic manufacturer in another, even when foreign cars are manufactured by the same rail car builder.”

A fourth commenter, also a large transit operator, raised similar arguments to support its endorsement of the shifting approach to end products. This commenter also stated that abandonment of the shifting methodology would create a disincentive for manufacturers to establish domestic facilities to support after market purchases, but added that the lack of domestic facilities “will create longer lead times on acquiring replacement parts.”

B. Commenter Proposals

One commenter suggested FTA revisit its application of the end product definition as it applies to construction projects, specifically, that the “deliverable of the project” as described in the contract should be viewed as the end product, with structures such as terminals and stations to be considered as components. Furthermore, the commenter suggested that FTA should not apply the Buy America requirements “for the minimal use of iron or steel products where the cost of the foreign sourced item is less than a particular dollar threshold.” Such an approach, according to the commenter, would be consistent with the application of Buy America used by the Federal Highway Administration, and would foster uniformity within the U.S. Department of Transportation.

Another commenter appeared to endorse the “shift” approach to end product analysis and suggested the following definitions:

“Any item subject to 49 U.S.C. 5323(j) that is to be acquired by a grantee, as specified in the overall project contract and which is ready to provide its intended end function or use without any further manufacturing or assembly change(s).” Or,

“End product means any article, material, supply, or system, whether manufactured or unmanufactured, that is acquired for public use under a federally funded third party contract and which is ready to provide its intended end function or use without any further manufacturing or assembly change(s). A list of representative end products is included at Appendix A.”

This commenter stated that this proposed definition would clarify that an end product is something that will not require further changes and can function with appropriate mounting and interconnection for its input and output without further manufacturing or assembly.

Of the sixteen remaining commenters, three did not specifically comment on the issue of “shift/non-shift,” but focused instead on whether a “system” should be included as an end product, or recommended that certain products be included in the list of representative end products. Another commenter requested FTA “strike the end product definition as written,” but did not identify which of the two proposed definitions to strike.

Twelve commenters expressly favored the second definition—the “non-shift” approach—to end product analysis. The primary reason given for eliminating the shift methodology, as this commenter put it, is to “achieve reasonable predictability for the business community.” Commenters also stated that knowing particular items will always be designated as an end product, a component, or a subcomponent would enhance stability in the transit industry, enable proposers to plan and price proposals more accurately, and would allow transit agencies to obtain better prices.

One of the twelve commenters addressed the concerns of some grantees that abandonment of the “shift” approach in rolling stock procurements would discourage manufacturers from establishing domestic facilities for after market support; and would thereby create an overwhelming recordkeeping burden on public transit agencies and suppliers. Specifically, the commenter recommended that in adopting a “non-shift” methodology to end product analysis, FTA should retain its current practice of treating replacement parts as manufactured products rather than as rolling stock.

The commenter stated that treating replacement parts under the rolling stock standard, instead, would prove unworkable and would impose crushing recordkeeping requirements on transit agencies. This is so because transit agencies would have to track the origins of every component and sub-component

of their rolling stock end products, no matter how old, to determine if they should replace foreign and domestic components and subcomponents with like foreign and domestic replacement parts—a task that becomes impossible or excessively burdensome where vehicles and components may each contain a varied combination of foreign and domestic parts.

On the other hand, treating replacement parts under the manufactured product standard rather than the rolling stock standard would obviate the need to maintain detailed parts lists, according to the commenter. While acknowledging that some in the transit community advocate treating replacement parts as manufactured end products, per the terms of a contract and current FTA practice, the commenter advocated a different approach. Using the example of a replacement bus engine, the commenter would treat this as “a manufactured product *component*, regardless of the individual contract terms.”

For rolling stock replacement parts, the commenter stated that the optimal course of action for maintaining consistency and avoiding undue administrative burden “is in consistently applying the end product, component, and sub-component labels.” Because replacement parts manufacturers are already accustomed to having their products treated as manufactured products, the commenter states that its approach “will not represent the kind of sea change likely to disrupt the supply industry.”

Addressing the topic of replacement parts, another commenter recommended that “all spare parts be exempt from the Buy America requirements.” While acknowledging that such an approach may circumvent the objectives of Buy America, the commenter argued that “it will increase competition and should result in lower costs to the grantee.”

Twelve commenters who supported a “non-shift” approach expressed differences of opinion on a proposed definition of end product. For example, five commenters favored FTA’s proposed non-shift definition of end product, which is based on the Buy American Act, used for direct Federal procurements. Three of these commenters stated that consistency of definitions in publicly funded contracts is a benefit.

Seven commenters disagreed with FTA’s proposed definition. Some of these commenters characterized FTA’s proposed definition as overly broad or insufficiently descriptive. One commenter proposed an alternative definition, as follows:

“a structure, vehicle, or similar item that has a distinct use, function, or purpose, consistent with the representative list at Appendix A.”

However, several commenters specifically disagreed with this proposed definition, as it did not include the term “system.”

A second commenter proposed a “non-shift” definition of end product, by specifically amending 49 CFR 661.11(s) to read as follows:

“an end product is a system, structure, vehicle, or similar item that has a distinct use, function, or purpose, consistent with the representative list at Appendix A subject to 49 U.S.C. 5323(j) that is to be acquired by a grantee, as specified in the overall project contract.”

Two commenters, in identical fashion, proposed the following definition:

“any material item or assembly that is manufactured or assembled for the purpose of performing a specific function, and is usually specified as a separate or stand alone assembly or line item component in a system, and it is covered by its own individual performance warranty and can function independently in differing operating environments. A list of representative end products is included in Appendix A.”

In proposing this definition, these two commenters stated that end products are usually specified as stand alone assemblies (line item or separate descriptions) and are sold with individual performance warranties and can function independently in differing service environments.

Two commenters criticized the “shift” approach to end product analysis, but did not propose alternative definitions. One of these commenters stated that FTA’s proposed “shift” definition is not consistent with Congressional intent, as it allows for system end products. The other commenter advocated eliminating the “shift” approach. While not offering a definition of end product, the commenter suggested that an “individual items” may be considered as end products if any of the following criteria are present: (1) Separate line item pricing for individual elements is involved; (2) Performance warranties for individual or separable product elements are involved; (3) The procured items are regularly sold separately; and (4) The procured items can function separately.

C. FTA Response

Upon careful analysis and review of the comments received on the end product issue, FTA concurs with the majority of commenters who recommended FTA adopt a “non-shift”

approach to end product analysis. FTA finds the commenters’ argument especially compelling that such an approach would (1) Foster reasonable predictability and stability in the transit business community, (2) enable offerors and bidders to price proposals more accurately, and (3) allow transit agencies to obtain better prices to be especially compelling. Further, FTA is mindful of the concerns expressed by commenters who opposed abandoning the current “shift” approach, as this change could lead to enormous administrative burdens on grantees and result in the potential loss of American jobs. FTA believes there is a straightforward solution that can address these concerns.

The commenters who opposed the “non-shift” approach focused their comments almost entirely on the effect of such a change in the market for rolling stock replacement parts. FTA agrees with the “grave concerns” expressed by some commenters on this issue. Keeping track of after market rolling stock components would not only prove to be an impossible burden for grantees, it also and could very well discourage parts suppliers from sourcing in the United States. However, these concerns rest on the assumption that FTA would treat replacement parts under the rolling stock standard (*i.e.*, where sixty percent of the subcomponents of a component, by cost, must be domestic, but forty percent may be foreign-sourced). The better approach, as one commenter suggested and others endorsed, is for FTA to continue to treat rolling stock replacement parts under the manufactured products standard, which requires that one hundred percent of components be of domestic manufacture. FTA agrees with this recommendation.

By continuing to treat replacement parts under the manufactured products standard in 49 CFR 661.5, suppliers must still manufacture replacement components in the United States, thus preserving American jobs. In addition, grantees will not have to engage in the burdensome recordkeeping requirements that a change to a rolling stock standard for replacement parts would entail. As one commenter stated, “[r]eplacement parts manufacturers are already accustomed to their products being treated as manufactured products so this will not represent the kind of sea change likely to disrupt the supply industry.” FTA agrees, and believes that this approach should alleviate grantees’ concerns about procuring replacement parts under a “non-shift” end product standard.

D. FTA Proposal

Here is how FTA believes a “non-shift” approach to end product analysis would work in rolling stock procurement. First, when procuring end products such as rail cars or buses, there would be little or no difference in the Buy America requirements under a “non-shift” approach from the current “shift” method. In either case, under FTA’s Buy America requirements for rolling stock, 49 U.S.C. 5323(j)(2)(C) and 49 CFR 661.11, sixty percent of all components, by cost, must be of U.S. origin, and final assembly of the vehicle must take place in the United States. Furthermore, FTA’s audit requirements, which state that a recipient purchasing rolling stock must conduct, or cause to be conducted, a pre-award and a post-delivery audit to verify compliance with Buy America would remain the same. See 49 CFR part 663.

Any change between the “non-shift” and “shift” approaches to end product analysis would occur primarily in the procurement of replacement parts. Under FTA’s current Buy America methodology, if a grantee procures a replacement part for a bus, rail car, or other rolling stock end product, then the general requirements for manufactured products found at 49 CFR 661.5 apply. In that case, the replacement part component, such as a bus engine, “shifts” to become an end product and all manufacturing processes for the engine must take place in the United States. All of the components of the engine must be manufactured domestically, regardless of the origin of the subcomponents. See decision letter from FTA to Hubner Manufacturing Corporation (stating the current Buy America standard for rolling stock replacement parts) (March 14, 2000).

Under the proposed “non-shift” methodology, what would change specifically is that the replacement part, in this example a bus engine, would always remain a component instead of “shifting” to being an end product. Using the manufactured product standard, this would mean the replacement part component, *i.e.*, the bus engine, would still have to be manufactured in the United States, but its subcomponents could be foreign sourced. To further illustrate this concept, under FTA’s current “shift” methodology, a replacement bus engine acquired for a mid-life overhaul is the end product; the pistons assemblies are components; and connecting rods are subcomponents, which may be foreign sourced. Under the proposed “non-shift” model, the replacement bus engine remains a component, which

must be manufactured in the United States. But the replacement piston assemblies are now subcomponents, which may be foreign sourced.

With adoption of a “non-shift” approach to manufactured end products, similar results would apply. For example, when procuring a manufactured end product such as a mobile vehicle lift, there would be little or no difference in the Buy America requirements under a “non-shift” approach from the current “shift” method. In either case, all of the manufacturing processes for the vehicle lift end product must take place in the United States and all of the components of the product must be of U.S. origin. See 49 CFR 661.5(d)(1). Additionally, a component “is considered of U.S. origin if it is manufactured in the United States, regardless of the origin of its subcomponents.” 49 CFR 661.5(d)(2).

As with the example of the bus engine, however, there would be a change in the subcomponent requirements for replacement parts for manufactured end products such as a mobile vehicle lift. What would be considered a component under the current “shift” approach would become a subcomponent under the “non-shift” approach, and may be foreign-sourced.

With products that are made primarily of steel and iron such as track-work or a steel bridge, there would be absolutely no change in the Buy America requirements between the current “shift” approach and the proposed “non-shift” methodology. In either case, the requirements are clear: “all steel and iron manufacturing processes must take place in the United States,” whether the item is an end product, a component, or a subcomponent. See 49 CFR 661.5(b)(emphasis added).

In short, FTA foresees a change in the Buy America requirements resulting from adoption of the “non-shift” approach to end product analysis primarily in the procurement of replacement parts for rolling stock and manufactured products. While this change may permit an increase in the level of foreign sourced subcomponents for replacement parts, FTA believes the benefits of the new approach more than outweigh the possible disadvantages. FTA agrees with one commenter who stated that for rolling stock replacement parts, in particular, the proposed “non-shift” approach represents “the optimal course of action for balancing consistency and administrative burden.”

To conclude, FTA believes a “non-shift” approach to end product analysis will achieve the goals of enhancing

consistency, stability, and favorable price structures in the transit industry with minimal disruption to current practices while still maintaining the legislative intent of Buy America.

Having proposed adoption of the “non-shift” methodology, the task remains to shape a workable definition of end product. Additionally, in drafting a definition of end product, FTA believes the end product definition should be consistent with the current definition of “component” in 49 CFR 661.3, which states: “*Component* means any article, material, or supply, whether manufactured or unmanufactured, that is directly incorporated into the end product at the final assembly location.” Thus, FTA seeks comments on its proposal to modify the definition of end product in 49 CFR 661.3.

4b. “System” as an “End Product”

In defining the term “end product,” SAFETEA-LU requires that “the procurement of systems” be addressed “to ensure that major system procurements are not used to circumvent the Buy America requirements.” In light of this requirement, the NPRM sought comment on whether FTA should continue its longstanding practice of including “systems” as definable end products. Furthermore, FTA sought comment on a proposed definition of system, which is based on the “functional test” for interconnected systems from the Harmonized Tariff Schedule of the United States (HTSUS), 19 U.S.C. 1202, heading 8474, used in customs law. FTA’s proposed definition of system stated: “System means a machine, product, or device, or a combination of such equipment, consisting of individual components, whether separate or interconnected by piping, transmission devices, electrical cables or circuitry, or by other devices, which are intended to contribute together to a clearly defined function.”

In addition, FTA also sought comment on whether the same or different Buy America requirements should apply to open architecture versus proprietary system end products.

A. Comments Received

FTA received nineteen comments on the issue of system end products. Eight commenters opposed including systems as end products. Two comments, which were identical, expressed concern that FTA’s proposed definition could be “stretched to include a whole ‘system’ of disconnected but related end products, such as buses, garages, access roads, bus shelters,” which could lead to distortions in the Buy America

requirements. Another commenter objected that including a system in the end product definition could result in “gamesmanship,” thereby eliminating American jobs. A fifth commenter offered similar views that including a system as an end product allows “foreign suppliers to circumvent the intent of Congress with respect to Buy America compliance.”

One other commenter, whose views were fully endorsed by a yet another commenter, stated that including a system as an end product would violate Congress’ stated intent in SAFETEA-LU that “system procurements not be used to circumvent Buy America requirements.” The commenter explained that under FTA’s historical interpretation of the Buy America requirements, “end products” are made up of components and subcomponents. For manufactured products, components must be domestically produced, but subcomponents may be foreign sourced.

Using the example of fare collection equipment, the commenter pointed out that an automated fare collection system is comprised of ticket vending machines, fare gates, computers, software, and like items. By designating an automated fare collection system as an end product, the ticket vending machine, for example, would be a component, and must be manufactured domestically. The ticket handling assembly that goes into the ticket vending machine would be a subcomponent, and may be foreign sourced. Under a “non-system” approach to Buy America analysis, however, the ticket vending machine is the end product and the ticket handling assembly is a component, and both items would have to be manufactured domestically.

The commenter went on to state that including a “major system” as an end product results in designation of critical equipment as components, rather than as end products, thereby dramatically increasing the quantity of foreign-manufactured equipment that may be incorporated into a procured system. This is so where systems are end products and an item “should be designated properly as a component is pushed ‘downstream’ and becomes a subcomponent,” that may be foreign sourced. It is this situation, according to the commenter, that Congress sought to avoid.

The commenter stated further that if equipment must be domestically made when not purchased as part of a system, but may be foreign sourced when part of a system procurement, then the system procurement “has been used to

circumvent the Buy America requirement.” The risk of such circumvention is more pronounced when procuring manufactured goods, as distinct from rolling stock products. The commenter added that “enshrining” system end products in regulation would induce manufacturers to source cheaper products off shore, resulting in “the exportation of American jobs and capital.” Similarly, the commenter faulted FTA’s proposed list of representative end products for including systems.

B. Commenter Proposals

The above commenter asserted that the definition of “end product” is not objectionable if it includes only those items which may be considered as a single manufactured product if manufactured in a U.S. facility. To facilitate this approach, the commenter proposed clarifying the existing regulatory definition of end product as “any item subject to 49 U.S.C. 5323(j) that is to be acquired by the grantee, as specified in the overall project contract,” by adding the following language to the regulatory text:

Notwithstanding the characterization of a system as an end product by a grantee in its project contract procuring manufactured products, the system shall not be considered the end product where (1) The solicitation provides separate line item pricing for individual product elements and the owner retains the right to materially add or subtract quantities of individual product elements, (2) the solicitation provides for performance warranties for individual or separable product elements (other than warranties relating to degraded mode operation), thereby demonstrating that individual elements can fully perform independently, or (3) items identified in the solicitation that constitute the system are regularly sold separately (other than in the context of replacement parts) and can function independently of the system. In solicitations where circumstances described in (1), (2), or (3) above are present, then those individual items or elements identified in the solicitation shall be considered end products rather than part of any system.

In addition, the commenter suggested FTA consider the following clarifying language:

Example of manufacturing products that have sometimes been treated by grantees as end products, based upon a system characterization, which would no longer be treated as end products under this definition include fare collection and distribution, security and access control, vehicle location, passenger information and signage products (unless such signage provides system-wide information rather than just location specific information). Further, FTA should eliminate fare collection systems from the proposed list of end products in the appendix to the

regulation; so that it is clear that separable fare collection products with separable performance warranties do not constitute an end product merely because they are purchased as part of a larger procurement described as a “system.”

The commenter proposed a representative list of “proper end products” to include in the regulation, which FTA has summarized, as follows:

End Products: transit/coach/shuttle buses; trolley replicas; subway rail cars; light rail cars; destination displays or signs; audio announcement devices; wheelchair restraint devices; mobile video surveillance equipment; vehicle power generation devices; vehicle fire suppression devices; route or run displays or signs; video recorders and cameras; audio recorder, player, or transmission device; GPS and vehicle location devices; electrical control and multiplexing devices; voice enunciation devices; operator input/output displays and devices; automatic passenger counting equipment; automated gates and turnstiles; vehicle location devices; fareboxes; automated ticketing/fare card machines; ticket/fare card validators; ticket/fare card encoding equipment.

Another commenter offered similar views that an end product system could be so large, and incorporate so many different levels and types of equipment that relatively major items now considered to be components, and subject to the Buy America requirements, would become subcomponents not subject to the Buy America requirements. The commenter added that FTA’s proposal is “contrary to the statutory requirement that the definition of end product ensure major system procurements are not used to circumvent the Buy America requirements.”

In contrast to the foregoing, the ten remaining commenters recommended including a system as a definable end product. Six commenters endorsed FTA’s proposed definition of system, which limits system end products to those that are intended to provide a “clearly defined function.” One commenter recommended that the following language be added after the clause “clearly defined function,” to wit: “necessary to fulfill the function as defined.” The commenter suggested this change would “minimize the tendency to add ancillary items to a “system.” Another commenter noted simply that “[a]ddition of this definition [of system] reflects the requirements of SAFETEA-LU.”

Of the reasons given in support of FTA’s proposal, several commenters noted that the concept of system end products has long precedent in FTA-funded procurements for both rolling stock and manufactured products. These

commenters also stated that nothing in SAFETEA-LU or its legislative history indicates that Congress intended to preclude a system as an end product. Referring to the legislative history of SAFETEA-LU, one of these commenters pointed out that Congress specifically rejected at least two proposals that would have effectively treated all identifiable items or discrete elements of a system procurement as end products. According to the commenter, Congress rejected these proposals so as not to substantially alter current FTA practice. Rather, SAFETEA-LU instructed FTA to develop a rule that would cure potential abuses without eliminating system procurements, or fundamentally change the agency’s long-standing Buy America practices.

This commenter endorsed FTA’s proposed definition of “system,” which employs a functional test to make clear that a system is an end product only where the system provides a “clearly defined function.” The commenter felt FTA’s definition “protects against the bundling of a host of unrelated independent functions into a ‘super system’ that would undermine the Buy America rules.” The commenter agreed with another comment which recommended FTA provide some examples (based on FTA precedents) of “super systems” that would not qualify as end products. Furthermore, the commenter stated that for manufactured items, requiring the end product, “and all components” be of U.S. manufacture, would ensure that substantial processing and labor all occur in the United States.

A third commenter, who also endorsed FTA’s proposed definition of system, recommended that FTA make clear in its regulatory guidance that if products in a particular application, which must necessarily perform on an integrated basis with other products constitute a portion of the same acquisition, then the products together constitute a system end product. The commenter offered the following examples of “high-end systems” that should be referenced as end products: (1) Communication based train control systems; (2) automatic train supervision systems; (3) passenger information and communication systems; (4) CCTV (closed circuit television) systems; (5) traction power systems; (6) automatic interlocking systems; (7) access control systems; (8) intelligent video systems; and (9) intrusion detection systems. Such systems may be covered by performance warranties for the system as a whole. The commenter stated, however, that discrete elements of a system may also be covered by

warranties, which are intended to ensure a level of functionality in a degraded mode that results from the failure of another product in the same system. The commenter stated that the existence of such “separable warranties” should not defeat an end product characterization. The commenter recommended FTA consider such warranty information as an indication that a system is an end product.

The above commenter also recommended FTA not make any distinction between open architecture and proprietary systems. The commenter stated the key question to consider is whether products perform and operate on an integrated basis. The intellectual property rights, if any, which pertain to products is a separate legal question that does not necessarily relate to integration of system equipment.

Another commenter recommended a two-pronged approach to defining “system,” in order to provide a ceiling on what may be bundled into a particular end product and to discourage any gamesmanship that sidesteps the Buy America requirements. First, the commenter stated the representative listing of products in Appendix A of the current 49 CFR part 661 should include proper end products, whether or not referred to as “systems.” Second, the commenter recommended the definition of “system” be expanded to provide guidance on what is *not* a proper end product. For example, “an entire transit ‘system’” that includes stations, track work, and vehicles, would constitute an impermissibly broad end product system according to the commenter. The commenter added that providing such “negative definitions” of system in the rule would prove more instructive than any positive definition and would reinforce the ceiling on bundling. Another commenter fully concurred with these comments.

In similar fashion, one commenter recommended FTA develop a “list of high level systems or end products that are commonly purchased and require that systems or end products on this list must be treated as end products for the purpose of meeting Buy America requirements even if the contract calls for a higher level system of which two or more listed items would be components.” To meet these criteria, the commenter recommended that the end product definition be revised to read: “The following is a list of items * * * that are representative end products subject to the requirements of Buy America as end products even if they

are to be acquired by a grantee as part of a larger overall project.” The commenter stated that adoption of its recommendation would prevent a grantee from acquiring a “transportation system” of trains, buses, and fare collection equipment, and treating these major items as components of system procurement. The commenter also suggested that based on its recommendations, FTA would have “no reason” to distinguish between proprietary and open architecture systems.

Another commenter similarly recommended against creation of “super system” end products that do not meet the Buy America requirements. Such a situation could lead to foreign “dumping” of manufactured products into the U.S. transit market.

C. FTA Response

FTA agrees with the majority of commenters who recommended FTA should continue its longstanding practice of including a “system” as a definable end product. Based on the plain language of SAFETEA-LU and its legislative history, FTA also agrees with those commenters who stated that by requiring FTA to develop a rule to “ensure that major system procurements are not used to circumvent the Buy America requirements,” Congress did not intend to expressly prohibit the designation of system end products. Rather, SAFETEA-LU instructs FTA to develop a rule that would cure potential abuses, without eliminating system procurements or drastically changing FTA’s long-standing Buy America practices. FTA proposes to contain the potential for abuse by defining a “system” as the minimum set of components and interconnections needed to perform all of the functions specified by the grantee in its procurement. All second and subsequent system elements proposed by the supplier to meet the site capacity specified by the grantee would be additional end products applied to the original system. In addition, the second and subsequent sites in a procurement addressing multiple geographic sites would be additional end products applied to the original system.

Furthermore, as FTA explained in the NPRM, and as commenters subsequently noted, the concept of system end products is of long standing at FTA, and is a concept well grounded in Federal public contract law. *See* FTA’s Buy America regulation at 49 CFR 661.11(r), which addresses “[i]f a system is being procured as an end product” (emphasis added). *See also*, *Brown Boveri Corp.*, B-187252, 56

Comp. Gen. 596, May 10, 1997 (a Government Accountability Office (GAO) case involving the Buy American Act, where the end product of the procurement was a sodium pump-drive system in a nuclear power plant); *Matter of: Dictaphone Corp.*, B-191,383, May 8, 1978, 78-1 CPD 343 (GAO decision under the Buy American Act where the end product of the procurement was a “Central Dictation System,” and the various elements of the system, such as transcribers and recorders were components of the system, rather than separate end products); and *Bell Helicopter Textron, Inc. v. Adams*, 493 F. Supp. 824, 833 (D.D.C. 1980) (the court ruled that the contract end product under the Buy American Act was a helicopter “system” consisting of five components).

D. FTA Proposal

For the foregoing reasons, FTA proposes to retain the application of a “system” in the definition of “end product.” FTA agrees with a commenter who noted FTA’s proposed definition will “protect against the bundling of a host of unrelated independent functions into a ‘super system’ that would undermine the Buy America rules.” Most importantly, as FTA explained in the NPRM, FTA will carefully review system procurements in Buy America cases to determine whether an integrated system actually exists, and, if so, which items of equipment constitute the system. This review process will further serve to avoid the problem of “super systems.” FTA already employs a longstanding model to determine if a system is “too large” and must be broken down into separate, multiple end products. Thus, the concerns expressed by commenters that an end product system could be so large, and incorporate so many different levels of equipment such as stations, track, vehicles, fare collection equipment, etc., so as to circumvent the requirements of Buy America, are adequately addressed. Under FTA’s Buy America methodology, if a purported end product is too large, *i.e.*, composed of what FTA traditionally considers as separate end products such as structures, vehicles, fare collection equipment, etc., FTA will break it down into constituent end products. This reflects FTA’s understanding that a single procurement may indeed contain multiple end products, each of which must independently meet the requirements of Buy America. Nonetheless, FTA is mindful that heightened scrutiny of Buy America requirements is warranted in the area of system procurements.

In response to FTA's request for comment on whether different Buy America requirements should apply to open architecture versus proprietary system end products, one commenter recommended FTA not make any distinction between the two. The commenter stated that the key question to consider is whether products perform and operate on an integrated basis. The intellectual property rights, if any, which pertain to products is a separate legal question that does not necessarily relate to integration. FTA agrees with these comments, and will not implement a distinction in regulation between open architecture versus proprietary system end products.

FTA received many helpful comments on its proposed definition of "system" to further refine it. For example, commenters suggested FTA should consider whether performance warranties apply to an integrated system (regardless of whether components are separately warranted); whether products perform on an integrated basis with other products in a system, or are operated independently of associated products in the system; or whether transit agencies routinely procure a product separately (other than as replacement or spare parts). Based on these suggestions, FTA seeks comments on its proposal to revise the definition of "system" in 49 CFR 661.3.

4c. Representative List of End Products

To comply with the SAFETEA-LU requirement to include a "representative list" of end products, FTA sought comment on a proposed list of representative end products. As FTA explained in the first NPRM, the proposed list is not meant to be all-inclusive. Rather, it describes general "representative" categories of end products.

A. Comments Received

FTA received thirteen substantive comments on this issue. Of these, nine commenters proposed their own lists of end products, components, or subcomponents, which were often extensive and reflected particular industries. Comments offering such lists may be viewed online at <http://dms.dot.gov/> or physically in the DOT's Docket Management Facility, *supra*, Docket Number 23082, entries: 3-4, 9, 11-13, 16, and 21-22.

Two comments, which were identical, stated FTA's representative list "in Appendix A can quickly be outdated by technology (e.g., the current list refers to wheelchair lifts, but most buses now use ramps)." A third commenter suggested that for "manufactured end products,"

FTA clarifies whether "infrastructure projects" include "[a]luminum and elastomeric/non-metal products." A fourth commenter stated FTA's proposed list of end products is "far from comprehensive and is itself subject to interpretation." The commenter noted that for construction procurements, by including "lifts, hoists and elevators" as end products along with building structures, the question is raised as to the status of "building components such as roofs, HVAC equipment, etc."

B. Commenter Proposals

One commenter stated FTA's proposed representative list was overly broad, without instructional value, and, therefore, insufficient. Instead, the commenter recommended FTA implement a "comprehensive" list of representative end products, components, and subcomponents in Appendix A to 49 CFR part 661. The commenter further stated that Appendix A should be "regularly supplemented as new or changing end products, components, sub-components, and manufacturing processes enter the marketplace." Such proposed supplemental changes should be posted for public comment, prior to final decision. The commenter also suggested that the list of items in Appendix A should consist of concrete examples, rather than mere descriptive terms. The commenter proposed a new version of Appendix A, which can be found in the docket at entry number 21.

Three commenters disagreed with the proposal that FTA adopt a "comprehensive" list of end products, components, and subcomponents to be constantly updated. These commenters felt that attempting to identify a "comprehensive list" from the universe of potential end products, components, and subcomponents typically acquired in transit procurements, and then constantly updating this list, is unrealistic and burdensome to grantees. In substantially similar statements, two commenters noted that the previous commenter was unable to achieve consensus from its membership on this issue, or on its proposed "comprehensive list."

Instead of a "comprehensive list," the three commenters agreed with FTA's inclusion of a "representative" list of end products in Appendix A. The commenters supported the suggestion FTA include some "illustrative" examples of end products in Appendix A. Commenters stated that these examples should be drawn from published FTA decisions.

C. FTA Response and Proposal

FTA agrees with the commenters who recommended FTA implement a "representative" list of end products rather than a "comprehensive" list as some commenters suggested for two reasons. First, SAFETEA-LU requires the Secretary to "develop a list of *representative* items that are subject to the Buy America requirements" (emphasis added). By use of the term "representative" rather "comprehensive," FTA believed that Congress did not intend that the list be exhaustive. Second, FTA agrees that it would be unrealistic to develop a comprehensive list and keep it "constantly updated" as some commenters suggested. The examples of "comprehensive" lists offered by commenters, which were often very lengthy, highly detailed, and seldom uniform, exemplify the difficulty of creating such a list.

FTA believes it is impractical to attempt to produce an exhaustive "comprehensive" list of every conceivable end product, component, and subcomponent in the transit industry. Instead, the better approach is to develop a representative list that is not meant to be all-inclusive. An example of this practical approach are the representative lists of typical bus and rail car components found in Appendices B and C to 49 CFR 661.11. FTA's proposed representative list of end products is similarly reflective of the broad scope of transit end products with which Buy America is concerned.

Several commenters recommended FTA provide "illustrative" examples of typical end products. In fact, FTA believes that its proposed list accurately reflects the type of end products FTA typically reviews in its Buy America practices. For example, FTA recently reviewed a procurement for a "hybrid-electric shuttle bus." Rather than enumerate this specific vehicle type in the regulation, a "hybrid-electric shuttle bus" is clearly a "vehicle," and, thus, a rolling stock end product within the meaning of 49 CFR 661.3 and the proposed representative list of end products in Appendix A. Thus, FTA believes it is unnecessary to enumerate every conceivable type of bus in the list of end products, whether the bus is a trolley replica, hybrid-electric, or standard diesel model, as one commenter recommended.

In another example from an actual procurement that underwent Buy America review, "manganese steel frogs" are a type of special track-work, and thus, a steel end product. Again, FTA sees no need to specifically add the

term “manganese steel frog” or even “frog” to the list of representative end products, as this type of product is already covered under the term “track-work.” In short, FTA’s proposed representative list of general end products is intended to cover innumerable designations of specific items.

FTA seeks comments on its proposal to add an Appendix A to 49 CFR 661.1 to include a representative list of end products.

5. Definition of “Final Assembly”

In the first NPRM, FTA sought comment on its proposal to amend the definition of “final assembly” in 49 CFR part 661 for rolling stock procurements; to incorporate the “minimum requirements” of final assembly for rail cars and buses as stated in the March 18, 1997, Dear Colleague letter, C–97–03 (incorporated as section 3035 of the Transportation Equity Act for the 21st Century (TEA–21) (Pub. L. 105–178)); and to further clarify those requirements. FTA based its proposed definition on its March 18, 1997, Dear Colleague letter.

A. Comments Received and Commenter Proposals

FTA received nine comments on this issue. One comment, which three other comments endorsed, recommended several changes to FTA’s proposed definition, to make it consistent with the lists of typical components for rail cars and buses in 49 CFR 661.11(b) and (c). The comment proposed the following revisions to FTA’s proposed rule (the commenter’s proposed inserted text is underlined; proposed deletions are in brackets):

Rail Cars: In the case of the manufacture of a new, remanufactured, or overhauled rail car, final assembly would typically include, as a minimum, [the following operations:] installation and interconnection of the *typical Rail Car Components listed in 661.11 (c), including but not limited to the following items:* car bodies or shells, *car-body wiring, car-borne power plants, if any,* propulsion control equipment, propulsion cooling equipment, *friction* brake equipment, energy sources for auxiliary *equipment* and controls, heating and air conditioning *equipment, interior and exterior lighting equipment, coupler equipment and coupler control system,* communications equipment, pneumatic and electrical systems, door and door control systems, passenger seats, passenger and cab interiors, destination signs, wheelchair lifts, or other equipment required to permit handicapped access to the rail car, motors, wheels, axles, [and] gear [units]boxes or integrated motor/gear units, suspensions, truck frames and chassis. *Final Assembly activities shall also include the inspection and verification of all installation*

and interconnection work; and the in-plant testing of the [stationary product] rail car to verify all functions. *In the case of articulated vehicles, the interconnection of the car bodies or shells shall also be included as work to be performed at the final assembly site.*

Buses: In the case of a new, remanufactured, or overhauled bus, final assembly would typically include, at a minimum, the installation and interconnection of the *typical Bus Components listed in 661.11 (b), including but not limited to the following items:* car bodies or shells, the engine and transmission (drive train), axles, *propulsion control system, axles,* chassis, and wheels, including the cooling and braking systems; the installation and interconnection of the heating and air conditioning equipment; the installation of pneumatic and electrical systems, door systems, passenger seats, passenger grab rails, destination signs, wheelchair lifts; and road testing. *Final Assembly activities shall also include final inspection, repairs and preparation of the vehicles for delivery. In the case of articulated vehicles, the interconnection of the car bodies or shells shall also be included as work to be performed at the final assembly site.*

Two other comments, which are identical, recommended the following changes to the Bus section of FTA’s proposed definition by: (1) Moving the word “chassis” just after the word “shells;” (2) replace the words “suspensions, steering mechanisms and wheels,” where chassis had been; (3) replace the words “(drive train)” by “(propulsion components, including inverters and controllers) and energy storage device (if used)” —to accommodate hybrid electric buses; and (4) replace “wheelchair lift” to “wheelchair lift/ramp”—to accommodate low floor bus components. Another commenter recommended FTA’s proposed reference to “motors” and “gear units” be modified to read “motors, gear units or integrated motor/gearbox.”

Additionally, a commenter noted that the March 18, 1997, Dear Colleague letter contained the following provision, which the commenter recommended should be added to the proposed definition of final assembly in Appendix D of 49 CFR 661.11:

If a manufacturer’s final assembly processes do not include all the activities that are typically considered the minimum requirements, it can request a Federal Transit Administration (FTA) determination of compliance. FTA will review these requests on a case-by-case basis to determine compliance with Buy America.

This commenter also found the following language in FTA’s proposed definition to be ambiguous: “installation and interconnection of car bodies or

shells.” The commenter felt that this language could be interpreted to mean that various sections of the car body or bus shell are to be assembled at the final assembly location. The commenter recommended FTA either delete the language or replace it with the phrase, “the installation and interconnection of intercar or bus articulations or coupling systems.” The commenter suggested that the term “suspensions, frames and chassis” should be clarified. The commenter also recommended that the term “door control systems” replace the current “door systems.” Finally, the commenter recommended FTA consider a previously rescinded Dear Colleague letter issued on September 25, 1997, C–97–18, as it raised “valid issues concerning the need for flexibility in determining compliance with final assembly requirements.”

B. FTA Response and Proposal

FTA concurs with the comment, which FTA quoted in full above, recommending several changes to FTA’s proposed definition of “final assembly” for rail cars and buses. FTA notes that several of the proposed changes were also mentioned by other commenters, such as using the terms “door control systems” and “integrated motor/gear units” in lieu of the designations proposed in the first NPRM. In addition, FTA agrees that the definition of final assembly should refer back to 49 CFR 661.11(b) and (c) for the bus and rail car components that must be incorporated into the end product at the final assembly location.

FTA also agrees with the comment recommending that the following language from the March 18, 1997, Dear Colleague Letter should be added to the definition of “final assembly:”

If a manufacturer’s final assembly processes do not include all the activities that are typically considered the minimum requirements, it can request a Federal Transit Administration (FTA) determination of compliance. FTA will review these requests on a case-by-case basis to determine compliance with Buy America.

FTA, however, disagrees with the commenter who stated that the phrase “installation and interconnection of car bodies or shells” is ambiguous. FTA also declines to adopt the language of a previously rescinded Dear Colleague letter of September 25, 1997, C–97–18, as the commenter suggested.

Based on the above, FTA seeks comments on its proposal to adopt Appendix D to 49 CFR 661.11 per the above commenter’s recommendation.

6. Communication, Train Control, and Traction Power Equipment

FTA sought comment on three substantive proposals to the Buy America requirements for rolling stock in 49 CFR 661.11. In the first of these proposals, FTA sought comment on whether it should continue to find that the items of communication equipment listed in 49 CFR 661.11 include wayside equipment, *i.e.*, communication equipment that is not in or on a vehicle, but nevertheless subject to the rolling stock standard. FTA also sought comment on whether the items of train control, communication, and traction power equipment listed in 49 CFR 661.11(t), (u), and (v) should be deleted and whether any new items should be added to these lists to reflect new technology.

In addition, FTA sought comment on whether the term "communication equipment" should be clarified in the Buy America regulations to reflect continuing changes in technology and advances in systems integration. In particular, FTA posed the question whether "communication equipment" should be limited to equipment whose primary function is communication "with or between people" versus "machine to machine" interface.

A. Comments Received

FTA received eight comments on these three proposals. Three commenters urged FTA not to modify its interpretation of communication equipment listed in 49 CFR 661.11 as including wayside equipment. No commenter opposed this interpretation.

Two commenters, who submitted identical comments, agreed with FTA's proposal that "communication equipment" should be limited to equipment whose primary function is to facilitate communication "with or between people" versus "machine to machine" interface. Three commenters opposed this proposal. These commenters argued that such a distinction is unnecessary, ineffective, or illogical. Several commenters pointed out that many communications networks often support both capabilities; and that it cannot be said whether equipment primarily supports one purpose or the other.

B. Commenter Proposals

One commenter recommended that FTA change or delete the following listed items in 49 CFR 661.11(t), (u), and (v): Under 49 CFR 661.11(v)(2), "Primary AC transformer rectifiers" be changed to "Primary AC Rectifier Transformers;" the language "at central

control" be deleted from 49 CFR 661.11(v)(4), which states "Traction power console and CRT display system at central control;" and the language "Power rail" be deleted from 49 CFR 661.11(v)(17), which states "Power rail insulators." The commenter also recommended that FTA delete the following pieces of equipment entirely in section 661.11(v): (9) Facility step down transformers; (10) Motor control centers (facility use only); (21) Connectors, tensioners, and insulators for overhead power wire systems; and (22) Negative drainage boards.

The above commenter and another recommended that the following items be added to the lists of equipment in 49 CFR 661.11(t), (u), and (v), as follows:

49 CFR 661.11(t) [train control equipment]: (1) Propulsion Control Systems; (2) Cab Signaling; (3) ATO Equipment; (4) ATP Equipment; (5) Wayside Transponders; (6) Trip Stop Equipment; (7) Wayside Magnets; (8) Cab Displays; (9) Speed Measuring Devices; (10) Car Axle Counters; and (11) Communication Based Train Control (CBTC).

49 CFR 661.11(u) [communication equipment]: (1) Antennas; (2) Wireless Telemetry Equipment; (3) Passenger Information Displays; (4) Communications Control Units; (5) Communication Control Heads; (6) Wireless Intercar Transceivers; (7) Multiplexers; (8) SCADA Systems; (9) LED Arrays; (10) [APTA added] Screen Displays such as LEDs and LCDs; (11) Fiber-optic transmission equipment; (12) Frame or cell based multiplexing equipment; and (13) Communication system network elements.

49 CFR 661.11(v) [traction power equipment]: (1) Surge Arrestors; (2) Protective Relaying; and (3) Bimetallic Power Transmission System (BPTS) Equipment.

One commenter recommended that the following items be added to the list of traction power equipment in 49 CFR 661.11(v): Main transformers, transfer switches, bonds, and power rail.

Another commenter suggested the following items be added to the list of communications equipment in 49 CFR 661.11(u): (1) Fiber Optic Transmission Equipment; (2) Frame or cell-based multiplexing equipment; and (3) Communication system network elements. This commenter also recommended that aluminum conducting rail, which is referred to as Bimetallic Power Transmission System (BPTS), be added to the list of traction power equipment in 49 CFR 661.11(v).

A final commenter proposed various miscellaneous "corrections and clarification" on such issues as (1)

FTA's Buy America Web site be binding; (2) a standard "tariff exemption" form be added to 49 CFR 661.11; (3) spare parts be 60% domestic; (4) a U.S. components' domestic manufacturing costs count toward a vehicle; (5) administrative and overhead costs be counted towards components; (6) the general requirements of § 661.5 not apply to remanufactured or overhauled vehicles; (7) manufacturers not be required to provide recipients with hard copies of Buy America calculations; and (8) grantees not be allowed to require both 49 CFR 661.5 and 661.11 requirements on rolling stock contract. FTA views these comments to be non-responsive.

C. FTA Response

FTA agrees with the commenters who recommended that FTA continue its longstanding interpretation that items of communication equipment listed in 49 CFR 661.11 include wayside equipment, and, thus, are subject to the rolling stock standard. FTA notes that no commenter opposed this interpretation.

FTA also concurs with the commenters who argued that "communication equipment" should not be limited to equipment whose primary function is to facilitate communication "with or between people" versus "machine to machine" interface. FTA finds commenters' argument particularly convincing that communication networks frequently support both capabilities (*i.e.*, human to human interaction and machine to machine interface) either directly or indirectly and that it cannot always be said whether communication equipment primarily supports one purpose or the other. FTA's review of prior Buy America decisions involving communication equipment support these conclusions. Therefore, FTA will not make such a distinction in the Buy America regulations at this time. FTA will continue to carefully scrutinize, on a case-by-case basis, whether technology may properly be characterized as "communication equipment" within the meaning of the rolling stock provisions of 49 U.S.C. 5323(j) and 49 CFR 661.11.

Regarding proposed changes to train control, communication, and traction power equipment in 49 CFR 661.11(t), (u), and (v), respectively, FTA notes that only one commenter recommended deleting enumerated items. FTA declines to do so, absent a specific showing as to why specific items of equipment should be deleted from the lists in 49 CFR 661.11.

However, FTA agrees to add certain items of equipment, as recommended by several commenters. With respect to two

proposed items of equipment, "Propulsion Control Systems" and "Cab Displays," FTA believes the former functions more as part of traction power equipment, rather than as train control equipment. With respect to "Cab Displays," this type of equipment is already an integral part of a vehicle, and does not need to be separately listed.

D. FTA Proposal

Accordingly, FTA seeks comments on its proposal to amend 49 CFR 661.11(t), (u), and (v), respectively, by adding the following: (t) *train control equipment*; cab signaling, ATO equipment, ATP equipment, wayside transponders, trip stop equipment, wayside magnets, speed measuring devices, car axle counters, communication based train control (CBTC); (u) *communication equipment*; antennas, wireless telemetry equipment, passenger information displays, communications control units, communication control heads, wireless inter-car transceivers, multiplexers, SCADA systems, LED arrays, screen displays such as LEDs and LCDs, fiber-optic transmission equipment, frame or cell based multiplexing equipment, communication system network elements; and (v) *traction power equipment*; propulsion control systems, surge arrestors, protective relaying.

FTA notes that several commenters recommended that aluminum composite conducting rail, otherwise known as Bimetallic Power Transmission (BPTS) Equipment, which is a combination of an aluminum conductor and a stainless steel abrasion-resistant cap, be considered as traction power equipment, and added to the list of items at 49 CFR 661.11(v). FTA's current regulation at 49 CFR 661.11(w) states that "[t]he power or third rail is not considered traction power equipment and is thus subject to the requirements of 49 U.S.C. 5323(j) and the requirements of 49 CFR 661.5." Regardless whether BPTS equipment is made primarily from aluminum, steel, or some other material, 49 CFR 661.11(w) expressly precludes it from being considered as traction power equipment if it is used as the "power or third rail". If BPTS third rail is not made primarily of steel, it would be treated as a "manufactured product" under 49 CFR 661.5(d).

7. Statutory Update

Section 3023 of SAFETEA-LU amended 49 U.S.C. 5323(j)(6) (as redesignated by SAFETEA-LU) by striking "Intermodal Surface Transportation Efficient Act of 1991 (Public Law 102-240, 105 Stat. 1914)" and inserting "Federal Public

Transportation Act of 2005". This SNPRM proposes to amend 49 CFR 661.18 to conform to this statutory change.

XI. Regulatory Analyses and Notices

A. Statutory/Legal Authority for This Rulemaking

This SNPRM is authorized under the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) (Pub. L. 109-59), which amended section 5323(j) and (m) of title 49, United States Code and required FTA to revise its regulations with respect to Buy America requirements.

B. Executive Order 12866 and DOT Regulatory Policies and Procedures

This SNPRM is a nonsignificant regulatory action under section 3(f) of Executive Order 12866 and, therefore, was not reviewed by the Office of Management and Budget. This SNPRM is also nonsignificant under the Regulatory Policies and Procedures of the Department of Transportation (44 FR 11034, Feb. 26, 1979). This SNPRM imposes no new compliance costs on the regulated industry; it merely clarifies terms existing in the Buy America regulations and adds terms consistent with SAFETEA-LU.

C. Executive Order 13132

This SNPRM has been analyzed in accordance with the principles and criteria contained in Executive Order 13132 ("Federalism"). This SNPRM does not include any regulation that 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. Therefore, the consultation and funding requirements of Executive Order 13132 do not apply.

D. Executive Order 13175

This SNPRM has been analyzed in accordance with the principles and criteria contained in Executive Order 13175 ("Consultation and Coordination with Indian Tribal Governments"). Because this SNPRM does not have tribal implications and does not impose direct compliance costs, the funding and consultation requirements of Executive Order 13175 do not apply.

E. Regulatory Flexibility Act and Executive Order 13272

The Regulatory Flexibility Act (5 U.S.C. 601-611) requires each agency to analyze regulations and proposals to assess their impact on small businesses and other small entities to determine

whether the rule or proposal will have a significant economic impact on a substantial number of small entities. This SNPRM imposes no new costs. Therefore, FTA certifies that this proposal does not require further analysis under the Regulatory Flexibility Act. FTA requests public comment on whether the proposals contained in this SNPRM have a significant economic impact on a substantial number of small entities.

F. Unfunded Mandates Reform Act of 1995

This SNPRM does not propose unfunded mandates under the Unfunded Mandates Reform Act of 1995. If the proposals are adopted into a final rule, it will not result in costs of \$100 million or more (adjusted annually for inflation), in the aggregate, to any of the following: State, local, or Native American tribal governments, or the private sector.

G. Paperwork Reduction Act

This SNPRM proposes no new information collection requirements.

H. 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 may be used to cross-reference this action with the Unified Agenda.

I. 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. There are no significant environmental impacts associated with this SNPRM.

J. 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 661

Grant programs-transportation, Public transportation, Reporting and recordkeeping requirements.

Accordingly, for the reasons described in the preamble, 49 CFR part 661 of the Code of Federal Regulations is proposed to be amended as follows:

PART 661—BUY AMERICA REQUIREMENTS—SURFACE TRANSPORTATION ASSISTANCE ACT OF 1982, AS AMENDED

1. The authority citation for part 661 continues to read as follows:

Authority: 49 U.S.C. 5323(j) (formerly sec. 165, Pub. L. 97-424; as amended by sec.337, Pub. L. 100-17; sec.1048, Pub. L. 102-240; sec.3020(b), Pub. L. 105-178; and sec. 3023(i) and (k), Pub. L. 109-59); 49 CFR 1.51.

2. Revise § 661.3 to read as follows:

§ 661.3 Definitions.

As used in this part:

Act means the Surface Transportation Assistance Act of 1982 (Pub. L. 97-424), as amended.

Administrator means the Administrator of FTA, or designee.

Component means any article, material, or supply, whether manufactured or unmanufactured, that is directly incorporated into the end product at the final assembly location.

Contractor means a party to a third party contract other than the grantee.

End product means any vehicle, structure, product, article, material, supply, or system, which directly incorporates constituent components at the final assembly location, that is acquired for public use under a Federally-funded third party contract, and which is ready to provide its intended end function or use without any further manufacturing or assembly change(s). A list of representative end products is included at appendix A to this section.

FTA means the Federal Transit Administration.

Grantee means any entity that is a recipient of FTA funds.

Manufactured product means an item produced as a result of the manufacturing process.

Manufacturing process means the application of processes to alter the form or function of materials or of elements of the product in a manner adding value and transforming those materials or elements so that they represent a new end product functionally different from that which would result from mere assembly of the elements or materials.

Negotiated procurement means a contract awarded using other than sealed bidding procedures.

Rolling stock means transit vehicles such as buses, vans, cars, railcars, locomotives, trolley cars and buses, and ferry boats, as well as vehicles used for support services.

System means a machine, product, or device, or a combination of such equipment, consisting of individual components, whether separate or interconnected by piping, transmission devices, electrical cables or circuitry, or by other devices, which are intended to contribute together to a clearly defined function. In determining whether a system constitutes an end product, or is instead made up of independent end products, the Administrator will consider all appropriate factors on a case-by-case basis. Such factors may include whether performance warranties apply to an integrated system (regardless of whether components are separately warranted); whether products perform on an integrated basis with other products in a system, or are operated independently of associated products in the system; or whether transit agencies routinely procure a product separately (other than as replacement or spare parts).

United States means the several States, the Commonwealth of Puerto Rico, the District of Columbia, Guam, American Samoa, the U.S. Virgin Islands, and the Commonwealth of the Northern Mariana Islands.

Appendix A to § 661.3—End Products

The following is a list of representative end products that are subject to the requirements of Buy America. This list is representative, not exhaustive.

(1) Rolling stock end products: All individual items identified as rolling stock in § 661.3 (e.g., buses, vans, cars, railcars, locomotives, trolley cars and buses, ferry boats, as well as vehicles used for support services); train control, communication, and traction power equipment that meets the definition of end product at § 661.3 (e.g., a communication or traction power system).

(2) Steel and iron end products: Items made primarily of steel or iron such as structures, bridges, and track work, including running rail, contact rail, and turnouts.

(3) Manufactured end products: Infrastructure projects not made primarily of steel or iron, including structures (terminals, depots, garages, and bus shelters), ties and ballast; contact rail not made primarily of steel or iron; fare collection equipment; computers; information, security, and data processing equipment; mobile lifts, hoists, and elevators.

3. In § 661.7:

a. Revise paragraph (b) and add new paragraph (c)(3) to read as set forth below; and

b. Amend appendix A to § 661.7 by removing paragraphs (b) and (c) and adding new paragraph (b) to read as set forth below.

§ 661.7 Waivers.

* * * * *

(b) Under the provision of section 165(b)(1) of the Act, the Administrator may waive the general requirements of section 165(a) if the Administrator finds that their application would be inconsistent with the public interest. In determining whether the conditions exist to grant this public interest waiver, the Administrator will consider all appropriate factors on a case-by-case basis, unless a general exception is specifically set out in this part. When granting a public interest waiver, the Administrator shall issue a detailed written statement justifying why the waiver is in the public interest. The Administrator shall publish this justification in the Federal Register, providing the public with a reasonable time for notice and comment of not more than seven calendar days.

(c) * * *

(3) After contract award, the Administrator may grant a non-availability waiver under this paragraph, in any case in which a bidder or offeror originally certified compliance with the Buy America requirements in good faith, but can no longer comply with its certification. The Administrator will grant a non-availability waiver only if the grantee provides sufficient evidence that the original certification was made in good faith and that the item to be procured cannot now be obtained domestically due to commercial impossibility or impracticability. In determining whether the conditions exist to grant a post-award non-availability waiver, the Administrator will consider all appropriate factors on a case-by-case basis.

* * * * *

Appendix A to § 661.7—General Waivers

* * * * *

(b) Under the provisions of § 661.7 (b) and (c) of this part, a general public interest waiver from the Buy America requirements applies to microprocessors, computers, microcomputers, or software, or other such devices, which are used solely for the purpose of processing or storing data. This general waiver does not extend to a product or device which merely contains a microprocessor or microcomputer and is not used solely for the purpose of processing or storing data.

4. Amend § 661.11 by removing and reserving paragraph (s), adding paragraphs (t)(14) through (t)(22), (u)(18)

through (u)(30), and (v)(28) through (30), and adding a new Appendix D, to read as follows:

§ 661.11 Rolling stock procurements.

* * * * *

(t) * * *

- (14) Cab Signaling;
- (15) ATO Equipment;
- (16) ATP Equipment;
- (17) Wayside Transponders;
- (18) Trip Stop Equipment;
- (19) Wayside Magnets;
- (20) Speed Measuring Devices;
- (21) Car Axle Counters;
- (22) Communication Based Train

Control (CBTC).

(u) * * *

- (18) Antennas;
- (19) Wireless Telemetry Equipment;
- (20) Passenger Information Displays;
- (21) Communications Control Units;
- (22) Communication Control Heads;
- (23) Wireless Intercar Transceivers;
- (24) Multiplexers;
- (25) SCADA Systems;
- (26) LED Arrays;
- (27) Screen Displays such as LEDs and LCDs for communication systems;
- (28) Fiber-optic transmission equipment;
- (29) Fiber-optic transmission equipment;
- (30) Frame or cell based multiplexing equipment; 13) Communication system network elements.

(v) * * *

- (28) Propulsion Control Systems;
- (29) Surge Arrestors;
- (30) Protective Relaying.

* * * * *

Appendix D to § 661.11—Minimum Requirements for Final Assembly

(a) *Rail Cars*: In the case of the manufacture of a new, remanufactured, or overhauled rail car, final assembly would typically include, as a minimum, installation and interconnection of the typical Rail Car Components listed in § 661.11, Appendix C, including but not limited to the following items: car bodies or shells, chassis, carbody wiring, car-borne power plants or power pick-up equipment, energy management and storage devices, articulation equipment, propulsion control equipment, propulsion cooling equipment, friction brake equipment, energy sources for auxiliary equipment and controls, heating and air conditioning equipment, interior and exterior lighting equipment, coupler equipment and coupler control system, communications equipment, pneumatic systems, electrical systems, door and door control systems, passenger seats, passenger interiors, cab interiors, destination signs, wheelchair lifts (or other equipment required to permit handicapped access to the rail car), motors, wheels, axles, gear boxes or integrated motor/gear units, suspensions, truck frames and chassis. Final Assembly activities shall also include the inspection and verification of all installation and interconnection work; and the in-plant testing of the rail car to verify all functions. In the case of articulated vehicles, the interconnection of the car bodies or shells shall be included as work to be performed by the manufacturer as part of vehicle delivery.

(b) *Buses*: In the case of a new, remanufactured, or overhauled bus, final assembly would typically include, at a minimum, the installation and interconnection of the typical Bus Components listed in § 661.11, Appendix B, including but not limited to the following items: car bodies or shells, the engine and

transmission (drive train), axles, energy management and storage devices, articulation equipment, propulsion control system, chassis, and wheels, cooling system, and braking systems; the installation and interconnection of the heating and air conditioning equipment; the installation of pneumatic system and the electrical system, door systems, passenger seats, passenger grab rails, destination signs, wheelchair lifts or ramps and other equipment required to make the vehicle accessible to persons with disabilities, and road testing. Final Assembly activities shall also include final inspection, repairs and preparation of the vehicles for delivery. In the case of articulated vehicles, the interconnection of the car bodies or shells shall be included as work to be performed by the manufacturer as part of vehicle delivery.

(c) If a manufacturer's final assembly processes do not include all the activities that are typically considered the minimum requirements, it can request a Federal Transit Administration (FTA) determination of compliance. FTA will review these requests on a case-by-case basis to determine compliance with Buy America.

§ 661.18 [Amended]

5. Amend § 661.18 introductory text by removing "the Intermodal Surface Transportation Efficiency Act of 1991" and in its place add, "the Federal Public Transportation Act of 2005".

Issued in Washington, DC this 22nd day of November, 2006.

James S. Simpson,
Administrator.

[FR Doc. E6-20166 Filed 11-29-06; 8:45 am]

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RULES GOING INTO EFFECT NOVEMBER 30, 2006**AGRICULTURE DEPARTMENT****Rural Utilities Service**

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- Alaska; fisheries of Exclusive Economic Zone—
- Gulf of Alaska groundfish; published 10-31-06

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Air quality implementation plans; approval and promulgation; various States:

- California; published 10-31-06

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- St. Louis River, Duluth, MN; published 11-13-06

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Endangered and threatened species:

- Critical habitat designations—
- Fender's blue butterfly, Kincaid's lupine, and Willamette daisy; published 10-31-06

INTERIOR DEPARTMENT**Surface Mining Reclamation and Enforcement Office**

Permanent program and abandoned mine land reclamation plan submissions:

- New Mexico; published 11-30-06

SECURITIES AND EXCHANGE COMMISSION

Investment companies:

- Eligible portfolio company; definition; published 10-31-06

SMALL BUSINESS ADMINISTRATION

Organization, functions, and authority delegations:

- Disaster Assistance Office; reorganization; published 10-31-06

Small business size standards and HUBZone program:

- Small Business Innovation Research Program and miscellaneous amendments; correction; published 11-30-06

COMMENTS DUE NEXT WEEK**AGENCY FOR INTERNATIONAL DEVELOPMENT**

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- Mentor-Protege Program; comments due by 12-8-06; published 11-22-06 [FR E6-19707]

AGRICULTURE DEPARTMENT**Agricultural Marketing Service**

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AGRICULTURE DEPARTMENT**Animal and Plant Health Inspection Service**

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- Tuberculosis in cattle and bison—
- State and zone designations; comments due by 12-4-06; published 10-3-06 [FR E6-16299]

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- Pine shoot beetle; comments due by 12-4-06; published 10-3-06 [FR E6-16278]

AGRICULTURE DEPARTMENT**Rural Housing Service**

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- Annual guarantee fee; due date change; comments due by 12-4-06; published 10-4-06 [FR E6-16399]

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- Georgia

Eastman Kodak Co.; x-ray film, color paper, digital media, inkjet paper, entertainment imaging, and health imaging; Open for comments until further notice; published 7-25-06 [FR E6-11873]

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NACCO Materials Handling Group, Inc.; forklift truck manufacturing facility; comments due by 12-4-06; published 9-18-06 [FR E6-15479]

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- China; export and reexport controls revisions and clarification; new authorization validated end-user; comments due by 12-4-06; published 7-6-06 [FR E6-10504]

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- Guatemala and Bahrain; comments due by 12-4-06; published 10-4-06 [FR E6-16418]

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- Semiconductor manufacturing; comments due by 12-4-06; published 10-19-06 [FR E6-17224]

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- Class I ozone depleting substances; essential use allowances allocation (CY 2007);

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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>.

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(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.

S. 435/P.L. 109-370

Lower Farmington River and Salmon Brook Wild and Scenic River Study Act of 2005 (Nov. 27, 2006; 120 Stat. 2643)

S. 819/P.L. 109-371

Pactola Reservoir Reallocation Authorization Act of 2005 (Nov. 27, 2006; 120 Stat. 2644)

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Fort McDowell Indian Community Water Rights Settlement Revision Act of 2006 (Nov. 27, 2006; 120 Stat. 2650)

S. 3880/P.L. 109-374

Animal Enterprise Terrorism Act (Nov. 27, 2006; 120 Stat. 2652)

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