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Federal Register
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Tuesday, December 26, 2006

Presidential Documents

Title 3—

The President

Memorandum of December 21, 2006

Provision of Aviation Insurance Coverage for Commercial Air Carrier Service in Domestic and International Operations

Memorandum for the Secretary of Transportation

By the authority vested in me as President by the Constitution and laws of the United States, including 49 U.S.C. 44302, *et seq.*, and 3 U.S.C. 301, I hereby:

1. determine that continuation of U.S.-flag commercial air service is necessary in the interest of air commerce, national security, and the foreign policy of the United States;

2. approve provision by the Secretary of Transportation (Secretary) of insurance or reinsurance to U.S.-flag air carriers against loss or damage arising out of any risk from the operation of an aircraft in the manner and to the extent provided in Chapter 443 of 49 U.S.C.:

(a) until August 31, 2007;

(b) after August 31, 2007, but no later than December 31, 2007, when the Secretary determines that such insurance or reinsurance cannot be obtained on reasonable terms and conditions from any company authorized to conduct an insurance business in a State of the United States; and

3. delegate to the Secretary the authority vested in me by 49 U.S.C. 44306(c) to extend this determination for additional periods beyond August 31, 2007, but no later than December 31, 2007, when the Secretary finds that the continued operation of aircraft to be insured or reinsured is necessary in the interest of air commerce or the national security, or to carry out the foreign policy of the United States Government.

You are directed to bring this determination immediately to the attention of all air carriers within the meaning of 49 U.S.C. 40102(2), and to arrange for its publication in the **Federal Register**.

THE WHITE HOUSE,
Washington, December 21, 2006.

[FR Doc. 06–9891
Filed 12–22–06; 8:45 am]
Billing code 4910–62–M

Rules and Regulations

Federal Register

Vol. 71, No. 247

Tuesday, December 26, 2006

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 1218

[Doc. No. FV–06–0215; FV–03–701]

Blueberry Promotion, Research, and Information Order; Amendment No. 2 to Change the Name of the U.S.A. Cultivated Blueberry Council and Increase Membership; Correction

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Correcting Amendments.

SUMMARY: The Agricultural Marketing Service published in the **Federal Register** on August 7, 2006, a final rule that changed the title of the U.S.A. Cultivated Blueberry Council (USACBC) to the ''U.S. Highbush Blueberry Council'' (Council) and added a member and alternate to represent the state of Washington. However, inaccurate amendatory language was used to make the change to the Council's name. In addition, an incorrect acronym used in § 1218.78 prevented its removal and replacement and a heading preceding § 1218.40 in the final rule was published with a repetitive word. This document corrects the error.

DATES: Effective on September 6, 2006.

FOR FURTHER INFORMATION CONTACT: Deborah S. Simmons, Research and Promotion Branch, FV, AMS, USDA, Stop 0244, 1400 Independence Avenue, SW., Room 0635–S, Washington, DC 20250–0244, telephone (202) 720–9915, fax (202) 205–2800, or e-mail *deborah.simmons@usda.gov.*

SUPPLEMENTARY INFORMATION:

List of Subjects in 7 CFR Part 1218

Administrative practice and procedure, Advertising, Blueberries, Consumer information, Marketing agreements, Blueberry promotion Reporting and recordkeeping requirements.

■ Accordingly, 7 CFR part 1218 is corrected by making the following correcting amendments:

PART 1218—BLUEBERRY PROMOTION, RESEARCH, AND INFORMATION

Subpart A—Blueberry Promotion, Research, and Information Order

■ 1. The authority citation for part 1218 continues to read as follows:

Authority: 7 U.S.C. 7401–7425.

■ 2. The undesignated center heading preceding § 1218.40 is revised to read as follows:

U.S. HIGHBUSH BLUEBERRY COUNCIL

§§ 1218.42, 1218.43, 1218.44, 1218.45, 1218.46, 1218.47, 1218.48, 1218.50, 1218.51, 1218.52, 1218.53, 1218.54, 1218.55, 1218.56, 1218.60, 1218.62, 1218.70, 1218.73, 1218.75, and 1218.77 [Amended]

■ 3. In §§ 1218.42, 1218.43, 1218.44, 1218.45, 1218.46, 1218.47, 1218.48, 1218.50, 1218.51, 1218.52, 1218.53, 1218.54, 1218.55, 1218.56, 1218.60, 1218.62, 1218.70, 1218.73, 1218.75, and 1218.77, ''USACBC'' is removed and the word ''Council'' is added in its place.

§ 1218.78 [Amended]

■ 4. In § 1218.78, ''USABC'' is removed and the word ''Council'' is added in its place.

Dated: December 20, 2006.

Lloyd C. Day,

Administrator, Agricultural Marketing Service.

[FR Doc. 06–9862 Filed 12–22–06; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 1250

[Docket No. PY–05–005]

Section 610 Review; Egg Research and Promotion Program

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Confirmation of regulations.

SUMMARY: This document summarizes the results of an Agricultural Marketing Service's (AMS) review of the Egg Research and Promotion Program (conducted under the Egg Research and Promotion Order), under the criteria contained in Section 610 of the Regulatory Flexibility Act (RFA). Based upon its review, AMS has determined that the Order should be continued without change.

ADDRESSES: Interested persons may obtain a copy of the review. Requests for copies should be sent to Angela C. Snyder, Chief, Research and Promotion, Office of the Deputy Administrator, Poultry Programs, Agricultural Marketing Service, U.S. Department of Agriculture, 1400 Independence Avenue, SW.; STOP 0256, Room 3932–South; Washington, DC 20250–0256; (202) 720–0623; fax (202) 720–5631; e-mail: *angie.snyder@usda.gov*.

FOR FURTHER INFORMATION CONTACT: Angela C. Snyder, Chief, Research and Promotion, Office of the Deputy Administrator, Poultry Programs, Agricultural Marketing Service, U.S. Department of Agriculture, 1400 Independence Avenue, SW.; STOP 0256, Room 3932–South; Washington, DC 20250–0256; (202) 720–0623; fax (202) 720–5631; e-mail: *angie.snyder@usda.gov*.

SUPPLEMENTARY INFORMATION: The Egg Research and Consumer Information Act of 1974, as amended (7 U.S.C. 1201 *et seq.*), authorized the Egg Research and Promotion Order (7 CFR part 1250), which is industry-operated and funded with oversight by USDA. The Egg Research and Promotion Order's objective is to establish, finance, and carry out promotion, research, and education programs to improve, maintain, and develop markets for eggs, egg products, spent fowl, and products of spent fowl.

The Program became effective on August 1, 1976, when the Egg Research and Promotion Order (7 CFR part 1250) was implemented. In accordance with the legislation, the American Egg Board was established, and assessments at 5 cents per 30-dozen case of commercial eggs soon began to be levied. Since that time, assessments have fluctuated from 2½ cents per 30-dozen case of eggs to the current 10 cents per 30-dozen case approved by producer referendum in 1994.

Assessments collected under this program are used to carry out promotion, research, and education programs to improve, maintain, and develop markets for eggs, egg products, spent fowl, and products of spent fowl.

The Program is administered by the American Egg Board, which is composed of egg producers and egg producer representatives. Each of the 18 members and their specific alternates are appointed by the Secretary of Agriculture from nominations submitted by certified producer organizations. The Secretary annually appoints half of the Board, nine members and nine alternates, for 2-year terms.

AMS published in the **Federal Register** (64 FR 8014) its plan to review certain regulations, including the Egg Research and Promotion Order, under the criteria contained in section 610 of the Regulatory Flexibility Act (5 U.S.C. 601–612). An updated plan was published in the **Federal Register** on August 14, 2003 (68 FR 48573).

A notice of review and request for written comments on the Order was published in the February 6, 2006, issue of the **Federal Register** (71 FR 6021). No comments were received.

The review was undertaken to determine whether the Order should be continued without change, amended, or rescinded (consistent with the objectives of the Egg Research and Consumer Information Act of 1974) to minimize the impacts on small entities. In conducting this review, AMD considered the following factors: (1) The continued need for the Order; (2) the nature of complaints or comments received from the public concerning the Order; (3) the complexity of the Order; (4) the extent to which the Order overlaps, duplicates, or conflicts with other Federal rules, and, to the extent feasible, with State and local governmental rules; and (5) the length of time since the Order has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the Order.

Currently, there are approximately 260 producers covered under the Order. AMS provides Federal oversight of the egg research and promotion program. The Order is not unduly complex, and AMS has not identified regulations that duplicate, overlap, or conflict with the Order. Over the years, regulation changes have been made to address industry operation changes and to improve program administration. The goal of these evaluations is to assure that the Order and the regulations implemented under it fit the needs of the industry and are consistent with the Act. Based upon the review, AMS has determined that the Order should be continued without change. AMS plans to continue working with the egg industry in maintaining an effective program.

Dated: December 19, 2006.

Lloyd C. Day,

Administrator, Agricultural Marketing Service.

[FR Doc. E6–22039 Filed 12–22–06; 8:45 am]

BILLING CODE 3410–02–P

FEDERAL RESERVE SYSTEM

12 CFR Part 203

[Regulation C; Docket No. R–1275]

Home Mortgage Disclosure

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Final rule; staff commentary.

SUMMARY: The Board is publishing a final rule amending the staff commentary that interprets the requirements of Regulation C (Home Mortgage Disclosure). The staff commentary is amended to increase the asset-size exemption threshold for depository institutions based on the annual percentage change in the Consumer Price Index for Urban Wage Earners and Clerical Workers. The adjustment from $35 million to $36 million reflects the increase of that index by 3.32 percent during the twelve-month period ending in November 2006. Thus, depository institutions with assets of $36 million or less as of December 31, 2006, are exempt from collecting data in 2007.

DATES: Effective January 1, 2007.

FOR FURTHER INFORMATION CONTACT: John C. Wood, Kathleen C. Ryan, or Dan S. Sokolov, Counsels, Division of Consumer and Community Affairs, at (202) 452–3667; for users of Telecommunications Device for the Deaf (TDD) only, contact (202) 263–4869.

SUPPLEMENTARY INFORMATION: The Home Mortgage Disclosure Act (HMDA; 12 U.S.C. 2801 *et seq.*) requires most mortgage lenders located in metropolitan areas to collect data about their housing-related lending activity. Annually, lenders must report that data to their federal supervisory agencies and make the data available to the public. The Board's Regulation C (12 CFR part 203) implements HMDA.

Prior to 1997, HMDA exempted depository institutions with assets totaling $10 million or less, as of the preceding year-end. Provisions of the Economic Growth and Regulatory Paperwork Reduction Act of 1996 (codified at 12 U.S.C. 2808(b)) amended HMDA to expand the exemption for small depository institutions. The statutory amendment increased the asset-size exemption threshold by requiring a one-time adjustment of the $10 million figure based on the percentage by which the Consumer Price Index for Urban Wage Earners and Clerical Workers (CPIW) for 1996 exceeded the CPIW for 1975, and provided for annual adjustments thereafter based on the annual percentage increase in the CPIW. The one-time adjustment increased the exemption threshold to $28 million for 1997 data collection.

Section 203.2(e)(1)(i) of Regulation C provides that the Board will adjust the threshold based on the year-to-year change in the average of the CPIW, not seasonally adjusted, for each twelve-month period ending in November, rounded to the nearest million. Pursuant to this section, the Board has adjusted the threshold annually, as appropriate.

For 2006, the threshold was $35 million. During the twelve-month period ending in November 2006, the CPIW increased by 3.32 percent. As a result, the exemption threshold is raised to $36 million. Thus, depository institutions with assets of $36 million or less as of December 31, 2006, are exempt from collecting data in 2007. An institution's exemption from collecting data in 2007 does not affect its responsibility to report data it was required to collect in 2006.

Final Rule

Under the Administrative Procedure Act, notice and opportunity for public comment are not required if the Board finds that notice and public comment are unnecessary. 5 U.S.C. 553(b)(3)(B). The amendment in this notice is technical. Comment 2(e)–2 to section 203.2 of the regulation is amended to implement the increase in the exemption threshold. This amendment merely applies the formula established by Regulation C for determining adjustments to the exemption threshold. For these reasons, the Board has determined that publishing a notice of proposed rulemaking and providing opportunity for public comment are unnecessary. Therefore, the amendment is adopted in final form.

List of Subjects in 12 CFR Part 203

Banks, Banking, Federal Reserve System, Mortgages, Reporting and recordkeeping requirements.

■ For the reasons set forth in the preamble, the Board amends 12 CFR part 203 as follows:

PART 203—HOME MORTGAGE DISCLOSURE (REGULATION C)

■ 1. The authority citation for part 203 continues to read as follows:

Authority: 12 U.S.C. 2801–2810.

■ 2. In Supplement I to part 203, under section 203.2 Definitions, *2(e) Financial Institution*, paragraph 2. is revised.

Supplement I to Part 203—Staff Commentary

* * * * *

§ 203.2 Definitions.

2(e) Financial Institution

* * * * *

2. *Adjustment of exemption threshold for depository institutions.* For data collection in 2007, the asset-size exemption threshold is $36 million. Depository institutions with assets at or below $36 million as of December 31, 2006 are exempt from collecting data for 2007.

* * * * *

By order of the Board of Governors of the Federal Reserve System, acting through the Director of the Division of Consumer and Community Affairs under delegated authority, December 20, 2006.

Jennifer J. Johnson,

Secretary of the Board.

[FR Doc. E6–22027 Filed 12–22–06; 8:45 am]

BILLING CODE 6210–01–P

FARM CREDIT ADMINISTRATION

12 CFR Parts 652 and 655

RIN 3052–AC17

Federal Agricultural Mortgage Corporation Funding and Fiscal Affairs; Federal Agricultural Mortgage Corporation Disclosure and Reporting Requirements; Risk-Based Capital Requirements

AGENCY: Farm Credit Administration.

ACTION: Final rule.

SUMMARY: The Farm Credit Administration (FCA, Agency, we) is amending regulations governing the Federal Agricultural Mortgage Corporation (Farmer Mac or the Corporation) risk-based capital stress test (RBCST or model). We are making these amendments in response to changing financial markets, new business practices and the evolution of the loan portfolio at Farmer Mac, as well as continued development of industry best practices among leading financial institutions. The rule modifies regulations in 12 CFR part 652, subpart B. The rule is intended to more accurately reflect risk in the model in order to improve the model's output—Farmer Mac's regulatory minimum risk-based capital level. The rule also clarifies Farmer Mac's reporting requirements in § 655.50(c).

DATES: *Effective Date:* This regulation will be effective the later of 30 days after publication in the **Federal Register** during which time either or both Houses of Congress are in session, or March 31, 2007. We will publish a notice of the effective date in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT:

Joseph T. Connor, Associate Director for Policy and Analysis, Office of Secondary Market Oversight, Farm Credit Administration, McLean, VA 22102–5090, (703) 883–4280, TTY (703) 883–4434;

or

Rebecca S. Orlich, Senior Counsel, Office of the General Counsel, Farm Credit Administration, McLean, VA 22102–5090, (703) 883–4020, TTY (703) 883–4020.

SUPPLEMENTARY INFORMATION:

I. Purpose

The purpose of this rule is to revise the risk-based capital (RBC) regulations that apply to Farmer Mac. Our proposed rule was published in the **Federal Register** on November 17, 2005.[1] The final rule makes the following changes to the RBCST:

1. Establishes specific proxy values for loans with missing or anomalous or ambiguous data. In the final rule, the Debt-to-Assets ratio (DA) proxy value is 0.50, the Loan-to-Value ratio (LTV) remains at 0.70, and the Debt Service Coverage ratio (DSC) is 1.25.

2. Requires the application of known data on Long-term Standby Purchase Commitment (Standby) loans in the model.

3. Revises the estimate of future years' miscellaneous income to the annualized 3-year weighted average of the most recent quarterly miscellaneous income rate as a fraction of the current quarter's sum of cash, investments, guaranteed securities, and loans held for investment.

4. Revises the treatment of gain on sale of agricultural mortgage-backed securities (AMBS) by applying the 3-year gain rate factor to the most recent 4 quarters of AMBS sales.

5. Revises the method used to estimate operating expenses to a moving-average of operating expenses as a percent of non-program assets and on- and off-balance sheet program investments.

The proposed rule also included provisions related to improved estimates of the carrying costs of troubled loans by revising assumptions regarding Loan Loss Resolution Timing (LLRT), and related to adding a component to reflect counterparty risk. These two items are not included in the final rule. The Agency plans to address these issues in a future rulemaking.

In developing this rule, we considered the comments and recommendations pertaining to the RBCST in the Government Accountability Office (GAO) report entitled, ''Farmer Mac: Some Progress Made, but Greater Attention to Risk Management, Mission, and Corporate Governance is Needed.''[2] We also met with Farmer Mac representatives on several occasions prior to the development of the proposed rule and discussed possible Agency revisions to the RBCST.

II. Background

Our analysis of the RBCST has identified a need to update the model in response to changing financial markets, new business practices and the evolution of the loan portfolio at Farmer Mac, as well as continued development of industry best practices among leading financial institutions. Our goal is to ensure that the RBCST reflects changes in the Corporation's business structure and loan portfolio that have occurred since the model was originally developed by FCA, while complying with the statutory requirements and constraints on the model's design.

Our proposed rule was published in the **Federal Register** on November 17, 2005, and provided for a 90-day comment period to end on February 15, 2006. We later extended and reopened the comment period, which ended on May 17, 2006.[3]

III. Comments

We received seven comment letters on the proposed rule from the following: Farmer Mac, the Farm Credit Bank of Texas (FCBT), AgFirst Farm Credit Bank (AgFirst), U.S. AgBank FCB (U.S. AgBank), Sacramento Valley Farm Credit (Sac Valley), First Dakota National Bank (Dakota Mac), and AgStar

[1] 79 FR 69692. See the preamble to our proposed rule for a full discussion of our proposed changes.

[2] United States General Accounting Office, Farmer Mac: Some Progress Made, but Greater Attention to Risk Management, Mission, and Corporate Governance is Needed, GAO–04–116 (2003). At the time of the report's publication, the GAO was known as the General Accounting Office.

[3] In response to requests from commenters, we extended the original comment period to April 17, 2006 (71 FR 7446, Feb. 13, 2006), and subsequently reopened the comment period until May 17, 2006 (71 FR 24613, Apr. 26, 2006).

Financial Services, ACA (AgStar).[4] In general, the commenters agreed with FCA's objective to revise the RBCST to reflect Farmer Mac's actual business risks more accurately but asserted that our proposal would not achieve that objective. The commenters contended that the proposed changes would result in a risk-based capital requirement that is higher than it should be and would drive up the cost of doing business with Farmer Mac. Specific comments were primarily focused on two changes: (1) The proposed data proxy values for loans with missing data; and (2) the method of implementing the carrying cost of nonperforming loans. The latter provision is not included in this final rule.

IV. Summary of the Provisions of the Final Rule and FCA's Responses to Comments

We begin by summarizing and responding to general comments on the proposed rule and then provide a summary of specific comments on the proposed rule and FCA's responses to the comments.

A. General Comments

FCBT stated that its chief concern was that certain proposed changes appear to have been selected primarily for the purpose of increasing the risk-based capital requirement. FCBT and each of the other commenters criticized the proposed rule as not being based on Farmer Mac's actual underwriting practices and loss experience.

U.S. AgBank called the proposed regulation overly prescriptive and stated that it would be better for FCA to direct Farmer Mac to create an RBCST calculation process that complies with the statute, than to continue the FCA-designed risk-based capital model. U.S. AgBank also stressed the importance of a model that is statistically valid and not biased toward overly conservative assumptions, thereby avoiding artificial results that could result in unintended consequences. It asserted that such consequences could include the compromising of sound governance practices at Farmer Mac and of management's accountability to its shareholders. Finally, U.S. AgBank said that the model is too inflexible given the dynamic nature of agricultural finance and Farmer Mac's lines of business that include unique risk factors such as part-time farm loans.

Sac Valley, FCBT, and AgFirst also provided their general support for the comments submitted by Farmer Mac. Sac Valley stated its concurrence with FCA's objective of estimating risk-based capital in a way that reflects the risks of Farmer Mac's business and incorporates as much as possible best business practices.

[4] All of the commenters except Dakota Mac are Farm Credit institutions.

B. Proxy Data Values for Loans With Missing or Anomalous Loan Origination Data and for Standby Loans—Appendix A, Section 4.1 d.

1. FCA's Proposal

As noted in the preamble to the proposed rule, the RBCST model was designed to use loan origination data—specifically the loan amount, DA, LTV, and DSC to estimate the lifetime probability of default on the loans, which is then seasoned to reflect the current age of the loan. At the time the model was designed, Farmer Mac had complete origination data for most loans in its portfolio. In 1998, it had complete origination data on approximately 88 percent of Cash Window loans, excluding pre-1996 loans. For the remaining loans, state-level average loss rates estimated from the loans with complete data were applied to loans where data were missing.

Today, a significant proportion of Farmer Mac's current portfolio has incomplete or anomalous loan origination data, or has data that are not used in the model. Some data are missing because Farmer Mac has several programs whose underwriting standards do not require the collection of such data. These programs include part-time farm, seasoned and fast-track loans. In addition, the model treats unseasoned Standby loans for which loan origination data are available as if the loan data were missing. This means that, as of June 30, 2006, complete loan origination data were available, and used in the RBCST, on well under half of Farmer Mac's loan portfolio, excluding pre-1996 loans. We proposed to revise this part of the model to replace the application of state-level loss estimates with the application of specified proxy values to all loans with missing or anomalous data, and to use known data for unseasoned Standby loans when such data are known. The proxy values we proposed were a DA ratio of 0.60, an LTV ratio of 0.70, and a DSC ratio of 1.20. As we explained in the preamble to the proposed rule, we chose conservative proxy values directly related to Farmer Mac's underwriting standards on the ground that using conservative proxy data best preserves the theoretical and structural integrity of the RBCST.

2. Comments

Farmer Mac agreed that the use of proxy values could be appropriate in these circumstances. It asserted, however, that the proposed proxy values are flawed because they are ''inconsistent with Farmer Mac's underwriting standards for the vast majority of full-time farm loans, as well as with Farmer Mac's own risk exposure in actual practice''; that they are ''arbitrary, unsupported by any reasoned methodology, and based on'' an incorrect interpretation of the Act; that they are ''unacceptable because they do not correlate strongly, or even adequately, to Farmer Mac's actual core business and underwriting standards''; and that it knows of no requirement in the Act that the loans ''should, unto themselves, represent a worst-case scenario for the abuse of Farmer Mac underwriting discretion.'' Farmer Mac asserted that, ''if there is available information that would more closely approximate Farmer Mac's actual book of business, it should be utilized, as opposed to unrelated conservative proxy values.'' Farmer Mac raised a concern that the proposed proxy values ''likely will'' distort or misrepresent the risks of its business and ''create unintended incentives for or against particular classes of loans.''

Farmer Mac recommended that the proxy values be based instead on its historical loan data, using a statistical process for the imputation of missing data, or alternatively selecting cutoff percentiles. Farmer Mac described possible methodologies and stated its view that there was no reason to depart from the model's current method, which it characterized as most similar to treatment of data that are ''Missing Completely At Random,'' absent ''evidence that [the current method] is untenable.'' Farmer Mac also contended that two of the proxy values, DA and DSC, are not relevant to its underwriting standards for part-time farm loans and offered to work with FCA to develop an appropriate RBCST submodel for those loans.

The other commenters submitted comments that were very much in line with Farmer Mac's. They asserted that:

- The proxy values appear arbitrary and not supported in the preamble to the proposed rule by any defined methodology or evidence;
- The proxy values are not representative of the commenters' loan experience with Farmer Mac or with Farmer Mac's portfolio (as understood by the commenters) and are not representative of Farmer Mac's underwriting standards; and

• The proposal, by requiring Farmer Mac to hold capital in excess of actual risk, could cause Farmer Mac to increase fees and could harm the secondary agricultural loan market and the commenters' business with Farmer Mac.

The commenters recommended basing the proxy values on Farmer Mac historical loan data and using a ''well defined methodology'' to determine the values. In the section below, we address specific comments of Farmer Mac and other commenters.

3. Final Rule

In the final rule, we establish proxy values for the DA, LTV, and DSC ratios that are related to Farmer Mac's underwriting standards, but we have moderated them somewhat from the proposed rule. In the final rule, the DA ratio proxy value is 0.50, down from 0.60 in the proposed rule; the LTV ratio remains at 0.70, the same value as in the proposed rule; and the DSC ratio is 1.25, up from 1.20 in the proposed rule. Upon further review and consideration of the ranges of Farmer Mac's underwriting standards and the relative proportions of the various loan types in the portfolio, we have decided that these values are more appropriate to the underwriting standards for the loan types that make up the preponderance of Farmer Mac's portfolio. In our judgment, these proxy values are appropriate for application to loan programs that have different underwriting standards but account for a smaller proportion of the portfolio. We believe these values are still sufficiently conservative to maintain the theoretical integrity of the model while avoiding unintended consequences related to inappropriate incentives to underwrite more aggressively in reduced-documentation loan programs. We note that, if the relative proportions of various loan types with differing underwriting standards change over time, the Agency may consider further adjustment to the proxy values.

We disagree with many of the comments we received. To begin with, we do not believe our proposal is based on an incorrect interpretation of the Act or that it imposes ''worst-case'' proxy values. The Act provides FCA with significant discretion in establishing the RBCST. Section 8.32 of the Act states that the FCA (through the Director of the Office of Secondary Market Oversight (OSMO)) must, among other things, ''take into account appropriate distinctions based on various types of agricultural mortgage products, varying terms of Treasury obligations, and any other factors the Director considers appropriate * * *.''[5] The model uses, and will continue to use, Farmer Mac's ''actual book of business'' as represented by actual data. The incompleteness or non-use of loan origination data for what is now a significant portion of Farmer Mac's portfolio is an important factor in evaluating the reliability of the RBCST output. The Agency must decide how best to treat the loans whose data are not in the model. We believe the model's current treatment is no longer adequate to represent loan risk for such a large portion of the portfolio. Our choice of conservative proxy values takes into consideration not only the role of the FCA to provide for the general supervision of the safe and sound performance of Farmer Mac under section 8.11(a) of the Act, but also Farmer Mac's actual loan data and practices. We do not believe the proxy values represent a ''worst-case scenario.'' In setting the proxy values, we considered Farmer Mac's actual practice of accepting loans with ratios that are riskier than those permitted under its underwriting standards when the loan has compensating strengths in other ratios or risk indicators. A ''worst-case'' approach would have yielded proxy values much higher than the proposed DA and LTV and much lower than the DSC.

We considered Farmer Mac's suggestion to substitute values based on Farmer Mac's historical loan data for the missing data.[6] In our judgment, the historical data are not necessarily representative of the portion of the portfolio that is missing data, and they are not necessarily representative of Farmer Mac's future underwriting practices on loans for which they will not collect complete data. We do not agree with the underlying assumption of the comments that the historical loan data on full-time farm loans would correlate strongly with the loans missing data. In a circumstance where we cannot know the predictive value of the historical loan data, we do not agree that a valid statistical methodology is available to set the proxy levels. Moreover, as we have noted, the loans for which loan origination data are complete now represent a much smaller proportion of Farmer Mac's loan portfolio. Therefore, we concluded that using the historical data is not the best means to determine appropriate proxy values.

A statistical approach suggested by Farmer Mac is the SAS Proc MI multiple imputation (MI) procedure for developing consistent estimates of confidence limits around the mean of each individual underwriting variable for loans for which data existed. The implication is that these estimates would be appropriate for use as proxies in cases where the underwriting data were absent in individual loans. The specific process demonstrated assumes that the underwriting data are multivariate normal and that the missing elements may depend on the remaining observed variables, but not on their own values. The resampling method generates consistent estimates of the variances from which confidence limits around the statistics can be constructed.

The MI methods cited in the comment are most often used in efforts to avoid deletion of observations in data sets with partially missing data, but for which portions of the covariate data sets exist.[7] The use of no additional independent variables (e.g., age, loan size) which are observable across loans both with and without underwriting data implies: (i) No conditioning on additional variables was considered, and (ii) an assumption of equivalent distributions between those missing data and those not missing data.

We do not agree that the Farmer Mac-suggested method provides a reasonable method for identifying candidate proxy values for numerous reasons. First, we did not intend that the proxies represent mean values of the underwriting data in cases where the data exist, or as conditioned by the pattern of missing data from cases missing only a portion of the underwriting variables. We do not believe that this approach is reasonable given the stark differences in other characteristics of the subset of loans that do and do not have complete underwriting data. To emphasize this point, Table 1 is provided which summarizes key attributes of the loans grouped by whether the loan observation received at least one proxy value due to missing or anomalous data.

[5] 12 U.S.C. 2279bb–1(b)(1)(A).

[6] We note that the current version of the RBC model, through its application of average loss rates by state to loans with missing data, is similar to the approach recommended in the comment. The insufficiency of this approach and the significant proportion of loans that have incomplete data are, in fact, the conditions that prompted the development of this revision to the RBCST.

[7] For example, if multiple health factors/indicators individually contribute to incidence rates of a serious health problem, but not all variables are observed or collected on all individuals, MI procedures allow the use of the data with incomplete measures across the independent variables rather than excluding entire observations that are missing only portions of their independent variables.

TABLE 1

Data	No proxy data	At least 1 proxy	Combined
Average Age (in years)	5.83	11.83	9.16
Average Current Balance	$433,568	$164,542	$284,199
Average Original Balance	$570,119	$267,039	$401,842
Number of Loans	7,269	9,074	16,343

As shown in the table, the loans missing data are considerably older (rendering the cases where a portion of the underwriting data does exist to be less likely to be reliable), have much smaller original balances, and have correspondingly lower current balances. Standard tests of the equivalence of means strongly reject the hypothesis of equivalence of the means between the two groups of loans by age, original size, or current balance (p − value = 0.0000, all cases).

As an alternative to using an imputation methodology, Farmer Mac also suggested that percentile cutoffs of actual ratios in its portfolio of unseasoned standard full-time farm loans should be considered as an acceptable method to derive proxies, though less appropriate (in their view) than imputation of mean values. Farmer Mac asserted that the proposed proxy levels are statistical outliers.[8] In general, we have the same concern here as with the multiple imputation approach regarding basing proxy values on historical measurements of a potentially uncorrelated portfolio. The appropriateness of using a cutoff percentile depends on the congruence in the data between the set missing underwriting data and those with data. Moreover, the distribution around a given ''consistent'' percentile choice is not necessarily comparable across the three underwriting variables (*i.e.*, there may be only a small ''distance'' between the 95th percentile and the maximum D/A in the available data, while there is a large ''distance'' from the 95th percentile of the order-adjusted DSC to the most undesirable one in the data set).[9]

We would also note that average loss rates generated by the RBCST's Credit Loss Module (CLM) are not especially sensitive to the level of the proxy values. To illustrate this point, we provide the following data tables. Table 2A sets forth the average loss rates generated by the CLM as of June 30, 2006, under various LTV and DA proxy value combinations, keeping DSC constant at 1.25. The table indicates that the average loss rate across all combinations presented varies within a range of 27 basis points. Under the final rule's proxy values (0.50, 0.70, and 1.25, for DA, LTV, and DSC proxies, respectively) the table shows that at June 30, 2006 the average loss rate would have been 3.782 percent.

TABLE 2A

DSC proxy = 1.25	LTV proxies					
DA Proxies		0.60	0.65	0.70	0.75	0.80
	0.45	3.694%	3.706%	3.724%	3.748%	3.783%
	0.50	3.751%	3.764%	3.782%	3.807%	3.842%
	0.55	3.811%	3.824%	3.843%	3.869%	3.905%
	0.60	3.874%	3.888%	3.907%	3.934%	3.966%

Table 2B presents the calculated average loss rate across combinations of DCS and DA ratios, holding LTV constant. Under these combinations, the average loss rate varies within a range of 16 basis points.

TABLE 2B

LTV proxy = 0.70	DSC proxies					
DA Proxies		1.15	1.20	1.25	1.30	1.35
	0.45	3.736%	3.730%	3.724%	3.718%	3.712%
	0.50	3.794%	3.788%	3.782%	3.775%	3.769%
	0.55	3.856%	3.849%	3.843%	3.836%	3.830%
	0.60	3.921%	3.914%	3.907%	3.900%	3.894%

Table 2C presents the variation in the calculated average loss rate across combinations of DCS and LTV ratios, holding DA constant at the level in the final rule. Under these combinations, the average loss rate varies within a range of just 3 basis points.

[8] The proposed DA proxy equated to the 95th percentile of Farmer Mac's portfolio of unseasoned full-time farm loans, the proposed LTV proxy equated to some percentile in excess of the 90th percentile, and the proposed DSC proxy equated to some percentile in excess of the 5th percentile (or, for greater ease of comparison, its inverse—the 95th percentile). In the final rule, the proxy values would equate to the 91st, 90th, and 9th percentiles respectively, as of June 30, 2006. Although we did not base our proxy values on the percentile cutoffs, we believe the relationships of those values to the percentile cutoffs is appropriate.

[9] Farmer Mac contends that the proposed proxies represent outliers in the data. However, we note that its comment includes a table showing that the proxy values indicated by the 95th percentiles in the set of unseasoned Full-time Farm loans all exceed Farmer Mac's underwriting limits for such loans. Thus, the proxy values would not appear to be unreasonably conservative.

TABLE 2C

DA proxy = 0.50	DSC proxies					
LTV proxies	....	1.15	1.20	1.25	1.30	1.35
	0.60	3.763%	3.757%	3.751%	3.745%	3.739%
	0.65	3.776%	3.770%	3.764%	3.757%	3.751%
	0.70	3.794%	3.788%	3.782%	3.775%	3.769%
	0.75	3.820%	3.814%	3.807%	3.801%	3.795%

Rather than focusing on the distribution of underwriting ratios in the existing loan data sets through time, we instead chose proxy values that are near the conservative limits of the range of values that are acceptable to Farmer Mac under its underwriting standards for different types of loans (including, but not limited to, full-time farm loans). In addition, we took into consideration that Farmer Mac can accept underwriting ratios that exceed the stated ranges of its underwriting standards.[10] We intended that the proxy values be sufficiently conservative to avoid underestimating the risk in the portfolio, but not at the extremes of Farmer Mac's underwriting standards. This approach recognizes that Farmer Mac would be unlikely to underwrite loans at its underwriting limits in each ratio category. These values are acceptable to Farmer Mac for underwriting purposes, as demonstrated by both its policies and its practices. Therefore, we believe that the proxy values are realistic as well as conservative and reflect Farmer Mac's actual business practices.

Farmer Mac's comment that the proposed proxy values ''likely will'' distort or misrepresent the risks of its business, as well as create unintended incentives for or against particular classes of loans, did not make clear exactly what unintended incentives or what classes of loans Farmer Mac had in mind. We would agree that, on an individual loan basis, using proxy data will ''misrepresent'' the loan to the extent that the proxy values understate or overstate the level of actual risk in the loan. The problem of the likely inexactitude in the calculation is necessitated by, and a direct result of, the uncertainty created by the missing data. This uncertainty is itself one component of the risk in Farmer Mac's loan portfolio. We believe that applying conservative proxy values is a way to consider adequately the actual risk in the loan as well as the added risk associated with this uncertainty. With respect to unintended incentives, it is true that, however we decide to treat loans with missing data—for example, if we were to apply proxy values based on historical loan data or related to underwriting standards, or even if we entirely removed loans with missing data from the model—we could create incentives for Farmer Mac and its business partners to expand or contract one or more lines of business or to modify program requirements. Indeed, in the model's current treatment of loans with missing data, one could argue that using state-level loss estimates may have been a disincentive for Farmer Mac to collect loan origination data in some cases. We believe that the proxy values in the final rule will minimize any potential incentive not to collect loan origination data on the great majority of loans, without providing inappropriate incentives to continue or terminate worthy and needed loan products.

As we described above, Farmer Mac offered to work with FCA to develop an appropriate RBCST submodel for part-time farm loans since, in Farmer Mac's stated view, the DA and DSC ratios are ''not relevant'' to its underwriting standards for such loans.[11] FCA weighed the added complexity of a submodel against potential benefits in improved accuracy of the RBC model's output, as well as the potential disincentive that might be created to underwrite part-time farm business in the absence of such a submodel. By our calculation of Farmer Mac-submitted data, the part-time farm loan volume is a very small percentage of the total modeled portfolio as of June 30, 2006. We do not consider this amount to be substantial and, therefore, do not see a compelling reason to add complexity to the model by adding a submodel at this time. We could consider a submodel in the future if the Corporation's part-time farm loan volume grows. We believe that the selected proxy data values appropriately balance the risk of a disincentive to underwrite part-time loans with the risk of an inappropriate incentive to underwrite more loans of this type with risk characteristics that exceed those of the proxy values.

AgStar commented specifically that the proxy values would reflect an especially unrealistic risk estimate on seasoned loans. We disagree with the comment because the model's loan seasoning adjustment occurs after loss rates are estimated. Therefore, the risk in seasoned loans in Farmer Mac's portfolio would continue to be adjusted downward in accordance with Section 2.2 of Appendix A. We expect the impact of the seasoning adjustment to be similar in magnitude in the revised RBCST model regardless of whether the proxy values are applied. The reason is that the model recognizes substantial risk mitigation through its seasoning adjustment component. However, we note that when a loan's origination date is among the missing data, and therefore age is not determinable, the final rule will substitute the ''cut off'' date for the origination date. In such cases, if a loan were several years old and only recently taken into Farmer Mac's portfolio, the risk-mitigation of its true age could not be recognized. We believe our approach recognizes the risk created when a loan's origination date is not collected in a low-documentation loan program.

AgStar also noted that recent unseasoned loans placed in the Standby program are better quality than the proxy values would estimate. While AgStar may have good information to substantiate this claim, if these loan records do not contain that information, the Agency must address the resulting uncertainty (i.e., risk). If a primary lender consistently has such information on Standby loans, it could benefit from including these data in the loan data submitted under the Standby program regardless of whether such data are required under the Standby program.

C. Calculation of Miscellaneous Income and Gain on Sale of AMBS—Appendix A, Section 4.2(3)

Farmer Mac commented that more accurate moving average calculations of miscellaneous income and gain on sale of AMBS would be achieved by first

[10] We note Farmer Mac's actual practice of accepting loans with ratios that are outside of the ranges, as permitted under its underwriting standards when the loan has compensating strengths in other ratios or risk indicators.

[11] Notwithstanding Farmer Mac's assertion that the DA and DSC ratios are not relevant, not all part-time farm loans are missing those data in Farmer Mac's submission of the RBCST as of June 30, 2006.

calculating individual ratios, annualizing the ratios and then computing the moving average over the appropriate time horizon. We do not agree that Farmer Mac's suggested approach would be more accurate. Our approach provides a volume-weighted measure of miscellaneous income that is more accurate and generally less sensitive to variations in asset volumes than the Farmer Mac-suggested approach. Under Farmer Mac's suggested approach, each individual observation has the same weight regardless of the level of the relevant assets. The weighted average approach to AMBS avoids counting each undefined (0/0) ratio as an individual observation which would skew the average.

Similarly, in the case of gain on sale of AMBS, we believe our approach to generating the weighted average rate of gain is less potentially volatile than the Farmer Mac-suggested approach. Moreover, Farmer Mac's suggestion that the calculated amount be annualized would be incorrectly applied in this case, regardless of the method adopted, because the calculated rate is as applicable and appropriate on an annual basis as it is on a quarterly basis. To multiply the calculated rate by 4 would overstate the rate of gain.

D. Operating Expense Regression Equation—Appendix A, Section 4.2(3)

In the RBCST's operating expense regression equation, we proposed a change that would remove the dummy variable from the equation and include multiple variables to account for different business activities.

Farmer Mac agreed in principle with the extension of the independent variables in the regression and the elimination of the dummy variable but argued that the intent of the proposed regression was to provide marginal impacts of different activities to the operating expenses. It observed that the individual coefficient signs are not entirely consistent with expected relationships and offered two alternative proposals to enable projections of their operating expenses to be applied within the model. The first alternative proposed involves calculation of a simple average of recent operating expenses applied as a constant in the model. They refer to this approach as being analogous to that used to estimate MI rates and gains on AMBS rates.

The second approach offered by Farmer Mac involves a regression framework across similar expense categories as proposed by us, but expresses these in cost share form. Their proposed approach contains similar drawbacks as those Farmer Mac raised regarding FCA's proposed approach and suffers specific problems in expressing logarithms of values which may be zero at times.

In light of the recent evolution of their cost structures and changing relative scales of their program activities, we agree with the comment that an approach to accurately reflect their cost structures can be obtained from recent data and applied forward within the existing constructs of the model. Farmer Mac proposes the use of average expenses to reflect future experiences. We note that in periods of increasing costs, the recent average will have a negative bias, and during periods of decreasing costs, that there will be a positive bias. We accept the moving average application of expenses and agree that it is consistent with the spirit of the calculations of the rates for miscellaneous income and gains on sales of AMBSs. In specific application, we require that the operating expense rate be calculated as the average of operating expense rates calculated as the annualized expenses as shares of the sum of on-balance sheet assets and off-balance sheet program activities over the most recent 4 quarters inclusive of the current submission date. This average rate is applied to the current quarter's on-balance sheet assets and off-balance sheet program activities. That share will then be applied forward to the balances of the same categories throughout the 10-year period of the RBCST model.

E. Change to Disclosure Regulations

We proposed to clarify § 655.50(c) to state that Farmer Mac must provide FCA with copies of its substantive correspondence with the Securities and Exchange Commission (SEC). We received no comments on this proposal and adopt it without change in the final rule.

V. Issues Not Addressed in Final Rule

A. Carrying Costs of Troubled Loans—Appendix A, Section 4.2(3)

We proposed to improve estimates of carrying costs of troubled loans by revising the Loan Loss Resolution Timing to reflect that problem loans may take longer than the 1 year assumed in the existing model's loss-severity rate. Farmer Mac commented that it agreed with aspects of the proposed change but had concerns about some of the modifications, as well as the validity of certain assumptions we made.

The Agency has elected to address this revision in a future rulemaking out of a desire to review further the scaling factor applied to loan loss volume in order to estimate the amount of associated unpaid principal balance, and to review any new information that may be available from Farmer Mac regarding its actual loan resolution timing. The proposed scaling factor is derived from the average principal amortization of loans in the current portfolio and would be recalculated on a quarterly basis. While we received no comments on the scaling factor, we believe that the principal amortization of actual nonperforming loans at Farmer Mac might provide an opportunity to improve the estimate of unpaid principal balance associated with nonperforming loans during the LLRT period.

B. Spreadsheet Linkage for Funding Off-Balance Sheet Loans

This comment from Farmer Mac deals with a component of the revision dealing with the carrying cost of nonperforming loans. Because the Agency has elected to address this revision in a future rulemaking for reasons explained in ''A'' above, we do not address this comment here.

C. Adding a Component To Reflect Counterparty Risk—Appendix A, Section 4.1e.

The proposed rule's provisions related to the estimation of counterparty risk are not included in the final rule and will be addressed by the Agency in a future rulemaking. Specifically, while we received no comments on the approach to identifying or applying the counterparty risk component, we have elected to review the Office of Federal Housing Enterprise Oversight (OFHEO) haircut levels, confirm the applicability of the OFHEO haircut schedules for application to yields rather than individual cash flows, and consider the formal development of a calculation tool with fixed-category investment instrument definitions.

In the preamble to the proposed rule, we requested comment on potential methods to incorporate three specific risks into the model in future proposed regulations. The three risks are: The risk associated with the AgVantage portfolio; the risk of a stress-induced increase in Farmer Mac's cost of funds; and the counterparty risk associated with the derivatives portfolio and specifically the replacement cost of defaulted derivative contracts. However, we received no comments on these topics.

VI. Other Comments Received

A. Method of Historical Loss Estimation

Farmer Mac reiterated comments it made to our first rule implementing the RBCST that was published in the **Federal Register** on November 12, 1999. (*See* 64 FR 61740.) The comments criticize the methodology employed to quantify the worst-case historical benchmark loss experience, stating that it is unsubstantiated by actual loss experience. In this rulemaking, we proposed no changes related to this aspect of the RBC model and are, therefore, not adopting Farmer Mac's recommended changes in the final rule. However, we note that the Agency's position on this issue remains consistent with our response that was published in the final rule implementing the RBC model on April 12, 2001. (*See* 66 FR 19048.)

B. Spreadsheet Financial Statement Formats

In its comment letter, Farmer Mac asked us to update the RBCST's Balance Sheet and Income Statement categories. Farmer Mac commented that populating financial statement data has become time-consuming for its staff due to changes in its SEC reporting formats that are not reflected in the RBC model. While we would prefer to make the submission preparation process as efficient as possible, we have observed that Farmer Mac's financial statements have been changing format with relative frequency over recent years. For that reason, we hesitate to expend resources to modify the formats in the model if these could become outdated relatively soon. However, we agree that such updates should be done periodically in order to keep the formats reasonably close. For that reason, while we have made no changes to the financial statement formats in this rule, we would expect to make such changes in consultation with Farmer Mac through the technical change process (*i.e.*, without rulemaking).

VII. Technical Changes to the RBCST in the Final Rule

In section 4.2b(3)(E) of the Appendix, we have deleted specific guarantee fee values for post-1996 Farmer Mac I assets, pre-1996 Farmer Mac I assets, and Farmer Mac II assets because specific values are not applied in the stress test. The stress test applies quarterly updates, supplied by Farmer Mac, of the weighted average guarantee rates for each category of assets.

VIII. Impact of Final Rule Changes on Required Risk-Based Capital

The table below provides an indication of the impact of the revisions in the quarter ended June 30, 2006. Lines 1 through 4 present the impacts if only that revision were made to the current version and the column labeled "Difference" calculates the impact of that individual change for the quarter ended June 30, 2006, compared to the minimum requirement calculated using the currently active Version 1.25. Line 5 presents the impact of all of the revisions in Version 2.0 (the model as revised in this final rule).[12]

Calculated regulatory minimum capital	6/30/2006	Difference
RBCST Version 1.25 (calculated as of 6/30/2006)	67,660	
RBCST 2.0 Individual Change Impacts:		
(1) CLM Changes: Data Proxies and Standby Treatment	93,523	25,862
(2) Miscellaneous Income Treatment	59,932	−7,728
(3) Gain on Sale of AMBS	67,660	0
(4) Operating Expenses	95,297	27,637
(5) Total RBCST Version 2.0 Impact	113,431	45,771

As shown in the table, implementation of the data proxies and the revised operating expense estimation result in the greatest impact on the calculated risk-based capital requirements.

IX. Regulatory Flexibility Act

Pursuant to section 605(b) of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), FCA hereby certifies the rule will not have a significant economic impact on a substantial number of small entities. Farmer Mac has assets and annual income over the amounts that would qualify them as small entities. Therefore, Farmer Mac is not considered a "small entity" as defined in the Regulatory Flexibility Act.

List of Subjects

12 CFR Part 652

Agriculture, Banks, banking, Capital, Investments, Rural areas.

12 CFR Part 655

Accounting, Agriculture, Banks, banking, Accounting and reporting requirements, Disclosure and reporting requirements, Rural areas.

■ For the reasons stated in the preamble, parts 652 and 655 of chapter VI, title 12 of the Code of Federal Regulations are amended as follows:

PART 652—FEDERAL AGRICULTURAL MORTGAGE CORPORATION FUNDING AND FISCAL AFFAIRS

■ 1. The authority citation for part 652 continues to read as follows:

Authority: Secs. 4.12, 5.9, 5.17, 8.11, 8.31, 8.32, 8.33, 8.34, 8.35, 8.36, 8.37, 8.41 of the Farm Credit Act (12 U.S.C. 2183, 2243, 2252, 2279aa–11, 2279bb, 2279bb–1, 2279bb–2, 2279bb–3, 2279bb–4, 2279bb–5, 2279bb–6, 2279cc); sec. 514 of Pub. L. 102–552, 106 Stat. 4102; sec. 118 of Pub. L. 104–105, 110 Stat. 168.

■ 2. Revise subpart B to part 652 to read as follows:

Subpart B—Risk-Based Capital Requirements

Sec.
652.50 Definitions.
652.55 General.
652.60 Corporation board guidelines.
652.65 Risk-based capital stress test.
652.70 Risk-based capital level.
652.75 Your responsibility for determining the risk-based capital level.
652.80 When you must determine the risk-based capital level.
652.85 When to report the risk-based capital level.
652.90 How to report your risk-based capital determination.
652.95 Failure to meet capital requirements.
652.100 Audit of the risk-based capital stress test.
Appendix A—Subpart B of Part 652—Risk-Based Capital Stress Test

Subpart B—Risk-Based Capital Requirements

§ 652.50 Definitions.

For purposes of this subpart, the following definitions will apply:

[12] Please note that Farmer Mac announced on October 6, 2006, that it intends to restate certain financial results for several recent reporting periods. The calculations in the table could change based on the restatement.

Farmer Mac, Corporation, you, and your means the Federal Agricultural Mortgage Corporation and its affiliates as defined in subpart A of this part.

Our, us, or we means the Farm Credit Administration.

Regulatory capital means the sum of the following as determined in accordance with generally accepted accounting principles:

(1) The par value of outstanding common stock;

(2) The par value of outstanding preferred stock;

(3) Paid-in capital, which is the amount of owner investment in Farmer Mac in excess of the par value of stock;

(4) Retained earnings; and,

(5) Any allowances for losses on loans and guaranteed securities.

Risk-based capital means the amount of regulatory capital sufficient for Farmer Mac to maintain positive capital during a 10-year period of stressful conditions as determined by the risk-based capital stress test described in § 652.65.

§ 652.55 General.

You must hold risk-based capital in an amount determined in accordance with this subpart.

§ 652.60 Corporation board guidelines.

(a) Your board of directors is responsible for ensuring that you maintain total capital at a level that is sufficient to ensure continued financial viability and—provide for growth. In addition, your capital must be sufficient to meet statutory and regulatory requirements.

(b) No later than 65 days after the beginning of Farmer Mac's planning year, your board of directors must adopt an operational and strategic business plan for at least the next 3 years. The plan must include:

(1) A mission statement;

(2) A review of the internal and external factors that are likely to affect you during the planning period;

(3) Measurable goals and objectives;

(4) Forecasted income, expense, and balance sheet statements for each year of the plan; and,

(5) A capital adequacy plan.

(c) The capital adequacy plan must include capital targets necessary to achieve the minimum, critical and risk-based capital standards specified by the Act and this subpart as well as your capital adequacy goals. The plan must address any projected dividends, equity retirements, or other action that may decrease your capital or its components for which minimum amounts are required by this subpart. You must specify in your plan the circumstances in which stock or equities may be retired. In addition to factors that must be considered in meeting the statutory and regulatory capital standards, your board of directors must also consider at least the following factors in developing the capital adequacy plan:

(1) Capability of management;

(2) Strategies and objectives in your business plan;

(3) Quality of operating policies, procedures, and internal controls;

(4) Quality and quantity of earnings;

(5) Asset quality and the adequacy of the allowance for losses to absorb potential losses in your retained mortgage portfolio, securities guaranteed as to principal and interest, commitments to purchase mortgages or securities, and other program assets or obligations;

(6) Sufficiency of liquidity and the quality of investments; and,

(7) Any other risk-oriented activities, such as funding and interest rate risks, contingent and off-balance sheet liabilities, or other conditions warranting additional capital.

§ 652.65 Risk-based capital stress test.

You will perform the risk-based capital stress test as described in summary form below and as described in detail in Appendix A to this subpart. The risk-based capital stress test spreadsheet is also available electronically at *http://www.fca.gov.* The risk-based capital stress test has five components:

(a) *Data requirements.* You will use the following data to implement the risk-based capital stress test.

(1) You will use Corporation loan-level data to implement the credit risk component of the risk-based capital stress test.

(2) You will use Call Report data as the basis for Corporation data over the 10-year stress period supplemented with your interest rate risk measurements and tax data.

(3) You will use other data, including the 10-year Constant Maturity Treasury (CMT) rate and the applicable Internal Revenue Service corporate income tax schedule, as further described in Appendix A to this subpart.

(b) *Credit risk.* The credit risk part estimates loan losses during a period of sustained economic stress.

(1) For each loan in the Farmer Mac I portfolio, you will determine a default probability by using the logit functions specified in Appendix A to this subpart with each of the following variables:

(i) Borrower's debt-to-asset ratio at loan origination;

(ii) Loan-to-value ratio at origination, which is the loan amount divided by the value of the property;

(iii) Debt-service-coverage ratio at origination, which is the borrower's net income (on- and off-farm) plus depreciation, capital lease payments, and interest, less living expenses and income taxes, divided by the total term debt payments;

(iv) The origination loan balance stated in 1997 dollars based on the consumer price index; and,

(v) The worst-case percentage change in farmland values (23.52 percent).

(2) You will then calculate the loss rate by multiplying the default probability for each loan by the estimated loss-severity rate, which is the average loss of the defaulted loans in the data set (20.9 percent).

(3) You will calculate losses by multiplying the loss rate by the origination loan balances stated in 1997 dollars.

(4) You will adjust the losses for loan seasoning, based on the number of years since loan origination, according to the functions in Appendix A to this subpart.

(5) The losses must be applied in the risk-based capital stress test as specified in Appendix A to this subpart.

(c) *Interest rate risk.* (1) During the first year of the stress period, you will adjust interest rates for two scenarios, an increase in rates and a decrease in rates. You must determine your risk-based capital level based on whichever scenario would require more capital.

(2) You will calculate the interest rate stress based on changes to the quarterly average of the 10-year CMT. The starting rate is the 3-month average of the most recent CMT monthly rate series. To calculate the change in the starting rate, determine the average yield of the preceding 12 monthly 10-year CMT rates. Then increase and decrease the starting rate by:

(i) 50 percent of the 12-month average if the average rate is less than 12 percent; or

(ii) 600 basis points if the 12-month average rate is equal to or higher than 12 percent.

(3) Following the first year of the stress period, interest rates remain at the new level for the remainder of the stress period.

(4) You will apply the interest rate changes scenario as indicated in Appendix A to this subpart.

(5) You may use other interest rate indices in addition to the 10-year CMT subject to our concurrence, but in no event can your risk-based capital level be less than that determined by using only the 10-year CMT.

(d) *Cashflow generator.* (1) You must adjust your financial statements based on the credit risk inputs and interest rate risk inputs described above to generate pro forma financial statements for each year of the 10-year stress test. The cashflow generator produces these financial statements. You may use the cashflow generator spreadsheet that is described in Appendix A to this subpart and available electronically at *http://www.fca.gov.* You may also use any reliable cashflow program that can develop or produce pro forma financial statements using generally accepted accounting principles and widely recognized financial modeling methods, subject to our concurrence. You may disaggregate financial data to any greater degree than that specified in Appendix A to this subpart, subject to our concurrence.

(2) You must use model assumptions to generate financial statements over the 10-year stress period. The major assumption is that cashflows generated by the risk-based capital stress test are based on a steady-state scenario. To implement a steady-state scenario, when on- and off-balance sheet assets and liabilities amortize or are paid down, you must replace them with similar assets and liabilities. Replace amortized assets from discontinued loan programs with current loan programs. In general, keep assets with small balances in constant proportions to key program assets.

(3) You must simulate annual pro forma balance sheets and income statements in the risk-based capital stress test using Farmer Mac's starting position, the credit risk and interest rate risk components, resulting cashflow outputs, current operating strategies and policies, and other inputs as shown in Appendix A to this subpart and the electronic spreadsheet available at *http://www.fca.gov.*

(e) *Calculation of capital requirement.* The calculations that you must use to solve for the starting regulatory capital amount are shown in Appendix A to this subpart and in the electronic spreadsheet available at *http://www.fca.gov.*

§ 652.70 Risk-based capital level.

The risk-based capital level is the sum of the following amounts:

(a) *Credit and interest rate risk.* The amount of risk-based capital determined by the risk-based capital test under § 652.65.

(b) *Management and operations risk.* Thirty (30) percent of the amount of risk-based capital determined by the risk-based capital test in § 652.65.

§ 652.75 Your responsibility for determining the risk-based capital level.

(a) You must determine your risk-based capital level using the procedures in this subpart, Appendix A to this subpart, and any other supplemental instructions provided by us. You will report your determination to us as prescribed in § 652.90. At any time, however, we may determine your risk-based capital level using the procedures in § 652.65 and Appendix A to this subpart, and you must hold risk-based capital in the amount we determine is appropriate.

(b) You must at all times comply with the risk-based capital levels established by the risk-based capital stress test and must be able to determine your risk-based capital level at any time.

(c) If at any time the risk-based capital level you determine is less than the minimum capital requirements set forth in section 8.33 of the Act, you must maintain the statutory minimum capital level.

§ 652.80 When you must determine the risk-based capital level.

(a) You must determine your risk-based capital level at least quarterly, or whenever changing circumstances occur that have a significant effect on capital, such as exposure to a high volume of, or particularly severe, problem loans or a period of rapid growth.

(b) In addition to the requirements of paragraph (a) of this section, we may require you to determine your risk-based capital level at any time.

(c) If you anticipate entering into any new business activity that could have a significant effect on capital, you must determine a pro forma risk-based capital level, which must include the new business activity, and report this pro forma determination to the Director, Office of Secondary Market Oversight, at least 10-business days prior to implementation of the new business program.

§ 652.85 When to report the risk-based capital level.

(a) You must file a risk-based capital report with us each time you determine your risk-based capital level as required by § 652.80.

(b) You must also report to us at once if you identify in the interim between quarterly or more frequent reports to us that you are not in compliance with the risk-based capital level required by § 652.70.

(c) If you make any changes to the data used to calculate your risk-based capital requirement that cause a material adjustment to the risk-based capital level you reported to us, you must file an amended risk-based capital report with us within 5-business days after the date of such changes;

(d) You must submit your quarterly risk-based capital report for the last day of the preceding quarter not later than the last business day of April, July, October, and January of each year.

§ 652.90 How to report your risk-based capital determination.

(a) Your risk-based capital report must contain at least the following information:

(1) All data integral for determining the risk-based capital level, including any business policy decisions or other assumptions made in implementing the risk-based capital test;

(2) Other information necessary to determine compliance with the procedures for determining risk-based capital as specified in Appendix A to this subpart; and

(3) Any other information we may require in written instructions to you.

(b) You must submit each risk-based capital report in such format or medium, as we require.

§ 652.95 Failure to meet capital requirements.

(a) *Determination and notice.* At any time, we may determine that you are not meeting your risk-based capital level calculated according to § 652.65, your minimum capital requirements specified in section 8.33 of the Act, or your critical capital requirements specified in section 8.34 of the Act. We will notify you in writing of this fact and the date by which you should be in compliance (if applicable).

(b) *Submission of capital restoration plan.* Our determination that you are not meeting your required capital levels may require you to develop and submit to us, within a specified time period, an acceptable plan to reach the appropriate capital level(s) by the date required.

§ 652.100 Audit of the risk-based capital stress test.

You must have a qualified, independent external auditor review your implementation of the risk-based capital stress test every 3 years and submit a copy of the auditor's opinion to us.

Appendix A—Subpart B of Part 652—Risk-Based Capital Stress Test

1.0 Introduction

a. Appendix A provides details about the risk-based capital stress test (stress test) for Farmer Mac. The stress test calculates the risk-based capital level required by statute under stipulated conditions of credit risk and interest rate risk. The stress test uses loan-level data from Farmer Mac's agricultural mortgage portfolio or proxy data as described in section 4.1 d.(3) below, as well as quarterly Call Report and related information to generate pro forma financial statements and calculate a risk-based capital requirement. The stress test also uses historic agricultural real estate mortgage performance data, relevant economic variables, and other inputs in its calculations of Farmer Mac's capital needs over a 10-year period.

b. Appendix A establishes the requirements for all components of the stress test. The key components of the stress test are: Specifications of credit risk, interest rate risk, the cashflow generator, and the capital calculation. Linkages among the components ensure that the measures of credit and interest rate risk pass into the cashflow generator. The linkages also transfer cashflows through the financial statements to represent values of assets, liabilities, and equity capital. The 10-year projection is designed to reflect a steady state in the scope and composition of Farmer Mac's assets.

2.0 Credit Risk

Loan loss rates are determined by applying loss-frequency and loss-severity equations to Farmer Mac loan-level data. From these equations, you must calculate loan losses under stressful economic conditions assuming Farmer Mac's portfolio remains at a ''steady state.'' Steady state assumes the underlying characteristics and risks of Farmer Mac's portfolio remain constant over the 10 years of the stress test. Loss rates are computed from estimated dollar losses for use in the stress test. The loan volume subject to loss throughout the stress test is then multiplied by the loss rate. Lastly, the stress test allocates losses to each of the 10 years assuming a time pattern for loss occurrence as discussed in section 4.3, ''Risk Measures.''

2.1 Loss-Frequency and Loss-Severity Models

a. Credit risks are modeled in the stress test using historical time series loan-level data to measure the frequency and severity of losses on agricultural mortgage loans. The model relates loss frequency and severity to loan-level characteristics and economic conditions through appropriately specified regression equations to account explicitly for the effects of these characteristics on loan losses. Loan losses for Farmer Mac are estimated from the resulting loss-frequency equation combined with the loss-severity factor by substituting the respective values of Farmer Mac's loan-level data or proxy data as described in section 4.1 d.(3) below, and applying stressful economic inputs.

b. The loss-frequency equation and loss-severity factor were estimated from historical agricultural real estate mortgage loan data from the Farm Credit Bank of Texas (FCBT). Due to Farmer Mac's relatively short history, its own loan-level data are insufficiently developed for use in estimating the default frequency equation and loss-severity factor. In the future, however, expansions in both the scope and historic length of Farmer Mac's lending operations may support the use of its data in estimating the relationships.

c. To estimate the equations, the data used included FCBT loans, which satisfied three of the four underwriting standards Farmer Mac currently uses (estimation data). The four standards specify: (1) The debt-to-assets ratio (D/A) must be less than 0.50, (2) the loan-to-value ratio (LTV) must be less than 0.70, (3) the debt-service-coverage ratio (DSCR) must exceed 1.25, (4) and the current ratio (current assets divided by current liabilities) must exceed 1.0. Furthermore, the D/A and LTV ratios were restricted to be less than or equal to 0.85.

d. Several limitations in the FCBT loan-level data affect construction of the loss-frequency equation. The data contained loans that were originated between 1979 and 1992, but there were virtually no losses during the early years of the sample period. As a result, losses attributable to specific loans are only available from 1986 through 1992. In addition, no prepayment information was available in the data.

e. The FCBT data used for estimation also included as performing loans, those loans that were re-amortized, paid in full, or merged with a new loan. Including these loans may lead to an understatement of loss-frequency probabilities if some of the re-amortized, paid, or merged loans experience default or incur losses. In contrast, when the loans that are re-amortized, paid in full, or merged are excluded from the analysis, the loss-frequency rates are overstated if a higher proportion of loans that are re-amortized, paid in full, or combined (merged) into a new loan are non-default loans compared to live loans.[1]

f. The structure of the historical FCBT data supports estimation of loss frequency based on origination information and economic conditions. Under an origination year approach, each observation is used only once in estimating loan default. The underwriting variables at origination and economic factors occurring over the life of the loan are then used to estimate loan-loss frequency.

g. The final loss-frequency equation is based on origination year data and represents a lifetime loss-frequency model. The final equation for loss frequency is:

$$p = 1/(1+\exp(-(BX))$$

Where:

$$BX = (-12.62738) + 1.91259 \cdot X_1 + (-0.33830) \cdot X_2 / (1 + 0.0413299)^{Periods} + (-0.19596) \cdot X_3 + 4.55390 \cdot (1-\exp((-0.00538178) \cdot X_4) + 2.49482 \cdot X_5$$

Where:

- p is the probability that a loan defaults and has positive losses (Pr (Y=1 | x));
- X_1 is the LTV ratio at loan origination raised to the power 5.3914596;[2]
- X_2 is the largest annual percentage decline in FCBT farmland values during the life of the loan dampened with a factor of 0.0413299 per year;[3]
- X_3 is the DSCR at loan origination;
- X_4 is 1 minus the exponential of the product of negative 0.00538178 and the original loan balance in 1997 dollars expressed in thousands; and
- X_5 is the D/A ratio at loan origination.

h. The estimated logit coefficients and p-values are:[4]

[1] Excluding loans with defaults, 11,527 loans were active and 7,515 loans were paid in full, re-amortized or merged as of 1992. A t-test[2] of the differences in the means for the group of defaulted loans and active loans indicated that active loans had significantly higher D/A and LTV ratios, and lower current ratios than defaulted loans where loss occurred. These results indicate that, on average, active loans have potentially higher risk than loans that were re-amortized, paid in full, or merged.

[2] Loss probability is likely to be more sensitive to changes in LTV at higher values of LTV. The power function provides a continuous relationship between LTV and defaults.

[3] The dampening function reflects the declining effect that the maximum land value decline has on the probability of default when it occurs later in a loan's life.

[4] The nonlinear parameters for the variable transformations were simultaneously estimated using SAS version 8e NLIN procedure. The NLIN procedure produces estimates of the parameters of a nonlinear transformation for LTV, dampening factor, and loan-size variables. To implement the NLIN procedure, the loss-frequency equation and its variables are declared and initial parameter values supplied. The NLIN procedure is an iterative process that uses the initial parameter values as the starting values for the first iteration and continues to iterate until acceptable parameters are solved. The initial values for the power function and dampening function are based on the proposed rule. The procedure for the initial values for the size variable parameter is provided in an Excel spreadsheet posted at *http://www.fca.gov.* The Gauss-Newton method is the selected iterative solving process. As described in the preamble, the loss-frequency function for the nonlinear model is the negative of the log-likelihood function, thus producing maximum likelihood estimates. In order to obtain statistical properties for the loss-frequency equation and verify the logistic coefficients, the estimates for the nonlinear transformations are applied to the FCBT data and the loss-frequency model is re-estimated using the SAS Logistic procedure. The SAS procedures, output reports and Excel spreadsheet used to estimate the parameters of the loss-frequency equation are located on the Web site *http://www.fca.gov.*

	Coefficients	p-value
Intercept	−12.62738	<0.0001
X_1: LTV variable	1.91259	0.0001
X_2: Max land value decline variable	0.33830	<0.0001
X_3: DSCR	−0.19596	0.0002
X_4: Loan size variable	4.55390	<0.0001
X_5: D/A ratio	2.49482	<0.0000

i. The low p-values on each coefficient indicate a highly significant relationship between the probability ratio of loan-loss frequency and the respective independent variables. Other goodness-of-fit indicators are:

Hosmer and Lemeshow goodness-of-fit p-value	0.1718
Max-rescaled R^2	0.2015
Concordant	85.2%
Disconcordant	12.0%
Tied	2.8%

j. These variables have logical relationships to the incidence of loan default and loss, as evidenced by the findings of numerous credit-scoring studies in agricultural finance.[5] Each of the variable coefficients has directional relationships that appropriately capture credit risk from underwriting variables and, therefore, the incidence of loan-loss frequency. The frequency of loan loss was found to differ significantly across all of the loan characteristics and lending conditions. Farmland values represent an appropriate variable for capturing the effects of exogenous economic factors. It is commonly accepted that farmland values at any point in time reflect the discounted present value of expected returns to the land.[6] Thus, changes in land values, as expressed in the loss-frequency equation, represent the combined effects of the level and growth rates of farm income, interest rates, and inflationary expectations—each of which is accounted for in the discounted, present value process.

k. When applying the equation to Farmer Mac's portfolio, you must get the input values for X_1, X_3, X_4, and X_5 for each loan in Farmer Mac's portfolio on the date at which the stress test is conducted, using either submitted data or proxy data as described in section 4.1 d.(3) below. For the variable X_2, the stressful input value from the benchmark loss experience is −23.52 percent. You must apply this input to all Farmer Mac loans subject to loss to calculate loss frequency under stressful economic conditions.[7] The maximum land value decline from the benchmark loss experience is the simple average of annual land value changes for Iowa, Illinois, and Minnesota for the years 1984 and 1985.[8]

l. Forecasting with data outside the range of the estimation data requires special treatment for implementation. While the estimation data embody Farmer Mac values for various loan characteristics, the maximum farmland price decline experienced in Texas was −16.69 percent, a value below the benchmark experience of −23.52 percent. To control for this effect, you must apply a procedure that restricts the slope of all the independent variables to that observed at the maximum land value decline observed in the estimation data. Essentially, you must approximate the slope of the loss-frequency equation at the point −16.69 percent in order to adjust the probability of loan default and loss occurrence for data beyond the range in the estimating data. The adjustment procedure is shown in step 4 of section 2.3 entitled, "Example Calculation of Dollar Loss on One Loan."

m. Loss severity was not found to vary systematically and was considered constant across the tested loan characteristics and lending conditions. Thus, the simple weighted average by loss volume of 20.9 percent is used in the stress test.[9] You must multiply loss severity with the probability estimate computed from the loss-frequency equation to determine the loss rate for a loan.

n. Using original loan balance results in estimated probabilities of loss frequency over the entire life of a loan. To account for loan seasoning, you must reduce the loan-loss exposure by the cumulative probability of loss already experienced by each loan as discussed in section 2.2 entitled, "Loan-Seasoning Adjustment." This subtraction is based on loan age and reduces the loss estimated by the loss-frequency and loss-severity equations. The result is an age-adjusted lifetime dollar loss that can be used in subsequent calculations of loss rates as discussed in section 2.4, "Calculation of Loss Rates for Use in the Stress Test."

2.2 Loan-Seasoning Adjustment

a. You must use the seasoning function supplied by FCA to adjust the calculated probability of loss for each Farmer Mac loan for the cumulative loss exposure already experienced based on the age of each loan. The seasoning function is based on the same data used to determine the loss-frequency equation and an assumed average life of 14 years for agricultural mortgages. If we determine that the relationship between the loss experience in Farmer Mac's portfolio over time and the seasoning function can be improved, we may augment or replace the seasoning function.

b. The seasoning function is parameterized as a beta distribution with parameters of p = 4.288 and q = 5.3185.[10] How the loan-seasoning distribution is used is shown in Step 7 of section 2.3, "Example Calculation of Dollar Loss on One Loan."

2.3 Example Calculation of Dollar Loss on One Loan

Here is an example of the calculation of the dollar losses for an individual loan with the following characteristics and input values:[11]

Loan Origination Year	1996
Loan Origination Balance	$1,250,000
LTV at Origination	0.5
D/A at Origination	0.5
DSCR at Origination	1.3984
Maximum Percentage Land Price Decline (MAX)	−23.52

Step 1: Convert 1996 Origination Value to 1997 dollar value (LOAN) based on the consumer price index and transform as follows:

$\$1,278,500 = \$1,250,000 \cdot 1.0228$

$0.998972 = 1 - \exp((-.00538178) \cdot \$1,278,500 / 1000)$

Step 2: Calculate the default probabilities using −16.64 percent and −16.74 percent land value declines as follows:[12]

Where:

$Z_1 = (-12.62738) + 1.91259 \cdot LTV^{5.3914596} - 0.33830 \cdot (-16.6439443) - 0.19596 \cdot DSCR + 4.55390 \cdot 0.998972 + 2.49482 \cdot DA = (-1.428509)$

Default Loss Frequency at (−16.64%) =

$1 / 1 + \exp^{-(-1.428509)} = 0.19333111$

And

$Z_1 = (-12.62738) + 1.91259 \cdot LTV^{5.3914596} - 0.33830 \cdot (-16.7439443) - 0.19596 \cdot DSCR + 4.55390 \cdot 0.998972 + 2.49482 \cdot DA = (-1.394679)$

Loss Frequency Probability at (−16.74%) =

$1 / 1 + \exp^{-(-1.394679)} = 0.19866189$

[5] Splett, N.S., P. J. Barry, B. Dixon, and P. Ellinger. "A Joint Experience and Statistical Approach to Credit Scoring," *Agricultural Finance Review*, 54(1994):39–54.

[6] Barry, P. J., P. N. Ellinger, J. A. Hopkin, and C. B. Baker. *Financial Management in Agriculture*, 5th ed., Interstate Publishers, 1995.

[7] On- and off-balance sheet Farmer Mac I agricultural mortgage program assets booked after the 1996 Act amendments are subject to the loss calculation.

[8] While the worst-case losses, based on origination year, occurred during 1983 and 1984, this benchmark was determined using annual land value changes that occurred 2 years later.

[9] We calculated the weighted-average loss severity from the estimation data.

[10] We estimated the loan-seasoning distribution from portfolio aggregate charge-off rates from the estimation data. To do so, we arrayed all defaulting loans where loss occurred according to the time from origination to default. Then, a beta distribution, β(p, q), was fit to the estimation data scaled to the maximum time a loan survived (14 years).

[11] In the examples presented we rounded the numbers, but the example calculation is based on a larger number of significant digits. The stress test uses additional digits carried at the default precision of the software.

[12] This process facilitates the approximation of slope needed to adjust the loss probabilities for land value declines greater than observed in the estimation data.

Step 3: Calculate the slope adjustment. You must calculate slope by subtracting the difference between ''Loss-Frequency Probability at −16.64 percent'' and ''Loss-Frequency Probability at −16.74 percent'' and dividing by −0.1 (the difference between −16.64 percent and −16.74 percent) as follows:

$0.05330776 = (0.19333111 - 0.19866189) / -0.1$

Step 4: Make the linear adjustment. You make the adjustment by increasing the loss-frequency probability where the dampened stressed farmland value input is less than −16.69 percent to reflect the stressed farmland value input, appropriately discounted. As discussed previously, the stressed land value input is discounted to reflect the declining effect that the maximum land value decline has on the probability of default when it occurs later in a loan's life.[13] The linear adjustment is the difference between −16.69 percent land value decline and the adjusted stressed maximum land value decline input of −23.52 multiplied by the slope estimated in Step 3 as follows:

Loss Frequency at −16.69 percent =
$Z_1 = (-12.62738) + (1.91259)(LTV^{5.3914596}) - (0.33830)(-16.6939443) - (0.19596)(DSCR) + (4.55390)(0.998972) + (2.49482)(DA) = -1.411594$

And

$1 / 1 + \exp^{-(-1.411594)} = 0.19598279$

Dampened Maximum Land Price Decline = $(-20.00248544) = (-23.52)(1.0413299)^{-4}$

Slope Adjustment = $0.17637092 = 0.053312247 \cdot (-16.6939443 - (-20.00248544))$

Loan Default Probability = $0.37235371 = 0.19598279 + 0.17637092$

Step 5: Multiply loan default probability times the average severity of 0.209 as follows:
$0.077821926 = 0.37235371 \cdot 0.209$

Step 6: Multiply the loss rate times the origination loan balance as follows:

$\$97,277 = \$1,250,000 \cdot 0.077821926$

Step 7: Adjust the origination based dollar losses for 4 years of loan seasoning as follows:

$\$81,987 = \$97,277 - \$97,277 \cdot (0.157178762)$ [14]

2.4 Calculation of Loss Rates for Use in the Stress Test

a. You must compute the loss rates by state as the dollar weighted average seasoned loss rates from the Cash Window and Standby loan portfolios by state. The spreadsheet entitled, ''Credit Loss Module.XLS'' can be used for these calculations. This spreadsheet is available for download on our Web site, *www.fca.gov*, or will be provided upon request. The blended loss rates for each state are copied from the ''Credit Loss Module'' to the stress test spreadsheet for determining Farmer Mac's regulatory capital requirement.

b. The stress test use of the blended loss rates is further discussed in section 4.3, ''Risk Measures.''

3.0 Interest Rate Risk

The stress test explicitly accounts for Farmer Mac's vulnerability to interest rate risk from the movement in interest rates specified in the statute. The stress test considers Farmer Mac's interest rate risk position through the current structure of its balance sheet, reported interest rate risk shock-test results,[15] and other financial activities. The stress test calculates the effect of interest rate risk exposure through market value changes of interest-bearing assets, liabilities, and off-balance sheet transactions, and thereby the effects to equity capital. The stress test also captures this exposure through the cashflows on rate-sensitive assets and liabilities. We discuss how to calculate the dollar impact of interest rate risk in section 4.6, ''Balance Sheets.''

3.1 Process for Calculating the Interest Rate Movement

a. The stress test uses the 10-year Constant Maturity Treasury (10-year CMT) released by the Federal Reserve in HR. 15, ''Selected Interest Rates.'' The stress test uses the 10-year CMT to generate earnings yields on assets, expense rates on liabilities, and changes in the market value of assets and liabilities. For stress test purposes, the starting rate for the 10-year CMT is the 3-month average of the most recent monthly rate series published by the Federal Reserve. The 3-month average is calculated by summing the latest monthly series of the 10-year CMT and dividing by three. For instance, you would calculate the initial rate on June 30, 1999, as:

Month end	10-year CMT monthly series
04/1999	5.18
05/1999	5.54
06/1999	5.90
Average	5.54

b. The amount by which the stress test shocks the initial rate up and down is determined by calculating the 12-month average of the 10-year CMT monthly series. If the resulting average is less than 12 percent, the stress test shocks the initial rate by an amount determined by multiplying the 12-month average rate by 50 percent. However, if the average is greater than or equal to 12 percent, the stress test shocks the initial rate by 600 basis points. For example, determine the amount by which to increase and decrease the initial rate for June 30, 1999, as follows:

Month end	10-year CMT monthly series
07/1998	5.46
08/1998	5.34
09/1998	4.81
10/1998	4.53
11/1998	4.83
12/1998	4.65
01/1999	4.72
02/1999	5.00
03/1999	5.23
04/1999	5.18
05/1999	5.54
06/1999	5.90
12-Month Average	5.10

Calculation of shock amount	
12-Month Average Less than 12%	Yes.
12-Month Average	5.10.
Multiply the 12-Month Average by	50%.
Shock in basis points equals	255.

c. You must run the stress test for two separate changes in interest rates: (i) An immediate increase in the initial rate by the shock amount; and (ii) immediate decrease in the initial rate by the shock amount. The stress test then holds the changed interest rate constant for the remainder of the 10-year stress period. For example, at June 30, 1999, the stress test would be run for an immediate and sustained (for 10 years) upward movement in interest rates to 8.09 percent (5.54 percent plus 255 basis points) and also for an immediate and sustained (for 10 years) downward movement in interest rates to 2.99 percent (5.54 percent minus 255 basis points). The movement in interest rates that results in the greatest need for capital is then used to determine Farmer Mac's risk-based capital requirement.

4.0 Elements Used in Generating Cashflows

a. This section describes the elements that are required for implementation of the stress test and assessment of Farmer Mac capital performance through time. An Excel spreadsheet named FAMC RBCST, available at *http://www.fca.gov*, contains the stress test, including the cashflow generator. The spreadsheet contains the following seven worksheets:

(1) Data Input;
(2) Assumptions and Relationships;
(3) Risk Measures (credit risk and interest rate risk);
(4) Loan and Cash Flow Accounts;
(5) Income Statements;
(6) Balance Sheets; and
(7) Capital.

b. Each of the components is described in further detail below with references where appropriate to the specific worksheets within the Excel spreadsheet. The stress test may be generally described as a set of linked financial statements that evolve over a period of 10 years using generally accepted accounting conventions and specified sets of stressed inputs. The stress test uses the initial financial condition of Farmer Mac, including earnings and funding relationships, and the credit and interest rate stressed inputs to calculate Farmer Mac's capital performance

[13] The dampened period is the number of years from the beginning of the origination year to the current year (i.e., January 1, 1996 to January 1, 2000 is 4 years).

[14] The age of adjustment of 0.157178762 is determined from the beta distribution for a 4-year-old loan.

[15] See paragraph c. of section 4.1 entitled, ''Data Inputs,'' for a description of the interest rate risk shock-reporting requirement.

through time. The stress test then subjects the initial financial conditions to the first period set of credit and interest rate risk stresses, generates cashflows by asset and liability category, performs necessary accounting postings into relevant accounts, and generates an income statement associated with the first interval of time. The stress test then uses the income statement to update the balance sheet for the end of period 1 (beginning of period 2). All necessary capital calculations for that point in time are then performed.

c. The beginning of the period 2 balance sheet then serves as the departure point for the second income cycle. The second period's cashflows and resulting income statement are generated in similar fashion as the first period's except all inputs (*i.e.*, the periodic loan losses, portfolio balance by category, and liability balances) are updated appropriately to reflect conditions at that point in time. The process evolves forward for a period of 10 years with each pair of balance sheets linked by an intervening set of cashflow and income statements. In this and the following sections, additional details are provided about the specification of the income-generating model to be used by Farmer Mac in calculating the risk-based capital requirement.

4.1 Data Inputs

The stress test requires the initial financial statement conditions and income generating relationships for Farmer Mac. The worksheet named ''Data Inputs'' contains the complete data inputs and the data form used in the stress test. The stress test uses these data and various assumptions to calculate pro forma financial statements. For stress test purposes, Farmer Mac is required to supply:

a. *Call Report Schedules RC: Balance Sheet and RI: Income Statement.* These schedules form the starting financial position for the stress test. In addition, the stress test calculates basic financial relationships and assumptions used in generating pro forma annual financial statements over the 10-year stress period. Financial relationships and assumptions are in section 4.2, ''Assumptions and Relationships.''

b. *Cashflow Data for Asset and Liability Account Categories.* The necessary cashflow data for the spreadsheet-based stress test are book value, weighted average yield, weighted average maturity, conditional prepayment rate, weighted average amortization, and weighted average guarantee fees. The spreadsheet uses this cashflow information to generate starting and ending account balances, interest earnings, guarantee fees, and interest expense. Each asset and liability account category identified in this data requirement is discussed in section 4.2, ''Assumptions and Relationships.''

c. *Interest Rate Risk Measurement Results.* The stress test uses the results from Farmer Mac's interest rate risk model to represent changes in the market value of assets, liabilities, and off-balance sheet positions during upward and downward instantaneous shocks in interest rates of 300, 250, 200, 150, and 100 basis points. The stress test uses these data to calculate a schedule of estimated effective durations representing the market value effects from a change in interest rates. The stress test uses a linear interpolation of the duration schedule to relate a change in interest rates to a change in the market value of equity. This calculation is described in section 4.4 entitled, ''Loan and Cashflow Accounts,'' and is illustrated in the referenced worksheet of the stress test.

d. *Loan-Level Data for all Farmer Mac I Program Assets.*

(1) The stress test requires loan-level data for all Farmer Mac I program assets to determine lifetime age-adjusted loss rates. The specific loan data fields required for running the credit risk component are:

Farmer Mac I Program Loan Data Fields

Loan Number
Ending Scheduled Balance
Group
Pre/Post Act
Property State
Product Type
Origination Date
Loan Cutoff Date
Original Loan Balance
Original Scheduled P&I
Original Appraised Value
Loan-to-Value Ratio
Debt-to-Assets Ratio
Current Assets
Current Liabilities
Total Assets
Total Liabilities
Gross Farm Revenue
Net Farm Income
Depreciation
Interest on Capital Debt
Capital Lease Payments
Living Expenses
Income & FICA Taxes
Net Off-Farm Income
Total Debt Service
Guarantee/Commitment Fee
Seasoned Loan Flag

(2) From the loan-level data, you must identify the geographic distribution by state of Farmer Mac's loan portfolio and enter the current loan balance for each state in the ''Data Inputs'' worksheet. The lifetime age-adjustment of origination year loss rates was discussed in section 2.0, ''Credit Risk.'' The lifetime age-adjusted loss rates are entered in the ''Risk Measures'' worksheet of the stress test. The stress test application of the loss rates is discussed in section 4.3, ''Risk Measures.''

(3) Under certain circumstances, described below, you must substitute the following data proxies for the variables LTV, DSCR, and D/A: LTV = 0.70, DSCR = 1.25, and D/A = 0.50. The substitution must be done whenever any of these data are missing, i.e., cells are blank, or one or more of the conditions in the following table is true.

Condition	Apply
1. Total Assets = 0	Proxy D/A.
2. Total Liabilities = 0	Proxy D/A.
3. Total assets less total liabilities <0	Proxy D/A.
4. Total debt service = 0 or not calculable	Proxy DSCR.
5. Net farm income = 0	Proxy DSCR.
6. LTV ratio = 0	Proxy LTV.
7. Total assets less than original appraised value	Proxy LTV, D/A.
8. Total liabilities less than the original loan amount	Proxy D/A.
9. Total debt service is less than original scheduled principal and interest payment	Proxy DSCR.
10. Depreciation, interest on capital debt, capital lease payments, or living expenses are reported as less than zero.	Proxy DSCR.
11. Original Scheduled Principal and Interest is greater than Total Debt Service	Proxy DSCR.
12. Calculated LTV (original loan amount divided by original appraised value) does not equal the submitted LTV ratio.	The greater of the two LTV ratios.
13. Any of the fields referenced in "1." through "12." above are blank or contain spaces, periods, zeros, negative amounts, or fonts formatted to any setting other than numbers.	Proxy all related ratios.

In addition, the following loan data adjustments must be made in response to the situations listed below:

Situation	Data adjustment
Original loan balance is less than scheduled loan balance	Substitute scheduled balance for origination.
Purchase (commitment) date (a.k.a. "cutoff" date) field and Origination date field are both blank.	Insert the quarter end "as of" date of the RBCST submission.
Origination date field is blank	Model based on Cutoff date.
Seasoned Standby loans that include loan data	Proxy data applied.*

* Application of proxy data recognizes that underwriting data on seasoned Standby loans are not reviewed by Farmer Mac in favor of other criteria and frequently not origination data.

Further, because it would not be possible to compile an exhaustive list of loan data anomalies, FCA reserves the authority to require an explanation on other data anomalies it identifies and to apply the loan data proxies on such cases until the anomaly is adequately addressed by the Corporation.

e. *Other Data Requirements.* Other data elements are taxes paid over the previous 2 years, the corporate tax schedule, selected line items from Schedule RS–C of the Call Report, and 10-year CMT information as discussed in section 3.1 entitled, "Process for Calculating the Interest Rate Movement." The stress test uses the corporate tax schedule and previous taxes paid to determine the appropriate amount of taxes, including available loss carry-backs and loss carry-forwards. Three line items found in sections Part II.2.a. and 2.b. of Call Report Schedule RS–C Capital Calculation must also be entered in the "Data Inputs" sheet. The two line items found in Part II.2.a. contain the dollar volume off-balance sheet assets relating to the Farmer Mac I and II programs. The off-balance sheet program asset dollar volumes are used to calculate the operating expense regression on a quarterly basis. The single-line item found in Part II.2.b. provides the amount of other off-balance sheet obligations and is presented in the balance sheet section of the stress test for purposes of completeness. The 10-year CMT quarterly average of the monthly series and the 12-month average of the monthly series must be entered in the "Data Inputs" sheet. These two data elements are used to determine the starting interest rate and the level of the interest rate shock applied in the stress test.

4.2 Assumptions and Relationships

a. The stress test assumptions are summarized on the worksheet called "Assumptions and Relationships." Some of the entries on this page are direct user entries. Other entries are relationships generated from data supplied by Farmer Mac or other sources as discussed in section 4.1, "Data Inputs." After current financial data are entered, the user selects the date for running the stress test. This action causes the stress test to identify and select the appropriate data from the "Data Inputs" worksheet. The next section highlights the degree of disaggregation needed to maintain reasonably representative financial characterizations of Farmer Mac in the stress test. Several specific assumptions are established about the future relationships of account balances and how they evolve.

b. From the data and assumptions, the stress test computes pro forma financial statements for 10 years. The stress test must be run as a "steady state" with regard to program balances, and where possible, will use information gleaned from recent financial statements and other data supplied by Farmer Mac to establish earnings and cost relationships on major program assets that are applied forward in time. As documented in the stress test, entries of "1" imply no growth and/or no change in account balances or proportions relative to initial conditions with the exception of pre-1996 loan volume being transferred to post-1996 loan volume. The interest rate risk and credit loss components are applied to the stress test through time. The individual sections of that worksheet are:

(1) *Elements related to cashflows, earnings rates, and disposition of discontinued program assets.*

(A) The stress test accounts for earnings rates by asset class and cost rates on funding. The stress test aggregates investments into the categories of: Cash and money market securities; commercial paper; certificates of deposit; agency mortgage-backed securities and collateralized mortgage obligations; and other investments. With FCA's concurrence, Farmer Mac is permitted to further disaggregate these categories. Similarly, we may require new categories for future activities to be added to the stress test. Loan items requiring separate accounts include the following:

(i) Farmer Mac I program assets post-1996 Act;

(ii) Farmer Mac I program assets post-1996 Act Swap balances;

(iii) Farmer Mac I program assets pre-1996 Act;

(iv) Farmer Mac I AgVantage securities;

(v) Loans held for securitization; and

(vi) Farmer Mac II program assets.

(B) The stress test also uses data elements related to amortization and prepayment experience to calculate and process the implied rates at which asset and liability balances terminate or "roll off" through time. Further, for each category, the stress test has the capacity to track account balances that are expected to change through time for each of the above categories. For purposes of the stress test, all assets are assumed to maintain a "steady state" with the implication that any principal balances retired or prepaid are replaced with new balances. The exceptions are that expiring pre-1996 Act program assets are replaced with post-1996 Act program assets.

(2) *Elements related to other balance sheet assumptions through time.* As well as interest earning assets, the other categories of the balance sheet that are modeled through time include interest receivable, guarantee fees receivable, prepaid expenses, accrued interest payable, accounts payable, accrued expenses, reserves for losses (loans held and guaranteed securities), and other off-balance sheet obligations. The stress test is consistent with Farmer Mac's existing reporting categories and practices. If reporting practices change substantially, the above list will be adjusted accordingly. The stress test has the capacity to have the balances in each of these accounts determined based upon existing relationships to other earning accounts, to keep their balances either in constant proportions of loan or security accounts, or to evolve according to a user-selected rule. For purposes of the stress test, these accounts are to remain constant relative to the proportions of their associated balance sheet accounts that generated the accrued balances.

(3) *Elements related to income and expense assumptions.* Several other parameters that are required to generate pro forma financial statements may not be easily captured from historic data or may have characteristics that suggest that they be individually supplied. These parameters are the gain on agricultural mortgage-backed securities (AMBS) sales, miscellaneous income, operating expenses, reserve requirement, and guarantee fees.

(A) The stress test applies the actual weighted average gain rate on sales of AMBS over the most recent 3 years to the dollar amount of AMBS sold during the most recent four quarters in order to estimate gain on sale of AMBS over the stress period.

(B) The stress test assumes miscellaneous income at a level equal to the average of the most recent 3-year's actual miscellaneous income as a percent of the sum of; cash, investments, guaranteed securities, and loans held for investment.

(C) Operating costs are determined in the model using weighted moving average of operating expenses as a percentage of the sum of on-balance sheet assets and off-balance sheet program activities over the previous four quarters inclusive of the current submission date. The share will then be applied forward to the balances of the same categories throughout the 10-year period of the RBCST model. As additional data accumulate, the specification will be re-examined and modified if we deem changing the specification results in a more appropriate representation of operating expenses.

(D) The reserve requirement as a fraction of loan assets can also be specified. However, the stress test is run with the reserve requirement set to zero. Setting the parameter to zero causes the stress test to calculate a risk-based capital level that is comparable to regulatory capital, which includes reserves. Thus, the risk-based capital requirement contains the regulatory capital required, including reserves. The amount of total capital that is allocated to the reserve account is determined by GAAP. The stress test applies quarterly updates of the weighted average guarantee rates for post-1996 Farmer Mac I assets, pre-1996 Farmer Mac I assets, and Farmer Mac II assets.

(4) *Elements related to earnings rates and funding costs.*

(A) The stress test can accommodate numerous specifications of earnings and funding costs. In general, both relationships are tied to the 10-year CMT interest rate. Specifically, each investment account, each loan item, and each liability account can be specified as fixed rate, or fixed spread to the 10-year CMT with initial rates determined by actual data. The stress test calculates specific spreads (weighted average yield less initial 10-year CMT) by category from the weighted average yield data supplied by Farmer Mac as described earlier. For example, the fixed spread for Farmer Mac I program post-1996 Act mortgages is calculated as follows:

Fixed Spread = Weighted Average Yield less 10-year CMT 0.014 = 0.0694—0.0554

(B) The resulting fixed spread of 1.40 percent is then added to the 10-year CMT when it is shocked to determine the new yield. For instance, if the 10-year CMT is shocked upward by 300 basis points, the yield on Farmer Mac I program post-1996 Act loans would change as follows:

Yield = Fixed Spread + 10-year CMT .0994 = .014 + .0854

(C) The adjusted yield is then used for income calculations when generating pro forma financial statements. All fixed-spread asset and liability classes are computed in an identical manner using starting yields provided as data inputs from Farmer Mac. The fixed-yield option holds the starting yield data constant for the entire 10-year stress test period. You must run the stress test using the fixed-spread option for all accounts except for discontinued program activities, such as Farmer Mac I program loans made before the 1996 Act. For discontinued loans, the fixed-rate specification must be used if the loans are primarily fixed-rate mortgages.

(5) *Elements related to interest rate shock test.* As described earlier, the interest rate shock test is implemented as a single set of forward interest rates. The stress test applies the up-rate scenario and down-rate scenario separately. The stress test also uses the results of Farmer Mac's shock test, as described in paragraph c. of section 4.1, ''Data Inputs,'' to calculate the impact on equity from a stressful change in interest rates as discussed in section 3.0 titled, ''Interest Rate Risk.'' The stress test uses a schedule relating a change in interest rates to a change in the market value of equity. For instance, if interest rates are shocked upward so that the percentage change is 262 basis points, the linearly interpolated effective estimated duration of equity is −6.7405 years given Farmer Mac's interest rate measurement results at 250 and 300 basis points of −6.7316 and 76.7688 years, respectively found on the effective duration schedule. The stress test uses the linearly interpolated estimated effective duration for equity to calculate the market value change by multiplying duration by the base value of equity before any rate change from Farmer Mac's interest rate risk measurement results with the percentage change in interest rates.

4.3 Risk Measures

a. This section describes the elements of the stress test in the worksheet named ''Risk Measures'' that reflect the interest rate shock and credit loss requirements of the stress test.

b. As described in section 3.1, the stress test applies the statutory interest rate shock to the initial 10-year CMT rate. It then generates a series of fixed annual interest rates for the 10-year stress period that serve as indices for earnings yields and cost of funds rates used in the stress test. (See the ''Risk Measures'' worksheet for the resulting interest rate series used in the stress test.)

c. The Credit Loss Module's state-level loss rates, as described in section 2.4 entitled, ''Calculation of Loss Rates for Use in the Stress Test,'' are entered into the ''Risk Measures'' worksheet and applied to the loan balances that exist in each state. The distribution of loan balances by state is used to allocate new loans that replace loan products that roll off the balance sheet through time. The loss rates are applied both to the initial volume and to new loan volume that replaces expiring loans. The total life of loan losses that are expected at origination are then allocated through time based on a set of user entries describing the time-path of losses.

d. The loss rates estimated in the credit risk component of the stress test are based on an origination year concept, adjusted for loan seasoning. All losses arising from loans originated in a particular year are expressed as lifetime age-adjusted losses irrespective of when the losses actually occur. The fraction of the origination year loss rates that must be used to allocate losses through time are 43 percent to year 1, 17 percent to year 2, 11.66 percent to year 3, and 4.03 percent for the remaining years. The total allocated losses in any year are expressed as a percent of loan volume in that year to reflect the conversion to exposure year.

4.4 Loan and Cashflow Accounts

The worksheet labeled ''Loan and Cashflow Data'' contains the categorized loan data and cashflow accounting relationships that are used in the stress test to generate projections of Farmer Mac's performance and condition. As can be seen in the worksheet, the steady-state formulation results in account balances that remain constant except for the effects of discontinued programs. For assets with maturities under 1 year, the results are reported for convenience as though they matured only one time per year with the additional convention that the earnings/cost rates are annualized. For the pre-1996 Act assets, maturing balances are added back to post-1996 Act account balances. The liability accounts are used to satisfy the accounting identity, which requires assets to equal liabilities plus owner equity. In addition to the replacement of maturities under a steady state, liabilities are increased to reflect net losses or decreased to reflect resulting net gains. Adjustments must be made to the long- and short-term debt accounts to maintain the same relative proportions as existed at the beginning period from which the stress test is run. The primary receivable and payable accounts are also maintained on this worksheet, as is a summary balance of the volume of loans subject to credit losses.

4.5 Income Statements

a. Information related to income performance through time is contained on the worksheet named ''Income Statements.'' Information from the first period balance sheet is used in conjunction with the earnings and cost-spread relationships from Farmer Mac supplied data to generate the first period's income statement. The same set of accounts is maintained in this worksheet as ''Loan and Cashflow Accounts'' for consistency in reporting each annual period of the 10-year stress period of the test. The income from each interest-bearing account is calculated, as are costs of interest-bearing liabilities. In each case, these entries are the associated interest rate for that period multiplied by the account balances.

b. The credit losses described in section 2.0, ''Credit Risk,'' are transmitted through the provision account, as is any change needed to re-establish the target reserve balance. For determining risk-based capital, the reserve target is set to zero as previously indicated in section 4.2. Under the income tax section, it must first be determined whether it is appropriate to carry forward tax losses or recapture tax credits. The tax section then establishes the appropriate income tax liability that permits the calculation of final net income (loss), which is credited (debited) to the retained earnings account.

4.6 Balance Sheets

a. The worksheet named ''Balance Sheets'' is used to construct pro forma balance sheets from which the capital calculations can be performed. As can be seen in the Excel spreadsheet, the worksheet is organized to correspond to Farmer Mac's normal reporting practices. Asset accounts are built from the initial financial statement conditions, and loan and cashflow accounts. Liability accounts including the reserve account are likewise built from the previous period's results to balance the asset and equity positions. The equity section uses initial conditions and standard accounts to monitor equity through time. The equity section maintains separate categories for increments to paid-in-capital and retained earnings and for mark-to-market effects of changes in account values. The process described below in the ''Capital'' worksheet uses the initial retained earnings and paid-in-capital account to test for the change in initial capital that permits conformance to the statutory requirements. Therefore, these accounts must be maintained separately for test solution purposes.

b. The market valuation changes due to interest rate movements must be computed utilizing the linearly interpolated schedule of estimated equity effects due to changes in interest rates, contained in the ''Assumptions & Relationships'' worksheet. The stress test calculates the dollar change in the market value of equity by multiplying the base value of equity before any rate change from Farmer Mac's interest rate risk measurement results, the linearly interpolated estimated effective duration of equity, and the percentage change in interest rates. In addition, the earnings effect of the measured dollar change in the market value of equity is estimated by multiplying the dollar change by the blended cost of funds rate found on the ''Assumptions & Relationships'' worksheet. Next, divide by 2 the computed earnings effect to approximate the impact as a theoretical shock in the interest rates that occurs at the mid-point of the income cycle from period t_0 to period t_1. The measured dollar change in the market value of equity and related earnings effect are then adjusted to reflect any tax-related benefits. Tax adjustments are determined by including the measured dollar change in the market value of equity and the earnings effect in the tax calculations found in the ''Income Statements'' worksheet. This approach ensures that the value of equity reflects the economic loss or gain in value of Farmer Mac's capital position from a change in interest rates and reflects any immediate tax benefits that Farmer Mac could realize. Any tax benefits in the module are posted through the income statement by adjusting the net taxes due before calculating final net income. Final net income is posted to accumulated unretained earnings in the shareholders' equity portion of the balance sheet. The tax section is also described in section 4.5 entitled, ''Income Statements.''

c. After one cycle of income has been calculated, the balance sheet as of the end of the income period is then generated. The ''Balance Sheet'' worksheet shows the periodic pro forma balance sheets in a format convenient to track capital shifts through time.

d. The stress test considers Farmer Mac's balance sheet as subject to interest rate risk and, therefore, the capital position reflects mark-to-market changes in the value of equity. This approach ensures that the stress test captures interest rate risk in a meaningful way by addressing explicitly the loss or gain in value resulting from the change in interest rates required by the statute.

4.7 Capital

The ''Capital'' worksheet contains the results of the required capital calculations as described below, and provides a method to calculate the level of initial capital that would permit Farmer Mac to maintain positive capital throughout the 10-year stress test period.

5.0 Capital Calculation

a. The stress test computes regulatory capital as the sum of the following:

(1) The par value of outstanding common stock;

(2) The par value of outstanding preferred stock;

(3) Paid-in capital;

(4) Retained earnings; and

(5) Reserve for loan and guarantee losses.

b. Inclusion of the reserve account in regulatory capital is an important difference compared to minimum capital as defined by the statute. Therefore, the calculation of reserves in the stress test is also important because reserves are reduced by loan and guarantee losses. The reserve account is linked to the income statement through the provision for loan-loss expense (provision). Provision expense reflects the amount of current income necessary to rebuild the reserve account to acceptable levels after loan losses reduce the account or as a result of increases in the level of risky mortgage positions, both on- and off-balance sheet. Provision reversals represent reductions in the reserve levels due to reduced risk of loan losses or loan volume of risky mortgage positions. The liabilities section of the ''Balance Sheets'' worksheet also includes separate line items to disaggregate the Guarantee and commitment obligation related to the Financial Accounting Standards Board Interpretation No. 45 (FIN 45) Guarantor's Accounting and Disclosure Requirements for Guarantees, Including Indirect Guarantees of Indebtedness of Others. This item is disaggregated to permit accurate calculation of regulatory capital post-adoption of FIN 45. When calculating the stress test, the reserve is maintained at zero to result in a risk-based capital requirement that includes reserves, thereby making the requirement comparable to the statutory definition of regulatory capital. By setting the reserve requirement to zero, the capital position includes all financial resources Farmer Mac has at its disposal to withstand risk.

5.1 Method of Calculation

a. Risk-based capital is calculated in the stress test as the minimum initial capital that would permit Farmer Mac to remain solvent for the ensuing 10 years. To this amount, an additional 30 percent is added to account for managerial and operational risks not reflected in the specific components of the stress test.

b. The relationship between the solvency constraint (*i.e.*, future capital position not less than zero) and the risk-based capital requirement reflects the appropriate earnings and funding cost rates that may vary through time based on initial conditions. Therefore, the minimum capital at a future point in time cannot be directly used to determine the risk-based capital requirement. To calculate the risk-based capital requirement, the stress test includes a section to solve for the minimum initial capital value that results in a minimum capital level over the 10 years of zero at the point in time that it would actually occur. In solving for initial capital, it is assumed that reductions or additions to the initial capital accounts are made in the retained earnings accounts, and balanced in the debt accounts at terms proportionate to initial balances (same relative proportion of long- and short-term debt at existing initial rates). Because the initial capital position affects the earnings, and hence capital positions and appropriate discount rates through time, the initial and future capital are simultaneously determined and must be solved iteratively. The resulting minimum initial capital from the stress test is then reported on the ''Capital'' worksheet of the stress test. The ''Capital'' worksheet includes an element that uses Excel's ''solver'' or ''goal seek'' capability to calculate the minimum initial capital that, when added (subtracted) from initial capital and replaced with debt, results in a minimum capital balance over the following 10 years of zero.

PART 655—FEDERAL AGRICULTURAL MORTGAGE CORPORATION DISCLOSURE AND REPORTING REQUIREMENTS

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

Authority: Sec. 8.11 of the Farm Credit Act (12 U.S.C. 2279aa–11).

Subpart B—Reports Relating to Securities Activities of the Federal Agricultural Mortgage Corporation

§ 655.50 [Amended]

■ 4. Section 655.50 is amended by removing the word ''should'' and adding in its place, the word ''must'' in the second sentence of paragraph (c).

Dated: December 15, 2006.

James M. Morris,

Acting Secretary, Farm Credit Administration Board.

[FR Doc. E6–21831 Filed 12–22–06; 8:45 am]

BILLING CODE 6705–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2006–26492; Directorate Identifier 2006–CE–77–AD; Amendment 39–14861; AD 2006–26–03]

RIN 2120–AA64

Airworthiness Directives; Alpha Aviation Design Limited (Type Certificate No. A48EU formerly held by APEX Aircraft and AVIONS PIERRE ROBIN), Model R2160 Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; request for comments.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for certain Alpha Aviation Model R2160 airplanes. This AD requires you to inspect the fuel pressure indication system for leakage at the end of the adapter in the fuel pressure indication system. This AD results from the possibility of fuel leakage at the end of the adapter in the fuel pressure indication system. We are issuing this AD to detect, correct, and prevent fuel leaks in the fuel pressure indicating system. This failure could allow fuel to leak near the exhaust manifold and lead to a fire.

DATES: This AD becomes effective on January 30, 2007.

We must receive any comments on this AD by January 25, 2007.

ADDRESSES: Use one of the following addresses to comment on this AD.

- *DOT Docket Web site:* Go to *http://dms.dot.gov* and follow the instructions for sending your comments electronically.
- *Mail:* Docket Management Facility; U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, Room PL–401, Washington, DC 20590–0001.
- *Fax:* (202) 493–2251.
- *Hand Delivery:* Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- *Federal eRulemaking Portal: http://www.regulations.gov*. Follow the instructions for submitting comments.

To get the service information identified in this AD, contact Alpha Aviation Ltd., Ingram Road, Hamilton Airport RD 2, Hamilton 2021, New Zealand; phone: 011 64 7 843 7070; fax: 011 64 7 843 8040.

To view the comments to this AD, go to *http://dms.dot.gov*. The docket number is FAA–2006–26492; Directorate Identifier 2006–CE–77–AD.

FOR FURTHER INFORMATION CONTACT: Karl Schletzbaum, Aerospace Engineer, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329–4146; facsimile: (816) 329–4090.

SUPPLEMENTARY INFORMATION:

Discussion

The Civil Aviation Authority of New Zealand (CAA), which is the airworthiness authority for New Zealand, recently notified FAA that an unsafe condition may exist on certain Alpha Aviation Model R2160 airplanes. The CAA reports that there is the possibility of fuel leakage at the end of the adapter in the fuel pressure indication system.

This condition, if not corrected, could allow fuel leaks near the exhaust manifold and result in a fire.

FAA's Determination and Requirements of This AD

These Alpha Aviation Model R2160 airplanes were manufactured in France, their state of design authority is New Zealand, and they are type-certificated for operation in the United States under the provisions of section 21.29 of the Federal Aviation Regulations (14 CFR 21.29) and the applicable bilateral airworthiness agreement.

Under this bilateral airworthiness agreement, the CAA has kept us informed of the situation described above. We are issuing this AD because we evaluated all the information and determined the unsafe condition described previously is likely to exist or develop on other products of the same type design. This AD requires periodic inspection of the adaptor for leaks and repair if a leak is found.

Cost Impact

None of the Alpha Aviation Model R2160 airplanes affected by this action are on the U.S. Register. All airplanes included in the applicability of this rule currently are operated by non-U.S. operators under foreign registry; therefore, they are not directly affected by this AD action. However, the FAA considers this rule necessary to ensure that the unsafe condition is addressed in the event that any of these subject airplanes are imported and placed on the U.S. Register.

Should an affected airplane be imported and placed on the U.S. Register, accomplishment of the required action would take approximately 1 work-hour at an average labor rate of $80 per work-hour. There are no parts required for this AD. Based on these figures, the total cost impact of this AD would be $80 per airplane that would become registered in the United States.

Comments Invited

Because there are no affected airplanes on the U.S. register, it has no adverse economic impact and imposes no additional burden on any person. Therefore, prior notice and public procedures hereon are unnecessary. We invite you to send any written relevant data, views, or arguments regarding this AD. Send your comments to an address listed under the **ADDRESSES** section. Include the docket number ''FAA–2006–26492; Directorate Identifier 2006–CE–77–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of the AD. We will consider all comments received by the closing date and may amend the AD in light of those comments.

We will post all comments we receive, without change, to *http://dms.dot.gov*, including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive concerning this AD.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

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

Examining the AD Docket

You may examine the AD docket that contains the AD, the regulatory evaluation, any comments received, and other information on the Internet at *http://dms.dot.gov*; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Office (telephone (800) 647–5227) is located at the street address stated in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2006–26–03 Alpha Aviation Design Limited (Type Certificate No. A48EU formerly held by APEX Aircraft and AVIONS PIERRE ROBIN): Amendment 39–14861; Docket No. FAA–2006–26492; Directorate Identifier 2006–CE–77–AD.

Effective Date

(a) This AD becomes effective on January 30, 2007.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Model R2160 airplanes, serial numbers 142, 143, 144, 147, 148, and 151 through 155, that are certificated in any category.

Unsafe Condition

(d) This AD is the result of the possibility of fuel leakage at the end of the adapter in the fuel pressure indication system. We are issuing this AD to detect and correct fuel leaks in the fuel pressure indicating system. This failure could allow fuel to leak near the exhaust manifold and lead to a fire.

Compliance

(e) To address this problem, you must do the following, unless already done:

Actions	Compliance	Procedures
(1) Inspect the fuel pressure system indication adaptor (part number 52.46.11.000 or FAA approved equivalent part number) for indication of fuel leakage.	Before further flight after January 30, 2007 (the effective date of this AD) and thereafter at intervals not to exceed 50 hours time-in-service.	Perform a visual inspection. Figure 1 of Robin Aviation Service Letter No 37 rev. 2 dated April 4, 2000, shows a view of the fuel pressure indicator system.
(2) If any leak is found, repair the leak	Before further flight after inspection required by paragraph (e)(1) of this AD.	Perform a repair program approved specifically for this AD by the FAA.

Alternative Methods of Compliance (AMOCs)

(f) The Manager, Standards Staff, FAA, ATTN: Karl Schletzbaum, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329–4146; fax: (816) 329–4090, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19.

Related Information

(g) This AD is related to the Civil Aviation Authority of New Zealand AD DCA/R2000/33, dated June 29, 2006, which references Direction Generale de l'Aviation Civile (DGAC) AD F–2001–391(a), dated October 3, 2001.

Material Incorporated by Reference

(h) None.

Issued in Kansas City, Missouri, on December 15, 2006.

Kim Smith,

Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. E6–21923 Filed 12–22–06; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9260]

RIN 1545–BF46

Application of Separate Limitations to Dividends From Noncontrolled Section 902 Corporations; Correction

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Correcting amendments.

SUMMARY: This document contains corrections to final and temporary regulations that were published in the **Federal Register** on Tuesday, April 25, 2006 (71 FR 24516) concerning the application of separate foreign tax credit limitations to dividends received from noncontrolled section 902 corporations under section 904(d)(4).

DATES: These corrections are effective April 25, 2006.

FOR FURTHER INFORMATION CONTACT: Ginny Chung (202) 622–3850 (not a toll-free call).

SUPPLEMENTARY INFORMATION:

Background

The final and temporary regulations (TD 9260) that are the subject of these corrections are under sections 902, 904, and 964 of the Internal Revenue Code.

Need for Correction

As published, TD 9260 contains errors that may prove to be misleading and are in need of clarification.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Correction of Publication

■ Accordingly, 26 CFR part 1 is corrected by making the following correcting amendments:

PART 1—INCOME TAXES

■ **Paragraph 1.** The authority for part 1 is amended and continues to read in part:

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

■ **Par. 2.** Section 1.902–1 is amended by adding a heading to paragraph (a)(4)(i) introductory text and revising the heading for paragraph (c)(8) to read as follows:

§ 1.902–1 Credit for domestic corporate shareholder of a foreign corporation for foreign income taxes paid by the foreign corporation.

(a) * * *

(4) *Third- or lower-tier corporation*—(i) *Third-tier corporation.* * * *

* * * * *

(c) * * *

(8) *Effect of certain liquidations, reorganizations, or similar transactions on certain foreign taxes paid or accrued in taxable years beginning on or before August 5, 1997.*

* * *

* * * * *

■ **Par. 3.** Section 1.902–1T is amended by revising the first sentence of paragraph (a)(7) to read as follows:

§ 1.902–1T Credit for domestic corporate shareholder of a foreign corporation for foreign income taxes paid by the foreign corporation (temporary).

(a) * * *

(7) * * * The term *foreign income taxes* means income, war profits, and excess profits taxes as defined in § 1.902–1(a), and taxes included in the term income, war profits, and excess profits taxes by reason of section 903, that are imposed by a foreign country or a possession of the United States, including any such taxes deemed paid by a foreign corporation under this section. * * *

* * * * *

■ **Par. 4.** Section 1.902–2 is amended by revising the first sentence of paragraph (a)(1) to read as follows:

§ 1.902–2 Treatment of deficits in post-1986 undistributed earnings and pre-1987 accumulated profits of a first- or lower-tier corporation for purposes of computing an amount of foreign taxes deemed paid under § 1.902–1.

(a) * * * (1) * * * For purposes of computing foreign income taxes deemed paid under § 1.902–1(b) with respect to dividends paid by a first- or lower-tier corporation, when there is a deficit in the post-1986 undistributed earnings of that corporation and the corporation makes a distribution to shareholders that is a dividend or would be a dividend if there were current or accumulated earnings and profits, then the post-1986 deficit shall be carried back to the most recent pre-effective date taxable year of the first- or lower-tier corporation with positive accumulated profits computed under section 902. * * *

* * * * *

■ **Par. 5.** Section 1.904–0 is amended by adding the entries for paragraphs (o)(1) and (o)(2) under § 1.904–5 to read as follows:

§ 1.904–0 Outline of regulations provisions for section 904.

* * * * *

§ 1.904–5 Look-through rules as applied to controlled foreign corporations and other entities.

* * * * *

(o) * * *

(1) Rules for controlled foreign corporations and other look-through entities.

(2) Rules for noncontrolled section 902 corporations.

* * * * *

■ **Par. 6.** Section 1.904–4 is amended by revising paragraph (c)(4) introductory text and adding paragraphs (c)(4)(i) through (c)(4)(iii) to read as follows:

§ 1.904–4 Separate application of section 904 with respect to certain categories of income.

* * * * *

(c) * * *

(3) and (4) [Reserved]. For further guidance, see § 1.904–4T(c)(3) and (4) introductory text.

(4)(i) *Income from sources within the QBU's country of operation.* Passive income from sources within the QBU's country of operation shall be treated as one item of income.

(ii) *Income from sources without the QBU's country of operation.* Passive income from sources without the QBU's country of operation shall be grouped on the basis of the tax imposed on that income as provided in § 1.904–4T(c)(3)(i) through (iv).

(iii) *Determination of the source of income.* For purposes of this paragraph (c)(4), income will be determined to be from sources within or without the QBU's country of operation under the laws of the foreign country of the payor of the income.

* * * * *

Par. 7. Section 1.904–5 is amended by revising paragraphs (a) introductory text and (a)(1) and adding *Examples 4* and *5* to paragraph (i)(5) to read as follows:

§ 1.904–5 Look-through rules as applied to controlled foreign corporations and other entities.

(a) and (a)(1) [Reserved]. For further guidance, see § 1.904–5T(a) introductory text and (a)(1).

* * * * *

(i) * * *

(5) * * *

Examples 4 and *5* [Reserved]. For further guidance, see § 1.904–5T(i)(5) *Examples 4* and *5*.

* * * * *

Par. 8. Section 1.904(f)–12T is amended by revising the heading for paragraph (g)(1) to read as follows:

§ 1.904(f)–12T Transition rules (temporary).

* * * * *

(g) * * * (1) *Recapture of separate limitation loss or overall foreign loss in a separate category for dividends from a noncontrolled section 902 corporation.* * * *

* * * * *

■ **Par. 9.** Section 1.964–1 is amended by:

■ 1. Redesignating paragraphs (a) introductory text, (a)(1), (a)(2) and (a)(3) as paragraphs (a)(1) introductory text, (a)(1)(i), (a)(1)(ii) and (a)(1)(iii), respectively.

■ 2. Designating the undesignated text following newly-designated paragraph (a)(1)(iii) as paragraph (a)(2).

■ 3. Removing the comma following the word ''shall'' from newly-designated paragraph (a)(1) introductory text.

■ 4. Removing the last sentence in newly-designated paragraph (a)(1)(i).

■ 5. Revising newly-designated paragraph (a)(2), and the text of paragraphs (b)(1) introductory text and (c)(1) introductory text.

The revisions read as follows:

§ 1.964–1 Determination of the earnings and profits of a foreign corporation.

(a) * * *

(2) *Required adjustments.* The computation described in paragraph (a)(1) of this section shall be made in the foreign corporation's functional currency (determined under section 985 and the regulations under that section) and may be made by following the procedures described in paragraphs (a)(1)(i) through (a)(1)(iii) of this section in an order other than the one listed, as long as the result so obtained would be the same. In determining earnings and profits, or the deficit in earnings and profits, of a foreign corporation under section 964, the amount of an illegal bribe, kickback, or other payment (within the meaning of section 162(c), as amended by section 288 of the Tax Equity and Fiscal Responsibility Act of 1982 in the case of payments made after September 3, 1982, and the regulations issued pursuant to section 964) paid after November 3, 1976, by or on behalf of the corporation during the taxable year of the corporation directly or indirectly to an official, employee, or agent in fact of a government shall not be taken into account to decrease such earnings and profits or to increase such deficit. No adjustment shall be required under paragraph (a)(1)(ii) or (iii) of this section unless it is material. Whether an adjustment is material depends on the facts and circumstances of the particular case, including the amount of the adjustment, its size relative to the general level of the corporation's total assets and annual profit or loss, the consistency with which the practice has been applied, and whether the item to which the adjustment relates is of a recurring or merely a nonrecurring nature. For the treatment of earnings and profits whose distribution is prevented by restrictions and limitations imposed by a foreign government, see section 964(b) and the regulations issued pursuant to section 964. For rules for determining the earnings and profits (or deficit in earnings and profits) of a foreign corporation for taxable years beginning before January 1, 1987, for purposes of sections 951 through 964, see 26 CFR 1.964–1(a) (revised as of April 1, 2006).

(b) * * * (1) * * * The accounting principles to be applied in making the adjustments required by paragraph (a)(1)(ii) of this section shall be those accounting principles generally accepted in the United States for purposes of reflecting in the financial statements of a domestic corporation the operations of its foreign affiliates, including the following:

* * * * *

(c) * * * (1) * * * The tax accounting standards to be applied in making the adjustments required by paragraph (a)(1)(iii) of this section shall be the following:

* * * * *

■ **Par. 10.** Section 1.964–1T is amended by revising the first sentence of paragraph (c)(2) and the last sentence of paragraph (c)(5)(i) to read as follows:

§ 1.964–1T Determination of the earnings and profits of a foreign corporation (temporary).

* * * * *

(c) * * *

(2) * * * For the first taxable year of a foreign corporation beginning after April 25, 2006, in which such foreign corporation first qualifies as a controlled foreign corporation (as defined in section 957 or 953) or a noncontrolled section 902 corporation (as defined in section 904(d)(2)(E)), any method of accounting or taxable year allowable under this section may be adopted, and any election allowable under this section may be made, by such foreign corporation or on its behalf notwithstanding that, in previous years, its books or financial statements were prepared on a different basis, and notwithstanding that such election is required by the Internal Revenue Code or regulations to be made in a prior taxable year. * * *

* * * * *

(5) * * * (i) * * * In the event that the United States shareholders of the controlled foreign corporation do not, in the aggregate, own (within the meaning of section 958(a)) more than 50 percent of the total combined voting power of all classes of the stock of such foreign corporation entitled to vote, the controlling United States shareholders of the controlled foreign corporation shall be all those United States shareholders who own (within the meaning of section 958(a)) stock of such corporation.

* * * * *

Cynthia Grigsby,

Senior Federal Register Liaison Officer, Publications and Regulations Branch, Legal Processing Division, Associate Chief Counsel (Procedure and Administration).

[FR Doc. E6–22024 Filed 12–22–06; 8:45 am]

BILLING CODE 4830–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 80

Regulation of Fuels and Fuel Additives

CFR Correction

In Title 40 of the Code of Federal Regulations, parts 72 to 80, revised as of July 1, 2006, on page 695, § 80.75 is corrected by reinstating paragraphs (a)(2)(ix) and (a)(2)(x) to read as follows:

§ 80.75 Reporting requirements.

* * * * *

(a) * * *

(2) * * *

(ix) In the case of butane blended with reformulated gasoline or RBOB under § 80.82:

(A) Identification of the butane batch as complying with the provisions of § 80.82;

(B) Identification of the butane batch as commercial or non-commercial grade butane;

(C) The batch number of the butane;

(D) The date of production of the gasoline produced using the butane batch;

(E) The volume of the butane batch;

(F) The properties of the butane batch specified by the butane supplier, or the properties specified in § 80.82(c) or (d), as appropriate;

(G) The volume of the gasoline batch subsequent to the butane blending; and

(x) In the case of any imported GTAB, identification of the gasoline as GTAB.

* * * * *

[FR Doc. 06–55532 Filed 12–22–06; 8:45 am]

BILLING CODE 1505–01–D

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 112

[EPA–HQ–OPA–2005–0001; FRL–8258–3]

RIN 2050–AG23

Oil Pollution Prevention; Spill Prevention, Control, and Countermeasure Plan Requirements—Amendments

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA or the Agency) is amending the Spill Prevention, Control, and Countermeasure (SPCC) Plan requirements by: first, providing the option for owners and operators of facilities that store 10,000 gallons of oil or less and meet other qualifying criteria to self-certify their SPCC Plans in lieu of review and certification by a Professional Engineer; second, providing an alternative to the general secondary containment requirement without requiring a determination of impracticability for facilities that have particular types of oil-filled equipment; third, defining and exempting particular vehicle fuel tanks and other on-board bulk oil storage containers used for motive power; and fourth, exempting mobile refuelers from the sized secondary containment requirements for bulk storage containers. The Agency also is removing and reserving the SPCC requirements for animal fats and vegetable oils that are specific to onshore oil production facilities, onshore oil drilling and workover facilities, and offshore oil drilling, production, or workover facilities. Finally, the Agency is extending the SPCC compliance dates for farms. These changes significantly reduce the burden imposed on the regulated community for complying with the SPCC requirements, while maintaining protection of human health and the environment. In a separate document in this **Federal Register**, the Agency is proposing to extend the compliance dates for all facilities.

DATES: This final rule is effective February 26, 2007.

ADDRESSES: The public docket for this final rule, Docket ID No. EPA–HQ–OPA–2005–0001, contains the information related to this rulemaking, including the response to comment document. All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information may not be publicly available, e.g., Confidential Business Information or other information the disclosure of which is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the EPA Docket, EPA/DC, EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number of the Public Reading Room is 202–566–1744, and the telephone number to make an appointment to view the docket is 202–566–0276. The EPA Docket Center suffered damage due to flooding during the last week of June 2006. The Docket Center is continuing to operate. However, during the cleanup, there will be temporary changes to Docket Center telephone numbers, addresses, and hours of operation for people who wish to visit the Public Reading Room to view documents. Consult EPA's **Federal Register** notice at 71 FR 38147 (July 5, 2006) or the EPA Web site at *http://www.epa.gov/epahome/dockets.htm* for current information on docket status, locations and telephone numbers.

FOR FURTHER INFORMATION CONTACT: For general information, contact the Superfund, TRI, EPCRA, RMP and Oil Information Center at 800–424–9346 or TDD 800–553–7672 (hearing impaired). In the Washington, DC metropolitan area, call 703–412–9810 or TDD 703–412–3323. For more detailed information on specific aspects of this rule, contact Vanessa E. Rodriguez at 202–564–7913 (*rodriguez.vanessa@epa.gov*), or Mark W. Howard at 202–564–1964 (*howard.markw@epa.gov*), U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460–0002, Mail Code 5104A.

SUPPLEMENTARY INFORMATION: The contents of this preamble are:

I. General Information

The Environmental Protection Agency (EPA or the Agency) is amending the Spill Prevention, Control, and Countermeasure (SPCC) Plan requirements of the Oil Pollution Prevention regulation at 40 CFR part 112 to streamline the regulatory requirements for owners and operators of a subset of facilities by: (1) Providing an option to allow the owners or operators of facilities with an oil storage capacity of 10,000 gallons or less and who meet other qualifying criteria to self-certify their SPCC Plans in lieu of review and certification by a Professional Engineer; (2) allowing owners and operators of facilities that have particular types of oil-filled operational equipment to use an oil spill contingency plan along with an inspection or monitoring program as an alternative to secondary containment for qualified equipment without requiring a determination of impracticability; (3) providing an exemption for newly defined ''motive power containers''; and (4) exempting mobile refuelers from the specifically sized secondary containment requirements for bulk storage containers. In addition, the Agency is removing and reserving certain SPCC requirements for animal fats and vegetable oils; and is extending the compliance dates for farms. The purpose of this rulemaking is to provide streamlined, alternative approaches for compliance with oil spill prevention requirements for these entities, and to improve net welfare by reducing the costs of regulation and improving compliance, resulting in greater environmental protection.

II. Entities Potentially Affected by This Rule

Industry sector	NAICS code
Oil Production	211111
Farms	111, 112
Electric Utility Plants	2211
Petroleum Refining and Related Industries	324
Chemical Manufacturing	325
Food Manufacturing	311, 312
Manufacturing facilities using and storing animal fats and vegetable oils (AFVO)	311, 325
Metal Manufacturing	331, 332
Other Manufacturing	31–33
Real Estate Rental and Leasing	531–533
Retail Trade	441–446, 448, 451–454
Contract Construction	23
Wholesale Trade	42
Other Commercial	492, 541, 551, 561–562
Transportation	481–488
Arts Entertainment & Recreation	711–713
Other Services (Except Public Administration)	811–813
Petroleum Bulk Stations and Terminals	4247

Industry sector	NAICS code
Education	61
Hospitals & Other Health Care	621, 622
Accommodation and Food Services	721, 722
Fuel Oil Dealers	45431
Gasoline stations	4471
Information Finance and Insurance	51, 52
Mining	212
Warehousing and Storage	493
Religious Organizations	813110
Military Installations	928110
Pipelines	4861, 48691
Government	92

The list of potentially affected entities in the above table may not be exhaustive. The Agency's aim is to provide a guide for readers regarding those entities that potentially could be affected by this action. However, this action may affect other entities not listed in this table. If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding section entitled **FOR FURTHER INFORMATION CONTACT**.

III. Statutory Authority and Delegation of Authority

Section 311(j)(1)(C) of the Clean Water Act (CWA or the Act), 33 U.S.C. 1321(j)(1)(C), requires the President to issue regulations establishing procedures, methods, equipment, and other requirements to prevent discharges of oil from vessels and facilities and to contain such discharges. The President delegated the authority to regulate non-transportation-related onshore facilities to EPA in Executive Order 11548 (35 FR 11677, July 22, 1970), which has been replaced by Executive Order 12777 (56 FR 54757, October 22, 1991). A Memorandum of Understanding (MOU) between the U.S. Department of Transportation (DOT) and EPA (36 FR 24080, November 24, 1971) established the definitions of transportation-related and non-transportation-related facilities. A MOU among EPA, the U.S. Department of the Interior (DOI), and DOT, effective February 3, 1994, has re-delegated the responsibility to regulate certain offshore facilities from DOI to EPA.

IV. Background

On July 17, 2002, EPA published a final rule amending the SPCC rule, formally known as the Oil Pollution Prevention regulation (40 CFR part 112), promulgated under the authority of section 311(j) of the CWA. (The SPCC rule was originally promulgated on December 11, 1973 (38 FR 34164).) This rule included revised requirements for SPCC Plans and for Facility Response Plans (FRPs). It also included new subparts outlining the requirements for various classes of oil; revised the applicability of the regulation; amended the requirements for completing SPCC Plans; and made other modifications (67 FR 47042). The revised rule became effective on August 16, 2002. After publication of this rule, several members of the regulated community filed legal challenges to certain aspects of the rule. Most of the issues raised in the litigation have been settled, following which EPA published clarifications in the **Federal Register** to several aspects of the revised rule (69 FR 29728, May 25, 2004).[1] In addition, concerns were raised about the implementability of certain aspects of the 2002 rule.

EPA has extended the dates for compliance with the 2002 rule by extending the dates for amending and implementing revised SPCC Plans in 40 CFR 112.3(a), (b), and (c), most recently by notice dated February 17, 2006 (71 FR 8462). Please see the **Federal Register** notice for further discussion on the compliance extensions. EPA took the most recent action in order to allow time to finalize the revisions in today's final rule and to provide the regulated community time to review and understand the material presented in the *SPCC Guidance for Regional Inspectors,* which was made available in December of 2005. The Agency also was concerned that the effects of the September 2005 hurricanes on many industry sectors might adversely impact their ability to meet the compliance dates if no extension was provided.

October 31, 2007 is the current deadline for amending and implementing revised SPCC Plans for facilities (including mobile facilities) that were in operation on or before August 16, 2002. Facilities that came into operation after August 16, 2002 also must prepare and implement an SPCC Plan on or before October 31, 2007. As discussed in Section V.F of this preamble, today's final rule provides an additional extension of the compliance date for farms. Today's rule, which is effective February 26, 2007, does not modify the compliance dates for owners and operators of facilities other than farms. Elsewhere in today's **Federal Register**, EPA is proposing to extend the compliance dates for owners and operators of facilities until July 1, 2009 based on further SPCC regulatory revisions that EPA is considering, and that it expects to propose in 2007.

On September 20, 2004, EPA published two Notices of Data Availability (NODAs). The first NODA solicited comments on submissions to EPA that suggested more focused requirements for owners and operators of facilities subject to the SPCC rule that handle oil below a certain threshold amount, referred to as ''certain facilities'' (69 FR 56182). Streamlined approaches for owners and operators of facilities with oil capacities below a certain threshold were discussed in the NODA-related documents. The second NODA solicited comments on whether alternate regulatory requirements would be appropriate for owners and operators of facilities with oil-filled and process equipment (69 FR 56184). EPA has reviewed the public comments and data submitted in response to the NODAs in developing today's final rule.

Additionally, on December 2, 2005, EPA issued the SPCC Guidance for Regional Inspectors. This guidance document is intended to assist regional inspectors in reviewing implementation of the SPCC rule at a regulated facility. The guidance document is designed to facilitate an understanding of the rule's applicability, to help clarify the role of

[1] *American Petroleum Institute* v. *Leavitt,* No. 1:102CV02247 PLF and consolidated cases (D.D.C. filed Nov. 14, 2002). The remaining issue to be decided concerns the definition of ''navigable waters'' in § 112.2.

the inspector in the review and evaluation of a facility owner or operator's compliance with the performance-based SPCC requirements, and to provide a consistent national policy on several SPCC-related issues. The guidance is available to owners and operators of facilities that may be subject to the requirements of the SPCC rule and to the general public on the Agency's Web site at *http://www.epa.gov/oilspill.* This guidance document is a living document and will be revised, as necessary, to reflect any relevant future regulatory amendments, including today's action.

Based on the comments received on the NODAs, as well as other information received, EPA proposed to amend the SPCC rule to address a number of issues raised, including those pertaining to qualified facilities, qualified oil-filled operational equipment, motive power containers, airport mobile refuelers, animal fats and vegetable oils, and the compliance date for farms. (See 70 FR 73524, December 12, 2005.) EPA discusses each of these issues in Section V of this preamble. The preamble generally discusses the comments received on the proposal, EPA's response, and any modifications made to the proposal. For a more detailed discussion of the comments received and EPA's response, see ''Summary and Response to Comments,'' which is included in the docket for today's final rule.

The scope of today's final rule was intended to address only certain targeted areas of the SPCC requirements, and a number of issues and concerns raised by the regulated community. As highlighted in the EPA Regulatory Agenda and the 2005 OMB report on ''Regulatory Reform of the U.S. Manufacturing Sector,'' EPA is considering further amendments to address other areas where regulatory reform may be appropriate. For these additional areas, the Agency expects to issue a proposed rule in 2007. Areas where regulatory reform may be appropriate include, and are not limited to, oil and natural gas exploration and production, farms, and Tier I facilities. EPA, in conjunction with DOE, has been conducting an energy impact analysis of the SPCC requirements, and, to the extent that the analysis is available, will consider it to inform the Agency's 2007 rulemaking.

Because it is highly unlikely that the Agency will be able to promulgate such regulatory amendments before the current October 31, 2007 compliance date for SPCC becomes effective, EPA believes it is appropriate to provide an extension of the compliance date. Such an extension has been proposed elsewhere in today's **Federal Register**.

The Agency is not in a position, at this time, to indicate all the areas for possible regulatory reform that may be addressed as part of the 2007 SPCC proposal. Nevertheless, the Agency recognizes that owners and operators of facilities need time to determine which changes may be made to the rules that may impact the requirements they are subject to in order to determine when they need to comply with the new requirements.

This approach would allow those potentially affected in the regulated community an opportunity to make changes to their facilities and to their SPCC Plans necessary to comply with the revised requirements, rather than with the existing requirements. Regarding modifications of the SPCC regulations, EPA is proposing in a separate notice in today's **Federal Register** to extend the deadlines for compliance to July 1, 2009.

V. Today's Action

A. Qualified Facilities

1. Overview of the Qualified Facilities Proposal

On December 12, 2005 (70 FR 73524), EPA proposed to amend the SPCC rule to provide an option to allow the owner or operator of a facility that meets the qualifying criteria (hereafter referred to as a ''qualified facility'') to self-certify the facility's SPCC Plan in lieu of review and certification by a licensed Professional Engineer (PE). EPA proposed to amend § 112.3 to describe the SPCC eligibility criteria that a regulated facility must meet in order to be considered a qualified facility.

As proposed, the eligibility criteria for a qualified facility would be a facility subject to the SPCC rule that (1) has an aggregate oil storage capacity of 10,000 gallons or less; and (2) had no discharges as described in § 112.1(b) during the ten years prior to self-certification. Self-certified Plans could not include ''environmentally equivalent'' alternatives to required Plan elements as provided in § 112.7(a)(2) or contingency planning in lieu of secondary containment as provided in § 112.7(d) on the basis of ''impracticability.'' However, the proposal included specified ''environmentally equivalent'' measures with respect to security and integrity testing that would be available to facility owners and operators that choose to self-certify. Self-certification would be optional for owners and operators of facilities meeting the eligibility criteria, so that those owners and operators of qualified facilities that found the existing rules more cost-effective in achieving compliance with the SPCC requirements, would continue to have the option of complying with the streamlined approach or could choose to comply with the existing SPCC requirements (including the PE certification) to take advantage of the flexibility offered by PE-certified impracticability determinations and environmentally equivalent measures.

In general, the Agency agrees with the commenters who supported the qualified facilities proposal for self-certification and believe that this revision will relieve regulatory burden on small oil storage facilities. As one commenter noted, self-certification should result in greater compliance rates across the board. Therefore, today's rule finalizes the proposed provision with a few modifications.

As described in the preamble to the proposed rule, EPA also considered, but did not propose, a multi-tiered structure option based on an analysis prepared for the U.S. Small Business Administration's (SBA) Office of Advocacy that included a tiered system for facilities that have total oil storage capacities between 1,321 and 5,000 gallons, between 5,001 and 10,000 gallons, and greater than 10,000 gallons. Under this option, Tier I facilities (1,321 to 5,000 gallons oil storage capacity) would not need a written SPCC Plan (and therefore no PE certification), but would adhere to all other SPCC requirements. Tier II facilities (5,001 to 10,000 gallons oil storage capacity) would be required to have a written SPCC Plan, but no PE certification requirement. Tier III facilities (greater than 10,000 gallons oil storage capacity) would be required to have a written SPCC Plan, certified by a PE. A significant number of commenters on the proposed rule supported a multi-tiered approach.

The Agency continues to believe that a facility owner or operator cannot effectively implement an oil spill prevention program, or any other program (business or otherwise), without documentation of that program's action items. As a matter of practice, it would be extremely difficult for a facility owner or operator to be able to follow the regulatory requirements and to comply with all the recordkeeping components without the documentation that is the Plan itself. The Plan also serves as an important communication and training tool for both management and oil-handling personnel at the facility. The sole action of having to document compliance with all of the requirements can assist in uncovering flaws in the program's implementation, and may serve as a tool to correct them. Additionally, the documentation of compliance with the rule's requirements in a written Plan serves as a facility-specific oil spill response and prevention planning exercise which is designed to improve oil spill prevention. Nevertheless, the Agency understands the concerns, particularly of owners and operators of facilities with a smaller oil storage capacity and likely more limited resources, of the potential effort needed to develop a complicated Plan. Thus, the Agency has been exploring the possibility of developing a further simplified Plan for facilities that handle between 1,320 and 5,000 gallons of oil. However, because the Agency is considering removing or changing some of the regulatory requirements and developing a standardized form/checklist for ease of implementation, the Agency chose not to finalize this option without taking further comment. Therefore, although EPA is not adopting a multi-tiered approach in today's final rule, the Agency intends to propose a simplified approach for facilities that handle between 1,320 and 5,000 gallons of oil within the near future. In that proposal, the Agency expects to discuss the implementation of the SPCC rule for these facilities.

The preamble to the proposed rule also described an approach whereby the Agency would require owners and operators of qualified facilities to make a one-time notification to EPA if they have been in operation or subject to the SPCC requirements for a period less than ten years from the time of Plan certification, and therefore could not show a ten-year clean spill history as a qualifier. The comments generally opposed a notification requirement, arguing that it would impose additional burden with no clear benefit for the regulated community. EPA is not adopting this one-time notification requirement, because the Agency does not believe it would offer any further environmental protection. The additional burden of a notification requirement was not considered necessary and would be contrary to the intent of today's rule.

2. Summary of This Final Rule for Qualified Facilities

Today's rule finalizes the proposed option with modifications to the reportable discharge history criterion and to the self-certification limitations for qualified facilities. The final rule also places the alternative self-certification provisions in § 112.6, rather than in § 112.3(g) as proposed. A facility owner or operator may qualify to prepare a Plan that meets the alternative requirements in § 112.6 of today's final rule, in lieu of a Plan prepared in accordance with the general requirements contained in § 112.7 and the applicable requirements in subparts B and C of the rule. Finally, today's action allows a qualified facility owner or operator to use environmentally equivalent measures or an impracticability determination provided they are certified by a PE.

To qualify for this option, a facility must meet the following eligibility criteria: the facility had no single discharge as described in § 112.1(b) exceeding 1,000 U.S. gallons or no two discharges as described in § 112.1(b) each exceeding 42 U.S. gallons within any twelve month period in the three years prior to the SPCC Plan certification date, or since becoming subject to 40 CFR part 112 if the facility has been in operation for less than three years, and the facility has 10,000 gallons or less in aggregate aboveground oil storage capacity. Discharges as described in § 112.1(b) that are the result of natural disasters, acts of war, or terrorism will not disqualify a facility owner or operator from using the self-certification option.

An owner or operator of a qualified facility may prepare, self-certify and implement an SPCC Plan that complies with all of the applicable requirements of the rule in accordance with § 112.6 of today's final rule. No PE certification is required for qualified facilities' Plans. A qualified facility owner or operator also may choose to prepare a Plan in accordance with the general Plan requirements in § 112.7 and applicable requirements in subparts B and C, including having the Plan certified by a Professional Engineer as required under § 112.3(d). The qualified facility approach in today's final rule is optional; owners or operators of facilities that qualify may choose not to exercise this option.

In proposing this option for facilities handling smaller amounts of oil, the Agency sought to focus on those smaller operations that may be concerned about the impact of utilizing a PE on their limited budget. Some of the current noncompliance with the SPCC regulation may be attributed to those concerns. The Agency believes that providing a simpler, less costly option for owners and operators of these smaller, less complex facilities will improve the overall compliance for the SPCC regulation, ultimately resulting in greater environmental protection.

3. Eligibility Criteria

a. Total Facility Oil Storage Capacity Threshold

EPA proposed to limit the maximum aggregate oil storage capacity at a qualified facility to 10,000 gallons or less. EPA considered many different factors before selecting this maximum storage capacity. As explained in the preamble to the proposal (70 FR 73529), EPA has established 10,000 gallons as a threshold in several other rules relating to oil discharges. The National Oil and Hazardous Substances Pollution Contingency Plan size classes define an oil discharge to inland waters exceeding 10,000 gallons as a major discharge. An oil discharge of 10,000 gallons or more to waters of the U.S. and adjoining shorelines that could reasonably be expected to cause substantial harm to the environment also is one of the factors used in identifying facilities whose owners and operators must prepare and submit a Facility Response Plan (see 40 CFR 112.20(f)(1)(D). A number of State regulations also differentiate regulatory requirements based on a facility's total storage capacity, with some States specifying a 10,000-gallon threshold (e.g., Maryland, Minnesota, Oregon, New York, Wisconsin). Finally, 10,000 gallons is a common storage container size.

More commenters supported than opposed the proposed threshold eligibility criterion of total oil storage capacity of 10,000 gallons or less, while others offered alternative thresholds. Many commenters supported the idea of establishing tiers for qualified facilities. (As noted earlier, the Agency intends to propose a more streamlined approach for owners and operators of facilities with a total oil storage capacity of 5,000 gallons or less.) Many supporters believed that the proposed 10,000-gallon threshold would reduce the financial burden on owners and operators of small facilities. Among commenters that opposed the threshold, at least one stated that the proposed 10,000-gallon threshold did not provide enough regulatory relief to owners and operators of small facilities, but others noted that smaller storage sizes do not necessarily correlate with lower spill risk.

Facilities handling smaller amounts of oil are typically simpler in layout and operation. Most facilities with an oil storage capacity of 10,000 gallons or less are in industrial sectors that are end-consumers of oil (i.e. farms, real estate, rental and leasing, retail trade, construction [see the Regulatory Impact Analysis for this action, found in the docket for today's final rule]). These facilities are commonly not in an oil production or distribution business and tend to use oil on-site for heating purposes, or to fuel emergency power generators or heavy machinery. The configuration of the oil-related equipment tends to be relatively standard and simple. Oil is commonly stored in a few bulk storage containers which are often bought off-the-shelf from a tank manufacturer or installer (e.g., standard UL–142 tanks) and connected with few short lengths of piping in a standard configuration that changes relatively little from one facility to another.

Additionally, these facilities typically do not have significant transfers of oil because they do not further distribute the oil. A survey conducted by EPA of oil storage facilities (1995 SPCC Survey of Oil Storage Facilities) found that the larger the storage capacity at a facility, the greater the likelihood of larger spills, more spills, and more cleanup costs annually. Our regression analyses of the 1995 survey data (see ''Analysis of the Relationship between Facility Characteristics and Oil Spill Risk,'' found in today's docket) confirmed similar linkages for facilities with a greater number of tanks and larger annual throughput. These analyses were performed because storage capacity, number of tanks, and throughput were identified as important individual factors in explaining the total annual spill volume, number of spills, and cleanup costs. Thus, these factors were used together in a multivariate regression model to ensure that these three variables continue to be statistically significant variables when assessing whether there is potential bias (i.e., an overstatement of the importance of the variable in explaining the variation in the dependent variable). After performing these analyses, storage capacity and number of tanks were found to be statistically significant in relation to all three measures of spill risk (i.e., total number, volume, and cleanup costs of oil spills). The Agency believes simple oil storage configuration, in conjunction with the smaller quantities of oil handled at qualified facilities, makes self-certification an appropriate alternative. Therefore, the Agency has decided to maintain the maximum aggregate oil storage capacity for qualified facilities at 10,000 gallons as proposed.

The development of streamlined requirements for owners and operators of those facilities with a smaller size or storage volume is not new; industry standards, engineering codes and practices, State regulations, local fire codes and local ordinances often recognize the differences between sizes and complexity of their target facilities and/or equipment and as a result incorporate simplified requirements. The Agency believes that today's action provides an alternative compliance option for owners and operators of facilities handling smaller amounts of oil that will ultimately result in increased environmental protection by making it easier and less burdensome to comply.

EPA recognizes that an oil discharge of less than 10,000 gallons can be harmful (see 40 CFR part 110, where the Agency defines what constitutes a discharge of oil in quantities that may be harmful). Nevertheless, EPA believes that it is reasonable to allow owners and operators of facilities with a capacity of no more than 10,000 gallons the option to prepare and implement SPCC Plans without the involvement of a PE (except in those cases where environmental equivalence or an impracticability determination is requested by an owner or operator and that the owner or operator chooses to have a PE certify part or all of the facility SPCC Plan). Therefore, the Agency is adopting in today's rule a threshold capacity of 10,000 gallons as a criterion for those facilities that are qualified for self-certification.

Some commenters argued that the 10,000-gallon threshold would still preclude owners and operators of smaller facilities from taking advantage of the self-certification alternative. For example, a facility with two 5,000-gallon storage containers and a few totes just exceeds the 10,000-gallon threshold. Commenters argued that these kinds of facilities have low volumes of oil and simple operations, and that perhaps a slightly higher threshold would be more appropriate. The Agency recognizes that regardless of the threshold quantity selected, there are likely to be facilities just above that threshold that will be excluded. To the extent that facility owners or operators want to take advantage of the streamlined approach, they always have the option of reducing the storage capacity of oil at their facility by either removing containers from the facility inventory, or permanently closing containers in accordance with § 112.2.

Other commenters suggested higher threshold quantities, generally based upon the quantities of oil used or stored in their particular industry sector. EPA does not agree that this provides a rational basis for raising the threshold limit for qualified facilities. Higher thresholds would potentially allow owners and operators of facilities (in some cases unmanned) with more complex operations or more complex oil system configurations, designs and layouts, and with the potential for an increased number of transfers, the option of foregoing the services of a PE. Thus, self-certification for owners and operators of more complex facilities would not be commensurate with their potential spill risks.

By limiting the self-certification option to owners and operators of facilities with a maximum aggregate oil storage capacity of 10,000 gallons, the Agency believes that an owner or operator of a qualified facility should be able to self-certify compliance the facility's SPCC Plan, and that offering this simpler and streamlined alternative will result in greater environmental protection by improving compliance with the SPCC rule. Owners and operators of facilities handling smaller amounts of oil would still be required to comply with the SPCC requirements and to prevent and prepare to respond to oil discharges to navigable waters and adjoining shorelines, but they would be able to do so in a less costly manner. We believe this alternative certification provision will prove to be an incentive for compliance.

b. Reportable Discharge History

Clean Water Act section 311(b)(3) prohibits ''the discharge of oil * * * into or upon the navigable waters of the United States, the adjoining shorelines, or into or upon the waters of the contiguous zone'' or in connection with specified activities in waters ''in such quantities as may be harmful * * *.'' Section 311(b)(4) requires regulations to define the quantities of oil, ''the discharge of which may be harmful to the public health or welfare or the environment of the United States, * * *.'' 33 U.S.C. 1321(b)(3), (4). In part 110, EPA defines a ''discharge of oil in such quantities that may be harmful'' as a discharge of oil that violates applicable water quality standards; a discharge of oil that causes a film or sheen upon the surface of the water or on adjoining shorelines; or a discharge of oil that causes a sludge or emulsion to be deposited beneath the surface of the water or adjoining shorelines (40 CFR 110.3). The Agency refers to such discharges as reportable discharges or as ''a discharge as described in § 112.1(b)'' of the rule. Any person in charge of a facility must report any such discharge of oil to waters of the United States, adjoining shorelines, the contiguous zone or in connection with specified activities in waters from the facility to the National Response Center (NRC) at 1–800–424–8802 immediately. While EPA recognizes that past discharge history does not necessarily translate into a predictor of future performance, the Agency believes that discharge history is a reasonable indicator of a facility owner or operator's ability to develop an SPCC Plan for his smaller oil storage capacity facility without the involvement of a PE.

EPA proposed that a qualified facility subject to the SPCC requirements must have no reportable oil discharges as described in § 112.1(b) during the ten years prior to self-certification or since becoming subject to the SPCC requirements, whichever time period is less. The Agency proposed using a facility's reportable discharge history as a reasonable indicator of the effective implementation of an SPCC Plan based on an established record of good oil spill prevention. The reportable discharge history criterion was intended to limit the option of self-certification to owners and operators of those facilities that had demonstrated an effective implementation of spill prevention measures in the past.

The commenters who supported the proposed reportable discharge requirement agree that it is important for a facility to have a clean spill history. However, a significant number of commenters argued against the proposed reportable discharge history criterion as an appropriate criterion, and that the small storage capacity alone should be sufficient to allow self-certification. One reason is that some reportable discharges are not the facility owner or operator's fault, but caused by outside sources. For example, a number of commenters pointed to the recent hurricanes in the Gulf Coast states that led to oil discharges that were not within the control of the facility owner or operator. A further reason is that facilities that have a clean discharge history might not always remain spill-free. As for the proposed ten-year period, one commenter stated that facility owners and operators are only required to keep records for SPCC Plans for three years; most owners and operators keep them for five years. Another commenter stated that a discharge history of ten years would almost be impossible to prove. Another commenter believed that the qualification for a qualified facility should not be based on the ten-year discharge history, but should be based on the discharge history under the current operator. A few commenters believed that risk of discharge should determine self-certification. Additionally, many commenters recommended alternative discharge history timeframes in place of the ten-year timeframe EPA proposed. Half of the commenters believed that three years should be the time frame for the reportable discharge history since the SPCC record-keeping requirement for facility owners and operators is three years. Two commenters mentioned that if a discharge occurs and the Regional Administrator (RA) responds, and after review of the SPCC Plan the RA does not require an amendment in the Plan, then the discharge should not count against the facility owner or operator when determining its compliance with a spill-history criterion.

After consideration of the comments received, EPA is finalizing the reportable discharge criterion for qualified facilities but for three years, rather than ten years. The Agency agrees with commenters that a ten-year spill history is unreasonable, particularly since the facility owner or operator is only required to keep records for three years. In addition, EPA is modifying the types of discharges that must be considered for this criterion. The final rule provides that for the three years prior to the SPCC Plan certification date, or since becoming subject to 40 CFR part 112 if the facility has been in operation for less than three years, the owner or operator of a facility must certify that the facility has (1) had no single discharge as described in § 112.1(b) exceeding 1,000 U.S. gallons or (2) had no two discharges as described in § 112.1(b) each exceeding 42 U.S. gallons within any twelve month period. When determining spill history, the gallon amount specified in the criterion (either 1,000 or 42) refers to the amount of oil that actually reaches waters of the United States, adjoining shorelines, the contiguous zone or in connection with specified activities in waters and not the total amount of oil spilled. For example, a facility only experiencing one discharge over the past ten years in which 1,500 gallons of oil discharged onto the ground but only 20 gallons reached waters of the United States (causing a sheen and reportable to the NRC) would meet the reportable discharge history criterion. However, a facility having 1,500 gallon discharge to waters of the United States would not meet the reportable discharge history criterion.

In the preamble to the proposed rule, EPA requested comment on how extreme events such as natural disasters, acts of war or terrorism, sabotage or other calamities might potentially affect the discharge history criterion for qualified facilities. Many commenters stated that it would not be appropriate to include these events in the discharge history criterion. The Agency agrees that those reportable discharges caused by external factors beyond the control of the facility owner or operator such as natural disasters, acts of war, or terrorism should not disqualify owners and operators of otherwise qualified facilities from taking advantage of the self-certification option. Therefore, we have excluded those events from consideration in the reportable discharge criterion in today's final rule. The Agency did not include sabotage/vandalism in the final list of reportable discharge history extreme events because these are not necessarily beyond the control or planning ability of the facility owner or operator. Only those discharges as described in § 112.1(b) that are the result of natural disasters, acts of war, or terrorism will not disqualify any owner or operator of an otherwise qualified facility from using the self-certification option.

The discharge criterion finalized in today's rule is similar to the provision in § 112.4(a) for discharges that must be reported to the EPA Regional Administrator (RA). A discharge that must be reported to the RA pursuant to § 112.4(a) may result from improper Plan implementation, rather than from a deficiency in the Plan itself, which would likely not cause the RA to require the facility owner or operator to amend its Plan. Therefore, the EPA does not agree with the commenters that suggested excluding those discharges as described in § 112.1(b) from the eligibility criterion that have been investigated by the RA with no subsequent requirement for a Plan amendment.

The determination of eligibility based on reportable discharge history is made at the time the SPCC Plan is certified—*i.e.*, when the SPCC Plan is amended to comply with the SPCC rule revisions in today's final rule and those promulgated in July 2002. Once the compliance date extension ends, Plans must be amended, certified and implemented. Any discharges to navigable waters and adjoining shorelines that occur from a qualified facility after the SPCC Plan has been certified do not impact the eligibility of an owner or operator of the qualified facility to take advantage of the self-certification option. The facility does not lose eligibility status as a result of a discharge as described in § 112.1(b), unless the RA requires an amendment to the SPCC Plan in accordance with § 112.4(d) and specifically requires PE-certification. If an owner or operator cannot certify that the facility meets the eligibility criterion at the initial date of Plan certification, but can later demonstrate a clean spill history of three years, as well as compliance with any remedial actions required by the RA following a spill, then a technical amendment to the Plan can be self-certified and the Plan can be revised to allow for qualified status.

4. Requirements for Qualified Facilities

In today's rule, the Agency is creating a new section, § 112.6, with requirements specific for qualified facilities whose owners and operators choose to self-certify their Plans. Owners and operators of qualified facilities with an aggregate aboveground oil storage capacity of 10,000 gallons of oil or less may choose to comply with the requirements in § 112.6 by completing and implementing a self-certified SPCC Plan. A qualified facility's Plan, whether certified by a PE or self-certified, must comply with all of the applicable requirements of § 112.7 and subparts B and C of the rule. We note, however, that a facility's SPCC Plan does not need to conform to any particular format. There is flexibility with respect to how a facility owner or operator chooses to maintain the documentation comprising the facility's Plan, just as there is flexibility with respect to how the owner or operator chooses to carry out the elements of the Plan.

a. Self-Certification of Plan and Plan Amendment

The commenters who supported self-certification for owners and operators of qualified facilities believed that it would relieve burden on the owners and operators. The commenters who opposed self-certification did so for four main reasons. First, some commenters believe that the preparation of the SPCC Plan requires scientific, engineering, and professional judgment skills that are unique to engineers. Second, some commenters believe owners and operators of small facilities often cannot afford the cost of responding to a spill, and it is important that the SPCC Plan is prepared carefully and thoroughly by a PE. Third, some commenters believe that not having a PE involved would adversely affect public health, safety, and welfare. Fourth, some commenters believe that the proposal would allow non-engineers to perform a function that is only allowed by engineers under the National Council of Examiners for Engineering and Surveying, a Model Law adopted by the majority of States.

The self-certification option is designed for owners and operators of those facilities that store smaller amounts of oil. These smaller amounts of oil generally translate to facilities with simpler, pre-engineered installations, such as restaurants, office buildings, family farms, automotive repair shops, and rural electrical substations. EPA believes that a differentiated option for users of smaller amounts of oil has merit as other official bodies, such as standards setting organizations have provided differentiations in their standards for smaller users of oil. For example, the National Fire Protection Association (NFPA) provides differentiated requirements based on type of facility and size of tanks. Specifically, NFPA 30 (*Flammable and Combustible Liquids Code,* 2000 Edition) applies to tanks that exceed 3,000 liters (793 gallons) and does not apply to facilities storing flammable and combustible liquids as covered by NFPA 395, *Standard for the Storage of Flammable and Combustible Liquids at Farms and Isolated Sites.* The Agency believes that the relative simplicity of operations at facilities using smaller amounts of oil has served as a basis for other official bodies to develop requirements that are simpler in scope.

To this end, the Agency is amending the certification language so that it clearly states that the owner or operator of the facility is the certifying official for those who choose the option to self-certify the Plan for qualified facilities. The Agency also intends to develop materials to assist these owners or operators in developing SPCC Plans. It should also be remembered that while owners and operators of these facilities may choose not to have their SPCC Plans certified by a PE, they will still be required to comply with all of the SPCC requirements and to develop and implement a spill prevention program in accordance with good engineering practices, and they may do so by following regulatory guidance, industry recommended practices and standard design and operation protocols. Finally, to the extent that a State has adopted a law, such as one based on the National Council of Examiners for Engineering and Surveying, that requires that a PE to perform certain functions, including certifying Plans, nothing in today's rule affects whether a facility owner or operator would be required to utilize a PE to meet the state or local requirements since today's rule does not pre-empt any State or local requirements.

The Agency believes providing the added flexibility of self-certification for the smaller oil handlers/simpler operations will yield an increase in overall compliance for this segment of the regulated community, which will result in improved compliance with the rule and as a result, improve overall spill prevention and environmental protection. However, owners or operators of some qualified facilities with complicated operations may nonetheless find that having a PE-certified Plan offers a more cost-effective method of achieving compliance than the proposed option. Therefore, a qualified facility owner or operator could choose to follow the existing SPCC requirements (including the PE certification).

The Agency also proposed and is finalizing today that an owner or operator of a qualified facility may self-certify technical amendments to the Plan, including modification of site diagrams, and that owners and operators of facilities with PE-certified Plans that qualify for self-certification can choose to self-certify future technical amendments rather than hire a PE to certify the technical amendment. Owners and operators of facilities that are not eligible to self-certify are required to have a PE certify such modifications. In all cases, any technical amendment in an SPCC Plan must be certified in writing. As described in the preamble to the proposed rule, the Agency notes that under the existing SPCC regulations, the RA, after reviewing the facility's Plan, has the authority in § 112.4 to require an owner or operator of a facility that has had a discharge as described in § 112.1(b) or that poses an imminent danger of a discharge as described in § 112.1(b), to amend its SPCC Plan, including requiring PE certification in accordance with § 112.3(d).

b. Elements of Self-Certification and Plan Amendments for Owners and Operators of Qualified Facilities

The finalized requirements for owners and operators of qualified facilities are similar to those in the proposed qualified facilities option in the proposed rule. An owner or operator of a qualified facility may choose to comply with the requirements in § 112.6 by completing and implementing a self-certified SPCC Plan in lieu of having a PE certified Plan. The SPCC Plan must comply with all of the applicable requirements of § 112.7 and subparts B and C of the rule.

Owners and operators that choose to self-certify their Plans must certify that they are familiar with the requirements of the SPCC rule; they have visited and examined the facility; the Plan has been prepared in accordance with accepted and sound industry practices and standards; procedures for required inspections and testing have been established; the Plan is being fully implemented; the facility meets the qualification criteria set forth under § 112.3(g); the Plan does not include any environmental equivalence measures as described in § 112.7(a)(2) or determinations of impracticability under § 112.7(d) unless each alternative method and/or determination has been reviewed and certified by a PE in accordance with § 112.6(d); and the Plan and the individual(s) responsible for implementing the Plan have the full approval of management and the facility owner or operator has committed the necessary resources to fully implement the Plan.

The qualified facility self-certification approach is optional. Under today's final rule, an owner or operator of a qualified facility may choose to prepare and implement a PE-certified SPCC Plan to comply with the requirements under 40 CFR part 112.

c. Environmental Equivalence and Impracticability Determinations

Under § 112.7, all facility owners and operators have the flexibility to deviate from specific rule provisions if the Plan states the reason for nonconformance and if equivalent environmental protection is provided by some other means of spill prevention, control, or countermeasure. These ''environmentally equivalent'' measures must be described in the SPCC Plan, including how the equivalent environmental protection will be achieved based on good engineering practice. Allowance for ''environmentally equivalent''' deviations is provided in § 112.7(a)(2), and the deviations are available only for the specific requirements listed in § 112.7(a)(2), such as fencing and other security measures, evaluation of the potential for catastrophic tank failure due to brittle fracture, integrity testing, and overfill prevention. Environmental equivalence is not available for secondary containment or the administrative or recordkeeping requirements of the SPCC rule. As part of the SPCC Plan, any environmentally equivalent measures are required to be certified by a PE and the owner or operator, and the PE is required to consider industry standards in the development of the Plan. Thus, when a PE certifies a Plan that includes any environmentally equivalent protection measure, the PE is certifying that these alternative measures are consistent with relevant industry standards.

The SPCC rule also provides flexibility for owners or operators who determine that the general secondary containment requirements in § 112.7(c) or any of the applicable additional requirements for secondary containment in subparts B and C are impracticable. Where impracticability is demonstrated, § 112.7(d) allows facility owners and operators the flexibility to instead develop a contingency plan and comply with additional requirements. The SPCC Plan must explain why secondary containment measures are not practicable. Section 112.7(d) requires that, when containment for bulk storage containers is deemed impracticable, the owner or operator must conduct both periodic integrity testing of the containers and periodic integrity and leak testing of the valves and piping. The owner or operator also must provide an oil spill contingency plan that follows the provisions of 40 CFR part 109 (Criteria for State, Local and Regional Oil Removal Contingency Plans), and a written commitment of manpower, equipment, and materials required to expeditiously control and remove any quantity of oil discharged that may be harmful as described in 40 CFR part 110. A PE must certify any determinations that secondary containment is impracticable, as well as the additional measures implemented in lieu of secondary containment.

Because of the expertise that a PE has in evaluating whether particular measures provide equivalent environmental protection and in knowing how to effectively implement such measures, EPA believes that the flexibility in these performance-based provisions is best suited to SPCC Plans that are reviewed and certified by a PE. The same expertise is necessary in determining whether the required secondary containment is impracticable.

EPA proposed that when a Plan is self-certified, the owner or operator would not be able to use environmentally equivalent measures or to make impracticability determinations with respect to secondary containment. Instead, EPA proposed specific alternative measures for compliance with security and integrity testing requirements at qualified facilities that self-certify. The commenters who supported this approach indicated that it added a safety factor into the self-certification. Most commenters opposed this approach because impracticability determinations and environmental equivalence were originally created to relieve burden, and owners and operators of small facilities still need the flexibility these mechanisms provide. Some commenters believed that the agricultural industry would be negatively affected because the environmental equivalence and impracticability provisions are an important element to reduce the burden on owners and operators of these facilities due to topography and operations. As for the proposed specific alternative to environmentally equivalent measures for security, one commenter supported this proposal.

With respect to integrity testing, the Agency proposed to allow self-certifying owners and operators of qualified facilities to perform integrity testing by relying on industry standards for the integrity testing requirements as an alternative to the existing bulk storage containing integrity testing requirements. All but one commenter supported the proposal. One commenter supported it, but also wanted visual inspection of individual shop-fabricated tanks up to 10,000 gallons. Another commenter agreed, but believed that the expense of the Steel Tank Institute's (STI) Tank Inspection Standard, SP001 (July 2005), was high and the STI standard and accompanying checklists are not applicable to small facilities. A hybrid approach also was suggested whereby owners and operators of qualified facilities would be allowed to use the self-certification option, and, in the event that an environmental equivalency or impracticability determination is needed, the owner or operator must consult a PE for just that aspect of their program, rather than requiring a full PE review and approval of the entire Plan.

The Agency continues to believe that the flexibility afforded by the environmental equivalence or impracticability determinations should be available only to owners and operators of facilities having those elements reviewed and certified by a PE. At the same time, the Agency recognizes that by restricting these options for owners and operators of qualified facilities, the alternative of self-certification may not be as attractive for some owners or operators because they will lose the added flexibility of further tailoring the SPCC requirements to their facility's characteristics. The Agency agrees with commenters that under the proposed rule, there would likely be certain circumstances where, because of cost considerations, a facility owner or operator would not choose to self-certify because it would be more cost effective for a PE to prepare an SPCC Plan that utilizes environmentally equivalent measures or impracticability determinations.

In today's final rule, the Agency therefore is adopting a hybrid approach. This approach finalizes the alternatives for addressing security measures and integrity testing and also allows owners or operators of self-certified facilities to include environmentally equivalent measures with respect to requirements other than facility security and integrity testing, as well as to make impracticability determinations, provided they have a PE certify these environmentally equivalent measures or impracticability determinations. Because qualified facilities typically have less complex operations and petroleum system configurations and storage capacities than other facilities subject to SPCC requirements, EPA believes that the alternative requirements for facility security and bulk storage container integrity testing finalized today are appropriate for self-certification. However, today's rule does not preclude a qualified facility from choosing to have a PE certify the integrity testing and/or security measures in the facility's Plan as environmentally equivalent measures. For example, where there are no industry standards to guide integrity testing at a qualified facility, the alternative integrity testing option in § 112.6(c)(4)(ii) is not available. However, the facility owner/operator is allowed to have a PE certify an integrity testing protocol in the Plan that is environmentally equivalent to the applicable requirements in subpart B or C. The Agency believes that this ''hybrid'' approach will further expand the flexibility offered by the self-certification compliance option to owners and operators of qualified facilities without compromising proper environmental protection.

Similarly, EPA is adopting a hybrid approach to certification of technical amendments to a qualified facility's SPCC Plan in § 112.5. PE-certified sections of a qualified facility's ''hybrid'' SPCC Plan require PE certification of any technical amendments to that portion of the Plan. Technical amendments to the non-PE certified sections of a qualified facility's ''hybrid'' Plan can be certified by the owner or operator.

B. Qualified Oil-Filled Operational Equipment

The definition of bulk storage container in § 112.2 specifically excludes oil-filled electrical, operating, and manufacturing equipment (''oil-filled equipment''). Therefore, oil-filled equipment is not subject to the bulk storage container requirements in §§ 112.8(c), 112.9(c), and 112.12(c). However, oil-filled equipment must meet the general requirements of § 112.7, including the general secondary containment requirements of § 112.7(c). The general secondary containment requirements are intended to address the most likely oil discharge from oil-filled equipment. Although oil-filled equipment differs from bulk storage containers in several ways, the oil storage capacity of oil-filled equipment still counts towards the aggregate oil storage capacity of the facility.

EPA proposed to amend the SPCC rule to provide a definition of oil-filled operational equipment and an optional alternative to the general secondary containment requirements for oil-filled operational equipment at a facility that meets the qualifying criterion (hereafter referred to as ''qualified oil-filled operational equipment''). These amendments are being finalized in today's rule. The rule allows owners and operators of facilities with eligible oil-filled operational equipment as defined in § 112.2 the option to prepare an oil spill contingency plan and a written commitment of manpower, equipment, and materials to expeditiously control and remove any oil discharged that may be harmful without having to make an individual impracticability determination as required in § 112.7(d). If an owner or operator takes this option, he or she is also required to establish and document an inspection or monitoring program for this qualified oil-filled operational equipment to detect equipment failure and/or a discharge in lieu of providing secondary containment.

New provisions in § 112.7(k) define the criterion that facilities must meet in order to be considered eligible for the ''qualified oil-filled operational equipment'' option. Eligibility of a facility with oil-filled operational equipment is determined by considering the reportable discharge history from only oil-filled operational equipment at the facility; the Agency is adopting the same reportable discharge history criterion that it adopted for qualified facilities, as discussed in Section V.A.3.b above. That is, the qualified oil-filled operational equipment criterion specifically requires that the facility did not discharge more than 1,000 U.S. gallons in a single discharge as described in § 112.1(b) or discharge more than 42 U.S. gallons in each of two discharges as described in § 112.1(b) within twelve months, from any oil-filled operational equipment in the three years prior to the SPCC Plan certification date, or since becoming subject to 40 CFR part 112 if the facility has been in operation for less than three years.

As proposed, the final rule provides an alternative means of SPCC compliance for this equipment; therefore, an owner or operator could choose to comply with the existing SPCC requirements to provide general secondary containment for each piece of qualified oil-filled operational equipment in accordance with § 112.7(c), if desired. For example, oil-filled operational equipment at electrical substations is often surrounded by a gravel bed, which serves as a passive fire quench system and support for the facility grounding network that can restrict the movement of oil in the event of a release. Gravel beds, if designed to prevent a discharge as described in § 112.1(b) (i.e., drainage systems that do not serve as a conduit to surface waters) may meet the general secondary containment requirements of § 112.7(c). EPA further notes that oil-filled operational equipment located within buildings with limited drainage and which prevent a discharge as described in § 112.1(b), may already meet the requirements for general secondary containment of § 112.7(c).

In some situations, permanent containment structures, such as dikes, may not be feasible (*i.e.*, for certain electrical equipment). Section 112.7(c) allows for the use of certain types of active containment measures (countermeasures or spill response capability), which prevent a discharge to navigable waters or adjoining shorelines. Active containment measures are those that require deployment or other specific action by the owner or operator. These measures may be deployed either before an activity involving the handling of oil starts, or in reaction to a discharge so long as the active measure is designed to prevent an oil spill from reaching navigable waters or adjoining shorelines. Thus, a method of detecting a discharge is of great importance to effectively implement the use of active containment measures. If an owner or operator provides secondary containment for oil-filled operational equipment by the use of active measures, a contingency plan for this equipment is not necessary. Ultimately, the decision whether to use the optional approach to secondary containment for qualified oil-filled equipment must be made by the owner or operator.

1. Oil-Filled Operational Equipment Definition

EPA proposed to define ''oil-filled operational equipment'' as ''equipment which includes an oil storage container (or multiple containers) in which the oil is present solely to support the function of the apparatus or the device. Oil-Filled operational equipment is not considered a bulk storage container, and does not include oil-filled manufacturing equipment (flow-through process).'' Many of the commenters supported this definition and therefore, we are finalizing this definition in today's rule and including examples in the definition to provide additional clarity. Examples of oil-filled operational equipment include, but are not limited to, hydraulic systems, lubricating systems (*i.e.*, those for pumps, compressors and other rotating equipment, including pumpjack lubrication systems), gear boxes, machining coolant systems, heat transfer systems, transformers, circuit breakers, electrical switches, and other systems containing oil solely to enable the operation of the device. When piping is intrinsic to the oil-filled operational equipment in a closed loop system, *i.e.*, inherent to the equipment and used solely to facilitate operation of the device, (*e.g.*, for lubrication) then EPA will consider the piping to be a component of the oil-filled operational equipment. However, piping not intrinsic to the operational equipment (*i.e.*, flowlines, transfer piping or piping associated with a process) will not be considered to be part of the oil-filled operational equipment.

The Agency received comments that included alternatives to the definition proposed. Specifically, commenters suggested that the word ''storage'' be removed from the definition of ''oil-filled operational equipment.'' The Agency disagrees with the suggestion to remove the word ''storage'' from the definition because oil-filled operational equipment includes oil inherent to the device which is stored prior to and during use for the operation of the equipment and when the oil-filled operational equipment is in standby.

Some commenters asked that EPA identify generators (''gensets'') as oil-filled operational equipment. EPA's position is that gensets are a combination of oil-filled operational equipment and a bulk oil storage container, and the oil that is consumed to generate electricity is not inherent to the device. (The bulk storage container on a genset often requires the transfer of oil.) Therefore, although gensets incorporate oil-filled operational equipment, such as the lubrication oil system, gensets, as a whole unit, do not meet the definition of oil-filled operational equipment in today's final rule. In situations where it is impracticable to provide appropriate secondary containment for gensets (for either the bulk storage containers or oil-filled operational equipment of the genset), a PE can make a determination of impracticability in accordance with § 112.7(d) and develop a contingency plan following the provisions of 40 CFR part 109 and provide a written commitment of manpower, equipment and materials to expeditiously control and remove any quantity of oil discharged that may be harmful. See Chapter 4 of the *SPCC Guidance for Regional Inspectors* for further explanation regarding when sized secondary containment is required for mobile or portable containers that are in a stationary, unattended mode.

Several commenters argued that by combining oil-filled electrical with other operational equipment, EPA diluted the strong case for differentiation of oil-filled operational equipment. Commenters also suggested that EPA redefine electrical equipment to include not only circuit breakers, transformers, and electrical switches, but also hydraulic systems, lubricating systems, gear boxes, machining coolant systems, heat transfer systems, etc. In July 2002, when EPA clarified that oil-filled electrical, operating, and manufacturing equipment are not bulk storage containers, the Agency agreed to continue to evaluate whether the general secondary containment requirements found in § 112.7(c) should be modified for small electrical and other types of equipment which use oil for operating purposes. Today's definition of oil-filled operational equipment describes the function of both electrical equipment, as well as other types of operating equipment (hydraulic systems, lubricating systems, etc.)

Oil-filled electrical and operating equipment share common characteristics. They both typically have minimal oil throughput because such equipment does not require frequent transfers of oil. Further, the oil contained in oil-filled operational equipment, such as cooling or lubricating oil, is intrinsic to the operation of the device and facilitates the function of the equipment. Utilities have strong economic incentives to prevent power outages, to discover and respond to an outage, and to correct the conditions that produced the outage as quickly as possible. Other industry sectors also have strong incentives to prevent discharges to avoid disruption in business and costs of a cleanup. The Agency believes it is appropriate to allow the same alternative means of compliance with the general secondary containment requirements of § 112.7(c) for oil-filled operational equipment at all facilities. In addition, oil-filled operational equipment often is subject to routine maintenance and inspections to ensure proper operation. Therefore, the Agency believes it is appropriate to allow the same alternative means of compliance with general secondary containment requirements to apply to both oil-filled electrical and operational equipment. We have included both types of equipment into the definition of oil-filled operational equipment.

2. Oil-Filled Manufacturing Equipment

The Agency is not finalizing a definition of oil-filled manufacturing equipment because we did not propose and seek comment on a definition. Additionally, the Agency does not agree with commenters that the alternative option to general secondary containment should also apply to oil-filled manufacturing equipment. Oil-filled manufacturing equipment is inherently more complicated than oil-filled operational equipment because it typically involves a flow-through process and is commonly interconnected through piping. For example, oil-filled manufacturing equipment may receive a continuous supply of oil, in contrast to the static capacity of other, non-flow-through oil-filled equipment. Examples of oil-filled manufacturing equipment include, but are not limited to, process vessels, conveyances such as piping associated with a process, and equipment used in the alteration, processing or refining of crude oil and other non-petroleum oils, including animal fats and vegetable oils.

The final rule does not change any requirements for oil-filled manufacturing equipment. Oil-filled manufacturing equipment remains subject to the general SPCC requirements under § 112.7, including a demonstration of impracticability under § 112.7(d) if the SPCC Plan does not provide for general secondary containment as required by § 112.7(c). The oil storage containers associated with the storage of raw products or finished oil products are bulk oil storage containers and are not considered oil-filled manufacturing equipment or oil-filled operational equipment. Oil-filled manufacturing equipment is distinct from bulk storage containers in its purpose and is described in the SPCC Guidance for Regional Inspectors. Oil-filled manufacturing equipment stores oil only as an ancillary element of performing a mechanical or chemical operation to create or modify an intermediate or finished product. Some more specific examples of oil-filled manufacturing equipment may include reaction vessels, fermentors, high pressure vessels, mixing tanks, dryers, heat exchangers and distillation columns. Under the SPCC rule, flow-through process vessels are generally considered oil-filled manufacturing equipment since they are not intended to store oil. EPA expects the owner or operator and the certifying PE to delineate bulk storage containers from the oil-filled manufacturing equipment in the facility's SPCC Plan (*i.e.*, on the facility's diagram and in discussion of compliance with inspection requirements of the rule). Additionally, although oil-filled manufacturing equipment is not a bulk storage container and is therefore not subject to the frequent visual inspection requirement for bulk storage containers under § 112.8(c)(6), EPA believes that it is good engineering practice to have some form of visual inspection or monitoring for oil-filled manufacturing equipment in order to prevent discharges as described in § 112.1(b). Furthermore, it is a challenge to comply with several of the SPCC provisions (for example, requirements for security under § 112.7(g)) and to address countermeasures for discharge discovery under § 112.7(a)(3)(iv)) without some form of inspection or monitoring program.

3. Eligibility Criteria

a. Reportable Discharge History

Part 110 defines a discharge of oil in such quantities that may be harmful to the public health, welfare, or the environment of the United States as a discharge of oil that violates applicable water quality standards; a discharge of oil that causes a film or sheen upon the surface of the water or on adjoining shorelines; or a discharge of oil that causes a sludge or emulsion to be deposited beneath the surface of the water or adjoining shorelines (40 CFR 110.3). The Agency refers to such discharges as reportable discharges or as ''a discharge as described in § 112.1(b)'' of the rule. Any person in charge of a facility must report any such discharge of oil from the facility to the National Response Center (NRC) at 1–800–424–8802 immediately. While EPA recognizes that past release history does not necessarily translate into a predictor of future performance, the Agency believes that discharge history is a reasonable indicator of a facility owner or operator's ability to develop an SPCC Plan for the facility without the involvement of a PE.

Under the proposal, the alternative compliance approach for general secondary containment for oil-filled operational equipment would not be allowed to be implemented at the facility unless the owner or operator had no reportable discharge from any oil-filled operational equipment in the ten years prior to the SPCC Plan certification date, or since becoming subject to 40 CFR part 112 if the facility had been in operation for less than ten years. This criterion was based on a proposal submitted by the Utility Solid Waste Activities Group (USWAG), as described in the documents supplementing the September 20, 2004 Notice of Data Availability (NODA) at 69 FR 56184.

Many commenters agreed with the proposed eligibility requirement. However, several comments requested that the qualifier be dropped and the type of equipment be the only qualifier. These commenters argued that reportable discharge history was not a suitable criterion for a number of reasons, including: (1) It is arbitrary and capricious—eligibility should be rationally related to equipment or equivalent facility performance; (2) it is not effective to identify bad actors who do not report discharges; (3) it is unreasonable for crude oil and natural gas production facilities, so no requirements should apply; and (4) it does not take into consideration the volume of oil or location of equipment in assessing risk. Other commenters suggested considering the criterion for submitting reports to EPA under § 112.4 to be the eligibility criterion for oil-filled operational equipment. Another commenter requested EPA clarify that the discharge is from regulated equipment, *i.e.*, equipment that is greater than 55 gallons.

Although EPA recognizes that past discharge history does not necessarily predict future performance, the Agency believes that discharge history can be used as a surrogate measure for a facility owner or operator's ability to appropriately manage its oil. Hence, as with ''qualified facilities,'' EPA is using this discharge history criterion to identify a facility owner or operator's ability to effectively implement its SPCC Plan and prevent discharges in quantities that may be harmful. In establishing a good oil spill prevention history for its oil-filled operational equipment, a facility then qualifies for the oil spill contingency plan option in lieu of secondary containment. Because the Agency believes it is appropriate to extend this approach to all oil-filled operational equipment, regardless of the oil storage capacity of the equipment, the spill history criterion is critical to establish an appropriate balance between environmental protection and streamlined requirements by identifying those facilities whose owners or operators have demonstrated good spill prevention practices in the past.

EPA does not agree that this is unreasonable for crude oil and natural gas production facilities because the reportable discharge criterion is applicable only to the oil-filled operational equipment at the facility and is not affected by other discharges that may have occurred from the facility from other types of oil storage containers. One commenter pointed out that discharges from compressors, pumpjacks, and similar equipment are extremely rare and unlikely to reach navigable waters and adjoining shorelines.

Many commenters suggested an alternate reportable discharge history period of five years. One commenter suggested three years and another suggested either two or five years. A few commenters suggested the time period should be five years with a § 112.4 spill notification trigger.

In response to comments received on the proposed rule, EPA has reduced the discharge history period from ten years to three years, which is consistent with the recordkeeping requirements in § 112.7(e). In addition, rather than including all discharges reportable to the National Response Center, the Agency is specifying amounts of more than 1,000 U.S. gallons in a single discharge as described in § 112.1(b) or more than 42 U.S. gallons in two discharges as described in § 112.1(b) within a twelve month period during the three-year timeframe, or since becoming subject to 40 CFR part 112 if the facility has been in operation for less than three years, only from oil-filled operational equipment at the facility. This criterion does not include oil discharges as described in § 112.1(b) that are the result of natural disasters, acts of war, or terrorism. The approach is similar to the discharges that are reportable to the Regional Administrator under § 112.4(a), with the exception that the criterion finalized today applies only to discharges from oil-filled operational equipment and not all oil containers at a facility as in the case of § 112.4(a). When determining spill history, the gallon amount specified in the criterion (either 1,000 or 42) refers to the amount of oil that actually reaches waters of the United States, adjoining shorelines, the contiguous zone or in connection with specified activities in waters and not the total amount of oil spilled. For example, a facility only experiencing one discharge over the past ten years in which 1,500 gallons of oil discharged onto the ground but only 20 gallons reached waters of the United States (causing a sheen and reportable to the NRC) would meet the Reportable Discharge History criterion. However, a facility having 1,500-gallon discharge to waters of the United States would not meet the Reportable Discharge History criterion.

The determination of eligibility based on reportable discharge history is made at the time the SPCC Plan is certified.

That is, when the SPCC Plan is amended to comply with the SPCC rule revisions in today's final rule and those promulgated in July 2002. Once the current compliance date extension ends, Plans must be amended, certified and implemented. Any discharges to navigable waters and adjoining shorelines that occur from oil-filled operational equipment at the facility after the SPCC Plan has been certified do not impact the eligibility of qualified oil-filled operational equipment at the facility. The facility does not lose eligibility status as a result of a discharge as described in § 112.1(b), unless the RA requires an amendment to the SPCC Plan in accordance with § 112.4(d) and specifically requires secondary containment for oil-filled operational equipment. If an owner or operator cannot certify that the oil-filled operational equipment meets the eligibility criterion at the initial date of Plan certification, but can later demonstrate a clean spill history of three years, then a technical amendment to the Plan can be certified and the Plan can be revised to allow for qualified status for oil-filled operational equipment.

In the preamble to the proposed rule, EPA requested comment on how extreme events such as natural disasters and acts of war, terrorism , sabotage, or other calamities might potentially affect the discharge history criterion for qualified facilities. Many commenters agreed (and no commenters disagreed) that EPA should account for extreme events such as natural disasters, acts of war or terrorism, etc. in granting eligibility status. The Agency agrees that reportable discharges caused by external factors beyond the control of the facility owner or operator such as natural disasters, acts of war, or terrorism should not disqualify a facility from eligibility for the qualified oil-filled equipment provision. Therefore we have excluded those events from consideration in the reportable discharge eligibility criterion in today's final rule. The Agency has excluded sabotage/vandalism from the final list of extreme events not to be considered in the reportable discharge history because these are not necessarily beyond the control or planning ability of the facility owner or operator.

b. Consideration of Alternative Qualification Criteria

One commenter suggested that the inspection and monitoring program be the only qualifier for a facility owner or operator to take advantage of this option. Other suggestions would allow eligibility to be based on the type of equipment and a commitment or duty to properly maintain that equipment such as the duty in 40 CFR 122.41(e) to maintain wastewater treatment equipment. In this case, facility owners or operators would lose eligibility based on their performance or SPCC inspection results (*i.e.* failure to maintain oil-filled electrical equipment). The Agency is not finalizing these alternatives as part of the eligibility criteria because we believe it is in the owner or operator's best interest to properly maintain equipment at the facility and a commitment to the Agency to maintain equipment is not necessary.

The Agency believes that inspections and monitoring are part of an effective spill prevention program and it is more appropriate to include these prevention practices as a component of the alternative option for compliance with general secondary containment requirements for oil-filled operational equipment. To include these spill prevention practices as a basis for qualification raises questions on the length of time and scope of the inspection and monitoring program necessary to be in place at the facility in order to demonstrate qualification.

Additionally, the SPCC regulations already provide EPA the authority to require SPCC Plan amendments under § 112.4 so it is not necessary to include an automatic loss of eligibility based on facility performance or SPCC inspection results. Section 112.4(a) requires an owner or operator of a facility that has discharged more than 1,000 U.S. gallons of oil in a single discharge as described in § 112.1(b) or that has discharged more than 42 U.S. gallons of oil in each of two discharges as described in § 112.1(b) within any twelve month period, to submit information to the EPA RA within 60 days of the date of the discharge. As per § 112.4(d), the RA may require the facility owner or operator to amend the SPCC Plan in order to prevent and contain discharges, including a requirement that a facility owner or operator provide secondary containment for qualified oil-filled operational equipment. The time frame for this review and amendment process is described in § 112.4. The facility owner or operator may choose to appeal the RA's decision to require a Plan amendment under § 112.4. In addition, a discharge of oil ''in such quantities as may be harmful'' as defined in 40 CFR 110.3 that does not trigger the reporting requirements of § 112.4(a) must still be reported to the National Response Center. Criminal action can be taken against an owner or operator of a facility if discharges are willfully not reported. EPA also receives copies of the NRC reports and has the authority under § 112.1(f) to require a facility owner or operator to prepare and implement an SPCC Plan or any applicable part of a Plan.

Owners and operators of facilities with qualified oil-filled operational equipment that choose the alternative to secondary containment and that subsequently have a discharge would not automatically lose eligibility for today's optional approach. Owners or operators of facilities that discharge oil in quantities that may be harmful from oil-filled operational equipment should re-evaluate the effectiveness of the SPCC Plan (specifically the contingency plan, written commitment of resources, and inspections/monitoring alternative discussed in today's final rule) and determine the need for secondary containment measures in lieu of contingency planning. Additionally, the Regional Administrator may determine that a facility owner or operator is no longer eligible to have a contingency plan in lieu of secondary containment without making an impracticability determination, and such owners or operators may be required to amend their Plans to provide secondary containment for their oil-filled operational equipment.

4. Requirements for Qualified Oil-Filled Operational Equipment In Lieu of Secondary Containment

a. Contingency Plans and a Written Commitment of Manpower, Equipment, and Materials

As described in the preamble to the proposed rule, EPA believes that secondary containment often may be impracticable for oil-filled operational equipment because of inherent design and safety considerations, as well as site configuration. The oil associated with oil-filled operational equipment remains inside the equipment and transfers do not occur regularly; for oil-filled electrical equipment (*i.e.*, transformers) transfers typically occur infrequently, if at all. The complexity of the equipment and the nature of the use of this equipment does not lend itself to traditional bulk storage containment methods and thus flexibility is appropriate in this area and may improve compliance with oil pollution prevention measures. EPA proposed amendments to § 112.7 to give owners and operators of facilities with qualified oil-filled operational equipment the option of implementing an inspection and monitoring program, developing an oil spill contingency plan and providing a written commitment of resources required to expeditiously control and remove any quantity of oil discharged that may be harmful, in lieu of secondary containment for this equipment, without having to make an impracticability determination for each piece of oil-filled operational equipment. The inspection and/or monitoring program, contingency plan and written commitment of resources would be included in the facility SPCC Plan. Commenters generally supported this proposal and the provision is being finalized in § 112.7(k) as proposed.

A number of commenters were unclear regarding the intent of an oil spill contingency plan. For example, a common industry interpretation of an ''oil spill contingency plan'' covers anticipated responses to oil spills both on land, as well as spills that reach navigable waters. Some commenters suggested that the contingency plan be in lieu of an SPCC Plan entirely. Others suggested that it is an administrative burden to identify downstream water users and the majority of commenters suggested that it is inappropriate to consider large discharges to water since the goal should be to prevent oil from getting to navigable waters in the first place. Several commenters suggested that implementation of a contingency plan in accordance with the requirements of 40 CFR part 109 was inappropriate because the purpose of the contingency plan should be to prevent a discharge to navigable waters and adjoining shorelines.

Commenters suggested that the oil spill contingency plan should instead contain four major elements: hazard identification, vulnerability analysis, risk assessment and response actions. Many of the commenters that suggested simplifying the contingency planning option to allow for hazard identification, vulnerability analysis, risk assessment, and response actions may already be in compliance with the general secondary containment requirements of the SPCC rule by utilizing active secondary containment measures.

We do not believe that a contingency plan, by itself, is sufficient to substitute for an SPCC Plan. The purpose of the SPCC Plan is to prevent discharges of oil from reaching navigable waters and adjoining shorelines and includes a combination of procedures, measures and equipment to achieve that goal, *e.g.*, procedures for inspections and personnel training, equipment to prevent and control discharges of oil and security measures. Conversely, a contingency plan is a detailed oil spill response and removal plan that addresses controlling, containing, and recovering an oil discharge in quantities that may be harmful to navigable waters or adjoining shorelines. Contingency plans have a dual purpose. The first purpose is to outline the response capability or countermeasures to limit the quantity of a discharge from reaching navigable waters or adjoining shorelines (if possible). The second is to address the facility owner or operator's effective preparation for a response to a discharge of oil that has already reached navigable waters or adjoining shorelines. A contingency plan should include the ability to expeditiously control and remove any quantity of oil discharged that may be harmful.

The elements of the contingency plan are outlined in § 109.5, and include: definition of the authorities, responsibilities, and duties of all persons, organizations, or agencies that are to be involved or could be involved in planning or directing oil removal operations; establishment of notification procedures for the purpose of early detection and timely notification of an oil discharge; provisions to ensure that full resource capability is known and can be committed during an oil discharge situation; provisions for well-defined and specific actions to be taken after discovery and notification of an oil discharge; and specific and well-defined procedures to facilitate recovery of damages and enforcement measures as provided for by state and local statutes and ordinances.

An owner or operator of a facility with oil-filled operational equipment that has submitted a Facility Response Plan (FRP) to EPA in accordance with § 112.20 would not need to also develop a contingency plan in accordance with 40 CFR part 109 for the oil-filled operational equipment because an FRP is more comprehensive than a contingency plan. Additionally, the contingency planning requirement can be met either by a whole new plan or by ensuring that the elements called for in 40 CFR part 109 and the accompanying written commitment of manpower, equipment and materials are integrated into the SPCC Plan or another plan already in place at the facility (provided that a section cross-referencing the location of requirements listed in 40 CFR part 109 and the equivalent requirements in the other response plan is included).

For a contingency plan to satisfy the requirements listed in § 112.7(k) of today's final rule, a facility owner or operator must be able to implement the contingency plan. Activation of the contingency plan depends on the capability of the owner or operator of the facility to quickly detect a discharge. Therefore, as part of an evaluation of the adequacy of a contingency plan to satisfy the requirements of § 112.7(k), EPA will consider the time it takes facility personnel to detect and mitigate a discharge as described in § 112.1(b).

Inspections or monitoring are particularly important to detect an oil discharge when there is no secondary containment in place. Therefore, EPA proposed and is finalizing the provision to require owners and operators of facilities with qualified oil-filled operational equipment that choose to develop and implement contingency plans to also develop and implement an inspection or monitoring program, as further discussed in this section of the preamble. Because the qualified oil-filled operational equipment approach is optional, an owner or operator of a facility with such equipment may choose to provide general secondary containment in accordance with § 112.7(c) for this oil-filled operational equipment, if desired. Ultimately, this is the decision of the owner or operator of the facility.

The comments received suggest there is a misunderstanding concerning the general secondary containment requirements of § 112.7(c). General secondary containment under § 112.7(c) should be designed to address the most likely discharge from the primary containment system, *i.e.*, appropriate containment and/or diversionary structures or equipment must be designed to prevent a discharge as described in § 112.1(b). Secondary containment may be either passive measures or active measures (countermeasures or land-based spill response capability) since both are designed to prevent a discharge from reaching navigable waters or adjoining shorelines.

Passive measures are permanent installations (such as dikes or berms) and do not require deployment or action by the owner or operator. However, permanent (passive) containment structures, such as dikes, may not always be feasible for certain oil-filled operational equipment (*i.e.*, electrical transformers, capacitors, switches). The owner or operator of an SPCC-regulated facility may instead use the flexibility of active containment measures to comply with the general secondary containment requirements for oil-filled operational equipment.

Active containment measures are those that require deployment or other specific action by the owner or operator of a facility. These active measures may be deployed either before an activity involving the handling of oil starts, or in reaction to a discharge, so long as the active measure is designed and can reasonably be implemented to prevent an oil spill from reaching navigable waters or adjoining shorelines. The efficacy of active secondary containment measures to prevent discharges depends on their technical effectiveness (*i.e.*, mode of operation, absorption rate), placement and quantity, and timely deployment prior to, or following a discharge. A method of detecting a discharge is therefore of great importance to effectively implement the use of active containment measures. These active measures must be implemented effectively and in a timely manner to prevent oil from reaching navigable waters and adjoining shorelines, as required by § 112.7(a)(3)(iii) and (c).

Many commenters indicated that the 40 CFR part 109 plan is designed for local governments and therefore inappropriate for facilities. Some commenters suggested using environmental equivalence to tailor a 40 CFR part 109 plan or allow flexibility for facility owners and operators to comply only with applicable requirements. Other commenters suggested the use of generic and multi-facility plans. Some commenters suggested expanding the training requirements to apply to more than just the oil-handling personnel at the facility. Commenters also indicated that it is onerous to list each piece of equipment in a Plan, and that it is burdensome to keep the Plan up-to-date to account for mobile equipment.

Environmental equivalence is available to allow for alternative means of fulfilling the same function as the specific provision listed in § 112.7(a)(2). Because the contingency plan elements in part 109 do not contain specific requirements as to how those elements are fulfilled, there is no need to provide for environmentally equivalent means of fulfilling those requirements, Thus, the Agency believes that there is already sufficient flexibility in the criteria for an oil spill contingency plan in 40 CFR part 109. Moreover, since the purpose of the plan is to prepare for response to a discharge of oil that has reached navigable waters or adjoining shorelines, each of the elements of a contingency plan listed in 40 CFR part 109 are appropriate. Although the elements of a contingency plan listed in 40 CFR part 109 were originally developed to outline procedures for local and regional oil removal contingency plans, these elements can be adapted for SPCC regulated facilities. A sample contingency plan adapted to the needs of an SPCC-regulated facility following the provisions of 40 CFR part 109 is included in Appendix F of the *SPCC Guidance for Regional Inspectors* which is available on the EPA Web site at *http://www.epa.gov/oilspill*. The guidance document also provides more information on active and passive secondary containment measures.

Other commenters suggested the use of generic and multi-facility SPCC Plans. In July 2002, the Agency stated that a multi-facility SPCC Plan may be appropriate for operating equipment (oil-filled operational equipment) (see 67 FR 47042, 47080.) This type of SPCC Plan is intended for electrical utility transmission systems, electrical cable systems, and similar facilities whose owners and operators might aggregate equipment located in diverse areas into one Plan. Multi-facility Plans would include all elements required for individual SPCC Plans. Site-specific information would be required for all equipment included in each Plan. However, the site-specific information might be maintained in a separate location, such as a central office, or an electronic database, as long as such information was immediately accessible to responders and inspectors. If you keep the information in an electronic database, you must also keep a paper or other backup that is immediately accessible for emergency response purposes, or for EPA inspectors, in case the computer is not functioning. It is not clear what the commenters meant by a generic Plan, however, the Agency believes that any Plan developed must be in accordance with the requirements of 40 CFR part 112.

Commenters recommended that training at a facility be expanded beyond the personnel involved in oil handling, with one commenter suggesting that training include any individuals who could reasonably be expected to implement any component of the contingency plan; they also suggested rule language for such an approach. The Agency agrees that any employee who is required to implement any component of an oil spill contingency plan may be considered ''oil-handling personnel'' and require training in accordance with § 112.7(f). This would consist of training in the operation and maintenance of equipment to prevent discharges; discharge procedure protocols; applicable pollution control laws, rules and regulations; general facility operations; and the contents of the facility SPCC Plan (including the contingency plan). Contractors involved in oil handling activities at the facility should also have appropriate oil spill response training.

Additionally, commenters indicated that it is onerous to list each piece of equipment in an SPCC Plan, and that it is burdensome to keep the Plan up-to-date to account for mobile equipment. The Agency agrees that it may be burdensome to frequently update an SPCC Plan for mobile equipment. However, we believe there is sufficient flexibility in the SPCC rule to address this concern. For example, EPA has stated that if you store mobile containers in a certain area, you must mark that area on the diagram. You may mark the contents of each container either on the diagram of the facility, or on a separate sheet or log if those contents change on a frequent basis. More information on the flexibility of the SPCC rule for mobile/portable containers is available in the *SPCC Guidance for Regional Inspectors* available on the EPA Web site at *http://www.epa.gov/oilspill*.

b. Inspections or Monitoring Program

The majority of commenters supported the proposal to include an inspection and monitoring program. A facility owner or operator must be able to quickly detect a discharge from oil-filled operational equipment in order for a contingency plan to be effective. Therefore, the Agency is including a requirement for an inspection and monitoring program in today's rule. Facility owners or operators who wish to take advantage of this alternative are required to develop an appropriate set of procedures for inspections or a monitoring program for qualified oil-filled operational equipment. For facility owners and operators that rely on contingency planning in lieu of secondary containment for qualified oil-filled operational equipment, the discovery of a discharge by inspection or monitoring is of paramount importance for effective and timely implementation of the contingency plan. An inspection or a monitoring program ensures that facility personnel are alerted quickly of equipment failures and/or discharges. A written description of the inspection or monitoring program is required to be included in the SPCC Plan. Under the requirement in § 112.7(e), the owner or operator is required to keep a record of inspections and tests, signed by the appropriate supervisor or inspector, for a period of three years.

Although oil-filled operational equipment is not a bulk storage container and is therefore not subject to the frequent visual inspection requirement for bulk storage containers under § 112.8(c)(6), EPA believes that it is good engineering practice to have some form of visual inspection or monitoring for oil-filled operational equipment in order to prevent discharges as described in § 112.1(b). Therefore, in lieu of secondary containment, the proposal included the requirement for a facility owner or operator to establish and document an inspection or monitoring program, in addition to the preparation of a contingency plan and a written commitment of manpower, equipment, and materials to expeditiously control and remove discharged oil. One commenter suggested requiring only inspection and monitoring for oil-filled operational equipment up to 5,000-gallon capacity and no other written Plan. The Agency continues to believe that a written SPCC Plan is essential to document the prevention procedures and countermeasures employed at the facility and is necessary for effective implementation of an SPCC program, or any other program (business or otherwise). As a matter of practice, it would be extremely difficult for a facility owner or operator to be able to follow the regulatory requirements and to comply with all the recordkeeping components without the documentation that is the Plan itself. The Plan also serves as an important communication tool for both management and operators at the facility. The sole action of having to document all of the requirements can assist in uncovering flaws in the program implementation, and may serve as a tool to correct them. The Plan is also used to communicate these procedures and measures to employees. Additionally, the documentation of compliance with the rule's requirements in a written Plan serves as a facility specific oil spill response and prevention planning exercise which is designed to improve oil spill prevention.

c. Alternative Options Considered

Many commenters believed, and supported the Agency's proposal to not include, a capacity threshold qualifier. There was also significant support for the USWAG multi-tiered option for electrical equipment, with some commenters suggesting that the Agency differentiate between electrical and other oil-filled operational equipment and then adopt the USWAG proposal providing an exemption for most small equipment. Other commenters specifically commended EPA for not including a volume threshold for applicability of relief based on lack of data to suggest that large oil-filled equipment have greater potential for discharge over small oil-filled equipment. However, these commenters indicated that small equipment should be exempt because of lack of spill data. Multiple commenters requested exemption or deferral requirements in the same manner as proposed for farms. Others requested suspension of the requirements.

The Agency agrees with commenters that no threshold qualifier is necessary to allow for an alternative means of compliance with secondary containment requirements for oil-filled operational equipment. The alternative measure is appropriate based on the type of equipment, *i.e.*, the oil is intrinsic to the operational equipment and present solely to support the apparatus and there is minimal oil throughput because such equipment does not require frequent transfers of oil. The Agency did not finalize the multi-tiered approach for electrical equipment to allow for an exemption for smaller pieces of oil-filled operational equipment because we believe there is still a reasonable potential for discharges from oil-filled operational equipment with an oil storage capacity of 1,320 gallons or less, thus coverage by some type of SPCC Plan is warranted. An exemption of these smaller pieces of oil-filled operational equipment could in some cases allow for large amounts of aggregate capacity that would not be counted for SPCC or FRP purposes, and would therefore be unregulated, posing a threat to the environment. However, in the July 17, 2002 **Federal Register** notice, EPA stated ''We believe that it is not necessary to apply SPCC or FRP rules requiring measures like secondary containment, inspections, or integrity testing, to containers smaller than 55 gallons storing oil because a discharge from these containers generally poses a smaller risk to the environment.'' (67 FR 47066). Oil-filled operational equipment with a capacity of less than 55 gallons is not subject to the rule.

Oil-filled electrical and operating equipment share common characteristics. They both typically have minimal oil throughput because such equipment does not require frequent transfers of oil. Further, the oil contained in oil-filled operational equipment, such as cooling or lubricating oil, is intrinsic to the operation of the device and facilitates the function of the equipment. Should oil-filled electrical equipment fail, utilities responsible for such equipment have strong economic incentives to prevent power outages, to discover and respond to an outage, and to correct the conditions that produced the outage as quickly as possible to prevent an oil discharge. Similarly, when other critical oil-filled operating equipment fails, the industry sectors responsible for such equipment also have strong incentives to respond and address failures to avoid disruption in business and costs of a cleanup. In addition, oil-filled operational equipment often is subject to routine maintenance and inspections to ensure proper operation. Therefore, the Agency is not promulgating different requirements, but believes it is appropriate to offer the same alternative means of compliance with the general secondary containment requirements of § 112.7(c) to both oil-filled electrical and operational equipment. Both types of equipment are addressed in the definition of oil-filled operational equipment.

The Agency has decided not to provide an indefinite extension or suspension for owners and operators of facilities with oil-filled operational equipment. The regulated community, particularly owners and operators of electrical facilities, identified secondary containment for oil-filled operational equipment as one of its major cost concerns. Today's rule addresses that concern and offers an alternative means of compliance for oil-filled operational equipment, while maintaining protection of human health and the environment.

5. Qualified Oil-Filled Operational Equipment and Qualified Facilities Overlap

Some facilities will meet the criteria for qualified facilities and have qualified oil-filled operational equipment on-site. Owners and operators of such facilities are able to benefit from both of the alternative compliance approaches finalized in today's rule. The owner or operator can choose to develop an oil spill contingency plan, a written commitment of manpower, equipment and materials and an inspection or monitoring program as an alternative to secondary containment for qualified oil-filled operational equipment. Since no impracticability determination is necessary for qualified oil-filled operational equipment, the owner or operator can self-certify his/her SPCC Plan and is not required to have a PE develop and certify the contingency plan for the qualified oil-filled operational equipment. The responsibility of preparing a contingency plan and identifying the necessary equipment, materials and manpower to implement the contingency plan would fall on the owner or operator of the qualified facility.

C. Motive Power

In the proposed rule, EPA addressed specific types of motor vehicles (including aircraft, buses, sport utility vehicles, small construction vehicles, cherry pickers, self-propelled cranes, self-propelled aviation ground service equipment vehicles, self-propelled forestry, agricultural, construction, and excavation vehicles and locomotives) that contain oil in capacities greater than or equal to 55 gallons solely for the purpose of providing fuel for propulsion, or solely to facilitate the operation of the vehicle, such as lubrication of moving parts or operation of onboard hydraulic equipment. Such oil storage containers are technically subject to the SPCC rule, including the requirement for secondary containment and other SPCC requirements. This means that heavy equipment dealers, commercial truck dealers, or certain parking lots may be subject to the SPCC requirements (including bulk storage secondary containment, inspection, and overfill protection) solely because of the presence of motive power containers. EPA never intended to regulate these motive power containers or facilities where these vehicles might be located and who are not otherwise subject to the SPCC requirements because of the impracticability of application of the SPCC requirements to such vehicles. These individually provide their own means of propulsion from location to location within or between facilities. The management, record keeping, and compliance with the spill prevention requirements associated with motive power containers would be difficult due to their movement throughout and between facilities. For example, a truck with a large fuel tank and associated large capacity hydraulic units that moves throughout a facility and between facilities would require tracking and containment under the SPCC requirements. This is impracticable because such vehicles are not stationary or located in a specific operational area, as is the case with mobile non-vehicular mobile/portable containers that are placed in specific oil handling or operational areas. Motor vehicles with a storage tank capacity of 55 gallons or greater, such as a number of semi-rigs delivering materials to an otherwise regulated SPCC facility that enter and leave a facility on a routine basis would provide a significant challenge for compliance with the SPCC requirements. Finally, these containers are either ''end use'' fuel tanks or oil-filled operational equipment in which transfers from the container are rare unlike other mobile portable containers. To correct this unintended application of the SPCC rule, EPA proposed to exempt motive power containers from the SPCC requirements. Commenters generally favored this proposal and agreed that subjecting motive power containers to SPCC requirements would be impracticable. In today's action, EPA is clarifying its position on motive power containers associated with self-propelled motor vehicles by finalizing the proposed definition and exemption.

The Agency believes that the general protection and the spill response and planning activities in place at an otherwise regulated SPCC facility will address any discharges associated with these motive power containers.

For those facilities whose capacity is comprised solely of motive power containers, today's action may result in the facility no longer being subject to the SPCC requirements. However, for owners and operators of these facilities, EPA maintains the authority, under 311(j)(1)(C) of the CWA, to impose requirements to prevent oil discharges from motive power containers. EPA believes that owners and operators of these facilities will continue to act prudently to prevent discharges from motive power containers from reaching navigable waters and owners and operators of non-transportation-related facilities that fail to do so can be required by the EPA Regional Administrator (RA) to develop an SPCC Plan. The RA has the option under § 112.1(f) to require owners and operators of facilities, including those with motive power containers, to prepare and implement an SPCC Plan or any applicable part, if a determination is made that it is necessary to prevent a discharge of oil into waters of the United States. EPA will continue to encourage owners and operators of facilities that are no longer regulated under the SPCC rule, as a result of today's action, to provide prevention, planning and response measures to prevent oil discharges from motive power containers.

1. Definition of Motive Power

One commenter generally supported the definition as proposed. Several other commenters opposed the proposed definition and additional comments were submitted with alternate definitions of motive power containers. Those who opposed the definition indicated that it will not effectuate its purpose, simply because the gas tank, for example, is not used solely to power the movement of a motor vehicle. Other reasons for opposition note that the definition may not be broad enough, and it should be modified to clarify the scope of ''motor vehicle.'' The definition may not cover all motive power configurations, and it may not cover ground service equipment, including ground service equipment in the airport industry sector.

Recommendations included expanding the definition to include other mobile equipment like forestry and mining equipment. Other commenters indicated that the scope of the definition should be modified to clarify that a motor vehicle includes not just automobiles and trucks, but all types of motor vehicles including cranes, cherry pickers, or production drill rigs at mining sites and equipment that may be stationary for a temporary duration. Commenters also suggested that the definition be revised to cover various motive power configurations.

EPA agrees with the commenters that the scope of the definition should be clarified to include motor vehicle bulk storage containers that serve a non-operational purpose in addition to the propulsion of the motor vehicle (for example, a bulk storage container that supplies fuel to an engine which provides the propulsion for that motor vehicle, as well as its auxiliary units and functions (i.e., heaters, air conditioning units, and electrical power generation, etc.). As noted by commenters, the term ''solely'' in the definition of motive power containers limits the inclusion of motor power fuel tanks that serve one of the non-operational functions listed above in addition to providing fuel for propulsion of the motor vehicle. In response to this comment, EPA has removed the word ''solely'' and replaced it with the word ''primarily.'' The definition of motive power containers only applies to motor vehicles where the primary purpose of the bulk storage container is to supply fuel to power the movement of the vehicle and, secondly, power other equipment on board the vehicle, so long as no further distribution (transfers) of oil occurs from the container as in the case with some mobile refuelers.

EPA agrees with the commenters that additional clarification is needed to describe the type of motor vehicles covered under the definition of motive power containers. Only motor vehicles which provide their own means of propulsion fall within the scope of this definition for the purposes of 40 CFR part 112. For example, aircraft, cherry pickers, self-propelled cranes, self-propelled aviation ground service equipment vehicles, self-propelled heavy (forestry, agricultural, mining, excavation and construction) vehicles and locomotives, all of which individually provide their own means of propulsion from location to location within a facility or between facilities, are considered motor vehicles for the purposes of this definition and 40 CFR part 112. However, towed aviation ground service equipment, non-self-propelled construction/cargo cranes, non-self-propelled (forestry, agricultural, mining, excavation or construction) equipment, diesel powered generators, fire pumps, and compressors are examples of oil-filled equipment and bulk storage containers not considered motor vehicles for the purposes of this definition because they do not provide their own means of propulsion. The exemption was based on the impracticability of application of SPCC requirements to motor vehicles and their unique self-propelled capability of movement within and between facilities, typically without restriction.

2. Exemption

This final rule amendment exempts motive power containers, as defined above, from SPCC rule applicability by adding a new paragraph (7) under the general applicability section, § 112.1(d). Furthermore, the capacity of these storage containers are not counted toward facility oil storage capacity under § 112.1(d)(2). The RA has the option under § 112.1(f), however, to require owners and operators of facilities, including those with motive power containers, to prepare and implement an SPCC Plan or any applicable part, if a determination is made that it is necessary in order to prevent a discharge of oil into waters of the United States, or adjoining shorelines.

EPA notes that although this amendment provides an exemption from the SPCC requirements for the fuel tanks and ancillary onboard oil-filled operational equipment of motor vehicles, the oil transfer activities occurring within an SPCC-covered facility continue to be regulated. An example of such an activity would be the transfer of oil from an on-site tank via a dispenser to a motive power container. This transfer activity is subject to the general secondary containment requirements of § 112.7(c).

An onboard bulk storage container that supplies oil for the movement of a vehicle or operation of onboard equipment, and at the same time, is used for the distribution or storage of this oil, is not eligible for this exemption. For example, a mobile refueler that has an onboard bulk storage container used to distribute fuel to other vehicles on a site may also draw its engine fuel (for propulsion) from that bulk container. However, such bulk storage containers (on a mobile refueler, as defined in today's rule under 112.2) are exempt from the sized secondary containment requirements in §§ 112.8(c)(2) and (11) and 112.12(c)(2) and (11), as applicable (see Section D below).

EPA is also not extending the exemption for motive power containers to oil drilling and workover equipment, including rigs. The Agency believes that because of the unique nature of oil drilling and workover rig operations and the large amounts and high flow rates of oil associated with these activities, it would not be appropriate or environmentally sound to exempt them from the SPCC requirements, and thus they remain subject to 40 CFR part 112. Although drilling and workover rigs are not exempt, other types of motive power containers located at drilling or workover facilities (i.e., trucks, automobiles, bulldozers, seismic exploration vehicles, or other earth-moving equipment) are exempted. The Agency believes that the general protection and the spill response and planning activities provided at an otherwise regulated SPCC facility will help the facility owner or operator to address any spills associated with these motive power containers. However, the specific provisions (such as blowout prevention), which are present in the rule for drilling or workover rigs, need to be preserved to maintain an adequate level of environmental protection for these unique activities. Therefore, an exemption for drilling and workover equipment, including rigs, is inappropriate.

Some commenters, representing the aviation, forestry, mining, recycling, and construction industries, requested that stationary cranes, gensets, and other non-self-propelled operational and towed ground service equipment be included in the exemption. The Agency believes that where these kinds of non-self-propelled, stationary or towed equipment operate in pre-determined oil handling areas, an SPCC Plan can reasonably address oil spill prevention measures under § 112.8(c)(2) and (11). For example, the Agency understands that towed ground service equipment at an airport is typically located at terminal gates for use when aircraft are parked at the gates. This equipment typically is staged and operated in an area that includes other oil storage containers such as airport mobile refuelers (see Section D below). As such, the identified oil spill prevention approach that addresses potential spills from an airport mobile refueler at the gate should also address potential spills from nearby ground service equipment used by airline personnel at the same gate. Thus, the exemption does not include non-self-propelled stationary or towed equipment, such as towed ground service equipment or any type of gensets, but only motor vehicles that can provide propulsion to another location. See Chapter 4 of the *SPCC Guidance for Regional Inspectors* for further explanation regarding when sized secondary containment is required for mobile or portable containers that are in a stationary, unattended mode.

D. Mobile Refuelers

EPA proposed to amend the SPCC rule to define an airport mobile refueler as a vehicle with an onboard bulk storage container designed or used solely to store and transport fuel for transfer into or from aircraft and ground service equipment (such as belt loaders, tractors, luggage transport vehicles, deicing equipment, and lifts) at airports. Airport mobile refuelers have onboard bulk storage containers that are used solely to transport and transfer fuel and are subject to the SPCC rule because they are containers used to store oil prior to further distribution and use. As such, they are subject to all applicable SPCC rule provisions, including the sized secondary containment provisions of §§ 112.8(c)(2) (applicable to all bulk storage containers) and 112.8(c)(11) (applicable more specifically to mobile/portable bulk storage containers). These provisions require a secondary means of containment, such as a dike or catchment basin, sufficient to contain the capacity of the largest single compartment or container with sufficient freeboard to contain precipitation.

As described in the preamble to EPA's proposed rule, members of the aviation sector have expressed concern that requiring sized secondary containment for airport mobile refuelers is not practicable for safety and security reasons. They argued that requiring refuelers to park in specifically sized secondary containment areas located within an Airport Operations Area (AOA) could create a safety and security hazard because it entails grouping the vehicles or placing impediments in the AOA. In response to these concerns, EPA proposed to exempt airport mobile refuelers from the specifically sized secondary containment requirements for bulk storage containers in § 112.8(c)(2) and (11), while preserving environmental protection (especially for fuel transfers associated with airport mobile refuelers), afforded by the spill prevention provisions outlined in § 112.7(c).

Members of the aviation sector were generally supportive of the proposal. Commenters generally supported the proposed exemption of airport mobile refuelers from certain provisions of the SPCC regulations and noted that general secondary containment is already practiced at airports. Commenters stated that requiring secondary containment around airport mobile refuelers, while they are stationary or idle creates serious safety and security risks. One commenter did have reservations about certain provisions of the rule still governing airport mobile refuelers, specifically the provisions of § 112.8(c) and the general secondary containment requirements of § 112.7(c). A Professional Engineering firm opposed the exemption of airport mobile refuelers from certain provisions of the SPCC regulation. The commenter asserted that the argument regarding the accident potential for not excluding airport fuel transporters is highly questionable, since airport fuel spills are well documented.

The Agency agrees with the commenter that fuel spills at airports are well documented, and that potential spills from airport mobile refuelers need to be addressed in the facility's SPCC Plan. Nevertheless, the Agency agrees with those commenters that argued that the sized secondary containment requirement did present safety and security concerns and therefore, we are finalizing the proposal to exclude mobile refuelers as defined in today's rule in § 112.2 from the specifically sized secondary containment requirements for bulk storage containers in §§ 112.8(c)(2) and (11) and 112.12(c)(2) and (11). General secondary containment still applies for mobile refuelers at non-transportation-related facilities, unless permanently closed as defined in § 112.2.

Although the Agency did not propose to extend this exclusion to other mobile refuelers that may operate within the confines of a non-transportation facility, we requested comment as to whether the proposed exclusion should be more broadly applied to other types of mobile refuelers. Commenters responded that the proposed exclusion for airport mobile refuelers from the sized secondary containment requirements should be extended to mobile refuelers at industrial sites, construction sites, chemical complexes (i.e., refineries), mining sites, seaport terminals, and tank truck home bases. Several commenters indicated that the same rationale discussed in the proposed rule preamble supporting this exclusion applies to owners and operators of industrial facilities as well. Specifically, one commenter stated that: (1) Requiring sized secondary containment for industrial mobile refuelers is not practicable and distracts from safety and security monitoring by providing a blind spot and hiding location behind the containment unit; (2) requiring refuelers to park in specially designated secondary containment areas located within an industrial or chemical facility operating area will create safety and security hazards by grouping the vehicles or placing impediments in the operations area; and (3) requiring mobile refuelers to return to containment areas located within the industrial facilities tank farm between refueling operations will increase the risk of accidents (and therefore accidental oil discharge), as the vehicles would travel with increased frequency through the busy industrial operating areas. Another commenter also indicated that the clarification should extend to rail cars, since rail cars are less mobile then airport mobile refuelers and additional rail car movements in congested rail yards exposes these vehicles to many of the hazards identified for airport mobile refuelers.

The Agency agrees with commenters that the exclusion provided for airport mobile refuelers should be extended to mobile refuelers at other types of facilities. The Agency agrees that providing sized secondary containment for vehicles that move frequently within a non-transportation-related facility to perform refueling operations can raise safety and security concerns, so the exclusion from complying with the sized secondary containment requirements provided for airport mobile refuelers is being extended to mobile refuelers that are vehicles with an onboard bulk storage container used to store and transport oil for transfer into or from other vehicles, ground service equipment or another oil storage container.

Furthermore, the Agency continues to believe that other mobile/portable bulk storage tanks that are being towed by vehicles or otherwise moved to or from a designated area typically cannot be provided with sized secondary containment as per §§ 112.8(c)(2) and (11) and 112.12(c)(2) and (11), as applicable, during that movement or relocation. However, when these mobile/portable bulk storage containers (except mobile refuelers) are placed in a designated area of a site (e.g., a construction site) whereby a dike or catchment basin sufficient to contain the capacity of the largest single compartment or container with sufficient freeboard to contain precipitation can be installed, sized secondary containment requirements would apply. In the same vein, the Agency believes that rail cars cannot be provided with sized secondary containment when entering, moving within, or exiting the confines of a facility. Conversely, when they are situated in defined locations at an otherwise regulated facility, sized secondary containment, such as a catchment basin, could be provided. See Chapter 4 of the *SPCC Guidance for Regional Inspectors* for further explanation regarding when sized secondary containment is required for mobile or portable containers that are in a stationary, unattended mode.

1. Definition of Mobile Refueler

EPA is amending the SPCC rule to exempt mobile refuelers from the requirements of §§ 112.8(c)(2) and (11) and 112.12(c)(2) and (11). In today's final rule, EPA defines a mobile refueler as ''a bulk storage container, onboard a vehicle or towed, that is designed or used solely to store and transport fuel for transfer into or from an aircraft, motor vehicle, locomotive, vessel, ground service equipment, or other oil storage container.'' The definition is intended to describe vehicles of various sizes equipped with a bulk storage container such as a cargo tank or tank truck that is used to fuel or defuel aircraft, motor vehicles, locomotives, tanks, vessels or other oil storage containers. The definition is also intended to describe tank full trailers and tank semi-trailers including those at airports that are used to fuel or defuel aircraft. The definition does not include other mobile or portable oil storage containers that are not involved in fueling activities. When these other mobile or portable containers are in a stationary, unattended mode and not under the direct oversight or control of facility personnel, the requirements of §§ 112.8(c)(2) and (11) and 112.12(c)(2) and (11) apply. (See Chapter 4 of the *SPCC Guidance for Regional Inspectors.*) In addition, the Agency intends the secondary containment exemption to apply to vehicles used for refueling, and not vehicles used primarily for the bulk storage of oil in a stationary location, in place of stationary oil storage containers.

A commenter from the aviation sector supported EPA's proposed definition and encouraged the inclusion of fuel transfers into or from ground service equipment. Two commenters from the chemical manufacturing sector stated that the definition that was proposed is too broad and unlawfully extends EPA's jurisdiction. The MOU between DOT and EPA establishes non-transportation facilities to include ''highway vehicles and railroad cars which are used for the transport of oil exclusively within the confines of a non-transportation-related facility and which are not intended to transport oil in interstate or intrastate commerce.'' EPA understands that mobile refuelers that operate solely within the confines of an airport, or other type of facility that is subject to SPCC regulations would be covered by the definition of mobile refuelers at § 112.2. Thus, a mobile refueler that operates solely on airport property, or some other type of facility would be subject to § 112.7(c) during all periods of operation. Conversely, for a mobile refueler that operates on highways (i.e., intended to transport oil in interstate or intrastate commerce) in addition to an airport, or other type of facility, then only the period of actual transfer operations at a non-transportation facility would be subject to the general secondary containment requirements of § 112.7(c), unless the transfer occurs at a loading/unloading rack, whereby the rack and vehicle are subject to the requirements at § 112.7(h).

Similarly, another commenter suggested applying the existing requirements for portable fueling facility requirements of § 112.3(c) to mobile refuelers when in a fixed, non-transportation mode. Specific requirements for mobile facilities should be developed as a separate subpart through rulemaking. The Agency disagrees that a separate rulemaking be initiated for mobile refuelers. We believe that the modification being promulgated today provides the owner or operator with considerable flexibility to identify the appropriate spill prevention measures under § 112.7(c) applicable to the mobile refueler operation operating solely at a non-transportation facility. Furthermore, we disagree that § 112.3(c) needs to be modified to apply to this type of mobile refueler that enters a non-transportation facility as this provision already addresses a portable fueling facility operating in a fixed, non-transportation-related mode. For either type of mobile refueler, § 112.7(c) applies.

2. Amended Requirements

This amendment revises §§ 112.8(c)(2) and (11) and 112.12(c)(2) and (11) to specifically exempt mobile refuelers, as defined above, from these provisions. As noted above, the Agency is expanding the proposed exemption from the sized secondary containment requirements to apply to any person that operates a mobile refueler. Since mobile refuelers are mobile or portable bulk storage containers, the other provisions of §§ 112.8(c) and 112.12(c) still apply. Secondary containment systems sufficient to contain the capacity of the largest single compartment or container with sufficient freeboard to contain precipitation are no longer required. A commenter representing small business expressed concerns about the security, safety and logistical concerns for the proposed amendment for airport mobile refuelers. The commenter recommended that EPA further revise the SPCC requirements so that general secondary containment applies only when airport mobile refuelers are transferring fuel. The Agency disagrees that the amendment should be limited to transfer operations only, as another commenter asserts that mobile refuelers can experience leaks and spills (e.g., vehicular accidents, line leaks, or other equipment/container failure). Thus, we believe that the general secondary containment provisions at § 112.7(c) should apply to all mobile refueler operations.

Per § 112.7(c), appropriate containment and/or diversionary structures or equipment must be designed to prevent a discharge as described in § 112.1(b). The Agency believes general secondary containment should be designed to address the most likely discharge from the primary containment system (i.e., the storage container). Section 112.7(c) allows for the use of certain types of active containment measures (countermeasures or spill response capability) which prevent a discharge to navigable waters or adjoining shorelines. One aviation commenter indicated that the availability of ''active measures'' is necessary to make the general secondary containment provision workable in an airport setting. To clarify, EPA believes that active containment measures are those that require deployment or other specific action by the owner or operator. These measures may be deployed either before an activity involving the handling of oil starts, or in reaction to a discharge, so long as the active measure is designed and can reasonably be implemented to prevent an oil spill from reaching navigable waters or adjoining shorelines. Passive measures are permanent installations and do not require deployment or action by the owner or operator. The efficacy of active containment measures to prevent a discharge depends on their technical effectiveness (i.e., mode of operation, absorption rate), placement and quantity, and timely deployment prior to, or following a discharge. For discharges that occur only during manned activities, such as those occurring during transfers, an active measure (i.e., sock, mat, other portable barrier, or land-based response capability) may be appropriate, provided that the measure is capable of containing the oil discharge volume and rate, and is timely and properly constructed/deployed. The Agency also believes that these active measures may be appropriately applied to other situations (i.e., when the refueler is not engaged in transfer operations or moving around the facility).

In summary, EPA believes that the general provisions for secondary containment address the most likely spill scenarios associated with this equipment (i.e., during oil transfers into or from the mobile refuelers). Section 112.7(c) does not prescribe a size for a secondary containment structure, but does require appropriate containment and/or diversionary structures or equipment to prevent a discharge as described in § 112.1(b) including the use of active measures. This final rule would maintain environmental protection, while still allowing the necessary flexibility for compliance with the general secondary containment requirements of the rule for mobile refuelers at airports or other types of facilities.

E. Animal Fats and Vegetable Oils

The Agency proposed to amend Subpart C of part 112 by removing § 112.13 (requirements for onshore oil production facilities), § 112.14 (requirements for onshore oil drilling and workover facilities), and § 112.15 (requirements for offshore oil drilling, production, or workover facilities) and by reserving these sections of Subpart C of the regulation because they are not appropriate for animal fats and vegetable oils. Commenters generally supported this proposal and therefore, the Agency has amended the final rule to remove these provisions. In addition, the Agency also requested comment on whether different requirements were appropriate for animal fats and vegetable oils from the requirements for petroleum and other oils. Some commenters provided suggestions for differentiating animal fats and vegetable oils from other classes of oils in the SPCC rule. The Agency is continuing to examine these issues to determine the appropriateness of amendments to the regulatory scheme to differentiate the SPCC requirements for animal fats and vegetable oils from the requirements for petroleum and other oils and plans to address this issue in a future rulemaking.

As a point of clarification, EPA also removed the phrase ''for onshore facilities (excluding production facilities)'' from the title of § 112.12 Spill Prevention, Control, and Countermeasure Plan requirements. Section 112.2 of the rule defines production facility to mean ''all structures (including, but not limited to, wells, platforms, or storage facilities), piping (including, but not limited to flowlines or gathering lines), or equipment (including, but not limited to workover equipment, separation equipment, or auxiliary non-transportation-related equipment) used in the production, extraction, recovery, lifting, stabilization, separation or treating of oil, or associated storage or measurement, and located in a single geographical oil or gas field operated by a single operator.'' The exclusion of production facilities from § 112.12 was originally intended to differentiate requirements based on facility type and § 112.13 applied to onshore production facilities. Since this final rule removes the inapplicable requirements for animal fats and vegetable oils, it is no longer necessary to differentiate onshore oil production facilities from other facilities in § 112.12.

As an editorial change, EPA revised the provisions in § 112.7(a)(2) and 112.7(d) to eliminate reference to the inapplicable provisions in §§ 112.13 and 112.14, because these sections have been removed.

F. Extension of Compliance Dates for Farm

While determining if the agriculture sector warrants specific consideration under the SPCC rule, EPA proposed to extend the compliance dates for preparing or amending and implementing SPCC Plans for farms that have a total storage capacity of 10,000 gallons of oil or less either indefinitely or until the Agency publishes a final rule in the **Federal Register** establishing a new compliance date. This final rule provides an extension for all farms as defined in this notice until the Agency promulgates a rule specifically addressing how farms should be regulated under the SPCC rules.

1. Eligibility Criteria

Most commenters, primarily from the agricultural sector, generally supported EPA's proposed extension of compliance for farms with a storage capacity of 10,000 gallons of oil or less. Several commenters who supported the extension suggested modifications to the extension as proposed, such as expanding the extension to all farms. Supporters argued the proposal reduces unnecessary regulatory burden on the agricultural community, while the Agency determines if this sector warrants specific consideration under the SPCC rule. Others argued that the sector is already regulated by state and local agencies for pollution-related activities on farms. Support for the argument that the physical layout of a farm makes this sector unique within the universe of SPCC-regulated facilities was also offered. Comments also were offered in opposition to the extension and potential exemptions from SPCC requirements for farms. Commenters argued that farms may endanger the environment, farmers, and their neighbors and expressed concern that farms are often close to surface waters. Commenters opposing the extension also argued that farms should have been in compliance with the original SPCC rule and that current technology makes compliance relatively inexpensive and easy.

In finalizing the compliance extension for farms, EPA is adopting the definition of ''farm,'' as proposed, for purposes of part 112 and the extension in the final rule. EPA defines ''farm,'' in part, by adapting the definition used by the National Agricultural Statistics Service (NASS) in its Census of Agriculture. NASS defines a farm as any place from which $1,000 or more of agricultural products were produced and sold, or normally would have been sold, during the census year. Operations receiving $1,000 or more in Federal government payments are counted as farms, even if they have no sales and otherwise lack the potential to have $1,000 or more in sales.

EPA also considered the definition it uses to exempt farm tanks under the Underground Storage Tank (UST) regulations at 40 CFR part 280. As defined in 40 CFR 280.12, a farm tank is a tank located on a tract of land devoted to the production of crops or raising of animals, including fish. The preamble to the UST rule explains that the term ''farm'' includes fish hatcheries, rangeland, and nurseries with growing operations, but does not include laboratories where animals are raised, land used to grow timber, and pesticide aviation operations. This term also does not include retail stores or garden centers where the product of nursery farms is marketed, but not produced, nor does the Agency interpret the term ''farm'' to include golf courses or other places dedicated primarily to recreational, aesthetic, or other non-agricultural activities. (See 53 FR 37082, 37117, September 23, 1988.) EPA utilized elements of the UST definition of farm, in combination with the Census definition, in developing the proposal and final rule. By combining elements of both of these approaches, the Agency believes the definition more specifically targets the intended universe for the extension.

Several commenters provided general remarks on definitions of facility, farm, farming facility, farming operation, and/or agribusiness for purposes of the SPCC rule; some proposed alternate definitions of farm. One suggested alternative was to use the definition of eligible agricultural businesses used in the ''Agricultural Business Security Tax Credit Act of 2005'' (S. 052). Most broadly, the term ''eligible agricultural business'' means any person in the trade or business of: selling agricultural products, including specified agricultural chemicals, at retail predominantly to farmers and ranchers, or manufacturing, formulating, distributing, or aerially applying specified agricultural chemicals. The Agency disagrees with expanding the definition as suggested because we believe it would apply to businesses that are distinctly different from farms, e.g., oil marketing and distribution to farmers, that do not present the same unique issues that farms raise. In fact, these agribusinesses are more like industrial or manufacturing operations and thus, it would be inappropriate to include these businesses within the compliance extension. Several commenters suggested that the farm definition specify that operations comprised of non-contiguous or non-adjacent agricultural lands would not be considered a single ''farm facility'' for purposes of fuel tank storage capacity regardless of whether such parcels of land are under common ownership or control. They also suggested that the Agency allow for aggregate tank storage capacity to be determined separately for each field or parcel of such agricultural lands. The definition of facility as provided in § 112.2 currently provides the flexibility for the owner or operator of a farm to determine the scope of his or her facility as recommended by the commenters. However, the Agency will further explore these questions in a future rulemaking addressing farms.

The Agency is also expanding the extension to owners and operators of all facilities that meet the definition of farm finalized in today's rule, which was supported by many of the commenters. This action allows the Agency to study the universe and determine whether the current requirements are appropriate for farms. The Agency is expanding this extension because, upon further assessment, we believe it is premature for the Agency to determine that the current SPCC requirements are appropriate for farms with oil storage capacities greater than 10,000 gallons before we undertake our study of the universe of farms.

2. Compliance Date Extension for Farms

With today's action, EPA extends the compliance dates for the owner or operator of a farm, as defined in § 112.2, to prepare or amend and implement the farm's SPCC Plan until the effective date of a rule addressing whether to provide differentiated requirements for farms. The Agency will announce the new compliance date in the **Federal Register**. The Agency will be conducting additional information collection and analysis to determine if differentiated SPCC requirements may be appropriate for farms. The Agency will be working with USDA to collect data that would more accurately characterize oil handling at these facilities, thereby allowing the Agency to focus on priorities where substantial environmental improvements can be obtained.

Some commenters argued that EPA should provide a suspension of requirements rather than an extension of the compliance date. We believe that providing a compliance extension in the same manner as previous compliance extensions that have been granted is appropriate. We are not aware that the farming community has had concerns with the previous compliance extensions that have been granted. In addition, we would have concerns about the impact that such an action may have as some number of farms handle significant quantities of oil and it would not be appropriate to issue a blanket suspension of all spill prevention requirements for owners and operators of these facilities. By extending the compliance date, the Agency is allowing for burden relief, while it makes a determination of whether the agriculture sector warrants specific consideration under the SPCC rule. Regardless of whether the Agency ultimately determines that differentiated requirements for farms are warranted, we will publish a notice in the **Federal Register** proposing new compliance dates for farms.

VI. Statutory and Executive Order Reviews

A. Executive Order 12866—Regulatory Planning and Review

Under section 3(f)(1) of Executive Order (EO) 12866 (58 FR 51735, October 4, 1993), this action is an "economically significant regulatory action" because it is likely to have an annual effect on the economy of $100 million or more. Accordingly, EPA submitted this action to the Office of Management and Budget (OMB) for review under EO 12866 and any changes made in response to OMB recommendations have been documented in the docket for this action.

In addition, EPA prepared an analysis of the potential costs and benefits associated with this action. This analysis is contained in the "Regulatory Impact Analysis for the Final Revisions to the Oil Pollution Prevention Regulations" (October 2006). A copy of the analysis is available in the docket for this action and the analysis is briefly summarized here.

The regulatory impact analysis developed in support of today's action compares the compliance costs for owners and operators of facilities affected by the 2006 amendments to the costs owners and operators would face under the SPCC rule as amended in 2002 with respect to the four major components of the final rule: (1) Qualified facilities with 10,000 gallons or less of storage capacity; (2) facilities with certain types of oil-filled operational equipment; (3) facilities with motive power containers; and (4) facilities with mobile refuelers.

For each of these components, the benefits consist of reductions in costs accruing from reductions in compliance costs. The main steps used to estimate the compliance cost impacts of the SPCC final Rule are as follows:

- Develop the baseline universe of SPCC-regulated facilities;
- Estimate the number of facilities affected by the final rule amendments;
- Estimate changes in compliance cost elements resulting from the final rule;
- Estimate total compliance cost savings to owners and operators of potentially affected facilities; and
- Annualize compliance cost savings over a ten-year period, 2008 through 2017, and discount the estimates using 3 and 7 percent discount rates.

Based on these procedures, EPA estimated the average annual number of potentially affected facilities and the annual compliance cost savings associated with each of the four major components of the final rule, as can be seen in Exhibit 1. EPA assumes cost minimization behavior applies to all owners and operators of facilities that qualify for reduced regulatory requirements, whereby all those affected will seek burden relief. These estimates are not necessarily additive, given that they do not account for interactions among the various components of the final rule. Exhibit 1 presents one compliance cost savings scenario for each rule component, whereby all qualified facilities, 50 percent of qualified oil-filled operational equipment, 10 percent of motive power containers, and 50 percent of mobile refuelers are affected.

EXHIBIT 1.—COMPLIANCE COST SAVINGS ASSOCIATED WITH THIS FINAL ACTION

Major components of the final rule	Projected average annual number of affected facilities		Estimated annual compliance cost savings ($2005 in millions)	
	Existing	New	Discounted 3%	Discounted 7%
Qualified Facilities	337,000	7,260	$37.9	$37.7
Qualified Oil-filled Equipment	[1] 0	5,040	53.1	52.8
Motive Power Containers	28,500	516	1.07	1.07
Mobile Refuelers	[1] 0	2,940	34.4	34.2

[1] The number of existing facilities with qualified oil-filled operational equipment and mobile refuelers is zero because EPA assumed that existing SPCC-regulated facilities would already have secondary containment or a determination of the impracticability of secondary containment in accordance with § 112.7(d).

EPA also prepared an Alternative Baseline that describes the estimated changes in cost savings resulting from the 2006 SPCC final rule assuming partial (50 percent) compliance. For this alternative analysis, EPA assumed 50 percent compliance with both the 2002 and 2006 rules. The Agency anticipates the compliance rate under the 2006 final rule to be at the same level as it would have been under the 2002 rule, or higher.

B. Paperwork Reduction Act

The information collection requirements for the final rule were submitted for approval to the Office of Management and Budget (OMB) under the *Paperwork Reduction Act*, 44 U.S.C. 3501 *et seq.* The Information Collection Request (ICR) document prepared by EPA has been assigned EPA ICR number 0328.13.

EPA does not collect the information required by the SPCC rule on a routine basis. SPCC Plans ordinarily need not be submitted to EPA, but must generally be maintained at the facility. Preparation, implementation, and maintenance of an SPCC Plan by the facility owner or operator helps prevent oil discharges, and mitigates the environmental damage caused by such discharges. Therefore, the primary user of the data is the facility personnel. While EPA may, from time to time, request information under these regulations, such requests are not routine.

Although facility personnel are the primary data user, EPA also uses the data in certain situations. EPA reviews SPCC Plans: (1) When it requests a facility owner or operator to submit required information in the event of certain discharges of oil or to evaluate an extension request; and, (2) as part of EPA's inspection program. State and local governments also use the data, which are not necessarily available elsewhere and can greatly assist local emergency preparedness efforts. Preparation of the information for affected facilities is required under section 311(j)(1) of the Act as implemented by 40 CFR part 112.

EPA estimates that in the absence of this rulemaking, approximately 580,000 facilities would be subject to the SPCC rule in 2006 and have SPCC Plans. In addition, EPA estimates that approximately 17,500 new facilities would become subject to SPCC requirements annually. In the absence of this final rulemaking, EPA projects that the average annual public reporting and recordkeeping burden for this information collection would be 2,695,329 hours.

Under today's rulemaking, owners and operators of qualified facilities no longer need a licensed Professional Engineer to certify their Plans. Facilities that store oil solely in motive power containers are no longer regulated, while owners and operators of facilities with oil storage in addition to motive power containers may incur lower compliance costs. Today's rule also allows greater use of contingency plans and written commitment of manpower, equipment, and resources without requiring an impracticability determination when combined with an inspection or monitoring program as an alternative to secondary containment for qualified oil-filled operational equipment. It also allows mobile refuelers at airports and facilities within other industries, to fall under a facility's general secondary containment requirements, rather than require specifically sized secondary containment.

Under today's rule, an estimated 434,000 regulated facilities would annually be subject to the SPCC information collection requirements of this rule during the information collection period. This figure excludes farms, to reflect the final compliance extension. Under this rule, the estimated annual average burden over the next three-year ICR period would be approximately 2,191,069 hours, resulting in a 19 percent average reduction. The estimated average annual public reporting for owners and operators of individual facilities already regulated under the SPCC rule would range between 3.3 and 7.1 hours, while the burden for owners and operators of newly regulated facilities would range between 40.1 and 70.1 hours as a result of this final action. The net annualized capital and start-up costs for the SPCC information collection portion of the rule would average $1.4 million and net annualized operation and maintenance (O&M) costs are estimated to be $34.3 million for owners and operators of all of these facilities combined.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of today's final rule on small entities, small entity is defined as: (1) a small business as defined in the SBA's regulations at 13 CFR 121.201—the SBA defines small businesses by category of business using North American Industry Classification System (NAICS) codes, and in the case of farms and production facilities, which constitute a large percentage of the facilities affected by this final rule, generally defines small businesses as having less than $500,000 in revenues or 500 employees, respectively; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise that is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today's final rule on small entities, I certify that this action would not have a significant economic impact on a substantial number of small entities. In determining whether a rule has a significant economic impact on a substantial number of small entities, the impact of concern is any significant adverse economic impact on small entities, since the primary purpose of the regulatory flexibility analyses is to identify and address regulatory alternatives ''which minimize any significant economic impact of the final rule on small entities.'' 5 U.S.C. 603 and 604. Thus, an agency may certify that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, or otherwise has a positive economic effect on all of the small entities subject to the rule.

This rule reduces regulatory burden on owners and operators of qualified facilities and facilities with qualified oil-filled operational equipment. Owners and operators of qualified facilities no longer need a licensed

Professional Engineer to certify their Plans. Facilities that store oil solely in motive power containers are no longer regulated, while owners and operators of facilities with oil storage in addition to motive power containers may incur lower compliance costs. Today's rule also allows greater use of contingency plans and a written commitment of manpower, equipment, and materials without requiring an impracticability determination as an alternative to secondary containment for qualified oil-filled operational equipment when combined with an established and documented inspection or monitoring program. It also allows mobile refuelers no matter the industry to fall under a facility's general secondary containment requirements rather than require specifically sized secondary containment. The Agency has therefore concluded that today's rule relieves regulatory burden for small entities.

Overall, EPA estimates that today's rule will reduce annual compliance costs by roughly $38 million for owners and operators of qualified facilities, $53 million for owners and operators of facilities with qualified oil-filled equipment, $1 million for owners and operators of facilities with motive power containers, and $34 million for owners and operators of facilities with mobile refuelers. Total costs were annualized over a 10-year period using both 3 and 7 percent discount rates assuming all qualified facilities, 50 percent of qualified oil-filled operational equipment, 10 percent of motive power containers, and 50 percent of mobile refuelers are affected under this scenario. EPA derived these savings by estimating the number of facilities affected by each provision in the final rule; identifying the specific behavioral changes (e.g., choosing to self-certify an SPCC Plan rather than using a licensed PE) that may occur; estimating the unit costs of compliance measures under the baseline and regulatory scenarios; and applying the change in unit costs to the projected number of affected facilities.

We have therefore concluded that today's final rule will relieve regulatory burden for all affected small entities.

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with ''Federal mandates'' that may result in expenditures to State, local, and tribal governments, in the aggregate, or to the private sector, of $100 million or more in any one year. Before promulgating an EPA rule for which a written statement is needed, section 205 of UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted.

Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed under section 203 of UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements. EPA has determined that this final rule does not contain a Federal mandate that may result in expenditures of $100 million or more for State, local, and tribal governments, in the aggregate, or the private sector in any one year. Today's final rule would reduce compliance costs on owners and operators of affected facilities by as much as $126 million annually, although EPA acknowledges this estimate is derived from analyses of each of the four major components of the final rule and are not necessarily additive, given that they do not account for interactions among the various components. Thus, today's rule is not subject to the requirements of sections 202 and 205 of the UMRA.

EPA has determined that this rule contains no regulatory requirements that might significantly or uniquely affect small governments. As explained above, the effect of final rule would be to reduce burden and costs for owners and operators of qualified regulated facilities, including certain small governments that are subject to the rule.

E. Executive Order 13132—Federalism

Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.''

This final rule does not have federalism implications. It would not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. Under CWA section 311(o), States may impose additional requirements, including more stringent requirements, relating to the prevention of oil discharges to navigable waters. EPA encourages States to supplement the Federal SPCC program and recognizes that some States have more stringent requirements. 56 FR 54612 (October 22, 1991). This final rule would not preempt State law or regulations. Thus, Executive Order 13132 does not apply to this final rule.

F. Executive Order 13175—Consultation and Coordination With Indian Tribal Governments

Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 9, 2000), requires EPA to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' This final rule does not have tribal implications, as specified in Executive Order 13175. Today's rule would not significantly or uniquely affect communities of Indian trial governments. Thus, Executive Order 13175 does not apply to this rule.

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

Executive Order 13045, ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997), applies to any rule that: (1) Is determined to be ''economically significant'' as defined under Executive Order 12866; and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency. EPA interprets Executive Order 13045 as applying only to those regulatory actions that are based on health or safety risks, such that the analysis required under section 5–501 of the Order has the potential to influence the regulation. This final rule is not subject to Executive Order 13045 because the Agency does not have reason to believe the environmental health or safety risks addressed by this action present a disproportionate risk to children.

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

This rule is not a ''significant energy action'' as defined in Executive Order 13211, ''Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001) because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The overall effect of the rule is to decrease the regulatory burden on facility owners or operators subject to its provisions.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (''NTTAA''), Public Law 104–113, section 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards such as materials specifications, test methods, sampling procedures, and business practices that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

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

J. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is a ''major rule'' as defined by 5 U.S.C. 804(2) because it will likely result in an annual effect on the economy of $100 million or more. This rule will be effective February 26, 2007.

List of Subjects in 40 CFR Part 112

Environmental protection, Airports, Animal fats and vegetable oils, Farms, Fire prevention, Flammable materials, Materials handling and storage, Oil pollution, Oil spill response, Penalties, Petroleum, Reporting and recordkeeping requirements, Tanks, Water pollution control, Water resources.

Dated: December 12, 2006.

Stephen L. Johnson,

Administrator.

■ For the reasons stated in the preamble, the Environmental Protection Agency amends 40 CFR part 112 as follows:

PART 112—OIL POLLUTION PREVENTION

■ 1. The authority citation for part 112 continues to read as follows:

Authority: 33 U.S.C. 1251 *et seq.*; 33 U.S.C. 2720; and E.O. 12777 (October 18, 1991), 3 CFR, 1991 Comp., p. 351.

Subpart A—[Amended]

■ 2. Amend § 112.1 by revising paragraph (d)(2)(ii) and adding paragraph (d)(7) to read as follows:

§ 112.1 General applicability.

* * * * *

(d) * * *

(2) * * *

(ii) The aggregate aboveground storage capacity of the facility is 1,320 gallons or less of oil. For the purposes of this exemption, only containers with a capacity of 55 gallons or greater are counted. The aggregate aboveground storage capacity of a facility excludes the capacity of a container that is ''permanently closed,'' and the capacity of a ''motive power container'' as defined in § 112.2.

* * * * *

(7) Any ''motive power container,'' as defined in § 112.2. The transfer of fuel or other oil into a motive power container at an otherwise regulated facility is not eligible for this exemption.

* * * * *

■ 3. Amend § 112.2 by adding definitions for ''Farm,'' ''Mobile refueler,'' ''Motive power container,'' and ''Oil-filled operational equipment'' in alphabetical order to read as follows:

§ 112.2 Definitions.

* * * * *

Farm means a facility on a tract of land devoted to the production of crops or raising of animals, including fish, which produced and sold, or normally would have produced and sold, $1,000 or more of agricultural products during a year.

* * * * *

Mobile refueler means a bulk storage container onboard a vehicle or towed, that is designed or used solely to store and transport fuel for transfer into or from an aircraft, motor vehicle, locomotive, vessel, ground service equipment, or other oil storage container.

Motive power container means any onboard bulk storage container used primarily to power the movement of a motor vehicle, or ancillary onboard oil-filled operational equipment. An onboard bulk storage container which is used to store or transfer oil for further distribution is not a motive power container. The definition of motive power container does not include oil drilling or workover equipment, including rigs.

* * * * *

Oil-filled operational equipment means equipment that includes an oil storage container (or multiple containers) in which the oil is present solely to support the function of the apparatus or the device. Oil-filled operational equipment is not considered a bulk storage container, and does not include oil-filled manufacturing equipment (flow-through process). Examples of oil-filled operational equipment include, but are not limited to, hydraulic systems, lubricating systems (*e.g.*, those for pumps, compressors and other rotating equipment, including pumpjack lubrication systems), gear boxes, machining coolant systems, heat transfer systems, transformers, circuit breakers, electrical switches, and other systems containing oil solely to enable the operation of the device.

■ 4. Amend § 112.3 as follows:

■ a. By redesignating paragraph (a) as paragraph (a)(1).

■ b. By adding paragraph (a)(2).

■ c. By redesignating paragraph (b) as paragraph (b)(1).

■ d. By adding paragraph (b)(2).
■ e. By revising paragraph (d) introductory text.
■ f. By adding paragraph (g).

§ 112.3 Requirement to prepare and implement a Spill Prevention, Control, and Countermeasure Plan.

* * * * *

(a)(1) * * *

(2) If your onshore facility is a farm as defined in § 112.2, the compliance date described in paragraph (a)(1) of this section is delayed until the effective date of a rule establishing SPCC requirements specifically for farms or otherwise establishes dates by which farms must comply with the provisions of this part.

(b)(1) * * *

(2) If your onshore facility meets the definition of farm in § 112.2, the compliance date described in paragraph (b)(1) of this section is delayed until the effective date of a rule establishing SPCC requirements specifically for farms or otherwise establishes dates by which farms must comply with the provisions of this part.

* * * * *

(d) Except as provided in § 112.6, a licensed Professional Engineer must review and certify a Plan for it to be effective to satisfy the requirements of this part.

* * * * *

(g) *Qualified Facilities.* The owner or operator of a qualified facility as defined in this subparagraph may self-certify his or her facility's Plan, as provided in § 112.6. A qualified facility is one that:

(1) Has an aggregate aboveground storage capacity of 10,000 gallons or less; and

(2) Has had no single discharge as described in § 112.1(b) exceeding 1,000 U.S. gallons or no two discharges as described in § 112.1(b) each exceeding 42 U.S. gallons within any twelve month period in the three years prior to the SPCC Plan self-certification date, or since becoming subject to this part if the facility has been in operation for less than three years (other than discharges as described in § 112.1(b) that are the result of natural disasters, acts of war, or terrorism).

■ 5. Amend § 112.5 by revising paragraph (c) to read as follows:

§ 112.5 Amendment of Spill Prevention, Control, and Countermeasure Plan by owners or operators.

* * * * *

(c) Except as provided in § 112.6, have a Professional Engineer certify any technical amendments to your Plan in accordance with § 112.3(d).

■ 6. Add § 112.6 to read as follows:

§ 112.6 Qualified Facility Plan Requirements.

(a) *Preparation and Self-certification of Plan.* If you are the owner or operator of a facility that meets the qualified facility qualification criteria in § 112.3(g), you may choose to self-certify your Plan. You must certify in the Plan that:

(1) You are familiar with the requirements of this part;

(2) You have visited and examined the facility;

(3) The Plan has been prepared in accordance with accepted and sound industry practices and standards, and with the requirements of this part;

(4) Procedures for required inspections and testing have been established;

(5) The Plan is being fully implemented;

(6) The facility meets the qualification criteria set forth under § 112.3(g);

(7) The Plan does not deviate from any requirement of this part as allowed by §§ 112.7(a)(2) and 112.7(d), except as provided in paragraph (c) of this section; and

(8) The Plan and individual(s) responsible for implementing the Plan have the full approval of management and the facility owner or operator has committed the necessary resources to fully implement the Plan.

(b) *Self-certification of Technical Amendments.* If you self-certify your Plan pursuant to paragraph (a) of this section, you must certify any technical amendments to your Plan in accordance with paragraph (a) of this section when there is a change in the facility design, construction, operation, or maintenance that affects its potential for a discharge as described in § 112.1(b) except:

(1) If a Professional Engineer certified a portion of your Plan in accordance with paragraph (d) of this section, and the technical amendment affects this portion of the Plan, you must have the amended provisions of your Plan certified by a Professional Engineer in accordance with § 112.6(d)(2).

(2) If the change is such that the facility no longer meets the qualifying criteria in § 112.3(g) because it exceeds 10,000 gallons in aggregate aboveground storage capacity, you must prepare a Plan in accordance with the general Plan requirements in § 112.7 and the applicable requirements in subparts B and C, including having the Plan certified by a Professional Engineer as required under § 112.3(d).

(c) *Applicable Requirements.* Except as provided in this subparagraph, your self-certified SPCC Plan must comply with § 112.7 and the applicable requirements in subparts B and C of this part:

(1) *Environmental Equivalence.* Your Plan may not include alternate methods which provide environmental equivalence pursuant to § 112.7(a)(2), unless each alternate method has been reviewed and certified in writing by a Professional Engineer, as provided in paragraph (d) of this section.

(2) *Impracticability.* Your Plan may not include any determinations that secondary containment is impracticable and provisions in lieu of secondary containment pursuant to § 112.7(d), unless each such determination and alternative provision has been reviewed and certified in writing by a Professional Engineer, as provided in paragraph (d) of this section.

(3) *Security (excluding oil production facilities).* You must either:

(i) Comply with the requirements under § 112.7(g); or

(ii) Describe in your Plan how you secure and control access to the oil handling, processing and storage areas; secure master flow and drain valves; prevent unauthorized access to starter controls on oil pumps; secure out-of-service and loading/unloading connections of oil pipelines; address the appropriateness of security lighting to both prevent acts of vandalism and assist in the discovery of oil discharges.

(4) *Bulk Storage Container Inspections.* You must either:

(i) Comply with the requirements under § 112.8(c)(6) or § 112.12(c)(6), as applicable; or

(ii) Test/inspect each aboveground container for integrity on a regular schedule and whenever material repairs are made. You must determine, in accordance with industry standards, the appropriate qualifications for personnel performing tests and inspections, the frequency and type of testing and inspections which take into account container size, configuration, and design (such as containers that are: shop built, skid-mounted, elevated, equipped with a liner, double walled, or partially buried). Examples of these integrity tests include, but are not limited to: visual inspection, hydrostatic testing, radiographic testing, ultrasonic testing, acoustic emissions testing, or other systems of non-destructive testing. You must keep comparison records and you must also inspect the container's supports and foundations. In addition, you must frequently inspect the outside of the container for signs of deterioration, discharges, or accumulation of oil inside diked areas. Records of inspections and tests kept under usual and customary business practices satisfy the recordkeeping requirements of this paragraph.

(d) *Professional Engineer Certification of Portions of a Qualified Facility's Self-certified Plan.* As described in paragraph (c) of this section, the facility owner or operator may not self-certify alternative measures allowed under § 112.7(a)(2) or (d), that are included in the facility's Plan. Such measures must be reviewed and certified, in writing, by a licensed Professional Engineer as follows:

(1) For each alternative measure allowed under § 112.7(a)(2), the Plan must be accompanied by a written statement by a Professional Engineer that states the reason for nonconformance and describes the alternative method and how it provides equivalent environmental protection in accordance with § 112.7(a)(2). For each determination of impracticability of secondary containment pursuant to § 112.7(d), the Plan must clearly explain why secondary containment measures are not practicable at this facility and provide the alternative measures required in § 112.7(d) in lieu of secondary containment.

(2) By certifying each measure allowed under § 112.7(a)(2) and (d), the Professional Engineer attests:

(i) That he is familiar with the requirements of this part;

(ii) That he or his agent has visited and examined the facility; and

(iii) That the alternative method of environmental equivalence in accordance with § 112.7(a)(2) or the determination of impracticability and alternative measures in accordance with § 112.7(d) is consistent with good engineering practice, including consideration of applicable industry standards, and with the requirements of this part.

(3) The review and certification by the Professional Engineer under this paragraph is limited to the alternative method which achieves equivalent environmental protection pursuant to § 112.7(a)(2) or to the impracticability determination and measures in lieu of secondary containment pursuant to § 112.7(d).

■ 7. Amend § 112.7 as follows:

■ a. By revising paragraph (a)(2).

■ b. By revising paragraph (c) introductory text.

■ c. By revising paragraph (d) introductory text.

■ d. By adding paragraph (k).

§ 112.7 General requirements for Spill Prevention, Control, and Countermeasure Plans.

* * * * *

(a) * * *

(2) Comply with all applicable requirements listed in this part. Except as provided in § 112.6, your Plan may deviate from the requirements in paragraphs (g), (h)(2) and (3), and (i) of this section and the requirements in subparts B and C of this part, except the secondary containment requirements in paragraphs (c) and (h)(1) of this section, and §§ 112.8(c)(2), 112.8(c)(11), 112.9(c)(2), 112.10(c), 112.12(c)(2), and 112.12(c)(11), where applicable to a specific facility, if you provide equivalent environmental protection by some other means of spill prevention, control, or countermeasure. Where your Plan does not conform to the applicable requirements in paragraphs (g), (h)(2) and (3), and (i) of this section, or the requirements of subparts B and C of this part, except the secondary containment requirements in paragraph (c) and (h)(1) of this section, and §§ 112.8(c)(2), 112.8(c)(11), 112.9(c)(2), 112.10(c), 112.12(c)(2), and 112.12(c)(11), you must state the reasons for nonconformance in your Plan and describe in detail alternate methods and how you will achieve equivalent environmental protection. If the Regional Administrator determines that the measures described in your Plan do not provide equivalent environmental protection, he may require that you amend your Plan, following the procedures in § 112.4(d) and (e).

* * * * *

(c) Provide appropriate containment and/or diversionary structures or equipment to prevent a discharge as described in § 112.1(b), except as provided in paragraph (k) of this section for qualified oil-filled operational equipment. The entire containment system, including walls and floor, must be capable of containing oil and must be constructed so that any discharge from a primary containment system, such as a tank or pipe, will not escape the containment system before cleanup occurs. At a minimum, you must use one of the following prevention systems or its equivalent:

* * * * *

(d) Provided your Plan is certified by a licensed Professional Engineer under § 112.3(d), or, in the case of a qualified facility that meets the criteria in § 112.3(g), the relevant sections of your Plan are certified by a licensed Professional Engineer under § 112.6(d), if you determine that the installation of any of the structures or pieces of equipment listed in paragraphs (c) and (h)(1) of this section, and §§ 112.8(c)(2), 112.8(c)(11), 112.9(c)(2), 112.10(c), 112.12(c)(2), and 112.12(c)(11) to prevent a discharge as described in § 112.1(b) from any onshore or offshore facility is not practicable, you must clearly explain in your Plan why such measures are not practicable; for bulk storage containers, conduct both periodic integrity testing of the containers and periodic integrity and leak testing of the valves and piping; and, unless you have submitted a response plan under § 112.20, provide in your Plan the following:

* * * * *

(k) *Qualified Oil-filled Operational Equipment.* The owner or operator of a facility with oil-filled operational equipment that meets the qualification criteria in paragraph (k)(1) of this sub-section may choose to implement for this qualified oil-filled operational equipment the alternate requirements as described in paragraph (k)(2) of this sub-section in lieu of general secondary containment required in paragraph (c) of this section.

(1) *Qualification Criteria—Reportable Discharge History:* The owner or operator of a facility that has had no single discharge as described in § 112.1(b) from any oil-filled operational equipment exceeding 1,000 U.S. gallons or no two discharges as described in § 112.1(b) from any oil-filled operational equipment each exceeding 42 U.S. gallons within any twelve month period in the three years prior to the SPCC Plan certification date, or since becoming subject to this part if the facility has been in operation for less than three years (other than oil discharges as described in § 112.1(b) that are the result of natural disasters, acts of war or terrorism); and

(2) *Alternative Requirements to General Secondary Containment.* If secondary containment is not provided for qualified oil-filled operational equipment pursuant to paragraph (c) of this section, the owner or operator of a facility with qualified oil-filled operational equipment must:

(i) Establish and document the facility procedures for inspections or a monitoring program to detect equipment failure and/or a discharge; and

(ii) Unless you have submitted a response plan under § 112.20, provide in your Plan the following:

(A) An oil spill contingency plan following the provisions of part 109 of this chapter.

(B) A written commitment of manpower, equipment, and materials required to expeditiously control and remove any quantity of oil discharged that may be harmful.

Subpart B—[Amended]

■ 8. Amend § 112.8 by revising paragraphs (c)(2) and (c)(11) to read as follows:

§ 112.8 Spill Prevention, Control, and Countermeasure Plan requirements for onshore facilities (excluding production facilities).

* * * * *

(c) * * *

(2) Construct all bulk storage tank installations (except mobile refuelers) so that you provide a secondary means of containment for the entire capacity of the largest single container and sufficient freeboard to contain precipitation. You must ensure that diked areas are sufficiently impervious to contain discharged oil. Dikes, containment curbs, and pits are commonly employed for this purpose. You may also use an alternative system consisting of a drainage trench enclosure that must be arranged so that any discharge will terminate and be safely confined in a facility catchment basin or holding pond.

* * * * *

(11) Position or locate mobile or portable oil storage containers to prevent a discharge as described in § 112.1(b). Except for mobile refuelers, you must furnish a secondary means of containment, such as a dike or catchment basin, sufficient to contain the capacity of the largest single compartment or container with sufficient freeboard to contain precipitation.

* * * * *

Subpart C—[Amended]

■ 9. Amend § 112.12 by revising the section heading and by revising paragraphs (c)(2) and (c)(11) to read as follows:

§ 112.12 Spill Prevention, Control, and Countermeasure Plan requirements.

* * * * *

(c) * * *

(2) Construct all bulk storage tank installations (except mobile refuelers) so that you provide a secondary means of containment for the entire capacity of the largest single container and sufficient freeboard to contain precipitation. You must ensure that diked areas are sufficiently impervious to contain discharged oil. Dikes, containment curbs, and pits are commonly employed for this purpose. You may also use an alternative system consisting of a drainage trench enclosure that must be arranged so that any discharge will terminate and be safely confined in a facility catchment basin or holding pond.

* * * * *

(11) Position or locate mobile or portable oil storage containers to prevent a discharge as described in § 112.1(b). Except for mobile refuelers, you must furnish a secondary means of containment, such as a dike or catchment basin, sufficient to contain the capacity of the largest single compartment or container with sufficient freeboard to contain precipitation.

§ 112.13 [Removed and Reserved]

■ 10. Remove and reserve § 112.13.

§ 112.14 [Removed and Reserved]

■ 11. Remove and reserve § 112.14.

§ 112.15 [Removed and Reserved]

■ 12. Remove and reserve § 112.15.

[FR Doc. E6–21509 Filed 12–22–06; 8:45 am]
BILLING CODE 6560–50–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Part 209

[FRA–2006–24512]

RIN 2130–AB70

Revisions to Civil and Criminal Penalties; Penalty Guidelines

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: In this final rule, the Federal Railroad Administration is revising its regulations to reflect revisions to the penalty provisions in the Hazardous Materials Transportation Safety and Security Reauthorization Act of 2005 (Title VII of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users), enacted on August 10, 2005. We are also revising baseline assessments for several categories of violations, including those related to training and security plans, in our Civil Penalty Assessment Guidelines. We publish our Guidelines in order to provide the regulated community and the general public with information on the hazardous materials civil penalty assessment process for violations related to the transportation of hazardous materials by rail.

DATES: *Effective Date:* This final rule is effective December 26, 2006.

FOR FURTHER INFORMATION CONTACT: Roberta Stewart, Trial Attorney, Office of Chief Counsel, RCC–12, Mail Stop 10, FRA, 1120 Vermont Ave., NW., Washington, DC 20590 (telephone 202–493–6027).

SUPPLEMENTARY INFORMATION:

I. Civil and Criminal Penalties

On August 10, 2005, the President signed the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU), Public Law 109–59, 119 Stat. 1144. Title VII of SAFETEA–LU—the Hazardous Materials Transportation Safety and Security Reauthorization Act of 2005—revises the maximum and minimum civil penalties, and the maximum criminal penalty, for violations of Federal hazardous materials transportation law (Federal hazmat law; 49 U.S.C. 5101 *et seq.*) or a regulation, order, special permit, or approval issued under Federal hazmat law (including 49 CFR subtitle B, chapter I, subchapters A and C). The Federal Railroad Administration (FRA) is revising references in our regulations to the maximum and minimum civil penalties, and the maximum criminal penalties, to reflect the following statutory changes:

—The maximum civil penalty was increased from $32,500 to $50,000 for a knowing violation, and to $100,000 if the violation results in death, serious illness or severe injury to any person, or substantial destruction of property.

—The minimum civil penalty has reverted from $275 to $250, except that a minimum civil penalty of $450 applies to a violation related to training.

—Criminal penalties now apply to both reckless and willful violations of Federal hazardous material transportation law or a regulation, order, special permit, or approval issued thereunder. The criminal penalties also apply to a knowing violation of the prohibition in 49 U.S.C. 5104(b) against tampering with a marking, label, placard, or description on a shipping document.

—The maximum criminal penalty of five years' imprisonment and a fine in accordance with Title 18 of the United States Code ($250,000 for an individual, $500,000 for a corporation) was retained, except that the maximum amount of imprisonment has been increased to 10 years in any case in which the violation involves the release of a hazardous material that results in death or bodily injury to a person.

II. Revisions to Civil Penalty Guidelines

FRA's hazardous material transportation enforcement civil penalty guidelines are published in Appendix B to 49 CFR Part 209, to provide the regulated community and the general public with information concerning the manner in which FRA generally begins its hazmat penalty assessment process and the types of information that respondents in enforcement cases should provide to justify reduction of proposed penalties. These guidelines were first published in the **Federal Register** on July 25, 1996 in response to a request contained in Senate Report 103–150 that accompanied the Department of Transportation and Related Agencies Appropriations Act of 1994. 61 FR 38644. These guidelines are periodically updated, and we previously published revisions to them on May 28, 2004. 69 FR 30590.

These guidelines are used by FRA's enforcement personnel and attorneys as a means of determining a proposed civil penalty for violations of Federal hazardous material transportation law and the regulations issued under that law. As a general statement of agency policy and practice, these guidelines are not fully determinative of any issues or rights, and do not have the force of law. They are informational, impose no requirements, and constitute a statement of agency policy for which no notice of proposed rulemaking is necessary.

In this final rule, we are revising baseline assessments to reflect the increase to $450 in the minimum civil penalty for a violation related to training. We are adding baseline assessments applicable to the failure to develop or adhere to a security plan and provide security training when a security plan is required. We have also revised other baseline assessments in an effort to account for the relative severity of violations, and to update penalties to more appropriate amounts, as some time has passed since many of the baselines have been revised.

FRA is proceeding to a final rule without providing a notice of proposed rulemaking or an opportunity for public comment. The provisions adopted in this final rule simply set forth changes in the law and our general statements of agency policy and procedure, for which notice-and-comment procedure is not necessary.

III. Rulemaking Analyses and Notices

A. Statutory/Legal Authority for This Rulemaking

This final rule is published under the authority of 49 U.S.C. 5123 and 5124, which provide civil and criminal penalties for violations of Federal hazardous material transportation law or a regulation, order, special permit, or approval issued under that law. The hazardous material transportation regulations are issued by the Pipeline and Hazardous Materials Safety Administration (PHMSA). 49 CFR 1.53(b). Responsibility for the enforcement of the hazardous materials transportation law and regulations primarily in instances where violations involve railroads and those entities who ship by rail has been delegated to FRA. 49 CFR 1.49(s). This rule revises references in FRA's regulations to reflect revisions to the civil and criminal penalties in the Hazardous Materials Transportation Safety and Security Reauthorization Act of 2005 (Title VII of SAFETEA–LU), which was enacted on August 10, 2005. This rule also adds baseline assessments relating to training and security plans in our penalty guidelines, and revises other baseline assessments.

B. Executive Order 12866 and DOT Regulatory Policies and Procedures

This final rule is not considered a significant regulatory action under section 3(f) of Executive Order 12866 and, therefore, was not reviewed by the Office of Management and Budget. This rule is not significant under the Regulatory Policies and Procedures of the Department of Transportation (44 FR 11034). The economic impact of this rule is minimal to the extent that preparation of a regulatory evaluation is not warranted.

C. Executive Order 13132

This final rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13132 (''Federalism''). As amended in SAFETEA–LU, 49 U.S.C. 5125(i) provides that the preemption provisions in Federal hazardous material transportation law do ''not apply to any * * * penalty * * * utilized by a State, political subdivision of a State, or Indian tribe to enforce a requirement applicable to the transportation of hazardous material.'' Accordingly, this final rule does not have any preemptive effect on State, local, or Indian tribe enforcement procedures and penalties, and preparation of a federalism assessment is not warranted.

D. Regulatory Flexibility Act and Executive Order 13272

FRA certifies that this final rule will not have a significant economic impact on a substantial number of small entities. This rule applies to shippers, offerors and carriers of hazardous materials by rail, manufacturers, and repairers of packagings used in the transport of hazardous materials by rail, and any other persons involved in the transportation of hazardous materials by rail. Some of these entities are classified as small entities; however, there is no economic impact on any person that complies with Federal hazardous materials law and the regulations and orders issued under that law.

E. Paperwork Reduction Act

There are no new information requirements in this final rule.

F. Unfunded Mandates Reform Act of 1995

This final rule does not impose unfunded mandates under the Unfunded Mandates Act of 1995. It does not result in annual costs of $128,100,000 or more, in the aggregate, to any of the following: State, local, or Indian tribal governments, or the private sector, and is the least burdensome alternative to achieve the objective of the rule.

G. Environmental Assessment

There are no significant environmental impacts associated with this final rule.

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 spring and fall of each year. The RIN contained in the heading of this document can be used to cross-reference this action with the Unified Agenda.

List of Subjects in 49 CFR Part 209

Hazardous materials, Penalties.

■ Therefore, in consideration of the foregoing, chapter II, subtitle B of title 49 of the Code of Federal Regulations is amended as follows:

PART 209—[AMENDED]

■ 1. The authority citation for part 209 is revised to read as follows:

Authority: 49 U.S.C. 5123, 5124, 20103, 20107, 20111, 20112, 20114; 28 U.S.C. 2461, note; and 49 CFR 1.49.

■ 2. Section 209.3 is amended by adding a definition of *Federal hazardous material transportation law* in alphabetical order to read as follows:

§ 209.3 Definitions.

* * * * *

Federal hazardous material transportation law means 49 U.S.C. 5101 *et seq.*

* * * * *

■ 3. Revise § 209.103 to read as follows:

§ 209.103 Minimum and maximum penalties.

(a) A person who knowingly violates a requirement of the Federal hazardous material transportation law, an order issued thereunder, subchapter A or C of Chapter I, subtitle B, of this title, or a special permit or approval issued under subchapter A or C of Chapter I, subtitle B, of this title is liable for a civil penalty of at least $250 but not more than $50,000 for each violation, except that—

(1) The maximum civil penalty for a violation is $100,000 if the violation results in death, serious illness or severe injury to any person, or substantial destruction of property and

(2) A minimum $450 civil penalty applies to a violation related to training.

(b) When the violation is a continuing one, each day of the violation constitutes a separate offense. 49 U.S.C. 5123.

(c) The maximum and minimum civil penalties described in paragraph (a) above apply to violations occurring on or after August 10, 2005.

■ 4. Revise the last sentence of § 209.105(c) to read as follows:

§ 209.105 Notice of probable violation.

* * * * *

(c) * * * In an amended notice, FRA may change the civil penalty amount proposed to be assessed up to and including the maximum penalty amount of $50,000 for each violation, except that if the violation results in death, serious illness or severe injury to any person, or substantial destruction of property, FRA may change the penalty amount proposed to be assessed up to and including the maximum penalty amount of $100,000.

■ 5. Revise § 209.109(a) to read as follows:

§ 209.109 Payment of penalty; compromise.

(a) Payment of a civil penalty may be made by certified check, money order, or credit card. Payments made by certified check or money order should be made payable to the Federal Railroad Administration and sent to DOT/FRA, Mike Monroney Aero Center, General Accounting Division, AMZ–300, P.O. Box 25082, Oklahoma City, OK 73125. Overnight express payments may be sent to DOT/FRA, Mike Monroney Aero Center, General Accounting Division, AMZ–300, 6500 South MacArthur Blvd. Headquarters Building, Room 176, Oklahoma City, OK 73169. Payment by credit card must be made via the Internet at *https://www.pay.gov/paygov/.* Instructions for online payment are found on the Web site.

* * * * *

■ 6. Revise § 209.131 to read as follows:

§ 209.131 Criminal penalties generally.

A person who knowingly violates 49 U.S.C. 5104(b) or § 171.2(l) of this title or willfully or recklessly violates a requirement of the Federal hazardous material transportation law or a regulation, order, special permit, or approval issued thereunder shall be fined under title 18, United States Code, or imprisoned for not more than 5 years, or both, except the maximum amount of imprisonment shall be 10 years in any case in which the violation involves the release of a hazardous material which results in death or bodily injury to any person.

■ 7. Revise the first sentence of § 209.133 to read as follows:

§ 209.133 Referral for prosecution.

If an inspector, including a certified state inspector under part 212 of this chapter, or another employee of FRA becomes aware of a possible knowing violation of 49 U.S.C. 5104(b) or a willful or reckless violation of the Federal hazardous materials transportation law or a regulation issued under those laws for which FRA exercises enforcement responsibility, he or she shall report it to the Chief Counsel. * * *

■ 8. In appendix A to part 209, revise the first two sentences of the fourth paragraph under the heading ''Extraordinary Remedies'' to read as follows:

Appendix A to Part 209—Statement of Agency Policy Concerning Enforcement of the Federal Railroad Safety Laws

* * * * *

Extraordinary Remedies

* * * * *

Criminal penalties are available for knowing violations of 49 U.S.C. 5104(b), or for willful or reckless violations of the Federal hazardous materials transportation law or a regulation issued under that law. See 49 U.S.C. Chapter 51, and 49 CFR 209.131, 133. * * *

* * * * *

■ 9. Amend Appendix B to part 209 as follows:

■ A. Revise the second sentence of the first paragraph of text;

■ B. Revise the last sentence of the second paragraph of text;

■ C. Revise the last sentence of the third paragraph of text;

■ D. Revise the table in its entirety.

The revisions read as set forth below:

Appendix B to Part 209—Federal Railroad Administration Guidelines for Initial Hazardous Materials Assessments

* * * The guideline penalty amounts reflect the best judgment of the FRA Office of Safety Assurance and Compliance (RRS) and of the Safety Law Division of the Office of Chief Counsel (RCC) on the relative severity of the various violations routinely encountered by FRA inspectors on a scale of $250 to $50,000, except the maximum civil penalty is $100,000 if the violation results in death, serious illness or severe injury to any person, or substantial destruction of property, and a minimum $450 penalty applies to a violation related to training. * * *

* * * When a violation of the Federal hazardous materials transportation law, an order issued thereunder, the Hazardous Materials Regulations or a special permit, approval, or order issued under those regulations results in death, serious illness or severe injury to any person, or substantial destruction of property, a maximum penalty of at least $50,000 and up to and including $100,000 shall always be assessed initially.

* * * In fact, FRA reserves the express authority to amend the NOPV to seek a penalty of up to $50,000 for each violation, and up to $100,000 for any violation resulting in death, serious illness or severe injury to any person, or substantial destruction of property, at any time prior to issuance of an order. FRA periodically makes minor updates and revisions to these guidelines, and the most current version may be found on FRA's Web site at *http://www.fra.dot.gov.*

CIVIL PENALTY ASSESSMENT GUIDELINES

[As of December 26, 2006]

Emergency orders		Guideline amount[1]
EO16	Penalties for violations of EO16 vary depending on the circumstances	Varies.
EO17	Penalties for violations of EO17 vary depending on the circumstances	Varies.
	Failure to file annual report	$5,000.

CIVIL PENALTY ASSESSMENT GUIDELINES—Continued

[As of December 26, 2006]

Emergency orders		Guideline amount[1]
EO23	Penalties for violations of EO23 vary depending on the circumstances	Varies.

[1] Any person who violates an emergency order issued under the authority of 49 U.S.C. Ch. 201 is subject to a civil penalty of at least $500 and not more than $11,000 per violation, except that where a grossly negligent violation or a pattern of repeated violations has created an imminent hazard of death or injury to persons, or has caused a death or injury, a penalty not to exceed $27,000 per violation may be assessed. Each day that the violation continues is a separate offense. 49 U.S.C. 21301; 28 U.S.C. 2461, note.

49 CFR section	Description	Guideline amount[2]
	PART 107—HAZARDOUS MATERIALS PROGRAM PROCEDURES	
107.608	Failure to register or to renew registration. (Note: registration—or renewal—is mitigation.).	1,500.
107.620(d)	Failure to show records on proper request	2,000.
	Deliberate attempt to hide records-considerable aggravation possible	Varies.
	PART 171—GENERAL REGULATIONS	
171.2(a), (b), (c), (e), (f)	General duty sections—may be cited in support of another, more specific citation to the actual regulatory section violated.	
171.2(d)	Offering or accepting a hazardous material (hazmat or HM) without being registered	1,500.
171.2(g)	Representing (marking, certifying, selling, or offering) a packaging as meeting regulatory specification when it does not.	8,000.
171.2(i)	Certifying that a hazardous material is offered for transportation in commerce in accordance with the regulations (packaged, marked, labeled, etc.) when it is not. A more specific citation to the actual underlying regulation violated should be used instead of this section, or accompanying this section, if possible.	5,000.
171.2(j)	Representing (by marking or otherwise) that a container or package for transportation of a hazardous material is safe, certified, or in compliance with the regulations when it is not.	8,000.
171.2(k)	Representing, marking, etc. for the presence of HM when no HM is present. (Mitigation required for shipments smaller than a carload, e.g., single drum penalty is $1,000.)	2,000.
171.2(l)	Tampering with (altering, removing, defacing, or destroying) any marking, label, placard, or description on a document required by hazmat law or regulations; unlawfully tampering with a package, container, motor vehicle, rail car, aircraft, or vessel used for the transportation of hazardous materials.	Varies—considerable aggravation possible.
171.2(m)	Falsifying or altering an exemption, approval, registration, or other grant of authority issued under hazmat regulations. Offering or transporting a hazmat under an altered exemption, approval, registration, or other grant of authority without the consent of the issuing authority. Representing, marking, certifying, or selling a packaging or container under an altered exemption, approval, registration, or other grant of authority.	Varies—considerable aggravation possible.
171.12	Import shipments—Importer not providing shipper and forwarding agent with U.S. requirements. Cannot be based on inference.	4,000.
	Import shipments—Failure to certify by shipper or forwarding agent	2,000.
171.15	Failure to provide immediate notice of certain hazardous materials incidents	6,000.
171.16	Failure to file incident report (form DOT 5800.1). (Multiple failures will aggravate the penalty.).	4,000.
	PART 172—SHIPPING PAPERS	
172.200–.203	Offering hazardous materials for transportation when the material is not properly described on the shipping paper as required by §§ 172.200—.203. (The "shipping paper" is the document tendered by the shipper/offeror to the carrier. The original shipping paper contains the shipper's certification at § 172.204.) Considerable aggravation of penalties under these sections is possible, particularly in case involving undeclared hazmat.	
	—Undeclared shipment: offering a hazardous material without shipping papers, package markings, labels, or placards (see also §§ 172.300, 172.400, 172.500 for specific requirements).	15,000.
	—Information on the shipping paper is wrong to the extent that it caused or materially contributed to a reaction by emergency responders that aggravated the situation or caused or materially contributed to improper handling by the carrier that led to or materially contributed to a product release.	15,000.
	—Total lack of hazardous materials information on shipping paper. (Some shipping names alone contain sufficient information to reduce the guideline to the next lower level, but there may be such dangerous products that aggravation needs to be considered.).	7,500.
	—Some information is present, but the missing or improper description could cause mishandling by the carrier or a delay or error in emergency response.	5,000.

49 CFR section	Description	Guideline amount[2]
	—When the improper description is not likely to cause serious problem (technical defect).	2,000.
	—Shipping paper includes a hazardous material description and no hazardous material is present. (Technically, this is also a violation of § 171.2(k); it is presented here as a convenience.).	7,500.
	Failure to include emergency response information is covered at §§ 172.600–604; while the normal unit of violation for shipping papers is the whole document, failure to provide emergency response information is a separate violation.	
172.201(d)	Failure to put emergency response telephone number on shipping paper	4,000.
172.201(e)	Failure to retain shipping paper for required period (1 year if carrier, 2 years if offeror).	7,500.
172.204	Offeror's failure to certify	2,000.
172.205	Hazardous waste manifest. (Applies only to defects in the Hazardous Waste Manifest form [EPA Form 8700–22 and 8700–22A]; shipping paper defects are cited and penalized under § 172.200–.203.).	Parallel the penalties for §§ 172.200–.203, depending on circumstances.
Marking:		
172.301	Failure to mark a non-bulk package as required (e.g., no commodity name on a 55-gallon drum). (Shipment is the unit of violation.).	1,000.
172.302	Failure to follow standards for marking bulk packaging	2,000.
172.302(a)	ID number missing or in improper location. (The guideline is for a portable tank; for smaller bulk packages, the guideline should be mitigated downward.)	2,500.
172.302(b)	Failure to use the correct *size* of markings. (Note: If § 172.326(a) is also cited, it takes precedence and § 172.302(b) is not cited. Note also: the guideline is for a gross violation of marking size—½″ where 2″ is required—and mitigation should be considered for markings approaching the required size.)	2,000.
172.302(c)	Failure to place exemption number markings on bulk package	2,000.
172.303	Prohibited marking. (Package is marked for a hazardous material and contains either another hazardous material or no hazardous material.)	
	—The marking is wrong and caused or contributed to a wrong emergency response	10,000.
	—Use of a tank car stenciled for one commodity to transport another	5,000.
	—Inconsistent marking; e.g., shipping name and ID number do not agree	5,000.
	—Marked as a hazardous material when package does not contain a hazardous material.	2,000.
172.304	Obscured marking	2,000.
172.313	"Inhalation Hazard" not marked	2,500.
172.322	Failure to mark for MARINE POLLUTANT where required	1,500.
172.325(a)	Improper, or missing, HOT mark for elevated temperature material	1,500.
172.325(b)	Improper or missing commodity stencil	2,500.
172.326(a)	Failure to mark a portable tank with the commodity name	2,500.
	Failure to have commodity name visible ("legible") when portable tank is loaded on intermodal equipment.	2,500.
172.326(b)	Owner's/lessee's name not displayed	500.
172.326(c)	Failure to mark portable tank with ID number	2,500.
	Failure to have ID number visible when portable tank is loaded on intermodal equipment.	2,500.
172.330(a)(1)(i)	Offering/transporting hazardous material in a tank car that does not have the required ID number displayed on the car.	2,500.
172.330(a)(1)(ii)	Offering/transporting hazardous material in a tank car that does not have the required shipping name or common name stenciled on the car. This section "lists" the materials that require such markings on the tank. For tank car marking requirements for molten aluminum and molten sulfur, see § 172.325(b).	2,500.
172.330(c)	Failing to mark tank car as NON-ODORIZED or NOT ODORIZED when offering/transporting tank car or multi-unit tank car containing unodorized LPG.	2,500.
172.331(b)	Offering bulk packaging other than a portable tank, cargo tank, or tank car (e.g., a hopper car) not marked with ID number. (E.g., a hopper car carrying a hazardous substance, where a placard is not required).	2,500.
172.332	Improper display of identification number markings. Citation of this section and §§ 172.326(c) (portable tanks), 172.328 (cargo tanks), or 172.330 (tank cars) does not create two separate violations.	2,000.
172.334(a)	Displaying ID numbers on a RADIOACTIVE, EXPLOSIVES 1.1, 1.2, 1.3, 1.4, 1.5, or 1.6, or DANGEROUS, or subsidiary hazard placard.	4,000.
172.334(b)	—Improper display of ID number that caused or contributed to a wrong emergency response.	15,000.
	—Improper display of ID number that could cause carrier mishandling or minor error in emergency response.	5,000.
	—Technical error	2,000.
172.334(f)	Displaying ID number on orange panel not in proximity to the placard	1,500.

49 CFR section	Description	Guideline amount[2]
Labeling:		
172.400–.406	Failure to label properly. (See also § 172.301 regarding the marking of packages.)	2,500.
Placarding:		
172.502	—Placarded as hazardous material when car does not contain a hazardous material	2,000.
	—Hazardous material is present, but the placard does not represent hazard of the contents.	4,000.
	—Display of sign or device that could be confused with regulatory placard. Photograph or good, clear description necessary.	2,000.
172.503	Improper display of ID number on placards	See § 172.334.
172.504(a)	Failure to placard; affixing or displaying wrong placard. (See also §§ 172.502(a), 172.504(a), 172.505, 172.512, 172.516, 174.33, 174.59, 174.69; all applicable sections should be cited, but the penalty should be set at the amount for the violation most directly in point.) (Generally, the car is the unit of violation, and penalties vary with the number of errors, typically at the rate of $1,000 per placard.)	
	—Complete failure to placard	7,500.
	—One placard missing (add $1,000 per missing placard up to a total of three; then use the guideline above).	1,000.
	—Complete failure to placard, but only two (2) placards are required (e.g., intermediate bulk containers [IBCs]).	2,500.
172.504(b)	Improper use of DANGEROUS placard for mixed loads	5,000.
172.504(c)	Placarded for wrong hazard class when no placard was required due to "1,001 pound" exemption.	2,000.
172.504(e)	Use of placard other than as specified in the table:	
	—Improper placard caused or contributed to improper reaction by emergency response forces or caused or contributed to improper handling by carrier that led to a product release.	15,000.
	—Improper placard that could cause improper emergency response or handling by carrier.	5,000.
	—Technical violation	2,500.
172.505	Improper application of placards for subsidiary hazards. (This is in addition to any violation on the primary hazard placards.)	5,000.
172.508(a)	Offering hazardous material for rail transportation without affixing placards. (The preferred section for a total failure to placard is § 172.504(a); only one section should be cited to avoid a dual penalty.) (Note also: Persons offering hazardous material for rail movement must *affix* placards; if offering for highway movement, the placards must be *tendered* to the carrier. § 172.506.)	7,500.
	One placard missing (per car). (Add $1,000 per missing placard up to a total of three; if all placards are missing, the guideline above applies.)	1,000.
	Placards OK, except they were International Maritime Dangerous Goods (IMDG) labels instead of 10″ placards. (Unit of violation is the packaging, usually a portable tank.)	500.
	Placards on Container on Flatcar/Trailer on Flatcar (TOFC/COFC) units not readily visible. (§ 172.516 should be cited).	See § 172.516.
172.508(b)	Accepting hazardous material for rail transportation without placards affixed	5,000.
172.510(a)	EXPLOSIVES 1.1, EXPLOSIVES 1.2, POISON GAS, (Division 2.3, Hazard Zone A), POISON, (Division 6.1, Packing Group I, Hazard Zone A), or a Division 2.1 material transported in a Class DOT 113 tank car, placards displayed without square background.	5,000.
172.512(a)	Improper placarding of freight containers	Follow § 172.504 guidelines.
172.514	Improper placarding of bulk packaging other than a tank car: For the "exception" packages in 174.514(c). Use the regular placarding sections for the guideline amounts for larger bulk packages.	2,000.
172.516	Placard not readily visible, improperly located or displayed, or deteriorated. Placard is the unit of violation.	1,000.
	—When placards on an intermodal container are not visible, for instance, because the container is in a well car. Container is the unit of violation, and, as a matter of enforcement policy, FRA accepts the lack of visibility of the end placards.	2,000.
	—Note that, while placards on freight containers, portable tanks, or TOFC vehicles may be used in lieu of placards on the rail cars, if both are placarded, each must be done properly. Thus, for instance, EXPLOSIVES 1.1 placards on intermodal containers do not require white square backgrounds, but if the rail car carrying such a container is placarded, the white square background is required on the rail car.	
172.519(b)(4)	Improper display of hazard class on placard—primary hazard	2,500.

49 CFR section	Description	Guideline amount [2]
	Improper display of hazard class on placard—secondary hazard	2,500.
Emergency Response Information.	Violations of §§ 172.600–.604 are in addition to shipping paper violations. In citing a carrier, if the railroad's practice is to carry an emergency response (E/R) book or to put the E/R information as an attachment to the consist, the unit of violation is generally the train (or the consist). "Telephone number" violations are generally best cited against the shipper; if against a railroad, there should be proof that the number was given to the railroad; that is, the number was on the original shipping document. Considerable aggravation of the penalties under these sections is possible.	
172.600–.602	Where improper emergency response information has caused an improper reaction from emergency forces and the improper response has aggravated the situation.	15,000.
	Bad, missing, or improper emergency response information that could cause a significant difference in response.	5,000.
	Bad, missing, or improper emergency response information not likely to cause a significant difference in response.	2,500.
172.602(c)	Failure to have emergency response information "immediately accessible," resulting in delay or confusion in emergency response.	15,000.
	Failure to have emergency response information "immediately accessible" with no negative effect on emergency response.	7,500.
172.604	Emergency response telephone number.	
	—Failure to include emergency response telephone number on a shipping paper	4,000.
	—Listing an unauthorized, incorrect, non-working, or unmonitored (24 hrs. a day) emergency response telephone number on a shipping paper.	4,000.
Training	NOTE: The statutory minimum penalty for training violations is $450.	
172.702(a)	General failure to train hazardous material employees	7,500.
172.702(b)	Hazardous material employee performing covered function without training. (Unit of violation is the employee.)	1,000.
172.704(a)	—Failure to train in a required area:	2,500.
	—General awareness/familiarization;	
	—Function-specific;	
	—Safety;	
	—Security awareness;	
	—In-depth security training.	
	(Unit of violation is the "area," per employee. For a total failure to train, § 172.702(a) applies.)	
172.704(c)	Initial and recurrent training. (This section should be cited with the relevant substantive section, e.g., § 172.702(a), and use penalty provided there.)	Varies.
172.704(d)	Failure to maintain record of training. (Unit of violation is the employee.)	2,500.
	There is some evidence of training, but no (or inadequate) records and the employee demonstrates no or very little knowledge or skills in doing the job.	4,000.
Security:		
172.800	Total failure to develop security plan. Factors to consider are the size of the entity (is it a small business?); the type of hazmat handled; and the quantities of hazmat handled. Aggravation should be considered, for example, if it is a large entity that handles significant quantities of chlorine or other toxic inhalation hazard (TIH) material.	5,000 to 10,000.
	Failure to adhere to the developed security plan—considerable aggravation possible. Factors to consider include size of entity, quantities and types of hazmat handled, number of security plan components not complied with.	1,000 to 10,000.
172.802(a)	Failure to include each required component in plan:	2,000.
	—Personnel security;	
	—Unauthorized access;	
	—En route security.	
	(Unit of violation is the "area." For a total failure to have a security plan, cite § 172.800 and use that penalty instead of § 172.802.)	
172.802(b)	Failure to have security plan (or appropriate portions of it) available to implementing employees. (A failure to have the plan "in writing" is treated as a violation of the requirement to have a plan and cited under § 172.800, using that penalty.)	5,000.
	Failure to revise/update the plan. (The requirement to revise/update is based on "changing circumstances." Specific, clear, and detailed explanations of the circumstances that changed will be necessary.)	5,000.
	Failure to update all copies of the plan to the current level (i.e. all copies should be identical). (As in the tank car quality control area, the requirement to conform copies applies only to the "official" copies of the plan. Uncontrolled (and non-updated) copies of the security plan are not a violation if the uncontrolled copies are clearly marked as such.)	5,000.

49 CFR section	Description	Guideline amount[2]
PART 173—SHIPPERS—GENERAL REQUIREMENTS FOR SHIPMENTS AND PACKAGES		
General:		
173.1	General duty section applicable to shippers; also includes subparagraph (b), the requirement to train employees about applicable regulations. (Cite the appropriate section in the 172.700–704 series for training violations.).	2,000.
173.9(a)	Early delivery of transport vehicle that has been fumigated. (48 hours must have elapsed since fumigation.).	5,000.
173.9(b)	Failure to display fumigation placard. (Ordinarily cited against shipper only, not against railroad.).	1,000.
173.10	Delivery requirements for gases and for flammable liquids. See also §§ 174.204 and 174.304.	3,000.
Preparation of Hazardous Materials for Transportation:		
173.22	Shipper responsibility: This general duty section should ordinarily be cited only to support a more specific charge.	See specific section.
173.22a	Improper use of packagings authorized under exemption	2,500.
	Failure to maintain copy of exemption as required	1,000.
173.24(b)(1) and 173.24(b)(2) and 173.24(f)(1) and 173.24(f)(1)(ii).	Securing closures: These subsections are the general ''no leak'' standard for all packagings. § 173.24(b) deals primarily with *packaging* as a whole, while § 173.24(f) focuses on *closures*. Use § 173.31(d) for tank cars, when possible. Cite the sections accordingly, using both the leak/non-leak criteria and the package size considerations to reach the appropriate penalty. Any actual leak will aggravate the guideline by, typically, 50%; a leak with contact with a human being will aggravate by at least 100%, up to the maximum of $50,000, and up to $100,000 if the violation results in death, serious illness or injury or substantial destruction of property. For intermodal (IM) portable tanks and other tanks of that size range, use the tank car penalty amounts, as stated in § 173.31.	
	—Small bottle or box	1,000.
	—55-gallon drum	2,500.
	—Larger container, e.g., IBC; not portable tank or tank car	5,000.
	—IM portable tank, cite § 173.24(f) and use the penalty amounts for tank cars: Residue, generally, § 173.29(a) and, loaded, § 173.31(d).	
	—Residue adhering to outside of package (i.e., portable tanks, tank cars, etc.)	5,000.
173.24(c)	Use of package not meeting specifications, including required stencils and markings. The most specific section for the package involved should be cited (see below). The penalty guideline should be adjusted for the size of the container. Any actual leak will aggravate the guideline by, typically, 50%; a leak with contact with a human being will aggravate by at least 100%, up to the maximum of $50,000, and up to $100,000 if the violation results in death, serious illness or injury or substantial destruction of property.	
	—Small bottle or box	1,000.
	—55-gallon drum	2,500.
	—Larger container, e.g., IBC; not portable tank or tank car, but this section is applicable to a hopper car.	5,000.
	For more specific sections: Tank cars—§ 173.31(a), portable tanks—§ 173.32, and IM portable tanks—§§ 173.32a,173.32b, and 173.32c.	
173.24a(a)(3)	Non-bulk packagings: Failure to secure and cushion inner packagings	1,000.
	—Causes leak	5,000.
	—Leak with any contact between product and any human being	15,000.
173.24a(b) and (d)	Non-bulk packagings: Exceeding filling limits	1,000.
	—Causes leak	5,000.
	—Leak with any contact between product and any human being	15,000.
173.24b(a)	Insufficient outage:	
	—<1%	3,000.
	—Causes leak	5,000.
	Outage <5% on PIH material	5,000.
	—Causes leak	7,500.
	—Leak with any contact between product and any human being	15,000.
173.24b(d)(2)	Overloaded to exceed the maximum weight of lading marked on the specification plate.	5,000.
173.26	Loaded beyond gross weight or capacity as stated in specification. (Applies only if quantity limitations do not appear in packaging requirements of part 173.) (For tank cars, see § 179.13.) For gross weight and capacity requirements, see § 179.13. § 173.26 should be the citation for the violation and civil penalty; § 179.13 can be cited as a reference section.	5,000.
173.28	Improper reuse, reconditioning, or remanufacture of packagings	1,000.

49 CFR section	Description	Guideline amount [2]
173.29(a)	Offering residue tank car for transportation when openings are not tightly closed (§ 173.31(d) is also applicable for tank cars). The regulation requires offering "in the same manner as when" loaded and may be cited when a car not meeting specifications (see § 173.31(a)(1)) is released back into transportation after unloading; same guideline amount. Guidelines vary with the type of commodity involved. In addition to the vapor pressure factor cited below, the RQ (reportable quantity) is a fair measure of the danger of a commodity to the environment. For RQ values ≤ 10, consider aggravating the penalties below by no less than 50 percent.	
	—Hazardous material with insignificant vapor pressure and without classification as "poison" or "inhalation hazard.".	2,000.
	—With actual leak	5,000.
	—With leak allowing the product to contact any human being	15,000.
	—Hazardous material with vapor pressure (essentially any gas or compressed gas) and/or with classification as "poison" or "inhalation hazard.".	5,000.
	—With actual leak	7,500.
	—With leak allowing the product (or fumes or vapors) to contact any human being. (In the case of fumes, the "contact" must be substantial.).	15,000.
	—Where only violation is failure to secure a protective housing, e.g., the covering for the gaging device.	1,000.
173.30	A general duty section that should be cited with the explicit statement of the duty.	
173.31(a)(1)	Use of a tank car not meeting specifications and the "Bulk packaging" authorization in Column 8 of the § 172.101 Hazardous Materials Table reference is:	
	§ 173.240	1,000.
	§ 173.241	2,500.
	§ 173.242	5,000.
	§ 173.243	5,000.
	§ 173.244	7,500.
	§ 173.245	7,500.
	§ 173.247	1,000.
	§ 173.249	7,500.
	§ 173.314	5,000.
	§ 173.315	5,000.
	§ 173.319	5,000.
	§ 173.320	5,000
	§ 173.323	7,500.
	—Minor defect not affecting the ability of the package to contain a hazardous material, e.g., no chain on a bottom outlet closure plug.	500.
	—Defect of greater importance, e.g., safety valve tested, but test date not stenciled on valve.	1,000.
	—Tank meets specification, but specification is not stenciled on car. § 179.1(e) implies that only the builder has the duty here, but it is the presence of the stencil that gives the shipper the right to rely on the builder. (See § 173.22(a)(3).).	1,000.
	—Tank car not stenciled according to Appendix C of the Tank Car Manual. The sub-reference is to § 179.22 which requires each tank car to be marked in accordance with Appendix C of the Tank Car Manual. For example, Appendix 3.03(a)(5), requires marking of the tank "NOT FOR FLAMMABLE LIQUIDS" or "NOT FOR FLAMMABLE OR POISONOUS LIQUIDS.".	2,500.
173.31(a)(2)	Tank cars and appurtenances used for a material not authorized on the certificate of construction (or by addendum on Association of American Railroads (AAR) form R–1).	7,500.
173.31(a)(3)	Filling a tank car overdue for a periodic inspection with a hazardous material and then offering it for transportation. (Note: Offering a residue car, overdue for inspection, is not a violation; neither is filling the car—so long as it is not offered for transportation.) (Adjust penalty if less than one month or more than one year overdue.).	7,500.
173.31(a)(4)	Use of tank car without air brake support attachments welded to pads.	5,000.
173.31(a)(5)	Use of a tank car with a self-energized manway located below the liquid level of the lading.	15,000.
173.31(b)(1)	Use of DOT-specification tank car, or any tank car used for transportation of a hazardous material, without shelf couplers.	10,000.
	—Against a carrier, cite § 174.3 and this section.	6,000.
173.31(b)(2)	Tank car with nonreclosing pressure relief device used to transport Class 2 gases, Class 3 or 4 liquids, or Division 6.1 liquids, PG I or II.	7,500.
	Tank car has a nonreclosing pressure relief device and the wrong pressure is stenciled on the tank. Cite this section where the standard in § 179.22(a) is not met and the respondent is other than the builder or manufacturer.	1,000.
	Where either the rupture disc is unmarked for pressure or manufacturer name or is marked but is of the wrong pressure. Cite this section for a violation of § 179.156(h) against other than the builder or manufacturer.	5,000.

49 CFR section	Description	Guideline amount[2]
173.31(b)(3)	Use of a tank car for the transportation of a hazardous material without the required tank-head protection. See paragraphs (b)(3)(iii) and (iv) for compliance periods.	
	—Class 2	10,000.
	—Tank car constructed from aluminum or nickel plate	7,500.
	—Against a carrier, cite § 174.3 and this section	6,000.
173.31(b)(4)	Use of a tank car for the transportation of a Class 2 material without the required thermal protection. See paragraphs (b)(4)(i) for compliance periods.	10,000.
173.31(b)(5)	Use of a tank car for the transportation of a hazardous material without the required bottom-discontinuity protection. See the paragraph for compliance periods.	5,000.
173.31(b)(6)	Failure to submit a progress report to the FRA	2,500.
173.31(c)	Use of a tank car with an incorrect tank test pressure	10,000.
173.31(d)	Offering a tank car for transportation with a hazardous material, or a residue of a hazardous material, that is not in proper condition or that is unsafe for transportation. Sections 173.24(b) and (f) establish a "no-leak" design standard, and 173.31 imposes that standard on operations. In addition to the vapor pressure factor cited below, the RQ (reportable quantity) is a fair measure of the danger of a commodity to the environment. For RQ values ≤ 10, consider aggravating the penalties below by no less than 50 percent. The unit of violation is the car, aggravated if necessary for truly egregious condition.	5,000.
	Loaded car:	
	—Failure to inspect the tank car, service equipment, or markings prior to offering the car for transportation.: If the failure to inspect resulted in a release of product, the appropriate penalty amount below applies.	5,000.
	—With actual leak of product	10,000.
	—With actual leak allowing the product (or fumes or vapors) to contact any human being. (With safety vent, be careful because carrier might be at fault).	15,000.
	—Minor violation, e.g., bottom outlet cap loose on tank car of molten sulfur (because product is a solid when shipped).	1,000.
	Residue car: (The penalties are the same as in 173.29(a).)	
	Offering residue tank car for transportation when openings are not tightly closed (§ 173.29(a) is also applicable for tank cars) Guidelines vary with the type of commodity involved:	
	—Hazardous material with insignificant vapor pressure and without classification as "poison" or "inhalation hazard.".	2,000.
	—With actual leak	5,000.
	—With leak allowing the product to contact any human being	15,000.
	—Hazardous material with vapor pressure (esentially any gas or compressed gas) and/or with classification as "poison" or "inhalation hazard.".	5,000.
	—With actual leak	7,500.
	—With leak allowing the product (or fumes or vapors) to contact any human being. (In the case of "fumes," the "contact" must be substantial.).	15,000.
	Whether loaded or residue:	
	—Where the only violation is the failure to secure a protective housing, e.g., the covering for the gaging device.	1,000.
	—Where "other conditions" than a loose closure make a tank car not "in proper condition for transportation" (e.g., loose ladders, seals thrown into safety valves, etc.).	2,500 (Varies to account for seriousness).
173.31(e)(1)	Tank car with interior heating coils used to transport Division 2.3 or Division 6.1, PG I, based on inhalation toxicity.	7,500.
173.31(e)(2)	Use of a tank car for a material poisonous by inhalation that does not meet the minimum specification i.e., 300 pound tank test pressure, head protection, and a metal jacket.) See the paragraph for the compliance dates.	10,000.
173.31(f)	Use of a tank car for a "listed" hazardous substance that does not meet the minimum specification (i.e., 200 pound tank test pressure, head protection, and a metal jacket.): See the paragraph for the compliance dates and § 173.31(f)(2) for the list of hazardous substances.	5,000.
173.31(g)(1)	Unloading a tank car without securing access to the track to prevent entry by other rail equipment. Derails, lined and blocked switches, or other equipment that provides equivalent level of security is acceptable.	4,000.
173.31(g)(2)	Unloading a tank car without caution signs properly displayed. (See Part 218, Subpart B).	2,000.

49 CFR section	Description	Guideline amount[2]
173.31(g)(3)	Unloading without brakes set and/or wheels blocked. (The enforcement standard, as per 1995 Hazardous Materials Technical Resolution Committee, is that sufficient handbrakes must be applied on one or more cars to prevent movement and each car with a handbrake set must be blocked in both directions. The unloading facility must make a determination on how many brakes to set.).	
	—No brakes set, no wheels blocked, or fewer brakes set/wheels blocked than facility's operating plan.	5,000.
	—No brakes set, but wheels blocked	3,000.
	—Brakes set, but wheels not blocked	4,000.
173.32(a)(1)	Using a portable tank for transportation of hazardous materials, when tank does not meet regulatory requirements. (For loose closures or leaks on portable tanks use 173.24.).	5,000.
173.32(a)(2)	Filling and offering portable tank when periodic test or inspection overdue	5,000.
Gases; Preparation and Packaging:		
173.314(c)	Compressed gas loaded in excess of filling density (same basic concept as insufficient outage).	6,000.
173.314(e) through (o)	Failure to comply with a special requirement for a compressed gas	5,000.
	PART 174—CARRIAGE BY RAIL	
General Requirements:		
174.3	Acceptance of improperly prepared shipment. This general duty section shall be accompanied by a citation to the specific section violated.	
174.9	Failure to properly inspect a rail car containing a hazardous material when accepted for transportation or placed in a train: The carrier shall inspect the rail car, at ground level, for required markings, labels, placards, securement of closures and leakage. The inspection may be performed in conjunction with the inspections required under parts 215 and 232. This requirement will not "trigger" an inspection and thereby require a train to be stopped. For example, in run-through train operations, the train crew of the receiving railroad simply assumes responsibility for the train from the delivering crew. Acceptance of responsibility includes the right to receive a penalty action for transporting a rail car with a non-complying condition. Note also that the presence of a non-complying condition by itself does not prove that there was a failure to inspect. See also § 174.50 for violations against the carrier for loose (visible from ground level) closures on cars.	For loaded car 5,000. For residue car 2,000.
174.14	Failure to expedite: Violation of "48-hour rule."	2,500.
General Operating Requirements.	This subpart (Subpart B) of Part 174 has two sections referring to shipment documentation: § 174.24 relating to *accepting* documents, and § 174.26 relating to movement documents in the *possession* of the train crew. Only the most relevant section should be cited. In most cases, the unit of violation is the shipment, although where a unified consist is used to give notice to the crew, there is some justification for making it the train, especially where the discrepancy was generated using automated data processing and the error is repetitious.	
174.24(a)	Accepting hazardous material shipment without properly prepared shipping paper. (The carrier's duty extends only to the document received, that is, a shipment of hazardous material in a non-placarded transport vehicle with a shipping paper showing other than a hazardous material is not a violation against the carrier unless knowledge of the contents of the vehicle is proved. Likewise, receipt of a tank car placarded for Class 3 with a shipping paper indicating a flammable liquid does not create a carrier violation if the car, in fact, contains a corrosive. On the other hand, receipt of a placarded trailer with a shipping paper listing only FAK ("freight-all-kinds"), imposes a duty on the carrier to inquire further and to reject the shipment if it is improperly billed.)	
	—Improper hazardous material information that could cause delay or error in emergency response.	7,500.
	—Total absence of hazardous material information	5,000.
	—Technical errors, not likely to cause problems, especially with emergency response.	1,000.
	—Minor errors not relating to hazardous material emergency response, e.g., not listing an exemption number and the exemption is not one affecting emergency response.	500.
	Failure to include emergency response information is covered at §§ 172.600–.604; while the normal unit of violation for movement documents is the whole document, failure to provide emergency response information is a separate violation.	
174.24(b)	Failure to retain shipping papers for one year. (Variation over a wide range is not unusual, depending upon circumstances.).	7,500.

49 CFR section	Description	Guideline amount [2]
174.26(a)	Train crew does not have a document indicating position in train of each rail car containing a hazardous material. Routinely aggravate by 50% for Poison Gas, 2.3, and Explosives, 1.1 and 1.2. (Train is the unit of violation—this is generally going to be the consist list for a train.).	6,000.
	Train crew has documents described above but they have not updated the document to account for delivery or pickup of car or cars. Penalty amount may vary depending on the number of cars not listed or out of place, the number of places the cars are off, the type of commodity in the car, and the potential effects on safe handling of the cars or emergency response. (Each failure to update is a separate unit of violation—if the crew picked up one cut of cars and failed to update the document, that would be one unit of violation. The ''update'' requirement only matures when the crew has placed the cars into the train—or removed them from the train—re-laced the air hoses, and are ready to depart.).	2,000 to 4,000.
174.26(b)	Improper paperwork in possession of train crew. (Shipment is unit of violation, although there is justification for making it the train if a unified consist [e.g. one that shows both train car order and hazmat information] is used to carry this information and the violation is a pattern one throughout all, or almost all, of the hazardous material shipments. For intermodal traffic, ''shipment'' can mean the container or trailer—e.g., a UPS trailer with several non-disclosed hazardous material packages would be one unit.)	
	—Information on the document possessed by the train crew is wrong to the extent that it caused or materially contributed to a reaction by emergency responders that aggravated the situation or caused or materially contributed to improper handling by the carrier that led to or materially contributed to a product release.	15,000.
	—Information is present and wrong, but without adverse emergency response effect (e.g. insignificant error in shipping name for the hazmat; name is incorrect but the emergency response would be the same).	3,000.
	—Total lack of hazardous material information on movement document. (Some shipping names alone contain sufficient information to reduce the guideline to the next lower level, but there may be such dangerous products that aggravation needs to be considered.).	7,500.
	—Some information is present but the error(s) could cause mishandling by the carrier or a delay or error in emergency response. Includes missing RESIDUE description required by § 172.203(e)(2).	5,000.
	—Improper information, but the hazardous material are small shipments (e.g., UPS moves) and PG III (e.g., the ''low hazard'' material allowed in TOFC/COFC service without an exemption since HM–197).	3,000.
	—Lack of emergency response phone number	4,000.
	—Technical defect or minor error not likely to cause delay or error in emergency response or carrier handling.	500–1,000.
174.50	Forwarding a bulk packaging (e.g. a tank car) that no longer conforms to the hazmat regulations without first repairing the defect. This includes such non-conforming conditions as loose closures visible from ground level (e.g. loose bottom outlet caps), improper stenciling or marking.	For loaded car 5,000. For residue car 2,000.
	—Forwarding a leaking, or non-conforming non-bulk package containing a hazardous material without repair or over-packing.	5,000.
	—Forwarding a leaking bulk package beyond the movement ''as necessary to reduce or to eliminate an immediate threat * * *.'' Consider mitigation for low hazard HM (e.g., HOT) and for bulk packages smaller than tank cars.	10,000.
	—Loss of product resulted in human contact because of improper carrier handling	15,000.
	—Failure to obtain movement approval from the FRA for the transportation of a bulk packaging that no longer conforms to the regulations.	7,500.
	—Failure to follow directives in a movement approval	5,000.
	—Failure to report corrective actions (or any other reporting requirement in the movement approval).	5,000.
General Handling and Loading Requirements:		
174.55	Failure to block and brace as prescribed. (See also §§ 174.61, 174.63, 174.101, 174.112, 174.115; where these more specific sections apply, cite them.) Note: The regulatory requirement is that hazardous material packages be loaded and securely blocked and braced to prevent the packages from changing position, falling or sliding into each other. If the load is tight and secure, pieces of lumber or other material may not be necessary to achieve the ''tight load'' requirement.	
	—General failure to block and brace	5,000.
	—Inadequate blocking and bracing (an attempt was made but blocking/bracing was insufficient).	2,500.
	—Inadequate blocking and bracing leading to a leak	7,500.
	—Inadequate blocking and bracing leading to a leak and human being contact	15,000.
174.59	Other specific placarding and marking sections may also be applicable.	

49 CFR section	Description	Guideline amount[2]
	Marking and placarding. A railroad's placarding duties are to *not* accept a car without placards [§ 172.508(b)], and to *not* transport a car without placards [§ 174.59]. At each inspection point, a railroad must determine that all placards are in place. [§ 174.9]. The ''next inspection point'' replacement requirement in this section refers to placards that disappear *between* inspection points. A car at an inspection point must be placarded because it is ''in transportation'' [49 U.S.C. 5102(12)], even if held up at that point. Because the statute creates civil penalty liability only if a violation is ''knowing,'' that is, ''a reasonable person knew or should have known that an act performed by him was in violation of the HMR,'' and because railroads are not under a duty to inspect hazardous material cars merely standing in a yard, *violations written for unplacarded cars in yards must include proof that the railroad knew about the unplacarded cars and took no corrective action within a reasonable time.* (Note also that the real problem with unplacarded cars in a railyard may be a lack of emergency response information, §§ 172.600–172.604, and investigation may reveal that those sections should be cited instead of this one.)	
	—Complete failure to placard or to replace missing placards	7,500.
	—One placard missing (per car). (Add $1,000 per missing placard up to a total of three; then use the guideline above).	1,000.
	For other placarding violations, see §§ 172.500–.560 and determine if one of them more correctly states the violation. For marking violations, see §§ 172.300–.338 and determine if one of them more correctly states the violation. Note that marking violations, except for the UN number, are generally applicable to the shipper/offeror.	
174.61	Improper transportation of transport vehicle or freight container on flat car. (If improper lading restraint is the violation, see § 174.55; if improper restraint of a bulk packaging inside a closed transport vehicle is the violation, see § 174.63(b).).	3,000.
174.63(a) and (c)	—Improper transportation of portable tank or other bulk packaging in TOFC/COFC service.	3,000.
	—Portable tank double stacked with container above or below. (§ 174.63(c)(5)(i).)	5,000.
	—Portable tank transported in a well car with its outlet valve facing inward. (§ 174.63(c)(5)(ii).).	3,000.
	—Portable tank transported without securement fittings engaged and locked or void filling devices not properly deployed.	5,000.
	—Improper transportation leading to a release of product	7,500.
	—Improper transportation leading to a release and human being contact	15,000.
174.63(b)	Improper securement of bulk packaging inside enclosed transport vehicle or freight container.	
	—General failure to secure	5,000.
	—Inadequate securement (an attempt to secure was made but the means of securement were inadequate).	2,500.
	—Inadequate securement leading to a leak	7,500.
	—Inadequate securement leading to a leak and human being contact	15,000.
174.63(e)	Transportation of cargo tank or multi-unit tank car tank in TOFC or COFC service without authorization and in the absence of an emergency.	7,500.
174.67(a)(1)	Tank car transloading operations performed by persons not properly instructed (case cannot be based on inference). (Note: for all transloading requirements, there must be clear evidence that the hazmat shipment is continuing in transportation by another mode. For example, shipping papers show another destination than the one where the tank car is being unloaded/transloaded, and the contents of the tank car are being transloaded into a highway tank truck. Otherwise, the tank car unloading requirements contained in section 173.31(g) apply).	5,000.
174.67(a)(2)	Unloading/transloading hazmat without brakes set and/or wheels blocked. (The enforcement standard, as per 1995 Hazardous Materials Technical Resolution Committee, is that sufficient handbrakes must be applied on one or more cars to prevent movement and each car with a handbrake set must be blocked in both directions. The unloading facility must make a determination on how many brakes to set.)	
	—No brakes set, no wheels blocked, or fewer brakes set/wheels blocked than facility's operating plan.	5,000.
	—No brakes set, but wheels blocked	3,000.
	—Brakes set, but wheels not blocked	4,000.
174.67(a)(3)	Unloading/transloading without securing access to the track to prevent entry by other rail equipment. Derails, lined and blocked switches, or other equipment that provides equivalent level of security is acceptable.	4,000.
174.67(a)(4)	Unloading/transloading without caution signs properly displayed. (See Part 218, Subpart B).	2,000.
174.67(a)(5)	Failure of transloading facility to maintain written safety procedures (such as those it may already be required to maintain pursuant to the Department of Labor's Occupational Safety and Health Administration requirements in 29 CFR 1910.119 and 1910.120) in a location where they are immediately available to hazmat employees responsible for the transloading operation.	2,500.

49 CFR section	Description	Guideline amount[2]
174.67(c)(2)	Failure to use non-metallic block to prop manway cover open while unloading through bottom outlet.	
	—Flammable or combustible liquid, or other product with a vapor flash point hazard	3,000.
	—Material with no vapor flammability hazard	500.
174.67(h)	Insecure unloading connections, resulting in actual leak of product	10,000.
	Insecure unloading connections, no leak of product	5,000.
174.67(i)	Unattended/unmonitored unloading. Tank car must be attended by a designated employee or monitored by a signaling system.	5,000.
174.67(j)	Noncompliance with piping requirements	2,000.
174.67(k)	Failure to comply with requirements for leaving tank car unloading connections attached.	
	—Hazardous material with insignificant vapor pressure and without classification as "poison" or "inhalation hazard." (One count can be assessed for each element not followed. May also assess per tank car if more than one is involved in violation)..	2,000.
	—With actual leak	5,000.
	—With leak allowing the product to contact any human being	15,000.
	—Hazardous material with vapor pressure (essentially any gas or compressed gas) and/or with classification as "poison" or "inhalation hazard.".	5,000.
	—With actual leak	7,500.
	—With leak allowing the product (or fumes or vapors) to contact any human being). Contact with "fumes" must be substantial.	15,000.
174.67(l)	Failure to remove connections, tighten all valves with a "suitable tool" and tighten all other closures once unloading is complete.	2,000.
174.81	—Failure to obey segregation requirements for materials forbidden to be stored or transported together. ("X" in the table).	6,000.
	—Failure to obey segregation requirements for materials that must be separated to prevent commingling in the event of a leak. ("O" in the table).	4,000.
Handling of Placarded Rail Cars, Transport Vehicles and Freight Containers:		
174.83(a)	Improper switching of placarded rail cars	5,000.
174.83(b)	Improper switching of loaded rail car containing Division 1.1/1.2, 2.3 PG I Zone A, or Division 6.1 PG I Zone A, or DOT 113 tank car placarded for 2.1.	8,000.
174.83(c)–(e)	Improper switching of placarded flatcar	5,000.
174.83(f)	Switching Division 1.1/1.2 without a buffer car or placement of Division 1.1/1.2 car under a bridge or alongside a passenger train or platform.	8,000.
174.84	Improper handling of Division 1.1/1.2, 2.3 PG I Zone A, 6.1 PG I Zone A in relation to guard or escort cars.	4,000.
174.85	Improper Train Placement (The unit of violation under this section is the car. Where more than one placarded car is involved, *e.g.*, if two (2) placarded cars are too close to the engine, both are violations. Where both have a similar violation, *e.g.*, a Division 1.1 car next to a loaded tank car of a Class 3 material, each car gets the appropriate penalty as listed below)	
	RESIDUE car without at least 1 buffer from engine or occupied caboose	3,000.
	Placard Group 1—Division 1.1/1.2 materials (Class A explosive) See chart at § 174.85.	
	—Fewer than six (6) cars (where train length permits) from engine or occupied caboose.	8,000.
	—As above but with at least one (1) buffer	7,000.
	—No buffer at all (where train length doesn't permit five (5) cars)	8,000.
	—Next to open top car or car with permanent bulkheads, where lading extends beyond car ends/bulkheads or, if shifted, would be beyond car ends/bulkheads.	7,000.
	—Next to loaded flat car, except closed TOFC/COFC equipment, auto carriers, specially equipped car with tie-down devices.	6,000.
	—Next to operating temperature-control equipment or internal combustion engine in operation.	7,000.
	—Next to placarded car, except one from same placard group or COMBUSTIBLE ...	7,000.
	Placard Group 2—Division 1.3/1.4/1.5 (Class B and C explosives); Division 2.1/2.2 (compressed gas, other than Division 2.3, PG 1 Zone A; Class 3 (flammable liquids); Class 4 (flammable solid); Class 5 (oxidizing materials); Class 6 (poisonous liquids), except 6.1 PG 1 Zone A; Class 8 (corrosive materials). See chart at § 174.85.	
	For tank cars:	
	—Fewer than six (6) cars (where train length permits) from engine or occupied caboose.	6,000.
	—As above but with at least one (1) buffer	5,000.
	No buffer at all (where train length doesn't permit five (5))	6,000.
	—Next to open top car or car with permanent bulkheads, where lading extends beyond car ends/bulkheads or, if shifted, would be beyond car ends/bulkheads.	5,000.

49 CFR section	Description	Guideline amount [2]
	—Next to loaded flat car, except closed TOFC/COFC equipment, auto carriers, specially equipped car with tie-down devices.	5,000.
	—Next to operating temperature-control equipment or internal combustion engine in operation.	5,000.
	—Next to placarded car, except one from same placard group or COMBUSTIBLE ...	5,000.
	For other rail cars:	
	—Next to placarded car, except one from same placard group or COMBUSTIBLE ...	5,000.
	Placard Group 3—Divisions 2.3 (PG 1 Zone A; poisonous gases) and 6.1 (PG 1 Zone A; poisonous materials).	
	For tank cars:	
	—Fewer than six (6) cars (where train length permits) from engine or occupied caboose.	8,000.
	—As above but with at least one (1) buffer	7,000.
	No buffer at all (where train length doesn't permit five (5))	8,000.
	—Next to open top car or car with permanent bulkheads, where lading extends beyond car ends/bulkheads or, if shifted, would be beyond car ends/bulkheads.	7,000.
	—Next to loaded flat car, except closed TOFC/COFC equipment, auto carriers, specially equipped car with tie-down devices.	6,000.
	—Next to operating temperature-control equipment or internal combustion engine in operation.	7,000.
	—Next to placarded car, except one from same placard group or COMBUSTIBLE ...	7,000.
	For other rail cars:	
	—Next to placarded car, except one from same placard group or COMBUSTIBLE ...	5,000.
	Placard Group 4—Class 7 (radioactive) materials	
	For rail cars:	
	—Next to locomotive or occupied caboose	8,000.
	—Next to placarded car, except one from same placard group or COMBUSTIBLE ...	5,000.
	—Next to carload of undeveloped film	3,000.
174.86	Exceeding maximum allowable operating speed (15 mph) while transporting molten metals or molten glass.	3,000.
Class 1 (Explosive) Materials:		
174.101(o)(4)	Failure to have proper explosives placards on flatcar carrying trailers/containers placarded for Class 1. (Except for a complete failure to placard, the unit of violation is the placard.)	
	—Complete failure to placard	7,500.
	—One placard missing (add $1,000 per missing placard up to a total of three, then use the guideline above).	1,000.
174.104(b)	Car used to transport Division 1.1 or 1.2 materials does not meet requirements. (Aggravation to be considered, and may be considerable, for multiple failures to meet requirements.).	5,000.
174.104(c)	Failure to inspect and certify car before placing for loading with Division 1.1 or 1.2 materials.	7,500.
174.104(e)	Failure to supervise the loading and securement of a container (of Division 1.1 or 1.2 materials) on a flat car and failure to certify the car. (Unit of violation is the container.).	5,000.
174.104(f)	Failure to retain car certificates at "forwarding station."	1,000.
	Failure to attach car certificates to car. (Unit of violation is the certificate, two (2) are required.)	1,000.
Detailed Requirements for Class 2 (Gases) Materials:		
174.204	Improper tank car delivery of gases (Class 2 materials)	3,000.
Detailed Requirements for Class 3 (Flammable Liquid) Materials:		
174.304	Improper tank car delivery of flammable liquids (Class 3 materials)	3,000.
Detailed Requirements for Division 6.1 (Poisonous) Materials:		
174.600	Improper tank car delivery of materials extremely poisonous by inhalation (Division 2.3 Zone A or 6.1 Zone A materials).	5,000.

49 CFR section	Description	Guideline amount[2]
	PART 178—SPECIFICATIONS FOR PACKAGINGS	
178.2(b)	Package not constructed according to specifications—also cite specific section not complied with.	
	—Bulk packages, including portable tanks	8,000.
	—55-gallon drum	2,500.
	—Smaller package	1,000.
	PART 179—SPECIFICATIONS FOR TANK CARS	
179.1(e)	Tank car not constructed according to specifications—also cite section not complied with. (Part 179 violations are against the builder or repairer. Sections in this Part are often cited in conjunction with violations of §§ 172.330 and 173.31(a) and (b) by shippers. In such cases, the part 179 sections are cited as references, not as separate alleged violations.).	8,000.
179.3	Constructing tank car without securing approval from Tank Car Committee	10,000.
179.5(a)	Failure to furnish a Certificate of Construction before tank car is placed in service	7,500.
179.6	Repair procedures not in compliance with Appendix R of the Tank Car Manual	10,000.
179.7	Section 179.7 requires that each tank car facility have a quality assurance (QA) program that encompasses at least the elements in § 179.7(b). A tank car facility is an entity that manufactures, repairs, inspects, tests, qualifies, or maintains a tank car to ensure that the tank car conforms to parts 179 and 180, or alters the certificate of construction of the car. As a rule, a facility "qualifies" a tank by "inspecting" it and then "representing" it as meeting the standard. In addition to the following penalty amounts, the agency may "recall" all tanks qualified by the tank car facility during the period the facility failed to comply with the quality assurance requirements. See, for example, § 180.509(b)(4).	
	Total failure to have a quality assurance program	15,000.
	Failure to perform activities as a tank car facility other than in accordance with the quality assurance program. See 180.509(l) for applicability to tank car maintenance activities. Note that failures to perform ministerial activities such as updating the pages in a quality assurance manual or calibrating an instrument carry a lesser penalty (e.g. $2,500), unless they are the cause of a release or an injury or death.	10,000.
	The quality assurance program does not contain one or more of the elements in § 179.7(b). (The "element" is the unit of violation.).	7,500.
	Failure to provide written procedures to its employees	7,500.
	Use of an employee to perform nondestructive testing on a tank when that employee does not have the qualifications for that type of nondestructive testing.	10,000.
179.11	Use of an employee to perform welding on a tank when that employee does not have the qualifications for that type of welding procedure. Note: also reference §§ 179.100–9, 179.200–10, 179.220–10, 179.300–9, and 179.400–11 as appropriate.	10,000.
179.13	Tank cars may not be built or converted to exceed 34,500 gallons capacity or 263,000 pounds gross weight on rail. This is the building specification only; for tank cars loaded beyond capacity or gross weight see 173.26.	Varies. See 173.26 for overloaded cars.
179.15	Pressure relief device (e.g. rupture disc) that does not conform to the requirements (loaded car). May also cite 173.31(d).	5,000.
179.201–3(a)	Failure to properly line a rubber-lined tank car	7,500.
179.201–3(b)	Three possible violations under this section: (1) Failure to produce report certifying that tank car and its equipment have been brought into compliance with specification. Must occur prior to lining tank car with rubber or rubber compound. (2) Failure of tank car liner to provide copy of report and certification that tank has been lined in compliance with specs to tank car owner. (3) Failure of tank car owner to retain reports of latest lining application until next re-lining has been accomplished and recorded.	5,000.
	PART 180—CONTINUING QUALIFICATION AND MAINTENANCE OF PACKAGINGS	
180	Part 180 prescribes the requirements applicable to any person that manufactures, fabricates, marks, maintains, repairs, inspects, or services tank cars to ensure that the tank cars are in proper condition for transportation. In addition to the following penalty amounts, the agency may "recall" all tanks qualified by the tank car facility during the period the facility failed to comply with the quality assurance requirements. See, for example, § 180.509(b)(4).	
180.505	This section brings the quality assurance requirements of § 179.7 (car construction) into the tank car maintenance arena. See § 179.7 for penalty guidelines, cite this section and reference the applicable paragraph(s) or subparagraph(s). No dual penalty will apply. (Part 180 applies the construction standards of Part 179 to service life maintenance and requalification of tank cars.)	
Tank car specific provisions:		

49 CFR section	Description	Guideline amount [2]
180.509(a)	Failure to comply with requirements for inspection and test.	
	—Failure to mark a car passing a periodic inspection and test	See § 180.515.
	—Failure to prepare written report for inspection and test performed under this section.	See § 180.517.
180.509(b)	Failure to perform inspection and test when at least one of the qualifying conditions has been met.	5,000.
180.509(c)	Failure to perform inspection and test at specified interval	5,000.
180.509(d)	Failure to properly perform visual inspection	7,500.
180.509(e)	Failure to properly perform structural integrity inspection and test	10,000.
180.509(f)	Failure to properly perform thickness test	10,000.
180.509(h)	Failure to properly inspect safety systems	7,500.
180.509(i)	Failure to properly perform lining and coating inspection and test	10,000.
180.509(j)	Failure to properly perform leakage pressure test	7,500.
180.509(l)	Failure to perform inspection and test in accordance with the quality assurance program. (Applies to all non-DOT specification tank cars as of July 1, 2000, but see § 180.509(l)(3) for "20-year" cars. See also § 179.7(f).).	10,000.
180.513	Failure to repair the tank according to Appendix R of the AAR Tank Car Manual	10,000.
	Use of an employee to perform welding on a tank when that employee does not have the qualifications for that type of welding procedure.	10,000.
180.515	Failure to mark the tank as required	7,500.
180.517	Failure to report, record, and retain required documentation	7,500.
Provisions for tank cars other than single unit tank car tanks:		
180.519(a)	Failure to retest at required interval	Cite 180.519(b)(5).
180.519(b)(1)	Failure to perform hydrostatic pressure/expansion test as required	7,500.
180.519(b)(2)	Failure to perform interior air pressure test as required	7,500.
180.519(b)(3)	Failure to test pressure relief valves as required	7,500.
180.519(b)(4)	Failure to remove and inspect frangible discs and fusible plugs	5,000.
180.519(b)(5)	Failure to retest at required interval	3,000.
180.519(b)(6)	Failure to stamp tank as required	5,000.
180.519(c)	Failure to visually inspect as required	5,000.
	Failure to use competent persons to perform visual inspection	5,000.
180.519(d)	Failure to record and retain documentation. Mitigate/aggravate depending on the extent of the violation.	7,500.

[2] A person who knowingly violates the hazardous materials transportation law, or regulation, special permit, approval, or order issued thereunder, is subject to a civil penalty of at least $250 but not more than $50,000 for each violation, except that the maximum civil penalty for a violation is $100,000 if the violation results in death, serious illness or severe injury to any person, or substantial destruction of property; and a minimum $450 civil penalty applies to a violation related to training. Each day that the violation continues is a separate offense. 49 U.S.C. 5123; 28 U.S.C. 2461, note.

Issued in Washington, DC on December 14, 2006.

Joseph H. Boardman,

Administrator, Federal Railroad Administration.

[FR Doc. E6–21850 Filed 12–22–06; 8:45 am]

BILLING CODE 4910–06–P

Proposed Rules

Federal Register
Vol. 71, No. 247
Tuesday, December 26, 2006

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2006–26231; Directorate Identifier 2006–CE–61–AD]

RIN 2120–AA64

Airworthiness Directives; EADS SOCATA Model TBM 700 Airplanes

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

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for the products listed above. This proposed AD results from mandatory continuing airworthiness information (MCAI) issued by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as two fatigue failures of flap carriage rollpins occurred on in-service airplanes. The proposed AD would require actions that are intended to address the unsafe condition described in the MCAI.

DATES: We must receive comments on this proposed AD by January 25, 2007.

ADDRESSES: You may send comments by any of the following methods:

- *DOT Docket Web Site:* Go to *http://dms.dot.gov* and follow the instructions for sending your comments electronically.
- *Fax:* (202) 493–2251.
- *Mail:* Docket Management Facility, U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, Room PL–401, Washington, DC 20590–0001.
- *Hand Delivery:* Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://dms.dot.gov;* or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (telephone (800) 647–5227) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Albert J. Mercado, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri, 64106; telephone: (816) 329–4119; fax: (816) 329–4090.

SUPPLEMENTARY INFORMATION:

Streamlined Issuance of AD

The FAA is implementing a new process for streamlining the issuance of ADs related to MCAI. The streamlined process will allow us to adopt MCAI safety requirements in a more efficient manner and will reduce safety risks to the public. This process continues to follow all FAA AD issuance processes to meet legal, economic, Administrative Procedure Act, and **Federal Register** requirements. We also continue to meet our technical decision-making responsibilities to identify and correct unsafe conditions on U.S.-certificated products.

This proposed AD references the MCAI and related service information that we considered in forming the engineering basis to correct the unsafe condition. The proposed AD contains text copied from the MCAI and for this reason might not follow our plain language principles.

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2006–26231; Directorate Identifier 2006–CE–61–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD because of those comments.

We will post all comments we receive, without change, to *http://dms.dot.gov,* including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive about this proposed AD.

Discussion

The Direction générale de l'aviation civile (DGAC), which is the airworthiness authority for France, has issued AD No. F–2005–017, Issue date: January 19, 2005 (referred to after this as ''the MCAI''), to correct an unsafe condition for the specified products. The MCAI states reports of two fatigue failures of flap carriage rollpins occurred on in-service airplanes. The MCAI requires inspecting and applying torque values to the rollpins nuts. You may obtain further information by examining the MCAI in the AD docket.

Relevant Service Information

EADS SOCATA has issued TBM Aircraft Mandatory Service Bulletin SB SB 70–122, Amendment 1, ATA No. 57, dated March 2006. The actions described in this service information are intended to correct the unsafe condition identified in the MCAI.

FAA's Determination and Requirements of the Proposed AD

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to our bilateral agreement with this State of Design Authority, they have notified us of the unsafe condition described in the MCAI and service information referenced above. We are proposing this AD because we evaluated all information and determined the unsafe condition exists and is likely to exist or develop on other products of the same type design.

Differences Between This Proposed AD and the MCAI or Service Information

We have reviewed the MCAI and related service information and, in general, agree with their substance. But we might have found it necessary to use different words from those in the MCAI to ensure the AD is clear for U.S.

operators and is enforceable. In making these changes, we do not intend to differ substantively from the information provided in the MCAI and related service information.

We might also have proposed different actions in this AD from those in the MCAI in order to follow FAA policies. Any such differences are described in a separate paragraph of the proposed AD. These requirements, if ultimately adopted, will take precedence over the actions copied from the MCAI.

Costs of Compliance

Based on the service information, we estimate that this proposed AD would affect about 221 products of U.S. registry. We also estimate that it would take about 1 work-hour per product to comply with the proposed AD. The average labor rate is $80 per work-hour. Required parts would cost about $100 per product. Where the service information lists required parts costs that are covered under warranty, we have assumed that there will be no charge for these costs. As we do not control warranty coverage for affected parties, some parties may incur costs higher than estimated here. Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be $39,780, or $180 per product.

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify this proposed regulation:

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

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

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

EADS SOCATA: Docket No. FAA–2006–26231; Directorate Identifier 2006–CE–61–AD

Comments Due Date

(a) We must receive comments by January 25, 2007.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Model TBM 700 airplanes, serial numbers 1 through 268, and 270 through 327, certificated in any category.

Reason

(d) The mandatory continuing airworthiness information (MCAI) states reports of two fatigue failures of flap carriage rollpins occurred on in-service airplanes.

Actions and Compliance

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

(1) Within the next 100 hours time-in-service (TIS) after the effective date of this AD, inspect all flap inboard carriage roller pins for proper torque values and correct as necessary before further flight.

(2) Repeat these inspections thereafter at intervals not to exceed 100 hours TIS and correct as necessary before further flight after the inspection in which a correction is necessary.

(3) Accomplish these actions according to the instructions given in EADS SOCATA TBM Aircraft Mandatory Service Bulletin SB 70–122, Amendment 1, ATA No. 57, dated March 2006, and the applicable maintenance manual.

(4) If both flap inboard carriages have been replaced following EADS SOCATA TBM Aircraft Mandatory Service Bulletin SB 70–138, ATA No. 57, dated March 2006, no further action is required. Make an entry in the logbook to show compliance with this AD.

FAA AD Differences

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

Other FAA AD Provisions

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

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, Standards Staff, FAA, Small Airplane Directorate, ATTN: Albert J. Mercado, Aerospace Engineer, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329–4119; fax: (816) 329–4090, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19.

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

(3) *Reporting Requirements:* For any reporting requirement in this AD, under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 et. seq.), the Office of Management and Budget (OMB) has approved the information collection requirements and has assigned OMB Control Number 2120–0056.

Related Information

(h) Refer to MCAI Direction generale de l'aviation civile AD No. F–2005–017, Issue date: January 19, 2005, EADS SOCATA TBM Aircraft Mandatory Service Bulletin SB 70–122, Amendment 1, ATA No. 57, dated March 2006, and EADS SOCATA TBM Aircraft Mandatory Service Bulletin SB 70–138, ATA No. 57, dated March 2006, for related information.

Issued in Kansas City, Missouri, on December 14, 2006.

Kim Smith,

Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. E6–22037 Filed 12–22–06; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2006–26647; Directorate Identifier 2006–NM–194–AD]

RIN 2120–AA64

Airworthiness Directives; Bombardier Model CL–600–2B19 (Regional Jet Series 100 & 440) Airplanes

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

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to adopt a new airworthiness directive (AD) for certain Bombardier Model CL–600–2B19 (Regional Jet Series 100 & 440) airplanes. This proposed AD would require repetitive inspections of the bolts that attach the exhaust nozzle to the aft engine flange to determine if any bolts are missing or fractured, and replacement of the existing bolts with new, improved bolts. This proposed AD results from reports of the engine exhaust nozzle and fairing departing from the airplane in flight due to missing attachment bolts. We are proposing this AD to detect and correct missing or fractured attachment bolts, which could lead to the loss of an engine exhaust nozzle during flight and consequent structural damage to the airplane and hazard to people or property on the ground. Damage to the airplane could cause the airplane to yaw and result in reduced controllability of the airplane.

DATES: We must receive comments on this proposed AD by January 25, 2007.

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

- *DOT Docket Web site:* Go to *http://dms.dot.gov* and follow the instructions for sending your comments electronically.
- *Government-wide rulemaking Web site:* Go to *http://www.regulations.gov* and follow the instructions for sending your comments electronically.
- *Mail:* Docket Management Facility, U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, room PL–401, Washington, DC 20590.
- *Fax:* (202) 493–2251.
- *Hand Delivery:* Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Contact Bombardier, Inc., Canadair, Aerospace Group, P.O. Box 6087, Station Centre-ville, Montreal, Quebec H3C 3G9, Canada, for service information identified in this proposed AD.

FOR FURTHER INFORMATION CONTACT: Rocco Viselli, Aerospace Engineer, Airframe and Propulsion Branch, ANE–171, FAA, New York Aircraft Certification Office, 1600 Stewart Avenue, suite 410, Westbury, New York 11590; telephone (516) 228–7331; fax (516) 794–5531.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to submit any relevant written data, views, or arguments regarding this proposed AD. Send your comments to an address listed in the **ADDRESSES** section. Include the docket number ''FAA–2006–26647; Directorate Identifier 2006–NM–194–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of the proposed AD. We will consider all comments received by the closing date and may amend the proposed AD in light of those comments.

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

Examining the Docket

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

Discussion

Transport Canada Civil Aviation (TCCA), which is the airworthiness authority for Canada, notified us that an unsafe condition may exist on certain Bombardier Model CL–600–2B19 (Regional Jet Series 100 & 440) airplanes. TCCA advises that there have been three reported incidents of the engine exhaust nozzle and fairing departing from the airplane. One incident occurred in flight and the two other incidents occurred on the ground. TCCA has also received numerous ground reports of missing and loose bolts. Investigation has revealed that the bolts that attach the engine exhaust nozzle to the engine flange provide less than the necessary stress margins, which could lead to failure of the bolts. Missing or fractured attachment bolts could lead to loss of the engine exhaust nozzle during flight. This condition, if not corrected, could cause structural damage to the airplane when the engine exhaust nozzle departs from the airplane and could create a hazard to people or property on the ground. Damage to the airplane could cause the airplane to yaw and result in reduced controllability of the airplane.

Relevant Service Information

Bombardier has issued Service Bulletin 601R–78–021, dated June 2, 2006. The service bulletin describes procedures for doing repetitive detailed visual inspections of the bolts that attach the exhaust nozzle to the aft engine flange to determine if any bolts are missing or fractured. If any bolt is missing or fractured, the service bulletin specifies replacing the existing bolts that attach the exhaust nozzle to the aft engine flange with new, improved bolts. Accomplishing the actions specified in the service information is intended to adequately address the unsafe condition. TCCA mandated the service information and issued Canadian airworthiness directive CF–2006–19, dated July 28, 2006, to ensure the continued airworthiness of these airplanes in Canada.

Bombardier Service Bulletin 601R–78–021 refers to Short Brothers Service Bulletin CF34–NAC–78–024, Revision 4, dated November 10, 2005, as an additional source of service information for accomplishment of the replacement.

FAA's Determination and Requirements of the Proposed AD

This airplane model is manufactured in Canada and is type certificated for operation in the United States under the provisions of section 21.29 of the Federal Aviation Regulations (14 CFR 21.29) and the applicable bilateral airworthiness agreement. Pursuant to this bilateral airworthiness agreement, TCCA has kept the FAA informed of the situation described above. We have examined TCCA's findings, evaluated all pertinent information, and determined that we need to issue an AD for airplanes of this type design that are certificated for operation in the United States.

Therefore, we are proposing this AD, which would require accomplishing the actions specified in the service information described previously.

Clarification of Inspection Terminology

The ''detailed visual inspection'' specified in the Bombardier service bulletin and Canadian airworthiness directive is referred to as a ''detailed inspection'' in this proposed AD. We have included the definition for a detailed inspection in a note in the proposed AD.

Costs of Compliance

The following table provides the estimated costs for U.S. operators to comply with this proposed AD.

ESTIMATED COSTS

Action	Work hours	Average labor rate per hour	Parts	Cost per airplane	Number of U.S.-registered airplanes	Fleet cost
Inspection, per inspection cycle.	2	$80	None	$160, per inspection cycle.	686	$109,760, per inspection cycle.
Replacement	4	$80	$513	$833	686	$571,438.

Authority for this Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

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

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Bombardier, Inc. (Formerly Canadair): Docket No. FAA–2006–26647; Directorate Identifier 2006–NM–194–AD.

Comments Due Date

(a) The FAA must receive comments on this AD action by January 25, 2007.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Bombardier Model CL–600–2B19 (Regional Jet Series 100 & 440) airplanes, certificated in any category; serial numbers (S/Ns) 7003 through 7067 inclusive and S/Ns 7069 through 7947 inclusive.

Unsafe Condition

(d) This AD results from reports of the engine exhaust nozzle and fairing departing from the airplane in flight due to missing attachment bolts. We are issuing this AD to detect and correct missing or fractured attachment bolts, which could lead to the loss of an engine exhaust nozzle during flight and consequent structural damage to the airplane and hazard to people or property on the ground. Damage to the airplane could cause the airplane to yaw and result in reduced controllability of the airplane.

Compliance

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

Repetitive Inspections

(f) Within 1,500 flight hours after the effective date of this AD: For the left and right engine exhaust nozzles, do a detailed inspection of the bolts that attach the exhaust nozzle to the aft engine flange to determine if any bolts are missing or fractured, in accordance with part A of the Accomplishment Instructions of Bombardier Service Bulletin 601R–78–021, dated June 2, 2006. If no bolt of an engine exhaust nozzle is missing or fractured, repeat the detailed inspection for that engine exhaust nozzle thereafter at intervals not to exceed 1,500 flight hours, until the replacement specified in paragraph (g) or (h) of this AD is accomplished.

Note 1: For the purposes of this AD, a detailed inspection is: ''An intensive examination of a specific item, installation, or assembly to detect damage, failure, or irregularity. Available lighting is normally supplemented with a direct source of good lighting at an intensity deemed appropriate. Inspection aids such as mirror, magnifying lenses, etc., may be necessary. Surface cleaning and elaborate procedures may be required.''

Corrective Action, if Necessary

(g) If any bolt of an engine exhaust nozzle is found missing or fractured during any inspection required by paragraph (f) of this AD, before further flight, replace the existing bolts that attach the exhaust nozzle to the aft engine flange with new improved bolts, in accordance with part B of the Accomplishment Instructions of Bombardier Service Bulletin 601R–78–021, dated June 2, 2006. Accomplishing the bolt replacement for an engine exhaust nozzle terminates the repetitive inspections required by paragraph (f) of this AD for that engine exhaust nozzle only.

Note 2: Bombardier Service Bulletin 601R–78–021, dated June 2, 2006, refers to Short Brothers Service Bulletin CF34–NAC–78–024, Revision 4, dated November 10, 2005, as an additional source of service information for accomplishment of the replacement.

Terminating Action

(h) Within 4,000 flight hours after the effective date of this AD: For the left and right engine exhaust nozzles, replace the existing bolts that attach the exhaust nozzle to the aft engine flange with new, improved bolts, in accordance with part B of the Accomplishment Instructions of Bombardier Service Bulletin 601R–78–021, dated June 2, 2006. Accomplishing the replacement for the left and right engine exhaust nozzles terminates all of the inspections required by paragraph (f) of this AD.

Alternative Methods of Compliance (AMOCs)

(i)(1) The Manager, New York Aircraft Certification Office, FAA, has the authority to approve AMOCs for this AD, if requested in accordance with the procedures found in 14 CFR 39.19.

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

Related Information

(j) Canadian airworthiness directive CF–2006–19, dated July 28, 2006, also addresses the subject of this AD.

Issued in Renton, Washington, on December 14, 2006.

Stephen P. Boyd,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E6–22043 Filed 12–22–06; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Parts 201 and 343

[Docket No. 1977N–0094L]

RIN 0910–AF36

Internal Analgesic, Antipyretic, and Antirheumatic Drug Products for Over-the-Counter Human Use; Proposed Amendment of the Tentative Final Monograph; Required Warnings and Other Labeling

AGENCY: Food and Drug Administration, HHS.

ACTION: Proposed rule.

SUMMARY: The Food and Drug Administration (FDA) is proposing to amend its over-the-counter (OTC) labeling regulations and the tentative final monograph (TFM) for OTC internal analgesic, antipyretic, and antirheumatic (IAAA) drug products to include new warnings and other labeling requirements advising consumers about potential risks and when to consult a doctor. FDA is also proposing to remove the alcohol warning in its regulations and add new warnings and other labeling for all OTC IAAA drug products. The new labeling would be required for all OTC drug products containing an IAAA active ingredient whether marketed under an OTC drug monograph or an approved new drug application (NDA). FDA is issuing this proposal as part of its ongoing review of OTC drug products after considering the advice of its Nonprescription Drugs Advisory Committee (NDAC) and other available information. FDA is proposing these labeling changes because it has tentatively concluded they are necessary for these ingredients to be considered generally recognized as safe and effective and not misbranded for OTC use. FDA will address information about the cardiovascular risks of nonsteroidal anti-inflammatory drugs (NSAIDs) that was discussed at a February 16–18, 2005, FDA advisory committee meeting, and the ''Allergy alert'' warning for NSAID products, in a future issue of the **Federal Register**.

DATES: Submit written or electronic comments, including comments on FDA's economic impact determination, by May 25, 2007. The specified comment period is longer than is normally provided for proposed rules. Because of the complexity of the proposed rule, FDA is providing an additional 60 days (beyond the normal comment period) for comments to be submitted and does not plan to extend the comment period beyond this date. Please see section XV of this document for the proposed effective and compliance dates of any final rule that may publish based on this proposal.

ADDRESSES: You may submit comments, identified by Docket No. 1977N–0094L and Regulatory Information Number (RIN) 0910–AF36 by any of the following methods:

Electronic Submissions

Submit electronic comments in the following ways:

- Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the instructions for submitting comments.
- Agency Web site: *http://www.fda.gov/dockets/ecomments*. Follow instructions for submitting comments on the agency Web site.

Written Submissions

Submit written submissions in the following ways:

- FAX: 301–827–6870.
- Mail/Hand delivery/Courier [For paper, disk, or CD–ROM submissions]: Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

To ensure more timely processing of comments, FDA is no longer accepting comments submitted to the agency by e-mail. FDA encourages you to continue to submit electronic comments by using the Federal eRulemaking Portal or the agency Web site, as described in the *Electronic Submissions* portion of this paragraph.

Instructions: All submissions received must include the agency name and Docket No. and RIN for this rulemaking. All comments received may be posted without change to *http://www.fda.gov/ohrms/dockets/default.htm*, including any personal information provided. For additional information on submitting comments, see the ''Comments'' heading of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: For access to the docket to read background documents or comments received, go to *http://www.fda.gov/ohrms/dockets/default.htm* and insert the docket number(s), found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Division of Dockets Management, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Marina Chang, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Silver Spring, MD, 20993–0002, 301–796–2090.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Introduction

FDA is proposing to: (1) Amend the TFM for OTC IAAA drug products, (2) remove the alcohol warning, and (3) add new warnings and other labeling for all OTC IAAA drug products. The proposed warnings and other labeling requirements will advise consumers of potential risks and when to consult a doctor. More specifically, FDA is proposing the following changes to the labeling:

- Requiring a new liver warning for products that contain acetaminophen.
- Requiring a new stomach bleeding warning for products that contain an NSAID (e.g., aspirin or ibuprofen).
- Removing the alcohol warning currently required for all OTC IAAA drug products in § 201.322 (21 CFR 201.322) and incorporating an alcohol warning in the new liver warning for acetaminophen and the new stomach bleeding warning for NSAIDs.
- Requiring that the ingredient acetaminophen be prominently identified on the product's principal display panel (PDP) of the immediate container and the outer carton, if applicable.
- Requiring that the name of the NSAID ingredient followed by the term "NSAID" be prominently identified on the product's PDP of the immediate container and the outer carton, if applicable.

This new labeling would be required for all OTC drug products containing an IAAA active ingredient, whether marketed under an OTC drug monograph or an approved NDA. FDA bases this proposal on its reviews of the medical literature, data provided to FDA, and recommendations made by NDAC. FDA has tentatively concluded that new labeling for OTC IAAA drug products is necessary for the safe and effective use of these products by consumers.

II. Background

FDA believes that acetaminophen and NSAIDs, when labeled appropriately and used as directed, are safe and effective OTC drug products that benefit tens of millions of consumers every year. FDA believes that these products should continue to be accessible to consumers in the OTC setting.

- Internal analgesics have long been very effective OTC drug products for the intermittent treatment of minor aches and pains and fever.
- At their recommended OTC doses, these products are only rarely associated with serious adverse events relative to the number of consumers who use these products.

A. Development of OTC IAAA Drug Product Warnings

The development of a monograph for OTC IAAA drug products began in 1977 with publication of an expert panel report and continued in 1988 with publication of the TFM. The development of labeling for OTC IAAA drug products is recorded in the following documents.

1. Warnings for Aspirin and Acetaminophen

In the **Federal Register** of July 8, 1977 (42 FR 35346), FDA published the report of the Advisory Review Panel on OTC Internal Analgesic, Antipyretic, and Antirheumatic Drug Products (the IAAA Panel) for OTC IAAA active ingredients: Acetaminophen, aspirin, carbaspirin calcium, choline salicylate, magnesium salicylate, and sodium salicylate. The recommendations included labeling and warnings for:

- *Aspirin*: "Caution: Do not take this product if you have stomach distress, ulcers or bleeding problems except under the advice and supervision of a physician" (42 FR 35346 at 35387), and
- *Acetaminophen*: "Do not exceed recommended dosage because severe liver damage may occur" (42 FR 35346 at 35415).

In the **Federal Register** of November 16, 1988 (53 FR 46204), FDA published a tentative monograph with the following warnings for:

- *Aspirin*: "Do not take this product if you have stomach problems (such as heartburn, upset stomach, or stomach pain) that persist or recur, or if you have ulcers or bleeding problems, unless directed by a doctor" (53 FR 46204 at 46256), and
- *Acetaminophen*: "Prompt medical attention is critical for adults as well as for children even if you do not notice any signs or symptoms." This warning follows the general overdose warnings in 21 CFR 330.1(g) (53 FR 46204 at 46213).

2. Warnings in the Professional Labeling for Aspirin

In the **Federal Register** of October 23, 1998 (63 FR 56802), FDA published labeling for health professionals (not available in OTC drug product labeling) that provided for cardiovascular and rheumatologic indications. The labeling listed adverse reactions reported in the literature, e.g., hypotension (low blood pressure); tachycardia (rapid heart rate); dizziness; headache; dyspepsia (indigestion); bleeding, ulceration, and perforation of the gastrointestinal (GI) tract; nausea; and vomiting. FDA determined that consumers were not able to determine when they needed to take aspirin to prevent cardiovascular events, such as stroke, myocardial infarction (damage to the heart muscle), or other conditions. FDA did not consider it possible to provide adequate directions and warnings to enable the layperson to make a reasonable self-diagnosis of these cardiovascular and rheumatologic conditions.

3. Alcohol Warnings for Acetaminophen and NSAIDs

In the **Federal Register** of October 23, 1998 (63 FR 56789), FDA published a final regulation stating that any OTC drug product, labeled for adult use, containing acetaminophen, aspirin, carbaspirin calcium, choline salicylate, ibuprofen, ketoprofen, magnesium salicylate, naproxen sodium, and sodium salicylate must bear an alcohol warning statement in its labeling. Section 201.322 requires the following statements:

- *For products containing acetaminophen*:

Alcohol Warning: If you consume 3 or more alcoholic drinks every day, ask your doctor whether you should take acetaminophen or other pain relievers/fever reducers. Acetaminophen may cause liver damage.

- *For products containing aspirin, carbaspirin calcium, choline salicylate, ibuprofen, ketoprofen, magnesium salicylate, naproxen sodium, and sodium salicylate*:

Alcohol Warning: If you consume 3 or more alcoholic drinks every day, ask your doctor whether you should take (name of active ingredient) or other pain relievers/fever reducers. (Name of active ingredient) may cause stomach bleeding.

- *For products containing acetaminophen with other IAAA active ingredients*:

Alcohol Warning: If you consume 3 or more alcoholic drinks every day, ask your doctor whether you should take (insert acetaminophen and one other IAAA active ingredient—including, but not limited to aspirin, carbaspirin calcium, choline salicylate, magnesium salicylate, or sodium salicylate) or other pain relievers/fever reducers. Acetaminophen and (insert name of one other IAAA active ingredient—including, but not limited to aspirin, carbaspirin calcium, choline salicylate, magnesium salicylate, or sodium salicylate) may cause liver damage and stomach bleeding.

4. Proposed Amendment to Include Ibuprofen as a Generally Recognized Safe and Effective OTC IAAA Active Ingredient

In the **Federal Register** of August 21, 2002 (67 FR 54139), FDA proposed to include ibuprofen in the monograph for OTC IAAA drug products with additional warnings:

Ask a doctor before use if you have:

- Problems or serious side effects from taking pain relievers or fever reducers
- Stomach problems that last or come back, such as heartburn, upset stomach, or pain
- Ulcers
- Bleeding problems
- High blood pressure, heart or kidney disease, are taking a diuretic, or are over 65 years of age.

FDA received several comments (Refs. 1 and 2) about the proposed warning for kidney disease and reopened the administrative record on June 4, 2003 (68 FR 33429), to allow for additional public comment. FDA continues to propose a warning about kidney disease for ibuprofen and other NSAIDs in this document. In a future issue of the **Federal Register**, we will publish our final decision about this warning and the proposed inclusion of ibuprofen in the monograph.

B. Completion of the OTC IAAA Drug Products FM

In the process of completing the FM for OTC IAAA drug products, FDA reviewed a variety of data regarding the safety of acetaminophen, aspirin, and other NSAIDs. FDA continued to receive serious adverse event reports associated with the use of these products during this review. These serious adverse events included unintentional acetaminophen hepatotoxicity and NSAID-related GI bleeding and renal toxicity. Although the occurrence of these events is rare, relative to the extensive use of the products, as described in the text that follows, FDA believes that labeling changes are necessary for the safe and effective use of these products and to reduce the associated morbidity.

1. Unintentional Acetaminophen Hepatotoxicity

Acetaminophen is widely available in numerous single ingredient and combination OTC drug products, and in many prescription drug products, as a pain reliever and/or fever reducer. OTC acetaminophen drug products, as currently labeled and used, have been reported to be associated with unintentional overdose that may lead to serious hepatotoxicity (Ref. 3). The IAAA Panel discussed overdose-related hepatotoxicity (42 FR 35346 at 35413 to 35414), and FDA addressed it in the IAAA TFM (53 FR 46204 at 46213 to 46218). (See section II.A.1 of this document.)

2. Aspirin and Other NSAIDs—GI Bleeding and Renal Toxicity

Aspirin and other NSAIDs are available OTC for the treatment of minor aches and pain, for the treatment of headaches, and for fever reduction. Per aspirin's professional labeling (not part of the OTC drug product labeling), aspirin may be used to reduce the risk of serious cardiovascular events when taken on a daily basis under the direction of a physician. Aspirin is also effective in treating a variety of rheumatologic diseases under the direction of a physician. The professional labeling also includes information about the potential risk of GI bleeding and renal toxicity associated with aspirin.

OTC nonaspirin salicylates include the NSAIDs ibuprofen, naproxen sodium, and ketoprofen. The product labels for these products are not required to contain warnings about GI bleeding and renal toxicity. These ingredients are, however, also available by prescription at strengths higher than in OTC products and the prescription product labeling contains warnings about these risks.

III. NDAC Meeting

At a September 19 and 20, 2002, meeting, NDAC considered products currently marketed with OTC IAAA ingredients, including acetaminophen, aspirin, carbaspirin calcium, choline salicylate, ibuprofen, ketoprofen, magnesium salicylate, naproxen sodium, and sodium salicylate. FDA expressed its belief that these products should remain available OTC given their overall effectiveness and safety, the benefit to consumers of having a pain reliever and fever reducer available OTC, and the use of these products by tens of millions of people weekly. FDA suggested that certain interventions could decrease the frequency and morbidity of these serious adverse events. NDAC members were asked to consider which additional interventions were necessary to reduce the occurrence of serious adverse events. The presentations made at the meeting, and NDAC's findings, are summarized in this document. More information about the September 2002 NDAC meeting is available on the Internet and in the Division of Dockets Management (see **ADDRESSES**).

A. Data and Information Reviewed

FDA provided NDAC with the following data and information (Ref. 3):

- Applicable sections of rulemakings for OTC IAAA active ingredients.

• Proposed and final rules for the alcohol warning for OTC IAAA drug products.
• Final rule for professional labeling of OTC drug products containing aspirin.
• Amendment to propose inclusion of ibuprofen in the monograph for OTC IAAA drug products.
• For acetaminophen, FDA reviews of data, poisoning data in Toxic Exposure Surveillance System (TESS), exposure data from poison control centers, overdose reference articles, and an abstract describing trends in acute liver failure in the United States.
• For aspirin/NSAIDs, FDA reviews of data and articles from the medical literature.

NDAC also considered submissions and presentations from industry and individuals during the open public sessions (Refs. 4 and 5).

B. Acetaminophen

On the first day of the meeting (September 19, 2002), NDAC considered safety issues related to the use of acetaminophen, unintentional overdose, and the potential for hepatotoxicity from both OTC and prescription acetaminophen products.

1. Points for Discussion

FDA asked NDAC to discuss possible factors that might contribute to unintentional overdose (Ref. 3) and provided the following points for consideration:

• Acetaminophen is available to consumers in many OTC and prescription drug products (i.e., single ingredient and combinations with various other active ingredients).
• Consumers fail to identify acetaminophen as an ingredient in their OTC and prescription drug products.
• Consumers are unaware of the risks of exceeding the recommended dose of acetaminophen with a single product, or of simultaneously using multiple products containing acetaminophen.

FDA asked NDAC what additional measures could be taken to better ensure that prescribers and other people are aware of the potential risks associated with exceeding the recommended dose of prescription or OTC drug products containing acetaminophen and with using multiple products containing acetaminophen. FDA suggested the following possible measures for OTC drug products:

• Consumer education
• Changes in labeling that identify and highlight the risks
• Packaging that may enhance appropriate use
• Consumer inserts.

For prescription products, FDA suggested:

• Unit of use packaging with labeling on each blister pack
• Physician and pharmacist education
• Publication of information in professional journals
• Consumer education
• FDA publications to identify and highlight the danger and risk
• Providing patient information leaflets and stickers when dispensing the prescription.

FDA also asked NDAC if there are identifiable factors that might make some individuals more susceptible to hepatic toxicity (e.g., underlying liver disease, malnutrition, drug interactions, and alcohol users). If subpopulations at increased risk of acetaminophen-induced hepatotoxicity could be identified, FDA asked NDAC what reasonable measures could be taken to decrease their risk. FDA suggested some possible measures:

• Adjustment of the maximum total daily dose or dosing interval
• Changes in labeling that identify the population and highlight the risks
• Additional research on specific subpopulations
• Consumer and physician education.

FDA asked NDAC whether additional studies are needed to evaluate these issues. FDA suggested a number of subjects for potential research:

• Evaluation of the effectiveness of educational programs
• Evaluation of revised labeling
• Surveillance of serious acetaminophen hepatotoxicity cases
• Enhanced collection of information when medication errors occur
• Better understanding of consumer use of these products.

2. Presentations and Submissions to NDAC

As a lead-in to the liver toxicity discussion, Dr. William Lee, of the University of Texas Southwestern Medical Center at Dallas, presented the results of acute liver failure (ALF) studies in the United States (Ref. 6). He estimated that between 1,000 and 2,000 ALF cases occur in the United States each year and are associated with high mortality. Dr. Lee conducted a retrospective analysis of 177 cases of ALF reported in the literature between 1986 and 1998. Of these, 20 percent were attributed to acetaminophen toxicity. To study ALF prospectively, Dr. Lee also formed a study group of 25 treatment centers in 1998. Details of the group's initial 308 cases are presented in table 1. Approximately 40 percent of the cases were due to acetaminophen toxicity, which was increased when compared to the rate of acetaminophen toxicity in the cohort from Dr. Lee's retrospective analysis.

TABLE 1.— STUDY GROUP SERIES OF ALF CASES (N = 308)

Case Report Data	ALF Etiology				
	Acetaminophen Induced (n=120)	Drug (Not Acetaminphen) Induced (n=40)	Indeterminate Cause (n=53)	All Other Causes (n=95)	P value
Sex (% Female)	79	73	60	72	NS*
Age (years)	36	41	38	43	0.02
Jaundice (days)	1	12	12	4	<0.001
Coma (%)	50	43	47	47	NS
Alanine aminotransferase (ALT) (International Units/Liter (IU/L))**	4310	574	947	1060	<0.001
Bilirubin	4.3	20.2	24.5	12.6	<0.001

TABLE 1.— STUDY GROUP SERIES OF ALF CASES (N = 308)—Continued

Case Report Data	ALF Etiology				
	Acetaminophen Induced (n=120)	Drug (Not Acetaminphen) Induced (n=40)	Indeterminate Cause (n=53)	All Other Causes (n=95)	P value
Transplant (%)	6	53	51	36	<0.001
Spontaneous survival (%)	68	25	17	33	<0.001
Overall survival (%)	73	70	64	61	NS

* Not significant ** ALT (normal range 0–35 IU/L)

Of the 120 acetaminophen toxicity cases identified in Dr. Lee's series, 12 were omitted due to concomitant patient issues that would have confounded the analysis. The remaining 108 cases were analyzed and showed that alcohol use was reported in 57 percent of the cases and alcohol abuse was reported in 19 percent of the cases. Individuals in 38 percent of the cases were taking both narcotic-acetaminophen prescription products and OTC acetaminophen products at the same time, some for as long as 2 to 3 months. In 70 percent of the cases, patients ingested more than 4 grams (g) of acetaminophen per day (recommended maximum daily dose), and 32 percent of the cases reported ingestion of more than 10 g per day.

A comparison was conducted among the 108 cases of toxicity due to accidental (ingestion of drugs for pain relief, without suicidal intent) and suicidal (ingestion with admitted suicidal attempt) ingestion. The type of ingestion could not be determined in 5 cases, resulting in a comparison of 103 cases (table 2). More than half of the acetaminophen toxicity cases (57 percent) were accidental.

TABLE 2.—SUICIDAL VS. ACCIDENTAL ACETAMINOPHEN ALF CASES

	Accidental (n=59)	Suicidal (n=44)	p-value
Age	39	33	0.011
Acetaminophen total (g)	20	29	NS
Antidepressant	36%	34%	NS
Alcohol (non-abuse use)	55%	61%	NS
Double use*	24%	5%	0.02
Narcotic/acetaminophen	54%	14%	0.001
ALT (IU/L)	3,616	5,929	<0.001
Creatine	2.5	1.3	0.008
Survival	71%	75%	NS

* Use of more than one acetaminophen containing product.

The incidence of use of antidepressants and alcohol was nearly identical in the accidental and suicidal groups. The accidental cases included a larger percentage of subjects who double-dosed or used a narcotic/acetaminophen combination product. Survival rates were also similar. Lee concluded that acetaminophen toxicity accounted for about a third of all deaths from ALF in this case series and appears to be a growing problem in the United States.

FDA staff presented a safety analysis of hepatotoxicity associated with acetaminophen (Ref. 7). The cases were reported as ''intentional overdose'' and ''unintentional overdose.'' The reported doses were rarely within the recommended range. Four national databases were used to estimate the occurrence of these events:

1. National Hospital Ambulatory Care Survey: Emergency Department (ED) Component—a probability survey sampling of visits made to emergency departments and short stay hospitals in the United States.

2. National Electronic Injury Surveillance System—collects information on consumer product-related injuries treated in emergency departments of 66 selected hospitals.

3. National Hospital Discharge Survey—a probability survey sampling of patient discharge records from non-Federal, short stay hospitals in the United States.

4. Multiple Cause of Death Files—a data file that contains information from death certificates.

Acetaminophen overdose (unintentional and intentional) was associated with an annual average of over 56,000 emergency department visits (1993 to 1999) and more than 26,000 hospitalizations (1990 to 1999). Between 1996 and 1998, an annual average of 458 deaths was attributed, at least in part, to acetaminophen overdose. Unintentional acetaminophen overdose was associated with an annual average of over 13,000 emergency department visits (1993 to 1999), 2,189 hospitalizations (1990 to 1999), and 100 deaths (1996 to 1998). Each event in these tallies is independent from the others. No information about associated hepatotoxicity was available for these cases. FDA reviewed the age distribution for acetaminophen overdoses. Medication use varies by age and different OTC drug products containing acetaminophen are available for different age groups. The age distribution of unintentional overdose cases varies among reporting databases and is shown in table 3. While emergency department visits are most prevalent among young people, this age group accounts for the lowest percentage of cases of mortality.

TABLE 3.—AGE DISTRIBUTION OF UNINTENTIONAL CASES

	Age (years)		
	<17	17—64	>65
Emergency department visit	74%	25%	<1%
Hospitalization	23%	70%	7%
Mortality	1%	75%	23%

Chronic liver disease has been postulated to be one of the factors that increases the risk of hepatotoxicity from acetaminophen. Using the multiple cause of death database, the presence of chronic liver disease among cases of unintentional and intentional overdose with mortality outcomes was examined (table 4).

TABLE 4.—PERCENT OF LIVER DISEASE REPORTED AMONG FATAL ACETAMINOPHEN OVERDOSE CASES, MORTALITY DATA, 1996–1998

Liver Disease Reported	Unintentional (N=235)	Intentional (N=1,010)
Chronic alcoholic	13%	1%
Other chronic liver disease	48%	8%

These findings suggest that chronic liver disease, in the presence or absence of alcohol, may be a risk factor for developing or increasing severity of hepatotoxicity among people with unintentional overdose. However, this analysis has limitations. If the presence of alcohol or alcohol use was not mentioned on the death certificate, alcohol related liver disease may be misclassified as other chronic liver disease. In addition, suicide cases may be misclassified as unintentional overdose to protect privacy.

FDA also presented an analysis of cases of hepatotoxicity associated with acetaminophen from the published literature. A MEDLINE search identified all U.S. case series containing at least 10 cases that had been published in the previous 10 years (Ref. 7). Eight case series were identified, four of which were derived exclusively from review of hospital medical charts. In two series, cases were obtained from hospitals, published cases, the FDA adverse event reporting system, and poison control center databases. One case series was from a registry of cases reported by hepatologists and other practitioners. One case series was obtained exclusively from a consortium of liver transplant centers. The number of cases per series ranged from 47 to 73. Two case series were largely pediatric, and the remaining six case series consisted of largely adult populations. Six of the case series reported gender, and in all six there was a preponderance of females. Intentionality was reported in five of the series. Table 5 shows the acetaminophen dose reported among in the unintentional overdose groups.

TABLE 5.—HEPATOTOXICITY SERIES: UNINTENTIONAL TOXICITY CASES

Case Series	Reported Daily Doses (g/day)	No. of Cases in Series	No. of Cases With Typical Daily Dose of ≤4g/day
Johnston	1.3–20	53	9
Schiodt	2–30	21	3
Zimmerman	“<4”–“>15”*	67	27
Whitcomb	3.5–25	21	None
Broughan	15.9 (mean)	8	None

* Dose was reported categorically.

Nine people in the Johnston case series and three people in the Schiodt case series ingested 4 g/day or less of acetaminophen. In the Zimmerman case series, 27 people used acetaminophen at the recommended dose, while 13 people used between 4.1 and 6 g/day. In the Whitcomb case series, 3 people used acetaminophen at, or slightly above, the recommended dose (i.e., 3.5 to 5 g/day in one case and 4 to 6 g/day in two cases). In the Broughan case study, none of the people took acetaminophen at the recommended dose.

Table 6 compares the number of deaths and serious outcomes for the unintentional and intentional groups. Intentionality could only be compared in the adult case series. Serious outcomes were defined as hepatic coma, acute liver failure, and liver transplant.

TABLE 6.—COMPARISON OF UNINTENTIONAL AND INTENTIONAL TOXICITY GROUPS: CASES OF DEATH OR SERIOUS OUTCOME

Case Series	Unintentional	Intentional
Johnston	17/53	NA*
Schiodt	11/21	4/50
Zimmerman	13/67	NA*
Whitcomb	5/21	NR**
Broughan	2/8	0/40

*NA: Not applicable; **NR: Not reported

FDA also presented case data from the TESS of the American Association of Poison Control Centers (AAPCC). At that time, AAPCC had a repository of over 27 million human poison exposures reported by over 60 participating centers. These centers covered over 90 percent of the U.S. population. Examination of AAPCC's annual reports from 1995 to 1999 of cases listing acetaminophen as the primary (first) agent showed acetaminophen to be the leading cause of poisonings. In 1999, acetaminophen-related calls represented 10 percent of all calls to AAPCC. There was a decrease in calls between 1995 (111,175) and 1999 (108,102). In 1999, nearly 50 percent of the poison victims associated with the calls received treatment in health care facilities. Two percent of these victims were reported to have developed major effects resulting from the poisoning, i.e., the signs or symptoms occurring as a result of acetaminophen exposure were life-threatening or resulted in significant residual disability. Fifty percent of the calls involved children and adolescents (19 years of age or under). Of the acetaminophen related calls regarding children under 6 years of age (approximately 40,000 calls), 22 percent occurred in children who ingested adult formulations of acetaminophen.

In 1995, there were at least 76 acetaminophen-related fatalities. By 1999, the number of acetaminophen-related fatalities increased to 141. Of these, 92 (65 percent) were a result of suicidal intent, 43 (30 percent) were unintentional, and the dosing intent for 6 (4 percent) was undetermined. Among the 43 unintentional fatalities, 28 (65 percent) took one OTC drug product containing only acetaminophen; 4 (9 percent) took one prescription product containing acetaminophen, and 11 (26 percent) took more than one acetaminophen product simultaneously. These AAPCC data may underreport the actual number of acetaminophen toxicity cases, because serious cases that go directly to emergency departments, and chronic users of acetaminophen, are unlikely to generate poison control center contacts.

FDA staff reviewed spontaneous reports of hepatoxicity in FDA's adverse event reporting system (AERS). U.S. cases were identified that had been received by FDA between January 1998 and July 2001 and in which one or more acetaminophen containing products had been ingested. Of 633 reports, 43 were duplicates. Another 283 were excluded for various reasons, primarily to exclude cases in which there was apparent suicidal intent. A total of 307 cases were included in FDA's analysis (25 pediatric and 282 adult cases).

Pediatric cases (of children age 1 day to 8 years) consisted primarily of males (approximately 70 percent), although gender was not reported in each case. Fifteen of the 25 pediatric cases involved severe, life-threatening liver injury. Of the 25 children, 10 died, 21 were hospitalized, and 2 required only treatment in an emergency department. The dose was estimated, based upon reported daily doses and weight, in 10 cases to be 106 to 375 milligrams/kilogram (mg/kg) per day. The recommended pediatric dose is 75 mg/kg/day (Ref. 7). Twenty-two of the children (88 percent) took only 1 product containing acetaminophen and 3 children (12 percent) took 2 or more products containing acetaminophen. Sixteen of the cases (53 percent) reported ingestion of a single ingredient acetaminophen product (APAP), 12 cases (40 percent) reported ingestion of an ''unspecified APAP product'' and the remainder of the cases reported ingestion of combination products. Of the single ingredient products, concentrated drops containing acetaminophen 100 mg/milliliter (mL) were reportedly ingested in seven cases.

In 20 of the pediatric cases, 1 or more medication errors were reported. In three cases, the wrong product was used, i.e., the concentrated drops instead of the children's acetaminophen liquid formulation. In four cases, incorrect measuring devices were used, i.e., teaspoonfuls instead of dropperfuls. Five cases reported instances of misinterpretation of labeled dosing guidelines or misinterpretation of instructions provided by a health care provider.

Sixty percent of the 282 adult cases (15 to 85 years old) were female and 229 required hospitalization. A total of 169 adults experienced severe, life-threatening liver injury; 124 of these patients died and 7 required a liver transplant. One hundred ninety-nine (71 percent) adults reported using an acetaminophen product for a therapeutic indication, primarily analgesia. In 74 (26 percent) cases, the indication for use was unknown, and in 9 (3 percent) cases, abuse of a narcotic-acetaminophen prescription product was reported. One hundred thirty-eight (38 percent) cases listed an unspecified acetaminophen product (unknown whether single ingredient or combination product and whether OTC or prescription), 122 (33 percent) cases involved the use of a narcotic-acetaminophen prescription product, and 76 (21 percent) cases reported use of an OTC single ingredient acetaminophen product. Approximately 25 percent of all adult cases reported use of more than one acetaminophen product. When more than one acetaminophen product was reported, a narcotic-acetaminophen prescription product in combination with an OTC product containing acetaminophen was used more often than any other combination of acetaminophen products. These cases also used higher doses than people who took only one acetaminophen-containing product.

Dosing amounts were reported in 132 of the 282 adult cases. The mean and median daily dose were 6.5 and 5 g, respectively, but ranged from 650 mg to 30 g/day. Where the dosage strength was known, 500 mg acetaminophen was reported most often. If a dose range was reported in the case, the mid-point was used in the analysis. If the strength was unknown, a 500-mg strength was assumed. Dosing in the 65 adults with severe liver injury from this group showed a mean and median daily dose of 7.1 and 6.23 g, respectively. Twenty-three of the 65 cases with severe liver injury reported doses of less than 4 g/day. People who used more than one acetaminophen product reported taking higher doses than people who took a single product. Qualitative dosing information was provided for an additional 43 (15 percent) cases with terms such as ''excessive doses'' or ''recommended doses.'' Two out of three of these cases suggest that greater than recommended doses were used.

Alcohol use was reported in 116 of the adult cases and the content of the reports was highly variable. Alcohol use in these cases was defined by FDA as alcoholism or alcohol abuse in 64 cases; regular, daily, or moderate use in 23 cases; occasional use in 10 cases; previous use in 6 cases; and 13 cases did not provide a description. Eighty-six (74 percent) of the 116 alcohol users developed severe liver injury. For those cases with acetaminophen dose information, the mean dose associated with toxicity was lower for alcohol users compared to nonalcohol users (table 7).

TABLE 7.—ACETAMINOPHEN DOSE AND ALCOHOL USE

Category of Liver Disease (Developed Post-Acetaminophen)	Alcohol Users (Mean Dose)	Non-Users (Mean Dose)
All (N=132)	5.6 g (N=53)	6.9 g (N=79)
Severe only (N=65)	6.0 g (N=38)	8.6 g (N=27)

A history of prior liver disease, or possible underlying liver disease, was reported in 70 cases. In at least 20 of these cases, the pre-existing liver disease was reportedly due to alcohol. Twenty-three people reported a history of, or possible, viral hepatitis. Among the 70 cases with pre-existing liver disease, 49 percent (70 percent) developed severe liver injury. Table 8 shows the dose that was associated with liver injury for cases with and without pre-existing liver disease. The first row includes all cases (all degrees of acute liver injury) that reported dosing information. The second row shows a dose comparison in people who experienced severe liver injury after acetaminophen exposure.

TABLE 8.—ACETAMINOPHEN DOSE AND LIVER DISEASE

Category of Liver Injury Associated With Acetaminophen Dosing	Cases With Pre-existing Liver Disease (Mean Dose)	Cases With No Pre-existing Liver Disease (Mean Dose)
All (N=132)	5.4 g (N=36)	6.8 g (N=96)
Severe only (N=65)	5.7 g (N=23)	7.8 g (N=42)

Some additional factors may have contributed to the development of hepatotoxicity in these adults. Use of other medications that may have contributed to hepatotoxicity was reported in 93 cases, including 63 cases that involved products that are labeled with warnings about potential hepatotoxicity. A small number of reports also mentioned the existence of concomitant malnutrition or decreased oral intake.

FDA noted that there are limitations to interpreting the AERS data. Dosing information may be unreliable. Acetaminophen products are generally taken on an as-needed basis, so the actual dose ingested can be difficult to ascertain. There is no certainty that all of the adult cases included in this analysis were unintentional. Stigma may be associated with reporting suicide, so cases may be reported as unintentional when they were intentional overdoses. In addition, spontaneous reporting systems cannot provide certainty that acetaminophen was the cause of any of the reported adverse event. Furthermore, incidence rates cannot be determined, because the numerator or denominator descriptors for the entire population are not available. Overall, spontaneous reports may be subject to significant underreporting.

The AERS cases strongly suggest that particular circumstances were likely to have led to hepatotoxicity. Some examples of those circumstances follow:

- Errors related to product confusion were mostly observed in pediatric cases. These errors primarily involved confusion over varying product formulations and strengths and use of inappropriate measuring devices.
- Many adults were taking more than the recommended dose of acetaminophen and, in some cases, use of multiple products likely contributed to hepatotoxicity.
- Risk factors, such as alcohol use or pre-existing liver disease, were identified and may have increased the risk for hepatotoxicity.

FDA presented NDAC with several questions that remained unaddressed by FDA's review:

- Do users lack knowledge of the potential for and symptoms of hepatotoxicity when using a product containing acetaminophen?
- Does malnutrition or fasting affect severity of hepatoxicity?
- What is the contribution of concomitant hepatotoxic medication?
- What additional factors place a small number of individuals at risk for severe hepatotoxicity at various dose levels (i.e., under, at, or above the recommended dose)?

It is clear that unintentional acetaminophen doses are associated with a large number of emergency department and hospital admissions and are related to an estimated 100 deaths each year. Using a number of data sources, analyses have shown that circumstances leading to acetaminophen hepatotoxicity are multifactorial. FDA asked the committee to consider the contribution of each of the following in producing unintentional overdose toxicity:

- *Product*—the ingredient is present in multiple prescription and OTC drug products and in multiple oral formulation strengths
- *Knowledge*—since a number of cases have occurred from multiple product use and overuse, there is likely a lack of knowledge about safe use of acetaminophen
- *Risk factors*—multiple data sources identify alcohol and underlying liver disease as risk factors that may increase the potential for hepatotoxicity.

Several drug manufacturers and other interested parties provided additional comment (Ref. 4):

- One major manufacturer of acetaminophen OTC drug products provided the following comments:

1. The precise incidence of harmful, unintentional overuse cannot be accurately determined from the current databases. Forty-eight million American adults use products containing acetaminophen in any single week; thus, harm is rare and is caused by inadvertent overdose.

2. There are limitations to the AERS data set for assessing hepatic events. Patients consistently underestimate the dose taken, and suicide attempts are often not recorded in patients who are found unconscious or intoxicated. The AERS reports found to be definitely associated with acetaminophen involved substantial overdose in individuals with self-abusive behaviors (e.g., alcohol abuse, bulimia). Causality cannot be ascertained using retrospective data, especially case reports, because the dose history is often inaccurate.

3. Formulations most commonly reported were OTC single-ingredient and prescription combination acetaminophen products. OTC acetaminophen combination products were rarely reported.

4. Serious hepatotoxicity occurs following substantial overdose (a single dose of approximately 15 g or use of approximately 12 g for multiple days).

5. FDA focused on unintentional misuse. The manufacturer noted they had implemented labeling changes to minimize the inadvertent overuse of analgesics. The manufacturer recommended an organ specific overdose warning.

- One manufacturer of ibuprofen OTC drug products provided the following comments:

1. In overdose situations, in any given year, the number of deaths for acetaminophen reported by the AAPCC is approximately 20 times that for ibuprofen.

2 . Unintentional overdose of acetaminophen can put consumers in a life-threatening situation due to the delayed onset of clinical symptoms of toxicity.

3. Advertising portrays acetaminophen as a totally safe ingredient. This portrayal may exacerbate use and contribute to the silent danger resulting from overdose.

- One individual presented a review of acetaminophen overdose admissions at the University of Pennsylvania hospital over a 4-year period. Fifty-four reports of acetaminophen overdose were found in the hospital's database. Of the 47 cases reviewed to date, 23 (50 percent) were reported to be unintentional overdoses. In 13 of these 23 cases, the reviewer was able to document that an attending physician or a psychiatry consultant concluded that there had been no suicidal intent.

1. The median and average doses were between 6 and 8 g/day. These values are above the recommended maximum daily dose (4 g/day), but below the 10 to 15 g dosage usually considered to be toxic. There were three cases of intentional overdose and three cases of unintentional overdose involving prescription acetaminophen products. OTC products were associated with 20 intentional and 21 unintentional overdoses. More patients in the unintentional overdose group used single ingredient acetaminophen (i.e., not a combination product). The primary reason reported for exceeding the maximum dose was to treat unrelieved pain. Many patients stated that they knew they were exceeding the recommended dose and did so because they thought it was a safe drug. Thirty percent of the patients used the drug over a period of greater than 7 days.

2. The unintentional overdose group experienced greater morbidity and mortality than the intentional overdose group. The peak acetaminophen levels in the intentional overdose group were much lower compared to the unintentional overdose group (27.8 versus 115.1 mg/L). The unintentional overdose group had much higher peak levels of Alanine aminotransferase (ALT) (5,193 versus 3,065 units/L), Aspartate aminotransferase (AST) (6,819 versus 2,742 units/L), International Normalized Ratio (INR) (4 versus 2.5), and total bilirubin (5.87 versus 1.87 mg/dL). Patient outcomes were generally worse in the unintentional overdose group, in which more patients failed to have resolution of the liver problems from the overdose (31 versus 4 percent). More patients were evaluated for transplants (11 versus 9), received transplants (2 versus 0), and died (3 versus 0) as a result of unintentional overdoses.

3. Compared to the intentional overdose group, the unintentional overdose group was more likely to have one or more of the following risk factors for acetaminophen toxicity: (1) Hepatic disease, (2) acute or chronic alcohol use, (3) drug abuse, or (4) concomitant disease. Ninety-six percent of cases in the unintentional overdose group had one or more of these risk factors, as compared to 70 percent in the intentional group. Acute and chronic alcohol use was present in 87 percent of unintentional overdose cases, as compared to 61 percent of the intentional overdose cases. Thus, the existence of risk factors may have an impact on toxicity in unintentional ingestions.

- One individual described the untimely death of her son who initially used a prescription product. When the prescription was finished, he purchased an OTC acetaminophen product and developed flu like symptoms. Another OTC acetaminophen product was subsequently used to treat the flu symptoms, resulting in hepatotoxicity. He was hospitalized and ultimately died.
- A professional pharmaceutical association encouraged consumers to carefully read product labeling. The association also recommended: (1) Clear labeling on all prescription and OTC drug products containing acetaminophen with special statements (e.g., ''contains acetaminophen'' on the product's PDP), and (2) pharmacists placing auxiliary labels on the vial of prescription drug products containing acetaminophen to identify this ingredient.
- A consumer public health organization described a consumer survey showing that many consumers do not recognize the potential for harm from: (1) Taking more than the recommended dose, (2) taking more than one product containing acetaminophen, or (3) inappropriately combining OTC and prescription drug products containing acetaminophen.
- A member of a national health foundation expressed concern that present marketing practices make it very difficult to find the standard 325-mg acetaminophen dosage unit. As a result, many consumers believe that the 500-mg product is the only one available. This failure to more broadly market the lower dose may contribute to increased adverse events. The individual

advocated educational efforts to help minimize this problem.

• A spokesperson for a national consumer organization described marketing limitations that are employed in the United Kingdom and intended to limit the potential for overdose. In September 1998, a restriction was placed on the number of tablets in acetaminophen packages for sale without a prescription. If sold in a supermarket, the maximum is 16 tablets per package. If sold in a pharmacy, the maximum is 32 tablets per package. There is also an overall restriction that a maximum of 100 tablets can be purchased at one time. The representative stated that early evaluations of this program have shown decreases in (1) total and severe acetaminophen overdoses and (2) overdoses related to liver transplant and death.

Several drug manufacturers and others submitted additional information for the committee to review (Ref. 5):

• One major manufacturer of acetaminophen OTC drug products provided the following comments (Ref. 5, Tab A):

1. AERS serves as a signal generating system for rare, unexpected adverse events in marketed products. It cannot be used to determine event rates, dose ingested, or patient dosing intent.

2. FDA's review of the AERS data set was intended to exclude obvious suicide, usually associated with very large drug ingestion. Thus, the reported dosage (which could only be estimated in 48 percent of the reports in the data set) is skewed significantly toward labeled directions for use, so cases may falsely appear to be consistent with inadvertent misuse.

3. The selective data in FDA's AERS review cannot be used to determine an acetaminophen toxicity threshold associated with any patient condition (i.e., concomitant drug, alcohol history, or pre-existing concomitant disease).

4. The quality of the 281 adult reports in AERS was evaluated by the manufacturer. The manufacturer concluded that 168 reports (24 percent) contained insufficient information to estimate the dose taken and 212 reports (88 percent) contained no liver pathology information. AST and ALT levels were not reported in 108 cases (38 percent). Only 61 reports (25 percent) had information about viral hepatitis testing and, of these, 29 reports were positive for hepatitis A, B, or C.

5. There are flaws in the derivation of FDA's theory that alcohol use, underlying/history of liver disease, and potentially the use of hepatotoxic concomitant medications, may increase susceptibility to acetaminophen-associated hepatotoxicity at unexpectedly low doses of acetaminophen. The manufacturer provided arguments that the existence of any of these factors in a case report may each inherently interfere, for various reasons, with establishing the correct assessment of a hepatotoxic dose of acetaminophen.

• An expert panel sponsored by a manufacturer of acetaminophen products reviewed all 281 adult reports in AERS and assigned a probability category relating the reported hepatic adverse events to acetaminophen exposure. In 3 reports the adverse event and exposure were considered ''definitely'' related, in 74 reports they were ''probably'' related, 47 reports they were ''possibly'' related, in 53 reports they were unlikely to be related, and in 27 reports they were definitely not related. Data were considered insufficient in 73 reports, 3 reports were not able to be evaluated and there was no consensus regarding the evaluation of 1 report.

Based on an assessment of several databases, a sponsor calculated that the worst case scenario of deaths from acetaminophen overdose is estimated to be 213 deaths per year (Ref. 5, Tab A).

• One manufacturer submitted an analysis of data from TESS (Ref. 5, Tab B). The manufacturer made the following conclusions from these data:

1. The majority of hepatotoxicity cases (65 percent of cases in the year 2000) involved use of one acetaminophen-containing analgesic product.

2. Acetaminophen-containing cough/cold medications were not a significant contributor to the total number of reports of acetaminophen associated hepatotoxicity (2 percent of cases in the year 2000).

3. Only 1 percent of the reported cases of hepatotoxicity in 2000 involved use of an OTC acetaminophen-containing cough/cold product concomitantly with other acetaminophen-containing product(s).

• One physician stated that 3 to 4 g of acetaminophen per day is the upper range of a safe dose (Ref. 5 Tab C). For an individual who is a regular user of alcohol, in a prolonged fasting or in a rapid weight loss program, the upper limit of a safe dose is unknown, but unlikely to not exceed 2 g of acetaminophen. No data were provided to support these observations.

• Several organizations urged that labeling be improved to provide clear directions about the appropriate doses for use and frequency of administration, especially for combination products (Ref. 5 Tab D). Consumers need to know the type of medication and the dose of OTC analgesic in every combination product to ensure safe and effective use.

3. NDAC Deliberations and Recommendations Concerning Acetaminophen

NDAC unanimously agreed that the evidence of risk associated with unintentional overdose of acetaminophen warrants FDA labeling changes, without awaiting the outcome of further studies. NDAC noted the following four major areas of concern:

1. Unintentional use of multiple acetaminophen containing products
2. Exceeding the recommended dose without recognizing the consequences
3. Improper dosing of infants
4. The unknown consequences of use in special populations, such as alcohol abusers.

NDAC recommended that the minimum requirements for change should include, for all products containing acetaminophen (including those available by prescription), the addition of distinctive labeling (highlighted or bold type) on the front panel or PDP to state that the products contain acetaminophen. FDA noted that the nonproprietary name of prescription drugs must appear in labeling in letters at least half the size of the brand name (see 21 CFR 201.10(g)(2)). NDAC recommended that a similar provision also be applied to OTC drug products containing acetaminophen, such as a standard to ensure prominence of important information. NDAC stated that consumers need to be informed that combining products containing acetaminophen can result in exceeding the recommended dose.

NDAC commented that there are insufficient data in the OTC setting on risk management, understanding consumer behavior, and the effectiveness of warnings on labels. This lack of data makes it difficult to determine which factors contribute to liver injury. Although these factors are not clearly understood, NDAC concluded that labeling revisions are needed to help minimize any risks.

• *Separate liver toxicity and alcohol warnings.* NDAC recommended a liver toxicity statement, separate from the alcohol warning, be added to the label so that the potential for liver toxicity would not appear to be applicable only to consumers who drink alcohol. NDAC noted that alcohol is not the only risk factor for hepatotoxicity. It was also felt to be important to warn consumers of the consequences of taking multiple products containing acetaminophen and that toxicity can be related to the total dose of acetaminophen taken during a given period of time. NDAC felt it would be more prudent to describe these risks in a separate warning to more fully inform consumers who do not abuse alcohol.

NDAC did not propose exact language. It was believed that it was important that the message not refer to ''overdose,'' but rather to a statement such as ''do not take more'' or ''do not exceed the recommended dose.'' NDAC believed that the term ''overdose'' would not be understood to be pertinent to consumers whose intent was to use the product safely. One NDAC member stated the term ''exceed'' is not part of consumers' common vocabulary and proposed that it would be more useful to inform consumers of a specific allowable total dose (e.g., not to take more than a specified number of tablets in a given period).

NDAC re-examined the currently required alcohol warning for acetaminophen, which states: ''Alcohol Warning: If you consume 3 or more alcoholic drinks every day, ask your doctor whether you should take acetaminophen or other pain relievers/ fever reducers. Acetaminophen may cause liver damage.'' NDAC inquired why ''three drinks'' were used in the alcohol warning. FDA responded that the number is from recommendations of the American Heart Association as to what constitutes excessive alcohol use. FDA stated that it recognized this may seem arbitrary and asked NDAC to provide further recommendations. NDAC questioned whether doctors are well-informed with proper information about the relationship between alcohol and acetaminophen use and whether educational efforts should also include educational efforts directed at health care professionals and consumers. NDAC was concerned about the lack of available data on which to base such advice, noting that there is a lack of information about how to determine the amount of alcohol that may be harmful to any individual. NDAC noted that reducing the risk of drug adverse events is the goal, but believed that more data are essential for them to make specific recommendations.

FDA asked NDAC to comment on whether the current maximum allowable daily dose of acetaminophen should be used by individuals consuming three or more drinks per day. One NDAC member agreed that was prudent to lower the dose, however, the majority of NDAC members believed that more information is needed before dose reductions could be implemented for this population. NDAC stated that, intuitively, a lower dose would decrease potential toxicity, but noted that there is a lack of information to support such labeling.

One NDAC member mentioned that although some evidence appeared to show an association of increased acetaminophen toxicity for patients with pre-existing liver disease, this finding is contrary to hepatologists' experience with acetaminophen. Generally, acetaminophen is considered safe for use in patients with liver disease, including people awaiting liver transplantation. Most hepatologists recommend acetaminophen for such patients, but at reduced doses, such as 2 g maximum in a 24-hour period. NDAC urged more studies, not only of risk factors, but of a plan to reduce risk.

• *Consumer and healthcare provider education*. NDAC concluded that FDA and manufacturers have a joint responsibility to reduce the occurrence of unintentional overdoses from acetaminophen. NDAC considered it essential that consumer and professional educational programs heighten awareness of the risk, particularly to certain populations. NDAC believed consumers are unfamiliar with the term ''acetaminophen'' and are more likely to know the brand names. NDAC stated that an effort should be made to create a broader educational campaign to inform consumers that acetaminophen is an analgesic, because most people are familiar with aspirin and not with acetaminophen. NDAC also suggested that the packaging, display, format, and wording recommendations in OTC drug product labeling should also be extended to all product advertisements, both in print and media, because advertising is an educational tool for many consumers.

NDAC stated that many physicians and pharmacists may not be aware of the risks of unintentional overdose. NDAC added that, along with consumer education, professional programs are important, because prescription products containing acetaminophen are widely used. Education of pharmacists would be needed to support the use of additional labeling information (stick-on labels, etc.) attached to prescription containers. NDAC stated that auxiliary labeling is critical to conveying information that the prescription product contains acetaminophen.

• *Pediatric dosage*. NDAC also expressed concern about the lack of standardized pediatric dosage information, especially for infants under 2 years of age. FDA stated that a separate rulemaking on this issue was in progress and will be addressed in a future **Federal Register** publication.

C. Aspirin and Other NSAIDs

On the second day of the meeting (September 20, 2002), NDAC considered safety issues related to the use of aspirin and other OTC NSAIDs. The primary areas for discussion included the potential for GI bleeding and renal toxicity from using these drugs. The prescription labeling for NSAIDs and the professional labeling for aspirin have warnings for GI bleeding and possible renal toxicity. Aside from the alcohol warning required on all OTC NSAID drug products, current OTC labeling does not have warnings about damage to specific organs.

1. Points for Discussion

FDA asked NDAC to consider the relative risks for GI bleeding and renal toxicity associated with OTC doses of NSAIDs, including aspirin, and to consider the following issues:

• How should the relative risk of GI bleeding or renal toxicity be described to consumers who use the maximum recommended daily OTC dose?
• Are there subpopulations of consumers who are at a greater risk for developing GI bleeding or renal toxicity with OTC doses?
• If additional warnings are recommended, should such warnings inform consumers about the risk, provide information on the at-risk populations, or provide expanded information to all consumers about symptoms of toxicity?
• Should the warnings that are currently in professional labeling for aspirin be conveyed to consumers as part of the OTC labeling?
• If yes, which warnings should be conveyed and how should they appear in OTC drug product labeling?
• Are any additional studies needed to evaluate subpopulations at risk for serious adverse events, labeling revisions, and any other issues?
• Should the labeling and packaging of these products more prominently state that the product contains aspirin or the specific NSAID?

2. Presentations and Submissions to NDAC

GI bleeding

FDA staff described cases of GI bleeding (spontaneous reports from AERS received by FDA between 1998 and 2001) in individuals who used OTC NSAIDS (including aspirin) as an analgesic and/or antipyretic (Ref. 8). The review was limited to cases that mentioned ''OTC'' in the narrative of the report. Any cases that appeared to involve prescription NSAID products were excluded. A total of 279 cases of

GI bleeding were included: 82 for aspirin and 197 for nonaspirin NSAIDs (i.e., ibuprofen, ketoprofen, and naproxen). The mean age was 59 years (ranging from 1 to 99 years). There were 138 (49.5 percent) males, 119 (42.7 percent) females, and 22 cases (7.9 percent) in which gender was not reported.

Cases that specified the location in the GI tract of the bleed included: Stomach (63 cases), duodenum (35 cases), unspecified upper GI site (15 cases), esophagus (13 cases), and rectum/colon/small intestine (9 cases). For nonaspirin NSAIDs, the median time to onset was 7 days. Time to onset was defined as the time between each person's first use of the drug and the time that bleeding occurred. For aspirin, time to onset was about 30 days. For both aspirin and nonaspirin NSAIDs, there was a wide range in time to onset. FDA reviewed the cases for common risk factors for GI bleeding that are recognized in the medical literature, including previous GI bleed or history of an ulcer, social history (alcohol or tobacco use), concomitant use of other drugs (NSAIDs, aspirin, anticoagulants, corticosteroids), use of doses higher than recommended, and advanced age (65 years and older). The results included 195 (70 percent) cases with at least one risk factor, 112 (40 percent) cases with more than one risk factor, and 81 (29 percent) cases with no risk factors apparent in the report. The most commonly reported risk factors were:

- Concomitant use of another NSAID or aspirin (50 percent)
- Advanced age (40 percent)
- History of a previous GI bleed (18 percent)
- Using NSAID doses above the recommended OTC dose (14 percent)
- Alcohol or tobacco use (5 percent).

In the aspirin cases, only one person was reported to have exceeded the OTC recommended dose. Of the 279 aspirin and nonaspirin cases, 212 people (76 percent) were hospitalized. Most recovered; however, 13 (4.7 percent) people died.

FDA indicated that these reports suggest that serious GI bleeding events can occur with NSAID and aspirin use at OTC dosage strengths, within the duration of use described in the OTC labeling.

Dr. Byron Cryer, of the University of Texas Southwestern Medical School, provided an overview of the GI risks from NSAID use (Ref. 9). His review was not limited to OTC dosing of NSAIDs and extended to all NSAIDs. He made the following points:

- Despite the overall decrease in prevalence of uncomplicated ulceration, the incidence of complicated ulcerations (specifically, bleeding ulcers) has increased in the past few years. This is likely due to increased NSAID exposure, possibly from OTC use. Gastric ulceration (15 percent prevalence) associated with NSAIDs (at recommended doses) is much more common than duodenal ulceration (5 percent prevalence). Clinically relevant ulceration (i.e., ulcers that present with bleeding), has a prevalence of approximately 2 percent.
- A history of prior bleeding, anticoagulant use, corticosteroid use, and increasing age are factors that increase the risk of bleeding associated with NSAIDs (Refs. 10 through 13).
- The prevalence of upper GI bleeding from aspirin use is different than for nonaspirin NSAID use. A study evaluated the prevalence of aspirin and nonaspirin NSAID use in 421 patients evaluated for upper GI bleeding (Ref. 14). Patients were asked at the time of hospital admission whether they were using prescription or OTC products and whether they were using nonaspirin NSAIDs or aspirin. The results show that 42 percent of GI bleeding was associated with aspirin use. Fourteen percent of patients admitted to the hospital were using prescription NSAIDs and 9 percent were using OTC NSAIDs.
- A recent study suggests that up to 80 percent of people with GI bleeding are taking an NSAID, primarily low dose aspirin (Ref. 15). The relative risk (RR) (i.e., the probability of an event in the active group divided by the probability of the event in the control group) was 2.4 for a low/medium NSAID dose and 4.9 for a high dose.
- Another study compared the use of OTC aspirin, ibuprofen, naproxen, and acetaminophen between two case groups, one group who experienced GI bleeding events and a control group of cases who did not experience GI bleeding (Ref 16). The patients in the GI bleeding group were more likely to be taking aspirin or OTC NSAIDs prior to the GI bleeding event than were patients in the control group. The extent of use of acetaminophen was comparable between the two groups. This study included people with chronic disease and chronic analgesic exposure, providing information about a subgroup of patients that may be different from relatively healthy individuals exposed to OTC analgesics for acute, short-term, or intermittent use.
- The risk of combining low dose aspirin with nonaspirin NSAIDs was examined in a large national cohort study in Denmark (Ref. 17) in which 27,000 people were given 100 to 150 mg aspirin every day. The study showed that there is an increased risk of upper GI bleeding in patients who combine low dose aspirin and other NSAIDs compared to the incidence of GI bleeding events in the general population (RR 5.6; 95% confidence interval (CI) 4.4—7.0). The risk of GI bleeding among patients taking more than one NSAID was approximately double the risk among patients taking aspirin alone.
- In an American College of Gastroenterology Bleeding Registry (Ref. 18), cases of GI bleeding were assessed for use of aspirin or OTC NSAIDs and concomitant use of alcohol. These cases were compared to data from a control cohort of cases with no GI bleeding. The results suggest an increased risk of bleeding when alcohol is used while taking an OTC NSAID (odds ratio 4.47; 95 percent CI 2.73 -7.32) compared to the use of either alcohol or OTC NSAIDs alone (odds ratio for alcohol alone 2.07; 95 percent CI 1.48—2.88/ odds ratio for NSAID alone 2.76; 95 percent CI 2.03—3.74). Dr. Cryer noted that the results of the study were confounded because 12 percent of the subjects in the registry had gastric or esophageal varices (enlarged veins). He suggested that there may be an increased risk particularly to patients with an extensive history of alcohol use who are exposed to OTC NSAIDs.
- Another report (Ref. 19) evaluated subjects who regularly or occasionally used aspirin or ibuprofen and compared the RR of GI bleeding between those who never used alcohol and those who used alcohol. The results suggest a modest increase in RR of upper GI bleeding in alcohol users; however, the statistical analyses did not provide a strong distinction between alcohol users and non-users.

Dr. Marie Griffin of Vanderbilt University discussed additional information obtained from large population studies regarding GI complications associated with the use of NSAIDs (Ref. 20). She made the following points:

- The risk of ulcer disease was shown to increase 10-fold in older people and this risk is increased further by use of NSAIDs (Ref. 21). This ulcer hospitalization study found the absolute risks to increase from approximately 4 hospitalizations per 1,000 person-years in older non-users of NSAIDs to approximately 16 hospitalizations per 1,000 person-years in older users of NSAIDs. In general, consumers taking NSAIDs for a year at moderate doses have about a 1 to 2 percent chance of being hospitalized with a complication.

• The risk of hospitalization for peptic ulcer disease (PUD), and risk of GI complications, increases with increasing NSAID doses (Refs. 20, 22, and 23).

• Data obtained from the Tennessee Medicaid database indicate that the greatest absolute risk for hospitalization for PUD occurs in the first 30 days of NSAID use among patients older than 65 years of age (Ref. 23). For older patients, there were 26.3 hospitalizations for PUD per 1,000 NSAID users per year within 30 days of starting NSAID therapy, 20.9 hospitalizations between 31 and 180 days of use, and 16.2 hospitalizations for use longer than 180 days. In contrast, there were 4.2 hospitalizations per 1,000 NSAID non-users per year. Overall, people of all ages have a 1 to 2 percent chance of being hospitalized with a complication when using NSAIDs for over a year at moderate doses.

• Surveys in the 1980s showed that approximately 1 to 3 percent of people 65 and older take a prescription corticosteroid drug. The concomitant use of an OTC NSAID with a corticosteroid increases the risk of ulcer complication 13- to 15-fold over NSAID non-users. The ulcer hospitalization rate in people using both drugs was about 5 to 6 per 100 people per year.

• In the 1980s, 1 to 2 percent of the elderly population were co-prescribed warfarin (an anticoagulant drug) and NSAIDs. The risk of GI bleeding increased by 12 fold in patients who used both therapies compared to NSAID non-users. The risk of hospitalization for GI bleeding is approximately 3 per 100 per year in patients who use warfarin and NSAIDs.

Several drug manufacturers and others provided additional comments (Ref. 4):

• One drug manufacturer of ibuprofen OTC drug products stated that the OTC ibuprofen daily regimen is 1,200 mg/day versus 2,400 to 3,200 mg a day for prescription use. Unlike acetaminophen, the OTC directions clearly state to take one 200-mg tablet and, only if necessary, a second tablet may be taken. OTC use of NSAIDs is limited to a maximum of 10 days, whereas prescription use is chronic.

• One drug manufacturer stated that each analgesic ingredient requires appropriate labeling for its pattern of use and that it is inappropriate to label OTC products with risks associated with chronic, long-term prescription dosing. The prescription and OTC uses of NSAIDs are distinct and these two dose levels have different risk-benefit profiles. The OTC use is short-term for pain relief and fever reduction, with a low risk. Results of prevention studies of secondary and acute myocardial infarction have shown that for people whose 10-year risk of having a subsequent cardiovascular event is between 20 and 50 percent, the cardiovascular benefit of aspirin far outweighs the risks. The relative and absolute risks of aspirin are low.

• One consumer advocacy organization stated that GI bleeding caused by NSAIDs (reference to prescription or OTC products was not specified) is now recognized as the most common serious adverse drug reaction in the United States and accounts for as many as 16,000 deaths a year. The organization requested that: (1) Product labeling contain a clear organ-specific warning about GI bleeding, (2) packaging include consumer education on GI bleeding, such as a leaflet inside the packaging listing specific symptoms and factors associated with increased risk, and (3) a separate warning, about increased risk of GI bleeding associated with alcohol use, be added and directed at consumers who drink some alcohol.

Several drug manufacturers submitted additional information (Ref. 5):

• One manufacturer stated that the safety profile for OTC ibuprofen, generated over 18 years of OTC use by millions of consumers, indicates that the current labeling has been effective in informing consumers of the appropriate use of the drug (Ref. 5, Tab E). The manufacturer stated that FDA has received an average of 18 reports per year of GI perforations, ulcers, or hemorrhage associated with OTC use.

• One manufacturer stated that no antidote is available for aspirin or ibuprofen overdose (Ref. 5 Tab F). Acute overdose and chronic aspirin toxicity are associated with significant morbidity (as high as 25 percent). If acetaminophen was restricted, aspirin and other NSAID use would increase. Available data suggest that more people would die from aspirin and other NSAID-related GI bleeding. The net public health impact of changing labeling for OTC IAAA drug products should be taken into consideration in the formulation of any regulatory policy.

• One manufacturer stated that the risk patterns associated with use of acetaminophen and aspirin are distinct from one another and support different product labeling for the various ingredients in OTC IAAA drug products (Ref. 5, Tab G). There are no data to support the view that a balanced warning for acetaminophen will cause a significant number of patients to switch to another OTC analgesic. Available data indicate that both the absolute number, and the rate (per billion tablets sold), of fatalities associated with acetaminophen overdose in the United States significantly exceeds the corresponding figures for aspirin overdose.

• One manufacturer stated that the occurrence of GI adverse events with naproxen/naproxen sodium at single low dose (220 mg), at multiple doses (up to 880 mg), and as needed OTC doses, are comparable to the occurrence associated with use of placebo (Ref. 5, Tab H). Nausea, dyspepsia, and vomiting are the most common GI adverse events.

Renal effects

FDA staff presented information about the potential for OTC NSAIDs to cause nephrotoxicity (Ref. 24) and made the following points:

• NSAID-induced nephrotoxicity at prescription doses is characterized by fluid and electrolyte disturbances leading to sodium retention, edema (accumulation of watery fluid in cells and tissues), and hyperkalemia (high concentration of potassium in the blood). These drugs can also cause blood pressure to increase. The majority of healthy people who are exposed to therapeutic doses of NSAIDs for a limited time tolerate these drugs without untoward renal effects. Some subsets of the population are more susceptible to potentially life-threatening nephrotoxicity (e.g., acute renal failure and serious fluid and electrolyte disorders), including people who have volume depletion, underlying kidney disease, congestive heart failure, or liver dysfunction with ascites (accumulation of fluid in the peritoneal cavity of the abdomen), and the elderly. The use of NSAIDs in the last trimester of pregnancy has been associated with significant neonatal nephrotoxicity.

• Ideally, an assessment of the nephrotoxic risk associated with OTC NSAIDs should rely on data derived from prospective, randomized, placebo-controlled and adequately powered studies in healthy, as well as at-risk, populations. However, such data are not available. In 1995, the National Kidney Foundation (NKF) convened a group of investigators and clinicians to consider and develop recommendations on the issue of analgesic-related kidney disease. The database used to make their recommendations was comprised of 556 articles published in the medical literature on aspirin, acetaminophen, aspirin-acetaminophen combinations, and NSAID-related nephrotoxicity. The NKF recommended ''[t]here should be an explicit label warning people taking over-the-counter NSAIDs of the potential renal risks of consuming the drugs.''

• FDA staff identified all cases in the AERS database reporting acute renal failure, chronic renal failure, and renal failure in association with the use of OTC doses of NSAIDs. The time period reviewed was from the OTC approval date for ibuprofen (1984), naproxen sodium (1994), and ketoprofen (1995) through August 10, 1999. FDA's review included cases that specified that either OTC dosages and/or an OTC NSAID product had a role in the adverse reaction. People with pre-existing conditions were not included. Table 9 shows the number of cases of renal failure reported, including 94 cases for ibuprofen, 26 cases for naproxen sodium, and 1 case for ketoprofen. Fifty-six people who used ibuprofen required hospitalization; nine needed dialysis; and nine died. Renal failure occurred within less than 7 days of exposure to the drug. Fourteen ibuprofen cases were within the pediatric age group. For naproxen sodium, 25 people were hospitalized, 4 required dialysis, and 3 died. The single ketoprofen case was hospitalized.

TABLE 9.—FDA AERS CASES OF RENAL FAILURE AT OTC DOSES OF NSAIDS

	Ibuprofen	Naproxen Sodium	Ketoprofen
Reporting Period	15 years	5 years	4 years
Renal Failure Cases—Total	94	26	1
Renal Failure Cases—Adult	80	26	1
Renal Failure Cases—Pediatric	14	0	0

Next, Dr. Griffin discussed renal complications from the use of NSAIDs obtained from large population studies (Ref. 20). A study of patients 65 years of age and older in the Tennessee Medicaid database (Ref. 23) included the following information:

• Eighteen percent of the patients presenting with acute renal failure used NSAIDs at either prescription or OTC doses. A RR for acute renal failure in NSAID users was calculated to be 1.58 compared to NSAID non-users.

• The RR for acute renal failure with ibuprofen was dose related. The RR of acute renal failure associated with use of daily doses of less than 1,200 mg was approximately 1 compared to use of no ibuprofen. Daily doses of 1,200 to 2,400 mg (above the OTC range of 1,200 mg per day or less) increased the RR of renal failure to 1.89.

• The greatest risk for renal failure was within the first 30 days of therapy with an NSAID. The RR was 2.83.

Several drug manufacturers and others provided additional comments (Ref. 4). One drug manufacturer stated that the incidence of renal failure and other serious renal events are rare with use of either prescription or OTC ibuprofen. One drug manufacturer claimed that there was an average of approximately five reports of renal failure per year from FDA's safety surveillance data. The manufacturers also suggested that serious renal events are almost always reversible, even in the elderly or chronically ill. It was stated that serious renal events following NSAID therapy almost always occur in patients with pre-existing renal dysfunction, congestive heart failure, or compromised hepatic function.

Several drug manufacturers submitted additional information suggesting that (Ref. 5):

• The number of renal side effects that have been reported with OTC ibuprofen are minimal (less than two cases of renal failure per year), confirming that the drug is well-tolerated.

• The renal safety profile of naproxen/naproxen sodium is consistent with other currently marketed NSAIDs with which it has been compared. Even at prescription doses, reports of adverse events involving the kidney have been rare.

3. NDAC Deliberations and Recommendations Concerning Aspirin and Other NSAIDs

• *GI bleeding*. NDAC members agreed that NSAIDs increase the risk for GI adverse events. The risk appears to be related to dose. Aspirin, even at lower doses, has some GI risks. However, the benefits from use far exceed any risks. NDAC stated that low dose aspirin should be available OTC for the elderly for cardiovascular prophylaxis as described in the professional labeling. NDAC believed that the absolute risk of GI bleeding from use of low dose aspirin is probably comparable to the risk from using aspirin at analgesic doses. Therefore, NDAC recommended that the information on risk provided in OTC aspirin labeling to consumers need not be categorized by dose.

NDAC agreed that the data support a separate and distinct stomach bleeding warning and suggested that the heading ''stomach bleeding warning'' be used. NDAC recommended that this heading be in bold type and that the warning be included as one of the first warnings in labeling along with the Reye's syndrome warning. One NDAC member suggested the heading ''bleeding alert'' because aspirin and the other NSAIDs can cause more than stomach bleeding, and it is very important to stop using an OTC IAAA active ingredient when signs of bleeding are present (e.g., vomiting blood or bloody or black stools). Most NDAC members felt that stomach bleeding was the major safety problem and should be the focus of the warning statement.

NDAC found that low dose aspirin, combined with another NSAID, will increase the risk for GI bleeding two to four times more than use of an NSAID alone. From the data reviewed, enteric-coated or buffered aspirin preparations do not change the risk associated with use of multiple NSAID products. NDAC recommended that the labeling for aspirin and other NSAIDs include a stomach bleeding warning advising consumers of the risks of taking more than directed or using more than one NSAID. In addition, NDAC concluded that the warning should advise consumers that the risk is greater for individuals who are over 65 years of age, have a history of ulcers, stomach, or bleeding problems, or are taking steroids or anticoagulants (blood thinners).

A majority of NDAC members believed that there were insufficient data and a lack of a scientific rationale to support a warning about using alcohol while taking NSAIDs. Recognizing that the data are mixed and not conclusive, the members believed that a majority of the trials reviewed failed to show a direct and convincing association with alcohol. NDAC urged FDA to remove the existing alcohol warning from labeling and encouraged

FDA to examine future cases of GI bleeding in individuals who consume alcohol and are alcohol abusers to explore the impact of concomitant use of NSAIDs.

- *Renal effects*. NDAC considered particular groups at risk for short-term adverse renal consequences from NSAID use. While NDAC agreed that small increases in blood pressure of limited duration (e.g., several days) in normotensive or hypertensive individuals is not a significant risk, the labeling for NSAIDs should warn about the potential association of long-term use and renal failure in individuals who have high blood pressure, heart or kidney disease, use diuretics, or are over 65 years of age. NDAC agreed with the OTC labeling proposed for ibuprofen in the **Federal Register** of August 21, 2002, including the warning to ask a doctor before use in the presence of high blood pressure, heart or kidney disease, if also using a diuretic, or if over 65 years of age.

Labeling. NDAC members agreed that labeling continues to be a major factor in promoting the safe and effective use of OTC NSAID products. NDAC expressed concern that consumers do not read labels adequately and are often unaware of the names of the medicines that they are taking. This lack of awareness is especially problematic for people who are also taking prescription medicines concomitantly with OTC drug products. NDAC expressed concern about the ability to communicate meaningful information in the confines of a small package label, especially to the elderly. NDAC suggested that patient information be included in a package insert to provide expanded information beyond what could be presented clearly on a small label.

NDAC strongly recommend that the term ''NSAID'' be used throughout OTC product labeling. The term NSAID is becoming more widely recognized and is often found in drug information leaflets. NDAC suggested that meaning of the NSAID acronym could be spelled out somewhere on the label. Additionally, NDAC recommended that this term should be included on the front panel or PDP, advising consumers that the product contains an NSAID, especially if the product is a combination containing an NSAID. Finally, NDAC members agreed that there is a need for additional label comprehension studies to identify ways to improve communication with consumers.

IV. FDA's Review of Additional Data and Information

A. Pre-existing Liver Disease as a Risk Factor for Acetaminophen Hepatotoxicity

Following publication of the OTC IAAA TFM in 1988, FDA received comments urging adoption of a warning to advise consumers with pre-existing liver disease against using acetaminophen, unless directed by a doctor. The comments cited reports in the medical literature concerning toxicity in persons with liver disease. Other comments asserted that there is no evidence to warrant a warning. At that time, FDA believed the evidence was insufficient to propose a warning. NDAC briefly discussed this issue in September 2002, but concluded that there were not sufficient data to make specific recommendations.

FDA has reconsidered its previous position on this issue and now believes that the current evidence supports a warning. At the NDAC meeting, FDA reported information derived from mortality data of acetaminophen overdose (intentional and unintentional). Among patients with chronic alcoholic or other chronic liver disease, death associated with unintentional acetaminophen overdose was reported far more frequently than in association with intentional overdose (see table 4 of this document). In the series of 282 AERS cases of hepatoxicity associated with acetaminophen use presented at the meeting, 70 cases were reported as having underlying liver disease.

Metabolic activation and deactivation are involved in acetaminophen elimination (Ref. 25). At a therapeutic dose, the majority (greater than 90 percent) of acetaminophen combines with glucuronic acid (the major metabolic pathway for adults) and sulfuric acid (the major metabolic pathway for children). There is also a second, minor metabolic pathway in which a small portion of acetaminophen undergoes cytochrome P450 phase I metabolism to the toxic acetaminophen metabolite, N-acetyl-p-benzoquinoneimine (NAPQI). This toxic metabolite is normally inactivated through combination with hepatic glutathione (GSH). Any factors that can change GSH availability (by decreasing synthesis and/or increasing utilization or interfering with the conjugation enzyme) could potentially influence the hepatotoxicity of acetaminophen. Any factors that disturb the balance between these two metabolic pathways may affect the amount of acetaminophen metabolized by each pathway. After the NDAC meeting, FDA conducted a literature review (1966 to January 2003) and determined that the following factors may place patients with pre-existing liver disease at a greater risk for acetaminophen toxicity (Ref. 26).

- Depletion of hepatic GSH has been found in both alcoholic and nonalcoholic liver diseases, suggesting that the diseased liver may have less capacity to inactivate the toxic metabolite of acetaminophen. (Refs. 27 through 34)
- The hepatic cytochrome P450 enzyme, P450–2E1, metabolizes acetaminophen to the toxic metabolite that causes hepatotoxicity. Expression of hepatic P450–2E1 tends to increase in stable chronic liver diseases.
- Studies have shown that the clearance of acetaminophen from the body is impaired in people with chronic liver disease (Refs. 35, 36, and 37). The disease status of the liver alters drug metabolism and drug metabolites made by each metabolic pathway (Refs. 38 and 39).
- In chronic liver disease, hepatic glucuronide and sulfate conjugation are decreased (Refs. 40 through 43).
- Significant impairment of total hepatic P450 expression is found only in people with severe liver disease (hepatitis with liver failure and decompensated cirrhosis) (Ref. 38). Recent studies indicate that different types (viral, chemical, or immunological factors) and/or states (acute, chronic, or severe) of liver disease selectively influence expression of different P450 isozymes.
- Chronic alcohol use significantly induces hepatic P450–2E1 and increases this enzyme's ability to metabolize acetaminophen to NAPQI (Ref. 44). In other types of human liver disease, changes in expression and activity of P450–2E1, as well as other P450 isozymes (1A2 and 3A4) involved in acetaminophen metabolism, are variable (Refs. 38, 45, 46, and 47). Both human and animal studies show that hepatic P450–2E1 expression is significantly increased in a nonalcoholic fatty liver (Refs. 48 and 49).

Few clinical trials directly assess the hepatotoxicity of acetaminophen in people with nonalcoholic liver disease. One double-blind, placebo controlled, crossover study was conducted in 20 people with stable chronic liver disease (including Laennec's cirrhosis, alcoholic liver cirrhosis, primary biliary cirrhosis, or chronic hepatitis) (Ref. 50). The subjects received 1 g of acetaminophen or placebo every 4 hours (a total of 4 g/ day) for 13 days. The author stated that there were no significant changes in laboratory tests or clinical status in the acetaminophen and placebo treatments. The author concluded that underlying liver disease does not increase patient sensitivity to the hepatotoxic effects of acetaminophen at a therapeutic dose. Because of the small sample size and crossover study design, FDA believes this study is inadequate to make any conclusions regarding the risk for acetaminophen hepatotoxicity in patients with chronic liver disease.

In summary, the single prospective clinical study found by FDA in the literature that evaluated the susceptibility of the diseased liver to acetaminophen toxicity was not definitive. Analyses of an acetaminophen overdose database and a review of the AERS case reports suggest, however, that people with a history of liver disease may have increased susceptibility to acetaminophen-induced hepatotoxicity. In addition, the depletion of hepatic GSH has been found in both alcoholic and nonalcoholic liver diseases, suggesting that the diseased liver may have less capacity to inactivate the toxic metabolite of acetaminophen. Expression of hepatic P450–2E1, a major enzyme for metabolic activation of acetaminophen, tends to be increased in stable chronic liver diseases, particularly in nonalcoholic fatty liver disease. FDA believes that these data collectively establish that it is necessary to alert patients with chronic liver disease that they may be at risk for developing acetaminophen hepatotoxicity, as an important factor in the safe and effective use of acetaminophen products.

B. Updated Literature About Acetaminophen Hepatotoxicity

The Acute Liver Study Group recently published an update of the prospective data in patients diagnosed with ALF at 22 tertiary care centers. Over a 6-year period from January 1, 1998, to December 31, 2003, 662 patients fulfilled standard criteria for ALF. Of these cases, 275 were attributed to acetaminophen hepatotoxicity. The criteria for attribution to acetaminophen included one or more of the following: (1) A history of potentially toxic acetaminophen ingestion (> 4 g/day) within 7 days of presentation; (2) detection of any level of acetaminophen in the serum; or (3) a serum alanine aminotransferase (ALT) > 1,000 IU/L with a history of acetaminophen ingestion, irrespective of acetaminophen level (Ref. 51).

Of the 275 cases attributed to acetaminophen, the following observations were made:

- 48% were designated as unintentional injury, 44% were designated as an intentional injury and 8% could not be classified to either group;
- 147 (53%) used an OTC product, including 6 of 147 who used more than one OTC product at the same time and 41 of 147 who also used a prescription combination product;
- 120 (44%) reported use of a narcotic/acetaminophen combination;
- 55% had a history of alcohol use and 35% had a history of alcohol abuse;
- 108 (39%) also used a antidepressant;
- 65% survived without transplant; and
- 22% used more than one acetaminophen product.

The authors also compared characteristics between those classified as unintentional versus intentional liver injury. Females predominate in both groups. The clinical outcomes are similar for both groups. Narcotic/acetaminophen use was more prevalent in the unintentional injury group (63% vs. 18%). The unintentional injury group had a greater percentage with stage 3-4 hepatic coma score at admission and at peak during the hospitalization. FDA believes that these data support the previous NDAC conclusion that acetaminophen hepatotoxicity is an important public health consideration and that additional labeling is necessary for it to continue to be generally recognized as safe and effective.

C. Aspirin and Other NSAIDs

1. GI Bleeding

Following the NDAC meeting, FDA reviewed additional data and information related to the use of OTC NSAIDs and GI bleeding.

- One individual asserted in a citizen petition that incomplete information about aspirin reaches consumers and increases the danger that aspirin will be misused with serious consequences (Ref. 52). The citizen petition suggested that additional labeling for aspirin should be implemented without delay to state: ‘‘CAUTION: This product can cause severe hemorrhaging and should not be taken for more than five days except under the supervision of a physician. When used for fever, if symptoms persist more than three days, consult a physician.’’
- NSAIDs are being used by an estimated 17 million Americans on a daily basis (Ref. 53). The estimated rate of serious adverse events is about 1 percent for clinically significant GI bleeding in the first 3 months of use (Ref. 54). NSAID use is so widespread that NSAID-induced gastropathy has been identified by some as one of the most prevalent, serious drug toxicities in the United States (Ref. 55). NSAID-associated serious GI complications are estimated to result in over 200,000 hospitalizations per year in the United States. Although these adverse event rates are for prescription and OTC NSAID formulations combined, there is a significant prevalence of OTC NSAID use among people presenting to hospitals with upper GI bleeding (Ref. 56). The rate of consumption of OTC NSAIDs by consumers is estimated to be as much as seven times that of prescribed NSAIDs (Ref. 54).
- The American College of Gastroenterology guideline for treatment and prevention of NSAID-induced ulcers indicates an increased risk of NSAID-associated GI complications for people greater than 60 years of age (Ref. 56). A United Kingdom (UK) population-based, retrospective case-control study evaluated the risk of various NSAIDs (Ref. 10). The study reported a RR of 3.7 for upper GI bleeding (UGIB) and GI perforation in people under 60 years old exposed to NSAIDs, 13.2 in people 60 years and older exposed to NSAIDs, and 2.8 in people 60 years and older not exposed to NSAIDs.
- FDA analyzed a series of studies that used the Medicaid population in Tennessee (Refs. 12, 13, 56, 57, and 58). These case-controlled retrospective studies were based on hospitalizations for GI bleeds. The study population totaled 103,954 individuals, about 15 percent of Tennessee's elderly population, with 209,066 person-years of followup. There were 1,371 hospitalizations for PUD. These studies found increased risk of GI bleeds in people who were:
  - Over 65 years old (RR of 4.7),
  - Taking an increased NSAID dose (RR of 2.8 for the lowest dose vs. RR of 8 for the highest dose category), or
  - Taking concomitant corticosteroid (RR of 4.4) or anti-coagulant (RR 12.7) drug products.

In addition, the risk of GI bleeds among people taking NSAIDs was greatest within the first 30 days of use (RR of 7.2).

- A multicenter, case-control study of 550 people with UGIB admitted to a hospital with bloody stools or vomiting blood and 1,202 controls identified from census lists, compared risks of major GI bleeding for plain, coated, and buffered formulations of low-dose aspirin (Ref. 59). Each of these types of low-dose aspirin formulations (less than 325 mg per day) had about a 2.5 to 3 times increased risk of major UGIB.

- A double-blind, randomized, placebo-controlled, ulcer prevention study in 8,843 people with rheumatoid arthritis identified several risk factors for upper GI complications from NSAID use: (1) Age 75 years or older (odds ratio 2.48), (2) prior peptic ulcer (odds ratio 2.29), (3) prior GI bleeding (odds ratio 2.56), and (4) history of cardiovascular disease (odds ratio 1.84) (Ref. 60).
- A case control study of 1,122 subjects admitted consecutively for UGIB to four hospitals in Spain and 2,231 controls from the same geographic area, showed that a prior history of UGIB is a risk factor (odds ratio 3.7) for UGIB in people who used NSAIDs (Ref. 61).

In summary, results of several large-scale clinical studies, conducted in the United States and worldwide, have established that use of OTC NSAIDs is an important risk factor for serious GI adverse events, especially bleeding. The risk is higher for people age 60 or older, who have a history of stomach ulcers or bleeding problems, or who use corticosteroids or anticoagulants.

2. Renal Effects

NSAIDs decrease renal prostaglandin production, which may result in acute reduction in renal blood flow and glomerular filtration, leading to fluid retention, edema, and elevation of serum creatinine (Ref. 62). Marked reduction in renal blood flow may result in renal failure.

NSAID use may also result in higher than normal levels of potassium in the bloodstream. This occurs most commonly in people with diabetes mellitus or mild to moderate renal insufficiency as well as in people taking beta-blocker, angiotensin-converting enzyme inhibitor, or potassium-sparing diuretic drugs.

By inhibiting the production of vasodilatory prostaglandins, NSAIDs may decrease renal blood flow and the rate of glomerular filtration in subjects with congestive heart failure, liver failure with ascites, chronic renal disease, or those who are hypovolemic (abnormal volume decrease of circulating fluid (plasma) in the body) (Refs. 63, 64, and 65).

a. Pediatric population. The medical literature includes sporadic reports of acute renal failure in pediatric subjects taking ibuprofen within the OTC dose range, including the following cases:

- One article describes three cases in children 5-, 6.5-, and 7.5-years-old in which ibuprofen treatment led to varying degrees of renal failure (Ref. 66). Two subjects with dehydration and pre-existing renal problems were prescribed ibuprofen for the treatment of fever due to acute illness. Both had a recovery of renal function on withdrawal of the drug. The third child (a 7.5-year-old girl) developed progressive chronic renal failure. She had underlying hyper Ig-E syndrome and was treated with a single dose of ibuprofen 5 mg /kg for fever due to severe pulmonary infection. Her illness was also complicated by moderate dehydration. Her renal biopsy showed evidence of kidney damage consistent with loss of blood circulation.
- Ibuprofen-induced acute renal failure was reported in a 9-month-old girl (Ref. 67). A family practitioner treated the infant for diarrhea, vomiting, and fever. She was given oral rehydration therapy and acetaminophen and was sent home. Symptoms persisted for 48 hours and the acetaminophen was changed to ibuprofen 50 mg (5 mg/kg/dose) three times a day. Seven doses of ibuprofen were given over a 40-hour period, but the child's clinical state deteriorated. She was admitted to an emergency facility 18 hours after the last dose with a creatinine concentration of 2.1 mg/deciliter (dL). For the first 12 hours after admission, the infant's kidneys failed to secrete urine in spite of receiving adequate hydration and an intravenous diuretic (furosemide). The creatinine concentration increased to 2.4 mg/dL. Renal function slowly recovered; 4 days after admission her creatinine was 0.9 mg/dL and 3 weeks later was 0.5 mg/dL. Clinical diagnosis was kidney damage secondary to ibuprofen use in a dehydrated child.
- Primack, et al. reported acute renal failure with use of ibuprofen in an 11-year-old boy (Ref. 68). The child was diagnosed with possible sinusitis and given an antibiotic; on the third day symptoms worsened with associated headaches, fatigue and anorexia, and his serum creatinine was 0.7 mg/dL. The antibiotic was continued and ibuprofen 200 mg was added, alternating with acetaminophen every 4 hours for fever. He received a total of 24 200-mg ibuprofen tablets during the 12 days prior to hospitalization. The fever persisted with improvement in the other symptoms. The child became progressively weaker and began vomiting. Approximately 2 weeks after his illness began, the child was admitted with a serum creatinine of 7.6 milliequivalent/L. After 3 days of symptomatic treatment, his serum creatinine was 4.1 mg/dL and 1 week later his serum creatinine was 2.2 mg/dL. Findings of renal biopsy on the third hospital day were consistent with acute interstitial nephritis, which the authors attributed to beta-lactam antibiotic use.

These case reports demonstrate the variety of situations in which ibuprofen-associated renal toxicity can occur. In many of the cases, the children were already at risk for renal adverse effects because of underlying disease states, concomitant medications, or dehydration. Children with underlying illnesses or those dehydrated are at greatest risk for this injury. FDA currently requires all OTC pediatric products containing ibuprofen marketed under new drug applications to include warnings for children ages 2 to 11 years to ask a doctor before use if the child has ''not been drinking fluids'' or has ''lost a lot of fluid due to continued vomiting or diarrhea.''

b. Alcohol use. Binge drinking of alcohol reduces the production of antidiuretic hormone causing increased urine production. Two cases of reversible acute deterioration in renal function following binge drinking of beer with use of NSAIDs have been reported in adults (Ref. 69):

- The authors reported a case of a 22-year old male admitted to the hospital with low back pain and worsening renal function. Four days prior to admission, he had consumed an unknown amount of beer; 2 days later as the pain intensified he had taken six doses of 400-mg ibuprofen with no relief. Upon admission, his serum creatinine was 3.1 mg/dL. Biopsy of the kidney was consistent with the diagnosis of acute kidney failure. The subject's serum creatinine increased to a peak of 6.5 mg/dL on the fourth day and decreased to 1.4 mg/dL 6 days later.
- In a second case, a 20-year old male was admitted because of flank and back pain of 24 hours' duration. Four days before admission, the subject drank 8 to 10 bottles of beer (355 mL per bottle). On the evening of admission, he had taken 6 to 8 tablets of 325-mg aspirin for pain relief. The laboratory data showed a 2.0 mg/dL serum creatinine level. Following intravenous fluid administration, the subject urinated frequently for over 16 hours. Followup serum creatinine 1 week later was 1.2 mg/dL. The authors concluded that dehydration is a frequent consequence of heavy alcohol ingestion due to water diuresis. The volume contraction may be further aggravated by nausea and vomiting.

In the proposed rule to amend the TFM for OTC IAAA drug products to include ibuprofen, FDA included the results of the agency's evaluation of the adverse renal effects of OTC doses of ibuprofen (67 FR 54139 at 54144). Based on its evaluation of the data, FDA concluded that OTC doses of ibuprofen can exert a variety of adverse renal effects, particularly in those who are dependent on adequate prostaglandin levels to maintain renal hemodynamic perfusion (i.e., congestive heart failure, liver failure with ascites, etc.). It was further noted that although the sporadic nature of idiosyncratic drug-induced ibuprofen nephrotoxicity makes it impossible to predict which group of individuals is at risk for developing this event, this is not the case with individuals who experience prostaglandin-dependent hemodynamic changes. The latter, if recognized, is reversible upon discontinuation of the drug (67 FR 54139 at 54145).

V. FDA's Tentative Conclusions

FDA has carefully considered NDAC's recommendations and other available data and information and determined that labeling revisions are necessary for OTC IAAA drug products to advise consumers of potential health risks and to recommend, under certain circumstances, that they consult a doctor for advice about taking products containing OTC IAAA active ingredients.

FDA continues to believe that acetaminophen and NSAIDs, when labeled appropriately and used as directed, are generally recognized as safe and effective OTC IAAA drugs for consumer self-use. However, the available evidence clearly indicates that both drugs can cause serious side effects. When taken in excess amounts, acetaminophen can cause liver injury. NSAIDs have the potential to cause GI bleeding and renal (kidney) injury even at OTC dosing levels.

When compared to the extensive use of OTC acetaminophen and NSAID drug products, the incidence of injury appears relatively low. However, based on the available evidence and the seriousness of the risks, FDA believes it is necessary for consumers to be made aware of the possible serious side effects associated with using these products. For many people, the risks are quite low because they use these products only occasionally. The risks may be greater for people who use these products more frequently, have certain risk factors, and/or do not follow the labeling information on the package. FDA believes that providing additional labeling information about how to correctly use OTC drug products containing acetaminophen and NSAIDs could reduce injuries and is necessary for the products to be considered generally recognized as safe and effective and not misbranded.

FDA plans to act on several fronts:

- Propose revised OTC labeling for these products
- Continue a consumer and health provider educational campaign
- Continue to monitor AERS in various databases
- Examine available data to determine whether other measures may be needed in the future to try to decrease morbidity associated with OTC acetaminophen and NSAIDs.

In addition to the changes to the IAAA TFM proposed in this document, FDA encourages manufacturers of these products to undertake education initiatives regarding safe use of OTC products containing acetaminophen and NSAIDs. FDA plans to increase its monitoring of AERS in various databases to see how this new proposed labeling, if implemented, is working to reduce injuries resulting from OTC acetaminophen and NSAID drug products and to determine whether further measures need to be proposed.

A. Acetaminophen

1. Hepatotoxicity

FDA tentatively concludes that additional new labeling is needed for OTC drug products that contain acetaminophen. Data from Lee (Ref. 6), a case series from the University of Pennsylvania Hospital (Ref. 4), and the FDA AERS database show that unintentional overuse of acetaminophen is associated with severe hepatic injury. One manufacturer provided calculations of a ''worst case'' scenario for acetaminophen hepatic failure deaths using estimates by Lee (Ref. 70) and calculated 213 deaths per year. FDA does not know the exact number of cases of liver failure or deaths related to unintentional acetaminophen overdose. FDA thinks that improved labeling may help prevent events that are catastrophic to the unintentional victims and their family members. FDA has determined that adding a liver warning is necessary for safe and effective use of the drug and to reduce the number of unintentional overdoses. Thus, FDA is proposing a ''liver warning'' stating use factors that could lead to liver injury.

FDA notes that NDAC recommended both an alcohol warning and a liver toxicity statement separate from the alcohol warning for OTC drug products containing acetaminophen. FDA has combined this information because it is interrelated and a shorter warning saves label space on products that already contain extensive labeling information. FDA believes that two, separate warnings may be less likely to be read and understood by consumers.

FDA also tentatively concludes that a new warning is needed to advise consumers who have liver disease to consult a doctor before using OTC drug products that contain acetaminophen. FDA notes that many of the case reports in the databases involved people who had pre-existing liver disease (the rate of the number of cases in the databases exceeds the rate of underlying liver disease in the general population). This observation may also be due to a difference in the use of acetaminophen by people with chronic liver disease or that they are at greater risk to develop liver failure in general. As described in section IV.A of this document, people with chronic liver disease can have changes in the liver enzymes responsible for the metabolism of acetaminophen. It is not clear whether these changes increase the risk in these individuals. It was noted at NDAC that some physicians who treat patients with chronic liver disease recommend lower total daily doses. FDA believes this additional warning will alert patients with chronic liver disease to ask their doctor before using acetaminophen. FDA recognizes there is limited information supporting the need for different dose recommendations in people with liver disease. FDA seeks comment on the information this warning should provide and encourages healthcare providers and researchers who treat patients with chronic liver disease to provide information on how much they recommend as an appropriate dose and the basis for their recommendation.

2. Other Labeling

FDA also tentatively concludes that the name ''acetaminophen'' on the PDP should be enhanced to allow consumers to better identify acetaminophen containing products among the many products currently available on the OTC market. First, FDA is proposing that the name be highlighted (e.g., in fluorescent or color contrast to other information on the PDP) or in bold type so that the name is prominent and stands out from other text. Second, FDA is proposing that the name have a size that is prominent compared to other printed matter on the PDP. FDA's regulation for the statement of identity for OTC drug products in § 201.61(c) (21 CFR 201.61(c)) states that ''the statement of identity shall be presented in bold face type on the PDP, shall be in a size reasonably related to the most prominent printed matter on such panel * * *.'' FDA is proposing that manufacturers determine the prominence of the name ''acetaminophen'' on the PDP by selecting, from the two options that follow, the print size option that is greater:

- The name ''acetaminophen'' is at least one-quarter as large as the size of the most prominent printed matter on the PDP; or
- The name ''acetaminophen'' is at least as large as the size of the ''Drug Facts'' title, as required in § 201.66(d)(2) (21 CFR 201.66(d)(2)).

Finally, FDA notes that NDAC expressed concern about the lack of standardized pediatric dosage information, especially for infants under 2 years of age. FDA intends to address this issue in another **Federal Register** publication.

B. Aspirin and Other NSAIDs

1. GI Bleeding

FDA tentatively concludes that epidemiological data indicate a dose-related risk for GI bleeding with NSAIDs. The data demonstrate a slight increase in risk for GI bleeding at OTC daily doses. Because many people use OTC NSAIDs intermittently, the risk for bleeding for the average person is quite low. People who use NSAIDs for several days may be at greater risk but it is still low compared to chronic NSAID users. People who have certain identifiable risk factors (e.g., stomach ulcers or bleeding problems, taking certain other drugs or alcohol concurrently) are at greater risk of GI bleeding when they take a product containing an NSAID. FDA believes that additional warnings alerting these people about these potential risks and some of the symptoms associated with GI bleeding could reduce morbidity from using these OTC NSAID drug products.

Based on the NDAC's recommendations and the agency's review of the literature, FDA has determined that additional new warning labeling is needed to continue to consider OTC NSAID products generally recognized as safe and effective. Such warnings should advise people not to take more than one product containing NSAIDs (aspirin, ibuprofen, naproxen, or others) and not to take more drug or take the drug for a longer time than recommended in product labeling. NDAC also acknowledged that people age 65 and older are at increased risk for GI bleed.

FDA subsequently reviewed the results of several large-scale clinical studies, conducted in the United States and worldwide, and has established that use of NSAIDs is an important risk factor for serious GI adverse events, especially bleeding. These studies show that the risk is higher for people age 60 or older, who have had stomach ulcers or bleeding problems, or who use corticosteroids or anticoagulants (Refs. 10 and 55). Based on these studies, FDA believes that people 60 years of age and older are at increased risk and is proposing to include this age group in the warning.

In September 1993, NDAC concluded that the use of aspirin, ibuprofen, and naproxen sodium increases the risk of UGIB in people who are heavy alcohol users or abusers. At the September 2002 meeting, during discussion of the relative risks for GI bleeding associated with the use of OTC NSAIDs, some NDAC members questioned whether the incidence of GI bleeding is increased by the concurrent use of NSAIDs and alcohol. NDAC members were divided almost equally. Some members thought that there was no clear evidence that alcohol potentiates the risk of bleeding in NSAID or aspirin users. They proposed removal of the existing alcohol warning. Other NDAC members suggested that the alcohol warning should remain in effect, but be separated from the GI bleeding warning.

Subsequently, FDA considered NDAC's recommendations and evaluated the alcohol warning for OTC drug products containing an NSAID. FDA did a new literature search, selecting new articles describing the relationship between alcohol use and the risk of GI bleeding in OTC IAAA users. After reviewing these articles (Ref. 71), FDA finds that these studies, despite some flaws in their design and methodology, suggest that combining NSAIDs with alcohol increases the risks of a GI bleed. FDA has determined that it is necessary to retain a warning regarding use of OTC NSAID drug products with alcohol. FDA tentatively concludes that a warning about this risk should be incorporated in a ''Stomach bleeding warning'', in place of the current alcohol warning. Although NDAC recommended that a GI bleeding warning be distinct from a warning against alcohol ingestion with NSAIDs, FDA is proposing to combine these two warnings to conserve labeling space and avoid redundancy.

2. Renal Effects

FDA tentatively concludes that people who get acute renal insufficiency from using NSAIDs generally have a pre-existing condition that will predispose them to this insufficiency. There is a pharmacological basis for this to occur. Normal renal blood flow depends on prostaglandin metabolism. NSAIDs inhibit renal prostaglandin production. In predisposed people, suppression of prostaglandin production may result in acute reduction in renal blood flow and glomerular filtration, leading to renal insufficiency. These cases are often reversible. Although the epidemiological data are limited and the number of reported cases are rare relative to their use, FDA believes it is important to alert consumers about underlying conditions that may increase their risk if they take an NSAID without first asking a doctor because of potential serious side effects.

NDAC agreed with the OTC labeling proposed for ibuprofen in the **Federal Register** of August 21, 2002, including the warning to ask a doctor before use in the presence of high blood pressure, heart or kidney disease, concomitant use of a diuretic, or if they are over 65 years of age. Based upon a further review of the literature that indicates that the risk is higher for people age 60 or older, FDA is proposing to lower the age from 65 years of age to 60 years of age.

Children's NSAID products marketed under an NDA already have warnings regarding dehydration and fluid loss. FDA tentatively concludes that similar language is needed for children's NSAIDs products marketed under the OTC drug monograph. There are, however, few case reports suggesting a problem in adults. FDA is seeking comment on the need for similar language for adults. Although there are few reported cases in adults, it is anticipated that prostaglandin has similar effects on renal physiology.

3. Other Labeling

FDA agrees with NDAC that the term ''NSAID'' should be prominently displayed in OTC drug product labeling so consumers are aware of the presence of the ingredient in the product. The term should also be defined in the labeling as ''nonsteroidal anti-inflammatory drug.'' FDA tentatively concludes that the presence of an ''NSAID'' ingredient in an OTC drug product should be prominently stated on the PDP and in the Drug Facts labeling.

In section V.A.2 of this document, FDA discusses its proposed requirements for the name ''acetaminophen'' to be prominently presented on the PDP. FDA considers the same degree of prominence necessary to identify the presence of an ''NSAID'' ingredient in an OTC IAAA drug product. Accordingly, FDA is proposing that the name of the NSAID ingredient and the word ''(NSAID)'' be highlighted (e.g., fluorescent or color contrast) or in bold type, be in lines generally parallel to the base on which the package rests as it is designed to be displayed, and be in one of the following sizes, whichever is greater: (1) At least one-quarter as large as the size of the most prominent printed matter on the PDP, or (2) at least as large as the size of the ''Drug Facts'' title, as required in § 201.66(d)(2). In the Drug Facts labeling, FDA is proposing that the active ingredient(s) section, as defined in § 201.66(c)(2), be required to contain the term ''(NSAID)'' after the NSAID active ingredient with an asterisk statement at the end of the active ingredient(s) section that defines the term ''NSAID'' as a '' * nonsteroidal anti-inflammatory drug.''

In addition, FDA has conducted a detailed review of available data regarding the potential risks of serious cardiovascular events in patients receiving COX–2 selective and non-selective NSAIDs. FDA also held a joint meeting of its Arthritis and Drug Safety and Risk Management on February 16–18, 2005, to consider these issues. FDA is currently considering whether additional labeling changes related to these risks are warranted, and will address this in a future issue of the **Federal Register**.

VI. FDA's Proposal

Based on the available evidence, FDA is proposing to amend its regulations and the OTC IAAA TFM to make a number of changes. FDA is proposing new labeling for OTC IAAA drug products (proposed § 201.325). This labeling includes a number of important new warnings. To alert consumers to these new warnings, FDA is proposing to require that the statement ''See new warnings information'' appear on the PDP of all OTC IAAA drug products for a limited time after the effective date of a final rule based on this proposal (proposed § 201.325(b)).

The labeling statements in this proposed rule are in the OTC Drug Facts labeling format (see § 201.66), which is being implemented for all OTC drug products. For ease of reading, the following descriptions of the proposed labeling statements do not include the bracketed formatting instructions included in the codified portion of this document.

A. Alcohol Warning

FDA is proposing to remove § 201.322 of the regulations entitled ''Over-the-counter drug products containing internal analgesic/antipyretic active ingredients required alcohol warning.''

B. Acetaminophen

1. For All Acetaminophen Products

Proposed § 201.325(a)(1)(i) includes the following provisions:

- The presence of acetaminophen in the product must be prominently stated on the PDP. The word ''acetaminophen'' must appear highlighted (e.g., fluorescent or color contrast) or in bold type, be in lines generally parallel to the base on which the package rests as it is designed to be displayed, and be in one of the following sizes, whichever is greater: (1) At least one-quarter as large as the size of the most prominent printed matter on the PDP, or (2) at least as large as the size of the ''Drug Facts'' title, as required in § 201.66(d)(2).
- The presence of acetaminophen must appear as part of the established name of the drug, as defined in § 299.4 (21 CFR 299.4).
- Combination products containing acetaminophen and a non-analgesic ingredient(s) (e.g., cough-cold) must include the name ''acetaminophen'' and the names of the other active ingredients in the product on the PDP. Only the name ''acetaminophen'' must appear highlighted (e.g., fluorescent or color contrast) or in bold type, and be in one of the following sizes, whichever is greater: (1) At least one-quarter as large as the size of the most prominent printed matter on the PDP, or (2) at least as large as the size of the ''Drug Facts'' title, as required in § 201.66(d)(2).

2. For Acetaminophen Products Labeled for Adults Only

Under proposed § 201.325(a)(1)(iii), the labeling would be required to include the following statement:

Liver warning: This product contains acetaminophen. Severe liver damage may occur if you take

- more than (insert maximum number of daily dosage units) in 24 hours
- with other drugs containing acetaminophen
- 3 or more alcoholic drinks every day while using this product.

This ''Liver warning'' would be the first warning under the ''Warnings'' heading. For products that contain both acetaminophen and aspirin, the ''Liver warning'' would appear after the ''Reye's syndrome'' and ''Allergy alert'' warnings in § 201.66(c)(5)(ii)(A) and (c)(5)(ii)(B) and before the NSAID ''Stomach bleeding warning'' in proposed § 201.325(a)(2)(iii)(A).

The labeling would also be required to include the statements ''Do not use with any other drug containing acetaminophen (prescription or nonprescription). Ask a doctor or pharmacist before using with other drugs if you are not sure'' and ''Ask a doctor before use if you have liver disease.''

3. For Acetaminophen Products Labeled Only for Children Under 12 Years of Age

Under proposed § 201.325(a)(1)(iv), the labeling would be required to include the following statement:

Liver warning: This product contains acetaminophen. Severe liver damage may occur if the child takes

- more than 5 doses in 24 hours
- with other drugs containing acetaminophen.

This ''Liver warning'' must be the first warning under the ''Warnings'' heading.

The labeling would also be required to include the statements ''Do not use with any other drug containing acetaminophen (prescription or nonprescription). Ask a doctor or pharmacist before using with other drugs if you are not sure'' and ''Ask a doctor before use if the child has liver disease.''

FDA is aware that products labeled for children only are sometimes used by adults who cannot take solid oral dosage forms or who are taking a product marketed in children's strengths. Accordingly, FDA is proposing to include the statement ''this product does not contain directions or warnings for adult use'' in bold type in the labeling of these products under the heading ''Directions''.

4. For Acetaminophen Products Labeled for Adults and Children Under 12 Years of Age

Under proposed § 201.325(a)(1)(v), the labeling would be required to include all of the warnings for adults with the following modifications:

Liver warning: This product contains acetaminophen. Severe liver damage may occur if

- adult takes more than [insert maximum number of daily dosage units] in 24 hours
- child takes more than 5 doses in 24 hours
- taken with other drugs containing acetaminophen.
- adult has 3 or more alcoholic drinks every day while using this product.

This ''Liver warning'' must be the first warning under the ''Warnings'' heading. FDA is proposing to use the term ''the user'' instead of ''you or the child'' for warnings applying to both children and adults. The ''ask a doctor'' statement is modified to read: ''Ask a doctor before use if the user has liver disease.''

C. Aspirin and Other NSAIDs

The NSAID category includes, but is not limited to, aspirin, carbaspirin calcium, choline salicylate, ibuprofen, ketoprofen, magnesium salicylate, naproxen sodium, and sodium salicylate. In the **Federal Register** of August 21, 2002 (67 FR 54139 at 54159), FDA proposed a number of warnings for products containing ibuprofen if added to the OTC IAAA drug products monograph. FDA is adding information and further revising portions of some of those warnings in this document and proposing these warnings be applicable to all OTC NSAIDs.

1. For All Products Containing NSAIDs

Proposed § 201.325(a)(2)(i) includes the following provisions:

• The presence of an NSAID ingredient in the product must be prominently stated on the PDP. The name of the NSAID ingredient and the word ''(NSAID)'' must appear highlighted (e.g., fluorescent or color contrast) or in bold type, be in lines generally parallel to the base on which the package rests as it is designed to be displayed, and be in one of the following sizes, whichever is greater: (1) At least one-quarter as large as the size of the most prominent printed matter on the PDP, or (2) at least as large as the size of the ''Drug Facts'' title, as required in § 201.66(d)(2).

• For single ingredient products, the word ''(NSAID)'' must appear as part of the established name of the drug, as defined in § 299.4 of this chapter, or as part of the statement of identity of the drug, as defined in § 201.61 of this chapter. For example, either of the following would be acceptable:

• Ibuprofen Tablets (NSAID)

Pain reliever/ fever reducer

or

• Ibuprofen Tablets

Pain reliever/ fever reducer (NSAID)

• Combination products containing an NSAID and a non-analgesic ingredient(s) (e.g., cough-cold) must include the name of the NSAID ingredient and the names of the other active ingredients in the product on the PDP. The word ''(NSAID)'' must appear after either the name of the NSAID ingredient or the general pharmacological (principal intended) action of the NSAID ingredient (see previous examples). Only the name of the NSAID ingredient and the word ''(NSAID)'' must appear highlighted (e.g., fluorescent or color contrast) or in bold type, and be in one of the following sizes, whichever is greater: (1) At least one-quarter as large as the size of the most prominent printed matter on the PDP, or (2) at least as large as the size of the ''Drug Facts'' title, as required in § 201.66(d)(2).

2. For NSAID Products Labeled for Adults Only

Warnings for NSAIDS are proposed in § 201.325(a)(2)(iii). Some of the proposed warning statements are discussed here.

Stomach bleeding warning: This product contains a nonsteroidal anti-inflammatory drug (NSAID), which may cause stomach bleeding. The chance is higher if you:

• are age 60 or older
• have had stomach ulcers or bleeding problems
• take a blood thinning (anticoagulant) or steroid drug
• take other drugs containing an NSAID (aspirin, ibuprofen, naproxen, or others)
• have 3 or more alcoholic drinks every day while using this product
• take more or for a longer time than directed.

This ''Stomach bleeding warning'' would appear after the ''Reye's syndrome'' and ''Allergy alert'' warnings in § 201.66(c)(5)(ii)(A) and (c)(5)(ii)(B). For products that contain both acetaminophen and aspirin, the acetaminophen ''Liver warning'' would appear before the NSAID ''Stomach bleeding warning.''

The labeling would be required to include the following statement:

Ask a doctor before use if you have

• stomach problems that last or come back, such as heartburn, upset stomach, or stomach pain
• ulcers
• bleeding problems
• high blood pressure
• heart or kidney disease
• taken a diuretic
• reached age 60 or older.

The labeling would be required to include the statement:

Ask a doctor or pharmacist before use if you are

• taking any other drug containing an NSAID (prescription or nonprescription)
• taking a blood thinning (anticoagulant) or steroid drug

The labeling would be required to include the statement:

Stop use and ask a doctor if

• you feel faint, vomit blood, or have bloody or black stools. These are signs of stomach bleeding.
• stomach pain or upset gets worse or lasts

3. For NSAID Products Labeled Only for Children Under 12 Years of Age

Under proposed § 201.325(a)(2)(iv), the labeling would be required to include the following statement:

Stomach bleeding warning: This product contains a nonsteroidal anti-inflammatory drug (NSAID), which may cause stomach bleeding. The chance is higher if the child:

• has had stomach ulcers or bleeding problems
• takes a blood thinning (anticoagulant) or steroid drug
• takes other drugs containing an NSAID (aspirin, ibuprofen, naproxen, or others)
• takes more or for a longer time than directed.

The ''Stomach bleeding warning'' would appear after the ''Reye's syndrome'' and ''Allergy alert'' warnings in § 201.66(c)(5)(ii)(A) and (c)(5)(ii)(B).

The labeling would be required to include the following statement:

Ask a doctor before use if the child has

• stomach problems that last or come back, such as heartburn, upset stomach, or stomach pain
• ulcers
• bleeding problems
• not been drinking fluids
• lost a lot of fluid due to vomiting or diarrhea
• high blood pressure
• heart or kidney disease
• taken a diuretic.

The labeling would be required to include the statement:

Ask a doctor or pharmacist before use if the child is

• taking any other drug containing an NSAID (prescription or nonprescription)
• taking a blood thinning (anticoagulant) or steroid drug

The labeling would also be required to include the statement:

Stop use and ask a doctor if

• the child feels faint, vomits blood, or has bloody or black stools. These are signs of stomach bleeding.
• stomach pain or upset gets worse or lasts

FDA is aware that products labeled only for children are sometimes used by adults who cannot take solid oral dosage forms or who are taking a product marketed in children's strengths. Accordingly, FDA is proposing to include the statement ''this product does not contain directions or warnings for adult use'' in bold type in the labeling of these products under the heading ''Directions''.

4. For NSAID Products Labeled for Adults and Children Under 12 Years of Age

Under proposed § 201.325(a)(2)(v), the labeling would be required to include all of the warnings for adults with the following modifications:

Stomach bleeding warning: This product contains a nonsteroidal anti-inflammatory drug (NSAID), which may cause stomach bleeding. The chance is higher if the user:

• has had stomach ulcers or bleeding problems
• takes a blood thinning (anticoagulant) or steroid drug
• takes other drugs containing an NSAID (aspirin, ibuprofen, naproxen, or others)
• takes more or for a longer time than directed
• is age 60 or older
• has 3 or more alcoholic drinks everyday while using this product.

The ''Stomach bleeding warning'' would appear after the ''Reye's syndrome'' and ''Allergy alert'' warnings in § 201.66(c)(5)(ii)(A) and (c)(5)(ii)(B).

FDA is proposing to use the term ''the user'' instead of ''you or the child'' for warnings applying to both children and adults in the above and following modified statements.

The labeling would be required to include the following statement:

Ask a doctor before use if the user has

• stomach problems that last or come back, such as heartburn, upset stomach, or stomach pain
• ulcers
• bleeding problems
• high blood pressure
• heart or kidney disease
• taken a diuretic
• not been drinking fluids
• lost a lot of fluid due to vomiting or diarrhea
• reached age 60 or older

The labeling would be required to include the statement:

Ask a doctor or pharmacist before use if the user is

• taking any other drug containing an NSAID (prescription or nonprescription)
• taking a blood thinning (anticoagulant) or steroid drug

The labeling would also be required to include the statement:

Stop use and ask a doctor if

• the user feels faint, vomits blood, or has bloody or black stools. These are signs of stomach bleeding.
• stomach pain or upset gets worse or lasts.

5. Active Ingredients

Under proposed § 201.325(a)(2)(v), the active ingredient(s) section of the product's labeling, as defined in § 201.66(c)(2), would be required to contain the term ''(NSAID)*'' after the NSAID active ingredient with an asterisk statement at the end of the active ingredient(s) section that defines the term ''NSAID'' as a ''* nonsteroidal anti-inflammatory drug.''

D. Requirements to Supplement Approved Applications

Holders of approved applications for OTC IAAA drug products who voluntarily implement the proposed labeling changes in proposed § 201.325(a) would be required to submit supplements under § 314.70(c) (21 CFR 314.70(c)), but could implement the proposed labeling without advance approval from FDA, provided the labeling includes the information in proposed § 201.325(a). See section IX of this document on voluntary implementation.

E. Regulatory Action

Proposed § 201.325(c) sets out the implementation dates for the proposed labeling changes after publication of any final rule based on this proposal. See section VIII.B of this document on marketing conditions.

F. Conforming Changes to the OTC IAAA TFM

This proposed rule includes changes to the OTC IAAA TFM in proposed § 343.50. Proposed § 343.50(c)(1)(i), (c)(1)(iii), (c)(1)(iv)(A), (c)(1)(v)(A), (c)(1)(v)(B), (c)(1)(v)(C), (c)(1)(ix)(A), (c)(1)(ix)(B), (c)(1)(ix)(C), (c)(1)(ix)(E), (c)(2)(i), (c)(2)(iii), (c)(2)(iv)(A), (c)(2)(v)(A), (c)(2)(v)(B) and (c)(2)(v)(C) (as proposed in 53 FR 46204 and 67 FR 54139) would be amended and new paragraphs (b)(4)(i)(c) and (c)(3)(i) through (c)(3)(v)(C) would be added to either include references to proposed § 201.325 and/or additional language to conform to that section.

VII. Additional Issues for Consideration

A. Safe and Effective Daily Acetaminophen Dose

In 1960, FDA first approved (under the NDA process) a 325-mg immediate-release acetaminophen tablet formulation for OTC marketing in the United States. The recommended dose was one to two tablets every 4 to 6 hours, with a maximum daily dose of 3,900 mg in a 24-hour period (Ref. 3).

In 1973, FDA approved (under the NDA process) a 500-mg immediate-release acetaminophen capsule formulation for OTC marketing in the United States. The sponsor's rationale for this product was that the higher strength would have greater analgesic efficacy. Four double-blind, placebo-controlled, post partum pain studies evaluated the effectiveness of a single dose of two 500-mg capsules (1,000 mg) to a single dose of two 325-mg tablets (650 mg) in 338 subjects. Two of the studies demonstrated that a single 1,000-mg dose was significantly more effective than a single 650-mg dose. One of the other studies failed to demonstrate a dose response between the two doses, and the last study failed to show separation of the active treatments from placebo. The overall safety profile for the 1,000-mg dose was similar to the 650-mg dose, with the exception of a higher incidence of dizziness. In 1975, FDA approved a 500-mg immediate-release tablet. Data from two crossover bioequivalence studies comparing two 500-mg capsules to two 500-mg tablets demonstrated the bioequivalence of the two formulations (Ref. 3).

The IAAA Panel further evaluated acetaminophen and recommended in its 1977 report (42 FR 35346) that acetaminophen be generally recognized as safe and effective. The IAAA Panel's evaluation of effectiveness was based on data from a number of controlled and uncontrolled studies of the effectiveness of a variety of acetaminophen doses, i.e., 300, 325, 330, 500, 600, 1,000, and 1,200 mg (42 FR 35346 at 35412). However, the IAAA Panel's evaluation did not include an assessment of the relative effectiveness of each of the dosage strengths. The Panel determined the maximum daily safe dosage to be not greater than 4 g in a 24-hour period. Upon publication of that document, FDA permitted OTC marketing without an NDA provided the product was consistent with the IAAA Panel's recommended labeling. FDA's 1988 TFM for OTC IAAA drug products proposed to include acetaminophen as a monograph ingredient (53 FR 46204 at 46255). FDA revised the IAAA Panel's recommended dosing regimens but maintained the maximum limit of 4 g in a 24-hour period.

To determine the maximum daily safe dosage (4 g of acetaminophen in a 24-hour period), the Panel reviewed numerous references that describe cases of serious liver damage associated with excessive use of acetaminophen (42 FR 35346 at 35413). Most of these cases were associated with single dose oral ingestions of greater than 15 g of acetaminophen. Based on this information, the Panel concluded that a single dose less than 15 g is not usually associated with serious liver injury. The Panel also noted that 15 g is 23 times the usual recommended dose of 650 mg and approximately 4 times the maximum recommended daily dose of 4 g. In estimating the safety margin, the Panel decided the comparison with the single dose (650 mg) was probably more appropriate than the comparison with the daily therapeutic dose (4 g). The current information on unintentional overdose suggests that the margin of safety may be less than originally determined. The data on liver failure presented by Dr. Lee at the September 2002 NDAC meeting and the adverse event reports in the FDA AERS data suggest daily doses less than 10 g, ingested on consecutive days, presents a risk for liver injury in some individuals.

FDA invites comment on whether there are subpopulations of individuals who are more susceptible to developing liver injury when taking acetaminophen. The dosing information included in the AERS cases of hepatotoxicity reported for acetaminophen suggest that the median daily dose is in the 5- to 6-g range. FDA recognizes, however, that dosing information in the AERS reports is sometimes inaccurate and is difficult to validate. The information in the AERS cases of hepatotoxicity is adequate to raise concerns that there may be subpopulations at risk for developing hepatotoxicity with doses lower than the currently labeled maximum daily dose of 4 g. If such subpopulations can be identified, the maximum daily dose of 4 g may no longer be considered safe for those individuals and should be lowered. If the at risk subpopulations cannot be identified, or addressed through appropriate labeling, and cases of liver injury continue to be reported, FDA may reconsider whether the labeled maximum daily dose is still generally recognized as safe and effective for use in the general population.

B. Daily Dose Recommendation for Alcohol Abusers

Following publication of the IAAA TFM in 1988, FDA received a comment recommending that the maximum daily dose of acetaminophen be reduced from 4 to 2 g per day for alcohol abusers. The comment did not provide any data to support a reduced maximum daily dose. In June 1993, NDAC considered: (1) Identifying a population at risk in terms of alcohol consumption, e.g., people who rarely drink, social drinkers, or alcohol abusers, (2) whether the data are sufficient to support a reduced maximum daily dose for alcohol abusers, and (3) if yes, what the reduced maximum daily dose should be. NDAC found the data insufficient and was unable to recommend a reduced maximum daily acetaminophen dose for alcohol abusers.

At the September 19, 2002, NDAC meeting, FDA described cases of hepatotoxicity involving the use of prescription combination (narcotic/acetaminophen) products (Refs. 6 and 7). Many of these cases involved people with a history of alcohol abuse. NDAC was unable to recommend a reduced maximum daily acetaminophen dose for alcohol abusers, because of a lack of specific data.

One drug manufacturer issued a ''Dear Doctor'' letter to inform health professionals about the September 2002 NDAC meeting (Ref. 72). The letter stated: ''The NDAC proceedings may generate media interest and, as a result, people may contact you with questions about OTC pain relievers such as acetaminophen.'' The letter summarized the existing data that support the safety of acetaminophen, including the statement: ''Prospective data indicate that chronic alcoholics can take recommended doses of acetaminophen up to 4,000 mg/day without risk of liver injury.'' The letter cited two references from the medical literature to support the statement (Refs. 73 and 74). The letter continued: ''Acetaminophen can be used safely, at recommended doses, by the occasional moderate consumer of alcohol.''

FDA has reviewed the two references (studies of hepatotoxicity of the therapeutic dose of acetaminophen in people with alcohol abuse, conducted by the same investigators). One (Ref. 73) is a full study report of 201 people (102 on acetaminophen and 99 on placebo). The other (Ref. 75) was an abstract describing a pilot trial with 60 people (30 each on acetaminophen and placebo). A full report of this study is not available (Ref. 75).

Both studies were randomized, double-blind, placebo-controlled clinical trials conducted in an alcohol detoxification center to evaluate the hepatotoxicity of maximum therapeutic dosing of acetaminophen in long-term alcoholic subjects. In both studies, the subjects were treated with the maximum therapeutic dose of acetaminophen (1g four times a day) for 2 days, followed by a 2-day observation. The results showed that acetaminophen treatment did not significantly increase serum ALT, Aspartate Aminotransferase (AST), and International Normalized Ratio (INR), as compared to the placebo control. The authors concluded that there was no evidence that the daily maximum therapeutic dose of acetaminophen caused liver injury in alcoholics. However, FDA finds the data insufficient to support this conclusion.

Neither study included an assessment of the quantity, frequency, and duration of alcohol use by the subjects. Alcoholic detoxification history and information on alcohol-related disorders, including more specific hepatic evaluations (such as hepatic CYP2E1 p450 enzyme levels, glutathione levels, or biopsy), were not reported. That information would have enabled a better evaluation of chronic alcohol use and underlying alcohol-induced liver abnormalities. Subjects with AST and ALT higher than 120 IU/L were excluded from the study, so no evaluation of subjects with underlying liver damage evidenced by slight elevations of liver function tests could be assessed. Such subjects may respond differently than those with more substantial hepatic impairment. Other investigators have similarly criticized the studies (Refs. 76 and 77). Assessing the change in liver function tests after drug administration may not adequately support a conclusion that the drug is without risk of liver injury in this population. If subpopulations of chronic alcoholics are sensitive to lower doses of acetaminophen, this type of study would be inadequate to make any assessment of risk.

FDA also finds that a 2-day treatment period may be too short to deplete the lowered hepatic gluthianone capacity in alcoholic people. The 2-day regimen cannot be extrapolated into the recommended 10-day dosing regimen in OTC drug product labeling. One individual agreed, stating that the investigators gave no rationale for dosing acetaminophen for only 2 consecutive days while the drug is approved for 4 g/day for 10 consecutive days and commonly used for prolonged periods of time (Ref. 78). Further, the individual stated that the lack of elevation in liver enzyme values after only 2 days of acetaminophen lends little support to the authors' conclusion regarding its safety in alcoholic people. FDA's detailed assessment of these studies is on file in the Division of Dockets Management (Ref. 79).

FDA concludes that these studies do not provide reliable evidence that people with chronic alcohol use can safely take 4 g/day of acetaminophen, particularly for up to 10 days in accordance with OTC drug product labeling. Based on the data presented by Dr. Lee on liver failure, the experience in the University of Pennsylvania Hospital series, and data from the AERS database, FDA believes that alcohol users are a significant percentage of persons who develop severe liver injury. Acetaminophen products already have an alcohol warning to alert consumers of the risk for developing hepatotoxicity. It is important to determine whether the labeling should include a lower daily dose for chronic alcohol users. At this time, FDA is seeking both comments and data to support a specific dosage for acetaminophen as safe and effective in people who consume alcohol.

C. Combinations With Methionine or Acetylcysteine

FDA is currently evaluating different safety measures to reduce the relative risks for hepatotoxicity associated with the use of acetaminophen. Theoretically, one method might be to administer acetaminophen and N-acetylcysteine (NAC) together. NAC is a chemical produced by the body that enhances the production of the enzyme glutathione. A small portion of acetaminophen undergoes cytochrome P450-mediated N-hydroxylation to form N-acetyl-p-benzoquinoneimine (NAPQI, a toxic metabolite of acetaminophen). Liver toxicity from acetaminophen overdose depends in part on production of NAPQ to levels that exceed the ability of the normal hepatic detoxification pathway to eliminate NAPQ. Glutathione is produced predominantly in the liver and is an important detoxifier of NAPQ. In the event of acetaminophen overdose in people with enhanced activity of CYP 2E1 (alcoholics, or people using anticonvulsants), glutathione liver stores are depleted. One substrate for glutathione synthesis is cysteine. NAC protects against liver damage in early acetaminophen poisoning by production of cysteine, a glutathione precursor. The administration of precursors of cysteine, such as NAC or methionine, may prevent depletion of glutathione and, thus, liver injury (Refs. 80 and 81).

Scientific data supports the efficacy of treating acute acetaminophen overdose with early administration of NAC (Refs. 82 through 85). To determine whether there is any usage data of acetaminophen with NAC or methionine for the purposes of prevention of liver toxicity, FDA examined the literature from 1975 to December 2002. FDA did not find any articles that specifically addressed whether either combination (when used at the therapeutic dose level) would prevent liver toxicity.

The UK is the only country where a combination product containing acetaminophen and methionine is available. The marketed product contains 500 mg acetaminophen and 100 mg methionine. One published study summarized the issues related to combining acetaminophen and methionine (Ref. 85). The authors acknowledge that there are no data available on the relative efficacy or the prophylactic antidotal dose of methionine for protecting the liver after acetaminophen overdose in humans.

At this time, FDA finds insufficient evidence that combinations of acetaminophen with NAC or methionine would prevent or reduce acetaminophen-induced liver toxicity. FDA seeks comments and data on this issue.

D. Package Size and Configuration Limitations

At the September 19, 2002, NDAC meeting, a representative from a national consumer organization reported that the UK implemented package size restrictions on acetaminophen. He noted that an early assessment of the effect of the package size restrictions in the UK shows decreases in total and severe acetaminophen overdoses, as well as decreases in acetaminophen related toxicity leading to liver transplant or death. The representative did not provide any data to support his comments. FDA seeks comments on package size and package configuration limitations as a mechanism to increase safe use of acetaminophen products by reducing overdose. Comments should address the possible impact of such measures on unintentional and intentional overdose.

E. Label Warning for Individuals With Human Immunodeficiency Virus (HIV)

A citizen petition (Refs. 86 and 87) requested that FDA consider the need for a warning about the increased risk of liver injury from the use of acetaminophen by individuals infected with HIV. The request is based on the following reasoning:

- Glutathione (GSH) deficiency is frequent in HIV-infected individuals.
- Acetaminophen depletes GSH (essential for the detoxification of acetaminophen's toxic metabolite) and is potentially more toxic to GSH-deficient individuals.
- GSH deficiency is associated with impaired survival in persons with HIV disease, and acetaminophen may further reduce survival by depleting GSH.

In support of this request, the petitioner (Ref. 86) provided published studies of: (1) GSH and cysteine levels in plasma, peripheral blood monocytes and lymphocytes, and in the pleural fluid of HIV-positive individuals, and (2) the effects of GSH replacement in model systems and HIV-infected individuals. A subsequent submission (Ref. 87) provided a search of the worldwide literature that included studies of: (1) Nonhepatic GSH levels in numerous disease states, (2) the effects of treatment with NAC or other GSH-replenishing drugs in diseases and conditions in which GSH is decreased, (3) the causes of GSH deficiency in persons with HIV disease, (4) an association between GSH deficiency and impaired survival in persons with HIV disease, and (5) the effect of NAC replacement therapy on clinical outcomes in persons with HIV disease.

A comment (Ref. 88) disagreed with the petitioner's assertions for the following reasons:

- The available data do not demonstrate that acetaminophen reduces total body or circulating GSH when taken as recommended.
- There currently are no studies that demonstrate that acetaminophen has any impact on the survival of HIV patients.
- The depletion of hepatic GSH that occurs after acetaminophen overdose is not related to plasma GSH levels.
- The source of plasma GSH in humans is not clearly defined.

FDA finds that although data from in vitro and in vivo studies (Refs. 89 through 96) have documented low levels of GSH and its precursors in HIV infection, the effect of this deficiency on survival has not been clearly established. Data from in vitro studies (Refs. 97 through 100) have demonstrated improvement in healthy and HIV-infected T-cell functioning post exposure to NAC. However, these findings have not been correlated with survival from in vivo studies. While some studies of the effects of NAC administration in HIV-infected individuals (Refs. 89, 90, and 101 through 104) have demonstrated an increase in GSH, the majority of studies were not designed to assess survival.

Herzenberg, et al. (Ref. 102) discussed results from several studies in HIV-infected patients that evaluated the relationship between GSH levels and survival, the administration of NAC in patients with low GSH levels in whole blood and in CD4 T cells, and the effect of NAC on survival in patients with low GSH levels in CD4 T cells. The presentation of data in the report made it difficult to understand the study design details. Other problems based on the information presented included: Survival data was not collected in a significant proportion of the population (17 percent), baseline characteristics of the individuals in all of the trials were not presented, the use of antiviral treatments and other medications before and during the studies was not provided, and NAC administration after 8 weeks was not randomized. In their conclusions, the authors recommend that excessive exposure to acetaminophen be avoided in HIV-infected individuals. The report references acetaminophen overdose leading to GSH deficiency as a basis to support their recommendation. However, it does not provide sufficient information suggesting that intermittent or short-term use presents a problem in HIV patients. FDA concludes that this report does not provide a sufficient basis to restrict that use of acetaminophen in patients infected with HIV.

Further, a search of FDA's AERS database for hepatic adverse events in HIV-infected individuals who took acetaminophen failed to identify any case reports which fit the search parameters, i.e., acetaminophen, HIV infection, and hepatotoxicity. Thus, there is no clinical evidence of toxicity or decrease survival that can be attributed to the recommended use of acetaminophen in HIV-infected individuals since GSH levels were never validated to predict survival.

Given these facts, FDA does not consider the current data a sufficient basis for a warning. However, the issues raised by the petition highlight the need for additional information or research to clarify whether acetaminophen poses additional risk for certain population subgroups (e.g., conditions in which GSH is reduced). Therefore, FDA invites the submission of data and comments on this issue.

F. Drug Interactions Between Acetaminophen and Warfarin

The labeling for a currently marketed warfarin-containing prescription drug product lists acetaminophen as a drug that can increase warfarin's anticoagulant effect (Ref. 105). A reciprocal warning is not currently included on the consumer labeling for any OTC drug products that contain acetaminophen. To evaluate the need for a consumer warning regarding co-administration of warfarin-containing drugs with acetaminophen, FDA considered postmarketing adverse event case reports in our AERS database, studies published in the worldwide literature (Refs. 106 through 125), and three consultative reviews (Ref. 126, 127, and 128).

In the consultative reviews, FDA epidemiologists identified a cumulative total of 20 (3 probable and 17 possible) postmarketing adverse event case reports of prolongation of laboratory tests that monitor the ability of the blood to clot. These tests are the INR or Prothrombin Time (PT). These reports occur in individuals treated chronically with warfarin who concomitantly took acetaminophen and had minor or severe bleeding events. Of note, the only background characteristics that were identifiable in these case reports were that the individuals involved were generally elderly, had been on stable anticoagulant therapy for a prolonged period of time (several months to years), and used acetaminophen ''regularly'' instead of ''intermittently'' for approximately 3 to 14 days prior to the discovery of their abnormally prolonged INR or PT. The dosages of acetaminophen reportedly ingested by these individuals ranged from 1.2 to 4.5g/day. FDA's epidemiologists attribute the small number of postmarketing case reports collected to underreporting. We believe that the actual number of cases is much higher, based on the numbers of people who are treated with anticoagulant therapy.

FDA's epidemiologists also conducted two literature searches on this topic. In the first (Ref. 126), FDA reviewed 11 published articles describing three double-blind, placebo-controlled, randomized studies that demonstrated a prolongation of warfarin's anticoagulant effect when acetaminophen was used concomitantly in a chronic manner (Refs. 110, 112, and 113). Two additional published double-blind, crossover studies showed that people on a stable warfarin dose who were acutely dosed with acetaminophen did not experience any changes in their anticoagulant status (Refs. 111 and 117). A prospective, case-control study looked at a cohort of people from an anticoagulant clinic, each of whom were noted to have an INR greater than 6 on a routine followup clinic visit. The study found that after controlling for other risk factors associated with prolongation of anticoagulant status (i.e., medication use, recent diet, illness, alcohol consumption, and actual warfarin use), the use of acetaminophen was an independent dose-dependent risk factor for having an INR over 6 (P-value for trend <0.001). Other independent variables associated with the development of a prolonged INR were identified and included: Advanced malignancy (odds ratio [OR], 16.4; 95 percent confidence interval [CI], 2.4 to 111.0), recent diarrheal illness (OR, 3.5; 95 percent CI, 1.4 to 8.6), decreased oral intake (OR, 3.6; 95 percent CI, 1.3 to 9.7), ingesting a higher dose of warfarin than prescribed (OR, 8.1; 95 percent CI, 2.2 to 30.0), and taking new medications known to interact with warfarin (OR, 8.5; 95 percent CI, 2.9 to 24.7) (Ref. 113). The validity of this study's findings was subsequently questioned when it was publicly criticized in the literature for its flawed methodological design, such as the overlapping of risk factors in the population studied (i.e., fever and the use of acetaminophen), and the lack of reported adverse events (Refs. 115, 116, and 118). Additionally, the mechanism by which a possible acetaminophen-warfarin interaction occurs has yet to be clearly identified (Refs. 119 and 120).

The second updated literature review (Ref. 127) noted two additional case controlled studies generated from patient cohorts followed in anticoagulation clinics that were published in the European literature (Refs. 123 and 124). Both of these studies failed to document the existence of a possible drug-drug interaction in stable anticoagulated people treated with the warfarin analogues phenprocoumon or acenocoumarol and using acetaminophen concomitantly.

The data generated from the literature searches are conflicting. Although many of the studies controlled for other variables known to potentate warfarin's anticoagulant effect, it is not known if they all also controlled for life style factors such as diet, the use of vitamins and herbal medications, physical activity, concurrent illness, or liver status. Extrapolating the clinical findings generated from the study by Fattinger, et al. may not be applicable to real life situations, since this trial was conducted in people where background life style factors such as diet and physical activity did not come into play due to the controlled study environment (Ref. 124). The study by van den Bemt, et al. may have also failed to demonstrate the existence of an adverse drug-drug interaction associated with the concomitant use of acetaminophen with either of the warfarin analogues phenprocoumon or acenocoumarol, because these drugs may be metabolized differently than warfarin (Ref. 123). FDA believes that the current available data do not demonstrate sufficient evidence to warrant a consumer warning for warfarin-acetaminophen interaction. However, we are seeking comments or data on whether additional labeling about this drug-drug interaction is warranted at this time.

VIII. Legal Authority

A. Statement About Warnings

Mandating warnings in an OTC drug monograph does not require a finding that any or all of the OTC drug products covered by the monograph actually caused an adverse event, and FDA does not so find. Nor does FDA's requirement of warnings repudiate the prior OTC drug monographs and monograph rulemakings under which the affected drug products have been lawfully marketed. Rather, as a consumer protection agency, FDA has determined that warnings are necessary to ensure that these OTC drug products continue to be safe and effective for their labeled indications under ordinary conditions of use as those terms are defined in the Federal Food, Drug, and Cosmetic Act (the act). This judgment balances the benefits of these drug products against their potential risks (see 21 CFR 330.10(a)).

FDA's decision to act in this instance need not meet the standard of proof required to prevail in a private tort action (*Glastetter* v. *Novartis Pharmaceuticals Corp.*, 252 F. 3d 986, 991 (8th Cir. 2001)). To mandate warnings, or take similar regulatory action, FDA need not show, nor do we allege, actual causation. For an expanded discussion of case law supporting FDA's authority to require such warnings, see the final rule on ''Labeling of Diphenhydramine-Containing Drug Products for Over-the Counter Human Use'' (67 FR 72555, December 6, 2002).

B. Marketing Conditions

This proposal applies to all OTC internal analgesic/antipyretic drug products that contain an ingredient included in proposed § 201.325(a). Upon issuance of a final rule, any new labeling will apply to any product that is initially introduced or initially delivered for introduction into interstate commerce. Such products would be misbranded under section 502 of the act (21 U.S.C. 352) and would be subject to regulatory action unless:

- Products marketed without an NDA include the required labeling within 12 months after any final rule that is issued based on this proposal.
- Products marketed with an NDA include the required labeling within 12 months after any final rule that is issued based on this proposal. The labeling may be put into use without advance FDA approval provided it includes the information described in the final rule. Manufacturers should submit a supplement under § 314.70(c).

If companies voluntarily implement the labeling in this proposal before a final rule issues, FDA intends to provide those companies 18 months to implement the labeling in the final rule.

IX. Voluntary Implementation

The labeling proposed in this document represents a change from the current labeling required for OTC IAAA drug products. Although FDA considers these proposed labeling changes to be very important, holders of approved NDAs for OTC IAAA drug products will not be required to implement the proposed labeling at this time. However, holders of approved NDAs for these drug products may implement the proposed labeling without advance FDA approval provided the labeling includes the information in proposed § 201.325. A supplement must be submitted under § 314.70(c) to provide for the implementation of such labeling. The supplement and its mailing cover should be clearly marked: ''Special Supplement—Changes Being Effected.''

FDA considers the proposed labeling in this document to be important to the safe use of OTC IAAA drug products and strongly encourages manufacturers of these products to voluntarily implement the proposed labeling changes before FDA issues a final rule. However, voluntary compliance with the proposed labeling in this document is subject to the possibility that FDA may revise the wording of some of the proposed statements or changes, or not require the statement or change, as a result of comments filed in response to this proposal. Because FDA wishes to encourage the voluntary use of the proposed labeling statements and changes, FDA advises that manufacturers will be given 18 months after publication of a final rule to use up any labeling implemented in conformance with this proposal (see section XV of this document).

X. Analysis of Impacts

FDA has examined the impacts of this proposed rule under Executive Order 12866 and the Regulatory Flexibility Act (5 U.S.C. 601–612), and the Unfunded Mandates Reform Act of 1995 (Public Law 104–4). Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). Under the Regulatory Flexibility Act, if a rule may have a significant economic impact on a substantial number of small entities, an agency must analyze regulatory options that would minimize any significant impact of the rule on small entities. Section 202(a) of the Unfunded Mandates Reform Act of 1995 requires that agencies prepare a written statement, which includes an assessment of anticipated costs and benefits, before proposing ''any rule that includes any Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector of $100 million or more (adjusted annually for inflation) in any one year.''

FDA tentatively concludes that this proposed rule is consistent with the principles set out in Executive Order 12866 and in these two statutes. This proposed rule is not a significant regulatory action as defined by the Executive Order and so is not subject to review under the Executive Order. As discussed in this section, FDA has tentatively determined that this proposed rule will not have a significant economic impact on a substantial number of small entities. Because the rule does not impose any mandates on state, local or tribal governments, or the private sector that will result in an expenditure in any one year of $100 million or more, FDA is not required to perform a cost-benefit analysis according to the Unfunded Mandates Reform Act. The current threshold after adjustment for inflation is about $110 million.

FDA estimates that manufacturers and marketers of OTC IAAA drug products would incur one-time compliance costs of $32 million in the first year to revise labeling to conform to the proposed rule. The benefits of this proposed rule are based on estimated annual reductions from 1 to 3 percent in serious illnesses and related hospital and emergency room costs and in deaths related to unintentional overdosing. If 1 to 3 percent of these adverse events are avoided, the monetized benefits would be $6 million to $17 million per year, respectively. The present value of the monetized benefits over a 10-year period is $41 million to $126 million assuming a 7-percent discount rate,[1] and $49 million to $147 million at a 3-percent discount rate. If we assume only a 1 percent reduction in the illnesses and fatalities analyzed, the benefits of this proposed rule outweigh the costs. We summarize the impacts in Table 10 of this document.

FDA notes that we lack the data needed to confidently predict a percent reduction in serious cases related to unintentional overdosing. Because of the uncertainty in these estimates, we estimated an annual average number of adverse events that would need to be avoided over a 10-year period to reach a breakeven point. Social benefits would equal the costs of compliance if the proposed rule prevented about 1 fatality each year (0.9 and 0.7 fatalities over 10 years at a 7-percent and a 3-percent discount rate, respectively). Alternatively, if no fatalities are avoided, the proposed rule would need

[1] Per the Office of Management and Budget (OMB) Circular A4, revised in 2003.

to prevent about 475 hospitalizations per year over the 10-year period at a 7-percent discount rate. At a 3-percent discount rate, an average reduction of 410 hospitalizations per year is needed.

TABLE 10.—SUMMARY OF IMPACTS

Benefits:	($ Million)
Monetized 1 and 3-percent reduction in illnesses and mortality, per year Present value over 10 years at 7 percent Present value over 10 years at 3 percent	$5—$17 $41—$126 $49—$147
Costs: One-time label revision, first year	($ Million) $32

A. Need for the Rule

In September 2002, FDA's NDAC recommended changes to the labeling of OTC IAAA drug products to better inform consumers about the active ingredients and possible side effects caused by improper use. Although FDA considers acetaminophen to be safe and effective when labeled and used correctly, taking too much can lead to liver damage and death. Similarly, the use of NSAIDs can lead to GI bleeding and renal toxicity. The number of cases of injury reported is a very low percentage of the total use of OTC acetaminophen and NSAID drug products. For many people, the risks are quite low because they use these products only occasionally. The risks may be greater for people who use these products more frequently and/or do not follow the labeling information on the package. The risk of injury may be increased for certain populations and under certain conditions of use.

There are multiple reasons for unintentional acetaminophen overdoses. First, acetaminophen is an active ingredient in a wide variety of both OTC and prescription drug products. For prescription products, the immediate prescription container may not state that the product contains acetaminophen or state the maximum daily dose limit. Consumers may often fail to recognize the presence and amount of acetaminophen ingredients in OTC and prescription drug products. This lack of knowledge can result in a person taking two different products containing acetaminophen simultaneously. Moreover, many consumers are unaware that exceeding the recommended dosage for acetaminophen can lead to unintentional overdosing and cause potential harm. Based on the evidence discussed in this document, FDA finds that there is sufficient incidence of liver damage associated with acetaminophen to warrant new labeling, and that without the new labeling, acetaminophen products would no longer be considered generally recognized as safe and effective and not misbranded for OTC use.

Results of several large-scale clinical studies performed in the United States and in other countries have established that the use of NSAIDs is an important risk factor for serious GI adverse events, especially bleeding. The risk is higher for certain populations. Based on the evidence discussed in this document, FDA further finds that NSAIDs increase the risk for GI adverse events and that without a new stomach bleeding warning in the labeling for aspirin and other NSAIDs the products would no longer be considered generally recognized as safe and effective and not misbranded for OTC use.

The purpose of this proposed rule is to amend FDA's OTC drug labeling regulations and the TFM for OTC IAAA drug products to include new warnings and other labeling requirements to advise consumers of potential risks and when to consult a doctor. FDA is also proposing to remove the alcohol warning in § 201.322 and incorporate new alcohol-related warnings and other labeling for all OTC IAAA drug products. FDA is proposing certain warning information targeted to age specific populations. In addition, FDA is proposing that the presence of acetaminophen or any NSAID would appear prominently on the products' PDP. Table 11 presents an overview of the proposed changes by type of product.

TABLE 11.—OVERVIEW OF THE PROPOSED LABEL CHANGES BY PRODUCT TYPE

Type of Product	Proposed Change
Acetaminophen	Add a new warning to include information on serious liver injury. Include the name acetaminophen [highlighted or in bold type, and in a prominent print size] on the PDP.
NSAIDs (e.g., aspirin or ibuprofen)	Add a new warning to include information on stomach bleeding. Include the name of the NSAID ingredient [highlighted or in bold type] on the PDP. Include the word "(NSAID)" [highlighted or in bold type, and in a prominent print size] on the PDP either as part of the established name of the drug or after the general pharmacological (principal intended) action of the NSAID ingredient.
Combination products containing acetaminophen or an NSAID and a nonanalgesic ingredient	Include the name acetaminophen or the name of the NSAID ingredient [highlighted or in bold type, and in a prominent print size] and the names of the other active ingredients on the PDP. Products containing an NSAID ingredient must include the word "(NSAID)" as stated under NSAIDS.

TABLE 11.—OVERVIEW OF THE PROPOSED LABEL CHANGES BY PRODUCT TYPE—Continued

Type of Product	Proposed Change
All IAAA drug products	Remove the current alcohol warning in § 201.322, and incorporate new alcohol-related warnings format. For a specific period of time, add to the PDP the statement ''See new warnings information''. We are proposing that this statement appear highlighted in the same way that the name ''acetaminophen'' or the presence of an NSAID appear on the PDP. The statement would appear highlighted (e.g., fluorescent or color contrast) or in bold type; and be in one of the following sizes, whichever is greater: (1) At least one-quarter as large as the size of the most prominent printed matter on the PDP, or (2) at least as large as the size of the ''Drug Facts'' title, as required in § 201.66(d)(2).

B. Impact of the Rule

FDA contracted with Eastern Research Group, Inc. (ERG) to assess the costs and benefits of this proposed rule. The following is a summary of ERG's analysis; the full report, including details on assumptions, cost calculations, and findings, is on file in the Division of Dockets Management (Ref. 129).

Manufacturers and marketers of OTC IAAA drug products would incur one-time costs to revise affected product labeling to comply with the proposed labeling changes. We assumed an implementation period of 12 months for one-time costs for a major labeling revision. We estimated one-time costs for a major labeling revision using a pharmaceutical labeling revision cost model. This labeling model is described in detail in Appendix A of the ERG report (Ref. 129).

To develop the original model, FDA and ERG interviewed pharmaceutical representatives from regulatory, legal, manufacturing controls, and labeling departments to collect information on labeling change cost components, type of personnel affected, and costs. The model incorporates data on average industry costs by company size, including, where applicable, modifications to packaging configurations. Industry consultants also provided information on model inputs related to the OTC IAAA industry, the labeling revision process, the costs of modifying labeling, and the frequency of packaging reconfiguration changes.

The baseline for this proposed action is full compliance with the format and content requirements for OTC drug product labeling in 21 CFR 201.66. In the final rule that established these requirements on March 17, 1999 (64 FR 13254), FDA accounted for the total incremental costs to comply with requirements, including 6.0 font size and related costs for increased package size and longer labeling where applicable. FDA notes that although some forms of packaging (for small quantities) have been granted extensions on compliance dates, many packaging alternatives now exist to assure compliance.

Manufacturers routinely change labels at varying intervals and have standardized procedures in place for complying with FDA requirements. The analysis assumes that one-half of the manufacturers of OTC IAAA drug products typically redesign their label every 2 years, the remainder every 3 years, based on consultant input. For this analysis, ERG assumed that manufacturers whose label redesign cycle is less than the implementation period will not incur any regulatory costs. For example, if a company routinely revises its product labeling annually and is given at least that long to incorporate the required changes, ERG judged that the regulatory revision can be made at essentially no cost.

The costs of labeling change depend on the type of labeling (e.g., carton and container label) and whether there is sufficient labeling space to accommodate the proposed changes. There are an estimated 22,500 OTC IAAA drug product stockkeeping units (SKUs), split evenly among branded and private labels, according to an industry consultant.[2] FDA assumes branded SKUs are distributed by firm size: 50 percent small, 17 percent medium, and 33 percent large. Based on consultant input, we assumed the distribution of SKUs among OTC IAAA drug products as follows: Acetaminophen, 45 percent; NSAIDS (except ibuprofen), 38 percent; ibuprofen, 15 percent; and combinations of IAAAs (i.e., contain acetaminophen and aspirin), 2 percent. Cost estimates are for small, medium, and large branded companies, private label companies, and by affected product group. The ERG report presents model assumptions and methods for calculating costs.

ERG visited five stores—two major chain drug stores and three convenience stores—to collect information on the distribution of types of OTC IAAA drug product packaging. Roughly 80 percent of OTC IAAA drug products were packaged in cartons and 20 percent in containers. To assess the increase in label space requirements, ERG purchased 45 affected products, with an emphasis on smaller packages.

1. Label Area Changes

ERG collected and recorded descriptive packaging information on the sampled products and measured existing font size, labeling area and labeling text on packages, and the area needed for replacement text. ERG then calculated the percentage increase in square millimeters (mm^2) needed to accommodate the proposed labeling changes. In all cases, ERG determined that the requirement to add active ingredient names on the PDP, while requiring major redesign in some cases, did not impose a change in the size of the PDP or the addition of non-standard labeling (such as adding a fifth carton panel or peelback label). ERG estimates that the increase in existing label area needed to accommodate the additional proposed label warnings and text ranges from 8 percent (acetaminophen) to 32 percent (ibuprofen).

2. Package size or type changes

ERG measured the available panels and white space on the 45 packages sampled. If the available white space was greater than the estimated increase in space necessary to accommodate the new label warnings, ERG determined the product would not require an increase in carton or container size. Based on this review, ERG assumed that all current packaging can accommodate the required changes in this proposal without altering label sizes, package sizes, or adding non-standard labels. Therefore, ERG did not assign costs for adjustments to packaging. Although

[2] Estimates of affected SKUs are 18,000 (CDER) and from 20,000 to 25,000 (per industry consultant). This number of SKUs includes products marketed by manufacturers, repackers, relabelers, and distributors.

finding only a few small foil packs that did not comply with the OTC Drug Facts labeling requirements, ERG noted that alternative types of packaging are now available to replace the older packages.

Table 12 presents the estimated total and annualized costs of compliance with the OTC IAAA drug product proposed rule. The total estimated one-time costs to revise labeling are $32.6 million. The estimated annualized cost over the relevant relabeling period is $15.2 million at a 7-percent discount rate. The estimated average annualized cost per SKU is $677 ($15.2 million/ 22,500 SKUs).

TABLE 12.—ESTIMATED TOTAL AND ANNUALIZED COSTS OF COMPLIANCE ($ MILLION)

	Product Type				
	Company Type	Acetaminophen	NSAID (except Ibuprofen)	Ibuprofen	Combinations of IAAAs
Small Brand	2.2	1.8	0.7	0.1	4.9
Medium Brand	2.1	1.8	0.7	0.09	4.7
Large Brand	6.0	5.1	2.0	0.3	13.3
Private Label	4.4	3.7	1.5	0.2	9.7
Total	14.7	12.4	4.9	0.7	32.6
Total Annualized Costs (at 7-percent discount rate)					
Small Brand	1.0	0.9	0.3	0.05	2.7
Medium Brand	1.0	0.8	0.3	0.04	2.2
Large Brand	2.8	2.4	0.9	0.1	6.2
Private Label	2.0	1.7	0.7	0.09	4.5
Total	6.9	5.8	2.3	0.3	15.2

C. Impact on Affected Sectors

Manufacturers of OTC drug products are classified in North American Industry Classification System (NAICS) 325412, pharmaceutical preparation manufacturing. This classification code includes all manufacturers of prescription and OTC pharmaceutical preparations, but does not include relabelers, repackers, and distributors. The Small Business Administration (SBA) defines a small business in this industry classification code as one with fewer than 750 employees. In NAICS 325412, over 90 percent are considered small entities. The affected industry is a subset of the OTC pharmaceutical industry. This proposed rule affects an estimated 258 manufacturers (of which 200 are small) of OTC IAAA drug products.

Manufacturers often package private label products, although some chains package their own brands. SBA considers the following to be small: (1) Any pharmacy or drug store with annual sales under $6 million, and (2) supermarkets and other grocery stores and warehouses and superstores with sales under $23 million. Generally, only the largest supermarket and drug store chains (263 firms) or superstores (9 firms) would have their own private label. ERG included only those largest retail chains with annual sales of $100 million or more as having their own private labels. Thus, FDA believes that there are no small entities in these retail sectors that are affected. Marketers of private label OTC drug products are classified as follows:

NAICS 446110, Pharmacies and drug stores

NAICS 445110, Supermarkets and other grocery stores

NAICS 452910, Warehouse clubs and superstores.

Packaging and labeling services that contract with pharmaceutical manufacturing firms may also be affected, but we assume manufacturers bear the costs of any labeling changes. Both the manufacturing and marketing sectors will most likely share costs, but the extent is not known. Therefore, this impact analysis first assumes that manufacturers absorb all of the labeling costs. We then assume that all private labeling costs are absorbed by chain stores and calculate impacts.

To assess the impact on entities in the pharmaceutical-manufacturing sector (NAICS 325412), ERG adjusted SBA data on firm size and revenues to estimate average receipts per firm for the affected sector. ERG applied modeling assumptions to estimate the number of large and small affected firms. ERG further assumed the distribution of all 22,500 affected SKUs is one-third for large firms (producing either branded or private label products) and two-thirds for small firms. To estimate the share of total compliance costs for each size category, ERG distributed the SKUs attributed to small businesses in the same proportion as employment. The distribution of SKUs determines the distribution of compliance costs by employment size category. Table 13 summarizes the estimated impacts for pharmaceutical manufacturers, the total cost per firm based on $677 per SKU, and the compliance costs as a percent of revenues.

TABLE 13.—ESTIMATED IMPACTS ON PHARMACEUTICAL PREPARATION MANUFACTURING FIRMS BY SIZE (NAICS 325412)

Employment Size	Average Receipts per Firm ($mil)	Assumed No. of SKUs	SKUs per Firm	Total Firm Cost ($000)[1]	Compliance Cost as % of Receipts
<20	1.7	841	9	6.0	0.340%
20–99	12.2	2,591	65	43.8	0.361%
100–499	61.9	5,506	148	100.2	0.162%
500–749	366.8	6,062	225	151.9	0.041%
Total Small	29.1	15,000	75	50.8	0.175%
>750	947.8	7,500	130	88.1	0.009%
Total	109.6	22,500	87	59.1	0.054%

[1]Number of SKUs x $677 per SKU.
Source: SBA, 1999 and ERG estimates.

Total estimated compliance costs per firm ranged from $6,000 for firms with fewer than 20 employees to $152,000 for firms with 500 to 749 employees. The compliance cost as a percent of receipts is less than 1 percent for all firms; 0.18 percent for all small firms and 0.01 for large firms. This estimate of impacts is somewhat understated because the census data used to derive estimates includes both OTC and prescription drug manufacturers. However, no alternative revenue and employment size information for affected product lines is available. We tentatively conclude that this estimate of the impacts of the proposed rule does not constitute a significant economic impact on a substantial number of small entities.

In a similar analysis, we assume chain stores absorb costs for all 11,250 private label SKUs. Compliance costs as a percent of receipts are less than 0.001 percent for all of the affected sectors: Pharmacies, drug stores, superstores, supermarkets, and other grocery stores. No small entities are affected.

Manufacturers routinely change labels at varying intervals and have standardized procedures in place for complying with FDA requirements. The proposed rule would not require any new reporting and record keeping activities and no additional professional skills are needed. There are no other Federal rules that duplicate, overlap, or conflict with the proposed rule; FDA is proposing to remove the existing alcohol warning in § 201.322.

D. Alternatives

FDA does not believe that there are any alternatives to the proposed rule that would adequately provide for the safe and effective use of OTC drug products containing IAAA active ingredients. Nonetheless, FDA considered but rejected the following alternatives: (1) Not adding the new information to OTC IAAA drug product labeling, and (2) a longer implementation period. FDA does not consider either of these approaches acceptable because they do not assure that consumers will have the most current labeling information needed for the safe and effective use of these products. FDA considers this proposed rule the least burdensome alternative that meets the public health objectives of this rule.

E. Benefits

FDA's proposed requirements are intended to enhance consumer awareness and knowledge of the active ingredient in OTC IAAA drug products. These new proposals include:

• New label warnings
• Age specific information
• Advising consumers of potential risks and when to consult a doctor
• Prominent display of active ingredients on the PDP

The revised alcohol statements are intended to provide clearer warnings to high-risk individuals about product use. The overall intent of these proposed requirements is to reduce the liver damage and GI bleeding episodes that occur due to unintentional overdosing with these drugs. The proposed requirements are also intended to reduce the incidence of adverse health outcomes among high-risk subpopulations consuming proper doses of OTC IAAA drug products (e.g., people with liver disease or prone to GI bleeding).

To estimate the benefits of this proposed rule, we developed baseline information on the frequency of hospitalizations, emergency room visits, and deaths related to unintentional overdosing with OTC IAAA drug products. We used a value of $5 million to represent the premature loss of a statistical life in previous analyses (see 66 FR 6137, January 19, 2001). We quantified the related hospital and emergency room costs, estimated related morbidity costs, applied a value of $5 million to the premature loss of a statistical life, and estimated annual savings if 1 to 3 percent of these adverse events and deaths are avoided (Ref. 129).

We lack evidence to predict with certainty a specific level of reduction in adverse events. Nonetheless, we believe that presenting consumers with improved label warnings and more prominently displaying the active ingredients on the PDP will promote safer use of OTC IAAA drug products. Specifically, prominent display of the active ingredients on the PDP would alert consumers to the presence of the active ingredients in OTC IAAA drug products and help minimize the risks of unintentional overdosing. The revised warnings are intended to assist consumers, including higher risk individuals, to use OTC IAAA drug products more safely and lead to at least a modest reduction in unintentional overdosing.

Table 14 summarizes the baseline and estimates of the number of avoidable hospitalizations and emergency room visits, the average cost per case, and potential savings from events avoided. These data do not include reported cases of intentional overdosing. Based on the total monetized costs per adverse health outcome and the number of cases estimated to be avoided each year (from 1 to 3 percent), the total monetized benefits of illness avoided range from $0.6 million to $1.8 million per year ($592,600 to $1,777,900).

TABLE 14. —SUMMARY OF ANNUAL MONETIZED BENEFITS OF ILLNESSES AVOIDED ASSOCIATED WITH THE PROPOSED RULE (2001 $)

Adverse Health Event	Hospital Costs	Willing to Pay to Avoid Illness	Total Monetized Value of Illness Avoided	Potentially Preventable Baseline Cases per Year(1)	Annual Number of Cases Avoided Due to Proposed Rule(2)	Total Annual Monetized Benefits of Illness Avoided ($000)
Minor drug toxicity or emergency room visits	$209	$301	$510	3,380	34–101	$17.2–$51.7
Acetaminophen poisoning episode with hospitalization	$8,579	$2,000	$10,579	3,424	34–103	$362.2–$1,086.8
NSAID poisoning episode with hospitalization	$8,579	$357	$8,936	2,269	23–68	$202.8–$608.3
Acute renal failure with hospitalization	$22,251	Not Estimated	$22,251	5	0.05–0.15	$1.1–$3.3
Acute renal failure with dialysis	$22,251	Not Estimated	$22,251	0.7	0.007–0.021	$0.2–$0.5
GI bleeding	$14,653	$357	$15,010	61	0.6–1.8	$9.2–$27.5
Total monetized benefit of illness avoided	NA	NA	NA	NA	NA	$592.6–$1,777.9

(1) The number of potentially preventable baseline cases per year is derived from data on emergency department and hospital cases of overdosing, poisoning, or other serious adverse outcomes associated with acetaminophen and NSAID use, adjusted to estimate only unintentional cases.
(2) Assumes this proposed rule would reduce annual adverse event cases by 1 to 3 percent.
Source: FDA Section III.B.2 of this document and ERG report (Ref. 129).

In addition to estimating the value of preventing adverse drug events that result in emergency department or hospitalization, we consider the annual number of deaths related to unintentional acetaminophen overdoses. FDA estimates that from 1996 to 1998, an annual average of 99 adult deaths were related to unintentional acetaminophen overdoses (see section III.B.2 of this document and the ERG report (Ref. 129)). We assume the proposed rule would reduce fatalities by 1 to 3 percent annually. Applying a value of $5 million for each fatality prevented, we estimate the total benefits associated with preventing 1 to 3 fatalities to be $5 to $15 million annually ($2001).

If the proposed improved labeling and warnings reduced serious adverse events by 1 to 3 percent each year, the total monetized value of preventing illness and fatalities because of improved labeling and warnings would be $5.6 million to $16.8 million per year, respectively. These benefits are presented in 2001 dollars.

Benefit Cost Comparison. Industry would incur the one-time costs of the proposed rule of $32.6 million in the first year. In 2001, the costs were $32.0 million. However, the estimated savings from reduced hospital costs and deaths avoided, from $5.6 to $16.8 million, would accrue each year. Over a 10-year period, the $5.6 to $16.8 million per year in benefits has a present value of $41.2 to $126.1 million at a discount rate of 7 percent, and a present value of $49.1 to $147.4 million at a discount rate of 3 percent. Thus, the benefits of this proposed rule, assuming a 1-percent reduction in current levels of adverse health outcomes associated with the use of OTC IAAA drug products, will more than offset the costs of the proposed rule. Table 15 summarizes the estimated benefits and costs of this proposed rule.

TABLE 15.—SUMMARY OF IMPACTS

Benefits/Costs	($Million)
Benefits:	
Monetized 1 and 3 percent reduction in illnesses and mortality, per year	$5.6–$16.8
Present value over 10 years at 7 percent	$41–$126

TABLE 15.—SUMMARY OF IMPACTS—Continued

Benefits/Costs	($Million)
Present value over 10 years at 3 percent	$49–$147
Costs:	
One-time label revision, first year	$32.6

Break-even Analysis. FDA notes that we lack the data needed to confidently predict a percent reduction in serious cases related to unintentional overdosing. Because of the uncertainty in these estimates, we estimated an annual average number of adverse events that would need to be avoided over a 10-year period to reach a breakeven point (i.e., the cost of compliance/present value of avoiding one death each year for 10 years). The proposed rule would need to prevent about 1 fatality each year over 10 years [0.9 fatality ($32/$37.6 million at a 7-percent discount rate) and 0.7 fatality ($32/$43.9 million at a 3 percent discount rate)]. Alternatively, if no fatalities are avoided, the proposed rule would need to prevent about 476 hospitalizations ($32 million/$67,000) each year over the 10-year period. This estimate uses the present value of the lowest benefit category of poisoning episode with hospitalizations, $8,936 per episode over 10 years at a 7-percent discount rate. At a 3 percent discount rate, an average of 407 hospitalizations ($32 million/$79,000) would need to be avoided annually over the period.

Although we lack evidence to predict with certainty a specific level of reduction in adverse events, if we assume only a 1-percent reduction in the illnesses and fatalities analyzed, the benefits of this proposed rule outweigh the costs. FDA finds that this proposed rule will enhance public health and promote the safer use of OTC IAAA drug products.

This economic analysis, together with other relevant sections of this document, serves as FDA's initial regulatory flexibility analysis, as required under the Regulatory Flexibility Act.

FDA invites public comment regarding any significant economic impact that this rulemaking would have on affected manufacturers of these OTC IAAA drug products. Comments regarding the impact of this rulemaking should be accompanied by appropriate documentation. FDA is providing 150 days from the date of publication of this proposed rule in the **Federal Register** for comments on this subject to be developed and submitted. FDA will evaluate any comments and supporting data that are received and will reassess the economic impact of this rulemaking in the preamble to any final rule.

XI. Paperwork Reduction Act of 1995

FDA tentatively concludes that the labeling requirements proposed in this document are not subject to review by the Office of Management and Budget because they do not constitute a ''collection of information'' under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). Rather, the proposed labeling statements are public disclosures of information originally supplied by the Federal Government to the recipient for the purpose of disclosure to the public (5 CFR 1320.3(c)(2)).

XII. Environmental Impact

FDA has determined under 21 CFR 25.31(a) that this proposed action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

XIII. Federalism

FDA has analyzed this proposed rule in accordance with the principles set forth in Executive Order 13132. FDA has determined that the proposed rule, if finalized as proposed, would have a preemptive effect on State law. Section 4(a) of the Executive Order requires agencies to ''construe* * *a Federal statute to preempt State law only where the statute contains an express preemption provision or there is some other clear evidence that the Congress intended preemption of State law, or where the exercise of State authority conflicts with the exercise of Federal authority under the Federal statute.'' Section 751 of the Federal Food, Drug, and Cosmetic Act (act) (21 U.S.C. 379r) is an express preemption provision that applies to nonprescription drugs. Section 751(a) of the act (21 U.S.C. 379r(a)) provides that:

* * no State or political subdivision of a State may establish or continue in effect any requirement— * * * (1) that relates to the regulation of a drug that is not subject to the requirements of section 503(b)(1) or 503(f)(1)(A); and (2) that is different from or in addition to, or that is otherwise not identical with, a requirement under this Act, the Poison Prevention Packaging Act of 1970 (15 U.S.C. 1471 et seq.), or the Fair Packaging and Labeling Act (15 U.S.C. 1451 et seq.). * * *

Currently, this provision operates to preempt States from imposing requirements related to the regulation of nonprescription drug products. (See section 751(b), (c), (d), and (e) of the act for the scope of the express preemption provision, the exemption procedures, and the exceptions to the provision.) This proposed rule, if finalized as proposed, would amend the labeling for over-the-counter IAAA drug products to include new warnings and other labeling requirements advising consumers about potential risks and when to consult a doctor. Although any final rule would have preemptive effect, in that it would preclude States from issuing requirements related to the labeling of IAAA drug products that are different from or in addition to, or not otherwise identical with a requirement in the final rule, this preemptive effect is consistent with what Congress set forth in section 751 of the act. Section 751(a) of the act displaces both state legislative requirements and state common law duties. We also note that even where the express preemption provision is not applicable, implied preemption may arise. See *Geier* v. *American Honda Co.*, 529 U.S. 861 (2000).

FDA believes that the preemptive effect of the proposed rule, if finalized as proposed, would be consistent with Executive Order 13132. Section 4(e) of the Executive Order provides that ''when an agency proposes to act through adjudication or rulemaking to preempt State law, the agency shall provide all affected State and local officials notice and an opportunity for appropriate participation in the proceedings.'' FDA is providing an opportunity for State and local officials to comment on this rulemaking, and will conduct outreach to State and local governments or organizations representing them.

XIV. Request for Comments

In addition to requesting general comments on the proposal and the economic analysis, we are seeking comment on the following specific issues identified in the description of the proposed rule (presented here for the convenience of the reader):

1. Both comment and data on whether adult NSAID products should contain a warning regarding fluid loss or dehydration similar to children NSAID products (see section V.B.2 of this document).
2. Appropriate approaches to reduce unintentional acetaminophen overdose (see section VII.A of this document).
3. Whether more specific directions, such as those currently required for OTC drug products containing ibuprofen, should be considered for acetaminophen (see section VII.A of this document).
4. Both comment and data on whether there are specific populations of people for whom the maximum daily dose for acetaminophen is not safe and effective and should be lowered (see section VII.A of this document).
5. Both comment and data on specific dosage for safe and effective use of acetaminophen in people who consume alcohol (see section VII.B of this document).
6. Both comment and data on whether combinations of acetaminophen with NAC or methionine would prevent or reduce acetaminophen-induced liver toxicity (see section VII.C of this document).
7. Both comment and data on package size or package configuration limitations on the sale of acetaminophen (see section VII.D of this document).
8. Both comment and data on whether acetaminophen poses additional risk for certain population subgroups (e.g., conditions in which GSH is reduced) (see section VII.E of this document).
9. Both comment and data on whether additional labeling is necessary regarding acetaminophen-warfarin drug-drug interaction (see section VII.F of this document).
10. Comment on the proposal to include a warning on acetaminophen products for patients with liver disease to ask their doctor for advice. Also, request information and data on the current dosing practices of health providers who treat patients with underlying liver disease.

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) written or electronic comments regarding this document. Submit a single copy of electronic comments or three hard copies of any mailed comments, except that individuals may submit one paper copy. Comments are to be identified with the docket number found in brackets in the heading of this document and may be accompanied by a supporting memorandum or brief. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

XV. Proposed Effective and Compliance Dates

Because of the importance of the proposed labeling to the safe use of OTC IAAA drug products, FDA is proposing that any final rule that may publish based on this proposal become effective 12 months after its date of publication in the **Federal Register**. Manufacturers who voluntarily implement the labeling included in this proposal before the final rule is published will have 18 months after the date of publication of the final rule in the **Federal Register** to be in compliance with that final rule.

XVI. References

The following references are on display in the Division of Dockets Management (see **ADDRESSES**), under Docket No. 1977N–0094L, unless otherwise indicated, and may be seen by interested persons between 9 a.m. and 4 p.m., Monday through Friday. (FDA has verified the Web site addresses, but we are not responsible for subsequent changes to the Web sites after this document publishes in the **Federal Register**.)

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129. Eastern Research Group, Inc. ''Cost Benefit Analysis of Proposed FDA Rule on Over-the-Counter Internal Analgesic, Antipyretic, and Antirheumatic Drug Products; Required Warnings'', Final Report, October 6, 2004.

List of Subjects

21 CFR Part 201

Drugs, Labeling, Reporting and recordkeeping requirements.

21 CFR Part 343

Labeling, Over-the-counter drugs.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, it is proposed that 21 CFR parts 201 and 343 (as proposed in the **Federal Register** of November 16, 1988 and August 21, 2002) be amended as follows:

PART 201—LABELING

1. The authority citation for 21 CFR part 201 continues to read as follows:

Authority: 21 U.S.C. 321, 331, 351, 352, 353, 355, 358, 360, 360b, 360g–360s, 371, 374, 379e; 42 U.S.C. 216, 241, 262, 264.

■ 2. Section 201.66 is amended by revising paragraph (c)(5)(ii)(E) to read as follows:

§ 201.66 Format and content requirements for over-the-counter (OTC) drug product labeling.

* * * * *

(c) * * *
(5) * * *
(ii) * * *

(E) Liver warning set forth in § 201.325(a)(1)(iii) and/or stomach bleeding warning set forth in § 201.325(a)(2)(iii). The liver warning shall follow the subheading ''Liver warning:'' and the stomach bleeding warning shall follow the subheading ''Stomach bleeding warning:''

* * * * *

§ 201.322 [Removed]

3. Section 201.322 is removed.

4. Section 201.325 is added to subpart G to read as follows:

§ 201.325 Over-the-counter drug products containing internal analgesic/antipyretic active ingredients; required warnings and other labeling.

(a) *Labeling*. The labeling for all over-the-counter (OTC) drug products containing any internal analgesic/antipyretic active ingredients (including, but not limited to, acetaminophen, aspirin, carbaspirin calcium, choline salicylate, ibuprofen, ketoprofen, magnesium salicylate, naproxen sodium, and sodium salicylate) alone or in combination must bear the following labeling in accordance with §§ 201.60, 201.61, and 201.66.

(1) *Acetaminophen*.

(i) *Principal display panel*. The presence of ''acetaminophen'' in the product must be prominently stated on the principal display panel (PDP), as defined in § 201.60.

(ii) *Statement of identity*. The statement of identity appears in accord with §§ 201.61, 299.4, and 343.50(a) of this chapter. The ingredient name acetaminophen must appear highlighted (e.g., fluorescent or color contrast) or in bold type, be in lines generally parallel to the base on which the package rests as it is designed to be displayed, and be in one of the following sizes, whichever is greater: (1) At least one-quarter as large as the size of the most prominent printed matter on the PDP, or (2) at least as large as the size of the ''Drug Facts'' title, as required in § 201.66(d)(2). The presence of acetaminophen must appear as part of the established name of the drug, as defined in § 299.4 of this chapter. Combination products containing acetaminophen and a nonanalgesic ingredient(s) (e.g., cough-cold) must include the name ''acetaminophen'' and the name(s) of the other active ingredient(s) in the product on the PDP in accord with this paragraph. Only the name ''acetaminophen'' must appear highlighted or in bold type, and in a prominent print size, as described in this paragraph.

(iii) *For products labeled for adults only. Warnings*. The labeling of the product states the following warnings under the heading ''Warnings'':

(A) ''Liver warning [heading in bold type]: This product contains acetaminophen. Severe liver damage may occur if you take [bullet] more than [insert maximum number of daily dosage units] in 24 hours [bullet] with other drugs containing acetaminophen [bullet] 3 or more alcoholic drinks every day while using this product''. This ''Liver warning'' must be the first warning under the ''Warnings'' heading. For products that contain both acetaminophen and aspirin, this ''Liver warning'' must appear after the ''Reye's syndrome'' and ''Allergy alert'' warnings in § 201.66(c)(5)(ii)(A) and (c)(5)(ii)(B) and before the ''Stomach bleeding warning'' in paragraph (a)(2)(iii)(A) of this section.

(B) ''Do not use [heading in bold type] with any other drug containing acetaminophen (prescription or nonprescription). Ask a doctor or pharmacist before using with other drugs if you are not sure.''

(C) ''Ask a doctor before use if you have [heading in bold type] liver disease''.

(iv) *For products labeled only for children under 12 years of age*. (A) *Warnings*. The labeling of the product states the following warnings under the heading ''Warnings'':

(*1*) ''Liver warning [heading in bold type]: This product contains acetaminophen. Severe liver damage may occur if the child takes [bullet] more than 5 doses in 24 hours [bullet] with other drugs containing acetaminophen''. This ''Liver warning'' must be the first warning under the ''Warnings'' heading.

(*2*) ''Do not use [heading in bold type] with any other drug containing acetaminophen (prescription or nonprescription). Ask a doctor or pharmacist before using with other drugs if you are not sure.''

(*3*) ''Ask a doctor before use if the child has [heading in bold type] liver disease''.

(B) *Directions*. The labeling of the product contains the following information under the heading ''Directions'': ''this product does not contain directions or warnings for adult use'' [in bold type].

(v) *For products labeled for adults and children under 12 years of age. Warnings.* The labeling of the product states all of the warnings in paragraphs (a)(1)(iii)(A), (a)(1)(iii)(B), and (a)(1)(iii)(C) of this section with the following modifications:

(A) The Liver warning states ''Liver warning [heading in bold type]: This product contains acetaminophen. Severe liver damage may occur if [bullet] adult takes more than [insert maximum number of daily dosage units] in 24 hours [bullet] child takes more than 5 doses in 24 hours [bullet] taken with other drugs containing acetaminophen [bullet] adult has 3 or more alcoholic drinks everyday while using this product.''

(B) ''Ask a doctor before use if the user [heading in bold type] has liver disease.''

(2) *Nonsteroidal anti-inflammatory analgesic/antipyretic active ingredients—including, but not limited to, aspirin, carbaspirin calcium, choline salicylate, ibuprofen, ketoprofen, magnesium salicylate, naproxen sodium, and sodium salicylate.*

(i) *Principal display panel.* The presence of an ''NSAID'' ingredient in the product must be prominently stated on the principal display panel (PDP), as defined in § 201.60.

(ii) *Statement of identity.* The statement of identity appears in accord with §§ 201.61, 299.4, and 343.50(a) of this chapter. The name of the NSAID ingredient and the word ''(NSAID)'' must appear highlighted (e.g., fluorescent or color contrast) or in bold type, be in lines generally parallel to the base on which the package rests as it is designed to be displayed, and be in one of the following sizes, whichever is greater: At least one-quarter as large as the size of the most prominent printed matter on the PDP, or at least as large as the size of the ''Drug Facts'' title, as required in § 201.66(d)(2). The word ''(NSAID)'' must appear as part of the established name of the drug, as defined in § 299.4 of this chapter, or after the general pharmacological (principal intended) action of the NSAID ingredient. For example, either of the following would be acceptable: Ibuprofen Tablets (NSAID) or Pain reliever/ fever reducer (NSAID). Combination products containing an NSAID and a nonanalgesic ingredient(s) (e.g., cough-cold) must include the name of the NSAID ingredient and the word ''(NSAID)'' in accord with this paragraph, and the name(s) of the other active ingredient(s) in the product on the PDP. Only the name of the NSAID ingredient and the word ''(NSAID)'' need to appear highlighted or in bold type, and in a prominent print size, as described in this paragraph.

(iii) *For products labeled for adults only. Warnings.* The labeling of the product states the following warnings under the heading ''Warnings'':

(A) ''Stomach bleeding warning [heading in bold type]: This product contains a nonsteroidal anti-inflammatory drug (NSAID), which may cause stomach bleeding. The chance is higher if you [bullet] are age 60 or older [bullet] have had stomach ulcers or bleeding problems [bullet] take a blood thinning (anticoagulant) or steroid drug [bullet] take other drugs containing an NSAID [aspirin, ibuprofen, naproxen, or others] [bullet] have 3 or more alcoholic drinks every day while using this product [bullet] take more or for a longer time than directed''. This ''Stomach bleeding warning'' must appear after the ''Reye's syndrome'' and ''Allergy alert'' warnings in § 201.66(c)(5)(ii)(A) and (c)(5)(ii)(B). For products that contain both acetaminophen and aspirin, the acetaminophen ''Liver warning'' in § 201.325(a)(1)(iii) must appear before the ''Stomach bleeding warning'' in this paragraph.

(B) ''Ask a doctor before use if you have [heading in bold type] [bullet] stomach problems that last or come back, such as heartburn, upset stomach, or stomach pain [bullet] ulcers [bullet] bleeding problems [bullet] high blood pressure [bullet] heart or kidney disease [bullet] taken a diuretic [bullet] reached age 60 or older''.

(C) ''Ask a doctor or pharmacist before use if you are [heading in bold type] [bullet] taking any other drug containing an NSAID (prescription or nonprescription) [bullet] taking a blood thinning (anticoagulant) or steroid drug''.

(D) ''Stop use and ask a doctor if [heading in bold type] [bullet] you feel faint, vomit blood, or have bloody or black stools. These are signs of stomach bleeding. [bullet] stomach pain or upset gets worse or lasts''.

(iv) *For products labeled only for children under 12 years of age. Warnings.* (A) The labeling of the product states the following warnings under the heading ''Warnings'':

(*1*) ''Stomach bleeding warning [heading in bold type]: This product contains a nonsteroidal anti-inflammatory drug (NSAID), which may cause stomach bleeding. The chance is higher if the child [bullet] has had stomach ulcers or bleeding problems [bullet] takes a blood thinning (anticoagulant) or steroid drug [bullet] takes other drugs containing an NSAID (aspirin, ibuprofen, naproxen, or others) [bullet] takes more or for a longer time than directed''. The ''Stomach bleeding warning'' must appear after the ''Reye's syndrome'' and ''Allergy alert'' warnings in §§ 201.66(c)(5)(ii)(A) and (c)(5)(ii)(B).

(*2*) ''Ask a doctor before use if the child has [heading in bold type] [bullet] stomach problems that last or come back, such as heartburn, upset stomach, or stomach pain [bullet] ulcers [bullet] bleeding problems [bullet] not been drinking fluids [bullet] lost a lot of fluid due to vomiting or diarrhea [bullet] high blood pressure [bullet] heart or kidney disease [bullet] taken a diuretic''.

(*3*) ''Ask a doctor or pharmacist before use if the child is [heading in bold type] [bullet] taking any other drug containing an NSAID (prescription or nonprescription) [bullet] taking a blood thinning (anticoagulant) or steroid drug''.

(*4*) ''Stop use and ask a doctor if [heading in bold type] [bullet] the child feels faint, vomits blood, or has bloody or black stools. These are signs of stomach bleeding. [bullet] stomach pain or upset gets worse or lasts''.

(B) *Directions.* The labeling of the product contains the following information under the heading ''Directions'': ''this product does not contain directions or warnings for adult use'' [in bold type].

(v) *For products labeled for adults and children under 12 years of age. Warnings.* The labeling of the product states all of the warnings in paragraphs (2)(iii)(A) through (2)(iii)(D) of this section with the following modifications:

(A) The Stomach bleeding warning states ''Stomach bleeding warning [heading in bold type]: This product contains a nonsteroidal anti-inflammatory drug (NSAID), which may cause stomach bleeding. The chance is higher if the user [bullet] has had stomach ulcers or bleeding problems [bullet] takes a blood thinning (anticoagulant) or steroid drug [bullet] takes other drugs containing an NSAID [aspirin, ibuprofen, naproxen, or others] [bullet] takes more or for a longer time than directed [bullet] is age 60 or older [bullet] has 3 or more alcoholic drinks everyday while using this product''. The ''Stomach bleeding warning'' must appear after the ''Reye's syndrome'' and ''Allergy alert'' warnings in §§ 201.66(c)(5)(ii)(A) and (c)(5)(ii)(B).

(B) The labeling states ''Ask a doctor before use if the user has [heading in bold type] [bullet] stomach problems that last or come back, such as heartburn, upset stomach, or stomach pain [bullet] ulcers [bullet] bleeding problems [bullet] high blood pressure [bullet] heart or kidney disease [bullet] taken a diuretic [bullet] not been drinking fluids [bullet] lost a lot of fluid due to vomiting or diarrhea [bullet] reached age 60 or older.''

(C) The labeling states ''Ask a doctor or pharmacist before use if the user is [heading in bold type] [bullet] taking any other drug containing an NSAID (prescription or nonprescription) [bullet] taking a blood thinning (anticoagulant) or steroid drug''.

(D) The labeling states ''Stop use and ask a doctor if [heading in bold type] [bullet] the user feels faint, vomits blood, or has bloody or black stools. These are signs of stomach bleeding. [bullet] stomach pain or upset gets worse or lasts''.

(vi) *Active ingredient(s)*. The active ingredient(s) section of the product's labeling, as defined in § 201.66(c)(2), contains the term ''(NSAID)*'' after the NSAID active ingredient with an asterisk statement at the end of the active ingredient(s) section that defines the term ''NSAID'' and states ''* nonsteroidal anti-inflammatory drug.''

(b) *New warnings information statement*. The labeling of any drug product subject to this section that is initially introduced or initially delivered for introduction into interstate commerce before the effective date and within 12 months after the effective date of the final rule or if relabeled at any time before the effective date of the final rule must bear on its principal display panel (PDP), as defined in § 201.60, the statement ''See new warnings information.'' This statement must appear highlighted (e.g., fluorescent or color contrast) or in bold type, be in lines generally parallel to the base on which the package rests as it is designed to be displayed, and be in one of the following sizes, whichever is greater:

(1) At least one-quarter as large as the size of the most prominent printed matter on the PDP, or

(2) At least as large as the size of the ''Drug Facts'' title, as required in § 201.66(d)(2).

(c) *Requirements to supplement approved application*. Holders of approved applications for OTC drug products that contain internal analgesic/antipyretic active ingredients that are subject to the requirements of paragraph (a) of this section must submit supplements under § 314.70(c) of this chapter to include the required information in the product's labeling. Such labeling may be put into use without advance approval of FDA provided it includes at least the exact information included in paragraph (a) of this section.

(d) *Regulatory action*. Any drug product subject to this section that is not labeled as required and that is initially introduced or initially delivered for introduction into interstate commerce after [date 12 months after date of publication of the final rule in the **Federal Register**] is misbranded under section 502 of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 352) and is subject to regulatory action. Any drug product for which the labeling required in this section was voluntarily implemented before the date of publication of the final rule that is initially introduced or initially delivered for introduction into interstate commerce after [date 18 months after date of publication of the final rule in the **Federal Register**] and that is not labeled as required is misbranded under section 502 of the act and is subject to regulatory action.

PART 343—INTERNAL ANALGESIC, ANTIPYRETIC, AND ANTIRHEUMATIC DRUG PRODUCTS FOR OVER-THE-COUNTER HUMAN USE

4. The authority citation for 21 CFR part 343 continues to read as follows:

Authority: 21 U.S.C. 321, 351, 352, 353, 355, 360, 371.

5. Section 343.50, as proposed at 53 FR 46255, November 16, 1988, and 67 FR 54158, August 21, 2002, is further amended by revising paragraphs (c)(1)(i), (c)(1)(iii), (c)(1)(iv)(A), (c)(1)(v)(A) through (c)(1)(v)(C), (c)(1)(ix)(A), (c)(1)(ix)(B), (c)(1)(ix)(C), (c)(1)(ix)(E), (c)(2)(i), (c)(2)(iii), (c)(2)(iv)(A), (c)(2)(v)(A) through (c)(2)(v)(C)[3] and adding new paragraphs (b)(4)(i)(C) and (c)(3)(i) through (c)(3)(v)(C) to read as follows:

§ 343.50 Labeling of analgesic-antipyretic drug products.

* * * * *

(b) * * *

(4) * * *

(i) * * *

(C) The product states the following statement under the heading ''Directions,'' ''this product does not contain directions or warnings for adult use''. This statement is not required for products containing ibuprofen as identified in § 343.10 (g).

* * * * *

(c) * * *

(1) * * *

(i) For products containing any ingredient in § 343.10 (a) through (f) The labeling states ''Stop use and ask a doctor if [heading in bold type] [bullet][1] pain gets worse or lasts more than 10 days [bullet] fever gets worse or lasts more than 3 days [bullet] redness or swelling is present [bullet] any new symptoms appear''.

* * * * *

(iii) *For products containing acetaminophen identified in § 343.10(a)*. The labeling states the warnings in § 201.325(a)(1)(iii)(A), (a)(1)(iii)(B), and (a)(1)(iii)(C) and the following statement must follow the general warning identified in § 330.1(g) of this chapter: ''Prompt medical attention is critical for adults as well as for children even if you do not notice any signs or symptoms.''

(iv) * * *

(A) The labeling states the warning in paragraph (c)(1)(v)(B) plus the bulleted statement ''asthma''.

* * * * *

(v) * * *

(A) The labeling states the warning in paragraph (c)(1)(i) of this section plus ''[bullet] you feel faint, vomit blood, or have bloody or black stools. These are signs of stomach bleeding. [bullet] stomach pain or upset gets worse or lasts [bullet] ringing in the ears or loss of hearing occurs''.

(B) The labeling states ''Ask a doctor before use if you have [heading in bold type] [bullet] stomach problems that last or come back, such as heartburn, upset stomach, or stomach pain [bullet] ulcers [bullet] bleeding problems [bullet] high blood pressure [bullet] heart or kidney disease [bullet] taken a diuretic [bullet] reached age 60 or older''.

(C) The labeling states ''Ask a doctor or pharmacist before use if you are [heading in bold type] [bullet] taking any other drug containing an NSAID (prescription or nonprescription) [bullet] taking a blood thinning (anticoagulant) or steroid drug [bullet] taking a prescription drug for diabetes, gout, or arthritis''.

* * * * *

(ix) * * *

(A) The stomach bleeding warning set forth in § 201.325(a)(2)(iii)(A), (a)(2)(iv)(A), or (a)(2)(v)(A) of this chapter appears after the subheading ''Stomach bleeding warning:''.

(B) The labeling states ''Ask a doctor before use if you have [heading in bold type] [bullet] problems or serious side effects from taking pain relievers or fever reducers [bullet] stomach problems that last or come back, such as

[3] The warnings in these sections are revised to conform with § 201.66 (Drug Facts format). Other warnings remain as proposed in the TFM and will be revised into the Drug Facts format in a future issue of the **Federal Register**.

[1] See § 201.66(b)(4) of this chapter for definition of bullet symbol.

heartburn, upset stomach, or stomach pain [bullet] ulcers [bullet] bleeding problems [bullet] high blood pressure [bullet] heart or kidney disease [bullet] taken a diuretic [bullet] reached age 60 or older''.

(C) The labeling states ''Ask a doctor or pharmacist before use if you are [heading in bold type] [bullet] taking any other drug containing an NSAID (prescription or nonprescription [bullet] taking a blood thinning (anticoagulant) or steroid drug [bullet] under a doctor's care for any serious condition [bullet] taking any other drug''.

* * * * *

(E) In addition to the warning required in § 201.324(c) of this chapter after the subheading ''Stop use and ask a doctor if'' [heading in bold type], the following statements also appear: ''[bullet] you feel faint, vomit blood, or have bloody or black stools. These are signs of stomach bleeding. [bullet] pain gets worse or lasts more than 10 days [bullet] fever gets worse or lasts more than 3 days [bullet] stomach pain or upset gets worse or lasts [bullet] redness or swelling is present in the painful area [bullet] any new symptoms appear''.

* * * * *

(2) * * *

(i) For products containing any ingredient in § 343.10 (a) through (f) The labeling states ''Stop use and ask a doctor if [heading in bold type] [bullet] pain gets worse or lasts more than 5 days [bullet] fever gets worse or lasts more than 3 days [bullet] redness or swelling is present [bullet] any new symptoms appear ''.

* * * * *

(iii) *For products containing acetaminophen identified in § 343.10(a)*. The labeling states the warnings in § 201.325(a)(1)(iv)(A)(1), (a)(1)(iv)(A)(2), and (a)(1)(iv)(A)(3) and the following statement must follow the general warning identified in § 330.1(g) of this chapter: ''Prompt medical attention is critical even if you do not notice any signs or symptoms.''

(iv) * * *

(A) The labeling states the warning in paragraph (c)(2)(v)(B) plus the bulleted statement ''asthma''.

* * * * *

(v) * * *

(A) The labeling states the warning in paragraph (c)(2)(i) of this section plus ''[bullet] the child feels faint, vomits blood, or has bloody or black stools. These are signs of stomach bleeding. [bullet] stomach pain or upset gets worse or lasts [bullet] ringing in the ears or loss of hearing occurs''.

(B) The labeling states ''Ask a doctor before use if the child has [heading in bold type] [bullet] stomach problems that last or come back, such as heartburn, upset stomach, or stomach pain [bullet] ulcers [bullet] bleeding problems [bullet] not been drinking fluids [bullet] lost a lot of fluid due to vomiting or diarrhea [bullet] high blood pressure [bullet] heart or kidney disease [bullet] taken a diuretic''.

(C) The labeling states ''Ask a doctor or pharmacist before use if the child is [heading in bold type] [bullet] taking any other drug containing an NSAID (prescription or nonprescription) [bullet] taking a blood thinning (anticoagulant) or steroid drug [bullet] taking a prescription drug for diabetes, gout, or arthritis''.

* * * * *

(3) * * *

(i) For products containing any ingredient in § 343.10 (a) through (f). The labeling states ''Stop use and ask a doctor if [heading in bold type] [bullet] adult's pain gets worse or lasts more than 10 days [bullet] child's pain gets worse or lasts more than 5 days [bullet] fever gets worse or lasts more than 3 days [bullet] redness or swelling is present [bullet] any new symptoms appear''.

(ii) The warning in § 343.50(c)(1)(ii), if applicable.

(iii) *For products containing acetaminophen identified in § 343.10(a)*. The labeling states the warnings in § 201.325(a)(1)(v) of this chapter. The warning in § 201.325 (a)(1)(v)(B) is modified to read: '' Ask a doctor before use if the user [heading in bold type] [bullet] has liver disease [bullet] is a child with pain of arthritis''. The following statement must follow the general warning identified in § 330.1(g) of this chapter: ''Prompt medical attention is critical for adults as well as for children even if you do not notice any signs or symptoms.''

(iv) The warnings in § 343.50(c)(1)(iv), if applicable.

(*v*) *For products containing aspirin, carbaspirin calcium, choline salicylate, magnesium salicylate, or sodium salicylate identified in §§ 343.10(b), (c), (d), (e) and (f)*.

(A) The labeling states the warning in paragraph (c)(3)(i) of this section plus ''[bullet] the user feels faint, vomits blood, or has bloody or black stools. These are signs of stomach bleeding. [bullet] stomach pain or upset gets worse or lasts [bullet] ringing in the ears or loss of hearing occurs''.

(B) The labeling states the warning in § 201.325(a)(2)(v)(B) plus ''[bullet] is a child with pain of arthritis''.

(C) The labeling states the warning in § 201.325(a)(2)(v)(C) plus ''[bullet] taking a prescription drug for diabetes, gout, or arthritis''.

Dated: November 22, 2006.

Jeffrey Shuren,

Assistant Commissioner for Policy.

[FR Doc. E6–21855 Filed 12–19–06; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–136806–06]

RIN 1545–BF87

Treatment of Payments in Lieu of Taxes Under Section 141

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Change of location of public hearing.

SUMMARY: On October 19, 2006, on page 61693 of the **Federal Register** (71 FR 61693), a notice of proposed rulemaking and notice of public hearing announced that a public hearing concerning applying the private security or payment test for State and local governmental issuers of tax-exempt bonds will be held February 13, 2007 in the auditorium of the New Carrollton Federal Building, 5000 Ellin Road, Lanham, MD 20706. The location of the public hearing has changed.

ADDRESSES: The public hearing will be held in the IRS Auditorium, Internal Revenue Building, 1111 Constitution Avenue, NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Concerning submissions of comments, the hearing, and/or to be placed on the building access list to attend the hearing Kelly Banks, (202) 622–0392 (not a toll-free number).

LaNita Van Dyke,

Branch Chief, Publications and Regulations, Associate Chief Counsel, Legal Processing Division, (Procedure and Administration).

[FR Doc. E6–22017 Filed 12–22–06; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–127819–06]

RIN 154–BF79

TIPRA Amendments to Section 199

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Change of location of public hearing.

SUMMARY: On October 19, 2006, on page 61692 of the **Federal Register** (71 FR 61692), a notice of proposed rulemaking by cross-reference to temporary regulations and notice of public hearing announced that a public hearing concerning the application of section 199, which provides a deduction for income attributable to domestic production activities will be held February 5, 2007 in the auditorium of the New Carrollton Federal Building, 5000 Ellin Road, Lanham, MD 20706. The location of the public hearing has changed.

ADDRESSES: The public hearing will be held in the IRS Auditorium, Internal Revenue Building, 1111 Constitution Avenue, NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Concerning submissions of comments, the hearing, and/or to be placed on the building access list to attend the hearing Kelly Banks, (202) 622–0392 (not a toll-free number).

LaNita Van Dyke,

Branch Chief, Publications and Regulations, Associate Chief Counsel, Legal Processing Division, (Procedure and Administration).

[FR Doc. E6–22016 Filed 12–22–06; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–140379–02; REG–142599–02]

RIN 1545–BC07; 1545–BB23

General Allocation and Accounting Regulations Under Section 141

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Change of location of public hearing.

SUMMARY: On September 26, 2006, on page 56072 of the **Federal Register** (71 FR 56072), a notice of proposed rulemaking and notice of public hearing announced that a public hearing relating to allocation and accounting of tax-exempt bonds proceeds for purposes of the private activity bond restrictions will be held January 11, 2007, in the auditorium of the New Carrollton Federal Building, 5000 Ellin Road, Lanham, MD 20706. The location of the public hearing has changed.

ADDRESSES: The public hearing will be held in the IRS Auditorium, Internal Revenue Building, 1111 Constitution Avenue, NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Concerning submissions of comments, the hearing, and/or to be placed on the building access list to attend the hearing Kelly Banks, (202) 622–0392 (not a toll-free number).

LaNita Van Dyke,

Branch Chief, Publications and Regulations, Associate Chief Counsel, Legal Processing Division (Procedure and Administration).

[FR Doc. E6–22023 Filed 12–22–06; 8:45 am]

BILLING CODE 4830–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA R03-OAR–2006–0921; FRL–8261–2]

Approval and Promulgation of Air Quality Implementation Plans; Virginia; Amendments to VOC and NO_X Emission Control Areas and VOC Control Regulations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve State Implementation Plan (SIP) revisions submitted by the Commonwealth of Virginia. These revisions amend the existing volatile organic compound (VOC) and nitrogen oxide (NO_X) emissions control areas, and amend certain VOC and NO_X regulations in order to manage the extension of applicability of these provisions to the amended VOC and NO_X emission control areas. This action is being taken under the Clean Air Act (CAA or the Act).

DATES: Written comments must be received on or before January 25, 2007.

ADDRESSES: Submit your comments, identified by Docket ID Number EPA–R03–OAR–2006–0921 by one of the following methods:

A. *www.regulations.gov.* Follow the on-line instructions for submitting comments.

B. E-mail: *morris.makeba@epa.gov.*

C. Mail: EPA–R03–OAR–2006–0921, Makeba Morris, Chief, Air Quality Planning Branch, Mailcode 3AP21, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103.

D. Hand Delivery: At the previously listed EPA Region III address. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–R03–OAR–2006–0921. EPA's policy is that all comments received will be included in the public docket without change, and may be made available online at *www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *www.regulations.gov* or e-mail. The *www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *www.regulations.gov*, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the electronic docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, i.e., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically at *www.regulations.gov* or in hard copy during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the State submittal are available at the Virginia Department of Environmental Quality, 629 East Main Street, Richmond, Virginia 23219.

FOR FURTHER INFORMATION CONTACT: Ellen Wentworth, (215) 814–2034, or by e-mail at *wentworth.ellen@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. Background

On July 18, 1997, EPA promulgated a revised 8-hour ozone standard of 0.08 parts per million (ppm). This new standard is more stringent than the previous 1-hour standard. On April 30, 2004, (69 FR 23858), the EPA designated and classified areas for the 8-hour ozone national ambient air quality standard (NAAQS). For most areas, these designations became effective June 15, 2004. EPA designated, as nonattainment, any area violating the 8-hour ozone NAAQS based on the air quality for the three years of 2001–2003. These were the most recent three years of data at the time EPA designated 8-hour areas. The 8-hour standard replaced the 1-hour standard on June 15, 2005 (69 FR 23996).

Currently, Virginia's Chapter 40 of the Regulations for the Control and Abatement of Air Pollution contains a number of rules used to enforce control measures designed to attain and maintain the ozone air quality standard. The geographic applicability of these rules is defined by establishing VOC and NO_X emissions control areas in a list located in 9 VAC 5–20–206. The Commonwealth of Virginia's regulations establish VOC and NO_X emissions control areas to provide the legal mechanism to define the geographic areas in which Virginia implements control measures to attain and maintain the air quality standards for ozone. The emissions control areas may or may not coincide with the nonattainment areas found in 9 VAC 5–20–204, depending upon the necessity of the planning requirements. In order to implement control measures to attain and maintain the air quality standards for ozone, Virginia has proposed to expand the VOC and NO_X emissions control areas (9 VAC 5–20–206) and extend the geographic applicability of the VOC and NO_X regulatory rules in Chapter 40 of the regulations into the new 8-hour nonattainment areas. Accordingly, 9 VAC 5–20–206 is being amended to include those counties and cities in the corresponding new 8-hour ozone nonattainment areas that were not previously listed in 9 VAC 5–20–206. Most of these Chapter 40 regulations will automatically apply within all of the new VOC emissions control areas. Others have provisions that apply only to certain existing VOC and NO_X emission control areas. Each of these rules is being amended individually in order to manage the extension of applicability of these provisions to the additional VOC and NO_X emission control areas with coherence and consistency.

II. Summary of SIP Revisions

On September 12, 2006, the Commonwealth of Virginia submitted a revision to its SIP. This revision amends 9 VAC 5–20–206 of Chapter 20 of Virginia's Regulations for the Control and Abatement of Air Pollution to establish a new Fredericksburg NO_X and VOC Emissions Control Area, consisting of Spotsylvania County, and Fredericksburg City; to expand the Richmond VOC and NO_X Emissions Control Area to include Prince George County and Petersburg City; and to expand the Hampton Roads VOC and NO_X Emissions Control Area to include Gloucester County and Isle of Wight County. These amendments are necessary to include those counties and cities in the corresponding new 8-hour ozone nonattainment areas that were not previously listed in 9 VAC 5–20–206, and to implement VOC control and contingency measures within the 8-hour ozone nonattainment areas and 1-hour ozone maintenance areas.

On October 2, 2006, the Commonwealth of Virginia submitted a revision to its SIP. This revision consists of amendments to regulations found in Chapter 40 of Virginia's Regulations for the Control and Abatement of Air Pollution that implement non-CTG and CTG VOC reasonably available control technology (RACT) control requirements within those areas that are designated as VOC emissions control areas in 9 VAC 5–20–206.

As stated previously, most of the Chapter 40 rules will automatically be extended into the new 8-hour nonattainment areas automatically when the VOC emissions control areas in 9 VAC 5–20–206 are amended. Some Chapter 40 rules have provisions that apply only to certain existing VOC and NO_X emissions control areas. In this revision, Articles 4, 36, 37, and 53 are being amended individually in order to manage the extension of applicability of these provisions to the additional VOC and NO_X emission control areas.

Article 4, Emission Standards for General Process Operations, is being amended to ensure that VOC RACT is not automatically required from large VOC sources in the new areas that were included in the Richmond VOC Emissions Control Area (County of Prince George and City of Petersburg). Article 4 currently applies in the Northern Virginia and Richmond Emissions Control Areas designated in 9 VAC 5–20–206. With the addition of Prince George County and Petersburg to the Richmond VOC Emissions Control Area, VOC RACT would normally automatically apply to all large existing sources in the County of Prince George and the City of Petersburg. However, the Richmond 8-hour ozone nonattainment area was reclassified from a moderate 8-hour ozone nonattainment area to a marginal 8-hour ozone nonattainment area (69 FR 56697, September 22, 2004). EPA only requires existing sources in nonattainment areas that are classified as moderate and above to implement VOC RACT.

Article 36, Packaging and Publishing Rotogravure Printing, and Flexographic Printing, is being amended to provide exemptions for small facilities in all VOC emissions control areas, other than the Northern Virginia VOC Emissions Control Area, whose potential to emit is less than 100 tons per year.

Article 37, Storage or Transfer of Petroleum Liquids, is being amended to ensure that Stage II Vapor Recovery is not required at gasoline dispensing stations in the new areas within the expanded Richmond VOC Emissions Control Area—Petersburg City, and Prince George County, since these areas were not part of the 1-hour ozone moderate nonattainment area. This revision also removes applicability redundancies resulting from this action and a previous amendment that added the Western Virginia VOC Emissions Control Area (Botetourt County, Frederick County, and Winchester City, 70 FR 21625, April 27, 2005).

Article 53, Emission Standards for Lithographic Printing Processes, is being amended to apply in all VOC emissions control areas. The amendment also exempts from the provisions of this Article, all facilities in all VOC emissions control areas, other than the Northern Virginia VOC Emissions Control Area, whose potential to emit is less than 100 tons per year of VOCs. When EPA approved the lithographic printing processes regulation into the Virginia SIP (62 FR 11334, March 12, 1997), it was codified under Article 45. In this action, EPA is also recodifying the lithographic printing processes regulation (9 VAC 5–40–7800–7940, inclusive) from Article 45 to Article 53 to be consistent with Virginia's regulations.

III. General Information Pertaining to SIP Submittals From the Commonwealth of Virginia

In 1995, Virginia adopted legislation that provides, subject to certain conditions, for an environmental assessment (audit) ''privilege'' for voluntary compliance evaluations performed by a regulated entity. The legislation further addresses the relative burden of proof for parties either asserting the privilege or seeking disclosure of documents for which the privilege is claimed. Virginia's legislation also provides, subject to certain conditions, for a penalty waiver for violations of environmental laws when a regulated entity discovers such violations pursuant to a voluntary compliance evaluation and voluntarily discloses such violations to the Commonwealth and takes prompt and appropriate measures to remedy the violations. Virginia's Voluntary Environmental Assessment Privilege Law, Va. Code Sec. 10.1–1198, provides a privilege that protects from disclosure documents and information about the content of those documents that are the product of a voluntary environmental assessment. The Privilege Law does not extend to documents or information (1) that are generated or developed before the commencement of a voluntary environmental assessment; (2) that are prepared independently of the assessment process; (3) that demonstrate a clear, imminent and substantial danger to the public health or environment; or (4) that are required by law.

On January 12, 1998, the Commonwealth of Virginia Office of the Attorney General provided a legal opinion that states that the Privilege law, Va. Code Sec. 10.1–1198, precludes granting a privilege to documents and information ''required by law,'' including documents and information ''required by Federal law to maintain program delegation, authorization or approval,'' since Virginia must ''enforce Federally authorized environmental programs in a manner that is no less stringent than their Federal counterparts. . . .'' The opinion concludes that ''[r]egarding § 10.1–1198, therefore, documents or other information needed for civil or criminal enforcement under one of these programs could not be privileged because such documents and information are essential to pursuing enforcement in a manner required by Federal law to maintain program delegation, authorization or approval.''

Virginia's Immunity law, Va. Code Sec. 10.1–1199, provides that ''[t]o the extent consistent with requirements imposed by Federal law,'' any person making a voluntary disclosure of information to a state agency regarding a violation of an environmental statute, regulation, permit, or administrative order is granted immunity from administrative or civil penalty. The Attorney General's January 12, 1998 opinion states that the quoted language renders this statute inapplicable to enforcement of any Federally authorized programs, since ''no immunity could be afforded from administrative, civil, or criminal penalties because granting such immunity would not be consistent with Federal law, which is one of the criteria for immunity.''

Therefore, EPA has determined that Virginia's Privilege and Immunity statutes will not preclude the Commonwealth from enforcing its program consistent with the Federal requirements. In any event, because EPA has also determined that a state audit privilege and immunity law can affect only state enforcement and cannot have any impact on Federal enforcement authorities, EPA may at any time invoke its authority under the Clean Air Act, including, for example, sections 113, 167, 205, 211 or 213, to enforce the requirements or prohibitions of the state plan, independently of any state enforcement effort. In addition, citizen enforcement under section 304 of the Clean Air Act is likewise unaffected by this, or any, state audit privilege or immunity law.

IV. Proposed Action

EPA is proposing to approve the Commonwealth of Virginia's SIP revisions amending existing regulations pertaining to emissions control areas, and the accompanying rule regulations, which were submitted on September 12 and October 2, 2006. EPA is soliciting public comments on the issues discussed in this document. These comments will be considered before taking final action.

V. Statutory and Executive Order Reviews

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this proposed action is not a ''significant regulatory action'' and therefore is not subject to review by the Office of Management and Budget. For this reason, this action is also not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355 (May 22, 2001)). This action merely proposes to approve state law as meeting Federal requirements and imposes no additional requirements beyond those imposed by state law. Accordingly, the Administrator certifies that this proposed rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Because this rule proposes to approve pre-existing requirements under state law and does not impose any additional enforceable duty beyond that required by state law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4). This proposed rule also does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), nor will it have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999), because it merely proposes to approve a state rule implementing a Federal requirement, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. This proposed rule also is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997), because it is not economically significant.

In reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. In this context, in the absence of a prior existing requirement for the State to use voluntary consensus standards (VCS), EPA has no authority to disapprove a SIP submission for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews a SIP submission, to use VCS in place of a SIP submission that otherwise satisfies the provisions of the Clean Air Act. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. As required by section 3 of Executive Order 12988 (61 FR 4729, February 7, 1996), in issuing this proposed rule, EPA has taken the necessary steps to eliminate drafting errors and ambiguity, minimize potential litigation, and provide a clear legal standard for affected conduct. EPA has complied with Executive Order

12630 (53 FR 8859, March 15, 1988) by examining the takings implications of the rule in accordance with the ''Attorney General's Supplemental Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings'' issued under the executive order.

This proposed rule, pertaining to amendments to existing regulation provisions concerning Virginia's emissions control areas, and accompanying regulatory changes, does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

List of Subjects in 40 CFR Part 52

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

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

Dated: December 14, 2006

William T. Wisniewski,

Acting Regional Administrator, Region III.

[FR Doc. E6–22058 Filed 12–22–06; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 60, 62, 72, and 78

[EPA–HQ–OAR–2006–0905; FRL–8260–9]

Public Hearing for Revisions of Standards of Performance for New and Existing Stationary Sources; Electric Utility Steam Generating Units; Federal Plan Requirements for Clean Air Mercury Rule; and Revisions of Acid Rain Program Rules

AGENCY: Environmental Protection Agency (EPA).

ACTION: Announcement of Public Hearing.

SUMMARY: The EPA is announcing a public hearing for the proposed ''Revisions of Standards of Performance for New and Existing Stationary Sources; Electric Utility Steam Generating Units; Federal Plan Requirements for Clean Air Mercury Rule; and Revisions of Acid Rain Program Rules''. For convenience, we refer to the proposal as the Clean Air Mercury Rule (CAMR) Federal Plan. The hearing will be held on January 18, 2007 in Washington, DC.

DATES: The public hearing for the proposal for the CAMR Federal Plan will be held on January 18, 2007. Please refer to the **SUPPLEMENTARY INFORMATION** of this notice, and the public hearing information given in the proposal, for additional information on the public hearing.

ADDRESSES: The hearing will be held at the EPA East Building, 1201 Constitution Avenue, NW., Washington, DC, 20004. The hearing will take place in room 1153. Written comments on the proposal may also be submitted to EPA electronically, by mail, by facsimile, or through hand delivery/courier. Please refer to the proposal for the addresses and detailed instructions for submitting comments. Documents relevant to this action are available for public inspection at the EPA Docket Center, located at 1301 Constitution Avenue, NW., Room 3334, Washington, DC between 8:30 a.m. and 4:30 p.m., Monday through Friday, excluding legal holidays. A reasonable fee may be charged for copying. Documents are also available through EPA's electronic Docket System at *www.regulations.gov.* The EPA website for CAMR and the federal plan Proposal, which will include information about the public hearing, is at *www.epa.gov/CAMR.*

FOR FURTHER INFORMATION CONTACT: If you would like to speak at the public hearing or have questions concerning it, please contact Doran Stegura at (434) 979–3700 (ext. 161) and at the address given below under **SUPPLEMENTARY INFORMATION**. Questions concerning the proposed CAMR federal plan should be addressed to Meg Victor, U.S. EPA, Office of Air and Radiation, Clean Air Markets Division, Washington, DC, 20005, (202) 343–9193.

SUPPLEMENTARY INFORMATION: On May 18, 2005 EPA finalized CAMR and established standards of performance for mercury (Hg) for new and existing coal-fired electric utility steam generating units (utility units or EGUs). On December 8, 2006 a CAMR Federal Plan Proposal was signed by the EPA Administrator. CAA section 111(d)(2) grants the Administrator the authority to prescribe a plan for a State in cases where the State fails to submit a satisfactory plan as he would have under section 110(c) of the CAA in the case of a State's failure to submit an implementation plan. Section 60.27 of 40 CFR part 60 directs the Administrator to promptly prepare and publish proposed regulations for a State if the State fails to submit a plan by the prescribed deadline or the Administrator disapproves the State's submitted plan and to promulgate those regulations by the date 6 months after the date required for plan submission. The CAMR Federal Plan Proposal indicated that a public hearing for the CAMR Federal Plan would be held, and the date, time, and location of the event would be announced in a separate notice. This action constitutes that notice. The public hearing will provide interested parties the opportunity to present data, views, or arguments concerning issues raised in the proposed CAMR Federal Plan. The EPA may ask clarifying questions during the oral presentations, but will not respond to the presentations at that time. Written statements and supporting information submitted during the comment period will be considered with the same weight as any oral comments and supporting information presented at the public hearing. The public hearing for the proposal for the CAMR Federal Plan will be held on January 18, 2007, in Washington, DC. The hearing will begin at 1 p.m. and end at 5 p.m. The meeting facility address is provided above under **ADDRESSES**. The hearing may end early if all of the registered speakers have presented. If you would like to present oral testimony at the hearing, please notify Doran Stegura, Perrin Quarles Associates, 675 Peter Jefferson Parkway, Suite 200, Charlottesville, VA 22911, telephone (434) 979–3700 (ext. 161), *doranstegura@pqa.com*. She will provide you with a specific time to speak. Oral testimony will be limited to 5 minutes for each commenter, after which there will be an opportunity for the panel to ask clarifying questions. EPA will be able to provide equipment for commenters to show overhead slides or make computerized slide presentations only if we receive requests in advance. Commenters should notify Doran Stegura if they will need specific equipment. The EPA encourages commenters to provide written versions of their oral testimonies either electronically on computer disk or CD ROM or in paper copy. The hearing schedule, including the speaker list, will be posted on EPA's Web pages for the Proposal at *http://www.epa.gov/CAMR*. A verbatim transcript of the hearing and written statements will be included in the rulemaking docket.

How Can I Obtain Copies of This Document and Other Related Information?

This notice and the CAMR Federal Plan proposal are available on EPA's web site for the CAMR rulemaking at *http://www.epa.gov/CAMR* and are published in the **Federal Register**. The EPA has established the official public docket for the CAMR Federal Plan under Docket ID No. OAR–2006–0905. Please refer to the proposal for detailed information on accessing information related to the proposal.

Dated: December 19, 2006.

Edward Callahan,

Acting Director, Office of Air and Radiation.

[FR Doc. E6–22051 Filed 12–22–06; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 112

[EPA–HQ–OPA–2006–0949; FRL–8258–4]

RIN 2050–AG36

Oil Pollution Prevention; Non-Transportation Related Onshore Facilities

AGENCY: Environmental Protection Agency.

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency is proposing to extend the dates by which facilities must prepare or amend Spill Prevention, Control, and Countermeasure Plans (SPCC Plans), and implement those Plans. This action would allow the Agency time to promulgate further revisions to the July 17, 2002 SPCC rule (in addition to those published elsewhere in this **Federal Register**) before owners and operators are required to meet requirements of the rule related to preparing or amending, and implementing SPCC Plans. EPA expects to propose further revisions to the SPCC rule in 2007.

DATES: Written comments must be received by January 25, 2007.

ADDRESSES: Comments should be directed to Docket ID No. EPA–HQ–OPA–2006–0949. Comments may be submitted by one of the following methods:

(1) Federal Rulemaking Portal: *http://www.regulations.gov*. Follow the on-line instructions for submitting comments; or

(2) Mail: The mailing address of the docket for this rulemaking is EPA Docket Center (EPA/DC), Docket ID No. EPA–HQ–OPA–2006–0949, EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC 20460.

(3) Hand Delivery: Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Please note that per EPA's policy, all comments received will be included in the public docket without change, and may be made available online at *http://www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through regulations.gov.

Please also note that the Federal regulations.gov website is an ''anonymous access'' system, which means that EPA will not know your identity or contact information unless you provide it in the body of your comment. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of the comment and along with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

All documents in the docket are listed in the docket index at *http://www.regulations.gov*. Although listed in the index, some information is not publicly available (i.e., CBI or other information whose disclosure is restricted by a statute). Certain material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form.

Publicly available docket materials are available either electronically at *http://www.regulations.gov* or in hard copy at the EPA Docket Center, EPA/DC, EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number to make an appointment to view the docket is (202) 566–0276.

FOR FURTHER INFORMATION CONTACT: For general information, contact the Superfund, TRI, EPCRA, RMP and Oil Information Center at (800) 424–9346 or TDD (800) 553–7672 (hearing impaired). In the Washington, DC metropolitan area, call (703) 412–9810 or TDD (703) 412–3323. For more detailed information on specific aspects of this proposed rule, contact either Vanessa Rodriguez at (202) 564–7913 (*rodriguez.vanessa@epa.gov*) or Mark W. Howard at (202) 564–1964 (*howard.markw@epa.gov*), U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460–0002, Mail Code 5104A.

SUPPLEMENTARY INFORMATION:

I. Authority

33 U.S.C. 1251 *et seq.*; 33 U.S.C. 2720; E.O. 12777 (October 18, 1991), 3 CFR, 1991 Comp., p. 351.

II. Background

On July 17, 2002, the Agency published a final rule that amended the SPCC regulations (*see* 67 FR 47042). The rule became effective on August 16, 2002. The final rule included compliance dates in § 112.3 for preparing, amending, and implementing SPCC Plans. The original compliance dates were amended on January 9, 2003 (*see* 68 FR 1348), again on April 17, 2003 (*see* 68 FR 18890), a third time on August 11, 2004 (*see* 69 FR 48794), and a fourth time on February 17, 2006 (*see* 71 FR 8462).

Under the current provisions in § 112.3(a) and (b), a facility that was in operation on or before August 16, 2002 must make any necessary amendments to its SPCC Plan and fully implement it by October 31, 2007; a facility that came into operation after August 16, 2002, but before October 31, 2007, must prepare and fully implement an SPCC Plan on or before October 31, 2007. In addition, § 112.3(c) requires onshore and offshore mobile facilities to prepare or amend and implement SPCC Plans on or before October 31, 2007.

Elsewhere in today's **Federal Register**, EPA finalized a set of SPCC rule amendments that address certain targeted areas of the SPCC requirements and a number of issues and concerns raised by the regulated community. As highlighted in the EPA Regulatory Agenda and the 2005 OMB report on ''Regulatory Reform of the U.S. Manufacturing Sector,'' EPA is considering further amendments to address other areas where regulatory reform may be appropriate. For these additional areas, the Agency expects to issue a proposed rule in 2007. Areas where regulatory reform may be appropriate include, and are not limited to, oil and natural gas exploration and production, farms, and Tier I facilities. Because the Agency may not be able to promulgate such regulatory amendments before the current October 31, 2007 compliance date for SPCC becomes effective, EPA believes it is appropriate to provide an extension of the compliance date.

III. Proposal to Extend the Compliance Dates

This proposed rule would extend the dates in § 112.3(a), (b) and (c) by which a facility must prepare or amend and implement its SPCC Plan. As a result of this proposed rule, a facility that was in operation on or before August 16, 2002 would have to make any necessary amendments to its SPCC Plan, and implement that Plan, on or before July 1, 2009. This would allow owners and operators of SPCC regulated facilities time to prepare or amend and implement its SPCC Plan in accordance with the modifications to the 2002 SPCC requirements the EPA plans to propose in 2007. A facility that came into operation after August 16, 2002 would have to prepare and implement an SPCC Plan on or before July 1, 2009.

This proposed rule would similarly extend the compliance dates in Section 112.3(c) for mobile facilities. Under this proposal, a mobile facility must prepare or amend and implement an SPCC Plan on or before July 1, 2009.

The Agency believes the extension of the compliance date proposed in this notice is warranted for several reasons. The Agency is not in a position, at this time, to indicate all the areas for possible regulatory reform that may be addressed as part of a 2007 SPCC proposal. This extension would allow those potentially affected in the regulated community an opportunity to make changes to their facilities and to their SPCC Plans necessary to comply with the revised requirements expected to be proposed in 2007, rather than with the existing requirements.

Further, the Agency believes that this proposed extension of the compliance dates would also provide facilities time necessary to fully understand the regulatory relief offered by revisions to the 2002 SPCC rule as finalized elsewhere in today's **Federal Register**.[1]

In addition, the Agency intends to issue revisions to the *SPCC Guidance for Regional Inspectors*, to address both the revisions finalized elsewhere in today's **Federal Register**, and the upcoming revisions expected to be proposed in 2007. The guidance document is designed to facilitate an understanding of the rule's applicability, to help clarify the role of the inspector in the review and evaluation of the performance-based SPCC requirements, and to provide a consistent national policy on SPCC-related issues. The guidance also is available to both the owners and operators of facilities that may be subject to the requirements of the SPCC rule and to the general public on the Agency's Web site at *http://www.epa.gov/oilspill*. The Agency believes that this proposed extension would provide the regulated community the opportunity to understand the material presented in the revised guidance before preparing or amending their SPCC Plans.

[1] As stated in the rules, facilities must maintain their existing plans, to the extent they are required to have one. However, facilities that want to take advantage of the regulatory changes being finalized today may do so, but the owner and operator of the facility will need to modify their existing plan accordingly.

The Agency is seeking comment on this proposal to extend the date by which SPCC Plans must be amended and implemented in accordance with amendments to the SPCC Rule. Any alternative approaches presented must include appropriate rationale and supporting data in order for the Agency to be able to consider them for final action.

IV. Applicability to Farms

Elsewhere in today's **Federal Register**, EPA finalized an extension of the compliance dates for the owner or operator of a farm, as defined in § 112.2, to prepare or amend and implement the farm's SPCC Plan until the effective date of a rule addressing whether to provide differentiated requirements for farms. The Agency will be conducting additional information collection and analysis to determine if differentiated SPCC requirements may be appropriate for farms. The Agency will be working with USDA to collect data that would more accurately characterize oil handling at these facilities, thereby allowing the Agency to focus on priorities where substantial environmental improvements can be obtained.

Today's proposal does not affect this extended compliance date for farms. To the extent that the revisions EPA intends to propose in 2007 address differentiated requirements for farms, the ultimate compliance date for farms and other facilities may be the same. In any case, the Agency will announce the new compliance date for farms in the **Federal Register**.

V. Statutory and Executive Order Reviews

A. Executive Order 12866—Regulatory Planning and Review

Under the terms of Executive Order 12866, this action has been judged as not a ''significant regulatory action'' because it would extend the compliance dates in § 112.3, but would have no other substantive effect. However, because of its interconnection with the related SPCC rule amendments finalized elsewhere in this **Federal Register** notice (*see* discussion above in section III), which is a significant action under the terms of Executive Order 12866, this action was nonetheless submitted to OMB for review.

B. Paperwork Reduction Act

This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

C. Regulatory Flexibility Act

The Regulatory Flexibility Act generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions. Small entity is defined as: (1) A small business as defined in the Small Business Administration's (SBA) regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise that is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today's proposed rule on small entities, the Agency concludes that this action would not have a significant economic impact on a substantial number of small entities. In determining whether a rule has a significant economic impact on a substantial number of small entities, the impact of concern is any significant adverse economic impact on small entities, since the primary purpose of the regulatory flexibility analyses is to identify and address regulatory alternatives ''which minimize any significant economic impact of the proposed rule on small entities.'' 5 U.S.C. 603 and 604. Thus, an agency may certify that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, or otherwise has a positive economic effect on all of the small entities subject to the rule.

This proposed rule would relieve the regulatory burden for small entities by extending the compliance dates in § 112.3.

After considering the economic impacts of today's proposed rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities.

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with ''Federal mandates'' that may result in expenditures to State, local, and tribal governments, in the aggregate, or to the private sector, of $100 million or more in any one year. Before promulgating an EPA rule for which a written statement is needed, section 205 of UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted.

Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed under section 203 of UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

EPA has determined that this proposed rule does not contain a Federal mandate that may result in expenditures of $100 million or more for State, local, and tribal governments, in the aggregate, or the private sector in any one year. This proposed rule would reduce burden and costs for all facilities.

EPA has determined that this proposed rule contains no regulatory requirements that might significantly or uniquely affect small governments. As was explained above, the effect of the proposed rule would be to reduce burden and costs for owners and operators of all facilities, including small governments that are subject to the rule.

E. Executive Order 13132—Federalism

Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.''

This proposed rule does not have federalism implications. It would not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. Under CWA section 311(o), States may impose additional requirements, including more stringent requirements, relating to the prevention of oil discharges to navigable waters. EPA encourages States to supplement the Federal SPCC regulation and recognizes that some States have more stringent requirements (56 FR 54612, (October 22, 1991). This proposed rule would not preempt State law or regulations. Thus, Executive Order 13132 does not apply to this proposed rule.

F. Executive Order 13175—Consultation and Coordination With Indian Tribal Governments

On November 6, 2000, the President issued Executive Order 13175 (65 FR 67249) entitled, ''Consultation and Coordination with Indian Tribal Governments.'' Executive Order 13175 took effect on January 6, 2001, and revokes Executive Order 13084 (Tribal Consultation) as of that date.

Today's proposed rule would not significantly or uniquely affect communities of Indian tribal governments. Therefore, the Agency has not consulted with a representative organization of tribal groups.

G. Executive Order 13045—Protection of Children From Environmental Health and Safety Risk

Executive Order 13045, ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997) applies to any rule that: (1) Is determined to be ''economically significant'' as defined under Executive Order 12866; and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

EPA interprets Executive Order 13045 as applying only to those regulatory actions that are based on health or safety risks, such that the analysis required under section 5–501 of the Order has the potential to influence the regulation. This proposed rule is not subject to Executive Order 13045 because it is not economically significant as defined in Executive Order 12866, and because the Agency does not have reason to believe the environmental health or safety risks addressed by this action present a disproportionate risk to children.

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

This proposed rule is not a ''significant energy action'' as defined in Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001) because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (''NTTAA''), Public Law 104–113, section 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards such as materials specifications, test methods, sampling procedures, and business practices that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This proposed rule does not involve technical standards. Therefore, NTTAA does not apply.

List of Subjects in 40 CFR Part 112

Environmental protection, Oil pollution, Penalties, Reporting and recordkeeping requirements.

Dated: December 12, 2006.

Stephen L. Johnson,

Administrator.

For the reasons set forth in the preamble, title 40 CFR, chapter I, part 112 of the Code of Federal Regulations is proposed to be amended as follows:

PART 112—OIL POLLUTION PREVENTION

1. The authority citation for part 112 continues to read as follows:

Authority: 33 U.S.C. 1251 *et seq.*; 33 U.S.C. 2720; E.O. 12777 (October 18, 1991), 3 CFR, 1991 Comp., p. 351.

2. Section 112.3 amended by revising paragraphs (a)(1) and (b)(1) as proposed to be amended elsewhere in this **Federal Register** on December 26, 2006 and revising paragraph (c) to read as follows:

Subpart A—[Amended]

§ 112.3 Requirement to prepare and implement a Spill Prevention, Control, and Countermeasure Plan.

* * * * *

(a) * * *

(1) If your onshore or offshore facility was in operation on or before August 16, 2002, you must maintain your Plan, but must amend it, if necessary to ensure compliance with this part, and implement the Plan no later than July 1, 2009. If your onshore or offshore facility becomes operational after August 16, 2002, through July 1, 2009, and could reasonably be expected to have a discharge as described in § 112.1(b), you must prepare and implement a Plan on or before July 1, 2009.

* * * * *

(b)(1) If you are the owner or operator of an onshore or offshore facility that becomes operational after July 1, 2009, and could reasonably be expected to have a discharge as described in § 112.1(b), you must prepare and implement a Plan before you begin operations.

* * * * *

(c) If you are the owner or operator of an onshore or offshore mobile facility, such as an onshore drilling or workover rig, barge mounted offshore drilling or workover rig, or portable fueling facility, you must prepare, implement, and maintain a facility Plan as required by this section. You must maintain your Plan, but must amend and implement it, if necessary to ensure compliance with this part, on or before July 1, 2009. If your onshore or offshore mobile facility becomes operational after July 1, 2009, and could reasonably be expected to have a discharge as described in § 112.1(b), you must prepare and implement a Plan before you begin operations. This provision does not require that you prepare a new Plan each time you move the facility to a new site. The Plan may be a general Plan. When you move the mobile or portable facility, you must locate and install it using the discharge prevention practices outlined in the Plan for the facility. The Plan is applicable only while the facility is in a fixed (non-transportation) operating mode.

* * * * *

[FR Doc. E6–21507 Filed 12–22–06; 8:45 am]

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 2, 7, 11, 12, 13, 23, 42, and 52

[FAR Case 2004–032; Docket 2006–0020; Sequence 13]

RIN 9000–AK65

Federal Acquisition Regulation; FAR Case 2004–032, Biobased Products Preference Program

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) are proposing to amend the Federal Acquisition Regulation (FAR) to implement section 9002 of the *Farm Security and Rural Investment Act* of 2002 (FSRIA), as amended by Sections 205 and 943 of the *Energy Policy Act of 2005*. Entitled *Federal Procurement of Biobased Products*, section 9002 requires that a procurement preference be afforded biobased products within items designated by the Secretary of Agriculture.

DATES: Interested parties should submit written comments to the FAR Secretariat on or before February 26, 2007 to be considered in the formulation of a final rule.

The Councils, in collaboration with OFPP, invite interested parties from both the private and public sector to provide comments on the biobased procurement preference program and the requirement that Federal agencies shall consider maximum practicable use of biobased products when acquiring products and services.

ADDRESSES: Submit comments identified by FAR case 2004–032 by any of the following methods:

- Federal eRulemaking Portal: *http://www.regulations.gov*. Search for any document by first selecting the proper document types and selecting ''Federal Acquisition Regulation'' as the agency of choice. At the ''Keyword'' prompt, type in the FAR case number (for example, FAR Case 2006–001) and click on the ''Submit'' button. Please include any personal and/or business information inside the document.

You may also search for any document by clicking on the ''Advanced search/document search'' tab at the top of the screen, selecting from the agency field ''Federal Acquisition Regulation'', and typing the FAR case number in the keyword field. Select the ''Submit'' button.

- Fax: 202–501–4067.
- Mail: General Services Administration, Regulatory Secretariat (VIR), 1800 F Street, NW, Room 4035, ATTN: Laurieann Duarte, Washington, DC 20405.

Instructions: Please submit comments only and cite FAR case 2004–032 in all correspondence related to this case. All comments received will be posted without change to *http://www.regulations.gov*, including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact William Clark, Procurement Analyst, at (202) 219–1813. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501–4755. Please cite FAR case 2004–032.

SUPPLEMENTARY INFORMATION:

A. Background

On May 13, 2002, the President signed the *Farm Security and Rural Investment Act* of 2002 (FSRIA), Public Law 107—171. Section 9002 of the Act, entitled *Federal Procurement of Biobased Products*, requires that each Federal agency (''Procuring Agency'' as amended by the *Energy Policy Act of 2005*), which procures products within items designated by the Secretary of Agriculture, give a preference to qualified biobased products, subject to specified exceptions. This same section requires the Secretary of Agriculture to designate items which contain products which are or can be produced with biobased products, establish recommended practices with respect to the procurement of products within the designated items, and provide information as to the availability, relative price, performance, and environmental and public health benefits of such items. In a final rule, published January 11, 2005 entitled *Guidelines for Designating Biobased Products for Federal Procurement*, the USDA promulgated regulations defining the process for designating items. In the July 5, 2005 **Federal Register** (70 FR 38612), USDA proposed 6 item containing biobased materials that it plans to designate for Federal procurement preference. In the March 16, 2006 **Federal Register** (71 FR 13685) entitled ''Designation of Biobased Items for Federal Procurement'', USDA made a final determination about these items. USDA designated the following six items within which biobased products will be afforded Federal procurement preference, as provided for under section 9002 of the Farm Security and Rural Investment Act of 2002: Mobile equipment hydraulic fluids; roof coatings; water tank coatings; diesel fuel additives; penetrating lubricants; and bedding, bed linens, and towels. USDA also established minimum biobased content for each of these items. However, USDA deferred the effective date for two items (water tank coatings and bedding, bed linens, and towels) until such time that more than one manufacturer of products in these two items is identified and planned to announce that availability in a future **Federal Register** notice. In the August 17, 2006 **Federal Register** (71 FR 47566 and 47589), USDA proposed 20 additional items containing biobased materials that it plans to designate for Federal procurement preference.

USDA's designation of biobased items parallels the approach taken by the Environmental Protection Agency (EPA) in its designation of items containing recovered material pursuant to 40 CFR part 247, subpart B. USDA indicates throughout the preamble of the rule that where a biobased item is used for the same purposes and to meet the same requirements as an EPA-designated recovered content product, the Federal agency must purchase the recovered content product. If, on the other hand, for example, biobased hydraulic fluid is to be used to address certain environmental or health requirements that the EPA-designated recovered content product would not meet, then the biobased product should be given preference, subject to cost, availability, and performance.

On August 8, 2005, the President signed the *Energy Policy Act* of 2005, Public Law 109—58. Section 943 of the *Energy Policy Act* amended the *FSRIA* by revising the term ''Federal agency'' to ''Procuring Agency'' in several areas of Section 9002. The term 'Procuring agency'' was defined as any Federal agency that is using Federal funds for procurement; or any person contracting with any Federal agency with respect to work performed under the contract. The amended definition expanded application of the Biobased Program to products used in the performance of service contracts (including construction). Section 205 added a requirement for degradable plastic ring carriers, see 40 CFR part 238.

In the July 27, 2006 **Federal Register** (71 FR 42572), USDA amended 7 CFR 2902 in order to clarify that biobased products from certain designated countries must be treated by procuring agencies as eligible for the procurement preference under FSRIA. This amendment requires agencies treat as eligible for the preference, biobased products composed of renewable agricultural materials or forestry materials from ''designated countries,'' as defined in 25.003, provided that those products otherwise meet all requirements for participation in the preference program.

This proposed rule incorporates the biobased procurement preference into the FAR. As discussed by the USDA in the Supplemental Information section of their final rule at 70 FR 1792–1793 (January 11, 2005), Congress had three primary objectives in enacting section 9002 of *FSRIA*: improved demand for biobased products, development of the industrial base through value-added agricultural processing and manufacturing, and energy security. While environmental enhancement is only a possible ancillary feature to the first goal, the bulk of the implementing regulations are proposed for inclusion in FAR subpart 23.4 due to the similarities between *FSRIA* section 9002 and section 6002 of the *RCRA* mandating a similar preference for items containing recovered materials. Specifically, both have similar triggering, preference, and exemption provisions; mandate a preference program; and require conformity certification. Both also require federal agencies responsible for drafting specifications to review and revise their specifications to require the use of recovered materials and biobased products respectively. By integrating the regulations implementing section 9002 of the *FSRIA* and section 6002 of the *RCRA*, efficiencies can be achieved at the contracting officer level by eliminating the repetitive requirement of reconciling the two provisions. While the statutory provisions are strikingly similar, there are minor differences in the details of the two statutes as reflected in the proposed rule.

The EPA program began at a time when contract certifications were more stringent than the current practice. Under the EPA, the offerors are required to furnish a preaward certification that they will furnish a product with the requisite EPA recommended recovered material content. At contract completion, the contractor is required to furnish an estimate of the actual recovered material content of the product delivered. The Government, in turn, is required to verify the accuracy of the contractors' certifications. Under the new USDA program, offerors are simply required to furnish a preaward self-certification that they will deliver and/or use products containing the minimum biobased content. Under both programs, the EPA or USDA may propose and designate additional products from time to time. Under both programs, the Federal agencies have a period of 1-year period in which to modify their procurement programs to accommodate the newly designated products. Under both programs, Federal agencies may choose not to acquire products with recovered material or biobased content if they are not readily available, not reasonably priced, or do not perform satisfactorily.

This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Solicitation of Public Comment

The Councils, along with OFPP, wish to ensure that the biobased preference program includes the acquisition of products and services (including construction). In furtherance of its responsibility under section 9002, OFPP seeks to better understand the application of acquisition of services coverage and welcomes feedback on this aspect of the proposed rule. In commenting, please include citations, as appropriate, to relevant sources of information that may be used to substantiate the basis for your comments.

C. Regulatory Flexibility Act

This proposed rule may have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because manufacturers, large or small, are expected to develop and market biobased products within the designated items. The actual impact will be item specific and based on how many small entities are providing a specific item once it is designated by the United States Department of Agriculture.

On March 16, 2006, the USDA issued a final rule in the **Federal Register** (71 FR 13685) amending 7 CFR part 2902, Guidelines for Designating Biobased Products for Federal Procurement, to add six sections designating the first six of a series of items that are made with biobased products that would be afforded Federal procurement preference, as provided for under section 9002 of the Farm Security and Rural Investment Act of 2002. The Initial Regulatory Flexibility Act Statement is summarized as follows:

The rule will amend the FAR to implement section 9002 of the Farm Security and *Rural Investment Act (FSRIA)* (Public L. 107–171, 7 U.S.C. section 8102), as amended by the *Energy Policy Act of 2005* (Public L. 109–58, section 943) and incorporate the biobased preference program. As USDA designates items through the issuance of final rules, it is anticipated that this rule will impact small business entities that manufacture or sell products within the designated items. The impact may vary based on the specific item[s] once they are designated by USDA.

The objective of the rule is to incorporate the biobased procurement preference into the FAR. As discussed by the USDA in the Supplementary Information section of their final rule published in the **Federal Register** at 70 FR 1792, January 11, 2005; Congress had three primary objectives in enacting section 9002 of FSRIA: (1) improved demand for biobased products; (2) development of the industrial base through value-added agricultural processing and manufacturing, and; (3) energy security.

The proposed rule will apply to all large and small business entities that seek award of Federal contracts that may involve the manufacturing, selling or use of biobased products. Because the program is still in its infancy, the number of small business entities impacted is unknown and cannot be determined by the Councils. Small business entities are encouraged to thoroughly review the USDA's final rule entitled ''Guidelines for Designating Biobased Products for Federal Procurement'' published in the **Federal Register** at 70 FR 1792, January 11, 2005 as well as any subsequent publications from USDA concerning the program. It is anticipated that as items are designated by USDA through the issuance of final rules, this Federal procurement preference program may provide additional opportunities for small business entities that manufacture and sell USDA designated biobased products to Federal agencies. USDA anticipates that it will take approximately 4 years to designate all items under this program. In its final rule published on March 16, 2006, USDA indicated they have no data on the number of small businesses that may choose to develop and market products within the six items designated, however, USDA expects the number to be small. Because biobased products represent a small emerging market, only a small percentage of all manufacturers, large or small, are expected to develop and market biobased products.

The proposed rule does contain information collection requirements, which the Paperwork Reduction Act section of this notice addresses more fully below. The rule does not duplicate, overlap, or conflict with any other Federal rules. There are no practical alternatives that will accomplish the objectives of this proposed rule.

The FAR Secretariat has submitted a copy of the IRFA to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the IRFA may be obtained from the FAR Secretariat. The Councils will consider comments from small entities concerning the affected FAR parts 2, 7, 11, 12, 13, 23, 42, and 52 in accordance with 5 U.S.C. 610. Comments must be submitted separately and should cite 5 U.S.C 601, *et seq.* (FAR case 2004–032), in correspondence.

D. Paperwork Reduction Act

The Paperwork Reduction Act (Pub. L. 104–13) applies because the proposed rule contains information collection requirements. The rule will require offerors to submit a certification that products being used or delivered in the performance of the contract are qualified biobased products that fall under items (generic groupings of biobased products) that have been designated by USDA for preferred procurement. Accordingly, the FAR Secretariat has submitted a request for approval of a new information collection requirement concerning OMB Control Number 9000–00XX, Biobased Products Preference Program, implementation of section 9002 of the *Farm Security and Rural Investment Act of 2002* (Pub. L. 107—171, 7 U.S.C. section 8102), to the Office of Management and Budget under 44 U.S.C. 3501m *et seq.*

Annual Reporting Burden:

The clause at 52.223–1 requires the contractor to certify the use of biobased material in each applicable solicitation, i.e. when the Federal agency purchases $10,000 or more of one of the USDA designated items or when functionally equivalent items purchased during the preceding fiscal year was $10,000 or more. As USDA continues to designate items, it is anticipated that the number of responses will increase over time. It is estimated that an average of 30 minutes will be required for offerors and contractors to research, prepare, and submit the required information. We currently estimate the annual total burden hours as follows:

Respondents: 6,000.
Responses per respondent: 6.
Total annual responses: 36,000.
Preparation hours per response: .5.
Total response burden hours: 18,000.

E. Request for Comments Regarding Paperwork Burden

Submit comments, including suggestions for reducing this burden, not later than February 26, 2007 to: FAR Desk Officer, OMB, Room 10102, NEOB, Washington, DC 20503, and a copy to the General Services Administration, FAR Secretariat (VIR), 1800 F Street, NW, Room 4035, Washington, DC 20405.

Public comments are particularly invited on: whether this collection of information is necessary for the proper performance of functions of the FAR, and will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

Requester may obtain a copy of the justification from the General Services Administration, FAR Secretariat (VIR), Room 4035, Washington, DC 20405, telephone (202) 501–4755. Please cite OMB Control Number 9000–00XX, Biobased Products Preference Program, in all correspondence.

List of Subjects in 48 CFR Parts 2, 7, 11, 12, 13, 23, 42, and 52

Government procurement.

Dated: December 15, 2006.

Ralph De Stefano,

Director, Contract Policy Division.

Therefore, DoD, GSA, and NASA propose amending 48 CFR parts 2, 7, 11, 12, 13, 23, 42, and 52 as set forth below:

1. The authority citation for 48 CFR parts 2, 7, 11, 12, 13, 23, 42, and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 2—DEFINITIONS OF WORDS AND TERMS

2. Amend section 2.101 in paragraph (b)(2) by adding, in alphabetical order, the definition ''Biobased product'' to read as follows:

2.101 Definitions.

*   *   *   *   *

(b) * * *

(2) * * *

Biobased product (7 U.S.C. 8101(2)) means a product determined by the U.S.

Department of Agriculture to be a commercial or industrial product (other than food or feed) that is composed, in whole or in significant part, of biological products or renewable domestic agricultural materials (including plant, animal, and marine materials) or forestry materials.

* * * * *

PART 7—ACQUISITION PLANNING

3. Amend section 7.103 by revising paragraph (n)(2) to read as follows:

7.103 Agency-head responsibilities.

* * * * *

(n) * * *

(2) Comply with the policy in 11.002(d) regarding procurement of biobased products, products containing recovered materials, and environmentally preferable and energy-efficient products and services.

* * * * *

PART 11—DESCRIBING AGENCY NEEDS

4. Amend section 11.002 by revising paragraph (d) to read as follows:

11.002 Policy.

* * * * *

(d)(1) When agencies acquire products and services, various statutes and executive orders (identified in Part 23) require consideration of—

(i) Energy-efficient products and services (Subpart 23.2);

(ii) Products and services that utilize renewable energy technologies (Subpart 23.2);

(iii) Products containing energy-efficient standby power devices (Subpart 23.2);

(iv) Products containing recovered materials (Subpart 23.4);

(v) Biobased products (Subpart 23.4); and

(vi) Environmentally preferable products and services (Subpart 23.7).

(2) Executive agencies shall consider maximum practicable use of products and services listed in paragraph (d)(1) of this section when—

(i) Developing, reviewing, or revising Federal and military specifications, product descriptions (including commercial item descriptions) and standards;

(ii) Describing Government requirements for products and services; and

(iii) Developing source-selection factors.

* * * * *

11.101 [Amended]

5. Amend section 11.101 by removing paragraph (b) and redesignating paragraph (c) as (b).

6. Amend section 11.302 by revising paragraph (c) to read as follows:

11.302 Policy.

* * * * *

(c)(1) When the contracting officer needs additional information to determine whether supplies meet minimum recovered material or biobased standards stated in the solicitation, the contracting officer may require offerors to submit additional information on the recycled or biobased content or related standards. The request for the information must be included in the solicitation. When acquiring commercial items, limit the information to the maximum extent practicable to that available under normal commercial practices.

(2) For biobased products, the contracting officer may require vendors to provide information on life cycle costs and environmental and health benefits in accordance with 7 CFR 2902.8.

PART 12—ACQUISITION OF COMMERCIAL ITEMS

7. Amend section 12.301 by revising paragraph (e)(3) to read as follows:

12.301 Solicitation provisions and contract clauses for the acquisition of commercial items.

* * * * *

(e) * * *

(3) The contracting officer may use the provisions and clauses contained in Part 23 regarding the use of recovered material and biobased products when appropriate for the item being acquired.

* * * * *

PART 13—SIMPLIFIED ACQUISITION PROCEDURES

8. Amend section 13.201 by revising paragraph (f) to read as follows:

13.201 General.

* * * * *

(f) The procurement requirements in Subparts 23.2, 23.4, and 23.7 apply to purchases at or below the micro-purchase threshold.

* * * * *

PART 23—ENVIRONMENT, ENERGY AND WATER EFFICIENCY, RENEWABLE ENERGY TECHNOLOGIES, OCCUPATIONAL SAFETY, AND DRUG-FREE WORKPLACE

9. Amend section 23.000 by revising paragraph (d) to read as follows:

23.000 Scope.

* * * * *

(d) Acquiring energy-and water-efficient products and services, environmentally preferable products, products that use recovered materials, and biobased products; and

* * * * *

10. Revise Subpart 23.4 to read as follows:

Subpart 23.4—Use of Products Containing Recovered Materials and Biobased Products

Sec.

23.400 Scope of subpart.

(a) The procedures in this subpart apply to all agency acquisitions of an Environmental Protection Agency (EPA) or United States Department of Agriculture (USDA)-designated item, if—

(1) The price of the designated item exceeds $10,000; or

(2) The aggregate amount paid for designated items, or for functionally equivalent designated items, in the preceding fiscal year was $10,000 or more.

(b) While micro-purchases are included in determining the aggregate amount paid under paragraph (a)(2) of this section, it is not recommended that an agency track micro-purchases when—

(1) The agency anticipates the aggregate amount paid will exceed $10,000; or

(2) The agency intends to establish or continue an affirmative procurement program in the following fiscal year.

23.401 Definitions.

As used in this subpart—

(a) *EPA-designated item* means a product that is or can be made with recovered material—

(1) That is listed by EPA in a procurement guideline (40 CFR part 247); and

(2) For which EPA has provided purchasing recommendations in a related Recovered Materials Advisory Notice (RMAN).

(b) *USDA-designated item* means a product that is or can be made with biobased material—

(1) That is listed by USDA in a procurement guideline (7 CFR part 2902, subpart B); and

(2) For which USDA has provided purchasing recommendations.

23.402 Authorities.

(a) The Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. 6962.

(b) The Farm Security and Rural Investment Act of 2002 (FSRIA), 7 U.S.C. 8102.

(c) Executive Order 13101 of September 14, 1998, Greening the Government Through Waste Prevention, Recycling, and Federal Acquisition.

(d) The Energy Policy Act of 2005, Public Law 109–58.

23.403 Policy.

Government policy on the use of products containing recovered materials and biobased products considers cost, availability of competition, and performance. Agencies shall assure the use of products containing recovered materials and biobased products to the maximum extent practicable without jeopardizing the intended use of the product while maintaining a satisfactory level of competition at a reasonable price. Such products shall meet the reasonable performance standards of the agency and be acquired competitively, in a cost-effective manner. Except as provided at 23.404(b), virgin material shall not be required by the solicitation (see 11.302).

23.404 Agency affirmative procurement programs.

(a) An agency must establish an affirmative procurement program for EPA and USDA-designated items if the agency's purchases of designated items exceed the threshold set forth in 23.400.

(1) Agencies have a period of 1 year to revise their procurement program(s) after the designation of any new item by EPA or USDA.

(2) Technical or requirements personnel and procurement personnel are responsible for the preparation, implementation, and monitoring of affirmative procurement programs.

(3) Agency affirmative procurement programs must include—

(i) A recovered materials and biobased products preference program;

(ii) An agency promotion program;

(iii) For EPA-designated items only, a program for requiring reasonable estimates, certification, and verification of recovered material used in the performance of contracts. Both the recovered material content and biobased programs require preaward certification that the products meet EPA or USDA recommendations. A second certification is required at contract completion for recovered material content; and

(iv) Annual review and monitoring of the effectiveness of the program.

(b) Agency affirmative procurement programs must require that 100 percent of purchases of EPA or USDA-designated items contain recovered material or biobased content, respectively, unless the item cannot be acquired—

(1) Competitively within a reasonable time frame;

(2) Meeting reasonable performance standards; or

(3) At a reasonable price.

(c) Agency affirmative procurement programs must provide guidance for purchases of EPA-designated items at or below the micro-purchase threshold.

(d) Agencies may use their own specifications or commercial product descriptions when procuring products containing recovered materials or biobased products. When using either, the contract should specify—

(1) For products containing recovered materials, that the product is composed of the—

(i) Highest percent of recovered materials practicable; or

(ii) Minimum content standards in accordance with EPA's Recovered Materials Advisory Notices; and

(2) For biobased products, that the product is composed of—

(i) The highest percentage of biobased material practicable; or

(ii) USDA's recommended minimum contents standards.

(e) Agencies shall treat as eligible for the preference for biobased products, products from ''designated countries,'' as defined in 25.003, provided that those products—

(1) Meet the criteria for the definition of biobased product, except for the requirement that renewable agricultural materials (including plant, animal, and marine materials) or forestry materials in such product must be domestic; and

(2) Otherwise meet all requirements for participation in the preference program.

23.405 Procedures.

(a) *Designated items and procurement guidelines.*—(1) *Recovered Materials.* Contracting officers should refer to EPA's list of EPA-designated items (available via the Internet at *http://www.epa.gov/cpg/*) and to their agencies' affirmative procurement program when purchasing products that contain recovered material, or services that could include the use of products that contain recovered material.

(2) *Biobased products.* Contracting officers should refer to USDA's list of USDA-designated items (available through the Internet at *http://www.biobased.oce.usda.gov*) and to their agencies' affirmative procurement program when purchasing supplies that contain biobased material or when purchasing services that could include supplies that contain biobased material.

(b) *Procurement exemptions.*—(1) Once an item has been designated by either EPA or USDA, agencies shall purchase conforming products unless it is determined that conforming products cannot be acquired—

(i) Competitively within a reasonable time frame;

(ii) Meeting reasonable performance standards; or

(iii) At a reasonable price.

(2) When an exemption is used for an EPA designated item or the procurement of a product containing recovered material does not meet or exceed the EPA recovered material content guidelines, the contracting officer shall place a written justification in the contract file.

(c) *Program priorities.* When both the USDA-designated item and the EPA-designated item will be used for the same purposes, and both meet the agency's needs, the agency shall purchase the EPA-designated item.

23.406 Solicitation provisions and contract clauses.

(a) Insert the provision at 52.223–1, Biobased Product Certification, in solicitations that—

(1) Require the delivery or specify the use of USDA-designated items; or

(2) Include the clause at 52.223–XX.

(b) Insert the provision at 52.223—4, Recovered Material Certification, in solicitations that are for, or specify the use of, EPA-designated items.

(c) Insert the clause at 52.223—9, Estimate of Percentage of Recovered Material Content for EPA-designated Items, in solicitations and contracts exceeding $100,000 that include the provision at 52.223—4. If technical personnel advise that estimates can be verified, use the clause with its Alternate I.

(d) Insert the clause at 52.223–XX, Affirmative Procurement of Biobased Products Under Service and Construction Contracts, in service or construction solicitations and contracts unless the contract will not involve the use of USDA-designated items at *http://www.biobased.oce.usda.gov* or 7 CFR part 2902.

23.701 [Removed and Reserved]

11. Remove and reserve section 23.701.

12. Amend section 23.702 by adding paragraph (g) to read as follows:

23.702 Authorities.

* * * * *

(g) Farm Security and Rural Investment Act of 2002 (FSRIA) (7 U.S.C. 8102).

13. Amend section 23.703 by revising paragraph (b)(7); and adding paragraph (b)(8) to read as follows:

23.703 Policy.

* * * * *

(b) * * *

(7) Promote the use of biobased products.

(8) Purchase only plastic ring carriers that are degradable (7 USC 8102(c)(1), 40 CFR part 238).

PART 42—CONTRACT ADMINISTRATION AND AUDIT SERVICES

14. Amend section 42.302 by revising paragraph (a)(68)(ii) to read as follows:

42.302 Contract administration functions.

(a) * * *

(68) * * *

(ii) Monitoring contractor compliance with specifications or other contractual requirements requiring the delivery or use of environmentally preferable products, energy-efficient products, products containing recovered materials, and biobased products. This must occur as part of the quality assurance procedures set forth in Part 46; and

* * * * *

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

15. Add section 52.223–1 to read as follows:

52.223–1 Biobased Product Certification.

As prescribed in 23.406(a), insert the following provision:

BIOBASED PRODUCT CERTIFICATION (DATE)

The Contractor shall execute the following certification required by the Farm Security and Rural Investment Act of 2002 (7 U.S.C. 8102(c)(3)):

I, _____________ (name of certifier), am an officer or employee responsible for the performance of this contract and I hereby certify that biobased products (within categories of items listed by the United States Department of Agriculture in 7 CFR part 2902, subpart B) to be used or delivered in the performance of the contract will comply with the applicable specifications or other contractual requirements.

____

[*Signature of the Officer or Employee*]

____

[*Typed Name of the Officer or Employee*]

____

[*Title*]

____

[*Name of Company, Firm, or Organization*]

____

[*Date*]

(End of provision)

52.223–4 [Amended]

16. Amend section 52.223–4 by removing from the prescription ''23.406(a'') and adding ''23.406(b'') in its place.

52.223–9 [Amended]

17. Amend section 52.223–9 by removing from the prescription ''23.406(b'') and adding ''23.406(c'') in its place.

18. Add section 52.223–XX to read as follows:

52.223–XX Affirmative Procurement of Biobased Products Under Service and Construction Contracts.

As prescribed in 23.406(d), insert the following clause:

AFFIRMATIVE PROCUREMENT OF BIOBASED PRODUCTS UNDER SERVICE AND CONSTRUCTION CONTRACTS (DATE)

(a) In the performance of this contract, the contractor shall make maximum use of biobased products that are USDA-designated items unless the product cannot be acquired—

(1) Competitively within a time frame providing for compliance with the contract performance schedule;

(2) Meeting contract performance requirements; or

(3) At a reasonable price.

(b) Information about this requirement and these products is available at *http://www.biobased.oce.usda.gov*.

(End of clause)

[FR Doc. 06–9846 Filed 12–22–06; 8:45 am]

BILLING CODE 6820–EP–S

Notices

Federal Register

Vol. 71, No. 247

Tuesday, December 26, 2006

JOINT BOARD FOR THE ENROLLMENT OF ACTUARIES

Meeting of the Advisory Committee; Meeting

AGENCY: Joint Board for the Enrollment of Actuaries.

ACTION: Notice of Federal Advisory Committee meeting.

SUMMARY: The Executive Director of the Joint Board for the Enrollment of Actuaries gives notice of a meeting of the Advisory Committee on Actuarial Examinations (portions of which will be open to the public) in Washington, DC at the Willard Intercontinental Hotel on January 8 and 9, 2007.

DATES: Monday, January 8, 2007, from 9 a.m. to 5 p.m., and Tuesday, January 9, 2007, from 8:30 a.m. to 5 p.m.

ADDRESSES: The meeting will be held at the Willard Intercontinental Hotel, 1401 Pennsylvania Ave., NW., Washington, DC, 20004.

FOR FURTHER INFORMATION CONTACT: Patrick W. McDonough, Executive Director of the Joint Board for the Enrollment of Actuaries, 202–622–8225.

SUPPLEMENTARY INFORMATION: Notice is hereby given that the Advisory Committee on Actuarial Examinations will meet at the Willard Intercontinental Hotel, 1401 Pennsylvania Ave., NW., Washington, DC on Monday, January 8, 2007, from 9 a.m. to 5 p.m., and Tuesday, January 9, 2007, from 8:30 a.m. to 5 p.m.

The purpose of the meeting is to discuss topics and questions that may be recommended for inclusion on future Joint Board examinations in actuarial mathematics and methodology referred to in 29 U.S.C. 1242(a)(1)(B) and to review the November 2006 Pension (EA–2A) Joint Board Examination in order to make recommendations relative thereto, including the minimum acceptable pass score. Topics for inclusion on the syllabus for the Joint Board's examination program for the May 2007 Basic (EA–1) Examination and the May 2007 Pension (EA–2B) Examination will be discussed.

A determination has been made as required by section 10(d) of the Federal Advisory Committee Act, 5 U.S.C. App., that the portions of the meeting dealing with the discussion of questions which may appear on the Joint Board's examinations and review of the November 2006 Joint Board examination fall within the exceptions to the open meeting requirement set forth in 5 U.S.C. 552b(c)(9)(B), and that the public interest requires that such portions be closed to public participation.

The portion of the meeting dealing with the discussion of the other topics will commence at 1 p.m. on January 8 and will continue for as long as necessary to complete the discussion, but not beyond 3 p.m. Time permitting, after the close of this discussion by Committee members, interested persons may make statements germane to this subject. Persons wishing to make oral statements should notify the Executive Director in writing prior to the meeting in order to aid in scheduling the time available and should submit the written text, or at a minimum, an outline of comments they propose to make orally. Such comments will be limited to 10 minutes in length. All persons planning to attend the public session should notify the Executive Director in writing to obtain building entry. Notifications of intent to make an oral statement or to attend must be faxed, no later than December 31, 2006, to 202–622–8300, Attn: Executive Director. Any interested person also may file a written statement for consideration by the Joint Board and the Committee by sending it to the; Internal Revenue Service, Joint Board for the Enrollment of Actuaries, Attn: Executive Director, SE:OPR, 1111 Constitution Avenue, NW., Washington, DC 20224.

Dated: December 1, 2006.

Patrick W. McDonough,

Executive Director, Joint Board for the Enrollment of Actuaries.

[FR Doc. E6–22025 Filed 12–22–06; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

[Docket # AMS–FV–2006–0201; FV–06–314]

United States Standards for Grades of Parsley

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Notice.

SUMMARY: The Agricultural Marketing Service (AMS) of the Department of Agriculture (USDA) is soliciting comments on its proposal to revise the United States Standards for Grades of Parsley. AMS is proposing to revise the standards to allow percentages to be determined by count rather than weight. AMS is also proposing to eliminate the unclassified category. The proposed revisions would bring the standards for parsley in line with current marketing practices, thereby improving the usefulness in serving the industry.

DATES: Comments must be received by February 26, 2007.

ADDRESSES: Interested persons are invited to submit written comments to the Standardization Section, Fresh Products Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, U.S. Department of Agriculture, 1400 Independence Ave., SW., Room 1661 South Building, Stop 0240, Washington, DC 20250–0240; Fax (202) 720–8871, E-mail: *FPB.DocketClerk@usda.gov*. Comments should make reference to the dates and page number of this issue of the **Federal Register** and will be made available for public inspection in the above office during regular business hours. The United States Standards for Grades of Parsley are available either through the address cited above or by accessing the AMS, Fresh Products Branch Web site at: *http://www.ams.usda.gov/standards/stanfrfv.htm*.

FOR FURTHER INFORMATION CONTACT: Cheri L. Emery, at the above address or call (202) 720–2185; E-mail: *Cheri.Emery@usda.gov*.

SUPPLEMENTARY INFORMATION: Section 203(c) of the Agricultural Marketing Act of 1946 (7 U.S.C. 1621–1627), as amended, directs and authorizes the Secretary of Agriculture ''To develop and improve standards of quality, condition, quantity, grade and packaging and recommend and demonstrate such standards in order to encourage uniformity and consistency in commercial practices.'' AMS is committed to carrying out this authority in a manner that facilitates the marketing of agricultural commodities. AMS makes copies of official standards available upon request. The United States Standards for Grades of Fruits and Vegetables not connected with Federal Marketing Orders or U.S. Import Requirements no longer appear in the Code of Federal Regulations, but are maintained by USDA, AMS, Fruit and Vegetable Programs.

AMS is proposing to revise the voluntary United States Standards for Grades of Parsley using procedures that appear in Part 36, Title 7 of the Code of Federal Regulations (7 CFR part 36). These standards were last published on July 30, 1930.

Background

Prior to undertaking research and other work associated with revision of the grade standards, AMS published a notice in the **Federal Register** (71 FR 41755) on July 24, 2006, soliciting comments on the possible revision to the United States Standards for Grades of Parsley.

In response to our request for comments, AMS received one comment from an industry group representing receivers. The comment is available by accessing AMS's Fresh Products Branch Web site at: *http://www.ams.usda.gov/fv/fpbdocketlist.htm.* The commenter was in favor of the proposed revision to allow the percentages for tolerances and defects to be determined by count rather than weight, and further stated that as for the ''Unclassified'' category, some members requested that it be preserved, while others did not. However, this section is being removed in all standards when they are revised, as this category is not a grade and it only serves to show that no grade has been applied to the lot. It is no longer considered necessary. Therefore, AMS will eliminate the ''Unclassified'' category.

The proposed revision will allow percentages for tolerances and defects to be determined by count rather than weight. Currently, parsley is packed and marketed by count and weight. Taking into account these marketing practices, this proposal will bring the standards for parsley in line with current marketing practices, thereby, improving the usefulness of the standards in serving the industry.

The official grade of a lot of parsley covered by these standards is determined by the procedures set forth in the Regulations Governing Inspection, Certification, and Standards of Fresh Fruits, Vegetables and Other Products (Sec. 51.1 to 51.61).

This notice provides for a 60-day comment period for interested parties to comment on the proposed changes to the United States Standards for Grades of Parsley.

Authority: 7 U.S.C. 1621–1627.

Dated: December 19, 2006.

Lloyd C. Day,

Administrator, Agricultural Marketing Service.

[FR Doc. E6–22048 Filed 12–22–06; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Forest Service

Forestry Research Advisory Council

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Forestry Research Advisory Council will meet in Madison, WI, January 23–25, 2007. The purpose of the meeting is to discuss emerging issues in forestry research.

DATES: The meeting will be held January 23–25, 2007. On January 23 the meeting will be from 8:30 a.m. to 5 p.m, and on January 25 from 8:30–noon.

ADDRESSES: The meeting will be held at the Forest Products Laboratory, One Gifford Pinchot Drive, Madison WI. Individuals who wish to speak at the meeting or to propose agenda items must send their names and proposals to Daina Apple, Designated Federal Officer, Forestry Research Advisory Council, USDA Forest Service Research and Development, 1400 Independence Ave., SW., Washington DC 20250–1120. Individuals also may fax their names and proposed agenda items to (202) 205–1530.

FOR FURTHER INFORMATION CONTACT: Daina Apple, Forest Service Office of the Deputy Chief for Research and Development, (202) 205–1665.

SUPPLEMENTARY INFORMATION: The meeting is open to the public. Council discussion is limited to Forest Service, Cooperative State Research Education, and Extension Service staff and Council members. However, persons who wish to bring forestry research matters to the attention of the Council may file written statements with the Council staff before or after the meeting.

Dated: December 15, 2006.

Jimmy L. Reaves,

Acting Deputy Chief, Research & Development.

[FR Doc. E6–22060 Filed 12–22–06; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF AGRICULTURE

Forest Service

Procedures for Third Party Facilitated Land Exchanges

AGENCY: Forest Service, USDA.

ACTION: Notice of Issuance of Agency Interim Directive.

SUMMARY: The Forest Service is issuing an interim directive to Forest Service Handbook (FSH) 5409.13—Land Acquisition Handbook to provide additional guidance to its employees for using third party facilitators in a real estate action.

DATES: This interim directive is effective December 26, 2006.

ADDRESSES: This interim directive (id_5409.13–2006–1) is available electronically from the Forest Service via the World Wide Web/Internet at *http://www.fs.fed.us/im/directives.* Single paper copies of the interim directive are also available by contacting Maryanne Kurtinaitis, Lands Staff (Mail Stop 1124), Forest Service, 1400 Independence Avenue, SW., Washington, DC 20250–1124 (telephone 202–205–1264).

FOR FURTHER INFORMATION CONTACT: Maryanne Kurtinaitis, Lands Staff, (202) 205–1264.

SUPPLEMENTARY INFORMATION: The interim directive to Forest Service Handbook (FSH) 5409.13, section 32.2 provides additional guidance when a third party facilitator is used in a real estate action. Several problems have been identified with facilitated land exchanges, including third party facilitators not being legally authorized in writing by non-Federal landowners to represent their interests, and non-Federal landowners not being adequately informed and involved by the third party facilitator and the Forest Service.

The effect of these situations may be that while the Forest Service incurs appraisal, environmental analysis, and other costs associated with a proposed exchange, the facilitator may not have bound the non-Federal landowner or lands to enable completion of the exchange upon an affirmative decision.

Dated: December 19, 2006.

Dale N. Bosworth,

Chief, Forest Service.

[FR Doc. E6–22063 Filed 12–22–06; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF AGRICULTURE

Forest Service

RIN 0596–AC45

Forest Service Interim Guidelines for Tribal Forest Protection Act

AGENCY: Forest Service, USDA.

ACTION: Notice; request for comment.

SUMMARY: On December 13, 2005, the Forest Service issued an interim directive to provide guidance for Tribal Forest Protection Act (TFPA) proposals. This interim directive provides internal administrative direction to guide Forest Service employees in planning, implementing, and monitoring TFPA proposals. The interim directive is issued to Forest Service Handbook (FSH) 2409.19, Renewable Resources Handbook, Chapter 60, Stewardship Contracting, as Interim Directive No. 2409.19–2005–2 and can be found at *http://www.fs.fed.us/spf/tribalrelations/.* This direction was developed to implement the provisions as authorized in Public Law 108–278, Tribal Forest Protection Act. The agency is requesting comment on this interim directive to ensure that the public has the opportunity to comment on the implementation of this new authority. The public's comments will be considered prior to development of final agency policy.

DATES: Public input must be received by February 26, 2007.

ADDRESSES: Written comments should be addressed to: USDA Forest Service, Office of Tribal Relations, 1400 Independence Avenue, SW., Mail Stop Code 1109, Washington, DC 20250–1109. Public input on this interim directive may also be submitted via facsimile to (202) 205–1773 or by e-mail to *tribal_relations@fs.fed.us.* The agency cannot confirm receipt of comments sent via facsimile or e-mail. All comments, including names and addresses when provided, are placed in the record and are available for public inspection and copying. The public may inspect comments during regular business hours (8:30 a.m. to 4 p.m. Monday through Friday, except holidays) at the USDA Forest Service Office of Tribal Relations, 2nd Floor Central, Sidney R. Yates Building, 201 14th Street, SW., Washington, DC. Visitors are encouraged to call ahead to (202) 205–1514 to facilitate entry into the building.

FOR FURTHER INFORMATION CONTACT: Marsha Butterfield, USDA Forest Service, Office of Tribal Relations, (202) 205–4095.

SUPPLEMENTARY INFORMATION: The Tribal Forest Protection Act of 2004 (TFPA) was intended to strengthen Forest Service (FS) and Bureau of Land Management (BLM) agency relationships with federally recognized tribes and to restore forested lands. The TFPA authorizes the Secretaries of Interior and Agriculture to enter into contracts and agreements with tribes to carry out certain projects on FS and BLM-administered lands that will reduce threats to adjacent or bordering tribal lands. A copy of the TFPA and other information on the interim directive can be found at: *http://www.fs.fed.us/spf/tribalrelations.*

Background

The TFPA was passed in July 2004 in response to devastating wildfires that crossed from Federal onto tribal lands the prior summer. The TFPA provides a tool for tribes to propose work and enter into contracts and agreements with the FS or BLM to reduce threats on FS or BLM-administered lands adjacent to or bordering on Indian trust land and Indian communities. The Forest Service and BLM coordinated on development of policy to implement the TFPA.

Forest Service policy to implement the TFPA is included with Stewardship Contracting guidance in Forest Service Handbook (FSH) 2409.19, Chapter 60. Draft policy was sent to Regional Foresters for tribal consultation and a comment period from April 25, 2005, to June 25, 2005. Comments were considered during development of the interim directive.

Description of Interim Directive

Key points of the policy include:

1. Tribal proposals must focus on National Forest System (NFS) lands that: (a) Border on or are adjacent to tribal forest lands; and (b) pose a fire, disease, or other threat to the Indian trust land or community, or need restoration; and (c) are not subject to some other conflicting agreement or contract; and (d) involve a feature or circumstance unique to the proposing (i.e. treaty rights, cultural, archaeological, historical, or biological).

2. The Forest Service may utilize an array of legal instruments to enter into contracts and agreements with tribes in response to their proposals, including an emphasis on stewardship contracting.

3. To qualify, the Indian land must: (a) Border on or be adjacent to NFS lands; and (b) be in trust or restricted status; and (c) be forested or have grass, brush, or other vegetative cover; and (d) if burned over land, be capable of regenerating vegetative cover.

4. Before initiating a project proposal, tribes are encouraged to meet with Forest Service personnel and other interested stakeholders prior to submitting formal requests to the Forest Supervisor or District Ranger.

5. Within 120 days of a tribe submitting a request, the Forest Service will issue a public notice indicating: (a) Initiation of any necessary environmental review, (b) potential for entering into an agreement or contract with the tribe, or (c) notify the tribe of the denial of their proposal.

6. When the Forest Service evaluates and considers entering into agreements or contracts with tribes under the TFPA, the FS may use a best value basis and give specific consideration to tribally related factors, including: status of the Indian tribe as an Indian tribe; trust status of the Indian tribe's forest land or rangeland; treaty rights or other reserved rights of the Indian tribe relating to the land subject to the proposal; cultural, traditional, historic affiliations; indigenous knowledge and skills of members of the Indian tribe; landscape and vegetation features; coordination between the tribe and the agencies; and tribal access to the land subject to the proposal.

7. If the Forest Service denies a tribe's proposal to enter into an agreement or contract, the agency will issue a notice of denial to the tribe that identifies specific factors in, and reasons for, the denial, identifies potential corrective courses of action when appropriate, and provides for consultation with the tribe on how to protect the Indian trust land and tribal interests on the Forest Service land. Before a denial is issued, agency personnel may work with the tribes to attempt to make the proposal acceptable.

Regulatory Certifications

Regulatory Impact

This interim directive has been reviewed under USDA procedures and Executive Order 12866 on Regulatory Planning and Review. This interim directive would not have an annual effect of $100 million or more on the economy, nor adversely affect productivity, competition, jobs, the environment, public health or safety, nor State or local Governments. This interim directive would not interfere with an action taken or planned by another agency, nor raise new legal or policy issues. Finally, this interim directive would not alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients of such programs. Accordingly, this interim directive is not subject to OMB review under Executive Order 12866.

Proper Consideration of Small Entities

This interim directive has been considered in light of Executive Order 13272 regarding proper consideration of small entities and the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), which amended the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). It has been determined that this interim directive would not have a significant economic impact on a substantial number of small entities as defined by SBREFA.

Environmental Impact

Section 31.1b of Forest Service Handbook 1909.15 (57 FR 43180; September 18, 1992) excludes from documentation in an environmental assessment or impact statement ''rules, regulations, or policies to establish Service-wide administrative procedures, program processes, or instructions'' that do not significantly affect the quality of the human environment. This interim directive sets forth administrative procedures for implementation of the TFPA and, as such, has no direct effect on Forest Service decisions for land management activities.

No Takings Implications

This interim directive is limited to establishment of administrative procedures to respond to American Indian and Alaska Natives proposed work projects to enter into contracts and/or agreements with the Forest Service. Projects would conduct land management activities on Forest Service and BLM lands adjacent to Indian trust land and Indian communities.

This interim directive has been analyzed in accordance with the principles and criteria contained in Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights, and it has been determined that the interim directive does not pose the risk of a taking of private property.

Federalism

Executive Order 13132, Federalism, requires consultation with State and local officials when planned regulations and other policies have substantial direct effects on the States. This interim directive establishes procedures for the TFPA which will be administered by the Forest Service and implemented by participating Indian tribes. Therefore, the agency has determined that there are no direct effects on the States and no further assessment of federalism implications is necessary.

Consultation and Coordination With Indian Tribal Governments

In accordance with Forest Service policy and Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, formal consultation was conducted with Indian tribes on development of this new policy in 2005. The draft TFPA policy was sent to regional FS offices, where it was then sent to tribes in their respective regions that have tribal land, rangeland, or tribal communities bordering on or adjacent to NFS land, for consultation with those tribes. A 60-day comment period was provided for the consultation and comment.

Energy Effects

This interim directive has been reviewed under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. It has been determined that this proposed guideline does not constitute a significant energy action as defined in the Executive Order.

Unfunded Mandates Reform

Pursuant to Title II of the Unfunded Mandates Reform Act of 1995, which the President signed into law on March 22, 1995, the Department has assessed the effects of this interim directive on Tribal governments and the private sector. This interim directive does not compel the expenditure of $100 million or more by any Tribal government or anyone in the private sector. Therefore, a statement under section 202 of the Act is not required.

Civil Justice

This interim directive has been reviewed under Executive Order 12988, Civil Justice Reform. After adoption of this interim directive as final, (1) all State and local laws and regulations that conflict with this policy or that would impede full implementation of this policy will be preempted (2) no retroactive effect would be given to this interim directive; and (3) this interim directive would not require the use of administrative proceedings before parties could file suit in court challenging its provisions.

Dated: November 27, 2006.

Sally Collins,

Associate Chief, Forest Service.

[FR Doc. E6–22061 Filed 12–22–06; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF COMMERCE

Foreign–Trade Zones Board

Docket 47–2006

Foreign–Trade Zone 15 - Kansas City, Missouri, Area, Application for Expansion

An application has been submitted to the Foreign–Trade Zones Board (the Board) by the Greater Kansas City Foreign Trade Zone, Inc., grantee of FTZ 15, requesting authority to expand its zone in the Kansas City, Missouri, area, adjacent to the Kansas City CBP port of entry. 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 December 14, 2006.

FTZ 15 was approved on March 23, 1973 (Board Order 93, 38 FR 8622, 4/4/73) and expanded on October 25, 1974 (Board Order 102, 39 FR 39487, 11/7/74); on February 28, 1996 (Board Order 804, 61 FR 9676, 3/11/96); on May 31, 1996 (Board Order 824, 61 FR 29529, 6/11/96); on December 8, 1997 (Board Order 934, 62 FR 65654, 12/15/97); on October 19, 1998 (Board Order 1004, 63 FR 59761, 11/5/98); on January 8, 1999 (Board Order 1016, 64 FR 3064, 1/20/99); on June 17, 1999 (Board Order 1042, 64 FR 34188, 6/25/99); on April 15, 2002 (Board Order 1226, 67 FR 20087, 4/24/02); and, on April 20, 2005 (Board Order 1388, 70 FR 22630, 5/2/05).

The zone project to date has consisted of the following sites in the Kansas City area: *Site 1* (5.7 acres, 250,000 sq. ft.) -- Midland International Corporation warehouse facility located at 1650 North Topping St., Kansas City; *Site 1A* (2.76 acres) -- located at 1226 Topping Drive, Kansas City; *Site 2* (64.3 acres, 2.8 million sq. ft.) -- surface/underground warehouse complex located at 8300 NE Underground Drive, Kansas City (includes a site (75,000 sq. ft.) located at 3600 Great Midwest Drive operated by Terminal Consolidation Company); *Site 3* (9,615 acres) -- located within the 10,000–acre Kansas City International Airport facility; *Site 3A* (1 acre, 33,541 sq. ft.) -- located at 10201 N. Everton, Kansas City; *Site 3B* (3 parcels, 384 acres total) -- Kansas City: *Parcel 1* (68 acres) -- within the 330–acre Air World Center Business Park, located at Interstate 29 and 112th Street; *Parcel 2* (155 acres) -- Congress Corporate Center Industrial Park, located at the northwest corner of 112th Street and North Congress; and, *Parcel 3* (161 acres) -- city–owned Harley Davidson Site; *Site 4* (416 acres) -- Carefree Industrial Park, 1600 NM–291 Highway, Sugar Creek/ Independence; *Site 5* (1,000 acres, 5.75 million sq. ft.) -- CARMAR Underground Business Park/CARMAR Industrial Park, No. 1 Civil War Road, Carthage; *Site 6* (28,000 sq. ft., 11 acres) -- Laser Light Technologies, Inc., facility located within the Hermann Industrial Park, 5 Danuser Drive, Hermann (expired 12/ 31/05); *Site 7* (1,750 acres) Richards–Gebaur Memorial Airport/Industrial Park complex, 1540 Maxwell, Kansas City; *Site 8* (13.57 acres) located at Ryan Road and Brunswick, Chillicothe; *Site 8T* (6 acres, 85,000 sq. ft.) - temporary site located at 411 S. Brunswick Road, Chillicothe (expires 12/1/08); and, *Site 9* (50 acres, 2 parcels) St. Joseph: *Parcel 1* (200,000 sq. ft., 25 acres) located at 2307 Alabama Street and *Parcel 2* (169,000 sq. ft., 25 acres) located at 2326 Lower Lake Road.

The applicant is requesting authority to include additional sites in the Kansas City, Missouri area: Expand Site 8 to include an additional parcel located at 411 South Brunswick Road, Chillicothe (this will include Site 8T on a permanent basis); *Proposed Site 10* (72.31 acres) - warehouse located at 8201 E. 23rd Street, Kansas City; *Proposed Site 11* (49 acres, 3 parcels) located at an industrial park in Grandview: *Parcel A* (18 acres)-tract of undeveloped land, 13700 S. US 71 Hwy; *Parcel B* (9 acres)-tract of undeveloped land, 5610 East 139th Street; *Parcel C* (22 acres)-warehouse located at 13500 15th Street; and, *Proposed Site 12* (125 acres)- Botts warehouse located at 14100 Botts Road, Grandview.

The applicant is also requesting that six acres at Site 8 be restored to zone status. (A minor modification was approved in November 13, 2006 (A(27f)-62–2006) removing six acres from Site 8 to establish the temporary site (Site 8T).) The applicant is further requesting to remove 183 acres from Site 7 due to changed circumstances (new total - 1,567 acres). No specific manufacturing requests are being made at this time. Such requests would be made to the Board on a case–by-case basis.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 on the application is invited from interested parties. Submissions (original and 3 copies) shall be addressed to the Board's Executive Secretary at the address below. The closing period for their receipt is February 26, 2007. Rebuttal comments in response to material submitted during the foregoing period may be submitted during the subsequent 15-day period (to March 12, 2007.

A copy of the application and accompanying exhibits will be available for public inspection at each of the following locations: U.S. Department of Commerce Export Assistance Center, Suite 650, 2345 Grand Boulevard, Kansas City, Missouri 64108, and, Office of the Executive Secretary, Foreign–Trade Zones Board, Room 2814B, 1401 Constitution Avenue, NW, Washington, DC 20230.

Dated: December 14, 2006.

Pierre V. Duy,

Acting Executive Secretary.

[FR Doc. E6–22079 Filed 12–22–06; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

A–570–846

Brake Rotors from the People's Republic of China: Extension of Time Limit for the Preliminary Results of the 2005–2006 Administrative and New Shipper Reviews

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

EFFECTIVE DATE: December 26, 2006.

FOR FURTHER INFORMATION CONTACT: Jennifer Moats, 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) 482–5047.

SUPPLEMENTARY INFORMATION: On May 31, 2006, the Department published a notice of initiation of the administrative review of brake rotors from the People's Republic of China (''PRC''), covering the period April 1, 2005, through March 31, 2006. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part*, 71 FR 30864 (May 31, 2006). This administrative review covers 16 firms. However, due to the large number of firms subject to this administrative review, and the Department's experience regarding the administrative burden to review each company for which a request has been made, the Department exercised its authority to limit the number of respondents selected for individual review. *See* Section 777(A)(c) of the Tariff Act of 1930, as amended (''the Act''); See also Memorandum to Wendy Frankel from Blanche Ziv regarding the Antidumping Duty Administrative Review of Brake Rotors from the People's Republic of China: Selection of Respondents (''Selection Memo''), dated August 18, 2006.

The following respondents were selected for individual review: Longkou Haimeng Machinery Co., Ltd. (''Haimeng''), Yantai Winhere Auto–Part Manufacturing Co., Ltd. (''Winhere''), and Qingdao Meita Automotive Industry Co., Ltd. (''Meita''). *See* Selection Memo. On May 30, 2006, the Department published a notice of initiation of new shipper review of brake rotors from the PRC covering the period April 1, 2005, through March 31, 2006. *See Brake Rotors from the People's Republic of China: Initiation of New Shipper Review*, 71 FR 30655 (May 30, 2006).

On October 2, 2006, the Department received a letter from counsel to Qingdao Golrich Autoparts Co., Ltd. (''Golrich''), agreeing to waive the new shipper review time limits in accordance with 19 CFR § 351.214(j)(3). Therefore, in accordance with 19 CFR § 351.214(j)(3), on October 4, 2006, the Department acknowledged respondent's waiver of the new shipper review time limits and aligned the new shipper review with the administrative review. *See* Department's Memorandum to the File on the Alignment of 2005–2006 Administrative and New Shipper Reviews, dated October 4, 2006. The preliminary results are currently due by January 2, 2007.

In November 2006, the Department conducted verifications of sales and factors of production (''FOP'') for the new shipper review and one of the three administrative review companies selected as mandatory respondents. Also, in November 2006, the Department conducted a separate–rate verification for one of the companies not selected as a mandatory respondent requesting its own separate–rate.

Extension of Time Limit of Preliminary Results

Section 751(a)(3)(A) of the Act requires the Department to issue the preliminary results of an administrative review within 245 days after the last day of the anniversary month of an antidumping duty order for which a review is requested and issue the final results within 120 days after the date on which the preliminary results are published. However, if it is not practicable to complete the review within the time period, section 751(a)(3)(A) of the Act allows the Department to extend these deadlines to a maximum of 365 days and 180 days, respectively.

The Department determines that completion of the preliminary results of these reviews within the statutory time period is not practicable, given the extraordinarily complicated nature of the proceeding. The 2005–2006 administrative and new shipper reviews cover four companies, and to conduct the sales and factor analyses for each requires the Department to gather and analyze a significant amount of information pertaining to each company's sales practices and manufacturing methods. In addition, the Department must analyze the responses of thirteen separate–rate respondents to determine their eligibility for a separate–rate. Therefore, the Department requires more time to complete these analyses. Additionally, the Department requires additional time to analyze the verification findings of the three companies verified.

Therefore, given the number and complexity of issues in this case, and in accordance with sections 751(a)(3)(A) and 751(a)(2)(B)(iv) of the Act, we are extending the time period for issuing the preliminary results of review by 40 days to 285 days. Therefore, the preliminary results will be due no later than February 9, 2007. The final results continue to be due 120 days after the publication of the preliminary results.

This notice is published pursuant to sections 751(a)(3)(A) and 777(i) of the Act.

Dated: December 19, 2006.

Stephen J. Claeys,

Deputy Assistant Secretaryfor Import Administration.

[FR Doc. E6–22073 Filed 12–22–06; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

A–122–847

Certain Hard Red Spring Wheat from Canada: Notice of Rescission of Antidumping Duty Administrative Review

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

SUMMARY: Based on the withdrawal of a request for review, the Department of Commerce is rescinding its administrative review of the antidumping duty order on Certain Hard Red Spring Wheat from Canada for the period October 1, 2004, through September 30, 2005.

EFFECTIVE DATE: December 26, 2006.

FOR FURTHER INFORMATION CONTACT: Yasmin Nair, AD/CVD Operations, Office 1, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington DC 20230; telephone (202) 482–3813.

SUPPLEMENTARY INFORMATION:

Background

On October 3, 2005, the Department of Commerce (''the Department'') published in the **Federal Register** the *Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review*, 70 FR 57558 (Oct. 3, 2005), for the above–cited segment of this antidumping duty proceeding. On October 31, 2005, the Department received a timely filed request for review from the Canadian Wheat Board. The Canadian Wheat Board also timely filed a request to defer for one year the initiation of the administrative review. The Department received no objections to this request from any party cited in 19 CFR 351.213(c)(1)(ii). On December 1, 2005, the Department published in the **Federal Register** the *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Deferral of Administrative Reviews*, 70 FR 72107 (Dec. 1, 2005), which granted the Canadian Wheat Board's request for deferral of administrative review for one year. On November 27, 2006, the Department published in the **Federal Register** the *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 71 FR 68535 (Nov. 27, 2006), in which the Department automatically initiated the above–referenced deferred administrative review of Certain Hard Red Spring Wheat from Canada.

On December 6, 2006, we received a timely filed submission from the Canadian Wheat Board withdrawing its request for an administrative review.

Rescission of Antidumping Administrative Review

The Canadian Wheat Board filed its withdrawal request within the deadline established by section 351.213(d)(1) of the Department's regulations. No other parties have requested a review of the Canadian Wheat Board or any other producer or exporter of the subject merchandise. Therefore, we are rescinding the above–cited administrative review in accordance with 19 CFR 351.213(d)(1).

Assessment

The Department will instruct U.S. Customs and Border Protection (''CBP'') to assess antidumping duties on all appropriate entries. For the company for which this review is rescinded, antidumping duties shall be assessed at rates equal to the cash deposit of estimated antidumping duties required at the time of entry, or withdrawal from warehouse, for consumption, in accordance with 19 CFR 351.212(c)(1)(i). The Department will issue appropriate assessment instructions directly to CBP within 41 days of publication of this notice.

Cash Deposit Rates

The Department has revoked the antidumping and countervailing duty orders on Certain Hard Red Spring Wheat from Canada. *See Antidumping Duty Investigation and Countervailing Duty Investigation of Hard Red Spring Wheat from Canada: Notice of Panel Decision, Revocation of Countervailing and Antidumping Duty Orders and Termination of Suspension of Liquidation*, 71 FR 8275 (Feb. 16, 2006). The effective date of the revocation is January 2, 2006. Therefore, the CBP has been directed to terminate the suspension of liquidation for all shipments of Certain Hard Red Spring Wheat from Canada entered, or withdrawn from warehouse, for consumption on or after January 2, 2006.

Notification to Importers

This notice serves as a reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of doubled antidumping duties.

Notification Regarding APOs

This notice also serves as a reminder to parties subject to administrative protective orders (''APOs'') of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305, which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of the return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

This notice is issued and published in accordance with section 777(i) of the Tariff Act of 1930, as amended, and 19 CFR 351.213(d)(4).

Dated: December 19, 2006.

Stephen J. Claeys,

Deputy Assistant Secretaryfor Import Administration.

[FR Doc. E6–22078 Filed 12–22–06; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

A–201–817

Oil Country Tubular Goods from Mexico; Preliminary Results of the Sunset Review of Antidumping Duty Order

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

SUMMARY: On June 1, 2006, the Department of Commerce (''the Department'') initiated a sunset review of the antidumping duty order on oil country tubular goods (''OCTG'') from Mexico. On the basis of the notice of intent to participate, adequate substantive responses, and rebuttal comments filed on behalf of the domestic and respondent interested parties, the Department is conducting a full sunset review of the antidumping duty order pursuant to section 751(c) of the Tariff Act of 1930, as amended (''the Act''), and 19 CFR 351.218(e)(2)(i). As a result of this sunset review, the Department preliminarily finds that revocation of the antidumping duty order would likely lead to the continuation or recurrence of dumping at the levels listed below in the section entitled ''Preliminary Results of Review.''

EFFECTIVE DATE: December 26, 2006.

FOR FURTHER INFORMATION CONTACT: John Drury or Angelica Mendoza, AD/CVD Operations, Office 7, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street & Constitution Avenue, NW, Washington, DC, 20230; telephone: 202–482–0195 or 202–482–3019, respectively.

SUPPLEMENTARY INFORMATION:

Background

On June 1, 2006, the Department published its notice of initiation of the sunset review of the antidumping duty order on OCTG from Mexico, in accordance with section 751(c) of the Act. *See Initiation of Five–Year (''Sunset'') Reviews*, 71 FR 31153 (June 1, 2006) (''*Notice of Initiation*'').

The Department received notices of intent to participate on behalf of United States Steel Corporation and IPSCO Tubulars Inc., Lone Star Steel Company, Koppel Steel (NS Group), Maverick Tube Corporation, Newport Steel (NS Group) and V&M Star LP (collectively ''the domestic interested parties''), within the 15–day deadline specified in 19 CFR 351.218(d)(1)(i). The domestic interested parties claimed interested party status under section 771(9)(C) of the Act, as manufacturers of a domestic–like product in the United States.

The Department received complete substantive responses to the notice of initiation from the interested parties Hylsa S.A. de CV (''Hylsa'') and Tubos de Aceros de Mexico, S.A. (''TAMSA'') (collectively ''respondent interested parties'') within the 30–day deadline specified in 19 CFR 351.218(d)(3)(i). The Department received rebuttal responses from domestic interested parties to the substantive responses from the respondent interested parties on July 5, 2006, and July 14, 2006, respectively.

19 CFR 351.218(e)(1)(ii)(A) provides that the Secretary normally will conclude that respondent interested parties have provided adequate response to a notice of initiation where the Department receives complete substantive responses from respondent interested parties accounting on average for more than 50 percent, by volume, or value, if appropriate, of the total exports of the subject merchandise to the United States over the five calendar years preceding the year of publication of the notice of initiation. On July 21, 2006, the Department found that respondent interested parties accounted for more than 50 percent of exports by volume of the subject merchandise from Mexico to the United States. *See* Memorandum to Stephen J. Claeys, Deputy Assistant Secretary for Import Administration, from John K. Drury entitled, ''Adequacy Determination: Sunset Review of the Antidumping Duty Order on Oil Country Tubular Goods from Mexico,'' (July 21, 2006). In accordance with 19 CFR 351.218(e)(2)(i), the Department determined to conduct a full sunset review of this antidumping duty order. On September 25, 2006, in accordance with section 751(c)(5)(B) of the Act, the Department extended the deadlines for the preliminary and final results of this sunset review by 90 days. *See Oil Country Tubular Goods from Mexico; Extension of Time Limits for Preliminary and Final Results of Full Five–year (''Sunset'') Review of Antidumping Duty Order*, 71 FR 55774.

The final results of the full sunset review of this antidumping duty order are due on or before April 27, 2007.

Scope of the Order

The merchandise covered by this order is OCTG, hollow steel products of circular cross–section, including oil well casing and tubing of iron (other than cast iron) or steel (both carbon and alloy), whether seamless or welded, whether or not conforming to American Petroleum Institute (''API'') or non–API specifications, whether finished or unfinished (including green tubes and limited–service OCTG products). The scope of this order does not cover casing or tubing pipe containing 10.5 percent or more of chromium, or drill pipe. The OCTG subject to this order are currently classified in the Harmonized Tariff Schedule of the United States (''HTSUS'') under item numbers: 7304.29.10.10, 7304.29.10.20, 7304.29.10.30, 7304.29.10.40, 7304.29.10.50, 7304.29.10.60, 7304.29.10.80, 7304.29.20.10, 7304.29.20.20, 7304.29.20.30, 7304.29.20.40, 7304.29.20.50, 7304.29.20.60, 7304.29.20.80, 7304.29.30.10, 7304.29.30.20, 7304.29.30.30, 7304.29.30.40, 7304.29.30.50, 7304.29.30.60, 7304.29.30.80, 7304.29.40.10, 7304.29.40.20, 7304.29.40.30, 7304.29.40.40, 7304.29.40.50, 7304.29.40.60, 7304.29.40.80, 7304.29.50.15, 7304.29.50.30, 7304.29.50.45, 7304.29.50.60, 7304.29.50.75, 7304.29.60.15, 7304.29.60.30, 7304.29.60.45, 7304.29.60.60, 7304.29.60.75, 7305.20.20.00, 7305.20.40.00, 7305.20.60.00, 7305.20.80.00, 7306.20.10.30, 7306.20.10.90, 7306.20.20.00, 7306.20.30.00, 7306.20.40.00, 7306.20.60.10, 7306.20.60.50, 7306.20.80.10, and 7306.20.80.50. The Department has determined that couplings, and coupling stock, are not within the scope of the antidumping order on OCTG from Mexico. *See* Letter to Interested Parties; Final Affirmative Scope Decision, August 27, 1998. The HTSUS subheadings are provided for convenience and customs purposes. Our written description of the scope of this order is dispositive.

Analysis of Comments Received

All issues raised in this sunset review are addressed in the ''Issues and Decision Memorandum for the Full Sunset Review of the Antidumping Duty Order on Oil Country Tubular Goods (''OCTG'') from Mexico; Preliminary Results,'' from Stephen J. Claeys, Deputy Assistant Secretary for Import Administration, to David M. Spooner, Assistant Secretary for Import Administration, dated December 18, 2006 (''Decision Memo''), which is hereby adopted by this notice. The issues discussed in the Decision Memo include the likelihood of continuation or recurrence of dumping and the magnitude of the margin likely to prevail if the antidumping duty order were revoked. Parties can find a complete discussion of all issues raised in this sunset review and the corresponding recommendations in this public memorandum, which is on file in room B–099 of the main Department building. In addition, a complete version of the Decision Memo can be accessed directly on the Web at http://ia.ita.doc.gov/frn. The paper copy and electronic version of the Decision Memo are identical in content.

Preliminary Results of Review

The Department preliminarily determines that revocation of the antidumping duty order on OCTG from Mexico is likely to lead to continuation or recurrence of dumping at the following weighted–average margins:

Manufacturers/Producers/Exporters	Weighted–Average Margin (Percent)
TAMSA	21.70
Hylsa	0.62
All Others	21.70

Any interested party may request a hearing within 30 days of publication of this notice in accordance with 19 CFR 351.310(c). Interested parties may submit case briefs no later than 50 days after the date of publication of this notice, in accordance with 19 CFR 351.309(c)(1)(i). Rebuttal briefs, which must be limited to issues raised in the case briefs, may be filed no later than five days after the case briefs, in accordance with 19 CFR 351.309(d)(1). Any hearing, if requested, will be held two days after rebuttal briefs are due, in accordance with 19 CFR 351.310(d)(1). The Department will issue a notice of final results of this sunset review, which will include the results of its analysis of issues raised in any such briefs, no later than April 27, 2007.

This five–year (''sunset'') review and notice are in accordance with sections 751(c), 752(c), and 777(i)(1) of the Act.

Dated: December 18, 2006.

David M. Spooner,

Assistant Secretary for Import Administration.

[FR Doc. E6–22076 Filed 12–22–06; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

(A–570–905)

Preliminary Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances: Certain Polyester Staple Fiber from the People's Republic of China

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

EFFECTIVE DATE: December 26, 2006.

SUMMARY: We preliminarily determine that certain polyester staple fiber (''PSF'') from the People's Republic of China (''PRC'') is being, or is likely to be, sold in the United States at less than fair value (''LTFV''), as provided in section 733 of the Tariff Act of 1930, as amended (''the Act''). The estimated margins of sales at LTFV are shown in the ''Preliminary Determination'' section of this notice.

FOR FURTHER INFORMATION CONTACT: Michael Holton or Paul Walker, AD/CVD Operations, Office 9, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC, 20230; telephone: (202) 482–1324 or 482–0413, respectively.

SUPPLEMENTARY INFORMATION:

Initiation

On June 23, 2006, the Department of Commerce (''Department'') received a petition on imports of PSF from the PRC filed in proper form by Dak Americas LLC., Nan Ya Plastics Corporation America, and Wellman, Inc. (''Petitioners'') on behalf of the domestic industry and workers producing PSF. This investigation was initiated on July 13, 2006. *See Initiation of Antidumping Duty Investigation: Certain Polyester Staple Fiber from the People's Republic of China*, 71 FR 41201 (July 20, 2006) (''*Initiation Notice*''). Additionally, in the *Initiation Notice*, the Department notified parties of the application process by which exporters and producers may obtain separate–rate status in non–market economy (''NME'') investigations. The new process requires exporters and producers to submit a separate–rate status application. *See Policy Bulletin 05.1: Separate–Rates Practice and Application of Combination Rates in Antidumping Investigations involving Non–Market Economy Countries*, (April 5, 2005), (''*Policy Bulletin 05.1*'') available at *http://ia.ita.doc.gov*. However, the standard for eligibility for a separate rate (which is whether a firm can demonstrate an absence of both *de jure* and *de facto* governmental control over its export activities) has not changed.

On August 7, 2006, the United States International Trade Commission (''ITC'') issued its affirmative preliminary determination that there is a reasonable indication that an industry in the United States is materially injured or threatened with material injury by reason of imports from the PRC of PSF. The ITC's determination was published in the **Federal Register** on August 11, 2006. *See* Investigation No. 731–TA–1104 (Preliminary), *Certain Polyester Staple Fiber from China*, 71 FR 46241 (August 11, 2006).

Scope Comments

The Department also set aside a 20-day period from the publication of the initiation for all interested parties to raise issues regarding product coverage. The Department did not receive any comments from interested parties regarding product coverage during the 20-day period and subsequently, did not change the scope in the *Initiation Notice*.

Quantity and Value

On July 19, 2006, the Department requested quantity and value (''Q&V'') information from a total of 106 companies that Petitioners identified as potential producers or exporters of PSF from the PRC. Also, on July 19, 2006, the Department sent a letter requesting Q&V information to the China Bureau of Fair Trade for Imports & Exports (''BOFT'') of the Ministry of Commerce (''MOFCOM'') requesting that BOFT transmit the letter to all companies who manufacture and export subject merchandise to the United States, or produce the subject merchandise for the companies who were engaged in exporting the subject merchandise to the United States during the POI. For a complete list of all parties from which the Department requested Q&V information, *see Memorandum to James C. Doyle, Director, AD/CVD Operations, Office 9, from Michael Holton, Sr. International Trade Compliance Analyst, AD/CVD Operations, Office 9: Selection of Respondents for the Antidumping Investigation of Polyester Staple Fiber from the People's Republic of China*, dated September 18, 2006, (''*Respondent Selection Memorandum*''). Between August 8, 2006, and August 21, 2006, the Department received Q&V responses from 19 interested parties. The Department did not receive any type of communication from BOFT regarding its request for Q&V information. *See Respondent Selection Memorandum* at 1.

On September 18, 2006, the Department selected Cixi Jiangnan Chemical Fiber Co., Ltd. (''Cixi Jiangnan''), Far Eastern Industries (Shanghai) Ltd. (''Far Eastern'') and Ningbo Dafa Chemical Fiber Co., Ltd. (''Ningbo Dafa'') as mandatory respondents in this investigation. *See Respondent Selection Memorandum* at 4.

Surrogate Country

On September 28, 2006, the Department determined that India, Indonesia, Sri Lanka, the Philippines, and Egypt are countries comparable to the PRC in terms of economic development. *See Memorandum from Ron Lorentzen, Director, Office of Policy, to Alex Villanueva, Program Manager, China/NME Group, Office 9: Antidumping Investigation of Certain Polyester Staple Fiber from the People's Republic of China (PRC): Request for a List of Surrogate Countries*, dated September 28, 2006.

On October 5, 2006, the Department requested comments on the surrogate country selection from the interested parties in these reviews. Petitioners submitted surrogate country comments on October 27, 2006. Far Eastern submitted surrogate country comments on November 9, 2006. On November 20, 2006, Petitioners submitted rebuttal surrogate country comments. No other interested parties commented on the selection of a surrogate country. For a detailed discussion of the selection of the surrogate country, *see* ''Surrogate Country'' section below, and the *Memorandum to the File through James C. Doyle, Director, AD/CVD Operations, Office 9, from Alex Villanueva, Program Manager, AD/CVD Operations, Office 9: Antidumping Duty Investigation of Polyester Staple Fiber from the People's Republic of China: Selection of a Surrogate Country*, dated December 15, 2006 (''*Surrogate Country Memorandum*'').

Separate Rates Applications

Between August 16, 2006, and August 21, 2006, we received separate–rate applications from seventeen companies, including the mandatory respondents: Cixi Jiangnan, Far Eastern and Ningbo Dafa. On September 13, 2006, and September 14, 2006, we received applications from Hangzhou Taifu Textile Fiber Co., Ltd. (''Hangzhou Taifu'') and Zhejiang Anshun Pettechs Fibre Co., Ltd., respectively.

Questionnaires

On September 6, 2006, the Department requested comments from all interested parties on proposed product characteristics and model match criteria to be used in the designation of control numbers (''CONNUMs'') to be assigned to the subject merchandise. The Department received comments from Cixi Jiangnan, Far Eastern, Springs Global US, Inc. (''Springs Global'') and Petitioners. The Department also received rebuttal comments from Ningbo Dafa. On September 20, 2006, the Department issued its sections A, C, D, and E, questionnaire with product characteristics and model match criteria used in the designation of CONNUMs and assigned to the merchandise under consideration. On November 27, 2006, the Department requested supplemental information from Hangzhou Taifu. The Department issued supplemental questionnaires to Cixi Jiangnan, Far Eastern, and Ningbo Dafa between October and November 2006, and received responses between October and December 2006. On December 7 and 8, 2006, Petitioners submitted Comments on Cixi Jiangnan's, Far Eastern's and Ningbo Dafa's December 4, 2006, supplemental questionnaires responses. On December 11, 2006, Cixi Jiangnan, Far Eastern and Ningbo Dafa responded to Petitioners' comments. The Department was unable to fully consider Petitioners' December 7 and 8, 2006, comments and respondents' December 11, 2006, comments because they were filed less than 10 days before the preliminary determination.

Surrogate Value Comments

On November 9, 2006, Petitioners, Far Eastern, Cixi Jiangnan and Ningbo Dafa submitted comments on surrogate information with which to value the factors of production in this proceeding. On November 20, 2006, Petitioners filed rebuttal comments on surrogate information with which to value the factors of production in this proceeding. On December 4, 2006, Ningbo Dafa submitted additional surrogate value comments.

Critical Circumstances

On September 29, 2006, Petitioners alleged that there is a reasonable basis to believe or suspect critical circumstances exist with respect to the antidumping investigation of PSF from the PRC. On October 5, 2006, the Department issued questionnaires requesting data for monthly exports to the United States from January 2003 through September 2006 from Cixi Jiangnan, Far Eastern and Ningbo Dafa, and received responses on October. For a detailed discussion, please see the ''Critical Circumstances'' section below.

Postponement of Preliminary Determination

On November 16, 2006, the Department informed Petitioners, Cixi Jiangnan, Far Eastern, and Ningbo Dafa of our intent to postpone the preliminary determination pursuant to section 733(c)(1)(B)(i) of the Act by fifteen days to December 15, 2006. On December 5, 2006, the Department published a postponement of the preliminary antidumping duty determination on PSF from the PRC. *See Notice of Postponement of Preliminary Determination of Antidumping Duty Investigation: Certain Polyester Staple Fiber from the People's Republic of China*, 71 FR 70508 (December 5, 2006).

Period of Investigation

The period of investigation (''POI'') is October 1, 2006, through March 31, 2006. This period corresponds to the two most recent fiscal quarters prior to the month of the filing of the petition (June 23, 2006). *See* 19 CFR 351.204(b)(1).

Scope of Investigation

The merchandise subject to this proceeding is synthetic staple fibers, not carded, combed or otherwise processed for spinning, of polyesters measuring 3.3 decitex (3 denier, inclusive) or more in diameter. This merchandise is cut to lengths varying from one inch (25 mm) to five inches (127 mm). The subject merchandise may be coated, usually with a silicon or other finish, or not coated. PSF is generally used as stuffing in sleeping bags, mattresses, ski jackets, comforters, cushions, pillows, and furniture.

The following products are excluded from the scope: (1) PSF of less than 3.3 decitex (less than 3 denier) currently classifiable in the Harmonized Tariff Schedule of the United States (''HTSUS'') at subheading 5503.20.0025 and known to the industry as PSF for spinning and generally used in woven and knit applications to produce textile and apparel products; (2) PSF of 10 to 18 denier that are cut to lengths of 6 to 8 inches and that are generally used in the manufacture of carpeting; and (3) low–melt PSF defined as a bi–component fiber with an outer, non–polyester sheath that melts at a significantly lower temperature than its inner polyester core (classified at HTSUS 5503.20.0015).

Certain PSF is classifiable under the HTSUS subheadings 5503.20.0045 and

5503.20.0065. Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the merchandise under the orders is dispositive.

Non–Market-Economy Country

For purposes of initiation, Petitioners submitted LTFV analyses for the PRC as a non–market economy. *See Initiation Notice*, 71 FR at 41203. The Department considers the PRC to be a NME country. In accordance with section 771(18)(C)(i) of the Act, any determination that a foreign country is an NME country shall remain in effect until revoked by the administering authority. *See Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, (''TRBs'') From the People's Republic of China: Preliminary Results 2001–2002 Administrative Review and Partial Rescission of Review*, 68 FR 7500 (February 14, 2003), unchanged in *Final Results of 2001–2002 Administrative Review: TRBs from the People's Republic of China*, 68 FR 70488 (December 18, 2003). No party has challenged the designation of the PRC as an NME country in this investigation. Therefore, we have treated the PRC as an NME country for purposes of this preliminary determination.

Surrogate Country

When the Department is investigating imports from an NME, section 773(c)(1) of the Act directs it to base normal value, in most circumstances, on the NME producer's factors of production valued in a surrogate market–economy country or countries considered to be appropriate by the Department. In accordance with section 773(c)(4) of the Act, in valuing the factors of production, the Department shall utilize, to the extent possible, the prices or costs of factors of production in one or more market–economy countries that are at a level of economic development comparable to that of the NME country and are significant producers of comparable merchandise. The sources of the surrogate values we have used in this investigation are discussed under the normal value section below.

As detailed in the *Surrogate Country Memorandum*, the Department has preliminarily selected India as the surrogate country on the basis that: (1) it is a significant producer of comparable merchandise; (2) it is at a similar level of economic development pursuant to 733(c)(4) of the Act; and (3) we have reliable data from India that we can use to value the factors of production. Thus, we have calculated normal value using Indian prices when available and appropriate to value Cixi Jiangnan's, Far Eastern's and Ningbo Dafa's factors of production. *See Memorandum to the File from Paul Walker, through Alex Villanueva, Program Manager, AD/CVD Operations, Office 9, and James C. Doyle, Director, AD/CVD Operations, Office 9: Certain Polyester Staple Fiber from the People's Republic of China: Surrogate Values for the Preliminary Determination*, dated December 15, 2006 (''*Factor Value Memorandum*'').

In accordance with 19 CFR 351.301(c)(3)(i), for the final determination in an antidumping investigation, interested parties may submit publicly available information to value the factors of production within 40 days after the date of publication of the preliminary determination.

Affiliations

Based on the evidence on the record in this investigation and based on the evidence presented in Far Eastern's questionnaire responses, we preliminarily find that Far Eastern is affiliated with Far Eastern Polychem Industries (''FEPI''), WuHan Far Eastern Industrial Trading Ltd. (''WHFE''), Alberta & Orient Co., Ltd (Canada) (''A&O''), Yuang Ding Investment Co. Ltd. (''YDIC''), Everest Investment (Holding) Limited (''EIHL''), Everest Textile Co. Ltd. (''Everest Textile''), Far Eastern Industrial (Suzhou) Ltd. (''FEIZ''), Far Eastern Industrial (Wuxi) Ltd. (''FEIW'') and Far Eastern Textiles (Taiwan) Ltd.'s (''FETL''), in addition to FETL's other related parties, pursuant to sections 771(33)(E), (F), and (G) of the Act. Additionally, based on the evidence on the record in this investigation and presented in Ningbo Dafa's questionnaire responses, we preliminarily find that Ningbo Dafa is affiliated with Cixi Dafa Chemical Fiber Co., Ltd., Ferry Fly Foreign Trade Co., Ltd. and Worthal Limited Partnership pursuant to sections 771(33)(E), (F), and (G) of the Act. We preliminarily find that it is not necessary to collapse Far Eastern or Ningbo Dafa with its affiliates because there is no record evidence demonstrating that there is significant potential for manipulation of price or production with its affiliates. We note that the Department normally considers three criteria for collapsing: (i) the level of common ownership; (ii) the extent to which managerial employees or board members of one firm sit on the board of directors of an affiliated firm; and (iii) whether operations are intertwined, such as through the sharing of sales information, involvement in production and pricing decisions, the sharing of facilities or employees, or significant transactions between the affiliated producers. *See* 19 C.F.R. Sec. 351.401(f)(2).

Separate Rates

In proceedings involving NME countries, the Department has a rebuttable presumption that all companies within the country are subject to government control and thus should be assessed a single antidumping duty rate. It is the Department's policy to assign all exporters of merchandise subject to investigation in an NME country this single rate unless an exporter can demonstrate that it is sufficiently independent so as to be entitled to a separate rate. Cixi Jiangnan, Far Eastern and Ningbo Dafa, and the Separate–Rate Applicants have provided company–specific information to demonstrate that they operate independently of *de jure* and *de facto* government control, and therefore satisfy the standards for the assignment of a separate rate.

We have considered whether each PRC company that submitted a complete application is eligible for a separate rate. The Department's separate–rate test is not concerned, in general, with macroeconomic/border–type controls, *e.g.*, export licenses, quotas, and minimum export prices, particularly if these controls are imposed to prevent dumping. *See Notice of Final Determination of Sales at Less Than Fair Value: Certain Preserved Mushrooms from the People's Republic of China*, 63 FR 72255, 72256 (December 31, 1998). The test focuses, rather, on controls over the investment, pricing, and output decision–making process at the individual firm level. *See Certain Cut–to-Length Carbon Steel Plate from Ukraine: Final Determination of Sales at Less than Fair Value*, 62 FR 61754, 61758 (November 19, 1997), and *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 62 FR 61276, 61279 (November 17, 1997).

To establish whether a firm is sufficiently independent from government control of its export activities to be entitled to a separate rate, the Department analyzes each entity exporting the subject merchandise under a test arising from the *Notice of Final Determination of Sales at Less Than Fair Value: Sparklers from the People's Republic of China*, 56 FR 20588 (May 6, 1991) (''Sparklers''), as further developed in *Notice of Final Determination of Sales at Less Than Fair Value: Silicon Carbide from the People's Republic of China*, 59 FR 22585 (May 2, 1994) (''*Silicon Carbide*''). In accordance with the separate–rates criteria, the Department assigns separate rates in NME cases only if respondents can demonstrate the absence of both de jure and de facto governmental control over export activities.

1. Absence of De Jure Control

The Department considers the following *de jure* criteria in determining whether an individual company may be granted a separate rate: (1) an absence of restrictive stipulations associated with an individual exporter's business and export licenses; (2) any legislative enactments decentralizing control of companies; and (3) other formal measures by the government decentralizing control of companies. *See Sparklers*, 56 FR at 20589.

The evidence provided by Cixi Jiangnan, Far Eastern, Ningbo Dafa and the Separate–Rate Applicants supports a preliminary finding of de jure absence of governmental control based on the following: 1) an absence of restrictive stipulations associated with the individual exporter's business and export licenses; 2) the applicable legislative enactments decentralizing control of the companies; and 3) any other formal measures by the government decentralizing control of companies. *See Memorandum to James C. Doyle, Director, AD/CVD Operations, Office 9, through Alex Villanueva, Program Manager, AD/CVD Operations, Office 9: Antidumping Duty Investigation of Certain Polyester Staple Fiber from the People's Republic of China: Separate Rates Memorandum*, dated December 15, 2006 (''*Separate Rates Memorandum*'').

2. Absence of De Facto Control

Typically the Department considers four factors in evaluating whether each respondent is subject to *de facto* governmental control of its export functions: (1) whether the export prices are set by or are subject to the approval of a governmental agency; (2) whether the respondent has authority to negotiate and sign contracts and other agreements; (3) whether the respondent has autonomy from the government in making decisions regarding the selection of management; and (4) whether the respondent retains the proceeds of its export sales and makes independent decisions regarding disposition of profits or financing of losses. *See Silicon Carbide*, 59 FR at 22586–87; *see also Notice of Final Determination of Sales at Less Than Fair Value: Furfuryl Alcohol From the People's Republic of China*, 60 FR 22544, 22545 (May 8, 1995). The Department has determined that an analysis of de facto control is critical in determining whether respondents are, in fact, subject to a degree of governmental control which would preclude the Department from assigning separate rates.

We determine that, for Cixi Jiangnan, Far Eastern, Ningbo Dafa and the Separate–Rate Applicants, the evidence on the record supports a preliminary finding of *de facto* absence of governmental control based on record statements and supporting documentation showing the following: 1) each exporter sets its own export prices independent of the government and without the approval of a government authority; 2) each exporter retains the proceeds from its sales and makes independent decisions regarding disposition of profits or financing of losses; 3) each exporter has the authority to negotiate and sign contracts and other agreements; and 4) each exporter has autonomy from the government regarding the selection of management.

Therefore, the evidence placed on the record of this investigation by Cixi Jiangnan, Far Eastern, Ningbo Dafa and the Separate–Rate Applicants demonstrate an absence of *de jure* and *de facto* government control with respect to each of the exporter's exports of the merchandise under investigation, in accordance with the criteria identified in *Sparklers* and *Silicon Carbide*. As a result, for the purposes of this preliminary determination, we have granted separate company–specific rates to Cixi Jiangnan, Far Eastern and Ningbo Dafa. Additionally, we have granted the Separate–Rate Applicants a weighted–average margin for the purposes of this preliminary determination. *See Separate Rates Memorandum*.

The PRC–Wide Entity

The Department has data that indicates there were more exporters of PSF from the PRC than those indicated in the response to our request for Q&V information during the POI. *See Respondent Selection Memorandum*. We issued our request for Q&V information to 106 potential Chinese exporters of the subject merchandise, in addition to BOFT and MOFCOM.[1] We received only 19 Q&V responses and 3 Q&V responses that were improperly filed. See Respondent Selection Memorandum at 1–2. We did not receive Q&V responses from most of the companies to which we sent our request for Q&V information. *See Id*.

[1] For a list of companies to which the Department sent its request for Q&V information, see Respondent Selection Memorandum at 1.

Information on the record of this investigation indicates that there are numerous producers/exporters of PSF in the PRC. Based upon our knowledge of the volume of imports of subject merchandise from the PRC, the companies which responded to the Q&V questionnaire, the Separate–Rate Applicants, Cixi Jiangnan, Far Eastern, and Ningbo Dafa do not account for all imports into the United States. Although all exporters were given an opportunity to provide Q&V information, not all exporters provided a response to the Department's Q&V letter. Further, the Government of the PRC did not respond to the Department's questionnaire. Therefore, the Department determines preliminarily that there were PRC exporters of the subject merchandise during the POI from PRC producers/exporters that did not respond to the Department's request for information. We have treated these PRC producers/exporters as part of the PRC–wide entity because they did not qualify for a separate rate.

Section 776(a)(2) of the Act provides that, if an interested party (A) withholds information that has been requested by the Department, (B) fails to provide such information in a timely manner or in the form or manner requested, subject to subsections 782(c)(1) and (e) of the Act, (C) significantly impedes a proceeding under the antidumping statute, or (D) provides such information but the information cannot be verified, the Department shall, subject to subsection 782(d) of the Act, use facts otherwise available in reaching the applicable determination.

Information on the record of this investigation indicates that the PRC–wide entity was non–responsive. Certain companies did not respond to our request for Q&V information and did not respond to the Department's questionnaire. As a result, pursuant to section 776(a)(2)(A) of the Act, we find that the use of facts available is appropriate to determine the PRC–wide rate. *See Preliminary Determination of Sales at Less Than Fair Value, Affirmative Preliminary Determination of Critical Circumstances and Postponement of Final Determination: Certain Frozen Fish Fillets from the Socialist Republic of Vietnam*, 68 FR 4986 (January 31, 2003), unchanged in *Final Determination of Sales at Less Than Fair Value and Affirmative Critical Circumstances: Certain Frozen Fish Fillets from the Socialist Republic of Vietnam*, 68 FR 37116 (June 23, 2003).

Section 776(b) of the Act provides that, in selecting from among the facts otherwise available, the Department may employ an adverse inference if an interested party fails to cooperate by not acting to the best of its ability to comply with requests for information. *See Final Determination of Sales at Less Than Fair Value: Certain Cold–Rolled Flat–Rolled Carbon–Quality Steel Products from the Russian Federation*, 65 FR 5510, 5518 (February 4, 2000); *see also* ''*Statement of Administrative Action*,'' accompanying the URAA, H.R. Rep. No. 103–316, 870 (1994) (''*SAA*''). We find that, because the PRC–wide entity did not respond to our request for information, it has failed to cooperate to the best of its ability. Therefore, the Department preliminarily finds that, in selecting from among the facts available, an adverse inference is appropriate.

Further, section 776(b) of the Act authorizes the Department to use as adverse facts available (''AFA'') information derived from the petition, the final determination from the LTFV investigation, a previous administrative review, or any other information placed on the record. In selecting a rate for adverse facts available, the Department selects a rate that is sufficiently adverse ''as to effectuate the purpose of the facts available rule to induce respondents to provide the Department with complete and accurate information in a timely manner.'' *See Final Determination of Sales at Less Than Fair Value: Static Random Access Memory Semiconductors from Taiwan*, 63 FR 8909, 8932 (February 23, 1998). It is the Department's practice to select, as AFA, the higher of the (a) highest margin alleged in the petition, or (b) the highest calculated rate of any respondent in the investigation. *See Final Determination of Sales at Less Than Fair Value: Certain Cold–Rolled Carbon Quality Steel Products from the People's Republic of China*, 65 FR 34660 (May 21, 2000) and accompanying Issues and Decision Memorandum, at ''Facts Available.'' In the instant investigation, as AFA, we have assigned to the PRC–wide entity a margin based on information in the petition, because the margin derived from the petition is higher than the calculated margins for the selected respondents. In this case, we have applied the petition rate of 44.30 percent.

Section 776(c) of the Act requires that, when the Department relies on secondary information rather than on information obtained in the course of an investigation as facts available, it must, to the extent practicable, corroborate that information from independent sources reasonably at its disposal.[2] The *SAA* also states that the independent sources may include published price lists, official import statistics and customs data, and information obtained from interested parties during the particular investigation. *See SAA* at 870.

The *SAA* also clarifies that ''corroborate'' means that the Department will satisfy itself that the secondary information to be used has probative value. *See SAA* at 870. As noted in *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, from Japan; Preliminary Results of Antidumping Duty Administrative Reviews and Partial Termination of Administrative Reviews*, 61 FR 57391, 57392 (November 6, 1996), unchanged in *Final Results of Antidumping Duty Administrative Reviews and Termination in Part: Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan*, 62 FR 11825 (March 13, 2005), to corroborate secondary information, the Department will, to the extent practicable, examine the reliability and relevance of the information used.

Petitioners' methodology for calculating the export price and normal value in the petition is discussed in the initiation notice. *See Initiation Notice* at 41203. To corroborate the AFA margin selected, we compared the U.S. price and normal values from the petition to the U.S. price and normal values for the respondents. *See Memorandum to the File through Alex Villanueva, Program Manager, AD/CVD Operations, Office 9: Corroboration of the PRC–Wide Facts Available Rate for the Preliminary Determination in the Antidumping Duty Investigation of PSF and parts thereof from the People's Republic of China*, dated December 15, 2006, (''*Corroboration Memorandum*''). Accordingly, we find that the rate of 44.30 percent is corroborated within the meaning of section 776(c) of the Act. Consequently, we are applying 44.30 percent as the single antidumping rate to the PRC–wide entity. The PRC–wide rate applies to all entries of the merchandise under investigation except for entries from Cixi Jiangnan, Far Eastern, Ningbo Dafa and the Separate-Rate Applicants.

[2] Secondary information is described in the *SAA* as ''information derived from the petition that gave rise to the investigation or review, the final determination concerning subject merchandise, or any previous review under section 751 concerning the subject merchandise.'' *See SAA* at 870.

Margin for the Separate Rate Applicants

The Department received timely and complete separate rates applications from the Separate Rates Applicants, who are all exporters of PSF from the PRC, which were not selected as mandatory respondents in this investigation. Through the evidence in their applications, these companies have demonstrated their eligibility for a separate rate, as discussed above in the ''Separate Rates'' section and in the *Separate Rates Memorandum*. Consistent with the Department's practice, as the separate rate, we have established a weighted–average margin for the Separate Rates Applicants based on the rates we calculated for Ningbo Dafa, Cixi Jiangnan and Far Eastern, excluding any rates that are zero, *de minimis*, or based entirely on AFA. Companies receiving this rate are identified by name in the ''Suspension of Liquidation'' section of this notice.

Date of Sale

Section 351.401(i) of the Department's regulations states that, ''in identifying the date of sale of the subject merchandise or foreign like product, the Secretary normally will use the date of invoice, as recorded in the exporter or producer's records kept in the normal course of business.'' However, the Secretary may use a date other than the date of invoice if the Secretary is satisfied that a different date better reflects the date on which the exporter or producer establishes the material terms of sale. *See* 19 CFR 351.401(i); *See also Allied Tube and Conduit Corp. v. United States*, 132 F. Supp. 2d 1087, 1090–1093 (CIT 2001) (''*Allied Tube*''). The date of sale is generally the date on which the parties agree upon all substantive terms of the sale. This normally includes the price, quantity, delivery terms and payment terms. In order to simplify the determination of date of sale for both the respondent and the Department and in accordance with 19 CFR 351.401(i), the date of sale will normally be the date of the invoice, as recorded in the exporter's or producer's records kept in the ordinary course of business, unless satisfactory evidence is presented that the exporter or producer establishes the material terms of sale on some other date. In other words, the date of the invoice is the presumptive date of sale, although this presumption may be overcome. For instance, in *Final Determination of Sales at Less Than Fair Value: Polyvinyl Alcohol from Taiwan*, 61 FR 14067 (March 29, 1996), the Department used the date of the purchase order as the date of sale because the terms of sale were established at that point.

After examining the questionnaire responses and the sales documentation that Cixi Jiangnan, Far Eastern and Ningbo Dafa placed on the record, we preliminarily determine that invoice date is the most appropriate date of sale for Cixi Jiangnan, Far Eastern and Ningbo Dafa. In its supplemental section A response, dated November 16, 2006, Far Eastern explained that it had incorrectly stated that it did not encounter any changes to the material terms of sale from its purchase orders. Instead, its original statement should have read that material terms of the sale from its commercial invoice had not changed during the POI. Additionally, Far Eastern provided several specific examples where it did encounter changes to the material terms of sale from its purchase orders. These examples included a cancellation of a sale and order changes that affected the price, quantity, product types and shipping destination.

Petitioners, however, claim that the purchase order date is the most appropriate date of sale because Far Eastern stated that it did not encounter any changes with respect to the material terms of the sale from its purchase orders in its original section A questionnaire response, dated October 12, 2006. Petitioners have requested that the Department use the purchase order date because Far Eastern stated that the terms of sale did not change after the purchase order was issued.

In *Allied Tube*, the Court of International Trade (''CIT'') found that a ''party seeking to establish a date of sale other than invoice date bears the burden of producing sufficient evidence to 'satisfy' the Department that a different date better reflects the date on which the exporter or producer establishes the material terms of sale.''' *Allied Tube* 132 F. Supp. 2d at 1092.

Therefore, for this preliminary determination, the Department finds that based on the information on the record, Petitioners have failed to rebut the presumption that the invoice date is not the appropriate date of sale for Cixi Jiangnan, Far Eastern or Ningbo Dafa. Each respondent has provided various examples of material changes to their purchase orders during the POI. *See Preliminary Determination of Sales at Less Than Fair Value: Saccharin From the People's Republic of China*, 67 FR 79054 (December 27, 2005).

Fair Value Comparisons

To determine whether sales of PSF to the United States by Cixi Jiangnan, Far Eastern and Ningbo Dafa were made at less than fair value, we compared the export price (''EP'') to normal value (''NV''), as described in the ''U.S. Price,'' and ''Normal Value'' sections of this notice. We compared NV to weighted–average EPs in accordance with section 777A(d)(1) of the Act.

U.S. Price

Export Price

For Cixi Jiangnan, Far Eastern and Ningbo Dafa, we based U.S. price on EP in accordance with section 772(a) of the Act, because the first sale to an unaffiliated purchaser was made prior to importation, and CEP was not otherwise warranted by the facts on the record. We calculated EP based on the packed price from the exporter to the first unaffiliated customer in the United States. Where applicable, we deducted foreign movement expenses, foreign brokerage and handling expenses, and international freight expenses from the starting price (gross unit price), in accordance with section 772(c) of the Act.

Where foreign movement or international ocean freight was provided by PRC service providers or paid for in Renminbi (''RMB''), we valued these services using surrogate values (see ''Factors of Production'' section below for further discussion).

For a complete discussion of specific respondent calculations of the U.S. price, *see Memorandum to the File from Michael Holton, Senior Case Analyst: Program Analysis for the Preliminary Determination of Antidumping Duty Investigation of Certain Polyester Staple Fiber from the People's Republic of China: Cixi Jiangnan*, dated December 15, 2006 (''Cixi Jiangnan Analysis Memorandum''); *Memorandum to the File from Michael Holton, Senior Case Analyst: Program Analysis for the Preliminary Determination of Antidumping Duty Investigation of Certain Polyester Staple Fiber from the People's Republic of China: Far Eastern*, dated December 15, 2006 (''Far Eastern Analysis Memorandum''); and *Memorandum to The File from Paul Walker, Senior Case Analyst, Investigation of Certain Polyester Staple Fiber from the People's Republic of China: Analysis Memo for Ningbo Dafa Chemical Fiber Co., Ltd.*, dated December 15, 2006 (''Ningbo Dafa Analysis Memorandum'').

Normal Value

Section 773(c)(1) of the Act provides that the Department shall determine the NV using a factors–of-production methodology if the merchandise is exported from an NME and the information does not permit the calculation of NV using home–market prices, third–country prices, or constructed value under section 773(a) of the Act. The Department bases NV on the FOP because the presence of government controls on various aspects of non–market economies renders price comparisons and the calculation of production costs invalid under the Department's normal methodologies.

During the POI, Far Eastern did not have production of all types of merchandise for which it had POI sales. Consequently, Far Eastern reported in the factors of production database the most closely resembling CONNUM produced during the POI for the merchandise that was sold, but not produced during the POI. At the Department's request, Far Eastern also submitted factors of production information covering the six-month period prior to the POI for the merchandise that was sold, but not produced during the POI, which included factors of production most closely resembling the CONNUM produced during the POI. Therefore, the Department has determined to use the additional six-month information provided by Far Eastern. *See Far Eastern Analysis Memorandum*.

In addition, Ningbo Dafa produced subject merchandise in more than one facility. Ningbo Dafa has stated that all subject merchandise sales to the United States and their respective CONNUMs may be tied to a single production facility. The Petitioners have argued that the Department should calculate normal value using factors of production from all of Ningbo Dafa's production facilities. However, absent record information to the contrary, for this preliminary determination, the Department has only included the factors of production from this single facility in our calculation of normal value. *See Ningbo Dafa Analysis Memorandum* for a more complete explanation. The Department will continue to examine this issue for the final determination.

Critical Circumstances

On September 29, 2006, Petitioners alleged that there is a reasonable basis to believe or suspect critical circumstances exist with respect to the antidumping investigation of PSF from the PRC. On October 19, 2006, Cixi

Jiangnan, Far Eastern and Ningbo Dafa submitted information on their exports from January 2003 through September 2006 as requested by the Department. In accordance with 19 C.F.R. § 351.206(c)(2)(i), because Petitioners submitted critical circumstances allegations more than 20 days before the scheduled date of the preliminary determination, the Department must issue preliminary critical circumstances determinations not later than the date of the preliminary determination.

Section 733(e)(1) of the Act provides that the Department will preliminarily determine that critical circumstances exist if there is a reasonable basis to believe or suspect that: (A)(i) there is a history of dumping and material injury by reason of dumped imports in the United States or elsewhere of the subject merchandise; or (ii) the person by whom, or for whose account, the merchandise was imported knew or should have known that the exporter was selling the subject merchandise at less than its fair value and that there was likely to be material injury by reason of such sales; and (B) there have been massive imports of the subject merchandise over a relatively short period. Section 351.206(h)(1) of the Department's regulations provides that, in determining whether imports of the subject merchandise have been ''massive,'' the Department normally will examine: (i) the volume and value of the imports; (ii) seasonal trends; and (iii) the share of domestic consumption accounted for by the imports. In addition, section 351.206(h)(2) of the Department's regulations provides that an increase in imports of 15 percent during the ''relatively short period'' of time may be considered ''massive.'' Section 351.206(i) of the Department's regulations defines ''relatively short period'' as normally being the period beginning on the date the proceeding begins (*i.e.*, the date the petition is filed) and ending at least three months later. The regulations also provide, however, that if the Department finds that importers, exporters, or producers had reason to believe, at some time prior to the beginning of the proceeding, that a proceeding was likely, the Department may consider a period of not less than three months from that earlier time.

In accordance with Section 733(e)(1)(A)(I) of the Act and as discussed in the *Critical Circumstances Memorandum*, the Department preliminarily finds that there is a history of dumping and material injury by reason of dumped imports in the United States and elsewhere of the subject merchandise based on the existence of foreign antidumping duty orders of PSF, and the ITC's preliminary determination of material injury. *See Memorandum to Stephen Claeys, Deputy Assistant Secretary, AD/CVD Operations from James C. Doyle, Director, AD/CVD Operations, Office 9: Antidumping Duty Investigation of Certain Polyester Staple Fiber from the People's Republic of China: Preliminary Negative Determination of Critical Circumstances* (''*Critical Circumstance Memorandum*'').

For the reasons set forth in the *Critical Circumstances Memorandum*, we find that there have been massive imports of the subject merchandise over a relatively short period for Far Eastern, but not for Ningbo Dafa, Cixi Jiangnan, the Separate Rates Applicants and the PRC–wide entity. *See Critical Circumstance Memorandum at Attachment* 5–7. We find that some importers, exporters, or producers knew or should have known an antidumping case was pending on PSF imports from the PRC in March of 2006 because there is record evidence that many of the Chinese producers begin planning the antidumping investigation. Therefore, we relied on a period of six months as the period, which is the maximum duration for the information we have available at this time, for comparison in preliminarily determining whether imports of the subject merchandise have been massive.

Therefore, given the analysis summarized above, and described in more detail in the *Critical Circumstances Memorandum*, we preliminarily determine that critical circumstances exist for imports of PSF from exist for Far Eastern, but do not exist for imports of PSF from Cixi Jiangnan, Far Eastern, Ningbo Dafa, the Separate–Rates Applicants and the PRC–wide entity.

We will make a final determination concerning critical circumstances for all producers/ exporters of subject merchandise from the PRC when we make our final dumping determination in this investigation, which is currently 75 days after the preliminary determination.

Factor Valuation Methodology

In accordance with section 773(c) of the Act, we calculated NV based on FOP data reported by respondents for the POI. To calculate NV, we multiplied the reported per–unit factor–consumption rates by publicly available surrogate values (except as discussed below). In selecting the surrogate values, we considered the quality, specificity, and contemporaneity of the data. As appropriate, we adjusted input prices by including freight costs to make them delivered prices. Specifically, we added to Indian import surrogate values a surrogate freight cost using the shorter of the reported distance from the domestic supplier to the factory or the distance from the nearest seaport to the factory where appropriate. This adjustment is in accordance with the Court of Appeals for the Federal Circuit's decision in *Sigma Corp. v. United States*, 117 F. 3d 1401, 1407–1408 (Fed. Cir. 1997). A detailed description of all surrogate values used for respondents can be found in the *Factor Value Memorandum* and company–specific analysis memorandum. Additionally, for detailed descriptions of all actual values used for market–economy inputs, *see* the company–specific analysis memoranda dated December 15, 2006. *See Cixi Jiangnan Analysis Memorandum; Far Eastern Analysis Memorandum*; and *Ningbo Dafa Analysis Memorandum*.

For this preliminary determination, the Department will use Far Eastern's reported market economy price of ethylene glycol from its unaffiliated supplier. However, the Department will continue to review whether Far Eastern is affiliated with its ethylene glycol supplier. If the Department finds that Far Eastern and its ethylene glycol supplier are affiliated, the Department will consider whether these purchases were made at arms–length in the final determination. *See Far Eastern Analysis Memorandum*.

For this preliminary determination, in accordance with the Department's practice, we used data from the Indian Import Statistics in order to calculate surrogate values for the mandatory respondents' material inputs. In selecting the best available information for valuing FOP in accordance with section 773(c)(1) of the Act, the Department's practice is to select, to the extent practicable, surrogate values which are non–export average values, most contemporaneous with the POI, product–specific, and tax–exclusive. *See e.g.*, *Notice of Preliminary Determination of Sales at Less Than Fair Value, Negative Preliminary Determination of Critical Circumstances and Postponement of Final Determination: Certain Frozen and Canned Warmwater Shrimp From the Socialist Republic of Vietnam*, 69 FR 42672, 42682 (July 16, 2004), unchanged in *Final Determination of Sales at Less Than Fair Value: Certain Frozen and Canned Warmwater Shrimp from the Socialist Republic of Vietnam*, 69 FR 71005 (December 8, 2004). The record shows that data in the Indian Import Statistics represents import data that is contemporaneous with the POI, product–specific, and tax–exclusive. Where we could not obtain publicly available information contemporaneous to the POI with which to value factors, we adjusted the surrogate values using, where appropriate, the Indian Wholesale Price Index (''WPI'') as published in the *International Financial Statistics* of the International Monetary Fund.

Furthermore, with regard to the Indian import–based surrogate values, we have disregarded import prices that we have reason to believe or suspect may be subsidized. We have reason to believe or suspect that prices of inputs from Indonesia, South Korea, and Thailand may have been subsidized. We have found in other proceedings that these countries maintain broadly available, non–industry-specific export subsidies and, therefore, it is reasonable to infer that all exports to all markets from these countries may be subsidized. *See Amended Final Determination of Sales at Less than Fair Value: Automotive Replacement Glass Windshields from the People's Republic of China*, 67 FR 11670 (March 15, 2002); *see also Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Certain Color Television Receivers From the People's Republic of China*, 69 FR 20594 (April 16, 2004) (''*CTVs from the PRC*''). We are also directed by the legislative history not to conduct a formal investigation to ensure that such prices are not subsidized. *See* H.R. Rep. 100–576 at 590 (1988). Rather, Congress directed the Department to base its decision on information that is available to it at the time it makes its determination. Therefore, we have not used prices from these countries either in calculating the Indian import–based surrogate values or in calculating market–economy input values. In instances where a market–economy input was obtained solely from suppliers located in these countries, we used Indian import–based surrogate values to value the input. *See Final Determination of Sales at Less Than Fair Value: Certain Automotive Replacement Glass Windshields From The People's Republic of China*, 67 FR 6482 (February 12, 2002), and accompanying Issues and Decision Memorandum at Comment 1.

For Cixi Jiangnan, Far Eastern, and Ningbo Dafa, certain inputs into the production of the merchandise under investigation were purchased from market economy suppliers and paid for in market economy currencies. For these inputs all purchases were made from a market economy supplier and paid in a market economy currency, and the Department has therefore used the weighted–average POI price experienced by each respondent for these inputs. Therefore, we used the individual market economy prices experienced by Cixi Jiangnan, Far Eastern, and Ningbo Dafa when the inputs were obtained from a market economy, paid for in a market economy currency, and was a significant portion of the total purchases of that input.

The Department used the Indian Import Statistics to value the raw material and packing material inputs that Far Eastern, Cixi Jiangnan, and Ningbo Dafa used to produce the subject merchandise during the POI, except where listed below. Absent adequate information on the record to value PSF waste (fiber, ''popcorn'' and lump), for this preliminary determination, we are using an average of three Indian HTS numbers, 5503.20.00, 3915.90.42 and 3915.90.90, which represent values for raw PET bottles, finished PSF and plastic scrap, respectively. We note that the Department ''need not prove that its methodology was the only way or even the best way to calculate surrogate values for factors of production, as long as it was a reasonable way.'' *See Coalition for the Pres. of Am. Brake Drum and Rotor Aftermakret Mfs. v. u.S.s.*, 23 CIT 88, 118, 44 F.Supp.2d 229, 258 (1999); *Shakeproof Assembly Components v. U.S.*, Slip–Op 06–129 (August 25, 2006). We find that, given the information on the record, that averaging HTS numbers 5503.20.00, 3915.90.42 and 3915.90.90 is the most reasonable way to value PSF waste. For a detailed description of PSF waste and all other surrogate values used for respondents, *see Factor Value Memorandum*.

To value electricity and diesel fuel, the Department used rates from *Key World Energy Statistics 2003*, published by the International Energy Agency. Because these data were not contemporaneous to the POI, we adjusted for inflation using WPI. *See Factor Value Memorandum*.

For natural gas, we applied a surrogate value obtained from the Gas Authority of India Ltd. website, a supplier of natural gas in India, covering the period January through June 2002. In addition, based on the February 1, 2005, article from *Chemical Weekly*, we note that the Petroleum Ministry had been considering raising the price but no action was taken. Therefore, consistent with the Department's recent determination in Polyvinyl Alcohol from the People's Republic of China, we took the average of the base and ceiling prices, added the transportation charge, and inflated the calculated value using the appropriate WPI inflator. *See* Surrogate Value Memo and *Polyvinyl Alcohol From the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 71 FR 27991 (May 15, 2006), and accompanying Issues and Decision Memorandum at Comment 2.

The Department valued steam following the methodology used in the investigation of *Certain Tissue Paper Products and Certain Crepe Paper Products from the People's Republic of China*, but updated the natural gas price. *See Factor Value Memorandum* and *Notice of Preliminary Determinations of Sales at Less Than Fair Value, Affirmative Preliminary Determination of Critical Circumstances and Postponement of Final Determination for Certain Tissue Paper Products*, 69 FR 56407 (September 21, 2004), unchanged in the final determination, *Notice of Final Determination of Sales at Less Than Fair Value: Certain Tissue Paper Products from the People's Republic of China*, 70 FR 7475 (February 14, 2005).

For direct, indirect, and packing labor, consistent with 19 CFR 351.408(c)(3), we used the PRC regression–based wage rate as reported on Import Administration's home page, Import Library, Expected Wages of Selected NME Countries, revised in November 2005, *http://ia.ita.doc.gov/wages/index.html*. The source of these wage–rate data on the Import Administration's web site is the Yearbook of Labour Statistics 2002, ILO (Geneva: 2002), Chapter 5B: Wages in Manufacturing. Because this regression–based wage rate does not separate the labor rates into different skill levels or types of labor, we have applied the same wage rate to all skill levels and types of labor reported by the respondent. *See Factor Value Memorandum*.

Because water is essential to the production process of the subject merchandise, the Department considers water to be a direct material input, and not as overhead, and valued water with a surrogate value according to our practice. *See Final Determination of Sales at Less Than Fair Value and Critical Circumstances: Certain Malleable Iron Pipe Fittings From the People's Republic of China*, 68 FR 61395 (October 28, 2003) and, accompanying Issue and Decision Memorandum at Comment 11. Although some suppliers have reported that they obtain water from a well, we find that whether the producer pays for water is irrelevant in determining whether it should be considered a direct material input. Further, there is no evidence on the record that the Indian producer of polyester staple fiber from which we are obtaining an overhead financial ratio accounts for water as an overhead expense. The Department valued water using data from the Maharashtra Industrial Development Corporation (*www.midcindia.org*) since it includes a wide range of industrial water tariffs. This source provides 386 industrial water rates within the Maharashtra province from June 2003: 193 for the ''inside industrial areas'' usage category and 193 for the ''outside industrial areas'' usage category. Because the value was not contemporaneous with the POI, we adjusted the rate for inflation. *See Factor Value Memorandum*.

We used Indian transport information in order to value the freight–in cost of the raw materials. The Department determined the best available information for valuing truck freight to be from *www.infreight.com*. This source provides daily rates from six major points of origin to five destinations in India during the POI. The Department obtained a price quote on the first day of each month of the POI from each point of origin to each destination and averaged the data accordingly. *See Factor Value Memorandum*. Consistent with the calculation of inland truck freight, the Department used the same freight distances used in the calculation of inland truck freight, as reported by *www.infreight.com* to derive a value in Rupees per kilogram per kilometer. *See Factor Value Memorandum*.

The Department used two sources to calculate a surrogate value for domestic brokerage expenses. The Department averaged December 2003–November 2004 data contained in Essar Steel's February 28, 2005, public version response submitted in the AD administrative review of Hot–Rolled Carbon Steel Flat Products from India with October 2002–September 2003 data contained in Pidilite Industries' March 9, 2004, public version response submitted in the AD investigation of Carbazole Violet Pigment 23 from India (*see Notice of Final Determination of Sales at Less Than Fair Value: Carbazole Violet Pigment 23 From India*, 69 FR 67306 (November 17, 2004)). The brokerage expense data reported by Essar Steel and Pidilite Industries in their public versions is ranged data. The Department first derived an average per–unit amount from each source. Then the Department adjusted each average rate for inflation. Finally, the Department averaged the two per–unit amounts to derive an overall average rate for the POI. *See Factor Value Memorandum*.

To value marine insurance, the Department obtained a price quote from *http://www.rjgconsultants.com/insurance.html*, a market–economy provider of marine insurance. See Factor Value Memo Memorandum. To value factory overhead, selling, general, and administrative expenses, and profit, we used the audited financial statements from Indo Rama's 2005/2006 Annual Report and Reliance Industries Ltd.'s 2005/2006 Annual Report. *See Factor Value Memorandum*.

Currency Conversion

We made currency conversions into U.S. dollars, in accordance with section 773A(a) of the Act, based on the exchange rates in effect on the dates of the U.S. sales as certified by the Federal Reserve Bank.

Verification

As provided in section 782(i)(1) of the Act, we intend to verify the information upon which we will rely in making our final determination.

Combination Rates

In the *Initiation Notice*, the Department stated that it would calculate combination rates for certain respondents that are eligible for a separate rate in this investigation. *See Initiation Notice*, 70 FR 35625, 35629. This change in practice is described in Policy Bulletin 05.1, available at *http://ia.ita.doc.gov/*. The Policy Bulletin 05.1, states:

> ''[w]hile continuing the practice of assigning separate rates only to exporters, all separate rates that the Department will now assign in its NME investigations will be specific to those producers that supplied the exporter during the period of investigation. Note, however, that one rate is calculated for the exporter and all of the producers which supplied subject merchandise to it during the period of investigation. This practice applies both to mandatory respondents receiving an individually calculated separate rate as well as the pool of non–investigated firms receiving the weighted–average of the individually calculated rates. This practice is referred to as the application of ''combination rates'' because such rates apply to specific combinations of exporters and one or more producers. The cash–deposit rate assigned to an exporter will apply only to merchandise both exported by the firm in question *and* produced by a firm that supplied the exporter during the period of investigation.'' *See Policy Bulletin 05.1* at 6.

Preliminary Determination

The weighted–average dumping margins are as follows:

PSF FROM THE PRC - WEIGHTED–AVERAGE DUMPING MARGINS

Exporter & Producer	Weighted–Average Deposit Rate
Cixi Jiangnan Chemical Co., Ltd.	15.30%
Far Eastern Industries (Shanghai) Ltd.	10.45%
Ningbo Dafa Chemical Fiber Co., Ltd.	4.39%
Cixi Sansheng Chemical Fiber Co., Ltd.	9.25%
Cixi Santai Chemical Fiber Co., Ltd.	9.25%
Cixi Waysun Chemical Fiber Co., Ltd.	9.25%
Hangzhou Best Chemical Fibre Co., Ltd.	9.25%
Hangzhou Hanbang Chemical Fibre Co., Ltd.,	9.25%
Hangzhou Huachuang Co., Ltd.	9.25%
Hangzhou Sanxin Paper Co., Ltd.	9.25%
Hangzhou Taifu Textile Fiber Co., Ltd.	9.25%
Jiaxang Fuda Chemical Fibre Factory	9.25%
Nantong Luolai Chemical Fiber Co. Ltd.	9.25%
Nanyang Textile Co., Ltd.	9.25%
Suzhou PolyFiber Co., Ltd.	9.25%
Xiamen Xianglu Fiber Chemical Co.	9.25%
Zhaoqing Tifo New Fiber Co., Ltd.	9.25%
Zhejiang Anshun Pettechs Fibre Co., Ltd.	9.25%

PSF FROM THE PRC - WEIGHTED–AVERAGE DUMPING MARGINS—Continued

Exporter & Producer	Weighted–Average Deposit Rate
Zhejiang Waysun Chemical Fiber Co., Ltd..	9.25%
PRC–Wide Rate	44.30%

Disclosure

We will disclose the calculations performed within five days of the date of publication of this notice to parties in this proceeding in accordance with 19 CFR 351.224(b).

Suspension of Liquidation

In accordance with section 733(d) of the Act, we will instruct U.S. Customs and Border Protection (''CBP'') to suspend liquidation of all entries of PSF from the PRC as described in the ''Scope of Investigation'' section, entered, or withdrawn from warehouse, for consumption from Ningo Dafa, Cixi Jiangnan, the Separate Rate Applicants and the PRC–wide entity on or after the date of publication of this notice in the **Federal Register**. We will instruct CBP to require a cash deposit or the posting of a bond equal to the weighted–average amount by which the normal value exceeds U.S. price, as indicated above. For Far Eastern, we will direct CBP to suspend liquidation of any entries of PSF from the PRC as described in the ''Scope of Investigation'' section, that are entered, or withdrawn from warehouse, for consumption on or after 90 days prior to the date of publication in the **Federal Register** of our preliminary determination. The suspension of liquidation will remain in effect until further notice.

International Trade Commission Notification

In accordance with section 733(f) of the Act, we have notified the ITC of our preliminary affirmative determination of sales at less than fair value. Section 735(b)(2) of the Act requires the ITC to make its final determination as to whether the domestic industry in the United States is materially injured, or threatened with material injury, by reason of imports of PSF, or sales (or the likelihood of sales) for importation, of the subject merchandise within 45 days of our final determination.

Public Comment

Case briefs or other written comments may be submitted to the Assistant Secretary for Import Administration no later than seven days after the date of the final verification report is issued in this proceeding and rebuttal briefs limited to issues raised in case briefs no later than five days after the deadline date for case briefs. A list of authorities used and an executive summary of issues should accompany any briefs submitted to the Department. This summary should be limited to five pages total, including footnotes.

In accordance with section 774 of the Act, we will hold a public hearing, if requested, to afford interested parties an opportunity to comment on arguments raised in case or rebuttal briefs. If a request for a hearing is made, we intend to hold the hearing three days after the deadline of submission of rebuttal briefs at the U.S. Department of Commerce, 14th Street and Constitution Ave, NW, Washington, DC 20230, at a time and location to be determined. Parties should confirm by telephone the date, time, and location of the hearing two days before the scheduled date.

Interested parties who wish to request a hearing, or to participate if one is requested, must submit a written request to the Assistant Secretary for Import Administration, U.S. Department of Commerce, Room 1870, within 30 days after the date of publication of this notice. *See* 19 CFR 351.310(c). Requests should contain the party's name, address, and telephone number, the number of participants, and a list of the issues to be discussed. At the hearing, each party may make an affirmative presentation only on issues raised in that party's case brief and may make rebuttal presentations only on arguments included in that party's rebuttal brief.

We will make our final determination no later than 75 days after the date of publication of this preliminary determination, pursuant to section 735(a) of the Act.

This determination is issued and published in accordance with sections 733(f) and 777(i)(1) of the Act.

Dated: December 15, 2006.

David M. Spooner,

Assistant Secretary for Import Administration.

[FR Doc. E6–22071 Filed 12–22–06; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

A–570–878

Saccharin from the People's Republic of China: Notice of Partial Rescission of Antidumping Duty Administrative Review

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

SUMMARY: In response to requests from interested parties, the Department of Commerce (''the Department'') initiated an administrative review of the antidumping duty order on saccharin from the People's Republic of China (''PRC''), covering the period July 1, 2005, through June 30, 2006. Based on the withdrawal of the requests for review with respect to two companies, we are rescinding this administrative review, in part.

EFFECTIVE DATE: December 26, 2006.

FOR FURTHER INFORMATION CONTACT: Jennifer Moats, AD/CVD Operations, Office 8, Import Administration, Room 1870, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Ave, NW, Washington, DC 20230; telephone: (202) 482–5047.

SUPPLEMENTARY INFORMATION:

Background

On July 3, 2006, the Department published a notice of opportunity to request an administrative review of the antidumping duty order on saccharin from the PRC. *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review*, 71 FR 37890, (July 3, 2006). We received timely requests for review from Amgal Chemical Products (1989) Ltd. (''Amgal''), Shanghai Fortune Chemical Company, Ltd. (''Shanghai Fortune''), and Suzhou Fine Chemical Co. Group Ltd. (''Suzhou'').

On August 30, 2006, the Department published a notice of the initiation of the administrative review of the antidumping duty order on saccharin from the PRC for the period July 1, 2005, through June 30, 2006. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for*

Revocation in Part, 71 FR 51573, (August 30, 2006). On October 16, 2006, Suzhou withdrew its request for an administrative review. On November 14, 2006, Amgal withdrew its request for an administrative review.

Rescission of Review

The Department's regulations, at 19 CFR 351.213(d)(1), provide that the Department will rescind an administrative review if the party that requested the review withdraws its request for review within 90 days of the date of publication of the notice of initiation of the requested review, or withdraws its request at a later date if the Department determines that it is reasonable to extend the time limit for withdrawing the request. Suzhou and Amgal, the only parties to request a review for these companies, respectively, withdrew their requests within the 90-day limit. Therefore, we are rescinding these reviews of the antidumping duty order on saccharin from the PRC covering the period July 1, 2005, through June 30, 2006, with respect to Suzhou and Amgal.

Assessment

The Department will instruct U.S. Customs and Border Protection (''CBP'') to assess antidumping duties on all appropriate entries. For the companies for which these reviews are rescinded, antidumping duties shall be assessed at rates equal to the cash deposit of estimated antidumping duties required at the time of entry, or withdrawal from warehouse, for consumption, in accordance with 19 CFR 351.212(c)(1)(i). The Department intends to issue instructions to CBP 15 days after the date of publication of this notice.

Notification Regarding APOs

This notice also serves as a reminder to parties subject to administrative protective orders (''APO'') of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305, which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of the return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

This notice is issued and published in accordance with section 777(i)(1) of the Tariff Act of 1930, as amended, and 19 CFR 351.213(d)(4).

Dated: December 18, 2006.

Stephen J. Claeys,

Deputy Assistant Secretary for Import Administration.

[FR Doc. E6–22080 Filed 12–22–06; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

(C–475–817)

Oil Country Tubular Goods from Italy: Final Results of Five-year (Sunset) Review and Revocation of the Countervailing Duty Order

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

SUMMARY: On June 1, 2006, the Department of Commerce (the Department) published in the **Federal Register** the notice of initiation of the second five-year sunset review of the countervailing duty order on oil country tubular goods (OCTG) from Italy, pursuant to section 751(c) of the Tariff Act of 1930, as amended (the Act). *See Initiation of Five-year (''Sunset'') Reviews*, 71 FR 31153 (June 1, 2006) (*Second Sunset Review*). The Department has conducted an expedited sunset review as provided for in section 751(c)(3)(B) of the Act and 19 CFR 351.218(e)(1)(ii)(C). As a result of this sunset review, the Department finds that revocation of the countervailing duty order would not be likely to lead to continuation or recurrence of a countervailable subsidy. Therefore, the Department is revoking this countervailing duty order.

EFFECTIVE DATE: July 25, 2006

FOR FURTHER INFORMATION CONTACT: Jun Jack Zhao or Sean Carey, AD/CVD Operations, Office 6, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street & Constitution Avenue, N.W., Washington, D.C. 20230; telephone: (202) 482–1396 or (202) 482–3964, respectively.

SUPPLEMENTARY INFORMATION:

Background

The countervailing duty order on OCTG from Italy was published in the **Federal Register** on August 10, 1995. *See Notice of Countervailing Duty Order: Oil Country Tubular Goods (''OCTG'') From Italy*, 60 FR 40822 (August 10, 1995). On March 8, 2001, the Department published in the **Federal Register** the final results of the first sunset review of the countervailing duty order on OCTG from Italy, pursuant to the Act. *See Oil Country Tubular Goods (''OCTG'') From Italy; Final Results of Sunset Review of Countervailing Duty Order*, 66 FR 13910 (March 8, 2001). In that review, the Department determined that the revocation of the CVD order would likely to lead to continuation or recurrence of countervailable subsidies at the same rate as found in the final determination. Following the affirmative injury determination by the International Trade Commission (ITC) and pursuant to 19 CFR 351.218(e)(4), the Department published a notice of continuation of the order. *See Continuation of Countervailing and Antidumping Duty Orders on Oil Country Tubular Goods From Argentina, Italy, Japan, Korea and Mexico, and Partial Revocation of Those Orders From Argentina and Mexico With Respect to Drill Pipe*, 66 FR 38630 (July 25, 2001) (*Continuation of Orders*).

On June 1, 2006, pursuant to section 751(c) of the Act, the Department initiated the second sunset review of the countervailing duty order on OCTG from Italy. *See Second Sunset Review*. The Department received notices of intent to participate from United States Steel Corporation, IPSCO Tubulars, Inc., Lone Star Steel Company, Koppel Steel (NS Group), Maverick Tube Corporation, Newport Steel (NS Group), V&M Star LP (collectively, ''domestic interested parties''), within the deadline specified in 19 CFR 351.218(d)(1)(i). Domestic interested parties claimed interested party status under section 771(9)(C) of the Act, as U.S. manufacturers of the domestic like product. Moreover, certain domestic interested parties were petitioners in the original investigation and have participated in subsequent reviews before the Department.

The Department received substantive responses within the deadline specified in section 19 CFR 351.218(d)(3)(i) from domestic interested parties, the Government of Italy (GOI), the European Union/Delegation of the European Commission (EU), Dalmine S.p.A. (Dalmine), and Arvedi Tubi Acciaio S.p.A. (Arvedi).[1] The Department also received timely filed rebuttal comments from the domestic interested parties.[2]

[1] Dalmine is a manufacturer and exporter of the subject merchandise. Arvedi indicated in its substantive response that it no longer produces the merchandise subject to this order. Therefore, Arvedi is not an interested party in accordance with 771(9)(A) of the Act.

[2] On June 29 and July 5, 2006, the Department received a substantive response and rebuttal comments, respectively, from IPSCO Tubulars, Inc., Lone Star Steel Company, Koppel Steel (NS Group), Maverick Tube Corporation, Newport Steel (NS

Continued

In addition to meeting the other requirements of section 351.218(d)(3) of the Department's regulations, the GOI provided information on the volume and value of exports of subject merchandise to the United States. Further, Dalmine reported exports of zero during the period of this sunset review (January 2001 through December 2005). The Department's regulations provide that the Secretary ''normally will conclude that respondent interested parties have provided adequate response to a notice of initiation where it receives complete substantive responses . . . from respondent interested parties accounting on average for more than 50 percent, on a volume basis (or value, if appropriate), of the total exports of subject merchandise to the United States over the five calender years preceding the year of publication of the notice of initiation.'' (*See* 19 CFR 351.218(e)(1)(ii)(A)). Dalmine's exports of subject merchandise to the United States during the period 2001 - 2005 did not account for more than 50 percent of total exports of subject merchandise. As such, the Department found the respondents' responses to be inadequate and therefore, has conducted an expedited sunset review of the countervailing duty order,[3] pursuant to 19 CFR 351.218(e)(1)(ii)(A) and 351.218(e)(1)(ii)(C). In accordance with 19 CFR 351.218(e)(1)(ii)(C)(2), the Department notified the ITC that respondent interested parties provided inadequate response to the notice of Initiation of Five-year (''Sunset'') Review.[4]

On October 2, 2006, the Department extended the deadline to issue the final results to December 19, 2006, in accordance with sections 751(c)(5)(B) and 751(c)(5)(C) of the Act. *See Oil Country Tubular Goods from Italy: Extension of Time Limit for Final Results of Expedited Five-year (Sunset) Review of Countervailing Duty Order*, 71 FR 57922 (October 2, 2006). On November 8 and 10, 2006, the Department conducted verification in Italy of the GOI's and Dalmine's substantive responses. On November 17, 2006, the Department issued verification reports on GOI and Dalmine. *See* November 17, 2006 memoranda to the file *Countervailing Duty Sunset Review of Oil Country Tubular Goods from Italy: Verification of the Government of Italy's (GOI) Substantive Questionnaire Response* and *Countervailing Duty Sunset Review of Oil Country Tubular Goods from Italy: Verification of Dalmine's Sales and Substantive Questionnaire Response*. On November 27, 2006, the Department received comments from the GOI regarding the verification report. The Department did not receive comments from other interested parties.

Group), V&M Star LP. On July 3 and July 14, 2006, the Department received a substantive response and rebuttal comments, respectively, from United States Steel Corporation.

[3] *See* July 21, 2006 Memorandum from the sunset team to Stephen J. Claeys, Deputy Assistant Secretary for Import Administration, through Barbara E. Tillman, Director, AD/CVD Operations, Office 6, *Adequacy Determination: Sunset Review of the Countervailing Duty Order on Oil Country Tubular Goods from Italy (Second Review)*

[4] *See* July 25, 2006 letter to Robert Carpenter, Director, Office of Investigations, ITC, from Edward C. Yang, Senior Enforcement Coordinator, AD/CVD Operations, Office of China/NME Compliance, Import Administration.

Scope of the Order

Imports covered by this order are oil country tubular goods, hollow steel products of circular cross-section, including oil well casing, tubing, and drill pipe, of iron (other than cast iron) or steel (both carbon and alloy), whether seamless or welded, whether or not conforming to American Petroleum Institute (API) or non–API specifications, whether finished or unfinished (including green tubes and limited service OCTG products). This scope does not cover casing, tubing, or drill pipe containing 10.5 percent or more of chromium. The OCTG subject to this order are currently classified in the Harmonized Tariff Schedule of the United States (HTSUS) under item numbers: 7304.21.30.00, 7403.21.60.00, 7304.29.10.10, 7304.29.10.20, 7304.29.10.30, 7304.29.10.40, 7304.29.10.50, 7304.29.10.60, 7304.29.10.80, 7304.29.20.10, 7304.29.20.20, 7304.29.20.30, 7304.29.20.40, 7304.29.20.50, 7304.29.20.60, 7304.29.20.80, 7304.29.30.10, 7304.29.30.20, 7304.29.30.30, 7304.29.30.40, 7304.29.30.50, 7304.29.30.60, 7304.29.30.80, 7304.29.40.10, 7304.29.40.20, 7304.29.40.30, 7304.29.40.40, 7304.29.40.50, 7304.29.40.60, 7304.29.40.80, 7304.29.50.15, 7304.29.50.30, 7304.29.50.45, 7304.29.50.60, 7304.29.50.75, 7304.29.60.15, 7304.29.60.30, 7304.29.60.45, 7304.29.60.60, 7304.29.60.75, 7305.20.20.00, 7305.20.40.00, 7305.20.60.00, 7305.20.80.00, 7306.20.10.30, 7306.20.10.90, 7306.20.20.00, 7306.20.30.00, 7306.20.40.00, 7306.20.60.10, 7306.20.60.50, 7306.20.80.10, and 7306.20.80.50. Although the HTSUS subheadings are provided for convenience and customs purposes, our written description of the scope of this proceeding is dispositive.

Analysis of Comments Received

All issues raised in substantive responses and in comments on the verification reports by parties in this sunset review are addressed in the *Issues and Decision Memorandum for Final Results of Expedited Five-year (Sunset) Review of the Countervailing Duty Order on Oil Country Tubular Goods from Italy*, from Stephen J. Claeys, Deputy Assistant Secretary for Import Administration, to David M. Spooner, Assistant Secretary for Import Administration, dated September 29, 2006 (*Decision Memo*), which is hereby adopted by this notice.

Parties can find a complete discussion of all issues raised in this sunset review and the corresponding recommendation in this public memorandum which is on file in Room B–099, the Central Records Unit, of the main Commerce building. In addition, a complete version of the *Decision Memo* can be accessed directly on the Department's Web page at *http://ia.ita.doc.gov/frn*. The paper copy and electronic version of the *Decision Memo* are identical in content.

Final Results of Review

The Department determines that revocation of the countervailing duty order on OCTG from Italy would not be likely to lead to continuation or recurrence of a countervailable subsidy. As a result, we are revoking this order effective July 25, 2006, the fifth anniversary of the date of publication in the **Federal Register** of the notice of continuation of the CVD order on OCTG from Italy. *See Continuation of Orders*. We will notify the ITC of these results. Furthermore, we intend to instruct U.S. Customs and Border Protection, 15 days after the publication of this notice, to terminate suspension of liquidation, effective July 25, 2006.

Notification Regarding Administrative Protective Order

This notice also serves as the only reminder to parties subject to administrative protective orders (APO) of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with section 351.305 of the Department's regulations. Timely notification of the return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

We are issuing and publishing this determination and notice in accordance with sections 751(c), 752, and 777(i) of the Act.

Dated: December 18, 2006.

David M. Spooner,

Assistant Secretary for Import Administration.

[FR Doc. E6–22077 Filed 12–22–06; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

Export Trade Certificate of Review

ACTION: Notice of application.

SUMMARY: Export Trading Company Affairs (''ETCA''), International Trade Administration, Department of Commerce, has received an application for an Export Trade Certificate of Review (''Certificate''). This notice summarizes the conduct for which certification is sought and requests comments relevant to whether the Certificate should be issued.

FOR FURTHER INFORMATION CONTACT: Jeffrey Anspacher, Director, Export Trading Company Affairs, International Trade Administration, by telephone at (202) 482–5131 (this is not a toll-free number) or e-mail at *oetca@ita.doc.gov.*

SUPPLEMENTARY INFORMATION: Title III of the Export Trading Company Act of 1982 (15 U.S.C. 4001–21) authorizes the Secretary of Commerce to issue Export Trade Certificates of Review. An Export Trade Certificate of Review protects the holder and the members identified in the Certificate from state and federal government antitrust actions and from private treble damage antitrust actions for the export conduct specified in the Certificate and carried out in compliance with its terms and conditions. Section 302(b)(1) of the Export Trading Company Act of 1982 and 15 CFR 325.6(a) require the Secretary to publish a notice in the **Federal Register** identifying the applicant and summarizing its proposed export conduct.

Request for Public Comments

Interested parties may submit written comments relevant to the determination whether a Certificate should be issued. If the comments include any privileged or confidential business information, it must be clearly marked and a nonconfidential version of the comments (identified as such) should be included. Any comments not marked privileged or confidential business information will be deemed to be nonconfidential. An original and five (5) copies, plus two (2) copies of the nonconfidential version, should be submitted no later than 20 days after the date of this notice to: Export Trading Company Affairs, International Trade Administration, U.S. Department of Commerce, Room 7021–B H, Washington, DC 20230. Information submitted by any person is exempt from disclosure under the Freedom of Information Act (5 U.S.C. 552). However, nonconfidential versions of the comments will be made available to the applicant if necessary for determining whether or not to issue the Certificate. Comments should refer to this application as ''Export Trade Certificate of Review, application number 06–00003.'' A summary of the application follows.

Summary of the Application

Applicant: American Sugar Alliance (''ASA''). 2111 Wilson Boulevard, Suite 600. Arlington, VA 22201.

Contact: Robert C. Cassidy, Jr. Counsel for ASA.

Telephone: (202) 663–6740.

Application No.: 06–00003.

Date Deemed Submitted: December 14, 2006,

Members (in addition to applicant)

ASA Executive Committee: American Sugarbeet Growers Association, American Sugar Cane League, Florida Sugar Cane League, Inc., Gay & Robinson, Inc., Hawaiian Commercial & Sugar Co., Rio Grande Valley Sugar Growers Inc., Sugar Cane Growers Cooperative of Florida, U.S. Beet Sugar Association, and

Sugar Beet Processors and Cane Sugar Refiners (''Producers''): Amalgamated Sugar Company LLC (owned by Snake River Sugar Company), American Sugar Refining Inc. (owned by Florida Crystals Corporation and the Sugar Cane Growers Cooperative of Florida), American Crystal Sugar Company and Sidney Sugars (a subsidiary of American Crystal Sugar Company), Florida Crystals Corporation, Hawaiian Commercial & Sugar Company, Imperial Sugar Company, Michigan Sugar Company, Minn-Dak Farmers Cooperative, Southern Minnesota Beet Sugar Cooperative and Spreckels Sugar Company (a subsidiary of Southern Minnesota Beet Sugar Cooperative), U.S. Sugar Corporation, Western Sugar Cooperative and Wyoming Sugar Company LLC.

Under the proposed Export Trade Certificate of Review, ASA would allocate Certificates of Prior Approval (''CPAs'') to Producers, permitting duty-free entry of U.S. sugar into Mexico under the tariff-rate quota (''TRQ'') for U.S.-origin sugar.

ASA seeks an Export Trade Certificate of Review to cover the following specific Export Trade, Export Markets, and Export Trade Activities and Methods of Operation.

Export Trade

Products

U.S.-origin sugar and syrups meeting the following definitions:

H.S. Code	Description
1701.11.01	Sugar, with a dry sucrose content that has polarization of 99.4 but not exceeding 99.5 degrees.
1701.11.02	Sugar, with a dry sucrose content that has polarization of 96 but not exceeding 99.4 degrees.
1701.11.03	Sugar, with a dry sucrose content that has polarization of 96 degrees.
1701.12.01	Sugar, with a dry sucrose content that has polarization of 99.4 but not exceeding 99.5 degrees.
1701.12.02	Sugar, with a dry sucrose content that has polarization of 96 but not exceeding 99.4 degrees.
1701.12.03	Sugar, with a dry sucrose content that has polarization of 96 degrees.
1701.91.01	Containing added flavoring or coloring matter.
1701.99.01	Sugar, with a dry sucrose content that has polarization of 99.5 but not exceeding 99.7 degrees.
1701.99.02	Sugar, with a dry sucrose content that has polarization of 99.7 but not exceeding 99.9 degrees.
1701.99.99	Others.
1701.90.01	Refined liquid sugar and inverted sugar.
1806.10.01	With a sugar content weighting not less than 90%.

H.S. Code	Description
2106.90.05	Flavored syrups or with added coloring matters (except syrups which have a sugar content less than 90%).

Export Markets

U.S.-origin sugar for which Certificates of Prior Approval (''CPAs'') are allocated will be exported only to Mexico.

Export Trade Activities and Methods of Operation

The ASA will allocate CPAs to any Producer that requests CPAs.

CPA Administration

The ASA will allocate all CPAs at one time. In the event that any CPAs are returned to ASA for any reason, ASA will reallocate those CPAs among interested Producers.

Certificate System

Under the procedures for the TRQ published on October 16, 2006, in the Mexican Diario Oficial, an importer in Mexico must file with the Mexican Government a CPA issued by ASA to obtain a license to allow U.S.-origin sugar to enter into Mexico free of duty under the TRQ. The ASA shall allocate CPAs among all Producers who express an interest in obtaining the CPAs, based on each Producer's share of total U.S. sugar refining capacity in 2006, as reported to ASA. The ASA shall issue CPAs to such Producers.

CPAs issued by ASA shall be freely transferable by Producers. Transfers of CPAs after they are issued by ASA will be subject to the normal application of antitrust laws.

Confidential Information

Each Member may provide to the ASA information regarding its capacity to produce refined sugar in the United States for the purpose of calculating the allocation of CPAs.

Allocation of CPAs will not involve any agreement or exchange of sensitive information among Members. Annual U.S. refining capacity information is currently available to the ASA, and no further information should be necessary. If additional information should be required, and this information is non-public, company-specific business information, ASA shall consider the information to be ''confidential'', and ASA shall maintain its confidentiality. ASA shall not disclose this confidential information to any party other than the submitter, or to any officers, agents, or employees of any party other than the submitter, and shall not disclose confidential information to any other person except to another neutral third party as necessary to make the determination for which the information was submitted, to allocate CPAs, or in connection with reports to the Department of Commerce as required by the Export Trade Certificate of Review or the arbitration of a dispute.

Cooperation With the U.S. and Mexican Governments

The ASA will consult with the U.S. Government and the Government of Mexico when necessary and provide to them whatever information may be useful in order to facilitate cooperation between the governments concerning the implementation and operation of the CPA System. Furthermore, directly or through the U.S. Government, the ASA will endeavor to accommodate any information requests from the Government of Mexico (while protecting confidential information entrusted to the ASA), and will consult with the Government of Mexico as appropriate.

Dated: December 19, 2006.

Jeffrey Anspacher,

Director, Export Trading Company Affairs.

[FR Doc. E6–22053 Filed 12–22–06; 8:45 am]

BILLING CODE 3510–DR–P

DEPARTMENT OF COMMERCE

International Trade Administration

The President's Export Council: Meeting of the President's Export Council

AGENCY: International Trade Administration, U.S. Department of Commerce.

ACTION: Notice of an open meeting.

SUMMARY: The President's Export Council (PEC) will hold a full Council meeting to discuss topics related to export expansion. The meeting will include discussion of trade priorities and initiatives, PEC subcommittee activity, and proposed letters of recommendation to the President. The PEC was established on December 20, 1973, and reconstituted May 4, 1979, to advise the President on matters relating to U.S. trade. It was most recently renewed by Executive Order 13316.

Date: January 18, 2007.

Time: 10 a.m. (EST).

Location: U.S. Department of Commerce, Room 4832, 1401 Constitution Avenue, NW., Washington, DC 20230. Because of building security, all non-government attendees must pre-register. Please RSVP to the PEC Executive Secretariat no later than January 12, 2007, to J. Marc Chittum, President's Export Council, Room 4043, 1401 Constitution Avenue, NW., Washington, DC 20230, telephone (202) 482–1124, or e-mail *Marc.Chittum@mail.doc.gov.*

This program will be physically accessible to people with disabilities. Seating is limited and will be on a first come, first served basis. Requests for sign language interpretation, other auxiliary aids, or pre-registration, should be submitted no later than January 12, 2007, to J. Marc Chittum, President's Export Council, Room 4043, 1401 Constitution Avenue, NW., Washington, DC 20230, telephone (202) 482–1124, or e-mail *Marc.Chittum@mail.doc.gov.*

FOR FURTHER INFORMATION CONTACT: The President's Export Council Executive Secretariat, Room 4043, Washington, DC 20230 (phone: 202–482–1124), or visit the PEC Web site, *http://www.trade.gov/pec.*

Dated: December 19, 2006.

J. Marc Chittum,

Staff Director and Executive Secretary, President's Export Council.

[FR Doc. 06–9848 Filed 12–20–06; 10:35 am]

BILLING CODE 3510–DR–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 122006A]

New England Fishery Management Council; Public Meeting

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

ACTION: Notice of a public meeting.

SUMMARY: The New England Fishery Management Council (Council) is scheduling a public meeting of its

Habitat/Marine Protected Area (MPA)/ Ecosystem Committee in January, 2007, to consider actions affecting New England fisheries in the exclusive economic zone (EEZ). Recommendations from this group will be brought to the full Council for formal consideration and action, if appropriate.

DATES: The meeting will be held on Tuesday, January 16, 2007, at 9:30 a.m.

ADDRESSES: The meeting will be held at the Courtyard by Marriott, 32 Exchange Terrace, Providence, RI 02903; telephone: (401) 272–1191; fax: (401) 752–3042.

Council address: New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950.

FOR FURTHER INFORMATION CONTACT: Paul J. Howard, Executive Director, New England Fishery Management Council; telephone: (978) 465–0492.

SUPPLEMENTARY INFORMATION: The Committee will review and update Essential Fish Habitat (EFH) designations. The committee will also consider designation of Habitat Areas of Particular Concern. In addition, the committee will have an update of prey species description for species in the Fishery Management Unit and an update on non-fishing impacts. The Committee will consider other topics at their discretion including, but not limited to, actionable items related to the EFH Omnibus Amendment.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Paul J. Howard, Executive Director, at (978) 465–0492, at least 5 days prior to the meeting date.

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

Dated: December 20, 2006.

Tracey L. Thompson,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. E6–22054 Filed 12–22–06; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 122006B]

New England Fishery Management Council; Public Meeting

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

ACTION: Notice of a public meeting.

SUMMARY: The New England Fishery Management Council (Council) is scheduling a public meeting of its Research Steering Committee in January, 2007, to consider actions affecting New England fisheries in the exclusive economic zone (EEZ). Recommendations from this group will be brought to the full Council for formal consideration and action, if appropriate.

DATES: The meeting will be held on Wednesday, January 17, 2007, at 9:30 a.m.

ADDRESSES: The meeting will be held at the Courtyard by Marriott, 32 Exchange Terrace, Providence, RI 02903; telephone: (401) 272–1191; fax: (401) 752–3042.

Council address: New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950.

FOR FURTHER INFORMATION CONTACT: Paul J. Howard, Executive Director, New England Fishery Management Council; telephone: (978) 465–0492.

SUPPLEMENTARY INFORMATION: The Committee will receive a staff update on ongoing activities including the NOAA Fisheries Experimental Fishing Permit Guidelines in the Northeast Region. The committee also will review the NMFS-funded pilot cod industry-based survey (IBS) project in the context of similar projects completed in the New England and Mid-Atlantic regions. It will develop recommendations concerning further IBS work in New England. In addition, the committee will briefly review of the status of the pilot study fleet project and develop advice concerning next steps. The committee will have an initial discussion on 2007 research priorities and evaluate final reports completed for several cooperative research project. Other topics may be discussed at the committee's discretion.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Paul J. Howard, Executive Director, at (978) 465–0492, at least 5 days prior to the meeting date.

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

Dated: December 20, 2006.

Tracey L. Thompson,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. E6–22055 Filed 12–22–06; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 122006C]

New England Fishery Management Council; Public Meeting

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

ACTION: Notice of a public meeting.

SUMMARY: The New England Fishery Management Council (Council) is scheduling a public meeting of its Multispecies (Groundfish) Oversight Committee (Committee) in January, 2007, to consider actions affecting New England fisheries in the exclusive economic zone (EEZ). Recommendations from this group will be brought to the full Council for formal consideration and action, if appropriate.

DATES: The meeting will be held on Thursday, January 18, 2007, at 9 a.m.

ADDRESSES: The meeting will be held at the Holiday Inn, 31 Hampshire Street, Mansfield, MA 02048; telephone: (508) 339–2200; fax: (508) 337–8677.

Council address: New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950.

FOR FURTHER INFORMATION CONTACT: Paul J. Howard, Executive Director, New England Fishery Management Council; telephone: (978) 465–0492.

SUPPLEMENTARY INFORMATION: The Council has begun development of Amendment 16 to the Northeast Multispecies Fishery Management Plan

(FMP). This amendment will adjust measures as necessary to continue the stock rebuilding programs adopted by Amendment 13 to the FMP on May 1, 2004. The amendment may also consider other adjustments to management measures or alternatives to the effort control system currently used to manage the multispecies fishery. On November 6, 2006, the Council published a Notice of Intent (NOI) to prepare a Supplementary Environmental Impact Statement (SEIS) to support this amendment (71 FR 64941) and announced a scoping period that ended on December 29, 2006. The Committee will meet to review comments received during the scoping period. Based on this review, the Committee will develop recommendations for what issues and ideas should be considered in the development of the amendment and SEIS. Since alternative management system proposals will probably be received during the scoping period, the Committee may begin to evaluate those proposals and recommend which should be further developed for consideration. These recommendations will be considered by the full Council at its meeting in February, 2007. The Committee will also meet in closed session to discuss Advisory Panel appointments.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Act, provided the public has been notified of the Council's intent to take final action to address the emergency.Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Paul J. Howard, Executive Director, at (978) 465–0492, at least 5 days prior to the meeting date.

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

Dated: December 20, 2006.

Tracey L. Thompson,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. E6–22064 Filed 12–22–06; 8:45 am]

BILLING CODE 3510–22–S

COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

Determination under the African Growth and Opportunity Act

December 18, 2006.

AGENCY: Committee for the Implementation of Textile Agreements (CITA)

ACTION: Directive to the Commissioner of Customs and Border Protection.

SUMMARY: The Committee for the Implementation of Textile Agreements (CITA) has determined that certain textile and apparel goods from Niger shall be treated as ''handloomed, handmade, folklore articles, or ethnic printed fabrics'' and qualify for preferential treatment under the African Growth and Opportunity Act. Imports of eligible products from Niger with an appropriate visa will qualify for duty-free treatment.

EFFECTIVE DATE: January 3, 2007.

FOR FURTHER INFORMATION CONTACT: Anna Flaaten, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 482-3400.

SUPPLEMENTARY INFORMATION:

Authority: Sections 112(a) and 112(b)(6) of the African Growth and Opportunity Act (Title I of the Trade and Development Act of 2000, Pub. L. No. 106-200) (''AGOA''), as amended by Section 7(c) of the AGOA Acceleration Act of 2004 (Pub. L. 108-274) (''AGOA Acceleration Act'') (19 U.S.C. § 3721(a) and (b)(6)); Sections 2 and 5 of Executive Order No. 13191 of January 17, 2001; Sections 25-27 and Paras. 13-14 of Presidential Proclamation 7912 of June 29, 2005.

AGOA provides preferential tariff treatment for imports of certain textile and apparel products of beneficiary sub-Saharan African countries, including handloomed, handmade, or folklore articles of a beneficiary country that are certified as such by the competent authority in the beneficiary country. The AGOA Acceleration Act further expanded AGOA by adding ethnic printed fabrics to the list of textile and apparel products made in the beneficiary sub-Saharan African countries that may be eligible for the preferential treatment described in section 112(a) of the AGOA. In Executive Order 13191 (January 17, 2001) and Presidential Proclamation 7912 (June 29, 2005), the President authorized CITA to consult with beneficiary sub-Saharan African countries and to determine which, if any, particular textile and apparel goods shall be treated as being hand-loomed, handmade, folklore articles, or ethnic printed fabrics. (66 FR 7271-72 and 70 FR 37959, 37961 & 63)

In a letter to the Commissioner of Customs dated January 18, 2001, the United States Trade Representative directed Customs to require that importers provide an appropriate export visa from a beneficiary sub-Saharan African country to obtain preferential treatment under section 112(a) of the AGOA (66 FR 7837). The first digit of the visa number corresponds to one of nine groupings of textile and apparel products that are eligible for preferential tariff treatment. Grouping ''9'' is reserved for handmade, handloomed, folklore articles, or ethnic printed fabrics.

CITA has consulted with Nigerien authorities and has determined that handloomed fabrics, handloomed articles (e.g., handloomed rugs, scarves, place mats, and tablecloths), handmade articles made from handloomed fabrics, and the folklore articles described in Annex A and ethnic printed fabric described in Annex B to this notice, if produced in and exported from Niger, are eligible for preferential tariff treatment under section 112(a) of the AGOA, as amended. After further consultations with Nigerien authorities, CITA may determine that additional textile and apparel goods shall be treated as folklore articles or ethnic printed fabrics. In the letter published below, CITA directs the Commissioner of Customs and Border Protection to allow duty-free entry of such products under U.S. Harmonized Tariff Schedule subheading 9819.11.27 if accompanied by an appropriate AGOA visa in grouping ''9''.

Philip J. Martello,

Acting Chairman, Committee for the Implementation of Textile Agreements.

Committee for the Implementation of Textile Agreements

December 18, 2006.

Commissioner,

Bureau of Customs and Border Protection, Washington, DC 20229.

Dear Commissioner: The Committee for the Implementation of Textiles Agreements (''CITA''), pursuant to Sections 112(a) and (b)(6) of the African Growth and Opportunity Act (Title I of the Trade and Development Act of 2000, Pub. L. No. 106-200) (''AGOA''), as amended by Section 7(c) of the AGOA Acceleration Act of 2004 (Pub. L. 108-274) (''AGOA Acceleration Act'') (19 U.S.C. § 3721(a) and (b)(6)), Executive Order No. 13191 of January 17, 2001, and Presidential Proclamation 7912 of June 29, 2005, has determined, effective on January 3, 2007, that the following articles shall be treated as ''handloomed, handmade, folklore articles, and ethnic printed fabrics'' under the AGOA:

(a) handloomed fabrics, handloomed articles (e.g., handloomed rugs, scarves, placemats, and tablecloths), and handmade articles made from handloomed fabrics, if made in Niger from fabric handloomed in Niger; (b) the folklore articles described in Annex A; and (c) ethnic printed fabrics described in Annex B if made in Niger. Such articles are eligible for duty-free treatment only if entered under subheading 9819.11.27 and accompanied by a properly completed visa for product grouping ''9'', in accordance with the provisions of the Visa Arrangement between the Government of Niger and the Government of the United States Concerning Textile and Apparel Articles Claiming Preferential Tariff Treatment under Section 112 of the Trade and Development Act of 2000. After further consultations with Nigerien authorities, CITA may determine that additional textile and apparel goods shall be treated as folklore articles or ethnic printed fabrics.

Sincerely,

Philip J. Martello,

Acting Chairman, Committee for the Implementation of Textile Agreements.

ANNEX A: Nigerien Folklore Products

CITA has determined that the following textile and apparel goods shall be treated as folklore articles for purposes of the AGOA if such goods are made in Niger. Articles must be ornamented in characteristic Nigerien or regional folk style. An article may not include modern features such as zippers, elastic, elasticized fabrics, snaps, or hook-and-pile fasteners (such as velcroc or similar holding fabric). An article may not incorporate patterns that are not traditional or historical to Niger, such as airplanes, buses, cowboys, or cartoon characters and may not incorporate designs referencing holidays or festivals not common to traditional Nigerien culture, such as Halloween and Thanksgiving.

Eligible folklore articles:

(a) Tera-Tera Blanket/Tapestry: Strips of handloomed fabric, usually 4 1/2 inches wide, hand or machine sewn together to make a larger piece of fabric, dyed with natural dyes, striped. Uses include blankets, bedspreads, interior decoration accessories, and are used in traditional marriage ceremonies.

(b) Boubou with hand-stitched embroidery: Made of handloomed strips of fabric, hand or machine sewn together, as described in (a), the garment is a traditional smock and may be accompanied by matching trousers. The garment is a natural cotton color, has an asymmetrical neckline and typically a center chest pocket immediately below the neckline. The front and back of the neckline is embellished in gray and blue hand-stitched embroidery

(c) Ladies' Boubou Style Dresses: This ladies' dress is a loose-fitting garment with large open armholes, may come with matching scarf, and is of bright solid colored machine-made fabric, or a machine-made lace-type fabric. Garment is decorated with hand or machine-sewn embroidery around the round or U-shaped neckline and the back of the shoulder, often in a cross-patterned motif. The garment may be full or half-length.

(d) Fulani Wodabe Loincloth/Wrap Skirt: This single piece of fabric garment is made of handloomed cotton strips of fabric, left in a natural cotton color, or dyed with a deep blue or black natural dyes. The wrap is heavily decorated with embroidery of colorful yarns along bottom hem and may be trimmed in a geometric-shaped machine-made fabric applique. The wrap also has fringes on two ends. Size measures approximately 1 x 1.5 meters.

(e) Touareg Trousers: Loose-fitting men's trousers made of solid-colored machine-made fabric. Garments have side-seam pockets and are embroidered along the bottom cuff and/or down side-seam.

(f) Ladies Wodabe Embroidered Shirt and Wrap Skirt: Straight-seamed, sleeveless shirt and accompanying wrap skirt, it is made of machine-made shiny cotton fabric, embellished with embroidery down the center front and bottom hem of wrap skirt.

(g) Fulani Wodabe Traditional Dress: This garment is made of hand-woven strips of fabric hand-sewn together left in a natural cotton color, or dyed black using natural dyes. The entire garment is embellished with embroidery in white, orange, green and yellow thread, and may have leather tassels and sea shells attached to sleeves or bottom hem. Edges may be trimmed with a geometric-shaped machine-made fabric applique. The garment comes in various lengths.

1. Men's traditional dress: Garment has a neck hole and drapes on the front and the back to approximately mid-thigh, sides open, and has a body armor-type appearance.

2. Women's traditional shirt and wrap skirt: Garment is straight-seamed, sleeveless shirt with a U-shaped neckline, extending down to the waistline. Garment may come with matching wrap skirt.

ANNEX B: Nigerien Ethnic Printed Fabrics

Each ethnic print must meet all of the criteria listed below:

A) selvedge on both edges

B) width of less than 50 inches

C) classifiable under subheading 5208.52.30 [1]or 5208.52.40 [2] of the Harmonized Tariff Schedule of the United States

D) contains designs, symbols, and other characteristics of African prints normally produced for and sold in Africa by the piece.

E) made from fabric woven in the U.S. using U.S. yarn or woven in one or more eligible sub-Saharan beneficiary countries using U.S or African yarn

F) printed, including waxed, in one or more eligible sub-Saharan beneficiary countries

[1] printed plain weave fabrics of cotton, 85% or more cotton by weight, weighing over 100g/m2 but not more than 200 g/m2, of yarn number 42 or lower

[2] printed plain weave fabrics of cotton, 85% or more cotton by weight, weighing over 100g/m2 but not more than 200g/m2, of yarn numbers 43-68

[FR Doc. E6–21991 Filed 12–22–06; 8:45 am]

BILLING CODE 3510–DS–S

COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

Determination under the African Growth and Opportunity Act

December 18, 2006.

AGENCY: Committee for the Implementation of Textile Agreements (CITA)

ACTION: Directive to the Commissioner of Customs and Border Protection.

SUMMARY: The Committee for the Implementation of Textile Agreements (CITA) has determined that certain additional textile and apparel goods from the United Republic of Tanzania shall be treated as ''handloomed, handmade, folklore articles, or ethnic printed fabrics'' and qualify for preferential treatment under the African Growth and Opportunity Act. Imports of eligible products from Tanzania with an appropriate visa will qualify for duty-free treatment.

EFFECTIVE DATE: January 10, 2007

FOR FURTHER INFORMATION CONTACT: Anna Flaaten, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 482-3400.

SUPPLEMENTARY INFORMATION:

Authority: Authority: Sections 112(a) and 112(b)(6) of the African Growth and Opportunity Act (Title I of the Trade and Development Act of 2000, Pub. L. No. 106-200) (''AGOA''), as amended by Section 7(c) of the AGOA Acceleration Act of 2004 (Pub. L. 108-274) (''AGOA Acceleration Act'') (19 U.S.C. § 3721(a) and (b)(6)); Sections 2 and 5 of Executive Order No. 13191 of January 17, 2001; Sections 25-27 and Paras. 13-14 of Presidential Proclamation 7912 of June 29, 2005.

AGOA provides preferential tariff treatment for imports of certain textile and apparel products of beneficiary sub-Saharan African countries, including handloomed, handmade, or folklore articles of a beneficiary country that are certified as such by the competent authority in the beneficiary country. The AGOA Acceleration Act further expanded AGOA by adding ethnic printed fabrics to the list of textile and apparel products made in the beneficiary sub-Saharan African countries that may be eligible for the preferential treatment described in section 112(a) of the AGOA. In Executive Order 13191 (January 17,

2001) and Presidential Proclamation 7912 (June 29, 2005), the President authorized CITA to consult with beneficiary sub-Saharan African countries and to determine which, if any, particular textile and apparel goods shall be treated as being handloomed, handmade, folklore articles, or ethnic printed fabrics. (66 FR 7271-72 and 70 FR 37959, 37961 & 63)

In a letter to the Commissioner of Customs dated January 18, 2001, the United States Trade Representative directed Customs to require that importers provide an appropriate export visa from a beneficiary sub-Saharan African country to obtain preferential treatment under section 112(a) of the AGOA (66 FR 7837). The first digit of the visa number corresponds to one of nine groupings of textile and apparel products that are eligible for preferential tariff treatment. Grouping ''9'' is reserved for handmade, handloomed, folklore articles, or ethnic printed fabrics.

CITA has consulted with Tanzanian authorities and has previously determined that handloomed fabrics, handloomed articles (e.g., handloomed rugs, scarves, place mats, and tablecloths), handmade articles made from handloomed fabrics, and certain folklore articles are eligible for preferential treatment (69 FR 54268). This directive expands Tanzania's existing Category 9 treatment to include certain ethnic printed fabrics described in Annex A to this notice, if produced in and exported from Tanzania. These goods are eligible for preferential tariff treatment under section 112(a) of the AGOA, as amended. In the letter published below, CITA directs the Commissioner of Customs and Border Protection to allow duty-free entry of such products under U.S. Harmonized Tariff Schedule subheading 9819.11.27 if accompanied by an appropriate AGOA visa in grouping ''9''.

Philip J. Martello,

Acting Chairman, Committee for the Implementation of Textile Agreements.

Committee for the Implementation of Textile Agreements

December 18, 2006.

Commissioner,

Bureau of Customs and Border Protection, Washington, DC 20229.

Dear Commissioner: The Committee for the Implementation of Textiles Agreements (''CITA''), pursuant to Sections 112(a) and (b)(6) of the African Growth and Opportunity Act (Title I of the Trade and Development Act of 2000, Pub. L. No. 106-200) (''AGOA''), as amended by Section 7(c) of the AGOA Acceleration Act of 2004 (Pub. L. 108-274) (''AGOA Acceleration Act'') (19 U.S.C. § 3721(a) and (b)(6)), Executive Order No. 13191 of January 17, 2001, and Presidential Proclamation 7912 of June 29, 2005, has determined, effective on January 10, 2007, that ethnic printed fabrics described in Annex A are eligible for duty-free treatment only if entered under subheading 9819.11.27 and accompanied by a properly completed visa for product grouping ''9'', in accordance with the provisions of the Visa Arrangement between the Government of the United Republic of Tanzania and the Government of the United States Concerning Textile and Apparel Articles Claiming Preferential Tariff Treatment under Section 112 of the Trade and Development Act of 2000. After further consultations with Tanzanian authorities, CITA may determine that additional textile and apparel goods shall be treated as folklore articles or ethnic printed fabrics.

Sincerely,

Philip J. Martello,

Acting Chairman, Committee for the Implementation of Textile Agreements.

ANNEX A: Tanzanian Ethnic Printed Fabrics: the Khanga

Each Khanga must meet all of the criteria listed below:

A) selvedge on both edges
B) width of less than 50 inches
C) classifiable under subheading 5208.52.30 [1] or 5208.52.40 [2] of the Harmonized Tariff Schedule of the United States
D) contains designs, symbols, and other characteristics of African prints normally produced for and sold in Africa by the piece (each fixed length measures approximately 3.35 meters long by 1.15 meters wide).
E) each design contains a two matching panels with center motifs, matching borders, and wording representing a saying in Swahili or other language. These panels are sold in a pair.
F) made from fabric woven in the U.S. using U.S. yarn or woven in one or more eligible sub-Saharan beneficiary countries using U.S or African yarn
G) printed, including waxed, in one or more eligible sub-Saharan beneficiary countries
H) must be manufactured by one of the companies listed below:
i. Urafiki - Tanzania China Friendship Textile Factory
ii. Karibu Textile Mills
iii. Lakhani Industries
iv. Nida Industries (Formerly Sunguratex)

v. African Pride
vi. Morogoro Polyester
vii. Mohamed Enterprises (Formerly Seifee Industry)
viii. Musoma Textile Factory
ix. Mwanza Textile Factory

[FR Doc. E6–21992 Filed 12–22–06; 8:45 am]

BILLING CODE 3510–DS–S

[1] printed plain weave fabrics of cotton, 85% or more cotton by weight, weighing over 100g/m2 but not more than 200 g/m2, of yarn number 42 or lower

[2] printed plain weave fabrics of cotton, 85% or more cotton by weight, weighing over 100g/m2 but not more than 200g/m2, of yarn numbers 43-68

CONSUMER PRODUCT SAFETY COMMISSION

[CPSC Docket No. 07–C0001]

Black Dog Tavern Company, Inc., Provisional Acceptance of a Settlement Agreement and Order

AGENCY: Consumer Product Safety Commission.

ACTION: Notice.

SUMMARY: It is the policy of the Commission to publish settlements which it provisionally accepts under the Consumer Product Safety Act in the **Federal Register** in accordance with the terms of 16 CFR 1118.20(e). Published below is a provisionally-accepted Settlement Agreement with Black Dog Tavern Company, Inc., containing a civil penalty of $50,000.

DATES: Any interested person may ask the Commission not to accept this agreement or otherwise comment on its contents by filing a written request with the Office of the Secretary by January 10, 2007.

ADDRESSES: Persons wishing to comment on this Settlement Agreement should send written comments to the Comment 07–C0001, Office of the Secretary, Consumer Product Safety Commission, Washington, DC 20207.

FOR FURTHER INFORMATION CONTACT: Seth B. Popkin, Trial Attorney, Office of Compliance, Consumer Product Safety Commission, Washington, DC 20207; telephone (301) 504–7612.

SUPPLEMENTARY INFORMATION: The text of the Agreement and Order appears below.

Dated: December 18, 2006.

Todd A. Stevenson,

Secretary.

Settlement Agreement and Order

1. In accordance with 16 CFR 1118.20, Black Dog Tavern Company, Inc. (''BDT'') and the staff (''Staff'') of the United States Consumer Product Safety Commission (''Commission'') enter into this Settlement Agreement (''Agreement''). The Agreement and the incorporated attached (''Order'') settle the Staff's allegations set forth below.

Parties

2. The Commission in an independent federal regulatory agency established pursuant to, and responsible for the enforcement of, the Consumer Product Safety Act, 15 U.S.C. 2051–2084 (''CPSA'').

3. BDT is a corporation organized and existing under the laws of Massachusetts, with its principal offices located in Vineyard Haven,

Massachusetts. At all times relevant hereto, BDT sold apparel and accessories.

Staff Allegations

4. From May 2004 through January 2006, BDT sold approximately 9,700 children's hooded sweatshirts with drawstrings through the hoods, style numbers K086, K088, K090, K062, and K0639 (''Drawstring Sweatshirts'').

5. The Drawstring Sweatshirts are ''consumer product(s),'' and, at all times relevant hereto, BDT was a ''retailer'' of those consumer product(s), which were ''distributed in commerce,'' as those terms are defined in CPSA sections 3(a)(1), (6), (11), and (12), 15 U.S.C. 2052(a)(1), (6), (11), and (12).

6. Although BDT reported no incidents or injuries from the Drawstring Sweatshirts, the Drawstring Sweatshirts did not meet ASTM F1816–97 and posed a strangulation hazard to children.

7. On February 15, 2006, the Commission and BDT announced a recall of the Drawstring Sweatshirts, informing consumers that they should immediately remove the drawstrings to eliminate the hazard. The recall plan, in part, required BDT to remove the drawstrings from the 7,326 Drawstring Sweatshirts in its inventory.

8. On May 19, 2006, the Commission posted on its website a letter from the Commission's Director of the Office of Compliance to manufacturers, importers, and retailers of children's upper outerwear. The letter urged them to make certain that all children's upper outerwear sold in the Untied States complies with the ASTM standard. The letter stated that the Staff considers children's upper outerwear with drawstrings at the hood or neck area to be defective and to present a substantial risk of injury to young children under Federal Hazardous Substances Act (''FHSA'') section 15(c), 15 U.S.C. 1274(c). The letter also noted the CPSA's section 15(b) reporting requirements.

9. On August 29, 2006, CPSC investigators listed two BDT stores, observed a total of 12 Drawstring Sweatshirts for sale, and purchased a total of three Drawstring Sweatshirts.

10. BDT's distribution in commerce of the Drawstring Sweatshirts through August 2006 failed to abide by the February 2006 corrective action plan and recall, the ASTM standard, and the staff's May 2006 defect notice.

11. BDT has presumed and actual knowledge that the Drawstring Sweatshirts distributed and sold after the recall posed a strangulation hazard and presented a substantial risk of injury to children under FHSA section 15(c)(1), 15 U.S.C. 1274(c)(1). BDT had obtained information that reasonably supported the conclusion that the Drawstring Sweatshirts distributed and sold after the recall contained a defect that could create a substantial product hazard or that they created an unreasonable risk of serious injury or death. CPSA sections 15(b)(2) and (3), 15 U.S.C. 2064(b)(2) and (3), required BDT to immediately inform the Commission of the defect and risk.

12. BDT did not report to the Commission regarding the post-recall distribution and sale of the Drawstring Sweatshirts until after the Staff informed BDT of the CPSC's August 29, 2006 purchase of the Drawstring Sweatshirts. BDT thereby failed to immediately inform the Commission as required by CPSA sections 15(b)(2) and (3), 15 U.S.C. 2064(b)(2) and (3). This failure violated CPSA section 19(a)(4), 15 U.S.C. 2068(a)(4).

13. BDT knowingly failed to immediately inform the Commission of the defect and risk posed by the post-recall distribution and sale of the Drawstring Sweatshirts, as the term ''knowingly'' is defined in CPSA section 20(d), 15 U.S.C. 2069(d). Pursuant to CPSA section 20, 15 U.S.C. 2069, this failure subjected BDT to civil penalties.

BDT Response

14. BDT denies the Staff's allegations set forth above that BDT knowingly violated the CPSA.

Agreement of the Parties

15. Under the CPSA, the Commission has jurisdiction over this matter and over BDT.

16. The parties enter into the Agreement for settlement purposes only. The Agreement does not constitute an admission by BDT, or a determination by the Commission, that BDT has knowingly violated the CPSA.

17. In settlement of the Staff's allegations, BDT shall pay a civil penalty in the amount of fifty thousand dollars ($50,000.00). The civil penalty shall be paid in four (4) installments as follows: $12,500.00 shall be paid within twenty (20) calendar days of service of the Commission's final Order accepting the Agreement; $12,500.00 shall be paid on or before the six-month anniversary of service of the Commission's final Order accepting the Agreement; $12,500.00 shall be paid on or before the one-year anniversary of service of the Commission's final Order accepting the Agreement; and $12,500.00 shall be paid on or before the eighteen-month anniversary of service of the Commission's final Order accepting the Agreement. Each payment shall be by check payable to the order of the United States Treasury.

18. Upon the Commission's provisional acceptance of the Agreement, the Agreement shall be placed on the public record and published in the **Federal Register** in accordance with the procedures set forth in 16 CFR 1118.20(e). If the Commission does not receive any written request not to accept the Agreement within fifteen (15) days, the Agreement shall be deemed finally accepted on the sixteenth (16th) day after the date it is published in the **Federal Register**.

19. Upon the Commission's final acceptance of the Agreement and issuance of the final Order, BDT knowingly, voluntarily, and completely waives any rights it may have in this matter to the following: (1) An administrative or judicial hearing; (2) judicial review or other challenge or contest of the validity of the Commission's Order or actions; (3) a determination by the Commission of whether BDT failed to comply with the CPSA and its underlying regulations; (4) a statement of findings of fact and conclusions of law; and (5) any claims under the Equal Access to Justice Act.

20. The commission may publicize the terms of the Agreement and Order.

21. The Agreement and Order shall apply to, and be binding upon, BDT and each of its successors and assigns.

22. The Commission issues the Order under the provisions of the CPSA, and violation of the Order may subject BDT to appropriate legal action.

23. The Agreement may be used in interpreting the Order. Understandings, agreements, representations, or interpretations apart from those contained in the Agreement and Order may not be used to vary or contradict its terms. The Agreement shall not be waived, amended, modified, or otherwise altered, except in a writing that is executed by the party against whom such waiver, amendment, modification, or alteration is sought to be enforced.

24. If after the effective date hereof, any provision of the Agreement and Order is held to be illegal, invalid, or unenforceable under present or future laws effective during the terms of the Agreement and Order, such provision shall be fully severable. The balance of the Agreement and Order shall remain in full force and effect, unless the Commission and BDT agree that severing the provision materially affects the purpose of the Agreement and Order.

Black Dog Tavern Company, Inc.

Dated: December 1, 2006.

Robert S. Douglas, Sr.,

President, Black Dog Tavern Company, Inc., P.O. Box 2219, Beach Street Extension, Vineyard Haven, MA 02568.

Dated: November 20, 2006.

Counsel for Black Dog Tavern Company, Inc.

Michael J. Gidding, Esq.,

Brown & Gidding, PC, 3201 New Mexico Avenue, NW., Washington, DC 20016.

U.S. Consumer Product Safety Commission Staff.

J. Gibson Mullan,

Assistant Executive Director, Office of Compliance and Field Operations.

Ronald G. Yelenik,

Acting Director, Legal Division, Office of Compliance and Field Operations.

Dated: December 6, 2006.

Seth B. Popkin,

Trial Attorney, Legal Division, Office of Compliance and Field Operations.

Order

Upon consideration of the Settlement Agreement entered into between Black Dog Tavern Company, Inc. (''BDT'') and the U.S. Consumer Product Safety Commission (''Commission'') staff, and the Commission having jurisdiction over the subject matter and over BDT, and it appearing that the Settlement Agreement and Order is in the public interest, it is

Ordered, that the Settlement Agreement be, and hereby is, accepted; and it is

Further ordered, that BDT shall pay a civil penalty in the amount of fifty thousand dollars ($50,000.00). The civil penalty shall be paid in four (4) installments as follows: $12,500.00 shall be paid within twenty (20) calendar days of service of the final Order upon BDT; $12,500.00 shall be paid on or before the six-month anniversary of service of the final Order upon BDT; $12,500.00 shall be paid on or before the one-year anniversary of service of the final Order upon BDT; and $12,500.00 shall be paid on or before the eighteen-month anniversary of service of the final Order upon BDT. The payment shall be made by check payable to the order of the United States Treasury. Upon the failure of BDT to make any of the foregoing payments when due, interest on the unpaid amount shall accrue and be paid by BDT at the federal legal rate of interest set forth at 28 U.S.C. 1961(a) and (b).

Provisionally accepted and Provisional Order issued on the 18th day of December, 2006.

By Order of the Commission.

Todd A. Stevenson,

Secretary, U.S. Consumer Product Safety Commission.

[FR Doc. 06–9840 Filed 12–22–06; 8:45 am]

BILLING CODE 6355–01–M

DEPARTMENT OF DEFENSE

Department of the Army; Corps of Engineers

Intent To Prepare a Draft Environmental Impact Statement for Navigation Improvements and Airport, Little Diomede Island, AK

AGENCY: Department of the Army, U.S. Army Corps of Engineers, DoD.

ACTION: Notice of intent.

SUMMARY: The U.S. Army Engineer District, Alaska, intends to prepare a Draft Environmental Impact Statement (DEIS) to evaluate the feasibility of a small boat harbor and, in collaboration with other agencies, opportunities for economic development and air transportation capability for the community of Little Diomede Island, AK. Ignaluk on Little Diomede Island, population 170, is a coastal community on the west side of Little Diomede Island, approximately 135 miles northwest of Nome. The community of Wales on the mainland is 27 miles from Little Diomede Island. Big Diomede Island, Russia, is 2 miles west of Little Diomede Island.

The community of Ignaluk is a small and very remote community in the Bering Sea. Transportation to Little Diomede is by air or sea. Due to the normal severe weather and sea conditions, any method of travel can be risky. A landing strip constructed on sea ice in the winter provides fixed-wing airplane access approximately 3 months of the year. Helicopters and boats are used during summer. High waves and rocky shores often make landing by boat difficult. A constant wind blows 15 knots with gusts up to 80 knots. Cloudy skies and fog are prevalent in the summer. There is no scheduled cargo ship schedule, and only barges and landing craft come close to the island; few actually land. There is weekly mail delivery by helicopter. Transportation of goods and services is expensive and medical evacuation is very difficult. The lack of access is a barrier to the economic future of the community and could force relocation of the entire community to the mainland. The draft EIS would also study any multi-use value of the airport and boat harbor projects for coastal storm damage reduction.

The DEIS will determine whether Federal action is warranted and will define alternative actions for Congressional consideration.

FOR FURTHER INFORMATION CONTACT: Lizette Boyer (907) 753–2637, Alaska District, U.S. Army Corps of Engineers, Environmental Resources Section (CEPOA–EN–CW–ER), P.O. Box 6898, Elmendorf AFB, AK 99506–0898. E-mail: *Lizette.P.Boyer@poa02.usace.army.mil.*

SUPPLEMENTARY INFORMATION: This study is authorized under the Rivers and Harbors Act. The people of Little Diomede Island have lived on the Bering Sea coast for at least 2,000 years. Relative isolation from outside influences has enabled the area to retain its traditions and customs.

The DEIS will consider various small boat harbor and investigate rock quarry sources for large armor stone and smaller sized rock for fill. The feasibility of the project depends on the availability of developing a quarry site on the island close to the community. A decision will be made if there is sufficient quantity and quality for the small boat harbor and other uses. The community will decide if community relocation is an option they want to take.

Issues: The DEIS will address Ignaluk need to become more economically viable through commercial fishing and accessibility to the mainland. Becoming more accessible to the outside world could impact community identity by allowing more social contact with off islanders. At the same time, accessibility to the island is key to quality of life issues such as sanitary water and sewer, health services, and general goods and services to people. The DEIS will address the importance of maintaining the community's traditional lifestyles, while providing modern infrastructure.

The Bering Strait is an important habitat area for marine life. It provides the only passage for marine birds and mammals that move seasonally between the Bering, Chukchi and Beaufort Seas. The upwelling and turbulence resulting from the water currents passing through the Bering Strait produces waters unusually rich in crustacean plankton which, in turn, support a large population of marine birds. The steep slopes of Little Diomede Island rise abruptly from the sea and provide nesting habitat for 13 species of seabirds. The island is the site of the largest kittiwake colony in the Northern

Bering Sea. It also has the largest auklet population in Alaska.

Constructability criteria include geologic stability, availability, and cost effectiveness of an armor rock and fill quarry sources. Environmental issues include effects to sea bird nesting habitat, fish and wildlife resources, social well being, cultural resources and justifiable and practicable mitigation measures. Other resources and concerns will be identified through scoping, public involvement, and interagency coordination.

Scoping: A copy of this notice and additional public information will be sent to interested parties to initiate scoping. All parties are invited to participate in the scoping process by identifying any additional concerns, issues, studies, and alternatives that should be considered. A scoping meeting will be held on Little Diomede Island, AK, in the February/March 2007 time frame. The DEIS is scheduled for release in 2009.

Brenda S. Bowen,

Army Federal Register Liaison Officer.

[FR Doc. 06–9854 Filed 12–22–06; 8:45 am]

BILLING CODE 3710–NL–M

DEPARTMENT OF DEFENSE

Department of the Army; Corps of Engineers

Intent To Prepare a Draft Environmental Impact Statement for the Wilmington Harbor—96 Act, Dredged Material Management Plan, New Hanover and Brunswick Counties, NC

AGENCY: Department of the Army, U.S. Army Corps of Engineers, DoD.

ACTION: Notice of intent.

SUMMARY: The Wilmington District, U.S. Army Corps of Engineers (USACE) is conducting a study to evaluate the long-term (20-year) dredged material placement needs and opportunities for Wilmington Harbor. The study area encompasses Wilmington Harbor and the Ocean Bar approach channels, which extend from the mouth of the Cape Fear River in Brunswick County, NC to a point just north of the Hilton Railroad Bridge in New Hanover County, near Wilmington, NC. The study will include the preparation of a Dredged Material Management Plan (DMMP) and Draft Environmental Impact Statement (DEIS) and will identify, evaluate, screen, prioritize, and ultimately optimize placement alternatives resulting in the recommendation of a plan for the placement of dredged materials for at least the next 20 years.

FOR FURTHER INFORMATION CONTACT: Questions regarding the DMMP and DEIS should be directed to: Ms. Jenny Owens; Environmental Resources Section; U.S. Army Engineer District, Wilmington; Post Office Box 1890; Wilmington, NC 28402–1890; telephone: (910) 251–4757.

SUPPLEMENTARY INFORMATION: The USACE, Engineering Regulation (ER) 1105–2–100 mandates that the Corps Districts develop DMMP plans for all Federal navigation projects where there is an indication of insufficient capacity to accommodate maintenance dredging for the next 20 years. The ER further states that the Districts should consider options that provide opportunities for beneficial uses of dredged material. The DMMP process began with a Preliminary Assessment (PA) that was completed in February 1997. The PA identified dredged material placement shortfalls for Wilmington Harbor and recommended the development of a DMMP.

Pursuant to the National Environmental Policy Act of 1969, as amended, options for dredged material management will be based on an evaluation of the probable impact of the proposed activity on the public interest. The decision will reflect the national concern for the protection and utilization of important resources. The benefit, which may reasonably be expected to accrue from the proposal, will be balanced against its reasonably foreseeable detriments. All factors that may be relevant to the proposal will be considered, including wetlands; fish and wildlife resources; cultural resources; land use; water and air quality; hazardous, toxic, and radioactive substances; threatened and endangered species; regional geology; aesthetics; environmental justice; and the general needs and welfare of the public.

The alternatives currently being considered for the DMMP include, but are not limited to: offshore disposal in the EPA designated Ocean Dredged Material Disposal Site (ODMDS), beach disposal, upland disposal at Eagle Island, dike restoration and wetland creation at existing islands in the Harbor and establishment of sand recycling islands. Additional beneficial uses will also be investigated for the DMMP. The DEIS will address measures, alternatives and impacts to the selected or preferred alternative(s).

All private parties and Federal, State, and local agencies having an interest in the study are hereby notified of the intent to prepare a DEIS and are invited to comment at this time. A scoping meeting was held on December 8, 2005 and all comments received as a result of the scoping meeting and this notice of intent will be considered in the preparation of the DMMP and DEIS.

The lead agency for this project is the U.S. Army Engineer District, Wilmington. Cooperating agency status has not been assigned to, nor requested by, any other agency.

The DEIS is being prepared in accordance with the requirements of the National Environmental Policy Act of 1969, as amended, and will address the relationship of the proposed action to all other applicable Federal and State Laws and Executive Orders.

The DMMP and DEIS is currently scheduled to be available in October 2007.

Dated: December 6, 2006.

John E. Pulliam, Jr.,

Colonel, EN, Commanding.

[FR Doc. 06–9853 Filed 12–22–06; 8:45 am]

BILLING CODE 3710–CE–M

DEPARTMENT OF EDUCATION

[CFDA No: 84.031S]

Office of Postsecondary Education, Institutional Development and Undergraduate Educational Services

ACTION: Notice Announcing Technical Assistance Workshops for fiscal year (FY) 2007 Developing Hispanic-Serving Institutions (HSI) program.

SUMMARY: This notice provides information about seven one-day technical assistance workshops to assist institutions of higher education interested in preparing grant applications for FY 2007 new awards under the HSI program. Staff will present information about the purpose of the HSI program, selection criteria, application content, submission procedures, and reporting requirements.

Although the Department has not yet announced an application deadline date in the **Federal Register** for the FY 2007 competition, the Department is holding these workshops to give potential applicants guidance for preparing applications for the competition we expect to conduct in FY 2007. Specific requirements for the FY 2007 competition will be published in a separate **Federal Register** notice. This notice announces the technical assistance workshops only.

FOR FURTHER INFORMATION CONTACT: Josephine Hamilton, Team Leader or Carlin Hertz, Developing Hispanic-

Serving Institutions (HSI) program, U.S. Department of Education, 1990 K Street, NW., room 6052, Washington, DC 20006–8513. Telephone: (202) 502–7777.

If you use a telecommunications device for the deaf (TDD), you may call the Federal Relay Service (FRS) at 1–800–877–8339.

Individuals with disabilities may obtain this document in an alternative format (*e.g.*, Braille, large print, audio tape, or computer diskette) on request to the contact person listed in this section.

Registration information and the registration form for the technical assistance workshops will be posted on the Internet at the following site: *http://www.ed.gov/programs/idueshsi/index.html.*

SUPPLEMENTARY INFORMATION: The technical assistance workshops will be held as follows:

1. Washington, DC: Wednesday, January 10, 2007. U.S. Department of Education, 400 Maryland Avenue, SW., Barnard Auditorium, Washington, DC 20202.
2. Santurce, Puerto Rico: Wednesday, January 17, 2007. Sacred Heart University, Avenida Eduardo Conde, Library Conference Room, Santurce, Puerto Rico 00909.
3. Cayey, Puerto Rico: Thursday, January 18, 2007. University of Puerto Rico, Avenida Barcelo, Cayey, Puerto Rico 00736.
4. Norwalk, California: Monday, January 22, 2007. Cerritos College, 11110 Alandra Boulevard, Learning Resource Center, Room LCC 155, Norwalk, California 90650.
5. Santa Fe, New Mexico: Wednesday, January 24, 2007. Santa Fe Community College, 6401 Richards Avenue, Administration Building: Jemez Room, Santa Fe, New Mexico 87508.
6. San Antonio, Texas: Monday, January 29, 2007. University of Texas at San Antonio, One UTSA Circle, Business Building, University Room BB 2.06.04, San Antonio, Texas 78249.
7. El Paso, Texas: Wednesday, January 31, 2007. El Paso Community College, 9050 Viscount Boulevard, Administration Services Center, El Paso, Texas 79927.

All Technical Assistance Workshop sessions will be conducted from 8 a.m.–5 p.m. each day. Please contact the Department of Education contact persons listed under **FOR FURTHER INFORMATION CONTACT** if you have any questions about the details of the workshops. You will need to pre-register at our Web site listed under **FOR FURTHER INFORMATION CONTACT**; however, there is no registration fee. We encourage attendance from those who will be responsible for submitting the application electronically using the Grants.gov Apply site.

Assistance to Individuals With Disabilities Attending the Technical Assistance Workshop

The technical assistance workshop sites are accessible to individuals with disabilities. If you need an auxiliary aid or service to participate in a workshop (*e.g.*, interpreting service, assistive listening device, or materials in an alternative format), notify the person(s) listed under **FOR FURTHER INFORMATON CONTACT** at least two weeks before the scheduled workshop date. Although we will attempt to meet a request received after that date, we may not be able to make the requested auxiliary aid or service available because of insufficient time to arrange it.

Electronic Access to This Document

You may view this document, as well as other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF) on the Internet at the following site: *http://www.ed.gov/news/fedregister.*

To use PDF, you must have Adobe Acrobat Reader, which is available free at this site. If you have any questions about using the PDF, call the U.S. Government Printing Office (GPO), toll free, at 1–888–293–6498; or in the Washington, DC area at (202) 512–1530.

Note: The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available on GPO Access at: *http://www.gpoaccess.gov/nara/index.html.*

Program Authority: 20 U.S.C. 1101.

Dated: December 20, 2006.

James F. Manning,

Delegated the Authority of Assistant Secretary for Postsecondary Education.

[FR Doc. E6–22075 Filed 12–22–06; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Environmental Management Site-Specific Advisory Board, Nevada

AGENCY: Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: This notice announces a meeting of the Environmental Management Site-Specific Advisory Board (EM SSAB), Nevada Test Site. The Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770) requires that public notice of this meeting be announced in the **Federal Register**.

DATES: Wednesday, January 10, 2007, 5 p.m.

ADDRESSES: 7710 West Cheyenne Avenue, Conference Room # 130, Las Vegas, Nevada.

FOR FURTHER INFORMATION CONTACT: Kelly Snyder, Deputy Designated Federal Officer, P.O. Box 98518, Las Vegas, Nevada 89193. Phone: (702) 295–2836; E-mail: *snyderk@nv.doe.gov.*

SUPPLEMENTARY INFORMATION:

Purpose of the Board: The purpose of the Board is to make recommendations to DOE in the areas of environmental restoration, waste management, and related activities.

Tentative Agenda: Committee updates and discussion of future meeting topics.

Public Participation: The meeting is open to the public. Written statements may be filed with the Board either before or after the meeting. Individuals who wish to make oral presentations pertaining to agenda items should contact Kelly Snyder at the telephone number listed above. The request must be received five days prior to the meeting and reasonable provision will be made to include the presentation in the agenda. The Deputy Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Individuals wishing to make public comment will be provided a maximum of five minutes to present their comments. This notice is being published less than 15 days prior to the meeting date due to programmatic issues that had to be resolved prior to the meeting date.

Minutes: The minutes of this meeting will be available for public review and copying at the U.S. Department of Energy's Freedom of Information Public Reading Room, 1E–190, Forrestal Building, 1000 Independence Avenue, SW., Washington, DC 20585 between 9 a.m. and 4 p.m., Monday through Friday, except Federal holidays. Minutes will also be available by writing to Kelly Snyder at the address listed above.

Issued at Washington, DC, on December 20, 2006.

Rachel Samuel,

Deputy Advisory Committee Management Officer.

[FR Doc. E6–22046 Filed 12–22–06; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Office of Energy Efficiency and Renewable Energy

State Energy Advisory Board

AGENCY: Department of Energy.

ACTION: Notice of open teleconference.

SUMMARY: This notice announces a teleconference of the State Energy Advisory Board (STEAB). The Federal Advisory Committee Act (Pub. L. 92–463; 86 Stat. 770) requires that public notice of these teleconferences be announced in the **Federal Register**.

DATES: January 18, 2007, from 2 p.m. to 3 p.m. EST.

FOR FURTHER INFORMATION CONTACT: Gary Burch, STEAB Designated Federal Officer, Assistant Manager, Intergovernmental Projects & Outreach, Golden Field Office, U.S. Department of Energy, 1617 Cole Boulevard, Golden, CO 80401, Telephone 303/275–4801.

SUPPLEMENTARY INFORMATION:

Purpose of the Board: To make recommendations to the Assistant Secretary for Energy Efficiency and Renewable Energy regarding goals and objectives, programmatic and administrative policies, and to otherwise carry out the Board's responsibilities as designated in the State Energy Efficiency Programs Improvement Act of 1990 (Pub. L. 101–440).

Tentative Agenda: Update members on routine business matters.

Public Participation: The teleconference is open to the public. Written statements may be filed with the Board either before or after the meeting. Members of the public who wish to make oral statements pertaining to agenda items should contact Gary Burch at the address or telephone number listed above. Requests to make oral comments must be received five days prior to the conference call; reasonable provision will be made to include requested topic(s) on the agenda. The Chair of the Board is empowered to conduct the call in a fashion that will facilitate the orderly conduct of business.

Notes: The notes of the teleconference will be available for public review and copying within 60 days at the Freedom of Information Public Reading Room, 1E–190, Forrestal Building, 1000 Independence Avenue, SW., Washington, DC, between 9 a.m. and 4 p.m., Monday through Friday, except Federal holidays. The notes will also be made available for downloading on the STEAB Web site, *http://www.steab.org,* within 60 days.

Issued at Washington, DC, on December 20, 2006.

Rachel Samuel,

Deputy Advisory Committee Management Officer.

[FR Doc. E6–22047 Filed 12–22–06; 8:45 am]

BILLING CODE 6450–01–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–8260–8]

Notice of Public Meeting on EPA Geospatial Data Access Project

AGENCY: Environmental Protection Agency.

ACTION: Notice of public meeting.

SUMMARY: Environmental Protection Agency (EPA) will hold a public meeting to solicit comments and feedback on the Agency's project to share and publish information on locations of environmental interest through commercial Internet services. This project is designed to increase the awareness and availability of environmental information to the public. The project includes a pilot to publish environmental data from the Superfund program (National Priorities List) with the project then being expanded to other U.S. EPA data resources.

DATES: The meeting will take place on Wednesday, January 17, 2007 from 1 p.m. to 3:30 p.m. (EST).

ADDRESSES: The meeting will be held at EPA's Offices at 1 Potomac Yard, First Floor Conference Center, 2777 Crystal Drive, Arlington, VA 22202.

FOR FURTHER INFORMATION CONTACT: Dalroy Ward (Mail Stop 2843T), Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460; telephone (202) 566–0381, e-mail: *ward.dalroy@epa.gov.*

SUPPLEMENTARY INFORMATION: EPA is initiating a project to foster collaboration with commercial publishers of geospatial data content to improve accessibility and increase public awareness of EPA's environmental data holdings. First steps consist of publishing environmental data from the Superfund program in XML format and made available to any interested parties. The data available through the project will be expanded after its initial release and may include data from other EPA programs. EPA's goal is to establish a single venue for providing and maintaining access to its environmental content that can be utilized by any commercial service provider with an interest in doing so.

Background

This meeting is informational and is an opportunity for EPA to present the methodology it will be following in making the data available and provide an opportunity for interested parties to ask questions to aid in their understanding.

Agenda

1 Welcome and EPA Introductions
1:15 Presentation on EPA's Geospatial Data Access Project
2 Presentation on the XML Schema and Tag Definitions
2:30 Questions and Answers

During the presentation attendees will have the opportunity to submit written questions. EPA will answer all questions that can be answered that are germane to the meeting and for which there is time available in the schedule. Some questions may require additional materials to be prepared and such questions will be deferred until after the meeting. Relevant questions not answered at the meeting will be answered in writing with the answers made available on the Geospatial Data Access Project Web site.

How can I participate in the meeting?

This meeting will be open to the public and seating is available on a first-come basis. Persons interested in attending do not need to register in advance of the meeting. To request accommodation of a disability, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**, preferably at least 10 days prior to the meeting, to give EPA as much time as possible to process your request.

Dated: December 11, 2006.

Linda A. Travers,

Acting Assistant Administrator and Chief Information, Officer, Office of Environmental Information.

[FR Doc. E6–22050 Filed 12–22–06; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–ORD–2006–0798; FRL–8261–1]

Human Studies Review Board (HSRB); Notification of a Public Teleconference to Review Its Draft Report From the October 18–19, 2006 HSRB Meeting

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The EPA Human Studies Review Board (HSRB) announces a public teleconference meeting to discuss

its draft HSRB report from the October 18–19, 2006 HSRB meeting.

DATES: The teleconference will be held on January 18, 2007, from 1:30 to approximately 4 p.m. (Eastern Time).

Location: The meeting will take place via telephone only.

Meeting Access: For information on access or services for individuals with disabilities, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**, so that appropriate arrangements can be made.

Procedures for Providing Public Input: Interested members of the public may submit relevant written or oral comments for the HSRB to consider during the advisory process. Additional information concerning submission of relevant written or oral comments is provided in Unit I.D. of this notice.

FOR FURTHER INFORMATION CONTACT: Members of the public who wish to obtain the call-in number and access code to participate in the telephone conference, request a current draft copy of the Board's report or who wish further information may contact Lu-Ann Kleibacker, EPA, Office of the Science Advisor, (8105R), Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460; telephone (202) 564–7189 or via e-mail at *kleibacker.lu-ann@epa.gov*. General information concerning the EPA HSRB can be found on the EPA Web site at *http://www.epa.gov/osa/hsrb/*.

ADDRESSES: Submit your written comments, identified by Docket ID No. EPA–HQ–ORD–2006–0798, by one of the following methods: *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.

E-mail: ORD.Docket@epa.gov.

Mail: ORD Docket, Environmental Protection Agency, Mailcode: 28221T, 1200 Pennsylvania Ave., NW., Washington, DC 20460.

Hand Delivery: EPA Docket Center (EPA/DC), Public Reading Room, Infoterra Room (Room Number 3334), EPA West Building, 1301 Constitution Avenue, NW., Washington, DC 20460, Attention Docket ID No. EPA–ORD–2006–0798. Deliveries are only accepted from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. Special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–HQ–ORD–2006–0798. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or e-mail. The *http://www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA, without going through *http://www.regulations.gov*, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

I. Public Meeting

A. Does This Action Apply to Me?

This action is directed to the public in general. This action may, however, be of interest to persons who conduct or assess human studies, including such studies on substances regulated by EPA, or to persons who are or may be required to conduct testing of chemical substances under the Federal Food, Drug, and Cosmetic Act (FFDCA) or the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). Since other entities may also be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT.**

B. How Can I Access Electronic Copies of This Document and Other Related Information?

In addition to using regulations.gov, you may access this **Federal Register** document electronically through the EPA Internet under the ''Federal Register'' listings at *http://www.epa.gov/fedrgstr/*.

Docket: All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the ORD Docket, EPA/DC, Public Reading Room, Infoterra Room (Room Number 3334), EPA West Building, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the ORD Docket is (202) 566–1752.

The October 18–19, 2006 HSRB meeting draft report is now available. You may obtain electronic copies of this document, and certain other related documents that might be available electronically, from the regulations.gov Web site and the HSRB Internet Home Page at *http://www.epa.gov/osa/hsrb/*. For questions on document availability or if you do not have access to the Internet, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

C. What Should I Consider as I Prepare My Comments for EPA?

You may find the following suggestions helpful for preparing your comments:

1. Explain your views as clearly as possible.
2. Describe any assumptions that you used.
3. Provide copies of any technical information and/or data you used that support your views.
4. Provide specific examples to illustrate your concerns and suggest alternatives.
5. To ensure proper receipt by EPA, be sure to identify the docket ID number assigned to this action in the subject line on the first page of your response. You may also provide the name, date, and **Federal Register** citation.

D. How May I Participate in This Meeting?

You may participate in this meeting by following the instructions in this section. To ensure proper receipt by EPA, it is imperative that you identify docket ID number EPA–HQ–ORD–2006–0798 in the subject line on the first page of your request.

1. *Oral comments*. Requests to present oral comments will be accepted up to January 11, 2007. To the extent that time permits, interested persons who have

not pre-registered may be permitted by the Chair of the HSRB to present oral comments at the meeting. Each individual or group wishing to make brief oral comments to the HSRB is strongly advised to submit their request (preferably via e-mail) to the person listed under **FOR FURTHER INFORMATION CONTACT** no later than noon, Eastern Time, January 11, 2007, in order to be included on the meeting agenda and to provide sufficient time for the HSRB Chair and HSRB Designated Federal Official to review the meeting agenda to provide an appropriate public comment period. The request should identify the name of the individual making the presentation and the organization (if any) the individual will represent. Oral comments before the HSRB are limited to five minutes per individual or organization. Please note that this includes all individuals appearing either as part of, or on behalf of an organization. While it is our intent to hear a full range of oral comments on the science and ethics issues under discussion, it is not our intent to permit organizations to expand these time limitations by having numerous individuals sign up separately to speak on their behalf. If additional time is available, there may be flexibility in time for public comments.

2. *Written comments*. Although you may submit written comments at any time, for the HSRB to have the best opportunity to review and consider your comments as it deliberates on its report, you should submit your comments at least five business days prior to the beginning of this teleconference. If you submit comments after this date, those comments will be provided to the Board members, but you should recognize that the Board members may not have adequate time to consider those comments prior to making a decision. Thus, if you plan to submit written comments, the Agency strongly encourages you to submit such comments no later than noon, Eastern Time, January 11, 2007. You should submit your comments using the instructions in Unit 1.C. of this notice. In addition, the Agency also requests that person(s) submitting comments directly to the docket also provide a copy of their comments to the person listed under **FOR FURTHER INFORMATION CONTACT**. There is no limit on the length of written comments for consideration by the HSRB.

E. Background

The EPA Human Studies Review Board will be reviewing its draft report from the October 18–19, 2006 HSRB meeting. Background on the October 18–19, 2006 HSRB meeting can be found at **Federal Register** 71 187, 56527 (September 27, 2006) and at the HSRB Web site *http://www.epa.gov/osa/hsrb/*. Finally, the Board may discuss planning for future HSRB meetings.

Dated: December 19, 2006.

George M. Gray,

EPA Science Advisor.

[FR Doc. E6–22052 Filed 12–22–06; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL DEPOSIT INSURANCE CORPORATION

Agency Information Collection Activities: Submission for OMB Review; Comment Request

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Notice of information collections to be submitted to OMB for review and approval under the Paperwork Reduction Act of 1995.

SUMMARY: In accordance with requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the FDIC hereby gives notice that it plans to submit to the Office of Management and Budget (OMB) a request for OMB review and approval of the information collection system described below.

DATES: Comments must be submitted on or before January 25, 2007.

ADDRESSES: Interested parties are invited to submit written comments to Steve Hanft, Paperwork Clearance Officer, (202) 898–3907, Legal Division, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429. All comments should refer to the OMB control number. Comments may be hand-delivered to the guard station at the rear of the 17th Street Building (located on F Street), on business days between 7 a.m. and 5 p.m. [FAX number (202) 898–8788].

A copy of the comments may also be submitted to: OMB desk officer for the FDIC, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 10235, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Steve Hanft, at the address identified above.

SUPPLEMENTARY INFORMATION: Proposal to renew the following currently approved collection of information:

Title: Foreign Banks.

OMB Number: 3064–0114.

Frequency of Response: On occasion.

Affected Public: Certain U.S. branches of foreign banks.

Estimated Number of Respondents: 12.

Estimated Time per Response: 131.

Total Annual Burden: 1,572 hours.

General Description of Collection: This collection consists of applications relating to the FDIC's supervision of insured branches of foreign banks. The applications cover such actions as moving a branch, operating as a noninsured state-licensed branch of a foreign bank, conducting activities which are not permissible for a federally-licensed branch internal recordkeeping; and reporting and recordkeeping requirements relating to pledges of assets to the FDIC.

Request for Comment

Comments are invited on: (a) Whether this collection of information is necessary for the proper performance of the FDIC's functions, including whether the information has practical utility; (b) the accuracy of the estimate of the burden of the information collection, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology. All comments will become a matter of public record.

Dated at Washington, DC, this 19th day of December, 2006.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

[FR Doc. E6–22065 Filed 12–22–06; 8:45 am]

BILLING CODE 6714–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

Agency Information Collection Activities: Submission for OMB Review; Comment Request

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Notice of information collections to be submitted to OMB for review and approval under the Paperwork Reduction Act of 1995.

SUMMARY: In accordance with requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the FDIC hereby gives notice that it plans to submit to the Office of Management and Budget (OMB) a request for OMB review and approval of

the information collection system described below.

DATES: Comments must be submitted on or before January 25, 2007.

ADDRESSES: Interested parties are invited to submit written comments to Steve Hanft, Paperwork Clearance Officer, (202) 898–3907, Legal Division, Federal Deposit Insurance Corporation, 550 17th Street NW., Washington, DC 20429. All comments should refer to the OMB control number. Comments may be hand-delivered to the guard station at the rear of the 17th Street Building (located on F Street), on business days between 7 a.m. and 5 p.m. [FAX number (202) 898–8788].

A copy of the comments may also be submitted to: OMB desk officer for the FDIC, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 10235, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Steve Hanft, at the address identified above.

SUPPLEMENTARY INFORMATION:

Proposal to renew the following currently approved collection of information:

1. *Title:* Occasional Qualitative Surveys.

OMB Number: 3064–0127.

Frequency of Response: On occasion.

Affected Public: Financial institutions, their customers, and members of the public generally.

Estimated Number of Respondents: 12,750.

Estimated Time per Response: 1 hour.

Total Annual Burden: 12,750 hours.

General Description of Collection: This collection involves the occasional use of qualitative surveys to gather anecdotal information about regulatory burden, bank customer satisfaction, problems or successes in the bank supervisory process (both safety-and-soundness and consumer related), and similar concerns. In general, these surveys would not involve more than 850 respondents, would not require more than one hour per respondent, and would be completely voluntary. It is not contemplated that more than fifteen such surveys would be completed in any given year.

Request for Comment

Comments are invited on: (a) Whether this collections of information is necessary for the proper performance of the FDIC's functions, including whether the information has practical utility; (b) the accuracy of the estimate of the burden of the information collection, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology. All comments will become a matter of public record.

Dated at Washington, DC, this 19th day of December, 2006.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

[FR Doc. E6–22066 Filed 12–22–06; 8:45 am]

BILLING CODE 6714–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Notice and request for comment.

SUMMARY: The FDIC, 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 (44 U.S.C. chapter 35). Currently, the FDIC is soliciting comments concerning the following collections of information titled.

DATES: Comments must be submitted on or before February 26, 2007.

ADDRESSES: Interested parties are invited to submit written comments by any of the following methods. All comments should refer to the name and number of the collection:

• *http://www.FDIC.gov/regulations/laws/federal/notices.html.*

• *E-mail: comments@fdic.gov.* Include the name and number of the collection in the subject line of the message.

• *Mail:* Steve Hanft (202–898–3907), Clearance Officer, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429.

• *Hand Delivery:* Comments may be hand-delivered to the guard station at the rear of the 550 17th Street Building (located on F Street), on business days between 7 a.m. and 5 p.m.

A copy of the comments may also be submitted to the OMB Desk Officer for the FDIC, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Steve Hanft, at the address identified above.

SUPPLEMENTARY INFORMATION:

Proposal to renew the following currently approved collections of information:

1. *Title:* Securities of Insured Nonmember Banks.

OMB Number: 3064–0030.

Form Numbers: 3, 4, 5.

Frequency of Response: On occasion.

Affected Public: Generally, any person subject to section 16 of the Securities Exchange Act of 1934 with respect to securities registered under 12 CFR part 335.

Estimated Number of Respondents: 1,333.

Estimated Time per Response: 0.6 hours.

Total Annual Burden: 1,800 hours.

General Description of Collection: FDIC bank officers, directors, and persons who beneficially own more than 10% of a specified class of registered equity securities are required to publicly report their transactions in equity securities of the issuer.

2. *Title:* Forms Relating to Outside Counsel, Legal Support and Expert Services Programs.

OMB Number: 3064–0122.

Form Numbers: 5000/24–29; 5000/31–35; 5200/01; 5210/01–15.

Frequency of Response: On occasion.

Affected Public: Those who wish to be or are providers of legal support services to the FDIC.

Estimated Number of Respondents: 4,603.

Estimated Time per Response: 0.8 hours.

Total Annual Burden: 3,711 hours.

General Description of Collection: These forms facilitate the procurement of and payment for legal services; ensure compliance with statutory and regulatory requirements relating to disqualifying conditions or conflicts of interest; and monitor the participation of women and minorities in legal services contracts.

Request for Comment

Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the FDIC's functions, including whether the information has practical utility; (b) the accuracy of the estimates of the burden of the information collection, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

At the end of the comment period, the comments and recommendations received will be analyzed to determine the extent to which the collection should be modified prior to submission to OMB for review and approval. Comments submitted in response to this notice also will be summarized or included in the FDIC's requests to OMB for renewal of these collections. All comments will become a matter of public record.

Dated at Washington, DC, this 20th day of December, 2006.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

[FR Doc. E6–22067 Filed 12–22–06; 8:45 am]

BILLING CODE 6714–01–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 January 19, 2007.

A. Federal Reserve Bank of San Francisco (Tracy Basinger, Director, Regional and Community Bank Group) 101 Market Street, San Francisco, California 94105-1579:

1. City National Corporation, Beverly Hills, California; to merge with Business Bank Corporation, and thereby indirectly acquire Business Bank of Nevada, both of Las Vegas, Nevada.

Board of Governors of the Federal Reserve System, December 20, 2006.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. E6–22033 Filed 12–22–06; 8:45 am]

BILLING CODE 6210–01–S

GENERAL SERVICES ADMINISTRATION

Privacy Act of 1974; Notice of updated System of Records

AGENCY: General Services Administration

ACTION: Notice of updated system of records

SUMMARY: The General Services Administration (GSA) is providing notice of an update to the record system Employee Drug Abuse/Alcoholism Files (GSA/HRO–2). The system includes counseling and rehabilitation referrals and records of counseling and rehabilitation.

EFFECTIVE DATE: The system of records will become effective without further notice on January 25, 2007 unless comments received on or before that date result in a contrary determination.

FOR FURTHER INFORMATION CONTACT: Call or e-mail the GSA Privacy Act Officer: telephone 202–501–1452/202–208–1317; *e-mail gsa.privacyact@gsa.gov/*

ADDRESSES: Comments may be submitted to the Director, Human Capital Policy and Program Management Division (CHP), Office of Human Capital Management (CH), 1800 F Street NW, Washington, DC 20405.

SUPPLEMENTARY INFORMATION: GSA reviewed this Privacy Act system of record to ensure that it is relevant, necessary, accurate, up-to-date, and covered by the appropriate legal or regulatory authority. Nothing in the updated system notice indicates a change in authorities or practices regarding the collection and maintenance of information. Nor do the changes impact individuals' rights to access or amend their records in the system of records.

Dated: December 18, 2006.

Cheryl M. Paige

Acting Director, Office of Information Management

GSA/HRO–2

SYSTEM NAME: EMPLOYEE DRUG ABUSE/ ALCOHOLISM FILES

LOCATION:

The system is located in the office of the private sector organizations or providers for the Employee Assistance Program (EAP) who have contracted with the *Office of Human Resources Services at GSA.*

The EAP office contacts are as follows:

Central Office
Federal Occupational Health
(800)222–0364
National Capital Region
Federal Occupational Health
(800)222–0364
Northeast and Caribbean Region
Cooperative Administrative Support Program Consortia
Long Island and Queens: (516)222–1221
New Jersey: (201)402–1015
Puerto Rico and the Virgin Islands: (809)763–6701 or (800)981–5070
New York City: (212)264–4673
New England: (617)565–6533 or (800)869–8867
Mid-Atlantic Region
Federal Occupational Health
(800)222–0364
Southeast Sunbelt Region
Davine Sparks, LCSW
(800)222–0364 or (404)730–3237
Great Lakes Region
Federal Occupational Health
(800)222–0364
The Heartland Region
Federal Occupational Health
(800) 222–0364
Greater Southwest Region
Federal Occupational Health
(800)222–0364 or (888)262–7848
Pacific Rim Region
North of Bakersfield: Linda Boone or Jean Taylor (415)436–7448
South of Bakersfield: Joan Sexton (213)894–0160 or Sandy Freed (213)894–0153
New England Region
(617)565–6533 or (800) 869–8867
Rocky Mountain Region
Federal Occupational Health
(800)222–0364 or (888)262–7848(TTY)

TYPES OF RECORDS IN THE SYSTEM:

1. Counseling and rehabilitation referrals.

2. Records of counseling and rehabilitation.

AUTHORITY FOR MAINTAINING THE SYSTEM: PUB. L. 92–255 AND 5 U.S.C. 7904.

PURPOSE:

To maintain an information system on employees suspected of abusing or known to abuse alcohol or another drug and for self-initiated referrals.

ROUTINE USES OF THE RECORD SYSTEM, INCLUDING TYPES OF USERS AND THEIR PURPOSES IN USING IT:

Disclosing information related to anyone with a history of alcohol or drug abuse is restricted by Alcohol and Drug Abuse Patient Records regulations, 42 CFR part 2.

System information may be accessed and used by authorized Federal agency employees or contractors to conduct official duties. Information from this system also may be disclosed as a routine use:

a. Documenting that the supervisor deals properly with an employee whose work is affected by alcohol abuse or other drug abuse.

b. Communicating information to those who use it in performing their duties, such as a counselor, medical or health worker, an alcohol or other drug abuse program administrator, or a qualified service organization.

c. Disclosing information to the Department of Justice or another Federal agency in defending a claim against the United States, when the claim is based on a person's mental or physical condition and is allegedly caused by GSA activities affecting the person.

d. In any legal proceeding, where pertinent, to which GSA is a party before a court or administrative body.

e. To authorized officials engaged in investigating or settling a grievance, complaint, or appeal filed by an individual who is the subject of the record.

f. To a Federal agency in connection with the hiring or retention of an employee; the issuance of a security clearance; the reporting of an investigation; the letting of a contract; or the issuance of a grant, license, or other benefit to the extent that the information is relevant and necessary to a decision.

g. To the Office of Personnel Management (OPM), the Office of Management and Budget (OMB), or the Government Accountability Office (GAO) when the information is required for program evaluation purposes.

h. To a Member of Congress or staff on behalf of and at the request of the individual who is the subject of the record.

i. To an expert, consultant, or contractor of GSA in the performance of a Federal duty to which the information is relevant.

j. To the National Archives and Records Administration (NARA) for records management purposes.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Paper records are kept in a file cabinet or in a drawer.

RETRIEVABILITY:

The records are filed alphabetically by name.

SAFEGUARDS:

When not in use by an authorized person, the records are stored in a locked metal file cabinet or in a secured room.

RETENTION AND DISPOSAL:

The records are kept for a year after the employee's last contact with a counselor or until the employee separates or transfers, whichever occurs first. If there is an EEO case, MSPB appeal, or arbitration, the records are kept for 3 years after the case is resolved. Records are destroyed by shredding or burning.

SYSTEM MANAGER(S) AND ADDRESS:

The Director, Human Capital Policy and Program Management Division (CHP), Office of Human Capital Management (CH), 1800 F Street NW, Washington, DC 20405.

NOTIFICATION PROCEDURE:

An employee may obtain information as to whether he or she is part of the system of records from the immediate supervisor or the Director of Human Capital Policy and Program Management Division at the address above, whichever is appropriate.

RECORD ACCESS PROCEDURE:

A request to review a record related to you should be directed to the immediate supervisor or Director of Human Capital Policy and Program Management Division at the address above, whichever is appropriate. For the identification required, see 41 CFR part 105–64 published in the **Federal Register**. Procedure to contest a record: GSA rules to review the content of a record and appeal an initial decision are in 41 CFR part 105–64 published in the **Federal Register**.

RECORD SOURCES:

The supervisor(s), counselors, personnel specialists, and individual employee.

[FR Doc. E6–22003 Filed 12–22–06; 8:45 am]

BILLING CODE 6820–34–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 2006P–0085]

Medical Devices; Exemptions from Premarket Notification; Class II Devices

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is publishing an order denying a petition requesting exemption for cranial orthosis type devices from the premarket notification requirements for certain class II devices. A cranial orthosis device is a device intended to apply pressure to prominent regions of an infant's cranium in order to improve cranial symmetry or shape. FDA is publishing this notice in accordance with procedures established by the Food and Drug Administration Modernization Act of 1997 (FDAMA).

DATES: This order is effective December 26, 2006.

FOR FURTHER INFORMATION CONTACT: Heather Rosecrans, Center for Devices and Radiological Health (HFZ–404), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 240–276–4040.

SUPPLEMENTARY INFORMATION:

I. Background

Under section 513 of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 360c), FDA must classify devices into one of three regulatory classes: class I, class II, or class III. FDA classification of a device is determined by the amount of regulation necessary to provide a reasonable assurance of safety and effectiveness. Under the Medical Device Amendments of 1976 (the 1976 amendments (Public Law 94–295)), as amended by the Safe Medical Devices Act of 1990 (the SMDA) (Public Law 101–629)), devices are to be classified into class I (general controls) if there is information showing that the general controls of the act are sufficient to assure safety and effectiveness; into class II (special controls), if general controls, by themselves, are insufficient to provide reasonable assurance of safety and effectiveness, but there is sufficient information to establish special controls to provide such assurance; and into class III (premarket approval), if there is insufficient information to support classifying a device into class I or class II and the device is a life-sustaining or life-supporting device or is for a use which is of substantial importance in preventing impairment of human health, or presents a potential unreasonable risk of illness or injury.

Most generic types of devices that were on the market before the date of the 1976 amendments (May 28, 1976) (generally referred to as preamendments devices) have been classified by FDA under the procedures set forth in section 513(c) and (d) of the act through the issuance of classification regulations into one of these three regulatory classes.

Devices introduced into interstate commerce for the first time on or after May 28, 1976 (generally referred to as postamendments devices) are classified through the premarket notification process under section 510(k) of the act (21 U.S.C. 360(k)). Section 510(k) of the act and the implementing regulations, 21 CFR part 807, require persons who intend to market a new device to submit a premarket notification report (510(k)) containing information that allows FDA to determine whether the new device is ''substantially equivalent'' within the meaning of section 513(i) of the act to a legally marketed device that does not require premarket approval.

On November 21, 1997, the President signed into law FDAMA (Public Law 105–115). Section 206 of FDAMA, in part, added section 510(m) to the act. Section 510(m)(l) of the act requires FDA, within 60 days after enactment of FDAMA, to publish in the **Federal Register** a list of each type of class II device that does not require a report under section 510(k) of the act to provide reasonable assurance of safety and effectiveness. Section 510(m) of the act further provides that a 510(k) will no longer be required for these devices upon the date of publication of the list in the **Federal Register**. FDA published that list in the **Federal Register** of January 21, 1998 (63 FR 3142). Section 510(m)(2) of the act provides that, 1 day after date of publication of the list under section 510(m)(l), FDA may exempt a device on its own initiative or upon petition of an interested person, if FDA determines that a 510(k) is not necessary to provide reasonable assurance of the safety and effectiveness of the device. This section requires FDA to publish in the **Federal Register** a notice of intent to exempt a device, or of the petition, and to provide a 30-day comment period. Within 120 days of publication of this document, FDA must publish in the **Federal Register** its final determination regarding the exemption of the device that was the subject of the notice. If FDA fails to respond to a petition under this section within 180 days of receiving it, the petition shall be deemed granted.

FDA classified the cranial orthosis into class II (special controls) effective August 31, 1998 (63 FR 40650, July 30, 1998). The classification regulation for cranial orthosis is at 21 CFR 882.5970. The cranial orthosis is identified as a device that is intended for medical purposes to apply pressure to prominent regions of an infant's cranium in order to improve cranial symmetry and/or shape in infants from 3 to 18 months of age, with moderate to severe nonsynostotic positional plagiocephaly, including infants with plagiocephalic-, brachycephalic-, and scaphocephalic-shaped heads.

II. Criteria for Exemption

There are a number of factors FDA may consider when determining whether a 510(k) is necessary to provide reasonable assurance of the safety and effectiveness of a class II device, including the factors discussed in the guidance entitled ''Procedures for Class II Device Exemptions from Premarket Notification, Guidance for Industry and CDRH Staff'' (available at *http://www.fda.gov/cdrh/modact/exemii.pdf* or by sending a fax request to 240–276–3151 to receive a hard copy). The factors outlined in the guidance included: (1) The device does not have a significant history of false or misleading claims or risks associated with inherent characteristics of the device; (2) characteristics of the device necessary for its safe and effective performance are well established; (3) changes in the device that could affect safety and effectiveness will either (a) be readily detectable by users by visual examination or other means such as routine testing, before causing harm, e.g., testing of a clinical laboratory reagent with positive or negative controls, or (b) not materially increase the risk of injury, incorrect diagnosis, or ineffective treatment; and (4) any changes to the device would not be likely to result in a change in the device's classification. FDA also considered that, even when exempting devices, these devices would still be subject to the limitations on exemptions.

III. Petition

FDA received a petition requesting an exemption from premarket notification for class II devices, 21 CFR 882.5970 Cranial orthosis, from Catherine Jeakle Hill, on behalf of the American Association of Neurological Surgeons (AANS), the Congress of Neurological Surgeons (CNS), and the AANS/CNS Section on Pediatrics.

On October 24, 2006 (71 FR 62268), FDA published a notice announcing that this petition had been received and providing an opportunity for interested persons to submit comments on the petition by November 24, 2006.

IV. Summary of Public Comments

FDA received a total of 39 comments (42 individuals; 3 letters had 2 signatures) regarding this petition. We have summarized the comments as follows:

A. Comments Supporting the Petition for Exemption

FDA received 13 comments supporting an exemption from premarket notification for this type of device, including:

Four comments stated that cranial orthoses have similar risks and technological considerations as those used for Class I exempt orthotics for use on other parts of the body.

FDA disagrees. FDA has identified specific health risks inherent to the cranial orthosis indications and technological characteristics (63 FR 40650). Some of the literature referenced by the petitioner also identified the risks inherent to cranial orthoses, e.g., restriction of cranial growth.

Eleven comments supported the petition stating that cranial orthoses are safe, and four comments stated that long term use is evidence of efficacy. One comment stated that the limitations to the exemption are sufficient for monitoring changes in intended use and technology. However, FDA believes that the petition failed to provide information, including potential special controls, to establish that premarket notification is not necessary to provide reasonable assurance of safety and effectiveness and to assure that health risks associated with inherent characteristics of the device and indications are addressed. Additionally, the petition failed to describe how changes in the device that could lead to device failures would either: (1) Be readily detectable by users by visual examination or other means, such as routine testing, before causing harm; or (2) not materially increase the risk of injury or ineffective treatment.

In addition, the petitioner did not provide sufficient information to address the frequency, persistence, cause, or seriousness of the inherent risks of the device or to establish special controls to address the health risks associated with cranial orthoses. The petitioner did not specify whether a comprehensive search of the medical literature and other available, unpublished data was conducted to substantiate that the safety can be assured if cranial orthoses are exempted from the requirements of premarket notification. Some of the public comments identified literature regarding additional safety issues that had not been identified by the petitioner.

One comment generally supported the petition, but stated that cranial orthoses indicated for posterior plagiocephaly should either have fabrication restrictions removed or the device should be pulled from the market until efficacy data is provided. FDA disagrees with this comment. Cranial orthoses are class II devices with special controls, including the requirement for premarket notification. This has assured reasonable safety and effectiveness for use with infants having posterior plagiocephaly.

Eleven comments stated that current regulation requirements inflate cost. Additionally, four comments stated that current regulation requirements decrease accessibility. FDA has no comment because neither issue is a criterion for exemption of a class II device.

B. Comments Opposing the Petition for Exemption

FDA received 26 comments (29 individuals; 3 letters had 2 signatures) opposing an exemption from premarket notification for these devices, including:

Twenty-four comments stated that exemption would fail to provide reasonable assurance of the safety and effectiveness of these devices. One comment states that special controls are required to ensure reasonable safety and effectiveness.

FDA agrees that insufficient information is available in the petition for FDA to make a determination that premarket clearance is not necessary to provide reasonable assurance of safety and effectiveness. FDA also agrees that special controls are required in order to address the health risks associated with inherent characteristics and indications of this class II device, and FDA has established special controls for the device (63 FR 40650). In addition, we have previously determined that premarket notification review and clearance was necessary prior to introducing the device into commercial distribution. As discussed previously, the petitioner did not provide sufficient information, which might include special controls, to address the health risks associated with cranial orthoses and that would sufficiently address the factors FDA considers important in determining whether to grant an exemption of a class II device.

One comment stated that there are no documented industry fabrication standards.

FDA believes this comment refers to the lack of recognized voluntary standards. FDA agrees and notes that it has not recognized any consensus standards relevant to the fabrication of cranial orthoses that would suffice as special controls, which could sufficiently address the factors FDA considers important in determining whether to grant an exemption of a class II device.

Nineteen comments stated that cranial orthoses should be regulated because they are indicated for a vulnerable population. One comment stated that the complexity of medical conditions that result in the need for treatment with these devices is just starting to be reported in the medical literature.

FDA believes that the level of regulation needed for this condition in a vulnerable population is commensurate with class II, including special controls. The petition provided insufficient information for developing special controls that would provide reasonable assurance of safety and effectiveness, when used on infants with complex medical conditions, if this type of device was exempt from premarket notification.

Four comments stated the petition has insufficient information for addressing the factors FDA considers important in determining whether to grant an exemption of a class II device from premarket notification, FDA agrees, as discussed earlier.

One comment stated that exemption of cranial orthoses will allow unqualified individuals to treat these patients and lower the standard of care. FDA does not regulate the qualifications of healthcare practitioners. However, regardless of whether a class II device is exempt from premarket notification, FDA can require prescription use labeling for class II devices. Prescription use labeling is required for this type of device.

Five comments stated that access has not been deterred by the Class II designation. Three comments stated that there is insufficient evidence that innovation has been deterred by the Class II designation. Five comments stated that price increases are due to the significant increase in the service-intensity of this therapy. FDA has no comment because none of these issues is a criterion for exemption of a class II device.

V. Order

After reviewing the petition and for the reasons explained previously, FDA has determined that the petition failed to provide information that premarket clearance is not necessary to provide reasonable assurance of safety and effectiveness. Therefore, FDA is issuing this order denying the petition requesting exemption for cranial orthosis from the premarket notification requirements.

Dated: December 19, 2006.

Jeffrey Shuren,

Assistant Commissioner for Policy.

[FR Doc. E6–22072 Filed 12–22–06; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

Neurological Devices Panel of the Medical Devices Advisory Committee; Amendment of Notice

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

The Food and Drug Administration (FDA) is announcing an amendment to the notice of the meeting of the Neurological Devices Panel of the Medical Devices Advisory Committee. This meeting was originally announced in the **Federal Register** of December 6, 2006 (71 FR page 70780). The amendment is being made to reflect a change in the *Agenda* portion of the document, specifically to include the name of the sponsors and devices. There are no other changes.

FOR FURTHER INFORMATION CONTACT: Janet L. Scudiero, Center for Devices and Radiological Health (HFZ–410), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 240–276–3737, or FDA Advisory Committee Information Line, 1–800–741–8138 (301–443–0572 in the Washington, DC area), code 3014512513. Please call the Information Line for up-to-date information on this meeting.

SUPPLEMENTARY INFORMATION: In the **Federal Register** of December 6, 2006, FDA announced that a meeting of the Neurological Devices Panel of the Medical Devices Advisory Committee would be held on January 26, 2007. On page 70780, column 1, the *Agenda* portion of the document is amended to read as follows:

Agenda: The committee will discuss and make recommendations on a premarket notification application, sponsored by Neuronetics, Inc., for the NeuroStar System for the treatment of major depressive disorder. The committee will also hear and discuss post approval study reports for two recently approved neurological device premarket approval applications: The VNS Therapy™ System, sponsored by Cyberonics, Inc., for treatment-resistant chronic or recurrent depression; and the Dural Sealant System, sponsored by Confluent Surgical, Inc., for use as an adjunct to sutured dural repair during cranial surgery to provide watertight closure.

FDA intends to make background material available to the public no later than 1 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 2007 and scroll down to the appropriate advisory committee link.

This notice is issued under the Federal Advisory Committee Act (5 U.S.C. app.2) and 21 CFR part 14, relating to the advisory committees.

Dated: December 18, 2006.

Randall W. Lutter,

Associate Commissioner for Policy and Planning.

[FR Doc. E6–21995 Filed 12–22–06; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Current List of Laboratories Which Meet Minimum Standards To Engage in Urine Drug Testing for Federal Agencies

AGENCY: Substance Abuse and Mental Health Services Administration, HHS.

ACTION: Notice.

SUMMARY: The Department of Health and Human Services (HHS) notifies Federal agencies of the laboratories currently certified to meet the standards of Subpart C of the Mandatory Guidelines for Federal Workplace Drug Testing Programs (Mandatory Guidelines). The Mandatory Guidelines were first published in the **Federal Register** on April 11, 1988 (53 FR 11970), and subsequently revised in the **Federal Register** on June 9, 1994 (59 FR 29908), on September 30, 1997 (62 FR 51118), and on April 13, 2004 (69 FR 19644).

A notice listing all currently certified laboratories is published in the **Federal Register** during the first week of each month. If any laboratory's certification is suspended or revoked, the laboratory will be omitted from subsequent lists until such time as it is restored to full certification under the Mandatory Guidelines.

If any laboratory has withdrawn from the HHS National Laboratory Certification Program (NLCP) during the past month, it will be listed at the end, and will be omitted from the monthly listing thereafter.

This notice is also available on the Internet at *http://workplace.samhsa.gov* and *http://www.drugfreeworkplace.gov.*

FOR FURTHER INFORMATION CONTACT: Mrs. Giselle Hersh or Dr. Walter Vogl, Division of Workplace Programs, SAMHSA/CSAP, Room 2–1035, 1 Choke Cherry Road, Rockville, Maryland 20857; 240–276–2600 (voice), 240–276–2610 (fax).

SUPPLEMENTARY INFORMATION: The Mandatory Guidelines were developed in accordance with Executive Order 12564 and section 503 of Public Law 100–71. Subpart C of the Mandatory Guidelines, "Certification of Laboratories Engaged in Urine Drug Testing for Federal Agencies," sets strict standards that laboratories must meet in order to conduct drug and specimen validity tests on urine specimens for Federal agencies. To become certified, an applicant laboratory must undergo three rounds of performance testing plus an on-site inspection. To maintain that certification, a laboratory must participate in a quarterly performance testing program plus undergo periodic, on-site inspections.

Laboratories which claim to be in the applicant stage of certification are not to be considered as meeting the minimum requirements described in the HHS Mandatory Guidelines. A laboratory must have its letter of certification from HHS/SAMHSA (formerly: HHS/NIDA) which attests that it has met minimum standards.

In accordance with Subpart C of the Mandatory Guidelines dated April 13, 2004 (69 FR 19644), the following laboratories meet the minimum standards to conduct drug and specimen validity tests on urine specimens:

ACL Laboratories, 8901 W. Lincoln Ave., West Allis, WI 53227. 414–328–7840/800–877–7016. (Formerly: Bayshore Clinical Laboratory).

ACM Medical Laboratory, Inc., 160 Elmgrove Park, Rochester, NY 14624. 585–429–2264.

Advanced Toxicology Network, 3560 Air Center Cove, Suite 101, Memphis, TN 38118. 901–794–5770/888–290–1150.

Aegis Analytical Laboratories, Inc., 345 Hill Ave., Nashville, TN 37210. 615–255–2400.

Baptist Medical Center—Toxicology Laboratory, 9601 I–630, Exit 7, Little Rock, AR 72205–7299. 501–202–2783. (Formerly: Forensic Toxicology Laboratory Baptist Medical Center).

Clinical Reference Lab, 8433 Quivira Road, Lenexa, KS 66215–2802. 800–445–6917.

Diagnostic Services, Inc., dba DSI, 12700 Westlinks Drive, Fort Myers, FL 33913. 239–561–8200/800–735–5416.

Doctors Laboratory, Inc., 2906 Julia Drive, Valdosta, GA 31602. 229–671–2281.

DrugScan, Inc., P.O. Box 2969, 1119 Mearns Road, Warminster, PA 18974. 215–674–9310.

Dynacare Kasper Medical Laboratories,* 10150–102 St., Suite 200, Edmonton, Alberta, Canada T5J 5E2. 780–451–3702/800–661–9876.

ElSohly Laboratories, Inc., 5 Industrial Park Drive, Oxford, MS 38655. 662–236–2609.

Gamma-Dynacare Medical Laboratories,* A Division of the Gamma-Dynacare Laboratory Partnership, 245 Pall Mall Street, London, ONT, Canada N6A 1P4. 519–679–1630.

General Medical Laboratories, 36 South Brooks St., Madison, WI 53715. 608–267–6225.

Kroll Laboratory Specialists, Inc., 1111 Newton St., Gretna, LA 70053. 504–361–8989/800–433–3823. (Formerly: Laboratory Specialists, Inc.).

Kroll Scientific Testing Laboratories, Inc., 450 Southlake Blvd., Richmond, VA 23236. 804–378–9130. (Formerly: Scientific Testing Laboratories, Inc.).

Laboratory Corporation of America Holdings, 7207 N. Gessner Road, Houston, TX 77040. 713–856–8288/800–800–2387.

Laboratory Corporation of America Holdings, 69 First Ave., Raritan, NJ 08869. 908–526–2400/800–437–4986. (Formerly: Roche Biomedical Laboratories, Inc.).

Laboratory Corporation of America Holdings, 1904 Alexander Drive, Research Triangle Park, NC 27709. 919–572–6900/800–833–3984. (Formerly: LabCorp Occupational Testing Services, Inc., CompuChem Laboratories, Inc.; CompuChem Laboratories, Inc., A Subsidiary of Roche Biomedical Laboratory; Roche CompuChem Laboratories, Inc., A Member of the Roche Group).

Laboratory Corporation of America Holdings, 10788 Roselle St., San

Diego, CA 92121. 800–882–7272. (Formerly: Poisonlab, Inc.).
Laboratory Corporation of America Holdings, 550 17th Ave., Suite 300, Seattle, WA 98122. 206–923–7020/ 800–898–0180. (Formerly: DrugProof, Division of Dynacare/Laboratory of Pathology, LLC; Laboratory of Pathology of Seattle, Inc.; DrugProof, Division of Laboratory of Pathology of Seattle, Inc.).
Laboratory Corporation of America Holdings, 1120 Main Street, Southaven, MS 38671. 866–827–8042/ 800–233–6339. (Formerly: LabCorp Occupational Testing Services, Inc.; MedExpress/National Laboratory Center).
LabOne, Inc. d/b/a Quest Diagnostics, 10101 Renner Blvd., Lenexa, KS 66219. 913–888–3927/800–873–8845. (Formerly: Quest Diagnostics Incorporated; LabOne, Inc.; Center for Laboratory Services, a Division of LabOne, Inc.).
Marshfield Laboratories, Forensic Toxicology Laboratory, 1000 North Oak Ave., Marshfield, WI 54449. 715–389–3734/800–331–3734.
MAXXAM Analytics Inc.,* 6740 Campobello Road, Mississauga, ON, Canada L5N 2L8. 905–817–5700. (Formerly: NOVAMANN (Ontario), Inc.).
MedTox Laboratories, Inc., 402 W. County Road D, St. Paul, MN 55112. 651–636–7466/800–832–3244.
MetroLab-Legacy Laboratory Services, 1225 NE 2nd Ave., Portland, OR 97232. 503–413–5295/800–950–5295.
Minneapolis Veterans Affairs Medical Center, Forensic Toxicology Laboratory, 1 Veterans Drive, Minneapolis, MN 55417. 612–725–2088.
National Toxicology Laboratories, Inc., 1100 California Ave., Bakersfield, CA 93304. 661–322–4250/800–350–3515.
One Source Toxicology Laboratory, Inc., 1213 Genoa-Red Bluff, Pasadena, TX 77504. 888–747–3774. (Formerly: University of Texas Medical Branch, Clinical Chemistry Division; UTMB Pathology-Toxicology Laboratory).
Oregon Medical Laboratories, 123 International Way, Springfield, OR 97477. 541–341–8092.
Pacific Toxicology Laboratories, 9348 DeSoto Ave., Chatsworth, CA 91311. 800–328–6942. (Formerly: Centinela Hospital Airport Toxicology Laboratory).
Pathology Associates Medical Laboratories, 110 West Cliff Dr., Spokane, WA 99204. 509–755–8991/ 800–541–7891x7.
Physicians Reference Laboratory, 7800 West 110th St., Overland Park, KS 66210. 913–339–0372/800–821–3627.
Quest Diagnostics Incorporated, 3175 Presidential Dr., Atlanta, GA 30340. 770–452–1590/800–729–6432. (Formerly: SmithKline Beecham Clinical Laboratories; SmithKline Bio-Science Laboratories).
Quest Diagnostics Incorporated, 4770 Regent Blvd., Irving, TX 75063. 800–824–6152. (Moved from the Dallas location on 03/31/01; Formerly: SmithKline Beecham Clinical Laboratories; SmithKline Bio-Science Laboratories).
Quest Diagnostics Incorporated, 4230 South Burnham Ave., Suite 250, Las Vegas, NV 89119–5412. 702–733–7866/800–433–2750. (Formerly: Associated Pathologists Laboratories, Inc.).
Quest Diagnostics Incorporated, 400 Egypt Road, Norristown, PA 19403. 610–631–4600/877–642–2216. (Formerly: SmithKline Beecham Clinical Laboratories; SmithKline Bio-Science Laboratories).
Quest Diagnostics Incorporated, 506 E. State Pkwy., Schaumburg, IL 60173. 800–669–6995/847–885–2010. (Formerly: SmithKline Beecham Clinical Laboratories; International Toxicology Laboratories).
Quest Diagnostics Incorporated, 7600 Tyrone Ave., Van Nuys, CA 91405. 866–370–6699/818–989–2521. (Formerly: SmithKline Beecham Clinical Laboratories).
Quest Diagnostics Incorporated, 2282 South Presidents Drive, Suite C, West Valley City, UT 84120. 801–606–6301/800–322–3361. (Formerly: Northwest Toxicology, a LabOne Company; LabOne, Inc., dba Northwest Toxicology; NWT Drug Testing, NorthWest Toxicology, Inc.; Northwest Drug Testing, a division of NWT Inc.).
S.E.D. Medical Laboratories, 5601 Office Blvd., Albuquerque, NM 87109. 505–727–6300/800–999–5227.
South Bend Medical Foundation, Inc., 530 N. Lafayette Blvd., South Bend, IN 46601. 574–234–4176 x276.
Southwest Laboratories, 4645 E. Cotton Center Boulevard, Suite 177, Phoenix, AZ 85040. 602–438–8507/800–279–0027.
Sparrow Health System, Toxicology Testing Center, St. Lawrence Campus, 1210 W. Saginaw, Lansing, MI 48915. 517–364–7400. (Formerly: St. Lawrence Hospital & Healthcare System).
St. Anthony Hospital Toxicology Laboratory, 1000 N. Lee St., Oklahoma City, OK 73101. 405–272–7052.
Toxicology & Drug Monitoring Laboratory, University of Missouri Hospital & Clinics, 301 Business Loop 70 West, Suite 208, Columbia, MO 65203. 573–882–1273.
Toxicology Testing Service, Inc., 5426 N.W. 79th Ave., Miami, FL 33166. 305–593–2260.
US Army Forensic Toxicology Drug Testing Laboratory, 2490 Wilson St., Fort George G. Meade, MD 20755–5235. 301–677–7085.

* The Standards Council of Canada (SCC) voted to end its Laboratory Accreditation Program for Substance Abuse (LAPSA) effective May 12, 1998. Laboratories certified through that program were accredited to conduct forensic urine drug testing as required by U.S. Department of Transportation (DOT) regulations. As of that date, the certification of those accredited Canadian laboratories will continue under DOT authority. The responsibility for conducting quarterly performance testing plus periodic on-site inspections of those LAPSA-accredited laboratories was transferred to the U.S. HHS, with the HHS' NLCP contractor continuing to have an active role in the performance testing and laboratory inspection processes. Other Canadian laboratories wishing to be considered for the NLCP may apply directly to the NLCP contractor just as U.S. laboratories do.

Upon finding a Canadian laboratory to be qualified, HHS will recommend that DOT certify the laboratory (**Federal Register**, July 16, 1996) as meeting the minimum standards of the Mandatory Guidelines published in the **Federal Register** on April 13, 2004 (69 FR 19644). After receiving DOT certification, the laboratory will be included in the monthly list of HHS-certified laboratories and participate in the NLCP certification maintenance program.

Elaine Parry,

Acting Director, Office Program Services, SAMHSA.

[FR Doc. E6–22049 Filed 12–22–06; 8:45 am]

BILLING CODE 4162–20–P

DEPARTMENT OF HOMELAND SECURITY

Bureau of Customs and Border Protection

Automated Commercial Environment (ACE): National Customs Automation Program Test of Automated Truck Manifest for Truck Carrier Accounts; Deployment Schedule

AGENCY: Customs and Border Protection; Department of Homeland Security.

ACTION: General notice.

SUMMARY: The Bureau of Customs and Border Protection, in conjunction with the Department of Transportation, Federal Motor Carrier Safety Administration, is currently conducting a National Customs Automation Program (NCAP) test concerning the transmission of automated truck manifest data. This document announces the next group, or cluster, of ports to be deployed for this test.

DATES: The ports identified in this notice, in the State of Vermont, are expected to be fully deployed for testing by December 31, 2006. Comments concerning this notice and all aspects of the announced test may be submitted at any time during the test period.

FOR FURTHER INFORMATION CONTACT: Mr. James Swanson via e-mail at *james.d.swanson@dhs.gov.*

SUPPLEMENTARY INFORMATION:

Background

The National Customs Automation Program (NCAP) test concerning the transmission of automated truck manifest data for truck carrier accounts was announced in a General Notice published in the **Federal Register** (69 FR 55167) on September 13, 2004. That notice stated that the test of the Automated Truck Manifest would be conducted in a phased approach, with primary deployment scheduled for no earlier than November 29, 2004.

A series of **Federal Register** notices have announced the implementation of the test, beginning with a notice published on May 31, 2005 (70 FR 30964). As described in that document, the deployment sites for the test have been phased in as clusters. The ports identified belonging to the first cluster were announced in the May 31, 2005, notice. Additional clusters were announced in subsequent notices published in the **Federal Register** including: 70 FR 43892, published on July 29, 2005; 70 FR 60096, published on October 14, 2005; 71 FR 3875, published on January 24, 2006; 71 FR 23941, published on April 25, 2006; and 71 FR 42103, published on July 25, 2006.

New Cluster

Through this notice, CBP announces that the next cluster of ports to be brought up for purposes of deployment of the test, to be fully deployed by December 31, 2006, will be all ports in the State of Vermont. This deployment is for purposes of the test of the transmission of automated truck manifest data only; the Automated Commercial Environment (ACE) Truck Manifest System is not yet the mandated transmission system for these ports. The ACE Truck Manifest System will become the mandatory transmission system in these ports only after publication in the **Federal Register** of 90 days notice, as explained by CBP in the **Federal Register** notice published on October 27, 2006 (71 FR 62922).

Previous NCAP Notices Not Concerning Deployment Schedules

On Monday, March 21, 2005, a General Notice was published in the **Federal Register** (70 FR 13514) announcing a modification to the NCAP test to clarify that all relevant data elements are required to be submitted in the automated truck manifest submission. That notice did not announce any change to the deployment schedule and is not affected by publication of this notice. All requirements and aspects of the test, as set forth in the September 13, 2004 notice, as modified by the March 21, 2005 notice, continue to be applicable.

Dated: December 18, 2006.

Jayson P. Ahern,

Assistant Commissioner, Office of Field Operations.

[FR Doc. E6–22036 Filed 12–22–06; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Receipt of Application of Endangered Species Recovery Permits

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability and receipt of applications.

SUMMARY: We announce our receipt of applications to conduct certain activities pertaining to enhancement of survival of endangered species.

DATES: Written comments on this request for a permit must be received by January 25, 2007.

ADDRESSES: Written data or comments should be submitted to the Assistant Regional Director-Ecological Services, U.S. Fish and Wildlife Service, P.O. Box 25486, Denver Federal Center, Denver, Colorado 80225–0486; facsimile 303–236–0027. Documents and other information submitted with these applications are available for review, subject to the requirements of the Privacy Act [5 U.S.C. 552A] and Freedom of Information Act [5 U.S.C. 552], by any party who submits a request for a copy of such documents within 30 days of the date of publication of this notice to Kris Olsen, by mail or by telephone at 303–236–4256. All comments received from individuals become part of the official public record.

SUPPLEMENTARY INFORMATION: The following applicants have requested issuance of enhancement of survival permits to conduct certain activities with endangered species pursuant to section 10(a)(1)(A) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Applicant: Toronto Zoo, Scarborough, Ontario, Canada, TE–051841, Hutchinson Zoo, Hutchinson, Kansas, TE–051824, and Elmwood Park Zoo, Norristown, Pennsylvania, TE–053485. The applicants request renewal of permits to possess captive-reared black-footed ferrets (*Mustela nigripes*) for public display and propagation in conjunction with recovery activities for the purpose of enhancing its survival and recovery.

Applicant: Dakota Zoological Society, Inc., Bismarck, North Dakota, TE–051815. The applicant requests renewal of a permit to possess captive-reared black-footed ferrets (*Mustela nigripes*) and hatchery-reared pallid sturgeon (*Scaphirhynchus albus*) for public display and propagation in conjunction with recovery activities for the purpose of enhancing their survival and recovery.

Applicant: Colorado Division of Wildlife, Native Aquatic Species Facility, Alamosa, Colorado, TE–047290. The applicant requests renewal of a permit to possess captive-reared bonytail (*Gila elegans*) and razorback sucker (*Xyrauchen texanus*) for public display and propagation in conjunction with recovery activities for the purpose of enhancing their survival and recovery.

Applicant: Kirby Carroll, Buys and Associates, Littleton, Colorado, TE–056165. The applicant requests a renewed permit to take Mexican spotted owls (*Strix occidentalis lucida*) and Southwestern willow flycatchers (*Empidonax traillii extimus*) in conjunction with recovery activities throughout the species' range for the purpose of enhancing their survival and recovery.

Applicant: U.S. Fish and Wildlife Service, Saratoga National Fish Hatchery, Saratoga, Wyoming, TE–052204. The applicant requests a renewed permit to take Wyoming toad (*Bufo baxteri*) in conjunction with recovery activities throughout the species' range for the purpose of enhancing its survival and recovery.

Dated: November 14, 2006.

James J. Slack,

Deputy Regional Director, Denver, Colorado.

[FR Doc. E6–22035 Filed 12–22–06; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Notice of Availability of the Draft Interim Visitor Services Plan for the Midway Atoll National Wildlife Refuge/Battle of Midway National Memorial/Midway Atoll Special Management Area

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability.

SUMMARY: The Fish and Wildlife Service (Service) has completed a Draft Interim Visitor Services Plan (VSP) and associated Environmental Assessment (EA) for the Midway Atoll National Wildlife Refuge/Battle of Midway National Memorial/Midway Atoll Special Management Area (Refuge). The Draft VSP/EA is available for public review and comments. This remote Pacific island Refuge is a U.S. territory located in the Northwestern Hawaiian Islands, and part of the newly established Northwestern Hawaiian Islands Marine National Monument (Monument). The VSP is intended to guide visitor activities on the Refuge for an interim period of time until a broader Monument management plan is completed that meets the applicable requirements of a refuge comprehensive conservation plan.

DATES: Written comments must be received (see **ADDRESSES**) by midnight on February 6, 2007.

ADDRESSES: Comments on the Draft VSP/EA should be submitted via electronic mail to *midway@fws.gov*. Please use ''VSP'' in the subject line. Alternatively, comments may be addressed to: Barbara Maxfield, Chief, Pacific Islands Division of External Affairs and Visitor Services, 300 Ala Moana Blvd., Room 5–231, Honolulu, HI 96850. You may view or obtain copies of the Draft VSP/EA as indicated under **SUPPLEMENTARY INFORMATION**.

FOR MORE INFORMATION CONTACT: Barbara Maxfield, Chief, Pacific Islands Division of External Affairs and Visitor Services, phone number (808) 792–9531.

SUPPLEMENTARY INFORMATION: The Draft VSP and EA were prepared pursuant to the National Wildlife Refuge System Administration Act of 1966, as amended by the National Wildlife Refuge System Improvement Act of 1997, and the National Environmental Policy Act of 1969, in consultation with the Secretary of Commerce through the National Oceanic and Atmospheric Administration (NOAA), and the State of Hawaii.

Important elements of the Draft VSP/EA include: Allowing visitation only in limited numbers, and only from November through July, to ensure no adverse impacts to wildlife or their habitats occurs and to maintain a high quality visitor experience; and developing and maintaining a financially self-sustaining program and an associated table of proposed fees.

The Draft VSP/EA will be available for viewing and downloading online at *http://www.fws.gov/midway*. Limited copies of the Draft VSP/EA may be obtained by writing to the U.S. Fish and Wildlife Service, Attn: Barbara Maxfield, Chief, Pacific Islands Division of External Affairs and Visitor Services, 300 Ala Moana Blvd., Room 5–231, Honolulu, HI, 96850. Copies of the Draft VSP/EA may be viewed at the Hawaiian and Pacific Islands National Wildlife Refuge Complex Office, Monday through Friday, during regular business hours from 7 a.m. to 4 p.m. The office is located in the Prince Jonah Kuhio Kalanianaole Federal Building at 300 Ala Moana Blvd., Room 5–231, Honolulu, HI.

Background

In 1996, the Service prepared a public use plan to guide visitor services on the Refuge. Since then, new laws and policy regarding wildlife-dependent recreation in the National Wildlife Refuge System have been promulgated, and a new visitor services plan is required to ensure recreational uses at the Refuge are compatible with the National Wildlife Refuge System mission and the purposes of the Refuge and the Battle of Midway National Memorial. In addition, all recreational activities must be compliant with the requirements of the newly designated Monument, which refers to the Refuge as a Special Management Area.

The Draft VSP/EA is an interim plan to guide visitor activities on the Refuge until such time as the broader management plan is completed for the Monument that meets the applicable requirements of a refuge comprehensive conservation plan. The Monument's management plan will incorporate opportunities to participate in broader management and conservation activities, within the Northwestern Hawaiian Islands and throughout the main Hawaiian Islands, benefiting the Monument.

The development of this Draft VSP/EA began prior to the establishment of the Monument to fulfill Service requirements necessary to allow a regularly scheduled visitor services program to resume at the Refuge. As such, the focus of activities under the Draft VSP/EA is limited to initial visitor services within the Midway Atoll Special Management Area only. Future planning for a Monument-wide visitor services program will be further developed to more fully realize the President's vision to create a visitor window to the Monument at the Refuge. In addition, future planning will explore opportunities for visitor use at Kure Atoll (under the jurisdiction of the State of Hawaii) and in the main Hawaiian Islands, using distance learning and remote educational opportunities. The Service will continue to work closely with its co-trustees of the Monument, NOAA and the State of Hawaii, when the final VSP is implemented, and in the development of the Monument's management plan. Longer-term strategies are included in this Draft VSP/EA, so the interested public may gain a vision of what the co-trustees envision at the Refuge.

This Draft VSP/EA evaluates recreational activities at the Refuge, and describes the structure of the proposed visitor services program. It also outlines activities that honor and interpret the World War II history at Midway Atoll, in recognition of its status as the Battle of Midway National Memorial. It discusses operational limitations, biological constraints, and partnership opportunities beyond Midway Atoll.

Since 1995, the Service has been strongly committed to welcoming visitors to the Refuge. This is the first and only remote island national wildlife refuge in the Pacific Ocean to provide the general public with an opportunity to learn about and experience these unique ecosystems. A regularly scheduled visitor program operated on the Refuge until early in 2002, when it ended after our cooperator left the atoll. Since then, visitors have arrived almost exclusively by the occasional cruise ship or sailboat, or for a Battle of Midway commemorative event. In the Draft VSP/EA, opportunities to expand the visitor program and allow more people to experience Midway's wildlife and historic treasury are proposed.

Preliminary compatibility determinations are provided in the Draft VSP/EA that would allow the following wildlife-dependent recreational uses: Wildlife observation and photography, environmental education and interpretation, and participatory research. Hunting and fishing, two uses normally given priority on national wildlife refuges, will not take place on the Refuge. All animal species occurring on the Refuge are protected by law, or occur in numbers too low to provide hunting opportunities. Recreational fishing is precluded under the Presidential proclamation (Proclamation 8031) designating the Monument.

Additional preliminary compatibility determinations allow for beach use activities such as swimming and volleyball, non-administrative airport operations, limited outdoor sports such as bicycling and jogging, and amateur radio use. Each preliminary compatibility determination includes stipulations necessary to ensure protection of the Refuge's natural and historic resources. Any additional activities that may be proposed within the Refuge would need to be evaluated through the compatibility determination process with formal public review. Activities that are determined to be compatible are authorized through the issuance of Monument permits, which fall within six permit types: Conservation and management, research, education, Native Hawaiian uses, special ocean uses, and recreation.

Goals, objectives, and strategies for the visitor program are discussed in Chapter 4 of the Draft VSP/EA. The Service will encourage individual visitors as well as organized groups to visit the Refuge. Opportunities for teacher workshops in environmental education, college courses, and distance learning will be explored. Improvements to trails and installation of blinds will benefit wildlife observation and photography opportunities, as will snorkeling and guided kayaking tours. Onsite and offsite interpretation of Midway Atoll's historic and wildlife resources will be enhanced.

In order to ensure a quality visitor experience using the limited infrastructure currently available, limiting the total number of overnight visitors that would be allowed on Midway Atoll at any one time to 30 people in 2007, and 50 people in 2008 and beyond, as long as the VSP is effective, is proposed. The number of visitors may exceed these limits for short periods of time (less than a day) for prearranged visits by ocean vessels or aircraft. In these cases, visitor activities are closely supervised and primarily consist of guided tours or participation in commemorative events. Annual goals for the number of overnight visitors are 100 people in 2007 and 500 people in 2008 and beyond.

For the next 5 years (2007–2011), visitor programs would operate from November through July, which coincides with the albatross season on the Refuge. The months of August through October would be reserved primarily for planned construction and major maintenance activities.

With no additional Service funding available to support a visitor program, visitation at the Refuge must be financially self-sustaining. Fees reflecting actual costs for transportation, lodging, food services, and visitor services staffing are included in this Draft VSP/EA. Additional permitting requirements also are discussed.

For this interim period, the Service intends to operate the visitor program primarily with its own staffing and with help from Monument co-trustees and volunteers. Outside entities may be needed to provide assistance with marketing the program, and to establish a dive program at the Refuge. These options will be evaluated over the coming year.

Public Comments

Public comments are requested, considered, and incorporated throughout the planning process. After the review and comment period ends for the Draft VSP/EA, comments will be analyzed by the Service and addressed in revised planning documents. All comments received from individuals, including names and addresses, become part of the official public record and may be released. Requests for such comments will be handled in accordance with the Freedom of Information Act, the Council on Environmental Quality's NEPA regulations [40 CFR 1506.6(f)], and Service and Department of the Interior policies and procedures.

Dated: December 6, 2006.

David J. Wesley,

Acting Regional Director, Region 1, Portland, Oregon.

[FR Doc. E6–22112 Filed 12–22–06; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Geological Survey

Inventory of Geological and Geophysical Collections at State Surveys

AGENCY: U.S. Geological Survey.

ACTION: Request for Public Comments on Proposed Information Collection Submitted to the Office of Management and Budget for Review Under the Paperwork Reduction Act.

SUMMARY: The proposal to initiate the collection of information described below will be submitted to the Office of Management and Budget for approval under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35). Copies of the proposed collection of information and related forms may be obtained by contacting the Bureau's Clearance Officer at the phone number listed below. OMB has up to 60 days to approve the information collection, but may respond after 30 days; therefore public comments should be submitted to OMB within 30 days in order to assure maximum consideration. Comments and suggestions on the proposal should be made directly to the Desk Officer for the Interior Department, OMB–OIRA, via e-mail to *OIRA_DOCET@omb.eop.gov* or via facsimile to (202) 395–6566, and to the Bureau Clearance Officer, U.S. Geological Survey, 807 National Center, 12201 Sunrise Valley Drive, Reston, Virginia 20192.

Specific public comments are requested as to:

1. Whether the collection of information is necessary for the proper performance of the functions of the Bureau, including whether the information will have practical utility;
2. The accuracy of the Bureau's estimate of the burden of the collection of information, including the validity of the methodology and assumptions use;
3. The quality, utility, and clarity of the information to be collected; and
4. How to minimize the burden of the collection of information on those who are to respond, including the use of the appropriate automated, electronic, mechanical, or other forms of information technology.

Title: Inventory of Geological and Geophysical Collections at State Surveys.

OMB approval number: 1028–.

Abstract: Section 351 of the Energy Policy Act of 2005 directs the Secretary of the Interior, through the Director of the U.S. Geological Survey, ''to carry out a National Geological and Geophysical data Preservation Program'' (NGGDPP). The Implementation Plan for the National Geological and Geophysical Data Preservation Program submitted to Congress in August 2006 outlines the vision and purpose of the program and makes recommendations for implementation of the program. One of the action items in the FY 2007 implementation plan is to ''begin interactions with State geological surveys and other DOI agencies that maintain geological and geophysical data and samples to address their preservation and data rescue needs.'' As the first step in this process, the USGS is requesting that each state provide an assessment of their current collections resources and data preservation needs. This information will provide a snapshot of the diversity of scientific collections held, supported, or used by state geological surveys.

The inventory covers geological and geophysical collections including:

(1) Physical collections such as cores, rocks, minerals, fossils, and liquid samples (such as oil).

(2) Digital collections (such as analyses and well logs) that are/were related to physical collections.

(3) Paper and other records (such as microfiche and tapes) that need to be converted to digital format (such as seismic lines and historical geological records).

Bureau Form Number: None.

Frequency: One time.

Description of Respondents: State Geological Surveys.

Annual Responses: 50.

Annual Burden in Hours: 150.

Bureau Clearance Officer: Fred Travnicek, 703–648–7231.

FOR FURTHER INFORMATION CONTACT: Tamara Dickinson, U.S. Geological Survey, MS911 National Center, Reston, Virginia 20192, (703) 648–6633.

P. Patrick Leahy,

Associate Director for Geology, U.S. Geological Surveys.

[FR Doc. 06–9843 Filed 12–22–06; 8:45 am]

BILLING CODE 4311–AM–M

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[WY–100–07–1310–DB]

Notice of Availability of Draft Supplemental Environmental Impact Statement for the Pinedale Anticline Oil and Gas Exploration and Development Project, Sublette County, Wyoming

ACTION: Notice, correction.

AGENCY: Bureau of Land Management, Interior.

SUMMARY: The Bureau of Land Management (BLM) published in the **Federal Register** on December 15, 2006 a Notice of Availability (NOA) of a Draft Supplemental Environmental Impact Statement (SEIS) for the Pinedale Anticline Oil and Gas Exploration and Development Project. The NOA contained incorrect information. The **ADDRESSES** section contained an incorrect Web address as to where the document would be available electronically. The **DATES** section contained unclear and incorrect information. The correct information is provided below.

DATES: The Draft SEIS will be available for public comment for 60 days starting on the date the Environmental Protection Agency publishes its Notice of Availability in the **Federal Register**. A separate CALGRID airborne ozone report is being prepared by BLM and will be published for public comment following the release of the Draft SEIS; when it is available the report will be available for review at *http://www.wy.blm.gov/nepa/pfodocs/anticline/seis.*

Although the comment period for the Draft SEIS will run for 60 days, the public will have a minimum of 45 days to review and comment on the CALGRID airborne ozone report after its release. The two review periods may run concurrently. All comments on the ozone report received by the BLM will be considered official comments on the Draft SEIS. To expedite the preparation of the Final SEIS by the BLM, please submit all comments on the Draft SEIS within the 60 day comment period.

To provide the public with an opportunity to review the proposal and project information, the BLM will host a meeting in Pinedale, Wyoming. The BLM will notify the public of the meeting date, time, and location at least 15 days prior to the event. Announcement of the public meeting will be made by news release to the media, individual letter mailings, and posting on the BLM Web site, listed below, if it is available.

ADDRESSES: Please send written comments or resource information to the Bureau of Land Management, Pinedale Field Office, Matt Anderson, Project Manager, 432 East Mill Street, P.O. Box 768, Pinedale, Wyoming 82941. Electronic mail may be sent to: *WYMail_PAPA_YRA@blm.gov*. The Draft SEIS will be available electronically for viewing or downloading at the following Web site: *http://www.wy.blm.gov/nepa/pfodocs/anticline/seis.*

Your response is important and will be considered in the environmental analysis process. If you do respond, we will keep you informed of decisions resulting from this analysis. Please note that public comments and information submitted regarding this project including names, e-mail addresses, and street addresses of the respondents will be available for public review and disclosure at the above address during regular business hours (7:45 a.m. to 4:30 p.m.), Monday through Friday, except holidays. Individual respondents may request confidentiality. If you wish to withhold your name, e-mail address, or street address from public review or from disclosure under the Freedom of Information Act, you must state this plainly at the beginning of your written comment. Such requests will be honored to the extent allowed by the law. All submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, will be made available for public inspection in their entirety.

SUPPLEMENTARY INFORMATION: A complete description of the proposed action and the Draft SEIS may be found in the **Federal Register**; Volume 71, Number 241; December 15, 2006.

Dated: December 18, 2006.

Donald A. Simpson,

Associate State Director.

[FR Doc. E6–22001 Filed 12–22–06; 8:45 am]

BILLING CODE 4310–22–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[NV–060–1990]

Notice of Intent To Prepare a Supplemental Environmental Impact Statement for the Round Mountain Expansion Project, Nye County, NV

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Intent (NOI).

SUMMARY: Pursuant to section 102(2)(c) of the National Environmental Policy Act of 1969, 40 Code of Federal Regulations (CFR) subparts 1500–1508, and 43 CFR subpart 3809, notice is hereby given that the Bureau of Land Management (BLM), Battle Mountain Field Office, Tonopah Field Station, will be preparing a Supplemental Environmental Impact Statement (SEIS) for the Round Mountain Expansion Project located in Nye County, Nevada. The proposal includes expansion of existing facilities at the Round Mountain mine and the development of new mining and leaching facilities at the adjacent Gold Hill ore deposit.

DATES: This notice initiates the public scoping period. Written comments on the scope of the SEIS should be post-marked or hand delivered to the Tonopah Field Station by 4:30 p.m., no later than 30 days after the date of publication in the **Federal Register** to ensure full consideration. The public will be notified of scoping meetings through the local news media at least 15 days prior to the first meeting.

ADDRESSES: Written scoping comments should be sent to the Bureau of Land Management, Tonopah Field Station, P.O. Box 911, Tonopah, NV 89049, ATTN: George Deverse. Written comments may also be faxed to George Deverse at (775) 482–7810, or submitted in writing to the BLM at one of the scoping meetings. To be most helpful, formal scoping comments should be submitted within 30 days after the date of publication of this notice, although comments will be accepted throughout the development of the SEIS. Comments and documents pertinent to this proposal, including names and street addresses of respondents, may be examined at the Tonopah Field Station, 1553 South Main, Tonopah, NV, during regular business hours (7:30 a.m.–4:30 p.m., Monday through Friday, except holidays). Comments may be published as part of the SEIS.

Your response is important and will be considered in the environmental analysis process. If you choose to include your address, phone number, e-mail address, or other personal identifying information in your comment, be advised that your entire comment, including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold from public review your personal identifying information, we cannot guarantee that we will be able to do so. All submissions from organizations and businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, will be available for public inspection in their entirety.

FOR FURTHER INFORMATION CONTACT: For further information and/or to have your name added to our mailing list, contact: George Deverse at the BLM Tonopah address, or call (775) 482–7800.

SUPPLEMENTARY INFORMATION: Round Mountain Gold Corporation (RMGC) has submitted an amended Plan of Operations (NVN–72662) to the BLM for the proposed mining project. A third-party contractor will prepare the SEIS under the direction of the BLM. Pursuant to Council on Environmental Quality (CEQ) regulations 1502.14(a) and 1502.14(d), in addition to the proposed action, the BLM will explore and objectively evaluate all reasonable alternatives, including the alternative of no action. For the SEIS, the reasonable range of alternatives may include partial or full pit backfill. The Round Mountain Expansion Project Amended Plan of Operations (Plan) will be presented to the public during scoping meetings to be held in Round Mountain and Tonopah, Nevada. Informational letters on the Plan will be mailed to interested parties. The Plan will be available for public review at BLM's Tonopah Field Station. The BLM invites public comment on the scope of the analysis, including issues to consider and alternatives to the proposed action. The purpose of the public scoping process is to determine relevant issues that will influence the scope of the environmental analysis and SEIS alternatives. BLM personnel will be present at the scoping meetings to explain the environmental review process, the mining regulations, and other requirements for processing the proposed Plan amendment and the associated SEIS. Representatives of RMGC will also be available to describe their proposal. You may submit comments on issues in writing to the BLM at the public scoping meetings, or you may submit them to the BLM using one of the methods listed in the **ADDRESSES** section above. Comments received and a list of attendees for each scoping meeting will be made available for public inspection. The comment period will remain open for 30 days following each meeting for any participant(s) who wish to clarify their views.

The proposed project area is located approximately 55 miles north of Tonopah, Nevada, and is in Mt. Diablo Meridian, Townships 9, 10 and 11 North, Ranges 43 and 44 East. The existing Round Mountain mine project boundary encompasses about 7,263 acres; of which 4,269 acres are administered by the BLM Tonopah Field Station, 133.4 acres are administered by the U.S Department of Agriculture, Forest Service, Humbolt-Toiyabe National Forest, and 1,033.6 acres of patented land are owned by the Smoky Valley Common Operation, which is a joint venture of wholly-owned subsidiaries of Kinross Gold Corporation and Barrick Gold Corporation. Current disturbance within this area is approximately 5,436 acres. The road connecting the Round Mountain operation area with the adjacent proposed Gold Hill operation area would be about 1.3 miles in length, and located on land administered by the BLM on mining claims controlled by RMGC.

The proposed Round Mountain expansion project would include increasing the existing Round Mountain mine plan boundary by 3,122 acres (to a total of 10,385 acres); expanding the Round Mountain pit by approximately 450 feet in depth and by 210 acres in size (to approximately 1,290 acres); expanding the dewatering operations by 3,125 gallons per minute (for a total of 7,525 gallons per minute); conducting underground mining operations within the Round Mountain pit; expanding the North Waste Rock Dump by 746 acres (to approximately 2,584 acres); adding the North Dedicated Leach Pad (a new pad with a footprint of approximately 443 acres), increasing the daily production capacity from 11,000 tons per day to 22,000 tons per day; and increasing tailings disposal capacity by adding 930 new acres of cells (expanded from 677 acres of current disturbance, for a combined footprint of approximately 1,607 acres). Development at the Gold Hill ore deposit would include delineating a Gold Hill disturbance boundary of approximately 4,932 acres; constructing a haul road and utility corridor of about 81 acres between the Round Mountain operation area and the Gold Hill operation area; excavating an open pit with a footprint of approximately 380 acres; creating two waste rock dumps with combined footprints of approximately 553 acres; constructing and operating a heap leach facility and lined solution ponds with a footprint of approximately 280 acres. Depending on economics, the Gold Hill operation may be developed concurrently with the Round Mountain operation or expansion may occur as the Round Mountain pit approaches completion. Construction and operation of the Round Mountain Expansion Project is projected to begin in 2008. Active mining would last approximately 13 years, followed by mine site reclamation, closure, and monitoring.

An interdisciplinary approach will be used to develop the SEIS, in order to consider the variety of resource issues and concerns identified. Potential significant direct, indirect, residual, and cumulative impacts from the proposed action will be analyzed in the SEIS. Significant issues to be addressed in the SEIS include dewatering, cultural and Native American concerns, and visual resources. Additional issues may be identified during the scoping process. Federal, State, and local agencies, as well as individuals or organizations that may be interested in or affected by the BLM's decision on this plan amendment are invited to participate in the scoping process and, if eligible, may request or be requested by the BLM to participate as a cooperating agency.

Dated: October 30, 2006.

Gene Seidlitz,

Associate Field Manager, Battle Mountain Field Office.

[FR Doc. E6–22059 Filed 12–22–06; 8:45 am]

BILLING CODE 4310–HC–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[ID–102–2822–JS–C3MG, DBG–07–1001]

Notice of Two-Year, Temporary Emergency Closure to motorized vehicle use on the Cherry and Frenchie Fires in Gem, Payette, and Washington Counties, ID

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: 43 CFR Subpart 8364—Closure and Restrictions, 8364.1 (a) states: ''To protect persons, property, and public lands and resources, the authorized officer may issue an order to close or restrict use of designated public lands.'' In coordination with several livestock grazing permittees and the Idaho Department of Fish and Game, all BLM-administered roads within the Cherry and Frenchie Fires of 2006 will be closed to all motorized vehicle travel (*e.g.*, all-terrain vehicles, pickup trucks, motorcycles, sport utility vehicles, snowmobiles, etc.), including existing roads and two-tracks within the perimeter. This action is necessary for the protection of watershed resources and highly erosive soils to allow adequate time to allow for the rehabilitation of the burned area. No motorized vehicle travel into these areas will be allowed, including motorized travel for purposes of retrieval of big game, unless specifically authorized (in writing) by the authorized officer (BLM Four Rivers Field Office Manager).

The following acts are exempt from this action: (1) Access within the area by other means (*e.g.*, foot or horseback); (2) persons with a BLM permit or contract specifically authorizing motor vehicle use; (3) owners or lessees of land in the closed area with written authorization; (4) any BLM employee or livestock grazing permittee providing maintenance to a structure or facility; and (5) any Federal, State, or local officer, or member of an organized rescue or fire fighting force in the performance of an official duty. Extension of the closure order may occur if it is determined that the rehabilitation of the burned area has not been successful. Once rehabilitation of the burned area is determined to be successful, motorized vehicle access will resume in accordance with the 1988 Cascade Resource Management Plan (RMP) Record of Decision (ROD), opening the area to off-road vehicle use, providing no resource damage occurs. Roads and fire lines will be appropriately signed to inform the public of the closure. This closure will affect the following areas:

Cherry Fire—29,342 Acres

Township 11N, Range 01E, section 35
Township 10N, Range 01E, sections 01–05, 07–11, 14–23, 27–34
Township 10N, Range 01W, section 36
Township 09N, Range 01E, sections 03–11, 14–22, 27–34
Township 09N, Range 01W, sections 01, 12–14, 21–29, 32–36
Township 08N, Range 01E, sections 03–10, 16–21, 28–32
Township 08N, Range 01W, sections 01–05, 08–29, 34–36

Frenchie Fire—6,547 Acres

Township 11N, Range 01W, sections 14, 15, 22, 23, 26–28, 31–35
Township 10N, Range 01W, sections 02–11, 14–16
Township 10N, Range 02W, section 01

DATES: This emergency closure will be effective immediately and will remain in effect until September 12, 2008. Following the 2-year closure period, road closures after September 12, 2008, will be revisited and decided upon by the authorized officer at that time.

FOR FURTHER INFORMATION CONTACT: Chris Robbins, Rangeland Management Specialist/Wild Horse and Burro Specialist (208 384–3348), or Mike Barnum, Rangeland Management Specialist (208 384–3218), Bureau of Land Management, 3948 Development Ave., Boise, ID 83705.

SUPPLEMENTARY INFORMATION: The BLM Four Rivers Field Office is responsible for management of public lands within Ada, Adams, Boise, Canyon, Elmore, Gem, Owyhee, Payette, Valley, and Washington Counties. The management of these lands is addressed in the Cascade RMP ROD, which was signed in 1988. The Cherry Fire started on August 10, 2006, and burned 54,350 acres, of which 29,342 acres are public lands. It was declared contained on August 16, 2006. The Frenchie Fire started on August 21, 2006, and burned 10,610 acres, of which 6,547 acres are public lands. The Frenchie Fire was contained on August 23, 2006. This Emergency Closure is necessary to protect the watershed and allow adequate time for the rehabilitation of the burned area within the Cherry and Frenchie Fires.

Authority for this restriction order is contained in CFR Title 43, Subpart 8341.2 and complies with CFR Title 43, Subpart 8364.1 Closure and Restriction Orders. In accordance with CFR Title 43, Subpart 8360.0–7, and is punishable by a fine not to exceed $1,000 and/or imprisonment not to exceed 12 months.

Maps of this emergency closure area will be available at the Boise District Office, 3948 Development Ave., Boise, ID 83705.

Rosemary Thomas,

Field Office Manager, Four Rivers Field Office.

[FR Doc. E6–22062 Filed 12–22–06; 8:45 am]

BILLING CODE 4310–GG–P

DEPARTMENT OF THE INTERIOR

National Park Service

National Register of Historic Places; Notification of Pending Nominations and Related Actions

Nominations for the following properties being considered for listing or related actions in the National Register were received by the National Park Service before December 9, 2006. Pursuant to § 60.13 of 36 CFR part 60 written comments concerning the significance of these properties under the National Register criteria for evaluation may be forwarded by United States Postal Service, to the National Register of Historic Places, National Park Service, 1849 C St., NW., 2280, Washington, DC 20240; by all other carriers, National Register of Historic Places, National Park Service, 1201 Eye St., NW., 8th floor, Washington, DC 20005; or by fax, 202–371–6447. Written or faxed comments should be submitted by January 10, 2007.

John W. Roberts,

Acting Chief, National Register/National Historic Landmarks Program.

California

Mariposa County

Wawona Covered Bridge, Pioneer Yosemite History Center, Wawona, 06001261

Orange County

Williams, Roger Y., House, 29991 Camino Capistrano, San Juan Capistrano, 06001237

Santa Clara County

Saratoga Village Library, 14410 Oak St., Saratoga, 06001238

Colorado

Summit County

Montezuma Schoolhouse, (Rural School Buildings in Colorado MPS), 5375 Webster St., Montezuma, 06001239

District of Columbia

District of Columbia

Glover—Archbold Park, Reservation 351 and 450 (Foundry Branch Valley), Washington, 06001260

Kansas

Rawlins County

Shirley Opera House, (Theaters and Opera Houses of Kansas MPS), 503 Main St., Atwood, 06001241

Riley County

Downtown Manhattan Historic District, Generally including the blks bet. Humboldt and Pierre Sts. from 3rd to 5th Sts., Manhattan, 06001240

Houston, Samuel D., House, 3524 Anderson Ave., Manhattan, 06001246

Russell County

Kennedy Hotel, 117 Third St., Paradise, 06001244

Paradise Water Tower, E of int. of Waldo and Main Sts., Paradise, 06001242

Sedgwick County

Mullen Court Apartments, 1140–1150 N. Topeka Ave., Wichita, 06001243

Wabaunsee County

Stuewe House, 617 Nebraska, Alma, 06001245

Mississippi

Lauderdale County

Meridian Downtown Historic District, Roughly bounded by Twenty-Sixth Ave., Eighteenth Ave., Sixth St., and Front St., Meridian, 06001249

Montana

Fergus County

Lewiston Satellite Airfield Historic District (Boundary Increase II), MT 87, Lewiston, 06001247

Lewis and Clark County

Fisk, Robert and Elizabeth, House, 319 N. Rodney St., Helena, 06001248

New Mexico

Colfax County

El Raton Theater, (Movie Theaters in New Mexico MPS), 115 N. Second St., Raton, 06001250

Curry County

Lyceum Theater, (Movie Theaters in New Mexico MPS), 409 Main St., Clovis, 06001253

State Theater, (Movie Theaters in New Mexico MPS), 504 Main St., Clovis, 06001255

Lea County

Lea Theater, (Movie Theaters in New Mexico MPS), 106 E. Central St., Lovington, 06001251

Quay County

Glenrio Historic District, (Route 66 through New Mexico MPS), TX loop 504/NM 1578, Glenrio, 06001259

Odeon Theater, (Movie Theaters in New Mexico MPS), 123 South Second St., Tucumcari, 06001254

Union County

Luna Theater, (Movie Theaters in Washington State MPS), 2–6 Main St., Clayton, 06001252

Pennsylvania

Dauphin County

Calver Island, Address Restricted, Swatara Township, 06001256

Rhode Island

Providence County

Jules Desurmont Worsted Company Mill, 84 Fairmount St., Woonsocket, 06001257

Texas

Deaf Smith County

Clenrio Historic District, (Route 66 in Texas MPS), TX loop 504/NM 1578, Glenrio, 06001258

[FR Doc. E6–22021 Filed 12–22–06; 8:45 am]

BILLING CODE 4312–51–P

DEPARTMENT OF JUSTICE

[OMB Number 1105–0030]

Justice Management Division; Office of Attorney Recruitment and Management; Agency Information Collection Activities: Proposed Revision to Previously Approved Collection; Comments Requested

ACTION: 60-Day Notice of Information Collection Under Review: Electronic Applications for the Attorney General's Honors Program and the Summer Law Intern Program.

The Department of Justice (DOJ), Justice Management Division, Office of Attorney Recruitment and Management (OARM), has submitted the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted for 60 days until February 26, 2007. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention: Department of Justice Desk Officer, Washington, DC 20530. Additionally, comments may be submitted to OMB via facsimile to 202–395–7285. Comments may also be submitted to the Department Clearance Officer, United States Department of Justice, Suite 1600, 601 D Street NW., Washington, DC 20530.

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

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

(2) Evaluate the accuracy of the agencies estimate of the burden of the proposed 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:* Revision of a Currently Approved Collection.

(2) *The title of the form/collection:* Electronic Applications for the Attorney General's Honors Program and the Summer Law Intern Program.

(3) *The agency form number, if any, and the applicable component of the department sponsoring the collection: Form Number:* None. Office of Attorney Recruitment and Management, Justice Management Division, U.S. Department of Justice.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals or households. *Other:* None. The application form is submitted voluntarily, once a year by law students and judicial law clerks who will be in this applicant pool only once; the revision to this collection concerns two additional forms required to be submitted only by those applicants who were selected to be interviewed by DOJ components. Both of these forms seek information in order to prepare both the official Travel Authorizations prior to the interviewees' performing pre-

employment interview travel (as defined by 41 CFR 301–1.3), and the official Travel Vouchers after the travel is completed. The first new form is the Travel Survey—used by the Department in scheduling travel and/or hotel accommodations, which in turn provides the estimated travel costs required by the Travel Authorization form. The second new form is a simple Reimbursement Form—the interviewees are asked to provide their travel costs and/or hotel accommodations (if applicable) in order for the Department to prepare the Travel Vouchers required before these interviewees can be reimbursed by the Department for the authorized costs they incurred during this pre-employment interview travel.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond/reply:* It is estimated that 5000 respondents will complete the application in approximately 1 hour per application. The revised burden would include 600 respondents who will complete the travel survey in approximately 10 minutes per form, and 600 respondents who will complete the reimbursement form in approximately 10 minutes per form.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The estimated revised total annual public burden associated with this application is 5200 hours.

If additional information is required, contact Lynn Bryant, Department Clearance Officer, Policy and Planning Staff, Justice Management Division, United States Department of Justice, Suite 1600, 601 D Street, NW., Washington, DC 20530.

Dated: December 20, 2006.

Lynn Bryant,

Department Clearance Officer, Department of Justice.

[FR Doc. E6–22029 Filed 12–22–06; 8:45 am]

BILLING CODE 4410–PB–P

DEPARTMENT OF JUSTICE

[OMB Number 1122–0003]

Office on Violence Against Women; Agency Information Collection Activities: Extension of a Currently Approved Collection

ACTION: 60-Day Notice of Information Collection Under Review: Annual Progress Report for the STOP Formula Grants Program.

The Department of Justice, Office on Violence Against Women (OVW) has submitted the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. Comments are encouraged and will be accepted for ''sixty days'' until February 26, 2007. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding the items contained in this notice, especially the estimated public burden and associated response time, should be directed to The Office of Management and Budget, Office of Information and Regulatory Affairs, Attention Department of Justice Desk Officer, Washington, DC 20503. Additionally, comments may be submitted to OMB via facsimile to (202) 395–5806.

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

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

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, 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:* Annual Progress Report for the STOP Violence Against Women Formula Grants Program.

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection:* Form Number: 1122–0003. U.S. Department of Justice, Office on Violence Against Women.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* The affected public includes the 56 STOP state administrators (from 50 states, the District of Columbia and five territories and commonwealths (Guam, Puerto Rico, American Samoa, Virgin Islands, Northern Mariana Islands)) and their subgrantees. The STOP Violence Against Women Formula Grant Program was authorized through the Violence Against Women Act of 1994 (VAWA) and reauthorized and amended by the Violence Against Women Act of 2000 (VAWA 2000) and by the Violence Against Women Act of 2005 (VAWA 2005). Its purpose is to promote a coordinated, multi-disciplinary approach to improving the criminal justice system's response to violence against women. The STOP Formula Grant Program envisions a partnership among law enforcement, prosecution, courts, and victim advocacy organizations to enhance victim safety and hold offenders accountable for their crimes of violence against women. The Department of Justice's Office on Violence Against Women administers the STOP Formula Grant Program. The grant funds must be distributed by STOP state administrators to subgrantees according to a statutory formula (as amended by VAWA 2000 and by VAWA 2005).

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond/reply:* It is estimated that it will take the 56 respondents (STOP administrators) approximately one hour to complete an annual progress report. It is estimated that it will take approximately one hour for roughly 2500 subgrantees [1] to complete the relevant portion of the annual progress report. The Annual Progress Report for the STOP Formula Grant Program is divided into sections that pertain to the different types of activities that subgrantees may engage in and the different types of subgrantees that receive funds, *i.e.* law enforcement agencies, prosecutors' offices, courts, victim services agencies, etc.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total annual hour burden to complete the annual progress report is 2556 hours.

If additional information is required contact: Lynn Bryant, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Suite 1600, Patrick Henry Building, 601 D Street NW., Washington, DC 20530.

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[1] Each year the number of STOP subgrantees changes. The number 2,500 is based on the number of reports that OVW has received in the past from STOP subgrantees.

Dated: December 20, 2006.

Lynn Bryant,

Department Clearance Officer, United States Department of Justice.

[FR Doc. E6–22030 Filed 12–22–06; 8:45 am]

BILLING CODE 4410–PB–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Consent Decree Pursuant to the Solid Waste Disposal Act, as Amended by the Resource Conservation and Recovery Act of 1976 and the Hazardous and Solid Waste Amendments of 1984

The United States Department of Justice gives notice that on December 18, 2006, a proposed consent decree was lodged in *United States* v. *WCI Steel, Inc.,* Civil Action No. 4:06–CV–03000, in the United States District Court for the Northern District of Ohio.

The consent decree resolves claims of the United States against WCI Steel, Inc. (''Reorganized WCI''), the current owner and operator of the WCI Steel facility in Warren, Ohio (''Facility''), under Section 7003 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976 and the Hazardous and Solid Waste Amendments of 1984 (''RCRA''), 42 U.S.C. 6973. The United States' complaint alleges that Reorganized WCI has willfully violated, or failed or refused to comply with, a RCRA Section 7003 administrative order (''Order'') issued by the United States Environmental Protection Agency (''U.S. EPA'') to WCI Steel, Inc. (''Debtor WCI''), the prior owner and operator of the Facility before its reorganization in bankruptcy. The complaint seeks an order from the court requiring that Reorganized WCI comply with the Order and to pay penalties for violations of the Order since it acquired the Facility through Debtor WCI's bankruptcy case on May 1, 2006.

The proposed consent decree would require Reorganized WCI to implement specified measures to reduce risks to birds and wildlife due to the management of oily wastes at impoundments at the Facility. In addition, under the consent decree, Reorganized WCI would be required to pay a civil penalty to the United States in the amount of $620,000.00. This penalty would be paid through resolution of claims of the United States (set forth in a proof of claim and administrative proof of claim) for penalties relating to Debtor WCI's alleged violations of the Order submitted in Debtor WCI's bankruptcy case in the United States Bankruptcy Court for the Northern District of Ohio (*In re: WCI Steel, Inc., et al.,* Case No. 05–81439). The Consent Decree would also resolve all claims for civil liability of Debtor WCI to the United States for the violations of the Order alleged in the United States' claims in the bankruptcy case.

The Department of Justice will receive, for a period of thirty (30) days from the date of this publication, comments relating to the proposed consent decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, United States Department of Justice, P.O. Box 7611, Ben Franklin Station, Washington, DC 20074–7611, and should refer to *United States* v. *WCI Steel, Inc.,* DOJ Ref. 90–5–1–1–5027/1. Commenters may request an opportunity for a public meeting in the affected area, in accordance with Section 7003(d) of RCRA, 42 U.S.C. 6973(d).

The consent decree may be examined at the Office of the United States Attorney for the Northern District of Ohio, United States Courthouse, 801 W. Superior Avenue, Suite 400, Cleveland, Ohio 44113 and at the offices of the United States Environmental Protection Agency, Region 5, 77 W. Jackson Blvd., Chicago, Illinois 60604. During the public comment period, the consent decree may also be examined on the following Justice Department Web site: *http://www.usdoj.gov/enrd/Consent_Decrees.html.* A copy of the consent decree may also be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, or by faxing or e-mailing a request to Tonia Fleetwood (*tonia.fleetwood@usdoj.gov*), fax no. (202) 514–0097, phone confirmation number (202) 514–1547. In requesting a copy from the Consent Decree Library, please enclose a check in the amount of $20.50 (25 cents per page reproduction cost) payable to the U.S. Treasury or, if by e-mail or fax, forward a check in that amount to the Consent Decree Library at the stated address.

William D. Brighton,

Assistant Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 06–9845 Filed 12–22–06; 8:45 am]

BILLING CODE 4410–15–M

DEPARTMENT OF LABOR

Office of the Secretary

Submission for OMB Review: Comment Request

December 20, 2006.

The Department of Labor (DOL) has submitted the following public information collection request (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. Chapter 35). A copy of this ICR, with applicable supporting documentation, may be obtained by calling the Department of Labor. A copy of this ICR, with applicable supporting documentation, may be obtained at *http://www.reginfo.gov/public/do/PRAMain,* or contact Ira Mills on 202–693–4122 (this is not a toll-free number) or E-Mail: *Mills.Ira@dol.gov.*

Comments should be sent to Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for U.S. Department of Labor/Employment and Training Administration (ETA), Office of Management and Budget, Room 10235, Washington, DC 20503, 202–395–7316 (this is not a toll-free number), within 30 days from the date of this publication in the **Federal Register**.

The OMB is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Agency: Employment and Training Administration.

Type of Review: New.

Title: Survey of Registered Apprenticeship Sponsors.

OMB Number: 1205—0NEW.

Frequency: One time.

Affected Public: Business or other for-profit.

Type of Response: Reporting.

RESPONDENT HOUR BURDEN FOR THE APPRENTICESHIP EVALUATION

Activity	Total respondents	Frequency	Average minutes per response	Burden hours
Survey of Sponsors	1,144	One time	18.5	353
Site Visits:				
State apprenticeship directors and staff	19	One time	360	114
Providers of related education (community college and training program administrators).	29	One time	60	29
One-stop Center Directors and Staff	14	One time	60	14
Sponsors	37	One time	60	37
Other: WIB chairs and staff	15	One time	60	15
Apprentices	80	One time	45	60
Totals	1,338			622

Total Annualized Capital/Startup Costs: 0.

Total Annual Costs (operating/ maintaining systems or purchasing services): 0.

Description: This is a one-time information collection consisting of a survey of sponsors of registered apprenticeship programs, using a stratified random sample with over sampling of sponsors in high growth industries who have recently begun apprenticeship programs. The survey will be conducted by phone or Internet at the respondent's choice. The findings from the survey will fill a gap in knowledge by providing, for the first time, systematic information on the views of sponsors' views re: Costs and benefits and on interactions with other parts of the workforce development system.

Ira L. Mills,

Departmental Clearance Officer/Team Leader.

[FR Doc. E6–22056 Filed 12–22–06; 8:45 am]

BILLING CODE 4510–30–P

SMITHSONIAN INSTITUTION

NATIONAL CAPITAL PLANNING COMMISSION

Revised Notice of Intent To Prepare an Environmental Impact Statement for Proposed Construction of the Smithsonian National Museum of African American History and Culture—Public Scoping Meeting on January 4, 2007

AGENCIES: Smithsonian Institution (SI), National Capital Planning Commission (NCPC).

ACTION: Notice.

SUMMARY: The SI and NCPC, as joint lead agencies with NCPC as the Responsible Federal Agency, are confirming the date of the public scoping meeting for the Environmental Impact Statement (EIS) for the proposed construction of the Smithsonian National Museum of African American History and Culture. Notice of the date of the public meeting was provided in the Washington Post on December 5, 2006. The Notice of Intent to Prepare an EIS initially published in the **Federal Register**/Volume 71, No. 223/Monday, November 20, 2006 did not include the meeting information. In addition, the comment period, Web site URL, and contact information have changed.

SUPPLEMENTARY INFORMATION: The EIS scoping meeting will be held on January 4, 2007 from 6 p.m. to 9 p.m. at the National Music Center at the City Museum building, located at 801 K Street, NW. (Mount Vernon Square), Washington, DC. Consultants representing the SI and NCPC will be available to answer questions and receive comments about the scope of the EIS. Announcements about the meeting are provided on the NCPC Web site at *www.ncpc.gov,* and in other media.

The public comment period is extended through February 4, 2007 to ensure sufficient time for submittal of comments following the meeting. Comments are invited at the meeting, in writing, by e-mail to *info@louisberger-nmaahceis.com,* or on the project Web site at *http://www.louisberger-nmaahceis.com.* Written comments should be sent to Jill Cavanaugh at the Louis Berger Group, Inc., 2445 M Street, NW., 4th Floor, Washington, DC 20037–1445.

FOR FURTHER INFORMATION CONTACT: Jane Passman, Senior Facilities Planner, Smithsonian Institution, Office of Facilities Engineering and Operations, P.O. Box 37012, 600 Maryland Ave., SW., suite 5001, MRC 511, Washington, DC 20013–7012; Phone 202–633–6549; Fax: 202–633–6233.

John E. Huerta,

General Counsel, Smithsonian Institution.

Dated: December 18, 2006.

Lois Schiffer,

General Counsel, National Capital Planning Commission.

[FR Doc. 06–9852 Filed 12–20–06; 12:45 pm]

BILLING CODE 8030–03–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–313]

Arkansas Nuclear One, Unit 1; Notice of Consideration of Issuance of Amendment to Renewed Facility Operating License, Proposed No Significant Hazards Consideration Determination, and Opportunity for a Hearing

The U.S. Nuclear Regulatory Commission (the Commission) is considering issuance of an amendment to Renewed Facility Operating License No. DPR–51 issued to Entergy Operations, Inc. (the licensee), for operation of the Arkansas Nuclear One, Unit 1 (ANO–1), located in Pope County, Arkansas.

The proposed amendment would revise Technical Specification (TS) 3.7.14, ''Spent Fuel Pool Boron Concentration,'' TS 3.7.15, ''Spent Fuel Pool Storage,'' and the associated Figure 3.7.15–1, and TS 4.3, ''Fuel Storage,'' and the associated Figure 4.3.1.2–1. In addition, this amendment would add TS 5.5.17, ''Metamic Coupon Sampling Program,'' and Surveillance Requirement 3.7.15.2 that directs the performance of the coupon sampling program.

The proposed TS changes support a modification to the ANO–1 spent fuel pool (SFP) that would utilize Metamic® poison insert assemblies (PIAs). In addition to the proposed plant modification, the licensee would increase the SFP boron concentration and credit boron to ensure that a 5-percent subcriticality margin is maintained during normal and accident conditions. This proposed amendment also would increase the allowable initial fuel assembly uranium-235 (U–235) enrichment from 4.1 weight percent (wt%) to a maximum U–235 enrichment of 4.95 wt%.

Before issuance of the proposed license amendment, the Commission will have made findings required by the Atomic Energy Act of 1954, as amended (the Act), and the Commission's regulations.

The Commission has made a proposed determination that the amendment request involves no significant hazards consideration. Under the Commission's regulations in Title 10 of the Code of Federal Regulations (10 CFR), Section 50.92, this means that operation of the facility in accordance with the proposed amendment would not (1) Involve a significant increase in the probability or consequences of an accident previously evaluated; or (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety. As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed change involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

Fuel Handling Accidents

The current licensing bases for the dose consequences associate with a fuel handling accident (FHA), which was performed considering a maximum U–235 enrichment of 4.95 wt% and a maximum burnup of 60,000 megawatt-days/ton of uranium, does not exceed 25% of 10 CFR 100 limits. The proposed change does not impact the current analysis and therefore, there is no increase in the dose consequences associated with a[n] FHA.

The probability of having a[n] FHA has not increased. Although it could be postulated that a Metamic® panel could be dropped during installation, the approximate 50 pound weight of the panel falling on the racks is bounded by the current fuel assembly drop analysis.

Criticality Accidents Associated With a Dropped Fuel Assembly

The three fuel assembly drop accidents described below can be postulated to increase reactivity. However, for these accident conditions, the double contingency principle of ANS[I] [American National Standards Institute] N–16.1–1975 is applied. This states that is is unneccessary to assume two unlikely, independent, concurrent events to ensure protection against a criticality accident. Thus, for accident conditions, the presence of soluble boron in the storage pool water can be assumed as a realistic initial condition since its absence would be a second unlikely event.

Three types of drop accidents have been considered: A vertical drop accident, a horizontal drop accident, and an inadvertent drop of an assembly between the outside periphery of the rack and the pool wall. The structural damage to the pool liner, the racks, and fuel assembly resulting from a dropped fuel assembly striking the rack, the pool floor, or another assembly located in the racks is primarily dependent on the mass of the falling object and drop height. Since these two parameters are not changed by the proposed modification, the postulated structural damage to these items remains unchanged. In all cases the proposed TS limit for boron concentration ensures that a five percent subcriticality margin is met for the postulated accidents.

Criticality Accidents Associated With a Misplaced Fuel Assembly

The fuel assembly misplacement accident was considered for all storage configurations. An assembly with high reactivity is assumed to be placed in a storage location which requires restricted storage based on initial U–235 loading, cooling time, and burnup. The presence of boron in the pool water assumed in the analysis has been shown to offset the worst case reactivity effect of a misplaced fuel assembly for any configuration. This boron requirement is less than the boron concentration required by the ANO–1 TS. Thus, a five percent subcriticality margin is met for postulated accidents, since any reactivity increase will be much less than the negative worth of the dissolved boron.

Optimum Moderation Accident

For fuel storage applications in the SFP, water is usually present. An ''optimum moderation'' accident is not a concern in SFP storage racks because the rack design prevents the preferential reduction of water density between the cells of a rack (*e.g.*, boiling between cells). In addition, the criticality analysis has demonstrated that k_{eff} [k-effective] will remain less than 1.0 when the SFP is fully flooded with unborated water.

An ''optimum moderation'' accident in the new fuel vault was evaluated and the conclusions of that evaluation confirmed that the reactivity effect is less than the regulatory limit of 0.98 for k_{eff}.

Loss of SFP Cooling

The proposed changes to the ANO–1 SFP racks do not result in changes to the SFP cooling system and therefore the probability of a loss of SFP cooling is not increased.

The consequences of a loss of spent fuel pool cooling were evaluated and found to not involve a significant increase as a result of the proposed changes. A thermal-hydraulic evaluation for the loss of SFP cooling was performed. The analysis determined that the minimum time to boil is more than three hours following a complete loss of forced cooling. This provides sufficient time for the operators to restore cooling or establish an alternate means of cooling before the water shielding above the top of the racks falls below 10 feet. Therefore, the proposed change represents no increase in the consequences of loss of pool cooling.

Therefore, the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed change create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The presence of soluble boron in the pool water assumed in the criticality analysis is less than the boron concentration required by the ANO–1 TSs. Thus, a five percent subcriticality margin is met for postulated accidents, since any reactivity increase will be much less than the negative worth of the dissolved boron.

No new or different types of fuel assembly drop scenarios are created by the proposed change. During the installation of the Metamic® panels, the possible drop of a panel is bounded by the current fuel assembly drop analysis. No new or different fuel assembly misplacement accidents will be created. Administrative controls currently exist to assist in assuring fuel misplacement does not occur.

No changes are proposed to the spent fuel pool cooling system or makeup systems and therefore no new accidents are considered related to the loss of cooling or makeup capability.

Therefore, the proposed change does not create the possibility of a new or different kind of accident from any previously evaluated.

3. Does the proposed change involve a significant reduction in a margin of safety?

Response: No.

With the presence of a nominal boron concentration, the SFP storage racks will be designed to assure a subcritical array with a five percent subcritical margin (95% probability at the 95% confidence level). This has been verified by criticality analyses.

Credit for soluble boron in the SFP water is permitted under accident conditions. The proposed modification that will allow insertion of Metamic® poison panels does not result in the potential of any new misplacement scenarios. Criticality analyses have been performed to determine the required boron concentration that would ensure the maximum k_{eff} does not exceed 0.95. The ANO–1 TS for the minimum SFP boron concentration is greater than that required to ensure k_{eff} does not exceed 0.95. Therefore, the margin of safety defined by taking credit for soluble boron will be maintained.

The structural analysis of the spent fuel racks along with the evaluation of the SFP structure indicated that the integrity of these structures will be maintained with the addition of the PIAs. The structural requirements were shown to be satisfied, thus the safety margins were maintained.

In addition the proposed change includes a coupon sampling program that will monitor the physical properties of the Metamic® absorber material. The monitoring program provides a method of verifying that the assumptions used in the SFP criticality analyses remain valid.

Therefore, the proposed change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

The Commission is seeking public comments on this proposed determination. Any comments received within 30 days after the date of publication of this notice will be considered in making any final determination.

Normally, the Commission will not issue the amendment until the expiration of 60 days after the date of publication of this notice. The Commission may issue the license amendment before expiration of the 60-day period provided that its final determination is that the amendment involves no significant hazards consideration. In addition, the Commission may issue the amendment prior to the expiration of the 30-day comment period should circumstances change during the 30-day comment period such that failure to act in a timely way would result, for example, in derating or shutdown of the facility. Should the Commission take action prior to the expiration of either the comment period or the notice period, it will publish in the **Federal Register** a notice of issuance. Should the Commission make a final No Significant Hazards Consideration Determination, any hearing will take place after issuance. The Commission expects that the need to take this action will occur very infrequently.

Written comments may be submitted by mail to the Chief, Rulemaking, Directives and Editing Branch, Division of Administrative Services, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, and should cite the publication date and page number of this **Federal Register** notice. Written comments may also be delivered to Room 6D59, Two White Flint North, 11545 Rockville Pike, Rockville, Maryland, from 7:30 a.m. to 4:15 p.m. Federal workdays. Documents may be examined, and/or copied for a fee, at the NRC's Public Document Room (PDR), located at One White Flint North, Public File Area O1F21, 11555 Rockville Pike (first floor), Rockville, Maryland.

The filing of requests for hearing and petitions for leave to intervene is discussed below.

Within 60 days after the date of publication of this notice, the licensee may file a request for a hearing with respect to issuance of the amendment to the subject facility operating license and any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written request for a hearing and a petition for leave to intervene. Requests for a hearing and a petition for leave to intervene shall be filed in accordance with the Commission's ''Rules of Practice for Domestic Licensing Proceedings'' in 10 CFR Part 2. Interested persons should consult a current copy of 10 CFR 2.309, which is available at the Commission's PDR, located at One White Flint North, Public File Area O1F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible from the Agencywide Documents Access and Management System's (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/doc-collections/cfr/.* If a request for a hearing or petition for leave to intervene is filed by the above date, the Commission or a presiding officer designated by the Commission or by the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition; and the Secretary or the Chief Administrative Judge of the Atomic Safety and Licensing Board will issue a notice of a hearing or an appropriate order.

As required by 10 CFR 2.309, a petition for leave to intervene shall set forth with particularity the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the following general requirements: (1) The name, address and telephone number of the requestor or petitioner; (2) the nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding; (3) the nature and extent of the requestor's/petitioner's property, financial, or other interest in the proceeding; and (4) the possible effect of any decision or order which may be entered in the proceeding on the requestors/petitioner's interest. The petition must also identify the specific contentions which the petitioner/requestor seeks to have litigated at the proceeding.

Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner/requestor shall provide a brief explanation of the bases for the contention and a concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing. The petitioner/requestor must also provide references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion. The petition must include sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. Contentions shall be limited to matters within the scope of the amendment under consideration. The contention must be one which, if proven, would entitle the petitioner to relief. A petitioner/requestor who fails to satisfy these requirements with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing.

If a hearing is requested, the Commission will make a final determination on the issue of no significant hazards consideration. The final determination will serve to decide when the hearing is held. If the final determination is that the amendment request involves no significant hazards consideration, the Commission may issue the amendment and make it immediately effective, notwithstanding the request for a hearing. Any hearing held would take place after issuance of the amendment. If the final determination is that the amendment request involves a significant hazards consideration, any hearing held would take place before the issuance of any amendment.

Nontimely requests and/or petitions and contentions will not be entertained absent a determination by the Commission or the presiding officer of the Atomic Safety and Licensing Board that the petition, request and/or the contentions should be granted based on a balancing of the factors specified in 10 CFR 2.309(c)(1)(i)–(viii).

A request for a hearing or a petition for leave to intervene must be filed by: (1) First class mail addressed to the Office of the Secretary of the

Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemaking and Adjudications Staff; (2) courier, express mail, and expedited delivery services: Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville Pike, Rockville, Maryland, 20852, Attention: Rulemaking and Adjudications Staff; (3) e-mail addressed to the Office of the Secretary, U.S. Nuclear Regulatory Commission, *HEARINGDOCKET@NRC.GOV;* or (4) facsimile transmission addressed to the Office of the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC, Attention: Rulemakings and Adjudications Staff at (301) 415–1101, verification number is (301) 415–1966. A copy of the request for hearing and petition for leave to intervene should also be sent to the Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, and it is requested that copies be transmitted either by means of facsimile transmission to 301–415–3725 or by e-mail to *OGCMailCenter@nrc.gov.* A copy of the request for hearing and petition for leave to intervene should also be sent to Terence A. Burke, Associate General Council—Nuclear Entergy Services, Inc., 1340 Echelon Parkway, Jackson, Mississippi 39213, the attorney for the licensee.

For further details with respect to this action, see the application for amendment dated July 27, 2006, as supplemented by letters dated October 4 and October 9, 2006, which is available for public inspection at the Commission's PDR, located at One White Flint North, File Public Area O1F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible from the ADAMS Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/adams.html.* Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS, should contact the NRC PDR Reference staff by telephone at 1–800–397–4209, 301–415–4737, or by e-mail to *pdr@nrc.gov.*

Dated at Rockville, Maryland, this 15th day of December 2006.

For The Nuclear Regulatory Commission.

Farideh E. Saba,

Project Manager, Plant Licensing Branch IV, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. E6–22026 Filed 12–22–06; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Sunshine Federal Register Notice

DATES: Weeks of December 25, 2006, January 1, 8, 15, 22, 29, 2007.

PLACE: Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

STATUS: Public and Closed.

Matters To Be Considered

Week of December 25, 2006

There are no meetings scheduled for the Week of December 25, 2006.

Week of January 1, 2007—Tentative

Thursday, January 4, 2007

12:55 p.m. Affirmation Session (Public Meeting) (Tentative)

a. Final Rule: Secure Transfer of Nuclear Material (RIN 3150–AH90) (Tentative).

b. Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), Intervenor Pilgrim Watch's Appeal of LBP–06–23 (Ruling on Standing and Contentions) (Tentative).

Week of January 8, 2007—Tentative

Wednesday, January 10, 2007

9:30 a.m. Briefing on Browns Ferry Unit 1 Restart (Public Meeting) (Contact: Catherine Haney, 301 415–1453).

This meeting will be webcast live at the Web address: *http://www.nrc.gov*

Thursday, January 11, 2007

1:25 p.m. Affirmation Session (Public Meeting) (Tentative)

a. Final Rulemaking to Revise 10 CFR 73.1, Design Basis Threat (DBT) Requirements (Tentative).

b. Entergy Nuclear Vermont Yankee, LLC, & Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), LBP–06–20 (9/22/06): Entergy Nuclear Generation Company & Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), LBP–06–23 (10/16/06) (Tentative).

1:30 p.m. Periodic Briefing on New Reactor Issues (Public Meeting) (Contact: Donna Williams, 301 415–1322).

This meeting will be webcast lie at the Web address: *http://www.nrc.gov.*

Week of January 15, 2007—Tentative

There are no meetings scheduled for the Week of January 15, 2007.

Week of January 22, 2007—Tentative

Tuesday, January 23, 2007

1:30 p.m. Joint Meeting with Federal Energy Regulatory Commission on Grid Reliability (Public Meeting) (Contact: Mike Mayfield, 301 415–5621).

The meeting will be webcast live at the Web address: *http://www.nrc.gov.*

Week of January 29, 2007—Tentative

Wednesday, January 31, 2007

9:30 a.m. Discussion of Security Issues (closed—Ex. 1 & 3). To be held at department of Homeland Security headquarters, Washington, DC.

Thursday, February 1, 2007

9:30 a.m. Discussion of management Issues (Closed—Ex. 2).

1:30 a.m. Briefing on Strategic Workforce Planning and Human Capital Initiatives (Public Meeting) (Contact: Mary Ellen Beach, 301 415–6803).

* * * * *

The schedule for Commission meetings is subject to change on short notice. To verify the status of meetings call (recording)—(301) 415–1292. Contact person for more information: Michelle Schroll, (301) 415–1662.

* * * * *

ADDITION INFORMATION: Affirmation of Entergy Nuclear Vermont Yankee, LLC, & Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), LBP–06–20 (Sept. 22, 2006), reconsid'n denied (Oct. 30, 2006) tentatively scheduled on Thursday, December 21, 2006 at 12:55 p.m. was cancelled and will be rescheduled at a later date. Affirmation of Final Rulemaking to Revise 10 CFR 73.1, Design Basis Threat (DBT) Requirements tentatively scheduled on Thursday, December 21, 2006 at 12:55 p.m. was cancelled and tentatively rescheduled on January 11, 2007, at 1:25 p.m.

* * * * *

The NRC Commission Meeting Schedule can be found on the Internet at: *www.nrc.gov/what-we-do/policy-making/schedule.html.*

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The NRC provides reasonable accommodation to individuals with disabilities where appropriate. If you need a reasonable accommodation to participate in these public meetings, or need this meeting notice or the transcript or other information from the public meetings in another format (e.g. braille, large print), please notify the NRC's Disability Program Coordinator, (Deborah Chan, at 301–415–2100, or by e-mail at *DLC@nrc.gov.* Determinations on requests for reasonable accommodation will be made on a case-by-case basis.

* * * * *

This notice is distributed by mail to several hundred subscribers; if you no longer wish to receive it, or would like to be added to the distribution, please contact the Office of the Secretary, Washington, DC 20555 (301–415–1969). In addition, distribution of this meeting notice over the Internet system is available. If you are interested in receiving this Commission meeting schedule electronically, please send an electronic message to *dkw@nrc.gov.*

Dated: December 20, 2006.

R. Michelle Schroll,

Office of the Secretary.

[FR Doc. 06–9868 Filed 12–21–06; 10:58 am]

BILLING CODE 7590–01–M

SECURITIES AND EXCHANGE COMMISSION

[Release No. IC–27603; File No. 812–13320]

Jackson National Life Insurance Company, et al.

December 19, 2006.

AGENCY: The Securities and Exchange Commission (''Commission'').

ACTION: Notice of application for an amended order under Section 6(c) of the Investment Company Act of 1940 (the ''Act'') granting exemptions from the provisions of Sections 2(a)(32), 22(c) and 27(i)(2)(A) of the Act and Rule 22c–1 thereunder to permit the recapture of contract enhancements applied to purchase payments made under certain deferred variable annuity contracts.

APPLICANTS: Jackson National Life Insurance Company (''Jackson National''), Jackson National Separate Account—I (the ''JNL Separate Account''), and Jackson National Life Distributors LLC (''Distributor,'' and collectively, ''Applicants'').

SUMMARY OF APPLICATION: Applicants seek an order under Section 6(c) of the Act to amend an existing order, and exempting them from the provisions of Sections 2(a)(32), 22(c), and 27(i)(2)(A) of the Act and Rule 22c–1 thereunder, to the extent necessary to permit the recapture, under specified circumstances, of certain contract enhancements applied to purchase payments made under the deferred variable annuity contracts described herein that Jackson National will issue through the JNL Separate Account (the ''Contracts'') as well as other contracts that Jackson National may issue in the future through its existing or future separate accounts (''Other Accounts'') that are substantially similar in all material respects to the Contracts (''Future Contracts''). Applicants also request that the order being sought extend to any other National Association of Securities Dealers, Inc. (''NASD'') member broker-dealer controlling or controlled by, or under common control with, Jackson National, whether existing or created in the future, that serves as distributor or principal underwriter for the Contracts or Future Contracts (''Affiliated Broker-Dealers'') and any successors in interest to the Applicants.

FILING DATE: The application was filed on June 23, 2006, and amended on December 18, 2006.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Secretary of the Commission and serving Applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on January 12, 2007, and should be accompanied by proof of service on Applicants, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons may request notification of a hearing by writing to the Secretary of the Commission.

ADDRESSES: Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090. Applicants: c/o Jackson National Life Insurance Company, 1 Corporate Way, Lansing, Michigan 48951, Attn: Anthony L. Dowling, Esq.; copies to Joan E. Boros, Esq., Jorden Burt LLP, 1025 Thomas Jefferson Street, NW., Suite 400 East, Washington, DC 20007–0805.

FOR FURTHER INFORMATION CONTACT: Ellen J. Sazzman, Senior Counsel, at (202) 551–6762, or Harry Eisenstein, Branch Chief, at (202) 551–6795, Office of Insurance Products, Division of Investment Management.

SUPPLEMENTARY INFORMATION: The following is a summary of the Application. The complete Application is available for a fee from the SEC's Public Reference Branch, 100 F Street, NE., Washington, DC 20549 ((202) 551–8090).

Applicants' Representations

1. Jackson National is a stock life insurance company organized under the laws of the state of Michigan in June 1961. Its legal domicile and principal business address is 1 Corporate Way, Lansing, Michigan 48951. Jackson National is admitted to conduct life insurance and annuity business in the District of Columbia and all states except New York. Jackson National is ultimately a wholly owned subsidiary of Prudential plc (London, England).

2. The JNL Separate Account was established by Jackson National on June 14, 1993, pursuant to the provisions of Michigan law and the authority granted under a resolution of Jackson National's Board of Directors. Jackson National is the depositor of the JNL Separate Account. The JNL Separate Account meets the definition of a ''separate account'' under the federal securities laws and is registered with the Commission as a unit investment trust under the Act (File No. 811–8664). The JNL Separate Account will fund the variable benefits available under the Contracts. The offering of the Contracts will be registered under the Securities Act of 1933 (the ''1933 Act'').

3. The Distributor is a wholly owned subsidiary of Jackson National and serves as the distributor of the Contracts. The Distributor is registered with the Commission as a broker-dealer under the Securities Exchange Act of 1934 (the ''1934 Act'') and is a member of the NASD. The Distributor enters into selling group agreements with affiliated and unaffiliated broker-dealers. The Contracts are sold by licensed insurance agents, where the Contracts may be lawfully sold, who are registered representatives of broker-dealers that are registered under the 1934 Act and are members of the NASD.

4. The Contracts require a minimum initial premium payment of $5,000 or $10,000 under most circumstances depending on the contract ($2,000 for a qualified plan contract). Subsequent payments may be made at any time during the accumulation phase. Each subsequent payment must be at least $500 ($50 under an automatic payment plan). Prior approval of Jackson National is required for aggregate premium payments of over $1,000,000.

5. The Contracts permit owners to accumulate contract values on a fixed basis through allocations to one of six fixed accounts (the ''Fixed Accounts''), including four ''Guaranteed Fixed Accounts'' which offer guaranteed crediting rates for specified periods of time (currently, 1, 3, 5, or 7 years), and two ''DCA+ Fixed Accounts'' (used in

connection with dollar cost averaging transfers, each of which from time to time offers special crediting rates).

6. The Contracts also permit owners to accumulate contract values on a variable basis, through allocations to one or more of the investment divisions of the JNL Separate Accounts (the ''Investment Divisions,'' collectively with the Fixed Accounts, the ''Allocation Options''). The 67 Investment Divisions listed in Exhibit E to the Application for an Amended Order currently are expected to be offered under most of the Contracts, but additional Investment Divisions may be offered in the future and some of those listed could be eliminated or combined with other Investment Divisions in the future. Similarly, Future Contracts may offer additional or different Investment Divisions.

7. Transfers among the Investment Divisions are permitted. The first 15 transfers in a contract year are free; subsequent transfers cost $25. Certain transfers to, from and among the Fixed Accounts are also permitted during the Contracts' accumulation phase, but are subject to certain adjustments and limitations. Dollar cost averaging and rebalancing transfers are offered at no charge and do not count against the 15 free transfers permitted each year.

8. If the owner dies during the accumulation phase of the Contracts, the beneficiary named by the owner is paid a death benefit by Jackson National. The Contracts' base death benefit, which applies unless an optional death benefit has been elected, is a payment to the beneficiary of the greater of: (i) Contract value on the date Jackson National receives proof of death and completed claim forms from the beneficiary or (ii) the total premiums paid under that Contract minus any prior withdrawals (including any applicable charges and adjustments for such withdrawals, annual contract maintenance charges, transfer charges, any applicable charges due under any optional endorsement and premium taxes).

9. The owner may also be offered certain optional endorsements (for fees described below) that can change the death benefit paid to the beneficiary. First, an ''Earnings Protection Benefit Endorsement'' is offered to owners who are no older than age 75 when their Contracts are issued. This endorsement would add to the death benefit otherwise payable an amount equal to a specified percentage (that varies with the owner's age at issue) of earnings under the Contract up to a cap of 250% of remaining premiums (premiums not previously withdrawn) excluding remaining premiums paid in the 12 months prior to the date of death (other than the initial premium if the owner dies in the first contract year).

10. Second, the owner of a Contract who is age 79 or younger may be offered the following five optional death benefits (state variations may apply) that would replace the base death benefit: (i) A ''4% Roll-Up'' death benefit, (ii) a ''5% Roll-Up'' death benefit, (iii) a ''Highest Anniversary Value'' death benefit, (iv) a ''Combination 4% Roll-Up and Highest Anniversary Value'' death benefit or (v) a ''Combination 5% Roll-Up and Highest Anniversary Value'' death benefit.

11. The Contracts offer fixed and variable versions of the following four types of annuity payment or ''income payment'': Life income, joint and survivor, life annuity with 120 or 240 monthly payments guaranteed to be paid (although not guaranteed as to amount if variable), and income for a specified period of 5 to 30 years. Jackson National may also offer other income payment options. The Contracts may also offer an optional Guaranteed Minimum Income Benefit (''GMIB'') endorsement.

12. In addition to the Earnings Protection Benefit, GMIB, and optional death benefit endorsements described above and the optional contract enhancement endorsements described below, additional optional endorsements are offered with the Contracts, several of which relate to withdrawals: (i) An endorsement that expands the percentage of premiums (that remain subject to a withdrawal charge) that may be withdrawn in a contract year with no withdrawal charge imposed from 10% to 20%; (ii) an endorsement that reduces the withdrawal charges applicable under the Contract and shortens the period for which withdrawal charges are imposed from seven years to five years or four years; and (iii) eight different Guaranteed Minimum Withdrawal Benefit (''GMWB'') endorsements. Three variations of the GMWB generally allow, subject to specific conditions, partial withdrawals prior to the income date that, in total, equal the amount of net premium payments made (if elected after issue, the contract value, less any recapture charges will be used instead of the net premium payment at issue). The guarantee is effective if gross partial withdrawals taken within any one contract year do not exceed a specified percentage of net premium payments.

13. If one of the optional contract enhancement endorsements is elected, each time an owner makes a premium payment during the first contract year, Jackson National will add an additional amount to the owner's contract value (a ''Contract Enhancement''). All Contract Enhancements are paid from Jackson National's general account assets. The Contract Enhancement is equal to 2%, 3%, 4%, or 5% of the premium payment. At issue, a Contract owner can choose only one of the Contract Enhancement endorsements. An owner may not elect the 3%, 4%, or 5% Contract Enhancements if the 20% additional free withdrawal endorsement is elected. Jackson National will allocate the Contract Enhancement to the Fixed Accounts and/or Investment Divisions in the same proportion as the premium payment allocation. The Contract Enhancement is not credited to any premiums received after the first contract year. If the 5% Contract Enhancement is elected, no premiums will be accepted after the first year.

14. There is an asset-based charge for each of the Contract Enhancements. The 2% Contract nhancement has a 0.395% charge that applies for five years. The asset-based charges for the other Contract Enhancements apply for seven years and are 0.42%, 0.56%, and 0.695%, respectively, for the 3%, 4%, and 5% Contract Enhancements. These charges will also be assessed against any amounts an owner has allocated to the Fixed Accounts, resulting in a lower annual credited interest rate that would apply to the Fixed Account if the Contract Enhancement had not been elected.

15. Jackson National will recapture all or a portion of any Contract Enhancements by imposing a recapture charge whenever an owner: (i) Makes a total withdrawal within the recapture charge period (five years after a first year payment in the case of the 2% Contract Enhancement and seven years after a first year payment in the case of the other Contract Enhancements) or a partial withdrawal of corresponding premiums within the recapture charge period in excess of those permitted under the Contracts' free withdrawal provisions (including free withdrawals permitted by a 20% additional free withdrawal endorsement), unless the withdrawal is made for certain health-related emergencies specified in the Contracts; (ii) elects to receive payments under an income option within the recapture charge period; or (iii) returns the Contract during the free-look period.

16. The amount of the recapture charge varies, depending upon which Contract Enhancement is elected and when the charge is imposed, as follows:

CONTRACT ENHANCEMENT RECAPTURE CHARGE

[As a percentage of first year premium payments]

Completed Years Since Receipt of Premium	0	1	2	3	4	5	6	7+
Recapture Charge (2% Credit)	2%	2%	1.25%	1.25%	0.5%	0	0	0
Recapture Charge (3% Credit)	3%	3%	2%	2%	2%	1%	1%	0
Recapture Charge (4% Credit)	4%	4%	2.5%	2.5%	2.5%	1.25%	1.25%	0
Recapture Charge (5% Credit)	4.5%	3.75%	3.25%	2.75%	2%	1.25%	1%	0

17. The recapture charge percentage will be applied to the corresponding premium reflected in the amount withdrawn or the amount applied to income payments that remain subject to a withdrawal charge. The amount recaptured will be taken from the Investment Divisions and the Fixed Accounts in the same proportion as the withdrawal charge.

18. Recapture charges will be waived upon death, but will be applied upon electing to commence income payments, even in a situation where the withdrawal charge is waived. Partial withdrawals will be deemed to remove premium payments on a first-in first-out basis (the order that entails payment of the lowest withdrawal and recapture charges).

19. Jackson National does not assess the recapture charge on any payments paid out as: Death benefits; withdrawals taken under free withdrawal provisions; withdrawals necessary to satisfy the required minimum distribution of the Internal Revenue Code; if permitted by the owner's state, withdrawals of up to $250,000 from the JNL Separate Account or from the Fixed Accounts in connection with the owner's terminal illness or if the owner needs extended hospital or nursing home care as provided in the Contract; or if permitted by the owner's state, withdrawals of up to 25% of contract value (12.5% for each of two joint owners) from the JNL Separate Account or from the Fixed Accounts in connection with certain serious medical conditions specified in the Contract.

20. The contract value will reflect any gains or losses attributable to a Contract Enhancement described above. Contract Enhancements, and any gains or losses attributable to a Contract Enhancement, distributed under the Contracts will be considered earnings under the Contract for tax purposes and for purposes of calculating free withdrawal amounts.

21. The Contracts have a ''free-look'' period of ten days after the owner receives the Contract (or any longer period required by state law). Contract value is returned upon exercise of free-look rights by an owner unless state law requires the return of premiums paid. The Contract Enhancement recapture charge reduces the amount returned.

22. The JNL Separate Account consists of sub-accounts, each of which will be available under the JNL Separate Account. The sub-accounts are referred to as ''Investment Divisions.'' The JNL Separate Account currently consists of 67 Investment Divisions, and each Investment Division will invest in shares of a corresponding series (''Series'') of JNL Series Trust (''Trust''), or JNL Variable Fund LLC (''Fund'') (collectively the ''Trust and Fund''). Not all Investment Divisions may be available.

23. The Trust and Fund are open-end management investment companies registered under the Act and their shares are registered under the 1933 Act. Jackson National Asset Management, LLC (''JNAM'') serves as the investment adviser for all of the Series of the Trust and Fund. JNAM has retained sub-advisers for each Series. Jackson National, at a later date, may determine to create additional Investment Divisions of the JNL Separate Account to invest in any additional Series, or other such underlying portfolios or other investments as may now or in the future be available. Similarly, Investment Division(s) of the JNL Separate Account may be combined or eliminated from time to time. Any changes to the Investment Divisions offered will be effected in compliance with the terms of the Contracts and with applicable state and federal laws.

24. In addition to the Contract Enhancement charges and the Contract Enhancement recapture charges, the JNL Contracts may have the following charges: Mortality and expense risk charge of 1.00%–1.45% depending on the version of the Contract (as an annual percentage of average daily account value); administration charge of 0.15% (as an annual percentage of average daily account value); contract maintenance charge of $35 per year (waived if contract value is $50,000 or more at the time the charge is imposed); Earnings Protection Benefit charge of 0.30% (as an annual percentage of daily account value—only applies if related optional endorsement is elected); GMIB charge of 0.60% per year (0.15% per quarter) of the ''GMIB Benefit Base''; GMWB charge ranging from 0.20% to 1.71% per year (0.1000% to 0.4250% per quarter) of the ''Guaranteed Withdrawal Balance'' depending upon age at election and upon which (if any) GMWB endorsement is elected; 20% additional free withdrawal benefit charge of 0.30% or 0.40% depending on the Contract (as an annual percentage of daily account value—only applies if related optional endorsement is elected); five-year withdrawal charge period charge of 0.30% (as an annual percentage of daily account value—only applies if related optional endorsement is elected); four-year withdrawal charge period charge of 0.40% (as an annual percentage of daily account value—only applies if related optional endorsement is elected); optional death benefit charge ranging from 0.25% to 0.55% (as an annual percentage of daily account value—only applies if related optional endorsement is elected) depending upon which (if any) optional death benefit endorsement is elected; transfer fee of $25 for each transfer in excess of 15 in a contract year (for purposes of which dollar cost averaging and rebalancing transfers are excluded); commutation fee that applies only upon withdrawals from income payments for a fixed period, measured by the difference in values paid upon such a withdrawal due to using a discount rate of 1% greater than the assumed investment rate used in computing the amounts of income payments; and a withdrawal charge that applies to total withdrawals, partial withdrawals in excess of amounts permitted to be withdrawn under the Contract's free withdrawal provisions (or the 20% additional free withdrawal endorsement) and on the income date (the date income payments commence) if the income date is within a year of the date the Contract was issued.

25. The withdrawal charges shown in the table below apply to differing versions of Contracts. The amount of the withdrawal charge depends upon the contribution year of the premium withdrawn as follows:

WITHDRAWAL CHARGE

[As a percentage of premium payments]

Completed Years Since Receipt of Premium	0	1	2	3	4	5	6	7+
Withdrawal Charge (Base Schedule for Offerings under File Nos. 333–70472 and 333–132128)	8.5%	8%	7%	6%	5%	4%	2%	0
Withdrawal Charge (Base Schedule for Offering under File No. 333–119656)	8%	8%	7%	6%	0	0	0	0
Withdrawal Charge if Five-Year Period is elected (Optional Schedule for Offerings under File No. 333–70472)	8%	7%	6%	4%	2%	0	0	0
Withdrawal Charge if Four-Year Period is elected (Optional Schedule for Offering under File No. 333–132128)	8%	7%	5.5%	3.5%	0	0	0	0

26. The withdrawal charge is waived upon withdrawals to satisfy the required minimum distribution of the Internal Revenue Code (if the withdrawal requested exceeds the required minimum distribution, the withdrawal charge will not be waived on the required minimum distribution) and, to the extent permitted by state law, the withdrawal fee is waived in connection with withdrawals of: (i) Up to $250,000 from the Investment Divisions or the Fixed Accounts of the Contracts in connection with the terminal illness of the owner of a Contract, or in connection with extended hospital or nursing home care for the owner; and (ii) up to 25% (12.5% each for two joint owners) of contract value in connection with certain serious medical conditions specified in the Contract.

Applicants' Legal Analysis

1. Applicants state that Section 6(c) of the Act authorizes the Commission to exempt any person, security or transaction, or any class or classes of persons, securities or transactions from the provisions of the Act and the rules promulgated thereunder if and to the extent that such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act. Applicants request that the Commission, pursuant to Section 6(c) of the Act, grant the exemptions requested below with respect to the Contracts and any Future Contracts funded by the JNL Separate Account or Other Accounts that are issued by Jackson National and underwritten or distributed by the Distributor or Affiliated Broker-Dealers. Applicants undertake that Future Contracts funded by the Separate Account or Other Accounts, in the future, will be substantially similar in all material respects to the Contracts. Applicants believe that the requested exemptions are appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act.

2. Applicants state that Subsection (i) of Section 27 of the Act provides that Section 27 does not apply to any registered separate account funding variable insurance contracts, or to the sponsoring insurance company and principal underwriter of such account, except as provided in paragraph (2) of the subsection. Paragraph (2) provides that it shall be unlawful for such a separate account or sponsoring insurance company to sell a contract funded by the registered separate account unless such contract is a redeemable security. Section 2(a)(32) defines ''redeemable security'' as any security, other than short-term paper, under the terms of the which the holder, upon presentation to the issuer, is entitled to receive approximately his proportionate share of the issuer's current net assets, or the cash equivalent thereof.

3. Applicants submit that the recapture of the Contract Enhancement in the circumstances set forth in its Application would not deprive an owner of his or her proportionate share of the issuer's current net assets. A Contract owner's interest in the amount of the Contract Enhancement allocated to his or her contract value upon receipt of a premium payment is not fully vested until five or seven complete years following a premium. Until or unless the amount of any Contract Enhancement is vested, Jackson National retains the right and interest in the Contract Enhancement amount, although not in the earnings attributable to that amount. Thus, Applicants urge that when Jackson National recaptures any Contract Enhancement it is simply retrieving its own assets, and because a Contract owner's interest in the Contract Enhancement is not vested, the Contract owner has not been deprived of a proportionate share of the JNL Separate Account's assets, *i.e.*, a share of the JNL Separate Account's assets proportionate to the Contract owner's contract value.

4. In addition, Applicants represent that it would be patently unfair to allow a Contract owner exercising the free-look privilege to retain the Contract Enhancement amount under a Contract that has been returned for a refund after a period of only a few days. If Jackson National could not recapture the Contract Enhancement, individuals could purchase a Contract with no intention of retaining it and simply return it for a quick profit. Furthermore, Applicants state that the recapture of the Contract Enhancement relating to withdrawals or receiving income payments within the first five or seven years of a premium contribution is designed to protect Jackson National against Contract owners not holding the Contract for a sufficient time period. It would provide Jackson National with insufficient time to recover the cost of the Contract Enhancement, to its financial detriment.

5. Applicants represent that it is not administratively feasible to track the Contract Enhancement amount in the JNL Separate Account after the Contract Enhancement(s) is applied. Accordingly, the asset-based charges applicable to the JNL Separate Account will be assessed against the entire amounts held in the JNL Separate Account, including any Contract Enhancement amounts. As a result, the aggregate asset-based charges assessed will be higher than those that would be charged if the Contract owner's contract value did not include any Contract Enhancement.

6. Applicants submit that the provisions for recapture of any Contract Enhancement under the Contracts do not violate Sections 2(a)(32) and 27(i)(2)(A) of the Act. Sections 26(e) and 27(i) were added to the Act to implement the purposes of the National Securities Markets Improvement Act of 1996 and Congressional intent. The application of a Contract Enhancement

to premium payments made under the Contracts should not raise any questions as to compliance by Jackson National with the provisions of Section 27(i). However, to avoid any uncertainty as to full compliance with the Act, Applicants request an Amended Order providing exemption from Section 2(a)(32) and 27(i)(2)(A), to the extent deemed necessary, to permit the recapture of the Contract Enhancements, including the 5% Contract Enhancement under the circumstances described herein and in the Application, without the loss of relief from Section 27 provided by Section 27(i).

7. Applicants state that Section 22(c) of the Act authorizes the Commission to make rules and regulations applicable to registered investment companies and to principal underwriters of, and dealers in, the redeemable securities of any registered investment company to accomplish the same purposes as contemplated by Section 22(a). Rule 22c–1 under the Act prohibits a registered investment company issuing any redeemable security, a person designated in such issuer's prospectus as authorized to consummate transactions in any such security, and a principal underwriter of, or dealer in, such security, from selling, redeeming, or repurchasing any such security except at a price based on the current net asset value of such security which is next computed after receipt of a tender of such security for redemption or of an order to purchase or sell such security.

8. Applicants state that it is possible that someone might view Jackson National's recapture of the Contract Enhancements as resulting in the redemption of redeemable securities for a price other than one based on the current net asset value of the JNL Separate Account. Applicants contend, however, that the recapture of the Contract Enhancement does not violate Rule 22c–1. The recapture of some or all of the Contract Enhancement does not involve either of the evils that Section 22(c) and Rule 22c–1 were intended to eliminate or reduce as far as reasonably practicable, namely: (i) The dilution of the value of outstanding redeemable securities of registered investment companies through their sale at a price below net asset value or repurchase at a price above it, and (ii) other unfair results, including speculative trading practices. To effect a recapture of a Contract Enhancement, Jackson National will redeem interests in a Contract owner's contract value at a price determined on the basis of the current net asset value of the JNL Separate Account. The amount recaptured will be less than or equal to the amount of the Contract Enhancement that Jackson National paid out of its general account assets. Although Contract owners will be entitled to retain any investment gains attributable to the Contract Enhancement and to bear any investment losses attributable to the Contract Enhancement, the amount of such gains or losses will be determined on the basis of the current net asset values of the JNL Separate Account. Thus, no dilution will occur upon the recapture of the Contract Enhancement. Applicants also submit that the second harm that Rule 22c–1 was designed to address, namely, speculatively trading practices calculated to take advantage of backward pricing, will not occur as a result of the recapture of the Contract Enhancement. Because neither of the harms that Rule 22c–1 was meant to address is found in the recapture of the Contract Enhancement, Rule 22c–1 should not apply to any Contract Enhancement. However, to avoid any uncertainty as to full compliance with Rule 22c–1, Applicants request an Amended Order granting an exemption from the provisions of Rule 22c–1 to the extent deemed necessary to permit them to recapture the Contract Enhancement under the Contracts.

9. Applicants submit that extending the requested relief to encompass Future Contracts and Other Accounts is appropriate in the public interest because it promotes competitiveness in the variable annuity market by eliminating the need to file redundant exemptive applications prior to introducing new variable annuity contracts. Investors would receive no benefit or additional protection by requiring Applicants to repeatedly seek exemptive relief that would present no issues under the Act not already addressed in the Application.

Applicants submit, for the reasons stated herein, that their exemptive request meets the standards set out in Section 6(c) of the Act, namely, that the exemptions requested are appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act and that, therefore, the Commission should grant the requested order.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Nancy M. Morris,

Secretary.

[FR Doc. E6–22009 Filed 12–22–06; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–54943; File No. SR–Amex–2006–90]

Self-Regulatory Organizations; American Stock Exchange LLC; Notice of Filing of a Proposed Rule Change as Revised by Amendment Nos. 1 and 2 Thereto Relating to the Listing and Trading of Notes Linked to the Performance of the Hang Seng China Enterprises Index

December 15, 2006.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934, as amended (''Act'') [1] and Rule 19b–4 thereunder,[2] notice is hereby given that on September 22, 2006, the American Stock Exchange LLC (''Amex'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I and II below, which Items have been substantially prepared by Amex. On November 15, 2006, Amex submitted Amendment No. 1 to the proposed rule change.[3] On December 12, 2006, Amex submitted Amendment No. 2 to the proposed rule change.[4] The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to list and trade notes linked to the performance of the Hang Seng China Enterprises Index (''Index''). The text of the proposed rule change (including Appendix A) is available on Amex's Web site at *http://www.amex.com*, at Amex's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, Amex included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item III below. Amex has prepared summaries, set forth in Sections A, B,

[1] 15 U.S.C. 78s(b)(l).

[2] 17 CFR 240. 19b–4.

[3] Amendment No. 1 supersedes and replaces the original rule filing in its entirety.

[4] Amendment No. 2 supersedes and replaces the original rule filing and Amendment No. 1 in their entirety.

and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

Under Section 107A of the Amex Company Guide, the Exchange may approve for listing and trading securities which cannot be readily categorized under the listing criteria for common and preferred stocks, bonds, debentures, or warrants.[5] Amex proposes to list for trading under Section 107A of the Company Guide notes linked to the performance of the Index (''Notes''). Citigroup Funding Inc. (''Issuer'') will issue the Notes under the name ''Stock Market Upturn Notes.'' The Notes provide for a multiplier of any positive performance of the Index during the stated term, subject to a maximum payment amount or ceiling to be determined at the time of issuance (''Capped Value'').[6]

The Notes would conform to the initial listing guidelines under Section 107A [7] and continued listing guidelines under Sections 1001–1003 [8] of the Company Guide. The Notes would be senior non-convertible debt securities of the Issuer. The Issuer would issue the Notes on an ''Issue Date'' approximately three business days after the ''Trade Date'' (as defined below) in denominations of whole units, with each unit representing a single Note. The Notes would mature on March 7, 2008 (''Maturity Date'') approximately 1.5 years after the Issue Date. The original public offering price would be $10 per Note. The Notes would entitle the owner at maturity to receive an amount based upon the percentage change of the Index. The Notes would not have a minimum principal amount that would be repaid; accordingly, payment on the Notes prior to or at maturity might be less than the original issue price of the Notes.[9] The Notes would not be callable by the issuer, Citigroup, or redeemable by the holder.

The payment that a holder or investor of a Note would be entitled to receive (''Redemption Amount'') would depend on the relation of: (1) The level of the Index at the close of the market on a single business day, March 4, 2008 (''Valuation Date''), shortly prior to maturity of the Notes (''Final Index Level''); and (2) the closing value of the Index on the date the Notes are priced for initial sale to the public (''Initial Index Level''). If there is a ''Market Disruption Event'' (as defined below) when determining the Final Index Level, the Final Index Level may be deferred up to two business days if deemed appropriate by the calculation agent.

Depending upon whether the Final Index Level (as defined below) is less than or equal to or greater than the Initial Index Level (as defined below), the Notes would entitle the owner at maturity to receive:

• *If the Final Index Level is less than or equal to Initial Index Level:*

$$\$10+\left(\$10\times\left(\frac{(\text{Final Index Level}-\text{Initial Index Level})}{\text{Initial Index Level}}\right)\right)$$

• *If the Final Index Level is greater than Initial Index Level:*

$$\$10+\left(\$10\times\left(\frac{(\text{Final Index Level}-\text{Initial Index Level})}{\text{Initial Index Level}}\right)\times\text{Participation Rate}\right),\ \text{not to exceed the Capped Value}$$

The Initial Index Level would be the closing level of the Index on August 24, 2006, the date the Notes priced for initial sale to the public (''Trade Date'') and the Final Index Level would be the closing level of the Index on the Valuation Date on March 4, 2008. The Participation Rate (in the formula above) is 300%.

The Hang Seng China Enterprises Index

The Hang Seng China Enterprises Index was launched on August 8, 1994, to track the performance of the shares of all Chinese enterprises listed on the Stock Exchange of Hong Kong (''H-Shares''). This was one year after the first H-Share company was listed on the Stock Exchange of Hong Kong. Before the launch of the 200-stock Hang Seng Composite Index (''HSCI'') on October 3, 2001, the Index included all H-Shares listed on the Main Board of the Stock Exchange of Hong Kong, but after the launch of the HSCI, the Index contains only those components that are included in the HSCI. Constituents of the Index comprise only the largest H-

[5] *See* Securities Exchange Act Release No. 27753 (March 1, 1990), 55 FR 8626 (March 8, 1990) (order approving File No. SR–Amex–89–29).

[6] The Exchange submits that the proposal is similar to several instruments that it currently lists and trades. *See* Securities Exchange Act Release No. 51563 (April 15, 2005), 70 FR 21257 (April 25, 2005) (SR–Amex–2005–01); Securities Exchange Act Release No. 51227 (February 18, 2005), 70 FR 9395 (February 25, 2005) (SR–Amex–2005–010); and Securities Exchange Act Release No. 50016 (July 14, 2004), 69 FR 43639 (July 21, 2004) (SR–Amex–2004–43).

[7] The initial listing standards for the Notes require: (1) A market value of at least $4 million and (2) a minimum public distribution requirement of one million trading units with a minimum of 400 public shareholders. In addition, the listing guidelines require that the issuer have assets in excess of $100 million and stockholders' equity of at least $10 million, and pre-tax income of at least $750,000 in the last fiscal year or in two of the three prior fiscal years. In the case of an issuer which is unable to satisfy the earning criteria stated in Section 101 of the Company Guide, the Exchange requires the issuer to have the following: (1) Assets in excess of $200 million and stockholders' equity of at least $10 million; or (2) assets in excess of $100 million and stockholders' equity of at least $20 million.

[8] The Exchange's continued listing guidelines are set forth in Sections 1001 through 1003 of Part 10 to the Exchange's Company Guide. Section 1002(b) of the Company Guide states that the Exchange would consider removing from listing any security where, in the opinion of the Exchange, it appears that the extent of public distribution or aggregate market value has become so reduced to make further dealings on the Exchange inadvisable. With respect to continued listing guidelines for distribution of the Notes, the Exchange would rely, in part, on the guidelines for bonds in Section 1003(b)(iv). Section 1003(b)(iv)(A) provides that the Exchange would normally consider suspending dealings in, or removing from the list, a security if the aggregate market value or the principal amount of bonds publicly held is less than $400,000.

[9] A negative return of the Index would reduce the redemption amount at maturity with the potential that the holder of the Note could lose his entire investment amount.

Shares companies that are included in the HSCI. The Index is a capitalization-weighted index. The base value of the Index is 2000 as of January 3, 2000. The Index replaced the old HSCE index on October 3, 2001. The Index components are subject to review semi-annually at the same time as the HSCI. H-Share companies joining or leaving the HSCI are automatically included or excluded from the Index.

As of July 31, 2006, the Index consisted of H-Shares of 38 separate entities. Information relating to the Index and components is available on the Web site for the Stock Exchange of Hong Kong at *http://www.hkex.com.hk*, Hang Seng Indexes at *http://www.hsi.com.hk*, as well as various market data vendors and financial news publications.

Annual Reweighting and Rebalancing of the Index

The Index is published and compiled by HSI Services Limited, a wholly owned subsidiary of Hang Seng Bank.[10] The Index is reviewed twice each year at the same time the HSCI is reviewed. As previously mentioned, H-Share companies joining or leaving the HSCI are automatically included or excluded from the Index. The weightings (freefloat-adjusted market capitalization weightings, described below) for the Index, as well as any associated Cap Factors (described below), are reviewed and announced generally twice each year within the first six weeks of Q1 and Q3 under the supervision of HSI Services Limited. The current weightings, as listed in *Appendix A*, were updated on August 11, 2006, which resulted in 37 companies being included in the Index.

To ensure that no H-Share company has a weighting exceeding 15%, a Cap Factor (''CF'') is calculated based on market value as of each regular semi-annual review date. A review of the CF is conducted semi-annually to coincide with the regular review of the freefloat-adjusted market capitalization weightings for the Index. For constituents whose weightings do not exceed 15% of the Index, the CF is set at 100% and for those constituents whose weightings exceed 15% of the Index, the CF is set so as to ensure the weighting does not exceed 15% as of the semi-annual review date. Individual constituent weightings may exceed 15% during the periods between the semi-annual reviews. The current CFs for the Index were set as of September 8, 2006, with a CF of 100% for all constituent companies other than PetroChina (CF of 77.66%).

A freefloat-adjusted market capitalization weighting with a cap of 15% for the H-Share portion of each constituent company has been adopted for the Index calculation since March 6, 2006. The freefloat adjustment is calculated by excluding the following types of holdings:

- Shares held by strategic shareholder(s) who individually or collectively control more than 30% of the shareholdings (''Strategic Holdings'');
- Shares held by director(s) who individually control more than 5% of the shareholdings (''Directors' Holdings'');
- Shares held by a Hong Kong-listed company which controls more than 5% of the shareholdings as investments (''Cross-Holdings''); and
- Shares held by shareholder(s) who individually or collectively represent more than 5% of the shareholdings in the company and with a publicly disclosed lock-up arrangement (''Lock-Up Shares'').

The data used for the freefloat adjustment are taken from publicly available sources, including annual reports and Securities Notification History Reports from Hong Kong Exchanges and Clearing Limited.

Index Calculation Disruption Events

From time to time, disruptions can occur in trading on exchanges. The daily calculation of the Index would be adjusted in the event of the occurrence or existence of any suspension of or limitation imposed on trading (by reason of movements in price exceeding limits permitted by any relevant exchange or market or otherwise) of, or the unavailability, through a recognized system of public dissemination of transaction information, for a period longer than two hours, or during the one-half hour period preceding the close of trading, on the applicable exchange or market, of accurate price, volume or related information in respect of:

(1) Stocks which then comprise 20% or more of the value of the Hang Seng China Enterprises Index or any successor index;

(2) Any options or futures contracts, or any options on such futures contracts relating to the Hang Seng China Enterprises Index or any successor index; or

(3) Any options or futures contracts relating to stocks which then comprise 20% or more of the value of the Hang Seng China Enterprises Index or any successor index on any exchange or market, if in each case, any such suspension, limitation, or unavailability is considered to be material by Citigroup Global Markets (each, a ''Market Disruption Event'').[11]

In the case of a temporary disruption in connection with the trading of the H-Shares comprising the Index or a Market Disruption Event, the Exchange believes that it is unnecessary for a filing pursuant to Section 19(b) under the Act to be submitted to the Commission. The Exchange submits that for a temporary disruption of said securities or a Market Disruption Event, the Exchange would typically use the last available price, except that if and to the extent determined by Citigroup Global Markets the value of the Index for that day would be the arithmetic mean of the value of the Index obtained from as many dealers in equity securities, but not exceeding three such dealers (''fair value'' pricing). The Exchange represents that, if the use of the last available price or ''fair value'' pricing for an Index constituent or the Index is more than of a temporary nature, the Exchange will submit a proposed rule change pursuant to Rule 19b–4 seeking the Commission's approval to continue to trade the Notes. Unless approved for continued trading, the Exchange would commence delisting proceedings.

Exchange Rules Applicable to the Notes

The Notes are cash-settled in U.S. dollars and do not give the holder any right or other ownership interest in the Index or commodities comprising the Index. The Notes are designed for investors who desire to participate in, or gain exposure to, an index composed of H-Shares and are willing to hold the investment to maturity.

The Notes would trade as equity securities subject to Amex equity trading rules including, among others, rules governing priority, parity, and precedence of orders; specialist responsibilities; account opening, and customer suitability requirements. In addition, the Notes would be subject to the equity margin rules of the Exchange.[12] The Exchange would, prior to trading the Notes, distribute a circular to the membership providing guidance with regard to member firm compliance

[10] HSI Services Limited is a member of the Hang Seng Bank Group and affiliated with broker dealers. HSI Services Limited has represented to the Exchange that the following exist: (1) Appropriate firewalls to ensure independence of operations among different units within the Hang Seng Group; and (2) policies and procedures containing among other things, insider trading prohibitions, designed to prevent conflicts of interest.

[11] Options and futures contracts relating to the Index, the Hang Seng China Enterprises Index, or stocks comprising the Hang Seng Enterprises Index are indicators of the liquidity of said stocks or indexes.

[12] *See* Amex Rule 462.

responsibilities (including suitability recommendations) when handling transactions in the Notes and highlighting the special risks and characteristics of the Notes. With respect to suitability recommendations and risks, the Exchange would require members, member organizations, and employees thereof recommending a transaction in the Notes: (1) To determine that such transaction is suitable for the customer; and (2) to have a reasonable basis for believing that the customer can evaluate the special characteristics of, and is able to bear the financial risks of, such transaction. In addition, the Issuer would deliver a prospectus in connection with the initial sales of the Notes.

Criteria for Initial and Continued Listing

The Exchange represents that it prohibits the initial and/or continued listing of any security that is not in compliance with Rule 10A–3 under the Securities Act of 1934.[13] The Exchange also has a general policy that prohibits the distribution of material, non-public information by its employees.

The Exchange represents that it would file a proposed rule change pursuant to Rule 19b–4 under the Act, seeking approval to continue trading the Notes and unless approved, the Exchange would commence delisting the Notes if:

• HSCI substantially changes either the index component selection methodology or the weighting methodology;

• If a new component is added to the Index (or pricing information is used for a new or existing component) that constitutes more than 10% of the weight of the Index with whose principal trading market the Exchange does not have a comprehensive surveillance sharing agreement; or

• If a successor or substitute index is used in connection with the Notes. The filing would address, among other things the listing and trading characteristics of the successor or substitute index and the Exchange's surveillance procedures applicable thereto.

If the Index value does not change during some or all of the period when trading is occurring on the Exchange because of time zone differences or holidays in Hong Kong, then the last official calculated Index value would remain available throughout Exchange trading hours.

[13] *See* 17 CFR 240.10A–3(c)(1).

Trading Halts

The Exchange would halt trading in the Notes if the circuit breaker parameters of Exchange Rule 117 have been reached. In exercising its discretion to halt or suspend trading in the Notes, the Exchange may consider factors such as those set forth in Exchange Rule 918C(b), in addition to other factors that may be relevant. In particular, if the Index value is not being disseminated as required, the Exchange may halt trading during the day in which the interruption to the dissemination of the Index value occurs. If the interruption to the dissemination of the Index value persists past the trading day in which it occurred, the Exchange would halt trading no later than the beginning of the trading day following the interruption.

The Exchange represents that its surveillance procedures are adequate to properly monitor the trading of the Notes. Amex, has stated that it would rely on its existing surveillance procedures governing index-linked securities. The Exchange currently has in place an Information Sharing Agreement with the Stock Exchange of Hong Kong for the purpose of providing information in connection with trading in or related to the components comprising the Index.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6 of the Act[14] in general and furthers the objectives of Section 6(b)(5)[15] in particular in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanism of a free and open market and a national market system.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange did not receive any written comments on the proposed rule change.

[14] 15 U.S.C. 78f(b).

[15] 15 U.S.C. 78f(b)(5).

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) As the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve such proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

Amex has requested accelerated approval of this proposed rule change, as amended, prior to the 30th day after the date of publication of the notice of the filing thereof, following the conclusion of a 15-day comment period. The Commission has determined that a 15-day comment period is appropriate before taking any action.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as amended, is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

• Use the Commission's Internet comment form at *http://www.sec.gov/rules/sro.shtml* or send an e-mail to *rule-comments@sec.gov.* Please include File No. SR–Amex–2006–90 on the subject line.

Paper Comments

• Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File No. SR–Amex–2006–90. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site at *http://www.sec.gov/rules/sro.shtml.* Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the

Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR–Amex–2006–90 and should be submitted on or before January 10, 2007.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[16]

Nancy M. Morris

Secretary.

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[16] 17 CFR 200.30–3(a)(12).

Appendix A

As of July 31, 2006

Constituent Weightings Name	% Weight
PetroChina Co Ltd	16.17%
China Construction Bank	13.05%
China Life Insurance Co Ltd	11.92%
Bank of Communications Co Ltd	9.04%
China Petroleum & Chemical Corp	9.02%
China Shenhua Energy Co Ltd	5.82%
China Telecom Corp Ltd	4.40%
Ping An Insurance Group Co of China Ltd	4.34%
Aluminum Corp of China Ltd	2.52%
Huaneng Power International Inc	1.87%
Zijin Mining Group Co Ltd	1.63%
Yanzhou Coal Mining Co Ltd	1.35%
Jiangxi Copper Co Ltd	1.29%
Dongfeng Motor Group Co Ltd	1.14%
Sinopec Shanghai Petrochemical Co Ltd	1.08%
Shanghai Electric Group Co Ltd	1.05%
China Shipping Development Co Ltd	1.03%
Guangzhou R&F Properties Co Ltd	0.96%
COSCO Holdings	0.92%
Air China Ltd	0.90%
PICC Property & Casualty Co Ltd	0.87%
Datang International Power Generation Co	0.86%
Zhejiang Expressway Co Ltd	0.86%
Beijing Capital International Airport Co	0.80%
China Oilfield Services Ltd	0.78%
Anhui Conch Cement Co Ltd	0.69%
Jiangsu Express	0.68%
Angang New Steel Co Ltd	0.67%
China Shipping Container Lines Co Ltd	0.54%
Guangshen Railway Co Ltd	0.54%
Maanshan Iron & Steel	0.52%
Sinotrans Ltd	0.52%
Weiqiao Textile Co	0.48%
ZTE Corp	0.45%
Huadian Power International Co	0.35%
Tsingtao Brewery Co Ltd	0.35%
Byd Co Ltd	0.34%
China Southern Airlines Co Ltd	0.21%

[FR Doc. 06–9844 Filed 12–22–06; 8:45 am]

BILLING CODE 8011–01–C

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–54949; File No. SR–BSE–2006–53]

Self-Regulatory Organizations; Boston Stock Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change and Amendment No. 1 Thereto To Allow Exchange Traded Funds To Trade on the Boston Equities Exchange Until 4:15 p.m. Eastern Standard Time

December 18, 2006.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 30, 2006, the Boston Stock Exchange, Inc. (''Exchange'' or ''BSE'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II and III below, which Items have been substantially prepared by the Exchange. On December 14, 2006, the BSE submitted Amendment No. 1 to the proposed rule change. The Exchange filed the proposed rule change pursuant to Section 19(b)(3)(A) of the Act [3] and Rule 19b–4(f)(6) thereunder,[4] which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The BSE proposes to allow Exchange Traded Funds, or ETFs, to trade on the Boston Equities Exchange (''BeX'') until 4:15 p.m. Eastern Standard Time each business day. Additionally, by this filing the BSE is providing notice to its Members that the Good Till Time order type will not be available for approximately six to eight weeks following the November 20, 2006 launch of the BeX marketplace. The BSE will provide its Members with at least one day's notice of the date Good Till Time order types will be accepted on BeX.

The text of the proposed rule changes is available on the Exchange's Web site (*http://www.bse.com*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

On June 13, 2006, the BSE filed Amendment No. 3 to SR–BSE–2006–22, a rule filing submitted in connection with the implementation of the first of two phases of BeX, a fully automated electronic book for the display and execution of orders in securities. On August 25, 2006, SR–BSE–2006–22 was approved by the Commission.[5] On August 3, 2006, the BSE filed, in connection with the implementation of the second phase of the BeX trading system and in connection with satisfying the requirements of Regulation NMS, SR–BSE–2006–30. On September 29, 2006, the Commission approved SR–BSE–2006–30.[6]

The purpose of this filing is to amend the operating hours of the BeX marketplace to reflect that ETFs may trade on BeX until 4:15 p.m. Eastern Standard Time each business day. The Amendment to the filing clarifies that although ETFs may trade on BeX until 4:15 p.m. Eastern Standard Time, ETFs cannot be submitted as Limit or Close Orders, will not participate in the Market on Close Period described in Chapter XXXVII, Section 3(f)(i) of the BSE Rules, and will not be placed in the Authorized Reserve State described in Chapter XXXVII, Section 3(f)(ii) of the BSE Rules. Rather, ETFs will simply cease matching in the BeX system after 4:15 p.m.

Further, by this filing, the BSE is providing notice to its Members that the Good Till Time order type will not be available for approximately six to eight weeks following the November 20, 2006 launch of the BeX marketplace. The BSE will provide its Members with at least one day's notice of the date Good Till Time order types will be accepted on BeX.

2. Statutory Basis

The Exchange believes that the proposal, as amended, is consistent with the requirements of Section 6(b) of the Act,[7] in general, and furthers the objectives of Section 6(b)(5) of the Act,[8] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest.[9]

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (1) Significantly affect the protection of investors or the public interest; (2) impose any significant burden on competition; and (3) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, provided that the Exchange has given the Commission written notice of its intent to file the proposed rule change

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 240.19b–4(f)(6).

[5] *See* Securities Exchange Act Release No. 54365 (Aug. 25, 2006), 71 FR 52192 (Sept. 1, 2006).

[6] *See* Securities Exchange Act Release No. 54546 (Sept. 29, 2006), 71 FR 59161 (Oct. 6, 2006).

[7] 15 U.S.C. 78f(b).

[8] 15 U.S.C. 78f(b)(5).

[9] For purposes of calculating the 60-day period within which the Commission may summarily abrogate the proposed rule change under Section 19(b)(3)(C) of the Act, the Commission considers the period to commence on December 14, 2006, the date on which the BSE filed Amendment No. 1. *See* 15 U.S.C. 78s(b)(3)(C).

at least five business days prior to the filing date of the proposal.[10]

A proposed rule change filed under Rule 19b–4(f)(6) normally may not become operative prior to 30 days after the date of filing.[11] However, Rule 19b–4(f)(6)(iii)[12] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has requested that the Commission waive the 30-day pre-operative period, which would make the rule change operative immediately. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest, because the proposed rule change clarifies how BeX operates in relation to ETFs.[13] For this reason, the Commission designates that the proposal become operative immediately.

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as amended, is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–BSE–2006–53 on the subject line.

Paper Comments

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–BSE–2006–53. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–BSE–2006–53 and should be submitted on or before January 16, 2007.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[14]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E6–22006 Filed 12–22–06; 8:45 am]

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[10] As required under Rule 19b–4(f)(6)(iii), BSE provided the Commission with notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposal.

[11] 17 CFR 240.19b–4(f)(6)(iii).

[12] *Id.*

[13] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[14] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–54953; File No. SR–NASD–2006–134]

Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Extending the Pilot Relating to Manning Price-Improvement Standards for Decimalized Securities

December 18, 2006.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 7, 2006, the National Association of Securities Dealers, Inc. (''NASD'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been substantially prepared by NASD. NASD has designated the proposal as constituting a ''non-controversial'' proposed rule change under Section 19(b)(3)(A) of the Act[3] and Rule 19b–4(f)(6) thereunder,[4] which renders it effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

NASD is proposing to extend through June 30, 2007, the current pilot price-improvement standards for decimalized securities contained in NASD Interpretive Material (''IM'') 2110–2—Trading Ahead of Customer Limit Order (''Manning Rule''). NASD proposes no changes to its rule text.[5]

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, NASD included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. NASD has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

NASD's Manning Rule requires an NASD member firm to provide a minimum level of price improvement to incoming orders in exchange-listed securities if the firm chooses to trade as principal with those incoming orders at a price equal to or better than customer limit orders the firm currently holds. If a firm fails to provide the minimum level of price improvement to the

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 240.19b–4(f)(6).

[5] NASD has proposed changes to the text of NASD IM 2110–2 in a separate filing, SR–NASD–2005–146, which is currently pending at the Commission. *See* Securities Exchange Act Release No. 54705 (November 3, 2006), 71 FR 65863 (November 9, 2006) (Notice of filing of SR–NASD–2005–146). The proposed changes in SR–NASD–2005–146 would amend, among other provisions, the price-improvement standards in NASD IM–2110–2.

incoming order, the firm must execute its held customer limit orders at the price at which the firm traded for its own account or better. Generally, if a firm fails to provide the requisite amount of price improvement and also fails to execute its held customer limit orders, it is in violation of the Manning Rule.

On April 6, 2001,[6] the Commission approved, on a pilot basis, price improvement standards for decimalized securities contained in the Manning Rule. The applicable provision in the current version of the Manning Rule is as follows: [7]

For Nasdaq securities authorized for trading in decimals pursuant to the Decimals Implementation Plan For the Equities and Options Markets, the minimum amount of price improvement necessary in order for a member to execute an incoming order on a proprietary basis in a security trading in decimals when holding an unexecuted limit order in that same security, and not be required to execute the held limit order, is as follows:

(1) For customer limit orders priced at or inside the best inside market displayed in Nasdaq, the minimum amount of price improvement required is $0.01; and

(2) For customer limit orders priced outside the best inside market displayed in Nasdaq, the member must price improve the incoming order by executing the incoming order at a price at least equal to the next superior minimum quotation increment in Nasdaq (currently $0.01).

Since approval, these standards continue to operate on a pilot basis that terminates on December 31, 2006.[8] NASD has determined to seek an extension of its current Manning Rule pilot until June 30, 2007. NASD believes that such an extension provides for an appropriate continuation of the current Manning Rule price improvement standards while the Commission continues to analyze the issues related to customer limit order protection in a decimalized environment. NASD is not proposing any other changes to the pilot at this time. NASD proposes to make the proposed rule change operative on January 1, 2007.

2. Statutory Basis

NASD believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,[9] which requires, among other things, that NASD rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. NASD believes that the proposed rule change will improve treatment of customer limit orders and enhance the integrity of the market.

B. Self-Regulatory Organization's Statement on Burden on Competition

NASD does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received by NASD.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [10] and Rule 19b–4(f)(6) thereunder [11] because the proposal does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest.[12] NASD has requested that the Commission waive the 30-day operative delay and designate the proposed rule change effective immediately. NASD intends for the rule to become operative on January 1, 2007. The Commission hereby grants the request.[13] The Commission believes that such waiver is consistent with the protection of investors and the public interest because it will allow the protection of customer limit orders provided by the pilot to continue without interruption.

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.[14]

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

• Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or

• Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–NASD–2006–134 on the subject line.

Paper Comments

• Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NASD–2006–134. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will

[6] *See* Securities Exchange Act Release No. 44165 (April 6, 2001), 66 FR 19268 (April 13, 2001) (SR–NASD–2001–27).

[7] Pursuant to the terms of the Decimals Implementation Plan for the Equities and Options Markets, the minimum quotation increment for Nasdaq securities at the outset of decimal pricing is $0.01. On June 9, 2005, the Commission adopted Rule 612 of Regulation NMS which establishes minimum pricing increments for NMS stocks (*e.g.*, exchange-listed securities). Rule 612 of Regulation NMS generally prohibits market participants from displaying, ranking, or accepting quotations, orders, or indications of interest in any NMS stock priced in an increment smaller than $0.01 if the quotation, order, or indication of interest is priced equal to or greater than $1.00 per share. If the quotation, order, or indication of interest is priced less than $1.00 per share, the minimum pricing increment is $0.0001. *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496 (June 29, 2005) (File No. S7–10–04). Rule 612 of Regulation NMS became effective on January 31, 2006. *See* Securities Exchange Act Release No. 52196 (August 2, 2005), 70 FR 45529 (August 8, 2005) (File No. S7–10–04).

Given the adoption and implementation of Rule 612 of Regulation NMS, Nasdaq, among other market centers, implemented changes to its trading systems to accept, rank, execute and disseminate priced quotations in accordance with Rule 612 of Regulation NMS. Quotations submitted to Nasdaq that are not in compliance with Rule 612 of Regulation NMS are rejected.

[8] *See* Securities Exchange Act Release No. 53972 (June 12, 2006), 71 FR 35315 (June 19, 2006) (SR–NASD–2006–069).

[9] 15 U.S.C. 78*o*–3(b)(6).

[10] 15 U.S.C. 78s(b)(3)(A).

[11] 17 CFR 240.19b–4(f)(6).

[12] Rule 19b–4(f)(6)(iii) under the Act requires that a self-regulatory organization submit to the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. NASD complied with the five day pre-filing requirement.

[13] For purposes only of accelerating the operative date of the proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[14] *See* 15 U.S.C. 78s(b)(3)(C).

post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing also will be available for inspection and copying at the principal office of NASD. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASD–2006–134 and should be submitted on or before January 16, 2007.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[15]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E6–22007 Filed 12–22–06; 8:45 am]

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[15] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–54956; File No. SR–NFA–2006–03]

Self-Regulatory Organization; National Futures Association; Notice of Filing and Immediate Effectiveness of a Proposed Amendment Relating to the Interpretive Notice to Compliance Rule 2–9 Regarding FCM and IB AML Program Requirements

December 18, 2006.

Pursuant to Section 19(b)(7) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–7 under the Act,[2] notice is hereby given that on November 27, 2006, National Futures Association (''NFA'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change described in Items I, II, and III below, which Items have been prepared by NFA. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons. In addition, on November 6, 2006, NFA filed the proposed rule change with the Commodity Futures Trading Commission (''CFTC''). The CFTC approved the proposed rule change on November 16, 2006.[3]

I. Self-Regulatory Organization's Description of the Proposed Rule Change

Section 15A(k) of the Act[4] makes NFA a national securities association for the limited purpose of regulating the activities of NFA members (''Members'') who are registered as brokers or dealers in security futures products under Section 15(b)(11) of the Act.[5] NFA's Interpretive Notice entitled ''Compliance Rule 2–9: FCM and IB Anti-Money Laundering Program'' (''Interpretive Notice'') applies to all futures commission merchant (''FCM'') and introducing broker (''IB'') Members of NFA, including Members registered under Section 15(b)(11).

The text of the proposed rule change is available on NFA's Web site (*http://www.nfa.futures.org*), at the NFA's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, NFA has prepared statements concerning the purpose of, and basis for, the proposed rule change, burdens on competition, and comments received from members, participants, and others. The text of these statements may be examined at the places specified in Item IV below. NFA has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Since NFA adopted its *Interpretive Notice to NFA Compliance Rule 2–9: FCM and IB Anti-Money Laundering Program* in early 2002, there have been a number of additional anti-money laundering requirements applicable to NFA FCM and IB Members.[6] The proposed rule change would amend the Interpretive Notice to include all requirements currently applicable to FCMs and IBs.

The revised Interpretive Notice includes changes in the following areas:

- The addition of Customer Identification Program requirements and guidance issued on these requirements;[7]
- The deletion of the Customer Identification and Verification section because it was replaced with the Customer Identification Program requirements;[8]
- The addition of Suspicious Activity Reporting requirements and guidance that was issued regarding these requirements;[9]
- The addition of Information Request requirements and guidance with which FCMs are required to comply. This section includes the requirement that FCMs designate a point of contact for these requests and that any changes to the point of contact information be immediately reported to NFA;[10]
- The addition of the Private Banking and Correspondent Account requirements and the guidance that was issued regarding these requirements;[11]
- A revision to the independent audit function requirement that would permit FCMs and IBs that do only proprietary business or that are inactive to conduct their independent audit on a 2-year, rather than 1-year, cycle;[12] and
- A relocation of the Allocation of Compliance Program Responsibilities section.[13]

2. Statutory Basis

The rule change is authorized by, and consistent with, Section 15A(k) of the Act.[14]

B. Self-Regulatory Organization's Statement on Burden on Competition

In the filing, NFA stated that it believes that the rule change will not

[1] 15 U.S.C. 78s(b)(7).

[2] 17 CFR 240.19b–7.

[3] *See* Letter from Eileen Donovan, Acting Secretary, CFTC, to Thomas W. Sexton, III, Esq., General Counsel, NFA (Nov. 16, 2006) (''Letter'').

[4] 15 U.S.C. 78o–3(k).

[5] 15 U.S.C. 78o(b)(11).

[6] *See, e.g.*, Treasury Department Rule 31 CFR 103.123 governing Customer Identification Programs, discussed in Section A of the revised Interpretive Notice.

[7] *See* Section A of the revised Interpretive Notice.

[8] *Id.*

[9] *See* Section B of the revised Interpretive Notice.

[10] *See* Section C of the revised Interpretive Notice.

[11] *See* Section D of the revised Interpretive Notice.

[12] This change is consistent with a similar NASD amendment made earlier this year. *See* the ''Independent Audit Function'' Section of the revised Interpretive Notice.

[13] This information was previously included in the ''Customer Identification and Verification'' Section of the 2002 Interpretive Notice. Because the requirements of this section apply to other program requirements, NFA believes it is appropriate to set it out in a separate section. *See* the ''Allocation of Compliance Program Responsibilities'' Section of the revised Interpretive Notice.

[14] 15 U.S.C. 78o–3(k).

impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act and the Commodities Exchange Act. NFA further stated that the proposed rule change primarily updates the Interpretive Notice to include the requirements imposed by CFTC and Treasury Department rulemakings.

C. Self-Regulatory Organization's Statement of Comments on the Proposed Rule Change Received From Members, Participants, or Others

NFA worked with the Futures Industry Association, National Introducing Brokers Association, Financial Crimes Enforcement Network (''FinCEN'') and the CFTC in developing the rule change. NFA did not solicit or receive comment concerning the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The proposed rule change became effective on November 16, 2006, upon approval by the CFTC.[15] Within 60 days of the date of effectiveness of the proposed rule change, the Commission, after consultation with the CFTC, may summarily abrogate the proposed rule change and require that the proposed rule change be refilled in accordance with the provisions of Section 19(b)(1) of the Act.[16]

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–NFA–2006–03 on the subject line.

Paper Comments

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NFA–2006–03. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro/shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of the filing also will be available for inspection and copying at the principal office of the NFA. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File number SR–NFA–2006–03 and should be submitted on or before January 16, 2007.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[17]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E6–22004 Filed 12–22–06; 8:45 am]

BILLING CODE 8011–01–P

[15] *See* Letter, *supra,* note 3.

[16] 15 U.S.C. 78s(b)(1).

[17] 17 CFR 200.30–3(a)(75).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–54944; File No. SR–NYSE–2006–69]

Self-Regulatory Organizations; New York Stock Exchange LLC; Order Granting Accelerated Approval to Proposed Rule Change and Amendment No. 1 Thereto Relating to the Listing and Trading of Exchange-Traded Notes of Barclays Bank PLC Linked to the Performance of the MSCI India Equities Index

December 15, 2006.

I. Introduction

On August 24, 2006, the New York Stock Exchange LLC (''NYSE'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] a proposed rule change to list and trade exchange-traded notes (''Notes'') of Barclays Bank PLC (''Barclays'') linked to the performance of the MSCI India Total Return Index℠ (''Index''). On November 8, 2006, the Exchange submitted Amendment No. 1.[3] The proposed rule change, as amended, was published for comment in the **Federal Register** on November 28, 2006 for a 15-day comment period.[4] The Commission received one comment regarding the proposal.[5] This order approves the proposed rule change, as amended, on an accelerated basis.

II. Description of the Proposal

Under Section 703.19 of the Listed Company Manual (''Manual''), the Exchange may, subject to Commission approval of a submission pursuant to Section 19(b) of the Act, approve for listing and trading securities not otherwise covered by the criteria of Sections 1 and 7 of the Manual, provided the issue is suited for auction market trading. Accordingly, the Exchange proposes to list and trade, under Section 703.19 of the Manual, the Notes, which are linked to the performance of the Index.[6]

In its proposal, the Exchange described the structure and features of the Notes, including early redemption and default provisions, as well as the underlying index, applicable trading rules and surveillance procedures. Key aspects of the proposal are noted below.

The Notes

The Notes are a series of debt securities of Barclays that provide for a cash payment at maturity or upon earlier redemption at the holder's option based on the performance of the Index, subject to applicable fees and expenses. The original issue price of each Note will be $50. The Notes will trade on the Exchange's equity trading floor, and the Exchange's existing equity trading rules will apply to trading in the Notes. Holders of the Notes will not receive any interest payments from the Notes, and the Notes will not have a minimum principal amount that will be repaid. Accordingly, payment on the Notes prior to or at maturity may be less than the original issue price of the Notes. The

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Amendment No. 1 replaced and superseded the Exchange's original submission in its entirety.

[4] *See* Securities Exchange Act Release No. 54800 (November 21, 2006), 71 FR 68864.

[5] *See* letter from Claire P. McGrath, Senior Vice President and General Counsel, American Stock Exchange LLC (''Amex''), to Nancy M. Morris, Secretary, Commission, dated December 8, 2006.

[6] Barclays intends to issue the Notes under the name ''iPath℠ Exchange-Traded Notes.''

Notes will have a term of 30 years. The Notes are not callable.

Holders of the Notes at maturity will receive a payment equal to the initial issue price of their Notes times an index factor minus an investor fee (''Cash Payment''). The ''index factor'' on any given day will be equal to the closing value of the Index on that day divided by the initial index level. The investor fee will be equal to 0.89 percent per year times the principal amount of holders' Notes times the index factor, calculated on a daily basis. Thus, each day until maturity or early redemption, the investor fee will increase by an amount equal to 0.89 percent times the principal amount of holders' Notes times the index factor on that day (or, if such day is not a trading day, the index factor on the immediately preceding trading day) divided by 365. Subject to certain restrictions,[7] the Notes may be redeemed prior to maturity. Unless otherwise permitted by Barclays,[8] Notes may only be redeemed in aggregations of 50,000. Upon redemption, a Note holder will receive the applicable Cash Payment less a redemption charge. The investor fee and the redemption charge are the only fees holders will be charged in connection with their ownership of the Notes.

The MSCI India Total Return Index SM

The Exchange provided detailed description of the Index in its proposal.[9] In summary, the Index is a free float-adjusted market capitalization index that is designed to measure the market performance, including price performance and income from dividend payments, of Indian equity securities. The Index is currently comprised of the top 68 companies by market capitalization listed on the National Stock Exchange of India (''NSE''). The Index is calculated by Morgan Stanley Capital International Inc. (''MSCI'') and is denominated in U.S. dollars.[10]

The Index is calculated and updated continuously until the market closes and is published as end of day values in U.S. dollars using the exchange rate published by WM Reuters at 4 p.m. on the previous day. The Index is reported by Bloomberg, L.P. under the ticker symbol ''NDEUSIA.'' The Index is static during the Exchange trading day.

Generally, the prices used to calculate the MSCI Indexes are the official exchange closing prices or those figures accepted as such. MSCI uses the foreign exchange rates published by WM Reuters at 4 p.m. London time.[11]

Pricing Information Regarding the Notes

An intraday value (''Indicative Value'') meant to approximate the intrinsic economic value of the Notes, updated to reflect changes in currency exchange rates, will be calculated and published by a third-party service provider via the facilities of the Consolidated Tape Association at least every fifteen seconds throughout the NYSE trading day on each day on which the Notes are traded on the Exchange. The Indicative Value will not reflect changes in the prices of securities included in the Index resulting from trading on other markets after the close of trading on the NSE, but will be updated to reflect changes in the exchange rate between the U.S. dollar and the Indian rupee. Additionally, Barclays or an affiliate will calculate and publish the closing Indicative Value of the Notes on each trading day at *http://www.ipathetn.com.* The last sale price of the Notes will also be disseminated over the Consolidated Tape, subject to a 20-minute delay.

Listing Criteria

In its proposal, the Exchange stated that the Notes will conform to the initial listing standards for equity securities under Section 703.19 of the Manual insofar as (i) Barclays is an affiliate of Barclays PLC,[12] which is an Exchange-listed company in good standing, (ii) the Notes will have a minimum life of one year, (iii) the minimum public market value of the Notes at the time of issuance will exceed $4 million, (iv) there will be at least one million Notes outstanding, and (v) there will be at least 400 holders at the time of issuance.

As detailed in its proposal, the Exchange will delist the Notes under the following circumstances:

- If, following the initial twelve month period from the date of commencement of trading of the Notes, (a) the Notes have more than 60 days remaining until maturity and there are fewer than 50 beneficial holders of the Notes for 30 or more consecutive trading days, (b) fewer than 100,000 Notes remain issued and outstanding, or (c) the market value of all outstanding Notes is less than $1,000,000.
- If the Index closing value ceases to be calculated or available during the time the Notes trade on the Exchange on at least a 15 second basis through one or more major market data vendors.[13]
- If, during the time the Notes trade on the Exchange, the Indicative Value ceases to be available through the facilities of the Consolidated Tape Association or a major market data vendor on a 15 second delayed basis.[14]
- If such other event shall occur or condition exists which in the opinion of the Exchange makes further dealings on the Exchange inadvisable.

In addition, the Exchange will file a proposed rule change pursuant to Rule 19b–4 under the Act, seeking approval to continue trading the Notes and unless approved, the Exchange will commence delisting the Notes, if

- A successor or substitute index is used in connection with the Notes. The filing will address, among other things, the listing and trading characteristics of the successor or substitute index and the Exchange's surveillance procedures applicable thereto.
- At any time the most heavily weighted component stock in the Index exceeds 25 percent of the weight of the Index or the five most heavily weighted component stocks exceed 60 percent of the weight of the Index.
- MSCI substantially changes the index methodology.

The Exchange prohibits the initial and/or continued listing of any security

[7] Generally, the Notes may only be redeemed once each week on a ''Redemption Date,'' which is the third business day following a weekly ''Valuation Date.'' Unless there is a market disruption event, a Valuation Date is each Thursday from the first Thursday after issuance of the Notes until the last Thursday before maturity of the Notes. *See* Notice, 71 FR at 68864–65.

[8] The Exchange states that any such reduction will be applied on a consistent basis for all holders of Notes at the time the reduction becomes effective.

[9] *See* Notice, 71 FR at 68866–68.

[10] As the Commission has previously stated, when a broker-dealer, or a broker-dealer's affiliate such as MSCI, is involved in the development and maintenance of a stock index upon which a product such as iShares is based, the broker-dealer or its affiliate should have procedures designed specifically to address the improper sharing of information. *See* Securities Exchange Act Release No. 52178 (July 29, 2005), 70 FR 46244 (August 8, 2005) (SR–NYSE–2005–41). In this proposal, the Exchange states that MSCI has implemented procedures to prevent the misuse of material, non-public information regarding changes to component stocks in the MSCI Indexes.

[11] MSCI monitors exchange rates independently and may, under exceptional circumstances, elect to use an alternative exchange rate if the WM Reuters rate is believed not to be representative for a given currency on a particular day.

[12] Though not an Exchange-listed company itself, Barclays would exceed the Exchange's earnings and minimum tangible net worth requirements in Section 102 of the Manual. Additionally, Barclays has informed the Exchange that the original issue price of the Notes, when combined with the original issue price of all other iPath securities offerings of the issuer that are listed on a national securities exchange (or association), does not exceed 25 percent of the issuer's net worth.

[13] Telephone conference between John Carey, Assistant General Counsel, NYSE, and Brian Trackman, Special Counsel, Division of Market Regulation, Commission, on December 15, 2006 (''Telephone Conference'') (clarifying scope of delisting condition).

[14] Telephone Conference (clarifying how dissemination must occur).

that is not in compliance with Rule 10A–3 under the Act.[15]

Trading Rules

The Exchange's existing equity trading rules will apply to trading of the Notes. The Notes will trade between the hours of 9:30 a.m. and 4 p.m. ET and will be subject to the equity margin rules of the Exchange.[16]

Trading Halts

With regard to trading of the Notes, the Exchange represents that, if the Index Value or the Indicative Value is not being disseminated as required, the Exchange may halt trading during the day on which the interruption to the dissemination of the Index Value or the Indicative Value first occurs. If the interruption to the dissemination of the Index Value or the Indicative Value persists past the trading day in which it occurred, the Exchange will halt trading no later than the beginning of the trading day following the interruption.

Suitability

Pursuant to Exchange Rule 405, the Exchange will impose a duty of due diligence on its members and member firms to learn the essential facts relating to every customer prior to trading the Notes.[17] With respect to suitability recommendations and risks, the Exchange will require members, member organizations and employees thereof recommending a transaction in the Notes: (i) To determine that such transaction is suitable for the customer, and (ii) to have a reasonable basis for believing that the customer can evaluate the special characteristics of, and is able to bear the financial risks of, such transaction.

Information Memorandum

The Exchange will, prior to trading the Notes, distribute an information memorandum to the membership providing guidance with regard to member firm compliance responsibilities (including suitability recommendations) when handling transactions in the Notes. The information memorandum will note to members language in the prospectus used by Barclays in connection with the sale of the Notes regarding prospectus delivery requirements for the Notes. Specifically, in the initial distribution of the Notes,[18] and during any subsequent distribution of the Notes, NYSE member organizations will deliver a prospectus to investors purchasing from such distributors.

The information memorandum will discuss the special characteristics and risks of trading this type of security. Specifically, the information memorandum, among other things, will discuss what the Notes are, how the Notes are redeemed, applicable Exchange rules, dissemination of information regarding the Index value and the Indicative Value, exchange rate, trading information, and applicable suitability rules. The information memorandum will also notify members and member organizations about the procedures for redemptions of Notes and that Notes are not individually redeemable but are redeemable only in aggregations of at least 100,000 Notes.

The information memorandum will also discuss any exemptive or no-action relief under the Act provided by the Commission staff.

Surveillance

The Exchange's surveillance procedures will incorporate and rely upon existing Exchange surveillance procedures governing equities with respect to surveillance of the Notes.[19] The Exchange believes that these procedures are adequate to monitor Exchange trading of the Notes and to detect violations of Exchange rules, thereby deterring manipulation. In this regard, the Exchange currently has the authority under NYSE Rule 476 to request the Exchange specialist in the Notes to provide NYSE Regulation with information that the specialist uses in connection with pricing the Notes on the Exchange, including specialist proprietary or other information regarding securities, options on securities or other derivative instruments. The Exchange believes it also has authority to request any other information from its members—including floor brokers, specialists and ''upstairs'' firms—to fulfill its regulatory obligations.

III. Summary of Comment

In its comment letter,[20] Amex noted that the NYSE intended to list and trade the Notes without entering into a comprehensive surveillance sharing agreement (''CSSA'') with the NSE or other Indian marketplaces. The Amex stated its belief that approval of the proposal would be a ''significant departure'' from existing practice and rules to permit derivative products like the Notes to be listed and traded without a CSSA. Specifically, the Amex noted that the Commission has generally required CSSAs between U.S. exchanges and foreign markets for index-linked notes and other derivative securities products. In addition, the Amex cited Section 107D(g)(viii) of the Amex *Company Guide* relating to index-linked securities and similar rules of other exchanges,[21] which require that foreign country securities or American Depository Receipts (''ADRs'') that are not subject to CSSAs do not in the aggregate represent more than 20 percent of the weight of the index. The Amex further noted that other rules addressing listing standards for derivative products, including index options and options on exchange-traded funds, generally require CSSAs but are not consistent with regard to what percentage of underlying foreign securities must be subject to such agreements. Noting that more recently, the Commission has approved listing standards for exchange-traded funds based on global and/or international securities indexes and other derivative products without requiring CSSAs, the Amex urges the Commission to clarify that CSSAs are not required for index-linked notes and index options. To the extent CSSA standards are inconsistent among different derivative product classes, the Amex also requests guidance on the proper regulatory standard.

While the Commission appreciates these comments, we believe that they are outside the scope of the present rule filing, which addresses only a single derivative product. Rather, the Commission believes that the Amex's comments—particularly in regard to any perceived anomalies between existing exchange rules establishing derivative product listing standards—are best addressed in the context of a separate rule proposal.

IV. Discussion and Commission's Findings

The Commission finds that the proposed rule change, as amended, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange. In particular, the

[15] 17 CFR 240.10A–3.

[16] *See* NYSE Rule 431.

[17] NYSE Rule 405 requires that every member, member firm or member corporation use due diligence to learn the essential facts relative to every customer and to every order or account accepted.

[18] The Registration Statement reserves the right to make subsequent distributions of these Notes.

[19] The Exchange's current trading surveillances focus on detecting securities trading outside normal patterns. When such situations are detected, surveillance analysis follows and investigations are opened, where appropriate, to review the behavior of all relevant parties for all relevant trading violations.

[20] *See supra* note 5.

[21] *See* NYSEArca Rule 5.2(j)(6)(g)(vii) and Nasdaq Rule 4420(m)(7)(ix).

Commission finds that the proposal, as amended, is consistent with the objectives of Section 6(b)(5) of the Act,[22] which requires, among other things, that the Exchange's rules be designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest.

A. Surveillance

The Commission finds that the Exchange's surveillance procedures are reasonably designed to monitor for trading abuses in connection with the Notes.

NYSE Rule 476 requires Exchange specialists in the Notes, upon the Exchange's request, to provide NYSE Regulation with information that the specialist uses in connection with pricing the Notes on the Exchange, including specialist proprietary or other information regarding securities, options on securities or other derivative instruments. Furthermore, the Exchange believes it also has authority to request any other information from its members—including floor brokers, specialists and ''upstairs'' firms—to fulfill its regulatory obligations. The Commission also notes that the Exchange represents that it will delist the Notes if a new component is added to the Index (or pricing information is used for a new or existing component), unless otherwise approved for continued trading by the Commission. The Commission believes that these requirements provide the NYSE with the tools necessary to adequately surveil trading in the Notes.

B. Dissemination of Information

The Commission believes that sufficient venues exist for obtaining reliable information so that holders of the Notes can monitor the value of their investment relative to the underlying Index.

Information about the Index (and its components) is widely available through public Web sites and professional subscription services, including Reuters and Bloomberg. Likewise, real-time information about the trading of the Index components and their daily closing values is available through major market data vendors. The Index Sponsor calculates the Index continuously. The Exchange has represented that the daily closing value will be disseminated during the time the Notes trade on the Exchange. Further, while the Index is calculated by a broker-dealer, a number of independent sources verify both the intraday and closing Index values. The composition and calculation methodology for the Index is public and transparent.

An Indicative Value for the Notes will be calculated and disseminated at least every 15 seconds throughout the NYSE trading day on each day on which the Notes are traded on the Exchange. In addition, Barclays or an affiliate will calculate and publish the closing Indicative Value of the Notes on each trading day at *http://www.ipathetn.com*.

If the closing level of Index or Indicative Value is not disseminated as described in its proposal, the Exchange may halt trading on which the interruption to the dissemination of the Index Value or the Indicative Value first occurs. If the interruption to the dissemination of the Index Value or the Indicative Value persists past the trading day in which it occurred, the Exchange will halt trading no later than the beginning of the trading day following the interruption.

C. Listing and Trading

The Commission finds that the Exchange's proposed rules and procedures for the listing and trading of the proposed Notes are consistent with the Act. The Notes will trade as equity securities subject to NYSE rules including, among others, rules governing equity margins, specialist responsibilities, account opening, and customer suitability requirements.

The Commission believes that the listing and delisting criteria for the Notes should help to maintain a minimum level of liquidity and therefore minimize the potential for manipulation of the Notes. The Exchange represents that it would file a proposed rule change pursuant to Rule 19b–4 under the Act,[23] which must be approved for continued trading of the Notes, if (a) a successor or substitute index is used in connection with the Notes, (b) at any time, the most heavily weighted component stock in the Index exceeds 25 percent of the weight of the Index or the top five most heavily weighted stocks exceed 60 percent of the weight of the Index, or (c) the Index Sponsor (MSCI) substantially changes the index methodology.

Finally, the Commission notes that the Information Memorandum that the Exchange will distribute will inform members and member organizations about the terms, characteristics and risks in trading the Notes, including their prospectus delivery obligations.

D. Accelerated Approval

The Commission finds good cause to approve the proposed rule change, as amended, prior to the thirtieth day after publication for comment in the **Federal Register**. Accelerating approval of this proposal should benefit investors who desire to participate, through the Notes, in the designated Index by enabling them to begin trading the Notes promptly. Therefore, the Commission finds good cause, consistent with Section 19(b)(2) of the Act,[24] to approve the proposed rule change on an accelerated basis.

V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act [25] that the proposed rule change (SR–NYSE–2006–69), be, and hereby is, approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[26]

Nancy M. Morris,

Secretary.

[FR Doc. E6–22005 Filed 12–22–06; 8:45 am]

BILLING CODE 8011–01–P

[22] 15 U.S.C. 78f(b)(5).

[23] 17 CFR 240.19b–4.

[24] 15 U.S.C. 78s(b)(2).

[25] 15 U.S.C. 78s(b)(2).

[26] 17 CFR 200.30–3(a)(12).

DEPARTMENT OF STATE

[Public Notice 5653]

Bureau of Economic and Business Affairs; List of November 20, 2006, of Participating Countries and Entities (Hereinafter Known as ''Participants'') Under the Clean Diamond Trade Act of 2003 (Pub. L. 108–19) and Section 2 of Executive Order 13312 of July 29, 2003

AGENCY: Bureau of Economic and Business Affairs, Department of State.

ACTION: Notice.

SUMMARY: In accordance with Sections 3 and 6 of the Clean Diamond Trade Act of 2003 (Pub. L. 108–19) and Section 2 of Executive Order 13312 of July 29, 2003, the Department of State is identifying all the Participants eligible for trade in rough diamonds under the Act, and their respective Importing and Exporting Authorities, and revising the previously published list of October 25, 2006 (Volume 71, Number 206, page 62501) to include Bangladesh.

FOR FURTHER INFORMATION CONTACT: Sue Saarnio, Special Advisor for Conflict Diamonds, Bureau of Economic and Business Affairs, Department of State, (202) 647–1713.

SUPPLEMENTARY INFORMATION: Section 4 of the Clean Diamond Trade Act (the ''Act'') requires the President to prohibit the importation into, or the exportation from, the United States of any rough diamond, from whatever source, that has not been controlled through the Kimberley Process Certification Scheme (KPCS). Under Section 3(2) of the Act, ''controlled through the Kimberley Process Certification Scheme'' means an importation from the territory of a Participant or exportation to the territory of a Participant of rough diamonds that is either (i) carried out in accordance with the KPCS, as set forth in regulations promulgated by the President, or (ii) controlled under a system determined by the President to meet substantially the standards, practices, and procedures of the KPCS. The referenced regulations are contained at 31 CFR Part 592 (''Rough Diamonds Control Regulations'') (69 FR 56936, September 23, 2004).

Section 6(b) of the Act requires the President to publish in the **Federal Register** a list of all Participants, and all Importing and Exporting Authorities of Participants, and to update the list as necessary. Section 2 of Executive Order 13312 of July 29, 2003 delegates this function to the Secretary of State. Section 3(7) of the Act defines ''Participant'' as a state, customs territory, or regional economic integration organization identified by the Secretary of State. Section 3(3) of the Act defines ''Exporting Authority'' as one or more entities designated by a Participant from whose territory a shipment of rough diamonds is being exported as having the authority to validate a Kimberley Process Certificate. Section 3(4) of the Act defines ''Importing Authority'' as one or more entities designated by a Participant into whose territory a shipment of rough diamonds is imported as having the authority to enforce the laws and regulations of the Participant regarding imports, including the verification of the Kimberley Process Certificate accompanying the shipment.

List of Participants

Pursuant to Section 3 of the Clean Diamond Trade Act (the Act), Section 2 of Executive Order 13312 of July 29, 2003, and Delegation of Authority No. 294 (July 6, 2006), I hereby identify the following entities as of November 20, 2006, as Participants under section 6(b) of the Act. Included in this list are the Importing and Exporting Authorities for Participants, as required by Section 6(b) of the Act. This list revises the previously published list of October 25, 2006 (Volume 71, Number 206 62501).

Angola—Ministry of Geology and Mines.
Armenia—Ministry of Trade and Economic Development.
Australia—Exporting Authority—Department of Industry, Tourism and Resources; Importing Authority—Australian Customs Service.
Bangladesh—Ministry of Commerce.
Belarus—Department of Finance.
Botswana—Ministry of Minerals, Energy and Water Resources.
Brazil—Ministry of Mines and Energy.
Bulgaria—Ministry of Finance.
Canada—Natural Resources Canada.
Central African Republic—Ministry of Energy and Mining.
China—General Administration of Quality Supervision, Inspection and Quarantine.
Democratic Republic of the Congo—Ministry of Mines
Croatia—Ministry of Economy.
European Community—DG/External Relations/A.2.
Ghana—Precious Minerals and Marketing Company Ltd.
Guinea—Ministry of Mines and Geology.
Guyana—Geology and Mines Commission.
India—The Gem and Jewellery Export Promotion Council.
Indonesia—Directorate General of Foreign Trade of the Ministry of Trade.
Israel—The Diamond Controller.
Ivory Coast—Ministry of Mines and Energy.
Japan—Ministry of Economy, Trade and Industry.
Republic of Korea—Ministry of Commerce, Industry and Energy.
Laos—Ministry of Finance.
Lebanon—Ministry of Economy and Trade.
Lesotho—Commissioner of Mines and Geology.
Malaysia—Ministry of International Trade and Industry.
Mauritius—Ministry of Commerce.
Namibia—Ministry of Mines and Energy.
New Zealand—Ministry of Foreign Affairs and Trade.
Norway—The Norwegian Goldsmiths' Association.
Romania—National Authority for Consumer Protection.
Russia—Gokhran, Ministry of Finance.
Sierra Leone—Government Gold and Diamond Office.
Singapore—Singapore Customs.
South Africa—South African Diamond Board.
Sri Lanka—National Gem and Jewellery Authority.
Switzerland—State Secretariat for Economic Affairs.
Taiwan—Bureau of Foreign Trade.
Tanzania—Commissioner for Minerals.
Thailand—Ministry of Commerce.
Togo—Ministry of Mines and Geology.
Ukraine—State Gemological Centre of Ukraine.
United Arab Emirates—Dubai Metals and Commodities Center.
United States of America—Importing Authority—United States Bureau of Customs and Border Protection; Exporting Authority—Bureau of the Census.
Venezuela—Ministry of Energy and Mines.
Vietnam—Ministry of Trade.
Zimbabwe—Ministry of Mines and Mining Development.

This notice shall be published in the **Federal Register**.

Nicholas R. Burns,
Under Secretary for Political Affairs, Department of State.

[FR Doc. E6–22068 Filed 12–22–06; 8:45 am]

BILLING CODE 4710–07–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2006–26656; Notice 1]

Continental Tire North America, Receipt of Petition for Decision of Inconsequential Noncompliance

Continental Tire North America (Continental) has determined that certain tires it produced in 2006 do not comply with S5.5(f) of 49 CFR 571.139, Federal Motor Vehicle Safety Standard (FMVSS) No. 139, ''New pneumatic radial tires for light vehicles.'' Continental has filed an appropriate report pursuant to 49 CFR Part 573, ''Defect and Noncompliance Reports.''

Pursuant to 49 U.S.C. 30118(d) and 30120(h), Continental has petitioned for an exemption from the notification and remedy requirements of 49 U.S.C. Chapter 301 on the basis that this noncompliance is inconsequential to motor vehicle safety.

This notice of receipt of Continental's petition is published under 49 U.S.C. 30118 and 30120 and does not represent any agency decision or other exercise of judgment concerning the merits of the petition.

Affected are a total of approximately 1,369 model 225/70R16 103S Continental and General replacement tires manufactured during October, 2006. S5.5(f) of FMVSS No. 139 requires the actual number of plies in the tread area to be molded on both sidewalls of each tire. The noncompliant tires are marked on the sidewall ''TREAD 5 PLIES 2 STEEL + 2 POLYESTER + 1 NYLON'' whereas the correct marking should be ''TREAD 4 PLIES 2 STEEL + 2 POLYESTER.''

Continental Tire believes that the noncompliance is inconsequential to motor vehicle safety and that no corrective action is warranted. Continental Tire states,

> All other sidewall identification markings and safety information are correct. This noncompliant sidewall marking does not affect the safety, performance and durability of the tire; the tires were built as designed.

Continental has corrected the problem that caused these errors so that they will not be repeated in future production.

Interested persons are invited to submit written data, views, and arguments on this petition. Comments must refer to the docket and notice number cited at the beginning of this notice and be submitted by any of the following methods. Mail: Docket Management Facility, U.S. Department of Transportation, Nassif Building, Room PL–401, 400 Seventh Street, SW., Washington, DC, 20590–0001. Hand Delivery: Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC. It is requested, but not required, that two copies of the comments be provided. The Docket Section is open on weekdays from 10 am to 5 pm except Federal Holidays. Comments may be submitted electronically by logging onto the Docket Management System Web site at *http://dms.dot.gov.* Click on ''Help'' to obtain instructions for filing the document electronically. Comments may be faxed to 1–202–493–2251, or may be submitted to the Federal eRulemaking Portal: go to *http://www.regulations.gov.* Follow the online instructions for submitting comments.

The petition, supporting materials, and all comments received before the close of business on the closing date indicated below will be filed and will be considered. All comments and supporting materials received after the closing date will also be filed and will be considered to the extent possible. When the petition is granted or denied, notice of the decision will be published in the **Federal Register** pursuant to the authority indicated below.

Comment closing date: January 25, 2007.

(Authority 49 U.S.C. 30118, 30120: delegations of authority at CFR 1.50 and 501.8)

Issued on: December 19, 2006.

Claude H. Harris,

Director, Office of Vehicle Safety Compliance.

[FR Doc. E6–22032 Filed 12–22–06; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

[Docket No. PHMSA–2006–26596; Notice No. 06–6]

Safety Advisory: Unauthorized Marking of Compressed Gas Cylinders

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: Safety advisory notice.

SUMMARY: This is to notify the public that we (PHMSA) have discovered the unauthorized marking of high-pressure compressed gas cylinders, mainly cylinders containing welding gases, fire extinguishers, and self-contained breathing apparatus, by Consulting and Safety Specialists, Inc. (CSSI), located at 924 Lefort Bypass, Thibodaux, LA 70301.

On November 30, 2006, an inspector from PHMSA's Office of Hazardous Materials Enforcement (OHME) conducted a compliance inspection of CSSI. As a result of that inspection, PHMSA has determined that CSSI did not hold a valid Requalifier Identification Number issued by DOT while requalifying (inspecting, testing, or certifying) high-pressure compressed gas cylinders. In addition, CSSI marked and certified an undetermined number of DOT specification and/or special permit high-pressure compressed gas cylinders as being properly tested in accordance with the Hazardous Materials Regulations (HMR), when it had not verified its equipment to be accurate as required by the HMR.

A hydrostatic requalification and visual inspection, conducted as prescribed in the HMR, are used to verify the structural integrity of a cylinder. If the hydrostatic requalification and visual inspection are not performed in accordance with the HMR, a cylinder with compromised structural integrity may have been returned to service when it should have been condemned. Extensive property damage, serious personal injury, or death may result from rupture of a cylinder. Cylinders that have not been requalified in accordance with the HMR may not be charged or filled with compressed gas or other hazardous material and offered for transportation in commerce.

FOR FURTHER INFORMATION CONTACT: Billy C. Hines, Jr., Chief, Southwest Region, Office of Hazardous Materials Enforcement, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, 8701 South Gessner Road, Suite 1110, Houston, TX 77074. Telephone: (713) 272–2820, Fax: (713) 272–2821.

SUPPLEMENTARY INFORMATION: The Hazardous Materials Regulations (HMR), 49 CFR Parts 171–180, prescribe requirements for the periodic requalification of cylinders used in transportation of compressed gases. In order to perform hydrostatic requalification of compressed gas cylinders, a person (including a company) must obtain an approval and Requalification Identification Number (RIN) from PHMSA. See 49 CFR 107.805 and 180.205(b). PHMSA issued RIN C381 to CSSI on October 25, 1989 to requalify high-pressure gas cylinders. CSSI's RIN expired on October 25, 1994 and it has not applied to renew its approval to requalify cylinders since that date. Therefore, CSSI is no longer authorized to requalify DOT specification and special permit cylinders.

Based on our investigation, PHMSA has concluded that, over the past three years, CSSI marked, certified and returned to service an undetermined number of high-pressure gas cylinders as having been properly tested in accordance with the HMR when requalifying was performed on test equipment that was not verified to be accurate as required by the HMR.

The cylinders in question are stamped with RIN C381 in the following pattern:

C 3

M Y

18

M is the month of requalification (e.g., 01, 02, etc.), and Y is the last two digits of the year of the requalification (e.g., 01, 02, 03).

All high-pressure gas cylinders that have been marked and certified as having been hydrostatically tested by CSSI since June 2003 may pose a safety risk to the public and should be considered unsafe for use in hazardous materials service until properly requalified by a DOT-authorized requalification facility.

Anyone possessing a high-pressure gas cylinder, hydrostatically tested by CSSI between June 2003 and May 2006, and has not had the cylinder tested by a DOT-authorized facility since then, should consider the cylinder unsafe and not fill it with a hazardous material unless the cylinder is first properly requalified by a DOT-authorized requalification facility. Cylinders described in this safety advisory that are filled with an atmospheric gas should be vented or otherwise safely discharged and then taken to a DOT-authorized cylinder requalification facility for proper requalification to determine compliance with the HMR and their suitability for continuing service. Cylinders described in this safety advisory that are filled with a material other than an atmospheric gas should not be vented, but instead should be safely discharged, and then taken to a DOT-authorized cylinder requalification facility for proper test to determine compliance with the HMR and their suitability for continuing service. Mr. Billy C. Hines, Jr., Chief, Southwest Region, can provide a list of authorized requalification facilities in your area, or you may obtain the list at the following Web site: *http://hazmat.dot.gov.* Under no circumstance should a cylinder described in this safety advisory be filled, refilled or used for its intended purpose until it is re-inspected and requalified by a DOT-authorized requalification facility.

PHMSA requests that any person possessing a cylinder described in this safety advisory telephone or provide a facsimile to Mr. Hines with the following information for each cylinder: (1) The cylinder manufacturer's name, (2) the serial number of the cylinder, (3) the DOT specification or special permit information for the cylinder, and (4) the month and year of the last requalification date marked by CSSI.

Issued in Washington, DC, on December 18, 2006.

Robert A. McGuire,

Associate Administrator for Hazardous Materials Safety.

[FR Doc. E6–21994 Filed 12–22–06; 8:45 am]

BILLING CODE 4910–60–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Docket No. AB–290 (Sub-No. 272X)]

Norfolk Southern Railway Company—Abandonment Exemption—in McDowell County, WV

Norfolk Southern Railway Company (NSR) has filed a notice of exemption under 49 CFR 1152 Subpart F—*Exempt Abandonments* to abandon a 2.5-mile line of railroad between milepost CB 0.0 and milepost CB 2.5, in Caretta, in McDowell County, WV. The line traverses United States Postal Service Zip Code 24892 and includes the former station of Juno.

NSR has certified that: (1) No local traffic has moved over the line for at least 2 years; (2) overhead traffic, if there were any, could be rerouted over other lines; (3) no formal complaint filed by a user of rail service on the line (or by a state or local government entity acting on behalf of such user) regarding cessation of service over the line either is pending with the Surface Transportation Board or with any U.S. District Court or has been decided in favor of complainant within the 2-year period; and (4) the requirements at 49 CFR 1105.7 (environmental reports), 49 CFR 1105.8 (historic reports), 49 CFR 1105.11 (transmittal letter), 49 CFR 1105.12 (newspaper publication), and 49 CFR 1152.50(d)(1) (notice to governmental agencies) have been met.

As a condition to this exemption, any employee adversely affected by the abandonment shall be protected under *Oregon Short Line R. Co.—Abandonment—Goshen*, 360 I.C.C. 91 (1979). To address whether this condition adequately protects affected employees, a petition for partial revocation under 49 U.S.C. 10502(d) must be filed.

Provided no formal expression of intent to file an offer of financial assistance (OFA) has been received, this exemption will be effective on January 25, 2007, unless stayed pending reconsideration. Petitions to stay that do not involve environmental issues,[1] formal expressions of intent to file an OFA under 49 CFR 1152.27(c)(2),[2] and trail use/rail banking requests under 49 CFR 1152.29 must be filed by January 5, 2007. Petitions to reopen or requests for public use conditions under 49 CFR 1152.28 must be filed by January 16, 2007, with: Surface Transportation Board, 1925 K Street, NW., Washington, DC 20423–0001.

A copy of any petition filed with the Board should be sent to NSR's representative: James R. Paschall, Senior General Attorney, Norfolk Southern Corporation, Three Commercial Place, Norfolk, VA 23510.

[1] The Board will grant a stay if an informed decision on environmental issues (whether raised by a party or by the Board's Section of Environmental Analysis (SEA) in its independent investigation) cannot be made before the exemption's effective date. *See Exemption of Out-of-Service Rail Lines*, 5 I.C.C.2d 377 (1989). Any request for a stay should be filed as soon as possible so that the Board may take appropriate action before the exemption's effective date.

[2] Each OFA must be accompanied by the filing fee, which currently is set at $1,300. *See* 49 CFR 1002.2(f)(25).

If the verified notice contains false or misleading information, the exemption is void *ab initio*.

NSR has filed environmental and historic reports which address the effects, if any, of the abandonment on the environment and historic resources. SEA will issue an environmental assessment (EA) by December 29, 2006. Interested persons may obtain a copy of the EA by writing to SEA (Room 500, Surface Transportation Board, Washington, DC 20423–0001) or by calling SEA, at (202) 565–1539. [Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1–800–877–8339.] Comments on environmental and historic preservation matters must be filed within 15 days after the EA becomes available to the public.

Environmental, historic preservation, public use, or trail use/rail banking conditions will be imposed, where appropriate, in a subsequent decision.

Pursuant to the provisions of 49 CFR 1152.29(e)(2), NSR shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the line. If consummation has not been effected by NSR's filing of a notice of consummation by December 26, 2007, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire.

Board decisions and notices are available on our Web site at *http://www.stb.dot.gov*.

Decided: December 18, 2006.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams,

Secretary.

[FR Doc. E6–21946 Filed 12–22–06; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Additional Designation of Individual Pursuant to Executive Order 13224

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice.

SUMMARY: The Treasury Department's Office of Foreign Assets Control (''OFAC'') is publishing the name of one newly-designated individual whose property and interests in property are blocked pursuant to Executive Order 13224 of September 23, 2001, ''Blocking Property and Prohibiting Transactions

With Persons Who Commit, Threaten To Commit, or Support Terrorism.''

DATES: The designation by the Secretary of the Treasury of the individual identified in this notice, pursuant to Executive Order 13224, is effective on December 19, 2006.

FOR FURTHER INFORMATION CONTACT: Assistant Director, Compliance Outreach & Implementation, Office of Foreign Assets Control, Department of the Treasury, Washington, DC 20220, tel.: 202/622–2490.

SUPPLEMENTARY INFORMATION:

Electronic and Facsimile Availability

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

Background

On September 23, 2001, the President issued Executive Order 13224 (the ''Order'') pursuant to the International Emergency Economic Powers Act, 50 U.S.C. 1701–1706, and the United Nations Participation Act of 1945, 22 U.S.C. 287c. In the Order, the President declared a national emergency to address grave acts of terrorism and threats of terrorism committed by foreign terrorists, including the September 11, 2001, terrorist attacks in New York, Pennsylvania, and at the Pentagon. The Order imposes economic sanctions on persons who have committed, pose a significant risk of committing, or support acts of terrorism. The President identified in the Annex to the Order, as amended by Executive Order 13268 of July 2, 2002, 13 individuals and 16 entities as subject to the economic sanctions. The Order was further amended by Executive Order 13284 of January 23, 2003, to reflect the creation of the Department of Homeland Security.

Section 1 of the Order blocks, with certain exceptions, all property and interests in property that are in or hereafter come within the United States or the possession or control of United States persons, of: (1) Foreign persons listed in the Annex to the Order; (2) foreign persons determined by the Secretary of State, in consultation with the Secretary of the Treasury, the Secretary of the Department of Homeland Security and the Attorney General, to have committed, or to pose a significant risk of committing, acts of terrorism that threaten the security of U.S. nationals or the national security, foreign policy, or economy of the United States; (3) persons determined by the Secretary of the Treasury, in consultation with the Secretary of State, the Secretary of the Department of Homeland Security and the Attorney General, to be owned or controlled by, or to act for or on behalf of those persons listed in the Annex to the Order or those persons determined to be subject to subsection 1(b), 1(c), or 1(d)(i) of the Order; and (4) except as provided in section 5 of the Order and after such consultation, if any, with foreign authorities as the Secretary of State, in consultation with the Secretary of the Treasury, the Secretary of the Department of Homeland Security and the Attorney General, deems appropriate in the exercise of his discretion, persons determined by the Secretary of the Treasury, in consultation with the Secretary of State, the Secretary of the Department of Homeland Security and the Attorney General, to assist in, sponsor, or provide financial, material, or technological support for, or financial or other services to or in support of, such acts of terrorism or those persons listed in the Annex to the Order or determined to be subject to the Order or to be otherwise associated with those persons listed in the Annex to the Order or those persons determined to be subject to subsection 1(b), 1(c), or 1(d)(i) of the Order.

On December 19, 2006, the Secretary of the Treasury, in consultation with the Secretary of State, the Secretary of the Department of Homeland Security, the Attorney General, and other relevant agencies, designated, pursuant to one or more of the criteria set forth in subsections 1(b), 1(c) or 1(d) of the Order, one individual whose property and interests in property are blocked pursuant to Executive Order 13224.

The additional designee is as follows:

AL GHABRA, Mohammed, East London, United Kingdom; DOB 1 Jun 1980; POB Damascus, Syria; nationality United Kingdom; Passport 094629366 (United Kingdom).

Dated: December 19, 2006.

Adam J. Szubin,

Director, Office of Foreign Assets Control.

[FR Doc. E6–22069 Filed 12–22–06; 8:45 am]

BILLING CODE 4811–42–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 2587

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 2587, Application for Special Enrollment Examination.

DATES: Written comments should be received on or before February 26, 2007 to be assured of consideration.

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

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

SUPPLEMENTARY INFORMATION:

Title: Application for Special Enrollment Examination.

OMB Number: 1545–0949.

Form Number: Form 2587.

Abstract: Form 2587 is used by individuals to apply to take the Special Enrollment Examination to establish eligibility for enrollment to practice before the IRS. The information on the form is used by the Director of Practice to identify those individuals seeking to take the examination and to plan for the administration of the examination.

Current Actions: The form has been redesigned.

Type of Review: Extension of a currently approved collection.

Affected Public: Individuals.

Estimated Number of Respondents: 11,000.

Estimated Time per Respondent: 1 hour.

Estimated Total Annual Burden Hours: 11,000.

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

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

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

Approved: December 12, 2006.

Glenn P. Kirkland,

IRS Reports Clearance Officer.

[FR Doc. E6–22010 Filed 12–22–06; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

[REG–125638–01]

Proposed Collection; Comment Request for Deduction Guidance and Capitalization Expenditures

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 an existing regulation, REG–125638–01 (Final), (TD 9107) Guidance Regarding Deduction and Capitalization of Expenditures.

DATES: Written comments should be received on or before February 26, 2007 to be assured of consideration.

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

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the regulations should be directed to Carolyn N. Brown, at (202) 622–6665, or at Internal Revenue Service, Room 6516, 1111 Constitution Avenue, NW., Washington, DC 20224, or through the internet, at *Carolyn.N.Brown@irs.gov*.

SUPPLEMENTARY INFORMATION:

Title: Guidance Regarding Deduction and Capitalization of Expenditures.

OMB Number: 1545–1870.

Regulation Project Number: REG–125638–01.

Abstract: The information required to be retained by taxpayers will constitute sufficient documentation for purposes of substantiating a deduction. The information will be used by the agency on audit to determine the taxpayer's entitlement to a deduction. The respondents include taxpayers who engage in certain transactions involving the acquisition of a trade or business or an ownership interest in a legal entity.

Current Actions: There is no change to this existing regulation.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit institutions.

Estimated Number of Respondents: 3,000.

Estimated Total Burden Hours: 3,000.

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

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

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

Approved: December 8, 2006.

Glenn P. Kirkland,

IRS Reports Clearance Officer.

[FR Doc. E6–22011 Filed 12–22–06; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Tip Rate Determination Agreement (TRDA) for Most Industries

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 Tip Rate Determination Agreement (TRDA) for Most Industries.

DATES: Written comments should be received on or before February 26, 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 information collection should be directed to Allan Hopkins at Internal Revenue Service, Room 6516, 1111 Constitution Avenue, NW., Washington, DC 20224, or at (202) 622–6669, or through the internet at *Allan.M.Hopkins@irs.gov*.

SUPPLEMENTARY INFORMATION:

Title: Tip Rate Determination Agreement (TRDA) for Most Industries.

OMB Number: 1545–1717.

Abstract: Information is required by the Internal Revenue Service in its tax compliance efforts to assist employers and their employees in understanding and complying with Internal Revenue Code section 6053(a), which requires employees to report all their tips monthly to their employers.

Current Actions: There is no change to this existing information collection.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents and/or Recordkeeping: 100.

Estimated Average Time Per Respondent/Recordkeeper: 18 hr., 58 min.

Estimated Total Annual Reporting and/or Recordkeeping Burden Hours: 1,897.

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: December 8, 2006.

Glenn Kirkland,

IRS Reports Clearance Officer.

[FR Doc. E6–22012 Filed 12–22–06; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Tip Reporting Alternative Commitment (TRAC) for Most Industries

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 Tip Reporting Alternative Commitment (TRAC) for Most Industries.

DATES: Written comments should be received on or before February 26, 2007 to be assured of consideration.

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

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection should be directed to Carolyn N. Brown at Internal Revenue Service, Room 6516, 1111 Constitution Avenue, NW., Washington, DC 20224, or at (202) 622–6665, or through the internet at *Carolyn.N.Brown@irs.gov*.

SUPPLEMENTARY INFORMATION:

Title: Tip Reporting Alternative Commitment (TRAC) for Most Industries.

OMB Number: 1545–1714.

Abstract: Information is required by the Internal Revenue Service in its tax compliance efforts to assist employers and their employees in understanding and complying with Internal Revenue Code section 6053(a), which requires employees to report all their tips monthly to their employers.

Current Actions: There is no change to this existing information collection.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents and/or Recordkeeping: 300.

Estimated Average Time per Respondent/Recordkeeper: 16 hr., 16 min.

Estimated Total Annual Reporting and/or Recordkeeping Burden Hours: 4,877.

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: December 8, 2006.

Glenn P. Kirkland,

IRS Reports Clearance Officer.

[FR Doc. E6–22013 Filed 12–22–06; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Tip Reporting Alternative Commitment (Hairstyling Industry)

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 Tip Reporting Alternative Commitment (Hairstyling Industry).

DATES: Written comments should be received on or before February 26, 2007 to be assured of consideration.

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

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of information collection should be directed to Carolyn N. Brown at Internal Revenue Service, Room 6516, 1111 Constitution Avenue, NW., Washington, DC 20224, or at (202) 622–6665, or through the internet at *CAROLYN.N.BROWN@irs.gov*.

SUPPLEMENTARY INFORMATION:

Title: Tip Reporting Alternative Commitment (Hairstyling Industry).

OMB Number: 1545–1529.

Abstract: Information is required by the Internal Revenue Service in its tax compliance efforts to assist employers and their employees in understanding and complying with Internal Revenue Code section 6053(a), which requires employees to report all their tips monthly to their employers.

Current Actions: There is no change to this existing information collection.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents and/or Recordkeeping: 4,600.

Estimated Average Time per Respondent/Recordkeeper: 9 hr., 22 min.

Estimated Total Annual Reporting and/or Recordkeeping Burden Hours: 43,073.

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: December 8, 2006.

Glenn P. Kirkland,

IRS Reports Clearance Officer.

[FR Doc. E6–22014 Filed 12–22–06; 8:45 am]

BILLING CODE 4830–01–P

Corrections

Federal Register

Vol. 71, No. 247

Tuesday, December 26, 2006

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, Rule, Proposed Rule, and Notice documents. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

The President

3 CFR

Regarding the Proposed Merger of Alcatel and Lucent Technologies, Inc.

Correction

In Presidential document 06–9381 beginning on page 67429 in the issue of Wednesday, November 22, 2006, make the following correction:

In the heading on page 67429, the word ''Lucnet'' should read ''Lucent''.

[FR Doc. C6–9381 Filed 12–22–06; 8:45 am]

BILLING CODE 1505–01–D

Federal Register

Tuesday,

December 26, 2006

Part II

Department of the Treasury

Office of the Comptroller of the Currency

12 CFR Part 3

Federal Reserve System

12 CFR Parts 208 and 225

Federal Deposit Insurance Corporation

12 CFR Part 325

Department of the Treasury

Office of Thrift Supervision

12 CFR Parts 566 and 567

Risk-Based Capital Guidelines; Capital Adequacy Guidelines; Capital Maintenance: Domestic Capital Modifications; Proposed Rules and Notice

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

12 CFR Part 3

[Docket No. 06–15]

RIN 1557–AC95

FEDERAL RESERVE SYSTEM

12 CFR Parts 208 and 225

[Regulations H and Y; Docket No. R–1238]

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 325

RIN 3064–AC96

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

12 CFR Part 567

[No. 2006–49]

RIN 1550–AB98

Risk-Based Capital Guidelines; Capital Adequacy Guidelines; Capital Maintenance: Domestic Capital Modifications

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

ACTION: Joint notice of proposed rulemaking.

SUMMARY: The Office of the Comptroller of the Currency (OCC), Board of Governors of the Federal Reserve System (Board), Federal Deposit Insurance Corporation (FDIC), and Office of Thrift Supervision (OTS) (collectively, the Agencies) are proposing revisions to the existing risk-based capital framework that would enhance its risk sensitivity without unduly increasing regulatory burden. These changes would apply to banks, bank holding companies, and savings associations (banking organizations). A banking organization would be able to elect to adopt these proposed revisions or remain subject to the Agencies' existing risk-based capital rules, unless it uses the Advanced Capital Adequacy Framework proposed in the notice of proposed rulemaking published on September 25, 2006 (Basel II NPR).

In this notice of proposed rulemaking (NPR or Basel IA), the Agencies are proposing to expand the number of risk weight categories, allow the use of external credit ratings to risk weight certain exposures, expand the range of recognized collateral and eligible guarantors, use loan-to-value ratios to risk weight most residential mortgages, increase the credit conversion factor for certain commitments with an original maturity of one year or less, assess a charge for early amortizations in securitizations of revolving exposures, and remove the 50 percent limit on the risk weight for certain derivative transactions. A banking organization would have to apply all the proposed changes if it chose to use these revisions.

Finally, in Section III of this NPR, the Agencies seek further comment on possible alternatives for implementing the ''International Convergence of Capital Measurement and Capital Standards: A Revised Framework'' (Basel II) in the United States as proposed in the Basel II NPR.

DATES: Comments on this joint notice of proposed rulemaking must be received by March 26, 2007.

ADDRESSES: Comments should be directed to:

OCC: You should include OCC and Docket Number 06–15 in your comment. You may submit comments by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *OCC Web Site: http://www.occ.treas.gov.* Click on ''Contact the OCC,'' scroll down and click on ''Comments on Proposed Regulations.''
- *E-mail address: regs.comments@occ.treas.gov.*
- *Fax:* (202) 874–4448.
- *Mail:* Office of the Comptroller of the Currency, 250 E Street, SW., Mail Stop 1–5, Washington, DC 20219.
- *Hand Delivery/Courier:* 250 E Street, SW., Attn: Public Information Room, Mail Stop 1–5, Washington, DC 20219.

Instructions: All submissions received must include the Agency name (OCC) and docket number or Regulatory Information Number (RIN) for this notice of proposed rulemaking. In general, OCC will enter all comments received into the docket without change, including any business or personal information that you provide. You may review comments and other related materials by any of the following methods:

- *Viewing Comments Personally:* You may personally inspect and photocopy comments at the OCC's Public Information Room, 250 E Street, SW., Washington, DC. You can make an appointment to inspect comments by calling (202) 874–5043.
- *Viewing Comments Electronically:* You may request e-mail or CD–ROM copies of comments that the OCC has received by contacting the OCC's Public Information Room at *regs.comments@occ.treas.gov.*
- *Docket:* You may also request available background documents and project summaries using the methods described above.

Board: You may submit comments, identified by Docket No. R–1238, by any of the following methods:

- *Agency Web Site: http://www.federalreserve.gov.* Follow the instructions for submitting comments at *http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm.*
- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *E-mail: regs.comments@federalreserve.gov.* Include docket number in the subject line of the message.
- *FAX:* (202) 452–3819 or (202) 452–3102.
- *Mail:* Jennifer J. Johnson, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue, NW., Washington, DC 20551.

All public comments are available from the Board's Web site at *http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm* as submitted, unless modified for technical reasons. Accordingly, your comments will not be edited to remove any identifying or contact information. Public comments may also be viewed electronically or in paper form in Room MP–500 of the Board's Martin Building (20th and C Street, NW.) between 9 a.m. and 5 p.m. on weekdays.

FDIC: You may submit by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Agency Web site: http://www.FDIC.gov/regulations/laws/federal/propose.html*
- *Mail:* Robert E. Feldman, Executive Secretary, Attention: Comments/Legal ESS, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429.
- *Hand Delivered/Courier:* The guard station at the rear of the 550 17th Street Building (located on F Street), on business days between 7 a.m. and 5 p.m.
- *E-mail: comments@FDIC.gov.*
- *Public Inspection:* Comments may be inspected and photocopied in the FDIC Public Information Center, Room

E–1002, 3502 Fairfax Drive, Arlington, VA 22226, between 9 a.m. and 5 p.m. on business days.

Instructions: Submissions received must include the Agency name and title for this notice. Comments received will be posted without change to *http://www.FDIC.gov/regulations/laws/federal/propose.html,* including any personal information provided.

OTS: You may submit comments, identified by No. 2006–49, by any of the following methods:

• *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

• *E-mail address: regs.comments@ots.treas.gov.* Please include No. 2006–49 in the subject line of the message and include your name and telephone number in the message.

• *Fax:* (202) 906–6518.

• *Mail:* Regulation Comments, Chief Counsel's Office, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552, Attention: No. 2006–49.

• *Hand Delivery/Courier:* Guard's Desk, East Lobby Entrance, 1700 G Street, NW., from 9 a.m. to 4 p.m. on business days, Attention: Regulation Comments, Chief Counsel's Office, Attention: No. 2006–49.

Instructions: All submissions received must include the Agency name and docket number or Regulatory Information Number (RIN) for this rulemaking. All comments received will be posted without change to the OTS Internet Site at *http://www.ots.treas.gov/pagehtml.cfm?catNumber=67&an=1*, including any personal information provided.

Docket: For access to the docket to read background documents or comments received, go to *http://www.ots.treas.gov/pagehtml.cfm?catNumber=67&an=1.* In addition, you may inspect comments at the Public Reading Room, 1700 G Street, NW., by appointment. To make an appointment for access, call (202) 906–5922, send an e-mail to *public.info@ots.treas.gov,* or send a facsimile transmission to (202) 906–7755. (Prior notice identifying the materials you will be requesting will assist us in serving you.) We schedule appointments on business days between 10 a.m. and 4 p.m. In most cases, appointments will be available the next business day following the date we receive a request.

FOR FURTHER INFORMATION CONTACT:

OCC: Nancy Hunt, Risk Expert, (202) 874–4923; or Kristin Bogue, Risk Expert, (202) 874–5411, Capital Policy Division; Ron Shimabukuro, Special Counsel, or Carl Kaminski, Attorney, Legislative and Regulatory Activities Division, (202) 874–5090; Office of the Comptroller of the Currency, 250 E Street, SW., Washington, DC 20219.

Board: Thomas R. Boemio, Senior Project Manager, Policy, (202) 452–2982; Barbara Bouchard, Deputy Associate Director, (202) 452–3072; William Tiernay, Supervisory Financial Analyst (202) 872–7579; or Juan C. Climent, Supervisory Financial Analyst, (202) 872–7526, Division of Banking Supervision and Regulation; or Mark E. Van Der Weide, Senior Counsel, (202) 452–2263, Legal Division. For the hearing impaired only, Telecommunication Device for the Deaf (TDD), (202) 263–4869.

FDIC: Karl R. Reitz, Capital Markets Specialist, (202) 898–3857, or Bobby R. Bean, Chief, Policy Section Capital Markets Branch, (202) 898–3575, Division of Supervision and Consumer Protection; or Benjamin W. McDonough, Attorney, (202) 898–7411, or Michael B. Phillips, Counsel, (202) 898–3581, Supervision and Legislation Branch, Legal Division, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429.

OTS: Teresa Scott, Senior Project Manager, Supervision Policy (202) 906–6478; or Karen Osterloh, Special Counsel, Regulation and Legislation Division, Chief Counsel's Office, (202) 906–6639; Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

SUPPLEMENTARY INFORMATION:

I. Background

In 1989, the Office of the Comptroller of the Currency (OCC), Board of Governors of the Federal Reserve System (Board), Federal Deposit Insurance Corporation (FDIC), and Office of Thrift Supervision (OTS) (collectively, the Agencies) implemented a risk-based capital framework for U.S. banking organizations.[1] The Agencies based the framework on the ''International Convergence of Capital Measurement and Capital Standards'' (Basel I), published by the Basel Committee on Banking Supervision (Basel Committee) in 1988.[2] Basel I addressed certain weaknesses in the various regulatory capital regimes that were in force in most of the world's major banking jurisdictions. In the United States, the Basel I-based framework established a uniform regulatory capital system that captured some of the risks not otherwise captured by the regulatory capital to total assets ratio, provided some modest differentiation of regulatory capital based on broadly defined risk-weight categories, and encouraged banking organizations to strengthen their capital positions.

Consistent with Basel I, the Agencies' existing risk-based capital rules generally assign each credit exposure to one of five broad categories of credit risk, which allows for only limited differentiation in the assessment of credit risk for most exposures. Since the implementation of Basel I-based capital rules, the Agencies have made numerous revisions to these rules in response to changes in financial market practices and accounting standards as well as to implement legislative mandates and address safety and soundness issues. Over time, these revisions have modestly increased the degree of risk sensitivity of the Agencies' risk-based capital rules. The Agencies and the industry generally agree that the existing risk-based capital rules could be modified to better reflect the risks present in many banking organizations' portfolios without imposing undue regulatory burden. In recent years, however, the Agencies have limited modifications to the existing risk-based capital rules while international efforts to create a new risk-based capital framework were in process.

In June 2004, the Basel Committee introduced a new, more risk-sensitive capital adequacy framework, ''International Convergence of Capital Measurement and Capital Standards: A Revised Framework'' (Basel II).[3] Basel II is designed to promote improved risk measurement and management processes and better align minimum capital requirements with risk. For credit risk, Basel II includes three approaches for regulatory capital: Standardized, foundation internal ratings-based, and advanced internal ratings-based. For operational risk, Basel II also includes three methodologies:

[1] 12 CFR part 3, appendix A (OCC); 12 CFR parts 208 and 225, appendix A (Board); 12 CFR part 325, appendix A (FDIC); and 12 CFR part 567 (OTS). The risk-based capital rules generally do not apply to bank holding companies with less than $500 million in assets. 71 FR 9897 (Februray 28, 2006).

[2] The Basel Committee on Banking Supervision was established in 1974 by central banks and governmental authorities with bank supervisory responsibilities. Current member countries are Belgium, Canada, France, Germany, Italy, Japan, Luxembourg, the Netherlands, Spain, Sweden, Switzerland, the United Kingdom, and the United States.

[3] The complete text for Basel II as amended in November 2005 is available on the Bank for International Settlements Web site at *http://www.bis.org/publ/bcbs118.htm.*

Basic indicator, standardized, and advanced measurement.

In August 2003, the Agencies issued an advance notice of proposed rulemaking (Basel II ANPR), which explained how the Agencies might implement Basel II in the United States.[4] On September 25, 2006, the Agencies issued a notice of proposed rulemaking that provides the industry with a more definitive proposal for implementing Basel II in the United States (Basel II NPR).[5]

The Basel II NPR identifies two types of U.S. banking organizations that would use the Basel II rules: Those for which application of the rules would be mandatory (core banks), and those that might voluntarily apply the rules (opt-in banks) (collectively referred to as Basel II banking organizations). In general, the Basel II NPR defines a core bank as a banking organization that has consolidated total assets of $250 billion or more, has consolidated on-balance sheet foreign exposure of $10 billion or more, or is a subsidiary of a Basel II banking organization. The Basel II NPR presents the advanced internal ratings-based approach for credit risk and the advanced measurement approach for operational risk. However, the Agencies did seek comment in the Basel II NPR on whether U.S. banking organizations subject to the advanced approaches in the proposed rule (that is, core banks and opt-in banks) should be permitted to use other credit and operational risk approaches provided for in Basel II. The Agencies are seeking further comment on possible alternatives for Basel II banking organizations in Section III of this NPR.

The complexity and cost associated with implementing Basel II in the United States effectively limit its application to those banking organizations that are able to take advantage of economies of scale and absorb the costs associated with the enhanced risk management practices required of Basel II banking organizations. Thus, the implementation of Basel II would create a bifurcated regulatory capital framework in the United States: One set of rules for Basel II banking organizations, and another for banking organizations that do not use the proposed Basel II capital rules (non-Basel II banking organizations).

In comments responding to the Basel II ANPR, Congressional testimony, and other industry communications, several banking organizations, trade associations, and others raised concerns about the competitive effects of a bifurcated regulatory framework on community and regional banking organizations. Among other broad concerns, these commenters asserted that implementing the Basel II capital regime in the United States could result in lower minimum regulatory capital requirements for Basel II banking organizations with respect to certain types of credit exposures. As a result, regulatory capital requirements for similar products could differ depending on the capital regime under which a banking organization operates. Community and regional banking organizations asserted that this would put them at a competitive disadvantage.

To assist in quantifying the potential effects of implementing Basel II in the United States, the Agencies conducted a quantitative impact study during late 2004 and early 2005 (QIS 4).[6] QIS 4 was a comprehensive survey completed on a best efforts basis by 26 of the largest U.S. banking organizations using their own internal estimates of the key risk parameters driving the capital requirements under the Basel II framework. The results of the study suggested that the aggregate minimum risk-based capital requirements for the 26 banking organizations could drop approximately 15.5 percent relative to the existing Basel I-based framework. The QIS 4 results also indicated dispersion in capital requirements across banking organizations and portfolios, which was attributed in part to differences in the underlying data and methodologies used by banking organizations to quantify risk and their overall readiness to implement a Basel II framework. The Basel II NPR contains several provisions designed to limit potential reductions in minimum regulatory capital, such as an extended transition period during which the Agencies can thoroughly review those Basel II systems that are subject to supervisory oversight.

On October 20, 2005, the Agencies issued an advanced notice of proposed rulemaking soliciting public comment on possible revisions to U.S. risk-based capital rules that would apply to non-Basel II banking organizations (Basel IA ANPR).[7] The proposals in this NPR are based on those initial conceptual approaches and take into consideration the public comments that the Agencies received.

Together, the Agencies received 73 public comments from banking, trade, and other organizations and individuals. Generally, most commenters supported the Agencies' goal to make the risk-based capital rules more risk-sensitive. Several larger banking organizations and industry groups favored increased risk sensitivity, but argued that many of the proposed revisions should be optional so that banking organizations may weigh the costs and benefits of using the revisions. Several non-Basel II banking organizations and industry groups argued that the U.S. risk-based capital rules should allow banking organizations to use internal assessments of risk to determine their capital requirements. A few commenters endorsed a proposal for a four-tier capital framework that would apply different approaches to banking organizations based on the size and complexity, and the robustness of a banking organization's internal ratings systems. The commenters' proposal included an approach that would permit some non-Basel II banking organizations to use internal rating-based systems.

One commenter suggested tying Basel IA capital requirements directly to the aggregate results for Basel II calculations. This commenter suggested that Basel IA capital charges should link by loan category to the average risk-based capital requirements of the Basel II banking organizations for that loan category, plus a small premium to recognize the substantial costs of implementing Basel II.

Most smaller and midsize banking organizations generally requested that any changes to the existing capital rules be simple and not require large data gathering and monitoring expenses. A number of the smallest banking organizations said that they do not wish to have any changes in the capital rules that apply to them. They noted that they already hold significantly more regulatory capital than the Agencies' risk-based capital rules require and, therefore, amending the rules would have little or no effect.

This NPR makes a number of proposals that should improve the risk sensitivity of the existing risk-based capital rules. The Agencies, however, are not proposing to allow a non-Basel II banking organization to use internal risk ratings or to use its internal risk

[4] As stated in its preamble, the Base II ANPR was based on the consultative document ''The New Basel Capital Accord'' that was published by the Basel Committee on April 29, 2003. The Basel II ANPR anticipated the issuance of a final revised accord. See 68 FR 45900 (August 4, 2003).

[5] 71 FR 55380 (September 25, 2006). The Basel II NPR would add new appendices to the Agencies' existing capital regulations. These new appendices would be found at 12 CFR Part 3, Appendix C (OCC); 12 CFR Part 208, Appendix F and 12 CFR Part 225, Appendix F (FRB); 12 CFR Part 325, Appendix D (FDIC); and 12 CFR part 566, subpart A (OTS).

[6] ''Summary Findings of the Fourth Quantitative Impact Study,'' Joint Agency press release, February 24, 2006.

[7] 70 FR 61068 (October 20, 2005).

measurement processes to calculate risk-based capital requirements for any new categories of exposures.[8] The Agencies believe that the use of these internal ratings and measurement processes should require the systems controls, supervisory oversight, and other qualification requirements that are proposed in the Basel II NPR.

The Agencies also believe that any proposal to tie capital requirements under Basel IA to the capital charges that would result under the proposed Basel II rules is premature. The Agencies anticipate that the Basel II transition phase would not be completed until 2011 at the earliest. The Agencies also have other concerns about the commenter's proposal including the absence of a capital charge for operational risk; the method by which any premium over the Basel II charges would be determined; difficulties in defining comparable portfolios; and the need to periodically update capital requirements, which would significantly increase complexity and burden.

II. Proposed Changes

In considering revisions to the existing risk-based capital rules, the Agencies were guided by five broad principles. A revised framework must: (1) Promote safe and sound banking practices and a prudent level of regulatory capital; (2) maintain a balance between risk sensitivity and operational feasibility; (3) avoid undue regulatory burden; (4) create appropriate incentives for banking organizations; and (5) mitigate material distortions in the risk-based capital requirements for large and small banking organizations.

The Agencies are concerned about potential competitive disadvantages that could result from capital requirements that differ depending on the capital regime under which a banking organization operates. By allowing non-Basel II banking organizations the choice of adopting all of the provisions in this proposal or continuing to use the existing risk-based capital rules, the proposed regulation is intended to help maintain the competitive position of these banks relative to Basel II banking organizations. Moreover, the proposed rule strives for better alignment of capital and risk, with capital requirements potentially higher for organizations with riskier exposures and lower for those with safer exposures. The Agencies seek to achieve these objectives while balancing operational feasibility and regulatory burden considerations.

In this NPR, the Agencies are proposing to:

- Allow non-Basel II banking organizations the choice of adopting all of the revisions in this proposal or continuing to use the existing risk-based capital rules. The voluntary nature of this proposed rule gives banking organizations the opportunity to weigh the various costs and benefits to them of adopting the new system.
- Increase the number of risk weight categories to which credit exposures may be assigned.
- Use external credit ratings to risk weight certain exposures.
- Expand the range of recognized collateral and eligible guarantors.
- Use loan-to-value ratios to risk weight most residential mortgages.
- Increase the credit conversion factor for various commitments with an original maturity of one year or less.
- Assess a risk-based capital charge for early amortizations in securitizations of revolving exposures.
- Remove the 50 percent limit on the risk weight for certain derivative transactions.

The existing risk-based capital requirements focus primarily on credit risk and do not impose explicit capital charges for interest rate, operational, or other risks. These risks, however, are implicitly covered by the existing risk-based capital rules. The risk-based capital charges proposed in this NPR continue the implicit coverage of risks other than credit risk. Moreover, the Agencies are not proposing revisions to the existing leverage ratio requirement (that is, the ratio of Tier 1 capital to total assets).[9]

To ensure safety and soundness, the Agencies intend to closely monitor the level of risk-based capital at those banking organizations that choose to opt in to Basel IA. Any significant decline in the aggregate level of risk-based capital for these banking organizations may warrant modifications to the proposed risk-based capital rules.

Question 1: The Agencies welcome comments on all aspects of these proposals, especially suggestions for reducing the burden that may be associated with these proposals. The Agencies believe that a banking organization that chooses to adopt these proposals will generally be able to do so with data it currently uses as part of its credit approval and portfolio management processes. Commenters are particularly requested to address whether any of the proposed changes would require data that are not currently available as part of the organization's existing credit approval and portfolio management systems.

A. Opt-In Proposal

In the Basel IA ANPR, the Agencies recognized that certain banking organizations might not want to assume the additional burden that might accompany a more risk-sensitive approach and might prefer to continue to apply the existing risk-based capital rules. Additionally, many commenters, particularly community bank respondents, favored an approach that would allow well-capitalized banking organizations to remain under the existing risk-based capital rules. For these commenters, limiting regulatory burden was a higher priority than increasing the risk sensitivity of their risk-based capital charges. One group of midsize banking organizations recommended applying the proposed rules only to banking organizations with assets of $500 million or greater. Some commenters noted the risk of ''cherry picking'' in permitting a choice between the framework discussed in the Basel IA ANPR and the existing risk-based capital rules, or adoption of parts of each.

The Agencies are proposing that a non-Basel II banking organization may, if it chooses, adopt the revisions in this proposed rule. If a banking organization chooses to use these proposed capital rules, however, it would be required to implement them in their entirety. The Agencies are proposing to permit a banking organization to adopt these proposals by notifying its primary Federal supervisor. Before a banking organization decides to opt in to these proposals, the Agencies expect that the organization would review its ability to collect and utilize the information required and evaluate the potential impact on its regulatory capital. A banking organization that chooses to adopt these proposals (that is, opts in) would also be able to request returning to the existing capital rules by first notifying its primary Federal supervisor. In its review of such a request, the primary Federal supervisor would ensure that the risk-based capital requirements appropriately reflect the risk profile of the banking organization and the change is not for purposes of

[8] The Agencies' existing capital rules, however, would continue to permit the use of internal ratings for a direct credit substitute (but not a purchased credit-enhancing interest-only strip) assumed in connection with an asset-backed commercial paper program sponsored by a banking organization. 12 CFR part 3, appendix A section 4(g) (OCC); 12 CFR parts 208 and 225, appendix A, section III.B.3.F (Board); 12 CFR part 325, appendix A, section II.B.5(g)(1) (FDIC); and 12 CFR 567.6(b)(4) (OTS).

[9] 12 CFR 3.6(b) and (c) (OCC); 12 CFR part 208, appendix B and 12 CFR part 225, appendix D (Board); 12 CFR part 325.3 (FDIC); and 12 CFR 567.8 (OTS).

capital arbitrage. Further, the Agencies expect that a banking organization would not alternate between the existing and proposed risk-based capital rules. The Agencies would reserve the authority to require a banking organization to calculate its minimum risk-based capital requirements in accordance with this proposal or the existing risk-based capital rules.

Under this proposal, a non-Basel II banking organization could continue to calculate its risk-based capital requirements using the existing risk-based capital rules. In this case, the banking organization would not need to notify its primary Federal supervisor or take any other action. As noted, above, however, the Agencies would retain the authority to require a non-Basel II banking organization to use either the existing or the proposed risk-based capital rules if the banking organization's primary Federal supervisor determines that a particular capital rule is more appropriate for the risk profile of the banking organization.

Question 2: The Agencies seek comment on all aspects of the proposal to allow banks to opt in to and out of the proposed rules. Specifically, the Agencies seek comment on any operational challenges presented by the proposed rules. How far in advance should a banking organization be required to notify its primary Federal supervisor that it intends to implement the proposed rule? If a banking organization wishes to ''opt out'' of the proposed rule, what criteria should guide the review of a request to opt out? When should a banking organization's election to opt in or opt out be effective? In addition, the Agencies seek comment on the appropriateness of requiring a banking organization to apply the proposed Basel IA capital rules based on a banking organization's asset size, level of complexity, risk profile, or scope of operations.

B. Increase the Number of Risk Weight Categories

The Agencies' existing risk-based capital rules contain five risk-weight categories: Zero, 20, 50, 100, and 200 percent. Differentiation of credit quality among individual exposures is generally limited to these few risk-weight categories. In the Basel IA ANPR, the Agencies suggested adding four new risk-weight categories (35, 75, 150, and 350 percent) and invited comment on whether: (1) Increasing the number of risk-weight categories would allow supervisors to more closely align capital requirements with risk; (2) the suggested additional risk-weight categories would be appropriate; (3) the risk-based capital framework should include more risk-weight categories than the four suggested; and (4) increasing the number of risk-weight categories would impose unnecessary burden on banking organizations.

Commenters generally supported increasing the number of risk-weight categories to enhance the overall risk-sensitivity of the risk-based capital rules. However, many commenters noted that adding too many categories could make the rules too complex. Several commenters argued that the 350 percent risk weight is too high and suggested that any new risk-weight categories should be lower than 100 percent to reflect the lower risks associated with certain mortgages and other high-quality assets. A few commenters suggested that the Agencies create a new 10 percent risk weight category to account for very low-risk assets.

The Agencies agree with the commenters that increasing the number of risk-weight categories would allow for greater risk sensitivity than the existing risk-based capital rules. Accordingly, the Agencies propose to add 35, 75, and 150 percent risk-weight categories. The Agencies believe that adding a 150 percent risk weight category and expanding the use of the existing 200 percent risk weight category would allow for somewhat greater differentiation of credit risk among more risky exposures than is permitted by the existing capital rules. At the same time, for certain types of relatively low-risk exposures, the existing risk-based capital charge may be higher than warranted. Therefore, the 35 and 75 percent risk weight categories provide an opportunity to increase the risk sensitivity of the regulatory capital charges for these exposures.

The Agencies agree that the credit risks covered by this NPR generally do not warrant a 350 percent category, and are not proposing to add this risk weight. *Question 3: The Agencies seek comment on whether these or any other new risk weight categories would be appropriate. More specifically, the Agencies are interested in any comments regarding whether any categories of assets might warrant a risk weight higher than 200 percent and what risk weight might be appropriate for such assets. The Agencies also solicit comment on whether a 10 percent risk weight category would be appropriate and what exposures should be included in this risk weight category.*

C. Use of External Credit Ratings to Risk Weight Exposures

The Agencies' existing risk-based capital rules permit the use of external credit ratings issued by a nationally recognized statistical rating organization (NRSRO) [10] to assign risk weights to recourse obligations, direct credit substitutes (DCS), residual interests (other than a credit-enhancing interest-only strip), and asset- and mortgage-backed securities.[11] For example, AAA- and AA-rated mortgage-backed securities [12] are assigned to the 20 percent risk weight category while BB-rated mortgage-backed securities are assigned to the 200 percent risk weight category. When the Agencies revised the risk-based capital rules to allow for the use of external credit ratings issued by an NRSRO for the types of exposures listed above, the Agencies acknowledged that such ratings could be used to determine the risk-based capital requirements for other types of debt instruments, such as rated corporate debt.

In the Basel IA ANPR, the Agencies suggested expanding the use of NRSRO ratings to determine the risk-based capital charge for most categories of NRSRO-rated exposures, including sovereign and corporate debt securities and rated loans. The Agencies indicated, however, that they were considering retaining the existing risk-based capital treatment for U.S. government and agency exposures, U.S. government-sponsored entity exposures, and municipal obligations. Tables 1 and 2 in the Basel IA ANPR matched ratings and possible corresponding risk weights for long- and short-term exposures. The Agencies requested comment on the use of other methodologies to assign risk weights to unrated exposures.

[10] An NRSRO is an entity recognized by the Division of Market Regulation of the Securities and Exchange Commission (SEC) as a nationally recognized statistical rating organization for various purposes, including the SEC's uniform net capital requirements for brokers and dealers 17 CFR 240.15c3–1). On September 29, 2006, the President signed the Credit Rating Agency Reform Act of 2006 (Reform Act) (Pub. L. 109–291) into law. The Reform Act requires a credit rating agency that wants to represent itself as an NRSRO to register with the SEC. The Agencies may review their risk-based capital rules, guidance and proposals from time to time in order to determine whether any modification of the Agencies' definition of an NRSRO is appropriate.

[11] Some synthetic structures may also be subject to the external rating approach. For example, certain credit-linked notes issued from a synthetic securitization are risk weighted according to the rating given to the notes. 66 FR 59614, 59622 (November 29, 2001).

[12] The ratings designations (for example, ''AAA,'' ''BBB,'' ''A–1,'' and ''P–1''), are illustrative and do not indicate any preference for, or endorsement of, any particular rating agency description system.

Many commenters supported the use of external ratings in principle but noted that non-Basel II banking organizations' holdings of securities and loans generally are not rated. Thus, they suggested that the expansion of the use of NRSRO ratings would have little impact on these banking organizations. A few commenters also asserted that using NRSRO ratings might discourage lending to non-rated entities.

Many commenters argued that the risk weights suggested in the Basel IA ANPR were too high. In particular, many commenters said that the 350 percent and 200 percent risk weights for exposures rated BB+ and lower would be unnecessarily punitive. A few commenters also expressed concerns about NRSRO ratings generally. These commenters said that there are too few NRSROs to ensure adequate market discipline, NRSROs are inadequately supervised, and NRSRO ratings often react too slowly to crises.

A number of commenters suggested alternative methods for differentiating risk among commercial exposures and making the capital requirements for these exposures more risk sensitive. Many larger banking organizations suggested allowing an internal risk measurement approach to determine risk-based capital requirements. Some smaller banking organizations sought increased recognition of a variety of risk mitigation techniques, such as personal guarantees and collateral.

The Agencies acknowledge that expanding the use of external ratings may have little effect on the risk-based capital requirements for existing loan portfolios at most banking organizations. To the extent that assets in a banking organization's investment portfolio are rated, however, the Agencies believe that using external ratings will improve risk sensitivity of the capital charges for these assets. Furthermore, implementing broader use of external ratings would also provide a basis for expanding recognition of eligible guarantees and recognized collateral. Accordingly, the Agencies are proposing to expand the use of external ratings for purposes of determining the risk-based capital charge for certain externally rated exposures as described below in the sections on direct exposures, recognized collateral, and eligible guarantees.

An external rating would be defined as a credit rating that is assigned by an NRSRO, provided that the credit rating (1) fully reflects the entire amount of credit risk with regard to all payments owed to the holder and the credit risk associated with timely repayment of principal and interest; (2) is published in an accessible public form, for example, on the NRSRO's Web site and in financial media; (3) is monitored by the NRSRO; and (4) is, or will be, included in the issuing NRSRO's publicly available transition matrix.[13] If an exposure has two or more external ratings, the banking organization must use the lowest assigned external rating to risk weight the exposure. If an exposure has components that are assigned different external ratings, a banking organization would be required to assign the lowest rating to the entire exposure. If a component is not externally rated, the entire exposure would be treated as unrated.

i. Direct Exposures

The Agencies are proposing to use external ratings to risk weight (1) sovereign[14] debt and debt securities, and (2) debt securities issued by and rated loans to non-sovereign entities including securities firms, insurance companies, bank holding companies, savings and loan holding companies, multilateral lending and regional development institutions, partnerships, limited liability companies, business trusts, special purpose entities, associations and other similar organizations. External ratings for direct exposures to sovereigns would be based on the external rating of the exposure or, if the exposure is unrated, on the sovereign's issuer rating. Direct exposures to non-sovereigns would be risk weighted based on the external rating of the exposure. For example, a banking organization would assign any AAA-rated debt security issued by a corporation, insurance company, or securities firm to the 20 percent risk weight category. The Agencies are, however, not proposing to permit the use of issuer ratings for non-sovereigns.

The risk weights for direct exposures are detailed in Table 1 (long-term exposures) and Table 2 (short-term exposures) below. The Agencies are also proposing to replace the existing risk-weight tables for externally rated recourse obligations, DCS, residual interests (other than a credit-enhancing interest-only strip), and asset- and mortgage-backed securities[15] with the risk weights in Tables 1 and 2.[16] This proposed treatment would apply to all externally rated exposures unless the banking organization uses a market risk rule.[17] For a banking organization that uses a market risk rule, this treatment applies only to externally rated exposures held in the banking book.

The Agencies intend to retain the existing risk-based capital treatment for direct exposures to public-sector entities,[18] the U.S. government and its agencies, U.S. government-sponsored agencies, and depository institutions (U.S. and foreign) and for unrated loans made to non-sovereign entities. Exposures issued by these entities are not subject to Table 1 or 2.

[13] A transition matrix tracks the performance and stability (or ratings migration) of an NRSRO's issued external ratings.

[14] A sovereign is defined as a central government, including its agencies, departments, ministries, and the central bank. A soverign does not include state, provincial, or local governments, or commercial enterprises owned by a central government.

[15] 12 CFR part 3, appendix A, section 4, Tables B and C (OCC); 12 CFR parts 208 and 225, appendix A, section III.B.3.c.i. (Board); 12 CFR part 325, appendix A, section II.B.5.(d) (FDIC); and 12 CFR 567.6(b) (OTS) (the Recourse Rule).

[16] With the exception of the clarification of the definition of an external rating and the proposed risk-based capital charge for securitizations with early amortization features described in section F of this NPR, the Agencies are not proposing to make other changes to the existing risk-based capital rules for recourse obligations, DCS, and residual interests. See 12 CFR part 3, appendix A, section 4 (OCC); 12 CFR parts 208 and 225, appendix A, section III.B.3 (Board); 12 CFR part 325, appendix A, section II.B.5 (FDIC); and 12 CFR 567.6(b) (OTS) (Recourse Rule).

[17] See 12 CFR part 3, appendix B (OCC); 12 CFR parts 208 and 225, appendix E (Board); and 12 CFR part 325 appendix C (FDIC). The Agencies issued an NPR that proposes revisions to the Market Risk rules. OTS does not currently have a market risk rule, but has proposed to add a new rule on this topic in the Market Risk NPR. See 71 FR 55958 (September 25, 2006).

[18] Public-sector entities include states, local authorities and governmental subdivisions below the central government level in an Organization for Economic Cooperation and Development (OECD) country. In the United States, this definition encompasses a state, county, city, town, or other municipal corporation, a public authority, and generally any publicly-owned entity that is an instrument of a state or municipal corporation. This definition does not include commercial companies owned by the public sector. The OECD-based group of countries comprises all full members of the OECD, as well as countries that have concluded special lending arrangements with the International Monetary Fund (IMF) associated with the Fund's General Arrangements to Borrow.

TABLE 1.—PROPOSED RISK WEIGHTS BASED ON EXTERNAL RATINGS FOR LONG-TERM EXPOSURES

Long-term rating category	Example	Sovereign risk weight (in percent)	Non-sovereign risk weight (in percent)	Securitization exposure [1] risk weight (in percent)
Highest investment grade rating	AAA	0	20	20
Second-highest investment grade rating	AA	20	20	20
Third-highest investment grade rating	A	20	35	35
Lowest-investment grade rating—plus	BBB+	35	50	50
Lowest-investment grade rating	BBB	50	75	75
Lowest-investment grade rating—minus	BBB−	75	100	100
One category below investment grade	BB+, BB	75	150	200
One category below investment grade—minus	BB−	100	200	200
Two or more categories below investment grade	B, CCC	150	200	[1]
Unrated [2]	n/a	200	200	[1]

[1] A securitization exposure includes asset- and mortgage-backed securities, recourse obligations, DCS, and residuals (other than a credit-enhancing interest-only strip). For long-term securitization exposures that are externally rated more than one category below investment grade, short-term exposures that are rated below investment grade, or any unrated securitization exposures, the existing risk-based capital treatment as described in the Agencies' Recourse Rule would be used.

[2] Unrated sovereign exposures and unrated debt securities issued by non-sovereigns would receive the risk weight indicated in Tables 1 and 2. Other unrated exposures, for example, unrated loans to non-sovereigns, would continue to be risk weighted under the existing risk-based capital rules.

TABLE 2.—PROPOSED RISK WEIGHTS BASED ON EXTERNAL RATINGS FOR SHORT-TERM EXPOSURES

Short-term rating category	Example	Sovereign risk weight (in percent)	Non-sovereign risk weight (in percent)	Securitization exposure [1] risk weight (in percent)
Highest investment grade rating	A–1, P–1	0	20	20
Second-highest investment grade rating	A–2, P–2	20	35	3
Lowest investment grade	A–3, P–3	50	75	75
Unrated [2]	n/a	100	100	([1])

[1] A securitization exposure includes asset- and mortgage-backed securities, recourse obligations, DCS, and residuals (other than a credit-enhancing interest-only strip). For long-term securitization exposures that are externally rated more than one category below investment grade, short-term exposures that are rated below investment grade, or any unrated securitization exposures, the existing risk-based capital treatment as described in the Agencies' Recourse Rule would be used.

[2] Unrated sovereign exposures and unrated debt securities issued by non-sovereigns would receive the risk weight indicated in Tables 1 and 2. Other unrated exposures, for example, unrated loans to non-sovereigns, would continue to be risk weighted under the existing risk-based capital rules.

The proposed risk weights in Tables 1 and 2 are generally consistent with the historical default rates reported in the default studies published by NRSROs. The Agencies believe that the additional application of external ratings to the exposures specified above would improve the risk sensitivity of the capital treatment for those exposures. Furthermore, the Agencies believe that the revised risk-weight tables for externally rated recourse obligations, DCS, residual interests (other than credit-enhancing interest only-strips), and asset- and mortgage-backed securities would also better reflect risk than the Agencies' existing risk-based capital rules.

Under the proposal, the Agencies would retain their authority to reassign an exposure to a different risk weight on a case-by-case basis to address the risk of a particular exposure.

ii. Recognized Financial Collateral

The Agencies' existing risk-based capital rules recognize limited types of collateral: (1) Cash on deposit; (2) securities issued or guaranteed by central governments of the OECD countries; (3) securities issued or guaranteed by the U.S. government or its agencies; (4) securities issued or guaranteed by U.S. government-sponsored agencies; and (5) securities issued by certain multilateral lending institutions or regional development banks.[19] In the past, the banking industry has commented that the Agencies should recognize a wider array of collateral types for purposes of reducing risk-based capital requirements.

In the Basel IA ANPR, the Agencies noted that they were considering expanding the list of recognized collateral to include short-or long-term debt securities (for example, corporate and asset- and mortgage-backed securities) that are externally rated at least investment grade by an NRSRO, or issued or guaranteed by a sovereign central government that is externally rated at least investment grade by an NRSRO. Consistent with the proposed treatment for direct exposures, the Basel IA ANPR suggested assigning exposures or portions of exposures collateralized by financial collateral to risk-weight categories based on the external rating of that collateral. To use this expanded list of collateral, the Basel IA ANPR considered requiring a banking organization to have collateral management systems to track collateral and readily determine its realizable value. The Agencies sought comment on whether this approach for expanding the scope of recognized collateral would improve risk sensitivity without being overly burdensome.

Many commenters supported expanding the list of recognized collateral, but several also noted that using NRSRO ratings would have little effect on most community banks. Some commenters suggested reducing the risk weights applied to exposures secured by

[19] The Agencies' rules for collateral transactions, however, differ somewhat as described in the Agencies' joint report to Congress. ''Joint Report: Differences in Accounting and Capital Standards among the Federal Banking Agences,'' 70 FR 15379 (March 25, 2005).

any collateral that is legally perfected and has objective methods of valuation or can be readily marked-to-market. Many commenters also stated that any collateral valuation and monitoring requirements likely would be too costly to benefit smaller community banks.

To increase the risk sensitivity of the existing risk-based capital rules, the Agencies are proposing to revise the list of recognized collateral to include a broader array of externally rated, liquid, and readily marketable financial instruments. The revised list would incorporate long- and short-term debt securities and securitization exposures that are:

a. Issued or guaranteed by a sovereign where such securities are externally rated at least investment grade by an NRSRO; or an exposure issued or guaranteed by a sovereign with an issuer rating that is at least investment grade; or

b. Issued by non-sovereigns where such securities are externally rated at least investment grade by an NRSRO.

Consistent with the Agencies' existing risk-based capital rules, the Agencies propose to continue to recognize collateral that is either issued or guaranteed by certain sovereigns. For non-sovereign exposures, however, the Agencies propose that the collateral itself must be externally rated investment grade or better to qualify as recognized collateral. The Agencies believe that this more conservative approach for recognizing non-sovereign collateral is appropriate and expect that any guarantee provided by a non-sovereign would be reflected in the external rating of the collateral.

A banking organization would assign exposures collateralized by financial collateral externally rated at least investment grade to the appropriate risk weight in Table 1 or 2 above. If an exposure is partially collateralized, a banking organization could assign the portions of exposures collateralized by the market value of the externally rated collateral to the appropriate risk weight category in Tables 1 and 2 of this NPR. For example, the portion of an exposure collateralized by the market value of a AAA-rated corporate debt security would be assigned to the 20 percent risk weight category. The Agencies are proposing a minimum risk weight of 20 percent for collateralized exposures except as noted below.

The Agencies have decided to retain their respective risk-based capital rules that govern the following collateral: Cash, securities issued or guaranteed by the U.S. government or its agencies, and securities issued or guaranteed by U.S. government-sponsored agencies. The Agencies are also retaining the existing risk-based capital rules for exposures collateralized by securities issued or guaranteed by other OECD central governments that meet certain criteria.[20]

iii. Eligible Guarantors

Under the Agencies' existing risk-based capital rules, the recognition of third party guarantees is limited to guarantees provided by central governments of OECD countries, U.S. government and government-sponsored entities, public-sector entities in OECD countries, multilateral lending institutions and regional development banks, depository institutions and qualifying securities firms in OECD countries, depository institutions in non-OECD countries (short-term claims), and central governments of non-OECD countries (local currency exposures only).

In the Basel IA ANPR, the Agencies suggested expanding the scope of eligible guarantors to include any entity whose long-term senior debt has been assigned an external credit rating of at least investment grade by an NRSRO. The applicable risk weight for guaranteed exposures would be based on the risk weights corresponding to the rating of the long-term debt of the guarantor.

Most commenters supported, in principle, expanding the list of eligible guarantors. However, many commenters noted that very few community and midsize banking organizations have exposures that are guaranteed by externally rated entities. Thus, many commenters suggested that this provision would have little impact unless the proposed revisions recognized more types of guarantees.

The Agencies believe that the range of eligible third-party guarantors under the existing risk-based capital rules is restrictive and ignores market practice. As a result, the Agencies are proposing to expand the list of eligible guarantors by recognizing entities that have long-term senior debt (without credit enhancement) rated at least investment grade by an NRSRO or, in the case of a sovereign, an issuer rating that is at least investment grade. Under this NPR, a recognized third-party guarantee would have to:

(1) Be written and unconditional, and, for a sovereign guarantee, be backed by the full faith and credit of the sovereign;

(2) Cover all or a pro rata portion of contractual payments of the obligor on the reference exposure;[21]

(3) Give the beneficiary a direct claim against the protection provider;

(4) Be non-cancelable by the protection provider for reasons other than the breach of the contract by the beneficiary;

(5) Be legally enforceable against the protection provider in a jurisdiction where the protection provider has sufficient assets against which a judgment may be attached and enforced; and

(6) Require the protection provider to make payment to the beneficiary on the occurrence of a default (as defined in the guarantee) of the obligor on the reference exposure without first requiring the beneficiary to demand payment from the obligor.

To be considered an eligible guarantor, a sovereign or its senior long-term debt (without credit enhancement) must be externally rated at least investment grade. Non-sovereigns must have long-term senior debt (without credit enhancement) that is externally rated at least investment grade. Under this proposal, a banking organization could assign the portions of exposures guaranteed by eligible guarantors to the proposed risk weight category corresponding to the external rating of the eligible guarantors' long-term senior debt in accordance with Table 1 above.

The Agencies would retain the existing risk-weight treatment of exposures guaranteed by the U.S. government and its agencies, U.S. government-sponsored agencies, public-sector entities, depository institutions in OECD countries, and depository institutions in non-OECD countries (short-term exposures only).

Question 4: The Agencies solicit comment on all aspects of the proposed use of external ratings including the appropriateness of the risk weights, expanded collateral, and additional eligible guarantors. The Agencies also seek comment on whether to exclude certain externally rated exposures from the ratings treatment as proposed or to use external ratings as a measure for all externally rated exposures, collateral, and guarantees. Alternatively, should the Agencies retain the existing risk-based capital treatment for certain types of exposures, for example, qualifying securities firms? The Agencies are also interested in comments on all aspects of the scope of the terms sovereign, non-

[20] 12 CFR part 3, appendix A, section 3(a)(1)(viii) (OCC); and 12 CFR parts 208 and 225, appendix A, section III.C.1 (Board).

[21] If an exposure is partially guaranteed, the pro rata portion not covered by the guarantee would be assigned to the risk weight category appropriate to the obligor, after consideration of collateral and external ratings.

sovereign, and securitization exposures. Specifically, the Agencies seek comment on the scope of these terms, whether they should be expanded to cover other entities, or whether any entities included in these definitions should be excluded.

iv. Government-Sponsored Agencies

One area of particular interest to the Agencies is the risk weighting of exposures to U.S. government-sponsored agencies, also commonly referred to as government-sponsored entities (GSEs). The Agencies' existing risk-based capital regulations assign a 20 percent risk weight to exposures issued or guaranteed by GSEs. The Basel IA NPR proposes to retain this risk-based capital treatment. The Agencies are aware that there are various types of ratings that might increase the risk sensitivity of risk weights assigned to GSE exposures. For example, NRSROs rate the creditworthiness of short-term senior debt, senior unsecured debt, subordinated debt and preferred stock of some GSEs. These ratings on individual exposures, however, are often based in part on the NRSROs' assessment of the extent to which the U.S. government might come to the financial aid of a GSE if necessary. In this context, and as indicated in the preamble to the Basel II NPR, the Agencies do not believe that risk weight determinations should be based on the possibility of U.S. government financial assistance, except for the financial assistance the U.S. government has legally committed to provide. The Agencies believe the existing approach has thus far met this objective. However, the Agencies also note that as part of the October 19, 2000 agreement with their regulator,[22] both Fannie Mae and Freddie Mac agreed to obtain and disclose annually ratings that would ''assess the risk to the government, or the independent financial strength, of each of the companies.'' [23]

In accordance with the agreement, Fannie Mae and Freddie Mac currently obtain and disclose separate ratings from two NRSROs—''Standard & Poor's (S&P) and Moody's Investors Service (Moody's). The S&P ''risk to the government rating'' uses the same scale as its standard corporate credit ratings. Currently, Fannie Mae and Freddie Mac both have a risk to the government issuer rating of AA− from S&P, which is unchanged from the initial AA− issuer rating that S&P initially provided in 2001. Moody's ''bank financial strength rating'' (BFSR) uses a scale of A–E. In 2002, Moody's provided a BFSR of A− to both GSEs. On March 28, 2005, Moody's downgraded Fannie Mae's BFSR to B+. Based on Moody's mapping of BFSRs to Moody's basic credit assessment ratings, A− is the equivalent of an Aa1 and B+ maps to an Aa2.

Both the risk to government rating and the BFSR (collectively, financial strength ratings) are issuer ratings that evaluate the financial strength of each GSE without respect to any implied financial assistance from the U.S. government. These financial strength ratings are published and monitored by the issuing NRSRO but they are not included in the NRSROs' transition matrices. These ratings are an indicator of each GSE's overall financial condition and safety and soundness and, thus, do not apply to any specific financial obligation or the probability of timely payment thereof.[24] If the Agencies were to use these S&P and Moody's financial strength ratings to risk weight exposures to Fannie Mae and Freddie Mac in a manner similar to the use of external ratings for rated exposures as proposed in the Basel IA NPR, the current ratings would map to a 20 percent risk weight.

Question 5: The Agencies are considering whether to use financial strength ratings to determine risk weights for exposures to GSEs, where this type of rating is available, and are seeking comment on how a financial strength rating might be applied. For example, should the financial strength rating be mapped to the non-sovereign risk weights in Tables 1 and 2? Should these ratings apply to all GSE exposures including short- and long-term debt, mortgage-backed securities, collateral, and guarantees? How should exposures to a GSE that lacks a financial strength rating be risk weighted? Are there any requirements in addition to publication and on-going monitoring that should be incorporated into the definition of an acceptable financial strength rating?

Question 6: The Agencies also seek comment on whether to exclude certain other externally rated exposures from the ratings treatment as proposed or to use external ratings as a measure for additional externally rated exposures, collateral, and guarantees. Should the proposed ratings treatment be applicable for direct exposures to public sector entities or depository institutions? Likewise, should the proposed ratings treatment be applicable to exposures guaranteed by public sector entities or depository institutions, and to exposures collateralized by debt securities issued by those entities?

D. Mortgage Loans Secured by a Lien on a One-to-Four Family Residential Property

i. First Lien Risk Weights

The Agencies' existing risk-based capital rules assign first-lien, one-to-four family residential mortgages to either the 50 percent or 100 percent risk weight category. Most mortgage loans secured by a first lien on a one-to-four family residential property (first lien mortgages) meet the criteria to receive a 50 percent risk weight.[25] The broad assignment of most first lien mortgages to the 50 percent risk weight category has been criticized for not being sufficiently risk sensitive.

In the Basel IA ANPR, the Agencies stated they were considering options to make the risk-based capital requirement for residential mortgages more risk sensitive while not unnecessarily increasing regulatory burden. One option was to base the capital requirement on loan-to-value ratios (LTV), determined after consideration of private mortgage insurance (PMI). This option was illustrated by an LTV risk weight table that suggested risk weights of 20, 35, 50, and 100 percent.

Another option discussed in the Basel IA ANPR was to assign risk weights based on LTV in combination with an evaluation of borrower creditworthiness. Under this scenario, different ranges of LTV could be paired with specified credit assessments, such as credit scores. A first lien mortgage with a lower LTV made to a borrower with higher creditworthiness would receive a lower risk weight than a loan with higher LTV made to a borrower with lower creditworthiness.

The Agencies received many comments about how to risk weight first lien mortgages. Many commenters cautioned against rules that would be burdensome and costly to implement. Commenters generally supported the use of LTV and stated that use of LTV in assigning risk weights would not be overly burdensome because LTV

[22] ''Freddie Mac and Fannie Mae Enhancements to Capital Strength, Disclosure and Market Discipline'', October 19, 2000 (agreement between the GSEs and the Office of Federal Housing Enterprise Oversight).

[23] Ibid, p. 2.

[24] Moody's and S&P's financial strength ratings would not meet the definition of an ''external rating'' as proposed in this NPR. Furthermore, the difficulty of defining an event of default and the lack of default data suggest that it would not be feasible to incorporate this type of rating into a transition matrix.

[25] 12 CFR part 3 appendix A section 3(c)(iii) (OCC); 12 CFR parts 208 and 225 appendix A section III.C.3 (Board); 12 CFR part 325, appendix A, section II.C.3 (FDIC); and 12 CFR 567.1 (definition of ''qualifying mortgage loan'') and 12 CFR 567.6(a)(1)(iii)(B) (50 percent risk weight) (OTS).

information is collected when lenders originate mortgage loans.

Some commenters supported the use of a matrix based on LTV and a measure of creditworthiness, to further improve the risk sensitivity of the risk weights assigned to residential mortgage loans. They stated that this approach would address both collateral and borrower risk and would mirror current practices among mortgage lenders. Other commenters expressed concern about the potential burden of this approach, particularly for smaller banking organizations. Some commenters noted that certain credit assessment measures such as credit-scoring models vary by region or credit reporting agency, and may harm lower income borrowers, borrowers without credit histories, and borrowers who have experienced unusual financial difficulties. Many of these commenters suggested that the use of credit scores as a measure of borrower creditworthiness be optional to alleviate the burden for some smaller banking organizations.

To increase the risk sensitivity of the existing risk-based capital rules while minimizing the overall burden to banking organizations, the Agencies are proposing to risk weight first lien mortgages based on LTV. LTV is a meaningful indicator of potential loss and the likelihood of borrower default. Consequently, under this proposal a banking organization would assign a risk weight for a first lien mortgage, including mortgages held for sale and mortgages held in portfolio as outlined in Table 3.

TABLE 3.—PROPOSED LTV AND RISK WEIGHTS FOR 1–4 FAMILY FIRST LIENS

Loan-to-Value ratios (in percent)	Risk weight (in percent)
60 or less	20
Greater than 60 and less than or equal to 80	35
Greater than 80 and less than or equal to 85	50
Greater than 85 and less than or equal to 90	75
Greater than 90 and less than or equal to 95	100
Greater than 95	150

The Agencies believe the implementation of this proposed approach would not impose a significant burden on banking organizations because LTV information is readily available and is commonly used in the underwriting process.

The Agencies believe that the use of LTV would enhance the risk sensitivity of regulatory capital but it remains a fairly simple measurement of risk. Use of LTV in risk weighting first lien mortgages does not substitute for, or otherwise release a banking organization from, its obligation to have prudent loan underwriting and risk management practices that are consistent with the size, type, and risk of a mortgage product. Through the supervisory process, the Agencies would continue to ensure that banking organizations engage in prudent underwriting and risk management practices consistent with existing rules, supervisory guidance, and safety and soundness. The Agencies would continue to reserve the authority to require banking organizations to hold additional capital where appropriate.

In general, Table 3 would apply to first lien mortgages. The Agencies would maintain their respective risk-based capital criteria for a first lien mortgage (for example, prudent underwriting) to receive a risk weight less than 100 percent.[26] Table 3 would not apply to loans to builders secured by certain pre-sold properties, which are subject to a statutory 50 percent risk weight.[27] Other loans to builders for the construction of residential property would continue to be subject to a 100 percent risk weight. The Agencies would maintain their respective capital treatment for a one-to-four family residential mortgage loan to a borrower for the construction of the borrower's own home.[28] *Question 7: The Agencies seek comment on all aspects of using LTV to determine the risk weights for first lien mortgages.*

The Agencies' existing risk-based capital rules place certain privately-issued mortgage-backed securities that do not carry the guarantee of a government or a government-sponsored entity (for example, unrated senior positions) in the 50 percent risk weight category, provided the underlying mortgages would qualify for a 50 percent risk weight. The Agencies intend to continue to risk weight these privately-issued mortgage-backed securities using the risk weights assigned to underlying mortgages under the Agencies' existing capital rules. *Question 8: The Agencies seek comment on this treatment and other methods for risk-weighting these privately-issued mortgage-backed securities, including the appropriateness of assigning risk weights to these securities based on the risk weights of the underlying mortgages as determined under Table 3.*

While the Agencies are not proposing to use LTV and borrower creditworthiness to risk weight mortgages, the Agencies continue to evaluate approaches that would consider borrower creditworthiness in risk weighting first lien mortgages. One such approach could use LTV and a measure of borrower creditworthiness to assign risk weights in a manner similar to that shown in Table 3A below. Table 3A would assign a lower risk weight to mortgages with a lower LTV that are underwritten to borrowers with a stronger credit history and a higher risk weight to mortgages with a higher LTV that are underwritten to borrowers with a weaker credit history.

[26] 12 CFR part 3 appendix A, section 3(3)(iii) (OCC); 12 CFR Parts 208 and 225, appendix A, section III.C.3 (Board); 12 CFR part 325, appendix A, section II.C.3 (FDIC); and 12 CFR 567.1 (definition of ''qualifying mortgage loan'') and 12 CFR 567.6(a)(1)(iii)(B) (50 percent risk weight) (OTS).

[27] This statutory risk weight applies to loans to builders secured by one-to-four family residential properties with substantial project equity for the construction of one-to-four family residences that have been pre-sold under firm contracts to purchasers who have obtained firm commitments for permanent qualifying mortgage loans and have made substantial earnest money deposits. See Resolution Trust Corporation Refinancing, Restructuring, and Improvement Act of 1991, Pub. L. 102–233, § 618(a), 105 Stat. 1761, 1789–91 (codified at 12 U.S.C. 1831n note (1991)).

[28] 12 CFR part 3 appendix A, section 3(3)(iv) (OCC); 12 CFR parts 208 and 225, appendix A, section III.C.3. (Board); 12 CFR part 325, appendix A, section II.C.3 (FDIC); and 12 CFR 567.1 (definition of ''qualifying mortgage loan'') (OTS).

TABLE 3A.—ILLUSTRATIVE RISK-WEIGHT RANGES FOR LTV AND CREDIT HISTORY FOR 1–4 FAMILY

[First liens]

First lien mortgages	Illustrative risk weight ranges		
Loan-to-Value ratios (in percent)	Credit history group 1 (in percent)	Credit history group 2 (in percent)	Credit history group 3 (in percent)
60 or less	20–35	20–35	20–35
Greater than 60 and less than or equal to 80	20–35	20–35	35–75
Greater than 80 and less than or equal to 90	20–50	35–75	75–150
Greater than 90 and less than or equal to 95	20–50	50–100	100–200
Greater than 95	35–75	50–100	150–200

Table 3A presents three broad categories of relative credit performance (credit history groups). The Agencies would determine the credit history groups using default odds. The default odds would be based upon credit reporting agencies' validation charts (also known as odds tables). A banking organization would determine a borrower's default odds by mapping the borrower's credit score, as obtained from a credit reporting agency,[29] to the credit reporting agency's validation chart. In order for a validation chart to qualify, it would be based on: (1) The same vendor and model as the credit scores used by the banking organization, (2) a nationally diverse group of credits, and (3) relevant default odds measured over no less than 18 months following the scoring date used in the validation chart. If the Agencies decide in the final rule to risk weight first lien mortgages based on LTV and borrower creditworthiness, the Agencies would generally determine a specific risk weight based on the ranges provided in Table 3A.

Question 9: While the Agencies are not proposing to use LTV and borrower creditworthiness to risk weight mortgages, the Agencies may decide to risk weight first lien mortgages based on LTV and borrower creditworthiness in the final rule. Accordingly, the Agencies continue to seek comment on an approach using LTV combined with credit scores for determining risk-based capital. More specifically, the Agencies seek comment on: operational aspects for assessing the use of default odds to determine creditworthiness qualifications to determine acceptable models for calculating the default odds; the negative performance criteria against which the default odds are determined (that is, 60-days past due, 90-days past due, etc.); regional disparity, especially for a banking organization whose borrowers are not geographically diverse; and how often credit scores should be updated. In addition, the Agencies seek comment on determining the proper credit history group for: an individual with multiple credit scores, a loan with multiple borrowers with different probabilities of default, an individual whose credit history was analyzed using inaccurate data, and individuals with insufficient credit history to calculate a probability of default.

ii. Calculation of LTV

The Agencies sought comment on whether LTV should be based on LTV at origination or should be periodically updated. Some commenters supported using LTV at origination only. These commenters stated that regularly updating and monitoring LTV would be unduly burdensome and costly. Other commenters said the Agencies should require periodic updates, especially during significant declines in housing values in a banking organization's service area. Some commenters said that banking organizations should be able to update LTV at their discretion. Certain commenters suggested that updates be based on periodic property appraisals and loan balance updates. However, a number of commenters expressed concern about the reliability of appraisals, especially in over-heated markets.

Commenters had varying opinions about how the Agencies should factor PMI into the LTV calculations. Most of the commenters that addressed the issue supported calculating LTV net of loan-level PMI coverage. However, some commenters suggested that the Agencies should also consider the risk mitigation benefits of pool-level PMI. A few commenters suggested considering PMI issued only by highly rated insurers. One commenter endorsed a Basel IA ANPR suggestion to create risk-weight floors for mortgages supported by loan-level PMI from highly rated insurers. Another commenter suggested considering PMI issued by non-affiliate insurers only.

In proposing the LTV calculation method, the Agencies aim to balance burden and costs against the benefits of a more risk sensitive risk-weighting system. The Agencies propose to calculate LTV at origination of the first mortgage as follows. First, the value of the property would be equal to the lower of the purchase price for the property or the value at origination. The value at origination must be based on an appraisal or evaluation of the property in conformance with the Agencies' appraisal regulations[30] and real estate lending guidelines.[31] The value of the property could only be updated for risk-weight purposes when the borrower refinances its mortgage and the banking organization extends additional funds. Second, for loans that are positively amortizing, banking organizations may adjust the LTV quarterly to reflect any decrease in the principal balance. For loans that negatively amortize, banking organizations would be required to adjust the LTV quarterly to reflect the increase in principal balance and risk weight the loan based on the updated LTV. However, where property values in a banking organization's market subsequently experience a general decline in value, the Agencies continue to reserve their authority to require additional capital when warranted for supervisory reasons. The Agencies emphasize that the updating of LTV for regulatory capital purposes is not intended to replace good risk management practices at banking organizations for situations where more frequent updates of loan or property values might be appropriate.

Question 10: The Agencies seek comment on whether there are other circumstances under which LTV should be adjusted for risk-weight purposes.

[29] See 15 U.S.C. 1681a(f), which defines a credit reporting agency.

[30] 12 CFR part 34 (OCC); 12 CFR part 208, subpart E and part 225, subpart G (Board); 12 CFR part 323, 12 CFR part 365 (FDIC); and 12 CFR part 564 (OTS).

[31] 12 CFR part 34 Subpart C.43 (OCC); 12 CFR part 208, subpart E and part 225, subpart G (Board); 12 CFR part 325, appendix A, section II.C.3 (FDIC);12 CFR 560.100—560.101 (OTS).

The Agencies believe that the risk mitigating impact of loan-level PMI should be reflected in calculating the LTV. Loan-level PMI is insurance that protects a mortgage lender in the event of borrower default up to a predetermined portion of the value of a one-to-four family residential property provided that there is no pool-level cap. A pool-level cap would effectively reduce coverage to any amount less than the predetermined portion. PMI would be recognized only if the loan-level insurer is not affiliated with the banking organization and has long-term senior debt (without credit enhancement) externally rated at least the third highest investment grade by an NRSRO. The Agencies believe that pool-level PMI should not generally reduce the LTV, because pool-level PMI absorbs losses based on a portfolio basis and is not attributable to a given loan.

Question 11: The Agencies request comment on all aspects of PMI including, whether PMI providers must be non-affiliated companies of the banking organization. The Agencies also seek comment on the treatment of PMI in the calculation of LTV when the PMI provider is not an affiliate, but a portion of the mortgage insurance is reinsured by an affiliate of the banking organization.

iii. Non-Traditional Mortgage Products

The Basel IA ANPR sought comment on whether mortgages with non-traditional features pose unique risks that warrant higher risk-based capital requirements. Non-traditional loan features include the possibility of negative amortization of the loan balance, a borrower's option to make interest-only payments, and interest rate reset provisions that may result in significant payment shock to the borrower.

Commenters generally supported risk weighting mortgage loans with non-traditional features consistently with the risk weighting for traditional first lien mortgages. These commenters suggested that any additional risks posed by these mortgage products were the result of imprudent underwriting practices or the combining of risks, not risks inherent in the products. One commenter, however, supported higher capital requirements for all non-traditional mortgage loans. Other commenters supported additional capital for specific products, such as negative amortization loans.

The Agencies recognize the difficultly in providing a clear and consistent definition of higher-risk mortgage loans with non-traditional features. Thus, the Agencies generally propose to risk weight first lien mortgages with non-traditional features in the manner described above. Notwithstanding this proposed treatment, the Agencies recognize that certain underwriting practices may increase the risk associated with a particular mortgage product. These practices may include underwriting of loans with less stringent income and asset verification requirements without offsetting mitigating factors; offering loans with very low introductory rates and short adjustment periods that may result in significant payment shock; and combining first lien loans with simultaneous junior lien loans that could result in an aggregate loan obligation with little borrower equity and the potential for a sizeable payment increase. The Agencies will continue to review banking organizations' lending practices on a case-by-case basis and may require additional capital or reserves in appropriate circumstances.

Loans with a negative amortization feature pose additional risks to a banking organization in the form of an unfunded commitment. Therefore, the Agencies propose to risk weight mortgage loans with negative amortization features consistent with the risk-based capital treatment for other unfunded commitments (for example, lines of credit). Under the proposed approach, the unfunded portion of the maximum negative amortization amount would be risk weighted separately from the funded portion of the loan. The funded portion of the loan would be risk weighted according to the risk weights for first-lien mortgages, and the unfunded portion of the maximum negative amortization amount would be risk weighted as a commitment based on the LTV for the maximum contractual loan amount.

Therefore, banking organizations would need to calculate two LTVs for a loan with a negative amortization feature for risk-based capital purposes: the LTV for the funded commitment and the LTV for the unfunded commitment. To demonstrate how loans with negative amortization features would be risk weighted, assume that a property is valued at $100,000 and the banking organization grants a first-lien loan for $81,000 that includes a negative amortization feature with a 10 percent cap. The funded amount of $81,000 results in an 81 percent LTV, which is risk weighted at 50 percent based on Table 3. In addition, the off-balance sheet unfunded commitment of $8,100 would receive a 50 percent credit conversion factor (CCF) resulting in an on-balance sheet credit equivalent amount of $4,050. The combined LTV of the funded and unfunded commitment would be 89.1 percent, hence $4,050 would receive a 75 percent risk weight based on Table 3. The total risk-weighted assets for the first-lien mortgage with negative amortization feature would equal the risk-weighted assets for the funded amount plus the risk-weighted assets for the unfunded amount.

That loan would be risk weighted at origination as follows:

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Table 4: Example of Proposed Risk Based Capital Calculation for Mortgages with Negative Amortization Features

Funded Risk-Weighted Assets Calculation	
1) Amount to Risk Weight	$81,000
2) Funded LTV = Funded Loan Amount / Property Value = $81,000 / $100,000 =	81%
3) Risk weight based on Table 3	50%
4) RW Assets for Funded Loan Amount $81,000 x .50 =	$40,500
Unfunded Risk-Weighted Assets Calculation	
1) Amount to risk weight = Unfunded maximum amount * CCF = $8,100 x .50 =	$4,050
2) Unfunded LTV = (Funded Loan Amount + Unfunded loan amount) / Property Value = ($81,000 +$8,100) / $100,000 =	89.1%
3) Risk Weight Based on Table 3	75%
4) RW Assets for Unfunded Amount = $4,050 x .75	$3,038
Total Risk-Weighted Assets for a Loan with Negative Amortizing Features	
RW Assets for Funded Amount + RW for Unfunded Amount = $40,500 + $3,038 =	$43,538
(Note: the funded and unfunded amount of the loan will change over time once the loan begins to negatively amortize)	

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The Agencies believe that this approach would result in a risk-based capital charge that more accurately reflects the risk of mortgage loans with negative amortization features.

Question 12: The Agencies seek comment on the proposed risk-based capital treatment for all mortgage loans with non-traditional features and, in particular the proposed approach for mortgage loans with negative amortization features. The Agencies also seek comment on whether the maximum contractual amount is the appropriate measure of the unfunded exposure to loans with negative amortization features. The Agencies seek comment on whether the unfunded commitment for a reverse mortgage should be subject to a similar risk-based capital charge.

iv. Junior Lien One-to-Four Family Residential Mortgages

The Basel IA ANPR discussed the existing treatment for home equity lines of credit (HELOCs) and other junior lien mortgages.[32] If a banking organization

[32] The unfunded portion of a HELOC that is a commitment for more than one year and that is not unconditionally cancelable is converted to an on-balance sheet asset using a 50 percent CCF. That amount plus the funded portion of the HELOC are

holds both a first and a junior lien, and no other party holds an intervening lien, the Agencies' existing capital rules require these loans to be combined to determine the LTV and then risk weighted as a first lien mortgage. The Basel IA ANPR indicated that the Agencies intended to continue this approach.

Currently, stand-alone junior lien mortgages (a stand-alone junior lien mortgage is one where an institution holds a second or more junior lien without holding all of the more senior liens) receive a 100 percent risk weight. The Basel IA ANPR indicated that the Agencies were considering retaining this risk weight for stand-alone junior lien mortgages where the LTV (computed by combining the loan amounts for the junior lien and all senior liens) does not exceed 90 percent. However, for stand-alone junior lien mortgages where the LTV of the combined liens exceeds 90 percent, the Agencies suggested that a risk weight higher than 100 percent might be appropriate in recognition of the elevated credit risk associated with these exposures.

Many commenters opposed this approach and suggested that a more risk-sensitive approach, similar to that proposed for first lien mortgages, would be more appropriate because not all stand-alone junior lien mortgages are riskier than first lien mortgages. Other commenters stated that the risk-based capital treatment of first and junior lien mortgages, regardless of whether the same banking organization holds both, should be consistent. In addition, many commented that it would be illogical and unjustifiable to impose higher risk weights (for example, 150 percent) for secured mortgage loans than for unsecured retail loans (for example, 100 percent).

Consistent with the existing risk-based capital rules, the Agencies propose that a banking organization that holds both the first and junior lien mortgages on a one-to-four family residential property, where there is no intervening lien, would assign the combined loans to the appropriate risk-weight category in Table 3 above, based on the loans' combined LTV. A banking organization that holds both the first and any subsequent liens may update the property value for calculation of the combined LTV of the senior loans and the junior lien if the organization obtains an appraisal or evaluation of the collateral in conformance with the Agencies' appraisal regulations and related guidelines at the origination of the junior lien mortgage.

For a stand-alone junior lien mortgage, the Agencies propose that a banking organization use the combined LTV of that loan and all senior loans to determine the appropriate risk weight for the junior lien. Using the combined LTV, a banking organization would risk weight the stand-alone junior lien based on Table 5.

TABLE 5.—PROPOSED LTV AND RISK WEIGHTS FOR 1–4 FAMILY JUNIOR LIENS

Combined loan-to-value ratios (in percent)	Risk weight (in percent)
60 or less	75
Greater than 60 and less than or equal to 90	100
Greater than 90	150

The combined LTV for the funded portion of stand-alone junior liens where the first lien can negatively amortize would be calculated using the maximum contractual loan amount under the terms of the first lien mortgage plus the funded portion of the junior lien. The combined LTV for the unfunded portion of all junior liens where the first lien can negatively amortize would be calculated using the maximum contractual loan amount under the terms of the first lien mortgage plus the funded unfunded portions of the junior lien.

The Agencies propose that banking organizations will be required to hold capital for both the funded and unfunded portion of a HELOC. Banking organizations that hold a HELOC where there is no intervening lien would assign the first lien and funded portion of the HELOC to the appropriate risk weight category in Table 3 above, based on the loans' combined LTV using the senior loans and the funded portion of the HELOC. The unfunded portion of the HELOC would be subject to the appropriate CCF [33] and risk weighted, using Table 3, based on the combined LTV, (senior loans plus the funded and unfunded portions of the HELOC).

For stand-alone HELOCs, the funded and unfunded portion of the stand-alone HELOC would be risk weighted based on Table 5. The funded portion of a HELOC would receive a risk weight based on the combined LTV of all senior loans and funded portion of the HELOC. The unfunded portion of the HELOC would be subject to the appropriate CCF and risk weighted, using Table 5, based on the combined LTV of all senior loans and the funded portion of the HELOC and the unfunded portion of the HELOC.

Question 13: The Agencies request comment on the appropriateness of the proposed risk-based capital treatment for HELOCs including the burden of adjusting LTV as the borrower utilizes the HELOC.

While the Agencies are not proposing in this NPR to use LTV and borrower creditworthiness, they also continue to evaluate approaches that would consider borrower creditworthiness in risk weighting junior lien mortgages. The Agencies believe that greater risk sensitivity can be achieved by evaluating not only LTV but also borrower creditworthiness. If the Agencies decide in the final rule to risk weight junior lien mortgages based on LTV and a measure of borrower creditworthiness, the Agencies would generally determine a specific risk weight based on the ranges provided in Table 5A.

Question 14: Accordingly, the Agencies seek further comment on all aspects of the use of LTV and borrower creditworthiness to determine the risk weight for a junior lien mortgage.

added together to determine the amount of the HELOC that is combined with the first lien position and then risk weighted at either 50 percent or 100 percent. See generally, 12 CFR part 3 appendix A, section (b)(2) and (a)(3)(iii) (OCC); 12 CFR parts 208 and 225, appendix A, section III.C.3 and 12 CFR parts 208 and 225, appendix A, section III.D.2 (Board); 12 CFR part 325, appendix A, section II.D.2.b. (FDIC); and 12 CFR 567.6(a)(2)(ii)(B) (OTS).

[33] The unfunded portion of a HELOC that is a commitment for more than one year and that is not unconditionally cancelable is converted to an on-balance sheet asset using a 50 percent CCF. If the unfunded portion of the HELOC is a commitment for less than a year or is unconditionally cancelable it is converted to an on-balance sheet credit equivalent using a 0 percent CCF.

TABLE 5A.—ILLUSTRATIVE RISK-WEIGHT RANGES FOR LTV AND CREDIT HISTORY FOR JUNIOR LIEN 1–4 FAMILY MORTGAGES

Junior liens/HELOCs	Illustrative risk weight ranges		
Loan-to-Value Ratios	Credit history Group 1 (in percent)	Credit history Group 2 (in percent)	Credit history Group 3 (in percent)
60 or less	20–50	75–150	150–200
Greater than 60 and less than or equal to 80	35–50	75–150	150–200
Greater than 80 and less than or equal to 95	35–75	75–200	200
Greater than 90 and less than or equal to 95	35–75	75–200	200
Greater than 95	35–75	75–200	200

v. Transitional Rule

Some commenters raised concerns about the cost and burden associated with recoding existing loans to conform to a new system. To minimize burden while moving toward a more risk-sensitive approach, the Agencies propose to allow banking organizations that choose to apply the proposed rule an option to continue to risk weight existing mortgage loans using the existing risk-based capital rules. The option would apply only to those loans that the banking organization owned at the time it chose to apply the proposed rules. The banking organization would be required to apply the transitional provision to all of its existing mortgage loans. A banking organization may not use this transitional treatment if it previously used Tables 3 or 5 to risk weight these existing loans.

E. Short-Term Commitments

Under the Agencies' existing risk-based capital rules, commitments with an original maturity of one year or less (short-term commitments) and commitments that are unconditionally cancelable [34] are generally converted to an on-balance sheet credit equivalent amount using a zero percent CCF. Accordingly, banking organizations extending short-term commitments or unconditionally cancelable commitments are not required to maintain risk-based capital against the credit risk inherent in these exposures. Short-term commitments that are eligible liquidity facilities that support asset-backed commercial paper (ABCP), however, are converted to on-balance sheet assets using a 10 percent CCF. Commitments with an original maturity of more than one year (long-term commitments), including eligible long-term liquidity facilities that support ABCP, are converted to on-balance sheet credit equivalent amounts using a 50 percent CCF.

In the Basel IA ANPR, the Agencies noted that they were considering amending the risk-based capital requirements for short-term commitments. Even though commitments with an original maturity of one year or less expose banking organizations to a lower degree of credit risk than longer-term commitments, some credit risk exists. Thus, the Agencies suggested applying a 10 percent CCF to short-term commitments. The resulting credit equivalent amount would be risk-weighted according to the rating of the facility or the underlying asset(s) or the obligor, after considering any collateral and guarantees. The Agencies noted that they planned to retain the zero percent CCF for commitments that are unconditionally cancelable. The Agencies also sought comment on an alternative approach that would apply a single CCF (for example, 20 percent) to all commitments, both short- and long-term.

Almost universally, commenters agreed that unconditionally cancelable commitments should not receive a capital charge. However, commenters' recommendations varied about how to approach other short- and long-term commitments. Some commenters suggested that all commitments, except unconditionally cancelable commitments, should receive a 20 percent CCF, regardless of maturity. These commenters argued that this simple approach would ease burden and counterbalance new complexities within the Basel IA ANPR.

Conversely, several commenters suggested that the capital treatment should reflect the fact that short-term commitments are less risky than long-term commitments. Of these commenters, a few argued that short-term commitments should not receive any capital charge. A few others supported the Basel IA ANPR suggestion to apply a 10 percent CCF to short-term commitments and 50 percent CCF to long-term commitments. One commenter suggested using a 20 percent CCF for short-term commitments and a 50 percent CCF for long-term commitments.

In the Agencies' view, banking organizations that provide short-term commitments that are not unconditionally cancelable are exposed to credit risk that the existing risk-based capital rules do not adequately address. The Agencies also recognize that short-term commitments generally expose banking organizations to a lower degree of credit risk than long-term commitments, thereby justifying a CCF that is lower than the 50 percent CCF currently assigned to long-term commitments. Thus, the Agencies are proposing to assign a 10 percent CCF to short-term commitments. The resulting credit equivalent amount would then be risk-weighted according to the rating of the facility, the underlying assets, or the obligor, after considering any applicable collateral and guarantees. Commitments that are unconditionally cancelable would retain a zero percent CCF.

Finally, the Agencies are not proposing to apply a CCF to commitments to originate one-to-four family residential mortgage loans that are provided in the ordinary course of business. The Agencies believe these types of commitments present only minimal credit risk because of their short durations, the significant number that expire before being funded, and the large percentage of originations that are held for resale. In addition, commitments on held-for-sale mortgages are treated as derivatives and are accounted for at fair value on the balance sheet of the issuer, and therefore already receive a capital charge. Given these mitigating factors, the Agencies do not wish to impose the burden of determining risk weights by LTV during the short commitment period.

[34] An unconditionally cancelable commitment is one that can be canceled for any reason at any time without prior notice. In the case of a home equity line of credit, the banking organization is deemed able to unconditionally cancel the commitment if it can, at its option, prohibit additional extensions of credit, reduce the line, and terminate the commitment to the full extent permitted by relevant Federal law.

Question 15: The Agencies continue to seek comments on an alternative approach that would apply a single CCF of 20 percent to all commitments, both short- and long-term (that are not unconditionally cancelable), and the advantages and disadvantages of such an approach.

F. Assess a Risk-Based Capital Charge for Early Amortization

The Agencies' existing risk-based capital rules do not assess a capital charge for risks associated with early amortization of securitizations of revolving credits (for example, credit card receivables). When assets are securitized, the extent to which the selling or sponsoring entity transfers the risks associated with the assets depends on the structure of the securitization and the nature of the underlying assets. Early amortization provisions [35] in securitizations of revolving retail credit facilities increase the likelihood that investors will be repaid before being subject to any risk of significant credit losses. These provisions raise two concerns about the risks to banking organizations that sponsor securitizations with early amortization provisions: (1) The payment allocation formula can result in the subordination of the seller's interest in the securitized assets during early amortization, and (2) an early amortization event can increase a banking organization's capital and liquidity needs in order to finance new draws on the revolving credit facilities.

In recognition of the risks associated with these structures, the Agencies have proposed a capital charge on securitizations of revolving credit exposures with early amortization provisions in prior rulemakings. On March 8, 2000, the Agencies published a proposed rule on recourse and direct credit substitutes.[36] In that proposal, the Agencies proposed to apply a fixed CCF of 20 percent to the amount of assets under management in all revolving securitizations that contained early amortization features.[37] The preamble to the final Recourse Rule [38] reiterated the concerns with early amortization, indicating that the risks associated with securitization, including those posed by an early amortization feature, are not fully captured in the Agencies' capital rules. While the Agencies did not impose a risk-based capital charge for early amortization provisions in the final Recourse Rule, they indicated that they would revisit the issue at some point in the future.[39]

In the Basel IA ANPR, the Agencies suggested two approaches to address these risks. One option was to apply a flat CCF to off-balance sheet receivables in revolving securitizations with early amortization provisions. Alternatively, the Agencies suggested using a risk-sensitive methodology based on excess spread [40] compression. Under this methodology, the risk-based capital charge would increase as excess spread decreased and approached the early amortization trigger point.

Most commenters that addressed this issue opposed the application of any capital charge on the investors' interest in credit card securitizations. Of the few that supported such a charge, one recommended that the rules apply a flat CCF to securitizations with early amortization provisions, and four supported the approach based on excess spread.

The Agencies are proposing to apply an approach based on excess spread to all revolving securitizations of credits with early-amortization features. This capital charge would be assessed against the investors' interest (that is, the total amount of securities issued by a trust or special purpose entity to investors, which is the portion of the securitization that is not on the banking organization's balance sheet) and would be imposed only in the event that the excess spread has declined to a predetermined percentage of the trapping point. The capital required would increase as the level of excess spread approaches the early amortization trigger. The Agencies are proposing to compare the three-month average excess spread against the point at which the securitization trust would be required to trap excess spread in a spread or reserve account as a basis for the capital charge. To determine the excess spread trapping point and the appropriate CCF, a banking organization would divide the level of excess spread by the spread trapping point as described below. In securitizations that do not require excess spread to be trapped, or that specify a trapping point based primarily on performance measures other than the three-month average excess spread, the excess spread trapping point would be set for purposes of this proposed rule at 4.5 percent.

To calculate the securitization's excess spread trapping point ratio, a banking organization must first calculate the annualized three month ratio for excess spread as follows:

a. For each of the three months, divide the month's excess spread by the outstanding principal balance of the underlying pool of exposures at the end of each month.

b. Calculate the average ratio for the three months and convert the resulting ratio to a compound annual rate.

Then a banking organization must divide the annualized three month ratio for excess spread by the excess spread trapping point that is specified in the documentation for the securitization. Finally, a banking organization must apply the appropriate CCF from Table 6 to the amount of investors' interest. The resulting on-balance sheet credit equivalent amount would be assigned to the risk weight category appropriate to the securitized assets.

TABLE 6.—EARLY AMORTIZATION CREDIT CONVERSION FACTORS

Excess spread trapping point ratio	CCF (in percent)
133.33 percent of trapping point or more	0
Less than 133.33 percent to 100 percent of trapping point	5
Less than 100 percent to 75 percent of trapping point	15
Less than 75 percent to 50 percent of trapping point	50
Less than 50 percent of trapping point	100

Question 16: The Agencies solicit comment on the appropriateness of the 4.5 percent excess spread trapping point and on other types and levels of early amortization triggers used in securitizations of revolving exposures that should be considered, especially for HELOC securitizations. The Agencies also seek comment on whether a flat 10

[35] An early amortization provision means a provision in the documentation governing a securitization that, when triggered, causes investors in the securitization exposures to be repaid before the original stated maturity of the securitization exposures, unless the provision is solely triggered by events not directly related to the performance of the underlying exposures or the originating banking organization (such as material changes in tax laws or regulations).

[36] 65 FR 12320 (March 8, 2000).

[37] Id. at 12330–12331.

[38] 66 FR 59614, 59619 (November 29, 2001).

[39] In October 2003, the Agencies issued another proposed rule that included a risk-based capital charge for early amortization. See 68 FR 56568, 56571–56573 (October 1, 2003). This proposal was based upon the Basel Committee's third consultative paper issued April 2003. When the Agencies finalized other unrelated aspects of this proposed rule in July 2004, they did not implement the early amortization proposal. The Agencies determined that the change was inappropriate because the capital treatment of retail credit, including securitizations of revolving credit, was subject to change as the Basel framework proceeded through the U.S. rulemaking process. 69 FR 44908, 44912–44913 (July 28, 2004).

[40] Excess spread means gross finance charge collections (including market interchange fees) and other income received by a trust or the special purpose entity (SPE) minus interest paid to investors in the securitization exposures, servicing fees, charge-offs, and other similar trust or SPE expenses.

percent CCF is a more appropriate capital charge for revolving securitizations with early amortization features.

G. Remove the 50 Percent Limit on the Risk Weight for Derivatives

Currently, the Agencies' risk-based capital rules permit banks to apply a maximum 50 percent risk weight to the credit equivalent amount of certain derivative contracts. The risk weight assigned to derivatives contracts was limited to 50 percent when the derivatives counterparty credit risk rule was finalized in 1995 because most derivative counterparties were highly rated and were generally financial institutions.[41] At the time, the Agencies noted that they intended to monitor the quality of credits in the interest rate and exchange rate markets to determine whether some transactions might merit a 100 percent risk weight.

As the market for derivatives has developed, the types of counterparties acceptable to participants have expanded to include counterparties that the Agencies believe should receive a risk weight greater than 50 percent. Although the Basel IA ANPR did not discuss the limit on the risk weight for derivatives contracts, the Agencies have determined that it is appropriate to propose removing the 50 percent risk weight limit that applies to certain derivative contracts. In this proposed rule, the risk weight assigned to the credit equivalent amount of a derivative contract would be the risk weight assigned to the counterparty after consideration of any collateral or guarantees.

H. Small Loans to Businesses

The Agencies' existing risk-based capital rules generally assign business loans to the 100 percent risk weight category unless the credit risk is mitigated by an acceptable guarantee or collateral. Banking organizations and other industry participants have criticized the lack of sensitivity in the measurement of credit risk associated with these exposures and maintained that the current risk-based capital charge is greater than warranted for high quality loans to businesses.

In the Basel IA ANPR, the Agencies noted that they were considering a lower risk weight for certain business loans under $1 million on a consolidated basis to a single borrower (small loans to businesses). One alternative discussed in the Basel IA ANPR would allow small loans to businesses to be eligible for a lower risk weight if certain requirements were satisfied. These requirements would include, for example, full amortization over a period of seven years or less, performance according to the contractual provisions of the loan agreement, and full protection by collateral. The banking organization would also have to originate the loans according to its underwriting policies (or purchase loans that have been underwritten in a manner consistent with the banking organization's underwriting policies), which would have to include an acceptable assessment of the collateral and the borrower's financial condition and ability to repay the debt. The Agencies sought comment on whether this potential change would improve the risk sensitivity of the risk-based capital rules without unduly increasing complexity and burden.

The Agencies also suggested an alternative approach that would assess risk-based capital requirements for small loans to businesses based on a credit assessment of the principals of the business and their ability to service the debt. This alternative could be applied in those cases where the principals personally guarantee the loan. The Agencies sought comment on any alternative approaches for improving the risk sensitivity of the risk-based capital treatment for small loans to businesses, including the use of credit assessments, LTV, collateral, guarantees, or other methods for stratifying credit risk.

Most commenters supported a lower risk weight for small loans to businesses. However, it was apparent from the comments that there is no universal set of risk drivers used to measure credit risk for these loans. In addition, there was little agreement among commenters about how credit risk for these loans should be measured without generating undue burden.

One commenter asked the Agencies to create a small-business risk-based capital model that takes into account various risk drivers, including financing leverage, use of funds, loss modeling, and lending shelf and securitization. Another commenter recommended measuring credit risk based on results obtained by the Fair Isaac Small Business Scoring Service, which the commenter claimed allows businesses to assess the creditworthiness of the principals of a small business and of the ability of the small business to make repayment on credit obligations up to $750,000.

Another commenter suggested that small loans to businesses that are collateralized should be risk weighted according to the LTV using the ratio of the amount of the loan to the value of eligible collateral. This commenter suggested that non-collateralized loans should be risk-weighted according to several factors, including credit assessments of personal guarantors, loan terms, size of the loan, amortization schedule, and past history of the borrower. Other commenters offered similar suggestions that would use risk measures such as credit assessments and debt-to-income ratios.

Several commenters suggested that the dollar threshold for receiving a lower risk weight was too low. A few commenters suggested increasing the threshold to $2 million. One commenter suggested setting the threshold at $5 million and indexing it to inflation.

Although the Agencies are not making a specific proposal in this NPR, they are exploring options for permitting certain small loans to businesses that meet certain criteria to qualify for a 75 percent risk weight. The Agencies believe that the application of the 75 percent risk weight to loans to businesses should be limited to situations where the banking organization's consolidated business credit exposure to the individual or company is $1 million or less.

Second, the Agencies believe that to qualify for the lower risk weight, these loans should be personally guaranteed by the owner or owners of the business and that the loans should be fully collateralized by the assets of the business. The Agencies believe that these requirements provide prudential safeguards to ensure that the banking organization is in the position to minimize losses in the event of default.

Third, the Agencies are considering requiring that qualifying loans fully amortize over a period of no more than seven years. The full amortization requirement encourages conservative cash management practices by the borrower and ensures that the banking organization can monitor the continued ability of the business to service the debt. The Agencies have chosen a seven-year limitation to coincide with the maturity structure of many loans used to finance equipment purchases.

The Agencies are also considering criteria for short-term loans that do not amortize, such as working capital loans and other revolving lines of credit. Under one alternative, the Agencies would allow loans or draws from a revolving line of credit that matures within 18 months to forgo the amortization requirement to the extent that the loan is to be repaid from the anticipated proceeds of a previously established financial transaction and

[41] 60 FR 46169–46185 (September 5, 1995).

such proceeds are pledged for the repayment of the loan.

Fourth, the Agencies are considering requiring that the loans be (1) prudently underwritten in a manner that justifies the assessment of a lower-than-100 percent risk weight and (2) performing, that is, the loan payments must be current. Thus, consistent with prudential standards required for the underwriting of any small loans to businesses, the Agencies would require that a banking organization establish standards for assessing the quality and sufficiency of pledged collateral, the financial condition of the borrower, the financial condition of any guarantors to the loan, and the ability of the business to meet certain debt service coverage criteria. The Agencies would also set requirements for an acceptable debt service coverage ratio, that is, the ratio of net operating income divided by total loan payments or net operating cash flow divided by debt service cost. The Agencies are considering a minimum debt service coverage ratio of 1.3.

Finally, the Agencies are analyzing the need for additional qualifying criteria. Among other criteria, the Agencies might require that the loans have not been restructured to prevent a past due occurrence and that none of the proceeds of the loans are used to service any other outstanding loan obligation.

Question 17: The Agencies seek comment on this or other approaches that might improve the risk sensitivity of the existing risk-based capital rules for small loans to businesses.

I. Multifamily Residential Mortgages, Other Retail Exposures, Loans 90 Days or More Past Due or In Nonaccrual, and Commercial Real Estate (CRE) Exposures

In the Basel IA ANPR, the Agencies sought comment on the risk-based capital treatment for multifamily residential mortgages, other retail exposures, loans 90 days or more past due or in nonaccrual, and commercial real estate exposures. After considering the comments that addressed the Agencies' approaches to the risk-based capital treatment for these exposures, the Agencies have decided that any increase in risk sensitivity is outweighed by the additional burden that would result from the suggested approaches. Consequently, the Agencies are not proposing any changes in this NPR with respect to these exposures. The Agencies will continue to examine these issues and may address the risk-based capital treatment for these exposures at some future time.

Question 18: The Agencies remain interested in industry comments on any methods that would increase the risk sensitivity of the risk-based capital requirements for other retail exposures, particularly through the use of credit assessments, such as the borrower's credit score or ability to service debt. The Agencies are particularly interested in whether and how credit assessments might be applied consistently and uniformly in the determination of risk weights without creating undue burden.

J. Other Issues Raised by Commenters

Although the issue was not addressed in the Basel IA ANPR, several commenters suggested that the Agencies should conduct a study of the potential effects of any proposed revisions to the Agencies' existing risk-based capital rules. They asserted that such a study would help the Agencies better understand the potential costs and benefits of the potential revisions, and help compare the revisions to the Basel II framework.

The Agencies intend to analyze the potential impact of these proposed changes, as well as any changes to the proposals that may result from the public comment process. The Agencies may make changes to these proposals if warranted based on this impact analysis.

III. Possible Alternatives for Basel II Banking Organizations

As noted in the ''Background'' section, on September 25, 2006, the Agencies issued the Basel II NPR. The Basel II advanced capital adequacy framework proposed in the Basel II NPR is highly complex and is directed primarily at banking organizations with total consolidated assets of $250 billion or more, or total consolidated on-balance sheet foreign exposure of $10 billion or more, and other banks that opt in to the Basel II framework—referred to as ''Basel II banking organizations.'' In the Basel II NPR, the Agencies requested comment on whether Basel II banking organizations should be permitted to use other credit and operational risk approaches similar to those provided under Basel II.

The Agencies seek comment on all aspects of the following questions and seek the perspectives of banking organizations of different sizes and complexity.

Question 19: To what extent should the Agencies consider allowing Basel II banking organizations the option to calculate their risk based capital requirements using approaches other than the Advanced Internal Ratings Based (A–IRB) approach for credit risk and the Advanced Measurement Approach (AMA) for operational risk? What would be the appropriate length of time for such an option?

Question 20: If Basel II banking organizations are provided the option to use alternatives to the advanced approaches, would either this Basel IA proposal or the standardized approach in Basel II be a suitable basis for a regulatory capital framework for credit risk for those organizations? What modifications would make either of these proposals more appropriate for use by large complex banking organizations? For example, what approaches should be considered for derivatives and other capital markets transactions, unsettled trades, equity exposures, and other significant risks and exposures typical of Basel II banking organizations?

Question 21: The risk weights in this Basel IA proposal were designed with the assumption that there would be no accompanying capital charge for operational risk. Basel II, however, requires banking organizations to calculate capital requirements for exposure to both credit risk and operational risk. If the Agencies were to proceed with a rulemaking for a U.S. version of a standardized approach for credit risk, should operational risk be addressed using one of the three methods set forth in Basel II?

Question 22: What additional requirements should the Agencies consider to encourage Basel II banking organizations to enhance their risk management practices or their financial disclosures, if they are provided the option to use alternatives to the advanced approaches of the Basel II NPR?

IV. Regulatory Analysis

Regulatory Flexibility Act Analysis

Pursuant to section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. 605(b) (RFA), the regulatory flexibility analysis otherwise required under section 604 of the RFA is not required if an agency certifies that the rule will not have a significant economic impact on a substantial number of small entities (defined for purposes of the RFA to include banking organizations with assets less than or equal to $165 million) and publishes its certification and a short, explanatory statement in the **Federal Register** along with its rule. Pursuant to section 605(b) of the RFA, the Agencies certify that this proposed rule will not have a significant economic impact on a substantial number of small entities. Accordingly, a regulatory flexibility analysis is not needed. The amendments to the Agencies' regulations described above are elective. They will apply only to banking organizations that opt to take advantage of the proposed revisions to the existing domestic risk-based capital framework and that will not be required to use the advanced approaches contained in the Basel II proposal.[42] The Agencies believe that banking organizations that elect to adopt these proposals will generally be able to do so with data they currently use as part of their credit approval and portfolio management processes. Banking organizations not exercising this option would remain subject to the current capital framework. The proposal does not impose any new mandatory requirements or burdens. Moreover, industry groups representing small banking organizations that commented on the Basel IA ANPR noted that small banking organizations typically hold more capital than is required by the capital rules and would prefer to remain under the existing risk-based capital framework. For these reasons, the proposal will not result in a significant economic impact on a substantial number of small entities.

OCC Executive Order 12866 Determination

Executive Order 12866 requires Federal agencies to prepare a regulatory impact analysis for agency actions that are found to be ''significant regulatory actions.'' ''Significant regulatory actions'' include, among other things, rulemakings that ''have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities.''[43] Regulatory actions that satisfy one or more of these criteria are referred to as ''economically significant regulatory actions.''

The OCC anticipates that the proposed rule will meet the $100 million criterion and therefore is an economically significant regulatory action. In conducting the regulatory analysis for an economically significant regulatory action, Executive Order 12866 requires each Federal agency to provide to the Administrator of the Office of Management and Budget's (OMB) Office of Information and Regulatory Affairs (OIRA):

- The text of the draft regulatory action, together with a reasonably detailed description of the need for the regulatory action and an explanation of how the regulatory action will meet that need;
- An assessment of the potential costs and benefits of the regulatory action, including an explanation of the manner in which the regulatory action is consistent with a statutory mandate and, to the extent permitted by law, promotes the President's priorities and avoids undue interference with State, local, and tribal governments in the exercise of their governmental functions;
- An assessment, including the underlying analysis, of benefits anticipated from the regulatory action (such as, but not limited to, the promotion of the efficient functioning of the economy and private markets, the enhancement of health and safety, the protection of the natural environment, and the elimination or reduction of discrimination or bias) together with, to the extent feasible, a quantification of those benefits;
- An assessment, including the underlying analysis, of costs anticipated from the regulatory action (such as, but not limited to, the direct cost both to the government in administering the regulation and to businesses and others in complying with the regulation, and any adverse effects on the efficient functioning of the economy, private markets (including productivity, employment, and competitiveness), health, safety, and the natural environment), together with, to the extent feasible, a quantification of those costs; and
- An assessment, including the underlying analysis, of costs and benefits of potentially effective and reasonably feasible alternatives to the planned regulation, identified by the agencies or the public (including improving the current regulation and reasonably viable nonregulatory actions), and an explanation why the planned regulatory action is preferable to the identified potential alternatives.

Set forth below is a summary of the OCC's regulatory impact analysis, which can be found in its entirety at *http://www.occ.treas.gov/law/basel.htm.*

i. The Need for Regulatory Action

Federal banking law directs federal banking agencies including the Office of the Comptroller of the Currency (OCC) to require banking organizations to hold adequate capital. The law authorizes federal banking agencies to set minimum capital levels to ensure that banking organizations maintain adequate capital. The law also gives banking agencies broad discretion with respect to capital regulation by authorizing them to also use any other methods that they deem appropriate to ensure capital adequacy.

Capital regulation seeks to address market failures that stem from several sources. Asymmetric information about the risk in a bank's portfolio creates a market failure by hindering the ability of creditors and outside monitors to discern a bank's actual risk and capital adequacy. Moral hazard creates market failure in which the bank's creditors fail to restrain the bank from taking excessive risks because deposit insurance either fully or partially protects them from losses. Public policy addresses these market failures because individual banks fail to adequately consider the positive externality or public benefit that adequate capital brings to financial markets and the economy as a whole.

Capital regulations cannot be static. Innovation in and transformation of financial markets require periodic reassessments of what may count as capital and what amount of capital is adequate. Continuing changes in financial markets create both a need and an opportunity to refine capital standards in banking. The proposed revisions to U.S. risk-based capital rules, ''Risk-Based Capital Guidelines; Capital Adequacy Guidelines; Capital Maintenance: Domestic Capital Modifications'' (''Basel IA NPR''), which we address in this impact analysis, provide a new option for determining risk-based capital for banking organizations that would not be required to operate under the other risk-based capital adequacy proposal, ''Risk-Based Capital Standards: Advanced Capital Adequacy Framework'' (''Basel II'').

ii. Regulatory Background

The proposed capital regulation examined in this analysis would apply to commercial banks and thrifts. Three banking agencies, the OCC, the Board of Governors of the Federal Reserve System (Board), and the FDIC regulate commercial banks, while the Office of Thrift Supervision (OTS) regulates all federally chartered and many state-chartered thrifts. Throughout this document, the four are jointly referred to as the federal banking agencies.

[42] 71 FR 55830 (September 25, 2006).

[43] Executive Order 12866 (September 30, 1993), 58 FR 51735 (October 4, 1993), as amended by Executive Order 13258, 67 FR 9385 (February 28, 2002). For the complete text of the definition of ''significant regulatory action,'' see E.O. 12866 at section 3(f). A ''regulatory action'' is ''any substantive action by an agency (normally published in the **Federal Register**) that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notices of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking.'' E.O. 12866 at section 3(e).

The Basel IA proposal seeks to improve the risk sensitivity of the existing risk-based capital rules. This framework would be optional and would be available to banking organizations not covered by the Basel II proposal. Any institution that is not a Basel II bank would be able to remain under the existing risk-based capital rules or elect to adopt Basel IA. The proposed changes in Basel IA would:

1. Increase the number of risk weight categories from five to eight.
2. Allow the greater use of external credit ratings.
3. Expand the range of recognized collateral and eligible guarantors.
4. Use loan-to-value ratios to risk-weight residential mortgages.
5. Increase the credit conversion factor for certain commitments with an original maturity of one year or less.
6. Assess a capital charge for early amortizations in securitizations of revolving retail exposures.
7. Remove the 50 percent limit on the risk weight for certain derivative transactions.

The Agencies would continue to reserve the authority to require banking organizations to hold additional capital where appropriate.

iii. Benefit-Cost Analysis of the Proposed Rule

A cost-benefit analysis considers the costs and benefits of a proposal as they relate to society as a whole. The social benefits of a proposal are benefits that accrue directly to those subject to a proposal plus benefits that might accrue indirectly to the rest of society. Similarly, the overall social costs of a proposal are costs incurred directly by those subject to the rule and costs incurred indirectly by others. In the case of Basel IA, direct costs and benefits are those that apply to the banking organizations that are subject to the proposal. Indirect costs and benefits then stem from banks and other financial institutions that are not subject to the proposal, bank customers, and, through the safety and soundness externality, society as a whole.

The enormous social and economic benefit that derives from a safe and sound banking system supported by vigorous and comprehensive supervision, including ensuring adequate capital clearly dwarfs any direct benefits that might accrue to institutions adopting Basel IA. Similarly, the social and economic cost of any reduction in the safety and soundness of the banking system would dramatically overshadow any cost borne by banking organizations subject to the rule. The banking agencies are confident that the enhanced risk sensitivity of the proposed rule could allow banking organizations to more effectively achieve objectives that are consistent with a safe and sound banking system.

Beyond the relatively minor societal benefit from the relatively minor enhancement to bank safety and soundness, we do not anticipate any benefits accruing other than directly to the banking organizations that elect to adopt Basel IA. Because many factors besides regulatory capital requirements affect pricing and lending decisions, we do not expect the adoption or non-adoption of Basel IA to affect pricing or lending. Hence, we do not anticipate any costs or benefits affecting the customers or competitors of Basel IA institutions. For these reasons, the cost and benefit analysis of Basel IA reduces to an analysis of the costs and benefits directly attributable to institutions that might elect to adopt Basel IA capital rules.

A. Organizations Affected by the Proposed Rule [44]

As of June 30, 2006, eleven banking organizations meet the criteria that would require them to adopt the U.S. implementation of Basel II. Removing those 11 mandatory Basel II institutions from the 7,606 FDIC-insured banking organizations active in June 2006 leaves 7,595 organizations that would be eligible to adopt Basel IA. Among national banks, six of the eleven mandatory Basel II institutions are national banks. Out of 1,545 banking organizations with national banks, 1,539 national banking organizations would thus be eligible to adopt Basel IA.

B. Benefits of the Proposed Rule

The proposed rule aims to improve the risk sensitivity of regulatory capital requirements. The five benefits of the proposed rule are:

1. Enhances the risk sensitivity of capital charges.
2. More efficient use of required bank capital.
3. Recognizes new developments in financial markets.
4. Mitigates potential distortions in minimum regulatory capital requirements between large and small banking organizations.
5. Ability to opt in offers long-term flexibility to banking organizations.

C. Costs of the Proposed Rule

As with any rule, the costs of the proposal include expenditures by banks and thrifts necessary to comply with the new regulation and costs to the federal banking agencies of implementing the new rules. Because of a lack of cost estimates from banking organizations, the OCC found it necessary to use a scope-of-work comparison with Basel II in order to arrive at a cost estimate for Basel IA. Based on this rough assessment, we estimate that implementation costs for Basel IA could range from $100,000 at smaller institutions to $3 million at larger institutions.

1. Costs to Banking Organizations

Explicit costs of implementing the proposed rule at banking organizations fall into two categories: setup costs and ongoing costs. Setup costs are typically one-time expenses associated with introducing the new programs and procedures necessary to achieve initial compliance with the proposed rule. Setup costs may also involve expenses related to tracking and retrieving data needed to implement the proposed rule. Ongoing costs are also likely to reflect data costs associated with retrieving and preserving data.

The total cost to national banks of adopting Basel IA depends entirely on the number of institutions that elect to adopt the voluntary rule and the size of those institutions. Obviously, if no institutions adopt Basel IA, the cost will be zero. Based on comment letters and discussions with bank supervision staff, we sought to identify national banks that would be more likely to adopt Basel IA. We selected national banks with significant mortgage holdings (over $500 million in 1–4 family first-lien mortgages and mortgages comprise at least 10 percent of their portfolio) as well as national banks that do not currently meet the well-capitalized threshold for their risk based capital-to-assets ratio. Using those criteria, we identified 46 national banks. We estimate that the total cost of the rule for national banks will be approximately $78 million. Over time, Basel IA may become more appealing to a larger number of banks. The total cost of the proposed rule would consequently increase to the extent that more institutions opt into Basel IA over time. At present, it is unclear how many national banks will ultimately elect to adopt Basel IA.

2. Government Administrative Costs

Like the banking organizations subject to new requirements, the costs to government agencies of implementing the proposed rule also involve both startup and ongoing costs. Startup costs include expenses related to the

[44] Unless otherwise noted, the population of banks and thrifts used in this analysis consists of all FDIC-insured institutions. Banking organizations are aggregated to the top holding company level.

development of the regulatory proposals, costs of establishing new programs and procedures, and costs of initial training of bank examiners in the new programs and procedures. Ongoing costs include maintenance expenses for any additional examiners and analysts needed to regularly apply the new supervisory processes. In the case of Basel IA, because modest changes to Call Reports will capture most of the rule changes, these ongoing costs are likely to be minor.

OCC expenditures fall into three broad categories: training, guidance, and supervision. Training includes expenses for workshops and other training courses and seminars for examiners. Guidance expenses reflect expenditures on the development of Basel IA guidance. Supervision expenses reflect organization-specific supervisory activities. We estimate that OCC expenses for Basel IA will be approximately $2.4 million through 2006. We also expect expenditures of $1 million per year between 2007 and 2010. Applying a five percent discount rate to future expenditures, past expenses ($2.4 million) plus the present value of future expenditures ($3.6 million) equals total OCC expenditures of $6 million on Basel IA.

3. Total Cost Estimate of Proposed Rule

The OCC's estimate of the total cost of the proposed rule includes expenditures by banking organizations and the OCC from the present through 2010. Based on our estimate that approximately 46 national banks will adopt Basel IA at a cost to each institution of between $100,000 and $3 million depending on the size of the institution, we estimate that national banks will spend approximately $78 million on Basel IA. Combining expenditures provides an estimate of $84 million for the total cost of the proposed rule for the OCC and national banks.

iv. Analysis of Baseline and Alternatives

In order to place the costs and benefits of the proposed rule in context, Executive Order 12866 requires a comparison between the proposed rule, a baseline of what the world would look like without the proposed rule, and a reasonable alternative to the proposed rule. In this regulatory impact analysis, we analyze one baseline and one alternative to the proposed rule. The baseline considers the possibility that the proposed Basel IA rule is not adopted and current capital standards continue to apply.

The baseline scenario appears in this analysis in order to estimate the effects of adopting the proposed rule relative to a hypothetical regulatory regime that might exist without Basel IA. Because the baseline scenario considers costs and benefits as if the proposed rule never existed, we set the costs and benefits of the baseline scenario to zero. Obviously, banking organizations face compliance costs and reap the benefits of a well-capitalized banking system even under the baseline. However, because we cannot quantify these costs and benefits, we normalize the baseline costs and benefits to zero and estimate the costs and benefits of the proposed rule and alternative as deviations from this zero baseline.

1. *Baseline Scenario: Current capital standards based on the 1988 Basel Accord continue to apply.*

Description of Baseline Scenario

Under the Baseline Scenario, current capital rules would continue to apply to all banking organizations in the United States that are not subject to the U.S. implementation of Basel II. Under this scenario, the United States would not adopt the proposed Basel IA rule but the implementation of the Basel II framework would continue.

Change in Benefits: Baseline Scenario

Staying with current capital rules instead of adopting the Basel IA proposal would eliminate essentially all of the benefits of the proposed rule listed above. Under the baseline, banking organizations not subject to Basel II would not be given the option of voluntarily selecting Basel IA. Institutions that would have adopted the proposed rule would not be able to take advantage of the enhanced risk sensitivity of Basel IA capital charges and the more efficient use of bank capital that implies.

One benefit that would remain under the baseline is that there would be no rule changes instead of just simple and voluntary rule changes. Without Basel IA as an available option, an institution would have to choose between the advanced approaches of Basel II and the *status quo.* The baseline without Basel IA would leave a level playing field for all the non-Basel II banks. However, the absence of an opportunity to mitigate potential distortions in minimum required capital would likely diminish this benefit in the eyes of an institution concerned about potential distortions created by Basel II.

Changes in Costs: Baseline Scenario

Continuing to use current capital rules eliminates the benefits and the costs of adopting the proposed rule. As discussed above, under the proposed rule we estimate that organizations would spend up to $78 million on implementation-related expenditures. Retaining current capital rules would eliminate any costs associated with the proposed rule, even though banking organizations would only incur those costs if they elected to do so.

2. *Alternative: Require all U.S. banking organizations not subject to Basel II to adopt Basel IA.*

Description of Alternative

The only change under the alternative is that adoption of the proposed rule would be mandatory rather than voluntary. Under this alternative, the provisions of the proposed rule would remain intact and apply to all national banks that are not subject to Basel II. Institutions subject to Basel II would include mandatory Basel II institutions and those institutions that elect to adopt the U.S. implementation of the Basel II framework.

Change in Benefits: Alternative

Because there are no changes to the elements of the proposed rule under the alternative, the list of benefits remains the same. Among these benefits, only one benefit is lost by making the proposed rule mandatory: the benefit derived from the fact that the proposed rule is voluntary. As for the benefits relating to the enhanced risk sensitivity of capital charges, because adoption of Basel IA is mandatory under the alternative, more banks will be subject to Basel IA provisions and the aggregate level of benefits will be higher. Because we anticipate that only 46 national banks would adopt Basel IA voluntarily, the difference in the aggregate benefit level could be considerable.

Changes in Costs: Alternative

Clearly the most significant drawback to the alternative is the dramatically increased cost of applying a new set of capital rules to all U.S. banking organizations. Under the alternative, direct costs would increase for every U.S. banking organization that would have elected to continue to use current capital rules under the proposed rule. The cost estimate for the alternative is the total cost estimate for a 100 percent adoption rate of Basel IA. With 1,545 national banking organizations eligible for Basel IA, we estimate that the cost to national banking organizations of the alternative is approximately $662 million. The actual cost may be somewhat less depending on the number of national banks that elect to adopt Basel II capital rules, but it is much greater than our cost estimate of $78 million for the proposed rule.

3. *Overall Comparison of Proposed Rule with Baseline and Alternative.*

The objective of the proposed rule is to enhance the risk sensitivity of capital charges for institutions not subject to Basel II capital regulations. The proposal also seeks to mitigate any potential distortions in minimum regulatory capital requirements that the U.S. implementation of Basel II might create between large and small banking organizations. Like Basel II, the anticipated benefits of the Basel IA proposal are difficult to quantify in dollar terms. Nevertheless, the OCC believes that the proposed rule provides benefits without posing any threat to the safety and soundness of the banking industry or the security of the Federal Deposit Insurance system. To offset the costs of the proposed rule, its voluntary nature offers regulatory flexibility that will allow institutions to adopt Basel IA on a bank-by-bank basis when an institution's anticipated benefits exceed the anticipated costs of adopting this regulation.

The banking agencies are confident that the proposed rule could serve to strengthen institutions electing to adopt Basel IA while the safety and soundness of institutions electing to forgo Basel IA and Basel II will not diminish. On the basis of our analysis, we believe that the benefits of the proposed rule are sufficient to offset the costs of implementing the proposed rule. However, because there is no social cost to allowing institutions to remain subject to current capital rules, we believe it is best to make the proposed rule voluntary in order to let each national bank decide whether it is in that institution's best interest to adopt Basel IA. Because adoption is voluntary, the proposed rule offers an improvement over the baseline scenario and the alternative. The proposed rule offers an important degree of flexibility unavailable with either the baseline or the alternative. The baseline does not give banking organizations a way into Basel IA and the alternative does not offer them a way out. The alternative would compel most banking organizations to follow a new set of capital rules and require them to undertake the time and expense of adjusting to these new rules. The proposed rule offers a better balance between costs and benefits than either the baseline or the alternative. Overall, the OCC believes that the benefits of the proposed rule justify its costs.

OTS Executive Order 12866 Determination

OTS concurs with OCC's RIA. Rather than replicate that analysis, OTS drafted an RIA incorporating OCC's analysis by reference and adding appropriate material reflecting the unique aspects of the thrift industry. The full text of OTS's RIA is available at the locations for viewing the OTS docket indicated in the **ADDRESSES** section above. OTS believes that its analysis meets the requirements of Executive Order 12866. The following discussion supplements OCC's summary of its RIA.

OTS is the primary federal regulator for 854 federal and state-chartered savings associations with assets of $1.5 trillion as of June 30, 2006. OTS-regulated savings associations assets are highly concentrated in residential mortgage-related assets. Approximately 68 percent of total thrift assets are residential mortgage-related assets. As a result, the most important change made by the proposed rule for OTS-regulated savings associations involves the proposed changes to the risk weighting of residential mortgages. Other aspects of the Basel IA NPR should not have a significant effect on saving associations.[45] Accordingly, OTS's analysis focuses on the proposed risk-weighting of residential mortgages.

Benefit-Cost Analysis

Overall OTS believes that the benefits of the proposed rule justify its costs. Under OTS's analysis, direct costs and benefits include costs and benefits to savings associations that opt-in to the proposed rule. OTS estimates that approximately 115 savings associations will opt-in to the proposed rule.[46] Direct costs and benefits also include OTS's costs of implementing the proposed rule. Indirect costs and benefits are those that may affect the economy as a whole. These indirect and direct costs arise from how the primary business of banking (*i.e.*, credit availability) is impacted by requirements for risk-based capital adequacy.

A. Direct Benefits

In general, the proposed rule seeks to improve the risk sensitivity of minimum regulatory capital requirements and, by doing so, to address some of the shortcomings of the current regulatory minimum capital requirements.[47] For OTS-regulated savings associations, the most important change involves the risk weighting of residential mortgages. Well-underwritten residential mortgages with LTV ratios at origination of less than 90 percent are all currently risk weighed for regulatory capital purposes at 50 percent. Data from a variety of sources, including the security markets, indicate that this risk weight may be too high for the credit risk of low LTV mortgages and insufficient for the credit risk of higher LTV mortgages. As a result, to the extent that minimum regulatory capital requirements affect savings associations' investment decisions, the current rules may discourage saving associations from retaining higher quality low LTV mortgages in their portfolios or encourage them to retain lower quality high LTV mortgages.

In addition, for the largest banking organizations, the recently published Basel II NPR addresses the credit risks of exposures more directly than under the current capital requirement regime by relating their probability of default and loss given default to minimum regulatory capital requirements. Preliminary survey results suggest that, on average, residential mortgages are likely to receive a lower credit risk weight under the Basel II NPR than under the current regime. The Basel IA NPR is intended to offer savings associations not covered under the Basel II NPR a more risk sensitive weighting scheme for residential mortgages, and, if adopted, may offer saving associations a more level playing field on which to compete against Basel II banking organizations in offering residential mortgage related products.

B. Direct Costs

OTS estimates that the total direct costs of the proposed rule for the six-year period from design through implementation will be $72 million. This includes direct costs of $67 million for the 115 savings associations that may opt-in to the proposed rule, and direct costs of $5 million for OTS implementation expenses.

C. Indirect Benefits and Costs

The primary business of banking is making credit available to borrowers. A myriad of considerations affect credit decisions by individual institutions. Among these considerations are the regulatory cost of capital and how closely the regulatory cost matches an institution's internal assessment of its

[45] Savings associations, for example, do not have significant holdings that would be affected by the ratings-based approaches for exposures, collateral, or guarantors. Rather, savings associations' assets are more heavily concentrated in mortgage-backed securities issued or guaranteed by the government sponsored enterprises, whose risk weightings would not change under the Basel IA NPR.

[46] This is the number of well-capitalized thrifts that hold total assets of $500 million or more, and that have a total risk-based capital ratio of 15 percent or less.

[47] The other benefits of the Basel IA NPR are more fully discussed in the OCC analysis.

capital needs. To the extent that regulatory risk-based capital requirements for capital adequacy may overstate (or understate) the amount of capital that an institution must otherwise hold to support its credit decisions, the regulatory requirements add costs of compliance and, thus, introduce inefficiencies to the extent that a savings association is unable to price its credit products consistent with the underlying credit risk.

The Basel II NPR attempted to develop a models-based system that more closely harmonized risk-based capital at the largest internationally active banks with their internal capital allocation models. For residential mortgages, the underwriting, risk differentiation, and system tracking processes described in the Basel II NPR are much closer to industry practice than the simple risk weight bucket system based on Basel I. The centerpiece of the Basel IA NPR is the expansion of the number of risk buckets and the establishment of new risk-based capital criteria that should, for residential mortgages, more closely mirror the underwriting, risk differentiation, and system tracking at likely opt-in institutions.

To the extent that the Basel IA NPR achieves its goal of more closely aligning risk-based capital requirements to real credit risk, it should reduce the inefficiency inherent in the simpler Basel I-based framework. This should enable adopters to price their mortgage credits more closely to their internal assessment of credit risk. Competitive equity would be easier to maintain, particularly vis-á-vis the largest institutions. Moreover, there may be fewer forced consolidations, which could also help maintain a more competitive mortgage credit environment. Credit decisions could be made more rationally, and could be based more exclusively on sound underwriting since capital adequacy requirements would more closely match internal risk assessments.

Smaller institutions that choose to hold risk-based capital in excess of the well-capitalized level could continue to operate under their distinct business model. These institutions hold those capital levels primarily due to concentration risk, their localized needs for liquidity, and other factors. Because their capital levels already exceed the regulatory minimums, these institutions have already harmonized their own assessment of risk with a Basel I-based system, and can presumably price their mortgage credits efficiently and competitively in the current environment.

It would be nearly impossible to estimate a dollar amount of the potential indirect cost or benefit to the economy derived from introduction of an optional risk-based capital framework that more closely aligns capital requirements with credit risk for residential mortgages. However, since the decision to opt in or not would be made by thousands of banks, even partial success at harmonizing risk-based capital with internal risk assessment should improve the efficiency of the mortgage credit decision and therefore reduce the cost to the economy.

Analysis of Baseline and Alternatives

The OCC analysis includes a comparison between the Basel IA NPR, a baseline scenario of what the world would look like without the Basel IA NPR, and an alternative to the Basel IA NPR. The alternative would require all banking organizations that are not subject to the Basel II NPR to apply the Basel IA NPR. Except for the discussions focusing on the benefit derived from the recognition of new developments in financial markets, which is only a minor benefit for savings associations, OTS believes that the OCC analysis is reasonable and equally applicable to savings associations. OTS supports the OCC's conclusion that the Basel IA NPR offers a better balance between costs and benefits than the alternative. OTS has the following additional comments:

A. Baseline Scenario

In its analysis of the baseline scenario, which would leave the current risk-based capital rules unchanged, OCC determines that national banks could avoid $78 million of implementation-related expenditures that would otherwise be required by the Basel IA NPR. As noted above, OTS estimates that 115 savings associations would spend up to $67 million to implement the Basel IA NPR. Retaining the current capital rules without adopting Basel IA would permit these savings associations to avoid these new expenditures.

As an indirect cost to the economy, the baseline scenario of maintaining a less risk-sensitive capital framework would continue to pose some cost of inefficiency and compliance for some institutions. This may lead to less competitive equity for those institutions, and less efficiently and mis-priced mortgage credits for borrowers generally.

B. Alternative Scenario

In its analysis of the alternative scenario, OCC concludes that the aggregate benefits would considerably increase because 1,539, rather than 46, national banks would implement the alternative. Under the alternative scenario, OTS estimates that the aggregate costs to savings associations would also increase considerably. Specifically, OTS estimates that these costs would increase from $67 million (for 115 savings associations) to $164 million (for 850 savings associations).

The alternative scenario would impose direct costs on institutions and indirect costs on the economy generally. Many savings associations elect to hold capital in excess of the well-capitalized levels to address other risks. This is a prudent decision regulators should encourage and not discourage. For these institutions, the mandatory imposition of the Basel IA NPR would only increase capital compliance costs. These institutions would not obtain an offsetting benefit in the form of lower capital requirements for mortgage credit risk. In such a scenario, some of these institutions could choose to pass on the increased costs, which would render them less competitive and could lead to inefficiently and mis-priced mortgage credits for borrowers, and hence, the economy generally. Alternatively, some of these institutions might choose to absorb the costs in the form of weaker earnings, which would make them more vulnerable targets for consolidation, and reduce the competitive environment in that manner.

OCC Executive Order 13132 Determination

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

Paperwork Reduction Act

Implementation of these proposed rules would require revisions to the Agencies' quarterly regulatory reports [48] to reflect the program and system changes required for a banking organization that adopts Basel IA. The Agencies project issuing a **Federal Register** notice for certain upcoming changes to the quarterly regulatory reports in early 2007. This notice will separately present a detailed discussion of the program and system changes and associated burden estimates for the potential future changes to the quarterly regulatory reports for banking organizations that decide to adopt Basel IA. This will afford the public ample

[48] Consolidated Reports of Condition and Income (Call Report) (OMB Nos. 7100–0036, 3064–0052, 1557–0081), Thrift Financial Report (TFR) (OMB No. 1550–0023), Consolidated Financial Statemetns for Bank Holding Companies (FR Y–9C) (OMB No. 7100–0128).

opportunity to consider potential future reporting changes associated with the Basel IA proposed rule before the comment period for this proposed rulemaking closes. Prior to the publication of the upcoming notice, public commenters may submit comments on aspects of this notice that may affect reporting requirements at the addresses listed in the **ADDRESSES** section of this NPR. The Agencies will submit such required revisions to the quarterly regulatory reports to the Office of Management and Budget (OMB) for review and approval under the Paperwork Reduction Act.

OCC and OTS Unfunded Mandates Reform Act of 1995 Determination

Section 202 of the Unfunded Mandates Reform Act of 1995, Public Law 104–4 (Unfunded Mandates Act) requires that an agency prepare a budgetary impact statement before promulgating a rule that includes a Federal mandate that may result in expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year. If a budgetary impact statement is required, section 205 of the Unfunded Mandates Act also requires an agency to identify and consider a reasonable number of regulatory alternatives before promulgating a rule. The OCC and OTS each has determined that this proposed rule will not result in expenditures by State, local, and tribal governments, or by the private sector, of $100 million or more. Accordingly, neither the OCC nor the OTS has prepared a budgetary impact statement or specifically addressed the regulatory alternatives considered.

Solicitation of Comments on Use of Plain Language

Section 722 of the GLBA requires the Federal banking agencies to use plain language in all proposed and final rules published after January 1, 2000. The Federal banking agencies invite comment on how to make this proposed rule easier to understand. For example:

- Have we organized the material to suit your needs? If not, how could this material be better organized?
- Are the requirements in the rule clearly stated? If not, how could the rule be more clearly stated?
- Do the regulations contain technical language or jargon that is not clear? If so, which language requires clarification?
- Would a different format (grouping and order of sections, use of headings, paragraphing) make the regulation easier to understand? If so, what changes to the format would make the regulation easier to understand?
- Would more, but shorter, sections be better? If so, which sections should be changed?
- What else could we do to make the regulation easier to understand?

List of Subjects

12 CFR Part 3

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

12 CFR Part 208

Accounting, Agriculture, Banks, Banking, Confidential business information, Crime, Currency, Mortgages, Reporting and recordkeeping requirements, Securities.

12 CFR Part 225

Administrative practice and procedure, Banks, Banking, Holding companies, Reporting and recordkeeping requirements, Securities.

12 CFR Part 325

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

12 CFR Part 567

Capital, Reporting and recordkeeping requirements, Savings associations.

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

12 CFR Chapter I

Authority and Issuance

For the reasons set out in the preamble, part 3 of chapter I of title 12 of the Code of Federal Regulations is proposed to be amended as follows:

PART 3—MINIMUM CAPITAL RATIOS; ISSUANCE OF DIRECTIVES

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

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

2. Amend § 3.4 by revising paragraph (b) and adding paragraphs (c) and (d) to read as follows:

§ 3.4 Reservation of Authority.

* * * * *

(b) *Risk-weight categories.* Notwithstanding the risk categories in appendices A and D of this part, the OCC will look to the substance of the transaction and may find that the assigned risk weight for any asset, the credit equivalent amount or credit conversion factor for any off-balance sheet item, or the use of an external rating or the external rating on any instrument does not appropriately reflect the risks imposed on a bank and may require another risk weight, credit equivalent amount, credit conversion factor or external rating that the OCC deems appropriate. Similarly, if no risk weight, credit equivalent amount, credit conversion factor, or external rating is specifically assigned, the OCC may assign any risk weight, credit equivalent amount, credit conversion factor, or external rating that the OCC deems appropriate. In making its determination, the OCC considers risks associated with the asset or off-balance sheet item as well as other relevant factors.

(c) In addition to the reservations of authority described in paragraph (b) of this section, the OCC reserves the authority to assign different risk weights to exposures as set forth in sections 1(c)(2)(i), and (ii) of appendix C and section 6 of appendix B of this part.

(d) *Applicability.* The OCC reserves the authority to require a bank calculate its minimum risk-based capital ratio according to either appendix A, appendix C, or appendix D of this part. In making this determination, the OCC will consider the bank's information systems and risk profile and apply notice and response procedures in the same manner and to the same extent as the notice and response procedures in § 3.12. Additionally, the OCC reserves the authority to require any bank to apply the market risk capital adjustment set forth in appendix B of this part.

3. Revise § 3.6 to read as follows:

§ 3.6 Minimum capital ratios.

(a) *General.* A national bank must maintain a capital to total assets leverage ratio and a risk-based capital ratio. The risk-based capital ratio may be subject to a market risk adjustment.

(b) *Total assets leverage ratio.* All national banks must have and maintain Tier 1 capital in an amount equal to at least 3.0 percent of adjusted total assets.

(c) *Additional leverage ratio requirement.* An institution operating at or near the level in paragraph (a) of this section should have well-diversified risks, including no undue interest rate risk exposure; excellent control systems; good earnings; high asset quality; high liquidity; and well managed on- and off-balance sheet activities; and in general be considered a strong banking organization, rated composite 1 under the Uniform Financial Institutions

Rating System (CAMELS) rating system of banks. For all but the most highly-rated banks meeting the conditions set forth in this paragraph (c), the minimum Tier 1 leverage ratio is 4 percent. In all cases, banking institutions should hold capital commensurate with the level and nature of all risks.

(d) *Risk-based capital ratio.* A national bank must have and maintain the minimum risk-based capital ratio in either appendix A (risk-based capital ratio), appendix C (internal ratings-based and advanced measurement approaches), or appendix D (alternative risk-based capital ratio), and, for certain banks, in appendix B of this part (market risk capital adjustment).

(1) *Risk-based capital ratio requirement.* Except as provided by paragraph (d)(2) (alternative risk-based capital ratio) and paragraph (f) of this section (internal ratings-based and advanced measurement approaches), a bank must maintain a minimum risk-based capital ratio as calculated in accordance with appendix A of this part.

(2) *Alternative risk-based capital ratio requirement.* A bank that is not subject (either mandatorily or by election) to the internal ratings-based and advanced measurement approaches under Appendix C, may adopt the alternative risk-based capital ratio requirements pursuant to section 1(c) of appendix D of this part. A bank subject to appendix D must maintain a minimum alternative risk-based capital ratio as calculated in accordance with appendix D of this part.

(3) *Internal ratings-based and advanced measurement approaches requirement.* (i) *Applicability.* A bank that meets any of the following internal ratings-based and advanced measurement approaches applicability requirements must apply appendix C of this part in determining its minimum risk-based capital ratio:

(A) The bank's consolidated total assets, as reported on its most recent year-end Call Report, equal to $250 billion or more;

(B) The bank's most recent year-end consolidated total on-balance sheet foreign exposure equals to $10 billion or more (where total on-balance sheet foreign exposure equals total cross-border claims less claims with head office or guarantor located in another country plus redistributed guaranteed amounts to the country of head office or guarantor plus local country claims on local residents plus revaluation gains on foreign exchange and derivative products, calculated in accordance with the Federal Financial Institutions Examination Council (FFIEC) 009 Country Exposure Report);

(C) The bank is a subsidiary of a depository institution that is subject to 12 CFR Part 3, Appendix C, 12 CFR Part 208, Appendix F, 12 CFR Part 325, Appendix D, or 12 CFR Part 566, subpart A; or

(D) The bank is a subsidiary of a bank holding company (as defined in 12 U.S.C. 1841) that is subject to 12 CFR Part 225, Appendix F.

(ii) *Mandatory banks.* A bank that meets the applicability requirements under paragraph (d)(3)(i) of this section must maintain a minimum risk-based capital ratio as calculated in accordance with appendix C of this part.

(iii) *Opt-in banks.* A bank not otherwise required to use appendix C, may elect to use the internal ratings-based and advanced measurement approaches to calculate its minimum risk-based capital ratio, subject to prior OCC approval as provided by section 21 of appendix C of this part. A bank approved to use the internal ratings-based and advanced measurement approaches, must maintain a minimum risk-based capital ratio as calculated in accordance with appendix C of this part [Basel II].

(4) Market risk capital adjustment requirement. (i) *Market risk capital adjustment applicability requirement.* A bank that meets any of the following applicability requirements, as determined by the bank's most recent year-end Call Report, must apply the additional market risk capital adjustment as provided by appendix B of this part:

(A) The bank has trading activities (on a worldwide consolidated basis) equals to, or greater than, 10 percent of its total assets; or

(B) The bank has trading activities (on a worldwide consolidated basis) equal to $1 billion or more.

(ii) *Mandatory market risk bank.* A bank that meets the market risk applicability requirements under paragraph (d)(4) of this section must apply the additional market risk capital adjustment in determining its minimum risk-based capital ratio (or alternative risk-based capital ratio, if applicable), as calculated in accordance with appendix B of this part.

(iii) *Opt-in market risk bank.* A bank not otherwise required to use appendix B, may elect to use the market risk capital adjustment, subject to prior OCC approval as provided by section 3(c) of appendix B of this part. A bank approved to use the market risk capital adjustment, must apply the additional market risk capital adjustment in determining its minimum risk-based capital ratio (or alternative risk-based capital ratio, if applicable), as calculated in accordance with appendix B of this part.

4. Appendix C to Part 3 is added and reserved.

5. Add Appendix D to Part 3 to read as follows:

Appendix D To Part 3—Alternative Risk-Based Capital Guidelines

Section 1. Purpose, Applicability of Guidelines, and Definitions

(a) *Scope.* This Appendix applies to all banks that have opted-in in accordance with section 1(b) of this appendix D.

(b) *Opt-in procedures.* (1) *Initial opt-in.* Unless otherwise subject to appendix C of this part, any bank may adopt the capital requirements set forth in this appendix D by notifying the OCC of its intent to do so.

(2) *Opt-Out.* Any bank that has opted into the capital requirements of this appendix D subsequently may elect to adopt the capital requirements set forth in appendix A by filing a notice with the appropriate supervisory office.

(c) *Reservation of authority.* (1) The OCC may apply this appendix D to any bank if the OCC deems it necessary or appropriate for safe and sound banking practices or if the OCC determines that this appendix D would produce risk-based capital requirements that more accurately reflect the risk profile of the bank. In making a determination under this paragraph, the OCC will apply notice and response procedures in the same manner and to the same extent as the notice and response procedures in § 3.12.

(2) The OCC may exclude a bank that has otherwise opted-in according to section 1(b)(1) of this appendix from applying the capital requirements of this appendix D, if the OCC determines such action is consistent with safe and sound banking practices. In making a determination under this paragraph, the OCC will apply notice and response procedures in the same manner and to the same extent as the notice and response procedures in § 3.12.

(d) *Definitions.* (1) Except where noted, the definitions listed in sections 1 and 4 of appendix A to this part 3 shall apply to this appendix D to this part 3. For the purposes of this appendix D, where the definitions in appendix A include cross references to other sections in appendix A, the OCC will construe them to refer to the appropriate sections in this appendix D.

(2) For the purposes of this appendix D, the following additional definitions apply:

Affiliate means, with respect to a company, any company that controls, is controlled by, or is under common control with, the company. For the purposes of this definition, a person or company controls a company if it:

(A) Owns, controls, or holds with power to vote 25 percent or more of a class of voting securities of the company; or

(B) Consolidates the company for financial reporting purposes.

Company means a corporation, partnership, limited liability company, business trust, special purpose entity, association, or similar organization.

Early amortization provision means a provision in the documentation governing a securitization that, when triggered, causes investors in the securitization exposures to be repaid before the original stated maturity of the securitization exposures, unless the provision is solely triggered by events not directly related to the performance of the underlying exposures or the originating banking organization (such as material changes in tax laws or regulations).

Eligible guarantee means a guarantee provided by a third party eligible guarantor that is:

(A) Written and unconditional; and if extended by a central government, is backed by the full faith and credit of the central government;

(B) Covers all or a *pro rata* portion of the contractual payments of the obligor on the reference exposure;

(C) Gives the beneficiary a direct claim against the protection provider;

(D) Is non-cancelable by the protection provider for reasons other than the breach of the contract by the beneficiary;

(E) Is legally enforceable against the protection provider in a jurisdiction where the protection provider has sufficient assets against which a judgment may be attached and enforced;

(F) Requires the protection provider to make payment to the beneficiary on the occurrence of a default (as defined in the guarantee) of the obligor on the reference exposure without first requiring the beneficiary to demand payment from the obligor.

Eligible guarantor means:

(A) A foreign central government with senior long-term debt externally rated at least investment grade by a NRSRO; or

(B) An entity, other than a central government, (for example, securities firms, insurance companies, bank holding companies, savings and loan holding companies, multilateral lending and regional development institutions, partnerships, limited liability companies, business trusts, special purpose entities, associations and other similar organizations) with senior long-term debt externally rated at least investment grade by a NRSRO.

Excess spread means gross finance charge collections (including market interchange fees) and other income received by a trust or the special purpose entity (SPE) minus interest paid to investors in the securitization exposures, servicing fees, charge-offs, and other similar trust or SPE expenses.

Excess spread trapping point means the point at which the bank is required by the documentation governing a securitization to divert and hold excess spread in a spread or reserve account, expressed as a percentage.

External rating means:

(A) A credit rating that is assigned by an NRSRO to a claim, provided that the credit rating:

(*1*) Fully reflects the entire amount of credit risk with regard to all payments owed on the claim (that is, the rating must fully reflect the credit risk associated with timely repayment of principal and interest);

(*2*) Is monitored by the issuing NRSRO;

(*3*) Is published in an accessible public form; and

(*4*) Is, or will be, included in the issuing NRSRO's publicly available transition matrix, which tracks the performance and stability (or ratings migrations) of an NRSRO's issued external ratings for the specific type of claim (for example, corporate debt); or

(B) An unrated claim on a foreign central government shall be deemed to have an external rating equal to the foreign central government's issuer rating assigned by an NRSRO.

Investor's interest means the total amount of securitization exposures represented by securities issued by a trust or special purpose entity to investors.

Loan-level private mortgage insurance means insurance provided by a regulated mortgage insurance company that protects the mortgage lender in the event of a default of a mortgage borrower up to a predetermined portion of the value of a single one-to-four residential property, provided there is no pool-level cap that would effectively reduce coverage.

Non-central government entity means an entity that is not a central government as that term is defined in this section. This term includes securities firms, insurance companies, bank holding companies, savings and loan holding companies, multilateral lending and regional development institutions, partnerships, limited liability companies, business trusts, special purpose entities, associations and other similar organizations.

Revolving credit means a line of credit where the borrower is permitted to vary both the drawn amount and the amount of repayment.

Section 2. Components of Capital

(a) A national bank's qualifying capital base is comprised as set forth in section 2 of appendix A to this part 3.

(b) For the purposes of this appendix D, the OCC will construe cross references in appendix A of this part to other sections in appendix A as cross references to the appropriate sections in this appendix D.

Section 3. Risk Categories/Weights for On-Balance Sheet Assets and Off-Balance Sheet Items.

(a) *General.* (1) *Calculations.* The denominator of the risk-based capital ratio, i.e., a national bank's risk-weighted assets, is derived by assigning that bank's assets and off-balance sheet items to one of the risk categories set out in this appendix D. Each category has a specific risk weight. Off-balance sheet items are converted to on-balance sheet equivalent amounts according to section 3(c) of this appendix D and then assigned a risk category. The risk weight assigned to a particular asset or on-balance sheet credit equivalent amount determines the percentage of that asset/credit equivalent that is included in the denominator of the bank's risk-based capital ratio. Any asset deducted from a bank's capital in computing the numerator of the risk-based capital ratio is not included as part of the bank's risk-weighted assets. The OCC reserves the right to require a bank to compute its risk-based capital ratio on the basis of average, rather than period-end, risk-weighted assets when necessary to carry out the purposes of these guidelines.

(2) *Indirect Holdings.* Some of the assets on a bank's balance sheet may represent an indirect holding of a pool of assets, *e.g.*, mutual funds, that encompasses more than one risk weight within the pool. In those situations, the bank may assign the asset to the risk-weight category applicable to the highest risk-weighted asset that pool is permitted to hold pursuant to its stated investment objectives in the fund's prospectus. Alternatively, the bank may assign the asset on a pro rata basis to different risk categories according to the investment limits in the fund's prospectus. In either case, the minimum risk weight that may be assigned to such a pool is 20 percent. If a bank assigns the asset on a pro rata basis, and the sum of the investment limits in the fund's prospectus exceeds 100 percent, the bank must assign the highest pro rata amounts of its total investment to the higher risk-weight category. If, in order to maintain a necessary degree of liquidity, the fund is permitted to hold an insignificant amount of its assets in short-term, highly-liquid securities of superior credit quality (that do not qualify for a preferential risk weight), such securities generally will not be taken into account in determining the risk category into which the bank's holding in the overall pool should be assigned. The prudent use of hedging instruments by a fund to reduce the risk of its assets will not increase the risk weighting of the investment in that fund above the 20 percent category. However, if a fund engages in any activities that are deemed to be speculative in nature or has any other characteristics that are inconsistent with the preferential risk weighting assigned to the fund's assets, the bank's investment in the fund will be assigned to the 100 percent risk-weight category. More detail on the treatment of mortgage-backed securities is provided in sections 3(b)(1)(ii)(F) and (G), 3(b)(1)(iv)(D), and 4(c) and (d) of this appendix D.

(b) *On-Balance Sheet Assets.* (1) *Risk-Weight Categories.* Unless otherwise provided by sections 3(b)(2) or 3(b)(3) of this appendix, a bank must assign a risk weight to an on-balance sheet asset according to the following risk-weight categories.

(i) *Zero percent risk weight.* (A) Cash, including domestic and foreign currency owned and held in all offices of a national bank or in transit. Any foreign currency held by a national bank should be converted into U.S. dollar equivalents.

(B) Deposit reserves and other balances at Federal Reserve Banks.

(C) Gold bullion held in the bank's own vaults or in another bank's vaults on an allocated basis, to the extent it is backed by gold bullion liabilities.

(D) The book value of paid-in Federal Reserve Bank stock.

(E) Securities issued by, and other direct claims on, the United States Government or its agencies.

(F) That portion of assets directly and unconditionally guaranteed by the United States Government or its agencies.

(G) That portion of assets and off-balance sheet transactions [1] collateralized by cash or securities issued or directly and unconditionally guaranteed by the United States Government or its agencies, or the central government of an OECD country, provided that: [2]

(*1*) The bank maintains control over the collateral:

(*i*) If the collateral consists of cash, the cash must be held on deposit by the bank or by a third-party for the account of the bank;

(*ii*) If the collateral consists of OECD government securities, then the securities must be held by the bank or by a third-party acting on behalf of the bank;

(*2*) The bank maintains a daily positive margin of collateral fully taking into account any change in the market value of the collateral held as security;

(*3*) Where the bank is acting as a customer's agent in a transaction involving the loan or sale of securities that is collateralized by cash or OECD government securities delivered to the bank, any obligation by the bank to indemnify the customer is limited to no more than the difference between the market value of the securities lent and the market value of the collateral received, and any reinvestment risk associated with the collateral is borne by the customer; and

(*4*) The transaction involves no more than minimal risk.

(H) Externally rated debt securities issued by, certain other externally rated claims on, and that portion of assets supported by an eligible guarantee of, a foreign central government that receive a zero percent risk weight, as provided in section 3(b)(3) of this appendix D.

(ii) *Twenty Percent Risk Weight.* (A) All claims on depository institutions incorporated in an OECD country, and all assets backed by the full faith and credit of depository institutions incorporated in an OECD country. This includes the credit equivalent amount of participations in commitments and standby letters of credit sold to other depository institutions incorporated in an OECD country, but only if the originating bank remains liable to the customer or beneficiary for the full amount of the commitment or standby letter of credit. Also included in this category are the credit equivalent amounts of risk participations in bankers' acceptances conveyed to other depository institutions incorporated in an OECD country. However, bank-issued securities that qualify as capital of the issuing bank are not included in this risk category, but are assigned to the 100 percent risk category.

(B) Claims on, or guaranteed by depository institutions, other than the central bank, incorporated in a non-OECD country, with a residual maturity of one year or less.

(C) Cash items in the process of collection.

(D) That portion of assets collateralized by cash or by securities issued or directly and unconditionally guaranteed by the United States Government or its agencies that does not qualify for the zero percent risk-weight category.

(E) That portion of assets conditionally guaranteed by the United States government or its agencies.

(F) Securities issued by, or other direct claims on, United States Government-sponsored agencies.

(G) That portion of assets guaranteed by United States Government-sponsored agencies.[3]

(H) That portion of assets collateralized by the current market value of securities issued or guaranteed by United States Government-sponsored agencies.

(I) Claims representing general obligations of any public-sector entity in an OECD country, and that portion of any claims guaranteed by any such public-sector entity. In the United States, these obligations must meet the requirements of 12 CFR 1.2(b).

(J) Unrated loans to official multilateral lending institutions or regional development institutions in which the United States Government is a shareholder or contributing member.[4] Rated loans to, debt securities issued by, claims guaranteed by, and claims collateralized by debt securities issued by, official multilateral lending institutions or regional development institutions shall be risk weighted according to section 3(b)(3) of this appendix D.

(K) An unrated loan to a securities firm incorporated in an OECD country, that satisfies the following conditions:

(*1*) If the securities firm is incorporated in the United States, then the firm must be a broker-dealer that is registered with the SEC and must be in compliance with the SEC's net capital regulation (17 CFR 240.15c3(1)).

(*2*) If the securities firm is incorporated in any other OECD country, then the bank must be able to demonstrate that the firm is subject to consolidated supervision and regulation, including its subsidiaries, comparable to that imposed on depository institutions in OECD countries; such regulation must include risk-based capital standards comparable to those applied to depository institutions under the Basel Capital Accord.

(*3*) The securities firm, whether incorporated in the United States or another OECD country, must also have a long-term credit rating in accordance with section 3(b)(1)(ii)(K)(*3*)(*i*) of this appendix D; a parent company guarantee in accordance with section 3(b)(1)(ii)(K)(*3*)(*ii*) of this appendix D; or a collateralized claim in accordance with section 3(b)(1)(ii)(K)(*3*)(*iii*) of this appendix D. Claims representing capital of a securities firm must be risk weighted at 100 percent.

(*i*) Credit rating. The securities firm must have either a long-term issuer credit rating or a credit rating on at least one issue of long-term unsecured debt, from a NRSRO that is in one of the three highest investment-grade categories used by the NRSRO. If the securities firm has a credit rating from more than one NRSRO, the lowest credit rating must be used to determine the credit rating under this paragraph.

(*ii*) Parent company guarantee. The claim on the securities firm must be guaranteed by the firm's parent company, and the parent company must have either a long-term issuer credit rating or a credit rating on at least one issue of long-term unsecured debt, from a NRSRO that is in one of the three highest investment-grade categories used by the NRSRO.

(*iii*) Collateralized claim. The claim on the securities firm must be collateralized subject to all of the following requirements:

(*A*) The claim must arise from a reverse repurchase/repurchase agreement or securities lending/borrowing contract executed using standard industry documentation.

(*B*) The collateral must consist of debt or equity securities that are liquid and readily marketable.

(*C*) The claim and collateral must be marked-to-market daily.

(*D*) The claim must be subject to daily margin maintenance requirements under standard industry documentation.

(*E*) The contract from which the claim arises can be liquidated, terminated, or accelerated immediately in bankruptcy or similar proceedings, and the security or collateral agreement will not be stayed or avoided under the applicable law of the relevant jurisdiction. To be exempt from the automatic stay in bankruptcy in the United States, the claim must arise from a securities contract or a repurchase agreement under section 555 or 559, respectively, of the Bankruptcy Code (11 U.S.C. 555 or 559), a qualified financial contract under section 11(e)(8) of the Federal Deposit Insurance Act (12 U.S.C. 1821(e)(8)), or a netting contract between or among financial institutions under sections 401–407 of the Federal Deposit Insurance Corporation Improvement

[1] See footnote 18 in section 3(c)(1)(vii)(C) of this appendix D (collateral held against derivative contracts).

[2] Assets and off-balance sheet transactions collateralized by securities issued or guaranteed by the United States Government or its agencies include, but are not limited to, securities lending transactions, repurchase agreements, collateralized letters of credit, such as reinsurance letters of credit, and other similar financial guarantees. Swaps, forwards, futures, and options transactions are also eligible, if they meet the collateral requirements. However, the OCC may at its discretion require that certain collateralized transactions be risk weighted at 20 percent if they involve more than a minimal risk.

[3] Privately issued mortgage-backed securities, e.g., CMOs and REMICs, where the underlying pool is comprised solely of mortgage-related securities issued by GNMA, FNMA and FHLMC, will be treated as an indirect holding of the underlying assets and assigned to the 20 percent risk category. If the underlying pool is comprised of assets which attract different risk weights, *e.g.*, FNMA securities and conventional mortgages, the bank should generally assign the security to the highest risk category appropriate for any asset in the pool. However, on a case-by-case basis, the OCC may allow the bank to assign the security proportionately to the various risk categories based on the proportion in which the risk categories are represented by the composition cash flows of the underlying pool of assets. Before the OCC will consider a request to proportionately risk-weight such a security, the bank must have current information for the reporting date that details the composition and cash flows of the underlying pool of assets.

[4] These institutions include, but are not limited to, the International Bank for Reconstruction and Development (World Bank), the Inter-American Development Bank, the Asian Development Bank, the European Investments Bank, the International Monetary Fund, and the Bank for International Settlements.

Act of 1991 (12 U.S.C. 4407), or Regulation EE (12 CFR part 231). Externally rated loans to, externally rated debt securities issued by, claims guaranteed by, and claims collateralized by externally rated debt securities issued by, securities firms shall be risk weighted according to section 3(b)(3) of this appendix.

(L) Externally rated debt securities issued by, certain other externally rated claims on, and that portion of assets supported by an eligible guarantee from, a foreign central government that receive a 20 percent risk weight as provided in section 3(b)(3) of this appendix D.

(M) Externally rated debt securities issued by, certain other rated claims on, and that portion of assets supported by an eligible guarantee of, a non-central government entity, that receive a 20 percent risk weight as provided in section 3(b)(3) of this appendix D.

(N) Assets collateralized by liquid and readily marketable externally rated debt securities that receive a 20 percent risk weight as provided in section 3(b)(3) of this appendix D, and recourse obligations, direct credit substitutes, residual interests, and asset- and mortgage-backed securities that receive a 20 percent risk weight as provided in section 4(c)(1) of this appendix D.

(O) Mortgage loans secured by liens on one-to-four family residential properties that receive a 20 percent risk weight as provided in section 3(b)(2) of this appendix D.

(iii) *Thirty Five Percent Risk Weight.* (A) Externally rated debt securities issued by, certain other externally rated claims on, and that portion of assets supported by an eligible guarantee of, a foreign central government, that receive a 35 percent risk weight as provided in section 3(b)(3) of this appendix D.

(B) Externally rated debt securities issued by, certain other rated claims on, and that portion of assets supported by an eligible guarantee of, a non-central government entity, that receive a 35 percent risk weight as provided in section 3(b)(3) of this appendix D.

(C) Assets collateralized by liquid and readily marketable externally rated debt securities that receive a 35 percent risk weight as provided in section 3(b)(3) of this appendix D, and recourse obligations, direct credit substitutes, residual interests, and asset- and mortgage-backed securities that receive a 35 percent risk weight as provided in section 4(c)(1) of this appendix D.

(D) Mortgage loans secured by liens on one-to-four family residential properties that receive a 35 percent risk weight as provided in section 3(b)(2) of this appendix D.

(iv) *Fifty Percent Risk Weight.* (A) Revenue obligations of any public-sector entity in an OECD country for which the underlying obligor is the public-sector entity, but which are repayable solely from the revenues generated by the project financed through the issuance of the obligations.

(B) Loans to residential real estate builders for one-to-four family residential property construction, if the bank obtains sufficient documentation demonstrating that the buyer of the home intends to purchase the home (*i.e.*, a legally binding written sales contract) and has the ability to obtain a mortgage loan sufficient to purchase the home (*i.e.*, a firm written commitment for permanent financing of the home upon completion), subject to the following additional criteria:

(*1*) The builder must incur at least the first 10 percent of the direct costs (*i.e.*, actual costs of the land, labor, and material) before any drawdown is made under the construction loan and the construction loan may not exceed 80 percent of the sales price of the resold home;

(*2*) The individual purchaser has made a substantial earnest money deposit of no less than 3 percent of the sales price of the home that must be subject to forfeiture by the individual purchaser if the sales contract is terminated by the individual purchaser; however, the earnest money deposit shall not be subject to forfeiture by reason of breach or termination of the sales contract on the part of the builder;

(*3*) The earnest money deposit must be held in escrow by the bank financing the builder or by an independent party in a fiduciary capacity; the escrow agreement must provide that in the event of default the escrow funds must be used to defray any cost incurred relating to any cancellation of the sales contract by the buyer;

(*4*) If the individual purchaser terminates the contract or if the loan fails to satisfy any other criterion under this section, then the bank must immediately recategorize the loan at a 100 percent risk weight and must accurately report the loan in the bank's next quarterly Consolidated Reports of Condition and Income (Call Report);

(*5*) The individual purchaser must intend that the home will be owner-occupied;

(6) The loan is made by the bank in accordance with prudent underwriting standards;

(*7*) The loan is not more than 90 days past due, or on nonaccrual; and

(*8*) The purchaser is an individual(s) and not a partnership, joint venture, trust, corporation, or any other entity (including an entity acting as a sole proprietorship) that is purchasing one or more of the homes for speculative purposes.

(C) Loans secured by a first mortgage on multifamily residential properties: [5]

(*1*) The amortization of principal and interest occurs in not more than 30 years;

(*2*) The minimum original maturity for repayment of principal is not less than 7 years;

(*3*) All principal and interest payments have been made on a timely basis in accordance with the terms of the loan for at least one year immediately preceding the risk weighting of the loan in the 50 percent risk-weight category, and the loan is not otherwise 90 days or more past due, or on nonaccrual status;

(*4*) The loan is made in accordance with all applicable requirements and prudent underwriting standards;

(*5*) If the rate of interest does not change over the term of the loan:

(*i*) The current loan amount outstanding does not exceed 80 percent of the current value of the property, as measured by either the value of the property at origination of the loan (which is the lower of the purchase price or the value as determined by the initial appraisal, or if appropriate, the initial evaluation) or the most current appraisal, or if appropriate, the most current evaluation; and

(*ii*) In the most recent fiscal year, the ratio of annual net operating income generated by the property (before payment of any debt service on the loan) to annual debt service on the loan is not less than 120 percent; [6]

(*6*) If the rate of interest changes over the term of the loan:

(*i*) The current loan amount outstanding does not exceed 75 percent of the current value of the property, as measured by either the value of the property at origination of the loan (which is the lower of the purchase price or the value as determined by the initial appraisal, or if appropriate, the initial evaluation) or the most current appraisal, or if appropriate, the most current evaluation; and

(*ii*) In the most recent fiscal year, the ratio of annual net operating income generated by the property (before payment of any debt service on the loan) to annual debt service on the loan is not less than 115 percent; and

(*7*) If the loan was refinanced by the borrower:

(*i*) All principal and interest payments on the loan being refinanced which were made in the preceding year prior to refinancing shall apply in determining the one-year timely payment requirement under section 3(b)(1)(iv)(C)(*3*) of this appendix D; and

(*ii*) The net operating income generated by the property in the preceding year prior to refinancing shall apply in determining the applicable debt service requirements under sections 3(b)(1)(iv)(C)(*5*) and (a)(2)(iv)(C)(*6*) of this appendix D.

(D) Unrated privately-issued mortgage-backed securities, *i.e.* those that do not carry the guarantee of a government or government-sponsored agency, if the unrated privately-issued mortgage-backed securities are at the time the mortgage-backed securities are originated fully secured by or otherwise

[5] The portion of multifamily residential property loans that is sold subject to a pro rata loss sharing arrangement may be treated by the selling bank as sold to the extent that the sales agreement provides for the purchaser of the loan to share in any loss incurred on the loan on a pro rata basis with the selling bank. The portion of multifamily residential property loans sold subject to any loss sharing arrangement other than *pro rata* sharing of the loss shall be accorded the same treatment as any other asset sold under an agreement to repurchase or sold with recourse under section 4(b) of appendix D.

[6] For the purposes of the debt service requirements in sections 3(b)(1)(iv)(C)(*5*)(*ii*) and 3(b)(1)(iv)(C)(*6*)(*ii*) of this Appendix D, other forms of debt service coverage that generate sufficient cash flows to provide comparable protection to the institution may be considered for (a) a loan secured by cooperative housing or (b) a multifamily residential property loan if the purpose of the loan is for the development or purchase of multifamily residential property primarily intended to provide low- to moderate-income housing, including special operating reserve accounts or special operating subsidies provided by federal, state, local or private sources. However, the OCC reserves the right, on a case-by-case basis, to review the adequacy of any other forms of comparable debt service coverage relied on by the bank.

represent a sufficiently secure interest in mortgages secured by multifamily residential properties that qualify for the 50 percent risk weight under section 3(b)(1)(iv)(C) of this appendix D; loans to residential real estate builders for one-to-four family residential property construction that qualify for the fifty percent risk weight under section 3(b)(1)(iv)(B) of this appendix D; and mortgages secured by residential properties that are either owner-occupied or rented, meet prudent underwriting standards in accordance with 12 CFR Part 34, and are not 90 days or more past due, have not been placed in nonaccrual status, and have not been restructured, provided that they meet the following criteria: [7]

(*1*) The underlying assets must be held by an independent trustee that has a first priority, perfected security interest in the underlying assets for the benefit of the holders of the security;

(*2*) The holder of the security must have an undivided *pro rata* ownership interest in the underlying assets or the trust that issues the security must have no liabilities unrelated to the issued securities;

(*3*) The trust that issues the security must be structured such that the cash flows from the underlying assets fully meet the cash flows requirements of the security without undue reliance on any reinvestment income; and

(*4*) There must not be any material reinvestment risk associated with any funds awaiting distribution to the holder of the security.

(E) Externally rated debt securities issued by, certain other externally rated claims on, and that portion of assets supported by an eligible guarantee of, a foreign central government, that receive a 50 percent risk weight as provided in section 3(b)(3) of this appendix D.

(F) Externally rated debt securities issued by, certain other rated claims on, and that portion of assets supported by an eligible guarantee of, a non-central government entity, that receive a 50 percent risk weight as provided in section 3(b)(3) of this appendix D.

(G) Assets collateralized by liquid and readily marketable externally rated debt securities that receive a 50 percent risk weight as provided in section 3(b)(3) of this appendix D, and recourse obligations, direct credit substitutes, residual interests, and asset- and mortgage-backed securities that receive a 50 percent risk weight as provided in section 4(c)(1) of this appendix D.

(H) Mortgage loans secured by liens on one-to-four family residential properties that receive a 50 percent risk weight as provided in section 3(b)(2) of this appendix D.

(v) *Seventy Five Percent Risk Weight.* (A) Externally rated debt securities issued by, certain other externally rated claims on, and that portion of assets supported by an eligible guarantee of, a foreign central government, that receive a 75 percent risk weight as provided in section 3(b)(3) of this appendix D.

(B) Externally rated debt securities issued by, certain other rated claims on, and that portion of assets supported by an eligible guarantee of non-central government entity, that receive a 75 percent risk weight as provided in section 3(b)(3) of this appendix D.

(C) Assets collateralized by liquid and readily marketable externally rated debt securities that receive a 75 percent risk weight as provided in section 3(b)(3) of this appendix D, and recourse obligations, direct credit substitutes, residual interests, and asset- and mortgage-backed securities that receive a 75 percent risk weight as provided in section 4(c)(1) of this appendix D.

(D) Mortgage loans secured by liens on one-to-four family residential properties that receive a 75 percent risk weight as provided in section 3(b)(2) of this appendix D.

(vi) *One Hundred Percent Risk Weight.* All other assets not specified in this appendix D,[8] including:

(A) Asset- or mortgage-backed securities that are externally rated are risk weighted in accordance with section 4 of this appendix D.

(B) All stripped mortgage-backed securities, including interest only portions (IOs), principal only portions (POs) and other similar instruments, regardless of the issuer or guarantor.

(C) Obligations issued by any state or any political subdivision thereof for the benefit of a private party or enterprise where that party or enterprise, rather than the issuing state or political subdivision, is responsible for the timely payment of principal and interest on the obligation, *e.g.*, industrial development bonds.

(D) Claims on commercial enterprises owned by foreign central governments.

(E) Any investment in an unconsolidated subsidiary that is not required to be deducted from total capital pursuant to section 2(c) of this appendix D.

(F) Instruments issued by depository institutions incorporated in OECD and non-OECD countries that qualify as capital of the issuer.

(G) Investments in fixed assets, premises, and other real estate owned.

(H) Claims representing capital of a securities firm.

(I) Bank-issued securities that qualify as capital of the issuing bank.

(J) Externally rated debt securities issued by, certain other externally rated claims on, and that portion of assets supported by an eligible guarantee of, a foreign central government, that receive a 100 percent risk weight as provided in section 3(b)(3) of this appendix D.

(K) Externally rated marketable debt securities issued by, certain other rated claims on, and that portion of assets supported by an eligible guarantee of, a non-central government entity, that receive a 100 percent risk weight as provided in section 3(b)(3) of this appendix D.

(L) Assets collateralized by liquid and readily marketable externally rated debt securities that receive a 100 percent risk weight as provided in section 3(b)(3) of this appendix D, and recourse obligations, direct credit substitutes, residual interests, and asset- and mortgage-backed securities that receive a 100 percent risk weight as provided in section 4(c)(1) of this appendix D.

(M) Mortgage loans secured by liens on one-to-four family residential properties that receive a 100 percent risk weight as provided in section 3(b)(2) of this appendix D.

(vii) *One Hundred and Fifty Percent Risk Weight.* (A) Externally rated debt securities issued by, certain other externally rated claims on, and that portion of assets supported by an eligible guarantee of, a foreign central government, that receive a 150 percent risk weight as provided in section 3(b)(3) of this appendix D.

(B) Externally rated debt securities issued by, certain other rated claims on, and that portion of assets supported by an eligible guarantee of, a non-central government entity, that receive a 150 percent risk weight as provided in section 3(b)(3) of this appendix D.

(C) Mortgage loans secured by liens on one-to-four family residential properties that receive a 150 percent risk weight as provided in section 3(b)(2) of this appendix D.

(viii) *Two Hundred Percent Risk Weight.* (A) Unrated debt securities issued by, certain other unrated and rated claims on, and that portion of assets supported by an eligible guarantee of, a foreign central government, that receive a 200 percent risk weight as provided in section 3(b)(3) of this appendix D.

(B) Externally rated and unrated debt securities issued by, certain other externally rated and unrated claims on, and that portion of assets supported by an eligible guarantee of, a non-central government entity, that receive a 200 percent risk weight as provided in section 3(b)(3) of this appendix D.

(2) *Mortgage Loans Secured by Liens on One-to-Four Family Residential Properties.* (i) *First Lien Mortgages.* (A) *Risk-Weight Table.* Unless otherwise provided in section 3(b)(2)(iii) (mortgage loans with negative amortization features) of this appendix D, a bank shall assign a mortgage loan secured by a first lien on a one-to-four family residential property to a risk weight based on its loan-to-value ratio, in accordance with Table 1 of this appendix D.

(B) *Minimum Risk Weight for Certain Mortgage Loans Secured by Liens on One-to-Four Family Residential Properties.* Notwithstanding section 3(b)(2)(i)(A) of this appendix D, a loan secured by a one-to-four family residential property that is not either owner-occupied or rented, that is 90 days or more past due, that has been placed in

[7] If all of the underlying mortgages in the pool do not qualify, the bank should generally assign the entire value of the unrated security to the 200 percent risk category of this appendix D; however, on a case-by-case basis, the OCC may allow the bank to assign only the portion of the security which represents an interest in, and the cash flows of, nonqualifying mortgages to the 200 percent risk category, with the remainder being assigned a risk weight of 50 percent. Before the OCC will consider a request to risk weight a mortgage-backed security on a proportionate basis, the bank must have current information for the reporting date that details the composition and cash flows of the underlying pool of mortgages.

[8] A bank subject to the market risk capital requirements pursuant to Appendix B of this part 3 may calculate the capital requirement for qualifying securities borrowing transactions pursuant to section 3(a)(1)(ii) of appendix B of this part 3.

nonaccrual status, has been restructured, or that does not meet prudent underwriting standards, shall receive a risk weight of 100 percent, or higher if warranted by the loan-to-value ratio, according to Table 1 of this appendix D.

(C) *First and Junior Liens.* If a bank holds a first lien and junior lien on a one-to-four family residential property and no other party holds an intervening lien, the combined exposure is treated as a single loan secured by a first lien for the purposes of both determining the loan-to-value ratio and assigning a risk weight to the combined exposure.

(D) *Loan-to-value ratio.* (*1*) *Initial loan-to-value ratio calculation.* (i) *Generally.* For the purpose of determining the appropriate risk weight in accordance with Table 1 of this appendix D, a bank shall determine the loan-to-value ratio for a mortgage loan secured by first lien mortgage on a one-to-four family residential property using the lower of the purchase price or the appraisal or evaluation at origination.

(*ii*) *Loan level private mortgage insurance.* In determining the loan-to-value ratio, a bank may take in to account loan-level private mortgage insurance, provided the insurer is not affiliated with the bank and has long-term debt rated at least third highest investment grade (without credit enhancements) by an NRSRO.

(*iii*) *Appraisal or Evaluation.* Any appraisal or evaluation used by a bank for the purposes of this appendix D must satisfy the real estate lending and appraisal requirements set forth in subpart C of 12 CFR part 34.

(2) *Adjustments to the loan-to-value ratio.* After origination of a mortgage loan, a bank may update the value of a one-to-four family residential property based on an appraisal or evaluation only if the borrower refinances the mortgage loan and the bank extends additional funds. On a quarterly basis, a bank may adjust the amount of the loan to reflect any decrease in the principal balance. In the case of a home equity line of credit, the bank shall adjust the amount of the loan quarterly to reflect any increase in the balance of the loan.

TABLE 1.—RISK WEIGHTS APPLICABLE TO MORTGAGE LOANS SECURED BY FIRST LIENS ON ONE-TO-FOUR FAMILY RESIDENTIAL PROPERTIES

Loan-to-value ratio	Risk weight (in percent)
Less than or equal to 60 percent	20
Greater than 60 percent but less than or equal to 80 percent	35
Greater than 80 percent but less than or equal to 85 percent	50
Greater than 85 percent but less than or equal to 90 percent	75
Greater than 90 percent but less than or equal to 95 percent	100
Greater than 95 percent	150

(ii) *Junior lien mortgages.* (A) *Risk-weight table.* Unless otherwise provided in section 3(b)(2)(i) (when a junior lien mortgages and all senior lien mortgages are held by same bank, the transaction is treated as a single loan), or section 3(b)(2)(iii) (mortgage loans with negative amortization features) of this appendix D, a bank shall assign a mortgage loan secured by a junior lien on a one-to-four family residential property to a risk weight based on its loan-to-value ratio, in accordance with Table 2 of this appendix D.

(B) *Minimum Risk Weight for Certain Mortgage Loans Secured by Junior Liens on One-to-Four Family Residential Properties.* Notwithstanding paragraph (b)(2)(ii)(A) of this section, a loan secured by a one-to-four family residential property that is not either owner-occupied or rented, that is 90 days or more past due, that has been placed in nonaccrual status, has been restructured, or that does not meet prudent underwriting standards, shall receive a risk weight of 100 percent or higher, if warranted by the loan-to-value ratio, according to Table 2 of this appendix D.

(C) *Loan-to-value ratio calculation.* (*1*) *Initial loan-to-value ratio calculation.* (*i*) *Generally.* For the purpose of determining the appropriate risk weight in accordance with Table 2 of this appendix D, a bank shall determine the loan-to-value ratio for a mortgage loan secured by junior lien a one-to-four family residential property, including a structured mortgage or a home equity line of credit, by dividing the aggregate principal outstanding on the junior lien mortgage and all senior lien mortgages by the appraisal or evaluation at the origination of the junior lien. For the purposes of this calculation, if a third party holds a senior or intervening lien mortgage with a negative amortization feature, the bank must adjust the principal amount of the senior or intervening lien mortgage to reflect the amount of that loan if it were to fully negatively amortize under the applicable contract.

(*ii*) *Loan level private mortgage insurance.* In determining the loan-to-value ratio, a bank may take into account loan-level private mortgage insurance, provided the insurer is not affiliated with the bank and has long term debt rated at least third highest investment grade (without credit enhancements) by an NRSRO.

(*iii*) *Appraisal or evaluation.* Any appraisal or evaluation used by a bank for the purposes of this section must satisfy the real estate lending and appraisal requirements set forth in subpart C of 12 CFR part 34.

(*2*) *Adjustments to the loan-to-value ratio.* After origination of a mortgage loan, a bank may update the value of a one-to-four family residential property based on an appraisal or evaluation only if the borrower refinances the mortgage loan and the bank extends additional funds. On a quarterly basis, a bank may adjust the amount of the loan to reflect any decrease in the principal balance. In the case of a home equity line of credit, the bank shall adjust the amount of the loan quarterly to reflect any increase in the balance of the loan.

TABLE 2.—RISK WEIGHTS APPLICABLE TO MORTGAGE LOANS SECURED BY STAND-ALONE JUNIOR LIENS ON ONE-TO-FOUR FAMILY RESIDENTIAL PROPERTIES

Combined loan-to-value ratio	Risk weight (in percent)
Less than 60 percent	75
Greater than 60 percent but less than or equal to 90 percent	100
Greater than 90 percent	150

(iii) *Mortgage loans with negative amortization features.* (A) *Risk weight table.* The funded portion of a mortgage loan secured by a lien on a one-to-four family residential property that includes a negative amortization feature shall be assigned to a risk-weight category based on that portion's loan-to-value ratio, in accordance with Table 1 or Table 2. The amount equal to the maximum unfunded amount of the loan if it were to negatively amortize to the fullest extent allowed under the applicable loan contract shall be treated as a commitment, as set forth in section 3(c) of this appendix D. The risk weight applicable to the unfunded amount is the risk weight that would be assigned to a loan with a LTV ratio computed using a loan amount that is equal to the funded amount of the loan plus the maximum unfunded amount of the loan if it were to negatively amortize to the fullest extent allowed under the applicable contract.

(B) *Loan-to-value ratio calculation.* (*1*) *Initial LTV ratio calculation.* (*i*) *Generally.* For the purpose of determining the appropriate risk weight for a mortgage loan secured by lien on a one-to-four family residential property in accordance with Table 1 or Table 2 of this appendix D, a bank initially shall determine the loan-to-value ratio using the lower of the purchase price or the appraisal or evaluation at origination.

(*ii*) *Loan level private mortgage insurance.* In determining the loan-to-value ratio, a bank may take into account loan-level private mortgage insurance, provided the insurer is not affiliated with the bank and has long-term debt rated at least third highest investment grade (without credit enhancements) by an NRSRO.

(*iii*) *Appraisal or evaluation.* Any appraisal or evaluation used by a bank for the purposes of this appendix D must satisfy the real estate lending and appraisal requirements set forth in subpart C of part 34 of this title 12.

(*2*) *Adjustments to the loan-to-value ratio.* After origination of a mortgage loan, a bank may update the value of a one-to-four family residential property based on an appraisal or evaluation only if the borrower refinances the mortgage loan and the bank extends additional funds. As the loan balance increases, banks must recalculate the LTV ratio on a quarterly basis.

(iv) *Grandfathered loans.* (A) If a bank owns mortgage loans secured by liens on one-to-four-family residential properties prior to electing to apply the requirements set forth in this appendix D of this Part 3, the bank may elect to determine the risk weights applicable to all such mortgage loans according to the requirements set forth in appendix A of this part 3.

(B) If a bank has previously applied the requirements set forth in this appendix D to determine the risk weight applicable to a mortgage loan secured by a lien on a one-to-four family residential property, the bank may not thereafter elect to determine the risk weight applicable the mortgage loan according to the requirements set forth in section 3(b)(2)(iv)(A) of this appendix D.

(3) *Externally rated exposures.* (i) *Claims on foreign central governments.* A bank shall determine the risk weight applicable to an externally rated short-or long-term foreign central government security or claim based on the external rating of the issued security or claim in accordance with Table 3 or Table 4 of this appendix D. The lowest single rating shall apply if there are two or more relevant external ratings. If the security or loan is not rated, a bank shall determine the risk weight based on the external rating of the issuing central government in accordance with Table 3 of this appendix D. The lowest single rating shall apply if the central government receives two or more external ratings.

(ii) *Claims collateralized by foreign central government debt securities.* A bank may determine the risk weight applicable to the portion of a claim collateralized by a liquid and readily marketable short-or long-term foreign central government security based on the external rating of the issued security, provided that either the central government or the security is externally rated at least investment grade by an NRSRO, in accordance with Table 3 or Table 4 of this Appendix D. The lowest single rating shall apply if the collateral receives more than one external rating. If the collateral is not rated, a bank may determine the risk weight applicable to the collateralized portion of the claim based on the risk weight of the central government that issued the security, in accordance with Table 3 or Table 4 of this appendix D. The lowest single rating shall apply if the central government receives two or more external ratings.

(iii) *Claims guaranteed by foreign central governments.* A bank may determine the risk weight applicable to the portion of a claim supported by an eligible guarantee from a foreign central government based on the long-term external rating of the central government or the external rating of the foreign central government's senior long-term debt (without credit enhancement), provided that it is rated at least investment grade by an NRSRO, in accordance with Table 3 of this appendix D. The lowest single rating shall apply if there are two or more relevant external ratings.

(iv) *Other externally rated claims.* Unless otherwise provided in section 3(b)(1) in this Appendix D (risk-weight categories), a bank shall determine the risk weight applicable to a claim on non-central government entity [9] based on the external rating of the claim, in accordance with Table 3 or Table 4 of this appendix D. The lowest single rating shall apply if the claim receives more than one external rating. This section does not apply to asset- and mortgage-backed securities, direct credit substitutes, and residual interests. Asset- and mortgage-backed securities, direct credit substitutes and residual interests are risk-weighted according to section 4 of this appendix D.

(v) *Other collateralized claims.* Unless otherwise provided in section 3(b)(1) in this appendix D (risk-weight categories), a bank may determine the risk weight applicable to the portion of a claim collateralized by a liquid and readily marketable externally rated debt security based on the external rating of the security, provided that the security is externally rated at least investment grade by an NRSRO, in accordance with Table 3 or Table 4 of this appendix D. A bank may determine the risk weight applicable to a claim collateralized by an externally rated recourse obligation, direct credit substitute, residual interest, or asset-or mortgage-backed security, provided the collateral is rated at least investment grade by an NRSRO, in accordance with section 4(c)(1) and Table 6 of this appendix D. The lowest single rating shall apply if the collateral receives more than one external rating.

(vi) *Other guaranteed claims.* Unless otherwise provided in section 3(b)(1) in this appendix D (risk-weight categories), a bank may determine the risk weight applicable to the portion of a claim supported by an eligible guarantee based on the external rating of the guarantor's senior long-term debt (without credit enhancement), provided that it is rated at least investment grade by an NRSRO, in accordance with Table 3 of this appendix D. The lowest single rating shall apply if the guarantor's externally rated senior long-term debt receives more than one external rating.

TABLE 3.—RISK WEIGHTS BASED ON EXTERNAL RATINGS FOR LONG-TERM EXPOSURES

Long-term rating category	Examples	Central government risk weight (in percent)	Non-central government risk weight (in percent)
Highest investment grade rating	AAA	0	20
Second-highest investment grade rating	AA	20	20
Third-highest investment grade rating	A	20	35
Lowest-investment grade rating—plus	BBB+	35	50
Lowest-investment grade rating	BBB	50	75
Lowest-investment grade rating—minus	BBB−	75	100
One category below investment grade	BB+,BB	75	150
One category below investment grade—minus	BB−	100	200
Two or more categories below investment grade	B, CCC	150	200
Unrated (excludes unrated loans to non-central government [1]	n/a	200	200

[1] Unrated claims on foreign central governments and unrated debt securities issued by non-central governments would receive the risk weight indicated in Table 3. Other unrated claims, for example, unrated loans to non-central governments, would continue to be risk weighted under the existing risk-based capital rules.

TABLE 4.—RISK WEIGHTS BASED ON EXTERNAL RATINGS FOR SHORT-TERM EXPOSURES

Short-term rating category	Examples	Central government risk weight (in percent)	Non-central government risk weight (in percent)
Highest investment grade rating	A–1, P–1	0	20
Second-highest investment grade rating	A–2, P–2	20	35
Lowest investment grade rating	A–3, P–3	50	75

[9] Non-central government entities include securities firms, insurance companies, bank holding companies, savings and loan holding companies, multilateral lending and regional development institutions, partnerships, limited liability companies, business trusts, special purpose entities, associations and other similar organizations.

TABLE 4.—RISK WEIGHTS BASED ON EXTERNAL RATINGS FOR SHORT-TERM EXPOSURES—Continued

Short-term rating category	Examples	Central government risk weight (in percent)	Non-central government risk weight (in percent)
Unrated (excludes unrated loans to non-sovereigns) [1]	n/a	100	100

[1] Unrated claims on foreign central governments and unrated debt securities issued by non-central governments would receive the risk weight indicated in Table 4. Other unrated claims, for example, unrated loans to non-central governments, would continue to be risk weighted under the existing risk-based capital rules.

(c) *Off-Balance Sheet Activities.* (1) The risk weights assigned to off-balance sheet activities are determined by a two-step process. First, the face amount of the off-balance sheet item is multiplied by the appropriate credit conversion factor specified in this section. This calculation translates the face amount of an off-balance sheet item into an on-balance sheet credit equivalent amount. Second, the resulting credit equivalent amount is then assigned to the proper risk-weight category using the criteria regarding obligors, guarantors, and collateral listed in sections 3(b)(1) and 3(b)(3) of this appendix D. Collateral and guarantees are applied to the face amount of an off-balance sheet item; however, with respect to derivative contracts, collateral and guarantees are applied to the credit equivalent amounts of such derivative contracts. The following are the off-balance sheet items subject to this appendix D, and their respective credit conversion factors.

(i) *100 percent credit conversion factor.* (A) Risk participations purchased in bankers' acceptances.

(B) Contingent obligations with a certain draw down, e.g., legally binding agreements to purchase assets at a specified future date.

(C) Indemnification of customers whose securities the bank has lent as agent. If the customer is not indemnified against loss by the bank, the transaction is excluded from the risk-based capital calculation.[10]

(ii) *50 percent credit conversion factor.* (A) Transaction-related contingencies including, among other things, performance bonds and performance-based standby letters of credit related to a particular transaction.[11] To the extent permitted by law or regulation, performance-based standby letters of credit include such things as arrangements backing subcontractors' and suppliers' performance, labor and materials contracts, and construction bids;

(B) Unused portions of commitments with an original maturity exceeding one-year that are not unconditionally cancelable;[12] however, commitments that are asset-backed commercial paper liquidity facilities must satisfy the eligibility requirements under section 3(c)(1)(vi)(B) of this appendix D.

(C) Unused portions of negatively amortizing mortgage loans with an original maturity exceeding one-year that are secured by liens on one-to-four family residential properties and are not unconditionally cancelable. If a mortgage loan secured by a lien on a one-to-four family residential property may negatively amortize, the bank shall calculate the risk-weighted asset amount for the unfunded portion of the loan by multiplying the amount of the off-balance sheet exposure by the applicable credit conversion factor.

(*1*) The amount of the off-balance sheet exposure is the maximum unfunded amount of the loan if it were to negatively amortize to the fullest extent allowed under the applicable contract; and

(*2*) The applicable risk weight is the risk weight that would be assigned under section 3(b)(2) of this appendix D to a loan with an LTV computed using a loan amount that is equal to the funded amount of the loan plus the maximum unfunded amount of the loan if it were to negatively amortize to the fullest extent allowed under the applicable contract.

(D) Revolving underwriting facilities, note issuance facilities, and similar arrangements pursuant to which the bank's customer can issue short-term debt obligations in its own name, but for which the bank has a legally binding commitment to either:

(*1*) Purchase the obligations the customer is unable to sell by a stated date; or

(*2*) Advance funds to its customer if the obligations cannot be sold.

(iii) *20 percent credit conversion factor.* (A) *Trade-related contingencies.* These are short-term self-liquidating instruments used to finance the movement of goods and are collateralized by the underlying shipment. A commercial letter of credit is an example of such an instrument.

(B) [Reserved].

(iv) *10 percent credit conversion factor.* (A) Unused portion of asset-backed commercial paper liquidity facilities with an original maturity of one year or less that satisfy the eligibility requirements under section 3(c)(1)(vi)(B) of this appendix.

(B) Unused portions of commitments with maturities of one year or less that are not unconditionally cancelable,[13] except for commitments to originate mortgage loans secured by one-to-four family residential properties provided in the ordinary course of business.

(C) Unused portions of negatively amortizing mortgage loans with an original maturity of one-year or less that are secured by liens on one-to-four family residential properties and that are not unconditionally cancelable. If a mortgage loan secured by a lien on a one-to-four family residential property may negatively amortize, the bank shall calculate the risk-weighted asset amount for the unfunded portion of the loan by multiplying the amount of the off-balance sheet exposure by the applicable credit conversion factor.

(*1*) The amount of the off-balance sheet exposure is the maximum unfunded amount of the loan if it were to negatively amortize to the fullest extent allowed under the applicable contract; and

(*2*) The applicable risk weight is the risk weight that would be assigned under section 3(b)(2) of this appendix D to a loan with a loan-to-value ratio computed using a loan amount that is equal to the funded amount of the loan plus the maximum unfunded amount of the loan if it were to negatively amortize to the fullest extent allowed under the applicable contract.

(v) *Zero percent credit conversion factor.* (A) Unused portion of commitments, regardless of maturity, if they are unconditionally cancelable[14] at any time at the option of the bank and the bank has the contractual right to make, and in fact does make, either—

(*1*) A separate credit decision based upon the borrower's current financial condition, before each drawing under the lending facility; or

(*2*) An annual (or more frequent) credit review based upon the borrower's current financial condition to determine whether or not the lending facility should be continued.

(B) The unused portion of retail credit card lines or other related plans that are unconditionally cancelable by the bank in accordance with applicable law.

(vi) *Liquidity facility provided to asset-backed commercial paper. (A) Noneligible asset-backed commercial paper liquidity facilities treated as recourse or direct credit substitute.* Unused portion of asset-backed commercial paper liquidity facilities that do not meet the criteria for an eligible liquidity

[10] When a bank lends its own securities, the transaction is treated as a loan. When a bank lends its own securities or, acting as agent, agrees to indemnify a customer, the transaction is assigned to the risk weight appropriate to the obligor or collateral that is delivered to the lending or indemnifying institution or to an indepdent custodian acting on their behalf.

[11] For purposes of this section, a ''performance-based standby letter of credit'' is any letter of credit, or similar arrangement, however named or described, which represents an irrevocable obligation to the beneficiary on the part of the issuer to make payment on account of any default by the account party in the performance of a non-financial or commercial obligation. Participations in performance-based standy letters of credit are treated in accordance with 4 of this appendix D.

[12] Participations in commitments are treated in accordance with section 4 of appendix D.

[13] Participations in commitments are treated in accordance with section of appendix D.

[14] See section 1(c)(35) of appendix A to this part 3.

facility provided to asset-backed commercial paper in accordance with section 3(c)(1)(vi)(B) of this appendix must be treated as recourse or as a direct credit substitute, and assessed the appropriate risk-based capital charge in accordance with section 4 of this appendix.

(B) *Eligible asset-backed commercial paper liquidity facility.* Except as provided in section 3(c)(1)(vi)(C) of this appendix D, in order for the unused portion of an asset-backed commercial paper liquidity facility to be eligible for either the 50 percent or 10 percent credit conversion factors under sections 3(c)(1)(ii)(B) or 3(c)(1)(iv)(A) of this appendix D, the asset-backed commercial paper liquidity facility must satisfy the following criteria:

(*1*) At the time of draw, the asset-backed commercial paper liquidity facility must be subject to an asset quality test that:

(*i*) Precludes funding of assets that are 90 days or more past due or in default; and

(*ii*) If the assets that an asset-backed commercial paper liquidity facility is required to fund are externally rated securities at the time they are transferred into the program, the asset-backed commercial paper liquidity facility must be used to fund only securities that are externally rated investment grade at the time of funding. If the assets are not externally rated at the time they are transferred into the program, then they are not subject to this investment grade requirement.

(*2*) The asset-backed commercial paper liquidity facility must provide that, prior to any draws, the bank's funding obligation is reduced to cover only those assets that satisfy the funding criteria under the asset quality test as provided in section 3(c)(1)(vi)(B)(*1*) of this appendix D.

(C) *Exception to eligibility requirements for assets guaranteed by the United States Government or its agencies, or the central government of an OECD country.* Notwithstanding the eligibility requirements for asset-backed commercial paper program liquidity facilities in section 3(c)(1)(vi)(B), the unused portion of an asset-backed commercial paper liquidity facility may still qualify for either the 50 percent or 10 percent credit conversion factors under sections 3(c)(1)(ii)(B) or 3(c)(1)(iv)(A) of this appendix D, if the assets required to be funded by the asset-backed commercial paper liquidity facility are guaranteed, either conditionally or unconditionally, by the United States Government or its agencies, or the central government of an OECD country.

(vii) *Derivative contracts.* (A) *Calculation of credit equivalent amounts.* The credit equivalent amount of a derivative contract equals the sum of the current credit exposure and the potential future credit exposure of the derivative contract. The calculation of credit equivalent amounts must be measured in U.S. dollars, regardless of the currency or currencies specified in the derivative contract.

(*1*) Current credit exposure. The current credit exposure for a single derivative contract is determined by the mark-to-market value of the derivative contract. If the mark-to-market value is positive, then the current credit exposure equals that mark-to-market value. If the mark-to-market is zero or negative, then the current credit exposure is zero. The current credit exposure for multiple derivative contracts executed with a single counterparty and subject to a qualifying bilateral netting contract is determined as provided by section 3(c)(1)(vii)(B) of this appendix D.

(*2*) Potential future credit exposure. The potential future credit exposure for a single derivative contract, including a derivative contract with negative mark-to-market value, is calculated by multiplying the notional principal [15] of the derivative contract by one of the credit conversion factors in Table 5 of this appendix D, for the appropriate category.[16] The potential future credit exposure for gold contracts shall be calculated using the foreign exchange rate conversion factors. For any derivative contract that does not fall within one of the specified categories in Table 5 of this appendix D, the potential future credit exposure shall be calculated using the other commodity conversion factors. Subject to examiner review, banks should use the effective rather than the apparent or stated notional amount in calculating the potential future credit exposure. The potential future credit exposure for multiple derivatives contracts executed with a single counterparty and subject to a qualifying bilateral netting contract is determined as provided by section 3(c)(1)(vii)(B)(*1*) of this appendix D.

TABLE 5.—CONVERSION FACTOR MATRIX [1]

Remaining maturity [2]	Interest rate (in percent)	Foreign exchange rate and gold (in percent)	Equity (in percent)	Precious metals (in percent)	Other commodity (in percent)
One year or less	0.0	1.0	6.0	7.0	10.0
Over one year to five	0.5	5.0	8.0	7.0	12.0
Over five years	1.5	7.5	10.0	8.0	15.0

[1] For derivative contracts with multiple exchanges of principal, the conversion factors are multiplied by the number of remaining payments in the derivative contract.

[2] For derivative contracts that automatically reset to zero value following a payment, the remaining maturity equals the time until the next payment. However, interest rate contracts with remaining maturities of greater than one year shall be subject to a minimum conversion factor of 0.5 percent.

(B) *Derivative contracts subject to a qualifying bilateral netting contract.* (1) *Netting calculation.* The credit equivalent amount for multiple derivative contracts executed with a single counterparty and subject to a qualifying bilateral netting contract as provided by section (3)(c)(1)(vii)(B)(*2*) of this appendix D is calculated by adding the net current credit exposure and the adjusted sum of the potential future credit exposure for all derivative contracts subject to the qualifying bilateral netting contract.

(*i*) *Net current credit exposure.* The net current credit exposure is the net sum of all positive and negative mark-to-market values of the individual derivative contracts subject to a qualifying bilateral netting contract. If the net sum of the mark-to-market value is positive, then the net current credit exposure equals that net sum of the mark-to-market value. If the net sum of the mark-to-market value is zero or negative, then the net current credit exposure is zero.

(*ii*) *Adjusted sum of the potential future credit exposure.* The adjusted sum of the potential future credit exposure is calculated as:

$$A_{net}=0.4\times A_{gross}+(0.6\times NGR\times A_{gross})$$

A_{net} is the adjusted sum of the potential future credit exposure, A_{gross} is the gross potential future credit exposure, and NGR is the net to gross ratio. A_{gross} is the sum of the potential future credit exposure (as determined under section 3(c)(1)(vii)(A)(*2*) of this appendix D) for each individual derivative contract subject to the qualifying bilateral netting contract. The NGR is the ratio of the net current credit exposure to the gross current credit exposure. In calculating

[15] For purposes of calculating either the potential future credit exposure under section 3(c)(1)(vii)(A)(*2*) of this appendix D or the gross potential future credit exposure under section 3(c)(1)(vii)(B)(*1*)(*ii*) of this appendix D for foreign exchange contracts and other similar contracts in which the notional principal is equivalent to the cash flows, total notional principal is the net receipts to each party falling due on each value date in each currency.

[16] No potential future credit exposure is calculated for single currency interest rate swaps in which payments are made based upon two floating indices, so-called floating/floating or basis swaps; the credit equivalent amount is measured solely on the basis of the current credit exposure.

the NGR, the gross current credit exposure equals the sum of the positive current credit exposures (as determined under section 3(c)(1)(vii)(A)(*1*) of this appendix D) of all individual derivative contracts subject to the qualifying bilateral netting contract.

(*2*) *Qualifying bilateral netting contract.* In determining the current credit exposure for multiple derivative contracts executed with a single counterparty, a bank may net derivative contracts subject to a qualifying bilateral netting contract by offsetting positive and negative mark-to-market values, provided that:

(*i*) The qualifying bilateral netting contract is in writing.

(*ii*) The qualifying bilateral netting contract is not subject to a walkaway clause.

(*iii*) The qualifying bilateral netting contract creates a single legal obligation for all individual derivative contracts covered by the qualifying bilateral netting contract. In effect, the qualifying bilateral netting contract must provide that the bank would have a single claim or obligation either to receive or to pay only the net amount of the sum of the positive and negative mark-to-market values on the individual derivative contracts covered by the qualifying bilateral netting contract. The single legal obligation for the net amount is operative in the event that a counterparty, or a counterparty to whom the qualifying bilateral netting contract has been assigned, fails to perform due to any of the following events: default, insolvency, bankruptcy, or other similar circumstances.

(*iv*) The bank obtains a written and reasoned legal opinion(s) that represents, with a high degree of certainty, that in the event of a legal challenge, including one resulting from default, insolvency, bankruptcy, or similar circumstances, the relevant court and administrative authorities would find the bank's exposure to be the net amount under:

(*A*) The law of the jurisdiction in which the counterparty is chartered or the equivalent location in the case of noncorporate entities, and if a branch of the counterparty is involved, then also under the law of the jurisdiction in which the branch is located;

(*B*) The law of the jurisdiction that governs the individual derivative contracts covered by the bilateral netting contract; and

(*C*) The law of the jurisdiction that governs the qualifying bilateral netting contract.

(*v*) The bank establishes and maintains procedures to monitor possible changes in relevant law and to ensure that the qualifying bilateral netting contract continues to satisfy the requirement of this section.

(*vi*) The bank maintains in its files documentation adequate to support the netting of a derivative contract.[17]

[17] By netting individual derivative contracts for the purpose of calculating its credit equivalent amount, a bank represents that documentation adequate to support the netting of a set of derivative contract is in the bank's files and available for inspection by the OCC. Upon determination by the OCC that a bank's files are inadequate or that a qualifying bilateral netting contract may not be legally enforceable in any one of the bodies of law described in sections 3(c)(1)(vii)(B)(*2*)(*i*) through (*iii*) of this appendix D, the underlying derivative contracts may not be netted for the purposes of this section.

(C) *Risk weighting.* Once the bank determines the credit equivalent amount for a derivative contract or a set of derivative contracts subject to a qualifying bilateral netting contract, the bank assigns that amount to the risk weight category appropriate to the counterparty, or, if relevant, the nature of any collateral or guarantee.[18]

(D) *Exceptions.* The following derivative contracts are not subject to the above calculation, and therefore, are not part of the denominator of a national bank's risk-based capital ratio:

(*1*) An exchange rate contract with an original maturity of 14 calendar days or less;[19] and

(*2*) A derivative contract that is traded on an exchange requiring the daily payment of any variations in the market value of the contract.

Section 4. Securitizations.

(a) *Credit equivalent amounts and risk weights of recourse obligations and direct credit substitutes.* (1) *Credit-equivalent amount.* Except as otherwise provided, the credit-equivalent amount for a recourse obligation or direct credit substitute is the full amount of the credit-enhanced assets for which the bank directly or indirectly retains or assumes credit risk multiplied by a 100 percent conversion factor.

(2) *Risk-weight factor.* To determine the bank's risk-weighted assets for off-balance sheet recourse obligations and direct credit substitutes, the credit equivalent amount is assigned to the risk category appropriate to the obligor in the underlying transaction, after considering any associated guarantees or collateral. For a direct credit substitute that is an on-balance sheet asset (*e.g.*, a purchased subordinated security), a bank must calculate risk-weighted assets using the amount of the direct credit substitute and the full amount of the assets it supports, *i.e.*, all the more senior positions in the structure.

(b) *Credit equivalent amount and risk weight of participations in, and syndications of, direct credit substitutes.* The credit equivalent amount for a participation interest in, or syndication of, a direct credit substitute is calculated and risk weighted as follows:

(1) In the case of a direct credit substitute in which a bank has conveyed a risk participation, the full amount of the assets that are supported by the direct credit substitute is converted to a credit equivalent amount using a 100 percent conversion factor. The *pro rata* share of the credit equivalent amount that has been conveyed through a risk participation is then assigned to whichever risk-weight category is lower: the risk-weight category appropriate to the obligor in the underlying transaction, after considering any associated guarantees or collateral, or the risk-weight category appropriate to the party acquiring the participation. The pro rata share of the credit equivalent amount that has not been participated out is assigned to the risk-weight category appropriate to the obligor after considering any associated guarantees or collateral.

(2) In the case of a direct credit substitute in which the bank has acquired a risk participation, the acquiring bank's *pro rata* share of the direct credit substitute is multiplied by the full amount of the assets that are supported by the direct credit substitute and converted using a 100 percent credit conversion factor. The resulting credit equivalent amount is then assigned to the risk-weight category appropriate to the obligor in the underlying transaction, after considering any associated guarantees or collateral.

(3) In the case of a direct credit substitute that takes the form of a syndication where each bank or participating entity is obligated only for its *pro rata* share of the risk and there is no recourse to the originating entity, each bank's credit equivalent amount will be calculated by multiplying only its *pro rata* share of the assets supported by the direct credit substitute by a 100 percent conversion factor. The resulting credit equivalent amount is then assigned to the risk-weight category appropriate to the obligor in the underlying transaction, after considering any associated guarantees or collateral.

(c) *Externally rated positions: credit-equivalent amounts and risk weights.* (1) *Traded positions.* With respect to a recourse obligation, direct credit substitute, residual interest (other than a credit-enhancing interest-only strip) or asset-or mortgage-backed security that is a ''traded position'' and that has received an external rating on a long-term position that is one grade below investment grade or better or a short-term position that is investment grade, the bank may multiply the face amount of the position by the appropriate risk weight, determined in accordance with Table 6 or Table 7 of this appendix D.[20] If a traded position receives more than one external rating, the lowest single rating will apply.

[18] Derivative contracts are an exception to the general rule of applying collateral and guarantees to the face value of off-balance sheet items. The sufficiency of collateral and guarantees is determined on the basis of the credit equivalent amount of derivative contracts. However, collateral and guarantees held against a qualifying bilateral netting contract is not recognized for capital purposes unless it is legally available for all contracts included in the qualifying bilateral netting contract.

[19] Notwithstanding section 3(c)(1)(v)(A) of this appendix D, gold contracts do not qualify for this exception.

[20] Stripped mortgage-backed securities or other similar instruments, such as interest-only or principal-only strips, that are not credit enhancing must be assigned to the 100 percent risk category.

TABLE 6.—RISK WEIGHTS BASED ON EXTERNAL RATINGS FOR LONG-TERM EXPOSURES

Long-term rating category	Examples	Risk weight (in percent)
Highest investment grade	AAA	20
Second highest investment grade	AA	20
Third highest investment grade	A	35
Lowest investment grade—plus	BBB+	50
Lowest investment grade	BBB	75
Lowest-investment grade—minus	BBB−	100
One category below investment grade	BB+, BB	200
One category below investment grade—minus	BB−	200

TABLE 7.—RISK WEIGHTS BASED ON EXTERNAL RATINGS FOR SHORT-TERM EXPOSURES

Short-term rating category	Examples	Risk Weight (in percent)
Highest investment grade	A–1, P–1	20
Second highest investment grade	A–2, P–2	35
Lowest investment grade	A–3, P–3	75

(2) *Non-traded positions.* A recourse obligation, direct credit substitute, residual interest (but not a credit-enhancing interest-only strip) or asset-or mortgage-backed security extended in connection with a securitization that is not a ''traded position'' may be assigned a risk weight in accordance with section 4(c)(1) of this appendix D if:

(i) It has been externally rated by more than one NRSRO;

(ii) It has received an external rating on a long-term position that is one category below investment grade or better or a short-term position that is investment grade by all NRSROs providing a rating;

(iii) The ratings are publicly available; and

(iv) The ratings are based on the same criteria used to rate traded positions.

If the ratings are different, the lowest rating will determine the risk category to which the recourse obligation, residual interest or direct credit substitute will be assigned.

(d) *Senior positions not externally rated.* For a recourse obligation, direct credit substitute, residual interest or asset- or mortgage-backed security that is not externally rated but is senior or preferred in all features to a traded position (including collateralization and maturity), a bank may apply a risk weight to the face amount of the senior position in accordance with section 4(c)(1) of this appendix D, based upon the traded position, subject to any current or prospective supervisory guidance and the bank satisfying the OCC that this treatment is appropriate. This section will apply only if the traded position provides substantive credit support to the unrated position until the unrated position matures.

(e) *Residual Interests*—(1) *Concentration limit on credit-enhancing interest-only strips.* In addition to the capital requirement provided by section 4(e)(2) of this appendix D, a bank must deduct from Tier 1 capital all credit-enhancing interest-only strips in excess of 25 percent of Tier 1 capital in accordance with section 2(c)(2)(iv) of appendix A of this part.

(2) *Credit-enhancing interest-only strip capital requirement.* After applying the concentration limit to credit-enhancing interest-only strips in accordance with section 4(e)(1) of this appendix D, a bank must maintain risk-based capital for a credit-enhancing interest-only strip equal to the remaining amount of the credit-enhancing interest-only strip (net of any existing associated deferred tax liability), even if the amount of risk-based capital required to be maintained exceeds the full risk-based capital requirement for the assets transferred. Transactions that, in substance, result in the retention of credit risk associated with a transferred credit-enhancing interest-only strip will be treated as if the credit-enhancing interest-only strip was retained by the bank and not transferred.

(3) *Other residual interests capital requirement.* Except as provided in sections 3(d) or (e) of this appendix D, a bank must maintain risk-based capital for a residual interest (excluding a credit-enhancing interest-only strip) equal to the face amount of the residual interest that is retained on the balance sheet (net of any existing associated deferred tax liability), even if the amount of risk-based capital required to be maintained exceeds the full risk-based capital requirement for the assets transferred. Transactions that, in substance, result in the retention of credit risk associated with a transferred residual interest will be treated as if the residual interest was retained by the bank and not transferred.

(4) *Residual interests and other recourse obligations.* Where the aggregate capital requirement for residual interests (including credit-enhancing interest-only strips) and recourse obligations arising from the same transfer of assets exceed the full risk-based capital requirement for those assets, a bank must maintain risk-based capital equal to the greater of the risk-based capital requirement for the residual interest as calculated under section 4(e)(1)–(3) of this appendix D or the full risk-based capital requirement for the assets transferred.

(f) *Positions that are not rated by an NRSRO.* A position (but not a residual interest) extended in connection with a securitization and that is not rated by an NRSRO may be risk-weighted based on the bank's determination of the credit rating of the position, as specified in Table 8 of this appendix D, multiplied by the face amount of the position. In order to qualify for this treatment, the bank's system for determining the credit rating of the position must meet one of the three alternative standards set out in section 4(f)(1)through (3) of this appendix D.

TABLE 8.—RISK WEIGHTS BASED ON INTERNAL RATINGS

Rating category	Examples	Risk weight (in percent)
Investment grade	BBB or better	100
One category below investment grade	BB	200

(1) *Internal risk rating used for asset-backed programs.* A direct credit substitute (but not a purchased credit-enhancing interest-only strip) is assumed by a bank in connection with an asset-backed commercial paper program sponsored by the bank and the bank is able to demonstrate to the satisfaction of the OCC, prior to relying upon its use, that the bank's internal credit risk rating system is adequate. Adequate internal credit risk rating systems usually contain the following criteria:

(i) The internal credit risk system is an integral part of the bank's risk management system that explicitly incorporates the full range of risks arising from a bank's participation in securitization activities;

(ii) Internal credit ratings are linked to measurable outcomes, such as the probability that the position will experience any loss, the position's expected loss given default, and the degree of variance in losses given default on that position;

(iii) The bank's internal credit risk system must separately consider the risk associated with the underlying loans or borrowers, and the risk associated with the structure of a particular securitization transaction;

(iv) The bank's internal credit risk system must identify gradations of risk among ''pass'' assets and other risk positions;

(v) The bank must have clear, explicit criteria that are used to classify assets into each internal risk grade, including subjective factors;

(vi) The bank must have independent credit risk management or loan review personnel assigning or reviewing the credit risk ratings;

(vii) An internal audit procedure should periodically verify that internal risk ratings are assigned in accordance with the bank's established criteria;

(viii) The bank must monitor the performance of the internal credit risk ratings assigned to nonrated, nontraded direct credit substitutes over time to determine the appropriateness of the initial credit risk rating assignment and adjust individual credit risk ratings, or the overall internal credit risk ratings system, as needed; and

(ix) The internal credit risk system must make credit risk rating assumptions that are consistent with, or more conservative than, the credit risk rating assumptions and methodologies of NRSROs.

(2) *Program Ratings.* A direct credit substitute or recourse obligation (but not a residual interest) is assumed or retained by a bank in connection with a structured finance program and a NRSRO has reviewed the terms of the program and stated a rating for positions associated with the program. If the program has options for different combinations of assets, standards, internal credit enhancements and other relevant factors, and the NRSRO specifies ranges of rating categories to them, the bank may apply the rating category applicable to the option that corresponds to the bank's position. In order to rely on a program rating, the bank must demonstrate to the OCC's satisfaction that the credit risk rating assigned to the program meets the same standards generally used by NRSROs for rating traded positions. The bank must also demonstrate to the OCC's satisfaction that the criteria underlying the NRSRO's assignment of ratings for the program are satisfied for the particular position. If a bank participates in a securitization sponsored by another party, the OCC may authorize the bank to use this approach based on a program rating obtained by the sponsor of the program.

(3) *Computer Program.* The bank is using an acceptable credit assessment computer program to determine the rating of a direct credit substitute or recourse obligation (but not a residual interest) extended in connection with a structured finance program. A NRSRO must have developed the computer program and the bank must demonstrate to the OCC's satisfaction that ratings under the program correspond credibly and reliably with the rating of traded positions.

(g) *Limitations on risk-based capital requirements.* (1) Low-level exposure rule. If the maximum contractual exposure to loss retained or assumed by a bank is less than the effective risk-based capital requirement, as determined in accordance with section 4(a) of this appendix D, for the asset supported by the bank's position, the risk based capital required under this appendix D is limited to the bank's contractual exposure, less any recourse liability account established in accordance with generally accepted accounting principles. This limitation does not apply when a bank provides credit enhancement beyond any contractual obligation to support assets that it has sold.

(2) *Related on-balance sheet assets.* If an asset is included in the calculation of the risk-based capital requirement under this section 4 of this appendix D and also appears as an asset on a bank's balance sheet, the asset is risk-weighted only under this section 4 of this appendix D, except in the case of loan servicing assets and similar arrangements with embedded recourse obligations or direct credit substitutes. In that case, both the on-balance sheet servicing assets and the related recourse obligations or direct credit substitutes must both be separately risk weighted and incorporated into the risk-based capital calculation.

(h) *Alternative Capital Calculation for Small Business Obligations.* (1) *Definitions.* For purposes of this section 4(h):

Qualified bank means a bank that:

(A) Is well capitalized as defined in 12 CFR 6.4 without applying the capital treatment described in this section 4(h), or

(B) Is adequately capitalized as defined in 12 CFR 6.4 without applying the capital treatment described in this section 4(h) and has received written permission from the appropriate district office of the OCC to apply the capital treatment described in this section 4(h).

Recourse has the meaning given to such term under generally accepted accounting principles.

Small business means a business that meets the criteria for a small business concern established by the Small Business Administration in 13 CFR part 121 pursuant to 15 U.S.C. 632.

(2) *Capital and reserve requirements.* Notwithstanding the risk-based capital treatment outlined in section 2(c)(4) and any other paragraph (other than paragraph (h)) of this section 4, with respect to a transfer of a small business loan or a lease of personal property with recourse that is a sale under generally accepted accounting principles, a qualified bank may elect to apply the following treatment:

(i) The bank establishes and maintains a non-capital reserve under generally accepted accounting principles sufficient to meet the reasonable estimated liability of the bank under the recourse arrangement; and

(ii) For purposes of calculating the bank's risk-based capital ratio, the bank includes only the face amount of its recourse in its risk-weighted assets.

(3) *Limit on aggregate amount of recourse.* The total outstanding amount of recourse retained by a qualified bank with respect to transfers of small business loans and leases of personal property and included in the risk-weighted assets of the bank as described in section 4(h)(2) of this appendix D may not exceed 15 percent of the bank's total capital after adjustments and deductions, unless the OCC specifies a greater amount by order.

(4) *Bank that ceases to be qualified or that exceeds aggregate limit.* If a bank ceases to be a qualified bank or exceeds the aggregate limit in section 4(h)(3) of this appendix D, the bank may continue to apply the capital treatment described in section 4(h)(2) of this appendix D to transfers of small business loans and leases of personal property that occurred when the bank was qualified and did not exceed the limit.

(5) *Prompt Corrective Action not affected.* (i) A bank shall compute its capital without regard to this section 4(h) for purposes of prompt corrective action (12 U.S.C. 1831o and 12 CFR part 6) unless the bank is an adequately or well capitalized bank (without applying the capital treatment described in this section 4(h)) and, after applying the capital treatment described in this section 4(h), the bank would be well capitalized.

(ii) A bank shall compute its capital without regard to this section 4(h) for purposes of 12 U.S.C. 1831o(g) regardless of the bank's capital level.

(i) *Additional capital charge for revolving securitizations with an early amortization trigger.* A bank that securitizes revolving credits where the securitization structure contains an early amortization provision must maintain risk-based capital against the investors' interest as required under this section.

(1) Capital for securitizations of revolving credit exposures that incorporate early-amortization provisions will be assessed based on a comparison of the securitization's annualized three-month average excess spread against the excess spread trapping point.

(2) To calculate the securitization's excess spread trapping point ratio:

(*i*) A bank must first calculate the annualized three month ratio for excess spread as follows:

(*A*) For each of the three months, divide the month's excess spread by the outstanding principal balance of the underlying pool of exposures at the end of each month.

(*B*) Calculate the average ratio for the three months, then convert the result to a compound annual rate.

(*ii*) Then the bank must divide the annualized three month ratio for excess spread by the excess spread trapping point that is specified in the documentation for the securitization.

(3) Banks shall compare the excess spread trapping point ratio to the ratios contained in Table 9 in appendix D to determine the appropriate conversion factor to apply to the investor's interest. The amount of investor's interest after conversion is then assigned to a risk-weight category in accordance with that appropriate to the underlying obligor, collateral, or guarantor. For securitizations that do not require excess spread to be trapped, or that specify trapping points based primarily on performance measures other than the three-month average excess spread, the excess spread trapping point is 4.5 percent.

TABLE 9.—EARLY AMORTIZATION CREDIT CONVERSION FACTORS

3-month average excess spread	CCF (in percent)
133.33 percent of trapping point or more	0
Less than 133.33 percent to 100 percent of trapping point	5
Less than 100 percent to 75 percent of trapping point	15
Less than 75 percent to 50 percent of trapping point	50
Less than 50 percent of trapping point	100

(4) *Limitations on risk-based capital requirements.* For a bank subject to the early amortization requirements in this section, the total risk-based capital requirement for all of the bank's exposures to a securitization of revolving retail credits is limited to the greater of the risk-based capital requirement for residual interests plus any early amortization charges as described in this section 4(i), or the risk-based capital requirement for the underlying securitized assets calculated as if the bank continued to hold the assets on its balance sheet.

Section 5. Target Ratios

(a) All national banks are expected to maintain a minimum ratio of total capital (after deductions) to risk-weighted assets of 8.0 percent.

(b) Tier 2 capital elements qualify as part of a national bank's total capital base up to a maximum of 100 percent of that bank's Tier 1 capital.

(c) In addition to the standards established by these risk-based capital guidelines, all national banks must maintain a minimum capital-to-total assets ratio in accordance with the provisions of 12 CFR part 3.

Federal Reserve System

12 CFR Chapter II

Authority and Issuance

For the reasons set forth in the joint preamble, the Board of Governors of the Federal Reserve System proposes to amend parts 208 and 225 of chapter II of title 12 of the Code of Federal Regulations as follows:

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

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

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

2. In appendix A to part 208, the following amendments are proposed:

a. Section I, Overview, is revised.

b. In section II, Definition of Qualifying Capital for the Risk-Based Capital Ratio, the first paragraph is revised.

c. In section III.A, Procedures, the first paragraph is revised, the fifth paragraph is redesignated as the sixth paragraph, and a new fifth paragraph is added.

d. In section III.C, the first paragraph is revised.

e. Section IV is removed and a new section IV, Alternative Approach for Computing Weighted Risk Assets and Off-Balance-Sheet Items, is added.

f. Attachment I is removed.

Appendix A To Part 208—Capital Adequacy Guidelines For State Member Banks: Risk-Based Measure

I. Overview

The Board of Governors of the Federal Reserve System has adopted a risk-based capital measure to assist in the assessment of the capital adequacy of state member banks.[1] The principal objectives of this measure are to: (i) Make regulatory capital requirements more sensitive to differences in risk profiles among banks; (ii) factor off-balance sheet exposures into the assessment of capital adequacy; (iii) minimize disincentives to holding liquid, low-risk assets; and (iv) achieve greater consistency in the evaluation of the capital adequacy of major banks throughout the world.[2]

The risk-based capital guidelines include both a definition of capital and a framework for calculating weighted risk assets by assigning assets and off-balance sheet items to broad risk categories. A bank's risk-based capital ratio is calculated by dividing its qualifying capital (the numerator of the ratio) by its weighted risk assets (the denominator).[3] The definition of qualifying capital is outlined in section II, and the procedures for calculating weighted risk assets are discussed in sections III and IV.

In addition, when certain banks that engage in trading activities calculate their risk-based capital ratios under this appendix A, they must also refer to appendix E of this part, which incorporates capital charges for certain market risks into the risk-based capital ratios. When calculating their risk-based capital ratios under this appendix A, such banks are required to refer to appendix E of this part for supplemental rules to determine qualifying and excess capital, calculate weighted risk assets, calculate market risk equivalent assets, and calculate risk-based capital ratios adjusted for market risk.

The risk-based capital guidelines apply to all state member banks on a consolidated basis. They are to be used in the examination and supervisory process as well as in the analysis of applications acted upon by the Federal Reserve. Thus, in considering an application filed by a state member bank, the Federal Reserve will take into account the bank's risk-based capital ratios, the reasonableness of its capital plans, and the extent to which it meets the risk-based capital standards.

The risk-based capital ratios focus principally on broad categories of credit risk, although the framework for assigning assets and off-balance-sheet items to risk categories does incorporate elements of transfer risk, as well as limited instances of interest rate and market risk. The framework incorporates risks arising from traditional banking

[1] A leverage capital measure for state member banks is outlined in appendix B of this part.

[2] The risk-based capital measure is based upon a framework developed jointly by supervisory authorities from the countries represented on the Basel Committee on Banking Supervision (Basel Supervisors' Committee) and endorsed by the Group of Ten Central Bank Governors. The framework is described in a paper prepared by the Basel Supervisors' Committee entitled ''International Convergence of Capital Measurement,'' July 1988.

[3] Banks will initially be expected to utilize period-end amounts in calculating their risk-based capital ratios. When necessary and appropriate, ratios based on average balances may also be calculated on a case-by-case basis. Moreover, to the extent banks have data on average balances that can be used to calculate risk-based ratios, the Federal Reserve will take such data into account.

activities as well as risks arising from nontraditional activities. The risk-based capital ratios do not, however, incorporate other factors that can affect an institution's financial condition. These factors include overall interest-rate exposure; liquidity, funding and market risks; the quality and level of earnings; investment, loan portfolio, and other concentrations of credit; certain risks arising from nontraditional activities; the quality of loans and investments; the effectiveness of loan and investment policies; and management's overall ability to monitor and control financial and operating risks, including the risks presented by concentrations of credit and nontraditional activities.

In addition to evaluating capital ratios, an overall assessment of capital adequacy must take account of those factors, including, in particular, the level and severity of problem and classified assets as well as a bank's exposure to declines in the economic value of its capital due to changes in interest rates. For this reason, the final supervisory judgment on a bank's capital adequacy may differ significantly from conclusions that might be drawn solely from the level of its risk-based capital ratios.

The risk-based capital guidelines establish a minimum ratio of qualifying total capital to weighted risk assets of 8 percent, of which at least 4 percentage points must be in the form of tier 1 capital. In light of the considerations just discussed, banks generally are expected to operate well above the minimum risk-based ratios. In particular, banks contemplating significant expansion proposals are expected to maintain strong capital levels substantially above the minimum ratios and should not allow significant diminution of financial strength below these strong levels to fund their expansion plans. Institutions with high or inordinate levels of risk are also expected to operate well above minimum capital standards. In all cases, institutions should hold capital commensurate with the level and nature of the risks to which they are exposed. Banks that do not meet the minimum risk-based capital standard, or that are otherwise considered to be inadequately capitalized, are expected to develop and implement plans acceptable to the Federal Reserve for achieving adequate levels of capital within a reasonable period of time.

The Board will monitor the implementation and effect of these guidelines in relation to domestic and international developments in the banking industry. When necessary and appropriate, the Board will consider the need to modify the guidelines in light of any significant changes in the economy, financial markets, banking practices, or other relevant factors.

*II. * * **

A bank's qualifying total capital consists of two types of capital components: ''core capital elements'' (comprising tier 1 capital) and ''supplementary capital elements'' (comprising tier 2 capital). These capital elements and the various limits, restrictions, and deductions to which they are subject, are discussed in this section II.

* * * * *

*III. * * **

A. * * *

Assets and credit-equivalent amounts of off-balance-sheet items of state member banks are assigned to one of several broad risk categories, according to the obligor, or, if relevant, the guarantor, the nature of the collateral, or an external rating. The aggregate dollar value of the amount in each category is then multiplied by the risk weight associated with the category. The resulting weighted values from each of the risk categories are added together, and this sum is the bank's total weighted risk assets that comprise the denominator of the risk-based capital ratios.

* * * * *

A bank may elect to apply the alternative procedures for computing weighted risk assets set forth in section IV of this appendix A (''Alternative Approach''). The Federal Reserve also may require a bank to apply the Alternative Approach if the Federal Reserve determines that the Alternative Approach would produce risk-based capital requirements that more accurately reflect the risk profile of the bank or would otherwise enhance the safety and soundness of the bank. A bank that applies the Alternative Approach must apply all the procedures set forth in section IV of this appendix A and also must apply all the procedures set forth in this section that are not inconsistent with the procedures in section IV.

* * * * *

C. * * *

Assets and on-balance-sheet credit equivalent amounts are assigned to the following risk weight categories: 0 percent, 20 percent, 50 percent, or 100 percent. A brief explanation of the components of each category follows.

* * * * *

IV. Alternative Approach for Computing Weighted Risk Assets and Off-Balance-sheet Items

A. Scope of Application

A bank may elect to use the Alternative Approach for computing weighted risk assets and off-balance sheet items set forth in this section IV by giving the Federal Reserve written notice on the first day of the quarter during which the bank elects to begin using the Alternative Approach. A bank that has elected to apply the Alternative Approach may opt out of the Alternative Approach after it has given the Federal Reserve 30 days prior written notice. The Federal Reserve may require a bank to apply the Alternative Approach if the Federal Reserve determines that the Alternative Approach would produce risk-based capital requirements that more accurately reflect the risk profile of the bank or would otherwise enhance the safety and soundness of the bank.

A bank that applies the Alternative Approach must apply all the procedures set forth in this section IV and also must apply all the procedures set forth in section III that are not inconsistent with the procedures in section IV.

B. External Ratings, Collateral, Guarantees, and Other Considerations

1. *External Credit Ratings.* A bank must use Table 1 in this section IV.B.1. to assign risk weights to covered claims with an original maturity of one year or more and Table 2 in this section IV.B.1. to assign risk weights to covered claims with an original maturity of less than one year. Covered claims are all claims other than (i) claims on an excluded entity, (ii) loans to non-sovereigns that do not have an external rating, and (iii) OTC derivative contracts. Excluded entities are (i) the U.S. central government and U.S. government agencies, (ii) state and local governments of the United States and other countries of the OECD, (iii) U.S. government-sponsored agencies, and (iv) U.S. depository institutions and foreign banks.

A bank must use column three of the tables for covered claims on a non-U.S. sovereign [58] and column four of the tables for covered claims on an entity other than a non-U.S. sovereign (excluding securitization exposures). A bank must use column five of the tables for covered claims that are securitization exposures, which include asset-backed securities, mortgage-backed securities, recourse obligations, direct credit substitutes, and residual interests (other than credit-enhancing interest-only strips).

TABLE 1.—RISK WEIGHTS BASED ON LONG-TERM EXTERNAL RATINGS

Long-term rating category	Rating	Non-U.S. sovereign risk weight (percent)	Non-sovereign risk weight (percent)	Securitization exposure risk weight (percent)
Highest investment grade rating	AAA	0	20	20
Second-highest investment grade rating	AA	20	20	20
Third-highest investment grade rating	A	20	35	35
Lowest investment grade rating—plus	BBB+	35	50	50

[58] For purposes of this section IV, a sovereign is defined as a central government, including its agencies, departments, ministries, and the central bank. This definition does not include state, provincial, or local governments, or commercial enterprises owned by a central government.

TABLE 1.—RISK WEIGHTS BASED ON LONG-TERM EXTERNAL RATINGS—Continued

Long-term rating category	Rating	Non-U.S. sovereign risk weight (percent)	Non-sovereign risk weight (percent)	Securitization exposure risk weight (percent)
Lowest investment grade rating—naught	BBB	50	75	75
Lowest investment grade rating—negative	BBB−	75	100	100
One category below investment grade—plus & naught	BB+, BB	75	150	200
One category below investment grade—negative	BB−	100	200	200
Two or more categories below investment grade	B, CCC	150	200	[2]
Unrated	n/a	200	200	[2]

[1] Claims collateralized by AAA-rated non-U.S. sovereign debt would be assigned to the 20 percent risk weight category.
[2] Apply the risk-based capital requirements set forth in section III.B.3.b. of this appendix A.

TABLE 2.—RISK WEIGHTS BASED ON SHORT-TERM EXTERNAL RATINGS

Short-term rating category	Examples	Non-U.S. sovereign risk weight* (percent)	Non-U.S. sovereign risk weigh (percent)	Securitization exposure risk weight
Highest investment grade rating [1]	A–1, P–1	0	20	20
Second-highest investment grade rating	A–2, P–2	20	35	35
Lowest investment grade rating	A–3, P–3	50	75	75
Unrated		100	100	100

[1] Claims collateralized by A1/P1 rated sovereign debt would be assigned to the 20 percent risk weight category.

For purposes of this section IV, an external rating is defined as a credit rating that is assigned by an NRSRO, provided that the credit rating:

a. Fully reflects the entire amount of credit risk with regard to all payments owed on the claim (that is, the rating must fully reflect the credit risk associated with timely repayment of principal and interest);

b. Is monitored by the issuing NRSRO;

c. Is published in an accessible public form (for example, on the NRSRO's Web site or in financial media); and

d. Is, or will be, included in the issuing NRSRO's publicly available ratings transition matrix which tracks the performance and stability (or ratings migration) of an NRSRO's issued external ratings for the specific type of claim (for example, corporate debt).

In addition, an unrated covered claim on a non-U.S. sovereign that has an external rating from an NRSRO should be deemed to have an external rating equal to the sovereign's issuer rating. If a claim has two or more external ratings, the bank must use the least favorable external rating to risk weight the claim. Similarly, if a claim has components that are assigned different external ratings, the lowest component rating must be applied to the entire claim. For example, if a securitization exposure has a principal component externally rated BBB, but the interest component is externally rated B, the entire exposure will be subject to the gross-up treatment accorded to a securitization exposure rated B or lower. Similarly, if a portion of a specific claim is unrated, then the entire claim must be treated as if it were unrated. The Federal Reserve retains the authority to override the use of certain ratings or the ratings on certain instruments, either on a case-by-case basis or through broader supervisory policy, if necessary or appropriate to address the risk that an instrument poses to banking organizations.

2. *Collateral.* In addition to the forms of recognized financial collateral set forth in section III.B.1. of this appendix A, a bank also may recognize as collateral (i) covered claims in the form of liquid and readily marketable debt securities that are externally rated no less than investment grade and (ii) liquid and readily marketable debt securities guaranteed by non-U.S. sovereigns whose issuer rating is at least investment grade. Claims, or portions of claims, collateralized by such collateral may be assigned to the risk weight appropriate to the collateral's external rating as set forth in Table 1 or 2 of section IV.B.1. For example, the portion of a claim collateralized with an AA-rated mortgage-backed security is assigned to the 20 percent risk weight category.

Subject to the final sentence of this paragraph, there is, however, a 20 percent risk weight floor on collateralized claims under this section IV. Thus, the portion of a claim collateralized by a security issued by a non-U.S. sovereign with an issuer rating of AAA would be assigned to the 20 percent risk weight category instead of the zero percent risk weight category. The procedures set forth in section III of this appendix A continue to apply, however, to claims collateralized by securities issued or guaranteed by OECD central governments for which a positive margin of collateral is maintained on a daily basis, fully taking into account any change in the bank's exposure to the obligor and counterparty under the claim in relation to the market value of the collateral held to support the claim.

In the event that the external rating of a security used to collateralize a claim results in a higher risk weight than would have otherwise been assigned to the claim, then the lower risk weight appropriate to the underlying claim could be applied.

3. *Guarantees.* Claims, or portions of claims, guaranteed by a third-party entity (other than an excluded entity) whose unsecured long-term senior debt (without credit enhancements) is externally rated at least investment grade or by a non-U.S. sovereign that has an issuer rating of at least investment grade may be assigned to the risk weight of the guarantor as set forth in Table 1 of section IV.B.1., corresponding to the protection provider's long-term senior debt rating (or issuer rating in the case of a non-U.S. sovereign), provided that the guarantee:

a. Is written and unconditional,

b. Covers all or a pro rata portion of contractual payments of the obligor on the underlying claim,

c. Gives the beneficiary a direct claim against the protection provider,

d. Is non-cancelable by the protection provider for reasons other than the breach of contract by the beneficiary,

e. Is legally enforceable against the protection provider in a jurisdiction where the protection provider has sufficient assets against which a judgment may be attached and enforced, and

f. Requires the protection provider to make payment to the beneficiary upon default of the obligor on the underlying claim without first requiring the beneficiary to demand payment from the obligor.

C. Residential Mortgages

1. A bank may separate its residential mortgage portfolio into two subportfolios, where the first subportfolio includes mortgage loans originated by the bank or acquired by the bank prior to the date the bank becomes subject to this section IV and the second includes mortgage loans originated or acquired by the bank after that date. The bank may apply the risk-based capital treatment set forth in section III of this appendix A to the first subportfolio while applying the requirements set forth in

this section IV to the second subportfolio. A bank that does not so separate its residential mortgage portfolio must apply the capital treatment in this section IV to all of its qualifying residential mortgage exposures. If a bank at any time opts-out of the Alternative Approach and, subsequently, again becomes subject to this section IV, it may not apply the procedures set forth in this section IV.C.1.

2. Subject to section IV.C.1., a bank assigns its residential mortgage exposures to risk weight categories based on their loan-to-value (LTV) or combined loan-to-value (CLTV) ratios, as appropriate, in accordance with Tables 3 and 4 of sections IV.C.3.a. and IV.C.3.b., respectively, but must risk-weight a nonqualifying residential mortgage exposure at no less than 100 percent. Residential mortgage exposures include all loans secured by a lien on a one- to four-family residential property [59] that is either owner-occupied or rented. Qualifying residential mortgage exposures are residential mortgage exposures that (1) have been made in accordance with prudent underwriting standards; (2) are performing in accordance with their original terms; (3) are not 90 days or more past due or carried in nonaccrual status; and (4) are not made for the purpose of speculative property development. Nonqualifying residential mortgage exposures are residential mortgage exposures other than qualifying residential mortgage exposures.

3. For purposes of Tables 3 and 4, LTV is defined as (i) the current outstanding principal balance of the loan less the amount covered by any loan-level private mortgage insurance (''PMI'') divided by (ii) the most recent purchase price of the property or the most recent appraisal or evaluation value of the property (if the appraisal or evaluation is more recent than the most recent purchase and was obtained by the bank in connection with an extension of new credit). Loan-level PMI means insurance (i) provided by a non-affiliated PMI provider whose unsecured long-term senior debt (without credit enhancements) is externally rated at least the third highest investment grade by an NRSRO, and (ii) which protects a mortgage lender in the event of the default of a mortgage borrower up to a predetermined portion of the value of a residential mortgage exposure. For purposes of the loan-level PMI definition, (i) an affiliate of a company means any company that controls, is controlled by, or is under common control with, the company; and (ii) a person or company controls a company if it owns, controls, or has power to vote 25 percent or more of a class of voting securities of the company or consolidates the company for financial reporting purposes. CLTV for a junior lien mortgage is defined as (i) the current outstanding principal balance of the junior mortgage and all more senior mortgages less the amount covered by any loan-level PMI covering the junior lien divided by (ii) the most recent purchase price of the property or the most recent appraisal or evaluation value of the property (if the appraisal or evaluation is more recent than the most recent purchase and was obtained by the bank in connection with an extension of new credit). The procedures for residential mortgage exposures that have negative amortization features are set forth in section IV.C.3.c.

a. *First Lien Residential Mortgage Exposures*

First lien residential mortgage exposures are risk-weighted in accordance with Table 3 of this section IV.C.3.a. (with nonqualifying residential mortgage exposures subject to a risk weight floor of 100 percent). If a bank holds both the senior and junior lien(s) on a residential property and no other party holds an intervening lien, the bank's claims are treated as a single claim secured by a senior lien for purposes of determining the LTV ratio and assigning a risk weight.

TABLE 3.—RISK WEIGHTS FOR FIRST LIEN RESIDENTIAL MORTGAGE EXPOSURES

Loan-to-Value ratio	Risk weight (percent)
Up to 60%	20
>60% and up to 80%	35
>80% and up to 85%	50
>85% and up to 90%	75
>90% and up to 95%	100
>95%	150

b. *Stand-Alone Junior Liens*

Stand-alone junior lien residential mortgage exposures, including structured mortgages and home equity lines of credit, must be risk weighted using the CLTV ratio of the stand-alone junior lien and all senior liens in accordance with Table 4 (with nonqualifying residential mortgage exposures subject to a risk weight floor of 100 percent).

TABLE 4.—RISK WEIGHTS FOR STAND-ALONE JUNIOR LIEN RESIDENTIAL MORTGAGE EXPOSURES

Combined Loan-to-Value ratio	Risk weight (percent)
Up to 60%	75
>60% and up to 90%	100
>90%	150

c. *Residential Mortgage Exposures With Negative Amortization Features*

Residential mortgage exposures with negative amortization features are assigned to a risk weight category using a loan's current LTV ratio in accordance with Table 3 of section IV.C.3.a. Any remaining potential increase in the mortgage's principal balance permitted through the negative amortization feature is to be treated as a long-term commitment and converted to an on-balance sheet credit equivalent amount as set forth in section III.D.2. of this appendix. The credit equivalent amount of the commitment is then risk-weighted according to Table 3 based on the loan's ''highest contractual LTV ratio.'' The highest contractual LTV ratio of a mortgage loan equals the current outstanding principal balance of the loan plus the credit equivalent amount of the remaining negative amortization ''commitment'' less the amount covered by any loan-level PMI divided by the most recent purchase price of the property or the most recent appraisal or evaluation value of the property (if the appraisal or evaluation is more recent than the most recent purchase and was obtained by the bank in connection with an extension of new credit). A bank with a stand-alone second lien where the more senior lien(s) can negatively amortize must first adjust the principal amount of those senior or intervening liens that can negatively amortize to reflect the maximum contractual loan amount as if it were to fully negatively amortize under the applicable contract. The adjusted LTV would then be added to the stand-alone junior lien to calculate the appropriate CLTV.

D. Short-Term Commitments

Unused portions of commitments with an original maturity of one year or less (including eligible asset backed commercial paper liquidity facilities) (that is, short-term commitments) are converted using the 10 percent conversion factor. Unconditionally cancelable commitments, as defined in section III.D.2.b. of this appendix, retain the zero percent conversion factor. Short-term commitments to originate one-to four-family residential mortgage loans provided in the ordinary course of business that are not treated as a derivative under GAAP will continue to be converted to an on-balance-sheet credit equivalent amount using the zero percent conversion factor.

E. Securitizations of Revolving Credit with Early Amortization Provisions

1. *Definitions*

a. *Early amortization provision* means a provision in the documentation governing a securitization that, when triggered, causes investors in the securitization exposures to be repaid before the original stated maturity of the securitization exposures, unless the provision is triggered solely by events not directly related to the performance of the underlying exposures or the originating bank (such as material changes in tax laws or regulations).

b. *Excess spread* means gross finance charge collections and other income received by a trust or special purpose entity minus interest paid to the investors in the securitization exposures, servicing fees, charge-offs, and other similar trust or special purpose entity expenses.

c. *Excess spread trapping point* is the point at which the bank is required by the documentation governing a securitization to divert and hold excess spread in a spread or reserve account, expressed as a percentage.

d. *Investors' interest* is the total amount of securitization exposures issued by a trust or special purpose entity to investors.

e. *Revolving credit* means a line of credit where the borrower is permitted to vary both the drawn amount and the amount of repayment within an agreed limit.

2. A bank that securitizes revolving credits where the securitization structure contains an early amortization provision must maintain risk-based capital against the investors' interest as required under this section. Capital for securitizations of

[59] Loans that qualify as mortgages that are secured by 1- to 4-family residential properties are listed in the instructions to the commercial bank Call Reports.

revolving credit exposures that incorporate early-amortization provisions will be assessed based on a comparison of the securitization's annualized three-month average excess spread against the excess spread trapping point. To calculate the securitization's excess spread trapping point ratio, a bank must calculate the three-month average of (1) the dollar amount of excess spread divided by (2) the outstanding principal balance of underlying pool of exposures at the end of each of the prior three months. The annualized three month average of excess spread is then divided by the excess spread trapping point that is required by the securitization structure. The excess spread trapping point ratio is compared to the ratios contained in Table 5 of section IV.E.3 to determine the appropriate conversion factor to apply to the investor's interest. The amount of investor's interest after conversion is then assigned capital in accordance with that appropriate to the underlying obligor, collateral or guarantor. For securitizations that do not require excess spread to be trapped, or that specify trapping points based primarily on performance measures other than the three-month average excess spread, the excess spread trapping point is 4.5 percent.

3. For a bank subject to the early amortization requirements in this section IV.E., if the aggregate risk-based capital requirement for residual interests, direct credit substitutes, other securitization exposures, and early amortization provisions in connection with the same securitization of revolving credit exposures exceeds the risk-based capital requirement on the underlying securitized assets, then the capital requirement for the securitization transaction will be limited to the greater of the risk-based capital requirement for (1) residual interests or (2) the underlying securitized assets calculated as if the bank continued to hold the assets on its balance sheet.

TABLE 5.—EARLY AMORTIZATION CREDIT CONVERSION FACTOR

Excess spread trapping point ratio	Credit conversion factor (CCF) (percent)
133.33 percent or more	0
less than 133.33 percent to 100 percent	5
less than 100 percent to 75 percent	15
less than 75 percent to 50 percent	50
less than 50 percent	100

F. Risk Weights for Derivatives

A bank may not apply the 50 percent risk weight cap for derivative contract counterparties set forth in section III.E. of this appendix A.

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

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

Authority: 12 U.S.C. 1817(j)(13), 1818, 1828(o), 1831i, 1831p–1, 1843(c)(8), 1844(b), 1972(1), 3106, 3108, 3310, 3331–3351, 3907, and 3909; 15 U.S.C. 6801 and 6805.1.

2. In Appendix A to part 225, the following amendments are proposed:

a. Section I, Overview, is revised.

b. In section III.A, Procedures, the first paragraph is revised, the fourth paragraph is redesignated as the fifth paragraph, and a new fourth paragraph is added.

c. In section III.C, the first paragraph is revised.

d. Section IV is removed and a new section IV, Alternative Approach for Computing Weighted Risk Assets and Off-Balance-Sheet Items, is added.

e. Attachment I is removed.

Appendix A to Part 225—Capital Adequacy Guidelines for Bank Holding Companies: Risk-Based Measure

I. Overview

The Board of Governors of the Federal Reserve System has adopted a risk-based capital measure to assist in the assessment of the capital adequacy of bank holding companies (*banking organizations*).[1] The principal objectives of this measure are to: (i) Make regulatory capital requirements more sensitive to differences in risk profiles among banking organizations; (ii) factor off-balance sheet exposures into the assessment of capital adequacy; (iii) minimize disincentives to holding liquid, low-risk assets; and (iv) achieve greater consistency in the evaluation of the capital adequacy of major banking organizations throughout the world.[2]

The risk-based capital guidelines include both a definition of capital and a framework for calculating weighted risk assets by assigning assets and off-balance sheet items to broad risk categories. An institution's risk-based capital ratio is calculated by dividing its qualifying capital (the numerator of the ratio) by its weighted risk assets (the denominator).[3] The definition of qualifying capital is outlined in section II, and the procedures for calculating weighted risk assets are discussed in sections III and IV.

In addition, when certain organizations that engage in trading activities calculate their risk-based capital ratios under this appendix A, they must also refer to appendix E of this part, which incorporates capital charges for certain market risks into the risk-based capital ratios. When calculating their risk-based capital ratios under this appendix A, such organizations are required to refer to appendix E of this part for supplemental rules to determine qualifying and excess capital, calculate weighted risk assets, calculate market risk equivalent assets, and calculate risk-based capital ratios adjusted for market risk.

The risk-based capital guidelines apply on a consolidated basis to bank holding companies with consolidated assets of $500 million or more. For bank holding companies with less than $500 million in consolidated assets, the guidelines will be applied on a bank-only basis unless: (a) The parent bank holding company is engaged in nonbank activity involving significant leverage;[4] or (b) the parent company has a significant amount of outstanding debt that is held by the general public.

The risk-based capital guidelines are to be used in the inspection and supervisory process as well as in the analysis of applications acted upon by the Federal Reserve. Thus, in considering an application filed by a bank holding company, the Federal Reserve will take into account the organization's risk-based capital ratio, the reasonableness of its capital plans, and the extent to which it meets the risk-based capital standards.

The risk-based capital ratios focus principally on broad categories of credit risk, although the framework for assigning assets and off-balance-sheet items to risk categories does incorporate elements of transfer risk, as well as limited instances of interest rate and market risk. The risk-based capital ratio does not, however, incorporate other factors that can affect an organization's financial condition. These factors include overall interest-rate exposure; liquidity, funding and market risks; the quality and level of earnings; investment or loan portfolio concentrations; the quality of loans and investments, the effectiveness of loan and investment policies; and management's ability to monitor and control financial and operating risks.

In addition to evaluating capital ratios, an overall assessment of capital adequacy must take account of these other factors, including, in particular, the level and severity of problem and classified assets. For this reason, the final supervisory judgment on an organization's capital adequacy may differ significantly from conclusions that might be drawn solely from the level of the organization's risk-based capital ratio.

The risk-based capital guidelines establish a *minimum ratio* of qualifying total capital to weighted risk assets of 8 percent, of which at least 4 percentage points must be in the form of tier 1 capital. In light of the considerations just discussed, banking organizations generally are expected to

[1] A leverage capital measure for state member banks is outlined in appendix D of this part.

[2] The risk-based capital measure is based upon a framework developed jointly by supervisory authorities from the countries represented on the Basel Committee on Banking Supervision (Basel Supervisors' Committee) and endorsed by the Group of Ten Central Bank Governors. The framework is described in a paper prepared by the Basel Supervisors' Committee entitled ''International Convergence of Capital Measurement,'' July 1988.

[3] Banking organizations will initially be expected to utilize period-end amounts in calculating their risk-based capital ratios. When necessary and appropriate, ratios based on average balances may also be calculated on a case-by-case basis. Moreover, to the extent banking organizations have data on average balances that can be used to calculate risk-based ratios, the Federal Reserve will take such data into account.

[4] A parent company that is engaged in significant off-balance sheet activities would generally be deemed to be engaged in activities that involve significant leverage.

operate well above the minimum risk-based ratios. In particular, banking organizations contemplating significant expansion proposals are expected to maintain strong capital levels substantially above the minimum ratios and should not allow significant diminution of financial strength below these strong levels to fund their expansion plans. Institutions with high or inordinate levels of risk are also expected to operate well above minimum capital standards. In all cases, institutions should hold capital commensurate with the level and nature of the risks to which they are exposed. Banking organizations that do not meet the minimum risk-based capital standard, or that are otherwise considered to be inadequately capitalized, are expected to develop and implement plans acceptable to the Federal Reserve for achieving adequate levels of capital within a reasonable period of time.

The Board will monitor the implementation and effect of these guidelines in relation to domestic and international developments in the banking industry. When necessary and appropriate, the Board will consider the need to modify the guidelines in light of any significant changes in the economy, financial markets, banking practices, or other relevant factors.

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III. * * *

A. * * *

Assets and credit-equivalent amounts of off-balance-sheet items of bank holding companies are assigned to one of several broad risk categories, according to the obligor, or, if relevant, the guarantor, the nature of the collateral, or an external rating. The aggregate dollar value of the amount in each category is then multiplied by the risk weight associated with the category. The resulting weighted values from each of the risk categories are added together, and this sum is the banking organization's total weighted risk assets that comprise the denominator of the risk-based capital ratios.

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A bank holding company may elect to apply the alternative procedures for computing weighted risk assets set forth in section IV of this appendix A (''Alternative Approach''). The Federal Reserve also may require a bank holding company to apply the Alternative Approach if the Federal Reserve determines that the Alternative Approach would produce risk-based capital requirements that more accurately reflect the risk profile of the banking organization or would otherwise enhance the safety and soundness of the institution. A bank holding company that applies the Alternative Approach must apply all the procedures set forth in section IV of this appendix A and also must apply all the procedures set forth in this section that are not inconsistent with the procedures in section IV.

* * * * *

C. * * *

Assets and on-balance-sheet credit equivalent amounts are assigned to the following risk weight categories: 0 percent, 20 percent, 50 percent, or 100 percent. A brief explanation of the components of each category follows.

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IV. Alternative Approach for Computing Weighted Risk Assets and Off-Balance-Sheet Items

A. Scope of Application

A bank holding company may elect to use the Alternative Approach for computing weighted risk assets and off-balance sheet items set forth in this section IV by giving the Federal Reserve written notice on the first day of the quarter during which the banking organization elects to begin using the Alternative Approach. A bank holding company that has elected to apply the Alternative Approach may opt out of the Alternative Approach after it has given the Federal Reserve 30 days prior written notice. The Federal Reserve may require a bank holding company to apply the Alternative Approach if the Federal Reserve determines that the Alternative Approach would produce risk-based capital requirements that more accurately reflect the risk profile of the banking organization or would otherwise enhance the safety and soundness of the institution.

A bank holding company that applies the Alternative Approach must apply all the procedures set forth in this section IV and also must apply all the procedures set forth in section III that are not inconsistent with the procedures in section IV.

B. External Ratings, Collateral, Guarantees, and Other Considerations

1. *External Credit Ratings.* A bank holding company must use Table 1 in this section IV.B.1. to assign risk weights to covered claims with an original maturity of one year or more and Table 2 in this section IV.B.1. to assign risk weights to covered claims with an original maturity of less than one year. Covered claims are all claims other than (i) claims on an excluded entity, (ii) loans to non-sovereigns that do not have an external rating, and (iii) OTC derivative contracts. Excluded entities are (i) the U.S. central government and U.S. government agencies, (ii) state and local governments of the United States and other countries of the OECD, (iii) U.S. government-sponsored agencies, and (iv) U.S. depository institutions and foreign banks.

A bank holding company must use column three of the tables for covered claims on a non-U.S. sovereign[58] and column four of the tables for covered claims on an entity other than a non-U.S. sovereign (excluding securitization exposures). A bank holding company must use column five of the tables for covered claims that are securitization exposures, which include asset-backed securities, mortgage-backed securities, recourse obligations, direct credit substitutes, and residual interests (other than credit-enhancing interest-only strips).

TABLE 1.—RISK WEIGHTS BASED ON LONG-TERM EXTERNAL RATINGS

Long-term rating category	Rating	Non-U.S. sovereign risk weight[1] (percent)	Non-sovereign risk weight (percent)	Securitization exposure risk weight (percent)
Highest investment grade rating	AAA	0	20	20
Second-highest investment grade rating	AA	20	20	20
Third-highest investment grade rating	A	20	35	35
Lowest investment grade rating—plus	BBB+	35	50	50
Lowest investment grade rating—naught	BBB	50	75	75
Lowest investment grade rating—negative	BBB−	75	100	100
One category below investment grade—plus & naught	BB+, BB	75	150	200
One category below investment grade—negative	BB−	100	200	200
Two or more categories below investment grade	B, CCC	150	200	[2]
Unrated	n/a	200	200	[2]

[1] Claims collateralized by AAA-rated non-U.S. sovereign debt would be assigned to the 20 risk weight category.

[2] Apply the risk-based capital requirements set forth in section III.B.3.b. of this appendix A.

[58] For purposes of this section IV, a sovereign is defined as a central government, including its agencies, departments, ministries, and the central bank. This definition does not include state, provincial, or local governments, or commercial enterprises owned by a central government.

TABLE 2.—RISK WEIGHTS BASED ON SHORT-TERM EXTERNAL RATINGS

Short-term rating category	Examples	Non-U.S. sovereign risk weight [1] (percent)	Non-sovereign risk weight (percent)	Securitization exposure risk weight (percent)
Highest investment grade rating *	A–1, P–1	0	20	20
Second-highest investment grade rating	A–2, P–2	20	35	35
Lowest investment grade rating	A–3, P–3	50	75	75
Unrated		100	100	100

[1] Claims collateralized by A1/P1 rated sovereign debt would be assigned to the 20 percent risk weight category.

For purposes of this section IV, an external rating is defined as a credit rating that is assigned by an NRSRO, provided that the credit rating:

a. Fully reflects the entire amount of credit risk with regard to all payments owed on the claim (that is, the rating must fully reflect the credit risk associated with timely repayment of principal and interest);

b. Is monitored by the issuing NRSRO;

c. Is published in an accessible public form (for example, on the NRSRO's Web site or in financial media); and

d. Is, or will be, included in the issuing NRSRO's publicly available ratings transition matrix which tracks the performance and stability (or ratings migration) of an NRSRO's issued external ratings for the specific type of claim (for example, corporate debt).

In addition, an unrated covered claim on a non-U.S. sovereign that has an external rating from an NRSRO should be deemed to have an external rating equal to the sovereign's issuer rating. If a claim has two or more external ratings, the bank holding company must use the least favorable external rating to risk weight the claim. Similarly, if a claim has components that are assigned different external ratings, the lowest component rating must be applied to the entire claim. For example, if a securitization exposure has a principal component externally rated BBB, but the interest component is externally rated B, the entire exposure will be subject to the gross-up treatment accorded to a securitization exposure rated B or lower. Similarly, if a portion of a specific claim is unrated, then the entire claim must be treated as if it were unrated. The Federal Reserve retains the authority to override the use of certain ratings or the ratings on certain instruments, either on a case-by-case basis or through broader supervisory policy, if necessary or appropriate to address the risk that an instrument poses to banking organizations.

2. *Collateral.* In addition to the forms of recognized financial collateral set forth in section III.B.1 of this appendix A, a bank holding company also may recognize as collateral (i) covered claims in the form of liquid and readily marketable debt securities that are externally rated no less than investment grade and (ii) liquid and readily marketable debt securities guaranteed by non-U.S. sovereigns whose issuer rating is at least investment grade. Claims, or portions of claims, collateralized by such collateral may be assigned to the risk weight appropriate to the collateral's external rating as set forth in Table 1 or 2 of section IV.B.1. For example, the portion of a claim collateralized with an AA-rated mortgage-backed security is assigned to the 20 percent risk weight category.

Subject to the final sentence of this paragraph, there is, however, a 20 percent risk weight floor on collateralized claims under this section IV. Thus, the portion of a claim collateralized by a security issued by a non-U.S. sovereign with an issuer rating of AAA would be assigned to the 20 percent risk weight category instead of the zero percent risk weight category. The procedures set forth in section III of this appendix A continue to apply, however, to claims collateralized by securities issued or guaranteed by OECD central governments for which a positive margin of collateral is maintained on a daily basis, fully taking into account any change in the banking organization's exposure to the obligor and counterparty under the claim in relation to the market value of the collateral held to support the claim.

In the event that the external rating of a security used to collateralize a claim results in a higher risk weight than would have otherwise been assigned to the claim, then the lower risk weight appropriate to the underlying claim could be applied.

3. *Guarantees.* Claims, or portions of claims, guaranteed by a third party entity (other than an excluded entity) whose unsecured long-term senior debt (without credit enhancements) is externally rated at least investment grade or by a non-U.S. sovereign that has an issuer rating of at least investment grade may be assigned to the risk weight of the guarantor as set forth in Table 1 of section IV.B.1 corresponding to the protection provider's long-term senior debt rating (or issuer rating in the case of a non-U.S. sovereign), provided that the guarantee:

a. Is written and unconditional,

b. Covers all or a pro rata portion of contractual payments of the obligor on the underlying claim,

c. Gives the beneficiary a direct claim against the protection provider,

d. Is non-cancelable by the protection provider for reasons other than the breach of contract by the beneficiary,

e. Is legally enforceable against the protection provider in a jurisdiction where the protection provider has sufficient assets against which a judgment may be attached and enforced, and

f. Requires the protection provider to make payment to the beneficiary upon default of the obligor on the underlying claim without first requiring the beneficiary to demand payment from the obligor.

C. Residential Mortgages

1. A bank holding company may separate its residential mortgage portfolio into two subportfolios, where the first subportfolio includes mortgage loans originated by the banking organization or acquired by the banking organization prior to the date the institution becomes subject to this section IV and the second includes mortgage loans originated or acquired by the bank holding company after that date. The bank holding company may apply the risk-based capital treatment set forth in section III of this appendix A to the first subportfolio while applying the requirements set forth in this section IV to the second subportfolio. A bank holding company that does not so separate its residential mortgage portfolio must apply the capital treatment in this section IV to all of its qualifying residential mortgage exposures. If a banking organization at any time opts-out of the Alternative Approach and, subsequently, again becomes subject to this section IV, it may not apply the procedures set forth in this section IV.C.1.

2. Subject to section IV.C.1., a bank holding company assigns its residential mortgage exposures to risk weight categories based on their loan-to-value (LTV) or combined loan-to-value (CLTV) ratios, as appropriate, in accordance with Tables 3 and 4 of sections IV C.3.a. and IV.C.3.b., respectively, but must risk-weight a nonqualifying residential mortgage exposure at no less than 100 percent. Residential mortgage exposures include all loans secured by a lien on a one- to four-family residential property [59] that is either owner-occupied or rented. Qualifying residential mortgage exposures are residential mortgage exposures that (1) have been made in accordance with prudent underwriting standards; (2) are performing in accordance with their original terms; (3) are not 90 days or more past due or carried in nonaccrual status; and (4) are not made for the purpose of speculative property development. Nonqualifying residential mortgage exposures are residential mortgage exposures other than qualifying residential mortgage exposures.

3. For purposes of Tables 3 and 4, LTV is defined as (i) the current outstanding principal balance of the loan less the amount covered by any loan-level private mortgage insurance (''PMI'') divided by (ii) the most recent purchase price of the property or the most recent appraisal or evaluation value of

[59] Loans that qualify as mortgages that are secured by 1- to 4-family residential properties are listed in the instructions to the commercial bank Call Reports.

the property (if the appraisal or evaluation is more recent than the most recent purchase and was obtained by the bank holding company in connection with an extension of new credit). Loan-level PMI means insurance (i) provided by a non-affiliated PMI provider whose unsecured long-term senior debt (without credit enhancements) is externally rated at least the third highest investment grade by an NRSRO, and (ii) which protects a mortgage lender in the event of the default of a mortgage borrower up to a predetermined portion of the value of residential mortgage exposure. For purposes of the loan level PMI definition, (i) an affiliate of a company means any company that controls, is controlled by, or is under common control with, the company; and (ii) a person or company controls a company if it owns, controls, or has power to vote 25 percent or more of a class of voting securities of the company or consolidates the company for financial reporting purposes. CLTV for a junior lien mortgage is defined as (i) the current outstanding principal balance of the junior mortgage and all more senior mortgages less the amount covered by any loan-level PMI covering the junior lien divided by (ii) the most recent purchase price of the property or the most recent appraisal or evaluation value of the property (if the appraisal or evaluation is more recent than the most recent purchase and was obtained by the bank holding company in connection with an extension of new credit). The procedures for residential mortgage exposures that have negative amortization features are set forth in section IV.C.3.c.

a. *First Lien Residential Mortgage Exposures*

First lien residential mortgage exposures are risk-weighted in accordance with Table 3 of this section IV.C.3.a (with nonqualifying residential mortgage exposures subject to a risk weight floor of 100 percent). If a banking organization holds both the senior and junior lien(s) on a residential property and no other party holds an intervening lien, the banking organization's claims are treated as a single claim secured by a senior lien for purposes of determining the LTV ratio and assigning a risk weight.

TABLE 3.—RISK WEIGHTS FOR FIRST LIEN RESIDENTIAL MORTGAGE EXPOSURES

Loan-to-value ratio	Risk weight (percent)
Up to 60%	20
>60% and up to 80%	35
>80% and up to 85%	50
>85% and up to 90%	75
>90% and up to 95%	100
>95%	150

b. *Stand-Alone Junior Liens*

Stand-alone junior lien residential mortgage exposures, including structured mortgages and home equity lines of credit, must be risk weighted using the CLTV ratio of the stand-alone junior lien and all senior liens in accordance with Table 4 (with nonqualifying residential mortgage exposures subject to a risk weight floor of 100 percent).

TABLE 4.—RISK WEIGHTS FOR STAND-ALONE JUNIOR LIEN RESIDENTIAL MORTGAGE EXPOSURES

Combined loan-to-value ratio	Risk weight (percent)
Up to 60%	75
>60% and up to 90%	100
>90%	150

c. *Residential Mortgage Exposures With Negative Amortization Features*

Residential mortgage exposures with negative amortization features are assigned to a risk weight category using a loan's current LTV ratio in accordance with Table 3 of section IV.C.3.a. Any remaining potential increase in the mortgage's principal balance permitted through the negative amortization feature is to be treated as a long-term commitment and converted to an on-balance sheet credit equivalent amount as set forth in section III.D.2. of this appendix. The credit equivalent amount of the commitment is then risk-weighted according to Table 3 based on the loan's ''highest contractual LTV ratio.'' The highest contractual LTV ratio of a mortgage loan equals the current outstanding principal balance of the loan plus the credit equivalent amount of the remaining negative amortization ''commitment'' less the amount covered by any loan-level PMI divided by the most recent purchase price of the property or the most recent appraisal or evaluation value of the property (if the appraisal or evaluation is more recent than the most recent purchase and was obtained by the bank holding company in connection with an extension of new credit). A bank holding company with a stand-alone second lien where the more senior lien(s) can negatively amortize must first adjust the principal amount of those senior or intervening liens that can negatively amortize to reflect the maximum contractual loan amount as if it were to fully negatively amortize under the applicable contract. The adjusted LTV would then be added to the stand-alone junior lien to calculate the appropriate CLTV.

D. Short-Term Commitments

Unused portions of commitments with an original maturity of one year or less (including eligible asset backed commercial paper liquidity facilities) (that is, short-term commitments) are converted using the 10 percent conversion factor. Unconditionally cancelable commitments, as defined in section III.D.2.b. of this appendix, retain the zero percent conversion factor. Short-term commitments to originate one- to four-family residential mortgage loans provided in the ordinary course of business that are not treated as a derivative under GAAP will continue to be converted to an on-balance-sheet credit equivalent amount using the zero percent conversion factor.

E. Securitizations of Revolving Credit with Early Amortization Provisions

1. *Definitions*

a. *Early amortization provision* means a provision in the documentation governing a securitization that, when triggered, causes investors in the securitization exposures to be repaid before the original stated maturity of the securitization exposures, unless the provision is triggered solely by events not directly related to the performance of the underlying exposures or the originating banking organization (such as material changes in tax laws or regulations).

b. *Excess spread* means gross finance charge collections and other income received by a trust or special purpose entity minus interest paid to the investors in the securitization exposures, servicing fees, charge-offs, and other similar trust or special purpose entity expenses.

c. *Excess spread trapping point* is the point at which the banking organization is required by the documentation governing a securitization to divert and hold excess spread in a spread or reserve account, expressed as a percentage.

d. *Investors' interest* is the total amount of securitization exposure issued by a trust or special purpose entity to investors.

e. *Revolving credit* means a line of credit where the borrower is permitted to vary both the drawn amount and the amount of repayment within an agreed limit.

2. A bank holding company that securitizes revolving credits where the securitization structure contains an early amortization provision must maintain risk-based capital against the investors' interest as required under this section. Capital for securitizations of revolving credit exposures that incorporate early-amortization provisions will be assessed based on a comparison of the securitization's annualized three-month average excess spread against the excess spread trapping point. To calculate the securitization's excess spread trapping point ratio, a bank holding company must calculate the three-month average of (1) the dollar amount of excess spread divided by (2) the outstanding principal balance of underlying pool of exposures at the end of each of the prior three months. The annualized three month average of excess spread is then divided by the excess spread trapping point that is required by the securitization structure. The excess spread trapping point ratio is compared to the ratios contained in Table 5 of section IV.E.3 to determine the appropriate conversion factor to apply to the investor's interest. The amount of investor's interest after conversion is then assigned capital in accordance with that appropriate to the underlying obligor, collateral or guarantor. For securitizations that do not require excess spread to be trapped, or that specify trapping points based primarily on performance measures other than the three-month average excess spread, the excess spread trapping point is 4.5 percent.

3. For a banking organization subject to the early amortization requirements in this section IV.E., if the aggregate risk-based capital requirement for residual interests, direct credit substitutes, other securitization exposures, and early amortization provisions in connection with the same securitization of revolving credit exposures exceeds the risk-based capital requirement on the underlying securitized assets, then the capital requirement for the securitization transaction will be limited to the greater of the risk-based capital requirement for (1) residual interests

or (2) the underlying securitized assets calculated as if the banking organization continued to hold the assets on its balance sheet.

TABLE 5.—EARLY AMORTIZATION CREDIT CONVERSION FACTOR

Excess spread trapping point ratio	Credit conversion factor (CCF) (percent)
133.33 percent or more	0
Less than 133.33 percent to 100 percent	5
Less than 100 percent to 75 percent	15
Less than 75 percent to 50 percent	50
Less than 50 percent	100

F. Risk Weights for Derivatives

A bank holding company may not apply the 50 percent risk weight cap for derivative contract counterparties set forth in section III.E. of this appendix A.

* * * * *

Federal Deposit Insurance Corporation

12 CFR Part 325

For the reasons set out in the preamble, part 325 of chapter III of title 12 of the Code of Federal Regulations is proposed to be amended as follows:

PART 325—CAPITAL MAINTENANCE

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

Authority: U.S.C. 1815(a), 1815(b), 1816, 1818(a), 1818(b), 1818(c), 1818(t), 1819 (Tenth), 1828(c), 1828(d), 1828(i), 1828(n), 1828(o), 1831o, 1835, 3907, 3909, 4808; Pub. L. 102–233, 105 Stat. 1761, 1789, 1790 (12 U.S.C. 1831n note); Pub. L. 102–242, 105 Stat. 2236, 2355, as amended by Pub. L. 103–325, 108 Stat. 2160, 2233 (12 U.S.C. 1828 note); Pub. L. 102–242, 105 Stat. 2236, 2386, as amended by Pub. L. 102–550, 106 Stat. 3672, 4089 (12 U.S.C. 1828 note).

2. Revise § 325.1 of subpart A to read as follows:

§ 325.1 Scope.

The provisions of this part apply to those circumstances for which the Federal Deposit Insurance Act or this chapter requires an evaluation of the adequacy of an insured depository institution's capital structure. The FDIC is required to evaluate capital before approving various applications by insured depository institutions. The FDIC also must evaluate capital, as an essential component, in determining the safety and soundness of state nonmember banks it insures and supervises and in determining whether depository institutions are in an unsafe or unsound condition. This subpart A establishes the criteria and standards FDIC will use in calculating the minimum leverage capital requirement and in determining capital adequacy. In addition, appendices A, D, and E to part 325 (appendices A, D, and E) set forth the FDIC's risk-based capital policy statements and appendix B to this subpart includes a statement of policy on capital adequacy that provides interpretational guidance as to how this subpart will be administered and enforced. In accordance with subpart B of part 325, the FDIC also must evaluate an institution's capital for purposes of determining whether the institution is subject to the prompt corrective action provisions set forth in section 38 of the Federal Deposit Insurance Act (12 U.S.C. 1831o).

3. Revise § 325.2(s), (w) and (y) of subpart A to read as follows:

§ 325.2 Definitions

* * * * *

(s) *Risk-weighted assets* means total risk-weighted assets, as calculated in accordance with appendices A, D, or E to part 325.

* * * * *

(w) *Tier 1 risk-based capital ratio* means the ratio of Tier 1 capital to risk-weighted assets, as calculated in accordance with appendices A, D, or E to part 325.

* * * * *

(y) *Total risk-based capital ratio* means the ratio of qualifying total capital to risk-weighted assets, as calculated in accordance with appendices A, D, or E to part 325.

* * * * *

4. Revise § 325.6(d) of subpart A to read as follows:

§ 325.6 Issuance of directives

* * * * *

(d) Enforcement of a directive. (1) Whenever a bank fails to follow the directive or to submit or adhere to its capital adequacy plan, the FDIC may seek enforcement of the directive in the appropriate United States district court, pursuant to 12 U.S.C. 3907(b)(2)(B)(ii), in the same manner and to the same extent as if the directive were a final cease-and-desist order. In addition to enforcement of the directive, the FDIC may seek assessment of civil money penalties for violation of the directive against any bank, any officer, director, employee, agent, or other person participating in the conduct of the affairs of the bank, pursuant to 12 U.S.C. 3909(d).

(2) The directive may be issued separately, in conjunction with, or in addition to, any other enforcement mechanisms available to the FDIC, including cease-and-desist orders, orders of correction, the approval or denial of applications, or any other actions authorized by law. In addition to addressing a bank's minimum leverage capital requirement, the capital directive may also address minimum risk-based capital requirements that are to be maintained and calculated in accordance with appendices A, D, and E to this part 325.

5. Revise § 325.103(a) of subpart B to read as follows:

§ 325.103 Capital measures and capital category definitions.

(a) *Capital measures* (1) For purposes of section 38 and this subpart the relevant capital measures shall be:

(i) The total risk-based capital ratio;

(ii) The Tier 1 risk-based capital ratio; and

(iii) The leverage ratio.

(2) *Risk-based capital ratios.* All state nonmember banks must maintain the minimum risk-based capital ratios as calculated under appendices A, D, or E to part 325 (and under appendix C to part 325, as applicable).

(i) Except as provided in paragraph (a)(2)(ii) of this section, any state nonmember bank that does not use appendix D, as provided in section 1(b) of appendix D to part 325, must calculate its minimum risk-based capital ratios under appendix A.

(ii) Any state nonmember bank that uses appendix D to part 325 must calculate its minimum risk-based capital ratios under appendix D.

(iii) Any state nonmember bank that does not use appendix D to part 325 may elect to calculate its minimum risk-based capital ratios under appendix E to part 325. Any state nonmember bank that makes this election must comply with the notice procedures in appendix E.

* * * * *

6. Add Appendix E to part 325 to read as follows:

Appendix E to Part 325—Statement of Policy on Risk-Based Capital: Alternative Approach for Computing Risk-Weighted Assets and Off-Balance-Sheet Items

I–1. Risk-Based Capital Framework

A. Introduction

1. Capital adequacy is one of the critical factors that the FDIC is required to analyze when taking action on various types of applications and when conducting supervisory activities related to the safety and soundness of individual banks and the banking system. In view of this, the FDIC's Board of Directors has adopted part 325 of its regulations (12 CFR part 325), which sets

forth minimum standards of capital adequacy for insured state nonmember banks and standards for determining when an insured bank is in an unsafe or unsound condition by reason of the amount of its capital.

2. This capital maintenance regulation was designed to establish, in conjunction with other federal bank regulatory agencies, uniform capital standards for all federally-regulated banking organizations, regardless of size. The uniform capital standards were based on ratios of capital to total assets. While those leverage ratios have served as a useful tool for assessing capital adequacy, the FDIC believes there is a need for a capital measure that is more explicitly and systematically sensitive to the risk profiles of individual banks. As a result, the FDIC's Board of Directors has adopted appendices A, D, and E that establish the minimum risk-based capital requirements for banks. This statement of policy does not replace or eliminate the existing part 325 capital-to-total assets leverage ratios.

3. The framework set forth in appendices A, D, and E to this part 325 consists of a *definition of capital* for risk-based capital purposes, and a system for calculating risk-weighted assets. A bank's risk-based capital ratio is calculated by dividing its qualifying total capital base (the numerator of the ratio) by its risk-weighted assets (the denominator).[1]

4. In addition, when certain banks that engage in trading activities calculate their risk-based capital ratio under these appendices A, D, and E, they must also refer to appendix C of this part, which incorporates capital charges for certain market risks into the risk-based capital ratio. When calculating their risk-based capital ratio under these appendices A, D, and E, such banks are required to refer to appendix C of this part for supplemental rules to determine qualifying and excess capital, calculate risk-weighted assets, calculate market risk equivalent assets and add them to risk-weighted assets, and calculate risk-based capital ratios as adjusted for market risk.

5. This statement of policy applies to all FDIC-*insured state-chartered banks* (excluding insured branches of foreign banks) that have elected to use this appendix E and that are not members of the Federal Reserve System, hereafter referred to as ''state nonmember banks,'' regardless of size, and to all circumstances in which the FDIC is required to evaluate the capital of a banking organization. Therefore, the risk-based capital framework set forth in this statement of policy will be used in the examination and supervisory process as well as in the analysis of applications that the FDIC is required to act upon.

6. The risk-based capital ratio focuses principally on broad categories of credit risk, however, the ratio does not take account of many other factors that can affect a bank's financial condition. These factors include overall interest rate risk exposure, liquidity, funding and market risks; the quality and level of earnings; investment, loan portfolio, and other concentrations of credit risk, certain risks arising from nontraditional activities; the quality of loans and investments; the effectiveness of loan and investment policies; and management's overall ability to monitor and control financial and operating risks, including the risk presented by concentrations of credit and nontraditional activities. In addition to evaluating capital ratios, an overall assessment of capital adequacy must take account of each of these other factors, including, in particular, the level and severity of problem and adversely classified assets as well as a bank's interest rate risk as measured by the bank's exposure to declines in the economic value of its capital due to changes in interest rates. For this reason, the final supervisory judgment on a bank's capital adequacy may differ significantly from the conclusions that might be drawn solely from the absolute level of the bank's risk-based capital ratio.

B. Election Into and Exit From Appendix E

1. Unless a bank uses appendix D of this part, any state nonmember bank may elect to use the capital requirements set forth in this appendix E by filing the appropriate Schedule of the Consolidated Reports of Condition and Income (Call Reports) to calculate its risk-based capital requirements. After a bank has filed its quarterly Call Reports under this appendix E, the bank's election to use appendix E will be effective on the date of filing its Call Reports and will apply retrospectively to the quarter covered by the filing.

2. Any bank that has elected to use this appendix E to calculate its risk-based capital ratios may elect to use appendix A of this part to calculate its risk-based capital ratios by giving the FDIC prior notice. This election will not apply retrospectively to the current quarter, but will apply prospectively for the next quarter. After the notice becomes effective, the bank must use appendix A, and the bank must file all subsequent Call Reports in accordance with appendix A.

C. Reservation of Authority

The FDIC reserves the authority to exclude a bank from coverage under this appendix E if the FDIC determines that the exclusion is appropriate based on the risk profile of the bank or would otherwise enhance the safety and soundness of the bank. The FDIC also reserves the authority to: Require a bank that has elected to use the capital requirements in this appendix E to continue to use appendix E; or require a bank that uses appendix A to calculate its risk-based capital requirements to instead use appendix E to calculate its capital requirements, if the FDIC determines that the exclusion from coverage under appendix A to this part 325 is appropriate based on the risk profile of the bank or would otherwise enhance the safety and soundness of the bank. In making a determination under this paragraph, the FDIC will apply notice and response procedures in the same manner as the notice and response procedures in 12 CFR 325.6(c).

D. Definitions

1. Affiliate means, with respect to a company, any company that controls, is controlled by, or is under common control with, the company. For purposes of this definition, a person or company controls a company if it:

(a) Owns, controls, or holds with power to vote 25 percent or more of a class of voting securities of the company; or

(b) Consolidates the company for financial reporting purposes.

2. Company means a corporation, partnership, limited liability company, business trust, special purpose entity, association, or similar organization.

3. Eligible guarantee means a guarantee provided by a third party eligible guarantor that:

(a) Is written and unconditional;

(b) Covers all or a pro rata portion of the contractual payments of the obligor on the reference exposure;

(c) Gives the beneficiary a direct claim against the protection provider;

(d) Is non-cancelable by the protection provider for reasons other than the breach of the contract by the beneficiary;

(e) Is legally enforceable against the protection provider in a jurisdiction where the protection provider has sufficient assets against which a judgment may be attached and enforced;

(f) Requires the protection provider to make payment to the beneficiary on the occurrence of a default (as defined in the guarantee) of the obligor on the reference exposure without first requiring the beneficiary to demand payment from the obligor; and

(g) If extended by a sovereign, is backed by the full faith and credit of the sovereign.

4. Eligible guarantor means a sovereign with senior long-term debt externally rated at least investment grade (without credit enhancements) by a nationally recognized statistical rating organization (NRSRO)[2] or a non-sovereign with senior long-term debt externally rated at least investment grade (without credit enhancements) by a NRSRO. A sovereign or non-sovereign rated less than investment grade by any NRSRO is not an *eligible guarantor* for purposes of this definition.

5. External rating means a credit rating that is assigned by a NRSRO to a claim or issuer, provided that the credit rating:

(a) Fully reflects the entire amount of credit risk with regard to all payments owed on the claim (that is, the rating must fully reflect the credit risk associated with timely repayment of principal and interest);

(b) Is monitored by the issuing NRSRO;

(c) Is published in an accessible public forum, for example, on the NRSRO's Web site and in financial media; and

(d) Is, or will be, included in the issuing NRSRO's publicly available ratings transition

[1] Period-end amounts, rather than average balances, normally will be used when calculating risk-based capital ratios. However, on a case-by-case basis, ratios based on average balances may also be required if supervisory concerns render it appropriate.

[2] A nationally recognized statistical rating organization is an entity recognized by the Division of Market Regulation of the Securities and Exchange Commission (or any successor Division) (Commission) as a nationally recognized statistical rating organization for various purposes, including the Commission's uniform net capital requirements for brokers and dealers (17 CFR 240.15c3–1).

matrix which tracks the performance and stability (or ratings migration) of an NRSRO's issued external ratings for the specific type of claim (for example, corporate debt).

6. Loan level private mortgage insurance (PMI) means insurance provided by a regulated mortgage insurance company, with senior long-term debt rated at least third-highest investment grade (without credit enhancements) by a NRSRO, that protects a mortgage lender in the event of the default of a mortgage borrower up to a predetermined portion of the value of a single one-to four-family residential property, provided the mortgage insurance company is not an affiliate of the bank and provided there is no pool-level cap that would effectively reduce coverage.

7. Non-sovereign.

(a) Non-sovereign means:

(i) A company (including a securities firm, insurance company, bank holding company, and savings and loan holding company), or

(ii) A multilateral lending institution or regional development institution.

(b) For purposes of this definition, *non-sovereign* does not include the United States (including U.S. Government Agencies); states or other political subdivisions of the United States and other OECD countries; U.S. Government-sponsored Agencies; or U.S. depository institutions and foreign banks. In addition, for purposes of determining the appropriate risk weight of claims on or guaranteed by qualifying securities firms that are collateralized by cash or securities issued or guaranteed by OECD central governments and that meet the requirements of section II.C.1(c) of this appendix E, *non-sovereign* also does not include a qualifying securities firm.[3]

8. Securitization exposures include asset- and mortgage-backed securities, recourse obligations, direct credit substitutes, and residual interests (other than credit-enhancing interest-only strips).

9. Sovereign.

(a) *Sovereign* means a central government, including its departments and ministries, and the central bank. It does not include states, provinces, local governments, or other political subdivisions of a country, or commercial enterprises owned by a central government.

(b) For purposes of this appendix E, *sovereign* does not include the United States, U.S. Government agencies, or the U.S. central bank (including the twelve Federal Reserve banks). In addition, for purposes of determining the appropriate risk weight of claims on qualifying securities firms that are collateralized by securities issued or guaranteed by OECD central governments that meet the requirements of section II.C.1(c) of this appendix E, *sovereign* does not include an OECD central government (including the United States).

10. Unconditionally cancelable means, with respect to a commitment-type lending arrangement, that a bank may, at any time, with or without cause, refuse to advance funds or extend credit under the facility. In the case of home equity lines of credit or mortgage lines of credit, a commitment is unconditionally cancelable if the bank can, at its option, prohibit additional extensions of credit, reduce the line, and terminate the commitment to the full extent permitted by applicable Federal law.

I–2. Definition of Capital for the Risk-Based Capital Ratio

A bank's qualifying total capital base consists of two types of capital elements: ''core capital elements'' (Tier 1) and ''supplementary capital elements'' (Tier 2). To qualify as an element of Tier 1 or Tier 2 capital, a capital instrument should not contain or be subject to any conditions, covenants, terms, restrictions, or provisions that are inconsistent with safe and sound banking practices.

A. The Components of Qualifying Capital (see Table I)

1. *Core capital elements (Tier 1)* consists of: Common stockholders' equity capital (includes common stock and related surplus, undivided profits, disclosed capital reserves that represent a segregation of undivided profits, and foreign currency translation adjustments, less net unrealized holding losses on available for-sale equity securities with readily determinable fair values); noncumulative perpetual preferred stock,[4] including any related surplus; and minority interests in the equity capital accounts of consolidated subsidiaries.

(a) At least 50 percent of the qualifying total capital base should consist of Tier 1 capital. Core (Tier 1) capital is defined as the sum of core capital elements minus all intangible assets (other than mortgage servicing assets, nonmortgage servicing assets and purchased credit card relationships eligible for inclusion in core capital pursuant to § 325.5(f)),[5] minus credit-enhancing interest-only strips that are not eligible for inclusion in core capital pursuant to § 325.5(f)), minus any disallowed deferred tax assets, and minus any amount of nonfinancial equity investments required to be deducted pursuant to section II.B.6 of this appendix E.

(b) Although nonvoting common stock, noncumulative perpetual preferred stock, and minority interests in the equity capital accounts of consolidated subsidiaries are normally included in Tier 1 capital, voting common stockholders' equity generally will be expected to be the dominant form of Tier 1 capital. Thus, banks should avoid undue reliance on nonvoting equity, preferred stock and minority interests.

(c) Although minority interests in consolidated subsidiaries are generally included in regulatory capital, exceptions to this general rule will be made if the minority interests fail to provide meaningful capital support to the consolidated bank. Such a situation could arise if the minority interests are entitled to a preferred claim on essentially low risk assets of the subsidiary. Similarly, although credit-enhancing interest-only strips and intangible assets in the form of mortgage servicing assets, nonmortgage servicing assets and purchased credit card relationships are generally recognized for risk-based capital purposes, the deduction of part or all of the credit-enhancing interest-only strips, mortgage servicing assets, nonmortgage servicing assets and purchased credit card relationships may be required if the carrying amounts of these assets are excessive in relation to their market value or the level of the bank's capital accounts. Credit-enhancing interest-only strips, mortgage servicing assets, nonmortgage servicing assets, purchased credit card relationships and deferred tax assets that do not meet the conditions, limitations and restrictions described in § 325.5(f) and (g) of this part will not be recognized for risk-based capital purposes.

(d) Minority interests in small business investment companies, investment funds that hold nonfinancial equity investments (as defined in section II.B.6(b) of this appendix E), and subsidiaries that are engaged in nonfinancial activities are not included in a bank's Tier 1 or total capital base if the bank excludes the consolidated assets of such programs from risk-weighted assets pursuant to section II.B.6(b) of this appendix.

2. *Supplementary capital elements (Tier 2).* The maximum amount of Tier 2 capital that may be recognized for risk-based capital purposes is limited to 100 percent of Tier 1 capital (after any deductions for disallowed intangibles and disallowed deferred tax assets). In addition, the combined amount of term subordinated debt and intermediate-term preferred stock that may be treated as part of Tier 2 capital for risk-based capital purposes is limited to 50 percent of Tier 1 capital. Amounts in excess of these limits may be issued but are not included in the calculation of the risk-based capital ratio. Supplementary capital elements (Tier 2) consist of: Allowance for loan and lease losses, up to a maximum of 1.25 percent of risk-weighted assets; cumulative perpetual preferred stock, long-term preferred stock (original maturity of at least 20 years) and any related surplus; perpetual preferred stock (and any related surplus) where the dividend is reset periodically based, in whole or part, on the bank's current credit standing, regardless of whether the dividends are cumulative or noncumulative; hybrid capital instruments, including mandatory convertible debt securities; term subordinated debt and intermediate-term preferred stock (original average maturity of five years or more) and any related surplus; and net unrealized holding gains on equity securities (subject to the limitations discussed in paragraph I–2.A.2(f) of this section).

(a) *Allowance for loan and lease losses.* (i) Allowances for loan and lease losses are reserves that have been established through a charge against earnings to absorb future

[3] See footnote 31.

[4] Preferred stock issues where the dividend is reset periodically based, in whole or in part, upon the bank's current credit standing, including but not limited to, auction rate, money market or remarketable preferred stock, are assigned to Tier 2 capital, regardless of whether the dividends are cumulative or noncumulative.

[5] An exception is allowed for intangible assets that are explicitly approved by the FDIC as part of the bank's regulatory capital on a specific case basis. These intangibles will be included in capital for risk-based capital purposes under the terms and conditions that are specifically approved by the FDIC.

losses on loans or lease financing receivables. Allowances for loan and lease losses exclude ''allocated transfer risk reserves.'' [6] and reserves created against identified losses.

(ii) This risk-based capital framework provides a phasedown during the transition period of the extent to which the allowance for loan and lease losses may be included in an institution's capital base. By year-end 1990, the allowance for loan and lease losses, as an element of supplementary capital, may constitute no more than 1.5 percent of risk-weighted assets and, by year-end 1992, no more than 1.25 percent of risk-weighted assets.[7]

(b) *Preferred stock.* (i) Perpetual preferred stock is defined as preferred stock that does not have a maturity date, that cannot be redeemed at the option of the holder, and that has no other provisions that will require future redemption of the issue. Long-term preferred stock includes limited-life preferred stock with an original maturity of 20 years or more, provided that the stock cannot be redeemed at the option of the holder prior to maturity, except with the prior approval of the FDIC.

(ii) Cumulative perpetual preferred stock and long-term preferred stock qualify for inclusion in supplementary capital provided that the instruments can absorb losses while the issuer operates as a going concern (a fundamental characteristic of equity capital) and provided the issuer has the option to defer payment of dividends on these instruments. Given these conditions, and the perpetual or long-term nature of the instruments, there is no limit on the amount of these preferred stock instruments that may be included with Tier 2 capital.

(iii) Noncumulative perpetual preferred stock where the dividend is reset periodically based, in whole or in part, on the bank's current credit standing, including auction rate, money market, or remarketable preferred stock, are also assigned to Tier 2 capital without limit, provided the above conditions are met.

(c) *Hybrid capital instruments.* (i) Hybrid capital instruments include instruments that have certain characteristics of both debt and equity. In order to be included as supplementary capital elements, these instruments should meet the following criteria:

(A) The instrument should be unsecured, subordinated to the claims of depositors and general creditors, and fully paid-up.

(B) The instrument should not be redeemable at the option of the holder prior to maturity, except with the prior approval of the FDIC. This requirement implies that holders of such instruments may not accelerate the payment of principal except in the event of bankruptcy, insolvency, or reorganization.

(C) The instrument should be available to participate in losses while the issuer is operating as a going concern. (Term subordinated debt would not meet this requirement.) To satisfy this requirement, the instrument should convert to common or perpetual preferred stock in the event that the sum of the undivided profits and capital surplus accounts of the issuer results in a negative balance.

(D) The instrument should provide the option for the issuer to defer principal and interest payments if: the issuer does not report a profit in the preceding annual period, defined as combined profits (i.e., net income) for the most recent four quarters; and the issuer eliminates cash dividends on its common and preferred stock.

(ii) Mandatory convertible debt securities, which are subordinated debt instruments that require the issuer to convert such instruments into common or perpetual preferred stock by a date at or before the maturity of the debt instruments, will qualify as hybrid capital instruments provided the maturity of these instruments is 12 years or less and the instruments meet the criteria set forth below for ''term subordinated debt.'' There is no limit on the amount of hybrid capital instruments that may be included within Tier 2 capital.

(d) *Term subordinated debt and intermediate-term preferred stock.* The aggregate amount of term subordinated debt (excluding mandatory convertible debt securities) and intermediate-term preferred stock (including any related surplus) that may be treated as Tier 2 capital for risk-based capital purposes is limited to 50 percent of Tier 1 capital. Term subordinated debt and intermediate-term preferred stock should have an original average maturity of at least five years to qualify as supplementary capital and should not be redeemable at the option of the holder prior to maturity, except with the prior approval of the FDIC. For state nonmember banks, a ''term subordinated debt'' instrument is an obligation other than a deposit obligation that:

(i) Bears on its face, in boldface type, the following: This obligation is not a deposit and is not insured by the Federal Deposit Insurance Corporation;

(ii)(A) Has a maturity of at least five years; or

(B) In the case of an obligation or issue that provides for scheduled repayments of principal, has an average maturity of at least five years; provided that the Director of the Division of Supervision may permit the issuance of an obligation or issue with a shorter maturity or average maturity if the Director has determined that exigent circumstances require the issuance of such obligation or issue; provided further that the provisions of this paragraph I.A.2(d)(2) shall not apply to mandatory convertible debt obligations or issues;

(iii) States expressly that the obligation:

(A) Is subordinated and junior in right of payment to the issuing bank's obligations to its depositors and to the bank's other obligations to its general and secured creditors; and

(B) Is ineligible as collateral for a loan by the issuing bank;

(iv) Is unsecured;

(v) States expressly that the issuing bank may not retire any part of its obligation without any prior written consent of the FDIC or other primary federal regulator; and

(vi) Includes, if the obligation is issued to a depository institution, a specific waiver of the right of offset by the lending depository institution.

(e) Subordinated debt obligations issued prior to December 2, 1987 that satisfied the definition of the term ''subordinated note and debenture'' that was in effect prior to that date also will be deemed to be term subordinated debt for risk-based capital purposes. An optional redemption (''call'') provision in a subordinated debt instrument that is exercisable by the issuing bank in less than five years will not be deemed to constitute a maturity of less than five years, provided that the obligation otherwise has a stated contractual maturity of at least five years; the call is exercisable solely at the discretion or option of the issuing bank, and not at the discretion or option of the holder of the obligation; and the call is exercisable only with the express prior written consent of the FDIC under 12 U.S.C. 1828(i)(1) at the time early redemption or retirement is sought, and such consent has not been given in advance at the time of issuance of the obligation. Optional redemption provisions will be accorded similar treatment when determining the perpetual nature and/or maturity of preferred stock and other capital instruments.

(f) *Discount of limited-life supplementary capital instruments.* As a limited-life capital instrument approaches maturity, the instrument begins to take on characteristics of a short-term obligation and becomes less like a component of capital. Therefore, for risk-based capital purposes, the outstanding amount of term subordinated debt and limited-life preferred stock eligible for inclusion in capital will be adjusted downward, or discounted, as the instruments approach maturity. Each limited-life capital instrument will be discounted by reducing the outstanding amount of the capital instrument eligible for inclusion as supplementary capital by a fifth of the original amount (less redemptions) each year during the instrument's last five years before maturity. Such instruments, therefore, will have no capital value when they have a remaining maturity of less than a year.

(g) *Unrealized gains on equity securities and unrealized gains (losses) on other assets.* Up to 45 percent of pretax net unrealized holding gains (that is, the excess, if any, of the fair value over historical cost) on available-for-sale equity securities with readily determinable fair values may be included in supplementary capital. However, the FDIC may exclude all or a portion of these unrealized gains from Tier 2 capital if the FDIC determines that the equity securities are not prudently valued. Unrealized gains (losses) on other types of assets, such as bank premises and available-

[6] Allocated transfer risk reserves are reserves that have been established in accordance with section 905(a) of the International Lending Supervision Act of 1983 against certain assets whose value has been found by the U.S. supervisory authorities to have been significantly impaired by protracted transfer risk problems.

[7] The amount of the allowance for loan and lease losses that may be included as a supplementary capital element is based on a percentage of gross risk-weighted assets. A bank may deduct reserves for loan and lease losses that are in excess of the amount permitted to be included in capital, as well as allocated transfer risk reserves, from gross risk-weighted assets when computing the denominator of the risk-based capital ratio.

for-sale debt securities, are not included in supplementary capital, but the FDIC may take these unrealized gains (losses) into account as additional factors when assessing a bank's overall capital adequacy.

B. Deductions from Capital and Other Adjustments. Certain assets are deducted from a bank's capital base for the purpose of calculating the numerator of the risk-based capital ratio.[8] These assets include:

(1) All *intangible assets* other than mortgage servicing assets, nonmortgage servicing assets and purchased credit card relationships.[9] These disallowed intangibles are deducted from the core capital (Tier 1) elements.

(2) Investments in *unconsolidated* banking and finance subsidiaries.[10] This includes any equity or debt capital investments in banking or finance subsidiaries if the subsidiaries are not consolidated for regulatory capital requirements.[11] Generally, these investments include equity and debt capital securities and any other instruments or commitments that are deemed to be capital of the subsidiary. These investments are deducted from the bank's total (Tier 1 plus Tier 2) capital base.

(3) Investments in *securities subsidiaries* established pursuant to 12 CFR 337.4. The FDIC may also consider deducting investments in other subsidiaries, either on a case-by-case basis or, as with securities subsidiaries, based on the general characteristics or functional nature of the subsidiaries.

(4) *Reciprocal holdings* of capital instruments of banks that represent intentional cross-holdings by the banks. These holdings are deducted from the bank's total capital base.

(5) *Deferred tax assets* in excess of the limit set forth in § 325.5(g). These disallowed deferred tax assets are deducted from the core capital (Tier 1) elements. On a case-by-case basis, and in conjunction with supervisory examinations, other deductions from capital may also be required, including any adjustments deemed appropriate for assets classified as loss.

II. Procedures For Computing Risk-Weighted Assets

A. General Procedures

1. Under the risk-based capital framework, a bank's balance sheet assets and credit equivalent amounts of off-balance sheet items are assigned to one of eight broad risk categories according to the obligor or, if relevant, the guarantor or the nature of the collateral. The aggregate dollar amount in each category is then multiplied by the risk weight assigned to that category. The resulting weighted values from each of the eight risk categories are added together and this sum is the risk-weighted assets total that, as adjusted,[12] comprises the denominator of the risk-based capital ratio.

2. The risk-weighted amounts for all off-balance sheet items are determined by a two-step process. First, the notional principal, or face value, amount of each off-balance sheet item generally is multiplied by a credit conversion factor to arrive at a balance sheet "credit equivalent amount." Second, the credit equivalent amount generally is assigned to the appropriate risk category, like any balance sheet asset, according to the obligor or, if relevant, the guarantor or the nature of the collateral.

3. The Director of the Division of Supervision and Consumer Protection (Director) of DSC may, on a case-by-case basis, determine the appropriate risk weight for any asset or credit equivalent amount that does not fit wholly within one of the risk categories set forth in this appendix E or that imposes risks on a bank that are not commensurate with the risk weight otherwise specified in this appendix E for the asset or credit equivalent amount. In addition, the Director of DSC may, on a case-by-case basis, determine the appropriate credit conversion factor for any off-balance sheet item that does not fit wholly within one of the credit conversion factors set forth in this appendix E or that imposes risks on a bank that are not commensurate with the credit conversion factor otherwise specified in this appendix E for the off-balance sheet item. In making such a determination, the Director of DSC will consider the similarity of the asset or off-balance sheet item to assets or off-balance sheet items explicitly treated in sections II.B and II.C of this appendix E, as well as other relevant factors.

B. Other Considerations

1. Indirect Holdings of Assets. Some of the assets on a bank's balance sheet may represent an indirect holding of a pool of assets; for example, mutual funds. An investment in shares of a mutual fund whose portfolio consists solely of various securities or money market instruments that, if held separately, would be assigned to different risk categories, generally is assigned to the risk category appropriate to the highest risk-weighted asset that the fund is permitted to hold in accordance with the stated investment objectives set forth in its prospectus. The bank may, at its option, assign the investment on a pro rata basis to different risk categories according to the investment limits in the fund's prospectus, but in no case will indirect holdings through shares in any mutual fund be assigned to a risk weight less than 20 percent. If the bank chooses to assign its investment on a pro rata basis, and the sum of the investment limits in the fund's prospectus exceeds 100 percent, the bank must assign risk weights in descending order. If, in order to maintain a necessary degree of short-term liquidity, a fund is permitted to hold an insignificant amount of its assets in short-term, highly liquid securities of superior credit quality that do not qualify for a preferential risk weight, such securities will generally be disregarded in determining the risk category to which the bank's holdings in the overall fund should be assigned. The prudent use of hedging instruments by a mutual fund to reduce the risk of its assets will not increase the risk weighting of the mutual fund investment. For example, the use of hedging instruments by a mutual fund to reduce the interest rate risk of its government bond portfolio will not increase the risk weight of that fund above the 20 percent category. Nonetheless, if the fund engages in any activities that appear speculative in nature or has any other characteristics that are inconsistent with the preferential risk weighting assigned to the fund's assets, holdings in the fund will be assigned to the 100 percent risk category.

2. Collateral (a) Cash and securities issued or guaranteed by the United States, other OECD central Governments and U.S. Government-sponsored entities. In determining risk weights of various assets, the following forms of collateral are formally recognized under this appendix E: cash on

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[8] Any assets deducted from capital when computing the numerator of the risk-based capital ratio will also be excluded from risk-weighted assets when computing the denominator of the ratio.

[9] In addition to mortgage servicing assets, nonmortgage servicing assets and purchased credit card relationships, certain other intangibles may be allowed if explicitly approved by the FDIC as part of the bank's regulatory capital on a specific case basis. In evaluating whether other types of intangibles should be recognized for regulatory capital purposes on a specific case basis, the FDIC will accord special attention to the general characteristics of the intangibles, including: (1) the separability of the intangible asset and the ability to sell it separate and apart from the bank or the bulk of the bank's assets, (2) the certainty that a readily identifiable stream of cash flows associated with the intangible asset can hold its value notwithstanding the future prospects of the bank, and (3) the existence of a market of sufficient depth to provide liquidity for the intangible asset.

[10] For risk-based capital purposes, these subsidiaries are generally defined as any company that is primarily engaged in banking or finance and in which the bank, either directly or indirectly, owns more than 50 percent of the outstanding voting stock but does not consolidate the company for regulatory capital purposes. In addition to investments in unconsolidated banking and finance subsidiaries, the FDIC may, on a case-by-case basis, deduct investments in associated companies or joint ventures, which are generally defined as any companies in which the bank, either directly or indirectly, owns 20 to 50 percent of the outstanding voting stock. Alternatively, the FDIC may, in certain cases, apply an appropriate risk-weighted capital charge against a bank's proportionate interest in the assets of associated companies and joint ventures. The definitions for subsidiaries, associated companies and joint ventures are contained in the instructions for the preparation of the Consolidated Reports of Condition and Income.

[11] Consolidation requirements for regulatory capital purposes generally follow the consolidation requirements set forth in the instructions for preparation of the consolidated Reports of Condition and Income. However, although investments in subsidiaries representing majority ownership in another federally-insured depository institution are not consolidated for purposes of the consolidated Reports of Condition and Income that are filed by the parent bank, they are generally consolidated for purposes of determining FDIC regulatory capital requirements. Therefore, investments in these depository institution subsidiaries generally will not be deducted for risk-based capital purposes; rather, assets and liabilities of such subsidiaries will be consolidated with those of the parent bank when calculating the risk-based capital ratio. In addition, although securities subsidiaries established pursuant to 12 CFR 337.4 are consolidated for Report of Condition and Income purposes, they are not consolidated for regulatory capital purposes.

[12] Any asset deducted from a bank's capital accounts when computing the numerator of the risk-based capital ratio will also be excluded from risk-weighted assets when calculating the denominator for the ratio.

deposit in the lending bank; securities issued or guaranteed by the United States, other central governments of the OECD-based group of countries,[13] U.S. Government agencies, and U.S. Government-sponsored agencies. Claims fully secured by such collateral are assigned to the 20 percent risk category.[14] The extent to which these securities are recognized as collateral for risk-based capital purposes is determined by their current market value. If a claim is partially secured, the portion of the claim that is not covered by the collateral is assigned to the risk category appropriate to the obligor or, if relevant, the guarantor.

(b) Collateral that requires an external rating. The following forms of liquid and readily marketable financial collateral also are recognized: both short- and long-term debt securities that are either issued or guaranteed by sovereigns where either the sovereign or the issued debt security are externally rated at least than investment grade by a NRSRO; issued by non-sovereigns where the issued security is externally rated at least investment grade by a NRSRO; or securitization exposures rated at least investment grade by a NRSRO. Claims or portion of claims collateralized by financial collateral externally rated at least investment grade are assigned to the risk weight appropriate to the collateral's external rating as set forth in section II.C.9(a) and Tables F1 and F2, or section II.B.5 and Tables A and B.[15] The extent to which externally rated securities are recognized as collateral for risk-based capital purposes is determined by their current market value. If a claim is partially secured, the pro rata portion of the claim that is not covered by the collateral is assigned to the risk category appropriate to the obligor or, if relevant, the guarantor. Notwithstanding Tables F1 and F2 there is a 20 percent risk weight floor on collateral.

3. Guarantees (a) Guarantees of the United States, U.S. Government-sponsored entities, OECD state and local governments, and certain banking organizations. Guarantees of the United States, U.S. Government agencies, U.S. Government-sponsored agencies, state and local governments of the OECD-based group of countries, U.S. depository institutions, and foreign banks in OECD countries are recognized under this appendix E. If a claim is partially guaranteed, the portion of the claim that is not fully covered by the guarantee is assigned to the risk category appropriate to the obligor or, if relevant, the collateral.

(b) Eligible guarantees by sovereigns and non-sovereigns. A claim backed by an eligible guarantee may be assigned to the risk weight in section II.C.9(a) and Table F1 of this appendix E corresponding to the eligible guarantor(s)' senior long-term debt rating or issuer rating, in the case of a sovereign. Portions of claims backed by an eligible guarantee may be assigned to the risk-weight category appropriate to the external credit rating of the eligible guarantor(s)' senior long-term debt or issuer rating in accordance with section II.C.9(a) and Table F1 of this appendix E.

4. Maturity. Maturity is generally not a factor in assigning items to risk categories with the exceptions of claims on non-OECD banks, commitments, and interest rate and foreign exchange rate related contracts. Except for commitments, short-term is defined as one year or less remaining maturity and long-term is defined as over one year remaining maturity. In the case of commitments, short-term is defined as one year or less original maturity and long-term is defined as over one year original maturity.

5. Recourse, Direct Credit Substitutes, Residual Interests and Mortgage- and Asset-Backed Securities. For purposes of this section II.B.5 of this appendix E, the following definitions will apply.

(a) Definitions. (i) *Credit derivative* means a contract that allows one party (''the protection purchaser'') to transfer the credit risk of an asset or off-balance sheet credit exposure to another party (the protection provider). The value of a credit derivative is dependent, at least in part, on the credit performance of the ''reference asset.''

(ii) *Credit-enhancing interest-only strip* is defined in § 325.2(g).

(iii) *Credit-enhancing representations and warranties* means representations and warranties that are made or assumed in connection with a transfer of assets (including loan servicing assets) and that obligate a bank to protect investors from losses arising from credit risk in the assets transferred or the loans serviced. Credit-enhancing representations and warranties include promises to protect a party from losses resulting from the default or nonperformance of another party or from an insufficiency in the value of the collateral. Credit-enhancing representations and warranties do not include:

(A) Early default clauses and similar warranties that permit the return of, or premium refund clauses covering, 1–4 family residential first mortgage loans that qualify for a 50 percent risk weight for a period not to exceed 120 days from the date of transfer. These warranties may cover only those loans that were originated within 1 year of the date of transfer;

(B) Premium refund clauses that cover assets guaranteed, in whole or in part, by the U.S. Government, a U.S. Government agency or a government-sponsored enterprise, provided the premium refund clauses are for a period not to exceed 120 days from the date of transfer; or

(C) Warranties that permit the return of assets in instances of misrepresentation, fraud or incomplete documentation.

(iv) *Direct credit substitute* means an arrangement in which a bank assumes, in form or in substance, credit risk associated with an on- or off-balance sheet credit exposure that was not previously owned by the bank (third-party asset) and the risk assumed by the bank exceeds the pro rata share of the bank's interest in the third-party asset. If the bank has no claim on the third-party asset, then the bank's assumption of any credit risk with respect to the third party asset is a direct credit substitute. Direct credit substitutes include, but are not limited to:

(A) Financial standby letters of credit, which includes any letter of credit or similar arrangement, however named or described, that support financial claims on a third party that exceeds a bank's pro rata share of losses in the financial claim;

(B) Guarantees, surety arrangements, credit derivatives, and similar instruments backing financial claims;

(C) Purchased subordinated interests or securities that absorb more than their pro rata share of credit losses from the underlying assets;

(D) Credit derivative contracts under which the bank assumes more than its pro rata share of credit risk on a third party asset or exposure;

(E) Loans or lines of credit that provide credit enhancement for the financial obligations of an account party;

(F) Purchased loan servicing assets if the servicer: is responsible for credit losses associated with the loans being serviced; is responsible for making mortgage servicer cash advances (unless the advances are not direct credit substitutes because they meet the conditions specified in II.B.5 (a)(ix) of this appendix E), or makes or assumes credit-enhancing representations and warranties with respect to the loans serviced;

(G) Clean-up calls on third party assets. Clean-up calls that are exercisable at the option of the bank (as servicer or as an affiliate of the servicer) when the pool balance is 10 percent or less of the original pool balance are not direct credit substitutes; and

(v) *Eligible ABCP liquidity facility* means a liquidity facility supporting ABCP, in form or in substance, that is subject to an asset

[13] Securities issued or guaranteed by OECD central governments are only recognized under the zero percent risk weight if they meet the collateral requirements of section II.C.1 of appendix E. The OECD-based group of countries comprises all full members of the Organization for Economic Cooperation and Development (OECD) regardless of entry date, as well as countries that have concluded special lending arrangements with the International Monetary Fund (IMF) associated with the IMF's General Arrangements to Borrow, but excludes any country that has rescheduled its external sovereign debt within the previous five years. As of November 1995, the OECD included the following countries: Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Japan, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States; and Saudi Arabia had concluded special lending arrangements with the IMF associated with the IMF's General Arrangements to Borrow. A rescheduling of external sovereign debt generally would include any renegotiation of terms arising from a country's inability or unwillingness to meet its external debt service obligations, but generally would not include renegotiations of debt in the normal course of business, such as renegotiation to allow the borrower to take advantage of a decline in interest rates or other change in market conditions.

[14] However, claims on or guaranteed by qualifying securities firms may receive a zero percent risk weight if such claims are: (i) collateralized by cash or securities issued by an OECD central government (including the United States) and (ii) meet the other requirements of section II.C.1(c) of this appendix E. See footnote 31.

[15] In the event that the external rating of a security used to collateralize a claim results in a higher risk weight than would have otherwise been assigned based on the claim's underlying asset type, obligor, or external rating, if applicable, then the lower risk weight appropriate to the underlying asset type or the obligor may be applied.

quality test at the time of draw that precludes funding against assets that are 90 days or more past due or in default. In addition, if the assets that an eligible ABCP liquidity facility is required to fund against are externally rated assets or exposures at the inception of the facility, the facility can be used to fund only those assets or exposures that are externally rated investment grade at the time of funding. Notwithstanding the eligibility requirements set forth in the two preceding sentences, a liquidity facility will be considered an eligible ABCP liquidity facility if the assets that are funded under the liquidity facility and which do not meet the eligibility requirements are guaranteed, either conditionally or unconditionally, by the U.S. government or its agencies, or by the central government of an OECD country.

(vi) *External rating* is defined above in the definitions to this appendix E.

(vii) *Face amount* means the notional principal, or face value, amount of an off-balance sheet item; the amortized cost of an asset not held for trading purposes; and the fair value of a trading asset.

(viii) *Financial asset* means cash or other monetary instrument, evidence of debt, evidence of an ownership interest in an entity, or a contract that conveys a right to receive or exchange cash or another financial instrument from another party.

(ix) *Financial standby letter of credit* means a letter of credit or similar arrangement that represents an irrevocable obligation to a third-party beneficiary:

(A) To receive money borrowed by, or advanced to, or for the account of, a second party (the account party), or

(B) To make payment on behalf of the account party, in the event that the account party fails to fulfill its obligation to the beneficiary.

(x) *Liquidity facility* means a legally binding commitment to provide liquidity support to ABCP by lending to, or purchasing assets from, any structure, program, or conduit in the event that funds are required to repay maturing ABCP.

(xi) *Mortgage servicer cash advance* means funds that a residential mortgage servicer advances to ensure an uninterrupted flow of payments, including advances made to cover foreclosure costs or other expenses to facilitate the timely collection of the loan. A mortgage servicer cash advance is not a recourse obligation or a direct credit substitute if:

(A) The mortgage servicer is entitled to full reimbursement and this right is not subordinated to other claims on the cash flows from the underlying asset pool; or

(B) For any one loan, the servicer's obligation to make nonreimbursable advances is contractually limited to an insignificant amount of the outstanding principal of that loan.

(xii) *Nationally recognized statistical rating organization (NRSRO)* means an entity recognized by the Division of Market Regulation of the Securities and Exchange Commission (or any successor Division) (Commission) as a nationally recognized statistical rating organization for various purposes, including the Commission's uniform net capital requirements for brokers and dealers (17 CFR 240.15c3–1).

(xiii) *Recourse* means an arrangement in which a bank retains, in form or in substance, of any credit risk directly or indirectly associated with an asset it has sold (in accordance with generally accepted accounting principles) that exceeds a pro rata share of the bank's claim on the asset. If a bank has no claim on an asset it has sold, then the retention of any credit risk is recourse. A recourse obligation typically arises when an institution transfers assets in a sale and retains an obligation to repurchase the assets or absorb losses due to a default of principal or interest or any other deficiency in the performance of the underlying obligor or some other party. Recourse may exist implicitly where a bank provides credit enhancement beyond any contractual obligation to support assets it has sold. The following are examples of recourse arrangements:

(A) Credit-enhancing representations and warranties made on the transferred assets;

(B) Loan servicing assets retained pursuant to an agreement under which the bank: is responsible for losses associated with the loans being serviced; or is responsible for making mortgage servicer cash advances (unless the advances are not a recourse obligation because they meet the conditions specified in section II.B.5(a)(xi) of this appendix E).

(C) Retained subordinated interests that absorb more than their pro rata share of losses from the underlying assets;

(D) Assets sold under an agreement to repurchase, if the assets are not already included on the balance sheet;

(E) Loan strips sold without contractual recourse where the maturity of the transferred portion of the loan is shorter than the maturity of the commitment under which the loan is drawn;

(F) Credit derivative contracts under which the bank retains more than its pro rata share of credit risk on transferred assets;

(G) Clean-up calls at inception that are greater than 10 percent of the balance of the original pool of transferred loans. Clean-up calls that are 10 percent or less of the original pool balance that are exercisable at the option of the bank are not recourse arrangements; and

(H) Liquidity facilities that provide liquidity support to ABCP (other than eligible ABCP liquidity facilities).

(xiv) *Residual interest* means any on-balance sheet asset that represents an interest (including a beneficial interest) created by a transfer that qualifies as a sale (in accordance with generally accepted accounting principles (GAAP)) of financial assets, whether through a securitization or otherwise, and that exposes a bank to credit risk directly or indirectly associated with the transferred assets that exceeds a pro rata share of the bank's claim on the assets, whether through subordination provisions or other credit enhancement techniques. Residual interests generally include credit-enhancing I/Os, spread accounts, cash collateral accounts, retained subordinated interests, other forms of over-collateralization, and similar assets that function as a credit enhancement. Residual interests further include those exposures that, in substance, cause the bank to retain the credit risk of an asset or exposure that had qualified as a residual interest before it was sold. Residual interests generally do not include interests purchased from a third party, except that purchased credit-enhancing I/Os are residual interests for purposes of the risk-based capital treatment in this appendix.

(xv) *Risk participation* means a participation in which the originating party remains liable to the beneficiary for the full amount of an obligation (e.g., a direct credit substitute) notwithstanding that another party has acquired a participation in that obligation.

(xvi) *Securitization* means the pooling and repackaging by a special purpose entity of assets or other credit exposures into securities that can be sold to investors. Securitization includes transactions that create stratified credit risk positions whose performance is dependent upon an underlying pool of credit exposures, including loans and commitments.

(xvii) *Sponsor* means a bank that establishes an ABCP program; approves the sellers permitted to participate in the program; approves the asset pools to be purchased by the program; or administers the ABCP program by monitoring the assets, arranging for debt placement, compiling monthly reports, or ensuring compliance with the program documents and with the program's credit and investment policy.

(xviii) *Structured finance program* means a program where receivable interests and asset-backed securities issued by multiple participants are purchased by a special purpose entity that repackages those exposures into securities that can be sold to investors. Structured finance programs allocate credit risks, generally, between the participants and credit enhancement provided to the program.

(xix) *Traded position* means a position that has an external rating and is retained, assumed or issued in connection with an asset securitization, where there is a reasonable expectation that, in the near future, the rating will be relied upon by unaffiliated investors to purchase the position; or an unaffiliated third party to enter into a transaction involving the position, such as a purchase, loan, or repurchase agreement.

(b) Credit equivalent amounts and risk weights of recourse obligations and direct credit substitutes—(i) General rule for determining the credit-equivalent amount. Except as otherwise provided, the credit-equivalent amount for a recourse obligation or direct credit substitute is the full amount of the credit-enhanced assets for which the bank directly or indirectly retains or assumes credit risk multiplied by a 100% conversion factor. Thus, a bank that extends a partial direct credit substitute, e.g., a financial standby letter of credit that absorbs the first 10 percent of loss on a transaction, must maintain capital against the full amount of the assets being supported.

(ii) Risk-weight factor. To determine the bank's risk-weighted assets for an off-balance sheet recourse obligation or a direct credit substitute, the credit equivalent amount is assigned to the risk category appropriate to the obligor in the underlying transaction, after considering any associated guarantees or collateral. For a direct credit substitute that is an on-balance sheet asset, e.g., a purchased subordinated security, a bank must calculate risk-weighted assets using the amount of the direct credit substitute and the full amount of the assets it supports, i.e., all the more senior positions in the structure. The treatment covered in this paragraph (ii) is subject to the low-level exposure rule provided in section II.B.5(h)(i) of this appendix E.

(c) Credit equivalent amount and risk weight of participations in, and syndications of, direct credit substitutes. Subject to the low-level exposure rule provided in section II.B.5(h)(i) of this appendix E, the credit equivalent amount for a participation interest in, or syndication of, a direct credit substitute (excluding purchased credit-enhancing interest-only strips) is calculated and risk weighted as follows:

(i) Treatment for direct credit substitutes for which a bank has conveyed a risk participation. In the case of a direct credit substitute in which a bank has conveyed a risk participation, the full amount of the assets that are supported by the direct credit substitute is converted to a credit equivalent amount using a 100% conversion factor. However, the pro rata share of the credit equivalent amount that has been conveyed through a risk participation is then assigned to whichever risk-weight category is lower: the risk-weight category appropriate to the obligor in the underlying transaction, after considering any associated guarantees or collateral, or the risk-weight category appropriate to the party acquiring the participation. The pro rata share of the credit equivalent amount that has not been participated out is assigned to the risk-weight category appropriate to the obligor guarantor, or collateral. For example, the pro rata share of the full amount of the assets supported, in whole or in part, by a direct credit substitute conveyed as a risk participation to a U.S. domestic depository institution or an OECD bank is assigned to the 20 percent risk category.[16]

(ii) Treatment for direct credit substitutes in which the bank has acquired a risk participation. In the case of a direct credit substitute in which the bank has acquired a risk participation, the acquiring bank's pro rata share of the direct credit substitute is multiplied by the full amount of the assets that are supported by the direct credit substitute and converted using a 100% credit conversion factor. The resulting credit equivalent amount is then assigned to the risk-weight category appropriate to the obligor in the underlying transaction, after considering any associated guarantees or collateral.

(iii) Treatment for direct credit substitutes related to syndications. In the case of a direct credit substitute that takes the form of a syndication where each party is obligated only for its pro rata share of the risk and there is no recourse to the originating entity, each bank's credit equivalent amount will be calculated by multiplying only its pro rata share of the assets supported by the direct credit substitute by a 100% conversion factor. The resulting credit equivalent amount is then assigned to the risk-weight category appropriate to the obligor in the underlying transaction, after considering any associated guarantees or collateral.

(d) Positions with external ratings: credit-equivalent amounts and risk weights.—(i) Traded positions. With respect to a recourse obligation, direct credit substitute, residual interest (other than a credit-enhancing interest-only strip) or mortgage- or asset-backed security that is a ''traded position'' and that has received an external rating on a long-term position that is one grade below investment grade or better or a short-term position that is investment grade, the bank may multiply the face amount of the position by the appropriate risk weight, determined in accordance with Table A or B of this appendix E, as appropriate.[17] If a traded position receives more than one external rating, the lowest rating will apply and that external rating must apply to the claim or exposure in its entirety. Thus, for banks that hold split or partially-rated instruments, the risk weight that corresponds to the lowest component rating will apply to the entire exposure. For example, a purchased subordinated security where the principal component is rated BBB, but the interest component is rated B, will be subject to the gross-up treatment accorded to residual interests rated B or lower. Similarly, if a portion of an instrument is unrated, the entire position will be treated as if it were unrated. The FDIC reserves the authority to override the use of certain ratings or the ratings on certain instruments, either on a case-by-case basis or through broader supervisory policy, if necessary or appropriate to address the risk that an instrument poses to a bank.

TABLE A.—RISK WEIGHTS FOR LONG-TERM EXTERNAL RATINGS OF SECURITIZATION EXPOSURES

Long-term rating category	Examples	Risk weight (percent)
Highest investment grade rating	AAA	20
Second-highest investment grade rating	AA	20
Third-highest investment grade rating	A	35
Lowest-investment grade rating—plus	BBB+	50
Lowest-investment grade rating—naught	BBB	75
Lowest-investment grade rating—negative	BBB−	100
One category below investment grade—plus & naught	BB+, BB	200
One category below investment grade—negative	BB−	200
Two or more categories below investment grade	B, CCC	Dollar for Dollar
Unrated	n/a	Dollar for Dollar

TABLE B.—RISK WEIGHTS FOR SHORT-TERM EXTERNAL RATINGS OF SECURITIZATION EXPOSURES

Short-term rating category	Examples	Risk weight (percent)
Highest investment grade rating	A–1, P–1	20
Second-highest investment grade rating	A–2, P–2	35
Lowest investment grade rating	A–3, P–3	75
Unrated	n/a	

[16] A risk participation with a remaining maturity of one year or less that is conveyed to a non-OECD bank is also assigned to the 20 percent risk category.

[17] Stripped mortgage-backed securities and similar instruments, such as interest-only strips that are not credit-enhancing and principal-only strips, must be assigned to the 100% risk category.

(ii) Non-traded positions. A recourse obligation, direct credit substitute, residual interest (but not a credit-enhancing interest-only strip) or mortgage- or asset-backed security extended in connection with a securitization that is not a ''traded position'' may be assigned a risk weight in accordance with section II.B.5(d)(i) of this appendix E if:

(A) It has been externally rated by more than one NRSRO;

(B) It has received an external rating on a long-term position that is one category below investment grade or better or a short-term position that is investment grade by all NRSROs providing a rating;

(C) The ratings are publicly available; and

(D) The ratings are based on the same criteria used to rate traded positions. If the ratings are different, the lowest rating will determine the risk category to which the recourse obligation, direct credit substitute, residual interest, or mortgage- or asset-backed security will be assigned.

(e) Senior positions not externally rated. For a recourse obligation, direct credit substitute, residual interest or mortgage-or asset-backed security that is not externally rated but is senior in all features to a traded position (including collateralization and maturity), a bank may apply a risk weight to the face amount of the senior position in accordance with section II.B.5(d)(i) of this appendix E, based upon the risk weight of the traded position, subject to any current or prospective supervisory guidance and the bank satisfying the FDIC that this treatment is appropriate. This section will apply only if the traded position provides substantial credit support for the entire life of the unrated position.

(f) Residual interests—(i) Concentration limit on credit-enhancing interest-only strips. In addition to the capital requirement provided by section II.B.5(f)(ii) of this appendix E, a bank must deduct from Tier 1 capital the face amount of all credit-enhancing interest-only strips in excess of 25 percent of Tier 1 capital in accordance with § 325.5(f)(3).

(ii) Credit-enhancing interest-only strip capital requirement. After applying the concentration limit to credit-enhancing interest-only strips in accordance with § 325.5(f)(3), a bank must maintain risk-based capital for a credit-enhancing interest-only strip, equal to the remaining face amount of the credit-enhancing interest-only strip (net of the remaining proportional amount of any existing associated deferred tax liability recorded on the balance sheet), even if the amount if risk-based capital required to be maintained exceeds the full risk-based capital requirement for the assets transferred. Transactions that, in substance, result in the retention of credit risk associated with a transferred credit-enhancing interest-only strip will be treated as if the credit-enhancing interest-only strip was retained by the bank and not transferred.

(iii) Other residual interests capital requirement. Except as otherwise provided in section II.B.5(d) or (e) of this appendix E, a bank must maintain risk-based capital for a residual interest (excluding a credit-enhancing interest-only strip) equal to the face amount of the residual interest (net of any existing associated deferred tax liability recorded on the balance sheet), even if the amount of risk-based capital required to be maintained exceeds the full risk-based capital requirement for the assets transferred. Transactions that, in substance, result in the retention of credit risk associated with a transferred residual interest will be treated as if the residual interest was retained by the bank and not transferred.

(iv) Residual interests and other recourse obligations. Where the aggregate capital requirement for residual interests (including credit-enhancing interest-only strips) and recourse obligations arising from the same transfer of assets exceed the full risk-based capital requirement for assets transferred, a bank must maintain risk-based capital equal to the greater of the risk-based capital requirement for the residual interest as calculated under sections II.B.5(f)(ii) through (iii) of this appendix E or the full risk-based capital requirement for the assets transferred.

(g) Positions that are not rated by an NRSRO. A bank's position (other than a residual interest) in a securitization or structured finance program that is not rated by an NRSRO may be risk-weighted based on the bank's determination of the credit rating of the position, as specified in Table C of this appendix E, multiplied by the face amount of the position. In order to qualify for this treatment, the bank's system for determining the credit rating of the position must meet one of the three alternative standards set out in section II.B.5(g)(i) through (iii) of this appendix E. Table C

Rating category	Examples	Risk weight (percent)
Investment grade	BBB or other	100
One category below investment grade	BB	200

(*i*) *Internal risk rating used for asset-backed programs.* A bank extends a direct credit substitute (but not a purchased credit-enhancing interest-only strip) to an asset-backed commercial paper program sponsored by the bank and the bank is able to demonstrate to the satisfaction of the FDIC, prior to relying upon its use, that the bank's internal credit risk rating system is adequate. Adequate internal credit risk rating systems usually contain the following criteria: [18]

(A) The internal credit risk rating system is an integral part of the bank's risk management system that explicitly incorporates the full range of risks arising form a bank's participation in securitization activities;

(B) Internal credit ratings are linked to measurable outcomes, such as the probability that the position will experience any loss, the position's expected loss given default, and the degree of variance in losses given default on that position;

(C) The internal credit risk rating system must separately consider the risk associated with the underlying loans or borrowers, and the risk associated with the structure of a particular securitization transaction;

(D) The internal credit risk rating system identifies gradations of risk among ''pass'' assets and other risk positions;

(E) The internal credit risk rating system must have clear, explicit criteria (including for subjective factors), that are used to classify assets into each internal risk grade;

(F) The bank must have independent credit risk management or loan review personnel assigning or reviewing the credit risk ratings;

(G) An internal audit procedure should periodically verify that internal risk ratings are assigned in accordance with the bank's established criteria;

(H) The bank must monitor the performance of the internal credit risk ratings assigned to nonrated, nontraded direct credit substitutes over time to determine the appropriateness of the initial credit risk rating assignment and adjust individual credit risk ratings, or the overall internal credit risk ratings system, as needed; and

(I) The internal credit risk rating system must make credit risk rating assumptions that are consistent with, or more conservative than, the credit risk rating assumptions and methodologies of NRSROs.

(ii) Program Ratings. A bank extends a direct credit substitute or retains a recourse obligation (but not a residual interest) in connection with a structured finance program and an NRSRO has reviewed the terms of the program and stated a rating for positions associated with the program. If the program has options for different combinations of assets, standards, internal credit enhancements and other relevant factors, and the NRSRO specified ranges of rating categories to them, the bank may apply the rating category applicable to the option that corresponds to the bank's position. In order to rely on a program rating, the bank must demonstrate to the FDIC's satisfaction that the credit risk rating assigned to the program meets the same standards generally used by NRSROs for rating traded positions. The bank must also demonstrate to the FDIC's satisfaction that the criteria underlying the NRSRO's assignment of ratings for the program are satisfied for the particular position issued by the bank. If a bank participates in a securitization sponsored by another party, the FDIC may authorize the bank to use this approach based

[18] The adequacy of a bank's use of its internal credit risk system must be demonstrated to the FDIC considering the criteria listed on this section and the size and complexity of the credit exposures assumed by the bank.

on a program rating obtained by the sponsor of the program.

(iii) Computer Program. A bank is using an acceptable credit assessment computer program that has been developed by an NRSRO to determine the rating of a direct credit substitute or recourse obligation (but not a residual interest) extended in connection with a structured finance program. In order to rely on the rating determined by the computer program, the bank must demonstrate to the FDIC's satisfaction that ratings under the program correspond credibly and reliably with the ratings of traded positions. The bank must also demonstrate to the FDIC's satisfaction the credibility of the program in financial markets, the reliability of the program in assessing credit risk, the applicability of the program to the bank's position, and the proper implementation of the program.

(h) Limitations on risk-based capital requirements—(i) Low-level exposure rule. If the maximum exposure to loss retained or assumed by a bank in connection with a recourse obligation, a direct credit substitute, or a residual interest is less than the effective risk-based capital requirement for the credit-enhanced assets, the risk-based capital required under this appendix E is limited to the bank's maximum contractual exposure, less any recourse liability account established in accordance with generally accepted accounting principles. This limitation does not apply when a bank provides credit enhancement beyond any contractual obligation to support assets it has sold.

(ii) Mortgage-related securities or participation certificates retained in a mortgage loan swap. If a bank holds a mortgage-related security or a participation certificate as a result of a mortgage loan swap with recourse, capital is required to support the recourse obligation plus the percentage of the mortgage-related security or participation certificate that is not covered by the recourse obligation. The total amount of capital required for the on-balance sheet asset and the recourse obligation, however, is limited to the capital requirement for the underlying loans, calculated as if the bank continued to hold these loans as an on-balance sheet asset.

(iii) Related on-balance sheet assets. If a recourse obligation or direct credit substitute also appears as a balance sheet asset, the asset is risk-weighted only under this section II.B.5 of this appendix E, except in the case of loan servicing assets and similar arrangements with embedded recourse obligations or direct credit substitutes. In that case, the on-balance sheet servicing assets and the related recourse obligations or direct credit substitutes must both be separately risk weighted and incorporated into the risk-based capital calculation.

(i) Alternative Capital Calculation for Small Business Obligations.

(i) Definitions. For purposes of this section II.B.5(i):

(A) *Qualified bank* means a bank that: is well capitalized as defined in § 325.103(b)(1) without applying the capital treatment described in this section II.B.5(i), or is adequately capitalized as defined in § 325.103(b)(2) without applying the capital treatment described in this section II.B.5(i) and has received written permission by order of the FDIC to apply the capital treatment described in this section II.B.5(i).

(B) *Small business* means a business that meets the criteria for a small business concern established by the Small Business Administration in 13 CFR part 121 pursuant to 15 U.S.C. 632.

(ii) *Capital and reserve requirements.* Notwithstanding the risk-based capital treatment outlined in any other paragraph (other than paragraph (i) of this section II.B.5), with respect to a transfer with recourse of a small business loan or a lease to a small business of personal property that is a sale under generally accepted accounting principles, and for which the bank establishes and maintains a non-capital reserve under generally accepted accounting principles sufficient to meet the reasonable estimated liability of the bank under the recourse arrangement; a qualified bank may elect to include only the face amount of its recourse in its risk-weighted assets for purposes of calculating the bank's risk-based capital ratio.

(iii) *Limit on aggregate amount of recourse.* The total outstanding amount of recourse retained by a qualified bank with respect to transfers of small business loans and leases to small businesses of personal property and included in the risk-weighted assets of the bank as described in section II.B.5(i)(ii) of this appendix E may not exceed 15 percent of the bank's total risk-based capital, unless the FDIC specifies a greater amount by order.

(iv) *Bank that ceases to be qualified or that exceeds aggregate limit.* If a bank ceases to be a qualified bank or exceeds the aggregate limit in section II.B.5(i)(iii) of this appendix E, the bank may continue to apply the capital treatment described in section II.B.5(i)(ii) of this appendix E to transfers of small business loans and leases to small businesses of personal property that occurred when the bank was qualified and did not exceed the limit.

(v) *Prompt correction action not affected.* (A) A bank shall compute its capital without regard to this section II.B.5(i) for purposes of prompt corrective action (12 U.S.C. 1831o) unless the bank is a well capitalized bank (without applying the capital treatment described in this section II.B.5(i)) and, after applying the capital treatment described in this section II.B.5(i), the bank would be well capitalized.

(B) A bank shall compute its capital without regard to this section II.B.5(i) for purposes of 12 U.S.C. 1831o(g) regardless of the bank's capital level.

6. *Nonfinancial equity investments.* (a) General. A bank must deduct from its Tier 1 capital the sum of the appropriate percentage (as determined below) of the adjusted carrying value of all nonfinancial equity investments held by the bank or by its direct or indirect subsidiaries. For purposes of this section II.B.6, investments held by a bank include all investments held directly or indirectly by the bank or any of its subsidiaries.

(b) Scope of nonfinancial equity investments. A nonfinancial equity investment means any equity investment held by the bank in a nonfinancial company: through a small business investment company (SBIC) under section 302(b) of the Small Business Investment Act of 1958 (15 U.S.C. 682(b)); [19] under the portfolio investment provisions of Regulation K issued by the Board of Governors of the Federal Reserve System (12 CFR 211.8(c)(3)); or under section 24 of the Federal Deposit Insurance Act (12 U.S.C. 1831a), other than an investment held in accordance with section 24(f) of that Act.[20] A nonfinancial company is an entity that engages in any activity that has not been determined to be permissible for the bank to conduct directly, or to be financial in nature or incidental to financial activities under section 4(k) of the Bank Holding Company Act (12 U.S.C. 1843(k)).

(c) *Amount of deduction from core capital.* (i) The bank must deduct from its Tier 1 capital the sum of the appropriate percentages, as set forth in Table D following this paragraph, of the adjusted carrying value of all nonfinancial equity investments held by the bank. The amount of the percentage deduction increases as the aggregate amount of nonfinancial equity investments held by the bank increases as a percentage of the bank's Tier 1 capital.

[19] An equity investment made under section 302(b) of the Small Business Investment Act of 1958 in a SBIC that is not consolidated with the bank is treated as a nonfinancial equity investment.

[20] The Board of Directors of the FDIC, acting directly, may, in exceptional cases and after a review of the proposed activity, permit a lower capital deduction for investments approved by the Board of Directors under section 24 of the FDI Act so long as the bank's investments under section 24 and SBIC investments represent, in the aggregate, less than 15 percent of the Tier 1 capital of the bank. The FDIC reserves the authority to impose higher capital charges on any investment where appropriate.

TABLE D.—DEDUCTION FOR NONFINANCIAL EQUITY INVESTMENTS

Aggregate adjusted carrying value of all nonfinancial equity investments held directly or indirectly by the bank (as a percentage of the Tier 1 capital of the bank) [1]	Deduction from Tier 1 Capital (as a percentage of the adjusted carrying value of the investment) (percent)
Less than 15 percent	8
15 percent to 24.99 percent	12
25 percent and above	25

[1] For purposes of calculating the adjusted carrying value of nonfinancial equity investments as a percentage of Tier 1 capital. Tier 1 capital is defined as the sum of core capital elements net of goodwill and net of all identifiable intangible assets other than mortgage servicing assets, nonmortgage servicing assets and purchased credit card relationships, but prior to the deduction for any disallowed mortgage servicing assets, any disallowed nonmortgage servicing assets, any disallowed purchased credit card relationships, any disallowed credit-enhancing interest-only strips (both purchased and retained), any disallowed deferred tax assets, and any nonfinancial equity investments.

(ii) These deductions are applied on a marginal basis to the portions of the adjusted carrying value of nonfinancial equity investments that fall within the specified ranges of the parent bank's Tier 1 capital. For example, if the adjusted carrying value of all nonfinancial equity investments held by a bank equals 20 percent of the Tier 1 capital of the bank, then the amount of the deduction would be 8 percent of the adjusted carrying value of all investments up to 15 percent of the bank's Tier capital, and 12 percent of the adjusted carrying value of all investments in excess of 15 percent of the bank's Tier 1 capital.

(iii) The total adjusted carrying value of any nonfinancial equity investment that is subject to deduction under this paragraph is excluded from the bank's risk-weighted assets for purposes of computing the denominator of the bank's risk-based capital ratio and from total assets for purposes of calculating the denominator of the leverage ratio.[21]

(iv) This appendix E establishes minimum risk-based capital ratios and banks are at all times expected to maintain capital commensurate with the level and nature of the risks to which they are exposed. The risk to a bank from nonfinancial equity investments increases with its concentration in such investments and strong capital levels above the minimum requirements are particularly important when a bank has a high degree of concentration in nonfinancial equity investments (e.g., in excess of 50 percent of Tier 1 capital). The FDIC intends to monitor banks and apply heightened supervision to equity investment activities as appropriate, including where the bank has a high degree of concentration in nonfinancial equity investments, to ensure that each bank maintains capital levels that are appropriate in light of its equity investment activities. The FDIC also reserves authority to impose a higher capital charge in any case where the circumstances, such as the level of risk of the particular investment or portfolio of investments, the risk management systems of the bank, or other information, indicate that a higher minimum capital requirement is appropriate.

(d) *SBIC investments.* (i) No deduction is required for nonfinancial equity investments that are held by a bank through one or more SBICs that are consolidated with the bank or in one or more SBICs that are not consolidated with the bank to the extent that all such investments, in the aggregate, do not exceed 15 percent of the bank's Tier 1 capital. Any nonfinancial equity investment that is held through an SBIC or in an SBIC and that is not required to be deducted from Tier 1 capital under this section II.B.6(d) will be assigned a 100 percent risk-weight and included in the bank's consolidated risk-weighted assets.[22]

(ii) To the extent the adjusted carrying value of all nonfinancial equity investments that a bank holds through one or more SBICs that are consolidated with the bank or in one or more SBICs that are not consolidated with the bank exceeds, in the aggregate, 15 percent of the bank's Tier 1 capital, the appropriate percentage of such amounts (as set forth in the table in section II.B.6(c)(i)) must be deducted from the bank's common stockholders' equity in determining the bank's Tier 1 capital. In addition, the aggregate adjusted carrying value of all nonfinancial equity investments held by a bank through a consolidated SBIC and in a non-consolidated SBIC (including any investments for which no deduction is required) must be included in determining, for purposes of the table in section II.B.6(c)(i), the total amount of nonfinancial equity investments held by the bank in relation to its Tier 1 capital.

(e) *Transition provisions.* No deduction under this section II.B.6 is required to be made with respect to the adjusted carrying value of any nonfinancial equity investment (or portion of such an investment) that was made by the bank prior to March 13, 2000, or that was made by the bank after such date pursuant to a binding written commitment [23] entered into prior to March 13, 2000, provided that in either case the bank has continuously held the investment since the relevant investment date.[24] For purposes of this section II.B.6(e) a nonfinancial equity investment made prior to March 13, 2000, includes any shares or other interests

[21] For example, if 8 percent of the adjusted carrying value of a nonfinancial equity investment is deducted from Tier 1 capital, the entire adjusted carrying value of the investment will be excluded from both risk-weighted assets and total assets in calculating the respective denominators for the risk-based capital and leverage ratios.

[22] If a bank has an investment in a SBIC that is consolidated for accounting purposes but that is not wholly owned by the bank, the adjusted carrying value of the bank's nonfinancial equity investments through the SBIC is equal to the bank's proportionate share of the adjusted carrying value of the SBIC's investments in nonfinancial companies. The remainder of the SBIC's adjusted carrying value (i.e., the minority interest holders' proportionate share) is excluded from the risk-weighted assets of the bank. If a bank has an investment in a SBIC that is not consolidated for accounting purposes and has current information that identifies the percentage of the SBIC's assets that are equity investments in nonfinancial companies, the bank may reduce the adjusted carrying value of its investment in the SBIC proportionately to reflect the percentage of the adjusted carrying value of the SBIC's assets that are not equity investments in nonfinancial companies. If a bank reduces the adjusted carrying value of its investment in a non-consolidated SBIC to reflect financial investments of the SBIC, the amount of the adjustment will be risk-weighted at 100 percent and included in the bank's risk-weighted assets.

[23] A "binding written commitment" means a legally binding written agreement that requires the bank to acquire shares or other equity of the company, or make a capital contribution to the company, under terms and conditions set forth in the agreement. Options, warrants, and other agreements that give a bank the right to acquire equity or make an investment, but do not require the bank to take such actions, are not considered a binding written commitment for purposes of this section II.B.6(e).

[24] For example, if a bank made an equity investment in 100 shares of a nonfinancial company prior to March 13, 2000, the adjusted carrying value of that investment would not be subject to a deduction under this section II.B.6. However, if the bank made any additional equity investment in the company after March 13, 2000, such as by purchasing additional shares of the company (including through the exercise of options or warrants acquired before or after March 13, 2000) or by making a capital contribution to the company and such investment was not made pursuant to a binding written commitment entered into before March 13, 2000, the adjusted carrying value of the additional investment would be subject to a deduction under this section II.B.6. In addition, if the bank sold and repurchased, after March 13, 2000, 40 shares of the company, the adjusted carrying value of those 40 shares would be subject to a deduction under this section II.B.6.

received by the bank through a stock split or stock dividend on an investment made prior to March 13, 2000, provided the bank provides no consideration for the shares or interests received and the transaction does not materially increase the bank's proportional interest in the company. The exercise on or after March 13, 2000, of options or warrants acquired prior to March 13, 2000, is not considered to be an investment made prior to March 13, 2000, if the bank provides any consideration for the shares or interests received upon exercise of the options or warrants. Any nonfinancial equity investment (or portion thereof) that is not required to be deducted from Tier 1 capital under this section II.B.6(e) must be included in determining the total amount of nonfinancial equity investments held by the bank in relation to its Tier 1 capital for purposes of the table in section II.B.6(c)(i). In addition, any nonfinancial equity investment (or portion thereof) that is not required to be deducted from Tier 1 capital under this section II.B.6(e) will be assigned a 100-percent risk weight and included in the bank's consolidated risk-weighted assets.

(f) *Adjusted carrying value.* (i) For purposes of this section II.B.6, the ''adjusted carrying value'' of investments is the aggregate value at which the investments are carried on the balance sheet of the bank reduced by any unrealized gains on those investments that are reflected in such carrying value but excluded from the bank's Tier 1 capital and associated deferred tax liabilities. For example, for equity investments held as available-for-sale (AFS), the adjusted carrying value of the investments would be the aggregate carrying value of those investments (as reflected on the consolidated balance sheet of the bank) less any unrealized gains on those investments that are included in other comprehensive income and not reflected in Tier 1 capital, and associated deferred tax liabilities.[25]

(ii) As discussed above with respect to consolidated SBICs, some equity investments may be in companies that are consolidated for accounting purposes. For investments in a nonfinancial company that is consolidated for accounting purposes under generally accepted accounting principles, the bank's adjusted carrying value of the investment is determined under the equity method of accounting (net of any intangibles associated with the investment that are deducted from the bank's core capital in accordance with section I–2.B(a)(i) of this appendix E). Even though the assets of the nonfinancial company are consolidated for accounting purposes, these assets (as well as the credit equivalent amounts of the company's off-balance sheet items) should be excluded from the bank's risk-weighted assets for regulatory capital purposes.

(g) *Equity investments.* For purposes of this section II.B.6, an equity investment means any equity instrument (including common stock, preferred stock, partnership interests, interests in limited liability companies, trust certificates and warrants and call options that give the holder the right to purchase an equity instrument), any equity feature of a debt instrument (such as a warrant or call option), and any debt instrument that is convertible into equity where the instrument or feature is held under one of the legal authorities listed in section II.B.6(b) of this appendix E. An investment in any other instrument (including subordinated debt) may be treated as an equity investment if, in the judgment of the FDIC, the instrument is the functional equivalent of equity or exposes the bank to essentially the same risks as an equity instrument.

7. *Asset-backed commercial paper programs.* (a) An asset-backed commercial paper (ABCP) program means a program that primarily issues externally rated commercial paper backed by assets or other exposures held in a bankruptcy-remote, special purpose entity.

(b) A bank that qualifies as a primary beneficiary and must consolidate an ABCP program that is defined as a variable interest entity under GAAP may exclude the consolidated ABCP program assets from risk-weighted assets provided that the bank is the sponsor of the ABCP program. If a bank excludes such consolidated ABCP program assets, the bank must assess the appropriate risk-based capital charge against any exposures of the bank arising in connection with such ABCP programs, including direct credit substitutes, recourse obligations, residual interests, liquidity facilities, and loans, in accordance with sections II.B.5, II.C, and II.D of this appendix E.

(c) If a bank has multiple overlapping exposures (such as a program-wide credit enhancement and multiple pool-specific liquidity facilities) to an ABCP program that is not consolidated for risk-based capital purposes, the bank is not required to hold capital under duplicative risk-based capital requirements under this appendix E against the overlapping position. Instead, the bank should apply to the overlapping position the applicable risk-based capital treatment that results in the highest capital charge.

8. *Securitizations of revolving credit with early amortization provisions.*

(a) Definitions. For purposes of this section II.B.8, the following definitions will apply:

(i) *Early amortization provision* means a provision in the documentation governing a securitization that, when triggered, causes investors in the securitization exposures to be repaid before the original stated maturity of the securitization exposures, unless the provision is triggered solely by events not directly related to the performance of the underlying exposures or the originating bank (such as material changes in tax laws or regulations).

(ii) *Excess spread* means gross finance charge collections and other income received by a trust or special purpose entity minus interest paid to the investors in the securitization exposures, servicing fees, charge-offs, and other similar trust or special purpose entity expenses.

(iii) *Excess spread trapping point* means the point at which the bank is required by the documentation governing a securitization to divert and hold excess spread in a spread or reserve account, expressed as a percent.

(iv) *Investors' interest* is the total securitization exposure represented by securities issued by a trust or special purpose entity to investors.

(v) *Revolving Credit* means a line of credit where the borrower is permitted to vary both the drawn amount and the amount of repayment within an agreed limit.

(b) Capital charge for revolving securitizations with an early amortizations trigger. A bank that securitizes revolving credits where the securitization structure contains an early amortization provision must maintain risk-based capital against the investors' interest as required under this section.

(c) Calculation. Capital for securitizations of revolving credit exposures that incorporate early-amortization provisions will be assessed based on a comparison of the securitizations' three-month average excess spread against the excess spread trapping point.

(i) To calculate the securitization's excess spread trapping point ratio, a bank must first calculate the three-month average of:

(A) The dollar amount of excess spread divided by

(B) The outstanding principal balance of the underlying pool of exposures at the end of each of the prior three months.

(ii) This annualized three-month average of excess spread is then divided by the excess spread trapping point that is required by the securitization structure.

(iii) The excess spread trapping point ratio is compared to the ratios contained in Table E to determine the appropriate conversion factor to apply to the investors' interest.

(iv) The amount of investors' interest after conversion is then assigned capital based on the underlying obligor, collateral, or guarantor.

(d) Default for certain securitizations. For purposes of section II.B.8 of this appendix E, for securitizations that do not require excess spread to be trapped, or that specify the trapping points based primarily on the performance measures other than the three-month average excess spread, the excess spread trapping point is 4.5.

(e) Limit. For a bank subject to the early amortization requirements in this section II.B.8 of appendix E, the aggregate risk-based capital requirement for all of the bank's exposures to a securitization of revolving credit is limited to the greater of the risk-based capital requirement for residual interests (as calculated under section II.B.5 of this appendix E); or the risk-based capital requirement for the underlying securitized assets calculated as if the bank continued to hold the assets on its balance sheet.

[25] Unrealized gains on available-for-sale equity investments may be included in Tier 2 capital to the extent permitted under section I–2.A(2)(f) of this appendix E. In addition, the net unrealized losses on available-for-sale equity investments are deducted from Tier 1 capital in accordance with section I–2.A(1) of this appendix E.

TABLE E.—EARLY AMORTIZATION CREDIT CONVERSION FACTORS

Excess spread trapping point ratio	Credit conversion factor (CCF) (percent)
133.33 percent of trapping point or more	0
less than 133.33 percent to 100 percent of trapping point	5
less than 100 percent to 75 percent of trapping point	15
less than 75 percent to 50 percent of trapping point	50
Less than 50 percent of trapping point	100

C. Risk Weights for Balance Sheet Assets (See Table J)

The risk-based capital framework contains eight risk weight categories—0 percent, 20 percent, 35 percent, 50 percent, 75 percent, 100 percent, 150 percent, and 200 percent.[26] In general, if a particular item can be placed in more than one risk category, it is assigned to the category that has the lowest risk weight. An explanation of the components of each category follows:

1—Zero Percent Risk Weight

(a) This category includes cash (domestic and foreign) owned and held in all offices of the bank or in transit; balances due from Federal Reserve banks and central banks in other OECD countries; [27] and gold bullion held in the bank's own vaults or in another bank's vaults on an allocated basis, to the extent it is offset by gold bullion liabilities.[28]

(b) The zero percent risk category also includes direct claims [29] (including securities, loans, and leases) on, and the portions of claims that are unconditionally guaranteed by the United States and U.S. Government agencies.[30] Federal Reserve Bank stock also is included in this category.

(c) This category also includes claims on, and claims guaranteed by, qualifying securities firms [31] incorporated in the United States or other members of the OECD-based group of countries that are collateralized by cash on deposit in the lending bank or by securities issued or guaranteed by the United States (including U.S. government Agencies) or OECD central governments, provided that a positive margin of collateral is required to be maintained on such a claim on a daily basis, taking into account any change in a bank's exposure to the obligor or counterparty under the claim in relation to the market value of the collateral held in support of the claim.

(d) As provided in sections II.B.3 and II.C.9 of this appendix E, this category also includes securities issued by and other claims on a sovereign rated highest investment grade, e.g., AAA, by a NRSRO, in the case of long-term ratings, or highest rating category, e.g., A–1, P–1, in the case of short-term ratings; and claims guaranteed by a sovereign rated highest investment grade by a NRSRO.

2—20 Percent Risk Weight

(a) This category includes short-term claims (including demand deposits) on, and portions of short-term claims that are guaranteed [32] by, U.S. depository institutions [33] and foreign banks; [34] portions of claims collateralized by cash held in a segregated deposit account of the lending bank; cash items in process of collection, both foreign and domestic; and long-term claims on, and portions of long-term claims guaranteed by, U.S. depository institutions and OECD banks.[35]

(b) This category also includes claims on, or portions of claims guaranteed by U.S. *Government-sponsored* agencies; [36] and portions of claims (including repurchase agreements) collateralized by securities issued or guaranteed by the United States, U.S. Government agencies, or U.S. Government-sponsored agencies. Also included in the 20 percent risk category are portions of claims that are conditionally guaranteed by U.S. Government agencies or U.S. Government-sponsored agencies.[37]

[26] In addition, certain items receive a dollar-for-dollar capital treatment under section II.B.5 of this appendix E.

[27] A central government is defined to include departments and ministries, including the central bank, of the central government. The U.S. central bank includes the 12 Federal Reserve banks. The definition of central government does not include state, provincial or local governments or commercial enterprises owned by the central government. In addition, it does not include local government entities or commercial enterprises whose obligations are guaranteed by the central government. OECD central governments are defined as central governments of the OECD-based group of countries. Non-OECD central governments are defined as central governments of countries that do not belong to the OECD-based group of countries.

[28] All other bullion holdings are to be assigned to the 100 percent risk weight category.

[29] For purposes of determining the appropriate risk weights for this risk-based capital framework, the terms ''claims'' and ''securities'' refer to loans or other debt obligations of the entity on whom the claim is held. Investments in the form of stock or equity holdings in commercial or financial firms are generally assigned to the 100 percent risk category.

[30] For risk-based capital purposes U.S. Government agency is defined as an instrumentality of the U.S. Government whose debt obligations are fully and explicitly guaranteed as to the timely payment of principal and interest by the full faith and credit of the U.S. Government. These agencies include the Government National Mortgage Association (GNMA), the Veterans Administration (VA), the Federal Housing Administration (FHA), the Farmers Home Administration (FHA), the Export-Import Bank (Exim Bank), the Overseas Private Investment Corporation (OPIC), the Commodity Credit Corporation (CCC), and the Small Business Administration (SBA). U.S. Government agencies generally do not directly issue securities to the public; however, a number of U.S. Government agencies, such as GNMA, guarantee securities that are publicly held.

[31] With regard to securities firms incorporated in the United States, qualifying securities firms are those securities firms that are broker-dealers registered with the Securities and Exchange Commission (SEC) and are in compliance with the SEC's net capital rule, 17 CFR 240.15c3–1. With regard to securities firms incorporated in any other country in the OECD-based group of countries, qualifying securities firms are those securities firms that a bank is able to demonstrate are subject to consolidated supervision and regulation (covering their direct and indirect subsidiaries, but not necessarily their parent organizations) comparable to that imposed on banks in OECD countries. Such regulation must include risk-based capital requirements comparable to those applied to banks under the Accord on International Convergence of Capital Measurement and Capital Standards (1988, as amended in 1998) (Basel Accord). Claims on a qualifying securities firm that are instruments the firm, or its parent company, uses to satisfy its applicable capital requirements are not eligible for this risk weight and are generally assigned to at least a 100 percent risk weight. In addition, certain claims on qualifying securities firms are eligible for a zero percent risk weight if the claims are collateralized by cash on deposit in the lending bank or by securities issued or guaranteed by the United States (including U.S. government agencies), provided that a positive margin of collateral is required to be maintained on such a claim on a daily basis, taking into account any change in a bank's exposure to the obligor or counterparty under the claim in relation to the market value of the collateral held in support of the claim.

[32] Claims guaranteed by U.S. depository institutions include risk participations in both bankers acceptances and standby letters of credit, as well as participations in commitments, that are conveyed to other U.S. depository institutions.

[33] U.S. depository institutions are defined to include branches (foreign and domestic) of federally insured banks and depository institutions chartered and headquartered in the 50 states of the United States, the District of Columbia, Puerto Rico, and U.S. territories and possessions. The definition encompasses banks, mutual or stock savings banks, savings or building and loan associations, cooperative banks, credit unions, international banking facilities of domestic depository institutions, and U.S.-chartered depository institutions owned by foreigners. However, this definition excludes branches and agencies of foreign banks located in the U.S. and bank holding companies.

[34] Foreign banks are distinguished as either OECD banks or non-OECD banks. OECD banks include banks and their branches (foreign and domestic) organized under the laws of countries (other than the U.S.) that belong to the OECD-based group of countries. Non-OECD banks include banks and their branches (foreign and domestic) organized under the laws of countries that do not belong to the OECD-based group of countries. For risk-based capital purposes, a bank is defined as an institution that engages in the business of banking; is recognized as a bank by the bank supervisory or monetary authorities of the country of its organization or principal banking operations; receives deposits to a substantial extent in the regular course of business; and has the power to accept demand deposits.

[35] Long-term claims on, or guaranteed by, non-OECD banks are assigned to the 100 percent risk weight category, as are holdings of bank-issued securities that qualify as capital of the issuing banks for risk-based capital purposes.

[36] For risk-based capital purposes, U.S. *Government-sponsored* agencies are defined as agencies originally established or chartered by the U.S. Government to serve public purposes specified by the U.S. Congress but whose debt obligations are not explicitly guaranteed by the full faith and credit of the U.S. Government. These agencies include the Federal Home Loan Mortgage Corporation (FHLMC), the Federal National Mortgage Association (FNMA), the Farm Credit System, the Federal Home Loan Bank System, and the Student Loan Marketing Association (SLMA). For risk-based capital purposes, claims on U.S. Government-sponsored agencies also include capital stock in a Federal Home Loan Bank that is held as a condition of membership in that bank.

[37] For risk-based capital purposes, a conditional guarantee is deemed to exist if the validity of the

(c) General obligation claims on, or portions of claims guaranteed by, the full faith and credit of states or other political subdivisions of the United States or other countries of the OECD-based group are also assigned to this 20 percent risk category, as well as portions of claims guaranteed by such organizations or collateralized by their securities.[38]

(d) As provided in sections II.B.2 and II.B.5 of this appendix E, this category also includes recourse obligations, direct credit substitutes, residual interests (other than a credit-enhancing interest-only strip) and asset- or mortgage-backed securities rated in the highest or second highest investment grade category, e.g., AAA, AA, in the case of long-term ratings, or the highest rating category, e.g., A–1, P–1, in the case of short-term ratings.

(e) As provided in sections II.B.2, II.B.3, and II.C.9 of this appendix E, this category also includes securities issued by and other claims on a sovereign rated second-highest or third-highest investment grade by a NRSRO, e.g. AA or A, in the case of long-term ratings, or second-highest investment grade, e.g. A–2, P–2, in the case of short-term ratings; claims guaranteed by a sovereign rated second-highest or third-highest investment grade by a NRSRO; and claims and portions of claims collateralized by securities issued by a sovereign rated second-highest or third-highest investment grade by a NRSRO, in the case of long-term ratings, or second-highest investment grade, in the case of short-term ratings.

(f) As provided in sections II.B.2, II.B.3, and II.C.9 of this appendix E, this category also includes securities issued by and other claims on a non-sovereign rated highest or second-highest investment grade by a NRSRO, e.g. AAA or AA, in the case of long-term ratings, or highest investment grade, e.g. A–1, P–1, in the case of short-term ratings; claims guaranteed by a non-sovereign whose long-term senior debt is rated highest or second-highest investment grade by a NRSRO; and claims and portions of claims collateralized by securities issued by a non-sovereign rated highest or second-highest investment grade by a NRSRO, in the case of long-term ratings, or highest-investment grade, in the case of short-term ratings.

(g) As provided in section II.C.9(b) of this appendix E, this category also includes certain one-to-four family residential mortgages.

3—35 Percent Risk Weight

(a) As provided in sections II.B.2 and II.B.5 of this appendix E, this category includes recourse obligations, direct credit substitutes, residual interests (other than a credit-enhancing interest-only strip) and asset- or mortgage-backed securities rated third-highest investment grade, e.g., A, in the case of long-term ratings, and second-highest investment grade, e.g. A–2, P–2, in the case of short-term ratings.

(b) As provided in sections II.B.2, II.B.3, and II.C.9 of this appendix E, this category also includes securities issued by and other claims on a sovereign rated lowest-investment grade plus by a NRSRO, e.g. BBB+, in the case of long-term ratings; claims guaranteed by a sovereign rated lowest-investment grade plus by a NRSRO; and claims and portions of claims collateralized by securities issued by a sovereign rated lowest-investment grade plus by a NRSRO, in the case of long-term ratings.

(c) As provided in sections II.B.2, II.B.3, and II.C.9 of this appendix E, this category also includes securities issued by and other claims on a non-sovereign rated third-highest investment grade by a NRSRO, e.g. A, in the case of long-term ratings, or second-highest investment grade, e.g. A–2, P–2, in the case of short-term ratings; claims guaranteed by a non-sovereign whose long-term senior debt is rated third-highest investment grade by a NRSRO; and claims and portions of claims collateralized by securities issued by a non-sovereign rated third-highest investment grade by a NRSRO, in the case of long-term ratings, or second-highest investment grade in the case of short-term ratings.

(d) As provided in section II.C.9(b) of this appendix E, the 35 percent risk-weight category also includes certain one-to-four family residential mortgages.

4—50 Percent Risk Weight

(a) This category includes loans, secured by one-to-four family residential properties, to builders with substantial project equity for the construction of one-to-four family residences that have been presold under firm contracts to purchasers who have obtained firm commitments for permanent qualifying mortgage loans and have made substantial earnest money deposits.[39] Such loans to builders will be considered prudently underwritten only if the bank has obtained sufficient documentation that the buyer of the home intends to purchase the home (i.e., has a legally binding written sales contract) and has the ability to obtain a mortgage loan sufficient to purchase the home (i.e., has a firm written commitment for permanent financing of the home upon completion), provided the following criteria are met:

(i) The purchaser is an individual(s) who intends to occupy the residence and is not a partnership, joint venture, trust, corporation, or any other entity (including an entity acting as a sole proprietorship) that is purchasing one or more of the homes for speculative purposes;

(ii) The builder must incur at least the first ten percent of the direct costs (i.e., actual costs of the land, labor, and material) before any drawdown is made under the construction loan and the construction loan may not exceed 80 percent of the sales price of the presold home;

(iii) The purchaser has made a substantial ''earnest money deposit'' of no less than three percent of the sales price of the home and the deposit must be subject to forfeiture if the purchaser terminates the sales contract; and

(iv) The earnest money deposit must be held in escrow by the bank financing the builder or by an independent party in a fiduciary capacity and the escrow agreement must provide that, in the event of default arising from the cancellation of the sales contract by the buyer, the escrow funds must first be used to defray any costs incurred by the bank.

(b) This category also includes loans fully secured by first liens on multifamily residential properties, [40] provided that:

(i) The loan amount does not exceed 80 percent of the value [41] of the property securing the loan as determined by the most current appraisal or evaluation, whichever may be appropriate (75 percent if the interest rate on the loan changes over the term of the loan);

(ii) For the property's most recent fiscal year, the ratio of annual net operating income generated by the property (before payment of any debt service on the loan) to annual debt service on the loan is not less than 120 percent (115 percent if the interest rate on the loan changes over the term of the loan) or in the case of a property owned by a cooperative housing corporation or nonprofit organization, the property generates sufficient cash flow to provide comparable protection to the bank;

(iii) Amortization of principal and interest on the loan occurs over a period of not more than 30 years;

(iv) The minimum original maturity for repayment of principal on the loan is not less than seven years;

(v) All principal and interest payments have been made on a timely basis in accordance with the terms of the loan for at least one year before the loan is placed in this category; [42]

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guarantee by the U.S. Government agency is dependent upon some affirmative action (e.g., servicing requirements on the part of the beneficiary of the guarantee). Portions of claims that are unconditionally guaranteed by U.S. Government agencies are assigned to the zero percent risk category.

[38] Claims on, or guaranteed by, states or other political subdivisions of countries that do not belong to the OECD-based group of countries are to be placed in the 100 percent risk weight category.

[39] In addition, such loans must have been approved in accordance with prudent underwriting standards, including standards relating to the loan amount as a percent of the appraised value of the property, and the loans must not be past due 90 days or more or carried in nonaccrual status. The types of loans that qualify as loans secured by one-to-four family residential properties are listed in the instructions for preparation of the Consolidated Reports of Condition and Income.

[40] The types of loans that qualify as loans secured by multifamily residential properties are listed in the instructions for preparation of the Consolidated Reports of Condition and Income. In addition, from the stand point of the selling bank, when a multifamily residential property loan is sold subject to a pro rata loss sharing arrangement which provides for the purchaser of the loan to share in any loss incurred on the loan on a pro rata basis with the selling bank when that portion of the loan is not subject to the risk-based capital standards. In connection with sales of multifamily residential property loans in which the purchaser of a loan shares in any loss incurred on the loan with the selling bank on other than a pro rata basis, the selling bank must treat these other loss sharing arrangements in accordance with section II.B.5 of this appendix E.

[41] At the origination of a loan to purchase an existing property, the term ''value'' means the lesser of the actual acquisition cost or the estimate of value set forth in an appraisal or evaluation, whichever may be appropriate.

[42] In the case where the existing owner of a multifamily residential property refinances a loan

Continued

(vi) The loan is not 90 days or more past due or carried in nonaccrual status; and

(vii) The loan has been made in accordance with prudent underwriting standards.

(c) This category also includes revenue (non-general obligation) bonds or similar obligations, including loans and leases, that are obligations of states or political subdivisions of the United States or other OECD countries, but for which the government entity is committed to repay the debt with revenues from the specific projects financed, rather than from general tax funds (e.g., municipal revenue bonds).

(d) As provided in section II.B.2 and II.B.5 of this appendix E, this category also includes recourse obligations, direct credit substitutes, residual interests (other than a credit-enhancing interest-only strip) and asset- or mortgage-backed securities rated lowest investment grade plus, e.g., BBB+, in the case of long-term ratings.

(e) As provided in sections II.B.2, II.B.3, and II.C.9 of this appendix E, this category also includes securities issued by and other claims on a sovereign rated lowest investment grade naught by a NRSRO, e.g. BBB, in the case of long-term ratings, or lowest investment grade, e.g. A–3, P–3, in the case of short-term ratings; claims guaranteed by a sovereign rated lowest investment grade naught by a NRSRO; and claims and portions of claims collateralized by securities issued by a sovereign rated at least lowest investment grade naught by a NRSRO, in the case of long-term ratings, or lowest investment grade, in the case of short-term ratings.

(f) As provided in sections II.B.2, II.B.3, and II.C.9 of this appendix E, this category also includes securities issued by and other claims on a non-sovereign rated lowest investment grade plus by a NRSRO, e.g. BBB+, in the case of long-term ratings; claims guaranteed by a non-sovereign whose long-term senior debt is rated lowest investment grade plus by a NRSRO; and claims and portions of claims collateralized by securities issued by a non-sovereign rated lowest investment grade plus by a NRSRO, in the case of long-term ratings.

(g) As provided in section II.C.9(b) of this appendix E, the fifty percent risk-weight category also includes certain one-to-four family residential mortgages.

5—75 Percent Risk Weight

(a) As provided in section II.B.2 and II.B.5 of this appendix E, this category also includes recourse obligations, direct credit substitutes, residual interests (other than a credit-enhancing interest-only strip) and asset- or mortgage-backed securities rated lowest investment grade naught, e.g., BBB, in the case of long-term ratings.

(b) As provided in sections II.B.2, II.B.3, and II.C.9 of this appendix E, this category also includes securities issued by and other claims on a sovereign rated lowest investment grade negative or one category below investment grade plus and naught by a NRSRO, e.g. BBB-, BB+, or BB, in the case of long-term ratings; claims guaranteed by a sovereign rated lowest investment grade negative by a NRSRO, in the case of long-term ratings; and claims and portions of claims collateralized by securities issued by a sovereign rated lowest investment grade negative by a NRSRO, in the case of long-term ratings.

(c) As provided in sections II.B.2, II.B.3, and II.C.9 of this appendix E, this category also includes certain securities issued by and other claims on a non-sovereign rated lowest investment grade naught by a NRSRO, e.g. BBB, in the case of long-term ratings, or lowest investment grade, A–3, P–3, in the case of short-term ratings; claims guaranteed by a non-sovereign whose long-term debt is rated lowest investment grade naught by a NRSRO; and claims and portions of claims collateralized by securities issued by a non-sovereign rated lowest investment grade naught by a NRSRO, in the case of long-term ratings, or lowest investment grade, in the case of short-term ratings.

(d) As provided in section II.C.9(b), the seventy-five percent risk-weight category also includes certain one-to-four family residential mortgages.

6—100 Percent Risk Weight

(a) All assets not included in the above categories in section II.C of this appendix E, except the assets specifically included in the 150 or 200 percent categories below in section II.C of this appendix E and the assets that are otherwise risk weighted in accordance with section II.B or II.C.9 of this appendix E, are assigned to this category, which comprises standard risk assets.

(b) This category includes:

(i) Long-term claims on, and the portions of long-term claims that are guaranteed by, non-OECD banks;[43]

(ii) Claims on commercial firms owned by the public sector;

(iii) Customer liabilities to the bank on acceptances outstanding involving standard risk claims;[44]

(iv) Investments in fixed assets, premises, and other real estate owned;

(v) Common and preferred stock of corporations, including stock acquired for debts previously contracted;

(vi) Commercial and consumer loans (except rated loans, loans to sovereigns, and mortgage loans as provided under section II.C.9 of this appendix E and those loans assigned to lower risk categories due to recognized guarantees or collateral)[45];

(vii) As provided in sections II.B.2 and II.B.5 of this appendix E, recourse obligations, direct credit substitutes, residual interests (other than a credit-enhancing interest-only strip) and asset-or mortgage-backed securities rated lowest investment grade negative, e.g., BBB-, as well as certain positions (but not residual interests) which the bank rates pursuant to section II.B.5(g) of this appendix E;

(viii) Industrial-development bonds and similar obligations issued under the auspices of states or political subdivisions of the OECD-based group of countries for the benefit of a private party or enterprise where that party or enterprise, not the government entity, is obligated to pay the principal and interest; and

(ix) Stripped mortgage-backed securities and similar instruments, such as interest-only strips that are not credit-enhancing and principal-only strips.

(x) Claims representing capital of a qualifying securities firm.

(c) The following assets also are assigned a risk weight of 100 percent if they have not already been deducted from capital: investments in unconsolidated companies, joint ventures, or associated companies; instruments that qualify as capital issued by other banks; deferred tax assets; and mortgage servicing assets, nonmortgage servicing assets, and purchased credit card relationships.

(d) As provided in sections II.B.2, II.B.3, and II.C.9 of this appendix E, this category also includes securities issued by and other claims on a sovereign rated at least one category below investment grade negative by a NRSRO, e.g. BB-, in the case of long-term ratings, or unrated, in the case of short-term ratings.

(e) As provided in sections II.B.2, II.B.3, and II.C.9 of this appendix E, this category also includes certain securities issued by and other claims on a non-sovereign rated lowest investment grade negative by a NRSRO, e.g. BBB-, in the case of long-term ratings, or unrated, in the case of short-term ratings; claims guaranteed by a non-sovereign whose long-term debt is rated lowest investment grade negative by a NRSRO; and claims and portions of claims collateralized by securities issued by a non-sovereign rated lowest investment grade negative by a NRSRO, in the case of long-term ratings.

(f) As provided in section II.C.9(b) of this appendix E, the 100 percent risk-weight category also includes certain one-to-four family residential mortgages.

7—150 Percent Risk Weight

(a) As provided in sections II.B.2, II.B.3, and II.C.9 of this appendix E, this category includes securities issued by and other claims on a sovereign rated two or more categories below investment grade by a NRSRO, e.g. B or CCC, in the case of long-term ratings.

(b) As provided in sections II.B.2, II.B.3, and II.C.9 of this appendix E, this category

on that property, all principal and interest payments on the loan being refinanced must have been made on a timely basis in accordance with the terms of that loan for at least the preceding year. The new loan must meet all of the other eligiblity criteria in order to qualify for a 50 percent risk weight.

[43] Such assets include all non-local currency claims on, and the portions of claims that are guaranteed by, non-OECD central governments that exceed the local currency liabilities held by the bank.

[44] Customer liabilities on acceptances outstanding involving non-standard risk claims, such as claims on U.S. depository institutions, are assigned to the risk category appropriate to the identity of the obligor or, if relevant, the nature of the collateral or guarantees backing the claims. Portions of acceptances conveyed as risk participations to U.S. depository institutions or foreign banks are assigned to the 20 percent risk category appropriate to short-term claims guaranteed by U.S. depository institutions and foreign banks.

[45] This category includes one-to-four family residential pre-sold construction loans for a residence whose purchase contract is cancelled.

also includes certain securities issued by and other claims on a non-sovereign rated one category below investment grade plus and naught by a NRSRO, e.g. BB+ or BB, in the case of long-term ratings.

(c) As provided in section II.C.9(b) of this appendix E, the 150 percent risk-weight category also includes certain one-to-four family residential mortgages.

8—200 Percent Risk Weight

This category includes:

(a) As provided in sections II.B.2 and II.B.5 of this appendix E, recourse obligations, direct credit substitutes, residual interests (other than a credit-enhancing interest-only strip) and asset-or mortgage-backed securities rated one category below investment grade plus, naught, and negative, e.g. BB+, BB, or BB-, in the case of long-term ratings.

(b) As provided in sections II.B.2, II.B.3, and II.C.9 of this appendix E, this category also includes securities issued by and other claims on an unrated sovereign.

(c) As provided in sections II.B.2, II.B.3, and II.C.9 of this appendix E, this category also includes certain securities issued by and other claims on a non-sovereign rated one category below investment grade and below by a NRSRO, e.g. BB+, BB, BB-, B, CCC, and unrated, in the case of long-term ratings.

(d) A position (but not a residual interest) in a securitization or structured finance program that is not rated by an NRSRO for which the bank determines that the credit risk is equivalent to one category below investment grade, e.g., BB, to the extent permitted in section II.B.5(g) of this appendix E.

9—Risk Weights for Certain Externally Rated Exposures and Certain Residential Mortgages

(a) *Externally Rated Exposures.* (i) Banks must assign an exposure to a sovereign or non-sovereign to the appropriate risk weight category in accordance with Tables F1 and F2 of this appendix E. Such exposures include but are not limited to: sovereign bonds (which may be based on the external rating of the issuing country or of the issued bond); all loans to sovereigns, including unrated loans; securities issued by multilateral lending institutions or regional development banks; corporate debt obligations (senior and subordinated); rated loans[46]; and commercial paper.

(ii) If a claim or exposure has two or more external ratings, the bank must use the lowest assigned external rating to risk weight the claim in accordance with Tables F1 and F2 of this appendix E, and that external rating must apply to the claim or exposure in its entirety. Thus, for banks that hold split or partially-rated instruments, the risk weight that corresponds to the lowest component rating will apply to the entire exposure. For example, a purchased subordinated security where the principal component is rated BBB, but the interest component is rated B, will be subject to the gross-up treatment accorded to residual interests rated B or lower. Similarly, if a portion of an instrument is unrated, the entire exposure will be treated as if it were unrated.

(iii) For exposures to sovereigns, the bank must first look to the rating (if any) on the issue to risk weight the claim. If the issue is unrated, the bank must use the issuer rating to determine the appropriate risk weight.

(iv) The FDIC reserves the authority to override the use of certain external ratings or the external ratings on certain instruments, either on a case-by-case basis or through broader supervisory policy, if necessary or appropriate to address the risk that an instrument or issuer poses to banks.

TABLE F1.—RISK WEIGHTS BASED ON LONG-TERM EXTERNAL RATINGS

Long-term rating category	Examples	Non-sovereign risk weight (percent)	Sovereign risk weight (percent)
Highest investment grade rating [1]	AAA	20	0
Second-highest investment grade rating	AA	20	20
Third-highest investment grade rating	A	35	20
Lowest-investment grade rating—plus	BBB+	50	35
Lowest-investment grade rating—naught	BBB	75	50
Lowest-investment grade rating—negative	BBB−	100	75
One category below investment grade—plus & naught	BB+, BB	150	75
One category below investment grade—negative	BB−	200	100
Two or more categories below investment grade	B, CCC	200	150
Unrated (excludes unrated loans to non-sovereigns) [2]	n/a	200	200

[1] Long-term claims collateralized by AAA-rated sovereign debt would be assigned to the 20 percent risk weight category.
[2] Unrated loans to non-sovereigns are risk weighted in accordance with section II.C of appendix A to part 325.

TABLE F2.—RISK WEIGHTS BASED ON SHORT-TERM EXTERNAL RATINGS

Short-term rating category	Examples	Non-sovereign risk weight (percent)	Sovereign risk weight (percent)
Highest investment grade rating [1]	A–1, P–1	20	0
Second-highest investment grade rating	A–2, P–2	35	20
Lowest investment grade rating	A–3, P–3	75	50
Unrated	n/a.		

[1] Short-term claims collateralized by A1/P1 rated sovereign debt would be assigned to the 20 percent risk weight category.

(b) *Residential Mortgages.* (i) This section II.C.9(b) (including Tables G1, G2, and G3) applies to all residential mortgages secured by a lien on a one-to-four family residential property, except for certain one-to-four family residential pre-sold construction loans, and certain one-to-four family residential pre-sold construction loans for residences for which the purchase contract is cancelled.[47] The risk weights described in Tables G1 and G2 of this section II.C.9(b) are minimum risk weights. For a mortgage to qualify for these risk weights, it must meet certain minimum criteria: Be fully secured by a lien on a one-to four-family residential

[46] Except for loans to sovereigns, loans that are not externally rated are risk weighted under section II.C to appendix A to part 325.

[47] Qualifying one-to-four family residential pre-sold construction loans are risk weighted at 50% under section II.C.4, unless the purchase contract is cancelled, in which case, they are risk weighted at 100% under section II.C.6 of this appendix E. Loans that qualify as mortgages, including junior lien mortgages, that are secured by 1- to 4-family residential properties are listed in the instructions to the commercial bank Call Report. This section II.C.9(b) does not apply to transactions where a lien on a one-to-four family residential property has been taken as collateral solely through an abundance of caution and where, as a consequence, the terms have not been made more favorable than they would have been in the absence of the lien. In such as case, the loan would not be considered to be secured by real estate in the Call Reports.

property, either owner-occupied or rented, be prudently underwritten, and not be 90 days or more past due or carried in nonaccrual status. Mortgages that do not meet these criteria will be risk weighted in accordance with Table G3 of this appendix E.

(ii) Mortgages subject to this section are risk weighted based on their loan-to-value (LTV) ratio [48] or combined loan-to-value (CLTV) ratio [49] and in accordance with Table G1, Table G2, or Table G3 of this appendix E, as applicable, after consideration of any loan level private mortgage insurance (loan level PMI). To calculate the CLTV on a junior lien mortgage, a bank must divide the aggregate principle amount outstanding for the first and junior lien(s) by the appraised value of the property at origination of the first lien. LTV ratios can only be adjusted through loan amortization, except for a loan refinancing where the bank extends additional funds. However, for purposes of calculating the CLTV, banks may adjust the appraised value of the property, as determined at the time of origination of the first lien, based on a new appraisal or evaluation in accordance with the FDIC's appraisal regulations and real estate lending guidelines.[50]

(A) Mortgage loans secured by first liens on one-to four-family residential properties. Mortgage loans secured by first liens on one- to four-family residential properties (first lien mortgages) must be risk-weighted in accordance with Table G1 of this appendix E. If a bank holds both the first and junior lien(s) on a residential property and no other party holds an intervening lien, the transaction is treated as a first lien mortgage for purposes of determining the loan-to-value ratio and assigning a risk weight.

TABLE G1.—RISK WEIGHTS FOR FIRST LIEN ONE- TO FOUR-FAMILY RESIDENTIAL MORTGAGES

Loan-to-Value ratio (percent)	Risk weight (percent)
Up to 60	20
>60 and up to 80	35
>80 and up to 85	50
>85 and up to 90	75
>90 and up to 95	100
>95	150

(B) *Stand-Alone Junior Liens.* Stand-alone junior liens on one- to four-family residential mortgages, including structured mortgages and the on-balance sheet portion of home equity lines of credit, must be risk weighted using the CLTV of the stand-alone junior and all senior liens in accordance with Table G2 of this appendix E. The CLTV of the stand-alone junior and all senior liens, where any of the senior liens has a negative amortization feature, must reflect the maximum contractual loan amount under the terms of these liens if they were to fully negatively amortize under the applicable contract.

TABLE G2.—RISK WEIGHTS FOR STAND-ALONE JUNIOR LIEN 1–4 FAMILY RESIDENTIAL MORTGAGES

Combined loan to value ratio (percent)	Risk weight (percent)
Up to 60	75
>60 and up to 90	100
>90	150

TABLE G3.—RISK WEIGHTS FOR MORTGAGES NOT MEETING MINIMUM CRITERIA

Risk weight under Table G1 or G2 [1]	Risk weight (percent)
20%, 35%, 50%, 75%, or 100%	100
150%	150

[1] This column represents the risk weight a mortgage would have received under Table G1 or G2 if it had met the minimum criteria required by this section II.C.9(b).

(C) *One- to Four-Family Residential Mortgages With Negative Amortization Features.* First lien mortgages with negative amortization features are risk weighted in accordance with Table G1 of this appendix E. For loans with negative amortization features, the LTV of the loans must be adjusted quarterly to include the amount of any negative amortization. Any remaining potential increase in the mortgage's principal balance permitted through negative amortization is to be treated as a long-term commitment and converted to an on-balance sheet equivalent amount as set forth in section II.D. of this Appendix E. The credit equivalent amount of the commitment is then risk-weighted according to Table G1 based on the loan's "highest contractual LTV ratio." The highest contractual LTV ratio of a first lien mortgage equals the current outstanding principal balance of the loan, [51] plus the credit equivalent amount of the remaining negative amortization commitment, minus the amount covered by any loan-level PMI divided by the value of the property.[52]

(iii) Transitional Rule for Residential Mortgage Exposures. A bank may continue to use appendix A to risk weight those mortgage loans that it owns before it elects to use this appendix E. However, the bank must use appendix A to risk weight all such mortgage loans. Mortgage loans approved, acquired, or originated after a bank elects to use appendix E must be risk weighted under this appendix E. A bank may only rely on this subsection II.C.9(b)(iii) the first time it elects to use this appendix E.

D. Conversion Factors for Off-Balance Sheet Items (see Table H)

The face amount of an off-balance sheet item is generally incorporated into the risk-weighted assets in two steps. The face amount is first multiplied by a credit conversion factor, except as otherwise specified in section II.B.5 of this appendix E for direct credit substitutes and recourse obligations. The resultant credit equivalent amount is assigned to the appropriate risk category according to the obligor or, if relevant, the guarantor, the nature of any collateral, or external credit ratings. [53]

1. Items With a 100 Percent Conversion Factor. (a) Except as otherwise provided in section II.B.5 of this appendix E, the full amount of an asset or transaction supported, in whole or in part, by a direct credit substitute or a recourse obligation. Direct credit substitutes and recourse obligations are defined in section II.B.5 of this appendix E.

(b) Sale and repurchase agreements, if not already included on the balance sheet, and forward agreements. Forward agreements are legally binding contractual obligations to purchase assets with drawdown which is certain at a specified future date. Such obligations include forward purchases, forward forward deposits placed,[54] and partly-paid shares and securities; they do not include commitments to make residential mortgage loans or forward foreign exchange contracts.

(c) Securities lent by a bank are treated in one of two ways, depending upon whether the lender is exposed to risk of loss. If a bank, as agent for a customer, lends the customer's securities and does not indemnify the customer against loss, then the securities transaction is excluded from the risk-based capital calculation. On the other hand, if a bank lends its own securities or, acting as agent for customer, lends the customer's securities and indemnifies the customer against loss, the transaction is converted at 100 percent and assigned to the risk weight category appropriate to the obligor or, if applicable, to the collateral delivered to the lending bank or the independent custodian acting on the lending bank's behalf.

2. Items With a 50 Percent Conversion Factor. (a) Transaction-related contingencies are to be converted at 50 percent. Such contingencies include bid bonds, performance bonds, warranties, and performance standby letters of credit related to particular transactions, as well as acquisitions of risk participations in

[48] For purposes of this section II.C.9(b), the value of the property equals the lower of the purchase price for the property or the value at origination. The value of the property must be based on an appraisal or evaluation of the property in conformance with the FDIC's appraisal regulations and real estate lending guidelines. See 12 CFR part 323, 12 CFR part 365.

[49] The CLTV represents the aggregate principle outstanding on a first lien mortgage and all applicable junior lien mortgages divided by the appraised value of the property at origination of the first lien.

[50] See 12 CFR part 323, 12 CFR part 365.

[51] As the loan balance increases through negative amortization, the bank must recalculate the outstanding loan amount using the original loan amount plus any increases to the loan amount due to negative amortization.

[52] See footnote 48.

[53] The sufficiency of collateral and guarantees for off-balance-sheet items is determined by the market value of the collateral or the amount of the guarantee in relation to the face amount of the item, except for derivative contracts, for which this determination is generally made in relation to the credit equivalent amount. Collateral and guarantees are subject to the same provisions noted under section II.B of this appendix E.

[54] Forward forward deposits accepted are treated as interest rate contracts.

performance standby letters of credits. Performance standby letters of credit (performance bonds) are irrevocable obligations of the bank to pay a third-party beneficiary when a customer (account party) fails to perform on some contractual nonfinancial obligation. Thus, performance standby letters of credit represent obligations backing the performance of nonfinancial or commercial contracts or undertakings. To the extent permitted by law or regulation, performance standby letters of credit include arrangements backing, among other things, subcontractors' and suppliers' performance, labor and materials contracts, and construction bids.

(b) The unused portion of commitments with an original maturity exceeding one year. including underwriting commitments and commercial and consumer credit commitments, also are to be converted at 50 percent. Original maturity is defined as the length of time between the date the commitment is issued and the earliest date on which: The bank can at its option, unconditionally (without cause) cancel the commitment,[55] and the bank is scheduled to (and as a normal practice actually does) review the facility to determine whether or not it should be extended and, on at least an annual basis, continues to regularly review the facility. Facilities that are unconditionally cancelable (without cause) at any time by the bank are not deemed to be commitments, provided the bank makes a separate credit decision before each drawing under the facility.

(c)(i) Commitments are defined as any legally binding arrangements that obligate a bank to extend credit in the form of loans or lease financing receivables; to purchase loans, securities, or other assets; or to participate in loans and leases. Commitments also include overdraft facilities, revolving credit, home equity and mortgage lines of credit, eligible ABCP liquidity facilities, and similar transactions. Normally, commitments involve a written contract or agreement and a commitment fee, or some other form of consideration. Commitments are included in weighted-risk assets regardless of whether they contain material adverse change clauses or other provisions that are intended to relieve the issuer of its funding obligation under certain conditions. In the case of commitments structured as syndications, where the bank is obligated solely for its pro rata share, only the bank's proportional share of the syndicated commitment is taken into account in calculating the risk-based capital ratio.

(ii) Banks that are subject to the market risk rules in appendix C to part 325 are required to convert the notional amount of eligible ABCP liquidity facilities, in form or in substance, with an original maturity of over one year that are carried in the trading account at 50 percent to determine the appropriate credit equivalent amount even though those facilities are structured or characterized as derivatives or other trading book assets. Liquidity facilities that support ABCP, in form or in substance, (including those positions to which the market risk rules may not be applied as set forth in section 2(a) of appendix C of this part) that are not eligible ABCP liquidity facilities are to be considered recourse obligations or direct credit substitutes, and assessed the appropriate risk-based capital treatment in accordance with section II.B.5 of this appendix E.

(d) In the case of commitments structured as syndications where the bank is obligated only for its pro rata share, the risk-based capital framework includes only the bank's proportional share of such commitments. Thus, after a commitment has been converted at 50 percent, portions of commitments that have been conveyed to other U.S. depository institutions or OECD banks, but for which the originating bank retains the full obligation to the borrower if the participating bank fails to pay when the commitment is drawn upon, will be assigned to the 20 percent risk category. The acquisition of such a participation in a commitment would be converted at 50 percent and the credit equivalent amount would be assigned to the risk category that is appropriate for the account party obligor or, if relevant, to the nature of the collateral or guarantees.

(e) Revolving underwriting facilities (RUFs), note issuance facilities (NIFs), and other similar arrangements also are converted at 50 percent. These are facilities under which a borrower can issue on a revolving basis short-term notes in its own name, but for which the underwriting banks have a legally binding commitment either to purchase any notes the borrower is unable to sell by the rollover date or to advance funds to the borrower.

3. Items With a 20 Percent Conversion Factor. Short-term, self-liquidating, trade-related contingencies which arise from the movement of goods are converted at 20 percent. Such contingencies include commercial letters of credit and other documentary letters of credit collateralized by the underlying shipments.

4. Items With a 10 Percent Conversion Factor. (a) Unused portions of commitments with an original maturity of one year or less are converted using the 10 percent conversion factor.[56] Unused portions of eligible ABCP liquidity facilities with an original maturity of one year or less that provide liquidity support to ABCP also are converted at 10 percent.

(b) Banks that are subject to the market risk rules in appendix C to part 325 are required to convert the notional amount of eligible ABCP liquidity facilities, in form or in substance, with an original maturity of one year or less that are carried in the trading account at 10 percent to determine the appropriate credit equivalent amount even through those facilities are structured or characterized as derivatives or other trading book assets. Liquidity facilities that provide liquidity support to ABCP, in form or in substance, (including those positions to which the market risk rules may not be applied as set forth in section 2(a) of appendix C of this part) that are not eligible ABCP liquidity facilities are to be considered recourse obligations or direct credit substitutes and assessed the appropriate risk-based capital requirement in accordance with section II.B.5 of this appendix.

5. Items with a Zero Percent Conversion Factor. These include unused portions of retail credit card lines and related plans are deemed to be short-term commitments if the bank, in accordance with applicable law, has the unconditional option to cancel the credit line at any time.

6. Derivative Contracts. The credit-equivalent amount for a derivative contract, or group of derivative contracts subject to a qualifying bilateral netting contract, is assigned to the risk weight category appropriate to the underlying obligor regardless of the type of transaction.

E. Derivative Contracts (Interest Rate, Exchange Rate, Commodity (Including Precious Metal) and Equity Derivative Contracts)

1. Credit equivalent amounts are computed for each of the following off-balance-sheet derivative contracts:

(a) Interest Rate Contracts

(i) Single currency interest rate swaps.

(ii) Basis swaps.

(iii) Forward rate agreements.

(iv) Interest rate options purchased (including caps, collars, and floors purchased).

(v) Any other instrument linked to interest rates that gives rise to similar credit risks (including when-issued securities and forward deposits accepted).

(b) Exchange Rate Contracts

(i) Cross-currency interest rate swaps.

(ii) Forward foreign exchange contracts.

(iii) Currency options purchased.

(iv) Any other instrument linked to exchange rates that gives rise to similar credit risks.

(c) Commodity (including precious metal) or Equity Derivative Contracts

(i) Commodity-or equity-linked swaps.

(ii) Commodity-or equity-linked options purchased.

(iii) Forward commodity-or equity-linked contracts.

(iv) Any other instrument linked to commodities or equities that gives rise to similar credit risks.

2. Exchange rate contracts with an original maturity of 14 calendar days or less and derivative contracts traded on exchanges that require daily receipt and payment of cash variation margin may be excluded from the risk-based ratio calculation. Gold contracts are accorded the same treatment as exchange rate contracts except gold contracts with an original maturity of 14 calendar days or less are included in the risk-based calculation. Over-the-counter options purchased are included and treated in the same way as other derivative contracts.

3. Credit Equivalent Amounts for Derivative Contracts. (a) The credit

[55] In the case of home equity or mortgage lines of credit secured by liens on one- to four-family residential properties, a bank is deemed able to unconditionally cancel the commitment if, at its option, it can prohibit additional extensions of credit, reduce the credit line, and terminate the commitment to the full extent permitted by relevant federal law.

[56] Short-term commitments to originate one- to four-family residential mortgage loans, other than a derivative contract, will continue to be converted to an on-balance-sheet credit equivalent amount using the zero percent conversion factor.

equivalent amount of a derivative contract that is not subject to a qualifying bilateral netting contract in accordance with section II.E.5 of this appendix E is equal to the sum of:

(i) The current exposure (which is equal to the mark-to-market value, [57] if positive, and is sometimes referred to as the replacement cost) of the contract; and

(ii) An estimate of the potential future credit exposure.

(b) The current exposure is determined by the mark-to-market value of the contract. If the mark-to-market value is positive, then the current exposure is equal to that mark-to-market value. If the mark-to-market value is zero or negative, then the current exposure is zero.

(c) The potential future credit exposure of a contract, including a contract with a negative mark-to-market value, is estimated by multiplying the notional principal amount of the contract by a credit conversion factor. Banks should, subject to examiner review, use the effective rather than the apparent or stated notional amount in this calculation. The credit conversion factors are:

TABLE H.—CONVERSION FACTOR MATRIX

Remaining maturity	Interest rate (percent)	Exchange rate and gold (percent)	Equity (percent)	Precious metals, except gold (percent)	Other commodities (percent)
One year or less	0.0	1.0	6.0	7.0	10.0
More than one year to five years	0.5	5.0	8.0	7.0	12.0
More than five years	1.5	7.5	10.0	8.0	15.0

(d) For contracts that are structured to settle outstanding exposure on specified dates and where the terms are reset such that the market value of the contract is zero on these specified dates, the remaining maturity is equal to the time until the next reset date. For interest rate contracts with remaining maturities of more than one year and that meet these criteria, the conversion factor is subject to a minimum value of 0.5 percent.

(e) For contracts with multiple exchanges of principal, the conversion factors are to be multiplied by the number of remaining payments in the contract. Derivative contracts not explicitly covered by any of the columns of the conversion factor matrix are to be treated as ''other commodities.''

(f) No potential future exposure is calculated for single currency interest rate swaps in which payments are made based upon two floating rate indices (so called floating/floating or basis swaps); the credit exposure on these contracts is evaluated solely on the basis of their mark-to-market values.

4. Risk Weights and Avoidance of Double Counting. (a) Once the credit equivalent amount for a derivative contract, or a group of derivative contracts subject to a qualifying bilateral netting agreement, has been determined, that amount is assigned to the risk category appropriate to the counterparty, or, if relevant, the guarantor or the nature of any collateral. However, the maximum weight that will be applied to the credit equivalent amount of such contracts is 50 percent.

(b) In certain cases, credit exposures arising from the derivative contracts covered by these guidelines may already be reflected, in part, on the balance sheet. To avoid double counting such exposures in the assessment of capital adequacy and, perhaps, assigning inappropriate risk weights, counterparty credit exposures arising from the types of instruments covered by these guidelines may need to be excluded from balance sheet assets in calculating a bank's risk-based capital ratio.

(c) The FDIC notes that the conversion factors set forth in section II.E.3 of appendix E, which are based on observed volatilities of the particular types of instruments, are subject to review and modification in light of changing volatilities or market conditions.

(d) Examples of the calculation of credit equivalent amounts for these types of contracts are contained in Table H of this appendix E.

5. Netting. (a) For purposes of this appendix E, netting refers to the offsetting of positive and negative mark-to-market values when determining a current exposure to be used in the calculation of a credit equivalent amount. Any legally enforceable form of bilateral netting (that is, netting with a single counterparty) of derivative contracts is recognized for purposes of calculating the credit equivalent amount provided that:

(i) The netting is accomplished under a written netting contract that creates a single legal obligation, covering all included individual contracts, with the effect that the bank would have a claim or obligation to receive or pay, respectively, only the net amount of the sum of the positive and negative mark-to-market values on included individual contracts in the event that a counterparty, or a counterparty to whom the contract has been validly assigned, fails to perform due to default, bankruptcy, liquidation, or similar circumstances;

(ii) The bank obtains a written and reasoned legal opinion(s) representing that in the event of a legal challenge, including one resulting from default, insolvency, bankruptcy or similar circumstances, the relevant court and administrative authorities would find the bank's exposure to be such a net amount under:

(A) The law of the jurisdiction in which the counterparty is chartered or the equivalent location in the case of noncorporate entities and, if a branch of the counterparty is involved, then also under the law of the jurisdiction in which the branch is located;

(B) The law that governs the individual contracts covered by the netting contract; and

(C) The law that governs the netting contract.

(iii) The bank establishes and maintains procedures to ensure that the legal characteristics of netting contracts are kept under review in the light of possible changes in relevant law; and

(iv) The bank maintains in its file documentation adequate to support the netting of derivative contracts, including a copy of the bilateral netting contract and necessary legal opinions.

(b) A contract containing a walkaway clause is not eligible for netting for purposes of calculating the credit equivalent amount.[58]

(c) By netting individual contracts for the purpose of calculating its credit equivalent amount, a bank represents that it has met the requirements of this appendix E and all the appropriate documents are in the bank's files and available for inspection by the FDIC. Upon determination by the FDIC that a bank's files are inadequate or that a netting contract may not be legally enforceable under any one of the bodies of law described in paragraphs (ii)(1) through (3) of section II.E.5(a) of this appendix E, underlying individual contracts may be treated as though they were not subject to the netting contract.

(d) The credit equivalent amount of derivative contracts that are subject to a qualifying bilateral netting contract is calculated by adding:

(i) The net current exposure of the netting contract; and

(ii) The sum of the estimates of potential future exposure for all individual contractors subject to the netting contract, adjusted to take into account the effects of the netting contract.[59]

[57] Mark-to-market values are measured in dollars, regardless of the currency or currencies specified in the contract and should reflect changes in both underlying rates, prices and indices, and counterparty credit quality.

[58] For purposes of this section, a walkaway clause means a provision in a netting contract that permits a non-defaulting counterparty to make lower payments than it would make otherwise under the contract, or no payment at all, to a defaulter or to the estate of a defaulter, even if a defaulter or the estate of a defaulter is a net creditor under the contract.

[59] For purposes of calculating potential future credit exposure for foreign exchange contracts and other similar contracts in which notional principal is equivalent to cash flows, total notional principal is defined as the net receipts to each party falling due on each value date in each currency.

(e) The net current exposure is the sum of all positive and negative mark-to-market values of the individual contracts subject to the netting contract. If the net sum of the mark-to-market values is positive, then the net current exposure is equal to that sum. If the net sum of the mark-to-market values is zero or negative, then the net current exposure is zero.

(f) The effects of the bilateral netting contract on the gross potential future exposure are recognized through application of a formula, resulting in an adjusted add-on amount (Anet). The formula, which employs the ratio of net current exposure to gross current exposure (NGR) is expressed as:

$$\text{Anet} = (0.4 \times A_{gross}) + 0.6(\text{NGR} \times A_{gross})$$

The effect of this formula is that Anet is the weighted average of A_{gross}, and A_{gross} adjusted by the NGR.

(g) The NGR may be calculated in either one of two ways—referred to as the counterparty-by-counterparty approach and the aggregate approach.

(i) Under the counterparty-by-counterparty approach, the NGR is the ratio of the net current exposure of the netting contract to the gross current exposure of the netting contract. The gross current exposure is the sum of the current exposure of all individual contracts subject to the netting contract calculated in accordance with section II.E of this appendix E.

(ii) Under the aggregate approach, the NGR is the ratio of the sum of all of the net current exposures for qualifying bilateral netting contracts to the sum of all of the gross current exposures for those netting contracts (each gross current exposure is calculated in the same manner as in section II.E.5(g)(i) of this appendix E). Net negative mark-to-market values to individual counterparties cannot be used to offset net positive current exposures to other counterparties.

(iii) A bank must use consistently either the counterparty-by-counterparty approach or the aggregate approach to calculate the NGR. Regardless of the approach used, the NGR should be applied individually to each qualifying bilateral netting contract to determine the adjusted add-on for that netting contract.

III. Minimum Risk-Based Capital Ratio

Subject to section II.B.5 of this appendix E, banks generally will be expected to meet a minimum ratio of qualifying total capital to risk-weighted assets of 8 percent, of which at least 4 percentage points should be in the form of core capital (Tier 1). Any bank that does not meet the minimum risk-based capital ratio, or whose capital is otherwise considered inadequate, generally will be expected to develop and implement a capital plan for achieving an adequate level of capital, consistent with the provisions of this risk-based capital framework and § 325.104, the specific circumstances affecting the individual bank, and the requirements of any related agreements between the bank and the FDIC.

TABLE I.—DEFINITION OF QUALIFYING CAPITAL

Components	Minimum requirements
(1) Core Capital (Tier 1)	Must equal or exceed 4% of risk-weighted assets.
(a) Common stockholders' equity	No limit.[1]
(b) Noncumulative perpetual preferred stock and any related surplus	No limit.[1]
(c) Minority interest in equity accounts of consolidated	No limit.[1]
(d) Less: All intangible assets other than certain mortgage servicing assets, nonmortgage servicing assets and purchased credit card relationships.	([2])
(e) Less: Certain credit-enhancing interest only strips and nonfinancial equity investments required to be deducted from capital.	([3])
(f) Less: Certain deferred tax assets.	([4])
(2) Supplementary Capital (Tier 2)	Total of tier 2 is limited to 100% of tier 1.[5]
(a) Allowance for loan and lease losses	Limited to 1.25% of weighted-risk assets.[5]
(b) Unrealized gains on certain equity securities[6]	Limited to 45% of pretax net unrealized gains.[6]
(c) Cumulative perpetual and long-term preferred stock (original maturity of 20 years or more) and any related surplus..	No limit within tier 2; long-term preferred is amortized for capital purposes as it approaches maturity.
(d) Auction rate and similar preferred stock (both cumulative and noncumulative)..	No limit within tier 2.
(e) Hybrid capital instruments (including mandatory convertible debt securities)..	No limit within tier 2.
(f) Term subordinated debt and intermediate-term preferred stock (original weighted average maturity of five years or more)..	Term subordinated debt and intermediate-term preferred stock are limited to 50% of Tier 1[5] and amortized for capital purposes as they approach maturity.
(3) Deductions (from the sum of tier 1 and tier 2).	
(a) Investments in banking and finance subsidiaries that are not consolidated for regulatory capital purposes..	
(b) Intentional, reciprocal cross-holdings of capital securities issued by banks..	
(c) Other deductions (such as investment in other subsidiaries or joint ventures) as determined by supervisory authority..	On a case-by-case basis or as a matter of policy after formal consideration of relevant issues.
(4) Total Capital	Must equal or exceed 8% of weighted-risk assets.

[1] No express limits are placed on the amounts of nonvoting common, noncumulative perpetual preferred stock, and minority interests that may be recognized as part of Tier 1 capital. However, voting common stockholders' equity capital generally will be expected to be the dominant form of Tier 1 capital and banks should avoid undue reliance on other Tier 1 capital elements.

[2] The amounts of mortgage servicing assets, nonmortgage servicing assets and purchased credit card relationships that can be recognized for purposes of calculating Tier 1 capital are subject to the limitations set forth in § 325.5(f). All deductions are for capital purposes only; deductions would not affect accounting treatment.

[3] The amounts of credit-enhancing interest-only strips that can be recognized for purposes of calculating Tier 1 capital are subject to the limitations set forth in § 325.5(f). The amounts of nonfinancial equity investments that must be deducted for purposes of calculating Tier 1 capital are set forth in section II.B.6 of appendix E to part 325.

[4] Deferred tax assets are subject to the capital limitations set forth in § 325.5(g).

[5] Amounts in excess of limitations are permitted but do not qualify as capital.

[6] Unrealized gains on equity securities are subject to the capital limitations set forth in paragraph I–2.A.2.(f) of appendix E to part 325.

IV. Calculation of the Risk-Based Capital Ratio

1. When calculating the risk-based capital ratio under the framework set forth in this statement of policy, qualifying total capital (the numerator) is divided by risk-weighted assets (the denominator). The process of determining the numerator for the ratio is summarized in Table I. The calculation of the denominator is based on the risk weights and conversion factors that are summarized in Tables II and III.

2. When determining the amount of risk-weighted assets, balance sheet assets are assigned an appropriate risk weight (see Table J) and off-balance sheet items are first converted to a credit equivalent amount (see Table H) and then assigned to one of the risk weight categories set forth in Table J.

3. The balance sheet assets and the credit equivalent amount of off-balance sheet items are then multiplied by the appropriate risk weight percentages and the sum of these risk-weighted amounts is the gross risk-weighted asset figure used in determining the denominator of the risk-based capital ratio. Any items deducted from capital when computing the amount of qualifying capital may also be excluded from risk-weighted assets when calculating the denominator for the risk-based capital ratio.

Table J—Summary of Risk Weights and Risk Categories

Category 1—Zero Percent Risk Weight

(1) Cash (domestic and foreign).

(2) Balances due from Federal Reserve banks.

(3) Direct claims on, and portions of claims unconditionally guaranteed by, the U.S. Treasury and U.S. Government agencies.[60]

(4) Gold bullion held in the bank's own vaults or in another bank's vaults on an allocated basis, to the extent that it is offset by gold bullion liabilities.

(5) Federal Reserve Bank stock.

(6) Claims on, or guaranteed by, qualifying securities firms incorporated in the United States or other members of the OECD-based group of countries that are collateralized by cash on deposit in the lending bank or by securities issued or guaranteed by the United States (including U.S. government agencies) or OECD central governments, provided that a positive margin of collateral is required to be maintained on such a claim on a daily basis, taking into account any change in a bank's exposure to the obligor or counterparty under the claim in relation to the market value of the collateral held in support of the claim.

(7) Certain externally rated exposures as provided under section II.C.9 of this appendix E.

Category 2—20 Percent Risk Weight

(1) Cash items in the process of collection.

(2) All claims (long- and short-term) on, and portions of claims (long- and short-term) guaranteed by, U.S. depository institutions and OECD banks.

(3) Short-term (remaining maturity of one year or less) claims on, and portions of short-term claims guaranteed by, non-OECD banks.

(4) Portions of loans and other claims conditionally guaranteed by the U.S. Treasury or U.S. Government agencies.[61]

(5) Securities and other claims on, and portions of claims guaranteed by, U.S. Government-sponsored agencies.[62]

(6) Portions of loans and other claims (including repurchase agreements) collateralized by securities issued or guaranteed by the U.S. Treasury, U.S. Government agencies, or U.S. Government-sponsored agencies.

(7) Portions of loans and other claims collateralized [63] by cash on deposit in the lending bank.

(8) General obligation claims on, and portions of claims guaranteed by, the full faith and credit of states or other political subdivisions of OECD countries, including U.S. state and local governments.

(9) Investments in shares of mutual funds whose portfolios are permitted to hold only assets that qualify for the zero or 20 percent risk categories.

(10) Recourse obligations, direct credit substitutes, residual interests (other than credit-enhancing interest-only strips) and asset-or mortgage-backed securities rated in either of the two highest investment grade categories, e.g., AAA or AA, in the case of long-term ratings, or the highest rating category, e.g., A–1, P–1, in the case of short-term ratings.

(11) Certain externally rated exposures as provided under section II.C.9 of this appendix E.

(12) Certain one-to-four family residential mortgages as provided under section II.C.9 of this appendix E.

Category 3—35 Percent Risk Weight

(1) Recourse obligations, direct credit substitutes, residual interests (other than credit-enhancing interest-only strips) and asset-or mortgage-backed securities rated in the third-highest investment grade category, e.g., A, in the case of long-term ratings, or the second highest rating category, e.g., A–2, P–2, in the case of short-term ratings.

(2) Certain externally rated exposures as provided under section II.C.9 of this appendix E.

(3) Certain one-to-four family residential mortgages as provided under section II.C.9 of this appendix E.

Category 4—50 Percent Risk Weight

(1) Certain presold residential construction loans, provided that the loans were approved in accordance with prudent underwriting standards and are not past due 90 days or more or carried on a nonaccrual status.

(2) Loans fully secured by first liens on multifamily residential properties that have been prudently underwritten and meet specified requirements with respect to loan-to-value ration, level of annual net operating income to required debt service, maximum amortization period, minimum original maturity, and demonstrated timely repayment performance.

(3) Recourse obligations, direct credit substitutes, residual interests (other than credit-enhancing interest-only strips) and asset-or mortgage-backed securities rated in the lowest-highest investment grade category plus, e.g., BBB+, in the case of long-term ratings.

(4) Revenue bonds or similar obligations, including loans and leases, that are obligations of U.S. state or political subdivisions of the United States or other OECD countries but for which the government entity is committed to repay the debt only out of revenues from the specific projects financed.

(5) Certain externally rated exposures as provided under section II.C.9 of this appendix E.

(6) Certain one-to-four family residential mortgages as provided under section II.C.9 of this appendix E.

Category 5—75 Percent Risk Weight

(1) Recourse obligations, direct credit substitutes, residual interests (other than credit-enhancing interest-only strips) and asset-or mortgage-backed securities rated in the lowest highest investment grade category naught, e.g., BBB, in the case of long-term ratings, or the lowest highest rating category, e.g., A–3, P–3, in the case of short-term ratings.

(2) Certain externally rated exposures as provided under section II.C.9 of this appendix E.

(3) Certain one-to-four family residential mortgages as provided under section II.C.9 of this appendix E.

Category 6—100 Percent Risk Weight

(1) All other claims on private obligors.

(2) Obligations issued by U.S. state or local governments or other OECD local governments (including industrial development authorities and similar entities) that are repayable solely by a private party or enterprise.

(3) Premises, plant, and equipment; other fixed assets; and other real estate owned.

(4) Investments in any unconsolidated subsidiaries, joint ventures, or associated companies—if not deducted from capital.

(5) Instruments issued by other banking organizations that qualify as capital.

(6) Claims on commercial firms owned by the U.S. Government or foreign governments.

(7) Recourse obligations, direct credit substitutes, residual interests (other than credit-enhancing interest-only strips) and asset-or mortgage-backed securities rated in the lowest investment grade category negative, e.g., BBB –, as well as certain

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[60] For the purpose of calculating the risk-based capital ratio, a U.S. Government agency is defined as an instrumentality of the U.S. Government whose obligations are fully and explicitly guaranteed as to the timely repayment of principal and interest by the full faith and credit of the U.S. Government.

[61] For the purpose of calculating the risk-based capital ratio, a U.S. Government agency is defined as an instrumentality of the U.S. Government whose obligations are fully and explicitly guaranteed as to the timely repayment of principal and interest by the full faith and credit of the U.S. Government.

[62] For the purpose of calculating the risk-based capital ratio, a U.S. Government-sponsored agency is defined as an agency originally established or chartered to serve public purposes specified by the U.S. Congress but whose obligations are not explicitly guaranteed by the full faith and credit of the U.S. Government.

[63] Degree of collateralization is determined by current market value.

positions (but not residual interests) which the bank rates pursuant to section II.B.5(g) of this appendix E.

(8) Other assets, including any intangible assets that are not deducted from capital, and the credit equivalent amounts [64] of off-balance sheet items not assigned to a different risk category, except for certain externally rated exposures and certain one-to-four family residential mortgages as provided under section II.C.9 of this appendix E.

Category 7—150 Percent Risk Weight

(1) Certain externally rated exposures as provided under section II.C.9 of this appendix E.

(2) Certain one-to-four family residential mortgages as provided under section II.C.9 of this appendix E.

Category 8—200 Percent Risk Weight

(1) Externally rated recourse obligations, direct credit substitutes, residual interests (other than credit-enhancing interest-only strips), and asset- and mortgage-backed securities that are rated one category below the lowest investment grade category—negative, e.g., BB, to the extent permitted in section II.B.5(d) of this appendix E.

(2) A position (but not a residual interest) extended in connection with a securitization or structured financing program that is not rated by an NRSRO for which the bank determines that the credit risk is equivalent to one category below investment grade, e.g., BB, to the extent permitted in section II.B.5(g) of this appendix E.

(3) Certain externally rated exposures as provided under section II.C.9 of this appendix E.

Department of the Treasury

Office of Thrift Supervision

12 CFR Chapter V.

Authority and Issuance

For the reasons stated in the common preamble, the Office of Thrift Supervision proposes to amend part 567 of chapter V of title 12 of the Code of Federal Regulations as follows:

PART 567—CAPITAL

1. The authority citation for part 567 continues to read as follows:

Authority: 12 U.S.C. 1462, 1462a, 1463, 1464, 1467a, 1828 (note).

2. In § 567.1, revise the definition of risk-weighted assets to read as follows:

§ 567.1. Definitions.

* * * * *

Risk-weighted assets. Risk-weighted assets means risk-weighted assets computed under § 567.6 or § 567.7 of this part.

* * * * *

[64] In general for each off-balance sheet item, a conversion factor (see Table H) must be applied to determine the ''credit equivalent amount'' prior to assigning the off-balance sheet item to a risk weight category.

3. Revise paragraph (a)(1)(i) of § 567.2 to read as follows:

§ 567.2 Minimum regulatory capital requirement.

(a) * * *

(1) * * *

(i) *Risk-based capital requirement.* A savings association's minimum risk-based capital requirement shall be an amount equal to 8 percent of its risk-weighted assets.

* * * * *

4. Revise the section heading and add a new introductory paragraph to § 567.6 to read as follows:

§ 567.6 Risk-weighted assets.

Unless the savings association uses 12 CFR part 566, Appendix A or elects to use § 567.7 of this part, a savings association must compute risk-weighted assets as described in this section.

* * * * *

5. Add a new § 567.7 to read as follows:

§ 567.7 Alternate computation of risk-weighted assets.

(a) *Opt-in.* (1) Any savings association, other than a savings association that uses 12 CFR part 566, Appendix A, may elect to compute risk-weighted assets under this section rather than § 567.6 of this part. If a savings association elects to apply this section, it must apply all of the requirements of this section.

(2) To elect to apply this section, a savings association must notify OTS. The election will remain in effect until the savings association withdraws the election by notifying OTS.

(b) *Definitions.* The following definitions apply to this section:

(1) *External rating.* (i) An external rating is a credit rating assigned by a NRSRO that:

(A) Fully reflects the entire amount of the credit risk with regard to all payments owed on the claim (that is, the rating must fully reflect the credit risk associated with timely repayment of principal and interest);

(B) Is published in an accessible public form;

(C) Is monitored by the issuing NRSRO; and

(D) Is, or will be, included in the issuing NRSRO's publicly available transition matrix, which tracks the performance and stability (or rating migration) of an NRSRO's issued external ratings for the specific type of claim (for example, corporate debt).

(ii) If an exposure has two or more external ratings, the external rating is the lowest assigned rating. If an exposure has components that are assigned different external ratings, the savings association must assign the lowest component rating to the entire exposure. If an exposure has a component that is not externally rated, the exposure is not externally rated.

(2) *Non-sovereign.* A non-sovereign includes a securities firm, insurance company, bank holding company, savings and loan holding company, multi-lateral lending and regional development institution, partnership, limited liability company, business trust, special purpose entity, association, and similar organization.

(3) *Public-sector entity.* A public-sector entity means a state, local authority or governmental subdivision below the central government level in an OECD country. In the United States, this definition encompasses a state, county, city, town, or other municipal corporation, a public authority, and generally any publicly-owned entity that is an instrumentality of a state or municipal corporation. This definition does not include commercial companies owned by a public-sector entity.

(4) *Sovereign.* Sovereign means a central government or an agency, department, ministry, or central bank of a central government. It does not include state, provincial or local governments, or commercial enterprises owned by a central government.

(c) *Computation.* Under this section, risk-weighted assets equal risk-weighted on-balance sheet assets computed under paragraph (d) of this section, plus risk-weighted off-balance sheet items computed under paragraph (e) of this section, plus risk-weighted recourse obligations, direct credit substitutes and certain other positions computed under paragraph (f) of this section. Assets not included (i.e., deducted from capital) for the purposes of calculating capital under § 567.5 are not included in calculating risk-weighted assets.

(d) *On-balance sheet assets.* Except as provided in paragraph (f) of this section, risk-weighted on-balance sheet assets are computed by multiplying the on-balance sheet asset amounts times the appropriate risk weight categories described in this section.

(1) The risk weight categories are:

(i) Zero percent risk weight.

(A) Cash, including domestic and foreign currency owned and held in all offices of a savings association or in transit. Any foreign currency held by a savings association must be converted into U.S. dollar equivalents;

(B) Securities issued by and other direct claims on the United States Government or its agencies (to the extent such securities or claims are unconditionally backed by the full faith and credit of the United States Government);

(C) Notes and obligations issued by either the Federal Savings and Loan Insurance Corporation or the Federal Deposit Insurance Corporation and backed by the full faith and credit of the United States Government;

(D) Deposit reserves at, claims on, and balances due from Federal Reserve Banks;

(E) The book value of paid-in Federal Reserve Bank stock;

(F) That portion of assets that is fully covered against capital loss or yield maintenance agreements by the Federal Savings and Loan Insurance Corporation or any successor agency;

(G) That portion of assets directly and unconditionally guaranteed by the United States Government or its agencies;

(H) Claims on, and claims guaranteed by, a qualifying securities firm that are collateralized by cash on deposit in the savings association or by securities issued or guaranteed by the United States Government or its agencies or the central government of an OECD country. To be eligible for this risk weight, the savings association must maintain a positive margin of collateral on the claim on a daily basis, taking into account any change in a savings association's exposure to the obligor or counterparty under the claim in relation to the market value of the collateral held in support of the claim;

(I) Debt securities issued by, other claims on, and that portion of assets backed by an eligible guarantee of, a sovereign that receive a zero percent risk weight, as provided in paragraphs (d)(3) and (5) of this section.

(ii) 20 percent risk weight.

(A) Cash items in the process of collection;

(B) That portion of assets collateralized by the current market value of securities issued or guaranteed by the United States Government or its agencies;

(C) That portion of assets conditionally guaranteed by the United States Government or its agencies;

(D) Securities (not including equity securities) issued by and other claims on the U.S. Government or its agencies that are not backed by the full faith and credit of the United States Government;

(E) Securities (not including equity securities) issued by, or other direct claims on, United States Government-sponsored agencies;

(F) That portion of assets guaranteed by United States Government-sponsored agencies;

(G) That portion of assets collateralized by the current market value of securities issued or guaranteed by United States Government-sponsored agencies;

(H) Loans that are not externally rated that are issued to a qualifying securities firm, subject to the conditions set forth below. Externally rated loans to, debt securities of, claims collateralized by claims on, and guarantees by a qualifying securities firm are subject to paragraphs (d)(1)(i)(H), and (d)(3) through (5) of this section.

(*1*) A qualifying securities firm must have a long-term issuer credit rating, or a rating on at least one issue of long-term unsecured debt, from a NRSRO. The rating must be in one of the three highest investment grade categories used by the NRSRO. If two or more NRSROs assign ratings to the qualifying securities firm, the savings association must use the lowest rating to determine whether the rating requirement of this paragraph is met. A qualifying securities firm may rely on the rating of its parent consolidated company, if the parent consolidated company guarantees the claim.

(*2*) A collateralized claim on a qualifying securities firm does not have to comply with the rating requirements under paragraph (d)(1)(ii)(H)(*1*) of this section if the claim arises under a contract that:

(*i*) Is a reverse repurchase/repurchase agreement or securities lending/borrowing transaction executed using standard industry documentation;

(*ii*) Is collateralized by debt or equity securities that are liquid and readily marketable;

(*iii*) Is marked-to-market daily;

(*iv*) Is subject to a daily margin maintenance requirement under the standard industry documentation; and

(*v*) Can be liquidated, terminated or accelerated immediately in bankruptcy or similar proceeding, and the security or collateral agreement will not be stayed or avoided under applicable law of the relevant jurisdiction. For example, a claim is exempt from the automatic stay in bankruptcy in the United States if it arises under a securities contract or a repurchase agreement subject to section 555 or 559 of the Bankruptcy Code (11 U.S.C. 555 or 559), a qualified financial contract under section 11(e)(8) of the Federal Deposit Insurance Act (12 U.S.C. 1821(e)(8)), or a netting contract between or among financial institutions under sections 401–407 of the Federal Deposit Insurance Corporation Improvement Act of 1991 (12 U.S.C. 4401–4407), or Regulation EE (12 CFR part 231).

(*3*) If the securities firm uses the claim to satisfy its applicable capital requirements, the claim is not eligible for a risk weight under this paragraph (d)(1)(ii)(H);

(I) Claims representing general obligations of any public-sector entity in an OECD country, and that portion of any claims guaranteed by any such public-sector entity;

(J) Bonds issued by the Financing Corporation or the Resolution Funding Corporation;

(K) Balances due from and all claims on domestic depository institutions. This includes demand deposits and other transaction accounts, savings deposits and time certificates of deposit, federal funds sold, loans to other depository institutions, including overdrafts and term federal funds, holdings of the savings association's own discounted acceptances for which the account party is a depository institution, holdings of bankers acceptances of other institutions and securities issued by depository institutions, except those that qualify as capital;

(L) The book value of paid-in Federal Home Loan Bank stock;

(M) Deposit reserves at, claims on and balances due from the Federal Home Loan Banks;

(N) Assets collateralized by cash held in a segregated deposit account by the reporting savings association;

(O) Loans that are not externally rated that are issued to official multilateral lending institutions or regional development institutions in which the United States Government is a shareholder or contributing member. Externally rated loans to, debt securities of, claims collateralized by claims on, and guarantees by such official multilateral lending institutions, or regional development institutions are subject to paragraph (d)(3) through (5) of this section;

(P) All claims on depository institutions incorporated in an OECD country, and all assets backed by the full faith and credit of depository institutions incorporated in an OECD country. This includes the credit equivalent amount of participations in commitments and standby letters of credit sold to other depository institutions incorporated in an OECD country, but only if the originating bank remains liable to the customer or beneficiary for the full amount of the commitment or standby letter of credit. Also included in this category are the credit equivalent amounts of risk participations in bankers' acceptances conveyed to other depository institutions incorporated in an OECD country. However, bank-issued securities that qualify as capital of the issuing bank are not included in this risk category;

(Q) Claims on, or guaranteed by depository institutions other than the central bank, incorporated in a non-OECD country, with a remaining maturity of one year or less;

(R) Debt securities issued by, other claims on, and that portion of assets backed by an eligible guarantee of, a sovereign that receive a 20 percent risk weight under paragraphs (d)(3) and (5) of this section;

(S) Debt securities issued by, certain other externally rated claims on, and that portion of assets backed by an eligible guarantee of, a non-sovereign that receive a 20 percent risk weight under paragraphs (d)(3) and (5) of this section;

(T) Recourse obligations, direct credit substitutes, residual interests (other than credit-enhancing interest-only strips), and asset-or mortgage-backed securities with long-term external ratings in the highest or second highest investment grade category or short-term external ratings in the highest investment rating category, as provided under paragraph (f) of this section;

(U) Assets collateralized by exposures that receive a 20 percent risk weight under paragraph (d)(4) of this section;

(V) Certain mortgage loans secured by liens on one-to four-family residential properties that receive a 20 percent risk weight under paragraph (d)(2) of this section.

(iii) *35 percent risk weight.*

(A) Debt securities issued by, other claims on, and that portion of assets backed by an eligible guarantee of, a sovereign that receive a 35 percent risk weight under paragraphs (d)(3) and (5) of this section;

(B) Debt securities issued by, certain other externally rated claims on, and that portion of assets backed by an eligible guarantee of, a non-sovereign that receive a 35 percent risk weight under paragraphs (d)(3) and (5) of this section;

(C) Recourse obligations, direct credit substitutes, residual interests (other than credit-enhancing interest-only strips), and asset-or mortgage-backed securities with long-term external ratings in the third highest investment grade category or short-term external ratings in the second highest investment rating category, as provided under paragraph (f) of this section;

(D) Assets collateralized by exposures that receive a 35 percent risk weight under paragraph (d)(4) of this section;

(E) Certain mortgage loans secured by liens on one-to four-family residential properties that receive a 35 percent risk weight under paragraph (d)(2) of this section.

(iv) *50 percent risk weight.*

(A) Revenue bonds issued by any public-sector entity in an OECD country, for which the underlying obligor is a public-sector entity, but which are repayable solely from the revenues generated from the project financed through the issuance of the obligations;

(B) Qualifying multifamily mortgage loans;

(C) Privately-issued mortgage-backed securities (i.e., those that do not carry the guarantee of a government or government-sponsored agency) representing an interest in qualifying mortgage loans or qualifying multifamily mortgage loans. If the security is backed by qualifying multifamily mortgage loans, the savings association must receive timely payments of principal and interest in accordance with the terms of the security. Payments will generally be considered timely if they are not 30 days past due;

(D) Qualifying residential construction loans;

(E) Debt securities issued by, other claims on, and that portion of assets backed by an eligible guarantee of, a sovereign that receive a 50 percent risk weight under paragraphs (d)(3) and (5) of this section;

(F) Debt securities issued by, certain other externally rated claims on, and that portion of assets backed by an eligible guarantee of, a non-sovereign that receive a 50 percent risk weight under paragraphs (d)(3) and (5) of this section;

(G) Recourse obligations, direct credit substitutes, residual interests (other than credit-enhancing interest-only strips), and asset-or mortgage-backed securities with long-term external ratings in the lowest investment '' plus grade category, as provided under paragraph (f) of this section;

(H) Assets collateralized by exposures that receive a 50 percent risk weight under paragraph (d)(4) of this section;

(I) Certain mortgage loans secured by liens on one-to four-family residential properties that receive a 50 percent risk weight under paragraph (d)(2) of this section.

(v) *75 percent risk weight.*

(A) Debt securities issued by, other claims on, and that portion of assets backed by an eligible guarantee of, a sovereign that receive a 75 percent risk weight under paragraphs (d)(3) and (5) of this section;

(B) Debt securities issued by, certain other externally rated claims on, and that portion of assets backed by an eligible guarantee of, a non-sovereign that receive a 75 percent risk weight under paragraphs (d)(3) and (5) of this section;

(C) Recourse obligations, direct credit substitutes, residual interests (other than credit-enhancing interest-only strips), and asset-or mortgage-backed securities with long-term external ratings in the lowest investment grade '' naught category or short-term external ratings in the lowest investment rating category, as provided under paragraph (f) of this section;

(D) Assets collateralized by exposures that receive a 75 percent risk weight under paragraph (d)(4) of this section;

(E) Certain mortgage loans secured by liens on one-to four-family residential properties that receive a 75 percent risk weight under paragraph (d)(2) of this section.

(vi) *100 percent risk weight.* All assets not otherwise specified in this section or deducted from calculations of capital under to § 567.5 of this part, including, but not limited to:

(A) Consumer loans;

(B) Commercial loans that are not externally rated;

(C) Non-qualifying multifamily mortgage loans;

(D) Residential construction loans;

(E) Land loans;

(F) Nonresidential construction loans;

(G) Obligations issued by any public-sector entity in an OECD country, for the benefit of a private party or enterprise provided that the party or enterprise, rather than the issuing public-sector entity, is responsible for the timely payment of principal and interest on the obligations, e.g., industrial development bonds;

(H) Investments in fixed assets and premises;

(I) Certain nonsecurity financial instruments including servicing assets and intangible assets includable in core capital under § 567.12 of this part;

(J) That portion of equity investments not deducted pursuant to § 567.5 of this part;

(K) The prorated assets of subsidiaries (except for the assets of includable, fully consolidated subsidiaries) to the extent such assets are included in adjusted total assets;

(L) All repossessed assets or assets (other than mortgage loans secured by liens on one-to four-family residential properties) that are more than 90 days past due;

(M) Equity investments that the Office determines have the same risk characteristics as foreclosed real estate by the savings association;

(N) Equity investments permissible for a national bank;

(O) Debt securities issued by, other claims on, and that portion of assets backed by an eligible guarantee of, a sovereign that receive a 100 percent risk weight under paragraphs (d)(3) and (5) of this section;

(P) Debt securities issued by, certain other rated claims on, and that portion of assets backed by an eligible guarantee of, non-sovereign that receive a 100 percent risk weight under paragraphs (d)(3) and (5) of this section;

(Q) Recourse obligations, direct credit substitutes, residual interests (other than credit-enhancing interest-only strips), and asset- or mortgage-backed securities with long-term external ratings in the lowest investment grade—negative category, as provided under paragraph (f) of this section;

(R) Assets collateralized by exposures that receive a 100 percent risk weight under paragraph (d)(4) of this section;

(S) Certain mortgage loans secured by liens on one-to four-family residential properties that receive a 100 percent risk weight under paragraph (d)(2) of this section.

(vii) *150 percent risk weight.*

(A) Debt securities issued by, certain other rated claims on, and that portion of assets backed by an eligible guarantee of a non-sovereign that receive a 150 percent risk weight under paragraphs (d)(3) and (5) of this section;

(B) Assets collateralized by exposures that receive a 150 percent risk weight under paragraph (d)(4) of this section;

(C) Certain mortgage loans secured by liens on one-to four-family residential properties that receive a 150 percent risk weight under paragraph (d)(2) of this section.

(viii) *200 percent risk weight.*

(A) Debt securities issued by, other claims on, and that portion of assets backed by an eligible guarantee of, a sovereign that receive a 200 percent risk weight under paragraphs (d)(3) and (5) of this section;

(B) Debt securities issued by, certain other rated claims on, and that portion of assets backed by an eligible guarantee of, a non-sovereign that receive a 200 percent risk weight under paragraphs (d)(3) and (5) of this section;

(C) Recourse obligations, direct credit substitutes, residual interests (other than credit-enhancing interest-only strips), and asset-or mortgage-backed securities with long-term external ratings one category below investment grade, as provided under paragraph (f) of this section;

(D) Assets collateralized by exposures that receive a 200 percent risk weight under paragraph (d)(4) of this section.

(2) *Mortgage loans secured by a lien on one-to four-family residential property.* A savings association must risk-weight mortgage loans secured by liens on one-to four-family residential properties under this paragraph (d)(2).

(i) *First liens.* A savings association must apply the risk weight in Table 1 that corresponds to the loan-to-value (LTV) ratio of a mortgage loan secured by a first lien on one-to four-family residential property. If a loan is not prudently underwritten, is not performing, or is more than 90 days past due, the savings association must apply a risk weight of 150 percent if the loan has an LTV that is greater than 95 percent, and must apply a risk weight of 100 percent to all other loans.

TABLE 1.—RISK WEIGHTS FOR MORTGAGE LOANS SECURED BY FIRST LIENS ON ONE-TO FOUR-FAMILY RESIDENTIAL PROPERTIES

Loan-to-Value ratio	Risk weight (percent)
60% or less	20
Greater than 60% and less than or equal to 80%	35
Greater than 80% and less than or equal to 85%	50
Greater than 85% and less than or equal to 90%	75
Greater than 90% and less than or equal to 95%	100
Greater than 95%	150

(ii) *Junior liens.*

(A) If a savings association holds the first lien and a junior lien on a one-to four family residential property and no other party holds an intervening lien, the savings association must treat the two loans as a single loan secured by a first lien and risk-weight the loans under paragraph (d)(2)(i) of this section.

(B) If a third party holds a senior or intervening lien, the savings association must apply the risk weight in Table 2 that corresponds the LTV ratio of the loan. If a loan is not prudently underwritten, is not performing, or is more than 90 days past due, the savings association must apply a risk weight of 150 percent if the loan has an LTV that is greater than 90 percent, and must apply a risk weight of 100 percent to all other loans.

TABLE 2.—RISK WEIGHTS FOR MORTGAGE LOANS SECURED BY JUNIOR LIENS ON ONE-TO FOUR-FAMILY RESIDENTIAL PROPERTIES

Loan-to-Value ratio	Risk weight
60% or less	75
Greater than 60% and less than or equal to 90%	100
Greater than 90%	150

(iii) LTV computation. To compute the LTV ratio under this paragraph (d)(2):

(A) The loan amount is the original principal amount of the loan and of all senior loans, subject to the following adjustments:

(*1*) If a loan has positively amortized, the savings association may adjust the original principal amount of the loan quarterly to reflect the positive amortization.

(*2*) If a loan has a negative amortization feature, the savings association must adjust the original principal amount of the loan quarterly to include amount of the negative amortization. If a third party holds a senior or intervening lien with a negative amortization feature, the savings association must adjust the original principal amount of the senior or intervening loan to reflect the amount of that loan if it were to fully negatively amortize under the applicable contract.

(*3*) If a loan is a home equity line of credit, the savings association must adjust the original principal amount of the loan quarterly to reflect the current funded amount of the line of credit.

(B) At the origination of the loan, the value of the property is the lower of the purchase price or the estimate of the property's value. The savings association may update the value of the property only when it extends additional funds in connection with refinancing the loan or originating another loan secured by a junior lien that is treated as a single loan under paragraph (d)(2)(ii)(A) of this section, and it obtains a new appraisal or evaluation of the value of the property as a part of that transaction. All estimates of the property's value must be based on an appraisal or evaluation of the property in conformance with 12 CFR part 564 and 12 CFR 560.100–560.101.

(C) The savings association may compute the LTV ratio after consideration of loan level private mortgage insurance (PMI) provided by non-affiliated insurer with long-term senior debt (without credit enhancement) that is externally-rated at least the third highest investment grade. Loan level PMI is insurance that protects a mortgage lender in the event of borrower default up to a predetermined portion of the value of a one-to four-family residential property and that has no pool-level cap that would effectively reduce coverage below the predetermined portion of the value of the property. An affiliated company is any company that controls, is controlled by, or is in common control with the savings association. A company or person controls a company if it owns, controls, or holds with power to vote 25 percent or more of a class of voting securities of the company, or consolidates the company for financial reporting purposes.

(iv) *Negatively amortizing loans and home equity lines of credit.* This paragraph (d)(2) applies to the funded portions of negatively amortizing loans and home equity lines of credit that are secured by a first or junior lien on one-to four-family residential property. The unfunded portions of these loans are addressed at paragraph (e)(2) of this section.

(v) *Construction loans.* This paragraph (d)(2) applies to a mortgage loan to an individual borrower that is secured by a lien on land to be used for the construction of the borrower's home. It does not apply to ''qualifying residential construction loans,'' as defined in § 567.1, which are addressed under paragraph (d)(1)(iv)(D) of this section or other residential construction loans, which are addressed under paragraph (d)(1)(vi)(D) of this section.

(vi) *Transition provision.* If a savings association owns a mortgage loan secured by a lien on one-to four-family residential property on the date that it elects to opt-in under paragraph (a) of this section, it may apply a 50 percent risk weight if the mortgage loan is a ''qualifying mortgage loan'' as defined in § 567.1, and apply a 100 percent risk weight if the mortgage loan is not a qualifying mortgage loan. If the savings association elects to apply this paragraph (d)(2)(vi), it must apply this transitional risk-weight treatment to all mortgage loans that it owns on the date that it elects to opt-in under paragraph (a). A savings association may only rely on this transitional provision the first time it elects to compute risk-weights under this § 567.7.

(3) *Direct claims—ratings-based approach.* (i) A savings association must risk-weight claims described in paragraph (d)(3)(ii) of this section using the risk weights indicated on Table 3 (claims with an original maturity of one year or more) or Table 4 (claims with an original maturity of less than one year). To determine the applicable risk weight for a claim, the savings association must use the external rating for the claim. If a sovereign exposure has no external rating, the exposure is deemed to have an external rating equal to the sovereign's issuer rating assigned by an NRSRO.

(ii)(A) This paragraph (d)(3) applies to claims on sovereigns, other than the United States Government and its agencies. Claims on the United States Government and its agencies are risk-weighted under paragraph (d)(1) of this section.

(B) This paragraph (d)(3) also applies to all claims on non-sovereigns, other than loans that are not externally rated and claims on United States Government-sponsored agencies, public-sector entities in OECD countries, and depository institutions. Loans to non-sovereigns that are not externally rated and claims on United States Government-sponsored agencies, public sector entities in OECD countries and depository institutions are risk-weighted under paragraph (d)(1) of this section.

(C) This paragraph (d)(3) does not apply to recourse obligations, direct credit substitutes, and other positions that are subject to paragraph (f) of this section.

(D) This paragraph (d)(3) also does not apply to OTC derivative counter-party risk. OTC derivative counter-party risk is addressed in paragraph (e) of this section.

TABLE 3.—RISK WEIGHTS BASED ON RATINGS FOR LONG-TERM EXPOSURES

Long-term rating category	Example	Sovereign risk weight (percent)	Non-Sovereign risk weight (percent)
Highest investment grade rating	AAA	0	20
Second-highest investment grade rating	AA	20	20
Third-highest investment grade rating	A	20	35
Lowest-investment grade rating—plus	BBB+	35	50
Lowest-investment grade rating	BBB	50	75
Lowest-investment grade rating—minus	BBB−	75	100
One category below investment grade	BB+, BB	75	150
One category below investment grade—minus	BB−	100	200
Two or more categories below investment grade	B, CCC	150	200
Unrated	n/a	200	200[1]

TABLE 4.—RISK WEIGHTS BASED ON RATINGS FOR SHORT-TERM EXPOSURES

Short-term rating category	Example	Sovereign risk weight	Non-Sovereign risk weight
Highest investment grade rating	A–1, P–1	0	20
Second-highest investment grade rating	A–2, P–2	20	35
Lowest investment grade rating	A–3, P–3	50	75
Unrated	n/a	100	100[1]

[1] Unrated debt securities issued by non-sovereigns receive the risk-weight indicated. Unrated loans to non-sovereigns are risk-weighted under paragraph (d)(1) of this section.

(4) *Claims collateralized by certain debt securities or asset-backed or mortgage-backed securities.* (i) In addition to collateralized claims addressed in paragraph (d)(1) of this section, a savings association may risk-weight a claim that is collateralized by:

(A) A debt security that may be risk-weighted under paragraph (d)(3) of this section, by applying the risk-weight that would be assigned directly to the debt security under that paragraph. The minimum risk-weight that may be assigned to an asset collateralized by a debt security that is issued by a sovereign is 20 percent;

(B) A debt security backed by a guarantee of a sovereign (other than the United States and its agencies) that may be risk-weighted under paragraph (d)(5) of this section, by applying the risk-weight that would be assigned directly to the debt security under that paragraph. The minimum risk-weight that may be assigned to an asset collateralized by a debt security that is guaranteed by a sovereign is 20 percent; or

(C) A security that may be risk-weighted under Table A or B of paragraph (f) of this section, by applying the risk-weight that would be assigned directly to the security under paragraph (f).

(ii) To be eligible for risk-weighting under this paragraph (d)(4), the collateral must be liquid and readily marketable and must have an external rating (or, if applicable, a sovereign issuer rating assigned by an NRSRO) of at least investment grade.

(iii) If an asset is partially collateralized, only that portion of the asset that is collateralized by the market value of the collateral may be risk-weighted under this paragraph (d)(4).

(5) Guaranteed assets or claims. (i) A savings association may risk-weight a claim that is backed by an eligible guarantee by applying the risk-weight indicated in Table 3 of this section. To determine the applicable risk weight for an exposure, the savings association must use the external rating assigned to the guarantor's long-term senior debt (without credit enhancement) or, if the guarantor is a sovereign, an external rating that is equal to the sovereign's issuer rating assigned by an NRSRO. The applicable external rating must be at least investment grade.

(ii) This paragraph (d)(5) applies to eligible guarantees of:

(A) Sovereigns, other than the United States Government and its agencies. Guarantees of the United States Government and its agencies are risk-weighted under paragraph (d)(1) of this section; and

(B) Non-sovereigns, other than United States Government-sponsored agencies, public-sector entities in OECD countries, and depository institutions. Guarantees of United States Government-sponsored agencies, public-sector entities in OECD countries, and depository institutions are risk-weighted under paragraph (d)(1) of this section.

(iii) To be an eligible guarantee, the guarantee must be issued by a third party guarantor and must:

(A) Be written and unconditional and, for a sovereign guarantee, be backed by the full faith and credit of the sovereign;

(B) Cover all or a pro rata portion of contractual payments of the obligor on the reference asset or claim. If an asset or claim is partially guaranteed, only the pro rata portion of the asset or claim that is guaranteed may be assigned a risk-weight under this paragraph (d)(5);

(C) Give the beneficiary a direct claim against the protection provider;

(D) Be non-cancelable by the protection provider for reasons other than the breach of the contract by the beneficiary;

(E) Be legally enforceable against the protection provider in a jurisdiction where the protection provider has sufficient assets against which a judgment may be attached and enforced; and

(F) Require the protection provider to make payment to the beneficiary on the occurrence of a default of the obligor on the reference asset or claim without first requiring the beneficiary to demand payment from the obligor.

(6) *Indirect ownership interests in pools of assets.* Assets representing an indirect holding of a pool of assets, e.g., mutual funds, are assigned to risk-weight categories based upon the risk weight that would be assigned to the assets in the portfolio of the pool. An investment in shares of a mutual fund whose portfolio consists primarily of various securities or money market instruments that, if held separately, would be assigned to different risk-weight categories, generally is assigned to the risk-weight category appropriate to the highest risk-weighted asset that the fund is permitted to hold in accordance with the investment objectives set forth in its prospectus. The savings association may, at its option, assign the investment on a pro rata basis to different risk-weight categories according to the investment limits in its prospectus. In no case will an investment in shares in any such fund be assigned to a total risk weight less than 20 percent. If the savings association chooses to assign investments on a pro rata basis, and the sum of the investment limits of assets in the fund's prospectus exceeds 100 percent, the savings association must assign the highest pro rata amounts of its total investment to the higher risk categories. If, in order to maintain a necessary degree of short-term liquidity, a fund is permitted to hold an insignificant amount of its assets in short-term, highly liquid securities of superior credit quality that do not qualify for a preferential risk weight, such securities will generally be disregarded in determining the risk-weight category into which the savings association's holding in the overall fund should be assigned. The prudent use of hedging instruments by a mutual fund to reduce the risk of its assets will not increase the risk-weighting of the mutual fund investment. For example, the use of hedging instruments by a mutual fund to reduce the interest rate risk of its government bond portfolio will not increase the risk weight of that fund above the 20 percent category. Nonetheless, if the fund engages in any activities that appear speculative in nature or has any other characteristics that are inconsistent with the preferential risk-weighting assigned to the fund's assets, holdings in the fund will be assigned to the 100 percent risk-weight category.

(e) *Off balance sheet items.* A savings association must calculate the risk-weighted off-balance sheet items as described at § 567.6 of this part, with the following modifications:

(1) *Short-term commitments.* A savings association must apply the following credit conversion factors to the unused portion of commitments with an original maturity of one year or less:

(i) Zero percent for commitments that are unconditionally cancelable and commitments to originate a loan secured by a lien on one- to four-family residential property; and

(ii) 10 percent for all other short-term commitments.

(2) *Unfunded amount of negatively amortizing mortgage loans and home equity lines of credit.* If a mortgage loan secured by a lien on one- to four-family residential property may negatively amortize or is a home equity line of credit, a savings association must calculate the risk-weighted asset amount for the unfunded amount of the loan by multiplying the amount of the off-balance sheet exposure times the applicable credit conversion factor times the applicable risk weight. For the purposes of this paragraph (e)(2):

(i) The amount of the off-balance sheet exposure is the unfunded amount of the loan if it were to fully negatively amortize under the applicable contract or the maximum unfunded amount of the home equity line of credit; and

(ii) The applicable risk weight is the risk weight prescribed in paragraph (d)(2) of this section using an LTV computed under that paragraph, except that the loan amount must include an additional amount equal to the unfunded amount of the loan if it were to fully negative amortize under the applicable contract or equal to the maximum unfunded amount of the home equity line of credit.

(3) *Risk weight for derivatives.* A savings association must calculate the risk-weighted asset amount for off-balance sheet derivative contracts without reference to the 50 percent maximum risk-weight cap described at 12 CFR 567.6(a)(2).

(f) *Ratings-based approach for recourse obligations, direct credit substitutes and certain other positions.* (1) *General.* A savings association must apply § 567.6(b) of this part to determine the risk weights for recourse obligations, direct credit substitutes, and other described positions, except the savings association must calculate risk-weights for recourse obligations, direct credit substitutes, residual interests (other than credit enhancing interest-on strips) described in § 567.6(b)(3) by referring to the exposure's external rating and using the following tables:

TABLE 5

Long-term external rating category	Example	Risk weight (percent)
Highest investment grade rating	AAA	20
Second-highest investment grade rating	AA	20
Third-highest investment grade rating	A	35
Lowest-investment grade rating—plus	BBB+	50
Lowest-investment grade rating—naught	BBB	75
Lowest-investment grade rating—negative	BBB−	100
One category below investment grade—plus & naught	BB+, BB	200
One category below investment grade—negative	BB−	200

TABLE 6

Short-term external rating category	Example	Risk weight (percent)
Highest investment grade rating	A–1, P–1	20
Second-highest investment grade rating	A–2, P–2	35
Lowest investment grade rating	A–3, P–3	75

(2) Securitizations of revolving credit with early amortization provisions.

(i) A savings association must risk-weight the off-balance sheet amount of the investor's interest in a securitization if:

(A) The savings association securitizes revolving credits in the securitization. A revolving credit is a line of credit where the borrower is permitted to vary the drawn amount and the amount of repayment within an agreed limit; and

(B) The securitization structure includes an early amortization provision. An early amortization provision is a provision in the documentation governing a securitization that, when triggered, causes investors in the securitization exposures to be repaid before the original stated maturity of the securitization exposures. An early amortization provision does not include a provision that is triggered solely by events that are not directly related to the performance of the underlying exposures or the originating savings association (such as material changes in tax laws or regulations).

(ii) The risk-based asset amount for the investors' interest in a securitization described in this paragraph (f)(2) is equal to the off-balance sheet investors' interest times the applicable credit conversion factor times the risk-weight applicable to the underlying obligor, collateral or guarantor. For the purposes of this paragraph (f)(2):

(A) The off-balance sheet investors' interest is the total amount of the securitization exposures issued by a trust or a special purpose entity to investors.

(B) The applicable credit conversion factor is determined by reference to Table 5, which is based upon a comparison of the securitization's annualized three month average excess spread against the excess spread trapping point. This excess spread trapping ratio is computed as follows:

(*1*) The savings association must calculate the three-month average of the dollar amount of excess spread divided by the outstanding principal balance of the underlying pool of exposures at the end of each month. Excess spread is equal to the gross finance charge collections (including market interchange fees) and other income received by a trust or special purpose entity minus interest paid to the investors in the securitization exposures, servicing fees, charge-offs, and other trust or special purpose entity expenses.

(*2*) The three-month average excess spread is converted to a compound annual rate and is then divided by the excess spread trapping point. The excess spread trapping point is the point at which the savings association is required by the documentation for the securitization to divert and hold excess spread in spread or reserve account, expressed as a percentage. The excess spread trapping point is 4.5 percent for securitizations that do not require excess spread to be trapped or that specify a trapping point that is based primarily on performance features other than the three-month average excess spread.

(iii) If the aggregate risk-based capital requirement for all of a savings association's exposures to a securitization (including the risk-based capital requirements for residual interests, recourse obligations, direct credit substitutes, the investor's interest computed under this paragraph (f)(2), and other securitization exposures) exceeds the risk-based capital requirement for the underlying securitized assets, the aggregate risk-based capital for all of the exposures is the greater of the risk-based capital requirement for:

(A) The residual interest; or

(B) The underlying securitized assets calculated as if the savings association continued to hold the assets on its balance sheet.

TABLE 7.—EARLY AMORTIZATION CREDIT CONVERSION FACTORS

Excess spread trapping point ratio	CCF (percent)
133.33 percent of trapping point or more	0
Less than 133.33 percent to 100 percent of trapping point	5
Less than 100 percent to 75 percent of trapping point	15

TABLE 7.—EARLY AMORTIZATION CREDIT CONVERSION FACTORS—Continued

Excess spread trapping point ratio	CCF (percent)
Less than 75 percent to 50 percent of trapping point	50
Less than 50 percent of trapping point	100

6. In § 567.11, revise paragraph (c)(2), redesignate paragraph (c)(3) as paragraph (c)(4) and add new paragraph (c)(3) to read as follows:

§ 567.11 Reservation of authority.

* * * * *

(c) * * *

(2) Notwithstanding §§ 567.6 and 567.7 of this part, OTS will look to the substance of a transaction and may find that the assigned risk-weight for any asset, or credit equivalent amount or credit conversion factor for any off-balance sheet item does not appropriately reflect the risks imposed on the savings association. OTS may require the savings association to apply another risk weight, credit equivalent amount, or credit conversion factor that the OTS deems appropriate. Similarly, OTS may override the use of certain ratings or ratings on certain instruments, if necessary or appropriate to reflect the risk that that an instrument poses to a savings association.

(3) OTS may require a savings association to use § 567.6 or § 567.7 of this part to compute risk-weighted assets, if OTS determines that the risk-weighted capital requirement computed under that section is more appropriate for the risk profile of the savings association or would otherwise enhance the safety and soundness of the savings association. In making a determination under this paragraph (c)(3), OTS will apply notice and response procedures in the same manner and to the same extent as the notice procedures in 12 CFR 567.3(d).

* * * * *

Dated: December 12, 2006.

John C. Dugan,

Comptroller of the Currency.

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

Jennifer J. Johnson,

Secretary of the Board.

Dated at Washington, D.C., this 5th Day of December, 2006.

By order of the Board of Directors.

Federal Deposit Insurance Corporation.

Valerie J. Best,

Assistant Executive Secretary.

Dated: December, 11, 2006.

By the Office of Thrift Supervision

John Reich,

Director.

[FR Doc. 06–9738 Filed 12–22–06; 8:45 am]

BILLING CODE 4810–33–P(25%); 6210–01–P(25%); 6714–01–P(25%); 6720–01–P(25%)

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

12 CFR Part 3

[Docket No. 06–09]

RIN 1557–AC91

FEDERAL RESERVE SYSTEM

12 CFR Parts 208 and 225

[Regulations H and Y; Docket No. R–1261]

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 325

RIN 3064–AC73

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

12 CFR Part 566

[Docket No. 2006–33]

RIN 1550–AB56

Risk-Based Capital Standards: Advanced Capital Adequacy Framework

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

ACTION: Joint notice of proposed rulemaking; extension of comment period.

SUMMARY: On September 25, 2006, the Office of the Comptroller of the Currency (OCC), the Board of Governors of the Federal Reserve System (Board), the Federal Deposit Insurance Corporation (FDIC), and the Office of Thrift Supervision (OTS) (collectively, the agencies) issued a joint notice of proposed rulemaking for public comment that proposed a new risk-based capital adequacy framework (Basel II NPR). The Basel II NPR would require some and permit other qualifying banks [1] to use an internal ratings-based approach to calculate regulatory credit risk capital requirements and advanced measurement approaches to calculate regulatory operational risk capital requirements. The Basel II NPR describes the qualifying criteria for banks required or seeking to operate under the proposed framework and the applicable risk-based capital requirements for banks that operate under the framework. The Basel II NPR comment period will end on January 23, 2007.

In today's issue of the **Federal Register**, the agencies are proposing revisions to the existing risk-based capital framework that would apply to banks that do not use the Basel II NPR (Basel IA NPR). The agencies have determined that an extension of the Basel II NPR comment period is appropriate to allow interested parties additional time to compare the risk-based capital requirements as proposed in the Basel II NPR with the risk-based capital requirements as proposed in the Basel IA NPR.

DATES: The comment period for the proposed rule published at 71 FR 55830 (Sept. 25, 2006) is extended until March 26, 2007.

ADDRESSES: You may submit comments by any of the methods identified in the Basel II NPR (See 71 FR 55830, September 25, 2006.)

FOR FURTHER INFORMATION CONTACT: *OCC:* Roger Tufts, Senior Economic Advisor, Capital Policy (202–874–4925) or Ron Shimabukuro, Special Counsel, Legislative and Regulatory Activities Division (202–874–5090). Office of the Comptroller of the Currency, 250 E Street, SW., Washington, DC 20219.

Board: Barbara Bouchard, Deputy Associate Director (202–452–3072 or *barbara.bouchard@frb.gov*) or Anna Lee Hewko, Senior Supervisory Financial Analyst (202–530–6260 or *anna.hewko@frb.gov*), Division of Banking Supervision and Regulation; or Mark E. Van Der Weide, Senior Counsel (202–452–2263 or *mark.vanderweide@frb.gov*), Legal Division. For users of Telecommunications Device for the Deaf (''TDD'') only, contact 202–263–4869.

FDIC: Jason C. Cave, Associate Director, Capital Markets Branch, (202) 898–3548, Bobby R. Bean, Chief, Policy Section, Capital Markets Branch, (202) 898–3575, Kenton Fox, Senior Capital Markets Specialist, Capital Markets

[1] As used in this notice, the term ''bank'' includes banks, savings associations, and bank holding companies.

Branch, (202) 898–7119, Division of Supervision and Consumer Protection; or Michael B. Phillips, Counsel, (202) 898–3581, Supervision and Legislation Branch, Legal Division, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429.

OTS: Michael D. Solomon, Director, Capital Policy, Supervision Policy (202) 906–5654; David W. Riley, Senior Analyst, Capital Policy (202) 906–6669; or Karen Osterloh, Special Counsel, Regulations and Legislation Division (202) 906–6639, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

SUPPLEMENTARY INFORMATION: On September 25, 2006, the agencies issued the Basel II NPR, which proposed a new risk-based capital adequacy framework that would require some and permit other qualifying banks to use an internal ratings-based approach to calculate regulatory credit risk capital requirements and advanced measurement approaches to calculate regulatory operational risk capital requirements. *See* 71 FR 55830. The proposed rule describes the qualifying criteria for banks required or seeking to operate under the proposed framework and the applicable risk-based capital requirements for banks that would operate under that framework.

In today's issue of the **Federal Register**, the agencies are proposing revisions to the existing risk-based capital framework applicable to banks that would not use the Basel II NPR. The Basel IA NPR proposes to expand the number of risk weight categories, allow the use of external credit ratings to risk weight certain exposures, expand the range of recognized collateral and eligible guarantors, use loan-to-value ratios to risk weight most residential mortgages, and revise other provisions of the existing risk-based capital requirements to increase the risk sensitivity of the risk-based capital rules for those banks that will not use the proposed risk-based capital requirements in the Basel II NPR.

The agencies believe that it is important for interested parties to be able to compare the risk-based capital requirements in the Basel II NPR and Basel IA NPR. Therefore, the agencies are extending the comment period for the Basel II NPR from January 23, 2007, to March 26, 2007.

Dated: December 5, 2006.

John C. Dugan,

Comptroller of the Currency.

Dated: December 8, 2006.

By order of the Board of Governors of the Federal Reserve System.

Jennifer J. Johnson,

Secretary of the Board.

Dated at Washington, DC, this 5th day of December, 2006.

By order of the Board of Directors, Federal Deposit Insurance Corporation.

Valerie J. Best,

Assistant Executive Secretary.

Dated: December 11, 2006.

John Reich,

Director.

[FR Doc. 06–9737 Filed 12–22–06; 8:45 am]

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DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

FEDERAL RESERVE SYSTEM

FEDERAL DEPOSIT INSURANCE CORPORATION

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

Proposed Agency Information Collection Activities; Comment Request

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

ACTION: Joint notice and request for comment; extension of comment period.

SUMMARY: In accordance with the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35), the OCC, the Board, the FDIC, and the OTS (collectively, the agencies) may not conduct or sponsor, and the respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number. The Federal Financial Institutions Examination Council (FFIEC), of which the agencies are members, approved the agencies' publication for public comment of proposed new regulatory reporting requirements for banks [1] that qualify for and adopt the Advanced Capital Adequacy Framework to calculate their risk-based capital requirement or banks that are in the parallel run stage of qualifying to adopt this proposed framework. This notice extends the comment period on this document for consistency with the extension of the comment period for the notice of proposed rulemaking on the Advanced Capital Adequacy Framework, as published elsewhere in today's issue of the **Federal Register**.

DATES: The comment period for the joint notice and request for comment published at 71 FR 55981 (Sept. 25, 2006) is extended until March 26, 2007.

ADDRESSES: You may submit comments by any of the methods identified in the joint notice on Proposed Agency Information Collection Activities. (See 71 FR 55981, September 25, 2006.)

FOR FURTHER INFORMATION CONTACT: For further information about the proposed regulatory reporting requirements discussed in this notice, please contact any of the agency clearance officers whose names appear below. In addition, copies of reporting schedules and instructions can be obtained at each agency's web site as well as the FFIEC's web site.[2]

OCC: Please direct substantive questions to Lorey Hoffman, Large Bank Director, Large Bank Supervision, (202) 874–4595, and requests for copies of the collection to Mary Gottlieb, OCC Clearance Officer, or Camille Dickerson, (202–874–5090), Legislative and Regulatory Activities Division, Office of the Comptroller of the Currency, 250 E Street, SW., Washington, DC 20219.

Board: Michelle Long, Federal Reserve Board Clearance Officer, Division of Research and Statistics, Board of Governors of the Federal Reserve System, Washington, DC 20551 (202–452–3829).

FDIC: Steven F. Hanft, Clearance Officer, at *shanft@fdic.gov,* (202–898–3907), Legal Division, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429.

OTS: Marilyn K. Burton, OTS Clearance Officer, at *marilyn.burton@ots.treas.gov*, (202) 906–6467, or facsimile number (202) 906–6518, Litigation Division, Chief Counsel's Office, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

SUPPLEMENTARY INFORMATION: On September 25, 2006, the agencies published a joint notice and request for comment on the proposed reporting requirements (71 FR 55981). Simultaneously with publication of the information collection notice, the agencies published a proposed rule seeking comment on the Advanced Capital Adequacy Framework (Basel II NPR) (71 FR 55830). The comment period on the information collection notice and the Basel II NPR ends on January 23, 2007. Elsewhere in today's issue of the **Federal Register**, the agencies extended the comment period for the Basel II NPR. The agencies have determined that an extension of the comment period on the information collection notice is appropriate for consistency. At the end of the comment period, the comments and recommendations received will be analyzed to determine the extent to which the FFIEC should modify the proposed reporting requirements prior to giving its final approval. The agencies will then submit the proposed reporting requirements to OMB for review and approval and, upon approval, OMB will assign control numbers.

Dated: December 6, 2006.

Stuart E. Feldstein,

Assistant Director, Legislative and Regulatory Activities Division, Office of the Comptroller of the Currency.

Dated: December 8, 2006.

Board of Governors of the Federal Reserve System.

Jennifer J. Johnson,

Secretary of the Board.

Dated at Washington, DC, this 5th day of December, 2006.

By order of the Board of Directors.

Federal Deposit Insurance Corporation.

Valerie J. Best,

Assistant Executive Secretary.

Dated: December 11, 2006.

Deborah Dakin,

Senior Deputy Chief Counsel, Regulations and Legislation Division, Office of Thrift Supervision.

[FR Doc. 06–9736 Filed 12–21–06; 8:45 am]

BILLING CODE 4810–33–P; 6210–01–P; 6714–01–P; 6720–01–P

[1] For simplicity, and unless otherwise indicated, this notice uses the term ''bank'' to include banks, savings associations, and bank holding companies (BHCs). The terms ''bank holding company'' and ''BHC'' refer only to bank holding companies regulated by the Board and do not include savings and loan holding companies regulated by the OTS. For a detailed description of the institutions covered by this notice, refer to Part I, Section 1, of the proposed regulatory text in the notice of proposed rulemaking entitled Risk-Based Capital Standards: Advanced Capital Adequacy Framework.

[2] For the OCC: *http://www.occ.treas.gov*; for the FDIC: *http://www.fdic.gov*; for the OTS: *http://www.ots.treas.gov*; for the Board: *http://www.federalreserve.gov/boarddocs/reportforms/review.cfm*; and for the FFIEC: *http://www.ffiec.gov/ffiec_report_forms.htm.*

Federal Register

Tuesday,

December 26, 2006

Part III

Federal Reserve System

Securities and Exchange Commission

12 CFR Part 218; 17 CFR Parts 240 and 247

Securities and Exchange Act of 1934—Broker Exemption for Banks; Proposed Rules and Notice

FEDERAL RESERVE SYSTEM

12 CFR Part 218

[Regulation R; Docket No. R–1274]

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 240 and 247

[Release No. 34–54946; File No. S7–22–06]

RIN 3235–AJ74

Definitions of Terms and Exemptions Relating to the ''Broker'' Exceptions for Banks

AGENCIES: Board of Governors of the Federal Reserve System (''Board'') and Securities and Exchange Commission (''SEC'' or ''Commission'') (collectively, the Agencies).

ACTION: Proposed rule.

SUMMARY: The Board and the Commission jointly are issuing, and requesting comment on, proposed rules that would implement certain of the exceptions for banks from the definition of the term ''broker'' under Section 3(a)(4) of the Securities Exchange Act of 1934 (''Exchange Act''), as amended by the Gramm-Leach-Bliley Act (''GLBA''). The proposed rules would define terms used in these statutory exceptions and include certain related exemptions. In developing this proposal, the Agencies have consulted with the Office of the Comptroller of the Currency (''OCC''), the Federal Deposit Insurance Corporation (''FDIC'') and the Office of Thrift Supervision (''OTS''). The proposal is intended, among other things, to facilitate banks' compliance with the GLBA.

DATES: Comments should be received on or before March 26, 2007.

ADDRESSES:

Board: You may submit comments, identified by Docket No. R–1274, by any of the following methods:

- *Board's Web site: http://www.federalreserve.gov.* Follow the instructions for submitting comments at *http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm.*
- *Federal eRulemaking Portal: http//www.regulations.gov.* Follow the instructions for submitting comments.
- *E-mail: regs.comments@federalreserve.gov.* Include docket number in the subject line of the message.
- *Fax:* (202) 452–3819 or (202) 452–3102.
- *Mail:* Jennifer J. Johnson, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue, NW., Washington, DC 20551.

All public comments are available from the Board's Web site at *http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm* as submitted, unless modified for technical reasons. Accordingly, your comments will not be edited to remove any identifying or contact information. Public comments also may be viewed electronically or in paper form in Room MP–500 of the Board's Martin Building (C and 20th Streets, NW) between 9 a.m. and 5 p.m. on weekdays.

SEC: Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/proposed.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number S7–22–06 on the subject line.

Paper Comments

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number S7–22–06. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/proposed.shtml*). Comments are also available for public inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT:

Board: Kieran J. Fallon, Assistant General Counsel, (202) 452–5270, Andrew Miller, Counsel, (202) 452–3428, or Andrea Tokheim, Senior Attorney, (202) 452–2300, Legal Division, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue, NW., Washington, DC 20551. Users of Telecommunication Device for Deaf (TTD) only, call (202) 263–4869.

SEC: Catherine McGuire, Chief Counsel, Linda Stamp Sundberg, Senior Special Counsel, Richard C. Strasser, Attorney Fellow, John Fahey, Special Counsel, Haimera Workie, Special Counsel, at (202) 551–5550, Office of the Chief Counsel, Division of Market Regulation, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Introduction and Background

The GLBA amended several federal statutes governing the activities and supervision of banks, bank holding companies, and their affiliates.[1] Among other things, it lowered barriers between the banking and securities industries erected by the Banking Act of 1933 (''Glass-Steagall Act'').[2] It also altered the way in which the supervisory responsibilities over the banking, securities, and insurance industries are allocated among financial regulators. Among other things, the GLBA repealed most of the separation of investment and commercial banking imposed by the Glass-Steagall Act. The GLBA also revised the provisions of the Exchange Act that had completely excluded banks from broker-dealer registration requirements.

In enacting the GLBA, Congress adopted functional regulation for bank securities activities, with certain exceptions from Commission oversight for specified securities activities. With respect to the definition of ''broker,'' the Exchange Act, as amended by the GLBA, provides eleven specific exceptions for banks.[3] Each of these exceptions permits a bank to act as an agent with respect to specified securities products or in transactions that meet specific statutory conditions.

In particular, Section 3(a)(4)(B) of the Exchange Act provides conditional exceptions from the definition of broker for banks that engage in certain securities activities in connection with third-party brokerage arrangements;[4] trust and fiduciary activities;[5] permissible securities transactions;[6] certain stock purchase plans;[7] sweep accounts;[8] affiliate transactions;[9] private securities offerings;[10] safekeeping and custody activities;[11] identified banking products;[12] municipal securities;[13] and a *de minimis* number of other securities transactions.[14]

On October 13, 2006, President Bush signed into law the ''Financial Services Regulatory Relief Act of 2006 (''Regulatory Relief Act'').''[15] Among other things, the Regulatory Relief Act requires that the SEC and the Board jointly adopt a single set of rules to implement the bank broker exceptions in Section 3(a)(4) of the Exchange Act.[16] It also requires that not later than 180 days after the date of enactment of the Regulatory Relief Act, the SEC and the Board jointly issue a single set of proposed rules to implement these exceptions.

Section 401 of the Regulatory Relief Act also amended the definition of ''bank'' in Section 3(a)(6) of the Exchange Act to include any Federal savings association or other savings association the deposits of which are insured by the FDIC. Accordingly, as used in this proposal, the term ''bank'' includes any savings association that qualifies as a ''bank'' under Section 3(a)(6) of the Exchange Act, as amended.

In accordance with these statutory provisions, the SEC and Board are jointly requesting comment on proposed rules to implement the broker exceptions for banks relating to third-party networking arrangements, trust and fiduciary activities, sweep activities, and safekeeping and custody activities.[17] The proposed rules include certain exemptions related to these activities, as well as exemptions related to foreign securities transactions, securities lending transactions conducted in an agency capacity, the execution of transactions involving mutual fund shares, the potential liability of banks under Section 29 of the Exchange Act, and the date on which the GLB Act's ''broker'' exceptions for banks will go into effect.[18] The proposed rules are designed to accommodate the business practices of banks and protect investors.

Any additions or changes to these rules that may be appropriate to implement Section 3(a)(4)(B) of the Exchange Act will be adopted jointly by the SEC and Board in accordance with the consultation provisions in Section 101(b) of the Regulatory Relief Act. Identical sets of the final rules will be published by the SEC in Title 17 of the Code of Federal Regulations and by the Board in Title 12 of the Code of Federal Regulations.

In developing this proposal, the Agencies considered, among other things, the language and legislative history of the ''broker'' exceptions for banks adopted in the GLBA, the rules previously issued or proposed by the Commission relating to these exceptions and the comments received in connection with those prior rulemakings. The Agencies request comment on all aspects of these proposals as well as on the specific provisions and issues identified below.

[1] Pub. L. 106–102, 113 Stat. 1338 (1999).

[2] Pub. L. 73–66, ch. 89, 48 Stat. 162 (1933) (as codified in various Sections of 12 U.S.C.).

[3] 15 U.S.C. 78c(a)(4).

[4] Exchange Act Section 3(a)(4)(B)(i). This exception permits banks to enter into third-party brokerage, or ''networking'' arrangements with brokers under specific conditions.

[5] Exchange Act Section 3(a)(4)(B)(ii). This exception permits banks to effect transactions as trustees or fiduciaries for securities customers under specific conditions.

[6] Exchange Act Section 3(a)(4)(B)(iii). This exception permits banks to buy and sell commercial paper, bankers' acceptances, commercial bills, exempted securities, certain Canadian government obligations, and Brady bonds.

[7] Exchange Act Section 3(a)(4)(B)(iv). This exception permits banks, as part of their transfer agency activities, to effect transactions for certain issuer plans.

[8] Exchange Act Section 3(a)(4)(B)(v). This exception permits banks to sweep funds into no-load money market funds.

[9] Exchange Act Section 3(a)(4)(B)(vi). This exception permits banks to effect transactions for affiliates, other than broker-dealers.

[10] Exchange Act Section 3(a)(4)(B)(vii). This exception permits certain banks to effect transactions in certain privately placed securities, under certain conditions.

[11] Exchange Act Section 3(a)(4)(B)(viii). This exception permits banks to engage in certain enumerated safekeeping or custody activities, including stock lending as custodian.

[12] Exchange Act Section 3(a)(4)(B)(ix). This exception permits banks to buy and sell certain ''identified banking products,'' as defined in Section 206 of the GLBA.

[13] Exchange Act Section 3(a)(4)(B)(x). This exception permits banks to effect transactions in municipal securities.

[14] Exchange Act Section 3(a)(4)(B)(xi). This exception permits banks to effect up to 500 transactions in securities in any calendar year in addition to transactions referred to in the other exceptions.

[15] Pub. L. 109–351, 120 Stat. 1966 (2006).

[16] *See* Exchange Act Section 3(a)(4)(F), as added by Section 101 of the Regulatory Relief Act. The Regulatory Relief Act also requires that the Board and SEC consult with, and seek the concurrence of, the OCC, FDIC and OTS prior to jointly adopting final rules. As noted above, the Board and the SEC also have consulted extensively with the OCC, FDIC and OTS in developing these joint proposed rules.

[17] *See* 15 U.S.C. 78c(a)(4)(B)(i), (ii), (v) and (viii).

[18] Employees of a bank that operates in accordance with the exceptions in Section 3(a)(4)(B) of the Exchange Act and, where applicable, the proposed rules also shall not be required to register as a ''broker'' to the extent that the employees'' activities are covered by the relevant exception or rule.

In addition, the Agencies request comment on whether it would be useful or appropriate for the Agencies to adopt rules implementing the other bank ''broker'' exceptions in Section 3(a)(4)(B) of the Exchange Act that are not addressed in this proposal. If any rules (including exemptions) related to these other exceptions are adopted in the future, they would be adopted jointly by the SEC and Board.

As required by the GLBA, the Board, OCC, FDIC, and OTS (collectively, the Banking Agencies) will develop, and request public comment on, recordkeeping rules for banks that operate under the ''broker'' exceptions in Section 3(a)(4) of the Exchange Act.[19] These rules, which will be developed in consultation with the SEC, will establish recordkeeping requirements to enable banks to demonstrate compliance with the terms of the statutory exceptions and the final rules ultimately jointly adopted and that are designed to facilitate compliance with the statutory exceptions and those rules.

II. Networking Arrangements

The third-party brokerage (''networking'') exception in Exchange Act Section 3(a)(4)(B)(i) permits a bank to avoid being considered a broker if, under certain conditions, it enters into a contractual or other written arrangement with a registered broker-dealer under which the broker-dealer offers brokerage services to bank customers (''networking arrangement'').[20] The networking exception does not address the type or amount of compensation that a bank may receive from its broker-dealer partner under a networking arrangement. However, the networking exception generally provides that a bank may not pay its unregistered employees [21] incentive compensation for referring a customer to the broker-dealer or for any securities transaction conducted by the customer at the broker-dealer. Nevertheless, the statutory exception does permit a bank employee to receive a ''nominal one-time cash fee of a fixed dollar amount'' for referring bank customers to the broker-dealer if payment of the referral fee is not ''contingent on whether the referral results in a transaction.'' [22] Congress included the limitation on incentive compensation to reduce securities sales practice concerns regarding unregistered bank employees.[23]

A. Proposed Definitions Related to the Payment of Referral Fees

The proposed rules define certain terms used in the networking exception in the Exchange Act related to referral fees and terms used in these proposed definitions. The proposed rules also provide an exemption from certain of the requirements in the networking exception with respect to payment for referrals of certain institutional customers and high net worth customers.

1. Proposed Definition of ''Nominal One-Time Cash Fee of a Fixed Dollar Amount''

Under the proposal, the term ''nominal one-time cash fee of a fixed dollar amount'' would be defined as a cash payment for a referral in an amount that meets any one of three alternative standards.[24] The Agencies believe that these alternatives provide useful and appropriate flexibility to banks of all sizes and locations to use different business models and to take into account economic differences around the country in assessing whether a cash referral fee paid in a particular instance is a ''nominal'' amount for purposes of the networking exception. The three alternatives are consistent with the statutory ''nominal'' fee requirement because the amount of compensation permitted under each of the three formulations would be small in relation to the employee's overall compensation and therefore unlikely to create undue incentives for bank employees to pre-sell securities to bank customers.

Under the first alternative, a referral fee would be considered nominal if it did not exceed either twice the average of the minimum and maximum hourly wage established by the bank for the current or prior year for the job family that includes the relevant employee, *or* 1/1000th of the average of the minimum and maximum annual base salary established by the bank for the current or prior year for the job family that includes the relevant employee.[25] The proposed rules define a ''job family'' for these purposes as a group of jobs or positions involving similar responsibilities, or requiring similar skills, education or training, that a bank, or a separate unit, branch or department of a bank, has established and uses in the ordinary course of its business to distinguish among its employees for purposes of hiring, promotion, and compensation.[26] Depending on a bank's internal employee classification system, examples of a job family may include tellers, loan officers, or branch managers. A bank should not deviate from its ordinary classification of jobs for purposes of determining whether a referral fee would be considered nominal under this standard.

Under the second alternative, a referral fee would be considered ''nominal'' if it did not exceed twice the employee's actual base hourly wage.[27] Thus, unlike the first option, this alternative is based on the actual hourly base wage of the employee receiving the referral fee.

Under the third alternative, a referral fee would be considered ''nominal'' for purposes of the networking exception if the payment did not exceed twenty-five dollars ($25).[28] This dollar amount would be adjusted for inflation on April 1, 2012, and every five years thereafter, to reflect any changes in the value of the Employment Cost Index For Wages and Salaries, Private Industry Workers (or any successor index thereto), as published by the Bureau of Labor Statistics, from December 31, 2006.[29] The Agencies selected this index because it is a widely used and broad indicator of increases in the wages of private industry workers, which includes bank employees.

A bank employee may receive a referral fee under the networking exception and Proposed Exchange Act Rule 700 for each referral made to a broker-dealer, including separate referrals of the same individual or entity. Referral fees paid under the networking exception must be paid in cash and fixed. The networking exception and the proposed rules do not permit a bank to pay referral fees in non-cash forms, such as vacation packages, stock grants, annual leave, or consumer goods.[30] We request comments on whether these alternatives provide banks sufficient flexibility to pay nominal referral fees without creating inappropriate incentives.

[19] *See* 12 U.S.C. 1828(t)(1).

[20] 15 U.S.C. 78c(a)(4)(B)(i).

[21] An unregistered bank employee is an employee that is not an associated person of a broker or dealer and is not qualified pursuant to the rules of a self-regulatory organization.

[22] 15 U.S.C. 78c(a)(4)(B)(i)(VI).

[23] *See* H.R. Rep. No. 106–74, pt. 3, at 163 (1999) (''[T]he conditions contained in the networking exception * * * restrict the securities activities of unregistered bank personnel to reduce sales practice concerns.'').

[24] Proposed Exchange Act Rule 700(c).

[25] Proposed Exchange Act Rule 700(c)(1).

[26] Proposed Exchange Act Rule 700(d).

[27] Proposed Exchange Act Rule 700(c)(2).

[28] Proposed Exchange Act Rule 700(c)(3).

[29] Each adjustment would be rounded to the nearest multiple of $1. Proposed Exchange Act Rule 700(f).

[30] *See* Exchange Act Section 3(a)(4)(B)(i)(VI), permitting payment of a ''nominal one-time cash fee.''

2. Proposed Definition of ''Contingent on Whether the Referral Results in a Transaction''

Under the statutory networking exception, a nominal fee paid to an unregistered bank employee for referring a customer to a broker or dealer may not be contingent on whether the referral results in a transaction. The objective is to reward bank employees for furthering the relationship with the broker without creating concerns about the securities sales practices of unregistered bank employees. Under the proposal, a fee would be considered ''contingent on whether the referral results in a transaction'' if payment of the fee is dependent on whether the referral results in a purchase or sale of a security; whether an account is opened with a broker or dealer; whether the referral results in a transaction involving a particular type of security; or whether the referral results in multiple securities transactions.[31] The proposed rules, however, also recognize that a referral fee may be contingent on whether a customer (1) contacts or keeps an appointment with a broker or dealer as a result of the referral; or (2) meets any objective, base-line qualification criteria established by the bank or broker or dealer for customer referrals, including such criteria as minimum assets, net worth, income, or marginal federal or state income tax rate, or any requirement for citizenship or residency that the broker or dealer, or the bank, may have established generally for referrals for securities brokerage accounts.[32]

3. Proposed Definition of ''Incentive Compensation''

As noted above, the networking exception prohibits unregistered employees of a bank that refer customers to a broker or dealer under the exception from receiving ''incentive compensation'' for the referral or any securities transaction conducted by the customer at the broker-dealer other than a nominal, non-contingent referral fee. To provide banks and their employees additional guidance in this area, Proposed Rule 700(b) defines ''incentive compensation'' as compensation that is intended to encourage a bank employee to refer potential customers to a broker or dealer or give a bank employee an interest in the success of a securities transaction at a broker or dealer.[33]

The proposed ''incentive compensation'' definition excludes certain types of bonus compensation. The purpose of the exclusions is to recognize that certain types of bonuses are not likely to give unregistered employees a promotional interest in the brokerage services offered by the broker-dealers with which the bank networks and to avoid affecting bonus plans of banks generally. The proposal excludes compensation paid by a bank under a bonus or similar plan that is paid on a discretionary basis and based on multiple factors or variables. These factors or variables must include significant factors or variables that are not related to securities transactions at the broker or dealer.[34] In addition, a referral made by the employee to a broker or dealer may not be a factor or variable in determining the employee's compensation under the plan and the employee's compensation under the plan may not be determined by reference to referrals made by any other person.[35]

In addition, the proposed rule provides that the definition of incentive compensation shall not be construed to prevent a bank from compensating an officer, director or employee on the basis of any measure of the overall profitability of (1) the bank, either on a stand-alone or consolidated basis; (2) any of the bank's affiliates (other than a broker or dealer) or operating units; or (3) a broker or dealer if such profitability is only one of multiple factors or variables used to determine the compensation of the officer, director, or employee and those factors or variables include significant factors or variables that are not related to the profitability of the broker or dealer.[36] Under this definition, banks would be permitted to take account of the full range of business for high net worth or institutional customers that an employee has brought to the bank and its partner broker-dealers. Comment is solicited on whether existing bank bonus programs would fit, or could be easily adjusted to fit, within the proposed exclusions from the definition of incentive compensation discussed in this Section.

B. Proposed Exemption for Payment of More Than a Nominal Fee for Referring Institutional Customers and High Net Worth Customers

The proposal also includes a conditional exemption that would permit a bank to pay an employee a contingent referral fee of more than a nominal amount for referring to a broker or dealer an institutional customer or high net worth customer with which the bank has a contractual or other written networking arrangement.[37] Banks that pay their employees only nominal, non-contingent fees in accordance with Proposed Rule 700 for referring customers—including institutional or high net worth customers—to a broker or dealer would not need to rely on this exemption for these purposes.

The purpose of the proposed exemption and its conditions is to recognize that sizable institutions and high net worth individuals, when provided appropriate information, are more likely to be able to understand and evaluate the relationship between the bank and its employees and its broker-dealer partner and any resulting securities transaction with the broker-dealer. To take advantage of the proposed exemption, the bank must comply with the conditions in the proposed exemption as well as the terms and conditions in the statutory networking exception (other than the compensation restrictions in Section 3(a)(4)(B)(i)(VI) of the Exchange Act's networking exception). The conditions in the proposed exemption are designed, among other things, to help ensure that institutional and high net worth customers receive appropriate investor protections and have the information to understand the financial interest of the bank employee so they can make informed choices. The following summarizes the conditions included in the proposed exemption.

1. Definitions of ''Institutional Customer'' and ''High Net Worth Customer''

The proposed exemption defines an ''institutional customer'' to mean any corporation, partnership, limited liability company, trust, or other non-

[31] Proposed Exchange Act Rule 700(a). ''Referral'' would be defined to mean the action taken by a bank employee to direct a customer of the bank to a broker or dealer for the purchase or sale of securities for the customer's account. Proposed Exchange Act Rule 700(e).

[32] Proposed Exchange Act Rule 700(a).

[33] Proposed Exchange Act Rule 700(b).

[34] Proposed Exchange Act Rule 700(b)(1)(ii)(A). A non-securities factor or variable would be considered ''significant'' under this proposed provision if it plays a non-trivial role in determining an employee's compensation under the bonus or similar plan. Moreover, a bank would not be in compliance with this proposed provision to the extent that it established or maintained a ''sham'' non-securities factor or variable in its bonus or similar plan for the purpose of evading this proposed restriction.

[35] Proposed Exchange Act Rule 700(b)(1)(ii)(C) and (D). The requirement that an employee's compensation not be based on ''a referral'' made by the employee or another person also means that the employee's compensation under the bonus or similar plan may not vary based on the number of securities referrals made by the employee or another person to a broker or dealer.

[36] Proposed Exchange Act Rule 700(b)(2).

[37] Proposed Exchange Act Rule 701.

natural person that has at least $10 million in investments or $40 million in assets. A non-natural person also may qualify as an ''institutional customer'' with respect to a referral if the customer has $25 million in assets and the bank employee refers the customer to the broker or dealer for investment banking services.[38] The lower asset threshold for referrals for investment banking services is designed to permit banks to facilitate access to capital markets by referring smaller businesses to broker-dealers. ''High net worth customer'' is defined to mean any natural person who, either individually or jointly with his or her spouse, has at least $5 million in net worth excluding the primary residence and associated liabilities of the person and, if applicable, his or her spouse.

The dollar amount threshold for both institutional customers and high net worth customers would be adjusted for inflation on April 1, 2012, and every five years thereafter, to reflect changes in the value of the Personal Consumption Expenditures Chain-Type Price Index, as published by the Department of Commerce, from December 21, 2006. The Agencies selected this index because it is a widely used and broad indicator of inflation in the U.S. economy.

A bank would be required to determine that a non-natural person referred to a broker or dealer under the exemption is an institutional customer before the referral fee is paid to the bank employee. In the case of a customer that is a natural person, the bank, prior to or at the time of any referral, would be required either to (1) determine that the customer is a high net worth customer; or (2) obtain a signed acknowledgment from the customer that the customer meets the standards to be considered a high net worth customer. The purpose of this condition is to provide the bank with a reasonable basis to believe the person meets the requirements of the exemption.[39]

2. Conditions Relating to Bank Employees

For a bank employee to receive a contingent or greater-than-nominal referral fee under the proposed exemption, the bank employee must meet other conditions designed to help ensure that the referral occurs in the ordinary course of the unregistered bank employee's activities and that the employee has not previously been disqualified under the Exchange Act. In particular, the bank employee—

• May not be qualified or otherwise required to be qualified pursuant to the rules of a self-regulatory organization (''SRO''); [40]

• Must be predominantly engaged in banking activities other than making referrals to a broker-dealer; [41]

• Must not be subject to a ''statutory disqualification'' as that term is defined in Section 3(a)(39) of the Exchange Act (other than subparagraph (E) of that Section); [42] and

• Must encounter the ''high net worth customer'' or ''institutional customer'' in the ordinary course of the bank employee's assigned duties for the bank.[43]

3. Other Conditions Relating to the Banks

The proposed exemption also would require that the bank provide the high net worth customer or institutional customer being referred to the bank's broker-dealer partner certain written disclosures about the employee's interest in the referral prior to or at the time of the referral.[44] These disclosures would have to clearly and conspicuously disclose (1) the name of the broker or dealer; and (2) that the bank employee participates in an incentive compensation program under which the employee may receive a fee of more than a nominal amount for referring the customer to the broker or dealer and that payment of the fee may be contingent on whether the referral results in a transaction with the broker or dealer.[45]

In addition, to allow verification before the referral fee is paid to the bank employee, the bank would be required to provide the broker or dealer the name of the employee and such other identifying information that may be necessary for the broker or dealer to determine whether the bank employee is associated with a broker or dealer or is subject to statutory disqualification (as defined in Section 3(a)(39) of the Exchange Act, other than subparagraph (E)).[46]

The proposed exemption also provides that a bank that acts in good faith and that has reasonable policies and procedures in place to comply with the requirements of the proposed exemption would not be considered a ''broker'' under Section 3(a)(4) of the Exchange Act solely because the bank fails, in a particular instance, to determine that a customer is an institutional or high net worth customer, provide the customer the required disclosures, or provide the broker or dealer the required information concerning the bank employee receiving the referral fee within the time periods prescribed. If the bank is seeking to comply and takes reasonable and prompt steps to remedy the error, such as by promptly making the required determination or promptly providing the broker or dealer the required information, the bank should not lose the exemption from registration in these circumstances. Similarly, to promote compliance with the terms of the exemption, the bank must make reasonable efforts to reclaim the portion of the referral fee paid to the bank employee for a referral that does not, following any required remedial actions, meet the requirements of the exemption and that exceeds the amount the bank otherwise would be permitted to pay under the statutory networking exception and proposed Exchange Act Rule 700.[47]

4. Provisions of Written Agreement

The proposed exemption also would require that the bank and its broker-dealer partner include certain provisions in their written agreement that obligate the bank or the broker or dealer to take certain actions. These provisions are designed to help ensure that banks and broker-dealers operate within the terms of the exemption and provide appropriate protections to customers referred under the exemption. Banks, brokers and dealers are expected to comply with the terms of their written networking agreements.

[38] Proposed Exchange Act Rule 701(d)(2). ''Investment banking services'' are defined to include, without limitation; acting as an underwriter in an offering for an issuer, acting as a financial adviser in a merger, acquisition, tender-offer or similar transaction, providing venture capital, equity lines of credit, private investment-private equity transactions or similar investments, serving as placement agent for an issuer, and engaging in similar activities. *Id.* at 701(d)(3). When used in this proposal, the term ''include, without limitation'' means a non-exhaustive list. This usage is not intended to suggest that the term ''including'' as used in the Exchange Act and the rules under that Act means an exhaustive list. The use of the term ''including, but not limited to'' in Exchange Act Rules 10b–10 and 15b7–1 is also not intended to create a negative implication regarding the use of ''including'' without the term ''but not limited to'' in other Exchange Act rules. *See* Exchange Act Release No. 49879, 69 FR 39682 (June 30, 2004), at footnote 76.

[39] Proposed Exchange Act Rule 701(a)(2)(ii). As discussed below (*see infra* at II.B.4.), the written agreement between the bank and the broker or dealer also must require the broker or dealer to determine whether a customer meets these qualification standards before the referral fee is paid to the bank employee.

[40] Proposed Exchange Act Rule 701(a)(1)(i)(A).

[41] Proposed Exchange Act Rule 701(a)(1)(i)(B).

[42] Proposed Exchange Act Rule 701(a)(1)(i)(C).

[43] Proposed Exchange Act Rule 701(a)(1)(ii).

[44] Proposed Exchange Act Rule 701(a)(2)(i).

[45] Proposed Exchange Act Rule 701(b).

[46] Proposed Exchange Act Rule 701(a)(2)(iii).

[47] Proposed Exchange Act Rule 701(a)(2)(iv).

If a broker or dealer or bank does not comply with the terms of the agreement, however, the bank would not become a ''broker'' under Section 3(a)(4) of the Exchange Act or lose its ability to operate under the proposed exemption.[48] A bank should not be required to register as a result of the actions of the broker or dealer.

a. Customer and Employee Qualifications

First, the proposed exemption provides that the written agreement between the bank and the broker or dealer must provide for the bank and the broker-dealer to determine, before a referral fee is paid to a bank employee under the exemption, that the employee is not subject to statutory disqualification, as that term is defined in Section 3(a)(39) of the Exchange Act (other than subparagraph (E) of that Section). In addition, as noted above, the written agreement must provide for the broker-dealer to determine, before the referral fee is paid, that the customer being referred is an institutional or high net worth customer.[49]

b. Suitability or Sophistication Analysis by Broker-Dealer

As a method of providing additional investor protections, the proposed exemption requires that the written agreement between the bank and broker or dealer must provide for the broker or dealer to perform a suitability or sophistication analysis of a securities transaction or the customer being referred, respectively. The type and timing of the analysis needed to be conducted by the broker or dealer depends on whether the referral fee is contingent on the completion of a securities transaction at the broker or dealer.

For contingent fees, the written agreement between the bank and the broker-dealer must provide for the broker or dealer to conduct a suitability analysis of any securities transaction that triggers any portion of the contingency fee in accordance with the rules of the broker's or dealer's applicable SRO as if the broker or dealer had recommended the securities transaction.[50] This analysis must be performed by the broker or dealer before each securities transaction on which the referral fee is contingent is conducted.

For a non-contingent referral fee, the written agreement must provide for the broker or dealer to conduct, before the referral fee is paid, either (1) a ''sophistication'' analysis of the customer being referred; or (2) a suitability analysis with respect to all securities transactions requested by the customer contemporaneously with the referral. Under the ''sophistication'' analysis option, the broker or dealer would be required to determine that the customer has the capability to evaluate investment risk and make independent decisions, and determine that the customer is exercising independent judgment based on the customer's own independent assessment of the opportunities and risks presented by a potential investment, market factors, and other investment considerations.[51] This ''sophistication'' analysis is based on elements of NASD IM–2310–3 (Suitability Obligations to Institutional Customers).

Alternatively, the broker or dealer could perform a suitability analysis of all securities transactions requested by the customer contemporaneously with the referral in accordance with the rules of the broker's or dealer's applicable SRO as if the broker or dealer had recommended the securities transaction.[52] Thus, the proposed exemption gives a broker or dealer the flexibility to perform a suitability analysis in connection with all referrals made under the exemption (regardless of whether the referral fee is contingent or not) if the broker or dealer determines that such an approach is appropriate for business reasons.

c. Notice From Broker-Dealer to Bank Regarding Customer Qualification

Under the proposed exemption, the written agreement between the bank and the broker-dealer would also be required to provide that the broker-dealer must promptly inform the bank if the broker-dealer determines that (1) the customer referred to the broker-dealer is not a ''high net worth customer'' or an ''institutional customer,'' as applicable; (2) the bank employee receiving the referral fee is subject to statutory disqualification, as that term is defined in Section 3(a)(39) of the Exchange Act, except subparagraph (E) of that Section; or (3) the customer or the securities transaction(s) to be conducted by the customer do not meet the applicable standard set forth in the suitability or sophistication determination Section above.[53] The notice will help banks monitor their compliance with the exemption and take remedial action when necessary.

5. Referral Fees Permitted under the Exemption

If the foregoing conditions are met, the proposed exemption would allow a bank employee to receive a referral fee for referring an institutional or high net worth customer to a broker or dealer that is greater than a ''nominal'' amount and that is contingent on whether the referral results in a transaction at the broker or dealer. The exemption places certain limits on how such a referral fee may be structured to reduce the potential ''salesman's stake'' of the bank employee in securities transactions conducted at the broker-dealer. Specifically, the exemption provides that the referral fee may be a dollar amount based on a fixed percentage of the revenues received by the broker or dealer for investment banking services provided to the customer.[54]

Alternatively, the referral fee may be a predetermined dollar amount, or a dollar amount determined in accordance with a predetermined formula, so long as the amount does not vary based on (1) the revenue generated by, or the profitability of, securities transactions conducted by the customer with the broker or dealer; (2) the quantity, price, or identity of securities purchased or sold over time by the customer with the broker or dealer; or (3) the number of customer referrals made.[55] For these purposes, ''predetermined'' means established or fixed before the referral is made.

As the exemption provides, these restrictions do not prevent a referral fee from being paid in multiple installments or from being based on a fixed percentage of the total dollar amount of assets placed in an account with the broker or dealer. Additionally, these restrictions do not prevent a referral fee from being based on the total dollar amount of assets maintained by the customer with the broker or dealer, or from being contingent on whether the customer opens an account with the broker or dealer or executes one or more transactions in the account during the initial phases of the account. A bank employee also may receive a permissible referral fee for each referral

[48] The Commission anticipates that it will be necessary for either NASD or the Commission to adopt a rule requiring broker-dealers to comply with the written agreements discussed in this Section.

[49] Proposed Exchange Act Rule 701(a)(3)(i).

[50] Proposed Exchange Act Rule 701(a)(3)(ii)(A). Because the proposed exemption provides for a broker or dealer to conduct its suitability analysis in accordance with the rules of its applicable SRO, the broker or dealer may follow and take advantage of any applicable SRO rules or interpretations that allow the broker or dealer to make an alternative suitability evaluation. *See, e.g.*, NASD IM–2310–3 (discussing a member's suitability obligations with respect to certain institutional investors).

[51] Proposed Exchange Act Rule 701(a)(3)(ii)(B)(*1*).

[52] Proposed Exchange Act Rule 701(a)(3)(ii)(B)(*2*).

[53] Proposed Exchange Act Rule 701(a)(3)(iii).

[54] Proposed Exchange Act Rule 701(d)(4)(ii).

[55] Proposed Exchange Act Rule 701(d)(4)(i).

made under the exemption. We request comment on all aspects of the definition of a referral fee.

6. Permissible Bonus Compensation Not Restricted

The proposed exemption for high net worth and institutional customers expressly provides that nothing in the exemption would prevent or prohibit a bank from paying, or a bank employee from receiving, any type of compensation under a bonus or similar plan that would not be considered incentive compensation under paragraph (b)(1), or that is described in paragraph (b)(2), of proposed Exchange Act Rule 700 (implementing the networking exception).[56] As explained above, these types of bonus arrangements do not tend to create the kind of financial incentives for bank employees that the statute was designed to address.

C. Scope of Networking Exception and Institutional/High Net Worth Exemption

Nothing in the statutory networking exception or the proposed rules limits or restricts the ability of a bank employee to refer customers to other departments or divisions of the bank itself, including, for example, the bank's trust, fiduciary or custodial department. Likewise, the networking exception and the proposed rules do not apply to referrals of retail, institutional or high net worth customers to a broker or dealer or other third party solely for transactions not involving securities, such as loans, futures contracts (other than a security future), foreign currency, or over-the-counter commodities.

III. Trust and Fiduciary Activities Exception

Section 3(a)(4)(B)(ii) of the Exchange Act (the ''trust and fiduciary exception'') permits a bank, under certain conditions, to effect securities transactions in a trustee or fiduciary capacity without being registered as a broker.[57] Under this exception from the definition of ''broker,'' a bank must effect such transactions in its trust department, or other department that is regularly examined by bank examiners for compliance with fiduciary principles and standards.[58] The bank also must be ''chiefly compensated'' for such transactions, consistent with fiduciary principles and standards, on the basis of: (1) An administration or annual fee; (2) a percentage of assets under management; (3) a flat or capped per order processing fee that does not exceed the cost the bank incurs in executing such securities transactions; or (4) any combination of such fees.[59] These fees are referred to as ''relationship compensation'' in the proposed rules.

Banks relying on this exception may not publicly solicit brokerage business, other than by advertising that they effect transactions in securities in conjunction with advertising their other trust activities.[60] In addition, a bank that effects a transaction in the United States of a publicly traded security under the exception must execute the transaction in accordance with Exchange Act section 3(a)(4)(C).[61]

This section requires that the bank direct the trade to a registered broker-dealer for execution, effect the trade through a cross trade or substantially similar trade either within the bank or between the bank and an affiliated fiduciary that is not in contravention of fiduciary principles established under applicable federal or state law, or effect the trade in some other manner that the Commission permits.[62] The purpose of the rules in this area is to explain the Agencies' interpretation of certain terms and concepts used in the statute and to implement the exception. The trust and fiduciary exception recognizes the traditional securities role banks have performed for trust and fiduciary customers and includes conditions to help ensure that a bank does not operate a securities broker in the trust department.

A. ''Chiefly Compensated'' Test and Bank-Wide Exemption Based on Two-Year Rolling Averages

The proposed rules provide that a bank meets the ''chiefly compensated'' condition in the trust and fiduciary exception if the ''relationship-total compensation percentage'' for each trust or fiduciary account of the bank is greater than 50 percent.[63] The ''relationship-total compensation percentage'' for a trust or fiduciary account would be calculated by (1) dividing the relationship compensation attributable to the account during each of the immediately preceding two years by the total compensation attributable to the account during the relevant year; (2) translating the quotient obtained for each of the two years into a percentage; and (3) then averaging the percentages obtained for each of the two immediately preceding years.[64] Under the proposal, a ''trust or fiduciary account'' means an account for which the bank acts in a trustee or fiduciary capacity as defined in section 3(a)(4)(D) of the Exchange Act.[65]

The proposed rules also include an exemption that would permit a bank to follow an alternate test to the account-by-account approach to the ''chiefly compensated'' condition. Under this exemption, the bank may calculate the compensation it receives from all of its trust and fiduciary accounts on a bank-wide basis. The alternative is designed to simplify compliance, alleviate concerns about inadvertent noncompliance, and reduce the costs and disruptions banks likely would incur under the account-by-account approach.

To use this bank-wide methodology, the bank would have to meet two conditions. First, the bank would have to comply with the conditions in the trust and fiduciary exception (other than the compensation test in Section 3(a)(4)(B)(ii)(I)) and comply with Section 3(a)(4)(C) (relating to trade execution) of the Exchange Act.[66] In addition, the ''aggregate relationship-total compensation percentage'' for the bank's trust and fiduciary business as a whole would have to be at least 70 percent.[67] We chose this percentage to ensure that a bank's trust department is not unduly dependent on non-relationship compensation from securities transactions. We invite comments generally on the appropriateness of the proposed exemption as well as this percentage

[56] Proposed Exchange Act Rule 701(c).

[57] 15 U.S.C. 78c(a)(4)(B)(ii).

[58] Id. The Agencies will rely on the appropriate Federal banking agency for a bank to determine whether the bank's activities are conducted in the bank's trust department or other department regularly examined by the agency's examiners for compliance with fiduciary principles and standards.

[59] 15 U.S.C. 78c(a)(4)(B)(ii)(I).

[60] 15 U.S.C. 78c(a)(4)(B)(ii)(II).

[61] 15 U.S.C. 78c(a)(4)(C).

[62] 15 U.S.C. 78c(a)(4)(C)(i)–(iii). As discussed below (*see infra* at VI.C.), the Agencies are proposing to adopt a rule that would permit banks to effect trades in investment company securities through the National Securities Clearing Corporation's Mutual Fund Services (''Fund/SERV'') or directly with the investment company's transfer agent. Trades effected by a bank in accordance with the proposed Fund/SERV rule would be conducted in accordance with section 3(a)(4)(C) of the Exchange Act.

[63] Proposed Exchange Act Rule 721(a)(1).

[64] The rule provides for this process to be accomplished by calculating the ''yearly compensation percentage'' and the ''relationship-total compensation percentage'' for the account. Proposed Exchange Act Rule 721(a)(2) and (3).

[65] Proposed Exchange Act Rule 721(a)(5). The definition of ''fiduciary capacity'' included in section 3(a)(4)(D) of the Exchange Act is based on the definition of that term in part 9 of the OCC's regulations, which relates to the trust and fiduciary activities of national banks, in effect at the time of enactment of the GLB Act.

[66] Proposed Exchange Act Rule 722(a)(1).

[67] Proposed Exchange Act Rule 722(a)(2).

and the other specific terms of the exemption.

The ''aggregate relationship-total compensation percentage'' of a bank operating under the bank-wide approach would be calculated in a similar manner as the ''relationship-total compensation percentage'' of an account under the account-by-account, except that the calculations would be based on the aggregate relationship compensation and total compensation received by the bank from all of its trust and fiduciary accounts during each of the two immediately preceding years. That is, it would be determined by (1) dividing the relationship compensation attributable to the bank's trust and fiduciary business as a whole during each of the immediately preceding two years by the total compensation attributable to the bank's trust and fiduciary business as a whole during the relevant year; (2) translating the quotient obtained for each of the two years into a percentage; and (3) then averaging the percentages obtained for each of the two immediately preceding years.[68]

Under either the account-by-account or bank-wide approach, a bank would have the flexibility to elect to use a calendar year or the bank's fiscal year for purposes of complying with these compensation provisions.[69] In addition, whether a bank decides to use the account-by-account approach or the bank-wide approach, the bank's compliance with the relevant compensation restriction would be based on a two-year rolling average of the compensation attributable to the trust or fiduciary account or the bank's trust or fiduciary business, respectively. This is to allow for short-term fluctuations that otherwise could lead a bank to fall out of compliance with the exception or exemption from year to year.

B. Proposed Definition of ''Relationship Compensation'

Both the account-by-account and bank-wide approaches discussed above are based in part on the relationship compensation attributable to one or more of a bank's trust or fiduciary accounts. The proposal defines the term ''relationship compensation'' to mean any compensation a bank receives that consists of (1) an administration fee; (2) an annual fee (payable on a monthly, quarterly or other basis); (3) a fee based on a percentage of assets under management; (4) a flat or capped per order processing fee, paid by or on behalf of a customer or beneficiary, that is equal to not more than the cost incurred by the bank in connection with executing securities transactions for trust or fiduciary accounts; or (5) any combination of these fees.[70] These types of compensation are identified in the statute.

The proposed rules also provide examples of fees that would be considered an administration fee or a fee based on a percentage of assets under management for these purposes. Specifically, the rule provides that a fee based on a percentage of assets under management (an ''AUM fee'') includes, without limitation—

- A fee paid by an investment company pursuant to a plan under 17 CFR 270.12b-1. Although Rule 12b-1 fees are related to mutual funds, we believe they should be viewed as relationship compensation because they are paid on an assets under management basis, rather than on a transactional basis; [71]
- A fee paid by an investment company for personal service or the maintenance of shareholder accounts; [72] and
- A fee paid by an investment company based on a percentage of assets under management for any of the following services: (1) Providing transfer agent or sub-transfer agent services for the beneficial owners of investment company shares; (2) aggregating and processing purchase and redemption orders for investment company shares; (3) providing the beneficial owners with account statements showing their purchases, sales, and positions in the investment company; (4) processing dividend payments to the account for the investment company; (5) providing sub-accounting services to the investment company for shares held beneficially in the account; (6) forwarding communications from the investment company to the beneficial owners, including proxies, shareholder reports, dividend and tax notices, and updated prospectuses; or (7) receiving, tabulating, and transmitting proxies executed by the beneficial owners of investment company shares in the account.[73]

In addition, the rule provides that the term ''administration fee'' includes, without limitation—

- A fee paid for personal services, tax preparation, or real estate settlement services; and
- A fee paid by an investment company for personal service, the maintenance of shareholder accounts or the types of sub-transfer agent or other services described above.[74]

The examples of an administration fee and an asset under management fee included in the proposed rules are provided only for illustrative purposes. Other types of fees or fees for other types of services could be an administration fee or an AUM fee. In addition, an administration fee, annual fee or AUM fee attributable to a trust or fiduciary account is considered relationship compensation regardless of what entity or person pays the fee, and regardless of whether the fee is related to only securities assets, to a combination of securities and non-securities assets, or to only non-securities assets. These fees are part of the compensation for acting as a trustee or fiduciary.

Under the proposal, relationship compensation also would include a flat or capped per order processing fee, paid by (or on behalf of) a customer or beneficiary, that is equal to not more than the cost incurred by the bank in connection with executing securities transactions for trust or fiduciary accounts.[75] If a bank seeks to include within this per order processing fee any fixed or variable processing costs incurred by the bank beyond those charged by the executing broker or dealer, the bank should maintain appropriate policies and procedures governing the allocation of these costs to the orders processed for trust or fiduciary customers.[76] This should help

[68] As a technical matter, the rule provides for this process to be accomplished by calculating the ''yearly bank-wide compensation percentage'' and the ''aggregate relationship-total compensation percentage'' for the bank's trust and fiduciary business as a whole. Proposed Exchange Act Rule 722(b) and (c).

[69] Proposed Exchange Act Rule 721(a)(6).

[70] Proposed Exchange Act Rule 721(a)(4).

[71] Proposed Exchange Act Rule 721(a)(4)(iii)(A).

[72] Proposed Exchange Act Rule 721(a)(4)(iii)(B).

[73] Proposed Exchange Act Rule 721(a)(4)(iii)(C).

[74] Proposed Exchange Act Rule 721(a)(4)(i). To the extent these fees are paid by an investment company based on a percentage of assets under management, these fees would be a permissible AUM fee.

[75] Proposed Exchange Act Rule 721(a)(4)(iv).

[76] A bank effecting transactions for trust or fiduciary customers through its trust or fiduciary departments may use other divisions or departments of the bank, or other affiliated or unaffiliated third parties, to handle aspects of these transactions. The bank must continue to act in a trustee or fiduciary capacity with respect to the account and, accordingly, should exercise appropriate diligence in selecting persons to provide services to the bank's trust or fiduciary customers and in overseeing the services provided in accordance with the bank's fiduciary obligations. No party, other than the bank (including, without limitation, a transfer agent or investment adviser), working in conjunction with the bank may rely on the bank's exception or exemption from ''broker'' status. To the extent that any such third party

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ensure that profits derived from per trade charges are not masked as costs of processing the trades.

C. Advertising Restrictions

Section 3(a)(4)(B)(ii)(II) of the Exchange Act addresses advertisements and the proposed rules explain the Agencies' understanding of the terms used in the statute. The proposed rules provide that a bank complies with the advertising restriction if advertisements by or on behalf of the bank do not advertise that the bank provides securities brokerage services for trust or fiduciary accounts except as part of advertising the bank's broader trust or fiduciary services, and do not advertise the securities brokerage services provided by the bank to trust or fiduciary accounts more prominently than the other aspects of the trust or fiduciary services provided to such accounts.[77]

An ''advertisement'' for these purposes means any material that is published or used in any electronic or other public media, including any Web site, newspaper, magazine or other periodical, radio, television, telephone or tape recording, videotape display, signs or billboards, motion pictures, blast e-mail, or telephone directories (other than routine listings).[78] Other types of material or information that is not distributed through public media would not be considered an advertisement. In addition, in considering whether an advertisement advertises the securities brokerage services provided to trust or fiduciary customers more prominently than the bank's other trust or fiduciary services, the nature, context and prominence of the information presented—and not simply the length of text or information devoted to a particular subject'should be considered.

D. Proposed Exemptions for Special Accounts, Transferred Accounts, and a De Minimis Number of Accounts

The proposed rules also would permit a bank to exclude certain types of accounts for purposes of determining its compliance with the account-by-account or bank-wide compensation tests discussed above. These exclusions are intended to reduce administrative burdens and facilitate compliance in connection with accounts that do not present a pronounced risk that a bank is operating a securities broker within the trust department. We solicit comment on these exclusions and their specific proposed terms.

Under the proposal, a bank could, in determining its compliance with either the account-by-account or bank-wide compensation tests, exclude any trust or fiduciary account that had been open for a period of less than 3 months during the relevant year.[79] The proposal would also permit a bank to exclude, for purposes of determining its compliance with either of these compensation tests, any trust or fiduciary account that the bank acquired from another person as part of a merger, consolidation, acquisition, purchase of assets or similar transaction by the bank for 12 months after the date the bank acquired the account from the other person.[80] Of course, in excluding such accounts, the bank would have to exclude all compensation it receives from such accounts from the relationship compensation to total compensation comparison. This approach would allow a bank to bring into compliance a group of acquired accounts.

Two additional exemptions would be provided for banks using the account-by-account approach. Specifically, a bank that uses the account-by-account approach would not be considered a broker for purposes of Section 3(a)(4) of the Exchange Act solely because a particular trust or fiduciary account does not meet the ''chiefly compensated'' test if, within 3 months of the end of the year in which the account fails to meet such standard, the bank transfers the account or the securities held by or on behalf of the account to a registered broker-dealer or another unaffiliated entity (such as an unaffiliated bank) that is not required to be registered as a broker or dealer.[81]

Moreover, a bank using the account-by-account approach could exclude a small number of trust or fiduciary accounts not exceeding the lesser of (1) 1 percent of the total number of trust or fiduciary accounts held by the bank *provided that* if the number so obtained is less than 1, the amount would be rounded up to 1; or (2) 500.[82] To rely on this exemption with respect to an account, the bank must not have relied on this exemption for such account during the immediately preceding year.[83] In addition, the bank would be required to maintain records demonstrating that the securities transactions conducted by or on behalf of the excluded account were undertaken by the bank in the exercise of its trust or fiduciary responsibilities with respect to the account.[84]

IV. Sweep Accounts and Transactions in Money Market Funds

Exchange Act Section 3(a)(4)(B)(v) excepts a bank from the definition of ''broker'' to the extent it ''effects transactions as part of a program for the investment or re-investment of deposit funds into any no-load, open-end management investment company registered under the Investment Company Act that holds itself out as a money market fund.''[85]

A. Proposed Sweep Account Definitions

To provide banks with guidance on the sweep accounts exception, the proposal defines various terms under the exception. One key term is ''no-load.'' Under the proposal, no-load, in the context of an investment company or the securities it issues, means that the securities are part of a class or series in which a bank effects transactions that is not subject to a sales charge or a deferred sales charge. In addition, total charges against net assets of that class or series of securities for sales or sales promotion expenses, personal service, or the maintenance of shareholder accounts may not exceed 0.0025 of average net assets annually.[86]

Consistent with NASD rules,[87] under the proposed no-load definition, charges for the following would not be considered charges against net assets of a class or series of an investment company's securities for sales or sales promotion expenses, personal service, or the maintenance of shareholder accounts:

(1) Providing transfer agent or sub-transfer agent services for beneficial owners of investment company shares;

(2) Aggregating and processing purchase and redemption orders for investment company shares;

(3) Providing beneficial owners with account statements showing their purchases, sales, and positions in the investment company;

(4) Processing dividend payments for the investment company;

(5) Providing sub-accounting services to the investment company for shares held beneficially;

(6) Forwarding communications from the investment company to the

performs activities that would make that entity a broker under Section 3(a)(4) of the Exchange Act that entity would be required to register as a broker (in the absence of an applicable exemption or regulatory relief) notwithstanding any written or unwritten agreement the third party may have with the bank.

77 Proposed Exchange Act Rule 721(b).

78 Proposed Exchange Act Rule 721(b)(2) (referencing Proposed Exchange Act Rule 760(g)(2)).

79 Proposed Exchange Act Rule 723(a).

80 Proposed Exchange Act Rule 723(b).

81 Proposed Exchange Act Rule 723(c).

82 Proposed Exchange Act Rule 723(d).

83 Proposed Exchange Act Rule 723(d)(3).

84 Proposed Exchange Act Rule 723(d)(1).

85 See Exchange Act Section 3(a)(4)(B)(v).

86 Proposed Exchange Act Rule 740(c).

87 See NASD Rule 2830.

beneficial owners, including proxies, shareholder reports, dividend and tax notices, and updated prospectuses; or

(7) Receiving, tabulating, and transmitting proxies executed by beneficial owners of investment company shares.[88]

B. Proposed Exemption Regarding Money Market Fund Transactions

The proposal also includes a new exemption that would permit banks, without registering as a broker, to effect transactions on behalf of a customer in securities issued by a money market fund under certain conditions.[89] This proposed exemption recognizes that banks have long offered sweeps and other services that invest customer funds in money market funds that do not qualify as no-load funds under Commission and NASD rules. In particular, to qualify for the proposed exemption from broker registration, the bank would be required to provide the customer, directly or indirectly, any other product or service, the provision of which would not, in and of itself, require the bank to register as a broker or dealer under Section 15(a) of the Exchange Act.[90] In addition, the class or series of money market fund securities that the bank provides the customer either would have to be no-load, or, if it is not no-load, the bank could not characterize or refer to the class or series of securities as no-load. For securities that are not no-load, the bank would be required to provide the customer, not later than at the time the customer authorizes the bank to effect the transactions, a prospectus for the securities.[91]

V. Safekeeping and Custody

A. Overview of Statutory Exception

Section 3(a)(4)(B)(viii) of the Exchange Act provides banks with an exception from the ''broker'' definition for certain bank custody and safekeeping activities (''custody and safekeeping exception''). In particular, this provision allows a bank to perform the following activities if performed as part of its customary banking activities without registering as a ''broker'':

• Providing safekeeping or custody services with respect to securities, including the exercise of warrants and other rights on behalf of customers;

• Facilitating the transfer of funds or securities, as a custodian or a clearing agency, in connection with the clearance and settlement of its customers' transactions in securities;

• Effecting securities lending or borrowing transactions with or on behalf of customers as part of the above-described custodial services or investing cash collateral pledged in connection with such transactions;

• Holding securities pledged by a customer to another person or securities subject to purchase or resale agreements involving a customer, or facilitating the pledging or transfer of such securities by book entry or as otherwise provided under applicable law, if the bank maintains records separately identifying the securities and the customer; and

• Serving as a custodian or provider of other related administrative services to any individual retirement account, pension, retirement, profit sharing, bonus, thrift savings, incentive, or other similar benefit plan.[92]

B. Proposed Exemption

The proposed rules contain an exemption that allows banks, subject to certain conditions, to accept orders for securities transactions from employee benefit plan accounts and individual retirement and similar accounts for which the bank acts as a custodian.[93] In addition, the exemption allows banks, subject to certain conditions, to accept orders for securities transactions on an accommodation basis from other types of custodial accounts.[94] These proposed exemptions are intended to allow a bank to perform the types of securities order-taking activities at times conducted in a custody department subject to conditions and limitations to protect investors and prevent a bank from using the exemptions to operate a securities broker in the bank.

The Agencies seek comment on all aspects of the proposed exemptions, including the conditions they contain. The proposed rules do not contain other rules to implement the custody and safekeeping exception. The Agencies request comment on whether other rules in this area are appropriate or needed.

A bank would have no need to rely on the custody exemption to the extent the bank conducts other custodial activities permitted by Section 3(a)(4)(B)(viii) (*e.g.*, exercising warrants or other rights with respect to securities or effecting securities lending or borrowing transactions on behalf of custodial customers) or another of the proposed rules (*e.g.*, proposed Exchange Act Rule 772, which permits banks to effect securities lending or borrowing transactions on behalf of certain non-custodial customers). In addition, a bank would not have to rely on the proposed exemption to the extent the bank holds securities in custody for a customer and provides clearance and settlement services to the account in connection with such securities, but the bank does not accept orders for securities transactions for the account or engage in other activities with respect to the account that would require the bank to be registered as a broker. The following discusses the scope and terms of the proposed custody exemption.

1. Employee Benefit Plan Accounts and Individual Retirement or Similar Accounts

Under the proposed exemption, a bank would not be considered a broker for purposes of Section 3(a)(4) of the Exchange Act to the extent that, as part of its customary banking activities, the bank accepts orders to effect transactions in securities in an ''employee benefit plan account'' [95] or an ''individual retirement account or similar account'' [96] for which the bank acts as a custodian if the bank complies with the following.

a. Employee Compensation Restriction

The proposed custody exemption provides that, if a bank accepts securities orders for an employee benefit plan or individual retirement or similar account under the exemption, then no bank employee may receive compensation (including a fee paid

[88] Proposed Exchange Act Rule 740(c)(2).

[89] Proposed Exchange Act Rule 741.

[90] Proposed Exchange Act Rule 741(a)(1).

[91] Proposed Exchange Act Rule 741(a)(2)(ii)(A).

[92] 15 U.S.C. 78c(a)(4)(B)(viii).

[93] Proposed Exchange Act Rule 760(a).

[94] Proposed Exchange Act Rule 760(b).

[95] ''Employee benefit plan account'' would mean a pension plan, retirement plan, profit sharing plan, bonus plan, thrift savings plan, incentive plan, or other similar plan, including, without limitation, an employer-sponsored plan qualified under Section 401(a) of the Internal Revenue Code (26 U.S.C. 401(a)), a governmental or other plan described in Section 457 of the Internal Revenue Code (26 U.S.C. 457), a tax-deferred plan described in Section 403(b) of the Internal Revenue Code (26 U.S.C. 403(b)), a church plan, governmental, multiemployer or other plan described in Section 414(d), (e) or (f) of the Internal Revenue Code (26 U.S.C. 414(d), (e) or (f)), an incentive stock option plan described in Section 422 of the Internal Revenue Code (26 U.S.C. 422); a Voluntary Employee Beneficiary Association Plan described in Section 501(c)(9) of the Internal Revenue Code (26 U.S.C. 501(c)(9)), a non-qualified deferred compensation plan (including a rabbi or secular trust), a supplemental or mirror plan, and a supplemental unemployment benefit plan.

[96] ''Individual retirement account or similar account'' would mean an individual retirement account as defined in Section 408 of the Internal Revenue Code (26 U.S.C. 408), Roth IRA as defined in Section 408A of the Internal Revenue Code (26 U.S.C. 408A), health savings account as defined in Section 223(d) of the Internal Revenue Code (26 U.S.C. 223(d)), Archer medical savings accounts as defined in Section 220(d) of the Internal Revenue Code (26 U.S.C. 220(d)), Coverdell education savings account as defined in Section 530 of the Internal Revenue Code (26 U.S.C. 530), or other similar account.

pursuant to a 12b–1 plan) from the bank, the executing broker or dealer, or any other person that is based on (1) whether a securities transaction is executed for the account; or (2) the quantity, price, or identity of the securities purchased or sold by the account.[97] These proposed restrictions, which we believe are consistent with banking practices, are intended to reduce the financial incentives a bank employee might have to encourage a customer to submit securities orders to the bank and use a custody account as the functional equivalent of a securities brokerage account. They do not prohibit a bank employee from receiving compensation that is based on whether a customer establishes a custodial account with the bank, or that is based on the total amount of assets in a custodial account at account opening or at any other time.

The proposed custody exemption also expressly provides that these employee compensation restrictions do not prevent a bank employee from receiving payments under a bonus or similar plan that would be permissible under proposed Exchange Act Rule 700(b)(1) of the networking rules as if a referral had been made, or any profitability-based compensation described in proposed Exchange Act Rule 700(b)(2) of the networking rules. In addition, because these restrictions relate to securities transactions conducted in the relevant custody account, they would not prevent a bank employee from receiving a referral fee for referring the customer to a broker or dealer to engage in securities transactions at the broker-dealer that are unrelated to the custody account in accordance with the networking exception or the institutional customer and high net worth customer exemption (proposed Exchange Act Rule 701) for networking arrangements.

b. Advertisements and Sales Literature

The proposed custody exemption provides that a bank relying on the exemption may not advertise that it accepts orders for securities transactions for employee benefit plan accounts or individual retirement accounts or similar accounts for which the bank acts as custodian, except as part of advertising the other custodial or safekeeping services the bank provides to these accounts. In addition, the bank may not advertise that such accounts are securities brokerage accounts or that the bank's safekeeping and custody services substitute for a securities brokerage account.[98] With respect only to individual retirement or similar accounts, advertisements and sales literature issued by or on behalf of the bank may not describe the securities order-taking services provided by the bank to these accounts more prominently than the other aspects of the custody or safekeeping services the bank provides.[99] The purpose of these restrictions is similar to the purpose of the advertising rules in the trust and fiduciary exception.

c. Other Conditions

The proposed custody exemption provides that a bank may accept orders for a securities transaction for an employee benefit plan account or an individual retirement account or similar account only if (1) the bank does not act in a trustee or fiduciary capacity (as defined in Section 3(a)(4)(D) of the Exchange Act) with respect to that account; (2) the bank complies with Section 3(a)(4)(C) of the Exchange Act in handling any order for a securities transaction for the account;[100] and (3) the bank complies with Section 3(a)(4)(B)(viii)(II) of the Exchange Act relating to carrying broker activities.[101]

d. Non-Fiduciary and Non-Custodial Administrators or Recordkeepers

The proposed exemption also would allow a bank that acts as a non-fiduciary and non-custodial administrator or recordkeeper for an employee benefit plan to accept securities orders for the plan if the bank and the custodian bank comply with all the conditions discussed in Sections V.B.1.a, b and c above and, in addition, the administrator/recordkeeper bank does not execute a cross-trade with or for the employee benefit plan or net orders for securities for the plan, other than orders for shares of open-end investment companies not traded on an exchange.[102] Executing cross-trades involves setting prices for securities transactions. The Agencies request comment on whether these conditions are consistent with the existing practices of banks acting as non-fiduciary and non-custodial administrators or recordkeepers.

2. Accommodation Transactions

Besides accepting securities orders for employee benefit plan and individual retirement and similar custodial accounts, banks also accept securities orders for other custodial accounts as an accommodation to the customer. The proposed custody exemption allows banks to continue to provide these order-taking services to other custodial accounts, subject to certain conditions designed to help ensure that these services continue to be provided only as an accommodation to customers and that a bank does not operate a securities broker out of its custody department. These conditions are discussed below.

a. Accommodation Basis

The proposed custody exemption expressly provides that a bank may accept securities orders for other custodial accounts only as an accommodation to the customer.[103] The Banking Agencies will develop guidance to assist Banking Agency examiners in reviewing, as part of the agencies' ongoing supervisory and examination process, the order-taking services provided to other custodial accounts. This guidance will describe the types of policies, procedures and systems that a bank should have in place to help ensure that the bank accepts securities orders for other custodial accounts only as an accommodation to the customer and in a manner consistent with both the terms

[97] Proposed Exchange Act Rule 760(c).

[98] Proposed Exchange Act Rule 760(a)(2)(i) and (ii). As discussed above, the proposed rules define the term ''advertisement'' to mean material that is published or used in any electronic or other public media, including any Web site, newspaper, magazine or other periodical, radio, television, telephone or tape recording, videotape display, signs or billboards, motion pictures, or telephone directories (other than routine listings). Proposed Exchange Act Rule 760(g)(2).

[99] Proposed Exchange Act Rule 760(a)(3). ''Sales literature'' would mean any written or electronic communication, other than an advertisement, that is generally distributed or made generally available to customers of the bank or the public, including circulars, form letters, brochures, telemarketing scripts, seminar texts, published articles, and press releases concerning the bank's products or services. Proposed Exchange Act Rule 760(g)(5).

[100] 15 U.S.C. 78c(a)(4)(C). This provision provides that, to meet one of the exceptions from the ''broker'' definition under the Exchange Act one of three conditions with respect to transactions effected under the applicable Section must be satisfied. In particular, the bank must direct such trade to a registered broker-dealer for execution. In the alternative, the trade must be a cross trade or other substantially similar trade of a security that is made by the bank or between the bank and an affiliated fiduciary and is not in contravention of fiduciary principles established under applicable Federal or State law. Alternatively, the trade must be conducted in some other manner permitted under rules, regulations, or orders as the Commission may prescribe or issue.

[101] 15 U.S.C. 78c(a)(4)(B)(viii)(II). This provision prohibits a custodian bank from acting as a carrying broker (as such term, and different formulations thereof, are used in Exchange Act Section 15(c)(3) and the rules and regulations under that Section) for any broker or dealer, unless such carrying broker activities are engaged in with respect to government securities.

[102] Proposed Exchange Act Rule 760(e).

[103] Proposed Exchange Rule Act 760(b)(1).

and purposes of the custody exemption and the GLB Act.

b. Employee Compensation Restriction

In order for a bank to rely on the custody exemption to accept orders for custodial accounts on an accommodation basis, the bank must comply with the employee compensation restrictions described above in Section B.1.a that apply with respect to employee benefit plans and individual retirement and similar accounts.[104]

c. Bank Fees

The proposed exemption also expressly limits the types of fees a bank that accepts accommodation orders for an account may charge for effecting securities transactions for the account. Specifically, any fee charged or received by the bank for effecting a securities transaction for the account may not vary based on (1) whether the bank accepted the order for the transaction; or (2) the quantity or price of the securities to be bought or sold.[105] These restrictions do not prevent a bank from charging or receiving a fee that is based on the type of security purchased or sold by the account (*e.g.*, a foreign security), provided the fee complies with the conditions set forth in the proposed exemption.

d. Advertising and Sales Literature Restrictions

Under the proposed exemption, the bank's advertisements may not state that the bank accepts orders for securities transactions for a custodial account (other than an employee benefit plan or individual retirement account or similar account). In addition, the bank's sales literature (1) may state that the bank accepts securities orders for such an account only as part of describing the other custodial or safekeeping services the bank provides to the account; and (2) may not describe the securities order-taking services provided to such an account more prominently than the other aspects of the custody or safekeeping services provided by the bank to the account.[106]

e. Investment Advice or Recommendations

Under the proposed exemption, a bank that accepts securities orders for a custodial account on an accommodation basis would not be permitted to provide investment advice or research concerning securities to the account, make recommendations concerning securities to the account, or otherwise solicit securities transactions from the account. These restrictions would not, however, prohibit the bank from advertising its custodial services and disseminating sales literature that comply with the restrictions in the proposed exemption. These restrictions also would not prevent a bank employee from responding to customer inquiries regarding the bank's safekeeping and custody services by providing advertisements or sales literature describing the safekeeping, custody and related services the bank offers (provided those advertisement and sales literature comply with the restrictions in the proposed exemption), a prospectus prepared by a registered investment company, sales literature prepared by a registered investment company or by the broker or dealer that is the principal underwriter of the registered investment company pertaining to the registered investment company's products, or information based on any of those materials. Moreover, the proposed exemption allows a bank's employees to respond to customer inquiries concerning the bank's safekeeping, custodial or other services, such as inquiries concerning the customer's account or the availability of sweep or other services, so long as the bank does not provide investment advice or research concerning securities to the account or make a recommendation to the account concerning securities.

The limitations and restrictions discussed in this part V.B.2, including those relating to investment advice and recommendations, relate only to those custodial accounts for which the bank accepts securities orders on an accommodation basis. Thus, for example, these limitations would not apply to (1) an employee benefit plan account or an individual retirement account or similar account; or (2) a trust or fiduciary account maintained by a customer with a bank even if that customer also maintains a custodial account with the bank. Similarly, the custody exemption does not prohibit a bank from cross-marketing the other products or services of the bank, including trust or fiduciary services, to its custodial customers.

f. Other Conditions

In addition to these conditions, a bank that accepts securities orders as an accommodation to a custodial account must comply with the conditions described in Section V.B.1.c. Thus, the bank may not rely on this proposed exemption to accept accommodation orders for a custodial account if the bank is acting in a trustee or fiduciary capacity (as defined in Section 3(a)(4)(D) of the Exchange Act) with respect to that account. In addition, the bank must comply with Section 3(a)(4)(C) of the Exchange Act in handling any order for a securities transaction for the account and with Section 3(a)(4)(B)(viii)(II) concerning carrying broker activities.[107] The reason for these additional conditions is to reinstate the statutory requirements for executing transactions and for the bank to refrain from acting as a carrying broker. In addition, a condition is added that makes it clear that a bank may not use this exemption to avoid the conditions applicable to a trust or fiduciary account when it is acting in a trustee or fiduciary capacity with respect to that account.

3. Evasion

As the proposed rules provide, to prevent evasions of the custody exemption, the Agencies will consider both the form and substance of the relevant account(s), transaction(s) and activities (including advertising activities) in considering whether a bank meets the terms of the exemption.[108] As part of the regular examination process, the Banking Agencies will monitor the securities transactions in custodial accounts. If the appropriate Banking Agency were to find that a bank is evading the terms of the custody exemption to run a brokerage business out of its custody department, the agency would take appropriate action to address the problem.

VI. Other Proposed Exemptions

The proposal also includes certain other exemptions relating to the securities ''broker'' activities of banks. These are discussed below.

A. Proposed Exemption for Regulation S Transactions With Non-U.S. Persons

Persons that conduct a broker or dealer business while located in the United States must register as broker-dealers (absent an exception or exemption), even if they direct all of their selling efforts offshore.[109] A bank industry group requested an exemption from broker-dealer registration requirements to permit banks to sell to non-U.S. persons securities that are covered by Regulation S, the safe harbor from U.S. securities registration

[104] Proposed Exchange Act Rule 760(b)(2) and (c).

[105] Proposed Exchange Act Rule 760(b)(3).

[106] Proposed Exchange Act Rule 760(b)(4) and (5).

[107] Proposed Exchange Act Rule 760(d).

[108] Proposed Exchange Act Rule 760(e).

[109] Exchange Act Release No. 27017 (July 11, 1989), 54 FR 30013.

requirements.[110] The group also requested that the exemption extend to the resale of Regulation S securities held by non-U.S. persons to other non-U.S. persons in transactions pursuant to Regulation S.

Non-U.S. persons typically will not rely on the protections of the U.S. securities laws when purchasing Regulation S securities from U.S. banks.[111] Non-U.S. persons usually can purchase the same securities from banks located outside of the United States and would not have the protections of U.S. law when purchasing these securities offshore. The proposal therefore would exempt a bank from the definition of ''broker'' under Section 3(a)(4) of the Exchange Act, to the extent that, as agent, the bank effects one of three types of transactions. In particular, the proposed exemption would apply if the bank effects a sale in compliance with the requirements of 17 CFR 230.903 of an ''eligible security'' to a ''purchaser'' who is outside of the United States within the meaning of 17 CFR 230.903.

The proposed exemption would also be available if the bank effects a resale of an ''eligible security'' after its initial sale with a reasonable belief that the ''eligible security'' was initially sold outside of the United States within the meaning of and in compliance with the requirements of 17 CFR 230.903, by or on behalf of a person who is not a U.S. person under 17 CFR 230.902(k) to a ''purchaser'' who is outside the United States within the meaning of 17 CFR 230.903 or a registered broker-dealer. Under this provision of the proposal, if the sale is made prior to the expiration of the distribution compliance period specified in 17 CFR 230.903(b)(2) or (b)(3), the sale would have to be made in compliance with the requirements of 17 CFR 230.904.

Moreover, the proposed Regulation S exemption would apply if the bank effects a resale of an ''eligible security'' after its initial sale outside of the United States within the meaning of and in compliance with the requirements of 17 CFR 230.903, by or on behalf of a registered broker-dealer to a ''purchaser'' who is outside the United States within the meaning of 17 CFR 230.903. Under this proposed provision, if the sale is made prior to the expiration of the distribution compliance period specified in 17 CFR 230.903(b)(2) or (b)(3), the sale would have to be made in compliance with the requirements of 17 CFR 230.904.[112] We invite comment on whether U.S. broker-dealer registration should be required for these transactions.

B. Proposed Securities Lending Exemption

Another exemption in the proposal addresses certain securities lending activities conducted as agent. Under the proposal, a bank would be exempt from the definition of ''broker'' under Section 3(a)(4) of the Exchange Act, to the extent that, as an agent, it engages in or effects ''securities lending transactions'' and any ''securities lending services'' in connection with such transactions, with or on behalf of a person the bank reasonably believes to be (1) a qualified investor as defined in Section 3(a)(54)(A) of the Exchange Act; [113] or (2) any employee benefit plan that owns and invests on a discretionary basis, not less than $25,000,000 in investments.[114] We understand that the primary role of banks in securities lending transactions, whether operating with or without custody of the securities, is to act in an agency capacity. A non-custodial securities lending arrangement permits a customer to divide custody and securities lending management between two expert entities.

The proposed exemption would reinstate, without modification, an exemption from the definition of ''broker'' under Section 3(a)(4) of the Exchange Act that the Commission adopted in the release implementing the GLBA bank exceptions from the definition of ''dealer.'' This exemption, would become void under the Regulatory Relief Act once the Agencies adopt a single set of final ''broker'' rules.[115] This exemption allows banks to engage in securities lending transactions as agent when they either do not have custody of the securities or have custody for less than the entire period of the stock loan. The exemption would permit banks to continue these activities without disruption. As discussed in an accompanying release, the Commission proposes to re-adopt, without modification, the ''dealer'' portions of Exchange Act Rule 15a–11 that relate to, among other things, conduit lending transactions.[116]

C. Proposed Exemption for the Way in Which Banks Effect Transactions in Investment Company Securities

The proposal also includes an exemption for the way in which banks may effect transactions in investment company securities. Under the proposal, a bank that meets the conditions for an exception or exemption from the definition of ''broker'' except for the condition in Section 3(a)(4)(C)(i) of the Exchange Act,[117] which requires banks, under certain circumstances, to direct securities transactions to a registered broker-dealer for execution, is exempt from such condition to the extent that the bank effects transactions in

[110] Letter dated May 27, 2004, from Lawrence R. Uhlick, Executive Director & General Counsel, Institute of International Bankers to Catherine McGuire, Chief Counsel, Division of Market Regulation, Commission. Regulation S specifies the requirements for an offer or sale of securities to be deemed to occur outside the United States and therefore not subject to the registration requirements of Section 5 of the Securities Act. Regulation S permits the sale of newly issued off-shore securities and re-sales of off-shore securities from a non-U.S. person to a non-U.S. person. 17 CFR 230.901, *et seq.* The letter also requests a separate exemption from Section 3(b)(5) of the Exchange Act for riskless principal transactions, which are treated as a ''dealer'' (and not a ''broker'') activity under the Exchange Act. The Commission will solicit comments on that proposed rule in a separate contemporaneous release.

[111] Although no rules have been adopted, the exemption provided by Exchange Act Section 30(b), pertaining to foreign securities, has been held unavailable if the United States is used as a base for securities fraud perpetuated on foreigners. *See Arthur Lipper Corp.* v. *SEC*, 547 F.2d 171 (2d Cir. 1976); *see also* Exchange Act Release No. 27017 *supra* note 110.

[112] Under the proposal, ''eligible security'' would mean a security that: (1) is not being sold from the inventory of the bank or an affiliate of the bank; and (2) is not being underwritten by the bank or an affiliate of the bank on a firm-commitment basis, unless the bank acquired the security from an unaffiliated ''distributor'' that did not purchase the security from the bank or an affiliate of the bank. ''Distributor'' under the proposal would have the same meaning as in 17 CFR 230.902(d). ''Purchaser'' under the proposal would mean a person who purchases an ''eligible security'' and who is not a U.S. person under 17 CFR 230.902(k).

[113] 15 U.S.C. 78c(a)(54)(A).

[114] Proposed Exchange Act Rule 772. Under the proposal, ''securities lending transaction'' would mean a transaction in which the owner of a security lends the security temporarily to another party pursuant to a written securities lending agreement under which the lender retains the economic interests of an owner of such securities, and has the right to terminate the transaction and to recall the loaned securities on terms agreed by the parties. Under the proposal, ''securities lending services'' would mean: (1) Selecting and negotiating with a borrower and executing, or directing the execution of the loan with the borrower; (2) receiving, delivering, or directing the receipt or delivery of loaned securities; (3) receiving, delivering, or directing the receipt or delivery of collateral; (4) providing mark-to-market, corporate action, recordkeeping or other services incidental to the administration of the securities lending transaction; (5) investing, or directing the investment of, cash collateral; or (6) indemnifying the lender of securities with respect to various matters.

[115] *See* 17 CFR 240.15a–11. *See* also Exchange Act Release No. 49879 (June 17, 2004), 69 FR 39682 (June 30, 2004). A bank that acts as custodian with respect to securities may effect securities lending transactions (and provide related securities lending services) with respect to such securities as agent under the statutory custody and safekeeping exception.

[116] The Commission does not propose to modify or re-adopt the other portions of the ''dealer'' rules adopted for banks under the GLBA, including the exemption that permits banks to engage in riskless principal transactions subject to certain conditions. *See* 17 CFR 240.3a5–1.

[117] 15 U.S.C. 78c(a)(4)(C)Ii).

securities issued by an open-end company that is neither traded on a national securities exchange nor through the facilities of a national securities association or an interdealer quotation system if certain conditions are met. In particular, the proposed exemption would allow a bank to effect such transactions through the National Securities Clearing Corporation's Mutual Fund Services (Fund/SERV) or directly with a transfer agent acting for the open-end company. Under the proposed exemption, the securities would have to be distributed by a registered broker-dealer, or, in the alternative, the sales charge for the transaction would have to be no more than the amount a registered broker-dealer could charge pursuant to the rules of a registered securities association adopted pursuant to Section 22(b)(1) of the Investment Company Act.[118]

D. Proposed Temporary and Permanent Exemption for Contracts Entered Into by Banks From Being Considered Void or Voidable

Other proposed exemptions would address inadvertent failures by banks that could trigger rescission of contracts between a bank and a customer under Section 29(b) of the Exchange Act for a transition period.[119] Under the first proposed exemption, no contract entered into before 18 months after the effective date of the proposed exemption would be void or considered voidable by reason of Section 29 of the Exchange Act because any bank that is a party to the contract violated the registration requirements of Section 15(a) of the Exchange Act, any other applicable provision of that Act, or the rules and regulations adopted under the Exchange Act based solely on the bank's status as a broker when the contract was created.[120]

Under the second proposed exemption, no contract entered into would be void or considered voidable by reason of Section 29(b) of the Exchange Act without a time limit. This exemption would provide relief to a bank that violated the registration requirements of Section 15(a) of the Exchange Act or the rules and regulations adopted thereunder based solely on the bank's status as a broker when a contract was created if two conditions are met (1) at the time the contract was created, the bank acted in good faith and had reasonable policies and procedures in place to comply with Section 3(a)(4)(B) of the Exchange Act, and the rules and regulations, thereunder; and (2) any violation of the registration requirements by the bank did not result in any significant harm, financial loss or cost to the person seeking to void the contract. This exemption is provided because a bank that is acting in good faith and has reasonable policies and procedures in effect at the time a securities contract is created should not be subject to rescission claims as a result of an inadvertent failure to comply with the requirements under Section 3(c)(4) of the Exchange Act if customers are not significantly harmed.

E. Extension of Time and Transition Period

The proposal also would extend the time that banks would have to come into compliance with the Exchange Act provisions relating to the definition of ''broker.'' Under the proposed exemption, a bank would be exempt from the definition of ''broker'' under Section 3(a)(4) of Exchange Act until the first day of its first fiscal year commencing after June 30, 2008.

VII. Withdrawal of Proposed Regulation B and Removal of Exchange Act Rules 3a4–2—3a4–6, and 3b–17

Under the Regulatory Relief Act, a final single set of rules or regulations jointly adopted by the Board and Commission in accordance with that Act shall supersede any other proposed or final rule issued by the Commission on or after the date of enactment of Section 201 of the GLBA with regard to the definition of ''broker'' under Exchange Act Section 3(a)(4).[121] Moreover, the new law states that ''[n]o such other rule, whether or not issued in final form, shall have any force or effect on or after that date of enactment.''

In 2001, the Commission adopted Interim Rules discussing the way in which the Commission would interpret the GLBA.[122] The rules that address the definition of ''broker'' under Section 3(a)(4) of the Exchange Act (and applicable exemptions) are Exchange Act Rules 3a4–2 through 3a4–6 and Rule 3b–17.[123] In 2004, the Commission proposed to revise and restructure the ''broker'' provisions of the Interim Rules and codify them in a new regulation, proposed Regulation B, which consists of proposed new Exchange Act Rules 710 through 781.[124] By operation of the Regulatory Relief Act, the joint adoption of new final rules will supersede Exchange Act Rules 3a4–2 through 3a4–6, 3b-17, and proposed Rules 710 through 781. Any discussion or interpretation of these prior rules in their accompanying releases would not apply to the single set of rules adopted by the Agencies.

VIII. Administrative Law Matters

A. Paperwork Reduction Act Analysis

Certain provisions of proposed Exchange Act Rules 701, 723, and 741, contain ''collection of information'' requirements within the meaning of the Paperwork Reduction Act of 1995.[125] The Commission has submitted these information collections to the Office of Management and Budget (''OMB'') for review in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. The Board has reviewed the proposed rules under authority delegated by OMB.[126]

The collections of information under proposed Exchange Act Rules 701, 723, and 741 are new. The title for the new collection of information under proposed Exchange Act Rule 701 is ''Rule 701: Exemption from the definition of 'broker' for certain institutional referrals.'' The title for the new collection of information under proposed Exchange Act Rule 723 is ''Rule 723: Exemptions for special accounts, transferred accounts, and a *de minimis* number of accounts.'' The title for the new collection of information under proposed Exchange Act Rule 741 is ''Rule 741: Exemption for banks effecting transactions in money market funds.'' OMB has not yet assigned a control number to the new collections of information contained in proposed Exchange Act Rules 701, 723, and 741. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.[127]

1. Proposed Exchange Act Rule 701

Proposed Exchange Act Rule 701 would provide a conditional exemption

[118] 15 U.S.C. 80a–22(b)(1). Under the proposal ''interdealer quotation system'' would have the same meaning as in 17 CFR 240.15c2–11. ''Open-end company'' would have the same meaning as in 17 CFR 247.740.

[119] 15 U.S.C. 78cc(b). Exchange Act Section 29(b) provides, in pertinent part, that every contract made in violation of the Exchange Act or of any rule or regulation adopted under the Exchange Act (with certain exceptions) shall be void.

[120] Proposed Exchange Act Rule 780.

[121] President Clinton signed the GLBA into law on November 12, 1999.

[122] Exchange Act Release No. 44291 (May 11, 2001), 66 FR 27760 (May 18, 2001).

[123] 17 CFR 240.3a4–2 through 3a4–6 and 17 CFR 240.3b–17.

[124] 17 CFR 242.710 through 781. See Exchange Act Release No. 49879 (June 17, 2004), 69 FR 39682 (June 30, 2004).

[125] 44 U.S.C. 3501, *et seq.*

[126] 5 CFR 1320.16; Appendix A.1.

[127] 44 U.S.C. 3512.

from the requirements under the networking exception under the Exchange Act. This proposed exemption would permit bank employees to receive payment of more than a nominal fee for referring institutional customers and high net worth customers to a broker or dealer and would permit such payments to be contingent on whether the customer effects a securities transaction with the broker or dealer.

a. Collection of Information

Proposed Exchange Act Rules 701(a)(2)(i) and (b) would require banks that wish to utilize the exemption provided in this proposed rule to make certain disclosures to high net worth or institutional customers. Specifically, these banks would need to clearly and conspicuously disclose (1) the name of the broker or dealer; and (2) that the bank employee participates in an incentive compensation program under which the bank employee may receive a fee of more than a nominal amount for referring the customer to the broker or dealer and payment of this fee may be contingent on whether the referral results in a transaction with the broker or dealer.[128]

In addition, one of the conditions of the exemption is that the broker or dealer and the bank need to have a contractual or other written arrangement containing certain elements, including notification and information requirements.[129] Proposed Exchange Act Rule 701(a)(3)(iii) requires a broker or dealer to notify its bank partner if the broker or dealer determines that (1) the customer referred under the exemption is not a high net worth or institutional customer, as applicable; (2) the bank employee making the referral is subject to statutory disqualification (as defined in Section 3(a)(39) of the Exchange Act); [130] or (3) the customer or the securities transaction(s) to be conducted by the customer do not meet the applicable suitability or sophistication determination standards set forth in the rule.[131] Similarly, the bank would be required to provide its broker or dealer partner with the name of the bank employee receiving the referral fee and certain other identifying information.[132]

b. Proposed Use of Information

The purpose of the collection of information in proposed Exchange Act Rules 701(a)(2)(i) and (b) is to provide a customer of a bank relying on the exemption with information to assist the customer in identifying and assessing any conflict of interest on the part of the bank employee making a referral to a broker or dealer. The collection of information in proposed Exchange Act Rules 701(a)(2)(iii) and (a)(3)(iii) is designed to help a bank determine whether it is acting in compliance with the proposed exemption.

c. Respondents

The proposed collection of information in proposed Exchange Act Rule 701 would apply to banks that wish to utilize the exemption provided in this proposed rule and broker-dealers with which those banks enter into networking arrangements.

d. Reporting and Recordkeeping Burden

The Agencies estimate that approximately 1,000 banks annually would use the exemption in proposed Exchange Act Rule 701 and each bank would on average make the required referral fee disclosures to 200 customers annually and provide one notice annually to its broker or dealer partner regarding the name of a bank employee and other identifying information. The Agencies also estimate that broker-dealers would, on average, notify each of the 1,000 banks approximately two times annually about a determination regarding a customer's high net worth or institutional status or suitability or sophistication standing as well as a bank employee's statutory disqualification status.

Based on these estimates, the Agencies anticipate that proposed Exchange Act Rule 701 would result in approximately 200,000 disclosures to customers, 1,000 notices to brokers or dealers, and 2,000 notices to banks per year. The Agencies further estimate (based on the level of difficulty and complexity of the applicable activities) that a bank would spend approximately 5 minutes per customer to comply with the disclosure requirement and 15 minutes per notice to a broker or dealer. The Agencies also estimate that a broker or dealer would spend approximately 15 minutes per notice to a bank. Thus, the estimated total annual reporting and recordkeeping burden for these requirements in proposed Exchange Act Rule 701 are 16,917 hours for banks and 500 hours for brokers or dealers. We solicit comment on this point as well as on the validity of all of our estimates and statements in this Section.

e. Collection of Information Is Mandatory

This collection of information would be mandatory for banks relying on proposed Exchange Act Rule 701 and their broker-dealer partners.

f. Confidentiality

A bank relying on the exemption provided in proposed Exchange Act Rule 701 would be required to provide certain referral fee disclosures to its customers as required by this proposed rule. Banks relying on the exemption provided in proposed Exchange Act Rule 701 would be also be required to enter into agreements with a broker or dealer obligating the broker or dealer to notify the bank upon becoming aware of certain information with respect to the customer, the bank employee, or the nature of the securities transaction. Similarly, a bank would be required to notify a broker or dealer about the name of the bank employee receiving a referral fee and certain other identifying information.

g. Record Retention Period

Proposed Exchange Act Rule 701 would not include a specific record retention requirement. Banks, however, would be required to retain the records in compliance with any existing or future recordkeeping requirements established by the Banking Agencies.

2. Proposed Exchange Act Rule 723

a. Collection of Information

Proposed Exchange Act Rule 723(d)(1) would require a bank that desires to exclude a trust or fiduciary account in determining its compliance with the chiefly compensated test, pursuant to a de minimis exclusion,[133] to maintain records demonstrating that the securities transactions conducted by or on behalf of the account were undertaken by the bank in the exercise of its trust or fiduciary responsibilities with respect to the account.[134]

b. Proposed Use of Information

The collection of information in proposed Exchange Act Rule 723 is designed to help ensure that a bank relying on the de minimis exclusion

[128] *See* proposed Exchange Act Rules 701(a)(2)(i) and (b).

[129] *See* proposed Exchange Act Rules 701(a) and (a)(3).

[130] This proposed requirement would not apply to subparagraph (E) of Section 3(a)(39) of the Exchange Act (15 U.S.C. 78c(a)(39)).

[131] *See* proposed Exchange Act Rule 701(a)(3)(iii).

[132] *See* proposed Exchange Act Rule 701(a)(2)(iii).

[133] *See* proposed Exchange Act Rule 723(d)(2), which would require that the total number of accounts excluded by the bank, under the exclusion from the chiefly compensated test in proposed Rule 721(a)(1), do not exceed the lesser of 1 percent of the total number of trust or fiduciary accounts held by the bank (if the number so obtained is less than 1, the amount would be rounded up to 1) or 500.

[134] *See* proposed Exchange Act Rule 723(d)(1).

would be able to demonstrate that it was acting in a trust or fiduciary capacity with respect to an account excluded from the chiefly compensated test in proposed Rule 721(a)(1).

c. Respondents

The proposed collection of information in Exchange Act Rule 723 would apply to banks relying on the de minimis exclusion from the chiefly compensated test.

d. Reporting and Recordkeeping Burden

Because the Agencies expect a small number of banks would use the account-by-account approach in monitoring their compensation, the Agencies estimate that approximately 50 banks annually would use the de minimis exclusion in proposed Exchange Act Rule 723 and each such bank would, on average, need to maintain records with respect to 10 trust or fiduciary accounts annually conducted in the exercise of the banks' trust or fiduciary responsibilities. Therefore, the Agencies estimate that proposed Exchange Act Rule 723 would result in approximately 500 accounts annually for which records are required to be maintained. The Agencies anticipate that these records would consist of records that are generally created as part of the securities transaction and the account relationship and minimal additional time would be required in maintaining these records. Based on this analysis, the Agencies estimate that a bank would spend approximately 15 minutes per account to comply with the record maintenance requirement of proposed Exchange Act Rule 723. Thus, the estimated total annual reporting and recordkeeping burden for proposed Exchange Act Rule 723 is 125 hours. We solicit comment on this point as well as on the validity of all of our estimates and statements in this Section.

e. Collection of Information Is Mandatory

This collection of information would be mandatory for banks desiring to rely on de minimis exclusion contained in proposed Exchange Act Rule 723.

f. Confidentiality

Proposed Exchange Act Rule 723 does not address or restrict the confidentiality of the documentation prepared by banks under the rule. Accordingly, banks would have to make the information available to regulatory authorities or other persons to the extent otherwise provided by law.

g. Record Retention Period

Proposed Exchange Act Rule 723 would include a requirement to maintain records related to certain securities transactions. Banks would be required to retain these records in compliance with any existing or future recordkeeping requirements established by the Banking Agencies.

3. Proposed Exchange Act Rule 741

a. Collection of Information

Proposed Exchange Act Rule 741(a)(2)(ii)(A) would require a bank relying on this proposed exemption (*i.e.*, the exemption from the definition of the term ''broker'' under Section 3(a)(4) of the Exchange Act for effecting transactions on behalf of a customer in securities issued by a money market fund) to provide customers with a prospectus of the money market fund securities, not later than the time the customer authorizes the bank to effect the transaction in such securities, if they are not no-load.

b. Proposed Use of Information

The purpose of the collection of information in proposed Exchange Act Rule 741 is to help ensure that a customer of a bank relying on the exemption would have sufficient information upon which to make an informed investment decision, in particular, regarding the fees the customer would pay with respect to the securities.

c. Respondents

The proposed collection of information in Exchange Act Rule 741 would apply to banks relying on the exemption provided in the proposed rule.

d. Reporting and Recordkeeping Burden

The Agencies believe that banks generally sweep or invest their customer funds into no-load money market funds. Accordingly, the Agencies estimate that approximately 500 banks annually would use the exemption in proposed Exchange Act Rule 741 and each bank, on average, would deliver the prospectus required by the proposed rule to approximately 1,000 customers annually. Therefore, the Agencies estimate that proposed Exchange Act Rule 741 would result in approximately 500,000 disclosures per year. The Agencies estimate further that a bank would spend approximately 5 minutes per response to comply with the delivery requirement of proposed Exchange Act Rule 741. Thus, the estimated total annual reporting and recordkeeping burden for proposed Exchange Act Rule 741 is 41,667 hours. We solicit comment on this point as well as on the validity of all of our estimates and statements in this Section.

e. Collection of Information Is Mandatory

This collection of information would be mandatory for banks relying on the proposed exemption.

f. Confidentiality

The collection of information delivered pursuant to proposed Exchange Act Rule 741 would be provided by banks relying on the exemption in this rule to customers that are engaging in transactions in securities issued by a money market fund that is not a no-load fund.

g. Record Retention Period

Proposed Exchange Act Rule 741 would not include a record retention requirement.

4. Request for Comment

Pursuant to 44 U.S.C. 3506(c)(2)(B), the Agencies solicit comments to:

(1) Evaluate whether the proposed collections of information are necessary for the proper performance of the functions of the Agencies, including whether the information would have practical utility;

(2) Evaluate the accuracy of the Agencies' estimates of the burden of the proposed collections of information and provide the Agencies with data on proposed Exchange Act Rules 701, 723, and 741;

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

(4) Minimize the burden of the collections of information on those required to respond, including through the use of automated collection techniques or other forms of information technology.

In addition to the general solicitation of comments above regarding the collections of information contained in the proposed rules, the Agencies also solicit comments regarding how many banks would rely on the exemptions provided in proposed Exchange Act Rules 701, 723, and 741, and whether banks relying on such exemptions would be able to use existing systems, programs, and procedures to comply with the collections of information requirements contained in the proposed rules.

Persons desiring to submit comments on the collection of information requirements should direct them in the manner discussed below. The Agencies propose that the information collections and burden estimates discussed above will be associated with the Board for banks and with the Commission for brokers or dealers.

Commission. Comments should be directed to the Office of Management and Budget, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and should send a copy of their comments to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090, and refer to File No. S7–22–06. OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this release in the **Federal Register**. Therefore, comments to OMB are best assured of having full effect if OMB receives them within 30 days of this publication. Requests for materials submitted to OMB by the Agencies with regard to this collection of information should be in writing, refer to File No. S7–22–06, and be submitted to the Securities and Exchange Commission, Records Management, Office of Filings and Information Services, 100 F Street, NE, Washington, DC 20549.

Board. You may submit comments, identified by the Docket number, by any of the following methods:

- *Agency Web site: http:// www.federalreserve.gov.* Follow the instructions for submitting comments on the *http:// www.federalreserve.gov/ generalinfo/foia/ProposedRegs.cfm.*
- *Federal eRulemaking Portal: http:// www.regulations.gov*. Follow the instructions for submitting comments.
- *E-mail: regs.comments@federalreserve.gov*. Include docket number in the subject line of the message.
- *FAX:* 202–452–3819 or 202–452–3102.
- *Mail:* Jennifer J. Johnson, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue, NW., Washington, DC 20551.

All public comments are available from the Board's Web site at *http:// www.federalreserve.gov/generalinfo/ foia/ProposedRegs.cfm* as submitted, unless modified for technical reasons. Accordingly, your comments will not be edited to remove any identifying or contact information. Public comments may also be viewed electronically or in paper form in Room MP–500 of the Board's Martin Building (20th and C Streets, NW) between 9 a.m. and 5 p.m. on weekdays.

B. Consideration of Benefits and Costs

1. Introduction

Prior to enactment of the GLBA, banks were exempted from the definition of ''broker'' in Section 3(a)(4) of the Exchange Act. Therefore, notwithstanding the fact that banks may have conducted activities that would have brought them within the scope of the broker definition, they were not required by the Exchange Act to register as such. The GLBA replaced banks' historic exemption from the definition of ''broker'' with eleven exceptions.[135]

While banks' efforts to comply with the GLBA and the exemptions we propose would result in certain costs, the Agencies have sought to minimize these burdens to the extent possible consistent with the language and purposes of the GLBA. For example, the Agencies are proposing exemptions and interpretations which should provide banks with increased options and flexibility and help to reduce overall costs.

2. Discussion of Proposed Interpretations and Exemptions

The potential benefits and costs of the principal exemptions and interpretations in the proposal are discussed below.

a. Networking Exception

Exchange Act Section 3(a)(4)(B)(i) excepts banks from the definition of ''broker'' if they enter into a contractual or other written arrangement with a registered broker-dealer under which the broker-dealer offers brokerage services to bank customers. This networking exception is subject to several conditions. The Section also prohibits banks from paying unregistered bank employees—such as tellers, loan officers, and private bankers—''incentive compensation'' for any brokerage transaction, except that bank employees may receive a ''nominal'' referral fee for referring bank customers to their broker-dealer networking partners.[136]

Under the proposal, a ''nominal'' referral fee would be defined as a fee that does not exceed any of the following standards (1) twice the average of the minimum and maximum hourly wage established by the bank for the current or prior year for the job family that includes the employee or 1/1000th of the average of the minimum and maximum annual base salary established by the bank for the current or prior year for the job family that includes the employee; (2) twice the employee's actual base hourly wage; or (3) twenty-five dollars ($25), as adjusted for inflation pursuant to proposed Exchange Act Rule 700(f).

The Agencies believe these alternatives should provide banks appropriate flexibility while being consistent with the statute. For example, some banks, and particularly small banks, may find it most useful to establish a flat fee or inflation-adjusted fee for securities referrals as this method is easy to understand and requires no complicated calculations. In addition, permitting banks to pay referral fees based on either an employee's base hourly rate of pay or the average rate of pay for a job family would give banks objective and easily calculable approaches to paying their employees referrals while remaining consistent with the requirements of the GLBA that such fees be ''nominal'' in relation to the overall compensation of the referring employees. While some start-up costs may be incurred by banks in the process of developing a fee structure in line with the requirements of the GLBA, the ability to choose among alternative methods (as reflected in proposed rules) should enable banks to minimize their overall costs based on their individual referral programs and cost structures.

In light of the statutory provision allowing banks to pay a ''nominal one-time cash fee,'' the proposal requires that all referral fees paid under the exception be paid in cash. The Agencies request comment on whether existing bank securities referral programs would be able to operate, or could easily be adjusted to operate, in accordance with the terms of proposed Exchange Act Rule 700.

The proposed rules also include a conditional exemption that would permit a bank to pay an employee a contingent referral fee of more than a nominal amount for referring an institutional customer or high net worth customer to a broker or dealer with which the bank has a contractual or other written networking arrangement.

This exemption would provide a benefit to banks by expanding the types of referrals fees that banks could utilize with respect to institutional customers and high net worth customers. However, there likely would be costs associated with complying with the conditions in the proposed exemption (such as the requirement for banks to make certain disclosures to high net worth or institutional customers and the

[135] *See* Exchange Act Section 3(a)(4)(B)(i) '' (xi).

[136] Exchange Act Section 3(a)(4)(B)(i)(VI) limits such referral fees to a ''nominal one-time cash fee of a fixed dollar amount'' and requires that the payment of the fees not be contingent on whether the referral results in a transaction.

requirement for broker-dealers to make certain determinations and provide certain notifications to banks)[137] as well as the other terms and conditions in the statutory networking exception. However, these costs would be either a result of the statutory requirements or costs voluntarily incurred by banks because they want to take advantage of the proposed exemption.

Proposed Exchange Act Rule 700 also contains a definition of ''incentive compensation'' and excludes from this definition compensation paid by a bank under a bonus or similar plan that meets certain criteria. The bonus or similar program must be paid on a discretionary basis and based on multiple factors or variables. These factors or variables must include significant factors or variables that would not be related to securities transactions at the broker or dealer. Moreover, a referral made by the employee could not be a factor or variable in determining the employee's compensation under the plan and the employee's compensation under the plan could not be determined by reference to referrals made by any other person.

We request comments generally on the costs and benefits associated with the proposed provisions regarding the networking exception and the related exemption. We also invite banks to provide information, including data, to assist us in further evaluating the costs and benefits associated with the proposed provisions. We invite banks to include estimates of their start-up costs for updating their systems, and their annual ongoing costs for complying with the proposed changes discussed above. We invite commenters to provide us with data to assist in further evaluating these proposed rules. For example, we request comment on whether the proposed provisions relating to bonus and similar plans would be consistent with current compensation and bonus arrangements and any costs or burdens that would be incurred to bring existing plans into compliance with the provisions. We also request comment on any other costs banks would likely need to incur as a result of the proposal, and ask that commenters provide us with data to support their views.

b. Trust and Fiduciary Activities Exception

Exchange Act Section 3(a)(4)(B)(ii) permits a bank, under certain conditions, to effect transactions in a trustee or fiduciary capacity in its trust department or other department that is regularly examined by bank examiners for fiduciary principles and standards without registering as a broker. To qualify for the trust and fiduciary activities exception, Exchange Act Section 3(a)(4)(B)(ii) requires that the bank be ''chiefly compensated'' for such transactions on the basis of the types of fees specified in the GLBA and comply with certain advertising restrictions set forth in the statute.

The Agencies believe that the proposed rules dealing with the trust and fiduciary activities exception should provide a number of benefits to banks and their customers without imposing significant costs on either group.[138] The proposed provisions regarding the ''chiefly compensated'' condition and related exemptions, while imposing some costs related to systems necessary to perform the calculations and track compensation, should reduce banks' compliance costs and make the trust and fiduciary activities exception more useful. For example, the proposed rules would permit a bank to follow an alternate test to the account-by-account approach to the ''chiefly compensated'' condition. Under this proposed exemption, a bank could calculate the compensation it receives from all of its trust and fiduciary accounts on a bank-wide basis, subject to certain conditions.[139] This proposed alternative should provide banks with a potentially less costly approach for determining compliance with the trust and fiduciary activities exception. Similarly, the Agencies' proposal to provide exemptions from the ''chiefly compensated'' condition for certain short-term accounts, accounts acquired as part of a business combination or asset acquisition, accounts transferred to a broker or dealer or other unaffiliated entity, and a *de minimis* number of accounts should also reduce banks' compliance costs by facilitating banks' ability to comply with the ''chiefly compensated'' condition.[140] While compliance with the conditions in these proposed exemptions would likely result in some costs, such as the recordkeeping requirement associated with the *de minimis* exclusion, these costs would likely be more than justified by the benefits associated with the exemptions given that banks could individually determine whether they wish to utilize the exemptions.

As previously noted, banks are likely to incur some costs to comply with the GLBA. The proposed rules, however, include a number of exemptions which should help to reduce overall costs. As a result, the Agencies do not believe that banks would incur significant additional costs to comply with the liberalized exemptions proposed in Exchange Act Rules 722 through 723 or the definitional guidance proposed in Exchange Act Rule 721.

We solicit comment on the costs and benefits, if any, banks expect to incur in complying with the ''chiefly compensated'' condition in the statute and the proposed rules. In particular, we would like information on the start-up and annual ongoing costs to update systems to track compensation under the account-by-account approach and under the proposed bank-wide approach. We also solicit comments on the costs and burdens associated with the advertising provisions of proposed Exchange Act Rule 721(b), which would apply to banks operating under both the account-by-account and bank-wide tests.

c. Sweep Accounts and Transactions in Money Market Funds

Section 3(a)(4)(B)(v) of the Exchange Act provides banks with an exception from the definition of ''broker'' to the extent it effects transactions as part of a program for the investment or re-investment of deposit funds into any no-load, open-end management investment company registered under the Investment Company Act that holds itself out as a money market fund. The proposed rules provide guidance, consistent with NASD rules,[141] regarding the definition of ''no-load'' as used in the exception. This guidance should benefit banks by clarifying the types of charges that are permissible and by providing greater legal certainty.

The proposed rules also contain an exemption that would permit banks to effect transactions on behalf of a customer in securities issued by a money market fund, subject to certain conditions.[142] While compliance with the conditions associated with this proposed exemption, such as the prospectus delivery requirement in certain circumstances, could require banks to incur some costs, these costs are likely to be more than justified by the investor protection benefits enjoyed by the banks' customers and the enhanced flexibility granted banks by the exemption. Furthermore, because banks would be able to freely determine whether to incur these costs, the exemption should provide a net benefit

[137] Proposed Exchange Act Rules 701(a)(2)(i), 701(a)(3)(iii), and 701(b).

[138] The trust and fiduciary exception is addressed in proposed Exchange Act Rules 721–723.

[139] *See* proposed Exchange Act Rule 722.

[140] *See* proposed Exchange Act Rule 723.

[141] *See* NASD Rule 2830.

[142] *See* proposed Exchange Act Rule 741.

for banks that wish to utilize the exemption. We solicit comment on the costs and benefits, if any, banks expect to incur in complying with the conditions in this proposed rule.

d. Safekeeping and Custody Exception

Section 3(a)(4)(B)(viii) of the Exchange Act provides banks with an exception from the definition of ''broker'' for certain bank custody and safekeeping activities. The proposed rules contain an exemption that would permit banks, subject to certain conditions, to accept orders to effect transactions in securities for accounts for which the bank acts as a custodian. Specifically, this proposed custody exemption (proposed Exchange Act Rule 760) would allow banks, subject to certain conditions, to accept orders for securities transactions from employee benefit plan accounts and individual retirement and similar accounts for which the bank acts as a custodian. In addition, the exemption allows banks, subject to certain conditions, to accept orders for securities transactions on an accommodation basis from other types of custodial accounts. This proposal would allow banks to accept orders from custody accounts while imposing conditions designed to prevent a bank from operating a securities broker out of its custody department.

The exemption should benefit banks by permitting certain order-taking activities for securities transactions. While banks may incur some costs in complying with the conditions contained in the exemption, such as developing systems for making determinations regarding compliance with advertising and compensation restrictions, the Agencies believe the conditions contained in the rules are consistent with the practices of banks and any costs would only be imposed on banks that choose to utilize the exemption.

We solicit comment on any costs and benefits banks expect to incur in complying with the conditions in the proposed exemption.

e. Other Proposed Changes

We are proposing certain special purpose exemptions. Specifically, we are proposing an exemption that would permit banks to effect transactions pursuant to Regulation S with non-U.S. persons.[143] Another proposed exemption also would, under certain conditions, allow a bank to effect transactions in investment company securities through Fund/SERV or directly with a transfer agent acting for an open-end company.[144] In addition, we are proposing an exemption that would permit banks, as an agent, to effect securities lending transactions (and engage in related securities lending services) for securities that they do not hold in custody with or on behalf of a person the bank reasonably believes is a qualified investor (as defined in Section 3(a)(54)(A) of the Exchange Act) or any employee benefit plan that owns and invests on a discretionary basis at least $25 million in investments.[145] Furthermore, we are proposing to extend the exemption from rescission liability under Exchange Act Section 29 to contracts entered into by banks acting in a broker capacity until a date that would be 18 months after the effective date of the final rule.[146] This proposed exemption also would, under certain circumstances, provide protections from rescission liability under Exchange Act Section 29 resulting solely from a bank's status as a broker, if the bank has acted in good faith, adopted reasonable policies and procedures, and any violation of broker registration requirements did not result in significant harm or financial loss to the person seeking to void the contract.[147] Finally, we are proposing a temporary general exemption from the definition of ''broker'' under Section 3(a)(4) of the Exchange Act until the first day of a bank's first fiscal year commencing after June 30, 2008.[148]

The Agencies believe these proposed changes could offer a number of benefits to banks and their customers. In particular, the proposed Regulation S exemption could help to ensure that U.S. banks that effect transactions in Regulation S securities with non-U.S. customers would be more competitive with foreign banks or other entities that offer those services. The proposed exemption from rescission liability under Exchange Act Section 29 should also provide banks some legal certainty, both temporarily and on a permanent basis, as they conduct their securities activities. The proposed exemption related to securities lending services should enable banks to engage in the types of services which they currently engage thereby minimizing compliance costs, while providing the banks' customers with continuity of service. The temporary general exemption from the definition of ''broker'' should also be of benefit to banks by providing them with an adequate period of time to transition to the requirements under the proposed rules.

We estimate that the costs of these proposed exemptions would be minimal and would be justified by the benefits the proposed exemptions would offer. For example, the Regulation S exemption could impose certain costs on banks that are designed to ensure that they remain in compliance with the conditions under the exemption. In particular, the proposed exemption would require banks to incur certain administrative costs so that the proposed exemption is used only for ''eligible securities'' and for a purchaser who is outside of the United States within the meaning of Section 903 of Regulation S. Nevertheless, the proposed exemption is an accommodation to banks that wish to effect transactions in Regulation S securities and, as a result, the compliance costs would only be imposed on those banks that believe that it is in their best business interests to take advantage of the proposed exemption. We request comment on whether banks would incur any costs related to this proposed exemption.

Given that Exchange Act Section 29 is rarely used as a remedy, we do not anticipate that this proposed exemption would impose significant costs on the industry or on investors. We request comment on whether any bank would incur any costs or would benefit as a result of this proposed exemption. We also request comment on whether banks would incur any costs or benefits in association with the proposed exemptions concerning securities lending services and effecting transactions in investment company securities. Please provide any supporting data with respect to any costs or benefits. We would also welcome comments on the usefulness of the temporary general exemption from the definition of ''broker'' under Section 3(a)(4) of the Exchange Act.

C. Consideration of Burden on Competition, and on Promotion of Efficiency, Competition, and Capital Formation

Exchange Act Section 3(f) requires the Commission, whenever it engages in rulemaking and is required to consider or determine if an action is necessary or appropriate in the public interest, to consider whether the action will promote efficiency, competition, and capital formation.[149] Exchange Act Section 23(a)(2) requires the Commission, in adopting rules under that Act, to consider the impact that any

[143] *See* proposed Exchange Act Rule 771.

[144] *See* proposed Exchange Act Rule 775.

[145] *See* proposed Exchange Act Rule 772.

[146] *See* proposed Exchange Act Rule 780.

[147] *Id.*

[148] *See* proposed Exchange Act Rule 781.

[149] 15 U.S.C. 78c(f).

such rule would have on competition. This Section also prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.[150]

The Agencies have designed the proposed interpretations, definitions, and exemptions to minimize any burden on competition. Indeed, the Agencies believe that by providing legal certainty to banks that conduct securities activities, by clarifying the GLBA requirements, and by exempting a number of activities from those requirements, the proposed rules should allow banks to continue to conduct securities activities they already conduct consistent with the GLBA. As a result, the Agencies believe that the proposed rules would permit banks to continue to compete with broker-dealers in providing a wide range of financial services, which should preserve competition and help to keep transaction costs low for investors and for companies.

The proposed rules define terms in the statutory exceptions to the definition of broker added to the Exchange Act by Congress in the GLBA, and provide guidance to banks as to the appropriate scope of those exceptions. In addition, the proposed rules contain a number of exemptions that should provide banks flexibility in conducting their securities activities, which should further promote competition and reduce costs.

The Commission is, however, interested in receiving comments regarding the effect of the proposed rules on efficiency, competition, and capital formation.

1. General Costs

Based on the burden hours discussed in the Paperwork Reduction Act Analysis Section the Agencies expect the ongoing requirements of the proposed rules to result in a total of 58,709 annual burden hours for banks and 500 annual burden hours for broker-dealers, for a grand total of 59,209 annual burden hours.[151] The Agencies estimate that the hourly costs for these burden hours will be approximately $68 per hour.[152] Therefore, the annual total costs would be approximately $4,026,212.

In addition to the costs associated with burden hours discussed in the Paperwork Reduction Act Analysis Section, the Agencies expect that many banks also could incur start-up costs for legal and other professional services.[153] Many banks would utilize their in-house counsel, accountants, compliance officers, and programmers in an effort to achieve compliance with the proposed rules. Industry sources indicate the following hourly labor costs: Attorneys—$324 per hour, intermediate accountants—$162 per hour, compliance manager—$205 per hour, and senior programmer—$268.[154] Taking an average of these professional costs, the Agencies estimate a general hourly in-house labor cost of $240 per hour for professional services.

Based on our expectation that most start-up costs would involve bringing systems into compliance and that many banks would be able to do so either using existing systems or by slightly modifying existing systems, the Agencies estimate that the proposed rules would require banks to utilize an average of 30 hours of professional services. The Agencies expect that most banks affected by the proposed rules would either use in-house counsel or employees resulting in an average total cost of $7,200 per affected bank.[155] The Agencies estimate that the proposed rules would apply to approximately 9,475 banks and approximately 25 percent of these banks would incur more than a de minimis cost. Using these values, the Agencies estimate total start-up costs of $17,055,000 (9,475 × .25 × $7,200). As previously discussed the Agencies have sought to minimize these costs to the extent possible consistent with the language and purposes of the GLBA.

Based on these estimates, the total costs for the first year would be approximately $21,081,212 ($17,055,000 + $4,026,212). The Agencies request comment on these cost estimates or any other applicable costs.

2. General Benefits

The Agencies believe that the proposed rules would provide greater legal certainty for banks in connection with their determination of whether they meet the terms and conditions for an exception to the definition of broker under the Exchange Act as well as provide additional relief through the proposed exemptions. Without the proposed rules, banks could have difficulty planning their businesses and determining whether their operations are in compliance with the GLBA. This, in turn, could hamper their business. The Agencies anticipate these benefits would prove to be useful to banks and provide saving in legal fees. Specifically, difficulties in interpreting the GBLA, absent any regulatory guidance, could result in the need for greater input from outside counsel. Based on the number of interactive issues raised by the GBLA, the Agencies estimate that absent any regulatory guidance, banks on average would use the services of outside counsel for approximately 25 more hours for the initial year and 5 more hours per year thereafter, than with the existence of the proposed rules. Industry sources indicate that the hourly costs for hiring outside counsel is approximately $400 per hour. The proposed rules would therefore result in an average total cost savings of approximately $10,000 per affected bank per year during the initial year and $2,000 per affected bank per year thereafter. The Agencies estimate that the proposed rules would apply to approximately 9,475 banks and approximately 25 percent of these banks would enjoy more than a de minimis cost savings benefit. Using these values, the Agencies estimate a total cost savings of $23,687,500 (9,475 × .25 × $10,000) for the initial year and $4,737,500 (9,475 × 0.25 × $2,000) per year thereafter. The Agencies request comment on these benefits or any other applicable benefit.

3. Request for Comments

The Agencies request comment on the costs and benefits of the proposed rules, and ask commenters to provide supporting empirical data for any positions advanced. Commenters should address in particular whether any of the new rules would generate the

[150] 15 U.S.C. 78w(a)(2).

[151] *See infra* at VIII.A.1.d., VIII.A.2.d., and VIII.A.3.d.

[152] $68/hour figure for a clerk (e.g. compliance clerk) is from the SIA *Report on Office Salaries in the Securities Industry 2005,* modified to account for an 1800-hour work-year and multiplied by 2.93 to account for bonuses, firm size, employee benefits and overhead.

[153] For example, banks may incur start-up costs in the process of reviewing or developing their networking arrangements in line with the requirements of the proposed rules. *See infra* at VIII.B.2.a. In addition, there would likely be costs for developing systems for making determinations regarding compliance with advertising and compensation restrictions pursuant to the proposed rules regarding safekeeping and custody. *See infra* at VIII.B.2.d.

[154] The hourly figures for an attorney, intermediate account, and compliance manager is from the SIA Report on Management & Professional Earnings in the Securities Industry 2005, modified to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead.

[155] Some banks may choose to utilize outside counsel, either exclusively or as a supplement to in-house resources. The Agencies estimate these costs as being similar to the in-house costs (Industry sources indicate the following hourly costs for hiring external workers: Attorneys—$400, accountant—$250, auditor—$250, and programmer—$160.).

anticipated benefits or impose any costs on investors, banks, customers of banks, registered broker-dealers or other market participants. As always, commenters are specifically invited to share quantifiable costs and benefits.

D. Consideration of Impact on the Economy

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996, or ''SBREFA,'' [156] the Agencies must advise the Office of Management and Budget as to whether the proposed rules constitute a ''major'' rule. Under SBREFA, a rule is considered ''major'' where, if adopted, it results or is likely to result in:

- An annual effect on the economy of $100 million or more (either in the form of an increase or a decrease);
- A major increase in costs or prices for consumers or individual industries; or
- A significant adverse effect on competition, investment, or innovation.

If a rule is ''major,'' its effectiveness will generally be delayed for 60 days pending Congressional review. The Agencies do not believe that the proposed rules, in their current form, would constitute a major rule. We request comment on the potential impact of the proposed rules on the economy on an annual basis. Commenters are requested to provide empirical data and other factual support for their views to the extent possible.

E. Initial Regulatory Flexibility Analysis

The Agencies have prepared an Initial Regulatory Flexibility Analysis (''IRFA''), in accordance with the provisions of the Regulatory Flexibility Act (''RFA''),[157] regarding the proposed rules.

1. Reasons for the Proposed Action

Section 201 of the GLBA amended the definition of ''broker'' in Section 3(a)(4) of the Exchange Act to replace a blanket exemption from that term for ''banks,'' as defined in Section 3(a)(6) of the Exchange Act. Congress replaced this blanket exemption with eleven specific exceptions for securities activities conducted by banks.[158] On October 13, 2006, President Bush signed into law the Regulatory Relief Act.[159] Section 101 of that Act, among other things, requires the Agencies jointly to issue a single set of proposed rules implementing the bank broker exceptions in Section 3(a)(4) of the Exchange Act within 180 days of the date of enactment of the Regulatory Relief Act.[160] These rules are being proposed by the Agencies to fulfill this requirement. The proposed rules are designed generally to provide guidance on GLBA exceptions from the definition of broker in Exchange Act Section 3(a)(4) and to provide conditional exemptions from the broker definition consistent with the purposes of the Exchange Act and the GLBA.

2. Objectives

The proposed rules would provide guidance to the industry with respect to the GLBA requirements. The proposal also provides certain conditional exemptions from the broker definition to allow banks to perform certain securities activities. The Supplementary Information Section above contains more detailed information on the objectives of the proposed rules.

3. Legal Basis

Pursuant to Section 101 of the Regulatory Relief Act, the Agencies are issuing the proposed rules for comment. In addition, pursuant to the Exchange Act and, particularly, the Sections 3(b), 15, 23(a), and 36 thereof, the Commission is issuing the proposed rules for comment.[161]

4. Small Entities Subject to the Rule

The proposed rule would apply to ''banks,'' which is defined in Section 3(a)(6) of the Exchange Act to include banking institutions organized in the United States, including members of the Federal Reserve System, Federal savings associations, as defined in Section 2(5) of the Home Owners' Loan Act, and other commercial banks, savings associations, and nondepository trust companies that are organized under the laws of a state or the United States and subject to supervision and examination by state or federal authorities having supervision over banks and savings associations.[162] Congress did not exempt small entity banks from the application of the GLBA. Moreover, because the proposed rules are intended to provide guidance to and exemptions for all banks that are subject to the GBLA, the Agencies determined that it would not be appropriate or necessary to exempt small entity banks from the operation of the proposed rules Therefore, the proposed rules generally apply to all banks, including banks that would be considered small entities (*i.e.*, banks with total assets of $165 million or less) for purposes of the RFA.[163]

The Agencies estimate that the proposed rules would apply to approximately 9,475 banks, approximately 5,816 of which could be considered small banks with assets of $165 million or less. We do not anticipate any significant costs to small entity banks as a result of the proposed rules.

5. Reporting, Recordkeeping and Other Compliance Requirements

The proposed rules would not impose any significant reporting, recordkeeping, or other compliance requirements on banks that are small entities.[164]

Nevertheless, the Agencies request comment on the costs of compliance with any recordkeeping, reporting, or other requirements under the proposed rules. The Agencies also request comment on any anticipated ongoing costs associated with complying with the proposed rules.[165] Commenters should provide detailed estimates of these costs.

6. Duplicative, Overlapping, or Conflicting Federal Rules

The Agencies believe that there are no rules that duplicate, overlap, or conflict with the proposed rules.

7. Significant Alternatives

Pursuant to Section 3(a) of the RFA,[166] the Agencies must consider the following types of alternatives (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the proposed rule for small entities; (3) the use of performance rather than design standards; and (4) an exemption from

[156] Pub. L. 104–121, Title II, 110 Stat. 857 (1996) (codified in various Sections of 5 U.S.C., 15 U.S.C. and as a note to 5 U.S.C. 601).

[157] 5 U.S.C. 603.

[158] 15 U.S.C. 78c(a)(4).

[159] Pub. L. 109–351, 120 Stat. 1966 (2006).

[160] *See* Exchange Act Section 3(a)(4)(F), as added by Section 101 of the Regulatory Relief Act. The Regulatory Relief Act also requires that the Board and SEC consult with, and seek the concurrence of, the OCC, FDIC and OTS prior to jointly adopting final rules. As noted above, the Board and the SEC also have consulted extensively with the OCC, FDIC and OTS in developing these joint proposed rules.

[161] 15 U.S.C. 78c(b), 78o, 78w(a), and 78mm.

[162] *See* 15 U.S.C. 78c(a)(6); Pub. L. 109–351, 120 Stat. 1966 (2006).

[163] Small Business Administration regulations define ''small entities'' to include banks and savings associations with total assets of $165 million or less. 13 CFR 121.201.

[164] The Agencies' estimates related to recordkeeping and disclosure are detailed in the ''Paperwork Reduction Act Analysis'' Section of this Release.

[165] The Agencies' estimates of the costs and benefits of the proposed rule amendments are detailed in the ''Consideration of Costs and Benefits'' Section of this release.

[166] 5 U.S.C. 603(c).

coverage of the proposed rules, or any part thereof, for small entities.

As discussed above, the GLBA does not exempt small entity banks from the Exchange Act broker registration requirements and because the proposed rules are intended to provide guidance to, and exemptions for, all banks that are subject to the GLBA, the Agencies determined that it would not be appropriate or necessary to exempt small entity banks from the operation of the proposed rules. Moreover, providing one or more special exemptions for small banks could place broker-dealers, including small broker-dealers, or larger banks at a competitive disadvantage versus small banks.

The proposed rules are intended to clarify and simplify compliance with the GLBA by providing guidance with respect to exceptions and by providing additional exemptions. As such, the proposed rules should facilitate compliance by banks of all sizes, including small entity banks.

The Agencies do not believe that it is necessary to consider whether small entity banks should be permitted to use performance rather than design standards to comply with the proposed rules because the proposed rules already use performance standards. Moreover, the proposed rules do not dictate for entities of any size any particular design standards (e.g., technology) that must be employed to achieve the objectives of the proposed rules.

8. Request for Comments

The Agencies encourage written comments on matters discussed in the IRFA. In particular, the Agencies request comments on (1) the number of small entities that would be affected by the proposed rules; (2) the nature of any impact the proposed rules would have on small entities and empirical data supporting the extent of the impact; and (3) how to quantify the number of small entities that would be affected by and/or how to quantify the impact of the proposed rules. Such comments will be considered in the preparation of the Final Regulatory Flexibility Analysis, if the proposed rules are adopted, and will be placed in the same public file as comments on the proposal itself. Persons wishing to submit written comments should refer to the instructions for submitting comments in the front of this release.

F. Plain Language

Section 722 of the GLBA (12 U.S.C. 4809) requires the Board to use plain language in all proposed and final rules published by the Board after January 1, 2000. The Board has sought to present the proposed rules, to the maximum extent possible, in a simple and straightforward manner. The Board invites comments on whether there are additional steps that could be taken to make the proposed rules easier to understand.

IX. Statutory Authority

Pursuant to authority set forth in the Exchange Act and particularly Sections 3(a)(4), 3(b), 15, 17, 23(a), and 36 thereof (15 U.S.C. 78c(a)(4), 78c(b), 78*o*, 78q, 78w(a), and 78mm, respectively) the Commission proposes to repeal by operation of statute current Rules 3a4–2, 3a4–3, 3a4–4, 3a4–5, 3a4–6, and 3b–17 (§§ 240.3a4–2, 240.3a4–3, 240.3a4–4, 240.3a4–5, 240.3a4–6, and 240.3b–17, respectively). The Commission is proposing to repeal Exchange Act Rules 15a–7 and 15a–8 (§ 240.15a–7 and § 240.15a–8, respectively). The Commission, jointly with the Board of Governors of the Federal Reserve System, is also proposing new Rules 700, 701, 721, 722, 723, 740, 741, 760, 771, 772, 775, 780, and 781 under the Exchange Act (§§ 247.700, 247.701, 247.721, 247.722, 247.723, 247.740, 247.741, 247.760, 247.771, 247.772, 247.775, 247.780, and 247.881, respectively).

X. Text of Proposed Rules and Rule Amendments

List of Subjects

12 CFR Part 218

Banks, Brokers, Securities.

17 CFR Part 240

Broker-dealers, Reporting and recordkeeping requirements, Securities.

17 CFR Part 247

Banks, Brokers, Securities.

Federal Reserve System

Authority and Issuance

For the reasons set forth in the preamble, the Board proposes to amend Title 12, Chapter II of the Code of Federal Regulations by adding a new Part 218 as set forth under Common Rules at the end of this document:

PART 218—EXCEPTIONS FOR BANKS FROM THE DEFINITION OF BROKER IN THE SECURITIES EXCHANGE ACT OF 1934 (REGULATION R)

Sec.
218.100 Definition.
218.700 Defined terms relating to the networking exception from the definition of ''broker.''
218.701 Exemption from the definition of ''broker'' for certain institutional referrals.
218.721 Defined terms relating to the trust and fiduciary activities exception from the definition of ''broker.''
218.722 Exemption allowing banks to calculate trust and fiduciary compensation on a bank-wide basis.
218.723 Exemptions for special accounts, transferred accounts, and a de minimis number of accounts.
218.740 Defined terms relating to the sweep accounts exception from the definition of ''broker.''
218.741 Exemption for banks effecting transactions in money market funds.
218.760 Exemption from definition of ''broker'' for banks accepting orders to effect transactions in securities from or on behalf of custody accounts.
218.771 Exemption from the definition of ''broker'' for banks effecting transactions in securities issued pursuant to Regulation S.
218.772 Exemption from the definition of ''broker'' for banks engaging in securities lending transactions.
218.775 Exemption from the definition of ''broker'' for the way banks effect excepted or exempted transactions in investment company securities.
218.780 Exemption for banks from liability under section 29 of the Securities Exchange Act of 1934.
218.781 Exemption from the definition of ''broker'' for banks for a limited period of time.

Authority: 15 U.S.C. 78c(a)(4)(F).

Securities and Exchange Commission

Authority and Issuance

For the reasons set forth in the preamble, the Commission proposes to amend title 17, chapter II of the Code of Federal Regulations as follows:

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

1. The authority citation for part 240 continues to read, in part, as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z–2, 77z–3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78e, 78f, 78g, 78i, 78j, 78j–1, 78k, 78k–1, 78*l*, 78m, 78n, 78o, 78p, 78q, 78s, 78u–5, 78w, 78x, 78*ll*, 78mm, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4, 80b–11, and 7201 *et seq.*; and 18 U.S.C. 1350, unless otherwise noted.

§§ 240.3a4–2 through 240.3a4–6, 240.3b–17, 240.15a–7, and 240.15a–8 [Removed and Reserved]

2. Sections 240.3a4–2 through 240.3a4–6, 240.3b–17, 240.15a–7, and 240.15a–8 are removed and reserved.

3. Part 247 is added as set forth under Common Rules at the end of this document:

PART 247—REGULATION R—EXEMPTIONS AND DEFINITIONS RELATED TO THE EXCEPTIONS FOR BANKS FROM THE DEFINITION OF BROKER

Authority: 15 U.S.C. 78c, 78*o*, 78q, 78w, and 78mm.

Common Rules

The common rules that are proposed to be adopted by the Board as part 218 of title 12, chapter II of the Code of Federal Regulations and by the Commission as part 247 of title 17, chapter II of the Code of Federal Regulations follow:

§ ____.100 Definition.

For purposes of this part the following definition shall apply: *Act* means the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*).

§ ____.700 Defined terms relating to the networking exception from the definition of ''broker.''

When used with respect to the Third Party Brokerage Arrangements (''Networking'') Exception from the definition of the term ''broker'' in section 3(a)(4)(B)(i) of the Act (15 U.S.C. 78c(a)(4)(B)(i)) in the context of transactions with a customer, the following terms shall have the meaning provided:

(a) *Contingent on whether the referral results in a transaction* means dependent on whether the referral results in a purchase or sale of a security; whether an account is opened with a broker or dealer; whether the referral results in a transaction involving a particular type of security; or whether it results in multiple securities transactions; provided, however, that a referral fee may be contingent on whether a customer:

(1) Contacts or keeps an appointment with a broker or dealer as a result of the referral; or

(2) Meets any objective, base-line qualification criteria established by the bank or broker or dealer for customer referrals, including such criteria as minimum assets, net worth, income, or marginal federal or state income tax rate, or any requirement for citizenship or residency that the broker or dealer, or the bank, may have established generally for referrals for securities brokerage accounts.

(b)(1) *Incentive compensation* means compensation that is intended to encourage a bank employee to refer potential customers to a broker or dealer or give a bank employee an interest in the success of a securities transaction at a broker or dealer. The term does not include compensation paid by a bank under a bonus or similar plan that is:

(i) Paid on a discretionary basis; and

(ii) Based on multiple factors or variables and:

(A) Those factors or variables include significant factors or variables that are not related to securities transactions at the broker or dealer;

(B) A referral made by the employee is not a factor or variable in determining the employee's compensation under the plan; and

(C) The employee's compensation under the plan is not determined by reference to referrals made by any other person.

(2) Nothing in this paragraph (b) shall be construed to prevent a bank from compensating an officer, director or employee on the basis of any measure of the overall profitability of:

(i) The bank, either on a stand-alone or consolidated basis;

(ii) Any of the bank's affiliates (other than a broker or dealer) or operating units; or

(iii) A broker or dealer if:

(A) Such profitability is only one of multiple factors or variables used to determine the compensation of the officer, director or employee; and

(B) The factors or variables used to determine the compensation of the officer, director or employee include significant factors or variables that are not related to the profitability of the broker or dealer.

(c) *Nominal one-time cash fee of a fixed dollar amount* means a cash payment for a referral in an amount that meets any of the following standards:

(1) The payment does not exceed:

(i) Twice the average of the minimum and maximum hourly wage established by the bank for the current or prior year for the job family that includes the employee; or

(ii) 1/1000th of the average of the minimum and maximum annual base salary established by the bank for the current or prior year for the job family that includes the employee; or

(2) The payment does not exceed twice the employee's actual base hourly wage; or

(3) The payment does not exceed twenty-five dollars ($25), as adjusted in accordance with paragraph (f) of this section.

(d) *Job family* means a group of jobs or positions involving similar responsibilities, or requiring similar skills, education or training, that a bank, or a separate unit, branch or department of a bank, has established and uses in the ordinary course of its business to distinguish among its employees for purposes of hiring, promotion, and compensation.

(e) *Referral* means the action taken by a bank employee to direct a customer of the bank to a broker or dealer for the purchase or sale of securities for the customer's account.

(f) *Inflation adjustment*—(1) *In general*. On April 1, 2012, and on the 1st day of each subsequent 5-year period, the dollar amount referred to in paragraph (c)(3) of this section shall be adjusted by:

(i) Dividing the annual value of the Employment Cost Index For Wages and Salaries, Private Industry Workers (or any successor index thereto), as published by the Bureau of Labor Statistics, for the calendar year preceding the calendar year in which the adjustment is being made by the annual value of such index (or successor) for the calendar year ending December 31, 2006; and

(ii) Multiplying the dollar amount by the quotient obtained in paragraph (f)(1)(i) of this section.

(2) *Rounding.* If the adjusted dollar amount determined under paragraph (f)(1) of this section for any period is not a multiple of $1, the amount so

determined shall be rounded to the nearest multiple of $1.

§ ____.701 Exemption from the definition of ''broker'' for certain institutional referrals.

(a) *General.* A bank that meets the requirements for the exception from the definition of ''broker'' under section 3(a)(4)(B)(i) of the Act (15 U.S.C. 78c(a)(4)(B)(i)), other than section 3(a)(4)(B)(i)(VI) of the Act (15 U.S.C. 78c(a)(4)(B)(i)(VI)), is exempt from the conditions of section 3(a)(4)(B)(i)(VI) of the Act solely to the extent that a bank employee receives a referral fee for referring a high net worth customer or institutional customer to a broker or dealer with which the bank has a contractual or other written arrangement of the type specified in section 3(a)(4)(B)(i) of the Act, if:

(1) *Bank employee.* (i) The bank employee is:

(A) Not qualified or otherwise required to be qualified pursuant to the rules of a self-regulatory organization;

(B) Predominantly engaged in banking activities, other than making referrals to a broker or dealer; and

(C) Not subject to statutory disqualification, as that term is defined in section 3(a)(39) of the Act (15 U.S.C. 78c(a)(39)), except subparagraph (E) of that section; and

(ii) The high net worth customer or institutional customer is encountered by the bank employee in the ordinary course of the employee's assigned duties for the bank.

(2) *Bank determinations and obligations.* (i) Disclosures. Prior to or at the time of the referral, the bank provides the customer with the information set forth in paragraph (b) of this section.

(ii) *Customer qualification.* (A) In the case of a customer that is a not a natural person, the bank determines, before the referral fee is paid to the bank employee, that the customer is an institutional customer.

(B) In the case of a customer that is a natural person, the bank, prior to or at the time of the referral, either:

(*1*) Determines that the customer is a high net worth customer; or

(*2*) Obtains a signed acknowledgment from the customer that the customer meets the standards to be considered a high net worth customer.

(iii) *Employee qualification information.* Before the referral fee is paid to the bank employee, the bank provides the broker or dealer the name of the employee and such other identifying information that may be necessary for the broker or dealer to determine whether the bank employee is associated with a broker or dealer or is subject to statutory disqualification, as that term is defined in section 3(a)(39) of the Act (15 U.S.C. 78c(a)(39)), except subparagraph (E) of that section.

(iv) *Good faith compliance and corrections.* A bank that acts in good faith and that has reasonable policies and procedures in place to comply with the requirements of this section shall not be considered a ''broker'' under section 3(a)(4) of the Act (15 U.S.C. 78c(a)(4)) solely because the bank fails to comply with the provisions of this paragraph (a)(2) with respect to a particular customer if the bank:

(A) Takes reasonable and prompt steps to remedy the error (such as, for example, by promptly making the required determination or promptly providing the broker or dealer the required information); and

(B) Makes reasonable efforts to reclaim the portion of the referral fee paid to the bank employee for the referral that does not, following any required remedial action, meet the requirements of this section and that exceeds the amount otherwise permitted under section 3(a)(4)(B)(i)(VI) of the Act (15 U.S.C. 78c(a)(4)(B)(i)(VI)) and § ____.700.

(3) *Provisions of written agreement.* The written agreement between the bank and the broker or dealer provides for the following:

(i) *Customer and employee qualifications.* Before the referral fee is paid to the bank employee:

(A) The bank and broker or dealer must determine that the bank employee is not subject to statutory disqualification, as that term is defined in section 3(a)(39) of the Act (15 U.S.C. 78c(a)(39)), except subparagraph (E) of that section; and

(B) The broker or dealer must determine that the customer is a high net worth customer or an institutional customer.

(ii) *Suitability or sophistication determination by broker or dealer*—(A) *Contingent referral fees.* In any case in which payment of the referral fee is contingent on completion of a securities transaction at the broker or dealer, the broker or dealer must, before such securities transaction is conducted, perform a suitability analysis of the securities transaction in accordance with the rules of the broker or dealer's applicable self-regulatory organization as if the broker or dealer had recommended the securities transaction.

(B) *Non-contingent referral fees.* In any case in which payment of the referral fee is not contingent on the completion of a securities transaction at the broker or dealer, the broker or dealer must, before the referral fee is paid, either:

(*1*) Determine that the customer:

(*i*) Has the capability to evaluate investment risk and make independent decisions; and

(*ii*) Is exercising independent judgment based on the customer's own independent assessment of the opportunities and risks presented by a potential investment, market factors and other investment considerations; or

(*2*) Perform a suitability analysis of all securities transactions requested by the customer contemporaneously with the referral in accordance with the rules of the broker or dealer's applicable self-regulatory organization as if the broker or dealer had recommended the securities transaction.

(iii) *Notice.* The broker or dealer must promptly inform the bank if the broker or dealer determines that:

(A) The customer is not a high net worth customer or institutional customer, as applicable;

(B) The bank employee is subject to statutory disqualification, as that term is defined in section 3(a)(39) of the Act (15 U.S.C. 78c(a)(39)), except subparagraph (E) of that section; or

(C) The customer or the securities transaction(s) to be conducted by the customer do not meet the applicable standard set forth in paragraph (a)(3)(ii) of this section.

(b) *Required disclosures.* The information provided to the high net worth customer or institutional customer pursuant to paragraph (a)(2)(i) of this section shall clearly and conspicuously disclose:

(1) The name of the broker or dealer; and

(2) That the bank employee participates in an incentive compensation program under which the bank employee may receive a fee of more than a nominal amount for referring the customer to the broker or dealer and payment of this fee may be contingent on whether the referral results in a transaction with the broker or dealer.

(c) *Receipt of other compensation.* Nothing in this section prevents or prohibits a bank from paying or a bank employee from receiving any type of compensation that would not be considered incentive compensation under § ____.700(b)(1) or that is described in § ____.700(b)(2).

(d) *Definitions.* When used in this section:

(1) *High net worth customer* means any natural person who, either individually or jointly with his or her spouse, has at least $5 million in net worth excluding the primary residence

and associated liabilities of the person and, if applicable, his or her spouse. In determining whether any person is a high net worth customer, there may be included in the assets of such person assets held individually and fifty percent of any assets held jointly with such person's spouse and any assets in which such person shares with such person's spouse a community property or similar shared ownership interest. In determining whether spouses acting jointly are high net worth customers, there may be included in the amount of each spouse's assets any assets of the other spouse (whether or not such assets are held jointly).

(2) *Institutional customer* means any corporation, partnership, limited liability company, trust or other non-natural person that has at least:

(i) $10 million in investments; or

(ii) $40 million in assets; or

(iii) $25 million in assets if the bank employee refers the customer to the broker or dealer for investment banking services.

(3) *Investment banking services* includes, without limitation, acting as an underwriter in an offering for an issuer; acting as a financial adviser in a merger, acquisition, tender-offer or similar transaction; providing venture capital, equity lines of credit, private investment-private equity transactions or similar investments; serving as placement agent for an issuer; and engaging in similar activities.

(4) *Referral fee* means a fee (paid in one or more installments) for the referral of a customer to a broker or dealer that is:

(i) A predetermined dollar amount, or a dollar amount determined in accordance with a predetermined formula (such as a fixed percentage of the dollar amount of total assets placed in an account with the broker or dealer), that does not vary based on:

(A) The revenue generated by or the profitability of securities transactions conducted by the customer with the broker or dealer; or

(B) The quantity, price, or identity of securities transactions conducted over time by the customer with the broker or dealer; or

(C) The number of customer referrals made; or

(ii) A dollar amount based on a fixed percentage of the revenues received by the broker or dealer for investment banking services provided to the customer.

(e) *Inflation adjustments*—(1) *In general.* On April 1, 2012, and on the 1st day of each subsequent 5-year period, each dollar amount in paragraphs (d)(1) and (d)(2) of this section shall be adjusted by:

(i) Dividing the annual value of the Personal Consumption Expenditures Chain-Type Price Index (or any successor index thereto), as published by the Department of Commerce, for the calendar year preceding the calendar year in which the adjustment is being made by the annual value of such index (or successor) for the calendar year ending December 31, 2006; and

(ii) Multiplying the dollar amount by the quotient obtained in paragraph (e)(1)(i) of this section.

(2) *Rounding.* If the adjusted dollar amount determined under paragraph (e)(1) of this section for any period is not a multiple of $100,000, the amount so determined shall be rounded to the nearest multiple of $100,000.

§ ____.721 Defined terms relating to the trust and fiduciary activities exception from the definition of "broker."

(a) *Defined terms for chiefly compensated test.* For purposes of this part and section 3(a)(4)(B)(ii) of the Act (15 U.S.C. 78c(a)(4)(B)(ii)), the following terms shall have the meaning provided:

(1) *Chiefly compensated—account-by-account test. Chiefly compensated* shall mean the relationship-total compensation percentage for each trust or fiduciary account of the bank is greater than 50 percent.

(2) The *relationship-total compensation percentage* for a trust or fiduciary account shall be the mean of the yearly compensation percentage for the account for the immediately preceding year and the yearly compensation percentage for the account for the year immediately preceding that year.

(3) The *yearly compensation percentage* for a trust or fiduciary account shall be equal to the relationship compensation attributable to the trust or fiduciary account during the year divided by the total compensation attributable to the trust or fiduciary account during that year, with the quotient expressed as a percentage.

(4) *Relationship compensation* means any compensation a bank receives that consists of:

(i) An administration fee, including, without limitation, a fee paid for personal services, tax preparation, or real estate settlement services, or a fee paid by an investment company for personal service, the maintenance of shareholder accounts or any service described in paragraph (a)(4)(iii)(C) of this section;

(ii) An annual fee (payable on a monthly, quarterly or other basis);

(iii) A fee based on a percentage of assets under management, including, without limitation:

(A) A fee paid by an investment company pursuant to a plan under 17 CFR 270.12b–1;

(B) A fee paid by an investment company for personal service or the maintenance of shareholder accounts; or

(C) A fee paid by an investment company based on a percentage of assets under management for any of the following services:

(*1*) Providing transfer agent or sub-transfer agent services for beneficial owners of investment company shares;

(*2*) Aggregating and processing purchase and redemption orders for investment company shares;

(*3*) Providing beneficial owners with account statements showing their purchases, sales, and positions in the investment company;

(*4*) Processing dividend payments for the investment company;

(*5*) Providing sub-accounting services to the investment company for shares held beneficially;

(*6*) Forwarding communications from the investment company to the beneficial owners, including proxies, shareholder reports, dividend and tax notices, and updated prospectuses; or

(*7*) Receiving, tabulating, and transmitting proxies executed by beneficial owners of investment company shares;

(iv) A flat or capped per order processing fee, paid by or on behalf of a customer or beneficiary, that is equal to not more than the cost incurred by the bank in connection with executing securities transactions for trust or fiduciary accounts; or

(v) Any combination of such fees.

(5) *Trust or fiduciary account* means an account for which the bank acts in a trustee or fiduciary capacity as defined in section 3(a)(4)(D) of the Act (15 U.S.C. 78c(a)(4)(D)).

(6) *Year* means a calendar year, or fiscal year consistently used by the bank for recordkeeping and reporting purposes.

(b) *Advertising restrictions.*

(1) *In general.* A bank complies with the advertising restriction in section 3(a)(4)(B)(ii)(II) of the Act (15 U.S.C. 78c(a)(4)(B)(ii)(II)) if advertisements by or on behalf of the bank do not advertise:

(i) That the bank provides securities brokerage services for trust or fiduciary accounts except as part of advertising the bank's broader trust or fiduciary services; and

(ii) The securities brokerage services provided by the bank to trust or fiduciary accounts more prominently than the other aspects of the trust or fiduciary services provided to such accounts.

(2) *Advertisement.* For purposes of this section, the term *advertisement* has the same meaning as in § ____.760(g)(2).

§ ____.722 Exemption allowing banks to calculate trust and fiduciary compensation on a bank-wide basis.

(a) *General.* A bank is exempt from meeting the ''chiefly compensated'' condition in section 3(a)(4)(B)(ii)(I) of the Act (15 U.S.C. 78c(a)(4)(B)(ii)(I)) to the extent that it effects transactions in securities for any account in a trustee or fiduciary capacity within the scope of section 3(a)(4)(D) of the Act (15 U.S.C. 78c(a)(4)(D)) if:

(1) The bank meets the other conditions for the exception from the definition of the term ''broker'' under sections 3(a)(4)(B)(ii) and 3(a)(4)(C) of the Act (15 U.S.C. 78c(a)(4)(B)(ii) and 15 U.S.C. 78c(a)(4)(C)); and

(2) The aggregate relationship-total compensation percentage for the bank's trust and fiduciary business is at least 70 percent.

(b) *Aggregate relationship-total compensation percentage.* For purposes of this section, the *aggregate relationship-total compensation percentage* for a bank's trust and fiduciary business shall be the mean of the bank's yearly bank-wide compensation percentage for the immediately preceding year and the bank's yearly bank-wide compensation percentage for the year immediately preceding that year.

(c) *Yearly bank-wide compensation percentage.* For purposes of this section, a bank's *yearly bank-wide compensation percentage* for a year shall equal the relationship compensation attributable to the bank's trust and fiduciary business as a whole during the year divided by the total compensation attributable to the bank's trust and fiduciary business as a whole during that year, with the quotient expressed as a percentage.

§ ____.723 Exemptions for special accounts, transferred accounts, and a de minimis number of accounts.

(a) *Short-term accounts.* A bank may, in determining its compliance with the chiefly compensated test in § ____.721(a)(1) and § ____.722(a)(2), exclude any trust or fiduciary account that had been open for a period of less than 3 months during the relevant year.

(b) *Accounts acquired as part of a business combination or asset acquisition.* For purposes of determining compliance with the chiefly compensated test in § ____.721(a)(1) or § ____.722(a)(2), any trust or fiduciary account that a bank acquired from another person as part of a merger, consolidation, acquisition, purchase of assets or similar transaction may be excluded by the bank for 12 months after the date the bank acquired the account from the other person.

(c) *Accounts transferred to a broker or dealer or other unaffiliated entity.* Notwithstanding section 3(a)(4)(B)(ii)(I) of the Act (15 U.S.C. 78c(a)(4)(B)(ii)(I)) and § ____.721(a)(1), a bank shall not be considered a broker for purposes of section 3(a)(4) of the Act (15 U.S.C. 78c(a)(4)) solely because a trust or fiduciary account does not meet the chiefly compensated standard in § ____.721(a)(1) if, within 3 months of the end of the year in which the account fails to meet such standard, the bank transfers the account or the securities held by or on behalf of the account to a broker or dealer registered under section 15 of the Act (15 U.S.C. 78*o*) or another entity that is not an affiliate of the bank and is not required to be registered as a broker or dealer.

(d) *De minimis exclusion.* A bank may, in determining its compliance with the chiefly compensated test in § ____.721(a)(1), exclude a trust or fiduciary account if:

(1) The bank maintains records demonstrating that the securities transactions conducted by or on behalf of the account were undertaken by the bank in the exercise of its trust or fiduciary responsibilities with respect to the account;

(2) The total number of accounts excluded by the bank under this paragraph (d) does not exceed the lesser of:

(i) 1 percent of the total number of trust or fiduciary accounts held by the bank, provided that if the number so obtained is less than 1, the amount shall be rounded up to 1; or

(ii) 500; and

(3) The bank did not rely on this paragraph (d) with respect to such account during the immediately preceding year.

§ ____.740 Defined terms relating to the sweep accounts exception from the definition of ''broker.''

For purposes of section 3(a)(4)(B)(v) of the Act (15 U.S.C. 78c(a)(4)(B)(v)), the following terms shall have the meaning provided:

(a) *Deferred sales load* has the same meaning as in 17 CFR 270.6c-10.

(b) *Money market fund* means an open-end company registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*) that is regulated as a money market fund pursuant to 17 CFR 270.2a–7.

(c)(1) *No-load*, in the context of an investment company or the securities issued by an investment company, means, for securities of the class or series in which a bank effects transactions, that:

(i) That class or series is not subject to a sales load or a deferred sales load; and

(ii) Total charges against net assets of that class or series of the investment company's securities for sales or sales promotion expenses, for personal service, or for the maintenance of shareholder accounts do not exceed 0.25 of 1% of average net assets annually.

(2) For purposes of this definition, charges for the following will not be considered charges against net assets of a class or series of an investment company's securities for sales or sales promotion expenses, for personal service, or for the maintenance of shareholder accounts:

(i) Providing transfer agent or sub-transfer agent services for beneficial owners of investment company shares;

(ii) Aggregating and processing purchase and redemption orders for investment company shares;

(iii) Providing beneficial owners with account statements showing their purchases, sales, and positions in the investment company;

(iv) Processing dividend payments for the investment company;

(v) Providing sub-accounting services to the investment company for shares held beneficially;

(vi) Forwarding communications from the investment company to the beneficial owners, including proxies, shareholder reports, dividend and tax notices, and updated prospectuses; or

(vii) Receiving, tabulating, and transmitting proxies executed by beneficial owners of investment company shares.

(d) *Open-end company* has the same meaning as in section 5(a)(1) of the Investment Company Act of 1940 (15 U.S.C. 80a–5(a)(1)).

(e) *Sales load* has the same meaning as in section 2(a)(35) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)(35)).

§ ____.741 Exemption for banks effecting transactions in money market funds.

(a) A bank is exempt from the definition of the term ''broker'' under section 3(a)(4) of the Act (15 U.S.C. 78c(a)(4)) to the extent that it effects transactions on behalf of a customer in securities issued by a money market fund, provided that:

(1) The bank provides the customer, directly or indirectly, any other product

or service, the provision of which would not, in and of itself, require the bank to register as a broker or dealer under section 15(a) of the Act (15 U.S.C. 78o(a)); and

(2)(i) The class or series of securities is no-load; or

(ii) If the class or series of securities is not no-load, (A) The bank provides the customer, not later than at the time the customer authorizes the bank to effect the transactions, a prospectus for the securities; and

(B) The bank does not characterize or refer to the class or series of securities as no-load.

(b) *Definitions.* For purposes of this section:

(1) *Money market fund* has the same meaning as in § ____.740(b).

(2) *No-load* has the same meaning as in § ____.740(c).

§ ____.760 Exemption from definition of "broker" for banks accepting orders to effect transactions in securities from or on behalf of custody accounts.

(a) *Employee benefit plan accounts and individual retirement accounts or similar accounts.* A bank is exempt from the definition of the term "broker" under section 3(a)(4) of the Act (15 U.S.C. 78c(a)(4)) to the extent that, as part of its customary banking activities, the bank accepts orders to effect transactions in securities for an employee benefit plan account or an individual retirement account or similar account for which the bank acts as a custodian if:

(1) *Employee compensation restriction.* The bank complies with the employee compensation restrictions in paragraph (c) of this section;

(2) *Advertisements.* Advertisements by or on behalf of the bank do not:

(i) Advertise that the bank accepts orders for securities transactions for employee benefit plan accounts or individual retirement accounts or similar accounts, except as part of advertising the other custodial or safekeeping services the bank provides to these accounts; or

(ii) Advertise that such accounts are securities brokerage accounts or that the bank's safekeeping and custody services substitute for a securities brokerage account; and

(3) *Advertisements and sales literature for individual retirement or similar accounts.* Advertisements and sales literature issued by or on behalf of the bank do not describe the securities order-taking services provided by the bank to individual retirement or similar accounts more prominently than the other aspects of the custody or safekeeping services provided by the bank to these accounts.

(b) *Accommodation trades for other custodial accounts.* A bank is exempt from the definition of the term "broker" under section 3(a)(4) of the Act (15 U.S.C. 78c(a)(4)) to the extent that, as part of its customary banking activities, the bank accepts orders to effect transactions in securities for an account for which the bank acts as custodian other than an employee benefit plan account or an individual retirement account or similar account if:

(1) *Accommodation.* The bank accepts orders to effect transactions in securities for the account only as an accommodation to the customer;

(2) *Employee compensation restriction.* The bank complies with the employee compensation restrictions in paragraph (c) of this section;

(3) *Bank fees.* Any fee charged or received by the bank for effecting a securities transaction for the account does not vary based on:

(i) Whether the bank accepted the order for the transaction; or

(ii) The quantity or price of the securities to be bought or sold;

(4) *Advertisements.* Advertisements by or on behalf of the bank do not state that the bank accepts orders for securities transactions for the account;

(5) *Sales literature.* Sales literature issued by or on behalf of the bank:

(i) Does not state that the bank accepts orders for securities transactions for the account except as part of describing the other custodial or safekeeping services the bank provides to the account; and

(ii) Does not describe the securities order-taking services provided to the account more prominently than the other aspects of the custody or safekeeping services provided by the bank to the account; and

(6) *Investment advice and recommendations.* The bank does not provide investment advice or research concerning securities to the account, make recommendations to the account concerning securities or otherwise solicit securities transactions from the account; provided, however, that nothing in this paragraph (b)(6) shall prevent a bank from:

(i) Publishing, using or disseminating advertisements and sales literature in accordance with paragraphs (b)(4) and (b)(5) of this section; and

(ii) Responding to customer inquiries regarding the bank's safekeeping and custody services by providing:

(A) Advertisements or sales literature consistent with the provisions of paragraphs (b)(4) and (b)(5) of this section describing the safekeeping, custody and related services that the bank offers;

(B) A prospectus prepared by a registered investment company, or sales literature prepared by a registered investment company or by the broker or dealer that is the principal underwriter of the registered investment company pertaining to the registered investment company's products;

(C) Information based on the materials described in paragraphs (b)(6)(ii)(A) and (B) of this section; or

(iii) Responding to inquiries regarding the bank's safekeeping, custody or other services, such as inquiries concerning the customer's account or the availability of sweep or other services, so long as the bank does not provide investment advice or research concerning securities to the account or make a recommendation to the account concerning securities.

(c) *Employee compensation restriction.* A bank may accept orders pursuant to this section for a securities transaction for an account described in paragraph (a) or (b) of this section only if no bank employee receives compensation, including a fee paid pursuant to a plan under 17 CFR 270.12b–1, from the bank, the executing broker or dealer, or any other person that is based on whether a securities transaction is executed for the account or that is based on the quantity, price, or identity of securities purchased or sold by such account, provided that nothing in this paragraph shall prohibit a bank employee from receiving compensation that would not be considered incentive compensation under § ____.700(b)(1) as if a referral had been made by the bank employee, or any compensation described in § ____.700(b)(2).

(d) *Other conditions.* A bank may accept orders for a securities transaction for an account for which the bank acts as a custodian under this section only if the bank:

(1) Does not act in a trustee or fiduciary capacity (as defined in section 3(a)(4)(D) of the Act (15 U.S.C. 78c(a)(4)(D)) with respect to the account;

(2) Complies with section 3(a)(4)(C) of the Act (15 U.S.C. 78c(a)(4)(C)) in handling any order for a securities transaction for the account; and

(3) Complies with section 3(a)(4)(B)(viii)(II) of the Act (15 U.S.C. 78c(a)(4)(B)(viii)(II)) regarding carrying broker activities.

(e) *Non-fiduciary administrators and recordkeepers.* A bank that acts as a non-fiduciary and non-custodial administrator or recordkeeper for an employee benefit plan for which another bank acts as custodian may rely on the exemption provided in this section if:

(1) Both the custodian bank and the administrator or recordkeeper bank meet the requirements of this section; and

(2) The administrator or recordkeeper bank does not execute a cross-trade with or for the employee benefit plan or net orders for securities for the plan, other than orders for shares of open-end investment companies not traded on an exchange.

(f) *Evasions.* In considering whether a bank meets the terms of this section, both the form and substance of the relevant account(s), transaction(s) and activities (including advertising activities) of the bank will be considered in order to prevent evasions of the requirements of this section.

(g) *Definitions.* When used in this section:

(1) *Account for which the bank acts as a custodian* means an account that is:

(i) An employee benefit plan account for which the bank acts as a custodian;

(ii) An individual retirement account or similar account for which the bank acts as a custodian; or

(iii) An account established by a written agreement between the bank and the customer that sets forth the terms that will govern the fees payable to, and rights and obligations of, the bank regarding the safekeeping or custody of securities.

(2) *Advertisement* means any material that is published or used in any electronic or other public media, including any Web site, newspaper, magazine or other periodical, radio, television, telephone or tape recording, videotape display, signs or billboards, motion pictures, or telephone directories (other than routine listings).

(3) *Employee benefit plan account* means a pension plan, retirement plan, profit sharing plan, bonus plan, thrift savings plan, incentive plan, or other similar plan, including, without limitation, an employer-sponsored plan qualified under section 401(a) of the Internal Revenue Code (26 U.S.C. 401(a)), a governmental or other plan described in section 457 of the Internal Revenue Code (26 U.S.C. 457), a tax-deferred plan described in section 403(b) of the Internal Revenue Code (26 U.S.C. 403(b)), a church plan, governmental, multiemployer or other plan described in section 414(d), (e) or (f) of the Internal Revenue Code (26 U.S.C. 414(d), (e) or (f)), an incentive stock option plan described in section 422 of the Internal Revenue Code (26 U.S.C. 422); a Voluntary Employee Beneficiary Association Plan described in section 501(c)(9) of the Internal Revenue Code (26 U.S.C. 501(c)(9)), a non-qualified deferred compensation plan (including a rabbi or secular trust), a supplemental or mirror plan, and a supplemental unemployment benefit plan.

(4) *Individual retirement account or similar account* means an individual retirement account as defined in section 408 of the Internal Revenue Code (26 U.S.C. 408), Roth IRA as defined in section 408A of the Internal Revenue Code (26 U.S.C. 408A), health savings account as defined in section 223(d) of the Internal Revenue Code (26 U.S.C. 223(d)), Archer medical savings account as defined in section 220(d) of the Internal Revenue Code (26 U.S.C. 220(d)), Coverdell education savings account as defined in section 530 of the Internal Revenue Code (26 U.S.C. 530), or other similar account.

(5) *Sales literature* means any written or electronic communication, other than an advertisement, that is generally distributed or made generally available to customers of the bank or the public, including circulars, form letters, brochures, telemarketing scripts, seminar texts, published articles, and press releases concerning the bank's products or services.

(6) *Principal underwriter* has the same meaning as in section 2(a)(29) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)(29)).

§ ____.771 Exemption from the definition of "broker" for banks effecting transactions in securities issued pursuant to Regulation S.

(a) A bank is exempt from the definition of the term "broker" under section 3(a)(4) of the Act (15 U.S.C. 78c(a)(4)), to the extent that, as agent, the bank:

(1) Effects a sale in compliance with the requirements of 17 CFR 230.903 of an eligible security to a purchaser who is outside of the United States within the meaning of 17 CFR 230.903;

(2) Effects a resale of an eligible security after its initial sale with a reasonable belief that the eligible security was initially sold outside of the United States within the meaning of and in compliance with the requirements of 17 CFR 230.903, by or on behalf of a person who is not a U.S. person under 17 CFR 230.902(k) to a purchaser who is outside the United States within the meaning of 17 CFR 230.903 or a registered broker or dealer, provided that if the sale is made prior to the expiration of the distribution compliance period specified in 17 CFR 230.903(b)(2) or (b)(3), the sale is made in compliance with the requirements of 17 CFR 230.904; or

(3) Effects a resale of an eligible security after its initial sale outside of the United States within the meaning of and in compliance with the requirements of 17 CFR 230.903, by or on behalf of a registered broker or dealer to a purchaser who is outside the United States within the meaning of 17 CFR 230.903, provided that if the sale is made prior to the expiration of the distribution compliance period specified in 17 CFR 230.903(b)(2) or (b)(3), the sale is made in compliance with the requirements of 17 CFR 230.904.

(b) *Definitions.* For purposes of this section:

(1) *Distributor* has the same meaning as in 17 CFR 230.902(d).

(2) *Eligible security* means a security that:

(i) Is not being sold from the inventory of the bank or an affiliate of the bank; and

(ii) Is not being underwritten by the bank or an affiliate of the bank on a firm-commitment basis, unless the bank acquired the security from an unaffiliated distributor that did not purchase the security from the bank or an affiliate of the bank.

(3) *Purchaser* means a person who purchases an eligible security and who is not a U.S. person under 17 CFR 230.902(k).

§ ____.772 Exemption from the definition of "broker" for banks engaging in securities lending transactions.

(a) A bank is exempt from the definition of the term "broker" under section 3(a)(4) of the Act (15 U.S.C. 78c(a)(4)), to the extent that, as an agent, it engages in or effects securities lending transactions, and any securities lending services in connection with such transactions, with or on behalf of a person the bank reasonably believes to be:

(1) A qualified investor as defined in section 3(a)(54)(A) of the Act (15 U.S.C. 78c(a)(54)(A)); or

(2) Any employee benefit plan that owns and invests on a discretionary basis, not less than $25,000,000 in investments.

(b) *Securities lending transaction* means a transaction in which the owner of a security lends the security temporarily to another party pursuant to a written securities lending agreement under which the lender retains the economic interests of an owner of such securities, and has the right to terminate the transaction and to recall the loaned securities on terms agreed by the parties.

(c) Securities lending services means:

(1) Selecting and negotiating with a borrower and executing, or directing the execution of the loan with the borrower;

(2) Receiving, delivering, or directing the receipt or delivery of loaned securities;

(3) Receiving, delivering, or directing the receipt or delivery of collateral;

(4) Providing mark-to-market, corporate action, recordkeeping or other services incidental to the administration of the securities lending transaction;

(5) Investing, or directing the investment of, cash collateral; or

(6) Indemnifying the lender of securities with respect to various matters.

§ ____.775 Exemption from the definition of ''broker'' for the way banks effect excepted or exempted transactions in investment company securities.

(a) A bank that meets the conditions for an exception or exemption from the definition of the term ''broker'' except for the condition in section 3(a)(4)(C)(i) of the Act (15 U.S.C. 78c(a)(4)(C)(i)), is exempt from such condition to the extent that it effects transactions in securities issued by an open-end company that is neither traded on a national securities exchange nor through the facilities of a national securities association or an interdealer quotation system, provided that:

(1) Such transactions are effected through the National Securities Clearing Corporation's Mutual Fund Services or directly with a transfer agent acting for the open-end company; and

(2) The securities are distributed by a registered broker or dealer, or the sales charge is no more than the amount a registered broker or dealer may charge pursuant to the rules of a securities association registered under section 15A of the Act (15 U.S.C. 78o-3) adopted pursuant to section 22(b)(1) of the Investment Company Act of 1940 (15 U.S.C. 80a-22(b)(1)).

(b) *Definitions.* For purposes of this section:

(1) *Interdealer quotation system* has the same meaning as in 17 CFR 240.15c2–11.

(2) *Open-end company* has the same meaning as in § ____.740.

§ .____780 Exemption for banks from liability under section 29 of the Securities Exchange Act of 1934.

(a) No contract entered into before [date 18 months after effective date of the final rule], shall be void or considered voidable by reason of section 29(b) of the Act (15 U.S.C. 78cc(b)) because any bank that is a party to the contract violated the registration requirements of section 15(a) of the Act (15 U.S.C. 78o(a)), any other applicable provision of the Act, or the rules and regulations thereunder based solely on the bank's status as a broker when the contract was created.

(b) No contract shall be void or considered voidable by reason of section 29(b) of the Act (15 U.S.C. 78cc(b)) because any bank that is a party to the contract violated the registration requirements of section 15(a) of the Act (15 U.S.C. 78o(a)) or the rules and regulations thereunder based solely on the bank's status as a broker when the contract was created, if:

(1) At the time the contract was created, the bank acted in good faith and had reasonable policies and procedures in place to comply with section 3(a)(4)(B) of the Act (15 U.S.C. 78c(a)(4)(B)) and the rules and regulations thereunder; and

(2) At the time the contract was created, any violation of the registration requirements of section 15(a) of the Act by the bank did not result in any significant harm or financial loss or cost to the person seeking to void the contract.

§ ____.781 Exemption from the definition of ''broker'' for banks for a limited period of time.

A bank is exempt from the definition of the term ''broker'' under section 3(a)(4) of the Act (15 U.S.C. 78c(a)(4)) until the first day of its first fiscal year commencing after June 30, 2008.

By order of the Board of Governors of the Federal Reserve System, December 18, 2006.

Jennifer J. Johnson,

Secretary of the Board.

Dated: December 18, 2006.

By the Securities and Exchange Commission.

Nancy M. Morris,

Secretary.

[FR Doc. 06–9825 Filed 12–22–06; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 240

[Release No. 34–54947; File No. S7–23–06]

RIN 3235–AJ77

Exemptions for Banks Under Section 3(a)(5) of the Securities Exchange Act of 1934 and Related Rules

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: The Securities and Exchange Commission is publishing for comment proposed rules and rule amendments regarding exemptions from the definitions of ''broker'' and ''dealer'' under the Securities Exchange Act of 1934 (''Exchange Act'') for banks'' securities activities. In particular, the Commission is re-proposing a conditional exemption originally proposed in 2004 that would allow banks to effect riskless principal transactions with non-U.S. persons pursuant to Regulation S under the Securities Act of 1933 (''Securities Act''). The Commission also is proposing to amend and redesignate an existing exemption from the definition of ''dealer'' for banks' securities lending activities as a conduit lender. In addition, the Commission is proposing to amend a rule that grants a limited exemption from U.S. broker-dealer registration for foreign broker-dealers, conforming the rule to amended definitions of ''broker'' and ''dealer'' under the Exchange Act. Finally, the Commission is requesting comment on its intention to withdraw a rule defining the term ''bank'' for purposes of Sections 3(a)(4) and 3(a)(5) of the Exchange Act, because of judicial invalidation, a time-limited exemption for banks' securities activities, because of the passage of time, and an exemption from the definition of ''broker'' and ''dealer'' for savings associations and savings banks, an exemption no longer necessary because of the passage of the Regulatory Relief Act.

DATES: Comments should be received on or before March 26, 2007.

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic Comments:

• Use the Commission's Internet comment form (*http://www.sec.gov/rules/proposed.shtml*); or

• Send an e-mail to *rule-comments@sec.gov.* Please include File Number S7–23–06 on the subject line.

Paper Comments

• Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number S7–23–06. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/proposed.shtml*). Comments are also available for public inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: Catherine McGuire, Chief Counsel; Linda Stamp Sundberg, Senior Special Counsel, at (202) 551–5550, Office of the Chief Counsel, Division of Market Regulation, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549.

SUPPLEMENTARY INFORMATION: The Securities and Exchange Commission is requesting public comment on proposed Rules 3a5–2, 3a5–3, and 15a-6 under the Exchange Act.

Table of Contents

I. Introduction and Background

Today, the Commission and the Board of Governors of the Federal Reserve System (''Board'') are requesting comment on jointly proposed rules to implement the broker exceptions for banks relating to third-party networking arrangements, trust and fiduciary activities, sweep activities, and safekeeping and custody activities.[1]

The proposals in this release are intended to complement the Joint Proposal.[2] In particular, we re-propose (and propose to redesignate as Rule 3a5–2) a conditional exemption from the definition of dealer for banks to purchase from and sell to non-U.S. persons offerings in securities exempt under Regulation S.[3] In addition, we propose a clarifying amendment to Exchange Act Rule 15a–6,[4] which provides a conditional exemption from U.S. broker-dealer registration for certain foreign broker-dealers. This amendment would conform the language of Rule 15a–6 to more closely track the statutory changes made by the GLBA. We also propose to redesignate as new Rule 3a5–3 existing Rule 15a–11 and to amend this exemption from the definition of dealer for banks' conduit securities lending activities. Finally, we propose to withdraw Exchange Act Rule 3b–9,[5] in which the Commission defined the term ''bank'' for purposes of Sections 3(a)(4)[6] and 3(a)(5)[7] of the Exchange Act, due to judicial invalidation, Exchange Act Rule 15a–8,[8] a time-limited exemption for banks' securities activities, because of the passage of time, and Exchange Act Rule 15a–9,[9] an exemption from the definitions of ''broker'' and ''dealer'' for savings associations and savings banks, an exemption no longer necessary after passage of the Regulatory Relief Act.

II. The Proposed Rules and Rule Amendments

A. Regulation S Transactions With Non-U.S. Persons

In response to an industry request,[10] the Commission proposed Exchange Act Rule 771 in 2004.[11] We are re-proposing at this time the exemption we proposed in 2004, as applied to banks' dealer activities, substantially as proposed. As originally proposed, this rule would provide banks with a conditional exemption from the definition of ''dealer'' to engage in transactions with non-U.S. persons pursuant to Regulation S under the Securities Act of 1933.[12] In particular, a bank could purchase and sell ''eligible securities''[13] to offshore, non-U.S. persons on a ''riskless principal'' basis.[14] A bank could also resell any eligible Regulation S security, after its purchase and after its initial issuance, to a non-U.S. person as long as the bank continues to comply with the requirements of Regulation S.[15] After the requirements of Regulation S cease to apply to an issuance, a bank could resell such a security to another non-U.S. person or a broker-dealer, as long as the transaction complies with another bank broker or dealer exception or exemption.

In explaining the need for an exemption, the industry group expressed the view to the Commission

[1] Exchange Act Release No. 54946 (Dec. 18, 2006) (''Joint Proposal'').

[2] On May 11, 2001, the Commission adopted interim final rules (''the Interim Rules'') regarding the Gramm-Leach-Bliley Act (''GLBA'') definitions of broker and dealer. *See* Exchange Act Release No. 44291 (May 11, 2001), 66 FR 27760 (May 18, 2001) (*http://www.sec.gov/rules/final/34-44291.htm*). On June 17, 2004, the Commission proposed Regulation B. See Exchange Act Release No. 49879 (June 17, 2004), 69 FR 39682 (June 30, 2004) (*http://www.sec.gov/rules/proposed/34-49879.htm*). Both the Interim Rules as they apply to the broker activities of banks and Regulation B are superseded by the current joint rulemaking. The Regulatory Relief Act does not directly affect the operation of the rules the Commission adopted concerning banks' dealer activities. See Exchange Act Release No. 47364 (Feb.13, 2003), 68 FR 8686 (Feb. 24, 2003) (*http://www.sec.gov/rules/final/34-47364.htm*). However, we are proposing some limited amendments to separate and redesignate certain rules that provide exemptions to the definitions of both broker and dealer.

[3] The rule was proposed in 2004 but no further action on the proposed rule was taken by the Commission.

[4] 17 CFR 240.15a–6.

[5] 17 CFR 240.3b–9.

[6] 15 U.S.C. 78c(a)(4).

[7] 15 U.S.C. 78c(a)(5).

[8] 17 CFR 240.15a–8.

[9] 17 CFR 240.15a–9.

[10] See letter dated May 27, 2004, from Lawrence R. Uhlick, Executive Director and General Counsel, Institute of International Bankers to Catherine McGuire, Chief Counsel, Division of Market Regulation, Securities and Exchange Commission (*http://www.sec.gov/rules/proposed/s72604.shtml*). Regulation S [17 CFR 230.901, *et seq.*] specifies the requirements for an offer or sale of securities to be deemed to occur outside the United States and therefore not subject to the registration requirements of Section 5 of the Securities Act. Regulation S permits the sale of newly issued off-shore securities and re-sales of off-shore securities from a non-U.S. person to a non-U.S. person.

[11] *See* Exchange Act Release No. 49879, *supra note* 2. The Commission originally proposed this exemption to cover both a banks' broker and dealer securities activities. The Commission and the Board are jointly are re-proposing this exemption for banks' broker activities in response to passage of the Financial Services Regulatory Relief Act of 2006, Pub. L. 109–351, 120 Stat. 1966 (2006) (''Regulatory Relief Act''), which requires a joint proposal and provides that the final rules will supersede the existing bank broker rules. *See* text at note 36 *infra.*

[12] Persons that conduct a broker or dealer business while located in the United States must register as broker-dealers (absent an exemption), even if they direct all of their selling efforts offshore. Exchange Act Release No. 27017 (July 11, 1989), 54 FR 30013, 30016 (July 19, 1989). Nothing in proposed Rule 771 would affect the necessity of complying with Regulation S (17 CFR 230.904) or any other requirements of or exemptions from the Securities Act. Since the original proposal covered both agency and riskless principal transactions, an exemption for agency (brokerage) transactions is being separately proposed as a part of the Joint Proposal.

[13] Proposed Rule 771 would define an ''eligible security'' as a security not being sold from the inventory of the bank or an affiliate of the bank, and not being underwritten by the bank or an affiliate of the bank on a firm-commitment basis unless the bank acquired the security from an unaffiliated distributor that did not purchase the security from the bank or a bank affiliate.

[14] Proposed Rule 771 would define a ''riskless principal transaction'' as a transaction in which, after receiving an order to buy from a customer, the bank purchased the security from another person to offset a contemporaneous sale to such customer or, after having received an order to sell from a customer, the bank sold the security to another person to offset a contemporaneous purchase from such customer.

[15] Rule 904 of Regulation S (17 CFR 230.904).

staff that non-U.S. persons expect to deal with one private banker, and that these customers would not choose to deal with a registered broker-dealer to conduct securities transactions in Regulation S securities, but would instead look to foreign banks to effect these transactions.

We are re-proposing this exemption for the same reasons we proposed it in 2004. In proposing this exemption, we noted that the limited conditions in the proposed rule reflected our belief that non-U.S. persons generally will not be relying on the protections of the U.S. securities laws when purchasing Regulation S securities from U.S. banks.[16] By their terms, these securities are not intended to be sold within the U.S. We also expressed our understanding that non-U.S. persons can purchase the same securities from banks located outside of the U.S. We invited comment on whether U.S. broker-dealer registration should be required with respect to transactions with these non-U.S. persons who are purchasing new offering securities offshore, or may be selling or purchasing seasoned securities.

We received few comments on this proposed exemption.[17] Commenters generally supported proposed Rule 771, stating that it would allow banks to compete with foreign banks not subject to Commission regulation.[18] However, several commenters urged the Commission to broaden the proposed exemption. For example, one commenter suggested that the Commission modify the proposed exemption to include transactions for foreign investors in all securities sold in the United States.[19] Two commenters urged the Commission to amend the proposed definition of ''eligible security'' to eliminate the restriction on banks' selling securities from the inventory of affiliates or those underwritten by affiliates.[20] Two commenters suggested that the Commission expand the exemption to cover all secondary market trading with offshore persons in any ''foreign securities'' not effected on a U.S. exchange or Nasdaq, stating that it is burdensome for a bank to determine whether a security was initially sold in compliance with Regulation S.[21] One commenter also stated that to the extent the proposed rule requires a bank to make any determination or conduct any investigation of the way in which a security was initially offered, the rule should only require the bank to have a ''reasonable belief'' that the eligible security was initially sold in compliance with Regulation S.[22] In this commenter's view, a bank may not have direct access to all of the information necessary to determine whether a security was initially offered under Regulation S or part of a class that was offered under Regulation S.[23]

After carefully considering the comments, we are proposing the exemption for banks' riskless principal transactions in Regulation S securities, as new Rule 3a5–2, substantially as initially proposed. This proposed rule, however, incorporates the reasonable belief standard suggested by one of the commenters because we are persuaded that a bank should not suffer the loss of the exemption when due care is taken to identify the source of a security, even if an error in the identification occurs.[24] We request comment on all aspects of Proposed Rule 3a5–2.

B. Amendment to Exchange Act Rule 15a–6

In 2004, the Commission also proposed a clarifying amendment to Exchange Act Rule 15a–6, which provides a conditional exemption from U.S. broker-dealer registration for certain foreign broker-dealers.[25] Exchange Act Rule 15a–6(a)(4)(i) allows a foreign broker-dealer, without registering in the United States, to effect transactions in securities with or for a U.S.-registered broker-dealer or bank acting ''in a broker-dealer capacity as permitted by U.S. law.'' [26] Thus, in transactions between a U.S. bank and its foreign broker-dealer affiliate, acting as principal, the U.S. bank could rely on the affiliate transactions exception in the GLBA,[27] and the foreign affiliate could rely on Rule 15a–6(a)(4)(i). As the Commission explained in 2001, however, Exchange Act Rule 15a–6(a)(4)(i) does not permit a foreign broker-dealer or bank to have direct contact with customers of the U.S. bank.[28] Moreover, the GLBA affiliate transactions exception from the definition of broker for banks would not permit the U.S. bank to effect transactions with the bank's foreign affiliate's customers.[29] We received no comments on our 2001 discussion of the interplay between Exchange Act Rule 15a–6 and the affiliate transactions exemption and we are taking the same approach in the current proposal.

In light of the amended definitions of ''broker'' and ''dealer,'' the Commission proposed an amendment to Exchange Act Rule 15a–6 in 2004.[30] Currently, Exchange Act Rule 15a–6(a)(4)(i) refers to ''a bank acting in a broker or dealer

[16] Exchange Act Release No. 49879, *supra* note 2, 69 FR 39720. We also explained that although we generally believe that U.S. broker-dealers should be subject to the same standards of conduct when dealing with non-U.S. persons, this principle is less compelling when the foreign person has chosen to deal with a U.S. bank with respect to Regulation S securities that are designed to be sold to non-U.S. persons offshore.

Moreover, while no rules have been adopted, the exemption provided by Exchange Act Section 30(b), concerning foreign securities, has been held unavailable if the United States is used as a base for securities fraud perpetrated on foreigners, *Arthur Lipper Corp.* v. *SEC*, 547 F.2d 171 (2d Cir. 1976), *reh. denied*, 551 F.2d 915 (2d Cir. 1977), *cert. denied* 434 U.S. 1009.

[17] *See, e.g.*, letter dated September 1, 2004 from Jeffrey P. Neubert, President and CEO, the Clearing House (''Clearing House letter''); letter dated September 1, 2004 from Lawrence R. Uhlick, Executive Director and Chief Counsel, Institute of International Bankers (''IIB letter''); letter dated September 1, 2004 from Agustin Abalo, President, Florida International Bankers Association, Inc. (''FIBA letter''); letter dated September 1, 2004 from Sarah A. Miller, Director, Center for Securities, Trust and Investment, American Bankers Association and General Counsel, ABA Securities Association (''ABA/ABASA letter''); and letter dated September 1, 2004 from Charles C. Cutrell, III, Executive Vice President and General Counsel, State Street Bank and Trust Company (''State Street letter'').

[18] *See, e.g.*, Clearing House letter, IIB letter.

[19] State Street letter.

[20] *See* Clearing House letter; ABA/ABASA letter.

[21] IIB letter, FIBA letter.

[22] IIB letter.

[23] IIB letter. This commenter noted, however, that a bank may be able to obtain certain information regarding the security from third party information vendors or may need to rely on information statements or offering memoranda, filings, or other third-party sources to determine how the security was offered. This commenter said that the bank's exemption should not be jeopardized if this information is inaccurate or misleading as long as the bank had a reasonable belief that the information upon which it was relying was accurate and complete.

[24] In addition to adding the reasonable belief standard, the re-proposal includes some non-substantive clarifying changes to the text of the rule as proposed in 2004.

[25] Even when the GLBA permits a bank to engage in securities-related activities without itself registering as a broker-dealer, a broker-dealer engaged in the business of effecting transactions for such bank still must register—absent an exemption or other exclusion from the broker-dealer registration requirements of the Exchange Act. For instance, a foreign broker-dealer that executes trades for a bank under Exchange Act Section 3(a)(4)(C) would need to register as a U.S. broker-dealer if it does not meet the conditions of Exchange Act Rule 15a–6, or it does not otherwise qualify for an exemption from registration. Foreign banks cannot rely on the GLBA bank exceptions because they do not meet the definition of ''bank'' in Exchange Act Section 3(a)(6). However, U.S. branches and agencies of foreign banks would meet the definition of bank. *See* Exchange Act Release No. 27017, *supra* note 12, 54 FR 30015.

[26] 17 CFR 240.15a–6(a)(4)(i).

[27] 15 U.S.C. 78c(a)(4)(B)(vi).

[28] Exchange Act Release No. 44291, *supra* note 2.

[29] *Id.* If the Commission were to adopt the exemptions for Regulation S securities, proposed *supra*, a bank would be permitted to sell Regulation S securities to non-U.S. persons, including customers of a foreign affiliate, as long as it met the conditions of that exemption.

[30] Release No. 49879, *supra* note 2.

capacity as permitted by U.S. law.'' As amended, however, the definitions of 'broker' and 'dealer' in Exchange Act Section 3(a)(4) and 3(a)(5), respectively, provide that banks engaging in the activities permitted under the conditional exceptions in those definitions ''shall not be considered to be'' brokers or dealers. To reflect this change, we proposed to amend Exchange Act Rule 15a–6(a)(4)(i) by replacing the phrase ''in a broker or dealer capacity as permitted by U.S. law'' with the phrase ''pursuant to an exception or exemption from the definition of 'broker' or 'dealer' in Sections 3(a)(4)(B) or 3(a)(5)(C) of the Act.'' [31] We are now proposing to conform Rule 15a–6 to the changes made by the GLBA by incorporating the rules applicable to banks' broker and dealer activities as well as the statutory provisions with the addition of the phrase, ''or the rules thereunder.'' We are therefore re-proposing this modified clarifying amendment to Rule 15a–6. We request comment on all aspects of this proposal.

C. Securities Lending by Bank Dealers

In 2003, the Commission adopted Exchange Act Rule 15a–11, which provides a conditional exemption from the definitions of both ''broker'' and ''dealer'' for banks engaging in securities lending transactions.[32] Rule 15a–11 provides that a bank is exempt from the definition of ''broker'' and ''dealer'' under Sections 3(a)(4) and 3(a)(5) of the Exchange Act to the extent that, as a conduit lender,[33] it engages in securities lending transactions and any securities lending services in connection with such transactions, with or on behalf of a person the bank reasonably believes to be: (1) A qualified investor as defined in Section 3(a)(54)(A) of the Exchange Act; [34] or (2) any employee benefit plan that owns and invests, on a discretionary basis, not less than $25,000,000 in investments.[35]

As explained in the Joint Proposal, the exemption as applied to banks' broker activities was voided by the Regulatory Relief Act. The Commission and the Board are proposing to reinstate—as Rule 772—this exemption with respect to the definition of ''broker'' in the Joint Proposal.[36] We are proposing in this release to redesignate what was Rule 15a–11 as Rule 3a5–3 and to amend former Rule 15a–11 to eliminate its applicability to a bank's ''broker'' activities, while proposing to maintain its ongoing availability for a bank's ''dealer'' activities. We request comment on all aspects of these changes.

D. Proposed Withdrawal of Exchange Act Rule 3b–9, Rule 15a–8, and Rule 15a–9

We intend to withdraw Exchange Act Rule 3b–9, in which the Commission defined the term ''bank'' for purposes of Section 3(a)(4) and 3(a)(5) of the Exchange Act. Rule 3b–9 was invalidated by the U.S. Court of Appeals for the District of Columbia Circuit.[37] We also intend to withdraw Rule 15a–8, which provided a temporary exemption from Exchange Act Section 29 liability for banks' securities activities. This exemption expired. In addition, we intend to withdraw Rule 15a–9, an exemption from the definition of ''broker'' and ''dealer'' for savings associations and savings banks. The Regulatory Relief Act caused savings associations and savings banks to be treated as ''banks,'' eliminating the need to differentiate between these entities for the purposes of the Exchange Act. As a result, current Rule 15a–9 is no longer necessary. We request comment on all aspects of withdrawing Rule 3b–9, Rule 15a–8, and Rule 15a–9.

III. Administrative Law Matters

A. General Request for Comments

Interested persons are invited to submit written data, views and arguments concerning this proposal. The Commission will consider the comments we previously received. Commenters may reiterate or cross-reference previously submitted comments.

B. Paperwork Reduction Act Analysis

These proposed amendments to two rules and this re-proposal of a new rule would not impose recordkeeping or information collection requirements, or other collections of information that require approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.* Accordingly, the Paperwork Reduction Act does not apply.[38]

C. Consideration of Benefits and Costs

We believe that these two proposed rule amendments and the re-proposal of a new rule would be consistent with Congress's intent in enacting the GLBA and would provide banks with greater legal certainty regarding their conduct with respect to securities transactions. The rule amendments and the re-proposal are very limited in scope. The Commission is re-proposing an exemption that would permit banks to purchase from and sell to non-U.S. persons securities exempt under Regulation S. The proposed rule would facilitate banks' compliance with the federal securities laws and provide banks greater legal certainty regarding such conduct. The proposed addition of the reasonable belief standard would prevent banks from losing the exemption due to inadvertent errors in identifying the source of securities sold under the exemption, so long as the other conditions of the rule were met. We do not expect banks to incur any costs related to the re-proposal. The proposed clarifying amendment to Exchange Act Rule 15a–6 would conform the rule to the revised statutory definition of ''broker'' and ''dealer'' under the Exchange Act as well as to the rules adopted thereunder. With regard to securities lending activities, the Commission proposes to amend existing Exchange Act Rule 15a–11, and to redesignate it as Rule 3a5–3, to

[31] Nothing in this release should be construed as modifying the Exchange Act Section 3(a)(6) definition of ''bank'' as it applies to foreign banks. Currently, foreign banks generally would not meet this definition and would be considered broker-dealers under the U.S. securities laws. As such, foreign banks generally would be required to register as U.S. broker-dealers unless they qualify for an exemption from registration under Exchange Act Rule 15a–6.

[32] *See* Exchange Act Release No. 47364, *supra* note 2.

[33] Under Rule 15a–11 as adopted, as well as under the proposed amendment, ''conduit lender'' would mean a bank that borrows or loans securities, as principal, for its own account, and contemporaneously loans or borrows the same securities, as principal, for its own account.

[34] 15 U.S.C. 78c(a)(54)(A).

[35] Under Rule 15a–11 as adopted, as well as under the proposed amendment, ''securities lending transaction'' would mean a transaction in which the owner of a security lends the security temporarily to another party pursuant to a written securities lending agreement under which the lender retains the economic interests of an owner of such securities, and has the right to terminate the transaction and to recall the loaned securities on terms agreed by the parties. Under the proposal, ''securities lending services'' would mean: (1) Selecting and negotiating with a borrower and executing, or directing the execution of, the loan with the borrower; (2) receiving, delivering, or directing the receipt or delivery of loaned securities; (3) receiving, delivering, or directing the receipt or delivery of collateral; (4) providing mark-to-market, corporate action, recordkeeping or other services incidental to the administration of the securities lending transaction; (5) investing, or directing the investment of, cash collateral; or (6) indemnifying the lender of securities with respect to various matters.

[36] As applicable to banks' broker activities, the Rule 15a–11 exemption was never operable because of the temporary exemption applicable to all bank broker activities.

[37] *American Bankers Association* v. *SEC*, 804 F.2d 739 (1986).

[38] We note that, as a practical matter, banks likely already keep records that could be used to show they meet the terms of the proposed exemption. We also note that Section 203 of the GLBA specifically requires the bank regulators to promulgate recordkeeping requirements.

eliminate the rule's reference to banks' ''broker'' activities, and to clarify the rule's continued availability for banks' ''dealer'' activities. We do not expect banks to incur any costs related to these proposed amendments. The proposed withdrawal of Exchange Act Rules 3b–9 and 15a–8 reflects the invalidation of Rule 3b–9 by the U.S. Court of Appeals for the District of Columbia Circuit,[39] and the expiration of the 15a–8 exemption, respectively. Similarly, the proposed withdrawal of Exchange Act Rule 15a–9 is proposed because the exemption is no longer necessary after passage of the Regulatory Relief Act. Withdrawing these rules would provide administrative certainty and clarity, as rules no longer in effect would be removed from the Code of Federal Regulations. The withdrawals are administrative in effect, and thus would impose no costs. We request comments generally on the costs and benefits associated with the re-proposal, the proposed amendments, and the proposed rule withdrawals.

D. Consideration of Burden on Competition, and on Promotion of Efficiency, Competition, and Capital Formation

In accordance with our responsibilities under Section 3(f) of the Exchange Act,[40] we have considered both the protection of investors and whether these rule amendments and the re-proposal would promote efficiency, competition, and capital formation and have determined that they are consistent with the public interest.[41] In addition, Section 23(a)(2) of the Exchange Act requires us, in adopting rules under the Exchange Act, to consider the anticompetitive effects of such rules, if any, and to refrain from adopting a rule that will impose a burden on competition not necessary or appropriate in furthering the purpose of the Exchange Act.

We do not believe that the amendments and the re-proposal, as well as the elimination of Rules 3b–9, 15a–8, and 15a–9, would result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act. The proposed amendments and the re-proposal would provide guidance to banks regarding the scope of exceptions added to the Exchange Act by Congress in the GLBA. The rule amendments and re-proposal also would not impose any additional competitive burdens on banks engaging in a securities business, other than those imposed by Congress through functional regulation in the GLBA. Further, the proposed elimination of Rules 3b–9, 15a–8, and 15a–9 is administrative in nature.

Because the types of activities that are the subject of these amendments are not the types of activities in which small banks or small broker-dealers directly participate, there should be no competitive costs to small banks or small broker-dealers.

We do not believe that those rules impose any adverse effects on efficiency, competition, or capital formation that are not a consequence of the GLBA statutory provisions. The exemptive rules would make it easier for banks to conduct their securities lending and sales of Regulation S securities after the GLBA changes to the federal securities laws. These proposed rules also would give banks enhanced legal certainty for these securities activities. We do not believe that those rules impose any adverse effects on efficiency, competition, or capital formation that are not a result of the GLBA statute. When Congress passed the GLBA, it effectively determined that regulation of banks conducting a securities operation outside of certain exceptions was necessary, appropriate, and in the public interest. Further, we believe that the proposed elimination of Rules 3b–9, 15a–8, and 15a–9 would not have any impact on efficiency, competition, or capital formation.

The Commission requests comment on whether the proposed amendments would promote efficiency, competition, and capital formation. The Commission is particularly interested in hearing whether the existence of any of the proposed bank exemptions would have a negative impact on competition. Please provide detailed information and data on exactly how banks and broker-dealers compete and how the particular exemptions would impact broker-dealers' business.

E. Consideration of Impact on the Economy

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996, or ''SBREFA,''[42] the Commission must advise the Office of Management and Budget as to whether the proposed amendments and the re-proposal constitute a ''major'' rule. Under SBREFA, a rule is considered ''major'' where, if adopted, it results or is likely to result in: An annual effect on the economy of $100 million or more (either in the form of an increase or a decrease); a major increase in costs or prices for consumers or individual industries; or a significant adverse effect on competition, investment, or innovation. If a rule is ''major,'' its effectiveness will generally be delayed for 60 days pending Congressional review. We request comment on the potential impact of the proposed amendments, the re-proposal, and the rule withdrawals on the economy on an annual basis. Commenters are requested to provide empirical data and other factual support for their views to the extent possible.

F. Regulatory Flexibility Analysis

The Commission has prepared an Initial Regulatory Flexibility Analysis (''IRFA''), in accordance with the provisions of the Regulatory Flexibility Act (''RFA''),[43] regarding the proposed amendments and the re-proposal.

1. Reasons for the Proposed Action

The Commission is proposing the amendments to address issues raised by the passage of the GLBA and the Regulatory Relief Act. In addition, the exemption in proposed Rule 3a5–2 is being re-proposed to permit banks to purchase from and sell to non-U.S. persons securities exempt under Regulation S. Finally, we are proposing the elimination of Rules 3b–9, 15a–8, and 15a–9 for administrative clarity and in conformance with the Regulatory Relief Act.

2. Objectives

The proposed amendments, the re-proposal, and the proposed rule withdrawals are intended to provide legal certainty to the industry with respect to the GLBA requirements. The Commission also seeks to make the restrictions imposed by the GLBA more accommodating of current securities activities carried out by banks while preserving investor protection principles.

3. Legal Basis

Pursuant to the Exchange Act and, particularly, Sections 3(a)(4), 3(b), 15, 17, 23(a), and 36 thereof, the Commission proposes to adopt the amendments and the re-proposal and to eliminate the obsolete or unnecessary rules.

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[39] *See* text at note 37 *supra.*

[40] 15 U.S.C. 78w(a)(2). ''Whenever pursuant to this title the Commission is engaged in rulemaking * * * and is required to consider or determine whether an action is necessary or appropriate in the public interest, the Commission shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.''

[41] 15 U.S.C. 78c(f).

[42] Pub. L. 104–121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C., 15 U.S.C. and as a note to 5 U.S.C. 601).

[43] 5 U.S.C. 603.

4. Small Entities Subject to the Rule

Congress did not exempt small entity banks from the application of the GLBA. Moreover, because amendments and the re-proposal are intended to provide guidance to all banks that are subject to the GBLA, the Commission determined that it would not be appropriate to exempt small entity banks from their operation. Therefore, the amendments and the re-proposal generally apply to banks that would be considered small entities. Nonetheless, as noted above, the types of activities that are the subject of the amendments are not the types of activities in which small banks or small broker-dealers generally directly participate.

5. Reporting, Recordkeeping and Other Compliance Requirements

The proposed amendments would not impose any new reporting, recordkeeping, or other compliance requirements on banks that are small entities.

6. Duplicative, Overlapping, or Conflicting Federal Rules

The Commission believes that there are no rules that duplicate, overlap, or conflict with the proposed amendments.

7. Significant Alternatives

Pursuant to Section 3(a) of the RFA,[44] the Commission must consider the following types of alternatives: (a) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (b) the clarification, consolidation, or simplification of compliance and reporting requirements under the proposed rule for small entities; (c) the use of performance rather than design standards; and (d) an exemption from coverage of the proposed rule, or any part thereof, for small entities.

As discussed above, the GLBA does not exempt small banks from the Exchange Act broker-dealer registration requirements, and the Commission does not believe that an unconditional exemption would be consistent with the investor protection principles of the GLBA. Moreover, such an exemption could place broker-dealers at a competitive disadvantage versus small banks.

The proposed amendments, the re-proposal and the proposed rule withdrawals are intended to clarify and simplify compliance with the GLBA. As such, the proposals should ease compliance on banks of all sizes, including smaller entities.

[44] 5 U.S.C. 603(c).

The Commission does not believe that it is necessary to consider whether small entities should be permitted to use performance rather than design standards to comply with the proposed amendments because they already propose performance standards and do not dictate for entities of any size any particular design standards (e.g., technology) that must be employed to achieve the objectives of the proposed amendments.

8. Request for Comments

The Commission encourages written comments on matters discussed in the IRFA. In particular, the Commission requests comments on: (a) The number of small entities that would be affected by the proposed amendments; (b) the nature of any impact the proposed amendments would have on small entities and empirical data supporting the extent of the impact; and (c) how to quantify the number of small entities that would be affected by and/or how to quantify the impact of the proposed amendments. Such comments will be considered in the preparation of the Final Regulatory Flexibility Analysis, if the proposed rule is adopted, and will be placed in the same public file as comments on the proposed rule itself. Persons wishing to submit written comments should refer to the instructions for submitting comments in the front of this release.

IV. Statutory Authority

Pursuant to authority set forth in the Exchange Act and particularly Sections 3(a)(4), 3(b), 15, 17, 23(a), and 36 thereof (15 U.S.C. 78c(a)(4), 78c(b), 78*o*, 78q, 78w(a), and 78mm, respectively) the Commission proposes to repeal current Rules 3b–9, 15a–8, and 15a–9 (§§ 240.3b–9, 240.15a–8, and 240.15a–9, respectively). The Commission also is re–proposing Exchange Act Rule 3a5–2 (§ 240.3a5–2), proposing to amend Exchange Act Rule 15a–6 (§ 240.15a–6), and proposing to amend and redesignate Exchange Act Rule 15a–11 as Rule 3a5–3 (§ 240.15a–11 and § 240.3a5–3, respectively).

V. Text of Proposed Rules and Rule Amendments

List of Subjects in 17 CFR Part 240

Broker–dealers, Reporting and recordkeeping requirements, Securities.

For the reasons set forth in the preamble, Title 17, Chapter II of the Code of Federal Regulations is proposed to be amended as follows:

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

1. The authority citation for Part 240 continues to read, in part, as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z–2, 77z–3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78e, 78f, 78g, 78i, 78j, 78j–1, 78k, 78k–1, 78*l*, 78m, 78n, 78o, 78p, 78q, 78s, 78u–5, 78w, 78x, 78*ll,* 78mm, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4, 80b–11, and 7201 *et seq.*; and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

2. Sections 240.3a5–2 and 240.3a5–3 are added to read as follows:

§ 240.3a5–2 Exemption from the definition of ''dealer'' for banks effecting transactions in securities issued pursuant to Regulation S.

(a) A bank is exempt from the definition of the term ''dealer'' under section 3(a)(5) of the Act (15 U.S.C. 78c(a)(5)), to the extent that, in a riskless principal transaction, the bank:

(1) Sells an eligible security in compliance with the requirements of 17 CFR 230.903 to a purchaser who is outside of the United States within the meaning of 17 CFR 230.903 or to a registered broker or dealer, provided that if the sale is made prior to the expiration of the distribution compliance period specified in 17 CFR 230.903(b)(2) or (b)(3), the sale is made in compliance with the requirements of 17 CFR 230.904.

(2) Purchases from a person who is not a U.S. person under 17 CFR 230.902(k) an eligible security after its initial sale with a reasonable belief that the eligible security was initially sold outside of the United States within the meaning of and in compliance with the requirements of 17 CFR 230.903.

(3) Purchases from a registered broker or dealer an eligible security after its initial sale outside of the United States within the meaning of and in compliance with the requirements of 17 CFR 230.903, and sells to a purchaser who is outside the United States within the meaning of 17 CFR 230.903.

(b) *Definitions.* For purposes of this section:

(1) *Distributor* has the same meaning as in 17 CFR 230.902(d).

(2) *Eligible security* means a security that:

(i) Is not being sold from the inventory of the bank or an affiliate of the bank; and

(ii) Is not being underwritten by the bank or an affiliate of the bank on a firm–commitment basis, unless the bank acquired the security from an unaffiliated distributor that did not purchase the security from the bank or an affiliate of the bank.

(3) *Purchaser* means a person who purchases an eligible security and who is not a U.S. person under 17 CFR 230.902(k).

(4) *Riskless principal transaction* means a transaction in which, after having received an order to buy from a customer, the bank purchased the security from another person to offset a contemporaneous sale to such customer or, after having received an order to sell from a customer, the bank sold the security to another person to offset a contemporaneous purchase from such customer.

§ 240.3a5–3 Exemptionfrom the definition of ''dealer'' for banks engaging in securities lending transactions.

(a) A bank is exempt from the definition of the term ''dealer'' under section 3(a)(5) of the Act (15 U.S.C. 78c(a)(5)), to the extent that, as a conduit lender, it engages in or effects securities lending transactions, and any securities lending services in connection with such transactions, with or on behalf of a person the bank reasonably believes to be:

(1) A qualified investor as defined in section 3(a)(54)(A) of the Act (15 U.S.C. 78c(a)(54)(A)); or

(2) Any employee benefit plan that owns and invests, on a discretionary basis, not less than $25,000,000 in investments.

(b) *Securities lending transaction* means a transaction in which the owner of a security lends the security temporarily to another party pursuant to a written securities lending agreement under which the lender retains the economic interests of an owner of such securities, and has the right to terminate the transaction and to recall the loaned securities on terms agreed by the parties.

(c) *Securities lending services* means:

(1) Selecting and negotiating with a borrower and executing, or directing the execution of the loan with the borrower;

(2) Receiving, delivering, or directing the receipt or delivery of loaned securities;

(3) Receiving, delivering, or directing the receipt or delivery of collateral;

(4) Providing mark-to-market, corporate action, recordkeeping or other services incidental to the administration of the securities lending transaction;

(5) Investing, or directing the investment of, cash collateral; or

(6) Indemnifying the lender of securities with respect to various matters.

(d) For the purposes of this section, the term *conduit lender* means a bank that borrows or loans securities, as principal, for its own account, and contemporaneously loans or borrows the same securities, as principal, for its own account. A bank that qualifies under this definition as a conduit lender at the commencement of a transaction will continue to qualify, notwithstanding whether:

(1) The lending or borrowing transaction terminates and so long as the transaction is replaced within one business day by another lending or borrowing transaction involving the same securities; and

(2) Any substitutions of collateral occur.

§ 240.3b–9 [Removed and Reserved]

3. Section 240.3b–9 is removed and reserved.

4. Section 240.15a–6 is amended by revising paragraph (a)(4)(i) to read as follows:

§ 240.15a–6 Exemption of certain foreign brokers or dealers.

(a) * * *

(4) * * *

(i) A registered broker or dealer, whether the registered broker or dealer is acting as principal for its own account or as agent for others, or a bank acting pursuant to an exception or exemption from the definition of ''broker'' or ''dealer'' in sections 3(a)(4)(B), 3(a)(4)(E), or 3(a)(5)(C) of the Act (15 U.S.C. 78c(a)(4)(B), 15 U.S.C. 78c(a)(4)(E), or 15 U.S.C. 78c(a)(5)(C)) or the rules thereunder;

* * * * *

§ 240.15a–8 [Removed and Reserved]

5. Section 240.15a–8 is removed and reserved.

§ 240.15a–9 [Removed and Reserved]

6. Section 240.15a-9 is removed and reserved.

§ 240.15a–11 [Removed and Reserved]

7. Section 240.15a–11 is removed and reserved.

Dated: December 18, 2006.

By the Commission.

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 06–9842 Filed 12–22–06; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–54948; File No. S7–12–01]

Order Extending Temporary Exemption of Banks From the Definition of ''Broker'' Under Section 3(a)(4) of the Securities Exchange Act of 1934

December 18, 2006.

I. Background

The Gramm-Leach-Bliley Act (''GLBA'') repealed the blanket exception of banks from the definitions of ''broker'' and ''dealer'' under the Securities Exchange Act of 1934 (''Exchange Act'') [1] and replaced it with functional exceptions incorporated in amended definitions of ''broker'' and ''dealer.'' Under the GLBA, banks that engage in securities activities either must conduct those activities through a registered broker-dealer or ensure that their securities activities fit within the terms of a functional exception to the amended definition of ''broker.''

The GLBA provided that the amended definitions of ''broker'' and ''dealer'' were to become effective May 12, 2001. Starting on May 11, 2001, in connection with various rulemaking proposals,[2] the Securities and Exchange Commission (''Commission'') extended, most recently until January 15, 2007, a temporary exemption that gave banks time to come into full compliance with the more narrowly-tailored exceptions from broker-dealer registration under the GLBA.[3]

On October 13, 2006, President Bush signed into law the ''Financial Services Regulatory Relief Act of 2006 (''Regulatory Relief Act'').''[4] Among other things, the Regulatory Relief Act requires the Commission and the Board of Governors of the Federal Reserve (''Board'') jointly to adopt final rules implementing the bank broker exceptions in Section 3(a)(4) of the Exchange Act. It also requires that within 180 days of passage of the Regulatory Relief Act, the Commission and the Board jointly issue proposed rules.[5]

Consistent with the Regulatory Relief Act, the Commission today proposes implementing rules jointly with the Board.[6] As a result, the Commission is also granting banks [7] an exemption from compliance with the definition of broker until July 2, 2007, to permit the Commission and the Board time to receive comments, evaluate the comments on the implementing rules, and to take final action on the implementing rules.

II. Extension of Temporary Exemption From Definition of ''Broker'

In connection with the proposal of the implementing rules pursuant to the Regulatory Relief Act, the Commission finds that extending the temporary exemption for banks from the definition of ''broker'' is necessary and appropriate in the public interest, and is consistent with the protection of investors. In connection with this extension, the Commission notes that the implementing rules are being proposed with a request for comment and that the Commission and the Board will need time to give careful consideration to the comments and determine what changes, if any, should be made to the implementing rules. Recognizing that banks will need substantial time to come into compliance with final rules adopted by the Commission and the Board, we believe that extending the exemption from the definition of ''broker'' for banks until July 2, 2007, will prevent banks from unnecessarily incurring costs to comply before final implementing rules are jointly adopted. Further, the extension will give the Commission and the Board time to consider fully comments received on the implementing rules and take any final action on the proposal as necessary.

III. Conclusion

Accordingly, pursuant to Section 36 of the Exchange Act,[8]

It is hereby ordered that banks are exempt from the definition of the term ''broker'' under the Exchange Act until July 2, 2007.

By the Commission.

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 06–9841 Filed 12–22–06; 8:45 am]

BILLING CODE 8011–01–P

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[1] As defined in Exchange Act Sections 3(a)(4) and 3(a)(5) [15 U.S.C. 78c(a)(4) and 78c(a)(5)].

[2] *See* Definition of Terms in and Specific Exemptions for Banks, Savings Associations, and Savings Banks Under Sections 3(a)(4) and 3(a)(5) of the Securities Exchange Act of 1934, Exchange Act Release No. 44291 (May 11, 2001), 66 FR 27760 (May 18, 2001) (the ''Interim Rules''). *See also* Exchange Act Release No. 49879 (June 17, 2004), 69 FR 39682 (June 30, 2004) (''Regulation B''). In the Interim Rules, the Commission adopted Exchange Act Rule 15a–7, 17 CFR 240.15a–7, which, as proposed to be amended, would provide banks and other financial institutions until January 1, 2006, to begin complying with the GLBA. In proposing Regulation B, the Commission proposed Rule 781 as a re-designation of Rule 15a–7. *See* 17 CFR 242.781.

[3] *See* Exchange Act Release No. 44570 (July 18, 2001); Exchange Act Release No. 45897 (May 8, 2002); Exchange Act Release No. 46751 (Oct. 30, 2002); Exchange Act Release No. 47649 (April 8, 2003); Exchange Act Release No. 50618 (Nov. 1, 2004); Exchange Act Release No. 51328 (March 8, 2005); Exchange Act Release No. 52405 (Sept. 9, 2005); and Exchange Act Release No. 54544 (September 29, 2006), 71 FR 58891 (October 5, 2006) (extending the exemption from the definition of ''broker'' until January 15, 2006); During this time, the Commission also extended the temporary exemption from the definition of ''dealer'' to September 30, 2003. *See* Exchange Act Release No. 47366 (Feb. 13, 2003). On February 13, 2003, the Commission adopted amendments to certain parts of the Interim Rules that define terms used in the dealer exceptions, as well as certain dealer exemptions (''Dealer Release''), *see* Exchange Act Release No. 47364 (Feb. 13, 2003), 68 FR 8686 (Feb. 24, 2003). Therefore, this order is limited to an extension of the temporary exemption from the definition of ''broker.''

[4] Pub. L. 109–351, 120 Stat. 1966 (2006).

[5] Under the Regulatory Relief Act, a final single set of rules or regulations jointly adopted in accordance with that Act shall supersede any other proposed or final rule issued by the Commission on or after the date of enactment of Section 201 of the GLBA with regard to the definition of ''broker'' under Exchange Act Section 3(a)(4).

[6] Exchange Act Release No. 54946 (Dec. 18, 2006).

[7] Section 401 of the Regulatory Relief Act also amended the definition of ''bank'' in Section 3(a)(6) of the Exchange Act to include any Federal savings association or other savings association the deposits of which are insured by the FDIC. Accordingly, as used in this order, the term ''bank'' includes any savings association that qualifies as a ''bank'' under Section 3(a)(6) of the Exchange Act, as amended.

[8] 15 U.S.C. 78mm.

Federal Register

Tuesday,

December 26, 2006

Part IV

Department of Labor

Delegation of Authority and Assignment of Responsibilities for International Affairs; Notice

DEPARTMENT OF LABOR

Office of the Secretary

[Secretary's Order 18–2006]

Delegation of Authority and Assignment of Responsibilities for International Affairs

1. *Purpose.* To delegate authority and assign responsibilities to the Deputy Undersecretary for International Affairs.

2. *Authority and Directives Affected.* This Order is issued pursuant to 5 U.S.C. 301; 5 U.S.C. 551 *et seq.*; and Reorganization Plan No. 6 of 1950 (5 U.S.C. Appendix 1); additional authorities are listed in Paragraph 4 of this Order. This Order supersedes Secretary's Order 01–95.

3. *Background.* This Order delegates authority and assigns responsibilities to the Deputy Undersecretary for International Affairs for carrying out international responsibilities of the Secretary of Labor. The Order delegates authority and assigns responsibilities under statutes, regulations, executive orders, interagency memoranda and agreements. This Order is being issued in order to delegate additional responsibilities granted to the Secretary of Labor since issuance of Secretary's Order 01–95.

4. *Delegation of Authority and Assignment of Responsibilities to the Deputy Undersecretary for International Affairs.*

A. The Deputy Undersecretary for International Affairs is delegated authority for carrying out responsibilities vested in the Secretary of Labor for international activities except for those functions specifically reserved to the Secretary by statute or Executive Order. The Deputy Undersecretary for International Affairs carries out the Secretary's international responsibilities as provided for in this Order through the Bureau of International Labor Affairs (ILAB) and various Department of Labor agencies. In exercising these responsibilities, the Deputy Undersecretary shall provide oversight and serve as the coordinator of the Department's international activities and will consult with affected Departmental agencies and other U.S. Government agencies as appropriate. The authority delegated and responsibilities assigned to the Deputy Undersecretary for International Affairs cover the following functions:

(1) Supervising ILAB, and providing coordination, oversight, and foreign policy guidance for the international programs and activities of the other agencies of the Department of Labor.

(2) Developing Departmental policy and programs relating to international labor activities, and serving as the coordinator for all of the Department's international activities involving other U.S. Government agencies, intergovernmental organizations, and nongovernmental organizations.

(3) Coordinating all Department representations to international meetings and maintaining appropriate records of these meetings.

(4) Obtaining necessary White House and Department of State clearances, and approving and monitoring all foreign travel by Department employees, excluding the Office of the Inspector General.

(5) Coordinating relations between the Secretary of Labor and representative organizations of workers and employers on all international issues and between the Secretary of Labor and international or foreign trade union and employer institutions.

(6) Under the Trade Expansion Act of 1962, the Trade Act of 1974, the Trade Agreements Act of 1979, the Omnibus Trade and Competitiveness Act of 1988, the North American Free Trade Agreement Implementation Act of 1993, the Trade Act of 2000, and the Trade Act of 2002; Executive Orders 11846, 40 FR 14291 (1975), as amended, reprinted in 19 U.S.C. 2111 note, 12188, 45 FR 989 (1980), as amended, reprinted in 19 U.S.C. 2171 note, and 13277, 67 FR 70305 (2002), as amended, reprinted in 19 U.S.C. 3801; and Reorganization Plan No. 3 of 1979, 44 FR 69273 (1979), as amended, reprinted in 19 U.S.C. 2171 note:

a. Participating in the negotiation of, advising the Secretary on, and providing information sought from the Department concerning prospective trade agreements (Section 132 of the Trade Act of 1974, as codified at 19 U.S.C. 2152 and Executive Order 12188);

b. Advising the Secretary on policy issues related to the administration of the Trade Agreements Program (Executive Order 11846);

c. Organizing, jointly with the Office of the U.S. Trade Representative, and administering the Labor Advisory Committee for Trade Negotiations and Trade Policy, in order that representatives of U.S. labor may provide advice on matters relating to the negotiation and operation of trade agreements, and on the development, implementation, and administration of U.S. trade policy (§ 135 of the Trade Act of 1974, as codified at 19 U.S.C. 2155(c), and Executive Order 11846);

d. Reviewing and reporting to Congress on the extent to which beneficiary countries under the Generalized System of Preferences (GSP) implement their international commitments to eliminate the worst forms of child labor (section 412 of the Trade Act of 2000, as codified at 19 U.S.C. 2464);

e. Reviewing and reporting to Congress on the impact of future free trade agreements on U.S. employment, including labor markets, and making those findings available to the public (section 2102 of the Trade Act of 2002, as codified at 19 U.S.C. 3802 and Executive Order 13277);

f. Consulting with any country seeking a trade agreement with the United States concerning that country's labor laws and providing technical assistance to that country if needed, in consultation with the Secretary of State (section 2102 of the Trade Act of 2002, as codified at 19 U.S.C. 3802 and Executive Order 13277);

g. Preparing and submitting to Congress, in consultation with the Secretary of State and the U.S. Trade Representative, a meaningful labor rights report of the country or countries with respect to which the President is negotiating a free trade agreement (section 2102 of the Trade Act of 2002, as codified at 19 U.S.C. 3802 and Executive Order 13277);

h. Preparing and submitting to Congress, in consultation with the Secretary of State and the U.S. Trade Representative, a report with respect to any trade agreement that the President seeks to implement under trade authorities procedures, describing the extent to which a country or countries that are parties to the agreement, have in effect laws governing exploitative child labor (section 2102 of the Trade Act of 2002, as codified at 19 U.S.C. 3802 and Executive Order 13277);

i. Consulting with the Department of Homeland Security and the Department of State concerning regulations governing the admission of non-immigrant professionals under the North American Free Trade Agreement (section 341 of the North American Free Trade Agreement Implementation Act, as codified at 8 U.S.C. 1184);

j. Serving as the Secretary's designee on the Interagency Trade Data Advisory Committee (section 5402 of the Omnibus Trade and Competitiveness Act of 1988, as codified at 15 U.S.C. 4902);

k. Assisting in interagency administration of GSP (Executive Order 11846);

l. Assisting in matters pertaining to the Secretary's membership on the interagency Trade Policy Committee and the Trade Negotiating Committee (section 242 of the Trade Expansion Act of 1962, as codified at 19 U.S.C. 1872(a)(3), and Executive Orders 11846 and 12188);

m. Providing information and advice sought from the Department and consulting with the Secretary of Commerce in investigations to determine the effects on national security of imports of articles (section 232 of the Trade Expansion Act of 1962, as codified at 19 U.S.C. 1862); and

n. Participating in appropriate consultations between the Secretary and the U.S. Trade Representative concerning enforcement of U.S. rights under trade agreements and responses to certain foreign trade practices (section 301 of the Trade Act of 1974, as codified at 19 U.S.C. 2411 (c)(2)(C)).

(7) Preparing and publishing in the **Federal Register** a list of products, identified by their country of origin, which the Departments of Labor, State, and Treasury have a reasonable basis to believe might have been mined, produced, or manufactured by forced or indentured child labor (Executive Order 13126, 64 FR 32383 (1999), reprinted in 41 U.S.C. 35 note).

(8) Participating in formulating international economic, trade, investment, and monetary policy in connection with the Secretary's membership on the National Economic Council (Executive Order 12835, 58 FR 6189 (1993), reprinted in 15 U.S.C. 1023 note).

(9) Serving as the Secretary's representative on the Tourism Policy Council when the Assistant Secretary for Policy is unable participate. (section 301 of the International Travel Act of 1961, as codified at 22 U.S.C. 2124).

(10) Assisting the Secretary of Homeland Security in the preparation of immigration reports, including the Triennial Comprehensive Report on Immigration (8 U.S.C. 1364), the Reports on Unauthorized Alien Employment (8 U.S.C. 1324a note), and the Reports on Legalization Program (8 U.S.C. 1255a note) under the Immigration Technical Corrections Act of 1991 and the Immigration Reform and Control Act of 1986 (8 U.S.C. 1101 *et seq.*) (Executive Order 12789, 57 FR 5225 (1992), reprinted in 8 U.S.C. 1364 note).

(11) Consulting with the Department of Homeland Security and the Department of State concerning the admission of non-immigrant professionals under the U.S.-Chile Free Trade Agreement, the U.S.-Singapore Free Trade Agreement, and the General Agreement on Trade in Services (GATS).

(12) Assisting in the coordination of information on immigration and migration policy within the Department and coordinating the Department's participation in international forums on discussions of migration and immigration.

(13) Participating in the interagency administration of the GSP (19 U.S.C. 2461 *et seq.*), the Caribbean Basin Economic Recovery Act of 1983 (CBERA) (19 U.S.C 2701 *et seq.*), the Andean Trade Preference Act (ATPA) (19 U.S.C. 3201 *et seq.*), the Overseas Private Investment Corporation (OPIC) (22 U.S.C. 2191 *et seq.*), and the African Growth and Opportunity Act (19 U.S.C. 3701 *et seq.*), including:

a. Assisting in providing interagency information on the extent to which trade preference beneficiary countries recognize and enforce internationally recognized worker rights;

b. Conducting a continuing review and analysis on the impact that the implementation of the ATPA has with respect to U.S. labor, and preparing annual reports to Congress on such review and analysis; and

c. Assisting the Department's representative on the Board of OPIC.

(14) Coordinating the Secretary's participation on the Trade Promotion Coordinating Committee (TPCC) and representing the Department on TPCC working groups under section 201 of the Export Enhancement Act of 1992, as codified at 15 U.S.C. 4727, and Executive Order 12870, 58 FR 51753 (1993), reprinted in 15 U.S.C. 4727 note.

(15) Under the North American Agreement on Labor Cooperation and the labor provisions of free trade agreements to which the United States is or may become a party, including implementing legislation thereof:

a. Coordinating and providing support for the Secretary's membership on the Council governing the Commission for Labor Cooperation and its activities, including those related to cooperative consultations and evaluations and dispute settlement;

b. Administering and managing the responsibilities of the Office of Trade and Labor Affairs;

c. Coordinating multinational labor cooperation activities;

d. Participating in meetings, working groups, task forces, and other multinational bodies; and

e. Assisting in the preparation of reports.

(16) Serving as the Secretary's liaison with the members of the Trade Policy Committee.

(17) Carrying out activities under section 309 of the Defense Production Act, as amended, as codified at 50 App. U.S.C. 2099, and Executive Order 10480, 18 FR 4939 (1953), including assisting in the preparation of the annual report on offsets in military export sales.

(18) Representing the Secretary in the interagency team established under section 7 of the Defense Production Act Reauthorization of 2003, as codified at 50 App. U.S.C. 2099 note.

(19) Carrying out activities under section 204 of the Agricultural Act of 1956, as amended, as codified at 7 U.S.C. 1854, including representing the Department on the Committee for the Implementation of Textile Agreements (Executive Order 11651, 37 FR 4699 (1972), as amended, reprinted in 7 U.S.C. 1854 note).

(20) Under the Foreign Service Act of 1980, as amended, 22 U.S.C. 3901 *et seq.:*

a. Serving as the Department's representative on the Board of the Foreign Service (22 U.S.C. § 3930 and Executive Order 12293, 46 FR 13969 (1981), as amended, reprinted in 22 U.S.C. 3901 note);

b. Directing the Foreign Service functions of the Department;

c. Participating in formulating management policies related to the administration and personnel management of the Foreign Service of the United States; and

d. Collaborating with the Department of State in the management of the U.S. Labor Attaché Program.

(21) Providing international technical assistance, direct cultural exchange activities, and other services and information as authorized by Congress in ILAB appropriations language and through relationships with the Department of State, the U.S. Agency for International Development, the U.S. Information Agency, and other organizations under the United States Information and Educational Exchange Act of 1948, as amended, 22 U.S.C. 1431 *et seq.*; the Foreign Assistance Act of 1961, as amended, 22 U.S.C. 2151 *et seq.*; the Mutual Educational and Cultural Exchange Act of 1961, 22 U.S.C. 2451 *et seq.*; the March 19, 1965, General Agreement between the Department of Labor and the U.S. Agency for International Development; and the Secretary's Memorandum of February 10, 1978, on International Technical Assistance;

(22) Administering international technical assistance grants, including child labor grants, as authorized in paragraph 4.A(21) above.

(23) Participating in development assistance policy formulation by representing the Department on the Development Coordination Committee (22 U.S.C. 2399c and Executive Order 12163, 44 FR 56673 (1979), as amended, reprinted in 22 U.S.C. 2381 note).

(24) As required by the People's Republic of China Trade Relations Act, as codified at 22 U.S.C. 6901 *et seq.*

a. Providing support to the Department's representative on the Congressional-Executive Commission on the People's Republic of China (22 U.S.C. 6913);

b. Establishing a program to conduct rule of law training and technical assistance related to the protection of internationally recognized worker rights in the People's Republic of China (22 U.S.C. 6981).

(25) As required by Joint Resolution 131 of June 1934, as codified at 22 U.S.C. 271, Executive Order 12216, 45 FR 41619 (1980) and Executive Order 13385, 70 FR 57989 (2005), as amended, reprinted in 22 U.S.C. 271 note:

a. Providing advice and staff work required by the Secretary as Chairman of the President's Committee on the International Labor Organization (ILO);

b. Providing for U.S. Government representation and development of substantive policies for U.S. participation in the ILO.

(26) Coordinating and directing participation of the Department in activities of the United Nations and other international organizations.

(27) Providing for U.S. government representation and developing substantive positions for U.S. participation in the Organization for Economic Cooperation and Development's Employment, Labor and Social Affairs Committee and its subsidiary bodies.

(28) Participating in the Department of Labor-European Union Working Group on Employment and Labor-related issues under the Memorandum of Understanding signed by the Secretary and the European Union Commissioner for Social Affairs on May 2, 1996.

(29) Supporting the Secretary's participation in the President's Interagency Task Force to Monitor and Combat Trafficking in Persons and participating, as appropriate, as the Secretary's representative at the Senior Policy Operating Group (§ 105 of the Trafficking Victims Protection Act of 2000, as amended, and codified at 22 U.S.C. 7103 and Executive Order 13257, 67 FR 7259 (2002), reprinted in 22 U.S.C. 7103).

(30) As directed by the Secretary, carrying out such other responsibilities that may be assigned from time-to-time to the Secretary or the Department under other Federal acts, executive orders, interagency memoranda, or otherwise, which are similar to those listed under paragraphs (1) through (29) of this section.

B. Department of Labor Agency Heads are responsible for providing technical resources and staff to carry out the Department's international program objectives, including participation in intra and interagency committees, overseas diagnostic and technical missions, and international conferences and meetings.

C. The Solicitor of Labor has responsibility for providing legal advice and assistance to all officers of the Department relating to international affairs and functions described in section 4 of this Order.

5. *Redelegation of Authority.* The authority delegated and responsibilities assigned to the Deputy Undersecretary for International Affairs by this Order may be further redelegated.

6. *Effective Date.* This Order is effective immediately.

Dated: December 19, 2006.

Elaine L. Chao,

Secretary of Labor.

[FR Doc. 06–9855 Filed 12–22–06; 8:45 am]

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Federal Register

Tuesday,
December 26, 2006

Part V

The President

Executive Order 13419—National Aeronautics Research and Development

Federal Register
Vol. 71, No. 247
Tuesday, December 26, 2006

Presidential Documents

Title 3—

The President

Executive Order 13419 of December 20, 2006

National Aeronautics Research and Development

By the authority vested in me as President by the Constitution and the laws of the United States of America, including section 204 of the National Science and Technology Policy, Organization, and Priorities Act of 1976, as amended (42 U.S.C. 6613), section 101(c) of the National Aeronautics and Space Administration Authorization Act of 2005 (Public Law 109–155), and section 301 of title 3, United States Code, it is hereby ordered as follows:

Section 1. *National Aeronautics Research and Development Policy.* Continued progress in aeronautics, the science of flight, is essential to America's economic success and the protection of America's security interests at home and around the globe. Accordingly, it shall be the policy of the United States to facilitate progress in aeronautics research and development (R&D) through appropriate funding and activities of the Federal Government, in cooperation with State, territorial, tribal, local, and foreign governments, international organizations, academic and research institutions, private organizations, and other entities, as appropriate. The Federal Government shall only undertake roles in supporting aeronautics R&D that are not more appropriately performed by the private sector. The National Aeronautics Research and Development Policy prepared by the National Science and Technology Council should, to the extent consistent with this order and its implementation, guide the aeronautics R&D programs of the United States through 2020.

Sec. 2. *Functions of the Director of the Office of Science and Technology Policy.* To implement the policy set forth in section 1 of this order, the Director of the Office of Science and Technology Policy (the ''Director'') shall:

(a) review the funding and activities of the Federal Government relating to aeronautics R&D;

(b) recommend to the President, the Director of the Office of Management and Budget, and the heads of executive departments and agencies, as appropriate, such actions with respect to funding and activities of the Federal Government relating to aeronautics R&D as may be necessary to

(i) advance United States technological leadership in aeronautics;

(ii) support innovative research leading to significant advances in aeronautical concepts, technologies, and capabilities;

(iii) pursue and develop advanced aeronautics concepts and technologies, including those for advanced aircraft systems and air transportation management systems, to benefit America's security and effective and efficient national airspace management;

(iv) maintain and advance United States aeronautics research, development, test and evaluation infrastructure to provide effective experimental and computational capabilities in support of aeronautics R&D;

(v) facilitate the educational development of the future aeronautics workforce as needed to further Federal Government interests;

(vi) enhance coordination and communication among executive departments and agencies to maximize the effectiveness of Federal Government R&D resources; and

(vii) ensure appropriate Federal Government coordination with State, territorial, tribal, local, and foreign governments, international organizations, academic and research institutions, private organizations, and other entities.

Sec. 3. *Implementation of National Aeronautics Research and Development Policy.* To implement the policy set forth in section 1 of this order, the Director shall:

(a) develop and, not later than 1 year after the date of this order, submit for approval by the President a plan for national aeronautics R&D and for related infrastructure, (the ''plan''), and thereafter submit, not less often than biennially, to the President for approval any changes to the plan;

(b) monitor and report to the President as appropriate on the implementation of the approved plan;

(c) ensure that executive departments and agencies conducting aeronautics R&D:

(i) obtain and exchange information and advice, as appropriate, from organizations and individuals outside the Federal Government in support of Federal Government planning and performance of aeronautics R&D;

(ii) develop and implement, as appropriate, measures for improving dissemination of R&D results and facilitating technology transition from R&D to applications; and

(iii) identify and promote innovative policies and approaches that complement and enhance Federal Government aeronautics R&D investment; and

(d) report to the President on the results of the efforts of executive departments and agencies to implement paragraphs (c)(i) through (iii) of this section.

Sec. 4. *General Provisions.* (a) In implementing this order, the Director shall:

(i) obtain as appropriate the assistance of the National Science and Technology Council in the performance of the Director's functions under this order, consistent with Executive Order 12881 of November 23, 1993, as amended;

(ii) coordinate as appropriate with the Director of the Office of Management and Budget; and

(iii) obtain information and advice from all sources as appropriate, including individuals associated with academic and research institutions and private organizations.

(b) The functions of the President under subsection (c) of section 101 of the National Aeronautics and Space Administration Authorization Act of 2005, except the function of designation, are assigned to the Director of the Office of Science and Technology Policy. In performing these assigned functions, the Director shall, as appropriate, consult the Administrator of the National Aeronautics and Space Administration, the Secretary of Defense, the Secretary of Transportation, the Director of the Office of Management and Budget, and other heads of executive departments and agencies as appropriate. The Director also shall ensure that all actions taken in the performance of such functions are consistent with the authority set forth in subsections (a) through (d) of section 6 of Executive Order 13346 of July 8, 2004.

(c) This order shall be implemented in a manner consistent with: (i) applicable law, including section 102A

(i) of the National Security Act of 1947, as amended (50 U.S.C. 403-1(i)), and subject to the availability of appropriations; and

(ii) statutory authority of the principal officers of executive departments and agencies as the heads of their respective departments and agencies.

(d) This order shall not be construed to impair or otherwise affect the functions of the Director of the Office of Management and Budget relating to budget, administrative, and legislative proposals.

(e) This order is not intended to, and does not, create any rights or benefits, substantive or procedural, enforceable at law or in equity by a party against the United States, its departments, agencies, instrumentalities, or entities, its officers, employees, or agents, or any other person.

THE WHITE HOUSE,
December 20, 2006.

[FR Doc. 06–9895
Filed 12–22–06; 10:38 am]
Billing code 3195–01–P

Federal Register

Tuesday,
December 26, 2006

Part VI

The President

Executive Order 13420—Adjustments of Certain Rates of Pay

Federal Register
Vol. 71, No. 247
Tuesday, December 26, 2006

Presidential Documents

Title 3—

The President

Executive Order 13420 of December 21, 2006

Adjustments of Certain Rates of Pay

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the laws cited herein, it is hereby ordered as follows:

Section 1. *Statutory Pay Systems.* The rates of basic pay or salaries of the statutory pay systems (as defined in 5 U.S.C. 5302(1)), as adjusted under 5 U.S.C. 5303(a), are set forth on the schedules attached hereto and made a part hereof:

(a) The General Schedule (5 U.S.C. 5332(a)) at Schedule 1;

(b) The Foreign Service Schedule (22 U.S.C. 3963) at Schedule 2; and

(c) The schedules for the Veterans Health Administration of the Department of Veterans Affairs (38 U.S.C. 7306, 7404; section 301(a) of Public Law 102–40) at Schedule 3.

Sec. 2. *Senior Executive Service.* The ranges of rates of basic pay for senior executives in the Senior Executive Service, as established pursuant to 5 U.S.C. 5382, are set forth on Schedule 4 attached hereto and made a part hereof.

Sec. 3. *Certain Executive, Legislative, and Judicial Salaries.* The rates of basic pay or salaries for the following offices and positions are set forth on the schedules attached hereto and made a part hereof:

(a) The Executive Schedule (5 U.S.C. 5312-5318) at Schedule 5;

(b) The Vice President (3 U.S.C. 104) and the Congress (2 U.S.C. 31, and section 137 of Public Law 109–289, division B, as amended by section 7 of Public Law 109–383) at Schedule 6; and

(c) Justices and judges (28 U.S.C. 5, 44(d), 135, 252, and 461(a); section 140 of Public Law 97–92), at Schedule 7.

Sec. 4. *Uniformed Services.* Pursuant to section 601(a)-(c) of Public Law 109–364, the rates of monthly basic pay (37 U.S.C. 203(a)) for members of the uniformed services, as adjusted under 37 U.S.C. 1009, and the rate of monthly cadet or midshipman pay (37 U.S.C. 203(c)) are set forth on Schedule 8 attached hereto and made a part hereof.

Sec. 5. *Locality-Based Comparability Payments.*

(a) Pursuant to 5 U.S.C. 5304a, locality-based comparability payments shall be paid in accordance with Schedule 9 attached hereto and made a part hereof.

(b) The Director of the Office of Personnel Management shall take such actions as may be necessary to implement these payments and to publish appropriate notice of such payments in the **Federal Register**.

Sec. 6. *Administrative Law Judges.* The rates of basic pay for administrative law judges, as adjusted under 5 U.S.C. 5372(b)(4), are set forth on Schedule 10 attached hereto and made a part hereof.

Sec. 7. *Effective Dates.* Rates for the Congress, under Schedule 6, are effective on February 16, 2007. Schedule 7 reflects continuation of the pay rates in effect as of the first day of the applicable pay period beginning on or after January 1, 2006. Schedule 8 is effective on January 1, 2007. The other schedules contained herein are effective on the first day of the first applicable pay period beginning on or after January 1, 2007.

Sec. 8. *Prior Order Superseded.* Executive Order 13393 of December 22, 2005, is superseded.

THE WHITE HOUSE,
December 21, 2006.

Billing code 3195–01–P

SCHEDULE 1--GENERAL SCHEDULE

(Effective on the first day of the first applicable pay period beginning on or after January 1, 2007)

	1	2	3	4	5	6	7	8	9	10
GS-1	$16,630	$17,185	$17,739	$18,289	$18,842	$19,167	$19,713	$20,264	$20,286	$20,798
GS-2	18,698	19,142	19,761	20,286	20,512	21,115	21,718	22,321	22,924	23,527
GS-3	20,401	21,081	21,761	22,441	23,121	23,801	24,481	25,161	25,841	26,521
GS-4	22,902	23,665	24,428	25,191	25,954	26,717	27,480	28,243	29,006	29,769
GS-5	25,623	26,477	27,331	28,185	29,039	29,893	30,747	31,601	32,455	33,309
GS-6	28,562	29,514	30,466	31,418	32,370	33,322	34,274	35,226	36,178	37,130
GS-7	31,740	32,798	33,856	34,914	35,972	37,030	38,088	39,146	40,204	41,262
GS-8	35,151	36,323	37,495	38,667	39,839	41,011	42,183	43,355	44,527	45,699
GS-9	38,824	40,118	41,412	42,706	44,000	45,294	46,588	47,882	49,176	50,470
GS-10	42,755	44,180	45,605	47,030	48,455	49,880	51,305	52,730	54,155	55,580
GS-11	46,974	48,540	50,106	51,672	53,238	54,804	56,370	57,936	59,502	61,068
GS-12	56,301	58,178	60,055	61,932	63,809	65,686	67,563	69,440	71,317	73,194
GS-13	66,951	69,183	71,415	73,647	75,879	78,111	80,343	82,575	84,807	87,039
GS-14	79,115	81,752	84,389	87,026	89,663	92,300	94,937	97,574	100,211	102,848
GS-15	93,063	96,165	99,267	102,369	105,471	108,573	111,675	114,777	117,879	120,981

SCHEDULE 2--FOREIGN SERVICE SCHEDULE

(Effective on the first day of the first applicable pay period beginning on or after January 1, 2007)

Step	Class 1	Class 2	Class 3	Class 4	Class 5	Class 6	Class 7	Class 8	Class 9
1	$93,063	$75,408	$61,102	$49,511	$40,118	$35,864	$32,062	$28,662	$25,623
2	95,855	77,670	62,935	50,996	41,322	36,940	33,024	29,522	26,392
3	98,731	80,000	64,823	52,526	42,561	38,048	34,015	30,408	27,183
4	101,692	82,400	66,768	54,102	43,838	39,190	35,035	31,320	27,999
5	104,743	84,872	68,771	55,725	45,153	40,365	36,086	32,259	28,839
6	107,886	87,419	70,834	57,397	46,508	41,576	37,169	33,227	29,704
7	111,122	90,041	72,959	59,119	47,903	42,823	38,284	34,224	30,595
8	114,456	92,742	75,148	60,892	49,340	44,108	39,432	35,251	31,513
9	117,889	95,525	77,402	62,719	50,820	45,431	40,615	36,308	32,458
10	120,981	98,390	79,724	64,601	52,345	46,794	41,834	37,397	33,432
11	120,981	101,342	82,116	66,539	53,915	48,198	43,089	38,519	34,435
12	120,981	104,382	84,579	68,535	55,533	49,644	44,381	39,675	35,468
13	120,981	107,514	87,117	70,591	57,199	51,133	45,713	40,865	36,532
14	120,981	110,739	89,730	72,709	58,915	52,667	47,084	42,091	37,628

SCHEDULE 3--VETERANS HEALTH ADMINISTRATION SCHEDULES
DEPARTMENT OF VETERANS AFFAIRS

(Effective on the first day of the first applicable pay period beginning on or after January 1, 2007)

Schedule for the Office of the Under Secretary for Health
(38 U.S.C. 7306)*

Assistant Under Secretaries for Health (Only applies to incumbents who are not physicians or dentists)	146,915**

	Minimum	Maximum
Service Directors	109,144	135,550
Director, National Center for Preventive Health	93,063	135,550

Physician and Dentist Base and Longevity Schedule***

Physician Grade	91,530	$134,244
Dentist Grade	91,530	134,244

Clinical Podiatrist, Chiropractor, and Optometrist Schedule

Chief Grade	$93,063	$120,981
Senior Grade	79,115	102,848
Intermediate Grade	66,951	87,039
Full Grade	56,301	73,194
Associate Grade	46,974	61,068

Physician Assistant and Expanded-Function
Dental Auxiliary Schedule ****

Director Grade	$93,063	$120,981
Assistant Director Grade	79,115	102,848
Chief Grade	66,951	87,039
Senior Grade	56,301	73,194
Intermediate Grade	46,974	61,068
Full Grade	38,824	50,470
Associate Grade	33,409	43,435
Junior Grade	28,562	37,130

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* This schedule does not apply to the Deputy Under Secretary for Health, the Associate Deputy Under Secretary for Health, Assistant Under Secretaries for Health who are physicians or dentists, Medical Directors, the Assistant Under Secretary for Nursing Programs, or the Director of Nursing Services. Pay for these positions is set under 38 U.S.C. 7431 for physicians and dentists, and under 38 U.S.C. 7451 for registered nurses.

** Pursuant to 38 U.S.C. 7404(d), the rate of basic pay payable to these employees is limited to the rate for level V of the Executive Schedule, which is $136,200.

*** Pursuant to section 3 of Public Law 108-445 and 38 U.S.C. 7431, Veterans Health Administration physicians and dentists may also be paid market pay and performance pay.

**** Pursuant to section 301(a) of Public Law 102-40, these positions are paid according to the Nurse Schedule in 38 U.S.C. 4107(b), as in effect on August 14, 1990, with subsequent adjustments.

SCHEDULE 4--SENIOR EXECUTIVE SERVICE

(Effective on the first day of the first applicable pay period beginning on or after January 1, 2007)

	Minimum	Maximum
Agencies with a Certified SES Performance Appraisal System	$111,676	$168,000
Agencies without a Certified SES Performance Appraisal System	$111,676	$154,600

SCHEDULE 5--EXECUTIVE SCHEDULE

(Effective on the first day of the first applicable pay period beginning on or after January 1, 2007)

Level I	$186,600
Level II	168,000
Level III	154,600
Level IV	145,400
Level V	136,200

SCHEDULE 6--VICE PRESIDENT AND MEMBERS OF CONGRESS

(The rate of pay for the Vice President is effective on the first day of the first applicable pay period beginning on or after January 1, 2007, and the rates of pay for Members of Congress are effective February 16, 2007)

Vice President	$215,700
Senators	168,000
Members of the House of Representatives	168,000
Delegates to the House of Representatives	168,000
Resident Commissioner from Puerto Rico	168,000
President pro tempore of the Senate	186,600
Majority leader and minority leader of the Senate	186,600
Majority leader and minority leader of the House of Representatives	186,600
Speaker of the House of Representatives	215,700

SCHEDULE 7--JUDICIAL SALARIES

(Effective on the first day of the first applicable pay period beginning on or after January 1, 2006)

Chief Justice of the United States	$212,100
Associate Justices of the Supreme Court	203,000
Circuit Judges	175,100
District Judges	165,200
Judges of the Court of International Trade	165,200

SCHEDULE 8-PAY OF THE UNIFORMED SERVICES
(Effective on January 1, 2007)

Part I-MONTHLY BASIC PAY

YEARS OF SERVICE (COMPUTED UNDER 37 U.S.C. 205)

Pay Grade	2 or less	Over 2	Over 3	Over 4	Over 6	Over 8	Over 10	Over 12	Over 14	Over 16	Over 18	Over 20	Over 22	Over 24	Over 26
COMMISSIONED OFFICERS															
O-10**	-	-	-	-	-	-	-	-	-	-	-	$13,659.00	$13,725.90	$14,011.20*	$14,508.60*
O-9	-	-	-	-	-	-	-	-	-	-	-	11,946.60	12,118.50	12,367.20	12,801.30
O-8	$8,453.10	$8,729.70	$8,913.60	$8,964.90	$9,194.10	$9,577.20	$9,666.30	$10,030.20	$10,134.30	$10,447.80	$10,900.80	11,319.00	11,598.30	11,598.30	11,598.30
O-7	7,023.90	7,350.00	7,501.20	7,621.20	7,838.40	8,052.90	8,301.30	8,548.80	8,797.20	9,577.20	10,236.00	10,236.00	10,236.00	10,236.00	10,287.90
O-6	5,206.20	5,719.20	6,094.50	6,094.50	6,117.60	6,380.10	6,414.60	6,414.60	6,779.10	7,423.80	7,802.10	8,180.10	8,395.20	8,613.00	9,035.70
O-5	4,339.80	4,888.80	5,227.50	5,291.10	5,502.00	5,628.60	5,906.40	6,110.10	6,373.20	6,776.40	6,968.10	7,158.00	7,373.10	7,373.10	7,373.10
O-4	3,744.60	4,334.70	4,623.90	4,688.40	4,956.90	5,244.60	5,602.80	5,882.40	6,076.20	6,187.50	6,252.30	6,252.30	6,252.30	6,252.30	6,252.30
O-3***	3,292.20	3,732.30	4,028.40	4,392.00	4,602.00	4,833.00	4,982.70	5,228.40	5,355.90	5,355.90	5,355.90	5,355.90	5,355.90	5,355.90	5,355.90
O-2***	2,844.30	3,239.70	3,731.40	3,857.40	3,936.60	3,936.60	3,936.60	3,936.60	3,936.60	3,936.60	3,936.60	3,936.60	3,936.60	3,936.60	3,936.60
O-1***	2,469.30	2,569.80	3,106.50	3,106.50	3,106.50	3,106.50	3,106.50	3,106.50	3,106.50	3,106.50	3,106.50	3,106.50	3,106.50	3,106.50	3,106.50
COMMISSIONED OFFICERS WITH OVER 4 YEARS ACTIVE DUTY SERVICE AS AN ENLISTED MEMBER AND/OR WARRANT OFFICER******															
O-3E	-	-	-	$4,392.00	$4,602.00	$4,833.00	$4,982.70	$5,228.40	$5,435.40	$5,554.20	$5,715.90	$5,715.90	$5,715.90	$5,715.90	$5,715.90
O-2E	-	-	-	3,857.40	3,936.60	4,062.00	4,273.50	4,437.00	4,558.80	4,558.80	4,558.80	4,558.80	4,558.80	4,558.80	4,558.80
O-1E	-	-	-	3,106.50	3,317.70	3,440.10	3,565.50	3,688.80	3,857.40	3,857.40	3,857.40	3,857.40	3,857.40	3,857.40	3,857.40

* Basic pay is limited to the rate of basic pay for level II of the Executive Schedule, which is $14,000.10 per month for officers at pay grades O-7 through O-10, and limited to the rate of basic pay for level V of the Executive Schedule, which is $11,349.90 per month, for officers at O-6 and below.

** For officers serving as Chairman or Vice Chairman of the Joint Chiefs of Staff, Chief of Staff of the Army, Chief of Naval Operations, Chief of Staff of the Air Force, Commandant of the Marine Corps, Commandant of the Coast Guard, or commander of a unified or specified combatant command (as defined in 10 U.S.C. 161(c)), basic pay for this grade is calculated to be $15,959.40 per month, regardless of cumulative years of service computed under 37 U.S.C. 205. Nevertheless, actual basic pay for these officers is limited to the rate of basic pay for level II of the Executive Schedule, which is $14,000.10 per month.

*** Does not apply to commissioned officers who have been credited with over 4 years of active duty service as an enlisted member or warrant officer.

**** Reservists with at least 1,460 points as an enlisted member and/or warrant officer which are creditable toward reserve retirement also qualify for these rates.

SCHEDULE 8-PAY OF THE UNIFORMED SERVICES (PAGE 2)
(Effective on January 1, 2007)

Part I-MONTHLY BASIC PAY

YEARS OF SERVICE (COMPUTED UNDER 37 U.S.C. 205)

Pay Grade	2 or less	Over 2	Over 3	Over 4	Over 6	Over 8	Over 10	Over 12	Over 14	Over 16	Over 18	Over 20	Over 22	Over 24	Over 26
WARRANT OFFICERS															
W-5	-	-	-	-	-	-	-	-	-	-	-	$5,845.80	$6,046.50	$6,247.50	$6,450.00
W-4	$3,402.00	$3,660.00	$3,765.00	$3,868.50	$4,046.40	$4,222.20	$4,400.70	$4,574.10	$4,753.80	$5,035.50	$5,215.80	5,392.20	5,574.90	5,754.90	5,938.80
W-3	3,106.80	3,236.40	3,369.00	3,412.80	3,552.00	3,711.30	3,921.60	4,129.20	4,350.00	4,515.60	4,680.60	4,751.40	4,824.60	4,984.20	5,143.20
W-2	2,732.70	2,888.70	3,025.50	3,124.50	3,209.70	3,443.70	3,622.50	3,755.10	3,885.00	3,973.80	4,048.80	4,191.00	4,332.30	4,475.40	4,475.40
W-1	2,413.20	2,610.60	2,742.90	2,828.40	3,056.10	3,193.50	3,315.30	3,451.20	3,541.20	3,622.80	3,755.40	3,856.20	3,856.20	3,856.20	3,856.20
ENLISTED MEMBERS															
E-9*	-	-	-	-	-	-	$4,110.60	$4,203.90	$4,321.20	$4,459.50	$4,598.40	$4,821.60	$5,010.30	$5,209.20	$5,512.80
E-8	-	-	-	-	-	$3,364.80	3,513.90	3,606.00	3,716.40	3,835.80	4,051.80	4,161.30	4,347.30	4,450.50	4,704.90
E-7	$2,339.10	$2,553.00	$2,650.80	$2,780.70	$2,881.50	3,055.20	3,152.70	3,250.20	3,424.20	3,511.20	3,593.70	3,644.10	3,814.80	3,925.20	4,204.20
E-6	2,023.20	2,226.00	2,324.40	2,419.80	2,519.40	2,744.10	2,831.40	2,928.30	3,013.50	3,043.50	3,064.50	3,064.50	3,064.50	3,064.50	3,064.50
E-5	1,854.00	1,977.90	2,073.30	2,171.40	2,323.80	2,454.90	2,551.50	2,582.10	2,582.10	2,582.10	2,582.10	2,582.10	2,582.10	2,582.10	2,582.10
E-4	1,699.50	1,786.50	1,883.10	1,978.50	2,062.80	2,062.80	2,062.80	2,062.80	2,062.80	2,062.80	2,062.80	2,062.80	2,062.80	2,062.80	2,062.80
E-3	1,534.20	1,630.80	1,729.20	1,729.20	1,729.20	1,729.20	1,729.20	1,729.20	1,729.20	1,729.20	1,729.20	1,729.20	1,729.20	1,729.20	1,729.20
E-2	1,458.90	1,458.90	1,458.90	1,458.90	1,458.90	1,458.90	1,458.90	1,458.90	1,458.90	1,458.90	1,458.90	1,458.90	1,458.90	1,458.90	1,458.90
E-1**	1,301.40	1,301.40	1,301.40	1,301.40	1,301.40	1,301.40	1,301.40	1,301.40	1,301.40	1,301.40	1,301.40	1,301.40	1,301.40	1,301.40	1,301.40
E-1***	1,203.90	-	-	-	-	-	-	-	-	-	-	-	-	-	-

* For noncommissioned officers serving as Sergeant Major of the Army, Master Chief Petty Officer of the Navy or Coast Guard, Chief Master Sergeant of the Air Force, Sergeant Major of the Marine Corps, or Senior Enlisted Advisor to the Chairman of the Joint Chiefs of Staff, basic pay for this grade is $6,642.60 per month, regardless of cumulative years of service under 37 U.S.C. 205.

** Applies to personnel who have served 4 months or more on active duty.

*** Applies to personnel who have served less than 4 months on active duty.

SCHEDULE 8-PAY OF THE UNIFORMED SERVICES (PAGE 3)

Part II-RATE OF MONTHLY CADET OR MIDSHIPMAN PAY

The rate of monthly cadet or midshipman pay authorized by 37 U.S.C. 203(c) is $864.30.

Note: As a result of the enactment of sections 602-694 of Public Law 105-85, the National Defense Authorization Act for Fiscal Year 1998, the Secretary of Defense now has the authority to adjust the rates of basic allowances for subsistence and housing. Therefore, these allowances are no longer adjusted by the President in conjunction with the adjustment of basic pay for members of the uniformed services. Accordingly, the tables of allowances included in previous orders are not included here.

SCHEDULE 9--LOCALITY-BASED COMPARABILITY PAYMENTS

(Effective on the first day of the first applicable pay period beginning on or after January 1, 2007)

Locality Pay Area[1]	Rate
Atlanta-Sandy Springs-Gainesville, GA-AL	15.89%
Boston-Worcester-Manchester, MA-NH-ME-RI	20.97%
Buffalo-Niagara-Cattaraugus, NY	14.15%
Chicago-Naperville-Michigan City, IL-IN-WI	21.79%
Cincinnati-Middletown-Wilmington, OH-KY-IN	17.38%
Cleveland-Akron-Elyria, OH	15.96%
Columbus-Marion-Chillicothe, OH	15.00%
Dallas-Fort Worth, TX	17.34%
Dayton-Springfield-Greenville, OH	14.27%
Denver-Aurora-Boulder, CO	20.02%
Detroit-Warren-Flint, MI	21.53%
Hartford-West Hartford-Willimantic, CT-MA	22.44%
Houston-Baytown-Huntsville, TX	26.65%
Huntsville-Decatur, AL	13.60%
Indianapolis-Anderson-Columbus, IN	13.00%
Los Angeles-Long Beach-Riverside, CA	24.03%
Miami-Fort Lauderdale-Miami Beach, FL	18.30%
Milwaukee-Racine-Waukesha, WI	15.54%
Minneapolis-St. Paul-St. Cloud, MN-WI	18.17%
New York-Newark-Bridgeport, NY-NJ-CT-PA	24.57%
Philadelphia-Camden-Vineland, PA-NJ-DE-MD	18.85%
Phoenix-Mesa-Scottsdale, AZ	13.22%
Pittsburgh-New Castle, PA	14.16%
Portland-Vancouver-Beaverton, OR-WA	17.63%
Raleigh-Durham-Cary, NC	16.18%
Richmond, VA	14.41%
Sacramento--Arden-Arcade--Truckee, CA-NV	18.99%
San Diego-Carlsbad-San Marcos, CA	20.34%
San Jose-San Francisco-Oakland, CA	30.33%
Seattle-Tacoma-Olympia, WA	18.58%
Washington-Baltimore-Northern Virginia, DC-MD-PA-VA-WV	18.59%
Rest of U.S.	12.64%

SCHEDULE 10-ADMINISTRATIVE LAW JUDGES

(Effective on the first day of the first applicable pay period beginning on or after January 1, 2007)

AL-3/A	$97,100
AL-3/B	104,400
AL-3/C	112,000
AL-3/D	119,400
AL-3/E	126,900
AL-3/F	134,200
AL-2	141,900
AL-1	145,400

[1]Locality Pay Areas are defined in 5 CFR 531.603.

[FR Doc. 06–9896
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Tuesday, December 26, 2006

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REMINDERS

The items in this list were editorially compiled as an aid to Federal Register users. Inclusion or exclusion from this list has no legal significance.

RULES GOING INTO EFFECT DECEMBER 26, 2006

AGRICULTURE DEPARTMENT

Agricultural Marketing Service

Avocados grown in South Florida; published 12-22-06

Potato research and promotion plan; published 12-22-06

COMMERCE DEPARTMENT

National Oceanic and Atmospheric Administration

Fishery conservation and management:

Caribbean, Gulf, and South Atlantic fisheries—

Red snapper; published 12-19-06

Marine mammals:

Taking and importing—

Elgin Air Force Base, FL; precision strike weapons testing and training; published 11-24-06

ENERGY DEPARTMENT

Federal Energy Regulatory Commission

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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 "P L U S" (Public Laws Update Service) on 202–741–6043. This list is also available online at *http://www.archives.gov/federal-register/laws.html*.

The text of laws is not published in the **Federal Register** but may be ordered in "slip law" (individual pamphlet) form from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402 (phone, 202–512–1808). The text will also be made available on the Internet from GPO Access at *http://www.gpoaccess.gov/plaws/index.html*. Some laws may not yet be available.

H.R. 394/P.L. 109–419

To direct the Secretary of the Interior to conduct a boundary study to evaluate the significance of the Colonel James Barrett Farm in the Commonwealth of Massachusetts and the suitability and feasibility of its inclusion in the National Park System as part of the Minute Man National Historical Park, and for other purposes. (Dec. 20, 2006; 120 Stat. 2884)

H.R. 758/P.L. 109–420

To establish an interagency aerospace revitalization task force to develop a national strategy for aerospace workforce recruitment, training, and cultivation. (Dec. 20, 2006; 120 Stat. 2886)

H.R. 854/P.L. 109–421

To provide for certain lands to be held in trust for the Utu Utu Gwaitu Paiute Tribe. (Dec. 20, 2006; 120 Stat. 2889)

H.R. 864/P.L. 109–422

Sober Truth on Preventing Underage Drinking Act (Dec. 20, 2006; 120 Stat. 2890)

H.R. 1285/P.L. 109–423

Nursing Relief for Disadvantaged Areas Reauthorization Act of 2005 (Dec. 20, 2006; 120 Stat. 2900)

H.R. 1674/P.L. 109–424

Tsunami Warning and Education Act (Dec. 20, 2006; 120 Stat. 2902)

H.R. 4057/P.L. 109–425

To provide that attorneys employed by the Department of Justice shall be eligible for compensatory time for travel under section 5550b of title 5, United States Code. (Dec. 20, 2006; 120 Stat. 2910)

H.R. 4416/P.L. 109–426

To reauthorize permanently the use of penalty and franked mail in efforts relating to the location and recovery of missing children. (Dec. 20, 2006; 120 Stat. 2911)

H.R. 4510/P.L. 109–427

To direct the Joint Committee on the Library to accept the donation of a bust depicting Sojourner Truth and to display the bust in a suitable location in the Capitol. (Dec. 20, 2006; 120 Stat. 2912)

H.R. 4583/P.L. 109–428

Wool Suit Fabric Labeling Fairness and International Standards Conforming Act (Dec. 20, 2006; 120 Stat. 2913)

H.R. 5132/P.L. 109–429

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H.R. 5136/P.L. 109–430

National Integrated Drought Information System Act of 2006 (Dec. 20, 2006; 120 Stat. 2918)

H.R. 5646/P.L. 109–431

To study and promote the use of energy efficient computer servers in the United States. (Dec. 20, 2006; 120 Stat. 2920)

H.R. 6111/P.L. 109–432

Tax Relief and Health Care Act of 2006 (Dec. 20, 2006; 120 Stat. 2922)

H.R. 6131/P.L. 109–433

To permit certain expenditures from the Leaking Underground Storage Tank Trust Fund. (Dec. 20, 2006; 120 Stat. 3196)

H.R. 6316/P.L. 109–434

To extend through December 31, 2008, the authority of the Secretary of the Army to accept and expend funds contributed by non-Federal public entities to expedite the processing of permits. (Dec. 20, 2006; 120 Stat. 3197)

H.R. 6407/P.L. 109–435

Postal Accountability and Enhancement Act (Dec. 20, 2006; 120 Stat. 3198)

S. 1346/P.L. 109–436

Michigan Lighthouse and Maritime Heritage Act (Dec. 20, 2006; 120 Stat. 3264)

S. 1998/P.L. 109–437

Stolen Valor Act of 2005 (Dec. 20, 2006; 120 Stat. 3266)

S. 3938/P.L. 109–438

Export-Import Bank Reauthorization Act of 2006 (Dec. 20, 2006; 120 Stat. 3268)

S. 4044/P.L. 109–439

Religious Liberty and Charitable Donation Clarification Act of 2006 (Dec. 20, 2006; 120 Stat. 3285)

S. 4046/P.L. 109–440

Iraq Reconstruction Accountability Act of 2006 (Dec. 20, 2006; 120 Stat. 3286)

H.R. 1492/P.L. 109–441

To provide for the preservation of the historic confinement sites where Japanese Americans were detained during World War II, and for other purposes. (Dec. 21, 2006; 120 Stat. 3288)

H.R. 3248/P.L. 109–442

Lifespan Respite Care Act of 2006 (Dec. 21, 2006; 120 Stat. 3291)

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National Transportation Safety Board Reauthorization Act of 2006 (Dec. 21, 2006; 120 Stat. 3297)

H.R. 6342/P.L. 109–444

Veterans Programs Extension Act of 2006 (Dec. 21, 2006; 120 Stat. 3304)

H.R. 6429/P.L. 109–445

Fallen Firefighters Assistance Tax Clarification Act of 2006 (Dec. 21, 2006; 120 Stat. 3317)

S. 2370/P.L. 109–446

Palestinian Anti-Terrorism Act of 2006 (Dec. 21, 2006; 120 Stat. 3318)

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CFR CHECKLIST

This checklist, prepared by the Office of the Federal Register, is published weekly. It is arranged in the order of CFR titles, stock numbers, prices, and revision dates.

An asterisk (*) precedes each entry that has been issued since last week and which is now available for sale at the Government Printing Office.

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0–17	(869–060–00135–2)	60.00	July 1, 2006
18–End	(869–060–00136–1)	62.00	July 1, 2006
39	(869–060–00137–9)	42.00	July 1, 2006
40 Parts:			
1–49	(869–060–00138–7)	60.00	July 1, 2006
50–51	(869–060–00139–5)	45.00	July 1, 2006
52 (52.01–52.1018)	(869–060–00140–9)	60.00	July 1, 2006
52 (52.1019–End)	(869–060–00141–7)	61.00	July 1, 2006
53–59	(869–060–00142–5)	31.00	July 1, 2006
60 (60.1–End)	(869–060–00143–3)	58.00	July 1, 2006
60 (Apps)	(869–060–00144–7)	57.00	July 1, 2006
61–62	(869–060–00145–0)	45.00	July 1, 2006
63 (63.1–63.599)	(869–060–00146–8)	58.00	July 1, 2006
63 (63.600–63.1199)	(869–060–00147–6)	50.00	July 1, 2006
63 (63.1200–63.1439)	(869–060–00148–4)	50.00	July 1, 2006
63 (63.1440–63.6175)	(869–060–00149–2)	32.00	July 1, 2006
63 (63.6580–63.8830)	(869–060–00150–6)	32.00	July 1, 2006
63 (63.8980–End)	(869–060–00151–4)	35.00	July 1, 2006
64–71	(869–060–00152–2)	29.00	July 1, 2006
72–80	(869–060–00153–1)	62.00	July 1, 2006
81–85	(869–060–00154–9)	60.00	July 1, 2006
86 (86.1–86.599–99)	(869–060–00155–7)	58.00	July 1, 2006
86 (86.600–1–End)	(869–060–00156–5)	50.00	July 1, 2006
87–99	(869–060–00157–3)	60.00	July 1, 2006
100–135	(869–060–00158–1)	45.00	July 1, 2006
136–149	(869–060–00159–0)	61.00	July 1, 2006
150–189	(869–060–00160–3)	50.00	July 1, 2006
190–259	(869–060–00161–1)	39.00	July 1, 2006
260–265	(869–060–00162–0)	50.00	July 1, 2006
266–299	(869–060–00163–8)	50.00	July 1, 2006
300–399	(869–060–00164–6)	42.00	July 1, 2006
400–424	(869–060–00165–4)	56.00	July 1, 2006
425–699	(869–060–00166–2)	61.00	July 1, 2006
700–789	(869–060–00167–1)	61.00	July 1, 2006
790–End	(869–060–00168–9)	61.00	July 1, 2006
41 Chapters:			
1, 1–1 to 1–10		13.00	[3] July 1, 1984
1, 1–11 to Appendix, 2 (2 Reserved)		13.00	[3] July 1, 1984
3–6		14.00	[3] July 1, 1984
7		6.00	[3] July 1, 1984
8		4.50	[3] July 1, 1984
9		13.00	[3] July 1, 1984
10–17		9.50	[3] July 1, 1984
18, Vol. I, Parts 1–5		13.00	[3] July 1, 1984
18, Vol. II, Parts 6–19		13.00	[3] July 1, 1984
18, Vol. III, Parts 20–52		13.00	[3] July 1, 1984
19–100		13.00	[3] July 1, 1984
1–100	(869–060–00169–7)	24.00	July 1, 2006
101	(869–060–00170–1)	21.00	[8] July 1, 2006
102–200	(869–060–00171–9)	56.00	July 1, 2006
201–End	(869–060–00172–7)	24.00	July 1, 2006
42 Parts:			
1–399	(869–060–00173–5)	61.00	Oct. 1, 2006
*400–413	(869–060–00174–3)	32.00	Oct. 1, 2006
414–429	(869–060–00175–1)	32.00	Oct. 1, 2006
430–End	(869–060–00176–0)	64.00	Oct. 1, 2006
43 Parts:			
1–999	(869–056–00176–2)	56.00	Oct. 1, 2005
1000–end	(869–060–00178–6)	62.00	Oct. 1, 2006
44	(869–060–00179–4)	50.00	Oct. 1, 2006
45 Parts:			
1–199	(869–060–00180–8)	60.00	Oct. 1, 2006
200–499	(869–060–00181–6)	34.00	Oct. 1, 2006
500–1199	(869–060–00182–4)	56.00	Oct. 1, 2006
1200–End	(869–060–00183–2)	61.00	Oct. 1, 2006
46 Parts:			
1–40	(869–060–00184–1)	46.00	Oct. 1, 2006
41–69	(869–060–00185–9)	39.00	Oct. 1, 2006
70–89	(869–060–00186–7)	14.00	Oct. 1, 2006
90–139	(869–060–00187–5)	44.00	Oct. 1, 2006
140–155	(869–060–00188–3)	25.00	Oct. 1, 2006
156–165	(869–060–00189–1)	34.00	Oct. 1, 2006
166–199	(869–060–00190–5)	46.00	Oct. 1, 2006
200–499	(869–060–00191–3)	40.00	Oct. 1, 2006
500–End	(869–060–00192–1)	25.00	Oct. 1, 2006
47 Parts:			
0–19	(869–056–00192–4)	61.00	Oct. 1, 2005
20–39	(869–060–00194–8)	46.00	Oct. 1, 2006
*40–69	(869–060–00195–6)	40.00	Oct. 1, 2006
70–79	(869–056–00195–9)	61.00	Oct. 1, 2005
80–End	(869–060–00197–2)	61.00	Oct. 1, 2006
48 Chapters:			
1 (Parts 1–51)	(869–056–00197–5)	63.00	Oct. 1, 2005
1 (Parts 52–99)	(869–056–00198–3)	49.00	Oct. 1, 2005
2 (Parts 201–299)	(869–060–00200–6)	50.00	Oct. 1, 2006
3–6	(869–060–00201–4)	34.00	Oct. 1, 2006
7–14	(869–060–00202–2)	56.00	Oct. 1, 2006

Title	Stock Number	Price	Revision Date
15–28	(869–056–00202–5)	47.00	Oct. 1, 2005
29–End	(869–060–00204–9)	47.00	Oct. 1, 2006
49 Parts:			
1–99	(869–060–00205–7)	60.00	Oct. 1, 2006
100–185	(869–056–00205–0)	63.00	Oct. 1, 2005
186–199	(869–060–00207–3)	23.00	Oct. 1, 2006
*200–299	(869–060–00208–1)	32.00	Oct. 1, 2006
300–399	(869–060–00209–0)	32.00	Oct. 1, 2006
400–599	(869–056–00209–2)	64.00	Oct. 1, 2005
600–999	(869–056–00210–6)	19.00	Oct. 1, 2005
1000–1199	(869–060–00212–0)	28.00	Oct. 1, 2006
1200–End	(869–056–00212–2)	34.00	Oct. 1, 2005
50 Parts:			
1–16	(869–060–00214–6)	11.00	[9] Oct. 1, 2006
17.1–17.95(b)	(869–056–00214–9)	32.00	Oct. 1, 2005
17.95(c)–end	(869–056–00215–7)	32.00	Oct. 1, 2005
17.96–17.99(h)	(869–060–00217–1)	61.00	Oct. 1, 2006
17.99(i)–end and 17.100–end	(869–060–00218–9)	47.00	[9] Oct. 1, 2006
18–199	(869–056–00218–1)	50.00	Oct. 1, 2005
200–599	(869–056–00218–1)	45.00	Oct. 1, 2005
600–End	(869–056–00219–0)	62.00	Oct. 1, 2005
CFR Index and Findings Aids	(869–060–00050–0)	62.00	Jan. 1, 2006
Complete 2006 CFR set		1,398.00	2006
Microfiche CFR Edition:			
Subscription (mailed as issued)		332.00	2006
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Complete set (one-time mailing)		325.00	2004

[1] Because Title 3 is an annual compilation, this volume and all previous volumes should be retained as a permanent reference source.

[2] The July 1, 1985 edition of 32 CFR Parts 1–189 contains a note only for Parts 1–39 inclusive. For the full text of the Defense Acquisition Regulations in Parts 1–39, consult the three CFR volumes issued as of July 1, 1984, containing those parts.

[3] The July 1, 1985 edition of 41 CFR Chapters 1–100 contains a note only for Chapters 1 to 49 inclusive. For the full text of procurement regulations in Chapters 1 to 49, consult the eleven CFR volumes issued as of July 1, 1984 containing those chapters.

[4] No amendments to this volume were promulgated during the period January 1, 2005, through January 1, 2006. The CFR volume issued as of January 1, 2005 should be retained.

[5] No amendments to this volume were promulgated during the period April 1, 2000, through April 1, 2006. The CFR volume issued as of April 1, 2000 should be retained.

[6] No amendments to this volume were promulgated during the period April 1, 2005, through April 1, 2006. The CFR volume issued as of April 1, 2004 should be retained.

[7] No amendments to this volume were promulgated during the period April 1, 2005, through April 1, 2006. The CFR volume issued as of April 1, 2005 should be retained.

[8] No amendments to this volume were promulgated during the period July 1, 2005, through July 1, 2006. The CFR volume issued as of July 1, 2005 should be retained.

[9] No amendments to this volume were promulgated during the period October 1, 2005, through October 1, 2006. The CFR volume issued as of October 1, 2005 should be retained.